UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PHILADELPHIA ELECTRIC COMPANY	)	Docket Nos. 50-463 50-464
	)	
(Fulton Generating Station, Units 1 and 2)	)	

NRC STAFF'S BRIEF IN SUPPORT OF EXCEPTIONS OF PHILADELPHIA ELECTRIC COMPANY TO ASLB DECISION AND ORDER DATED FEBRUARY 27, 1981

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JUNE 11, 1981

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STATEMENT OF THE CASE

Introduction

This case arises as an appeal by Philadelphia Electric Company ("PEC" or "Applicant") from the "Decision and Order (Dismissing Proceeding with Prejudice)" ("Decision"), issued by the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding on February 27, 1981.[1/] That dismissal with prejudice came without prior notice that the Licensing Board was considering such action, upon the suggestion of one group of intervenors

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1/ The Licensing Board's Decision is reproduced as App. #27 in "Appendix I" to "Brief of the Applicant, Philadelphia Electric Company, On Exceptions From the Decision and Order of the Atomic Safety and Licensing Board" ("Applicant's Brief"), filed April 27, 1981. For the convenience of the Atomic Safety and Licensing Appeal Board ("Appeal Board"), whenever possible the Staff shall refer to documents reproduced in Appendix I to the Applicant's Brief as "PEC App. ___".

in their brief response[2/] to the Applicant's pro forma motion to withdraw its application and terminate the proceeding without prejudice.[3/]

In its Decision, the Licensing Board found that since 1975 the record did not reflect any statement by the Applicant that "it had a firm plan to construct nuclear facilities on the [Fulton] site" (Decision, at 7); that, to the contrary, the Applicant "had reached no decision as to whether or not to use the Fulton site for a nuclear facility" (id., at 8); that the Applicant "had reached no decision as to the type of facility it would construct, if it decided to use the site" (id.); and that the Applicant's "motive in seeking an Early Site Review was to maintain the uncertainties as to possible use of the site until a decision should be reached at some future time, possibly in 1983" (id.). The Licensing Board concluded that the Applicant's "request for an Early Site Review was for the purpose of preventing termination of this proceeding, and not for the purpose of expediting it" (id.) and, accordingly, that it "did not stop the running of the period of Applicant's suspension of prosecution of the proceeding" (id.). On this basis, the Licensing Board held as follows (id.):

> We hold that Applicant's request for an Early Site Review is outside the purpose and intent of the pertinent regulations . . . . [T]here has been a period of suspension and uncertainty since 1975 . . . . [T]he period of suspension is too long to justify a dismissal without prejudice.

2/ "Response of Intervenors York Committee for a Safe Environment and Central Pennsylvania Committee on Nuclear Power to Applicant's Request of December 5, 1980, to Withdraw Application Without Prejudice and to Terminate Construction Permit Proceedings" ("York Intervenors' Response"), filed December 17, 1980 (PEC App. 25).

3/ "Motion to Withdraw Application and to Terminate Proceeding" ("Motion to Withdraw"), filed December 5, 1980 (PEC App. 23).

On March 17, 1981, the Applicant filed 34 exceptions to the Licensing Board's Decision;[4/] and on April 27, 1981, the Applicant filed its Brief on appeal,[5/] pursuant to an extension of time granted by the Appeal Board.[6/] For the reasons set forth below, which include the Licensing Board's erroneous interpretation and application of the Commission's Early Site Review regulations, the Staff supports the exceptions filed by the Applicant and recommends that the Licensing Board's Decision be reversed and that this proceeding be dismissed without prejudice.

Background

The application for a construction permit (CP) in this proceeding, seeking licensing approval for two 1160 MWe High Temperature Gas Cooled Reactors (HTGRs) to be built by General Atomic Company, was submitted on July 3, 1973 along with an Environmental Report. The CP application was accepted for docketing by the Atomic Energy Commission (AEC) on November 16, 1973, and a Notice of Hearing on Application for a Construction Permit was published in the Federal Register on December 14, 1973 (38 Fed. Reg. 34484).

Following publication of the Notice of Hearing, petitions for leave to intervene were filed on behalf of four membership organizations, two

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4/ "Exceptions of Philadelphia Electric Company to ASLB Decision and Order Dated February 27, 1981" ("Exceptions").

5/ See n.1, supra.

6/ "Applicant's Motion for Extension of Time", dated April 13, 1981. The motion was granted by the Appeal Board on April 15, 1981. Pursuant to 10 CFR §§ 2.710 and 2.762, the Staff's Brief is due to be filed on or before June 11, 1981.

individuals, and two townships.[7] The intervenors were aligned into three separate groups for the purpose of participating in this proceeding, as follows:

(1) York Committee for a Safe Environment, Central Pennsylvania Committee on Nuclear Power, and Committee for Responsible Energy Sources of Philadelphia, Pennsylvania ("York Intervenors");

(2) Save Solanco Environment Conservation Fund, George W. Hough and Allen D. Weicksel ("Solanco Intervenors"); and

(3) The Townships of Fulton and Peach Bottom, Pennsylvania ("Townships").

The proceeding advanced rapidly during the 18-month period following publication of the Notice of Hearing. Numerous contentions were filed by the intervenors, and stipulations were actively pursued and reached as to many contentions with the Applicant and the Staff. A period of extensive discovery followed, marked by a good degree of cooperation among the parties.[8]

Throughout this period, the Staff progressed with its review of the CP application. On March 14, 1975, the Staff's Safety Evaluation Report (SER)

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[7] Petitions were filed also by the Commonwealth of Pennsylvania and the State of Maryland, participating as interested States. The Staff finds no record that the State of New Jersey had sought to participate in the proceeding, contrary to the representation to that effect made by the Applicant (Applicant's Brief, at 5).

[8] See, e.g., letter from Donald P. Irwin, Esq., to the Licensing Board, dated July 11, 1975 (reporting agreement reached with Solanco Intervenors as to the latter's interrogatories and depositions).

was published (NUREG-75/015, March 1975); and on May 8, 1975, the Staff transmitted its Final Environmental Impact Statement (NUREG-75/033, April 1975).[9/] On April 8, 1975, the Advisory Committee on Reactor Safeguards issued its required letter. Subsequently, on July 3, 1975, the Staff transmitted its SER Supplement No. 1 (NUREG-75/015 (Supp. 1), June 1975).

On September 17, 1975, just one and one-half months after the appointment of Administrative Judge Clark as Chairman of the Licensing Board[10/] -- and while discovery was still pending -- the Applicant advised the parties and the Licensing Board that its reactor supplier, General Atomic Company was "suspending work on the project" and that, as a consequence, "the Applicant has suspended its work on the Fulton station pending a review of this matter."[11/] The Applicant stated that it would advise the Licensing Board and the parties when it "has completed an assessment of the effect of this development on the Fulton licensing proceeding" (Id.).

Pursuant to the Licensing Board's request,[12/] commencing in December 1975,[13/] the Applicant submitted monthly status reports concerning its work

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9/ The Staff's Draft Environmental Impact Statement had been published in May 1974.

10/ The Licensing Board assigned to preside over the proceeding had experienced an unusual number of changes in composition. On July 26, 1974, following the death of the previous Licensing Board Chairman, an alternate member of the Licensing Board was appointed to serve as its new Chairman. One year later, on July 31, 1975, upon the retirement of that Chairman, Administrative Judge Hugh K. Clark, Esq. (who had not previously been a member of the Fulton Licensing Board), was appointed as the new Chairman.

11/ Letter from Donald P. Irwin, Esq. to the Licensing Board, dated September 17, 1975 (PEC App. 1).

12/ Letter from Hugh K. Clark, Esq., Licensing Board Chairman, to Donald P. Irwin, Esq., dated November 26, 1975 (PEC App. 2).

