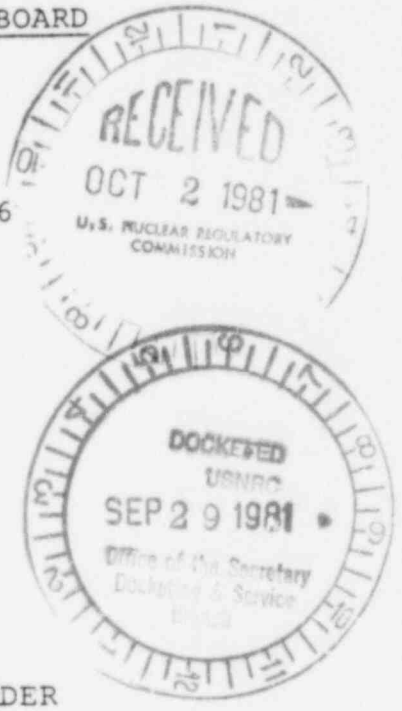
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	)	



AUTHORITY'S BRIEF IN OPPOSITION TO INTERVENORS' EXCEPTION TO LICENSING BOARD ORDER OF FEBRUARY 18, 1981

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INTRODUCTION

On September 11, 1980, the Puerto Rico Electric Power Authority (Authority) filed with the Licensing Board a notice of "Withdrawal of Application" for a construction permit for the Authority's North Coast Nuclear Plant and a "Motion for Termination of Proceeding." Thereafter, on September 18, 1980, Gonzalo Fernos and Citizens for the Conservation of Natural Resources, Inc. (Intervenors) filed with the Commission a "Motion for Direct Certification to Request Application Be Dismissed with Prejudice" (Motion).[1/] The NRC Staff and the Authority opposed the Motion both procedurally and on its merits,[2/] and in an "Order" dated October 17, 1980,

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1/ On September 18, 1980, the Intervenors also filed "Addendum to Motion for Direct Certification" (hereinafter Addendum to Motion).

2/ "Authority's Response to Motion for Direct Certification" (October 3, 1980); "NRC Staff Response to Intervenors' Motion for Directed Certification" (October 8, 1980).

the Commission declined to grant certification and transferred the Intervenors' Motion to the Licensing Board. The Licensing Board then permitted the Intervenors to file a submission which addressed the NRC Staff's and the Authority's argument that the Authority's application should not be dismissed with prejudice.[3/] Following the Intervenors' Reply,[4/] the Licensing Board allowed the NRC Staff and the Authority to respond to arguments raised for the first time in the Intervenors' Reply.[5/] After the filing of the replies by the NRC Staff and the Authority,[6/] the Licensing Board granted the Authority's request to terminate the proceeding and granted the withdrawal of the Authority's application without prejudice.[7/] By way of an "Order" dated March 26, 1981, the Licensing Board denied Intervenors' "Petition for Reconsideration" (March 3, 1981) of the February 18 Order.

3/ "Order" (November 19, 1980).

4/ "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) (hereinafter Intervenors' Reply).

5/ See "Order" (December 16, 1980).

6/ "NRC Staff Memorandum in Response to Atomic Safety and Licensing Board Order of December 16, 1980" (December 31, 1980); "Authority's Reply to Intervenor's Reply" (December 31, 1980) (hereinafter Authority's Reply).

7/ "Memorandum and Order (Granting Applicant's Motion for Termination of Proceeding, and Granting Without Prejudice the Withdrawal of Application)" (February 18, 1981) (hereinafter Order).

On May 12, 1981, the Intervenors filed an appeal with regard to the Order,[8] and on August 24, 1981, filed a brief on appeal.[9] The Authority hereby submits its brief in opposition to the Intervenors' appeal.

ISSUES PRESENTED

The Authority submits that the following issues are presented by the Intervenors' appeal:

I. Whether the Licensing Board correctly formulated and applied the appropriate standard for determining whether the Authority's application for a construction permit should be withdrawn with prejudice?

