Docketing Branch

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
NUCLEAR FUEL SERVICES, INC.	)	
	)	
AND	)	Docket No. 50-201 OLA
	)	
NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (Western New York Nuclear Service Center)	)	

BRIEF OF NRC STAFF IN OPPOSITION TO APPEAL OF DR. IRWIN D. J. BROSS

James R. Wolf
Counsel for NRC Staff

May 24, 1982

DESIGNATED ORIGINAL

Certified By DSO7 MJF

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BRIEF OF NRC STAFF IN OPPOSITION TO APPEAL OF DR. IRWIN D. J. BROSS

Dr. Irwin D. J. Bross has requested a hearing in connection with the transfer of the Western New York Nuclear Service Center to the Department of Energy pursuant to the West Valley Demonstration Project Act. The Atomic Safety and Licensing Board ruled that the Commission lacks subject matter jurisdiction to consider, in formal proceedings, the matters raised in the request for hearing. Dr. Bross has now appealed the Board's decision. The NRC Staff files this brief in support of the decision below and urges, further, that the appeal be denied insofar as it presents new arguments.

I. BACKGROUND

This proceeding involves license amendments (Change Nos. 31 and 32) issued by the NRC Staff with respect to the Western New York Nuclear Service Center at West Valley, New York. The facility is a nuclear fuel reprocessing

plant licensed by the Commission as a production facility under Provisional Operating License No. CSF-1. Nuclear Fuel Services, Inc. (NFS) was licensed to operate the facility, and the New York State Energy Research and Development Authority (NYSERDA) was licensed as owner of the site.[1/] Under the provisions of the license, either licensee was entitled to apply to the Commission, in the event of a change in the relationship between them, for an appropriate amendment reflecting such change. NYSERDA was to be responsible for long-term management of the site, including management of wastes remaining at the site after completion of reprocessing operations.

Reprocessing activities at West Valley were suspended several years ago. Substantial quantities of high-level waste--the residue from reprocessing operations--remain in storage at the site. These wastes need to be solidified so as to permit their disposal.

In response to this need, and for other purposes, Congress in 1980 enacted the West Valley Demonstration Project Act (the Act), Pub.L. 96-368. The Act calls for the Department of Energy (DOE) to carry out a demonstration project for the purpose of demonstrating waste solidification techniques. Certain facilities, including the waste storage tanks and those used in solidification, are to be decontaminated and decommissioned as part of the project. Sec. 2(a). Facilities "necessary for completion of the project" are to be made available to DOE for such period as may be required for completion of the project. Sec. 2(b)(4)(A).

1/ NYSERDA is successor to the named licensee, the New York State Atomic and Space Development Authority.

The Act provides for NRC to review and consult with DOE with respect to the project. Such review and consultation "shall be conducted informally by the Commission and shall not include nor require formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, or any other law." Sec. 2(c).

The Act further provides for "submission jointly by the Department of Energy and the State of New York of an application for a licensing amendment as soon as possible with the Nuclear Regulatory Commission providing for the demonstration." Sec. 2(b)(4)(D). Such an application was filed by letter dated August 14, 1981. In response to this application, the NRC Staff issued a license amendment (Change No. 31) which added a new paragraph 7 to the license. Change No. 31 authorized the licensees, as their respective interests under the license appear, to transfer the West Valley facility to DOE in accordance with the Act, subject to certain conditions. Under Change No. 31, DOE was to be in exclusive possession until the licensees, as their respective interests under the license appear, reacquire the facility. Such licensees were required to make timely submissions to the Commission, in anticipation of completion of the demonstration project, so as to enable the Commission to determine the provisions appropriate to the situation prevailing at that time.

NFS, which had not been a party to the application for Change No. 31, objected to its provisions and requested a hearing. It also filed a motion for an order postponing the effectiveness of the amendment pending a hearing. The NFS objections are no longer at issue in this proceeding. Suffice it here to say that NFS raised no question whatsoever with respect to the nature

of the activities to be carried out by DOE or any potential risk to the public health and safety associated with such activities. It did argue, however, that the suspension of NRC's Price-Anderson indemnity agreement could leave it without protection in the event of a nuclear incident occurring while DOE was in possession of the West Valley facility.

In a letter dated October 16, 1981, Dr. Irwin D. J. Bross filed with the Commission a separate request for hearing on Change No. 31. Citing his status "as a resident and health bureaucrat," Dr. Bross explained his concern "that misguided DOE efforts to clean up the 30,000,000 curies in Tank 8D2 could endanger the health and safety of hundreds of thousands of Western New Yorkers."

