

4 August, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

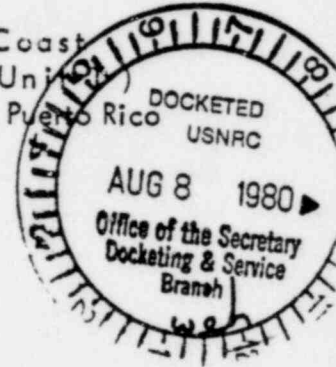
In the Matter of
PUERTO RICO POWER AUTHORITY
Applicant

GONZALO FERNOS, PRO SE, ET AL.
Intervenors

* * * * *

DOCKET NO. 50-376

Proposed North Coast
Nuclear Plant (Unit)
Islote Ward, Arecibo, Puerto Rico



INTERVENORS' RESPONSE TO APPLICANT'S *
MEMORANDUM OF JULY 18, 1980

TO THE HONORABLE APPEAL BOARD :

● COMES NOW the undersigned Intervenor, Pro Se, and in representation of Citizens for the Conservation of Natural Resources, Inc. (CCNR), hereinafter collectively referred to as the Intervenor, and respectfully states, alleges, and prays :

● INTRODUCTION : Intervenor's Motion of July 9, 1980, granted on July 14, 1980, requested "that in the event that pursuant to ASLAB ORDER of June 30, 1980, Applicant files with the ASLAB on or before July 18, 1980 a memorandum in response to the June 27, 1980 Memorandum of the NRC Staff, Intervenor be granted the option to file a responsive memorandum there-to..." Intervenor herein submit such response.

● Applicant does not address all the supported contentions raised by the NRC Staff. It infers, however, that the Commission, the Appeal Board and the Licensing Board lack jurisdiction to rule on the issues raised by Intervenor in their Petition (Motion) of April 30, 1980. The Applicant thus incorrectly alleges :

* Applicant should be instructed not to refer to itself as "the Authority", but plainly as the Applicant. In any event, the Authority in these proceedings is the Commission and its adjudicatory boards (ASLAB, ASLB). In the same token, Applicant should also be instructed to stop belittling Intervenor while upgrading itself.

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" 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, **** Consequently, the status of the law on this point is unsettled, and the question is res nova to the Appeal Board."

(See Applicant's Memo of July 18, 1980, at page 2.)

• Intervenors concur with NRC Staff stand that purport to prove that the Commission and any of its adjudicatory instrumentalities (ASLAB and ASLB) indeed have jurisdiction over the issues raised by Intervenors opposed by Applicant. In other words, Intervenors submit that the Licensing Board , who at first instance believed it lacked authority to decide on the issues raised by Intervenors, as a matter of law and precedence, has the "inherent authority to dismiss an application as moot over the objection of an applicant." The cases cited by the NRC Staff * are indeed applicable to the question raised by the Appeal Board in the instant proceeding. That is, those decisions constitute prima facie evidence of the jurisdiction of the Commission and its instrumentalities to adjudicate Intervenors' Motion of April 30, 1980. Applicant also incorrectly interprets 10 CFR § 2.107, § 2.108 and § 2.605. However, this Memorandum will discuss mainly whether the Licensing Board has inherent authority--as alleged by NRC Staff--to entertain a request by Intervenors for withdrawal of an application over the objections of the Applicant.

* Consumers Power Co. (Quanicassee Plant, Units 1 & 2), CLI-74-29, 8 AEC 10 (1974).
Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), LBP-76-56, 2 NRC 565, 568 (1975)
Rochester Gas & Electric Co. (Sterling Power Project, Unit 1), ASLAB-596 (June 17, 1980).
Kansas City Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1, 5 (1977).
Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-47, AEC 794 (1972).
Cf. Offshore Power Systems (Floating N Plants), ALAB-489, 8 NRC 194, 204-205 (1978).
Rocky Mountain Power Co. v. Federal Power Commission, 409 F.2d 1122, 1127-1129 (D.C. Cir. 1969).

