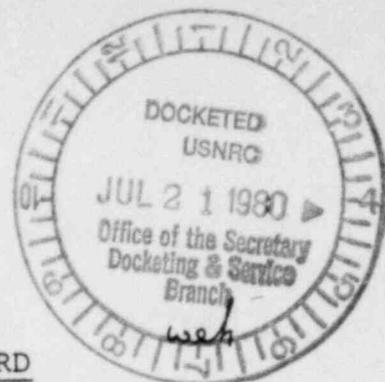


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
)
PUERTO RICO ELECTRIC POWER)
AUTHORITY)
)
North Coast Nuclear Plant,)
(Unit 1))
_____)

Docket No. 50-376

AUTHORITY'S RESPONSE TO NRC STAFF
MEMORANDUM OF JUNE 27, 1980

I. Introduction

In an unpublished Order in this proceeding, dated June 4, 1980, the Appeal Board ordered the NRC Staff and the Puerto Rico Electric Power Authority (Authority) to submit memoranda on the question of whether there is any procedure (short of withdrawal by an applicant) for dismissal of an application for a construction permit without a hearing on health, safety, and environmental issues. The Authority submitted its memorandum ^{1/} on June 27, 1980, as did the NRC Staff ^{2/}. In an unpublished Order issued on June 30, 1980, the Appeal Board invited the Authority to file a memorandum in response to the NRC Staff Memorandum. The Authority hereby submits its response.

1/ "Authority's Memorandum in Response to Appeal Board's Order of June 4, 1980," (Authority's Memorandum).

2/ "NRC Staff Memorandum in Response to Appeal Board's Order of June 4, 1980," (NRC Staff Memorandum).

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II. Authority's Comments on NRC Staff Memorandum

As we noted in our previous response,^{3/} an adjudicatory board may possess inherent authority in certain circumstances to dismiss matters on grounds of mootness. However, the Commission's regulations and decisions do not address the question of whether a board has inherent authority to dismiss a construction permit application as moot over the objections of an applicant, and we have not been able to discover any other precedent which purports to rule on this issue. Consequently, the status of the law on this point is unsettled, and the question is res nova to the Appeal Board.

The NRC Staff reaches a different result in its memorandum, and states that precedent and the Commission's regulations establish the inherent authority of an adjudicatory board to order an application withdrawn over the objections of the applicant for lack of intent to construct the facility.^{4/} However, in our view, the regulations and precedents which the Staff cite are not applicable to the precise issue raised by the Appeal Board, and they are not conclusive regarding the power of a licensing board to dismiss an application under the foregoing circumstances.

The Staff purports to find a basis for its conclusion in 10 C.F.R. § 2.107.^{5/} However, that section only permits an applicant

^{3/} Authority's Memorandum, pp. 11-18

^{4/} NRC Staff Memorandum, pp. 5-11.

^{5/} Section 2.107(a) states in full

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice
(Footnote continued on page 3)

to withdraw its application; we find nothing therein which would authorize another party to request an adjudicatory board to compel an applicant to withdraw its application. Clearly, if the Commission had intended § 2.107 to have a broader reach it could have readily drafted that section accordingly.^{6/}

The Staff supports its interpretation of § 2.107 by reference to two Commission orders in Quanicassee.^{7/} However, the facts and rulings in Quanicassee make it inapplicable to the question raised by the Appeal Board in the instant proceeding. In Quanicassee, a petitioner (not a party to a construction permit proceeding)

5/ (Footnote continued from page 2)

of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

(emphasis added). The NRC Staff Memorandum (p. 5) quotes § 2.107(a) in part, but omits that portion which is emphasized above. This omission is unfortunate, since the reader is provided with no indication that the section is addressed solely to applicants, and not to all parties in general.

6/ The provisions of 10 C.F.R. § 2.107 should be contrasted, for example, with those of § 2.108 and § 2.605. Under § 2.107, it is the applicant who is permitted to withdraw an application; under § 2.108, it is the NRC Staff which is permitted to file a motion to dismiss an application for failure of the applicant to submit requested information; and under § 2.605, it is any party which may request the Commission to decline to initiate an early site review hearing. It is apparent to us that the Commission intended to restrict the use of each of these sections to specifically named parties. Thus, only the applicant, and not other parties, may invoke § 2.107 to withdraw an application.

7/ Consumers Power Company (Quanicassee Plant, Units 1 and 2), CLI-74-29, 8 AEC 10 (1974) and CLI-74-37, 8 AEC 627 (1974).

requested that the Commission (not a licensing board) compel an applicant to withdraw its application because the applicant decided to defer the Quanicassee project for approximately one year.^{8/} Following receipt of the petitioner's request, the Commission learned that the applicant had publicly announced its intention to cancel the project. The Commission then directed the applicant to "show cause" before the Commission as to why the application should not be withdrawn; whereupon the applicant voluntarily requested to withdraw its application and the Commission granted such request.

