UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF RESPONSE TO
INTERVENORS' MOTION DATED JUNE 13, 1981

Henry J. McGurren
Counsel for NRC Staff

June 26, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF RESPONSE TO
INTERVENORS' MOTION DATED JUNE 13, 1981

I. INTRODUCTION

On September 11, 1980, the Applicant filed a document entitled "Motion for Termination of Proceeding" accompanied by a document entitled "Withdrawal of Application." In response to the Applicant's motion, Intervenors Gonzalo Fernos and Citizens for the Conservation of National Resources, Inc. (hereinafter referred to as the Intervenors) filed with the Commission on September 18, 1980, a document entitled "Motion for Direct Certification to Request Application Be Dismissed with Prejudice" and on the same date filed with the Licensing Board a document entitled "Motion for a Stay of Proceedings." In their motion to the Commission, the Intervenors sought either a direct ruling from the Commission dismissing the application with prejudice, or, in the alternative, an evidentiary hearing to determine the Applicant's intent to construct the

plant, "to enable the Licensing Board to know the full facts why the dismissal cannot be less than with prejudice."[1/]

By an order dated October 17, 1980, the Commission declined to grant directed certification on the issues presented and transferred the Intervenors' motion to the Licensing Board to determine whether the application for a construction permit should be permitted to be withdrawn without prejudice.

By an order dated December 16, 1980, the Licensing Board, after reviewing a reply brief filed by the Intervenors on December 3, 1980,[2/] granted the Staff and the Applicant until December 31, 1980, to respond to a "new" argument raised by the Intervenors. In their reply brief, the Intervenors essentially argued that it would be in the public interest to dismiss the application with prejudice. However, as noted by the Staff in its December 31, 1980 filing,[3/] the issues the Intervenors requested the Board to confront dealt with such matters as alleged Applicant misrepresentations to the Commission concerning the intent to build the North Coast facility, the suitability of the site, and possible

---

1/ "Intervenors' Motion for Direct Certification to Request Application Be Dismissed with Prejudice," p. 2 (September 18, 1980) (emphasis in original).

2/ "Intervenors' Reply to Applicant's and NRC Staff's Contention that North Coast Nuclear Plant's Withdrawn Application Should Not Be Dismissed with Prejudice," (December 3, 1980).

3/ "NRC Staff Memorandum in Response to Atomic Safety and Licensing Board Order of December 16, 1980," p. 8 (December 31, 1980).

sabotage and labor unrest.[4/] By Memorandum and Order of February 18, 1981 the Licensing Board granted without prejudice the Applicant's Motion for Withdrawal of Application concluding that the public interest would best be served by leaving open to the Applicant the nuclear option should changed conditions warrant (Order at 6).

The Intervenors filed a Notice of Appeal on May 12, 1981.[5/] On June 13, 1981, in connection with their appeal, the Intervenors filed a document entitled "Motion to File Sworn Statements from Owner-Residents of the Islote Nuclear Plant About Damages Inflicted Upon Them by Applicant" (Motion). In their motion, Intervenors request this Board to "accept" and consider eight sworn statements "as evidence of the sort of damage to public interest which would be caused and would remain latent if Applicant's application dismissed without prejudice were to be sustained in [sic] appeal."[6/] The Staff opposes this request.

II. DISCUSSION

The Staff opposes the Intervenors' request for two reasons: (1) the Intervenors by their Motion attempt to have this Board consider an issue raised for the first time on appeal and (2) the Intervenors have not met the burden established by the Appeal Board for the receipt of such evidence.

4/ Id.

5/ "Notice of Appeal and Request for an Extension of Time to File Brief Thereof" (May 12, 1981).

6/ Motion, at 1.

It is a well established rule that the Appeal Board will not entertain an issue raised for the first time on appeal. As this Board noted in Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974):[7/]

> Failing either to raise satisfactorily a particular factual issue or (once the record has been closed) to express himself in the prescribed manner regarding how that issue should be resolved, he is scarcely in a position, legally or equitably, to protest the determinations made by the Board in connection with it.

The factual issue that the Intervenors now wish to have this Board consider -- the alleged injury to land owners in the vicinity of the proposed site caused by the threat of expropriation of their property in the future should the Applicant's application be dismissed without prejudice -- was not raised by the Intervenors prior to the Licensing Board's decision rendered on February 18, 1981.[8/]

This factual issue was not raised by the Intervenors until April 6, 1981. In their "Application for a Temporary Stay of Licensing Board's Decisions of February 18, 1981 and March 26, 1981; and Petition for an Extension of Time to File an Appeal Thereof," dated April 6, 1981,

---

7/ See also Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978).

8/ As the Licensing Board noted, the Intervenors' argument in support of dismissal of the Applicant's application with prejudice concentrated on past alleged wrongful actions of the Applicant which allegedly deceived the Board, Staff and Intervenors. Memorandum and Order of February 18, 1981, at p. 3. See also Licensing Board order dated December 16, 1980 which characterizes Intervenors' public interest argument as one based on Applicant's alleged "hidden deceitful action" (at 1).