13/ Letter from Donald P. Irwin, Esq., to Hugh K. Clark, Esq., Licensing Board Chairman, dated December 11, 1975.

on the Fulton application. On February 19, 1976, the Applicant advised the Licensing Board that it had terminated its relationship with General Atomic Company for the purchase of the Fulton HTGRs, and that, "[a]s a result, the station will not be built as an HTGR".[14/] The Applicant indicated that it would be considering various options "for providing baseload electric generating capacity in the mid- to late 1980s, including the construction of light-water-cooled reactor units at the Fulton site," and that "[u]pon completion of this process, [it] will seek either to amend the existing Fulton application accordingly or to take other appropriate action". Thereafter, monthly status reports submitted by the Applicant from March 1976 to February 1978 indicated that no further changes had occurred in its "evaluation of baseload generating alternatives."

On January 30, 1978, the Staff advised the Applicant that it would file before the Licensing Board a motion seeking to terminate the proceeding if the Applicant's plans for the Fulton site were as previously represented to the Staff by the Applicant, viz , "that use of the site might not occur until 1989 to 1993, and that eventual use of the site may or may not be for a nuclear power plant."[15/] At the same time, the Staff noted that in December 1977, the Applicant had expressed interest "in qualifying the Fulton site

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14/ Letter from Donald P. Irwin, Esq., to Hugh K. Clark, Esq., Licensing Board Chairman, dated February 19, 1976 (PEC App. 3).

15/ Letter from Richard P. Denise, Assistant Director for Special Projects, Division of Project Management, to J. Lee Everett, President, Philadelphia Electric Company, dated January 30, 1978 (PEC App. 8).

under NRC's Early Site Review procedures"; accordingly, the Staff thereby forwarded to the Applicant a copy of NUREG-0180, "Early Site Reviews for Nuclear Power Facilities, Procedures and Possible Technical Review Options" (May 1977), for the Applicant's possible use in that regard.[16/]

On February 28, 1978, the Applicant advised the Licensing Board and the parties that it "intends to amend its Fulton construction permit application in accordance with the Commission's regulations so as to obtain an Early Site Review of the Fulton site,"[17/] noting that it had informed the Staff of this decision by letter of February 10, 1978.[18/]

On March 8, 1978, the Applicant replied directly to the Staff's letter of January 30, 1978, and indicated that it was its "intention to file with the Commission by the end of this year an amendment to the construction permit application for an adjudicatory Early Site Review for the Fulton site."[19/] In addition, the Applicant noted that it anticipated a need for

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16/ Id., at 2. The Commission's Early Site Review procedures were first published in proposed form on April 22, 1976 (41 Fed. Reg. 16835). The final Early Site Review regulations were published on May 5, 1977 (42 Fed. Reg. 22882), to become effective as of June 6, 1977 (10 CFR §§ 2.101(a-1); 2.600 et seq.).

17/ Letter from Donald P. Irwin, Esq., to Hugh K. Clark, Esq., Licensing Board Chairman, dated February 28, 1978 (PEC App. 10).

18/ Letter from Edward G. Bauer, Jr., Vice President and General Counsel, Philadelphia Electric Company, to Roger S. Boyd, Director, Division of Project Management, dated February 10, 1978 (PEC App. 9). In this letter, the Applicant stated that it "is presently evaluating options for providing additional baseload generating capacity for service in the late 1980's and early 1990's," and that it was planning to file an amendment to its CP application to seek early site review of the Fulton site.

19/ Letter from J. L. Everett, President, Philadelphia Electric Company, to Richard P. Denise, Assistant Director for Special Projects, Division of Project Management, dated March 8, 1978 (PEC App. 11).

additional baseload generation in the early 1990's, or possibly sooner, after the Applicant's Limerick Units 1 and 2 came on line. The Applicant continued as follows:

> The additional generation after Limerick would be baseload generation, using either coal or uranium as fuel. The economic choice is a uranium fueled plant and the prime candidate site for such nuclear generation on the Philadelphia Electric Company system is the Fulton site.20/

The Applicant expressed its view that much of its CP application submissions remained valid and could be utilized by the Staff in its Early Site Review analysis, and stated that the Applicant hoped "to meet with the Staff in the near future to discuss concretely any necessary revisions to the substance or format of information already in the record."21/ The Applicant concluded that, in its view, an amendment of its CP application to seek early site review was preferable to a termination of the Fulton proceeding:

> To simply terminate the Fulton proceedings . . . would waste applicable work already done, unnecessarily burden future efforts, and would constitute a lost opportunity to make use of a potentially valuable means of helping to stabilize the licensing process.22/

On the basis of the Applicant's letter of March 8, 1978, in which it expressed its intent to file during 1978 an amendment to its CP application for Early Site Review,23/ the Staff determined that it would not move to

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20/ Id., at 2.

21/ Id., at 3.

22/ Id., at 4.

23/ Copies of the Applicant's letter of March 8, 1978 were sent to the Licensing Board and parties to the Fulton proceeding, as an enclosure to the letter from Donald P. Irwin, Esq. to Hugh K. Clark, Esq., Licensing Board Chairman, dated March 17, 1978.

terminate the proceeding. In a letter to the Applicant dated August 25, 1978,[24] the Staff stated as follows:

> If the present proceeding were terminated, a fresh application for an Early Site Review would be required. The Staff considered the implications of both procedures for all parties and decided not to file a motion to terminate the construction permit proceeding at this time. An important factor in the decision was the statement of intention [to file a CP application amendment in 1978 for an adjudicatory Early Site Review].

During the period from March 1978 to December 1978, the Applicant continued to keep the Licensing Board and parties to the proceeding apprised of developments related to its decision to file an amendment to its CP application seeking an Early Site Review for the Fulton site.[25] These status reports noted generally that the Applicant was proceeding with work

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[24] Letter from Voss A. Moore, Assistant Director for Environmental Projects, Division of Site Safety and Environmental Analysis, to J. L. Everett, President, Philadelphia Electric Company, dated August 25, 1978 (PEC App. 15). In an earlier letter from Mr. Moore to Mr. Everett, dated May 31, 1978 (PEC App. 12), Mr. Moore noted that the Staff might file a motion to dismiss the CP proceeding if it determined that a separate request for Early Site Review should be filed:

> In view of PEC's representations of firm plans for action with regard to the existing construction permit application by the end of the year, the NRC Staff does not plan to file immediately a motion to terminate the present proceedings. However, the Staff is currently considering the appropriateness under the regulations of amending the existing construction permit application to one for an ESR, or whether a new application for an ESR should be required. If the Staff decides that a new ESR application is required, it will file a motion with the ASLB to terminate the present proceedings.

[25] Letters from Donald P. Irwin, Esq., to Hugh K. Clark, Esq., Licensing Board Chairman, dated April 11, May 12, July 10, August 10, September 11, October 10, and November 13, 1978.

related tc its decision to seek an Early Site Review; in addition, the Applicant reported that meetings were held with the Staff and Intervenors on May 11 and June 7, 1978, and that the Staff had advised the Applicant that it "presently intends not to seek termination of the Fulton application" (see n.24, supra).

On December 29, 1978, the Applicant filed Amendment No. 32 to its CP application, requesting "an Early Site Review and Partial Initial Decision related to site suitability issues for the Fulton site".[26/] By letter dated January 16, 1979,[27/] the Applicant advised the Licensing Board that it intended to no longer submit monthly status reports, since its Early Site Review amendment had been filed and "is currently undergoing review by the Regulatory Staff", and the CP application "has now returned to the usual licensing path."

On May 14, 1979, the Solanco Intervenors filed a petition seeking to terminate the CP proceeding and the Early Site Review which had been requested by the Applicant.[28/] Following the submiss on of responses by the Applicant[29/]

26/ The Amendment was filed on December 29, 1978, but was not served until January 3, 1979. Along with its Amendment, the Applicant filed two thick volumes of material -- its "Early Site Suitability Review Safety Report (Fulton Generating Station)" and its "Early Site Suitability Review Environmental Report (Fulton Generating Station)".

