UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Ivan W. Smith, Chairman
Dr. Walter H. Jordan
Dr. Donald P. deSylva

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

September 20, 1982

MEMORANDUM AND ORDER AUTHORIZING WITHDRAWAL OF APPLICATION FOR CONSTRUCTION PERMIT WITHOUT PREJUDICE

Background

Duke Power Company filed motions on March 2, 1982 with this Board and with the Appeal Board seeking leave to withdraw without prejudice Duke's application for construction permits for the Perkins Nuclear Station and requesting that the Boards terminate as moot the proceedings pending respectively before them. Intervenors, Mary Apperson Davis and the Yadkin River Committee, opposed the motion and counter-requested instead that the application be dismissed with prejudice and that Intervenors be awarded their costs in this proceeding. The NRC Staff stated that it did not oppose Duke's motion to withdraw but recommended that this Board decide the matter in the first instance. The Appeal Board agreed, and in ALAB-668, 15 NRC 450 (March 24, 1982), noted that it is

for the Licensing Board to pass upon the motion in the first instance. The Appeal Board also vacated the three partial initial decisions which had not achieved finality: LBP-78-25, 8 NRC 87 (1978); LBP-78-34, 8 NRC 470 (1978); and LBP-80-9, 11 NRC 310 (1980). We requested the parties to submit new pleadings and to brief the issues more thoroughly. They have refiled their papers and the matter is ripe for initial disposition.[1/]

Jurisdiction and Authority

Withdrawal of an application after the issuance of the Notice of Hearing shall be on such terms as the presiding officer may prescribe. 10 CFR 2.107(a). In determining whether the withdrawal shall be with or without prejudice, the Appeal Board in ALAB-668 instructed us to apply the guidance provided in Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981), and Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981). We understand from ALAB-668 that all aspects of the withdrawal motion and proceeding are to be considered by this Board in

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1/ Duke's April 19 motion to withdraw the application without prejudice; Intervenors' April 29 response to Applicant's motion to withdraw; Duke's May 28 reply to Intervenors' response to motion to withdraw; and NRC Staff's June 14 response to motion to withdraw application without prejudice.

the first instance, not just the matters over which we retained jurisdiction. Id. at 451. We are also told that this Board should consider first the Intervenors' demand for their litigation expenses. Id. at n.2. Here again we construe ALAB-668 to require us to consider all aspects of the proceeding in determining whether Intervenors are entitled to reimbursement of their litigation expenses. For the limited purpose of deciding the issues we necessarily must consider the partial initial decisions vacated in ALAB-668 and their respective underlying records.

History of the Proceeding

Duke applied for construction permits for the three Perkins units on March 29, 1974. The Perkins reactors were to be of the PWR type, Combustion Engineering System 80 models, each with net output of 1,280 megawatts electric. The station was to be located on the Yadkin River in North Carolina.

Appications for a sister plant, the three-unit Cherokee Nuclear Station, to be located in South Carolina, employing the same C.E. design, followed a roughly parallel course.

The Perkins Notice of Hearing was published in July 1974 and the intervenors Davis and Yadkin River Committee filed their late intervention petition in June 1975 which was granted by the Board in November 1975.

Following hearings the Board issued three partial initial decisions. The first partial initial decision, LBP-78-25, supra, concerned the health effects associated with releases of radon-222 during the uranium fuel cycle. Intervenors lost on that issue; the Board concluded that such effects were insignificant in striking the cost benefit balance for Perkins. The second partial initial decision, LBP-78-34, supra, decided National Environmental Policy Act and Atomic Energy Act issues in favor of granting the application with the exception of the question of alternate sites and generic safety issues, consideration of which was deferred. The Intervenors did not prevail on any issues. See particularly 8 NRC at 484-96. In the third partial initial decision, LBP-80-9, supra, the Board decided the alternate sites question, concluding that no other site considered was obviously superior to the Perkins site. Again, the Intervenors did not prevail. Following the third partial initial decision, the Board continued to have before it generic safety issues and issues related to the accident at Three Mile Island Unit 2.

