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)	)	
	)	

MOTION OF PHILADELPHIA ELECTRIC COMPANY FOR SUMMARY DECISION AND FOR TERMINATION OF PROCEEDINGS AS MOOT AND WITHOUT PREJUDICE

This matter is before this reconstituted Licensing Board on remand from a Decision of the Atomic Safety and Licensing Appeal Board dated November 17, 1981 and published at 14 NRC 967 (1981). The Appeal Board's Decision vacated and remanded the unpublished Decision and Order of the predecessor to this Licensing Board, dated February 27, 1981, which had dismissed with prejudice Philadelphia Electric Company's construction permit application for its then-proposed two-unit Fulton Generating Station. This motion is filed at this time in conjunction with PE's Opposition to the reconstituted Board's request, dated December 14, 1983, for objections on or before December 29, 1983 to its proposal to dismiss the Fulton proceeding with prejudice.

Philadelphia Electric Company (hereinafter "PE" or "the Applicant") hereby moves, pursuant to 10 CFR § 2.749(a) and the

terms of the Appeal Board's remand, for summary decision and entry of an order terminating this proceeding as moot, without prejudice. Though the record does not compel it, PE would not object to the Board's conditioning such an order on a requirement that any future application for a nuclear station at Fulton not be identical to the one which, as amended, is currently pending before this Board. The grounds for this motion are set forth below.

I. BACKGROUND

The factual background of this proceeding up to the time of the prior Licensing Board's Decision and Order is summarized in detail in the attached Statement of Material Facts, supported by the Affidavit of Vincent S. Boyer, which are incorporated by reference and will not be duplicated here. For this Board's convenience, however, certain major facts are summarized immediately below.

PE had filed an application for twin 1100-MWe High Temperature Gas Cooled Reactors (HTGRs) in 1973. Following issuance of a Notice of Hearing, three groups of intervenors were admitted to the proceeding: (1) a local coalition of groups and individuals (the "Solanco" intervenors); (2) the neighboring townships of Fulton and Peach Bottom (the "Townships"); and (3) three physically distant groups based in three localities ranging from 30 to 100 miles from Fulton (the "York"

intervenors). Two Interested States (Pennsylvania and Maryland) were also admitted to the proceeding. See Statement of Material Facts (hereinafter, "Facts"), ¶ 1.

The application was actively prosecuted by PE until September 1975, when the reactor's supplier, the General Atomic Company (GA), unilaterally ceased work on the project. By that time construction permit hearings had not yet begun but the Staff's evaluation (Final EIS, SER) and the ACRS's review had been satisfactorily completed and most prehearing discovery had been completed. See Facts, ¶¶ 2-5.

At that point, the construction permit proceedings were suspended; and for approximately two years thereafter, PE reported to the Board monthly on its evaluation of available options, which then consisted of withdrawing the application entirely or amending it to substitute light-water reactors for the HTGRs. Neither of these alternatives was attractive: withdrawing the application presumably would have meant losing all credit for the extensive, costly licensing review already completed by the Staff, which had shown Fulton to be an acceptable site in the Staff's view for a nuclear power plant. Fully amending the application to substitute a specific LWR design, on the other hand, would have been an extensive and costly task requiring both selection of and contracting with a vendor, and total reworking of the plant-specific portions of the application, to reflect the major differences between HTGRs and LWRs. See Facts, ¶ 6.

In 1977, a third, more viable alternative became available: Early Site Review under new regulations (10 CFR §§ 2.101(a-1), 2.600, et seq.) permitting determination of the acceptability of a potential reactor site without need for a specific reactor design, and containing more flexible temporal and other guidelines for site utilization than those existing under a conventional construction permit application. In early 1978, PE notified the Commission of its intent to convert its construction permit application to one for Early Site Review pursuant to the new ESR regulations. Following further communication on the matter with the Staff, the ESR application was timely filed in December 1978. See Facts, ¶¶ 7-9.

The ESR application, though received by the Staff, was never fully accepted for docketing. Rather, three major events or trends in the two years following its filing diverted the Staff and disrupted major assumptions underlying its viability. First, numerous of the licensing requirements in effect at the time the ESR application was filed were substantially modified, in some cases by regulation (e.g., amendment of requirements for evaluation of alternative sites, 45 Fed. Reg. 24168 (1980)), and in others by Staff "regulatory guidance" following the Three Mile Island event (e.g., the TMI Action Plan and Clarification thereof, NUREG-0660, -0737). The amendment of the alternative-site evaluation criteria, while not relating to the suitability of the Fulton site per se, would have required

