3 December, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of :	*	
PUERTO RICO ELECTRIC POWER AUTHORITY (POWER COMPANY) Applicant	*	DOCKET NO. 50-376
GONZALO FERNOS, PRO SE, ET AL. Intervenors	*	Proposed North Coast Nuclear Plant (Unit 1) Islote Ward, Arecibo, Puerto Rico

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INTERVENORS' REPLY TO APPLICANT'S AND NRC STAFF'S CONTENTION THAT NORTH COAST NUCLEAR PLANT'S WITHDRAWN APPLICATION SHOULD NOT BE DISMISSED WITH PREJUDICE

TO THE HONORABLE BOARD :

• COMES NOW the undersigned Intervenor, Pro Se, and in representation of Members of Citizens for the Conservation of Natural Resources, Inc. (CCNR), and respectfully states, alleges and prays :

• 1.- That on September 18, 1980, Intervenors filed by mail with the Nuclear Regulatory Commission (NRC), a Motion for Direct Certification to Request Application be Dismissed With Prejudice and an Addendum thereof. By ORDER of October 17, 1980, the Commission transferred the Motion to the Licensing Board for decision stating also that Intervenor(s) may pursue an appeal if the Licensing Board rules adversely on the merits of the Motion.

• 2.- That by ORDER of November 19, 1980, the Licensing Board stated it expected Intervenors to have filed a submission by November 3, 1980 opposing Applicant's and the NRC Staff's Responses of October 3 and 8, 1980, respectively. The Licensing Board, conscious of Intervenors' right to their day in court, granted Intervenors until December 4, 1980, in case we wished to file a submission. Since Rule 10 CFR § 2.730 (c) specifically states that "the moving party shall have no right to reply, except as permitted by the presiding officer...", Intervenors

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regret that the Licensing Board did not authorize earlier a reply, any time between October 18, 1980 and November 2, 1980, that is, during the 15 day period it granted subsequent to the Motion for a Stay of Proceedings. Such timely authorization would have been welcome by Intervenors and would thus have expedited the proceeding. Nonetheless, Intervenors' opposition to Applicant's and NRC Staff's responses is set forth below.

- REPLY TO APPLICANT'S AND NRC STAFF'S RESPONSES :

More than half of Applicant's 8 page response and more than half of NRC Staff's 14 page response are dedicated to arguing why the Commission should deny the Motion for Direct Certification. Since such arguments have become moot by succeeding events, there is no need to address them. It is to be noted, however, that on page 2, 1st paragraph of Applicant's October 3, 1980 submission, the latter refers to the alternate relief sought by Intervenors, yet the rest of the response is devoid of any argument pro or con Intervenors' alternate request of not terminating the proceeding until after evidentiary hearings may be conducted to enable the Licensing Board to know the full facts why the dismissal cannot be less than with prejudice. This issue is nevertheless discussed by the NRC Staff and Intervenors will reply to it furtheron.

There should not be any doubt that the authority of the Licensing Board to dismiss an application with prejudice stems from 10 CFR § 2.107 (a) which prior to the issuance of a notice of hearing grants the Commission the power to do so. Such section of the Rules of Practice implies, although it is not explicitly stated, that the Licensing Board is empowered to grant withdrawal of applications either with or without prejudice, depending the way the discretionary power of the Licensing Board is exercised in light of the circumstances of each case. It is stated in these words :

> "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)

" Such terms " is an ample discretionary power which the Rules of Practice grant the Licensing Board, including, but not limited to order that the withdrawal of an application be granted

with prejudice.

Applicant pretends to delimit the circumstances in which an applicant could be foreclosed from filing a new application at a future date, to Intervenors' showing the existence of prejudice to the public interest. To support such thesis, Applicant and NRC Staff quote Boston Edison Company, Pilgrim Nuclear Generating Station, Units 2 and 3, 8 AEC 324 (1974) which presents circumstances completely different and irrelevant to the instant case ; and Jones vs. Security Exchange Commission, 298 US 1 (1936). The doctrine established in Jones, supra, over the strong dissent of Justice Cardozo, to which Justice Brandeis and Justice Stone join in the dissident opinion, is not an inflexible one. Furthermore, the doctrine in Jones, supra, is centered around the right to withdraw an application and not on the conditions and character of the subsequent dismissal. It is deemed necessary to stress that the thrust of Jones doctrine is that " the right to dismiss, if it exists, is absolute." Whether the dismissal should be granted with or without prejudice is a marginal determination in Jones subordinated to the absolute right of dismissal. The fact that in Jones the right to dismiss was held to be without prejudice does not necessarily mean that in every case and in any circumstance it has to be so. Intervenors submit that since there are many ways in which public interest may be affected, not always prejudicial, but rather in some ways more beneficial than others, the import of Jones doctrine is the absolute right to dismiss and not the nature of the dismissal. This interpretation is implied in the following opinion quoted in United States v. Morgan, 307 US 183, at 194 (1939) :

