UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

DUKE POWER COMPANY'S REPLY TO INTERVENORS' RESPONSE TO MOTION TO WITHDRAW

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On April 19, 1982, Duke Power Company (Duke) filed a motion to withdraw its application for construction permits for the Perkins Nuclear Station (Motion). Intervenors, Mary Apperson Davis, et al. (Intervenors), filed a response to Duke's Motion on April 29 (Response). This reply addresses Intervenors' April 29 Response and is submitted pursuant to the Licensing Board's May 12, 1982 Memorandum And Order.

SUMMARY

The Licensing Board should dismiss without prejudice Duke's application for the Perkins Nuclear Station. The factors that necessitate withdrawal of the application and its dismissal without prejudice are set forth in Duke's April 19 Motion. Ignoring these factors, Intervenors make a series of arguments that contradict the record.

First, Intervenors claim that their participation "resulted in benefit" to Duke because as a result of Intervenors' participation Duke "hired an economist" and "implemented * * * peak load pricing" (Response, pp. 2-5, 8, 13). Continuing,

Intervenors claim that these factors, together with the "doubts raised by Intervenors", led to "reexamination of demand projections", the decision to withdraw Perkins and "savings on construction monies" (id., p. 13).

In addition, Intervenors assert that they ad a great impact" regarding the issue of the maximum level of Yadkin River withdrawals for cooling during the operation of Perkins (id., pp. 5-6, 13). Intervenors also argue that Duke acted in bad faith by not moving to withdraw the Perkins application until early this year (id., pp. 2, 9, n. 12). Then, relying on these unfounded claims, Intervenors argue that the Perkins application should be dismissed with prejudice (id., pp. 8-12), and contend that Duke should be ordered to pay their attorneys fees and other expenses in this proceeding (id., pp. 12-20).

Each of Intervenors' claims is fallacious. Indeed, Intervenors' fictional portrayal of both the extent and result of their participation in this proceeding is at bottom a collateral attack on the Licensing Board's three partial initial decisions, which consistently rejected Intervenors' contentions. Intervenors appear to argue that the outcome of these partial initial decisions should be ignored because the Appeal Board "has vacated all of [them]" and they "were never determined on appeal" (id., pp. 2, 5). The motive behind Intervenors' assertion is clear, in that the outcome of these partial initial decisions -- favorable to Duke and adverse to Intervenors in all respects -- belie any claim that Intervenors either

contributed substantially to the proceeding or cast doubt on Duke's application. As Intervenors are obviously aware, the initial decisions were vacated because Duke withdrew its application.[1/]

Intervenors' dismissal with prejudice argument is invalid as well. In fact, dismissal with prejudice has little place in a nuclear licensing proceeding such as this one where there were repeated findings by the Licensing Board, based on the record before it, in favor of Duke's application for the Perkins Station. Moreover, Intervenors continue to ignore the standards that govern dismissal with prejudice, as announced by the Appeal Board in Fulton and North Coast.[2/] The record shows that throughout this proceeding Duke acted in complete good faith and did not abuse the NRC process in any way. Intervenors have not supported any contrary conclusion, and cannot do so.

Nor is there any merit to Intervenors' claim that Duke should pay their attorneys fees and expenses. First, the simple fact is that the NRC does not have statutory

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1/ Intervenors' computation of the number of pages of evidence presented by each party is also invalid (id., p. 8). Intervenors conveniently ignore literally thousands of pages presented by Duke and the NRC staff. Just two examples are Duke's seven-volume Preliminary Safety Analysis and three-volume Environmental Report.

2/ Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981), and Puerto Rico Electric Power Authority (North Coast, Unit 1), ALAB-662, 14 NRC 1125 (1981).

authority to make such an award. In any event, there is no justification for Intervenors' request. Duke did not harass or abuse the Intervenors or the NRC licensing process. Absent these factors, there would be no basis for requiring Duke to pay Intervenors' expenses, assuming that the NRC has statutory authority to order such an award, which it does not.

ARGUMENT

I. Intervenors' Claims Of Their Contribution To This Proceeding Are Misguided

Intervenors attempt to show that their participation in the Perkins proceeding benefited Duke and cast doubt on the Perkins application (Response, pp. 2-8, 13). Presumably, these claims are intended as a foundation for Intervenors' argument that Duke should pay their legal fees and other expenses. See North Coast, 14 NRC at 1135, n. 11. In truth, however, Intervenors' contentions were uniformly rejected by the Licensing Board.

A. Intervenors' Claims Regarding Need For Power Are Erroneous

Intervenors argue that because they disputed the demand for power projected by Duke in the early stages of this proceeding, Duke's withdrawal of the Perkins application means that "the Intervenor was clearly correct and has been vindicated" (Response, p. 11; see also id., pp. 2-3).

Intervenors add that "[t]he reason for the dismissal is * * * inadequate economic and financial analysis" (id., p. 11).

1. Demand Projections

At the outset it should be emphasized that Intervenors' position is a collateral attack on this Board's finding on the record in this proceeding that the Duke system requires the new capacity that Perkins would provide. See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-78-34, 8 NRC 470, 492-96 (1978). Intervenors' criticism also flies in the face of the North Carolina Utility Commission's (NCUC) conclusion[3/] -- with which the NRC staff and the Bureau of Power of the former Federal Power Commission (now the Federal Energy Regulatory Commission) also agreed -- that the public

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3/ The NCUC has a statutory obligation to maintain a current analysis of North Carolina's long-range needs for additional generating capacity. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-490, 8 NRC 234, 238, n. 6 (1978). The NCUC's findings are based on a thorough and independent evaluation by the agency and its staff of the need for power question. The procedures followed by the NCUC in reaching its demand projections are described in the partial initial decision in this proceeding. See 8 NRC at 494. Public hearings are held and interested parties are allowed to participate.

