

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD (ASLAB)

In the Matter of
PUERTO RICO POWER
AUTHORITY (POWER COMPANY)
Applicant

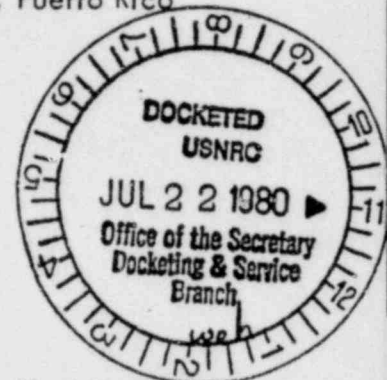
GONZALO FERNOS, PRO SE, ET AL.
Intervenors

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DOCKET NO. 50- 376
Proposed North Coast
Nuclear Plant (Unit 1)
slot Ward, Arecibo, Puerto Rico

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



TO THE HONORABLE APPEAL BOARD :

• COMES NOW the undersigned Intervenor, Pro Se, and on behalf of Members of Citizens for the Conservation of Natural Resources, Inc. (CCNR) hereinafter referred to as Intervenor * and respectfully states, alleges and prays :

- INTRODUCTION : On April 30, 1980, Intervenor* petitioned the ASLAB to hold evidentiary hearings in Puerto Rico "to Request Applicant to Show Cause Why Their Application Should Not Be Dismissed for Lack of Intention to Build." Applicant and NRC Staff opposed Intervenor's Petition. On May 29, 1980, ASLB issued order denying Intervenor's Petition without reaching the merits alleging lack of authority to decide on the matter.

* Applicant refers in their responses to only one Intervenor (Gonzalo Fernós), knowing that he represents and is the spokesman for about 300 citizens of Arecibo, Members all of CCNR who will be affected by decisions issued by the Licensing and Appeal Boards, and the U.S. Court of Appeals, if deemed necessary. Intervenor do not pretend to represent the entire population of Arecibo (over 40,000 inhabitants), but no doubt, if a referendum has to be carried out over the issue of the Nuclear Plant, the vast majority would vote against the siting of it in that community. There is no controversy about the existence of such strong opposition. In fact, it was evident during 1976 gubernatorial elections when both main contenders promised the electorate of Arecibo that if they were elected they would rule out the proposed North Coast Nuclear Plant there or elsewhere. Governor Romero-Barceló has not changed a bit his stand expressed in 1976.

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- On June 4, 1980, the ASLAB, sua sponte, questioned the validity of the ASLB's aforementioned position and thus, issued ORDER requesting Applicant and NRC Staff to furnish the ASLAB by memoranda with their views on the matter to be filed and served by June 27, 1980. Applicant and NRC Staff's Responses were received by Intervenors on July 3 and 7, 1980, respectively. The NRC Staff's Response of June 27, 1980 has been a turnabout from its previous position. Now it states that such hearings as requested by Intervenors should be held.

- On June 30, 1980, the ASLAB issued ORDER granting Applicant until July 18, 1980, to file a response to NRC Staff Memorandum of June 27, 1980, if Applicant so desired. Consequently, on July 9, 1980 Intervenors requested the ASLAB to grant them until August 8, 1980 to file a response to Applicant's Response, if they choose to respond.

- NRC Staff Memorandum* of June 27, 1980, is thorough and well supported by statutes, regulations and case law that at first sight a response from Intervenors seems unnecessary. Unless Applicant succeeds in destroying the substantive arguments presented by the NRC Staff -- a very doubtful probability -- it appears that the ASLAB will reverse the Licensing Board ORDER dated May 29, 1980, and that eventually the ASLB will conduct evidentiary hearings on Intervenors' pleading "treated as a motion to compel withdrawal of the application for Applicant's abandonment of intent to use the construction permit sought." To hold evidentiary hearings under present circumstances, however, presents a serious financial difficulty to Intervenors unless NRC or Applicant picks up the tab for legal fees** during hearings including transportation and lodging of counsel for Intervenors. Otherwise, due process may be impaired, unless an alternate relief is provided in lieu of evidentiary hearings. This is a situation of which Intervenors were not fully aware when the show cause petition was filed. Of course, if the Appeal Board and the Licensing Board compel Intervenors to litigate this case under the present circumstances we would not evade the challenge, even though it would be like a David vs. Goliath contest. Be it as it may be, no doubt that there is a need for a viable solution to such dilemma. In search of that solution this memorandum is directed.