On November 6, 1981, the Commission directed the establishment of a Licensing Board "to conduct an adjudicatory hearing in accordance with 10 CFR Part 2, Subpart G pursuant to the request of NFS, and to review Dr. Bross' request for a hearing." Nuclear Fuel Services, Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940 (1981). The Commission's order, noting that "Congress made plain [in the Act] that the start of the project should not be delayed past October 1, 1981," denied the NFS motion for a stay of Change No. 31.

Meanwhile, on October 6, 1981, NFS had filed an application to amend license CSF-1 to terminate all rights and responsibilities of NFS thereunder upon DOE's assuming exclusive possession and control of the facility. The NRC Staff denied this application on January 11, 1982, without prejudice, "in order to avoid adjudication of issues of law and fact that are presently the

subject of litigation in the District Court for the Western District of New York." NFS submitted a new application, dated February 1, 1982, under which its rights and responsibilities would be terminated upon DOE's assumption of exclusive possession of the facility and the occurrence of certain events related to the settlement of the litigation to which the NRC Staff's prior denial had referred. The NRC Staff thereupon issued an amendment (Change No. 32), substantially as requested by NFS.[2/]

The facility was transferred to DOE, pursuant to Change No. 31, on February 25, 1982. Notwithstanding this transfer, NFS is now and will continue to be a licensee under license CSF-1 until the events related to the settlement of the litigation occur, if in fact they ever do occur.

On February 11, 1982, NFS filed with the Commission a "withdrawal of request for hearing" with respect to Change No. 31. By letter dated February 16, 1982, Dr. Bross addressed to the Atomic Safety and Licensing Board (ASLB) a request for hearing on Change No. 32; he cited the health and safety issue which he had raised in connection with Change No. 31 as the basis for his request.

The ASLB issued a memorandum and order, ruling on the separate requests of NFS and Dr. Bross, on April 30, 1982. The ASLB treated the NFS "withdrawal" as a motion to dismiss the proceeding, insofar as it relates to

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2/ In response to a petition of the Sierra Club, dated March 26, 1982, the NRC Staff on April 26, 1982 undertook to reconsider the issuance of Change No. 32. The Sierra Club's petition relates to the technical and financial qualifications of NYSERDA. It raises no issues with respect to the conduct of the demonstration project by DOE. The requested reconsideration is still in progress.

those issues presented by the NFS request for hearing, and such motion was granted. The ASLB held that the Board lacked subject matter jurisdiction over the issues sought to be litigated by Dr. Bross and, accordingly, it ruled that his hearing request must be denied.[3/]

In his brief in support of his appeal of the ASLB order, Dr. Bross appears to concede that the issues originally raised--the safety of DOE operations--may not be the subject of NRC adjudicatory proceedings. But, he now argues, implementation of the license amendments will result in a loss of nuclear indemnity protection.

The NRC Staff agrees with the ASLB's conclusion that the Commission lacks subject matter jurisdiction to consider, in formal proceedings, the matters previously identified by Dr. Bross. The argument concerning indemnity protection was not raised before the ASLB and may not be considered here.

3/ The Commission notice constituting the ASLB authorized consideration of a request by Dr. Bross for hearing on Change No. 31. Change No. 32 would have been before the ASLB only if "related to the subject matter of the pending proceeding." 10 CFR § 2.717(b). The NRC Staff argued to the ASLB that Change No. 32 was not so related; after the Board issued its ruling, the Staff filed a motion for clarification, in which it suggested that the Board might wish to clarify its discussion of Change No. 32. The issues on this appeal can be decided without resolving the question of the Board's jurisdiction.