II. Whether the Licensing Board erred by not holding a hearing on the Intervenors' Motion?

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

9/ "Intervenors' Brief: Writ of Exceptions to ASLB Memorandum and Order of February 18, 1981" (August 24, 1981) (hereinafter Intervenors' Brief).

STATEMENT OF THE CASE[10/]

On November 28, 1970, the Authority[11/] submitted an application for a construction permit for a pressurized water reactor to be supplied by Westinghouse and built at the Aguirre site in Puerto Rico. Upon review of the Authority's application, the staff of the Atomic Energy Commission (AEC) identified several questions regarding the geology and seismology of the Aguirre site. Subsequently, the Authority submitted an amendment[12/] to its application, which altered the location of its proposed plant from Aguirre to Islote and changed the name of the plant from Aguirre Nuclear Plant to North Coast Nuclear Plant Unit One (NORCO). Notices of receipt of the Authority's application for NORCO and of a hearing on that application were duly published in the Federal Register,[13/] and the Intervenors were later admitted as parties to the proceeding on the Authority's application.[14/]

10/ The Statement of Facts in the Intervenors' Brief, pp. 3-10, contains innuendo and statements which are without support in the record. Since much of the contents of Intervenors' Statement of Facts is irrelevant to the issues on appeal, we will not prolong this brief by unnecessary dispute thereof. The fact that we will not explicitly respond to each of these irrelevant and baseless accusations, however, should not be construed as tacit acceptance.

11/ At this time, the Authority was known as the Puerto Rico Water Resources Authority. The Authority's name was changed in 1979. See letter from Maurice Axelrad to Licensing Board (December 28, 1979).

12/ See letter from the Authority to AEC (September 27, 1974), enclosing Amendment 20 to the Authority's application, and revision thereto dated January 27, 1975.

13/ 40 Fed. Reg. 6834, 6835 (February 14, 1975).

14/ "Second Prehearing Conference Order," p. 16 (July 3, 1975).

By letter dated December 3, 1975, the Authority notified the NRC of its decision to "postpone indefinitely" the NORCO project, based upon energy demand forecasts and economic considerations. The Authority also informed the NRC that it was "discontinuing all design and fabrication efforts" and that it would "explore the possibility of selling the plant to another utility." Finally, the Authority stated its "conviction that nuclear power is the only commercially viable alternative for power generation in Puerto Rico" and stated its desire "to establish the acceptability of the Islote site for a nuclear power station." The NRC Staff agreed "that an early site review for Islote [was] warranted."15/

During the next several years, the Authority continued to submit to the NRC Staff the information required for the Staff's review of the environmental and safety aspects of the Islote site.16/ Such information enabled the NRC Staff to issue its Draft Environmental Statement related to the suitability of the Islote site in August 1976, the Final Environmental Statement in April 1977, and the Site Safety Evaluation Report in April 1979.

In the meantime, the Authority had submitted a motion to the Licensing Board requesting the holding of a hearing

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15/ Letter from NRC to Authority (February 23, 1976).

16/ For example, the Authority submitted Amendment 7 to its Environmental Report on October 26, 1976; Amendment 31 to the PSAR (addressing hydrology, geology and seismology) on March 11, 1977; and the "Analysis of Seismicity Detected by the Puerto Rico Seismic Network" on September 26, 1977.

culminating in the issuance of a partial initial decision on the suitability of the Islote site from a health and safety and environmental standpoint.[17] The Authority later notified the Licensing Board of a change of administrations in Puerto Rico[18] and of the decision of the Authority's new Executive Director to review the need for new generating capacity for Puerto Rico.[19] The Authority requested that any hearings be deferred until completion of this study.[20] Ultimately, this study was not completed until almost three years later.[21]

On February 27, 1978, the Intervenors submitted a motion to dismiss the Authority's application, alleging that the Authority had no definite plans for construction of NORCO.[22] The Licensing Board denied this motion on the ground that "there is no requirement in any Commission regulation or underlying statute that requires an Applicant to proceed with the processing of its application in accordance with any set time scale."[23] The Licensing Board also noted that the

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17/ "Motion to Proceed with Hearings on Site-Related Issues and to Issue Partial Initial Decision Thereon" (July 2, 1976).