• CIRCUMSTANCES OF THIS CASE WHICH WERE NOT FORSEEN WHEN ENACTING NRC STATUTES, REGULATIONS AND RULES OF PRACTICE :

The Atomic Energy Act of 1954, 42 USC § 2239, et seq. and NRC Rules of Practice, 10 CFR § 2.100, et seq., with regard to licensing the construction of nuclear plants, are construed bearing in mind that the Licensing Board generally deals with privately owned power companies. Thus, the "ever-presence" of the state government in licensing proceedings, as the protector of the public interest vis-a-vis the interests of the power company, has generally been taken for granted. In the case of Puerto Rico, however, the power company -- Puerto Rico Electric Power Authority (hereinafter referred to as the Applicant) -- is a government owned public corporation. That is, the power company and the government, for all practical purposes, merge here in one sole entity. Consequently, Intervenors, lacking the proper resources -- technological, financial and otherwise -- are alone in the defense of public interest, save the fact that the Intervenors' stand against the siting of any nuclear plant in Puerto Rico is officially supported by the Office of Energy of Puerto Rico, as reflected by its publication in June, 1979 : " The Energy Policy of Puerto Rico " (EXHIBIT "E" of the show cause petition). In spite of this established governmental policy concerning nuclear plants, Applicant seems to be oblivious of

(Footnotes of preceding page.)

* NRC STAFF Memorandum of June 27, 1980, quotes Applicant's Response of May 19, 1980 on page 6 without checking for accuracy of the quotation (See EXHIBIT "C" of Intervenors' Petition of April 30, 1980). In citing the alleged omitted sentence, Applicant deliberately omits the second part of the sentence which states : "but for the next major addition to generating capacity, considerations of both scale and timing rule it [the nuclear option] out." (Emphasis added.)

** The Licensing Board should be empowered, as courts are, to treat Intervenors in forma pauperis. Intervenors' current bank account has only \$109.12. Because no one any longer believes that there is an imminent threat that a Nuclear Plant will ever be built in Puerto Rico, there are no hopes of raising funds through public contributions. Furthermore, as the ASLAB may have observed, it has been difficult to maintain the instant case free of clashes between counsel for Applicant and the undersigned Intervenor, a layman. It seems, therefore, that the cause of justice in a quasi-judicial forum would be, as in a court of justice, better served if both parties were represented by lawyers

this reality. Theoretically there should not be a given situation in which one arm of the Government (Applicant) disagrees totally with another arm (Office of Energy of Puerto Rico), but that is just what we have on hand now before the Honorable Appeal Board.

- Since Applicant through the Department of Justice of Puerto Rico exercised its prerogative of expropriating the land necessary to site the proposed nuclear plant, it perforce follows that once a decision was taken to turn over the land to its original owners, there could not possibly be any serious intention to build the nuclear plant, unless an alternate suitable site was being contemplated. Applicant ought to clarify the inconsistency presented : On one hand it pursues the application for constructing a nuclear plant and on the other it is getting rid of the land for siting the same. Without the land, obviously no nuclear plant can be built, unless by some secret formula or miraculous feat Applicant expects to condensate the project down to a pocket size that can be sited anywhere. Therefore, the thrust of the controversy before the ASLAB and ASLB is not "that the application should be dismissed because it is presently inactive" (Page 8, 2nd paragraph of Applicant's Response of May 19, 1980), but whether Applicant has or has not obtained from the Court of Expropriation of Puerto Rico a reversal of the expropriation already granted for the land in question. If it can be proven that Applicant has no site on hand or foreseen on which to build the nuclear plant at any future date, its action of returning the land to its original owners without seeking an alternate site replacement, is tantamount to an implicit withdrawal of the application, thus, the case should be dismissed without any further ado. It is highly doubtful that once the expropriated land has been reverted back to its original owners. Applicant can justify instituting contradictory tactics by means of reexpropriation proceedings, that is, to take the land back for a second time. No one in his sane mind expects the Government of Puerto Rico or its instrumentalities to engage in such back-and-forth-actions unless there is a sound reason to do so. Assuming for the sake of argument that such action of returning the land to its original owners while pursuing the licensing application before the ASLB could be justified, it would be

totally unfeasible. By the time a second expropriation took place, if ever Applicant decided to build the nuclear plant, the land value with its continuous development would have increased several folds its original expropriated value. Besides the fact that for obvious political reasons the Government of Puerto Rico would not consent to relocating the increasingly larger number of families then living there, the population density of the area may have increased considerably beyond the NRC permissible density established under guidelines of 10 CFR Part 100. No matter what the site guidelines requirements say, the only way that an early site review makes any sense is when the Applicant has the means to freeze the future development of the site until it is ready to build the nuclear plant. In Puerto Rico the only way that this could be accomplished is by holding title to the land. Since Applicant is in the process of reverting the expropriated land to its original owners, thus losing control of the future development of the area, the Site Safety Evaluation Report prepared by the NRC Staff on April 27, 1979, has become moot.

