UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE TO APPLICANTS' MOTION TO WITHDRAW

At the outset counsel for the Intervenors is reminded of the comment of the seasoned lawyer who suggested that sometimes it was worse to win a case as the winner had the laborious task of constructing the final terms of the judgment. It has been financially, professionally and emotionally painful for the Intervenors to keep their faith and maintain their calm over the past eight years of this struggle.

The Applicant has generalized certain features in order to distort the true nature of these proceedings. Secondly, the Applicant has stated conclusions and assertions rather than deal with the anlaysis required to locate and understand the law on the issues presented. Finally, the Applicant has treated the specific allegations concerning the hiring of an economist and peak-load pricing as resulting from these proceedings as "nonsense" despite the undeniable testimony in the record to the contrary which will be cited.

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THE TRUE NATURE OF THESE PROCEEDINGS

The Applicants' Motion repeatedly asserts a conclusion that the Applicant was successful on most issues. This is an over-simplification which ignores what has occurred. The Appeal Board in this matter has vacated all of the partial initial decisions. None were affirmed by the Appeal Board. The Motion to Withdraw by the Applicants concedes that it was dead wrong in at least two areas: The cost of construction and the demand for electricity. Therefore, the Applicant must acknowledge that it was wrong on matters which involved economic considerations and that the Intervenors were right.

What were the facts on the demand question? Did Intervenors make a contribution which educated the Applicant and the Board? When Duke Power Company first proposed the Perkins Plant it predicted a peak electricity demand of 14,524 megawatts for the year 1980. The actual peak demand for 1980 was 10,364 megawatts. This difference of 4,160 megawatts exceeded by several hundred megawatts the total projected capacity of the proposed Perkins Plant. In spite of this information in 1980, the Applicants did not move to withdraw until February of 1982.

The Intervenors at the first hearing of this case in April of 1976, presented Dr. Miles Bidwell who was a Professor of Economics at Wake Forest University and who presented econometric projections which indicated that the rise in utility rates from 1971 to 1975 would bring about a condition known as negative elasticity and which would cause a decline in the increase of electricity demand. Professor Bidwell also testified in regard to the need for peak load pricing and how this should be instituted by the Applicant.

Professor Bidwell had given similar testimony in October of 1975, when the Applicant had its first series of hearings on the Perkins Plant before the North Carolina Utilities Commission. Note the following exact testimony beginning at Page 372 of the Transcript of this case which occurred at the hearings in April of 1976, in Mocksville, North Carolina:

> Question to Vice President Frans Beyer. Well, who have you hired an outside consultant to do this?
>
> Answer by Vice Preident Franz Beyer. No Sir. No Sir. Hopefully I will hire an economist. I hope that will be done by the time I get back to Charlotte today. We are negotiating for such a person. We are investigating and reviewing models, econometric models, that have been developed principally by public service electric and gas in New Jersey. We are now in the stage of attempting to learn something about this.
>
> Question to Vice President Franz Beyer. Does your last comment imply that you don't know anything about it at this point?
>
> Answer by Vice President Frans Beyer. I am not sure that anyone really knows too much about it.

At hearings before this Licensing Board in April of 1977, the record beginning at Transcript Page 1507 reads as follows:

Question. Does Duke Power have an economist?

Answer. Yes Sir.

Question. Is he available?

Answer. He is not here with us, No.

Question. Is he in Charlotte?

Answer. Yes.

Question. And how long has he been working for Duke Power?

Answer. The economist working on the econometric model right now has been with us for about a year.

Question. Is that the first time Duke has had an economist?

Answer. We have had other people do the econometric work but this is an individual hired specifically for that purpose.

Question. And that since this hearing was last year, you hired an economist?

Answer. Well, we saw a need for one about a year ago. (Emphasis added)

Question. But you don't have any evidence from this economist for this hearing?

Answer. We have not implemented peak load pricing yet and we can't determined what the effect is until we find out.

Question. But your purpose here today is to bring us up to date with Duke Power's figures and what it knows about this matter. Isn't that correct?

Answer. That's correct.

Question. Well wouldn't it have been a good idea to bring your new economist up here and let us know what he is doing for Duke Power and therefore the rest of us?

Answer. He is still exploring the whole idea.
We don't know yet.

This section of the record plainly shows that Duke hired an economist to work on econometric matters as a result of the evidence and argument presented by the Intervenors in this case. This also shows that peak-load pricing which is now being implemented by Duke Power Company was also brought about at least in part by the evidence and arguments presented by the Intervenors. This reference to the exact record in this case certainly reveals that the Intervenors' position cannot and must not be dismissed as "nonsense".