18/ The Authority is a public agency of the Commonwealth of Puerto Rico.

19/ Letter from Maurice Axelrad to Licensing Board (February 16, 1977).

20/ See Id.

21/ See "Status Report as of December 28, 1979."

22/ "Motion to Dismiss or to Grant Alternate Relief" (February 27, 1978).

23/ "Order of the Board Concerning Intervenors' Motion to Dismiss or to Grant Alternative Relief," p. 4 (May 1, 1978).

Authority was remiss in not keeping the Board "up-to-date on the developments in Puerto Rico affecting this application," and it consequently directed the Authority to submit periodic information reports.[24/]

Accordingly, periodic status reports were submitted by the Authority to the Licensing Board and the parties. One such report informed the Board that the Authority had terminated its contract with Westinghouse regarding NORCO.[25/] Other reports described the progress of reviews of the need for new generating capacity in Puerto Rico. Following completion of these reviews in 1979, the Authority notified the Licensing Board that its next addition to its generating capacity would be a 300 megawatt coal-burning unit, and that "one or more additional such units may in the future be located at the selected site" for the coal plant.[26/] The Authority also stated that consideration of nuclear capacity was being deferred for one year, and in all likelihood, for several years.[27/]

On April 30, 1980, the Intervenors submitted another motion to dismiss the Authority's application, alleging that the Authority lacked intention to build NORCO.[28/] The Licensing

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24/ Id., p. 2.

25/ "Status Report as of December 29, 1978."

26/ "Status Report as of December 28, 1979."

27/ Id.

28/ "Petition Requesting Evidentiary Hearings to Request Applicant to Show Cause Why Their Application Should Not Be Dismissed for Lack of Intention to Build" (April 30, 1980).

Board denied this motion on the ground that it had no authority, absent withdrawal by the applicant, to dispose of an application absent a full evidentiary hearing.[29] The Appeal Board subsequently reversed this decision and remanded the cause to the Licensing Board for further proceedings on the Intervenors' motion to dismiss.[30] Thereafter, the Authority withdrew its application for NORCO, and the Intervenors submitted their Motion to dismiss the Authority's application with prejudice.

The Intervenors' principal argument for dismissal with prejudice was that the Authority had engaged in "hidden, deceitful action" by not informing the NRC and the Intervenors of the Authority's decision in 1976 to desist from expropriating the land comprising the Islote site, which, according to the Intervenors, evidenced an alleged intent by the Authority to cancel the NORCO project.[31] The Authority responded to this argument by demonstrating that the cessation of the expropriation proceedings was in fact made public by court records and newspaper articles, and that the expropriation proceedings had no significance to the early site review process.[32] Following a review of the filings by the parties, the Licensing

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29/ Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

30/ Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-606, 12 NRC 153 (1980).

31/ Intervenors' Reply, pp. 4-5, 7. The Intervenors also argued that the application should be dismissed with prejudice because NORCO, if later built, would allegedly endanger the public health and safety. Intervenors' Reply, pp. 6-8.

32/ Authority's Reply, pp. 6-9.

Board held that the Authority had not "hidden" the cessation of the expropriation proceedings, and that such cessation had "no significance from the standpoint of NRC regulatory review."[33/] The Licensing Board then granted withdrawal of the Authority's application without prejudice, whereupon the Intervenors filed this appeal.

33/ Order, p. 5.

ARGUMENT

I.

The Licensing Board Correctly Formulated and Applied the Appropriate Standard for Determining Whether the Authority's Application for a Construction Permit Should Be Dismissed With Prejudice.