Significantly, the Appeal Board has stated that the demand forecasts of this same state agency -- the NCUC -- are "entitled to be given great weight". Shearon Harris, 8 NRC at 240. This reflects the NCUC's in-depth knowledge of the needs of the state and the operations of the utilities under its jurisdiction. In Shearon Harris the Appeal Board emphasized that it will continue to place "heavy reliance upon the judgment of local regulatory bodies which are charged with the duty of insuring that the utilities within their jurisdiction fulfill the legal obligation to meet customer demands." 8 NRC at 241.

convenience and necessity required the Perkins Station. See Id., 8 NRC at 494; prepared testimony (April 26, 1976) of Duke witness Franz W. Beyer, p. 6, following Tr. 268.

Furthermore, Intervenors' Monday morning quarterbacking ignores numerous NRC decisions that recognize the built-in uncertainty of demand forecasts. Indeed, in judging demand forecasts the NRC's standard "is that the forecast be a reasonable one in light of what is ascertainable at the time made."[4/] Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 328 (1978). The NRC's standard explicitly recognizes that "inherent in any forecast of future electric power demands is a substantial margin of uncertainty." Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2) ALAB-264, 1 NRC 347, 365 (1975). This is because "[a]s with most methods of predicting the future, load forecasting [is] as much art as science." Id; see also Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979).

But as these NRC decisions also frankly acknowledge, utilities have an obligation to plan for and develop the capacity required to serve their customers' projected energy

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4/ Emphasis is supplied throughout this pleading.

needs. Wolf Creek, 7 NRC at 328.[5/] For these reasons, the Appeal Board has ruled that an applicant is not required "to demonstrate that the new facility will be needed in a specific future year". Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 185 (1978). Instead, the key words in evaluating these demand projections are "reasonable * * * at the time made". Wolf Creek, 7 NRC at 328.

Ignoring these precedents, Intervenors prefer to harp on the fact that Duke's 1973 projection of 1980 demand was substantially higher than Duke actually experienced. But the fact is that Duke annually reviews and updates its estimates of future demand.[6/] Indeed, by the time this case went to hearing Duke had already made a substantial downward adjustment to the 1973 estimate that Intervenors criticize. See Perkins, 8 NRC at 492. And it was that 1976 estimate upon

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5/ Moreover, a very substantial period is necessary to obtain regulatory approvals and construct a power plant. This "requires the utility to predict peak demands on its system often as much as ten years in advance." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 410 (1976). But "[s]eeing that far into the future with accuracy is not to be expected -- not of the applicant, not of the staff and not of the intervenor." Id.

6/ There are several examples of these revisions in the record. See p. 4 of Duke witness Franz W. Beyer's April 26, 1976 prepared testimony, following Tr. 268; see also Attachment 1 to the April 28, 1977 prepared testimony of Duke witness D. H. Sterrett, following Tr. 1491. This testimony refers to the reduced estimates of 1980 peak demand that Duke calculated in each of the years 1974-76.

which the Licensing Board based its need for power finding in this case. Id.

In sum, Intervenors have not shown that the demand projections underlying the Perkins application were unreasonable when made. Accordingly, Intervenors' criticisms must fail.

2. Negative Elasticity And Peak Load Pricing

To further their claim of having benefited Duke and cast doubt on the Perkins application, Intervenors argue that as a result of their participation in this proceeding "Duke hired an economist to work on econometric matters" and "implemented peak load pricing" (Response, p. 5; see generally id., pp. 3-5, 8, 13); and Intervenors imply that these endeavors "led to a re-examination of demand projections" and consequently to the decision to withdraw the Perkins application (id., p. 13). In presenting their argument Intervenors take selective quotations from the April 1976 and April 1977 transcripts in this proceeding.

Intervenors' claims are not supported by the record. Intervenors' participation in this proceeding had nothing to do with Duke's hiring of an economist or implementation of peak load pricing. Nor is there any basis or support in the record for Intervenors' suggestion that these matters resulted in Duke's decision to withdraw Perkins. On the contrary, as Intervenors are aware, Duke began investigating the use of econometric modeling without any prodding from Intervenors,

and did so prior to the hearings at which Intervenors questioned Duke witness Beyer on this subject (see pp. 7, 9-11 of Mr. Beyer's prepared testimony).[7/] Indeed, as the Licensing Board noted in its initial decision of the need for power issue, Duke's decision to investigate "the use of econometric modeling as an additional help in forecasting" was the result of "the rather large price increases that occurred in 1974 and 1975 as compared to the comparatively small changes that had been previously experienced". Perkins, 8 NRC at 493-494; see also Tr. 371-374.

Equally invalid are Intervenors' grandiose claims regarding peak load pricing. Indeed, in February, 1976 the North Carolina Utilities Commission, acting pursuant to a 1975 statute that endorsed peak load pricing (Section 62-155 of the General Statutes of North Carolina), ordered Duke and the other electric utilities that the NCUC regulates to develop plans for peak load pricing and other load management programs. See witness Beyer's testimony, p. 7; see also Duke witness D. H. Sterrett's testimony, p. 4, Tr. 1525 and 8 NRC

7/ Intervenors' representation of the record is truly distorted. Intervenors imply that until they questioned witness Beyer, Duke had never employed economists on its staff. There is nothing in the record to support that claim. Moreover, the focus of the dialogue from which Intervenors quote was not on whether Duke employed economists in general, but rather on whether Duke's System Planning Department had an economist specifically trained in econometric modeling techniques such as peak load pricing. As Duke witness Beyer's testimony clearly shows, the decision to hire an econometrician for that purpose preceded any of Intervenors' questioning on the subject (see Tr. 371-74, 1507-09).

at 494. Once again, this was done without any assistance from Intervenors in this proceeding.

