UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PUERTO RICO ELECTRIC POWER AUTHORITY	)	Docket No. 50-376
	)	
North Coast Nuclear Plant, (Unit 1)	)	
	)	
	)	

AUTHORITY'S MEMORANDUM IN RESPONSE TO APPEAL BOARD'S ORDER OF JUNE 4, 1980

I. Introduction

On April 30, 1980, Gonzalo Fernos (Intervenor), an intervenor in the above-captioned proceeding regarding the application for a construction permit by Puerto Rico Electric Power Authority (Authority), filed a petition to dismiss the Authority's application on the ground that the Authority has "dropped its intention to build North Coast Nuclear Plant." 1/ On May 29, 1980,

1/ "Petition Requesting Evidentiary Hearings to Request Applicant to Show Cause Why Their Application Should Not be Dismissed for Lack of Intention to Build," dated April 30, 1980, p. 1.

the Licensing Board issued an Order in this proceeding denying the Intervenor's petition for various reasons, including:

> In light of Section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2239, and the Commission's regulations, 10 C.F.R. §2.104, which mandate hearings on applications for construction of nuclear power plants, there is no procedure (short of withdrawal by the Applicant) for a Board's disposition of such an application without a hearing on health, safety and environmental issues. 2/

The Appeal Board noted that the Licensing Board's Order is interlocutory in nature and thus not appealable under the Commission's Rules of Practice. 3/ However, the Appeal Board expressed its concern that the foregoing holding "has such a questionable basis that, given its possible precedential importance, review of it on our own initiative may be now warranted." 4/ Consequently, it ordered the Authority and the NRC Staff to furnish memoranda on this issue to the Appeal Board by June 27, 1980. 5/ The Authority hereby submits its memorandum in response to this Order.

2/ Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC ____, slip op., p. 3 (May 29, 1980).

3/ Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), Order, slip op., p. 1 (June 4, 1980).

4/ Id.

5/ Id., pp. 3-4.

Section II of this memorandum provides a brief summary of the background and present status of the proceeding so that the Appeal Board may appreciate the context within which Intervenor's petition was filed and the Licensing Board's Order issued.

In light of the Appeal Board's expressed concern as to whether sua sponte review of the foregoing holding "may be now warranted," Section III sets forth the Authority's position as to why such review is not warranted in this proceeding.

If the Appeal Board decides to continue its review, Section IV sets forth the Authority's position as to why the Licensing Board's Order should be affirmed.

Section V briefly restates the Authority's conclusions.

II. Background

On December 3, 1975, the Authority notified the Commission of its decision to postpone indefinitely the North Coast Nuclear Plant (NORCO-NP-1) as a result of economic considerations and reduced energy demand forecasts. The Authority stated its intention to discontinue design and fabrication efforts and to explore the possibility of selling the plant, but reaffirmed its conviction that nuclear power was a commercially viable alternative for power generation in Puerto Rico. It

expressed its desire "to establish the acceptability of the Islote site . . . to enable the Authority to plan its future power generation additions with the assurance of having at least one suitable site for a nuclear power station," and to obtain a useful return on the time and effort expended by the Authority and the Commission.

In its letter to the Licensing Board of December 5, 1975, the Authority stated its intention to continue the pending proceeding to achieve the issuance of a partial initial decision on site suitability and environmental matters. By letter to the Authority of February 23, 1976, the NRC Staff agreed "that an early site review for Islote is warranted."

During the next several years, the Authority continued to submit to the NRC Staff the information required for the Staff's review of the environmental and safety aspects of the Islote site. 6/ Such information enabled the NRC Staff to issue its Draft Environmental Statement related to the suitability of the Islote site in August 1976, the Final Environmental Statement in April 1977, and the Site Safety Evaluation Report in April 1979.

6/ For example, the Authority submitted Amendment 7 to its Environmental Report on October 26, 1976; Amendment 31 to the PSAR (addressing hydrology, geology and seismology) on March 11, 1977; and the "Review of Seismicity Detected by the Puerto Rico Seismic Network" on September 26, 1977.