The Licensing Board considered two factors in determining whether the Authority's application should be dismissed with prejudice. First, it "considered whether the Intervenors will suffer some prejudice other than the mere prospect of a second lawsuit if [the Board] were to permit the withdrawal of the application without prejudice." Order, slip op. at 4. Second, it "considered whether the public interest would be prejudiced should we allow the withdrawal of the application without prejudice." Id.

The Intervenors have not explicitly taken issue with the standard utilized by the Licensing Board in determining whether withdrawal with prejudice is warranted. Furthermore, it is unclear whether the Intervenors actually disagree with the formulation of this standard or only with the Licensing Board's application of this standard given the facts of this case.[34/] Nevertheless, the standard formulated by the Licensing Board was undoubtedly correct.

34/ See in particular the discussion in the Intervenors' Reply, pp. 3-4.

10 CFR § 2.107(a)[35/] of the Commission's regulations controls withdrawal of an application by an applicant. Although this section permits the presiding officer to impose terms and conditions upon withdrawal of an application or to dismiss it with prejudice, it does not delineate any criteria for such actions.

Only one decision earlier than the instant case has discussed the criteria for dismissing an application with prejudice pursuant to Section 2.107(a).[36/] In Boston Edison Co. (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 AEC 324, 327 (1974), a licensing board held that two considerations were pertinent to such a determination: whether prejudice to the public interest or to the intervenors would result from

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35/ 10 CFR § 2.107(a) states:

> 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 the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

36/ Subsequently, in a "Decision and Order" dated February 27, 1981, the licensing board in Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), applied Section 2.107. That decision is currently the subject of an appeal.

withdrawal without prejudice.[37] It is apparent that the standard formulated in the Licensing Board's Order below is entirely consistent with the standard employed in Pilgrim.

Moreover, the standard formulated by the Licensing Board is also consistent with relevant federal court precedents. The leading case is Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936).[38] In this case, the petitioner had submitted an application with the SEC to register securities. Thereafter, the petitioner attempted to withdraw his application, and the SEC refused to permit the withdrawal. The Supreme Court held that the applicant had an absolute and unqualified right to withdraw his application, absent prejudice to another party or to the public interest.

37/ The licensing board in Pilgrim also noted that:

> Moreover, it seems to the Board that it would be infeasible for this Board even to attempt to impose a condition on a public utility that it be prohibited from filing an application for the construction of a power plant before a certain date . . . . It must be presumed that it is the public's need for power which is one of the underlying reasons for construction of a power plant. This statutory principle -- "public convenience and necessity" -- is the basis which underlies the authorization granted by other concerned federal and state regulatory agencies before any construction can be commenced by the utility, and requires a finding of public need. If such finding is made, based upon a proper showing by the utility, 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.

This argument weighs equally in favor of granting withdrawal of the Authority's application without prejudice.

38/ This case was cited by the licensing board in Pilgrim.

On the basis of Pilgrim and Jones v. SEC, it is clear that the Licensing Board correctly formulated the standard for determining whether an application should be dismissed with prejudice.

The Licensing Board was also correct in its application of this standard to the facts in the instant case.

With respect to possible prejudice to the interests of the Intervenors should the Authority's application be dismissed without prejudice, the Licensing Board held that "the Intervenors [did not] assert that they will suffer any legal harm other than leaving the door open for subsequent litigation." Order, p. 4. Thus, the Licensing Board weighed this factor in favor of granting withdrawal without prejudice. Id.

The record fully supports the Licensing Board's finding. Neither the Intervenors' Reply nor the Intervenors' Motion alleges that the Intervenors would incur any injury if the Authority's application were withdrawn without prejudice.[39/] The Intervenor did claim that they have suffered "financially and timewise" as a result of litigation of the Authority's application, and contended that it would be "unfair to the latter by way of an additional hardship" if the Authority were

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39/ In their brief, the Intervenors appear to claim, for the first time, that they would be prejudiced if NORCO is later built and operated. Intervenors' Brief, p. 15. As a basis for their claim, the Intervenors point to statements in the Intervenors' Reply, pp. 7-8, which allege that the public interest would be prejudiced if NORCO is built and operated. Id. As we show below, this type of "prejudice" is not cognizable in determining whether an application should be dismissed with prejudice.