> " It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved. Central Kentucky Gas Co. v. Railroad Commission, 290 US 264, 271 ; Pennsylvania v. Williams, 294 US 176, 185 ; Virginian Ry Co. v. System Federation, 300 US 515, 552, et seq.

Had Jones doctrine meant that a dismissal without prejudice perforce is concomitant to the absolute right to dismiss, then 10 CFR § 2.107 (a), which obviously has a broader context than what Applicant pretends to allow it to have, would have been wrong in allowing dismissals with

prejudice, on such terms as the presiding officer may prescribe. Now let us look into the fact that any individual of legal age or duly existing entity is a potential defendant or plaintiff because the right to sue or be sued is guaranteed by the U.S. Constitution. It follows that the prospect of being subjected to successive litigations is generally regarded as a latent jeopardy weighing over any citizen or entity, whether the right to dismiss a complaint at law is exercised. That, of course, is not the issue regarding the instant case, as it is neither the doctrine set in Jones.

What is simply at issue is whether an applicant such as the Applicant of the instant case can be rewarded in equity and justice with a dismissal without prejudice after deceiving the Licensing Board, NRC Staff and Intervenors alike by not coming out straightforwardly when deciding not to build the nuclear plant, by secretly reversing the expropriations of the land already acquired to site the nuclear plant, by hiding such actions and information from all other parties while continuing to pursue the application for over four years. Justice Cardozo would have condemned such an underhanded action of Applicant as he in Jones, supra stated :

> " Reckless and deceit do not automatically excuse themselves by notice of repentance..."

But it is deemed necessary to thoroughly state and prove the facts of the actions taken by Applicant behind the Licensing Board's back pointing toward a cancellation of the Nuclear Plant and also its concealing of those decisive facts from NRC Staff and Intervenors. Those concealed actions occurredon August 5, 1976, that is, between December 5, 1975 and February 16, 1977.*

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* It is evident from NRC Staff's Memorandum of June 27, 1980, p.2 and NRC Staff's Response of October 8, 1980, p.3, that Applicant remained silent during such a lapse of time, even though on August 5, 1976 Applicant requested the Court of Expropriation of Puerto Rico to order a reversal of the expropriations effected to acquire title of the Nuclear Plant site land, reversal which was granted for each tract of land since August 16, 1976 on. Yet, there is no record in the docket of this case that the Licensing Board was informed of such actions unless it was done through an ex-parte communication. It follows that a partial discovery proceeding and/or evidentiary hearing would be necessary to prove beyond a shadow of a doubt that Applicant's deceitful actions do not deserve the granting of a dismissal without prejudice.

Thereafter, following an order from the Licensing Board to submit every four months a periodical status report, Applicant, with apparent normalcy continued to pursue its application providing the necessary data to the NRC Staff to enable the latter to prepare the Site Safety Evaluation Report (published on April 27, 1979). During the same period Applicant opposed several motions to dismiss filed by Intervenors, yet it continued submitting periodical status reports every four months as directed by the Licensing Board. Never during all those four years that lapsed between December 5, 1975 and December 28, 1979,* during which time Applicant supposedly had kept the Licensing Board, the NRC Staff and Intervenors informed of any action taken affecting the status of the project, did Applicant inform, suggest or in any way hint to the parties that after having on May 23, 1975, expropriated the land necessary for the Nuclear Plant project, on August 5, 1976 Applicant initiated a reversal action in Court to return the expropriated land to its original owners. Had Applicant not expropriated the land in question until after it was ready to build the North Coast Nuclear Plant at the Islote site, the intention to build the project would have been validly supported. But the fact that the land was purchased way in advance and later on a reversal process initiated, if such action had been made known then, at that very moment (August 5, 1976) the lack of intention to build the Nuclear Plant would have been made clear to all concerned ; and thus would have spared the NRC Staff from the burdensome and costly task of preparing the Site Safety Evaluation Report. Such unwarranted hidden, deceitful action committed by Applicant not only caused unnecessary expenditure of taxpayers' money, but also unduly harassed Licensing Board, Appeal Board, NRC Staff and Intervenors in compelling them to attend a futile litigation. After such a flagrant, deceitful action and breach of the trust the Licensing Board had deposited on Applicant, the latter wants now to be rewarded with the granting of a dismissal without prejudice so that it is left with the door open for further wrongful actions and subsequent litigations.

