UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	ASLBP Docket No. 76-300-01 CP
	)	
PHILADELPHIA ELECTRIC COMPANY	)	(NRC Docket No. 50-463-CP
	)	50-464-CP)
(Fulton Generating Station, Units 1 and 2)	)	

PHILADELPHIA ELECTRIC COMPANY'S OBJECTION TO AND MOTION FOR MODIFICATION OF PROPOSED DECISION AND ORDER DISMISSING PROCEEDING WITH PREJUDICE

I. BACKGROUND

Philadelphia Electric Company (PE) hereby responds to the Board's December 14, 1983 Order requiring parties to state on or before December 29, 1983 any objection to its proposal to enter, on December 30, 1983, a Decision and Order dismissing the Fulton proceeding with prejudice. PE agrees with the scope of the Proposed Decision and Order, namely, that it should relate only to the proceeding involving the twin HTGR reactors applied for by PE in 1973, and not to any other potential application by PE for the Fulton site, nor to any other nuclear application by PE for other sites. PE also agrees that its 1973 HTGR application is totally moot and that all proceedings relating to it should end as expeditiously as possible, and that dismissal on the basis of summary proceedings is

contemplated by the controlling Decision of the Appeal Board, ALAB-657, 14 NRC 967 (1981).

PE objects, however, to so much of the Proposed Decision and Order as would leave the dismissal of the Application one with prejudice. The reasons are threefold. First, dismissal with prejudice, particularly in the summary fashion contemplated by the Proposed Decision and Order, is simply irreconcilable with the Appeal Board's Decision. In that decision, the Appeal Board reversed the prior Licensing Board's legal basis for dismissing the Fulton application with prejudice, and found its factual bases to be unsubstantiated in the record. This reconstituted Board's proposal to reinstate dismissal with prejudice with no new facts is no more tenable than the decision of the previous Licensing Board. The Appeal Board also placed squarely on the Licensing Board the burden of initiating any proceedings which would support a dismissal with prejudice if it still felt such terms of dismissal were sustainable. 14 NRC at 979. Thus to the extent that this reconstituted Licensing Board's proposed Decision and Order itself puts the burden on PE to avoid dismissal with prejudice, rather than on the proponent of dismissal with prejudice to demonstrate an adequate basis for it, PE respectfully submits that the burden is wrongly placed.

Second, PE understands and agrees with the Licensing Board's desire for finality with respect to this application.

However, dismissal with prejudice is not necessary to termination of this application; dismissal without prejudice but with proper conditions accomplishes the same purpose, and, as at least one other recent case before the Commission illustrates, is the proper course in the absence of demonstrated legally cognizable harm to other parties.

Third, dismissal with prejudice could possibly be construed, albeit wrongly, as reflecting adversely on PE's manner of pursuit of its Early Site Review application at Fulton. PE believes firmly that no such implications are warranted, and therefore desires to avoid any disposition that might lend itself to them.

PE accordingly requests that the proposed Decision and Order be modified as follows, upon consideration and granting of the attached Motion for Summary Decision and supporting Statement of Material Facts and Affidavit.

1. The proposed Decision and Order should be changed from dismissal with prejudice to dismissal as moot, without prejudice.

2. PE does not believe that any conditions on dismissal are compelled by the record. However, PE would not oppose as a condition on a dismissal without prejudice, the requirement that any future application by PE for a nuclear station at Fulton not be identical to that originally filed in 1973 and, as amended, now pending before this Board.

II. ARGUMENT

A. Summary Dismissal With Prejudice is Not Consistent With the Appeal Board's Decision

This reconstituted Licensing Board's proposed Order, while eliminating the tangibly punitive future restrictions on use of the Fulton site implicit in the prior Licensing Board's decision, is still a dismissal with prejudice. As is detailed below, the Appeal Board found that the prior Licensing Board had applied an improper test of intent for eligibility to use the Early Site Review regulations; found that the prior Board had not established a basis for the finding of bad-faith conduct necessary to justify a dismissal with prejudice; and found that even assuming, arguendo, that PE had engaged in bad-faith conduct, the prior Licensing Board had not established the existence of any legal harm either to any party or to the adjudicatory process. The Appeal Board accordingly vacated the prior Licensing Board's decision and remanded it for further proceedings in accordance with its own Decision.