permitted to submit an application for a nuclear power plant in the future. Addendum to Motion, p. 1. However, "[t]he 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." Jones v. SEC, supra, 298 U.S. at 19 (emphasis added). Thus, the Licensing Board properly rejected the claim that the Intervenors might sustain a cognizable injury upon withdrawal of the Authority's application without prejudice.[40/]

With respect to possible prejudice to the public interest, the Licensing Board did not accept the Intervenors' allegations that the Authority had engaged in deceitful conduct, and concluded that "the public interest should best be served by leaving open to the Applicant the nuclear option should changed conditions warrant." Order, pp. 4-6. As we summarize below, the Licensing Board's findings in this regard were also fully supported by the record.

40/ After the Licensing Board rendered its Order, the Intervenors attempted to submit affidavits which purported to demonstrate injury to the members of the Intervenors if the Authority's application were withdrawn without prejudice. See "Motion to File Sworn Statements from Owner-Residents of the Islote Nuclear Plant about Damages Inflicted Upon Them by Applicant" (June 13, 1981). The Appeal Board held that the presentation of these affidavits was "untimely" and consequently that "its possible significance to the outcome of the proceeding is of no moment." Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC ___, slip op. at 9 (July 2, 1981) [hereinafter ALAB-648].

In support of their argument before the Licensing Board that the Authority had engaged in "hidden, deceitful action," the Intervenors alleged that the Authority had actually decided to cancel NORCO in 1976, and that the Authority had concealed this information from the NRC Staff, the Licensing Board, and the Intervenors. Intervenors' Reply, pp. 4-5. The Intervenors based this allegation solely upon the fact that the Authority desisted from expropriating the land comprising the Islote site and offered to return expropriated property to its previous owners, and that the Authority did not inform the Licensing Board or the parties thereof. Id.

In responding to the Intervenors' allegations, the Authority acknowledged that in 1976 it had decided not to continue the expropriation process and to offer to return expropriated lands to the former owners. Authority's Reply, p. 5. However, the Authority disputed the inference that the absence of notification of this fact constituted "hidden, deceitful action." In support of its position, the Authority showed the following:

(1) that during a June 28, 1976, meeting of the Governing Board of the Authority, the Executive Director stated that the Authority was experiencing a "cash flow problem" and recommended not to continue the expropriation process "at this time." Authority's Reply, Attachment B.

(2) that cessation of the expropriation process did not affect the Authority's ability to exercise the power of eminent domain in the future. Authority's Reply, pp. 5-6.

(3) that the NRC was fully apprised by the Authority that it did not own the land comprising the Islote site. Authority's Reply, pp. 7-8.

(4) that the Authority's withdrawal from expropriation proceedings was made public in 1976 by way of court records and newspaper articles. Authority's Reply, pp. 8-9, Attachment C.

(5) that neither the Commission's regulations nor relevant precedents require that an applicant acquire ownership of the land comprising the proposed site in order to request an early site review.[41/] Authority's Reply, pp. 6-7.

(6) that since neither commencement nor cessation of expropriation proceedings is relevant to the NRC's regulatory review, the Authority did not notify the NRC of either event. Authority's Reply, pp. 5-6.

Based upon these facts, the Licensing Board found that the Authority had not hidden the reversal of the expropriation

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41/ See 10 CFR §§ 2.101(a-1), 2.600-2.606; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975); New England Power Co. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 281-83 (1978).

proceedings, and that the lack of formal notification of such reversal "had no significance from the standpoint of NRC regulatory review." Order, p. 5.