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* On the latter date Applicant stated that its next electricity generating unit would be a 300 mgwt. coal-fired unit, thereby needing the deferral for several years further consideration of nuclear plant

Both Applicant and NRC Staff, citing out of context the doctrine in Jones, supra, contend that the Licensing Board should let Applicant withdraw its application " without condition unless prejudice to public interest is shown," and that " Intervenors have not alleged any effect on the public interest..." Well, prejudice to public interest has been the tap root of Intervenors' motivation to intervene from the very beginning. That allegation has been repeatedly stated throughout this proceeding. Furthermore, an early site approval --as we have also repeatedly stated -- will be meaningless with the passage of time. Puerto Rico's high and ever increasing population density (now over 900 persons per square mile) would make the present Site Safety Evaluation Report void and null in the near future because the continued increase in the population of the area and vecinity of the Islote site, aggravated byApplicant's desistance to retain title to the site land, with the passage of time would make it impossible for the area to meet the population criteria set forth in 10 CFR, Part 100. In the event that in an unpredictable future Applicant decides to renew its application, by then the population density of the area would be so high that it would be impracticable, enormously costly and prejudicial to public interest to grant a construction license to Applicant because all the aforementioned factors outweigh any questionable benefit of a nuclear plant.

On page 11 of NRC Staff's Response of October 8, 1980, it is erroneously stated that " withdrawal of an application for lack of need cannot be with prejudice..." (Emphasis added). Again, that is not the issue. Applicant has never claimed that it withdraws its application " for lack of need." In fact, no explanation whatsoever has been given for the abrupt withdrawal. Applicant argues vehemently against an evidentiary hearing that could have enabled the Licensing Board to order a dismissal " for lack of intent to build ", but previously in its status report to the Licensing Board dated December 28, 1979, Applicant stated --based on recommendations by the National Research Council of the National Academy of Science --that Applicant's next base-load generating unit would not be a nuclear plant but a 300 mgwt coal-fired unit. That is, there

was no claim by Applicant of " lack of need but of a need which could better be met through another kind of technology. In fact, nuclear energy was practically discarded by the Office of Energy of the Governor of Puerto Rico in its report of June, 1979 entitled: THE ENERGY POLICY OF PUERTO RICO - A FIRST STEP, which states, inter alia :

> " Nuclear energy raises serious doubts within the Government of Puerto Rico at this moment. These concerns are caused by a series of questions that surround this alternative. "
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> " The most important of these questions is the problem of the disposal of nuclear waste. Other questions also exist with regard to the uncertainty of the availability of uranium and the costs and alternatives for the shutdown of nuclear installations."

• It is hard to conceive that at this stage the Licensing Board and the NRC Staff have not become aware that Applicant has turned its back on nuclear energy ever since at least August 5, 1976*. While Applicant continued to flirt with the NRC instrumentalities during the following four years making believe, under false pretences, that it was still very much in love with the nuclear plant, its love had really been switched to the coal-fired plant.