While these reviews by the NRC Staff were taking place, the Authority kept the Licensing Board and the parties informed of developments in Puerto Rico. The Authority stated that it would file a motion setting forth its suggestions concerning procedural steps relating to an early site review following completion of reviews of the need for new generating capacity in Puerto Rico. 7/ Status reports submitted by the Authority to the Licensing Board and the parties described the progress of these reviews, one of which included an energy study for Puerto Rico by the National Academy of Sciences sponsored by the Puerto Rico Energy Office. 8/ As a result of these reviews, the Authority informed the Board that its next additional plant will be a coal-fired plant, which will meet the Authority's immediate needs, and that "consideration of nuclear capacity is being deferred for at least one year and, in all likelihood, for a couple of years." 9/

7/ See, e.g., the Authority's letter of February 16, 1977 to the Licensing Board. See also the Authority's letter of May 3, 1978, responding to the NRC Staff, in which the Authority stated its preference to defer a decision concerning proceeding to a hearing on environmental issues until the reviews of the need for new generating capacity had been completed.

8/ Status Report as of December 29, 1978.

9/ Status Report as of December 28, 1979, p. 2.

Thus, throughout this period, it was clear to the Licensing Board and all parties that the complicated energy situation in Puerto Rico has caused the Authority to defer a decision as to whether and when to proceed to a hearing on site suitability issues in this proceeding, but that the establishment of the acceptability of the Islote site has remained a goal of the Authority. Following the Board's Order of May 1, 1978, which required the Authority to submit periodic status reports, the only burden on the Intervenor has been to receive such reports.

III. The Appeal Board's Review in This Proceeding is Not Warranted

Although an Appeal Board may undertake review at its own initiative of an interlocutory order of a licensing board, [10/] the Authority respectfully suggests that review of the instant interlocutory Order is not warranted for the following reasons that we detail at greater length below:

(1) In determining whether to review an interlocutory order sua sponte, the Appeal Board should, at a minimum, apply the standards pertinent to directed certification. Such standards are not met in the instant proceeding.

10/ Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417 (1977).

(2) Since there was an alternative basis for the ruling below, a decision of the issue singled out by the Appeal Board would not be dispositive. It would therefore be tantamount to rendering an advisory opinion on an abstract and academic question.

(3) The Appeal Board's Order of June 4 effectively destroys the precedential value of the Licensing Board's ruling. Thus, it is not necessary for the Appeal Board itself to resolve the legal question propounded by it.

Under the Commission's regulations, no interlocutory appeal may be taken from a ruling of a licensing board as a matter of right (10 CFR §2.730(f)), except under circumstances inapplicable here.[11/] It is clear, however, that a party to a licensing proceeding may request the Appeal Board to certify a question for its determination under 10 CFR §2.718(i).[12/] But such directed certification is granted by an Appeal Board "most sparingly,"[13/] and only upon establishment, at a minimum, that referral by a licensing board

---

11/ An appeal can be taken from a grant of or total denial of a petition to intervene. 10 CFR §2.714a.

12/ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

13/ Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-514, 8 NRC 697, 698 (1978).

of the question to the Appeal Board under 10 CFR §2.730(f) would have been proper, i.e., "necessary to prevent detriment to the public interest or unusual delay or expense."[14/] As the Appeal Board has stated, it has, almost without exception, "undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner."[15/]

There are obvious good reasons for granting a motion for interlocutory review sparingly. The Appeal Board is not in the business of deciding questions which may become moot upon the issuance of the initial decision of the licensing board.[16/] Additionally, the time of an appellate body cannot be spared for premature examination of matters which do not immediately and irreparably affect a litigant and may never need to be reviewed upon completion of a proceeding.

The standards for undertaking interlocutory review sua sponte should be at least as stringent as for directed

---

14/ See Seabrook, supra, 1NRC at 483.

15/ Public Service Co. of Indiana Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-405, 5 NRC 1190, 1192 (1977).

16/ See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977).

certification upon motion. Certainly if no party is immediately and irreparably impacted and the basic structure of the proceeding is not affected under the standards set forth in Marble Hill, the necessity for appellate intervention seems slight and the likelihood of unwarranted appellate litigation seems great.