In the meantime, in January 1978, Duke had informed the Board that Perkins Units 1 and 3 would each be delayed three years, to 1988 and 1993 respectively, and Unit 2 would be delayed four years until 1991. 8 NRC at 509, n.19. Later, in July 1979, Duke informed the Board that final plans for the Perkins units have not been made and that none of them would be added to Duke's generation until at least 1989. Duke reported difficulty in raising capital, complained of regulatory uncertainties, and reported a reduction in forecasted annual peak load growth during the

1982-1994 period.[2/] However, Duke reasserted its eventual need for the Perkins units, and requested the Board to issue the initial decision authorizing construction permits. At the same time, Duke announced delays in the operation of the Cherokee units.[3/]

On March 10, 1981 Duke responded to an Appeal Board inquiry reporting that Perkins was at that time unscheduled but that some additional generation would be needed in the 1990s. Duke's counsel requested that the Appeal Board proceed with its scheduled oral arguments on the partial initial decision on alternate sites.[4/] The Appeal Board heard oral arguments as scheduled on April 1, 1981.

On March 12, 1981 Duke reported to NRC's Director of the Division of Licensing, in response to his questions, substantially the same information given to the Appeal Board on March 10, and stated:

> Answer. In view of the delays in the Perkins schedule Duke does not consider it appropriate to expend Commission resources on the Perkins application during the next two years except for resolution of the pending licensing questions. The pending licensing questions are on alternative sites and site suitability. These have been thoroughly examined by the Licensing Board and are currently before the Appeal Board. The Appeal Board should hear the arguments and make their findings without delay.[5/]

2/ Letter William L. Porter to the Board, July 2, 1979.

3/ Id.

4/ Letter, William L. Porter to Bishop, March 10, 1981.

5/ Letter, William L. Porter to Eisenhut, March 12, 1981.

This Board also became aware of reports bringing into question the future of the Perkins project and on April 28, 1981 we directed Duke to report on its plans for Perkins. On May 5 Duke responded mainly by attaching its recent reports to the Appeal Board and to the Division of Licensing.[6/]

Noting Duke's response to the Director of Licensing, this Board revisited a July 10, 1979 Intervenors' motion to dismiss or stay the proceeding (renewed in October 1979) and ruled that, although we have no basis for dismissing the proceeding, the Applicant's suggestion for a two-year hiatus was reasonable. Accordingly, we suspended the proceeding on matters pending before us for two years on May 14, 1981. Then on February 3, 1982 Duke's counsel reported that its management would recommend to its board of directors that the application for Perkins be withdrawn. This report was followed by Duke's motion to withdraw on March 2.

Withdrawal With or Without Prejudice

The Intervenors defined a withdrawal of the Perkins application with prejudice as one which ". . . would mean that Applicant could not reapply for the construction of the same or similar facilities at the [Perkins] site or similar site in question."[7/] The Fulton Appeal

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6/ Duke's Response to Licensing Board order relative to future plans for Perkins, May 5, 1981.

7/ Intervenors' March 11, 1982 Response to Motion to Withdraw, at 2.

Board, in determining the potential reach of a withdrawal with prejudice, rejected out-of-hand one which would effectively eliminate the utility's nuclear option as being "well beyond the Licensing Board's jurisdiction over a particular construction permit application." 14 NRC at 973. In Fulton the type of reactor, an HTGR, was seen to be a moot point because of technological advances and regulatory changes. So the Appeal Board proceeded under the assumption that prejudice only with respect to the Fulton site would be the subject of its consideration.