27/ Letter from Donald P. Irwin, Esq., to Hugh K. Clark, Esq., Licensing Board Chairman, dated January 16, 1979.

28/ "Petition to Terminate Docket and to Quash Preapplication and Early Review of Site Suitability," dated May 14, 1979 (PEC App. 17).

29/ "Applicant's Opposition to Petition to Terminate Docket ... .", filed June 5, 1979 (PEC App. 18).

and the Staff[30/] opposing the petition, the Licensing Board denied the petition on the grounds, in part, that it constituted a deficient request for a show cause order, in that it did not allege that the Applicant had failed "to meet required standards of conduct."[31/] In addition, the Licensing Board noted that the function of performing the early site review was reserved for the Staff, that the Staff had not yet completed its review or determined even whether the application was complete and, accordingly, the petition was both premature and an impermissible intrusion into the Staff's independent function.[32/]

On June 25, 1980, approximately one year after the Licensing Board had denied the Solanco Intervenors' petition -- and 18 months after the Applicant had filed its CP application amendment seeking an Early Site Review -- the Staff formally advised the Applicant that its amendment would not be accepted for docketing unless and until the Applicant's discussion of alternative sites was "expanded in accordance with the new guidance set forth in the Proposed Rule on Alternative Site Reviews (45 F.R. 24168, April 9, 1980)."[33/] The Staff noted further that if the Applicant wished to pursue

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30/ "NRC Staff's Response to Save Solanco Environment Conservation Fund's Petition to Terminate Docket and Early Review of Site Suitability," filed June 4, 1979 (PEC App. 19).

31/ "Memorandum and Order Re Petition to Terminate Docket and to Quash Pre-application and Early Review of Site Suitability," dated August 8, 1979. LBP-79-23, 10 NRC 220, 223 (1979) (PEC App. 16, at 5).

32/ Id., 10 NRC at 223, 224; PEC App. 16, at 7, 8.

33/ Letter from James R. Miller, Chief, Standardization and Special Projects Branch, Division of Licensing, to J. L. Everett, President, Philadelphia Electric Company, dated June 25, 1980 (PEC App. 20). As
(FOOTNOTE CONTINUED ON NEXT PAGE)

its request for Early Site Review, responses to certain (enclosed) questions would be required, and the Applicant was requested to advise the Staff of its schedule for submitting the required information (id.).

On December 5, 1980, the Applicant advised the Staff that it was withdrawing its CP application;[34] at the same time, the Applicant filed with the Licensing Board a motion to withdraw its application and terminate the proceeding without prejudice.[35] On December 24, 1980, the Staff filed its brief response to the Applicant's Motion to Withdraw, noting that it had no objection thereto and had "not determined that any particular conditions should attach to the withdrawal of the application."[36]

On December 17, 1980, the York Intervenors filed their three-paragraph response to the Motion to Withdraw, in which they moved for dismissal with prejudice, arguing that the continued pendency of the CP application for seven years upon the "frivolous insistence" of the Applicant, when the project "has clearly lacked viability for the last several years," constituted

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[33] (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) Mr. Miller noted in his letter, the Staff had "informally advised Mr. George Hunger of [Applicant's] Staff early in 1979 that the application was not acceptable to docket because of deficiencies in the discussion of alternative sites and thus the staff did not initiate a detailed review." The Staff could not then respond formally to the Applicant's request as a result of its having to concentrate its attention upon more urgent matters.

[34] Letter from Donald P. Irwin, Esq., to Harold R. Denton, Director, Office of Nuclear Reactor Regulation, dated December 5, 1980 (PEC App. 23).

[35] Motion to Withdraw, n.3 supra (PEC App. 23).

[36] "NRC Staff's Response to Request for Withdrawal of Application," filed December 24, 1980 (PEC App. 24).

grounds for dismissal with prejudice.[37] On February 27, 1981, notwithstanding the fact that the Applicant filed a reply to the York Intervenors' Response in which it asserted that "each of the Applicant's acts referred to by Intervenors was merely consistent with good faith prosecution of a properly filed application" and was "consistently proper and reasonable in light of shifting and increasingly adverse circumstances,"[38] the Licensing Board issued its Decision dismissing the proceeding with prejudice.[39]

REFERENCE TO RULINGS

The decision from which this appeal arises is the "Decision and Order (Dismissing Proceeding With Prejudice)" ("Decision"), issued by the Licensing Board in this proceeding on February 27, 1981.[40]

STATEMENT OF ISSUES

1. Whether the Licensing Board erred in concluding that the Fulton CP application had been in a state of suspension since 1975, based upon its view that the Applicant lacked sufficient intent to use the Fulton site and that its request for Early Site Review was outside the purpose and intent of the Commission's regulations.

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[37] York Intervenors' Response, n.2 supra (PEC App. 25). No response to the Motion to Withdraw was filed by either the Townships or the Solanco Intervenors.

[38] "Applicant's Reply to Intervenors' Response to Applicant's Motion to Withdraw Application and Terminate Proceedings," filed January 23, 1981 (PEC App. 26).

[39] PEC App. 27; see discussion supra, at 1-3.

[40] See discussion supra, at 1-3.

2. Whether the Licensing Board erred in concluding that the period of suspension in this CP proceeding required dismissal with prejudice.

3. Whether the Licensing Board's dismissal of the Fulton CP application, with prejudice, constitutes an unwarranted and excessive penalty in this proceeding.

ARGUMENT

I. THE LICENSING BOARD ERRED IN CONCLUDING THAT THE FULTON CP APPLICATION HAD BEEN IN A STATE OF SUSPENSION SINCE 1975

In its Decision, the Licensing Board concluded that the Applicant's 1978 amendment of its CP application seeking an Early Site Review could not serve to alter the state of suspension which had existed since sometime in 1975,[41/] because of what the Licensing Board perceived as an improper motive. Thus, the Licensing Board concluded (Decision, at 8):

> From our study of the record, we conclude that Applicant's request for an Early Site Review was for the purpose of preventing termination of this proceeding, and not for the purpose of expediting it. It does not conform to the substance of the pertinent regulations, and did not stop the running of the period of Applicant's suspension of prosecution of the proceeding.

The Staff believes that the Licensing Board was plainly wrong in its perception of the Applicant's motives, although the record is far too

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41/ There is no doubt that the Fulton CP application entered a period of suspension in September 1975, when the Applicant advised the Licensing Board and the parties that it was suspending work on the Fulton application. In fact, the Applicant concedes that a period of suspension existed from September 1975 to March 1978. Applicant's Brief, at 35-36.

incomplete to permit any conclusive finding as to what those motives were. Further, the Staff believes that even if the Licensing Board did correctly perceive those motives, there is no legal support for its conclusion that under the Commission's regulations, the period of suspension was unaltered by the filing of the amendment to the CP application.

A. The Licensing Board Erred in its Findings as to the Applicant's Motives in Filing its Request for Early Site Review

The Licensing Board's Decision recognized that the filing by Applicant of its request for Early Site Review might have operated to terminate the period of suspension, but reasoned that this depended upon the Applicant's motives in seeking an Early Site Review:

> The period of time during which there has been no prosecution of this proceeding by Applicant, depends on whether or not the request for Early Site Review falls within both the form and the substance of the regulations. This, in turn, depends on the motives of the Applicant in filing such request.

(Decision, at 6). After searching the record for an indication of the Applicant's motives in seeking an Early Site Review, the Licensing Board concluded that the Applicant did not have "a firm plan to construct nuclear facilities on the [Fulton] site" (id., at 7). On the contrary, relying in large part upon the Staff's unofficial minutes of a meeting held with the Applicant in May 1978,[42/] the Licensing Board found as follows (id., at 8):

> (1) Applicant had reached no decision as to whether or not to use the Fulton site for a nuclear facility; (2) Applicant

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42/ "Summary of Meeting Held on May 11, 1978 to Discuss Plans for an Early Site Review of the Fulton Generating Station Site", by Richard P. Denise, Assistant Director for Special Projects, Division of Project
(FOOTNOTE CONTINUED ON NEXT PAGE)

had reached no decision as to the type of facility it would construct, if it decided to use the site; (3) site banking was not permitted under Pennsylvania law; and (4) because of the scarcity of suitable sites, Applicant's motive in seeking an Early Site Review was to maintain the uncertainties as to possible use of the site until a decision should be reached at some future time, possibly in 1983.

