

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

Before the Nuclear Regulatory Commission

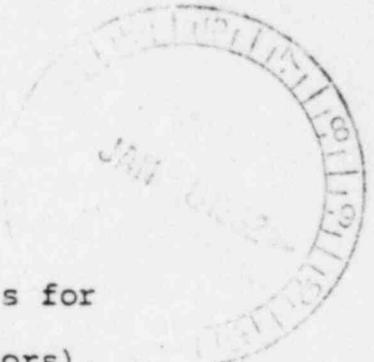
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OFFICE OF SECRETARY
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In the Matter of)	
)	
PUERTO RICO ELECTRIC POWER)	Docket No. 50-376
AUTHORITY)	
)	January 6, 1982
(North Coast Nuclear Plant,)	
Unit 1))	

AUTHORITY'S RESPONSE IN OPPOSITION TO
INTERVENORS' PETITION FOR REVIEW



On December 22, 1981, Gonzalo Fernos and Citizens for the Conservation of Natural Resources, Inc. (Intervenors), filed a "Petition for Review" requesting Commission review of two Appeal Board decisions in the above captioned proceeding. In the first decision, ALAB-648, 14 NRC 34 (1981), the Appeal Board denied Intervenors' motion to reopen and supplement the record before the Licensing Board. In the second decision, ALAB-662, 14 NRC ____ (December 7, 1981), the Appeal Board affirmed the Licensing Board's Memorandum and Order of February 18, 1981, which allowed Puerto Rico Electric Power Authority (Authority) to withdraw without prejudice its application for a construction permit for North Coast Nuclear Plant, Unit 1. The Authority hereby submits its response in opposition to the Intervenors' Petition for Review.

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The request for review of ALAB-648 is untimely and unsupported. That decision was served on July 6, 1981, and the time for filing a petition for review has long since expired. That Intervenor's "considered it of interlocutory nature and would rather wait for this occasion to request its review . . ." (Petition for Review, p. 1) cannot serve to excuse the late Petition, especially in view of the recorded fact that ALAB-648 became final agency action on August 17, 1981. Memorandum for Board and Parties in the North Coast Proceeding from Samuel J. Chilk (August 20, 1981). Furthermore, Intervenor's offer no explanation or argument in support of the Petition with respect to ALAB-648.

Petitions for review of Appeal Board decisions are governed by 10 C.F.R. § 2.786(b). This section specifies that such a petition ordinarily will not be granted "unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, or the common defense and security, constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy." 10 C.F.R. § 2.786(b)(4)(i). Additionally, Section 2.786(b)(4)(iii) states that such a petition "will not be granted to the extent that it relies on matters that could have been but were not raised before the Atomic Safety and Licensing Appeal Board." Intervenor's Petition for Review must fail under both of these provisions.

The Intervenors apparently assign two errors to the Appeal Board's handling of this proceeding.*/

First, the Intervenors claim that the Appeal Board erred by refusing to consider issues not raised before the Licensing Board, particularly the issue of alleged corrupt-ness of the management of the Authority.**/ Petition for Review, pp. 1-2. The Appeal Board declined to undertake such a consideration on the ground that no compelling cause existed for reopening the record.***/

It has been the long-standing NRC policy not to consider issues raised for the first time on appeal and not to reopen the record compiled by a licensing board absent a significant safety or environmental issue. See 10 C.F.R. § 2.762(a)(2); 10 C.F.R. § 2.786(b)(4)(iii); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant), ALAB-598, 11 NRC 876, 879 (1980); Tennessee Valley Authority (Hartsville Nuclear

*/ The Petition for Review lacks clarity and, as a result, it is difficult to discern both the extent of the Intervenors' exceptions to the Appeal Board's decisions and the bases for those exceptions. The interpretation of the Intervenors' arguments presented herein is a good faith attempt to paraphrase concisely and accurately the principal points raised in the Petition for Review.

**/ At several places throughout the Petition for Review, the Intervenors make factual allegations in support of their various claims. The Authority does not concede the accuracy of these allegations, and the fact that the Authority has not addressed each allegation should not be construed as such a concession.

***/ See Order (June 1, 1981); Memorandum and Order (June 11, 1981); ALAB-648, 14 NRC at 36-39; and ALAB-662, slip op. at 21-22.