On the environmental and water questions, the Applicant is again guilty of a gross over-simplification. These issues along with the question of alternative sites were never determined on appeal. It is also important to note the significant changes in the Applicants' proposal from its original stance on the water and environmental question and the final proposals. While Applicant will deny that Intervenors changed these matters, let us review the record.

When the Applicant first proposed the Perkins Plant in the year 1974, it proposed to withdraw up to fifty percent of the Yadkin River flow down to a minimum flow of 330 cubic feet per second and an impoundment of 4,550 acre feet. After the evidence and arguments of the Intervenors, the Applicants' proposal was reduced to twenty-five percent of the river flow and a larger makeup reservoir of 39,800 acre feet was required and net withdrawal could not go below a minimum of 1,000 cubic feet per second. The original minimum figure had been 330 cubic

feet per second and the State of North Carolina had agreed to 880 cubic feet per second. Therefore, it is obvious that Intervenors had a great impact on the water questions.

In order to fully understand the concerns of the Intervenors about water, it is helpful to consider language which Duke Power Company used in its argument before the Fourth Circuit Court of Appeals in Appalachian Power Company, et al v. Train, 545 F.2d 1351, in which it argued:

> Evaporating cooling towers on a 1,000 megawatt plant may consume as much as 50 to 70 million gallons of water per day.

That language is taken from a brief filed by the Applicant and indicates almost four times as much of evaporation of water as the evidence presented before this Licensing Board. Also, the final environmental impact statement indicated a drastic effect on the lake level of High Rock Lake a short distance downstream from the proposed Perkins Plant.

Confronting such a potentially drastic proposal, the Intervenors had to rely on stagegically located and educated volunteers. Of the six major witnesses presented by the Intervenors only one was paid for his time and expenses. Mr. Lawrence Pfefferkorn, an experienced real estate appraiser, testified by deposition and at the hearing. Mr. Pfefferkorn also participated in some of the inspections of alternate sites and was a source of detailed information about the Yadkin River and High Rock Lake. He is now deceased and will not be available if this controversy ever arises again. Dr. Miles Bidwell

held a Ph.D. in Economics from Columbia University and was a Professor at Wake Forest University. He gave a deposition and testified at least two separate occasions in these proceedings. He also developed information in regard to health and safety in order to prepare for those aspects of the proceedings. Dr. Bidwell was denied tenure shortly after his participation in these hearings and is now no longer a resident of North Carolina and therefore it would be extremely difficult for him to provide assistance in any future controversy. Mr. David Springer, who has a law decree from Harvard University, provided factual and legal help in this matter and testified as a witness and is presently available. Given his age, it is not likely that Mr. Springer would be available at a consideration of this matter some years in the future. Mr. Jesse Riley was also a witness for the Intervenors and on account of his age, could not be expected to provide help for many years in the future. Dr. Kepford in Pennsylvania, provided assistance on the question of radon as that question was given exceptional status in these proceedings for a period of time. It is doubtful that Dr. Kepford would be available on such a voluntary basis in the future. In short, only our paid witness and Dr. Lipkin have at the present time a reasonable prospect of being available for a future consideration of this matter. Attached to this Response is an Affidavit signed by the undersigned which indicates the fees, expenses and costs involved in this matter and also indicates what the total fees, expenses and costs would be if the unique

set of volunteer participation had not been available. These figures and the consideration of the specific contributions of each volunteer witness in this matter, show the substantial prejudice in time, money and circumstance which has been suffered by the Intervenors and its allies in this matter.

Analysis of the record in this matter shows the following information in regard to the imput of Applicant, Staff and Intervenors:

1. The Applicant presented 114 pages of evidence, the Staff 151 pages and the Intervenors 114. The Intervenors cross-examined for 954 pages, the Staff for 137 pages and the Applicant for 158 pages.

2. This Board engaged in questioning of substantive evidence for 935 pages.

3. In terms of public participation, there were 519 pages of public witnesses which included 110 witnesses against the Perkins Plant and 36 witnesses for the Plant.

The above survey indicates the depth and the breath of these proceedings. We believe the extensive nature of these proceedings weighed against the Applicants' decision to terminate this matter, should lead to a final and conclusive judgment.

This recourse to significant facts in the record is necessary in order to show that the Intervenors accomplished much in these proceedings and developed information and arguments which were successful and valuable to Intervenors private interest and the public interest. Having these actual facts in mind, we must now turn to the cases and the general principals of law to which the facts must be applied.