- It is deemed necessary to clarify that of the total 39 cases of expropriation instituted by the Government of Puerto Rico on behalf of the Applicant, only 5 cases (less than 13 percent) are pending adjudication by the Court of Expropriation. Those 5 cases are : E 74-1019 (hearing set for September 16, 1980) ; E 75-578 ; E 75-582 ; E 75-899 ; and E 75-905. It is to be noted that in case E75-578 the Court of Expropriation by voice of the Hon. Domingo Rafucci ruled as follows :

" The Court will not set this case for hearing again until there is a solution in public policy as to how to deal with the neighbors of Islote Ward of Arecibo that were object of an expropriation that now has no public use whatsoever for the expropriating agency." (Translated from the original in Spanish)

- In case E 75-899, there is a letter from José F. Irizarry, Esq., Legal Counsel for Applicant addressed to Rafael A. Pons del Valle, Esq., of the Department of Justice, Land Matter Division, dated December 4, 1979, which states that the Applicant is willing to grant a 15 percent discount as indemnification for having desisted from validating the expropriations already granted

by the Court to those original land owners who return the money to Applicant in exchange for reacquiring title of the expropriated land. Also, the Applicant is offering a convenient installment plan to the original land owners to pay the money back to the Applicant in order to facilitate the recovery of the land back to them.

● Intervenors wish to emphasize that Applicant is twisting the arguments raised by Intervenors in a futile attempt to give the impression that our objection is centered around the inaction by Applicant during the last four years and their having "decided to defer construction" indefinitely. No where in our Petition (Motion of April 30, 1980) does it appear that we allege "inaction" and "deferral" as the basis of our request for a show cause hearing. Intervenors' request is predicated on specific facts clearly spelled out, which are :

- 1.- The reversal of expropriations of land to site the nuclear plant constitute facie evidence of lack of intention to build such plant.
- 2.- The write down of most of the money Applicant invested on the ill-fated Nuclear Plant as shown on their Financial Statement of October 18, 1979.
- 3.- The ruling out of nuclear power in the Interim Report of the Committee on Energy Alternatives for Puerto Rico by the National Academy of Science dated 1979.
- 4.- The raising of serious doubts about the use of nuclear energy in Puerto Rico because of the many unanswered questions related to such technology, as reported by the Office of Energy of Puerto Rico in its document dated June, 1979, entitled : " Energy Policy of Puerto Rico."
- 5.- The discarding of nuclear energy amongst the various sources of energy contemplated for the future, as indicated by the Governor of Puerto Rico on his Report to the Legislature on January 31, 1980.

Furthermore, our show cause petition clearly states : " Documents made available to the Intervenors prove conclusively that Applicant had dropped its intention to build North Coast Nuclear Plant ever since August 5, 1976." (Intervenors' Petition of April 30, 1980, page 1.) Yet, Applicant has failed to satisfactorily contest any of the aforementioned arguments raised by the Intervenors.

• Now, if the Honorable Appeal Board lets us. Intervenors would like to address Note 3 of the Appeal Board's ORDER of June 4, 1980, which states :

" We recognize that there is a dispute among the parties respecting whether the applicant has abandoned the project or, rather, merely deferred it." (Footnote 3, page 4 of ASLAB Order of June 4, 1980.)

It is to be noted that neither responses by Applicant dated May 19, 1980 and June 27, 1980, attempt to dispute Intervenors' allegation that Applicant has completely abandoned their intention to build the North Coast Nuclear Plant at Arecibo, Puerto Rico or elsewhere. The only contention that Applicant raises which comes closer to being called a "dispute" is its footnote on page 4 of Applicant's Response of May 19, 1980, which incorrectly states :

" The Intervenor states that "most of land" acquired for the site by the Authority has been returned to the original owners. This assertion is incorrect. The Authority has made the land available for reacquisition by the original owners but the owners have not chosen to take advantage of this offer."

