

05/21/80

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO INTERVENORS' MOTION DATED APRIL 30, 1980

INTRODUCTION

On April 30, 1980, Gonzalo Fernos, for himself, and on behalf of the members of Citizens for the Conservation of Natural Resources, Inc. (Intervenors) filed a "Petition Requesting Evidentiary Hearings to Request Applicant to Show Cause Why Their Application Should Not Be Dismissed for Lack of Intention to Build". By this petition, Intervenors have requested the Atomic Safety and Licensing Board (Licensing Board) to:

1. Conduct a show cause hearing in Puerto Rico not later than July 1, 1980, regarding the Applicant's intention to pursue the application;
2. Issue an order dismissing with prejudice the above application; and
3. Impose on the Applicant costs and damages in the sum of \$10,000 on behalf of the Intervenors.

The Staff responds to each request below.

I. REQUEST FOR SHOW CAUSE HEARING

Intervenors' first request, that this Board conduct a show cause proceeding to determine if the Applicant intends to proceed with the application, should

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be denied. The Commission's regulations dealing with show cause orders, Subpart B of Part 2 of the Commission's Rules of Practice (10 CFR §2.200, et seq.), prescribe that the Staff, not the Licensing Board, issue such orders and that such orders are issued only where licensees have failed to live up to "standards of conduct required of them by statute, regulation, rule, board action, or licensing conditions".<sup>1/</sup> Intervenors' motion fails because requests for show cause actions, as prescribed by 10 CFR §2.206, must be filed with the Staff and not the Board and concern matters of compliance by a licensee, not an applicant. Accordingly, the Staff believes that the first relief requested must be denied.

## II. REQUEST THAT THE APPLICATION BE DISMISSED

Intervenors second request for relief,<sup>2/</sup> that the action be dismissed, should also be denied.

In support of this request for relief Intervenors assert in paragraph numbered (1) of their petition that Applicant's own documentation demonstrates that the Applicant no longer intends to construct the North Coast plant.

In paragraph numbered (2) Intervenors identify court documents as well as

<sup>1/</sup> See Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 222 (1979).

<sup>2/</sup> A similar request for dismissal was made by Intervenors in their "Motion to Dismiss or to Grant Alternate Relief" dated February 27, 1978. The Intervenors argued, inter alia, that there was no indication that the Applicant would ever submit a time-table for proceeding with its application. The Board denied the Intervenors' motion in its "Order of the Board Concerning Intervenors' Motion to Dismiss or to Grant Alternative Relief", dated May 1, 1978.

research and governmental reports which Intervenors assert demonstrate Applicant no longer intends to construct the North Coast plant. In sum, the sole basis for Intervenors' request is the same one advanced in their previous Motion to Dismiss, dated February 27, 1978, that Applicant must proceed with the processing of its application or have the application dismissed. As this Board pointed out in its denial of that motion (1) "there 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"<sup>3/</sup> and (2) the motion is, in essence, one for summary disposition pursuant to 10 CFR §2.749 which must fail because such a motion may not be used to determine the ultimate issue as to whether a construction permit shall be issued.<sup>4/</sup>

The lack of a requirement in any Commission regulation or underlying statute that applicants proceed with the processing of their application in accordance with any set time period was noted by another licensing board panel where a similar motion was filed when an applicant decided to postpone work on a project and extend the time schedule for commercial operation. Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), LBP-75-56, 2 NRC 565, 567 (September 17, 1975).

The second reason noted above for this Board's earlier denial of Intervenors' motion to dismiss - that the motion is in essence a denial of the

<sup>3/</sup> "Order of the Board Concerning Intervenors' Motion to Dismiss or to Grant Alternative Relief", dated May 1, 1978, at 4.

<sup>4/</sup> Id.

entire application and, accordingly, is in direct conflict with 10 CFR §2.749(d), has been recognized in other licensing proceedings. In Greenwood, like here, the relief sought by the motion was that the application for the construction permit be denied with prejudice. The Licensing Board there noted that this was in conflict with the express provisions of 10 CFR §2.749(d) barring summary disposition on "the ultimate issue as to whether the permit shall be issued." (2 NRC, at 569) Dismissal of the application by summary disposition was also sought by Intervenor in Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 879, where the Board denied the motion citing the language of 10 CFR §2.749(d).<sup>5/</sup>

To the extent this motion is construed as being filed pursuant to 10 CFR §2.605 of the Commission's regulations to request that the Commission decline to initiate an early hearing or render an early partial decision on an issue or issues of site suitability, it must be denied for completely failing to assert any ground supporting the motion (see generally, 10 CFR §2.730). Intervenor has not, in accordance with Section 2.605, alleged any facts showing that such an early hearing or decision would in any way prejudice later NEPA reviews of alternative sites (10 CFR §2.605(b)(1)) or that an

<sup>5/</sup> A motion to dismiss an application was also denied in Boston Edison Company, et al. (Pilgrim Nuclear Station, Unit 2), LBP-75-15, 1 NRC 419, 420 (1975). The Board there noted that the motion was inept as a motion for summary disposition under 10 CFR § 2.749. Furthermore the Board stated "... it is clear that in the face of Section 189 of the Atomic Energy Act, as amended, and the Commission's pertinent regulations affecting mandatory hearings on applications for construction of nuclear power plants, there is no procedure (short of withdrawal by the applicant) for the disposition of such an application without a hearing...."

early partial decision on any issue would not be in the public interest (10 CFR §2.605(b)(2)). Intervenors merely allege facts showing that the Applicant does not intend to pursue its application. As we discussed above, this showing is insufficient to support the relief requested.

For the reasons stated above, we believe that the Intervenors' second relief request must be denied.

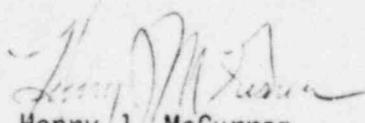
III. REQUEST THAT THE APPLICANT PAY INTERVENORS LITIGATION EXPENSES

Intervenors' third and final request, that the Applicant pay Intervenors \$10,000 "for compelling us to litigate for five years", should also be denied. The Staff has reviewed the Commission's statutory authority, Atomic Energy Act of 1954, as amended (42 U.S.C. §2011, et seq.) and the National Environmental Policy Act of 1969, as amended (42 U.S.C. §4321, et seq.), as well as the Commission's regulations and can find no basis which would allow this Board to grant the relief requested.

IV. CONCLUSION

For the reasons stated above, the Staff urges that Intervenors' motion be denied.

Respectfully submitted,

  
Henry J. McGurren  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 21st day of May, 1980.

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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PUERTO RICO WATER RESOURCES  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' MOTION DATED APRIL 30, 1980" in the above-captioned proceeding 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 21st day of May, 1980:

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