UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

MOTION OF DUKE POWER COMPANY
TO WITHDRAW APPLICATION WITHOUT PREJUDICE

Duke Power Company (Duke) requests that its application for construction permits for the Perkins Nuclear Station be withdrawn without prejudice. On March 2, 1982, Duke filed a Motion to Withdraw Application and to Terminate Proceedings in the Perkins docket. Intervenors, Mary Apperson Davis, et al. (Intervenors) on March 11 filed a response to that Motion. Duke resubmitted its Motion pursuant to the Licensing Board's April 1, 1982 Memorandum and Order. In its Order, the Licensing Board directed Duke to take into account (1) the relief sought by Intervenors in their March 11 response, (2) the Appeal Board's comments in ALAB-668 with respect to adversaries' expenses, and (3) the Appeal Board's decisions in 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 ___ (December 7, 1981).1/

1/ These decisions are referred to below as "Fulton" and "North Coast," respectively.

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The Board instructed that the motion should discuss the Appeal Board's observation in Fulton that in the normal course of events a dismissal "without prejudice" signifies that no merits disposition has been made.2/ Order, p. 2.

I. SUMMARY

The recent weakening of growth in demand for electric power comes at a time when the cost of financing nuclear power plants has reached an unprecedented level. At the same time, Duke has confronted increasing regulatory uncertainty and delay. These conditions have led Duke to withdraw its application for construction permits for the Perkins Nuclear Station. The appropriate course for this Licensing Board to take is to dismiss the Perkins application without prejudice. Indeed, withdrawal without prejudice is clearly the Commission's policy under these circumstances. See Fulton, North Coast.

2/ Intervenors March 11 "Response" is in essence "a counter-motion" (see the Licensing Board's April 1 Memorandum and Order)--to Duke's March 2 motion to withdraw. As noted, the Licensing Board's April 1 order instructs Duke to resubmit its motion to dismiss, and "take into account" the relief sought by Intervenors' counter-motion. But Intervenors' failure to offer any justification or support for their position puts Duke in a very awkward position. In truth, Duke is required to prove a negative--that is, anticipate arguments the Intervenors might otherwise have made and show why those arguments are invalid.

Moreover, based on the history of this proceeding, Duke is concerned that Intervenors' answer to the present motion will raise arguments that the motion does not anticipate. But Duke is entitled to confront those arguments. For that reason, Duke requests that it be permitted to file a reply to Intervenors' answer within fourteen days of the date that it is served. If Intervenors' answer is such that Duke does not consider a reply necessary, Duke will promptly advise the Licensing Board and parties.

However, in their March 11 Response, Intervenors oppose the simple dismissal without prejudice of the application and instead move for alternative forms of relief. First, they ask that the Perkins application be withdrawn "with prejudice to the Applicants." In the alternative Intervenors ask that, should the application be withdrawn "without prejudice," the previously-issued initial decisions "be vacated." Under either alternative, however, Intervenors request that this Board order Duke to pay all of "the costs in this matter including the reasonable attorneys' fees and costs of the Intervenors in this matter." Response at pp. 1-2.

Intervenors' request for relief is difficult to assess on its merits, for their Response is totally devoid of citation to any legal authority to support the relief which they seek. Nevertheless, Intervenors' argument that the Perkins application should be dismissed with prejudice simply cannot be squared with applicable case law, that is, the Appeal Board's decisions in Fulton and North Coast.3/ Dismissal with prejudice is a "severe and unusual sanction." North Coast, slip op. at 13.

3/ According to Intervenors, the effect of their proposal would be that Duke "could not reapply for the construction of the same or similar facilities at the site or similar site in question." See Intervenors' March 11, 1982 Response at p. 2.

Intervenors argument that all previous Licensing Board decisions in this proceeding should be vacated is now moot. The Appeal Board's March 24, 1982 Memorandum and Order vacated the Licensing Board's previous partial initial decisions regarding Perkins. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB 668, ___ NRC ___ (March 24, 1982)(slip op. at 3).