(Application at 3) the Intervenors raised for the first time the issue of alleged injury to landowners in the vicinity of the proposed site caused by the apprehension of future expropriation if the application is dismissed without predudice.[9/] Accordingly the Staff does not believe this issue should be addressed now by the Appeal Board.

Furthermore, it is not certain that dismissal with prejudice would necessarily prevent the injury now asserted by the Intervenors since it is not clear as a matter of law that dismissal with prejudice would preclude the filing at some later time of another application or a request for early site review for the Islote site.[10/]

Finally, the instant request to have this Board accept and consider the eight proffered affidavits can only be granted if the Intervenors

---

9/ The Intervenors indicated in support of their request for an extension of time in which to file their appeal that it would take time to obtain affidavits from the landowners (Application at 3). The request for an extension of time was granted by the Appeal Board on April 10, 1981.

10/ It is noted that prior administrative determinations are not necessarily controlling where facts or law might have changed. Federal Trade Commission v. Raladam Co., 316 U.S. 149, 150-51 (1942); Connecticut Light & Power Co. v. Federal Power Commission, 557 F.2d 349, 353 (2d Cir. 1977). Furthermore, even where there are such changed circumstances, it has been recognized that res judicata and collateral estoppel principles will not necessarily be invoked where there are competing policy factors which outweigh the application of those doctrines. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 213-15 (1974), aff'd and remanded on other grounds, CLI-74-12, 7 AEC 203 (1974).

move to reopen the record to include the affidavits.[11/] If the instant request is treated as a motion to reopen the record, the Staff believes that the Intervenors have not met the necessary burden to support the reopening of the record. As the Appeal Board has previously stated, "the proponent of a motion to reopen bears a heavy burden."[12/] Central to that burden is a demonstration that the issue asserted is a significant one.[13/] The Intervenors have failed to make any such showing. In fact, as

---

11/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 21 (1978).

12/ Id. See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). These holdings are wholly supported by the reasoning of the Court of Appeals in the recent decision in RSR Corporation v. FTC, No. 80-2131, slip op. at 5, ___ F.2d ___ (D.C. Cir., April 30, 1981), wherein the Court of Appeals stated:

> Both the Supreme Court and this court consistently have subscribed to the rule that administrative agencies are not to be required to reopen their final orders "except in the most extraordinary circumstances" (citations omitted). The need for that principle is evident, for "[i]f upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening . . . ." (citations omitted).

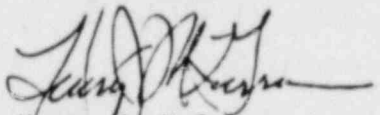
13/ In Three Mile Island, supra, the Appeal Board also noted that if an initial decision has already been rendered on an issue, it must appear that reopening the proceeding might alter the result in some material respect. Id., at 21. Intervenors have not made a showing here that this matter is of such significance that it might alter the prior decision.

indicated above, it is uncertain whether the injury that Intervenors assert may result from a dismissal without prejudice will in any way be precluded should the Licensing Board's decision be reversed by the Appeal Board.

III. CONCLUSION

For the foregoing reasons the Staff believes that the instant request should be denied.

Respectfully submitted



Henry J. McGurren
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of June, 1981.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION DATED JUNE 13, 1981" 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 26th day of June, 1981:

Alan S. Rosenthal, Esq., Chairman*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. John H. Buck, Member*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Sheldon J. Wolfe, Esq., Chairman*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Gustave A. Linenberger*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Richard F. Cole*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Maurice Axelrad, Esq.
Lowenstein, Newman, Reis,
Axelrad & Toll
1025 Connecticut Avenue, N.W.
Washington, DC 20036

Esq. Jose F. Irizarry Gonzalez
General Counsel
Puerto Rico Electric Power
Authority
G.P.O. Box 4267
San Juan, PR 00936

Alberto Bruno Vega, Assistant
Executive Director, Planning
and Engineering
Puerto Rico Electric Power
Authority
G.P.O. Box 4267
San Juan, PR 00936

Mr. Mario Roche Velazquez
Executive Director,
Mision Industrial, Inc.
Mision Industrial De Puerto Rico
G.P.O. Box 20434
Rio Piedras, PR 00925

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing
Appeal Board*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Eng. Francisco Jimenez
Box 1317
Mayaguez, PR 00708

Mr. Gonzalo Fernos, Chairman
Citizens for the Conservation of
Natural Resources, Inc.
503 Barbe Street
Santurce, PR 00912

Esq. German A. Gonzalez
Attorney for Mision
Industrial, Inc.
Mision Industrial De Puerto Rico
G.P.O. Box 20434
Rio Piedras, PR 00925

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Henry J. McGurren
Counsel for NRC Staff