● DISCUSSION : The NRC Staff purports the broad authority of a presiding officer under 10 CFR § 2.718 by quoting several of the Commission's Orders upheld by the U.S. Court of Appeals.* It also quotes the Rules of Practice and various cases resolved by the Commission or the Appeal Board to sustain that "the Commission had determined that the Licensing Board had authority under 10 CFR § 2.107 (a) to pass on the issue of whether an application may be ordered withdrawn for lack of intent to construct the project."

● Applicant incorrectly alleges that 10 CFR § 2.107 (a) "only permits an applicant to withdraw its application [and] find[s] nothing therein which would authorize another party to request an adjudicatory board to compel an applicant to withdraw its application." It is therefore deemed necessary to quote and analyze in the realm of its true context 10 CFR § 2.107 (a) :

" The Commission may permit an applicant to withdraw an application prior to the issuance of a notice 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 issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." (Emphasis added)

From its own wording 10 CFR § 2.107 (a) has a broader meaning and refers to more parties than what Applicant purports to limit it to. Said Rule permits the Commission to entertain a withdrawal of an application coming from either the applicant itself, the NRC Staff, an intervenor or any other party. What the Rule, naturally, does not specifically acknowledge to the Commission is the authority to sua sponte summarily dismiss an application, but that is not the issue at this stage. On the other hand, neither does the Rule restrict the Commission to consider requests for withdrawal of an application coming solely from an applicant, as Applicant erroneously alleges. In fact, as

* See NRC Staff Memorandum of June 27, 1980, pages 6 and 7, where it is stated : " These general powers to regulate the course of proceedings and bring them to fruition would provide authority for the [Licensing] Board to entertain the subject motion [Intervenors' Petition of April 30, 1980] and to inquire into whether the applicant intends to use the construction permit."

the Rule is worded the request can come from anyone--even from an inhabitant of another galaxy. Thus, inconceivable is Applicant's rationale that 10 CFR § 2.107(a) is to be interpreted as dealing exclusively with a request by an applicant with the exclusion of NRC Staff, Intervenor or any other party.* There is no doubt that the Rule grants permission to any party to request a withdrawal or dismissal with or without the objections of an applicant. That is the broader sense that the Commission and the Appeal Board have accorded to 10 CFR § 2.107 (a) as evidenced by orders issued in various proceedings, to wit: Quanicassee, supra, etc.

● Applicant also twists ** the meaning of NRC Staff comments *** by erroneously attributing to the latter "that an inquiring into the matter raised by the petition would not necessarily require a hearing..." The reverse is true. In fact, NRC Staff in the footnote omitted in Applicant's quotation further clarifies the propriety of a hearing by quoting a case in which "the Appeal Board noted that hearings might be conducted into the causes and justification for a delay." Applicant furtheron incorrectly generalized that "motions are usually decided upon the filing of the parties without opportunity for a hearing, cross-examination, or oral argument..." That would be a sheer violation of due process when the nature of the questions raised to be adjudicated--as in the instant proceeding--involves the need of supporting evidence to enable the Licensing Board to reach an equitable conclusion. It follows that there should not be any doubt in the minds of the Honorable Members of the Appeal Board that the questions raised by Intervenor need specific answers and supporting documental evidence either by instituting discovery on the issues raised by Intervenor or through an evidentiary hearing. The strength of the points raised by Intervenor, however, would

* In the Quanicassee case, supra, the request for withdrawal came from a petitioner who had not at that time been accepted as an intervenor.

** See Applicant's Memorandum of July 18, 1980, at page 8.

*** See NRC Staff Memorandum of June 27, 1980, at page 11.

inevitably lead Applicant to a voluntary withdrawal of the application when the facts are established without a shadow of a doubt. That seems to be the reason why Applicant is running the gauntlet to avoid an open confrontation with the issues raised by Intervenor's in their Petition of April 30, 1980. Thus, it seems that some pressure exerted by the Licensing Board to find out the truth would compel Applicant to expose its real situation. That is, if Intervenor's are given the opportunity to prove they are right in their claim that Applicant has given up long ago any consideration whatsoever to build a nuclear plant in Puerto Rico*, either Applicant motu proprio will withdraw the application or the Licensing Board will have no other choice but to issue an order of withdrawal or dismissal and such order would be sustained on the Commission's previous decisions and case law by the courts.