B. Intervenors' Claimed Contribution On "Environmental And Water Questions" Is False

Intervenors also assert that they "had a great impact on water questions" because "[a]fter the[ir] evidence and arguments" Duke changed its proposed use of the Yadkin River (Response, pp. 5-6). Intervenors' argument is charitably characterized as disingenuous; it is belied by the facts.

To be sure, when the Perkins application was filed in March, 1974, Duke did propose consumptive withdrawals from the Yadkin River of up to 50 percent of stream flow, subject to a minimum daily average flow of 330 cfs (cubic feet per second). However, after reviewing Duke's proposals, the state of North Carolina published a report in December 1974 stating that these withdrawals should be subject to a minimum daily flow of 1000 cfs.

Based on that report Duke and the staff of the North Carolina Environmental Management Commission (EMC) agreed -- as part of a proposed resolution to be adopted by the EMC -- that Yadkin River withdrawals would be subject to an 880 cfs minimum daily flow requirement and a maximum withdrawal limit of 25 percent of stream flow. Testimony of Duke witness L. C. Dail, p. 6, following Tr. 275. The EMC modified the water withdrawal level to 1000 cfs in its December 16, 1976 Resolution No. 76-41. See State Exhibit 2. In sum, there is no

evidence in the record of this proceeding to suggest that Duke changed its position on water withdrawals on the basis of the evidence and arguments presented in this case by Intervenors. Rather, the record clearly shows that all of the arguments advanced by Intervenors with regard to the alleged impacts associated with water withdrawals were uniformly rejected by the Licensing Board. See Perkins, 8 NRC at 484-490.

II. Intervenors' Arguments For Dismissal With Prejudice Are Invalid

Intervenors argue that their time and effort in this proceeding is the harm or injury that justifies dismissing the Perkins application with prejudice (Response, pp. 9-11). Intervenors' position is a patchwork of incorrect statements and ignores the governing legal standards.

A. Introduction

At the outset it should be emphasized that the judicial concept of dismissal with prejudice under Rule 41(a)(2) of the Federal Rules of Civil Procedure has little place in the context of NRC licensing proceedings. Rule 41(a)(2) was adopted to protect defendants from abuse of the judicial process by plaintiffs who would institute meritless actions, or not pursue actions that they had instituted, and then seek dismissal of these actions prior to a ruling on the merits. See, e.g., McCann v. Bentley Stores Corp., 34 F.Supp. 234 (W.D. Mo. 1940). The rule was designed to deal with "plaintiffs who had no real object in mind other than such

harassment." Klar v. Firestone Tire & Rubber Co., 14 F.R.D. 176 (S.D.N.Y. 1953). Indeed, in view of these factors the Appeal Board has recognized that dismissal with prejudice is a "severe and unusual sanction", North Coast, 14 NRC at 1133, which is reserved for "situations which involve substantial prejudice to the opposing party or to the public interest in general". Id. In short, the concept of dismissal with prejudice has no place absent a showing of bad faith prosecution or other abuse of the legal process.

It goes without saying that Duke did not file and successfully prosecute the Perkins application as part of some cat and mouse game with Intervenors. Nor is Duke in the position of a private plaintiff who initiates a lawsuit for personal gain or to redress a private wrong. On the contrary, Duke has a legal obligation to provide safe, adequate and reliable electric service. Duke filed the Perkins application in order to meet that obligation. Indeed, the North Carolina Utilities Commission -- like the NRC staff and the Bureau of Power of the former Federal Power Commission -- found that the Perkins Nuclear Station would be required to provide reliable service. See the prepared testimony of Duke witness Beyer, p. 6, following Tr. 268; see also Perkins, 8 NRC at 494. And at every step of the way during the period that the Perkins application was being litigated, the Licensing Board consistently found -- in three partial initial decisions -- that the public interest required approval of the application. Needless

to say, the fact that the Perkins application was prosecuted for eight years without the issuance of a construction permit does not show any bad faith on Duke's part.

Moreover, although the points discussed above fully distinguish this proceeding from the proceedings that Rule 41(a)(2)'s dismissal with prejudice sanction was intended to address, several additional factors underscore the fact that dismissal with prejudice has no place here. Thus, unlike the involuntary defendant who is "dragged into court" at plaintiff's whim by the filing of his complaint, McCann v. Bentley Stores, 34 F. Supp. at 234, the participation of the present Intervenors is clearly voluntary. Intervenors chose to participate in this proceeding and did so in order to protect their own interests.[8/]

Furthermore, the commencement of very few, if any, lawsuits require anything approaching the effort and expense involved in a nuclear power plant license application. The filing of a CP application is preceded by a vast amount of effort and expense. A utility could not file, withdraw and refile a construction permit application without sound justification and an enormous expenditure of time and expense. In short, unlike the civil litigation process, the nature of NRC licensing precludes a utility from using the process to harass.

8/ Indeed, the Commission's regulations (10 C.F.R. § 2.714(a)(2) require intervenors to show with particularity that they have an interest in the subject proceeding.

Finally, the factual circumstances underlying nuclear power plant license applications also distinguish these proceedings from civil lawsuits. Thus, a nuclear power plant license application must be filed many years in advance of the time that the plant would be needed. As numerous NRC decisions recognize, projecting conditions far into the future is fraught with considerable uncertainty (see pp. 6-7, above). The factual circumstances underlying a lawsuit, on the other hand, do not carry such uncertainties -- by definition the plaintiff seeks relief based on established facts.