In the instant case, the Intervenor is not immediately and irreparably impacted by the Licensing Board's ruling, nor is the basic structure of the proceeding affected by that ruling. The Intervenor's only burden as a result of the ruling is to await the Authority's next status report and to respond at such time as the Authority may file a motion requesting that early site review issues be considered in this proceeding. Surely, such a burden is minimal. Additionally, the basic structure of the proceeding, i.e., any issues to be considered and the manner of their consideration, are not affected by the Licensing Board's ruling. The basic structure of this proceeding depends upon the motions which may be filed by the Authority and upon the contentions of the Intervenor and the positions of the Staff. These are left completely untouched by the Licensing Board's Order. Consequently, there is little reason for the Appeal Board to review the Licensing Board's interlocutory Order in this proceeding.

Review of the Licensing Board's ruling on this legal question is also unwarranted because it would not affect the ultimate disposition of the Intervenor's petition. In addition to its ruling based upon Section 189 of the Atomic Energy Act of 1954, as amended (the Act), the Licensing Board also denied the petition on the ground that it constituted a request for an order to show cause, which the Licensing Board lacked authority to consider.[17/] This ruling by the Licensing Board is undoubtedly correct.[18/] As it fully disposes of the Intervenor's petition, other issues potentially raised by the Licensing Board's Order (i.e., the ruling under Section 189 of the Act) need not be considered since they would not affect the disposition of the petition. Thus, it would be particularly inappropriate for the Appeal Board to consider the Section 189 question in this proceeding, since a ruling thereon would be tantamount to rendering an advisory opinion on an abstract and academic question.[19/]

Finally, the Appeal Board expressed concern as to whether the Licensing Board's holding as to its authority to dismiss an application under Section 189 of the Act

---

17/ LBP-80-15, supra, slip op., pp. 2-3.

18/ See 10 CFR §2.206; Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978), aff'd ALAB-470, 7 NRC 473 (1978).

19/ See Prairie Island, supra.

should be reviewed because of its potential precedential value. The Appeal Board appeared to view the instant proceeding as one which might involve an "abandonment" by an applicant of his application and questioned whether a licensing board would be "required to retain on its docket in perpetuity an application which has become entirely academic." (Order, pp. 2-3.)

Any concerns of the Appeal Board that the Licensing Board's Order may have adverse precedential value can be accommodated without litigating and ruling on an abstract legal question in this proceeding. The very fact that questions were raised in the Appeal Board's Order of June 4 would, even without further ruling, strip the Licensing Board's Order of its limited precedential value. The Appeal Board could make this point even clearer in a subsequent order terminating its review but explicitly stating that such termination did not decide the legal question, which would await a proceeding where the question is concretely and explicitly raised.

IV. The Licensing Board's Order Should be Affirmed

In addition to determining that the Intervenor's request for an order to show cause had to be denied, the Licensing Board also ruled that if the petition were to "be construed

as a motion requesting that an order be issued dismissing the application should the Board determine, after an evidentiary hearing, that Applicant no longer intends to construct the nuclear plant, the motion must be denied." In briefly stating a basis for such denial, the Board cited Section 189 of the Act and 10 CFR §2.104 and indicated that "there is no procedure (short of withdrawal by the Applicant) for a Board's disposition of such an application without a hearing on health, safety and environmental issues."

As the Appeal Board has noted in footnote 1 of its Order of June 4, 1980, the Licensing Board may have relied upon a similar statement made by another licensing board in a different context several years ago in Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-15, 1 NRC 419, 420 (1975). The Pilgrim decision, including that specific statement, was called to the Licensing Board's attention both by the Authority in its opposition to the Intervenor's petition (at p. 2) and by the NRC Staff in its similar opposition (at n. 5, p. 4).

As is sometimes true in instances involving the denial of a request that is patently without legal or substantive merit, it is apparent that the referenced statement of the licensing board in Pilgrim was unduly broad. It is also apparent that

in the instant proceeding, which involves a similarly unmeritorious petition, the uncritical citation of the Pilgrim language by counsel for the Authority and the NRC Staff has inadvertently led to a similarly overbroad statement in the Board's Order. As we shall explain below, however, the Board's ruling, when read in its appropriate context, can be affirmed without reaching the legal questions raised by the unnecessarily broad sweep of the cited statement.