From our study of the record, we conclude that Applicant's request for an Early Site Review was for the purpose of preventing termination of this proceeding, and not for the purpose of expediting it. It does not conform to the substance of the pertinent regulations, and did not stop the running of the Applicant's suspension of prosecution of the proceeding.

While the Staff believes that the record is so meagre as to permit no conclusive determination as to the Applicant's actual motives in seeking an Early Site Review, we believe that, to the limited extent that the Licensing Board found that in 1978 the Applicant had not yet determined whether or not to proceed with its prior decision to construct a nuclear reactor on the Fulton site, the Licensing Board may have been correct.[43/]

[42/] (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
Management, dated May 24, 1978 ("Meeting Summary"), enclosed with letter from Voss A. Moore, Assistant Director for Environmental Projects, Division of Site Safety and Environmental Analysis, to J.L. Everett, President, Philadelphia Electric Company, dated May 31, 1978 (PEC App. 12).

While the Staff does not disagree with the Applicant's characterization of the Meeting Summary as "hearsay" with respect to the Applicant's intentions (Applicant's Brief, at 50-52), the Staff believes that the Meeting Summary would have been admissible with respect to the Staff's perception of the Applicant's intentions. In any event, however, we do not believe that this issue needs to be addressed by the Appeal Board.

[43/] The Staff has not found any statement made after 1975, in the record or in the Applicant's Brief, which reflects a firm intention to construct a nuclear facility on the Fulton site. In this respect, the
(FOOTNOTE CONTINUED ON NEXT PAGE)

Notwithstanding this fact, the Staff believes that the Licensing Board totally failed to give due consideration to the evidence that upon filing for Early Site Review, the Applicant still clung to the nuclear option, upon which it had previously decided, as one possible alternative for meeting its generating demands in the 1990's. Thus, the Applicant's letter to the Staff of March 8, 1978, which sought to avert the Staff's filing of a motion to dismiss the proceeding, clearly stated that the Applicant's additions to baseload generation in the 1990's (or possibly sooner) would use "either coal or uranium as fuel".[44/] Further, the Applicant noted that "the economic choice is a uranium fueled plant and the prime candidate site for such nuclear generation . . . is the Fulton site" (id.). In the Staff's view, these statements can only be interpreted as reflecting a continued interest by the Applicant in the nuclear generating alternative which it had previously decided upon, although it now was considering other options as well.

Similarly, the Staff's minutes of the May 11, 1978 meeting with Applicant, relied upon so heavily by the Licensing Board, demonstrate that the

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43/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
Staff notes that the Applicant's argument that it had come to a "current decision to proceed with a nuclear application" (Applicant's Brief, at 19; emphasis added), and that it had "declared its intent, as clearly as words would permit, to seek an Early Site Review of the Fulton site in connection with its proposal to site two units there in the early to mid-1990's" (id., at 36; emphasis added), does not necessarily mean that the Applicant had, in fact, decided to construct a nuclear facility on the Fulton site. Rather, the only clear intention which may be gleaned from these statements is an intention to pursue, for some unspecified period, the prosecution of this CP application in the administrative forum, in the interest of preserving the Applicant's nuclear option and conserving the efforts and expense which had already been expended on its CP application.

44/ See n.20, supra, and accompanying discussion.

Applicant still had under consideration the construction of a nuclear plant at the Fulton site. Thus, those minutes reflect the statement by Applicant that while "it was not clear that a nuclear unit would be pu at the Fulton site, and that the type of plant would be decided in about 1983", nonetheless "it was clearly possible that the Fulton site could be utilized for a gas cooled reactor, as contemplated in the original application".[45/] In addition, the Applicant noted that it might decide to share the Fulton site with another utility, and that it wished to pursue an Early Site Review "because there is not an abundance of suitable nuclear sites" (id.).

Based upon these statements by the Applicant, which indicated that the Applicant continued to consider the Fulton site for the possible construction of a nuclear plant, and intended to seek an Early Site Review to qualify the site for such use, the Staff decided that it would not yet move to dismiss the Fulton CP proceeding.[46/] A fair reading of the Staff's Meeting Summary reveals that the Staff understood that the Applicant did not then have a firm plan to construct a nuclear plant on the site, and that it had not ruled out the possibility of building a coal-fired plant on the Fulton site. Nonetheless, the Staff considered these expressions of continued, although not unqualified, interest in constructing a nuclear plant at the Fulton site sufficient to warrant the continuation of the Fulton proceeding.

45/ Meeting Summary, at 2 (n.42, supra).

46/ Letter from Voss A. Moore, Assistant Director for Environmental Projects, Division of Site Safety and Environmental Analysis, to J.L. Everett, President, Philadelphia Electric Company, dated May 31, 1978 (PEC App. 12).

It is apparent that the Licensing Board simply misunderstood the Applicant's stated intentions -- and then compounded its error by attributing to the Staff the same misunderstanding. Thus, in its Decision, the Licensing Board asserts that when the Staff received the Applicant's letter of March 8, 1978,[47/] indicating that the Applicant would seek an Early Site Review, "[t]he Staff construed this to mean that Applicant had 'firm plans for early use of the Fulton site'" (Decision, at 3). The Staff disagrees with the Licensing Board's explanation as to what the Staff may have "construed", and notes that there is no evidence that the Staff ever held the view attributed to it by the Liensing Board. In support of its interpretation, the Licensing Board cites a letter from William J. Dircks to Congressman Robert S. Walker,[48/] in which Mr. Dircks noted that the Staff's decision not to file a motion to terminate the CP proceeding was "based on [its] view that Philadelphia Electric Company intends to use the Fulton site for a power plant . . ." (emphasis added). Clearly, this statement in no way supports the Licensing Board's explanation as to the Staff's state of mind. Thus, not only does Mr. Dircks' letter make no reference to any "early use" of the Fulton site, it nowhere indicates that the Staff believed that the construction of a nuclear plant, rather than any other type of plant, had been firmly decided upon by the Applicant.

47/ See discussion supra, at 7-8.

48/ Letter from William J. Dircks, Deputy Executive Director for Operations, to Hon. Robert S. Walker, U.S. House of Representatives, dated August 11, 1978 (PEC App. 14).

Similarly, the Licensing Board asserts that the Applicant's letter of January 16, 1979, in which the Applicant stated it would no longer file monthly status reports "[s]ince the Fulton construction permit application has now returned to the usual licensing path",[49/] was accepted by the Licensing Board "as meaning that the Applicant had decided to proceed with the construction of nuclear generating facilities at the site" (Decision, at 4). The Staff notes that not only does the Licensing Board's assumption in this regard appear to lack reasonable foundation, but the Licensing Board further attempts to attribute its misinterpretation to the Staff, as well (id.):

> The inferences of the Staff and the Board that Applicant had a firm plan to construct nuclear facilities on the site were based primarily on the assumption that Applicant's request for Early Site Review would meet both the form and the substance of the pertinent regulations (10 CFR § 2.600, et seq.).

Clearly, this "inference" does not support the Licensing Board's assumption that the Applicant "had decided to proceed with the construction of nuclear generating facilities at the site." Further, the Licensing Board's assumption is not supported by any fact in the record, and certainly not by any statement made by the Staff or the Applicant. In particular, the Staff notes that while it would have docketed the Applicant's request for Early Site Review only if it met "the form and the substance of the pertinent regulations", the Staff did not share the Licensing Board's mistaken assumption that first, the Applicant must have "had a firm plan to construct nuclear facilities on the site." Rather, the Staff recognized that the

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49/ See n.27, supra.