- Applicant is also incorrect when it purports to give the wrong impression that it "has not violated any of the Commission's regulatory requirements."** However, Applicant failed to report to the Licensing Board, NRC Staff and Intervenor's their action of desisting from the expropriation of the land for siting the Nuclear Plant, concealing such action for the last four years and even now does not want to admit to such an indisputable fact. Also, Applicant failed to submit to the parties its yearly Financial Statements which undoubtedly reveal the unreadiness of Applicant to pursue the Nuclear Plant project for lack of funds presently and in a foreseen future.

- Finally, Intervenor's wish to emphasize the need for legal assistance by means of providing Intervenor's with funds which can be used "to retain counsel in this Docket and its subsequent legal followings and procedures, redresses and remedies." It is to be noted that although in

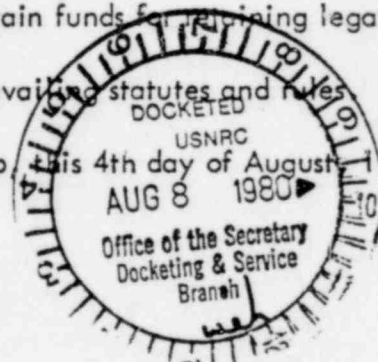
* Another sign of Applicant's lack of intent to build the Nuclear Plant project is that its Environmental, Licensing and Nuclear Division has been dismantled eliminating 70% of its employees. The remaining 30% is presently engaged in dealing with environmental issues related solely to oil and coal burning plants.

** See Applicant's Memorandum of July 18, 1980, at page 6.

Quanicassee, supra, the Commission did not reach the point of resolving on the merits the petitioners' request for attorney's fee, neither did the Commission rule out that the Rules of Practice and the Atomic Energy Act of 1954, as amended, preclude the Commission from granting legal funds to intervenors. Such preclusion was not raised, naturally, because there is no such prohibitory disposition in the statutes and regulations. Intervenors need not stress again the urgency for such legal assistance and thus rely on the Appeal Board's broad judgment to oversee that parties in an ongoing proceeding be properly represented.

● WHEREFORE, Intervenors respectfully pray the Honorable Appeal Board to reverse the Licensing Board's Order of May 29, 1980, so as to enable said Board to reach the merits of Intervenors' request of April 30, 1980, "treated as a motion to compel withdrawal or dismissal of the application for Applicant's abandonment of intent to use the construction permit sought" because of its unreadiness to materialize the Nuclear Plant project for lack of funds and other considerations; to grant Intervenors the means to obtain funds for obtaining legal assistance; and/or to grant any other relief not inconsistent with prevailing statutes and rules.

● In San Juan, Puerto Rico, this 4th day of August, 1980.



Gonzalo Fernós

Gonzalo Fernós, Pro Se, and representing Members of CCNR. 503 Barbé Street Santurce, Puerto Rico 00912



CERTIFICATE OF SERVICE BY MAIL

● I HEREBY CERTIFY : That on this same date copy of the above memorandum has been served by first class or air mail upon the following: Miss 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, Att. Docketing and Service Section; Sheldon J. Wolfe, Esq., Chairman, ASLB; Dr. Richard F. Cole, Member, ASLB; Mr. Gustave A. Linenberger, Member, ASLB; Edwin J. Reis, Esq., Counsel for NRC Staff (All the above bearing same address as follows: U.S. 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, P.R. 00936; Eng. Alberto Bruno Vega, Executive Director, Puerto Rico Electric Power Authority, GPO Box 4267, San Juan, Puerto Rico 00936.

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