Plant), ALAB-463, 7 NRC 341, 348 (1978) and case cited therein; Kansas Gas and Electric Co. (Wolf Creek Generating Station), ALAB-462, 7 NRC 320, 338 (1978) and cases cited therein. The Appeal Board's refusal to reopen the record and consider matters such as alleged corruptness of the Authority is entirely consistent with this policy, and Intervenors have not offered justification for a change in this policy. Thus, there is no reason for the Commission to review the Appeal Board's decision on this issue.*/

Second, the Intervenors in effect assert that the Appeal Board erred by ruling that two of the Intervenors' allegations,**/ which essentially pertain to the merits of the Authority's application, are irrelevant to dismissal of an application without prejudice. Petition for Review, pp. 2-5. Under the criterion specified by the Appeal Board, dismissal with

*/ At page 3 of the Petition for Review, the Intervenors appear to argue that news media reports regarding the alleged corruptness of the Authority were sufficient to raise this matter before the Licensing Board. As support for this proposition, the Intervenors rely upon the Appeal Board's holding that the existence of a newspaper article regarding the Authority's desistance from expropriation of land for the proposed site of the North Coast plant refutes the Intervenors' argument that such desistance was "hidden." ALAB-662, slip op. at 19. Suffice it to say that ALAB-662 cannot logically be extrapolated in the manner apparently proposed by the Intervenors.

**/ Specifically, the Petition for Review, pp. 2-5, asserts that the Authority's application should be dismissed with prejudice because of the alleged susceptibility of nuclear plants in Puerto Rico to sabotage by terrorists and because of the alleged corruptness of the Authority.

prejudice is warranted only if substantial prejudice to intervenors or the public interest would otherwise exist, ALAB-662, slip op. at 11-12, and the Appeal Board refused to consider the allegations raised by Intervenor because they "will be fully open for intervenors to advance should applicant again file for a permit to construct a nuclear power plant." ALAB-662, slip op. at 21-22; Memorandum and Order (June 11, 1981), pp. 2-3.

The criterion set forth by the Appeal Board for dismissal with prejudice is consistent with prior decisions of the Appeal Board, the Licensing Board, and the Supreme Court. See Philadelphia Electric Co. (Fulton Generating Station), ALAB-657, 14 NRC ____ (November 17, 1981); Boston Edison Co. (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 AEC 324, 327 (1974); Jones v. SEC, 298 U.S. 1 (1936). Intervenor has not explicitly objected to this criterion, nor have they offered any justification for a modification of this criterion. Consequently, Commission review of the legal standard adopted by the Appeal Board is not warranted.

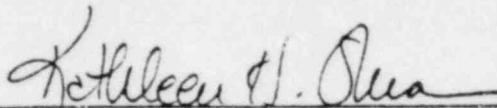
Similarly, review of the Appeal Board's application of the standard in this case is not warranted. Since intervenors will be permitted to raise any issues relevant to the grant of a construction permit if the Authority later decides to resubmit an application for a construction permit, Intervenor cannot claim that they will incur any cognizable prejudice if such issues are not presently considered.

In any event, dismissal of an application does not affect the public health and safety or the environment, and it is difficult to perceive any significant policy issue which could be implicated by the Appeal Board's decision. Consequently, there is no reason for the Commission to accept review of the Appeal Board's holding.

Finally, Intervenors, having failed to convince the Appeal Board that dismissal with prejudice is warranted, now request that the Commission remand this proceeding to the Licensing Board for the purpose of considering imposition of specified conditions upon the dismissal of the application. Petition for Review, pp. 6-7. These conditions, raised for the first time in the Petition for Review, relate to the alleged corruptness of the Authority and the alleged susceptibility of any plant in Puerto Rico to sabotage, and there is no reason why the Intervenors could not have attempted to raise them below. Furthermore, the substantive matters addressed by the proposed conditions are all subjects which may be considered in connection with any future application for a construction permit. Thus, there is no basis for the Commission to remand for consideration of Intervenors' belatedly-raised conditions.

For all of the above reasons, the Petition for Review of the decisions of the Appeal Board should be denied.

Respectfully submitted,



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Date: January 6, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Authority's Response in Opposition to Intervenor's Petition for Review were served on the following by deposit in the United States mail, first class and postage prepaid, this 6th day of January, 1982.

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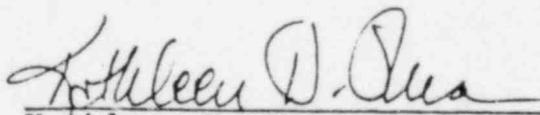
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