In this proceeding the Intervenors never defined their term, "same or similar facilities", nor have they ever discussed why or whether Combustion Engineering System 80 units, any PWRs, or any type of reactor or associated equipment should be the subject of their motion. Considering the nature of the Intervenors' participation in this proceeding -- site specific environmental issues, fuel cycle effects, and generalized need for power -- we see no relevance in the type of facility to the issues before us. Nor did Intervenors ever offer any justification for an order barring an application at a "similar site". Therefore we limit the consideration to whether the application should be withdrawn with prejudice to Duke's right to reapply at the Perkins site.

In Fulton the Appeal Board provided firm guidance to licensing boards as to the reach of their discretion to prescribe the terms of withdrawal of an application under 10 CFR 2.107(a):

> On its face, this provision [Section 2.107(a)] gives the boards substantial leeway in defining the circumstances in which an application may be voluntarily withdrawn. But as in all other areas, the boards may not abuse this discretion by exercising their power in an arbitrary manner. See LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604

> (5th Cir. 1976); 5 Moore's Federal Practice ¶41.05[1] at 41-58. The terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed. And, of course, the record must support any findings concerning the conduct and harm in question. See LeCompte, supra at 604, 605.
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> In the case at hand, the effective prohibition against PEC's future use of the Fulton site for any type of nuclear reactor (see p. 973, supra) is a particularly harsh and punitive term imposed upon withdrawal. The conduct and harm for which dismissal with prejudice is intended to serve as the remedy, therefore, must be of comparable magnitude.

14 NRC at 974.

Federal rules clearly favor dismissals without prejudice where no other party will be harmed thereby. Fed. R. Civ. P. 41(a)(1), (2); LeCompte, supra, 528 F.2d, at 603. In fact the rule favoring dismissal without prejudice is so well established that most decisions under the rule are concerned with the conditions to be imposed to obviate legal harm from a dismissal without prejudice, not with the issue of whether the dismissal should be with prejudice. See LeCompte, supra, at 603, and the cases and authorities cited therein. See also Yoffe v. Keller Indus., Inc., 580 F.2d 126, 129-30 (5th Cir. 1978); petition for rehearing denied, 582 F.2d 982 (1978).

Therefore we approach the parties' motions with the following standards in mind:

Duke is entitled to withdraw its application without prejudice unless there is legal harm to the intervenors or the public.

In this case the Board may attach reasonable conditions on a withdrawal without prejudice to protect intervenors and the public from legal harm.

But if conditions on a withdrawal without prejudice cannot avoid legal harm, dismissal with prejudice may be ordered, but only to the extent that a dismissal with prejudice is necessary to prevent the legal harm. The right to a voluntary dismissal without prejudice is not absolute. LeCompte, supra, 528 F.2d at 604.

Duke would have the option to accept either reasonable conditions on a dismissal without prejudice, or a dismissal with prejudice as to certain issues. Yoffe, supra, 580 F.2d at 131, n.13; 582 F.2d at 983.

Intervenors assert several possibilities of legal harm to their interest if the application is dismissed without prejudice or without appropriate conditions. First, the traditional concern is expressed, i.e., ". . . if this case is dismissed without prejudice, the Intervenors are obviously faced with the real possibility of a second proceeding with all its attendant fees and costs." Response at 14. That possibility -- another hearing -- standing alone does not justify either a dismissal with prejudice or conditions on a withdrawal without prejudice. As the Appeal Board noted in North Coast:

> That kind of harm -- the possibility of future litigation with its expenses and uncertainties -- is precisely the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without

prejudice. 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).[11]

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[11] We note that the case at bar did not entail lengthy discovery, or proceed through the trial stage. It hardly got off the ground. We leave open the question whether something short of a dismissal with prejudice, such as conditioning withdrawal of an application upon payment of the opposing parties' expenses might be within the Commission's powers and otherwise appropriate where the expenses incurred were substantial and intervenors developed information which cast doubt upon the merits of the application.

14 NRC at 1135. See also LeCompte, supra, 528 F.2d at 603, citing Holiday Queen Land Corp. v. Baker, 489 F.2d 1031, 1032 (5th Cir. 1974).