As the proponents of this extreme sanction, Intervenors have a "compelling burden of justification" to establish "a demonstrated injury to a private or public interest." North Coast, slip op. at 13; Fulton, 14 NRC at 979.

Nor is there any legal support for Intervenors' request that this Board order Duke to pay their costs and attorneys' fees in this proceeding. Indeed, this proposal contradicts the deeply rooted "American Rule" that requires litigants to be responsible for their own expenses. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 420 (1975). Moreover, despite the fact that Intervenors had a full and complete opportunity to litigate each of the myriad issues they raised, Intervenors did not develop any information that cast doubt on the Perkins application. In fact, Intervenors lost on every issue they raised. These factors require the Board to reject Intervenors' argument for costs and attorneys' fees. See North Coast, slip op. at 17, n. 11.

II. STATEMENT

A. Background

On March 29, 1974, Duke applied to the Atomic Energy Commission for authority to construct and operate the Perkins Nuclear Station. Duke's application was contested and public hearings were held at various times from 1976 to 1979. Intervenors participated fully in these hearings and were allowed, substantially without limitation, to present their position.

The Licensing Board ruled against Intervenors on each contention they raised.4/

During the time the Perkins application has been on file before the Commission the Licensing Board has issued several partial initial decisions. The first addressed the health effects of the uranium fuel cycle and concluded that they were insignificant in structuring the cost-benefit balance for Perkins. See LBP-78-25, 8 NRC 87. Another partial initial decision made affirmative findings on all environmental and radiological health and safety matters except alternative sites and generic safety issues. See LBP-78-34, 8 NRC 470. In so ruling, these partial decisions resolved adversely to Intervenors all of their contentions, with the exception of alternate sites. Following additional hearings on alternate sites and generic safety issues, the Licensing Board ruled on the former issue and found that there is no site for Perkins obviously superior to the one Duke has proposed. See LBP-80-9, 11 NRC 310. This ruling completed Board consideration of all contentions raised by Intervenors. All matters were resolved adversely to Intervenors.

4/ Intervenors' unexplained claim (Response at 1) that they "were under a great deal of pressure which was intentionally and continuously applied by the Applicants (sic)" is apparently an oblique attempt to complain that they did not have a full opportunity to litigate their contentions. That false claim is belied by the record.

B. Duke's Motion to Withdraw The Perkins Application

Several factors necessitated Duke's withdrawal of its application for construction permits for the Perkins Nuclear Station.

A primary factor was the rapid increase in the cost of financing construction. As the Licensing Board is aware, high interest rates and unstable financial conditions have become a serious concern throughout the nuclear power industry. Moreover, Duke has experienced accelerating regulatory uncertainty and delay in nuclear power plant licensing which merely further exacerbates these problems. In addition, the general weakening of the U. S. economy has resulted in a slower growth in demand on Duke's system.

These regulatory and financial uncertainties persist. As a result, Duke's management recommended to its Board of Directors at their February 23, 1982 meeting that the Perkins application be withdrawn. The Board of Directors agreed with management's recommendation, and Duke's motion to withdraw the Perkins application without prejudice was filed promptly thereafter.

III. ARGUMENT

A. Duke's Application For The Perkins Nuclear Station Should Be Dismissed Without Prejudice

Duke's application for construction permits for Perkins should be dismissed without prejudice. This request clearly reflects the Commission's policy and is fully supported by the

Appeal Board's recent decisions in Fulton and North Coast.

The Licensing Board ordered Duke to address the Appeal Board's observation in Fulton that "[O]rdinarily, a dismissal 'without prejudice' signifies that no merits disposition was made; a dismissal 'with prejudice' suggests otherwise." Order, p. 2. The quoted statement simply describes the effect of dismissals with and without prejudice. For example, the effect of a dismissal with prejudice is the same as a disposition on the merits. A dismissal without prejudice, on the other hand, leaves the parties in the same position as if the litigation had never been instituted. This matter is more fully discussed in Section I B below. It is important to stress that the quoted statement from Fulton does not establish the standards which govern the form the dismissal will take. Rather, these standards will be addressed in Section I A below.