In their appeal brief, the Intervenors do not take issue with the ruling that cessation of expropriation had no relevance to the NRC's regulatory review. Instead, they reassert the argument that the Authority intended to cancel NORCO as early as 1975-76. See Intervenors' Brief, p. 16. This bald, unsupported assertion is contradicted in the record by the Authority's submissions to the NRC, in which the Authority stated that it only desired to postpone NORCO indefinitely and had not abandoned the nuclear option for Puerto Rico.[42/]

The Intervenors respond by stating that the Authority's statements are "self-serving" and that the Authority has deceived the NRC as to its prior intent to cancel NORCO. See Intervenors' Brief, p. 13. However, the Intervenors have adduced no direct evidence of any such intent, nor can they. Rather, in order to support their conclusions, the Intervenors have drawn unwarranted and highly questionable inferences from a number of unrelated events. They then conclude that the Authority has hidden from the NRC not only the existence of these events but also an intent which the Intervenors infer from such events.

42/ See e.g., letter of December 3, 1975, from the Authority to the NRC; "Status Report as of December 29, 1978."

A review of the events which the Intervenors find so significant demonstrates that the Authority did not conceal any information from the NRC. First, and primarily, the Intervenors point to the absence of any notification of cessation of the expropriation proceedings. See Intervenors' Brief, p. 17. However, as previously mentioned, the Licensing Board held that cessation of the expropriation proceedings had no relevance to the NRC's regulatory review. Thus, there was no need for notification in this case. Second, the Intervenors allege that the Authority failed to inform the NRC about negotiations for the sale of the reactor purchased from Westinghouse, about the cancellation of its uranium supply contracts, and about the cancellation of the contract with Westinghouse. Intervenors' Brief, pp. 13-14. These allegations are patently false as to the negotiations for sale of the reactor and the cancellation of the contract with Westinghoust, as the record shows that the Authority did inform the NRC of these events.[43/] Third, the Intervenors claim that the Authority failed to inform the NRC about the Authority's alleged plans to construct three 300 megawatt coal-fired plants. Intervenors' Brief, p. 14. However, at the time of its last status report to the Board, the Authority did not have definite plans

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43/ See letter of December 3, 1975, from the Authority to NRC re discontinuation of design and fabrication efforts and possibility of selling the plant; "Status Report of December 29, 1978," re termination of the Westinghouse contract for the plant. Although the "Status Report of December 29, 1978," did not explicitly mention the contemporaneous termination of the uranium supply contract with Westinghouse, this event was obviously of no significance to an early site review.

to construct three 300 megawatt coal-fired plants,[44] and the Authority did inform the NRC both that it planned to construct one 300 megawatt coal-fired plant and that "one or more additional such units may in the future be located at the selected site" for the coal plant.[45] Finally, the Intervenors fault the Authority for failing to notify the NRC and the Intervenors of the "crucial information" that in 1976 both candidates for governor of Puerto Rico made campaign promises in opposition to nuclear power in Puerto Rico. Intervenors' Brief, pp. 16-17. In response to this allegation, we need say no more than that it strains credibility to assert that the failure to report alleged campaign promises should serve as a basis for dismissal with prejudice.[46] In summary, it is clear that the Authority never concealed relevant information from the NRC or the Intervenors, and that the Authority was not "deceitful."[47]

44/ The Intervenors base their allegation upon a bond statement attached to their brief. Intervenor's Brief, p. 14, Exhibit B. However, as that statement states, the Authority then projected a need for an additional 900 megawatts of capacity, but final decisions had not been made with respect to construction of any additional facilities.

45/ "Status Report as of December 28, 1979."

46/ The Authority did notify the NRC of the change of administrations in Puerto Rico and of the decision to review the need for new generating capacity for Puerto Rico. Letter from Maurice Axelrad to Licensing Board (February 16, 1977).

47/ It should be noted that, with the exception of the Intervenors' statements regarding cessation of the expropriation proceedings, the Intervenors raised all of the allegations in the paragraph above for the first time in their brief on appeal. The Appeal Board has previously admonished the Intervenor for resorting to this tactic. ALAB-648. Thus, these allegations are not appropriate for consideration, and could be rejected on that basis alone.

In addition to their argument that the Authority engaged in "hidden, deceitful action," the Intervenors make several other arguments for dismissing the Authority's application with prejudice. These arguments may be disposed of simply.