The cited footnote in North Coast above, n.11, was also specifically brought to our attention by the Appeal Board in ALAB-668, the order assigning the matter to this Board for first resolution. 15 NRC at 451, n.2. As the Appeal Board noted in Fulton, "Ordinarily a dismissal 'without prejudice' signifies that no merits disposition was made; a dismissal 'with prejudice' suggests otherwise." 14 NRC at 973. Moore's Federal Practice cited in North Coast (Vol. 5, ¶41.05[2], at 71-75 (2d ed. 1981)) discusses many cases where a motion for unconditional voluntary dismissal without prejudice was denied or where a motion to dismiss was granted, but with prejudice. The tenor of these cases is that the litigation had moved along too far to dismiss unconditionally without prejudice because the other party had already been put to the expense of defending. Certainly where the defendant has prevailed or is about to prevail an unconditional withdrawal cannot be approved. Id.; see also 9 Wright and Miller, Federal Practice and Procedure, Civil, Section 2364 (1971).

The Intervenors have not cited nor can we find any authority where a plaintiff has been denied or has sought a without-prejudice dismissal after having prevailed on the merits. Nor can we find any authority where a dismissal with prejudice has been imposed upon a prevailing plaintiff. We would not expect to find any such authority (except possibly where a prevailing plaintiff seeks dismissal in the face of a dependant counter-claim) because in purely adversary and private litigation there simply is no reason for the issue to arise.

This proceeding, a mandatory licensing hearing, is unusual in comparison with traditional adversary litigations. While the cases under Rule 41(a)(2) are helpful, they do not completely cover the issues involved here. Duke filed its applications for the Perkins permit in furtherance of its business and its responsibility to supply electric power in its service area. It did not seek out the Intervenors to be adversaries, nor did it sue for a judgment against them. Obviously Duke would have preferred that the Intervenors stay out of the proceeding. Moreover, Duke did not sit on its application. The record amply demonstrates that despite growing uncertainties about the future of the Perkins project, Duke was persistent in seeking a decision on the merits.[8/] Therefore, in the circumstances of a mandatory licensing proceeding, the fact that the motion for withdrawal comes after most of the hearings should not operate to bar a withdrawal without prejudice where the

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8/ Duke's diligence, in fact, is the major complaint Intervenors have against Duke, and their citation to Cherry v. Brown-Frazier-Whitney, 528 F.2d 965 (D.C. Cir. 1976) (dismissal with prejudice after failure to prosecute), is inapposite.

applicant has prevailed or where there has been a non-suit as to particular issues.

However Intervenors argue that Duke's assertion that it has been successful on most issues is an over-simplification and ignores the facts. In that connection, Intervenors explain that the Appeal Board failed to affirm and vacated the partial initial decisions. Response at 2. We do not know quite what Intervenors would have us make of the Appeal Board's action. The worst effect it would have on Duke's position is that the motion to withdraw would be in the face of a non-suit. Under traditional standards, that is exactly when withdrawal without prejudice is justified.[9/]

On the other hand we do not accept the argument implicit in Duke's pleadings that, because Intervenors voluntarily chose to participate in this proceeding to protect their own interests, and because an NRC licensing proceeding cannot be used to harrass intervenors, Intervenors have no standing to seek a dismissal with prejudice. Duke's Reply at 13. The same kind of argument is made by Duke (Reply at 28-29) and by the NRC Staff (Response at 21) with respect to Intervenors' standing to request litigation expenses as a condition of withdrawal. First, Intervenors are not completely volunteers. They did not elect to have their interests

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9/ We do not need to address the situation of an unwilling litigant who has gone to the expense and effort to prepare for trial and is entitled to conditions on withdrawal or a dismissal with prejudice even though the matter was not heard on the merits. 5 Moore's Federal Practice ¶41.05 at 41 and n.19 (2d ed. 1981). Intervenors make no claim on that basis. All matters scheduled to be heard before this Board were heard.