THE LAW OF DISMISSAL

This Licensing Board clearly has the discretion to attach the appropriate conditions to a withdrawal or a dismissal of this application. See 10 CFR 2.107(a) and Fulton ALAB 657. It is important to note that the Applicant is the party asking for a dismissal. This dismissal is being asked for in the full knowledge that this Board may impose appropriate conditions. The evidence above indicates that the Applicant knew in 1980 that its projections were out of line and that the proposed plant was unnecessary and could not be sustained. In spite of this the Applicant continued for almost two years in its efforts which required Intervenors to respond and to carry out an appeal in 1981. This activity was clearly vexatious to the Intervenors. The Appeal Board in both Fulton and North Coast set out the requirements for a dismissal with prejudice. The requirements are basically that public or private harm be shown. In both of those cases, the inquiry by the Licensing Board had not proceeded through the multitudinous stages which we have followed in this case. The private and public harm in this case is the strenous and extensive imput which was expended by the Intervenors and numerous volunteers and members of the public at each step of this proceeding. The involvment which is set out earlier in this Response is the equivalent of several trials and the Applicants' Motion at this time is the equivalent of a decision not to prosecute its action. In cases where a defendant has been required

to file pleadings and to participate in the preparation for trial only and the plaintiff is not diligent in pursuing his case, the Courts have ruled that a dismissal with prejudice was proper and was not an abuse of discretion. Cherry v. Brown-Frazier-Whitney, 548 F.2d 965,(1976). It is significant in the above case that the defendants were not put through a trial but did participate in discovery and the case had been pretried. After the discovery in that case was completed in 1972, the plaintiffs took no action to have the case tried. On September 27, 1973, the District Judge wrote to counsel giving them ten days to advise on the status of the case. The attorney for the plaintiffs failed to respond to request by the defendant's counsel in regard to the status of the trial and on October 31, the District Judge ordered the case dismissed for failure to prosecute by the plaintiffs. The Court of Appeals upheld the District Court. In that case the plaintiffs never conceded that they did not want to prosecute the action but just failed to do so. The Applicants here have admitted that they do not wish to prosecute the action.

The public harm in this matter is the damage to our legal processes. If an Applicant can be allowed to put an Intervenor and other concerned members of the community through eight years of worry, expenditure and anticipation and then come forward with the admission that it was all unnecessary, then our faith in the system has been impaired. If the dismissal ends the matter, then our faith is restored. The private harm is clearly shown in the time and effort which has been devoted to this cause.

This devotion cannot be recompensed in any complete way and therefore the harm is permanent. Furthermore, it is highly unlikely that volunteers, including the helpful allies will be able or available if the muster call is issued sometime in the future. This matter has been litigated for eight years. If Applicant has been so successful on the merits, then obviously he would not be asking for a dismissal. The reason for the dismissal is based upon inadequate economic and financial analysis. The record shows that Intervenors at the outset made a strong showing that the plant would not be necessary and that on this issue the Intervenor was clearly correct and has been vindicated. Therefore, the record shows that an Applicant who was put on full and complete notice that the plant would not be necessary as far back as seven years ago proceeded with all efforts to make out a case which ultimately in the year 1982, proved fruitless. If the Applicant had filed the Motion to Withdraw after the original showing by the Intervenors or even as late as 1979, or 1980, when all of the relevant evidence was available, then an argument for a without prejudice dismissal could be seriously made. However, by proceeding for the last two years in the face of this information, the Applicants have gambled that their estimates would evidentially be redeemed and they lost.

This result is especially called for in this case where the Applicants resisted every effort by the Intervenors to continue the matter or delay a consideration of the case. Applicants always asserted that they were ready to start, that the matter must proceed. In the light of the actual facts on

demand for power, such a position was in bad faith. It should be pointed out that in 1981, the Applicants insisted that the Appeal Board matter go forward and that Intervenors file exceptions and briefs and go to Washington and argue the appeal of the alternate site consideration even though Applicant had by April of 1981, placed the Perkins project in an indefinite status.

The Applicant is in the position of a plaintiff who has proceeded too far down the road to back out without prejudice. The Intervenors have been put to great expense and trouble to stay in this case even when several years ago it was obvious that the Perkins Plant would not be needed.

