UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. John H. Buck

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

Mr. Gonzalo Fernos, Santurce, Puerto Rico, pro se and on behalf of the intervenor Citizens for the Conservation of Natural Resources, Inc.

Ms. Kathleen H. Shea, Washington, D.C., for the applicant, Puerto Rico Electric Power Authority.

Mr. Henry J. McGurren for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

July 2, 1981

(ALAB-648)

1. This is a construction proceeding involving the proposed North Coast nuclear facility in Puerto Rico. Last August, acting on our own initiative, we directed the Licensing Board to consider and decide whether, as intervenors Gonzalo Fernos, et al., claimed, the applicant had abandoned any intention to build the facility. ALAB-605, 12 NRC 153.

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Precisely a month later, on September 11, 1980, the applicant formally withdrew the construction permit application and simultaneously moved to terminate the proceeding. On September 18, the intervenors filed with the Commission a "Motion for Direct[ed] Certification to Request Application be Dismissed with Prejudice". On October 17, the Commission entered an order transferring the motion to the Licensing Board for decision.

In a December 3, 1980 submission to the Licensing Board, the intervenors asserted, as a basis for its claim that the termination should be "with prejudice", that, inter alia, the applicant had deceitfully failed to disclose certain material facts to the Commission during the processing of its application. Following the receipt of responses to this assertion, the Board entered an unpublished order on February 18, 1981 in which it granted the applicant's motion and terminated the proceeding without prejudice. On March 26, intervenors' petition for reconsideration was denied.

On April 6, 1981, the intervenors moved before us for a temporary stay of the Licensing Board's February 18 and March 26 orders, as well as for an extension until May 15, 1981 of the time in which to take an appeal from those orders. On April 10, we granted the requested extension and implicitly denied a stay.

On May 12, 1981, the intervenors noted their appeal and asked that the time for the filing of their supporting brief be tolled pending the outcome of a governmental investigation of applicant's operations said to be now under way in Puerto Rico. In an unpublished order entered on June 1, we denied the request but extended intervenors' briefing time to July 3. On June 11, in response to a petition for reconsideration, we once again declined to toll the running of the briefing period. In view, however, of Mr. Fernos presentation that he would be absent from his residence in Puerto Rico from mid-June to mid-July, we set a new deadline of July 31, 1981 for the filing of intervenors' brief -- with the notation that we would expect it to be filed by that date.

Both our June 1 and June 11 orders explained that the consideration and determination of the pending appeal had to be founded on the Licensing Board record and thus could not be affected by any disclosures during the course of the governmental investigation alluded to by the intervenors. In this connection, the June 11 order pointed out (at pp. 2-3) that:

> [I]t does not follow, as intervenors appear to believe, that those disclosures perforce would have no influence upon the outcome of any new construction permit application which this utility might file at some future time. To the contrary, should such an application be filed, it will be open to any interested person -- including the present intervenors --

> to bring to the attention of the NRC staff or the Licensing Board any information (whether derived from the investigation in question or otherwise) which might bear adversely upon the entitlement of the applicant to receive a permit to construct a nuclear power plant.
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> In short, there is no reason to depart from the ruling in our June 1 order -- which rested upon the settled principle that the decisions and orders of a trial-level tribunal are to be judged on appeal in the light of the record on which that tribunal acted. Although NRC appeal boards possess the inherent authority to reopen a licensing board record where there is compelling cause to do so, here such cause is manifestly lacking. As just seen, whether the present proceeding is terminated "with" or "without" prejudice, no permit will later issue to this applicant for the construction of a nuclear power facility without prior full consideration of all relevant developments -- no matter when they might have come to light. 1/

2. Against this background, we are now called upon to consider a June 13, 1981 motion of the intervenors which seeks to supplement the record with eight affidavits executed by

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1/ In an accompanying footnote, we noted that:

> It goes without saying that under existing law any new construction permit application would be subject to a mandatory hearing before the Licensing Board. Section 189a. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239(a).

landowners in the vicinity of the North Coast site. We need not rehearse the content of these affidavits in detail. Suffice it to note that the affiants raise the spectre of a second attempt by the applicant to expropriate their land against their will[2] for the purpose of building a nuclear plant on it. Several of them assert that they have lived on their property for a long time and that another expropriation effort "would jeopardize me and would compel me to abandon the community * * *". In addition, two of the affiants maintain that either uncompensated pecuniary damage or the death of a relative resulted from the actions of the applicant associated with its prior expropriation endeavor.[3] According to the intervenors, the averments collectively constitute evidence "of the sort of damage to [the] public interest which would be caused and would remain latent if Applicant's application dismissal without prejudice were to be sustained [on] appeal". Motion, p. 1.

2/ "Expropriation" apparently is the term employed in Puerto Rico for the exercise of eminent domain powers and, as such, is synonomous with "condemnation".