affected by the Perkins application. Second, in any event, their standing to be admitted as a party to the proceeding is a statutory right under Section 189a of the Atomic Energy Act. Part and parcel of their right to intervene is the right to enjoy any earned benefits of the ensuing proceeding. Otherwise the entire intervention process would be pointless. In our view the Intervenors have standing to seek a dismissal with prejudice or to seek conditions on a dismissal without prejudice to the exact extent that they may be exposed to legal harm by a dismissal. If the Intervenors have won anything in this proceeding they are entitled to have that judgment preserved for use in any revived Perkins proceeding or to be protected from harm if any victory is nullified by the unfair need to litigate their interests again.

The Intervenors claim that they achieved success in this proceeding with respect to the amount of cooling water to be withdrawn from the Yadkin River:

> 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.

Intervenors Response at 5-6.

Intervenors' Contention III(A)1 asserted that the proposed draw down limitation of 880 cfs combined with other factors would have an

adverse effect on High Rock Lake. 8 NRC 484. The Board found that the contention as a whole failed and that Perkins' use of Yadkin River water would have a negligible impact on the lake. Id. at 487. Moreover the Board went on to find:

> 67. . . . [North Carolina] State Exhibit 2 is a copy of Environmental Management Commission (EMC) corrected Resolution No. 76-41. In that document EMC found that the effects of Duke's withdrawal on downstream users will be minimized if the net withdrawal is limited to no more than 25% of stream flow and is prohibited when stream flow is 1,000 cfs or less. The maximum consumptive withdrawal is not to exceed 112 cfs. These conditions were made a part of the certificate from the NCUC.

8 NRC at 489.

We accepted the State's conditions as conditions on any construction permit. Id. at 490. Thus it was the State of North Carolina, not the Intervenors, who succeeded in establishing the minimum withdrawal limitation from the Yadkin River. We make this determination from a review of the partial initial decision. Intervenors have not pointed to any evidentiary basis for its claim, nor have we made a separate search of the record on its behalf.

Let us assume for argument, however, that the Intervenors had an influence in attaining that 1,000 cfs minimum stream flow limitation, and in that sense ". . . developed information which cast doubt upon the merits of the application." North Coast, ALAB-662, 14 NRC 1135, n.11, cited supra. The most it could hope for would be a dismissal with prejudice with respect to the water condition imposed by the Board or, perhaps as we discuss below, compensation for expenses in anticipation of the need to litigate the condition again. We would not impose such a

condition, however, without further inquiry. Intervenors have not provided sufficient information to require "reasonable minds to inquire further" on the issue. North Coast, supra, 14 NRC at 1134. We see no need, sua sponte, in the public interest to inquire further now, because, inter alia, of the continuing interest and responsibility of the State of North Carolina on water issues in any renewed Perkins application. It is better to leave any condition for minimum stream flow open to conform to any changed future conditions on the Yadkin River. Moreover, it is as likely as not that in any renewed Perkins application, the minimum permissible stream flow might be increased, a risk that Duke accepts in withdrawing without prejudice. We conclude that neither Intervenors nor the public will suffer legal harm by a dismissal without prejudice on water issues.

Intervenors also argue that they aided the Board and Duke on the issue of need for power and, in effect, Intervenors should have prevailed on that issue. Response at 2-5. A dismissal of the Perkins application with total prejudice on the issue of need for power, a request implicit in Intervenors' motion, would make no sense at all. It would deprive the utility of its nuclear option contrary to statute, and would be contrary to the public interest when and if the need arises for a facility such as Perkins in the future. And, as the Fulton Appeal Board noted, supra, that action would be beyond our jurisdiction.