First, the Intervenors have argued that the public interest will be prejudiced if NORCO is eventually built and operated, because the plant will allegedly endanger the public health and safety. See Intervenors' Reply, pp. 6-8; Intervenors' Brief, pp. 14-15. Suffice it to say that this allegation goes to the merits of whether a hypothetical future plant should be built, and not to whether withdrawal of the current application without prejudice would adversely affect the public interest.

Second, the Intervenors contend, based upon the licensing board's decision in Fulton, that the period of suspension in this proceeding has been too long to justify withdrawal without prejudice. Intervenors' Brief, pp. 17-19. Initially, it should be noted that this is the first time that the Intervenors have argued that the alleged period of suspension warrants dismissal with prejudice. Thus, this argument is no longer appropriate for consideration. See ALAB-648. Nevertheless, even if this infirmity did not exist, the decision in Fulton would be of no avail to the Intervenors. The licensing board in Fulton did not discuss or apply the appropriate standard for determining whether a proceeding should be terminated with prejudice, and it provided no support for the novel proposition

that suspension per se would justify such termination. Moreover, the instant factual situation shows no "suspension." As we have discussed above, the Authority submitted information to the NRC Staff which enabled it to reach its views on the acceptability of the Islote site.

Finally, the Intervenors argue, based upon Rule 41(a)(1) of the Federal Rules of Civil Procedure,[48/] that the Authority's application should be dismissed with prejudice because the Authority has allegedly withdrawn its application for a second time. Intervenors' Brief, pp. 20-21. Like so many of the Intervenors' other arguments and allegations, this argument

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48/ This Rule states:

> (a) Voluntary Dismissal: Effect Thereof.
> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(3), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party or an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

was raised for the first time on appeal. In fact, the Intervenors have admitted that this argument was not made before the Licensing Board.[49/] Consequently, it is not appropriate for consideration. See ALAB-648. Moreover, it is the Commission's rules, not the Federal Rules of Civil Procedure, which govern withdrawals. Since 10 CFR § 2.107 does not parallel Rule 41(a)(1), that rule cannot serve as guidance for interpreting Section 2.107. See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 580-81 (1978).

Nevertheless, even if Rule 41(a)(1) did apply, it would not command a different result. As the Intervenors themselves state, the Authority did not withdraw its application; it only amended the application to change the site. See Intervenors' Brief, Exhibit A. Even if such amendment were construed as a second application, that application would then have been for a different plant. Thus, there would not be two withdrawals of an application for the same plant, and Rule 41(a)(1) would not apply. See 5 Moore's Federal Practice ¶ 41.04, p. 41-19 (1981).

49/ "Intervenors' Response to Applicant's Motion of April 17, 1981," pp. 3-4 (April 24, 1981).

I'.

The Licensing Board Did Not Err By Not Holding a Hearing on the Intervenors' Motion.

The Intervenors claim that:

> The ASLB erred as a matter of law in terminating the proceeding without notice and without affording Intervenors the opportunity for hearing in a matter involving material issues of disputed facts and important questions of law.

Intervenor's Brief, p. 11. Other than referring to purported "constitutional rights to due process of law," Intervenor's Brief, p. 12, the Intervenors cite no authority for the proposition that they were entitled to an evidentiary hearing on their Motion.

The Commission's rules do not require a presiding officer to hold an evidentiary hearing on motions, but instead state that motions "shall be accompanied by any affidavits or other evidence relied on." 10 CFR § 2.730(b). In fact, the Commission's rules even state that "[n]o oral argument will be heard on a motion unless the presiding officer or the Commission directs otherwise." 10 CFR § 2.730(d). Thus, it is obvious that the Licensing Board did not violate the Commission's regulations by not affording the Intervenors' oral argument or an evidentiary hearing on their Motion.