In sum, dismissal with prejudice has no place in this proceeding, which has from the beginning been a good faith effort by Duke in pursuit of the Perkins application in order to meet Duke's public service obligation.

B. There Is No Justification For Dismissal With Prejudice In This Case

Dismissal with prejudice is rarely imposed. Rather, as the Appeal Board explained in Fulton and North Coast, dismissal with prejudice is a "severe and unusual sanction" that requires a showing of "substantial prejudice" or "a demonstrated injury to a private or public interest." North Coast, 14 NRC at 1133; Fulton, 14 NRC at 979 and n. 14; see generally id. at 978-79. In view of the history and purpose of Rule 41(a)(2), the Appeal Board's description of the standards that govern dismissal with prejudice are clearly sound. Thus, the test for dismissal with prejudice

-- under either the teachings of Fulton and North Coast or the standards of Rule 41(a)(2) -- is whether Duke pursued the Perkins application in bad faith or otherwise abused the NRC's processes in a manner which would lead to a determination that there has been "substantial prejudice" to Intervenors or "a demonstrated injury to a private or public interest."

Intervenors, on the other hand, simply ignore these standards.[9/] Instead, Intervenors' sole argument is that dismissal with prejudice is required because "[t]he private and public harm in this case is the strenuous and extensive input which was expended by the Intervenors and numerous volunteers and members of the public at each step of this proceeding" (Response, p. 9; see generally id., pp. 9-12). Intervenors seem to be arguing that dismissal with prejudice

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9/ Duke's April 19 Motion fully describes the standards that govern dismissal with prejudice (see pp. 8-9 of Duke's Motion). Thus, "dismissal with prejudice is an extreme sanction which should be used only where 'a clear record of delay or contumacious conduct by the plaintiff' exists." Hildebrand v. Honeywell, Inc., 622 F.2d 179 181 (5th Cir. 1980), quoting Anthony v. Marion County General Hospital, 617 F.2d 1164, 1167 (5th Cir. 1980). To justify this "particularly harsh and punitive term", Fulton, 14 NRC at 974, there must be a "clear record of bad faith and abuse of the judicial system", Carter v. United States, 83 F.R.D. 116, 117 (E.D. Mo. 1979). Absent these factors, dismissal without prejudice is to be freely granted. LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976). This is true even if the case has already proceeded through trial and appeal. See Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LBP-82-29 (April 12, 1982).

is justified in order to assure that they will not have to undertake that effort again in the future.

Significantly, Intervenors do not cite any authority for their position. This is understandable. The fact that Intervenors expended time and effort in participating in this proceeding is not a factor in weighing whether dismissal with prejudice should be granted. Moreover, under the facts of this case, Intervenors' claim that their time and effort justifies dismissal with prejudice is particularly feeble. In this regard, it bears repeating that Intervenors lost on each of the issues that they raised to challenge the Perkins application. Thus, the effect of an order dismissing the Perkins application without prejudice would be to give Intervenors yet a second chance to establish their contentions. Under these circumstances, Intervenors cannot be heard to complain of an order dismissing the Perkins application without prejudice.[10/]

Nor is the possibility of a refiled Perkins application, in which Intervenors would again voluntarily participate, a basis for dismissal with prejudice. Indeed, North

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10/ Intervenors also claim that dismissal without prejudice would cause "public harm" in this case because, if after litigating the Perkins application, Duke is allowed to "come forward with an admission that it was all unnecessary, then our faith in the system has been impaired" (Response, p. 10). Intervenors' position is groundless. If anything, faith in the regulatory process will be enhanced by an order dismissing the Perkins application without prejudice. That order will avoid unfairly penalizing Duke or its consumers.

Coast specifically held that "possibility of future litigation with its expenses and uncertainties * * * does not provide a basis for departing from the usual rule that a dismissal should be without prejudice". See 14 NRC at 1135, citing Jones v. SEC, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice ¶ 41.05[1] at 41-72 to 41-73 (2d ed. 1981).

C. Duke Was Fully Justified In Not Moving To Withdraw The Perkins Application Prior To This Year

Intervenors also argue that the Perkins application should be dismissed with prejudice because Duke did not move to withdraw until early this year (Response, pp. 2, 9, 11-12). In this regard Intervenors also claim that Duke opposed Intervenors' efforts to delay their appeal of the initial decision on alternative siting (id., pp. 9, 12), asserting 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" (Response, p. 12).

At the outset two points should be emphasized. First, in presenting this argument Intervenors make a telling admission. Intervenors expressly concede that if Duke had moved to withdraw Perkins during 1980 then dismissal without prejudice would, in Intervenors' view, be justified.[11/] The record,

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11/ Specifically, Intervenors state that if Duke had moved to withdraw as late as 1980, "then an argument for a without prejudice dismissal could seriously be made" (Response, p. 11).

however, shows that Duke was fully justified in not seeking withdrawal of Perkins during the intervening months of 1981 and early 1982.

Furthermore, Duke cannot be taxed with the claim that it unfairly opposed Intervenors' effort to delay consideration of their own appeal. The facts are clearly otherwise, as even a cursory review of the events surrounding the appeal of the alternate site issue will disclose. Thus, Duke did oppose Intervenors' June 11, 1980 motion to delay filing their exceptions on alternate sites. However, Intervenors' sole reason for seeking that delay was not based on any assertion that the alternate site issue appeal should be delayed, but rather rested on their pending motion to reopen the record based on the petition to intervene of David Springer. That motion to reopen had no merit, and was later denied. In any event, Intervenors' motion to delay the filing of its exceptions on the alternate site issue was granted, so the fact that Duke opposed that motion is immaterial.