Even if Intervenors had prevailed on the merits of the need-for-power issue during the hearings, the most it could have achieved is a res judicata determination that, during the hearings in 1977, Duke failed to

establish that Perkins would be required in Duke's system roughly during the times then scheduled. Given the inherent uncertainty in predicting long-term power needs, as recognized in NRC decisions, it is unlikely in the extreme that the Board would have decided that the proposed Perkins facility would never be needed.10/ In fact, even the terms of Intervenors' Contention III(E) on need for power asserted only that Perkins ". . . would not be needed at the time the facility is scheduled to come on line . . . ."

Perhaps, however, Intervenors intend to assert only that they are entitled to their litigation expenses as a result of their participation on the need-for-power issues, a consideration which we address below.

Litigation Expenses

Intervenors' argument that they are entitled to attorney's fees from Duke as an award to the prevailing party is very weak. The Supreme Court in Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240; 44 L. Ed. 2d 141; 95 S. Ct. 1612 (1975), clearly reconfirmed that, under the American rule, ordinarily parties are to bear their own litigation expense. A claim for litigation costs under the "private attorney general"

10/ In Carolina Power and Light Co. (Shearon Harris, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609 (1979), the Commission commented: "The general rule applicable to cases involving differences or changes in demand forecasts was stated in Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). In that case the Appeal Board found the question was 'not whether Niagara Mohawk will need additional generating capacity but when.' Id. at 357."

theory must have a statutory basis. Id., 421 U.S. 269. The Alyeska ruling was extended to administrative agencies in Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975). Intervenors acknowledge the Alyeska decision, but argue that there is a statutory basis for authorizing attorney fees here because the Commission, by rule (10 CFR Part 170), under statute has provided for assessing licensing costs against applicants. We cannot see any similarity between Commission's regulation providing for license fees and a statute authorizing attorney fees in furtherance of a public policy to encourage the private enforcement of Federal statutes, e.g., treble damages and reasonable attorney's fees in antitrust suits under Section 4 of the Clayton Act, 15 U.S.C. Sec. 15.

On the other hand we have not been persuaded by the arguments of the NRC Staff (Response at 19-21) and Duke (Reply at 25-27) that the Commission's boards lack any authority whatever to award attorney fees for the purpose of obviating legal harm threatened by a withdrawal without prejudice.

Many cases under Rule 41 have involved the payment of attorney fees to save defendants from legal harm where actions have been dismissed without prejudice. As the court in LeCompte noted:

> Most cases under the Rule [41(a)(2)] 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.

528 F.2d at 603.

The courts have freely used the payment of attorney's expenses as the most useful of the conditions available to protect a defendant in recognition that the plaintiff may reinstate his action after the defendant has been put to effort and expense in the first proceeding for naught. Id.

The American rule, which bars recovery of litigation costs by the prevailing party as an award for winning a presumably completed law suit, must be distinguished from the practice of reimbursing litigation costs as a condition on a dismissal without prejudice. The latter is not an award for winning anything, but is intended as compensation to defendants who have been put to trouble and expense to prepare a defense only to have the plaintiff change his mind, withdraw the complaint, but remain free to bring the action again. It is only anticipation that the defendant may have to incur expenses to prepare again in a refiled proceeding which justifies the payment of defendants' costs in the first proceeding as a condition of dismissal without prejudice. 5 Moore's Federal Practice, supra, ¶41.06, at 41-83, 41-86.

Both Staff and Duke recognize that boards may apply appropriate conditions on the withdrawal of an application for construction permit, but each argues that a condition requiring reimbursement of attorney's fees may not attach because boards lack statutory authority or any inherent equity authority for such a condition. Their arguments fail of their own weight. Where is the express authority to attach any kind of condition -- redress of a site for example? Is there something about money that takes reimbursement of litigation expenses out of the bank of

possible conditions available to avoid legal harm to an adversary? Staff argues only that the Federal Rules do not necessarily apply to Commission proceedings. Response at 29. Applicant lightly brushes aside the well-established use of attorney fees in without-prejudice dismissals by courts to protect litigants from harm. Reply at 26. Both allow the clear prohibition against lawyers fees under the American rule to wander out of its limitations into their considerations of conditions on dismissals without prejudice -- two essentially unrelated concepts.