The rest of both responses by Applicant is reduced to simple legalistic rhetoric of no substance which has little bearing on the issues raised by Intervenors. Being as it is, such quasi dispute could be easily settled by just a simple process of discovery. Intervenors would welcome the Appeal Board ordering a discovery proceeding prior to any hearing. Who knows if by such means the ASLB would be spared conducting costly bilingual hearings in Puerto Rico just to decide whether Applicant intends to build the Nuclear Plant or not in spite of the fact well known everywhere, except at the NRC, that the Nuclear Plant for Puerto Rico is as dead as a corpse.

• In the event that evidentiary hearings are conducted in Puerto Rico in the very near future to enable the Licensing Board to inquire whether or not Applicant has abandoned its intention to construct the North Coast Nuclear Plant facility, it would be in order for the Appeal Board to advise the Licensing Board to treat Intervenors in forma pauperis and thus authorize payments from NRC or Applicant's funds of fees and travel expenses of a legal counsel for Intervenors chosen by the latter. No doubt that the Appeal Board is fully cognizant of the fact that the undersigned

Intervenor is not a lawyer and that his past personal clashes with counsel for Applicant, if re-
curred, may not contribute to maintaining the prospective hearings free of further personal
clashes which could obstruct the conduct of the proceedings. In view of this undesirable situ-
ation and in consideration of the constitutional provisions guaranteeing due process and equal
protection of the law, Intervenors pray the Honorable Appeal Board to recommend to the ASLB
that they institute the means to provide legal counsel for Intervenors during the hearings includ-
ing travel expenses from Washington, D.C. or New York and lodging in Puerto Rico.

● Now we address Applicant's allegation that "Intervenor[s] ha[ve] misstated the
amount of any potential "loss" (P.5 of Applicant's Response of May 19, 1980). The reverse is
true. If anyone has misstated financial data it is the Applicant itself. Counsel for Applicant
does not seem to know that "written down" means "loss". Applicant has misread the Financial
Statement, p. 1-12 (EXHIBIT "B3" of intervenors). Aside from the fact that such Financial
Statement is not accurate in many aspects ; e.g., the "write down" by year omits without an
explanation the year 1977. Applicant's Response of May 19, 1980 stating that "total costs in-
curred to-date with respect to the North Coast Nuclear Plant are \$88,041,000, which include
both equipment and site and licensing costs " is not correct. To that sum must be added the sums
which appear in note (9) Other properties ; \$44,280,000 for year 1978 and \$22,638,000 for
year 1979. The inclusion of those two figures is for the following reasons :

- 1.- Nuclear plant equipment and generating units have become obsolete and
Applicant has failed to sell the same, thus they have to be written down.
- 2.- Generator held "for possible future use" must be written down also because
it presents technical difficulties to fit into other types of generating plants.
- 3.- Land and laboratory building have to be written down also because neither
has any use for the Applicant and the land has been disposed of.

Furthermore, whether the loss is \$88,041,000 or \$154,959,000, the indisputable fact
is that Note (8) write down years 1975 to 1979 is an admission that Applicant no longer intends

to build the Nuclear Plant. The Applicant is really trying to make a fool of NRC, Bond Holders and Intervenors by stating in its Financial Report : (Intervenors' EXHIBIT "B2", show cause pet.)

" Costs incurred in connection with the licensing requirements, which in the opinion of management are of continued benefit to the development of a nuclear or other plant, aggregate \$21,004,000, and are included in construction work in progress."

Since no construction is going on, where does it fit to state: "work in progress" ?

- Intervenors did not allege that Applicant has hidden "financial" information. What we alleged was that Applicant withheld various kinds of information, not only of financial nature, referring also to the disposition of the land where the N-Plant was planned to be sited. We insist that it was a grievous offense that Applicant behind the back of the Licensing Board, NRC Staff and Intervenors took a series of legal actions to revert the Nuclear Plant site to the original owners. To make things worse, during four years Applicant omitted to inform all concerned parties of their actions behind closed doors. It was only accidentally that last April Intervenors discovered such concealed actions. Also, Applicant omitted serving copy to the Licensing Board, NRC Staff and Intervenors of their Financial Statement referred to above.