There are undoubtedly some instances where an application may be denied without a hearing on health, safety and environmental issues. For example, if an applicant fails to respond to requests for additional information from the NRC Staff, a licensing board, upon a motion by the NRC Staff, will rule whether an application should be denied under 10 CFR §2.108(c). Or, in a proceeding where an applicant is seeking only determination of site suitability issues, the application may in essence be denied if a licensing board declines to initiate an early hearing or to render an early partial decision on site suitability under 10 CFR §2.605. But the foregoing two potential exceptions were not here involved, and thus they do not provide authority for the denial of the application in this proceeding.

Granting that the Licensing Board's statement is unduly broad, it is still possible to affirm the Board's ruling without reaching complex legal questions which were not

essential ingredients of the Board's decision and thus need not be explored in this proceeding. When read in the context of this specific proceeding, the Board's Order can be affirmed as based on the narrow ground that the Board is without authority to dismiss an application on the basis set forth in the Intervenor's petition. In its opposition to the petition (at p. 3), the NRC Staff viewed the petition, as providing, as its sole basis, that the applicant must proceed with the application or have the application dismissed. Such basis is clearly inadequate to provide authority for dismissal of the application.[20/] As the Licensing Board ruled in this proceeding two years ago:

> [T]here is no requirement in any Commission regulation or underlying statute that requires an Applicant to proceed with the processing of its application in accordance with any set time scale.[21/]

In the absence of any allegation in the petition that the Authority's conduct violated any requirement of a regulation or

---

20/ The Authority also discusses the defects of such basis in its opposition to the Intervenor's petition (at pp. 6-8).

21/ Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), Order, p. 4 (May 1, 1978). See also, e.g., Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), LBP-75-56, 2 NRC 565, 567 (1975).

underlying statute -- or even any implicit or explicit policy[22] of the Commission -- the Licensing Board's denial of the petition was fully appropriate.

Affirmation of the Board's ruling on the foregoing narrow grounds makes it unnecessary to reach the complex legal questions of whether licensing boards have the inherent authority to dismiss a construction permit proceeding as moot[23]

22/ Not only is the Authority's consideration of achieving review of site suitability issues in this proceeding not inconsistent with Commission policy, but, in fact, it generally conforms to views expressed by the Commission when it adopted the early site review regulations in 1977. At that time, the Commission recognized that a number of utilities had found it necessary, for a variety of reasons, to cancel or postpone plans for the construction of nuclear power plants, and stated that it was the Commission's intent that the early site review procedures be available to qualified applicants who decide, following postponement of target dates for construction, that this procedure would be advantageous. 42 Fed. Reg. 22, 883, (1977).

23/ There is, of course, no doubt as to the authority of licensing boards to dispose of specific subordinate issues on any appropriate grounds, including mootness. In proceedings involving the issuance of an operating license or the amendment of a license, where the issues being litigated are usually confined to matters in controversy between the parties, if all of such issues are mooted, the proceeding can be terminated in such fashion as may be appropriate under the circumstances. See, e.g., Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54-55 (1978), remanded on other grounds, Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979). In a hearing involving the issuance of a construction permit, however, the matters before a licensing board are not limited to those placed in controversy by the parties, and therefore the mootness, or even absence of, controverted matters does not lead to termination of the proceeding.

and, if so, what may be the legal boundaries of such authority. In Federal courts, such inherent authority exists because mootness is a jurisdictional matter; moot cases are dismissed because they no longer constitute a "case or controversy" under Article III of the Constitution.[24/] Since, however, adjudication before Federal agencies is not jurisdictionally limited to Article III cases or controversies, [25/] that source of inherent authority is not present in the case of administrative tribunals.

This is not to say that there may not be other sources for such inherent authority, including any authority implied from the powers granted to administrative tribunals to control the conduct of proceedings before them.[26/] But such authority should not be lightly inferred.

In the view of the Authority, there is little policy reason to broadly interpret regulations or precedents to find inherent authority to dismiss construction permit applications as moot over the objections of an applicant. In the first place, such instances would undoubtedly be rare. It is

---

24/ E.g., Powell v. McCormack, 395 U.S. 486 (1969).