ATTORNEY FEES, COSTS AND EXPENSES

The Applicant has argued that this Board has no authority to award attorney fees and expenses. Applicant failed to distinguish between fees to a prevailing party and fees that are placed as conditions upon a voluntary dismissal. The distinction is crucial. While Intervenors argue that a dismissal with prejudice should be followed by attorney fees, we candidly admit that the basis for attorney fees is much stronger and almost mandatory if the dismissal be without prejudice. If the dismissal is with prejudice, then we may no longer concern ourselves with the proposal we have been fighting for eight years. In this event, an award of attorney fees could be characterized very easily as an award to a prevailing party. The Supreme Court in Alyeska Pipe Line v. Wilderness Society, 421 U.S. 240, 1975, ruled that such an award must have a statutory basis. We would argue that the Nuclear Regulatory

Commission has by rule under statute provided that Applicants are to bear the costs of staff work performed for their benefit in 10 CFR Part 170, and this has been upheld as noted in ALAB-662 at Page 20 in Mississippi Power and Light Company v. Nuclear Regulatory Commission, 601 F.2d 223 (4th Cir. 1979), cert. denied 444 U.S. 1101, 1980. The argument for reimbursement of costs, expenses and fees as a prevailing party under the appropriate rules of this Commission is based upon the fact that most of what the Intervenors presented and argued resulted in benefit to the Applicant. These benefits are set out above in regard to the development with the help of Intervenors of a proposal on the water issue that was tentatively acceptable to the State of North Carolina and this Licensing Board. Also, as argued in these proceedings, the demand figures offered by Intervenors through witnesses, Dr. Miles Bidwell and Jesse Riley, led to a reexamination of demand projections and the eventual savings on construction monies which would have been spent over the past three or four years but for the doubts raised by Intervenors. Again, the Applicants scoff at the suggestion of this benefit but this Board can take judicial notice of plant cancellations by the Tennessee Valley Authority and in the Northwestern portion of this country which plants were started at the same time that the Perkins Plant was scheduled. But for the intervention of these Intervenors, Perkins would be partially constructed at this point and it would have exposed the Applicants to hundreds of millions of dollars in unrecoverable expenditures.

We also realize that if the matter is dismissed with prejudice, then the Intervenors will have achieved their goals and have no concern with having to fight this matter out a second time in the future. However, if this case is dismissed without prejudice, the Intervenors are obviously faced with the real possibility of a second proceeding with all of its attendant fees and costs. For this reason, this Licensing Board may attach conditions to a voluntary dismissal. The fees and expenses are not an award by the Licensing Board but the consequences of the voluntary dismissal of the Applicant. For if the attorney fees is made a condition of the withdrawal and the Applicant goes through with his withdrawal, then the Applicant has voluntarily agreed to meet the conditions. If the Applicant does not meet the conditions, then he does not obtain the withdrawal. The Courts have in numerous instances supported this reasoning. See LeCompte v. Mr. Chip, Incorporated, 528 F.2d 601, 1976.

> **[4]** The conditions imposed by the district court are not the type usually found in Rule 41(a)(2) dismissals. *See* 9 Wright & Miller, *Federal Practice & Procedure: Civil* § 2366, at 178–182 (1971). Most cases under the Rule have involved conditions that require payment of costs and attorney's fees. *See, e. g., American Cyanamid Co. v. McGhee*, 317 F.2d 295 (5th Cir. 1963); *see also* 5 Moore's *Federal Practice* ¶ 41.06, at 1081–1083 (2d ed. 1975); Annot., 21 A.L.R.2d 627, 633–637 (1952), and cases cited therein. The trial judge is not limited to conditions of payment of costs, expenses and fees. The dismissal may be conditioned upon the imposition of other terms designed to reduce inconvenience

to the defendant. *See, e. g., Eaddy v. Little*, 234 F.Supp. 377 (E.D.S.C.1964) (dismissal conditioned on plaintiff's production of certain documents); *Goldlawr, Inc. v. Shubert*, 32 F.R.D. 467 (S.D.N.Y. 1963) (dismissal without prejudice conditioned on plaintiff covenanting not to sue defendants, where a dismissal with prejudice might have adversely affected plaintiff's related litigation); *Stevenson v. United States*, 197 F.Supp. 355 (M.D. Tenn.1961) (dismissal conditioned on plaintiff's making available to defendant at second suit certain records, producing certain witnesses at trial, and paying one-half cost of defendant bringing in other witnesses).

Also in the Office of Communication of United Church of Christ v. FCC, 465 F.2d 519 (1972), the Court explicity discusses the attachment of a payment of expenses and fees as being valid without statutory authority when it is part of a voluntary termination of the proceedings such as proposed by the Applicant in this case.