Quanicassee thus involved an instance when the Commission, exercising its own inherent authority, chose to order an applicant to show cause as to whether its application should be withdrawn. The authority of the Commission itself to take such action is not here in question -- but nothing in Quanicassee indicates that any such authority has been delegated to licensing boards. More specifically, Quanicassee certainly cannot appropriately be cited for the proposition that the Commission there "determined that the Licensing Board [has] authority under 10 C.F.R. § 2.107(a) to pass on the issue of whether an application may be ordered withdrawn for lack of intent to construct [a] project."^{9/} The Commission's only reference to § 2.107 in its rulings in Quanicassee occurred

^{8/} See "SEE's Response to Applicant's Petition to Withdraw Notice of Hearing and Motion for an Extension of Time to Answer Petition to Intervene," dated May 16, 1974; "SEE's Motion to Compel Consumers Power Company to Withdraw Its Application, and for Relief in the Form of Copies of the Rules We Are Expected to Follow," dated June 8, 1974.

^{9/} NRC Staff Memorandum, pp. 5-6 (emphasis added).

after the applicant requested to withdraw its application. The Commission simply noted the obvious, i.e., that under § 2.107 such a request would normally be ruled upon by a licensing board, but that the circumstances in Quanicasse made it appropriate for the Commission to rule thereon itself.^{10/} Nothing in such reference indicated that the Commission interpreted § 2.107 as authorizing a licensing board to act upon a motion to order withdrawal filed by a party other than the applicant.

The Staff also refers to 10 C.F.R. § 2.718 as the source of a licensing board's alleged authority to dismiss an application for a project which an applicant has no intention of constructing.^{11/} However, that section only grants general powers to a licensing board to regulate the course of a proceeding. It does not explicitly grant authority to a licensing board to dismiss an application, and the Staff cites no decision which has interpreted § 2.718 to provide a board with such authority in situations similar to the instant case. As we have stated previously, perhaps such authority can be implied from the powers granted to administrative tribunals under the Administrative Procedure Act and § 2.718, but we believe that such authority should not be lightly inferred.^{12/} We find nothing in the decisions cited by the Staff which would support the Staff's conclusion.^{13/}

^{10/} Supra, 8 AEC at 627 n.1.

^{11/} NRC Staff Memorandum, pp. 6-7.

^{12/} Authority's Memorandum, p. 16.

^{13/} The Staff's reference to Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978), aff'd CLI-79-9, (Footnote continued on page 6)

Finally, the Staff cites a number of federal decisions in support of its argument that a licensing board may dismiss an application on grounds of mootness. However, these decisions are inapposite to the present petition to dismiss the Authority's application, because each case involved the dismissal of a proceeding without an evidentiary hearing under circumstances in which a party failed to satisfy a regulatory requirement.^{14/} The Authority has complied with all requests for information, and has not violated any of the Commission's regulatory requirements.^{15/} We have

13/ (Footnote continued from page 5)

10 NRC 257 (1979) is somewhat anomalous. While the Appeal Board did hold that it may inquire into the Staff's reason for delaying issuance of an Environmental Impact Statement (EIS), it also held that it lacked the authority to take action (such as dismissal of the Staff as a party) if it failed to issue the EIS by a certain date. 8 NRC at 206-07. If anything, the decision emphasizes that the NRC adjudicatory tribunals lack certain authority which may be held only by the Commission itself.

14/ In Rocky Mountain Power Company v. Federal Power Commission, 409 F.2d 1122 (D.C. Cir. 1969), an application was dismissed when an applicant failed to submit requested information. (See 10 C.F.R. § 2.108 for an analogous provision in the Commission's regulations). In National Labor Relations Board v. Aaron Convalescent Home, 479 F.2d 736 (6th Cir. 1973) and in Liquid Carbonic Corp., 116 NLRB No. 101, 6 Ad. L. 2d 416 (1956), a judgment was rendered against a party who failed to answer a complaint within the prescribed time limits. In United States v. Storer Broadcasting Company, 351 U.S. 192 (1956), an application was dismissed because the applicant already owned the maximum number of radio stations permitted under the regulations of the Federal Communications Commission. In Federal Power Commission v. Texaco, Inc., 377 J.S. 33 (1964), an application was dismissed because it contained "pricing provisions" which were proscribed by regulation.

