

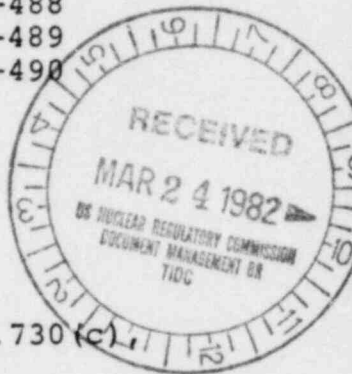
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD MAR 22 10:39

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In the Matter of)
DUKE POWER COMPANY) Docket Nos. STN 50-488
(Perkins Nuclear Station,) 50-489
Units 1, 2 & 3) 50-490

MOTION FOR LEAVE TO
FILE REPLY TO INTERVENORS'
"RESPONSE TO MOTION TO WITHDRAW"



Duke Power Company (Duke), pursuant to 10 CFR § 2.730(c), requests that it be granted leave to file a reply to Intervenor's (Mary Apperson Davis, et al.) "Response to Motion to Withdraw," dated March 11, 1982. In support of this motion, Duke states as follows:

1. On March 2, 1982, Duke filed a motion in this proceeding asking the Board to permit Duke to withdraw without prejudice its application for construction permits for the Perkins Nuclear Station. Intervenor's March 11 pleading is styled as a "Response" to Duke's motion to withdraw. However, the Response is in fact a motion for additional relief. Although the Commission's rules do not permit replies to answers as of right, the rules do contemplate that leave to file a reply may be granted upon motion. See 10 CFR § 2.730(c); Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), ALP-469, 7 NRC 470, 471 (1978). As shown below, there is good cause for granting such a motion in this instance.

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2. Intervenors' March 11 response makes several requests. The Board is asked to dismiss this proceeding with prejudice, or, alternatively, if the Board terminates the proceeding without prejudice, Intervenors ask the Board to vacate all of its previous decisions in the proceeding. Moreover, the Board is asked to order Duke to pay Intervenors' attorneys' fees and costs.

There can be no question that Intervenors' Response seeks affirmative relief from the Board and goes beyond the terms of Duke's March 2 motion. Fairness requires that Duke be allowed to respond. Moreover, if allowed to reply, Duke will show that each aspect of Intervenors' position is contrary to well-established Commission policy and controlling legal standards.

Accordingly, Duke respectfully requests that it be granted leave to reply to Intervenors' March 11 Response to Motion to Withdraw. Duke would be prepared to file a reply to Intervenors' pleading within 14 days of receipt of the Board's order granting leave to reply.

3. Duke would call the Board's attention to a matter which it might wish to consider prior to ruling on Duke's request to file a response. Specifically, Intervenors' Response is wholly devoid of any citation to any legal authority which could support the relief which they request, and thus Intervenors,

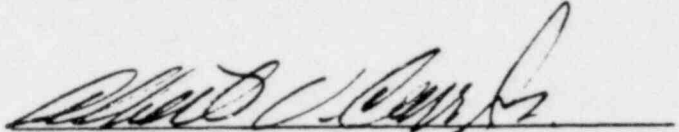
as proponents, have failed to meet their burden. See, 10 CFR § 2.732.

For example, Intervenors ask the Board to dismiss the application with prejudice. However, Intervenors' pleading is silent with respect to two recent Appeal Board cases which bear directly on this issue, with particular emphasis on the showing which must be made by the proponent of such a motion. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 957 (1981) and Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 11 NRC _____ (December 7, 1981). Moreover, the Response likewise fails to provide any authority whatsoever to support its request that this Licensing Board order Duke, a private entity, to pay some unspecified sum as "reasonable attorneys' fees and costs" to Intervenors. Such a request would appear to need extensive briefing by Intervenors in light of the fact that the NRC, as a government agency, is not even authorized to order the payment of any intervenor expense from public funds. See the Comptroller General's opinion attached to Board Notification of December 16, 1980.

Under these circumstances, this Board may well consider it more appropriate to direct Intervenors to provide a legal brief on their "motion" setting forth in full the bases for the relief they seek, rather than acting at this time on Duke's

request to file a response.* / To do otherwise is to shift
to Duke a burden more properly Intervenor's.

Respectfully submitted,



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March 19, 1982

* / If such a legal brief is ordered, Duke requests the
opportunity to respond to such.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Motion for Leave to File Reply to Intervenor's 'Response to Motion to Withdraw'" dated March 19, 1982 in the captioned matter have been served upon the following by deposit in the United States mail this 19th day of March, 1982:

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