In addition to the above cases and analysis, note the following discussion in Section 2366 of Fed. Prac. and Proc. by Wright and Miller

> The terms and conditions that may be imposed upon the granting of a motion for voluntary dismissal are for the protection of the defendant,[8] although if one of several plaintiffs moves for dismissal conditions may be imposed for the protection of the remaining plaintiffs.[9] The court may dismiss without conditions if they have not been shown to be necessary,[10] but should at least require that the plaintiff pay the costs of the litigation.[11]

6. Would not be voluntary

Federal Sav. & Loan Ins. Corp. v. First Nat. Bank, Liberty, Missouri, D.C.Mo.1945, 4 F.R.D. 313, mandamus denied C.C.A.8th, 1945, 148 F.2d 731.

7. Need not accept dismissal

Stevenson v. U. S., D.C.Tenn.1961, 197 F.Supp. 355.

See Scholl v. Felmont Oil Corp., C.A.6th, 1964, 327 F.2d 697, 700.

8. Protection of defendant

Home Owners' Loan Corp. v. Huffman, C.C.A.8th, 1943, 134 F.2d 314.

9. One of several plaintiffs

Motion for voluntary dismissal with prejudice of action as between certain plaintiffs and defendant would be granted on condition that moving plaintiffs furnish remaining plaintiff with copies of transcript relating to pretrial proceedings, together with all documents produced by them in connection with suit and any other information relating to action reasonably requested by remaining plaintiff. Hudson Engineering Co. v. Bingham Pump Co., D.C.N.Y. 1969, 298 F.Supp. 387.

10. Without conditions

U. S. v. Commercial Solvents Corp. of Delaware, D.C.Del.1938, 25 F. Supp. 653.

Where plaintiff in action under Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., moved court to dismiss cause without prejudice and therefore brought itself within Rule 41(a) (2) permitting court to dismiss upon terms, but could have filed notice under Rule 41(a) (1) permitting voluntary dismissal by plaintiff because neither answer nor motion for summary judgment had been filed, court would dismiss without prejudice at plaintiff's cost without imposing terms. White v. Thompson, D.C.Ill.1948, 80 F.Supp. 411.

Where no objection was interposed to plaintiff's motion to dismiss as to a defendant who was not indispensable, and no showing was made as to what terms and conditions should be imposed, plaintiff was entitled to dismissal as to such defendant without condition. McLean v. Wabash R. Co., D.C.Mo.1943, 3 F.R.D. 172.

11. Require payment of costs

Davis v. McLaughlin, C.A.9th, 1964, 326 F.2d 881, certiorari denied 85 S.Ct. 64, 379 U.S. 833, 13 L.Ed.2d 41.

American Cyanamid Co. v. McGhee, C.A.5th, 1963, 317 F.2d 295.

Federal Savings & Loan Ins. Corp. v. Reeves, C.C.A.8th, 1945, 148 F. 2d 731.

Home Owners' Loan Corp. v. Huffman, C.C.A.8th, 1943, 134 F.2d 314.

Burgess v. Atlantic Coast Line R. Co., D.C.S.C.1966, 39 F.R.D. 588.

Goldlawr, Inc. v. Shubert, D.C.N.Y. 1963, 32 F.R.D. 467.

In imposing conditions the court is not limited to taxable costs,[12] but may require the plaintiff to compensate for all of the expense to which his adversary has been put.[13] The court may

Todd v. Thomas, D.C.N.C.1962, 202 F.Supp. 45.

Meltzer v. National Airlines, Inc., D. C.Pa.1962, 31 F.R.D. 47.

Fleetwood v. Milwaukee Mechanics' Ins. Co., D.C.Mo.1947, 7 F.R.D. 680.

Paul E. Hawkinson Co. v. Goodman, D.C.Cal.1940, 32 F.Supp. 732.

Lawson v. Moore, D.C.Va.1939, 29 F.Supp. 175.

Intervenors may be granted leave to dismiss without prejudice upon payment of costs incident to their intervention. Glover v. McFaddin, D.C.Tex.1951, 99 F.Supp. 385, affirmed C.A.5th, 1953, 205 F.2d 1, certiorari denied 74 S.Ct. 227, 346 U.S. 900, 98 L.Ed. 400.

Where plaintiff suing for patent infringement had notice of indemnity provisions in contracts pursuant to which manufacturers sold alleged infringing mills to defendant but waited until date set for trial to file motion for dismissal of infringement action on assigned ground that plaintiff wished the rights of plaintiff and manufacturers to be determined in actions between them directly, plaintiff would be required as condition of granting motion to pay to defendant the taxable statutory costs, and such amount on account of expenses, but not including attorney's fees, as court should deem reasonable and equitable after a hearing. Union Nat. Bank of Youngstown, Ohio v. Superior Steel Corp., D.C.Pa.1949, 9 F.R.D. 117.