PE to perform substantial additional analyses of alternative sites. Facts, ¶ 10a. These costs and delays from regulatory changes beyond PE's control would have materially reduced the benefits of continuity in the application, which were premised on the Fulton site's being judged again by substantially the same standards under which it had earlier been approved. Second, PE's actual load growth in the 1977-1980 period dropped substantially below the rate earlier predicted, to less than 1.4% annually (compared with 2.7% earlier projected). This prompted re-evaluation and lowering of PE's long-term growth rate projections, resulting in a several-year delay in anticipated need for Fulton to meet peak load. Facts, ¶ 10b. Third, the occurrence of the Three Mile Island event in March 1979, shortly after the filing of the ESR application, led to a major reallocation of NRC Staff attention away from normal licensing activities for a substantial period. As a result, for example, PE did not receive written notice from the Staff until June 25, 1980, some 18 months after submission, that the Staff considered deficiencies to exist in the Fulton ESR application that would have to be remedied before docketing.1/ Facts, ¶ 10c.

1/ The extent of the regulatory changes that led the Staff to not accept the Fulton ESR application as filed even for initial docketing is cast into relief by the fact that virtually the same application (as to site-related characteristics) had been reviewed by the Staff and approved, from both safety and environmental aspects, for the granting of a construction permit in 1975.

In short, by the latter portion of 1980 the ESR application's viability in the form submitted had become subject to serious question. When the Staff proposed regulations, in November 1980 (45 Fed. Reg. 74493), which would amend the licensing fee schedule in such a fashion that withdrawal of the Fulton application after the proposed amendments took effect would subject PE to increased costs of over $800,000 (see Facts, ¶ 11), PE determined to withdraw the application early enough to avoid the additional costs. Accordingly, on December 5, 1980 PE filed its request with the Director of Regulation to withdraw its construction permit application and a motion with this Board to terminate this proceeding without prejudice. See Facts, ¶ 12.

The NRC Staff concurred in PE's motion. Neither the Solanco intervenors nor the Townships -- the only intervenors with any property or other local interest affected by the Fulton application -- objected to PE's motion, or indeed made any response to it. Only the York intervenors, located 30 to 100 miles away, filed a response to PE's motion. The York intervenors supported PE's motion to withdraw the Fulton application, but opposed PE's request that the withdrawal be without prejudice. In support of their opposition, the York intervenors alleged a variety of harms to unnamed members from the pendency of the Fulton application, consisting of unspecified costs incurred in opposing the Fulton application, unspecified

adverse effects on physical and mental health, and uncertainty in the potential sale price of unspecified real property in the immediate vicinity of the Fulton site, especially since the Three Mile Island event. Facts, ¶ 12. The York intervenors did not specify, or present any form of verification or offer of proof in support of, any of these allegations. No live proceedings were held by the prior Licensing Board, nor any verified pleadings submitted by or requested from any party on the York intervenors' allegations. See Facts, ¶¶ 12, 14.

During the period between the termination of GA's involvement in the Fulton project and PE's filing of its motion to withdraw the ESR application, no party had claimed on the record of this proceeding that PE's Early Site Review application was being pursued improperly by PE or that parties were being harmed in any legally cognizable fashion by its pendency. Facts, ¶ 13. Indeed, by Memorandum and Order dated August 8, 1979, while PE's ESR application was awaiting NRC predocketing review, the prior Licensing Board dismissed a "Petition" by the Solanco intervenors (not joined by the York intervenors) to dismiss the ESR review. As the Board noted, Memorandum and Order at 5, the Solanco "Petition" did not allege, and the prior Licensing Board did not find, any failure by PE to meet required standards of conduct. See Facts, ¶ 13, note 3; see also 14 NRC at 978, note 13.

On February 27, 1981, the prior Licensing Board issued its Decision and Order dismissing the licensing proceedings with prejudice. The Decision and Order was based in large measure on the prior Board's premise that Early Site Review (ESR) is available only to applicants who have a "present intention" and a "firm plan" to construct nuclear facilities on the site, Decision and Order (slip op.) at 4, 5, 6, 7, and that PE did not possess such intent or plan when it sought an ESR in early 1978, Decision and Order at 7-8. Since the prior Board perceived PE's actions as aimed merely at preventing termination of this proceeding, it held that the period of suspension was too long to justify a dismissal without prejudice. Id.; see also Facts, ¶ 14.

PE appealed the Decision and Order, and on November 17, 1981, the Atomic Safety and Licensing Appeal Board vacated and remanded it. In the Matter of Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981). Facts, ¶ 15.

The Appeal Board reviewed the prior Licensing Board's decision from three perspectives: (1) the legal test of intent used by the prior Licensing Board in determining eligibility for the ESR process; (2) the validity of the basis for the prior Licensing Board's implicit finding of bad-faith prosecution by PE of the Fulton ESR application; and (3) the relevance of, and validity of the Licensing Board's finding of, prejudice

to intervenors from assumedly bad-faith prosecution by PE of the ESR application.