Applicant was still undecided as to whether it would construct a nuclear plant on the site, although it had not yet abandoned its prior intention to do so.

In summary, it is apparent that the Licensing Board incorrectly perceived the Applicant's intentions in filing its request for an Early Site Review. Rather than having either (a) "a firm plan to construct nuclear facilities on the site", or (b) the intention "to maintain the uncertainties as to possible use of the site . . . . for the purpose of preventing termination of this proceeding", the Staff believes that the Applicant wished to pursue its CP application and that it continued to be interested in constructing a nuclear plant, although its plans were no longer certain.[50/] Thus, while the Licensing Board may have been correct in finding that no firm decision had been made by the Applicant, the Licensing Board simply overlooked the uncontroverted evidence that the Applicant was continuing to give serious consideration to the nuclear option -- an alternative which it had previously decided upon and had not yet abandoned.

50/ This distinction is an important one. Taken as a whole, the Licensing Board's Decision seems to imply that the Applicant had concealed its motives in seeking an Early Site Review, that it had no serious intention of constructing a nuclear plant on the site, and that its attempt to prevent the termination of the proceeding constituted, in effect, an abuse of process. The Staff believes there is no basis for such a view. From the start, the Staff understood that in seeking an Early Site Review, the Applicant had not firmly decided upon constructing a nuclear plant, and that it might later decide to abandon the project. The Staff has found no evidence in the record that the Applicant concealed its motives in seeking an Early Site Review or that it in any way willfully deceived the Licensing Board. In our view, there is no basis for viewing the Applicant's request for an Early Site Review as an abuse of process.

B. The Licensing Board Erred in Concluding that the Applicant's Motives Caused Its Request for Early Site Review to Fail to Conform to the Commission's Regulations

Having found that the Applicant's request for an Early Site Review was filed "for the purpose of preventing termination of this proceeding, and not for the purpose of expediting it", the Licensing Board concluded that "[i]t does not conform to the substance of the pertinent regulations . . . ." (Decision, at 8). Accordingly, the Licensing Board held, in part, that "the Applicant's request for an Early Site Review is outside the purpose and intent of the pertinent regulations" (id.).

As indicated in our discussion supra, at 15-21, the Staff believes that the Licensing Board erred in its determination, on the facts, as to the Applicant's motives in requesting an Early Site Review. In any event, however, even if the Licensing Board was correct in its assessment of the Applicant's motives, the Staff believes that the Applicant's Early Site Review request fully conformed with the purpose and intent of the Commission's regulations and that the Licensing Board erred in its conclusion as to the intent required by the Commission's regulations.

The regulations governing requests for Early Site Review by an applicant for a construction permit are set forth at 10 CFR §§ 2.101(a-1) and 2.600 et seq. Those regulations permit the filing of a request for Early Site Review by an applicant without requiring any particular degree of specific intent to construct a nuclear facility. Indeed, 10 CFR § 2.101 (a-1)(1) permits an applicant to request an Early Site Review even before it has selected any particular reactor design, as long as it specifies "a

range of postulated facility design and operation parameters that is sufficient to enable the Commission to perform the requested review of site suitability issues."

Further insight as to the intent which must accompany the filing of a request for Early Site Review is provided by the Statement of Consideration issued along with the publication of the Early Site Review regulations.[51/] Thus, the Statement of Consideration indicates clearly that use of the Commission's Early Site Review procedures are available not just to applicants for construction permits who have firm plans for an "early use" of the site under consideration, but are available also to applicants whose initial construction plans have been postponed or might otherwise be cancelled but for the availability of the Early Site Review program:

> Within the last year or so, a number of utilities have found it necessary, for various economic and financial reasons, to cancel or postpone plans for the construction of nuclear power plants. It is the Commission's intent that the procedures for early review, hearing and partial decision of site suitability issues provided in these regulations for construction permit applicants shall be available to all qualified construction permit applicants, including applicants who did not request early review of site suitability issues at the time of their initial application but who later decide, following postponement of the target date for actual construction of the facility, that this procedure would be advantageous.

42 Fed. Reg. 22883.

The Staff believes that the foregoing passage from the Statement of Consideration clearly contemplates that where an applicant's construction

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51/ Statement of Consideration, "Early Site Reviews and Limited Work Authorizations", 42 Fed. Reg. 22882-885 (May 5, 1977).

plans have been postponed, regardless of the duration of that postponement or the degree of certainty that a nuclear facility will be constructed, the applicant is permitted to request an Early Site Review of some or all site suitability issues, prior to proceeding further with the other portions of its construction permit application. Indeed, the period of postponement could be rather lengthy; thus the partial initial decision on site suitability issues is to remain valid for five years after the Commission or Appeal Board completes its review (unless the site suitability hearing is reopened upon a finding of significant new information which substantially affects the earlier conclusions), or until the conclusion of the construction permit proceeding (where the applicant has submitted the required additional information). 10 CFR § 2.606(b)(2).[52/]

Similarly, the Staff notes that the Commission's Early Site Review procedures contemplate that the plant under consideration may not be needed for as much as 15 or 20 years. Thus, among the findings which may be requested in connection with a request for Early Site Review is the following:

> Without having specific cost information or having a specific year identified for the plant to come on line, a generic approach would be employed. It would be shown that there is a reasonable likelihood of a nuclear facility of a given MWe being needed . . . at some, not necessarily well specified, time in the future. A reasonable outer limit of time of need, say 15 or 20 years, should be used . . . . Very little analysis effort would be required, since the ESR action would not commit to a prescribed time for construction and only a finding of reasonableness regarding need for site would be made.[53/]

[52/] The five-year period may be extended by the Commission for up to one year, for "good cause shown". 10 CFR § 2.606(b)(2).

[53/] NUREG-0180, "Early Site Reviews for Nuclear Power Facilities, Procedures and Possible Technical Review Options" (May 1977), at A-VIII-1.

While the Early Site Review procedures contemplate the possible postponement of construction plans for five years or more,[54/] nowhere is the question of the applicant's specific intent addressed. Thus, the regulations, the Statement of Consideration, and even the Staff report (NUREG-0180, n.53 supra) issued to provide "guidance to persons who seek early review of site suitability issues",[55/] are all silent in this regard.

In the Staff's view, the Commission's Early Site Review procedures are available to a construction permit applicant whose initial construction plans have been postponed, as long as the Applicant continues to be interested in pursuing its application, even though events have transpired which create some uncertainty as to whether the Applicant will, in fact, construct the nuclear facility. In our view, no other explanation may be found for the Commission's expressed consideration for utilities which "have found it necessary . . . to cancel or postpone plans for the construction of nuclear power plants" (Statement of Consideration, supra at 23).

This view is consistent with the Appeal Board's decision in Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980). There, the Appeal Board reversed a decision by the Licensing Board which had found it lacked the authority to dismiss a CP application unless it was voluntarily withdrawn by the applicant. The Appeal Board remanded the case to the Licensing Board to consider the

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54/ The Staff notes further that the time required for its own review and for the conclusion of hearing procedures upon a request for Early Site Review will inevitably add one or more years to the process.

55/ Statement of Consideration, 42 Fed. Reg. 22884.

intervenor's assertion that the applicant had "abandoned any intention to build the North Coast facility" (12 NRC at 155; emphasis added).

Similarly, this view is entirely consistent with, and forms the basis for, the Staff's actions with respect to the Applicant's request for Early Site Review in this proceeding. Thus, notwithstanding the fact that the Applicant had informed the Staff that it was considering the construction of a facility using either coal or uranium as fuel, the Staff indicated its willingness to consider a request for Early Site Review.[56/] Similarly, after that request had been filed, the Staff opposed the Intervenors' motion to terminate the Early Site Review,[57/] and subsequently requested the Applicant to provide additional information in connection with the Early Site Review.[58/] These actions all reflect the Staff's acceptance, in principle, of the validity of the Applicant's Early Site Review request.