There is nothing about the payment of money which removes a possible litigation-expense condition from consideration, because, in the final analysis, the utility does not have to pay. It can instead elect to accept a reasonable with-prejudice ruling as to issues where, for example, the intervenor prevailed and where the public interest permits.

The absence of specific statutory authority does not prevent boards from exercising reasonable authority necessary to carry out its responsibilities and a money condition is not necessarily barred from consideration. For example, under 10 CFR 2.720(f) a presiding officer may condition the denial of a motion to quash or to modify a subpoena duces tecum on "just and reasonable terms". In Pacific Gas and Electric Company (Stanislaus, Unit 1), ALAB-550, 9 NRC 683 (1979), the Appeal Board ruled that even without express statutory authority, an agency has the right to condition the enforcement of subpoenas upon the payment of production costs. Id. at 698-702.

It is true that the Appeal Board in ALAB-550, in broad language, held that there is ". . . a manifest difference exists between (1) awarding attorney's fees in favor of one litigant against another and (2) requiring a party who requests the issuance of a subpoena duces tecum to assume the costs of compliance with it." Id. at 700. However, the cited discussion was to make the necessary distinction between the American rule and the authority of the agency to impose reasonable terms of conditions on litigants in furtherance of the agency's mission.

We hold that the payment of attorney's fees is not necessarily prohibited, as a matter of law, as a condition of withdrawal without prejudice of a construction permit application.[11/]

This ruling, however, turns out to be a hollow victory for Intervenors because the record does not reveal that they will suffer any legal harm from an unconditioned dismissal of the Perkins applications without prejudice. We arrive at this conclusion quite easily on the issues of alternate sites, fuel cycle health effects, effects on the Yadkin River, and site-specific environmental and safety issues. As we noted above, Intervenors lost on these issues. The worst that can befall Intervenors if the Perkins application is withdrawn without prejudice is that they will have an unearned second chance to prevail on these issues.

11/ Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), LBP-82-29, 15 NRC 762 (1982), cited by Staff and Duke, can be distinguished because, inter alia, the Licensing Board there held that the effect of the termination, with or without prejudice, is to rescind the construction permit with finality. Id. at 767.

We do not so easily arrive at a conclusion on the need-for-power issue however. The issue presents several handles for possible analysis. Intervenors lost on the issue but feel that they should have prevailed in view of later developments. What is the consequence of that possibility? Should we make an evidentiary inquiry into the correctness of our need-for-power decision? Were Intervenors correct about need for power but for the wrong reasons? Should we inquire as to whether negative price elasticity, advances in alternate energy sources, conservation, and peak pricing reduced the need for Perkins, as contended by Intervenors in 1977? Even if we did inquire, could we separate the unanticipated high costs of financing utility expansion and the economic recession as contributors to Perkins' demise? These factors were not identified by Intervenors in 1977.

We decide the matter against Intervenors on two bases. The first is that in 1977 when the matter was heard, Intervenors did not prevail on the issue. Nor can we find from the ensuing events that they should have prevailed. While that theoretical possibility exists, Intervenors have not made the requisite showing sufficient to require reasonable minds to inquire further nor do they request a further inquiry. Based upon the record presented to us in 1977, we determined that the preponderance of the reliable, probative and substantial evidence established that in 1977 the Perkins units would be required on Applicant's schedule. 8 NRC 492-96. If the Perkins application is refiled, Intervenors will have an opportunity to test again the need-for-power issue, providing that issue remains the subject of individual Commission adjudications.

The second basis for ruling against Intervenors is similar to the reason we declined to dismiss with prejudice on the need-for-power issue. Supra, at 16. Even assuming that the Intervenors prevailed or should have prevailed on the merits of the need-for-power issue, because of the uncertainties in power need projections and the overriding public interest, the Intervenors could have achieved a res judicata ruling only as to future power needs as reasonably predicted from the situation prevailing in the relevant period surrounding 1977. Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek, Unit 1), ALAB-462, 7 NRC 320, 328 (1978). They would not have won (nor did they seek) a res judicata determination that the power from Perkins would never be needed. Therefore Intervenors could not have been assured even in victory that they would not have to face the issue again after a reasonable period of time.