25/ See, e.g., North Carolina Utilities Commission v. FCC, 537 F.2d 787, 790-91 n.2 (4th Cir.), cert. denied, 429 U.S. 1027 (1976); Prairie Island, supra, 7 NRC at 54.

26/ See, e.g., Section 7(b) of the Administrative Procedure Act, 5 U.S.C. §556(c); 10 CFR §2.718.

difficult to conceive of situations where an applicant has truly abandoned the possibility of utilizing a prospective site, yet seeks to cling to an existing proceeding notwithstanding the associated administrative and legal burdens cast upon it.

Moreover, there are available mechanisms to deal with the rare exceptions. Thus, the NRC Staff, which has the responsibility under the regulations to review the application and which is in the best position to be familiar with the applicant and its intentions, has the authority to request information from the applicant and to take appropriate action based thereon, including the filing of a motion under 10 CFR §2.108(c) to dismiss an application if the applicant is unable or unwilling to provide the necessary information.

In addition, in cases involving an early site review, any party may file a motion under 10 CFR §2.605(b) requesting the licensing board to decline to initiate a hearing on site suitability issues. Presumably in ruling on such a motion the board could, as appropriate, take into account the timing of the applicant's activities and any reason proferred for delays in the applicant's actions.

In light of all the foregoing, the Appeal Board should affirm the Licensing Board's Order on the narrow grounds suggested above, and should not unnecessarily explore the complex

questions that this memorandum has identified. Determination of the existence and legal boundaries of any inherent authority to dismiss a construction permit application as moot should await a proceeding in which such question cannot be avoided; it would serve neither the tribunal nor the parties to explore them prematurely. As previously noted, nothing in the petition before the Licensing Board in this proceeding -- where the applicant has diligently submitted all information required by the NRC Staff, has obtained a Site Safety Evaluation Report scarcely a year before the petition was filed, and has meticulously kept the Licensing Board informed in its status reports as to the reasons for deferral of decisions (without the Intervenor ever suggesting that supplementation or amplification was required) -- suggests that this proceeding is an appropriate forum for such exploration.

V. Conclusions

The Authority respectfully suggests that interlocutory review of the Licensing Board's Order is not warranted for the reasons set forth in Section III, supra. If the Appeal Board is concerned as to the potential precedential value of the Order, its termination of the review can make explicit that the Order has no precedential effect.

If the Appeal Board decides to continue its review, it should affirm the Order for the reasons set forth in Section IV, supra, and should not unnecessarily explore in this proceeding the complex questions associated with the existence and legal boundaries of any inherent authority of a licensing board to dismiss a construction permit application as moot.

Respectfully submitted,

LOWENSTEIN, NEWMAN, REIS,
AXELRAD & TOLL
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dated: June 27, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PUERTO RICO ELECTRIC POWER AUTHORITY	)	Docket No. 50-376
	)	
North Coast Nuclear Plant, (Unit 1)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Authority's Memorandum in Response to Appeal Board's Order of June 4, 1980" have been served upon the following by deposit in the United States mail, first class or air mail this 27th day of June, 1980:

Alan S. Rosenthal, Esq.
Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. John H. Buck
Member
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael C. Farrar, Esq.
Member
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Section

Sheldon J. Wolfe, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Gustave A. Linenberger
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Henry J. McGurren, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Gonzalo Fernos
Chairman
Citizens for the Conserva-
tion of Natural
Resources, Inc.
503 Barbe Street
Santurce, Puerto Rico 00912

German A. Gonzalez
Mission Industrial
G.P.O. Box 20434
Rio Piedras, Puerto Rico 00925

German A. Gonzalez
Suite 501
Condominio Le Mans
Avenida Munoz Rivera 602
Hato Rey, Puerto Rico 00919

Eng. Francisco Jimenez
Box 1317
Mayguez, Puerto Rico 00708

Mauricio Axelrad

LOWENSTEIN, NEWMAN, REIS,
AXELRAD & TOLL
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for
Puerto Rico Electric Power
Authority

June 27, 1980