12. Not limited to taxable costs

Federal Sav. & Loan Ins. Corp. v. First Nat. Bank, Liberty, Missouri, D.C.Mo.1945, 4 F.R.D. 313, mandamus denied C.C.A.8th, 1945, 148 F.2d 731.

Hoffman v. Berry, N.D.1966, 139 N.W.2d 529.

13. All expense

Federal Sav. & Loan Ins. Corp. v. First Nat. Bank, Liberty, Missouri, D.C.Mo.1945, 4 F.R.D. 313, mandamus denied C.C.A.8th, 1945, 148 F.2d 731.

Mott v. Connecticut Gen. Life Ins. Co., D.C.Iowa 1943, 2 F.R.D. 523.

Ryerson & Haynes v. American Forging & Socket Co., D.C.Mich. 1942, 2 F.R.D. 343.

Welter v. E. I. DuPont DeNemours & Co., D.C.Minn.1941, 1 F.R.D. 551.

McCann v. Bentley Stores Corp., D. C.Mo.1940, 34 F.Supp. 234.

Where plaintiff filed notice of dismissal of second cause of action against individual defendants without prejudice more than three years after defendants had filed answer and it was conceded that plaintiff had no case on such cause of action, plaintiff was liable for cost of preparation for defense of the second cause of action. Even-Cut Abrasive Band & Equip. Corp. v. Cleveland Container Co., C.A.6th, 1949, 171 F.2d 873.

Court required plaintiff who moved for a voluntary dismissal of action without prejudice to reimburse defendants' attorneys for costs of stenographic transcripts, and for payments made to plaintiff's accountants for attendances upon depositions, and for defendants' obligations to their attorneys as compensation for their services and for disbursements incurred by them, but refused to require reimbursements of defendants' attorneys' claims for amounts paid to other counsel for trial preparation assistance, or for amounts paid to corporations for presuit and pretrial advisory services and attendance upon depositions. Nazzaro v. Weiner, D.C.N.J.1965, 38 F.R.D. 430, affirmed C.A.3d, 1967, 353 F.2d 537.

Where plaintiff commenced action for both equitable relief and dam-

require plaintiff to pay the defendant's attorney's fees as well as other costs and disbursements.[14] It is somewhat anomalous

ages and a pretrial examination of the plaintiff's officer was commenced by defendants, plaintiff's motion for voluntary dismissal of action without prejudice made just prior to date of trial would not be granted except on the condition that defendants be reimbursed for legal expenses to which they had been put. Pathe Labs., Inc. v. Technicolor Motion Picture Corp., D.C.N.Y.1956, 19 F.R.D. 211.

14. Attorney's fees

American Cyanamid Co. v. McGhee, C.A.5th, 1963, 317 F.2d 295.

Barnett v. Terminal R. Ass'n of St. Louis, C.A.8th, 1953, 200 F.2d 893, certiorari denied 73 S.Ct. 938, 345 U.S. 956, 97 L.Ed. 1377.

Eaddy v. Little, D.C.S.C.1964, 234 F. Supp. 377.

Therrien v. New England Tel. & Tel. Co., D.C.N.H.1951, 102 F.Supp. 350.

Wilson v. Jolly, D.C.Tex.1948, 7 F.R.D. 649.

Krasnow v. Sacks & Perry, Inc., D.C.N.Y.1945, 58 F.Supp. 828.

Gold v. Geo. T. Moore Sons, Inc., D.C.N.Y.1943, 3 F.R.D. 201.

Mott v. Connecticut Gen. Life Ins. Co., D.C.Iowa 1942, 2 F.R.D. 523.

Ryerson & Haynes, Inc. v. American Forging & Socket Co., D.C.Mich. 1942, 2 F.R.D. 343.

Welter v. E. I. Du Pont De Nemours & Co., D.C.Minn.1941, 1 F.R.D. 551.

McCann v. Bentley Stores Corp., D.C.Mo.1940, 34 F.Supp. 234.

Payment of costs in amount of $554.62, which included expenses incurred by defendant along with a reasonable attorneys' fee, was a prerequisite to plaintiff's voluntary dismissal without prejudice. Mann v. Edwards, D.C.S.C.1965, 37 F.R.D. 452.