The current Licensing Board, without stating reliance on any significant new facts not considered by the previous Licensing Board, and without any further proceedings, still proposes to dismiss the Fulton application with prejudice. This proposal is simply irreconcilable with the Appeal Board's Decision, which found the previous dismissal to be unsupported by

the record, either as addressed by the prior Licensing Board or as reviewed by the Appeal Board. Even with the consequences of dismissal restricted to the Fulton application as filed, there may be collateral consequences of dismissal with prejudice which take this issue out of the category of "much ado about nothing." The present Board's proposal to reinstate the prior Board's conclusion with no proceedings and with no statement of its basis more illuminating than "review of the entire record in this matter" (Proposed Decision and Order at 1; cf. id. at 4) and a recitation of facts already found by the Appeal Board to be insufficient, is not in conformity with the Appeal Board's opinion.

1. The Appeal Board's Decision

The prior Licensing Board, in its unpublished Decision and Order of February 7, 1981, granted PE's motion to dismiss the Fulton application, but on the unverified suggestion of one group of intervenors in the case and without a hearing, made the dismissal with prejudice.1/ The Appeal Board, in a Decision not appealed from by any party or modified by the Commission, vacated the Licensing Board's decision and remanded the

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1/ The Staff and the Interested State of Maryland had filed papers supporting dismissal without prejudice. The only local intervenors, both governmental and private, did not take any part in the dismissal proceedings or the ensuing appeal.

case to the Licensing Board for proceedings in conformity with it. 14 NRC 967, 979 (1981).

The Appeal Board reversed the Licensing Board on all three issues it addressed.

a. Eligibility to Use ESR Regulations: Intent to Use Fulton Site

The prior Licensing Board had held that PE had not possessed a sufficiently immediate intent to use the Fulton site to qualify legally to avail itself of the Early Site Review regulations. The Appeal Board reversed, holding that the prior Licensing Board had imposed a test of intent not found in the Early Site Review regulations and that PE had met all the eligibility tests contained in the ESR regulations. 14 NRC at 974-76.

b. Bad-faith Prosecution

The prior Licensing Board had apparently found that PE, even if it had met the requirements for eligibility for the ESR regulations, had nevertheless prosecuted that application in such a fashion, i.e., one not in good faith, as to justify dismissal with prejudice. In this respect, the prior Licensing Board had recited in its Decision and Order a chronology of events. It also discussed various correspondence and a set of informal minutes of a meeting among PE, the NRC Staff

and intervenors in the case. On appeal, the Appeal Board began its review by noting that dismissal with prejudice is a discretionary matter, but then correctly observed that the terms of dismissal must bear a rational relationship to both the conduct and the legal harm at which they are aimed, and that the record must support any findings concerning such conduct and harm. 14 NRC at 974. It then reviewed each of the factual matters recited by the prior Licensing Board. 14 NRC at 971, 976-78. On the basis of these reviews, the Appeal Board found that "the 'evidence of record' upon which the [Licensing] Board relied simply does not support [its] conclusions' as to PE's conduct. Id. at 978.

In short, the Appeal Board did not find in the matter cited by the prior Licensing Board any basis at all for a finding of "bad faith" prosecution of an application that would justify a dismissal with prejudice, and concluded that the prior Licensing Board's determination, if it were to stand, must be "footed elsewhere" -- i.e., in matters not addressed by the prior Licensing Board's opinion. Id. This absence of support in the record for a finding of bad-faith conduct by PE contributed to the Appeal Board's conclusion that the Licensing Board had abused its discretion in dismissing the Fulton application with prejudice.