1. Once The Circumstances Necessitated Withdrawal Of The Perkins Application, Duke Took Prompt Action To Do So

Duke's decision to withdraw the Perkins application was not made in a vacuum or on the spur of the moment. Indeed, the circumstances that were affecting the timing of the Perkins application, such as deferrals of proposed in-service dates, and difficulty in raising capital on reasonable terms, were

periodically brought to the NRC's attention.[12/] Nevertheless, in response to Intervenors' motion to dismiss, the Licensing Board ruled one year ago that dismissing the Perkins application was not then justified. See Order Relative To Motion To Dismiss Proceedings Or In The Alternative To Stay Action, (May 14, 1981)(unreported).

Needless to say, Duke's decision to withdraw the Perkins application was not made lightly. Decisions of this magnitude necessarily require substantial deliberation. Duke has devoted considerable effort and financial resources to the Perkins application, and had been successful at every step in litigating the application before the NRC. Nevertheless, economic conditions and accelerating regulatory uncertainty made withdrawal of the Perkins application necessary (see Duke's April 19 Motion, p. 6).

Furthermore, contrary to the implication in Intervenors' Response (pp. 9-12) Duke did not drag its feet in seeking withdrawal of the Perkins application. On the contrary, Duke hoped that withdrawal could be avoided. Indeed, in February

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12/ See, e.g., letter of July 2, 1979 from William L. Porter, Esq., Duke Power Company, to the Licensing Board, advising the Board of Duke's difficulty in obtaining financing at a reasonable cost and of the fact that final plans for construction of the three Perkins units had not been made; letter of March 12, 1981, from L. C. Dail, Duke's Vice President, Design Engineering Department, to Darrell G. Eisenhut, Director, Division of Licensing, advising that in-service dates for Perkins Units 1, 2 and 3 were not then scheduled and recommending that the Perkins proceedings be suspended for two years.

of this year Duke was considering the alternative of amending the Perkins application pursuant to the Commission's Early Site Review (ESR) procedures.[13/] But once Duke's management had decided that Perkins should be withdrawn, management promptly recommended that action to Duke's Board of Directors.

2. Intervenors Cannot Legitimately Claim Injury Because Duke Moved To Withdraw The Perkins Application In Early 1982 Rather Than In 1980

As noted above, Intervenors do not complain that Duke did not move to withdraw the Perkins application during 1980 or before. On the other hand, Intervenors do argue that Duke should have moved to withdraw during the intervening months prior to March, 1982 (Response, pp. 9-12). But Intervenors' argument ignores an important fact: the only substantive impact for Intervenors resulting from Duke's decision to move to withdraw Perkins in March, 1982, rather than during 1980, was that Intervenors were required to present oral argument in April of last year in their appeal of the alternative siting issue.

It should also be noted that there is a striking similarity between Intervenors' argument and the position that the Appeal Board rejected in Fulton. Here Intervenors imply that Duke acted in bad faith by "insisting" that the previously scheduled oral argument in Intervenors' appeal proceed,

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13/ See letter of February 3, 1982 from Albert V. Carr, Jr., Esq., Duke Power Company, to the members of the Appeal Board.

even though Duke had "by April of 1981, placed the Perkins project in an indefinite status" (Response, p. 12). Similarly, in Fulton the Licensing Board reasoned that Philadelphia Electric Company (PECO) acted in bad faith when it amended a construction permit application to seek early site review even though PECO did not have "a firm plan" or "present intention" to construct the subject facility, and eventually withdrew the application. Fulton, 14 NRC at 976.

The Appeal Board reversed the Licensing Board in Fulton. The Appeal Board explained that the lack of a firm plan to construct a nuclear facility when PECO was pursuing the ESR was not bad faith conduct. 14 NRC at 974-77. The effect of the Appeal Board's ruling was that despite the absence of either a firm plan or present intention to build a nuclear plant, PECO was justified in availing itself of NRC procedures that would expedite the construction permit application if and when it was filed. Duke's desire to complete Intervenors' appeal on alternative siting clearly falls within the scope of the holding in Fulton.[14/]

14/ Intervenors also argue that Duke acted in "bad faith" in resisting Intervenors' efforts to reopen the record and further delay this proceeding (Response, pp. 11-12). Intervenors' argument has no merit. The fact is that Intervenors' efforts to reopen or delay were opposed not only by Duke, but by the NRC staff as well. Intervenors sought delay of the Perkins proceeding at least sixteen times, and moved to reopen the record on ten additional occasions. The Perkins application was filed in 1974 along with a companion

[Footnote continued on page 22].

III. Intervenors' Claim For "Attorneys Fees, Costs and Expenses" Cannot Be Sustained

Intervenors argue that Duke should pay their attorneys fees, costs and expenses (Response, pp. 12-20). As shown below Intervenors's position is invalid.

As a preliminary matter it is necessary to note that most of Intervenors' presentation in support of this position is simply a photocopy of a portion of the Wright & Miller treatise, Federal Practice and Procedure: Civil, with no accompanying analysis of how, based on the specific facts of this proceeding, that photocopied material supports the relief Intervenors request. This behavior by Intervenors is

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14/ [Footnote continued from page 21].
application for construction permits for the Cherokee Nuclear Station, Units 1, 2 and 3. The six Perkins and Cherokee units employed standardized engineering. See Perkins, 8 NRC at 473, n. 1. Although Perkins was scheduled for construction ahead of Cherokee, delays in the Perkins proceedings forced a change in the schedule and construction of Cherokee moved ahead of Perkins. Intervenors simply have no cause to complain that Duke opposed their efforts to further delay Perkins.