Court ordered plaintiff as condition of dismissal to pay defendants' costs and attorneys' fees, but withheld fixing amount until termination of related litigation. Goldlawr, Inc. v. Shubert, D.C.N.Y.1963, 32 F.R.D. 467.

Representatives of deceased airplane passengers who sought voluntary dismissal of death actions against airline company after six months would be required to pay court costs and $300 attorneys' fees, as condition of dismissal when company in responding to repeated motions by representatives regarding forum of actions suffered hardship. Meltzer v. National Airlines, Inc., D.C.Pa.1962, 31 F.R.D. 47.

Where plaintiff brought diversity action and subsequently changed her mind and filed motion for voluntary dismissal, motion would be granted on condition that she pay all court costs in federal court, cost of deposition and a reasonable attorney's fee for work that defendants' attorneys had done as result of action in federal court. Sahutsky v. National Dairy Prods. Corp., D.C.Pa.1960, 184 F. Supp. 68.

Counsel fees may be allowed as a term or condition for voluntary dismissal under the federal rule, and in determining amount to be allowed as the condition for voluntary dismissal court must take into consideration all the facts of case and circumstances of party. Lunn v. United Aircraft Corp., D.C.Del.1960, 26 F.R.D. 12.

Plaintiff was required to pay defendant $150 attorneys' fee and $10 for notarial service in taking deposition. Hannah v. Lowden, D.C.Okl.1943, 3 F.R.D. 52.

Costs, expenses and attorneys' fees. Taylor v. Swift & Co., D.C.Fla. 1942, 2 F.R.D. 424.

Cf.

Fact that city sought only to dismiss its complaint against power company and did not make a motion for substitution of counsel did not preclude court from requir-

to require payment of an attorney's fee if the plaintiff would not have been liable for the fee had he lost the case on the merits but the cases support this result.[15] However, it is for the court, under the circumstances of the particular case, to decide whether payment of an attorney's fee should be required. It is not obliged to order payment of the fee.[16] And it has been held that if dismissal is with prejudice the court lacks power to require an attorney's fee to be paid,[17] unless the case is of a kind in which an attorney's fee might otherwise be ordered after termination on the merits.[18]

ing, in its discretion, that city's retained attorneys be paid or secured as condition of granting the dismissal request. City of Hankinson, North Dakota v. Otter Tail Power Co., D.C.N.D.1969, 294 F. Supp. 249.

15. Somewhat anomalous

"Something might be said as to the anomaly of the defendant obtaining much more in a voluntary dismissal than he could have recovered after a successful trial at length. * * * However, I must bow to the weight of authority and hold that counsel fees may be allowed as a 'term or condition' for voluntary dismissal under Rule 41(a)(2)." Lunn v. United Aircraft Corp., D.C.Del.1960, 26 F.R.D. 12, 18.

"The rationale, however, on which an award of counsel fees under Rule 41(a) (2) is based is not that successful defendants could have secured such fees but that defendants have been put to the expense of litigation all of which may at some future time have to be duplicated, since the dismissal is without prejudice." Goldlawr, Inc. v. Shubert, D.C.N.Y.1963, 32 F.R.D. 467, 472 n. 5.

16. Not obliged to order payment

New York, C. & St. L. R. Co. v. Vardaman, C.A.8th, 1950, 181 F. 2d 769.

Since plaintiff was not responsible for a third-party defendant being a party to the action and defendant did not file the motion to dismiss or formally join in it, and since the third-party defendant received a benefit from dismissal of the action with prejudice in that the question of his indemnification to defendant for potential liability to the plaintiff had been conclusively resolved, even though the dismissal would not bar a direct action by the plaintiff against the third-party defendant, the third-party defendant's request for attorney's fees as a condition of dismissal was denied. Gammino Constr. Co. v. Great Am. Ins. Co., D.C.R.I.1971, 52 F.R.D. 323.

17. Dismissal with prejudice

Smoot v. Fox, C.A.6th, 1965, 353 F. 2d 830, certiorari denied 86 S.Ct. 1542, 384 U.S. 909, 16 L.Ed.2d 361.

Lawrence v. Fuld, D.C.Md.1963, 32 F.R.D. 329.

In proceeding on libel and impleading petitions arising out of collision in which libelant moved to discontinue, no award would be made to libelant for attorney fees or expenses related to arrest in Sweden of a certain vessel where it appeared as a matter of law that the arrested vessel was immune from any further arrest, so that dismissal would be, in effect, a dismissal with prejudice as to respondent's right to again arrest the hull of the vessel, and in context of a dismissal with prejudice attorney fees and expenses are not appropriate. Pacific Vegetable Oil Corp. v. S. S. Shalom, D.C.N.Y.1966, 257 F.Supp. 944.