1. The Standards That Govern Dismissal

In the context of this licensing proceeding, dismissal without prejudice means that Duke would not be precluded from filing a new application for a nuclear reactor at the Perkins site. See Fulton, 14 NRC at 973. Moreover, it is well established that dismissal without prejudice is to be freely given. Le Compte v. Mr. Chips, Inc., 528 F.2d 601 at 604 (5th Cir. 1976). In fact, dismissal without prejudice is the "usual rule," as the Appeal Board noted in North Coast. Id., slip op. at 16. Indeed, Rule 41(a)(2) of the Federal Rules of Civil Procedure contains a presumption in favor of dismissal without prejudice (the rule provides that "unless otherwise specified in the order, a dismissal under this paragraph is without prejudice").

Dismissal with prejudice, on the other hand, is "a particularly harsh and punitive term imposed upon withdrawal" of an application before the NRC. Fulton, 14 NRC at 974. This "extreme sanction * * * 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 at 181 (5th Cir. 1980), quoting Anthony v. Marion County General

Hospital, 617 F.2d 1164 at 1167 (5th Cir. 1980). In other words, the condition precedent to dismissal with prejudice is a "clear record of bad faith and abuse of the judicial system." Carter v. United States, 83 F.R.D. 116 at 117 (E.D. Mo. 1979).

Moreover, as the Appeal Board explained in Fulton, dismissal with prejudice requires a showing of "substantial prejudice" or "a demonstrated injury to a private or public interest." 14 NRC at 979 and n. 14; see generally id. at 978-79. This "severe and unusual sanction" (North Coast, slip op. at 13) is reserved for "situations which involve substantial prejudice to the opposing party or to the public interest in general," and requires a "compelling burden of justification." Id. at 12-13. Indeed, it is well established that dismissal with prejudice cannot be granted unless failure to do so would cause serious prejudice or legal harm. 9 Wright & Miller, Federal Practice and Procedure: Civil (hereafter cited as "Wright & Miller) § 2364, pp. 165, 171; Lee-Moore Oil Co. v. Union Oil Co., 441 F. Supp. 730, 740 (M.D.N.C. 1977), rev'd on other grounds, 599 F.2d 1299 (4th Cir. 1979). Thus, the mere prospect of future litigation does not constitute substantial prejudice. North Coast at 16-17; 9 Wright & Miller § 2364, p. 165. Neither does a missed opportunity for a final ruling on the merits of the litigation. In Re Federal Election Campaign Act Litigation, 474 F. Supp. 1051 at 1052 (D.D.C. 1979).

2. The Meaning of Dismissal "Without" Prejudice

The different impact of dismissals "with" and "without" prejudice is also well developed in case law. The difference

relates to the application of the doctrine of res judicata. As one court explained, when an action is dismissed "without prejudice," it "is terminated; however, a subsequent suit will not be barred by the doctrine of res judicata." Elfenbein v. Gulf & Western Industries, 590 F.2d 445 at 449 (2d Cir. 1978). In other words, dismissal without prejudice "leaves the parties as if no suit had ever been brought." Curtis v. United Transportation Union, 648 F.2d 492 at 495 (8th Cir. 1981).5/

A dismissal with prejudice, on the other hand, is "a complete adjudication and a bar to a further action between the parties." 9 Wright & Miller § 2364, p. 163. As noted earlier, in this nuclear reactor licensing case, dismissal with prejudice could result in an order which would preclude Duke from refiling the Perkins application at the Perkins site.6/ Fulton, 14 NRC at 973; see also

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5/ Accord, Cabrera v. Municipality of Bayamon, 622 F.2d 4 at 6 (1st Cir. 1980); White v. City of Suffolk, 460 F. Supp. 516 at 521 (E.D. Va. 1978); Wallace Clark & Co. v. Acheson Industries, 394 F. Supp. 393 at 401 (S.D.N.Y. 1975), aff'd 532 F.2d 846 (2d Cir.); cert. den., 425 U. S. 976, reh. den., 427 U. S. 908 (1976).