3/ As we understand it, that endeavor ended in 1976 when the applicant decided to postpone the North Coast facility "indefinitely". Based upon that decision, the applicant elected not to proceed further with the expropriation process it had previously instituted and to offer to return expropriated lands to previous owners. This enabled the applicant to recover monies which had been placed in an escrow account under court supervision for the compensation of the persons whose land had been taken.

It should be noted immediately that, by their motion, the intervenors are trying to inject an essentially new issue in the proceeding on the appellate level. As both the applicant and the NRC staff stress in opposing a reopening of the record to receive the affidavits, a dismissal of the proceeding "with prejudice" was sought from the Licensing Board on quite different grounds. As previously noted, the focus of the intervenors' December 3, 1980 submission to the Licensing Board was the alleged deceitful withholding by the applicant of information. More specifically, according to what intervenors then told that Board (at pp. 4-5), the applicant had concealed for a four year period between December 1975 and December 1979 the fact that it had decided to terminate the expropriation process and to return the expropriated land to its original owners. See fn. 3, supra. Neither in the December 1980 submission nor (insofar as we are aware) in any other filing below did the intervenors additionally assert possible injury to the landowners as a consequence of the threat of a future expropriation for a nuclear power facility.

We "ordinarily will not entertain an issue raised for the first time on appeal". Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978) and cases there cited. And our disclination to do so is particularly strong in circumstances where the issue and the

factual averments underlying it could have been -- but were not -- timely put before the Licensing Board. It scarcely is fair for a party to seek relief from a trial tribunal on one theory and, if unsuccessful, then to mount an appeal on a discrete theory founded on additional asserted facts which, although available at the time, had not been given to that tribunal.

That is precisely the situation which obtains here. With one possible exception, all of the affiants are members of the intervenor Citizens for the Conservation of National Resources, which is represented in the proceeding by the other intervenor, Mr. Fernos.[4/] None of the statements in their affidavits relates to developments either recently occurring or discoverable only after the Licensing Board entered its February 18 order.

In this connection, the averment of several of the affiants that the applicant has not abandoned its intention to build a nuclear plant in the vicinity is said to rest on the following "evidence": (1) at the applicant's request, the NRC prepared a

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4/ Unlike the others, affiant Almaranto Rufas Robles does not affirmatively allege CCNR membership. His affidavit is confined to the claim that he sustained non-compensated damage as a result of the prior expropriation of his land. It is unclear whether he still owns that land; in any event, he does not express concern over the possibility of a future expropriation.

Final Environmental Statement on the North Coast project, which was issued in April 1977 (approximately eight months after the applicant terminated the expropriation process); (2) one stated purpose of the FES was to determine the "suitability of the [North Coast] site for eventual construction" of a nuclear facility; (3) the applicant's December 31, 1980 submission to the Licensing Board noted (at p. 6) that the "[c]essation of the expropriation process in mid-1976 did not affect the availability of [its] power of eminent domain which * * * could again be exercised if and when the project went forward"; and (4) the applicant uniformly has opposed (beginning with an October 3, 1980 filing) the intervenors' attempts to have the licensing proceeding terminated "with prejudice". We need not pass here upon whether, singly or in combination, these events might support the inference which the affiants have drawn from them. It is enough that the intervenors either were or should have been aware of each of them when the Licensing Board still had before it the question whether the termination should be "with" or "without" prejudice.

In short, simple equity precludes us from reopening the record in aid of intervenors' apparent desire to attack the decision below on fresh grounds. This is so whether or not, as the applicant further maintains (but we do not decide), our consideration

of the substance of the now-proffered affidavits inevitably would leave the Licensing Board's result unchanged. To be sure, if the applicant is right in that belief, the motion to reopen would fail even were it timely. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974). Where the presentation of new matter is untimely, however, its possible significance to the outcome of the proceeding is of no moment. That is at least true if, as here, the issue to which it relates is devoid of grave public health and safety or environmental implications. Wolf Creek, ALAB-462, supra, 7 NRC at 338, and cases there cited.

Motion to supplement the record denied.[5/]

5/ The intervenors also filed an "informative motion" in which they complained of the difficulties they have encountered in obtaining the reports of prior AEC/NRC adjudicatory decisions. By June 30, 1981 letter, staff counsel informed us that a complete microfiche collection of those decisions, together with indices, has been furnished to the Law Library of the University of Puerto Rico in San Juan. We have been further told that that library possesses the necessary microfiche readers.

The staff was under no legal obligation to take this step. By doing so on a voluntary basis, however, it has substantially facilitated the ability of the intervenors to perform the legal research incident to the briefing of their appeal. We wish to record our gratitude to the staff for its sensitive appreciation of the problem which confronted the intervenors.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board