Also misplaced is Intervenors' reliance on Cherry v. Brown-Frazier-Whitney, 548 F.2d 965 (D.C. Cir. 1976). There the plaintiff failed to prosecute its action for a period of several years. See 548 F.2d at 966-67. Here, in contrast, Duke was diligent in prosecuting the Perkins application. Indeed, as explained above, had it not been for the delays in this proceeding, Perkins would in all likelihood be under construction.

Finally, Intervenors make one additional claim to support their dismissal with prejudice argument. Intervenors assert that it is unlikely that their volunteer witnesses in this proceeding will be available in any future proceeding (see Response, p. 6-8, 11). This claim provides no support for Intervenors' dismissal with prejudice argument.

an affront to the NRC licensing process. Intervenors are represented by experienced counsel, as they have been throughout this proceeding. Duke submits that no lawyer who practices before this Commission should be permitted to photocopy a treatise in lieu of analysis. This behavior should serve as a basis for striking that portion of Intervenors' pleading.[15]

A. The Commission Does Not Have Statutory Authority To Award Attorneys Fees And Costs

As explained in Duke's April 19 Motion (pp. 14-17), absent express Congressional authorization, administrative agencies have no authority to order reimbursement of intervenors' expenses. This rule applies both to the use of public funds[16] and to fee shifting from one private party to another. In the latter instance the deeply rooted "American Rule" provides that "absent statute or enforceable contract litigants pay their own attorneys fees." Alyeska Pipeline

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15/ An analogous problem arose in Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313 (1978). The intervenor in that proceeding failed to submit a brief supporting its exceptions. The Appeal Board explained that "[t]he absence of a brief not only makes our task difficult but, by not disclosing the authorities and evidence on which the appellant's case rests, it virtually precludes an intelligent response by appellees." Id., 7 NRC at 315. The Appeal Board disregarded the unbriefed issues.

16/ Greene County Planning Board v. FPC, 559 F.2d 1227,1238-40 (2d Cir. 1977)(en banc), cert. denied, 434 U.S. 1086 (1978).

Service Corp. v. Wilderness Society, 421 U.S. 240 at 257 (1975).[17/]

Furthermore, the actions of the NRC, like other administrative agencies, must be "reasonably ancillary" to the functions delegated to it by Congress and must constitute a legitimate means "necessary for the achievement of its statutory mandate." See United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968); Mobil Oil Corp. v. Federal Energy Administration, 566 F.2d 87, 97 (T.E.C.A. 1977). In the case of the NRC, that statutory mandate is the Atomic Energy Act, 42 U.S.C. § 2011, et seq.

While § 2.107(a) of the Commission's regulations allows the presiding officer to impose terms on the withdrawal of a license application, such terms would have to further the

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17/ Accord, FCC v. Turner, 514 F.2d 1354 (D.C. Cir. 1975). Intervenors attempt to distinguish FCC v. Turner by citing Office of Communication of United Church of Christ v. FCC, 465 F.2d 519 (1972). Intervenors claim that Church of Christ upholds fee shifting as "part of a voluntary termination" of administrative proceedings (Response, p. 15). That is plainly incorrect. Indeed, as FCC v. Turner explains, 514 F.2d at 1356:

> In conclusion, we wish clearly to distinguish our prior opinion in United Church of Christ. It is one thing to approve a voluntary agreement in which a litigant has agreed to reimburse his adversary his expenses and attorney's fees in an appropriate case. It is quite another for an agency to order a litigant to bear his adversary's expenses. Before an agency may so order, it must be granted clear statutory power by Congress.

Congressional policy entrusted to the Commission, which the courts, in the case of the Atomic Energy Act, have repeatedly confined to assuring public safety in connection with nuclear power plant construction and operation.18/

However, requiring Duke to pay the legal fees of Intervenors will not advance Congress' policy in any way. Moreover, Congress has not given the Commission authority to impose the equitable remedy of fee shifting.19/ Administrative agencies simply do not have such inherent equity

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18/ A number of decisions have interpreted the scope of the NRC's authority under the Atomic Energy Act. Each held that the NRC's authority in power reactor licensing is limited to protection of the health and safety and common defense and security. For example, NRC jurisdiction under the Atomic Energy Act does not extend to regulation of the thermal pollution produced by NRC-licensed power reactors. New Hampshire v. Atomic Energy Commission, 406 F.2d 170 (1st Cir.), cert. denied, 395 U.S. 96 (1969). Similarly, the essential inquiry in connection with the NRC's authority to adopt procedural orders is whether the NRC is acting to further its function of regulating the radiological aspects of power reactor operation and construction. Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission, 598 F.2d 759 (3d Cir. 1979).

Nor does NEPA in any way expand the NRC's statutory powers. This is because "NEPA does not mandate action beyond the agency's organic jurisdiction." Gage v. AEC, 479 F.2d 1214, 1220, n. 19 (D.C. Cir. 1973), citing Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972). NEPA, of course, does not confer statutory authority to order payment of attorneys fees. Friends of the Newburyport Waterfront v. Romney, 8 ERC 1287, 1288 (1st Cir. 1975)(per curiam).

19/ See Turner v. FCC, 514 F.2d at 1355, quoting with approval In Re Application of Radio Station WSNT, Inc., 45 F.C.C.2d 377, 381-82 (1974).

powers. Arrow-Hart & Hageman Electric Co. v. FTC, 291 U.S. 587, 598 (1934). Instead, "Congress * * * intended that specific statutory authority, rather than general inherent equity power, should provide the agency with its governing standards". American Telephone & Telegraph Co. v. FCC, 487 F.2d 865, 872 (2d Cir. 1973).

