

UNITED STATES OF AMERICA

BEFORE THE NUCLEAR REGULATORY COMMISSION



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

Docket No. 50-376

AUTHORITY'S RESPONSE TO MOTION FOR  
DIRECT CERTIFICATION

On September 11, 1980, the Puerto Rico Electric Power Authority (the "Authortity") filed with the Atomic Safety and Licensing Board and all parties its "Withdrawal of Application" in this docket and a "Motion for Termination of Proceeding."

On September 18, 1980, the NRC Staff filed the "NRC Staff's Answer to Motion of Applicant to Withdraw Their Application," in which it stated that it did not oppose the Authority's motion.

The Authority has not received an answer to the Motion for Termination of the Proceeding from the intervenors in this proceeding, Mr. Gonzalo Fernos and the Members of Citizens for the Conservation of Natural Resources, Inc. (collectively the "Intervenors"). However, the Intervenors have filed with the Commission a "Motion for Direct Certification to Request Application be Dismissed With Prejudice" and

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an "Addendum to Motion for Direct Certification" (collectively, the "Motion for Directed Certification").<sup>1/</sup>

In the Motion for Directed Certification, the Interveners request that the Commission order either that the Authority's application be dismissed with prejudice or that the proceeding not be terminated until after evidentiary hearings are conducted "to enable the Licensing Board to know the full facts why the dismissal cannot be less than with prejudice." (Emphasis in original.)

The Authority respectfully requests that the Motion for Directed Certification be denied in all respects because such motion is procedurally defective and does not satisfy applicable requirements for directed certification and because the relief requested is without merit.

The Authority does not question the Commission's plenary power to undertake interlocutory review, at its discretion, of matters under consideration in a proceeding pending before a Licensing Board. However, consideration by the Commission of the Motion for Directed Certification under the current circumstances in this proceeding would be both without support in

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<sup>1/</sup> Interveners also filed a motion with the Licensing Board requesting that the proceeding be stayed until 15 days after the Commission rules on the Motion for Directed Certification.

Commission regulations and precedent and contrary to orderly administrative practice.

Although the Commission regulations do not explicitly provide for the filing of motions for directed certification, it is now well established that such a motion is a procedure available to a party to a Licensing Board proceeding under 10 CFR § 2.718(i). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975). However, since 10 CFR § 2.785(b) assigns to the Appeal Board the functions and authority of the Commission under a number of regulations (including § 2.718(i)), any motion for directed certification should have been filed with the Appeal Board.<sup>2/</sup> Accordingly, the Motion for Directed Certification should be denied as improperly filed.

In addition, even if the Motion for Directed Certification had been filed with the Appeal Board--or were referred by the Commission to the Appeal Board--it should be denied for failing to satisfy applicable requirements. A party seeking directed certification must establish, at a minimum, that referral of the matter by the Licensing Board to the Appeal Board under 10 CFR § 2.730(f) would have been proper, i.e., a "prompt

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<sup>2/</sup> It is possible that 10 CFR § 2.785(d) provides a basis for filing with the Commission a motion for directed certification as to a matter pending before an Appeal Board. However, such section does not pertain to matters pending before a Licensing Board.

decision is necessary to prevent detriment to the public interest or unusual delay or expense." Seabrook, supra, at 483. Directed certification "is to be resorted to only in exceptional circumstances." Consumers Power Co. (Midland Plants, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977). Directed certification will not be granted unless the Licensing Board has had a reasonable opportunity to decide the matter for which certification is requested. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 729 (1975).

The Intervenors seek to have the Authority's application dismissed "with prejudice."<sup>3/</sup> By that, we understand them to seek to prevent termination of the proceeding by the Licensing Board in a manner which would leave "the door . . . open to Applicant to pursue the nuclear plant construction permit at a future date." (Addendum to Motion for Direct Certification, p. 1) However, they fail to explain why they cannot simply

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<sup>3/</sup> To the extent that the Intervenors alternatively seek that the Commission direct the Licensing Board to hold evidentiary hearings, there is clearly no warrant for imposing such a burden on the parties and the Licensing Board. Intervenors have raised no issue -- nor is there any issue reasonably associated with termination of the proceeding as requested by the Authority -- that cannot be resolved under the Commission's motion practice.

seek such objective before the Licensing Board and, if they later deem themselves aggrieved by the Licensing Board's ultimate actions, then pursue their normal administrative appeal. In other words, they have provided no basis for any determination that a prompt decision is necessary, or that any exceptional circumstances exist that would warrant directed certification, or that there are any circumstances that preclude them from pursuing their objectives with the Licensing Board for a ruling in due course.<sup>4/</sup>

Finally, even if the Motion for Directed Certification were to be considered by the Commission or the Appeal Board, it should be denied because the relief sought is without merit.