II. ARGUMENT

A. The West Valley Act Precludes a Hearing on DOE Activities

The ASLB held that the West Valley Act precludes a formal hearing with respect to DOE's conduct of the demonstration project. The NRC Staff agrees with this conclusion. In a situation such as this, where the legislative history (reviewed in the Board's memorandum) provides no real guidance, the normal reading of the language of the statute takes on additional significance. Federal Reserve System v. Investment Company Institute, 450 U.S. 46, 56 n.20, 67 L.Ed.2d 36, 45 (1981). Section 2(c) of the Act declares that review "shall be conducted informally by the Commission and shall not include nor require formal procedures or actions by the Commission." Whatever merit the original claims concerning DOE activities may have had, the Commission lacks jurisdiction to consider them in a formal hearing. Dr. Bross concedes that the ASLB's "carefully documented research and closely reasoned arguments would be difficult to countervene with respect to Change 31." Brief, at 2. For reasons that are not clear to the NRC Staff, he seems to maintain that the jurisdictional arguments do not apply to Change No. 32. But Change No. 32 authorizes no transfer to DOE and by itself provided no basis for considering any aspect of DOE operations. The ASLB concluded that the result would be the same under either Change No. 31 or 32; and that in either case the Commission would be precluded from considering DOE activities in formal proceedings. This result is mandated, in the Staff's opinion, by the clear language of the Act.

B. The Argument Concerning Indemnification May Not Be Raised On Appeal

Dr. Bross contends that implementation of Change No. 32 results in the loss of the protection of nuclear indemnity insurance for fiscal losses from a loss-of-containment accident at West Valley. Brief, at 5.

This contention is entirely new. The request for hearing, and subsequent filings by Dr. Bross, were devoted exclusively to the hazards believed to be associated with the conduct of cleanup operations by DOE and the obligation of NRC to give consideration to these hazards in formal proceedings. The only previous reference to fiscal matters relates not to the extension of Price-Anderson indemnification to Western New Yorkers, but rather to the continued validity of such protection in the event of elimination of DOE's status as an executive department. Bross letter to ASLB, Feb. 16, 1982, at 2.

The general rule is that a party may not take an appeal as to any issue that was not raised below. Where a party requests a hearing in a proceeding, he has an obligation to articulate, among other things, the nature and extent of his interest and the possible effect of any order which may be entered in the proceeding on that interest. 10 CFR §2.714(d). If he fails to do so, the Appeal Board would scarcely be justified in overturning the ruling of the ASLB on the strength of new assertions of fact which could have been, but were not, either included in the request for hearing or otherwise presented below. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980) (petition for intervention).

Failing either to raise satisfactorily a particular factual issue or (once the record has been closed) to express himself in the prescribed manner regarding how that issue should be resolved, a party is scarcely in a position, legally or equitably, to protest the determinations made by the Board in connection with it. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974).

The Staff recognizes that an exception might be made "in the case of a serious substantive issue as to which a genuine problem has been demonstrated." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-463, 7 NRC 341, 348 (1978). But in fact the protection of western New Yorkers was addressed in the course of the Staff's consideration of Change No. 31. One of the conditions (¶ 7.C.(1)) there imposed upon transfer of the facility to DOE was:

> DOE will contract with a person or persons to perform services for the benefit of the United States, subject to the direction and supervision of DOE, such contractual activity to include the conduct of the West Valley Demonstration Project ("Project") and such other services as may be needed in connection with the transferred facility from the time of the transfer and for so long thereafter as such facility is in the possession of DOE, and DOE will enter into agreements of indemnification with such person or persons in accordance with section 170d. of the Atomic Energy Act.

The basis for Dr. Bross' concerns apparently is to be found in the letter dated March 3, 1982 from Jerome Saltzman, Assistant Director, State and Licensee Relations, Office of State Programs, to O. S. Hiestand, Esq. (This was served on the parties on April 21, 1982.) The letter advises that NFS will not be required to maintain financial protection during the period that DOE is in possession of the West Valley facilities. This is consistent

with the suspension of the indemnity agreement pursuant to Change No. 31. ¶ 7.C.(2). It appears to the Staff that Dr. Bross construed the actions of NRC as having the effect of terminating Price-Anderson protection. Instead, such protection is still available under a DOE contractor indemnity agreement.

Western New Yorkers enjoyed the benefits of the Price-Anderson Act before the West Valley facility was transferred to DOE. They continue to enjoy such benefits. There is no serious substantive issue as to which a genuine problem has been demonstrated. Accordingly, the Appeal Board should not entertain the appeal of Dr. Bross insofar as it relates to nuclear indemnity insurance.

III. CONCLUSION

The NRC Staff urges the Appeal Board (1) to affirm the order of the ASLB and (2) to decline review of the new issue concerning indemnification under the Price-Anderson Act.

Respectfully submitted,

James R. Wolf
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of May, 1982

DESIGNATED ORIGINAL

Certified By 5-24-82

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached BRIEF OF NRC STAFF IN OPPOSITION TO APPEAL OF DR. IRWIN D. J. BROSS have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 24th day of May, 1982.

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