Intervenors attempt to avoid the "American Rule" and the limits on the NRC's statutory authority by arguing that Duke "failed to distinguish between fees to a prevailing party and fees that are placed as conditions upon a voluntary dismissal" (Response, p. 12).[20/] Intervenors' unexplained reliance in this regard (Response, pp. 15-20) on the photocopied portion of the Wright & Miller treatise is inapposite. That portion of Wright & Miller addresses the federal district courts' authority under Rule 41(a)(2) to attach "terms and conditions" to voluntary dismissals. Of course, Rule 41(a)(2) is a statutory rule that expressly confers upon the court the equitable power to impose conditions upon a

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20/ In fact, the "American Rule" applies to voluntary dismissals as well. See Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LBP-82-29 (April 12, 1982)(slip op., pp. 6-9); accord, Blackburn v. City of Columbus, 60 F.R.D. 197, 198 (S.D. Ohio 1973). Significantly, Intervenors have not cited a single instance in which an administrative agency ordered one party to pay another party's legal expenses -- either in the context of a voluntary dismissal or otherwise. Indeed, one Licensing Board recently rejected a proposal very similar to Intervenors'. See Bailly, slip op., pp. 6-9.

plaintiff seeking to dismiss without prejudice. See 5 Moore's Federal Practice ¶ 41.05[1] at 41-53 to 41-54.

However, prior to enactment of Rule 41(a)(2), in all actions at law the plaintiff had "an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment". Matter of Skinner & Eddy Corp., 265 U.S. 86, 92-93 (1924); Barrett v. Virginia Ry. Co., 250 U.S. 473, 476-77 (1919). Thus, the courts were strictly prohibited in actions at law from exercising their equity powers to attach conditions to voluntary dismissals. See McCann v. Bentley Stores Corp., 34 F. Supp. 234 (W.D. Mo. 1940).

The principles discussed above are fully applicable to the NRC. As shown, although courts do have inherent equity powers, until Congress gave them explicit statutory authority the courts could not condition dismissals without prejudice on payment of defendants' expenses. Surely an administrative agency, which has no inherent equity power, must be held to the same standard. In sum, the NRC does not have statutory authority to impose the equitable remedy of conditioning Duke's withdrawal of the Perkins application on the payment of Intervenors' legal fees or costs.[21/]

21/ The Licensing Board's April 12, 1982 decision in Bailly, supra, provides an additional reason for rejecting Intervenors' claim for legal fees. The NRC has steadfastly rejected intervenors' requests for attorneys fees (see Duke's

[Footnote continued on page 28].

B. In Any Event, Even Under The Standards Of Rule 41(a)(2) Intervenors Are Not Entitled To Attorneys Fees

Assuming that the standards of Rule 41(a)(2) apply to this proceeding, it is clear that Intervenors are not entitled to attorneys fees and expenses.

Before turning to that discussion it bears repeating that the policy of Rule 41(a)(2) -- including the court's authority to condition a dismissal without prejudice on payment of defendant's attorneys fees -- simply does not apply here (see pp. 11-14, above). This is not a case of abuse of the NRC's processes. Moreover, Duke cannot be analogized to the plaintiff who for reasons of its own -- such as gaining a procedural advantage -- prefers to terminate the litigation while preserving the opportunity to restart at another time or before another forum. Nor does Duke bear any resemblance to the plaintiff whose case was weak from the start, but who wants the option of starting over.

On the contrary, Duke initiated this proceeding as a good faith effort to meet its statutory public service

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21/ [Footnote continued from page 27]. April 19 Motion, p. 14). And in Bailly the Licensing Board concluded: "this Board lacks the authority to impose such a condition. We can go only as far as established precedent without adopting new Commission policy, and Commission policy can only be adopted by the Commission itself. The licensing and appeal boards are not empowered to make policy." Id., slip op. at 9, citing Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257, 261 (1979); South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-47, 14 NRC 866, 875 (1981), affirmed on other grounds, ALAB-663, 14 NRC 1140 (1981).

obligation to provide adequate and reliable electric service. Indeed, "it is the public's need for power which is one of the underlying reasons for construction of a power plant." Boston Edison Co. (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 AEC 324, 327 (1974). Moreover, three expert agencies (the NRC, FPC and NCUC) agreed, based on the record before them, that the Perkins application was necessary for Duke to meet that obligation. To require Duke to pay the expenses of Intervenors, who chose to participate in this proceeding and lost on every issue that they raised, would penalize not only Duke but also the consumers who would ultimately bear those expenses. Such a result would turn justice on its head.

Nevertheless, even under the standards of Rule 41(a)(2), Intervenors fee request is invalid. Under Rule 41(a)(2), payment of attorneys fees and expenses is discretionary with the court when a case is dismissed without prejudice.[22/] "[I]t is for the court, under the circumstances of the particular case, to decide whether payment of an

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22/ Most of Intervenors' presentation appears to be directed to fee shifting as a condition to dismissal without prejudice. But Intervenors also argue that they are entitled to fees even in the case of a dismissal with prejudice (Response, pp. 12-13). However, as Intervenors' own Response indicates (p. 19), it has been held that attorneys fees cannot be awarded where an action is dismissed with prejudice under Rule 41(a)(2). Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), cert. denied, 384 U.S. 909 (1965); see also Mobile Power Enterprises Inc. v. Power Vac, Inc., 496 F.2d 1311, 1312 (10th Cir. 1974); Lawrence v. Fuld, 32 F.R.D. 329 (D. Md. 1969).

[Footnote continued on page 30].

attorney's fee should be required. It is not obliged to order payment of the fee." 9 Wright & Miller, § 2366, p. 180. Moreover, in resolving this question it is well-established that "all the facts must be considered and all the equities weighed." Lunn v. United Aircraft Corp., 26 F.R.D. 12, 18 (D. Del. 1960).