6/ As a point of interest, a brief discussion of the effects of such an order on Duke is warranted. Duke believes that in the context of this matter, the most that a dismissal with prejudice would mean would be that Duke would be precluded from filing the Perkins application once again. Duke recognizes that, in Fulton, the Appeal Board determined that the effect of a dismissal with prejudice in that case would be an "effective prohibition against [Applicant Philadelphia Electric Company's] future use of the Fulton site for any type of nuclear reactor," 14 NRC at 974. However, that standard should be viewed in light of the factual situation in that case, viz., Fulton involved an application for an HTGR. The vendor had announced in 1975 that it was withdrawing from the business. Thus, an order prohibiting PEC from refiling an application for an HTGR at the site would have been meaningless. Such is not the case in Perkins. The reactors there are three Combustion Engineering System 80 reactors, a standardized design and thus the technology is viable. Therefore, even if the Board were to dismiss the application with prejudice, it should do no more than order Duke not to refile the Perkins application.

North Coast, slip op. at 11-12. In other words "[d]ismissal with prejudice constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial." Gambocz v. Yelencsics, 468 F.2d 837 at 840 (3d Cir. 1972), citing Lawlor v. National Screen Service Corp., 349 U. S. 322 at 327 (1955). And res judicata bars relitigation of the claims dismissed in the prior action. Id.; see also 9 Wright & Miller § 2367, p. 186.

3. Dismissal Without Prejudice Is Clearly Justified In This Proceeding

As explained above, the severe sanction of dismissal with prejudice requires a compelling showing of harm to a private party or the public interest. Fulton, 14 NRC at 978-79. But the facts of this case demonstrate overwhelmingly that the Licensing Board should grant Duke's request that the Perkins application be dismissed without prejudice.

Indeed, none of the factors that justify dismissal with prejudice are present in this case. There has been no suggestion--nor can there be--that Duke has at any time shown bad faith, attempted to delay this proceeding7/ or otherwise abused the

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7/ Indeed, the facts are otherwise. Intervenors sought to delay this proceeding in at least 16 instances. In addition, they sought to reopen the record on 10 occasions. In fact, the record shows that Perkins was part of a six-unit project, with the three Perkins units scheduled for construction before the three sister units (Duke's Cherokee Units 1, 2 and 3). But due to these delays Duke was forced to reschedule, and construction at Cherokee began first.

Commission's procedures. Moreover, Intervenors have not alleged--and, indeed, cannot allege--any harm to public or private interest as a result of either the Perkins proceeding or dismissing the Perkins application without prejudice.

To be sure, dismissal without prejudice will permit Duke to resubmit the Perkins application. But, the prospect of a future application for Perkins is simply not the type of harm that justifies dismissal with prejudice. This is especially true in this case where Intervenors failed to sustain any of their contentions regarding Perkins--they can hardly complain of a possible second bite at the apple.

Furthermore, dismissal without prejudice is particularly appropriate in a case such as this where each of the Licensing Board's partial initial decisions regarding Perkins fully supports Duke's application (see p. 5 above). Indeed, as the Appeal Board explained in North Coast (slip op. at 13), because of the limited number of suitable sites for nuclear power plants, none of them should be permanently condemned without good reason. Indeed, the Licensing Board found, after exhaustive inquiry, that the Perkins site is suitable for a nuclear power plant. And where an applicant undertakes the effort and expense of pursuing a second nuclear power plant application at the same site, the applicant's judgment that there is a public interest need for the plant is entitled to respect. Id. at 12-13. Duke's opportunity to exercise that judgment should not

be pretermitted.8/

4. Intervenors' Opposing Position Has No Justification Whatsoever

As noted above (pp. 8-9), dismissal without prejudice is the presumed or usual rule. For that reason the proponent of the extreme sanction of dismissal with prejudice must satisfy a "compelling burden of justification" in seeking this "severe and unusual sanction." North Coast, slip op. at 13. Thus, it is not enough for the proponent to make general, unsupported allegations of harm caused by the applicant. Id. at 14; Fulton at 978, n. 12 and corresponding text.