While the Staff believes that the Licensing Board failed to perceive correctly the Applicant's motives in requesting an Early Site Review, the Staff believes that even the motives which the Licensing Board erroneously attributed to the Applicant are consistent with the regulations. Thus, even if the Applicant had "no present intention to construct a nuclear facility" (Decision, at 5), but rather sought "to maintain the uncertainties as to possible use of the site until a decision should be reached at some future time, possibly in 1983" (id., at 8), the Staff believes that since the

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56/ See discussion supra, at 7-10.

57/ See n.30, supra.

58/ See discussion supra, at 11-12.

Applicant initially filed its construction permit application in good faith and still possessed some degree of interest in constructing a nuclear facility, its request for an Early Site Review is consistent with the Commission's regulations. As indicated in our discussion supra, at 23-25, a situation similar to this was contemplated by the Commission when it expressed consideration for utilities which "have found it necessary . . . to cancel or postpone plans for the construction of nuclear power plants." Similarly, since NUREG-0180, referred to in the Commission's Statement of Consideration as providing guidance to applicants, states that the Early Site Review procedures are available to an applicant who does not expect to have need for the plant for as much as 15 or 20 years (which long-range forecast is clearly subject to change), the Staff believes that a desire by the Applicant to obtain an Early Site Review and to defer making a final construction decision until "some future time, possibly in 1983", is not outside the intent of the Commission's regulations.

The Staff does not mean to suggest, of course, that the Commission's procedures are available to an applicant who does not and never expects to have an interest in constructing a nuclear facility, but seeks to utilize the Commission's procedures and resources for some other undisclosed reason of its own. Nor does the Staff mean to suggest that an applicant who willfully misrepresents itself to the Commission, to its adjudicatory bodies or to the Staff, is entitled to do so with impunity, safe from the imposition of proper sanctions by the Commission.[59/] Such practices clearly would

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59/ Cf. Virginia Electric & Power Co. (North Anna Power Station, Units 1&2), CLI-76-22, 4 NRC 480, 492 (1976) (material false statement or omission of material facts in application may result in revocation of license or permit under Section 186 of the Atomic Energy Act of 1954, as amended).

result in the needless expenditure of valuable Commission resources and may very well constitute an abuse of the regulatory process, and should not be tolerated.[60/] Here, however, the Applicant filed and prosecuted its CP application in good faith, and even after various intervening events created uncertainty as to whether it would, in fact, construct a nuclear facility, it continued to have some degree of interest in doing so. In these circumstances, the Staff believes that the Early Site Review procedures were properly available to the Applicant.

Finally, the Staff notes that here, the Applicant unquestionably could have resorted to seeking an Early Site Review under Appendix Q to 10 CFR Part 50, if it had been willing to terminate its construction permit application. Appendix Q procedures, which would lead to a Staff report without invoking the jurisdiction of the licensing boards, are available not just to utilities, but also to States and other interested persons who do not seek a permit to construct a facility. Here, however, the parties had already expended considerable effort in connection with the construction

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60/ Similarly, the Staff does not mean to suggest that the Licensing Board lacks the authority to dismiss a proceeding where the applicant has abandoned all intention to construct a nuclear facility. That issue has been addressed by the Appeal Board in Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980). There, the Licensing Board had concluded (LBP-80-15, 11 NRC 765 (1980)), inter alia, "that it lacked the authority to dismiss or deny a construction permit application pending before it even if it should clearly appear that the applicant had abandoned any intention to build the facility in question." ALAB-605, 12 NRC at 154. The Appeal Board rejected this conclusion, holding that neither the Atomic Energy Act nor the Commission's Rules of Practice require a Licensing Board "to retain on its docket in perpetuity an application which has become entirely academic," nor do they limit "the inherent authority of adjudicatory tribunals to dismiss those matters placed before them which have been mooted by supervening developments" (id., 12 NRC at 154).

permit application. The Staff submits that this effort should not have been required to be set aside and the construction permit application withdrawn, in order for the Applicant to pursue an Appendix Q Early Site Review -- which result would inevitably follow from the Licensing Board's self-proclaimed rule that when a construction permit applicant seeks an Early Site Review, it had better have a "present intention to construct nuclear facilities on the site" (Decision, at 6).

In sum, there is no basis for the Licensing Board's conclusion that the Applicant's motives were outside the intent and "substance" of the Commission's regulations, and clearly, no such basis is set forth in the Licensing Board's Decision. For all the above reasons, this portion of the Licensing Board's Decision must be set aside.

C. The Licensing Board Erred in Concluding that the Applicant's Request for Early Site Review Did Not Affect the State of Suspension of the Construction Permit Application

In its Decision, the Licensing Board concluded, without citation to any authority, that since the Applicant's motives in seeking an Early Site Review were allegedly improper, its request did "not conform to the substance of the pertinent regulations, and did not stop the running of the period of Applicant's suspension of prosecution of the proceeding" (Decision, at 8). The Staff believes that this unsupported conclusion is plainly wrong, and that the Licensing Board's own decision in August 1979, denying the Solanco Intervenors' petition to terminate the CP proceeding and quash the Early Site Review,[61/] effectively precludes such a determination at this time.

61/ See n.31, supra.

As indicated in our discussion supra, at 6-10, the Applicant filed its request for Early Site Review after having notified the Staff of its intent to pursue that course of action and after the Staff had indicated its willingness to consider such a request. The Early Site Review request, filed in December 1978, was accompanied by two thick volumes of materials prepared and assembled by the Applicant pursuant to regulatory requirements. At no time prior to the filing of that request had any indication been given to the Applicant by either the Staff or the Licensing Board that its Early Site Review request was improperly motivated or outside the intent and "substance" of the Commission's regulations. Accordingly, the Applicant undertook to expend considerable effort in the preparation of its Early Site Review request for filing.

Similarly, after the Applicant's request for Early Site Review had been filed, absolutely no indication was given to the Applicant by either the Staff or the Licensing Board that in filing its request, its motives would preclude the request from conforming to the intent or "substance" of the Commission's regulations. To the contrary, the Staff indicated that certain other information was required (relative to the alternative sites discussion), while no indication was given that other portions of the request or the request, in toto, was unacceptable.

At the same time, the Licensing Board, itself, never indicated that a question existed as to the validity of the Applicant's having filed an Early Site Review request. To the contrary, in 1979, it refused to quash that request and terminate the proceeding when presented with an opportunity to do so upon the motion of the Solanco Intervenors. The Licensing Board's present

decision is based entirely upon information which was available to and known by the Licensing Board in 1979, when it chose to permit the proceeding to go forward. While the Licensing Board was not previously presented with an issue of intent, that issue could have been raised long before December 1980, and the Applicant would have had a better opportunity to address the issue and avert a dismissal with prejudice.

Finally, the Licensing Board has provided no legal basis to support its conclusion that because the Applicant's Early Site Review request was improperly motivated, it was ineffective and did not change the state of suspension which had existed since 1975. In the Staff's view, no such legal authority may be found to exist. Rather, the Licensing Board's pronouncement is derived solely from its own totally independent view of the way the Commission's rules should be applied. There is no basis in the Commission's regulations or in the Statement of Consideration which supports the Licensing Board's action.

II. THE LICENSING BOARD ERRED IN CONCLUDING THAT THE PERIOD OF SUSPENSION REQUIRED DISMISSAL WITH PREJUDICE

Having concluded that the Applicant's request for Early Site Review "did not stop the running of the period of Applicant's suspension of prosecution of the proceeding" (Decision, at 8), the Licensing Board held that "there has been a period of suspension and uncertainty since 1975. . . . [and] that the period of suspension is too long to justify a dismissal without prejudice" (id.). In our view, not only is the premise stated by the Licensing Board (as to the length of the suspension) unsupported in fact or in law,[62/] but, further, the Staff believes that there is no basis for the Licensing Board's conclusion that a five-year period of suspension required dismissal with prejudice.