To be sure, the premise for awarding fees under Rule 41(a)(2) is that the defendant should not have to duplicate the expense of defending itself. Goldlawr, Inc. v. Schubert, 32 F.R.D. 467, 472, n. 5 (S.D.N.Y. 1963). But that concern is not applicable here where Intervenors lost on every issue they raised. Indeed, attorneys fees cannot be awarded "in the absence of showing as to their propriety", 5 Moore's Federal Practice ¶ 41.06 at 41-86 (2d Ed. 1981), and to do so here would improperly reward Intervenors for losing. The plain truth is that Intervenors failed to "develop[] information which cast doubt upon the merits of the [Perkins] application." North Coast, 14 NRC at 1135, n. 11.

22/ [Footnote continued from page 29].
Nevertheless, Intervenors attempt to end run these decisions. Intervenors rely on 10 C.F.R. Part 170 and Mississippi Power & Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980), which authorize the NRC to charge licensees for services that culminate in the issuance of a license and thereby benefit them. Intervenors argue that their intervention was a "benefit" to Duke. As explained above, that statement is simply not correct (see pp. 4-11). In any event, Intervenors' attempt to analogize their participation in this proceeding to 10 C.F.R. Part 170, which implements the Independent Offices Appropriations Act, 31 U.S.C.A. § 483a, is foolish -- the statute applies to agencies of the federal government only.

Moreover, as explained in Duke's April 19 Motion (pp. 16-17), attorneys fees should not be awarded under Rule 41(a)(2) absent a showing that the plaintiff's suit "was not a bona fide effort to seek redress", or was filed "to harass, embarrass or abuse the * * * defendants or the civil process", or that the plaintiff "deliberately sought to increase the defendants' costs by unduly protracting the litigation." Blackburn v. City of Columbus, 60 F.R.D. at 198. Indeed, in a case involving "copious litigation" spanning a number of years the court rejected defendant's request under Rule 41(a)(2) for attorneys fees on the grounds that "it would be difficult indeed to assert that plaintiff was not justified in bringing defendant into court". Union National Bank of Youngstown, Ohio v. Superior Steel Corp., 9 F.R.D. 117, 121 (W.D. Pa. 1949). Absent circumstances such as those referred to above, there is no justification for awarding attorneys fees as a condition to a dismissal without prejudice under Rule 41(a)(2). See International Video Corp. v. Ampex Corp., 484 F.2d 634, 637 (9th Cir. 1973).

Furthermore, these principles are confirmed by the cases that award attorneys fees under the rule. Thus, in several of these cases, the court expressly challenged the plaintiffs' good faith in filing and maintaining their suits.[23/] Indeed,

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23/ Pathe Laboratories, Inc. v. Technicolor Motion Picture Corp., 19 F.R.D. 211, 212 (S.D.N.Y. 1955); see also Even-Cut Abrasive Band & Equipment Corp. v. Cleveland Container Co., 171 F.2d 873, 877 (6th Cir. 1949).

in one case the court noted that the "[p]laintiffs have practically walked out on this litigation."[24/] In other cases the courts relied on the fact that the plaintiffs had engaged in delaying tactics, unresponsive discovery requests and the like.[25/] In several additional cases the courts found that the plaintiffs' decisions to file and dismiss their suits were nothing more than forum shopping, or other tactics intended to gain a procedural advantage.[26/]

As the preceding discussion demonstrates, none of the factors that can justify awarding attorneys fees under Rule 41(a)(2) are present in this case. Furthermore, the equities also preclude such an award. Duke filed and prosecuted the Perkins application in good faith and in order to

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24/ Gold v. Geo. T. Moore Sons, Inc., 3 F.R.D. 201, 202 (S.D.N.Y. 1943).

25/ Scholl v. Felmont Oil Corp., 327 F.2d 697, 700 (6th Cir. 1964); Nazzaro v. Weiner, 38 F.R.D. 430, 433-34 (D.N.J. 1965), aff'd, 353 F.2d 537 (3d Cir. 1965)(per curiam). Meltzer v. National Airlines, Inc., 31 F.R.D. 47, 50-51 (E.D. Pa. 1962).

26/ Thus, in Welter v. E. I. DuPont De Nemours & Co., 1 F.R.D. 551 (D. Minn. 1941), the court emphasized the fact that plaintiff sought to dismiss without prejudice after defendant had commenced discovery in the federal court proceeding -- plaintiff wanted to defeat defendant's discovery efforts by refiling in state court where the discovery rules were far less liberal. See also Kolman v. Kolman, 58 F.R.D. 632 (W.D. Pa. 1973). In another case, the court observed that the plaintiff had "engaged in extensive procedural maneuvering" to maintain the very action that the plaintiff was then seeking to dismiss without prejudice. Goldlawr, Inc. v. Shubert, 32 F.R.D. 467, 470 (S.D.N.Y. 1962). This included a trip to the Supreme Court. Another forum shopping case is Meltzer v. National Airlines, which is also cited in the preceeding footnote.

meet its statutory obligation to provide safe, adequate and reliable electric service. And as the case progressed, Duke's position was repeatedly sustained. However, the Perkins proceeding was subject to considerable delay, and conditions beyond Duke's control required Duke to withdraw the application.

CONCLUSION

Based on the foregoing, Duke Power Company respectfully requests that its application for construction permits for the Perkins Nuclear Station be dismissed without prejudice. In addition, Duke submits that the Licensing Board should reject Intervenors' arguments for dismissal of the Perkins application with prejudice and payment by Duke of Intervenors' costs and attorneys fees.

Respectfully submitted,

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May 28, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Power Company's Reply To Intervenors' Response To Motion To Withdraw" dated May 28, 1982, have been served upon the following by deposit in the United States mail this 28th day of May, 1982.

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