The Federal Rules of Civil Procedure contain provisions which are analogous to those in 10 CFR § 2.730(d). Rule 78 states that courts may make provisions for the determination

of motions "without oral hearing upon brief written statements of reasons in support and opposition." Generally, motions are decided upon the basis of the pleadings submitted, without opportunity for oral argument, see Morrow v. Topping, 437 F.2d 1155, 1156 (9th Cir. 1971); without the opportunity for an evidentiary hearing, see Gary W. v. State of Louisiana, 601 F.2d 240, 244 (5th Cir. 1979); Franz Chemical Corp. v. Philadelphia Quartz Co., 594 F.2d 146, 151 (5th Cir. 1979); and without opportunity for oral examination and cross-examination of witnesses. See World Brilliance Corp. v. Bethlehem Steel Co., 342 F.2d 362, 366 (2d Cir. 1965). This principle applies to motions to dismiss as well as other types of motions. See Goodpasture v. Tennessee Valley Authority, 434 F.2d 760, 764 (6th Cir. 1970). Moreover, the practice of deciding motions upon written submissions, without oral argument or an evidentiary hearing, does not offend due process. See Federal Communications Commission v. WJR, 337 U.S. 265, 274-77 (1949); Wilkens v. Rogers, 581 F.2d 399, 405 (4th Cir. 1978); United States Fidelity and Guaranty Co. v. Lawrenson, 334 F.2d 464, 467 (4th Cir. 1964), cert. den. 379 U.S. 869 (1969); Sarelas v. Porikos, 320 F.2d 827, 828 (7th Cir. 1963).

Although in the instant case the Licensing Board may have possessed the authority to grant a hearing on the Motion in the exercise of its discretion, see Gary W. v. Louisiana, supra, the Board did not abuse its discretion by failing to do so. The Intervenors were given ample opportunity to present their case, including

permission to file a reply to the answers of the NRC Staff and the Authority. The Intervenors made no showing that they were unable to present fully the information in their possession to the Licensing Board or that a hearing would have produced any furtner evidence.[50/] In such circumstances, a refusal to grant a hearing is proper. See Spark v. Catholic University of America, 510 F.2d 1277, 1280 (D.C. Cir. 1975).

Moreover, it is apparent that there are no material facts in dispute in this case. The record fully reveals the information that the Authority presented to the NRC, what information was available to the public, and when that information was disclosed. The only dispute concerning these facts revolves around the inferences to be drawn therefrom; i.e., do they constitute "hidden, deceitful action" by the Authority. The Licensing Board certainly did not abuse its discretion by ruling directly on this question.

50/ The Intervenors now argue that:

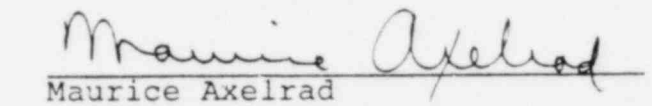
> Had the Licensing Board granted Intervenors' request for hearings, the material injury to owner-residents of Islote Ward, Arecibo, Puerto Rico, general prejudice to the public interest and the corruption in the managerial personnel of PREPA would have become patently evident and subsequently would have weighed strongly to support a dismissal with prejudice.

Intervenors' Brief, p. 12 (emphasis in original). Since the Intervenors did not present the first ground to the Licensing Board, they are foreclosed from doing so on appeal. ALAB-648; "Memorandum and Order," (July 24, 1981), pp. 1-2. As to the other two matters, unsupported and unspecific allegations of "general prejudice to the public interest" do not provide a sufficient basis for a hearing, and allegations of corruption of personnel are obviously irrelevant to the withdrawal of the Authority's application.

CONCLUSION

There is no legal or factual basis for the Intervenors' arguments, and the Licensing Board properly granted withdrawal of the Authority's application without prejudice. The Licensing Board's February 18 Order should be affirmed.

Respectfully submitted,



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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)	)	September 28, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of the Authority's Brief in Opposition to Intervenors' Exception to Licensing Board Order of February 18, 1981, dated September 28, 1981, were served on the following by deposit in the United States mail, first class and postage prepaid, this 28th day of September 1981.

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