• Public interest would also be adversely affected by sabotage of electric installations. In view of the fact that nuclear power plants' construction and operation involve a highly sophisticated technology which cannot tolerate even an Act of God without disastrous consequences, sabotage represents an enormous risk of disaster weighing adversely on public interest. Such a risk should be thoroughly considered by the Licensing Board when deciding whether to leave open the option to Applicant to build a nuclear plant in a future date. To support this allegation one must stress that Applicant's labor union (UTIER) is known for its link with Puerto Rico's Socialist Party which also has ties with the Communist regime in Cuba. During past strikes the incidence of sabotage to Appli-

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* As stated in footnote on page 4 of this Reply, that was the infamous date in which Applicant privately and underhandedly requested the Court of Expropriation of Puerto Rico to issue order to the effect that the site land already expropriated by the Government on behalf of Applicant be returned to its original owners.

cant's electric power generating stations and transmission lines committed by union members employed by Applicant has gotten out of hands, compelling on one occasion the Governor of Puerto Rico to mobilize the entire National Guard to protect such installations and to put a stop to the widespread sabotage. There is scarcely any need for more words to anticipate the latent risk of disaster to which Nuclear Plants in Puerto Rico would be subjected under the above circumstances , either for political or strictly laboral reasons, all in detriment of public interest.

• Intervenors believe that they have given enough arguments to justify a dismissal of the application with prejudice. Naturally, those arguments cannot be fully substatiated unless some limited discovery and/or evidentiary hearings are conducted. Since it is Applicant who is interested in keeping its option open for a possible future renewed application, Applicant should not and has not requested at this stage the foreclosure of Intervenors' right to be given the opportunity to prove their point. Apparently, that is the reason why Applicant's Response of October 3, 1980, is devoid of any argument against the Licensing Board conducting evidentiary hearings in Puerto Rico for determining whether the withdrawal of the application would be granted with prejudice or not.

• On the other hand, NRC Staff has misconstrued Intervenors' alternate request "that the proceedings not be terminated until after evidentiaryhearings are conducted to enable the Licensing Board to know the full facts why the dismissal cannot be less than with prejudice." The Staff incorrectly interpreted that Intervenors had requested that the hearing ordered by the Licensing Board on August 19, 1980, be reinstated. Intervenors believe that due process and the cause of justice would best be served if the Licensing Board instituted a limited discovery proceeding and/or evidentiary hearings aimed only to prove Intervenors' contention that a dismissal of the application without prejudice will either injure the public interest because of the above reasons or because of such action foreclosing the consideration of other perhaps more practical means of generating electricity.

• WHEREFORE, Intervenors respectfully pray the Licensing Board to grant the dismissal of the application with prejudice without any further ado or after a fact-finding proceeding is instituted in which Applicant would be ordered to answer pertinent questions with regard to the acquisition and disposal of the Nuclear Plant site land, as raised by the NRC Staff on September 9, 1980 (Questions 3, 4, 5 and 6) ; and similarly by Intervenors on September 3, 1980 (Questions 9, 10, 11 and 12) ; and/or after conducting evidentiary hearings with regard to Intervenors' allegation that a dismissal of the application without prejudice will injure the public interest and hampers the development of other alternate, practical means to generate electricity in Puerto Rico.

• In San Juan, Puerto Rico, this 3rd day of December, 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 motion entitled : Intervenors' Reply to Applicant's and NRC Staff's Contention that North Coast Nuclear Plant's Withdrawn Application Should Not Be Dismissed With Prejudice, has been served by first class or air mail upon the following : Samuel J. Chilk, Esq., Office of the Secretary of the Commission ; Alan S. Rosenthal, Esq., Chairman, ASLAB ; Dr. John H. Buck, Member, ASLAB ; Sheldon J. Wolfe Chairman, ASLB ; Dr. Richard F. Cole, Member, ASLB ; Mr. Gustave A. Linenberger, Member, ASLB ; Docketing and Service Section, Office of the Secretary (All the above bearing same address as follows : U.S. Nuclear Regulatory Commission, Washington, D.C. 20555) ; Maurice Axelrad, Esq., Lowenstein, Newman, Reis, Axelrad & Toll, 1025 Connecticut Avenue, N.W., Washington, D.C. 20036 ; José F. Irizarry, Esq., General Counsel, Puerto Rico Electric Power Authority, GPO Box 4267, San Juan, Puerto Rico 00936 ; Ing. Alberto Bruno Vega, Executive Director, Puerto Rico Electric Power Authority, GPO Box 4267, San Juan, Puerto Rico 00936 ; Dr. Tomás Morales-Cardona, School of Medicine, University of Puerto Rico, GPO Box 5067, San Juan, Puerto Rico 00936.

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