c. Harm to the Parties or to the Public Interest

The Appeal Board also found, even assuming bad faith prosecution by PE of its ESR application, that no legally cognizable harm had been shown either to any party or to the public interest in general. 14 NRC at 978-79. As to harm to the parties, the Appeal Board correctly noted, id. at 979 note 12, that the only intervenors who owned property interests in the Fulton exclusion area never sought dismissal with prejudice. Nor did the local governments with jurisdiction over Fulton. As PE pointed out in its brief to the Appeal Board, the only intervenors who sought prejudical dismissal -- the so-called York intervenors -- were a coalition of environmental groups based in cities from 30 miles (York) to 100 miles (State College) from Fulton. Brief of the Applicant on Exceptions from the Decision and Order of the Atomic Safety and Licensing Board, April 27, 1981, at 6 note 4 (hereinafter, "PE Appeal Brief");2/ see also 14 NRC at 979 note 14. These distant intervenors could have suffered no harm from any alleged hindrance to "optimum use of the land [in the exclusion area] or sale" of it, 14 NRC at 979, occasioned by the Fulton application. Nor do they have standing to allege such harm on behalf

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2/ Though copies of this brief were served on the prior Licensing Board, a copy is being lodged with this Objection for the present Licensing Board's convenience.

of persons who were, in fact, property owners in the immediate vicinity of the Fulton site. Further, as the Appeal Board noted, the prospect of another application is not a legally cognizable injury, 14 NRC at 979. In any event, parties to NRC proceedings are bound, in the absence of legislation not here applicable, to the normal American Rule in which each party normally bears its own litigation expenses. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), LBP-82-29, 15 NRC 762, 766-68 (1982); Ruckelshaus v. Sierra Club, ___ U.S. ___, 77 L. Ed. 2d 938, 943-44 (1983).3/

The Appeal Board, noting that these allegations by intervenors were "merely asserted in their pleading before the [prior] Licensing Board without evidentiary substantiation,"

3/ The York intervenors' sole other alleged basis of harm was the unamplified and unsubstantiated allegation that "[t]here are members of our organization whose physical and mental health has been adversely affected in consequence of the uncertainties imposed by [PE's] refusal to abandon" Fulton earlier than it did. Response of Intervenors York Committee [et al.] to Applicant's Request of December 5, 1980 . . ., (December 17, 1980), at 2. This allegation was not repeated by the York intervenors in their response to PE's Appeal Brief. PE submits that, given the distance of these unidentified individuals from the Fulton site and the fact that not one spade of earth was ever turned by PE for construction at Fulton, this allegation lacks on its face any clear causal nexus to the pendency of the Fulton application. The Supreme Court last Term applied a similar chain of reasoning, recognizing the absence of direct causal relationship, to reject, in the much higher-relief circumstances of the Three Mile Island restart hearings, a contention alleging that failure to consider the psychological effects of restart of TMI-1 on nearby residents would violate the National Environmental Policy Act. Metropolitan Edison Company v. PANE, ___ U.S. ___, 75 L.Ed.2d 534, 544-45 (1983).

stated also that it "did not mean to imply that [they] necessarily rise to a level that should trigger further inquiry." Id. at 978 note 12. The Appeal Board suggested that this allegation could be dealt with on summary disposition. Id; see Part III below.

The other possible basis for reinstitution of a dismissal with prejudice -- injury to the public interest in general, again assuming for the sake of argument that PE had acted in bad faith -- was also reviewed by the Appeal Board. Here again, on examination of the prior Licensing Board's decision, the Appeal Board found that it "fails to show what harm resulted to any party or to the public interest in general," and that it "made no link whatever to any harm or prejudice occasioned by [PE's] pursuit of early site review." 14 NRC at 978-79.

In short, the Appeal Board found that this essential element of dismissal with prejudice, also, had not been substantiated by the prior Licensing Board.

d. The Appeal Board's Conclusions

The Appeal Board reversed the prior Licensing Board on its legal test as to the degree of intent necessary to establish eligibility to use the ESR regulations. It also found that the record cited by the prior Licensing Board established neither bad faith conduct by PE nor (even assuming such

conduct) any prejudice either to parties or to the public interest. The Appeal Board thus found dismissal with prejudice to have been an abuse by the prior Licensing Board of its discretion. The Appeal Board did not dispositively end the case at that point, pronouncing itself "reluctant to interfere with exploration of matters that, in its view, involve a possible compromise of the Commission's adjudicatory processes." 14 NRC at 978, note 12. Thus it gave the prior Licensing Board the opportunity to hold further proceedings in conformity with ALAB-657, 14 NRC at 979, indicating that they could be summary. 14 NRC at 978 note 12. What was perfectly clear at all events, however, was that on the basis of the record as then presented by the prior Licensing Board to the Appeal Board, dismissal of the Fulton application with prejudice was not supportable.