- Finally, Intervenors wish to address Note 17 of NRC Staff Memorandum of June 27, 1980, which states that a dismissal of the application with prejudice would not be appropriate, alleging that "although the Applicant might not be entitled to a license now, it might be entitled to one at a future date." Intervenors vehemently disagree. There is no point in keeping Applicant's options open indefinitely for the future. Applicant is at present highly indebted and its balance sheet, which has been in the red for years, keeps plunging by astronomical proportions due to an incredible history of poor management, ineptitude* and shortsightedness. Had it not been for

* It is tragic for the electricity consumer of Puerto Rico that Applicant contracted and payed Westinghouse and others for supplying them the various components of the ill-fated Nuclear Plant before obtaining a construction license from ASLB, spending altogether almost \$155 million, all gone down the drain.

Applicant's power as a Governmental agency to manipulate the electricity rates * as they see it fit, Applicant would have been in bankrupt long ago.

Applicant has surrendered its prerogative of management to its labor union (UTIER)'s blackmail tactics. The incidence of sabotage to its installations committed by its own employees during strikes have gotten out of hands. On one occasion the Governor had to mobilize the entire National Guard to put a stop to the heavy losses on installations and widespread blackouts resulting from sabotage which cost the Applicant million of dollars.

In consideration of the fact that nuclear power plant construction and operation involve a highly sophisticated technology which cannot tolerate even an Act of God without disastrous consequences, there is no need for more words to anticipate the enormous risk of disaster that an Applicant's nuclear plant installation would be subjected to. Furthermore, Puerto Rico's geographical conditions and an ever growing population density -- presently over 900 inhabitants per square mile -- offers perhaps the worst place in the world to site a nuclear plant.

In view of the above, upon Intervenors proving without a shadow of a doubt that Applicant has abandoned its intention to build the Nuclear Plant, Intervenors would expect no less than a dismissal of the application with prejudice.

* Applicant's electricity rates are among the highest in the United States, and possibly highest the world over.

18 July, 1980

• WHEREFORE, Intervenors respectfully pray the Honorable Appeal Board to reverse the ASLB Order of May 29, 1980 regarding to the instant case, so as to enable such Licensing Board to "inquire into the facts of Applicant's abandonment of intent to use the construction permit sought" by instituting hearings in Puerto Rico and/or discovery proceedings at the earliest convenience, in which Intervenors are treated in forma pauperis, providing them with the legal counsel of their choice, including counsel's travel for and lodging expenses during hearings.

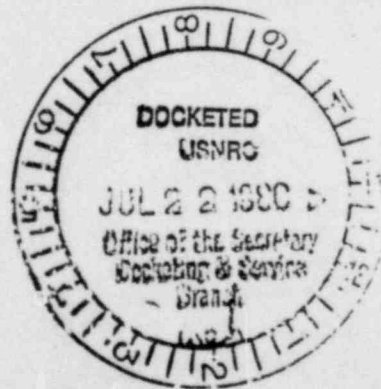
• In San Juan, Puerto Rico, this 18th day of July, 1980.



Gonzalo Fernós, Pro Se, and
representing Members of CCNR
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CERTIFICATE OF SERVICE BY MAIL

• I HEREBY CERTIFY: That on this same date copy of the above memorandum entitled: INTERVENORS' MEMORANDUM IN RESPONSE TO APPEAL BOARD ORDER OF JUNE 4, 1980, has been served by first class or air mail upon the following: C. Jean Bishop, Secretary to the ASLAB; Alan S. Rosenthal, Esq., Chairman, ASLAB; Dr. John H. Buck, Member, ASLAB; Michael C. Farrar, Esq., Member, ASLAB; Secretary of the NRC, Attention: Docketing and Service Section; Sheldon J. Wolfe, Esq., Chairman, ASLB; Dr. Richard F. Cole, Member, ASLB; Mr. Gustave A. Linenberger, Member, ASLB; Edwin J. Reiss, Esq. Counsel for NRC Staff (All the above bearing same address as follows: United States Nuclear Regulatory Commission, Washington, D.C. 20555); Maurice Axelrad, Esq., 1025 Connecticut Avenue, N.W., Washington, D.C. 20036; José F. Irizarry, Esq., Legal Counsel for Applicant, Puerto Rico Electric Power Authority, GPO Box 4267, San Juan, Puerto Rico 00936; and Alberto Bruno Vega, Executive Director, Puerto Rico Electric Power Authority, GPO Box 4267, San Juan, Puerto Rico 00936.




Gonzalo Fernós