15/ We assume that the Staff is not arguing that deferral of a project violates the Commission's regulations. Such a position would be inconsistent with a long line of Commission precedents. (Footnote continued on page 7)

discovered no cases, either before the Commission or before other agencies, in which an application has been involuntarily dismissed in such circumstances without a hearing on the merits of the application.^{16/}

In addition to our disagreement with the Staff's interpretation of regulations and precedents, we should also point out that the NRC Staff Memorandum contains a significant misstatement of fact. It alleges that after the proceeding was commenced, "The Applicant apparently took little action to forward this matter."^{17/} It is difficult to comprehend the basis of this statement, since the Authority

^{15/} (Footnote continued from page 6)

See Wisconsin Electric Power Company (Koshkonong Nuclear Plant, Units 1 and 2), CLI-75-2, 1 NRC 39, 42 (1975); Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), LBP-75-56, 2 NRC 565, 567 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), Order, p. 4 (May 1, 1978). See also Potomac Electric Power Company, (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Units 1 and 2), LBP-75-66, 2 NRC 776, 779 (1975); 10 C.F.R. § 2.606(b)(2). Deferrals of a project for reasons clearly explained by an applicant to the licensing board and to all parties can in no way be construed as inconsistent with Commission policies calling for "expeditious determination of applications" (NRC Staff Memorandum, p. 10), particularly when no further explanation was ever sought by the board or any party.

^{16/} We cannot understand why the Staff would cite the Sterling decision particularly in a footnote dealing with involuntary dismissal. NRC Staff Memorandum, p. 6 n.11. As the Appeal Board explicitly noted, the Sterling decision (which involved an applicant's request that a proceeding be dismissed) did not reach the question of a licensing board's authority to order an involuntary dismissal. Rochester Gas and Electric Corp., (Sterling Power Project, Nuclear Unit No. 1), 11 NRC ---, slip op. at 5 n.4 (June 17, 1980).

^{17/} NRC Staff Memorandum, p. 10.

has provided extensive additional information requested by the Staff (including information obtained through a Puerto Rico seismic network established in cooperation with the USGS to satisfy inquiries of the Staff and USGS) in sufficient detail and scope to enable the Staff to issue both a Final Environmental Statement in 1977 and the Staff's Site Safety Evaluation Report in 1979, scarcely a year ago.

One further point mentioned in the NRC Staff Memorandum deserves comment. The Staff asserts that the Licensing Board should have inquired into these matters and should "have held hearings if appropriate, on whether the Applicant has abandoned its intent to construct the North Coast facility."^{18/} To the extent that the Staff is pointing out that an inquiry into the matters raised by the petition would not necessarily require a hearing, we agree. Motions are usually decided upon the filings of the parties without opportunity for a hearing, cross-examination, or oral argument, though an adjudicatory tribunal may provide a hearing at its discretion. Thus, we assume that, even if the matter is remanded to the Licensing Board, it will be made clear that the Board may be able to dispose of the petition on its face or on the basis of further pleadings (including affidavits, if necessary) requested from the parties.

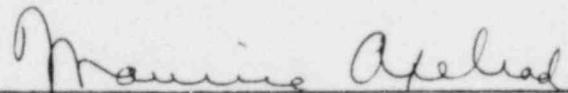
III. Conclusion

The regulations and precedents which the NRC Staff cite are inapplicable to this proceeding. None of them address involuntary

^{18/} NRC Staff Memorandum, p. 11 (emphasis added, footnotes omitted).

dismissal of an application in a situation in which the applicant has not violated any regulatory requirement and has reaffirmed its intention not to abandon its application, and we have been unable to discover any authority which addresses the power of a licensing board to dismiss an application in such a situation. Consequently, for the reasons stated in the Authority's Memorandum, we adhere to our position that interlocutory review of the Licensing Board's Order is not warranted and that, if such review is continued, the Order should be affirmed without unnecessary exploration of the complex questions associated with determinations as to any inherent authority to dismiss an application involuntarily.

Respectfully submitted,



Lowenstein, Newman, Reis,
Axelrad & Toll
1025 Connecticut Avenue, NW
Washington, D. C. 20036
(202-862-8400)

July 18, 1980

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NUCLEAR REGULATORY COMMISSION



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CERTIFICATE OF SERVICE

I hereby certify that copies of "Authority's Response to NRC Staff Memorandum of June 27, 1980" have been served upon the following by deposit in the United States mail, first class or air mail this 18th day of July, 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

Henry J. McGurren, Esq.
Office of the Executive
Legal Director
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

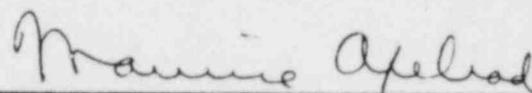
Mr. Gustave A. Linenberger
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Gonzalo Fernos
Chairman
Citizens for the Conservation
of Natural Resources, Inc.
503 Barbe Street
Santurce, PR 00912

Eng. Francisco Jimenez
Box 1317
Mayaguez, PR 00708

German A. Gonzalez
Mission Industrial
G.P.O. Bcx 20434
Rio Piedras, PR 00925

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



Lowenstein, Newman, Reis,
Axelrad & Toll
1025 Connecticut Avenue, NW
Washington, D. C. 20036
(202-862-8400)

Attorneys for
Puerto Rico Electric Power
Authority

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