Intervenors apparently seek the Commission to direct that any order of the Licensing Board terminating this proceeding pursuant to the Authority's motion of September 11, 1980, include a condition foreclosing the Authority from filing a new application at a future date. Whether or not a Licensing Board may have the authority to impose such a condition,<sup>5/</sup> there is no basis for

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<sup>4/</sup> Any relief sought by the Intervenors--regardless of merit--could, of course, have been requested in their answer to the Authority's Motion for Termination of Proceeding.

<sup>5/</sup> It is questionable whether, in terminating a proceeding, the Commission could impose conditions unrelated to health and safety considerations or to environmental aspects of any actions previously authorized. In instances such as the present proceeding, where no Limited Work Authorization or Construction Permit was issued, and thus no on-site work was performed, it is difficult to conceive of a basis for the imposition of any conditions upon termination.

its imposition in this proceeding. Clearly, no future application for a construction permit would be filed by the Authority or any other utility unless it determined that the nuclear plant was necessary to provide for the needs of the public that it serves, and no construction permit would be granted unless all applicable regulatory requirements were satisfied. Thus the public interest would be adversely affected if the Commission were to impede the filing of subsequent applications at the present time, when the future circumstances that might warrant such applications cannot be known or considered.

In light of the importance of not prejudicing the future ability of a utility to provide needed services to the public, another Licensing Board has held that foreclosure of future applications could not be imposed unless it is shown that denial of such relief would prejudice the public interest. See Boston Edison Co. (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 AEC 324, 327 (1974). There, the intervenors sought to have the dismissal of an application conditioned with a prohibition of the filing of a new application for a term of years. Recognizing the public interest in the construction of future plants for which there is a public need, the Board refused to impose such a condition stating that, "it would be unreasonable in the extreme to deprive the public of a needed utility service because of alleged 'inconvenience or burden' to potential intervenors."

Its discussion referenced Jones v. Securities and Exchange Commission, 298 U.S.] (1936) where the Supreme Court stated, citing numerous cases:

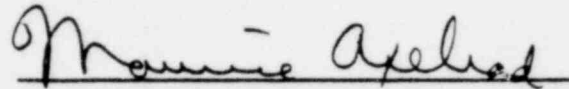
"The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter."  
298 U.S. at 19 (emphasis added).

As in Pilgrim, Intervenors here have not shown any prejudice to the public interest if the Authority's Motion for Termination of Proceeding is granted without the foreclosure of future applications. Impliedly, the only prejudice to Intervenors is that they may be faced with the need to contest a new application for a construction permit, if one were filed in the future. The speculative possibility of such potential inconvenience to the Intervenors is scarcely sufficient to outweigh the prejudice to the public interest if the Commission were now unwarrantedly to preclude subsequent applications. Any such arguments by the Intervenors would be contrary to the judicial authority discussed in Jones, which led the Court to conclude that "plainly enough, under the decisions of this court, the doctrine that dismissal must be granted if no prejudice is shown beyond the prospect of another suit, . . . is applicable, and the withdrawal should have been allowed as of

course." 298 U.S. at 22 (emphasis added).

For all of the foregoing reasons, the Motion for Directed Certification should be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Maurice Axelrad", written over a horizontal line.

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October 3, 1980



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of )  
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PUERTO RICO ELECTRIC POWER )  
AUTHORITY ) Docket No. 50-376  
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North Coast Nuclear Plant, )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the Authority's Response To Motion For Direct Certification dated October 3, 1980, were served on the following by deposit in the United States mail, first class and postage prepaid, this 3rd day of October, 1980.

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