B. The Proposed Decision and Order is Not Consistent with the Appeal Board's Decision

The reconstituted Licensing Board's December 14 proposal to enter on December 30, 1983 a Decision and Order withdrawing any prospective cloud over PE's ability to use the Fulton site for purposes other than resubmittal of the withdrawn application, removes much of the potentially draconian aspect of the prior Licensing Board's vacated Decision and Order. However, it still proposes to leave the dismissal as one with prejudice. The proposed Decision and Order, issued two days after this

Licensing Board's reconstitution, states that it rests on a "review of the entire record in this matter." Yet it recites no facts not already recited in either the prior Licensing Board decision or the Appeal Board's decision, other than a notation of the absence of any indication that the Staff ever finally docketed PE's Early Site Review application. The Proposed Decision and Order does not suggest, however, that this fact is in any way determinative of the outcome.4/ The Appeal Board's decision, in any event, is perfectly clear that the record to date will not sustain a dismissal with prejudice. This Board's Proposed Decision and Order shows nothing to change that.

Thus the Licensing Board's Proposed Decision and Order are irreconcilable with the Appeal Board's Decision in four ways.

First, for the reasons stated, the existing record will not support dismissal with prejudice. If the Licensing Board intends to dismiss in any way other than without prejudice (with any appropriate conditions), it can do so only on the basis of new material not already in the record. Such material cannot consist of the current unverified summary allegations. As the Appeal Board noted in the related North Coast case:

4/ This fact was, in any event, a matter of public record and was presented by PE in its brief to the Appeal Board. PE Appeal Brief at 23-24 and App. #20. For a fuller description of the circumstances surrounding this fact, see PE's Motion For Summary Decision And Termination Of This Proceeding As Moot at 4-5, and Statement Of Material Facts, ¶ 10a., accompanying this Objection.

> The threshold standard for requiring an evidentiary hearing on a motion for withdrawal with prejudice should be related to the substantive standard which a motion of that kind must satisfy. A severe and unusual sanction casts on the party who seeks it a more compelling burden of justification -- both for its imposition and for demonstrating that the allegation should be pursued in the shape of an evidentiary hearing. This means that to trigger a hearing on the question of withdrawal with prejudice, the allegations of substantial prejudice must not only be serious, but also supported by a showing, typically through affidavits or unrebutted pleadings, of sufficient weight and moment to cause reasonable minds to inquire further. To be sure, this standard is more stringent than that governing the admissibility of contentions where the Commission's rules do not require an evidentiary showing.

Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133-34 (1981).

Second, if such new material is to be developed, it must be done by a party having standing to seek, and seeking, dismissal with prejudice.

Third, the burden of going forward and the burden of proof, as in any proceeding, are on the proponent of a motion, and here must be on the party seeking dismissal with prejudice. 10 CFR § 2.732. The Appeal Board has ruled that the record adduced to date is not sufficient to warrant dismissal with prejudice; PE is certainly not bound to volunteer to go forward with a case adverse to its interest, and to the extent that the Board's Proposed Decision and Order put the burden on PE to exculpate itself, the burden is wrongly placed.

Fourth, any proceedings which might result in a dismissal other than one without prejudice must be pursuant to the provisions of 10 CFR Subpart G, 10 CFR § 2.700, et seq. The Fulton case is a licensing case and the procedural protections of the adjudicatory rules apply; and the evidence must consist of new relevant, material and reliable evidence that PE's pursuit of an ESR application requires dismissal with prejudice. 10 CFR § 2.743(c). In the event, however, that the Board were to conclude that on the record as reviewed to date by the Appeal Board, and in conformity with the Appeal Board's decision, dismissal as moot and without prejudice (with or without condition) were appropriate, then summary proceedings would be appropriate.5/

C. Dismissal With Prejudice Would be Unfairly Damaging to PE

In addition to being inconsistent with the Appeal Board's decision, dismissal with prejudice would harm PE in the following ways, which add to PE's opposition to the proposal to dismiss Fulton with prejudice.