Cf.

Gammino Constr. Co. v. Great Am. Ins. Co., D.C.R.I.1971, 52 F.R.D. 323, described note 16 above.

18. Otherwise ordered

Taxing of $10,135 in court costs was proper on voluntary dismissal with

> exercise its discretion to permit dismissal if the circumstances are such that it would not permit dismissal by a private plaintiff except on condition that he pay attorney's fees.[25]
>
> The plaintiff has an option not to dismiss if the conditions specified by the court seem to it too onerous.[26] If it accepts dismissal but does not meet the condition, the order of dismissal may be made with prejudice.[27] A condition that plaintiff pay defendant's costs is satisfied only by the payment of the costs and not by the mere entry of a judgment against plaintiff for the costs.[28] The court may give plaintiff the choice between a dismissal with prejudice upon payment of taxable costs and dismissal without prejudice upon payment of defendant's expenses.[29]

The sense of this result is obvious. If the Intervenors must be faced with hearing this case again, then they should at least be placed in the same position as they were before this case began. The Applicant is asking to be placed in the same position as it was before these proceedings. A dismissal without prejudice would not accomplish this for the Intervenors unless the appropriate fees, costs and expenses were paid by the Applicant. If the expenses are not allowed to be paid we will be impaired by the expenditure of much time and money against our will. The Applicant might argue that it has spent time and money. This was its choice. The unwilling Intervenor who was imposed upon by the application filed by Duke Power Company should at least be placed back into its position before the filing of the application.

CONCLUSION

The Intervenors submit that this matter should be dismissed with prejudice and costs, fees and expenses paid by the Applicant. In the alternative, if it is dismissed without prejudice then the Applicant should pay the fees, costs and expenses shown in this Response.

In closing, on the behalf of the Intervenors and all of our allies, we wish to express our admiration and respect for the members of this Board, both past and present, who have shown conscientious concern, healthy skepticism and patient kindness in these matters. We are honored to have served before you.

Respectfully submitted this 29th day of April, 1982.

WILLIAM G. PFEFFERKORN, Attorney for Intervenors

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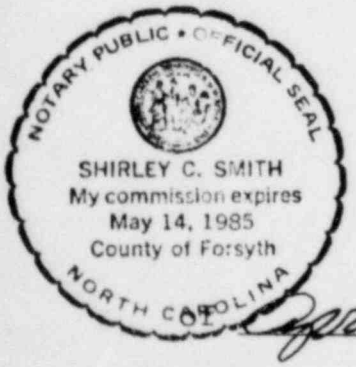
NORTH CAROLINA)
)
FORSYTH COUNTY)

AFFIDAVIT

The undersigned, being duly sworn, deposes and says:

That he has been actively involved in these proceedings as an attorney for the Intervenors since the hearings which were held in April of 1976; that from 1975 until the present time he has been paid approximately Twenty-one Thousand Dollars ($21,000.00) for legal work in regard to the proposed Perkins Plant, of which approximately Fifteen Thousand Dollars ($15,000.00) is directly attributable to work in these proceedings; that Fifteen Thousand Dollars ($15,000.00) worth of additional work at approximately Fifty Dollars ($50.00) per hour attributable to these proceedings has been done by the undersigned for which he has received no payment; that approximately Four Thousand Five Hundred Dollars ($4,500.00) was paid to one of the Intervenors' expert witnesses, Dr. Medina, for his testimony in this matter; that if all of the expert witnesses for the Intervenors had been paid on a similar basis, the total fees and expenses for such expert testimony would have been at least an additional Twenty-five Thousand Dollars ($25,000.00); that, therefore, the total reasonable value of the services of the attorney and expert witnesses acting on behalf of the Intervenors in this matter, with expenses, is not less than Sixty Thousand Dollars ($60,000.00); and that the actual amount paid for such services and expenses was Nineteen Thousand Five Hundred Dollars ($19,500.00), leaving an unpaid balance of not less than Forty Thousand Five Hundred Dollars ($40,500.00), plus approximately $5,000.00 paid to Attorney Tom Erwin.

Respectfully submitted this the 29th day of April, 1982.



William G. Pfefferkorn

WILLIAM G. PFEFFERKORN

Sworn to and subscribed before me this the 29th day of April, 1982.

Shirley C. Smith

Notary Public

My Commission Expires:

May 14, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of Response

in the above-captioned matter have been served on the following by deposit in the United States Mail this the 29th day of April, 1982.

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