But in this case, Intervenors' position necessarily falls far short of even the "threshold showing." Fulton at 978, n. 12.9/ Thus, Intervenors have not even alleged--let alone substantiated--any bad faith, delay or abuse by Duke. In short, Intervenors' dismissal with prejudice argument has no basis and must be rejected.

8/ When faced with a similar argument for dismissal with prejudice in Boston Edison Co. (Pilgrim Nuclear Generating Station, Units 2 and 3). LBP-74-62, 8 AEC 324 (1974), the Licensing Board explained (id. at 327, citing Jones v. SEC, 298 U.S. 1 (1936)):

> It must be presumed that it is the public's need for power which is one of the underlying reasons for construction of a power plant. * * * If such finding is made, based upon a proper showing by the utility, it would be unreasonable in the extreme to deprive the public of a needed utility service because of alleged "inconvenience or burden" to potential intervenors.

9/ In a case where the threshold showing is satisfied, the applicant would then have an opportunity to present rebuttal evidence. Fulton at 978, citing LeCompte v. Mr. Chips, Inc. 528 F.2d 601 at 605 (5th Cir. 1976).

B. Intervenors' Request For Payment Of Their Costs And Attorneys' Fees Is Contrary To Law

Intervenors also claim that the Licensing Board should order Duke to pay their costs and attorneys fees (Response at 1-2). Intervenors' request ignores well-established Commission policy and fundamental legal standards. Indeed, Intervenors' request is hardly novel -- the Commission has dealt with requests for reimbursement of fees on many occasions in other proceedings and uniformly rejected them.

The Commission has repeatedly recognized its lack of authority to order reimbursement of intervening parties' costs and attorneys' fees. See Consumers Power Co. (Midland Plant, Units 1 and 2) (Special Proceeding), CLI-79-3, 9 NRC 107, 108-09 (1979); Financial Assistance to Participants in Commission Proceedings, CLI-76-23, 4 NRC 494 (1976).10/ And, it is now well established that, absent express Congressional authorization, Intervenors cannot look to federal regulatory agencies for payment of their costs or attorneys' fees. Greene County Planning Board v. FPC, 559 F.2d 1227, 1238-40 (2d Cir.

10/ Accord, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772 (1977); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-77-12, 5 NRC 486 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-376, 5 NRC 426 (1977); Metropolitan Edison Co., et al. (Three Mile Island Nuclear Station, Unit 2), LBP-77-10, 5 NRC 478 (1977); Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), LBP-77-9, 5 NRC 474 (1977); see also Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), Licensing Board Notification of Comptroller General's Opinion (December 16, 1980) (unreported).

(1977)(en banc), cert. denied, 434 U.S. 1086 (1978).11/ Indeed, in the cases cited immediately above, requests for fees were denied even though the respective intervenors had cast doubt on the merits of the application or argued for modifications that the agency accepted. Surely, payment of Intervenors' costs and attorneys' fees cannot be authorized in this case where the Licensing Board rejected each of Interventors' contentions.

Nor does it make any difference that in this case Intervenors want Duke -- as opposed to the public treasury -- to be burdened with their litigation expenses. Indeed, if the Commission cannot use public funds to pay the Intervenors' expenses, then clearly the Commission cannot require Duke -- a private party -- to do so. On the contrary, the deeply rooted "American Rule" is that "absent statute or enforceable contract, litigants pay their own attorneys fees." Alyeska Pipeline Service Corp. v. Wilderness Society, 421 U.S. 240 at 257 (1975).12/

It is beyond dispute that the Supreme Court's Alyeska decision applies with full force to administrative proceedings. In Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975), the Court of Appeals squarely held that "Congress, and not the Commission, can authorize an exception to the 'American Rule' that litigants

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11/ See also Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 at 1006 (D.C. Cir. 1966), wherein Judge Burger enunciated the principle that public interest litigants are expected to bear their own costs and expenses.