The terms upon which an application may be withdrawn are set forth in 10 CFR § 2.107(a). That regulation provides as follows:

> 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.

While this provision does not set forth a particular standard by which the licensing boards are to be governed, it has been generally held that an

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62/ See discussion supra, at 29-31. The Staff notes that in another context, it has been held that there is "no legal requirement for an Applicant to proceed with the processing of its [construction permit] application in accordance with any set time scale." Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), LBP-75-56, 2 NRC 565, 567 (1975).

application should be permitted to be withdrawn without prejudice unless that would result in prejudice to the public interest or substantial prejudice to a party to the proceeding. Boston Edison Co. (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 AEC 324, 327 (1974).

This rule, favoring the dismissal of an application without prejudice, is consistent with and founded upon the rule governing litigation in the federal courts.[63] Thus, in Jones v. Securities and Exchange Commission, 298 U.S. 1, 19 (1936), the Supreme Court stated:

> The 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.[64]

There, the Supreme Court reversed a decision by the Securities and Exchange Commission (which had refused to permit the withdrawal of an application to register securities), on the grounds that a voluntary dismissal without prejudice was to be permitted absent a showing of prejudice to the public

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[63] The rule is now embodied in Rule 41(a), Fed.R.Civ. P.

[64] Cf. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217 (1947) (plaintiff possesses unqualified right to voluntary dismissal without prejudice even after trial, absent prejudice to opposing party "other than the mere prospect of a second lawsuit"). Indeed, it has been held an abuse of discretion to require that the voluntary dismissal of a suit be with prejudice, when the defendant's only harm would be "the mere prospect of a second lawsuit." Durham v. Florida East Coast Ry., 385 F.2d 366, 368, 369 (5th Cir. 1967), quoting 2 Barron and Holtzoff, Federal Practice and Procedure, § 912 (Wright's ed). Accord, Le Compte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976) (dismissal without prejudice should be granted absent "some legal harm" to the defendant).

interest or to a party to the proceeding (other than the prospect of relitigation).65/

The principle enunciated by the Supreme Court in Jones was expressly adopted by the Licensing Board's decision in Pilgrim, supra. Thus, in refusing to adopt the request of an intervenor and interested State that the Pilgrim 3 application be dismissed with prejudice, the Licensing Board held that the public interest is of paramount importance and must be protected, absent a showing of "substantial" prejudice to one of the litigants other than the mere prospect of future litigation (8 AEC, at 327). The Licensing Board concluded as follows (id.):

> 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, such as is apparently requested . . . . 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

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65/ In Jones, the Supreme Court noted that no other person was affected by the withdrawal of the application:

> The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned.

298 U.S., at 23.

> because of alleged "inconvenience or burden" to potential intervenors. (See Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936) . . . .)

When these principles are applied to the Fulton proceeding, the Staff believes that the dismissal with prejudice is contrary to applicable Supreme Court and Licensing Board precedent. An examination of the York Intervenors' request for dismissal with prejudice[66/] reveals only the following allegations of harm to them -- all of which has already been incurred:

> For seven years, this application has remained pending. Time, effort, research, and money have been expended by . . . the unfunded public-interest Intervenors . . . . There is no recompense proposed by Applicant for other parties who have incurred major costs . . . . There are members of our organization whose physical and mental health has been adversely affected in consequence of the uncertainties imposed by the Applicant's refusal to abandon this nuclear power project. Their real property has been in limbo in terms of sale price of land in the immediate vicinity of the proposed reactors . . . .

In the Staff's view, all of the allegations of harm to the York Intervenors, even if taken as true, have been incurred by them already. The time, effort and expense alleged to have been spent by them cannot now be recovered, regardless of whether the application is dismissed with or without prejudice. Similarly, any suffering which may have been incurred by their members cannot now be erased by a dismissal with prejudice, nor can any impact which may have resulted to their real property values be dispelled thereby.[67/]

66/ York Intervenors' Response, n.2 supra (PEC App. 25), at 1-2. No further allegation of harm is made by the Intervenors in their brief on appeal. See "Brief of the Intervenors Supporting the Decision to Terminate Fulton 1&2 With Prejudice," filed June 1, 1981.

67/ The Staff is unaware of any individuals represented by the York Intervenors who own real property within the "immediate vicinity" of the

(FOOTNOTE CONTINUED ON NEXT PAGE)

Furthermore, it is altogether uncertain that a dismissal with prejudice would preclude the filing of another application or Early Site Review request at some later time.[68/] Thus, the impact, if any, which may have resulted upon property values could very well continue into the future notwithstanding the dismissal with prejudice.

Juxtaposed against this lack of prospective prejudice to the York Intervenors is the clear and substantial prejudice which may be experienced by the public interest if the Licensing Board's decision is allowed to stand.[69/]

67/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
Fulton site, nor are any such members identified by the York Intervenors. Only one of the three groups comprising the York Intervenors (York Committee for a Safe Environment) even alleged generally that some of its members lived or owned property in the "immediate neighborhood" of the Peach Bottom and Fulton sites. See "Petition for Intervention", dated January 10, 1974. To our knowledge, no such person was ever specifically identified. On the other hand, the Solanco Intervenors, who did not oppose the Applicant's motion to withdraw without prejudice, include persons whose real property lies within the very exclusion area proposed by the Applicant. See "Petition for Intervention" by George W. Hough, filed on January 5, 1974.

68/ While the Staff recognizes that this issue need not be addressed at this time, we wish to note that even had there been a decision on the merits adverse to the Applicant, following a hearing, there would not necessarily be a bar to reapplication should there be a change in the conditions which led to the denial of the license. Thus, it has been held that the dismissal of an administrative proceeding does not prevent the relitigation of similar issues where the facts or the law 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 no 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).

69/ The State of Maryland, which lies three miles from the Fulton site and which participated in this proceeding as an interested State (see n.7, supra), has recently filed a pleading which supports the Applicant's
(FOOTNOTE CONTINUED ON NEXT PAGE)

As recognized by the Licensing Board in Pilgrim, supra at 34, the public's need for power is of paramount importance, and the public should not be deprived of a needed utility service because of an alleged "inconvenience or burden" to an intervenor, unless that inconvenience or burden is substantial.

The Staff believes that the York Intervenors have failed to demonstrate any prejudice to them which would result from a dismissal of the proceeding "without prejudice". All that has been alleged by them is that some harm was incurred by them during the past, while the CP application was pending. In contrast, the Staff believes that the public interest requires that the proceeding be dismissed "without prejudice", in order to preserve the Fulton site for a nuclear power plant, without the cloud of legal uncertainty created by a dismissal 'with prejudice", in the event that a future determination is made that the public convenience and necessity requires the construction of a nuclear reactor on the Fulton site. Accordingly, the Staff believes that the Licensing Board's determination that a dismissal "with prejudice" was

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69/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
appeal from the Licensing Board's Decision. Therein, the State of Maryland concludes:

> Maryland . . . finds no cause whatsoever for the Fulton site to be summarily eliminated from possible future consideration for a commercial nuclear generating station . . . . [T]he Applicant should not be prevented from attempting to show, at a later date, that the Fulton site represents a good location for a commercial plant from an economic, safety and environmental standpoint, and is therefore entitled to a license at that time.

"Response of the State of Maryland In Support of Exceptions Filed by Applicant to ASLB Decision and Order Dated February 27, 1981," filed June 1, 1981. To the Staff's knowledge, no official position has been expressed by the Commonwealth of Pennsylvania, which also participated in this proceeding as an interested State.

required, should be set aside as unsupported by the facts and contrary to controlling legal precedent.