First, dismissal with prejudice implies, and operates as, a disposition on the merits. 14 NRC at 973, and cases cited thereat. The fact is that no merits decision was ever reached

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5/ PE submits that this is what the Appeal Board plainly had in mind, given the nature of its findings on the facts.

on the Fulton application. Hearings had not yet started; and though the Staff's post-TMI review of safety requirements and revisions to siting regulations had stalled the licensing process at Fulton (as elsewhere) prior to the time the application was withdrawn, both the Staff's earlier SER and its Environmental Impact Statement had been favorable. It is true, as both the Appeal Board and this reconstituted Board have observed, that the passage of time and events, regulatory changes and technological advances combine to virtually guarantee that any future application for a reactor at Fulton, even if an HTGR, would not be for a reactor identical to that which was the subject of the 1973 application as amended. Thus the 1973 application, as this reconstituted Board accurately noted, is entirely moot and will never be revitalized in its current form. Proposed Decision and Order at 3-4; see also Statement Of Material Facts accompanying Motion For Summary Decision, ¶ 18. But it was never rejected on the merits and cannot, therefore, be dismissed with prejudice as a matter totally independent of PE's manner of prosecution of the ESR Application, absent further factual showings than those made to date on the record.

It is not necessary to dismiss this case with prejudice to satisfy this Board's understandable concern that the Fulton application, as it currently exists, be finally terminated once and for all. A dismissal as moot and without prejudice,

properly conditioned, can achieve this result. This is what PE proposes. This form of dismissal has also been recognized in a recent NRC case. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1135 (1982).

Second, a dismissal with prejudice could potentially open PE to claims for damages by third parties. See PE Appeal Brief at 3 note 3.6/ PE believes that any such claims would be frivolous, for the basic reasons stated by the Appeal Board and summarized above. However, unless it is this Board's determination, on the basis of substantial evidence in the record, that PE should be subject to such claims (if they can be proven), it is unfairly prejudical to PE to effect dismissal of this application on terms which render it subject to such collateral nuisance attacks.

Third, a dismissal with prejudice could possibly -- albeit wrongly -- be viewed as a criticism of PE's conduct of the Fulton ESR application. PE undertook, prosecuted and withdrew that application all in good faith, keeping the Board and parties informed all the while. PE never sought to manipulate the Board, the parties or the licensing process improperly. See Statement of Material Facts, ¶ 13. Dismissal with prejudice,

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6/ Such claims would be independent of claims for attorneys' fees and other expenses advanced independent of a dismissal with prejudice and which must be proven by the party seeking them on the basis of having prevailed on the merits of an issue but not having obtained final judgment. See Perkins, supra, 16 NRC at 1139-40.

to the extent it implies otherwise, would be inaccurate and unfair to PE and PE does not desire to accept that kind of implication voluntarily.

III. CONCLUSION

PE has filed this Objection with great reluctance. PE agrees with this reconstituted Board and with the Appeal Board that the 1973 Fulton application, as amended, is totally moot. The only reason PE itself had not earlier sought to institute proceedings for final disposition of this case, despite its clear interest in ending it, was that the Appeal Board's order went directly to the previous Licensing Board and PE believed that the initiative lay properly with that Board.

The Appeal Board's Decision, apparently contemplating ultimate dismissal without prejudice, required that there be further proceedings but indicated that they could be summary. PE requests that this reconstituted Board consider the attached Motion for Summary Decision and attached Statement of Material Facts and Affidavit of Vincent S. Boyer at the earliest possible time permitted by the Commission's Rules of Practice, 10 CFR § 2.749, and that if it grants the motion, it modify its Proposed Decision and Order to change dismissal with prejudice to dismissal as moot and without prejudice, with the condition, if the Board considers any conditions at all to be necessary, that any further nuclear application submitted by PE for Fulton

not be identical to the withdrawn 1973 application. For the reasons outlined in Part II.B above, PE believes that dismissal with prejudice would require the conduct of a full adjudicatory hearing in conformity with Subpart G of the Commission's Rules of Practice.

Respectfully submitted,

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