The result we reach produces an anomalous legal phenomenon because the matter arises after hearing and decision on the merits. Assuming arguendo that Duke's withdrawal proves that Intervenors prevailed on the need-for-power issue in that, as they contended, Perkins is not needed on the schedule set by Duke. In that case Intervenors would not be entitled to attorney fees because, as the prevailing party, they received what they paid for and are barred from recovery under the American rule. This would also hold true if the Perkins facility is never needed and the application never refiled. But assuming, as we find to be the case, that Intervenors lost on the need-for-power issue, then also they may not recover their attorney fees because they will suffer no legal harm on any

filing of a new Perkins application. Either way, under the circumstances of this unusual issue, Intervenors may not collect their litigation costs.12/

Intervenors also mount a claim for relief on the grounds that the Perkins application should have been withdrawn in 1980 and that, as a consequence, Intervenors were required to carry out an appeal in 1981. Response at 9-12. The Appeal Boards in Fulton and in North Coast recognized the relevance of the utilities' good or bad faith in revealing its intentions not to pursue a construction permit application. Fulton, 14 NRC at 974-79; North Coast, 14 NRC at 1136-37. But the asserted bad faith is relevant only to possible harm caused by the bad faith to the other party or to the public. Fulton, at 978-79.

We see no bad faith in the timing of Duke's withdrawal. This Board requested and received status information satisfactory to us in May 1981, and we denied Intervenors' motion to dismiss the application then. Apparently the Appeal Board was also satisfied with Duke's report to it in March 1981 because it heard oral arguments in April. In any event, even assuming bad faith, the only resulting legal harm to it asserted by Intervenors is their need to prepare for and present their appeal and this effort is referred to only in passing. Response at 12.

12/ Wright and Miller, supra, at 18-19, recognizes the anomalous situation where a plaintiff would not have been liable for defendants' attorney fees if the plaintiff had lost on the merits, but can be required to pay them on a withdrawal without prejudice. See also Lunn v. United Aircraft Corp., D.C. Del. 1960, 26 F.R.D. 12, 18.

The final grounds for relief asserted by Intervenors is that they have benefited Duke. First they claim (incorrectly) to have first brought to Duke's attention the usefulness of a staff economist. Response at 2-3. Second, they assert that, but for their intervention, Duke would have been exposed to hundreds of millions of dollars in unrecoverable expenditures because Perkins would have been partially constructed at this point. Id. at 13. As to the latter claim, we are fascinated with the Intervenors' innovative use of jurisprudential chutzpah, particularly in light of Duke's complaint that regulatory uncertainties contributed to Perkins' demise. But any claim Intervenors have for their volunteered beneficence to Duke must rest upon a private cause of action. It is beyond our jurisdiction.

The NRC Staff has advised the Board that it is aware of no reason why the Perkins application should not be dismissed. No Limited Work Authorization (LWA) has been issued and no site preparation activities have occurred, thus no site redress action is required. Letter, Sherwin Turk to Board, June 14, 1982.

Therefore it is the order of this Board that:

The motion of Duke Power Company to withdraw without prejudice the application for construction permits for the Perkins Nuclear Station is granted.

The request of Intervenors Davis, et al., to dismiss the application with prejudice and for attorney fees and costs is denied.

The proceeding pending before this Board, relating to generic and TMI-related safety issues, is terminated as moot.

This order is appealable. Any party may take an appeal to the Appeal Board by filing exceptions within ten days after service. A brief in support of the exceptions shall be filed within thirty days thereafter or within forty days in the case of the Staff.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

 , Chairman
Ivan W. Smith
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

September 20, 1982