12/ Alyeska rejected a proposed exception to the American Rule for litigants that "performed the functions of a private attorney general." 421 U.S. at 246.

bear the expense of their litigation." Id. at 1356. And the Appeal Board has recognized the applicability to NRC proceedings of the "American Rule" enunciated in Alyeska and Turner v. FCC. See Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1) ALAB-550, 9 NRC 683 at 699-700 (1979).13/

Moreover, the fact that Duke has moved to withdraw the Perkins application without prejudice is fully consistent with the "American Rule" against awarding attorneys' fees. See International Video Corp. v. Ampex Corp., 484 F.2d 634 (9th Cir. 1973). Indeed, under Rule 41(a)(2) of the Federal Rules of Civil Procedure, attorneys' fees cannot be awarded against a plaintiff who wishes to dismiss its suit without prejudice unless it is shown that the suit "was not a bona fide effort to seek redress", or was filed "to harass, embarass 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. 197 at 198 (S.D. Ohio 1973). In short, as the court explained in Blackburn (id.):

> In the absence of such showings, the Court cannot see why the traditional American rule on attorneys' fees -- one which refuses to economically penalize in this fashion the litigant who

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13/ See also Greene County, supra, 559 F.2d at 1242, Lumbard, J., dissenting on other grounds ("[E]xpress statutory authorization is required before either a court or regulatory commission can order one litigant to pay a prevailing litigant's expenses on the ground that the prevailing litigant represents the public interest").

> in good faith files a lawsuit -- should not be recognized in the case at bar. [Citations omitted.]

Needless to say, none of these factors are present in this case.

Finally, the Licensing Board should also reject Intervenors' various unsupported claims regarding their contribution to this proceeding (Response at 1-2). Significantly, Intervenors do not -- and cannot -- point to any information which they developed that undermined the strength of Duke's application for the Perkins Nuclear Station. Indeed, as noted above, each of the Licensing Board's partial initial decisions rejected Intervenors' contentions and ruled in favor of Duke's application for Perkins.14/ In other words, it is clear from the record that Intervenors failed to "develop[] information which cast doubt on the merits of the application." See North Coast, supra, slip op. at 17, n. 11; see also ALAB-668, slip op. at 2, n. 2.

IV. CONCLUSION

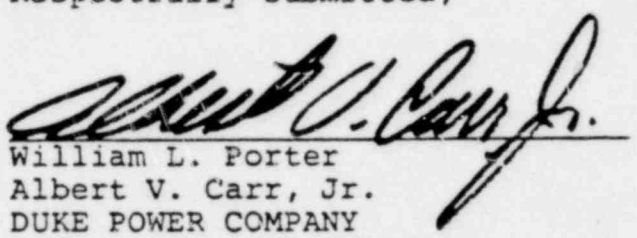
Based on the foregoing, Duke Power Company respectfully

14/ See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-78-25, 8 NRC 87 at 89, 91-92, 95, 96 and 99-100; LBP-78-34, 8 NRC 470 at 484-96; LBP-80-9, 11 NRC 310 at 332-36.

In this regard, it is simply nonsense for Intervenors to claim (Response at 1-2) that they are responsible for the "hiring" any of the numerous economists employed by Duke or for any peak load pricing rate schedules employed by Duke. Nor can Intervenors claim credit because Duke "did not have to expend construc]tion monies." Id. at 2.

requests that the Licensing Board dismiss without prejudice Duke's application for construction permits for the Perkins Nuclear Station. 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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April 19, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Motion of Duke Power Company to Withdraw Application Without Prejudice," dated April 19, 1982 in the captioned matter, have been served upon the following by deposit in the United States mail this 19th day of April, 1982:

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