In addition, in a proceeding raising issues similar to those presented here, the Licensing Board recently ordered the dismissal of a CP application without prejudice, notwithstanding the efforts of an intervenor to have the dismissal entered with prejudice. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-81-__, 13 NRC ___ ("Memorandum and Order", February 18, 1981).[70/] There, the intervenor alleged that the applicant "had clearly abandoned any intention of constructing the nuclear plant" (id., at 2; emphasis added), and had deceived the Licensing Board and the parties as to its intentions as evidenced by its having commenced reverse expropriation procedures, "while continuing to pursue the application for over four years" (id., at 3).

The Licensing Board rejected these assertions, noting that the applicant "denied that it had engaged in any deceitful, wrongful actions" (id., at 4), and had advised the Licensing Board and parties in 1975 "that it had decided to postpone indefinitely the nuclear plant project", that "it was discontinuing all design and fabrication efforts and that it would explore the

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70/ The Licensing Board's North Coast decision is presently awaiting appeal; the appellant's brief is due to be filed by July 3, 1981. See "Order" entered by Secretary to the Appeal Board, dated June 1, 1981. The Licensing Board's decision was entered upon the applicant's motion to withdraw its application and dismiss the proceeding without prejudice, filed after the Appeal Board had entered its decision requiring a determination as to the merits of the intervenor's "Petition Requesting Evidentiary Hearings to Request Applicant to Show Cause Why Their Application Should Not Be Dismissed For Lack of Intention to Build." Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980), rev'g. LBP-80-15, 11 NRC 765 (1980).

possibility of selling the plant to another utility", but that it was convinced "that nuclear power was the only commercially viable alternative for power generation and indicated that it wished to discuss procedures leading to a determination upon site suitability" (id., n.2 at 4-5). In addition, the Applicant advised the Licensing Board in 1978 that:

> it had terminated the contract with the nuclear steam supply system contractor but that it had not abandoned the nuclear option; that it would continue the generation expansion study considering nuclear power as a commercially available alternative; and that the Staff should complete and issue its site safety review.

(Id.). One year later, in December 1979, the applicant stated that "the next addition to its generating system would be a 300 megawatt coal burning unit to meet its immediate needs, and thus, that consideration of nuclear capacity would be deferred for at least one year, and in all likelihood, for a couple of years" (id.). Based upon these facts, the Licensing Board in North Coast concluded that the applicant had not concealed its intentions and that dismissal with prejudice was not warranted.

The Staff believes that in this proceeding, as in North Coast, the Applicant's interest in pursuing its construction permit application at a time when it had not decided for certain whether it would construct the facility, constituted sufficient intent as not to require a withdrawal of its application. Further, the Staff believes that here, as in North Coast, the Applicant's intentions had been properly disclosed to the Staff and the Licensing Board, and that the sanction of a dismissal with prejudice is inappropriate.

III. THE LICENSING BOARD'S DISMISSAL OF THE FULTON CP APPLICATION WITH PREJUDICE CONSTITUTES AN UNWARRANTED AND EXCESSIVE PENALTY

In dismissing this proceeding with prejudice, the Licensing Board appears to have been motivated by a sense of anger over the Applicant's delay in prosecuting its application, as well as by a sense of compassion for the intervenors who alleged that "the uncertainties as to the ultimate use of the proposed site have worked a hardship upon them, causing personal anxieties and preventing optimum uses of the land or sale thereof" (Decision, at 3). In attempting to reach an equitable solution, however, the Licensing Board appears to have set aside applicable legal principles and meted out a penalty which is both unwarranted and excessive.

As we discussed supra, at 30-31, the Applicant had no warning at any time since it first expressed an interest in obtaining an Early Site Review, that its request would be viewed as improper some three years later. Rather, both the Staff and the Licensing Board tacitly accepted, in principle, the validity of the Applicant's request for an Early Site Review. Thus, the Staff raised no objection to reviewing the substance of its request, nor did the Licensing Board quash the request when presented with an opportunity to do so.

Furthermore, while the Applicant certainly is responsible for significant delays in this proceeding, much of the delay cannot properly be attributed to the Applicant. The original cause for suspension of the proceeding was the unilateral cessation of work by the Applicant's reactor supplier. Other causes for the delay include an unexpectedly sharp reduction in the Applicant's forecasted need for power, the uncertainty resulting

from the events at Three Mile Island, and the unavoidable delay of one-and-one-half years after the request was submitted before the Staff formally advised the Applicant that certain other information was required before the Early Site Review request would be docketed.[71/] Thus, the result reached by the Licensing Board appears to lay blame upon the Applicant for delays which were not altogether of its making.

In addition, as the Licensing Board, itself, noted, a dismissal without prejudice would have been available to the Applicant if it had filed its motion for withdrawal promptly, and it later could have filed a further application for the Fulton site (Decision, at 4).[72/] In our view, the Licensing Board's Decision puts the Applicant in a worse position than if it had either filed a motion for withdrawal more promptly, or had gone ahead with its CP application through hearing.

The Licensing Board's refusal to dismiss the proceeding without prejudice does not appear to be based upon a desire to promote the interests of the public or to prevent potential prejudice from being incurred by the Intervenors. Thus, the Licensing Board observed that a dismissal

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71/ While the Staff had advised the Applicant informally, in 1979, that its alternative site discussion was deficient, no specific information or supplementation appears to have been requested by the Staff before June 1980. See n.33, supra.

72/ Indeed, there is no question that a dismissal without prejudice would permit the filing of a reapplication at some later time. See, e.g., National Labor Relations Board v. Basic Wire Products, Inc., 516 F.2d 261 (6th Cir. 1975); Wilwording v. Swenson, 502 F.2d 844, 848 (8th Cir. 1974), cert. denied, 420 U.S. 912 (1975).

without prejudice would have resulted in no prospective harm to the Intervenors:

> It is true that a prompt dismissal of the application after the events of 1975 would not have prevented a later filing of an application by Applicant or by others for construction permits using the same site. This possibility is always present at all sites throughout the nation and is so vague and nebulous as not to present the problems which the Intervenors have encountered.

(Decision, at 3). Notwithstanding its recognition, however, that a dismissal without prejudice would cause no harm to the Intervenors, the Licensing Board refused to order such a dismissal when the Applicant voluntarily requested it in 1980. In doing so, the Licensing Board clearly sought to penalize the Applicant for alleged past sufferings by the Intervenors, rather than to protect the Intervenors from further harm -- thus, in 1980, as in 1975, a dismissal without prejudice would present only a "vague and nebulous" risk that a reapplication might be filed, and, accordingly, no harm would be incurred by the Intervenors upon a dismissal without prejudice.

The Staff believes that the Licensing Board's Decision ignored the public interest, was not needed to protect the Intervenors from prospective injury, and only served to penalize the Applicant unfairly. In our view, the dismissal without prejudice constitutes an unwarranted and excessive penalty, and should be set aside.[73/]

[73/] The Staff is not persuaded by the Applicant's argument that the Licensing Board's Decision constitutes an unconstitutional taking of property (Applicant's Brief, at 59-63), but does not believe that this issue needs to be addressed by the Appeal Board. Similarly, we do not believe that the Applicant's due process arguments (id., at 46-47, 56-59) need to be addressed by the Appeal Board.

CONCLUSION

For the reasons set forth more fully above, the Staff believes that the Licensing Board's Decision should be reversed and the proceeding dismissed without prejudice.

Respectfully submitted,

Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 11th day of June, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PHILADELPHIA ELECTRIC COMPANY	)	Docket Nos. 50-463
	)	50-464
(Fulton Generating Station,	)	
Units 1 and 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with § 2.713(b), 10 CFR Part 2, the following information is provided:

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Name of Party	-	NRC Staff U.S. Nuclear Regulatory Commission Washington, DC 20555

Sherwin E Turk

Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 11th day of June, 1981

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(Fulton Generating Station, Units 1 and 2)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN SUPPORT OF EXCEPTIONS OF PHILADELPHIA ELECTRIC COMPANY TO ASLB DECISION AND ORDER DATED FEBRUARY 27, 1981" and "NOTICE OF APPEARANCE" for Sherwin E. Turk, 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 11th day of June, 1981:

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