On the first question, that of the intent necessary to permit applicants to make use of the ESR procedures, the Appeal Board reversed the prior Licensing Board's decision as a matter of law. After characterizing the ESR regulations as "reasonably clear and unambiguous on their face," the Appeal Board noted that

> [t]he regulations themselves contain no reference to an applicant's "intent" except perhaps for the requirement of a brief description, in part one of an ESR application, of the applicant's long-range plans for ultimate development of the site. . . . There is no mention of an applicant's "firm plans" for the site.

14 NRC at 975 (emphasis in original). The Appeal Board concluded that "the ESR regulations do not require a 'firm plan' to construct a nuclear plant at the involved site," id. at 977, and found that PE, as an applicant for a construction permit, had "satisfied the sole requirement for invoking" the ESR procedures, id. at 976. The Appeal Board concluded that

> by requiring more than that -- i.e., additional evidence of a "present intention" to construct a nuclear facility, manifest in "a firm plan" [citation omitted] -- the Licensing Board erroneously imposed a standard that exceeds what the [ESR] regulations themselves and the Statement of Consideration contemplate.

Id.

As to the second possible line of reasoning used by the prior Licensing Board -- that PE, though perhaps literally meeting the ESR regulations, nevertheless acted in a manner "not in good faith, thus justifying dismissal with prejudice" -- the Appeal Board found "the necessary factual predicate for such a conclusion missing from the [Licensing] Board's opinion." 14 NRC at 976. In making this determination, the Appeal Board reviewed the stated basis for the Licensing Board's conclusion, including summary informal Staff minutes of the May 11, 1978 meeting among PE, the Staff and intervenors. The Appeal Board noted that the minutes bore no oath or other form of verification, and that they had never been subject to any examination by affected parties. Id. at 977. Thus, regardless of their contents, it would have been "wholly inappropriate" for the Licensing Board to take the minutes "as accurate." Id. The Appeal Board nevertheless examined the minutes itself and found that their text was "far from providing a clear statement to resolve the asserted ambiguity in PE's December 5, 1980 letter" withdrawing the Fulton application, and that the minutes were "clouded with uncertainty about what PE represented at the May 1978 meeting." Id. at 977. Thus the Appeal Board held that if the Licensing Board's apparent conclusions of bad-faith prosecution by PE of its ESR application "are to stand, they must be footed elsewhere [than in the minutes]. More important, the parties themselves must be given the opportunity to

produce relevant, materia' and reliable evidence to support their positions and to discredit that of their opponents." Id. at 978. The Appeal Board specifically suggested that summary disposition on written pleadings, accompanied by appropriate affidavits, might be sufficient to resolve the issue. Id. note 12.

Third, the Appeal Board held that even if bad faith by PE were demonstrable on a valid record, actual legally cognizable harm or prejudice must be shown in order to justify dismissal with prejudice. Id. at 978-79. The Appeal Board found that the Licensing Board's decision "made no link whatsoever" between PE's pursuit of early site review and any legally cognizable harm. Id. The Appeal Board noted, as it had on the "bad faith" issue, that mere unsubstantiated allegations -- here, the York intervenors' allegations of harm -- cannot serve as a basis for a finding of legal harm. Id. The Appeal Board also noted the "well settled" rule that "the prospect of a second lawsuit -- or in this case, another application to construct a nuclear reactor at Fulton -- does not provide the requisite quantum of harm to warrant dismissal with prejudice." Id. Dismissal with prejudice would require "a demonstrated injury to a public or private interest," which it found had not been made. Id.

Thus the Appeal Board's decision held, in summary, as follows:

(1) It held legally incorrect the test of intent found necessary by the prior Licensing Board as a threshold requirement for use of the ESR procedures. It found that PE met the requirements for filing an ESR application.

(2) It held that dismissal with prejudice required both a demonstration of bad faith by PE in prosecuting its ESR application and of actual harm to a legally cognizable interest, and that the material adduced by the Licensing Board established neither bad faith nor legally cognizable harm. Absent such a demonstration, the application should be dismissed without prejudice.

(3) It held that summary proceedings on written pleadings accompanied by appropriate affidavits might be sufficient to resolve pending matters on remand.2/

2/ The Appeal Board stated as follows, 14 NRC at 978 n.12:

> We do not suggest that an oral hearing is necessarily required for such a pursuit. The matter might lend itself to summary disposition on written pleadings, accompanied by appropriate affidavits. See 10 CFR 2.749.
>
> In concluding that some sort of hearing is required, we do not mean to imply that intervenors' reasons for dismissing PEC's application with prejudice -- merely asserted in their pleadings before the Licensing Board without any evidentiary substantiation -- necessarily rise to a level that should trigger further inquiry. We are reluctant, however, to interfere with a board's exploration of matters that, in its view, involve a possible compromise

(Footnote continued)

No party sought review of the Appeal Board's Decision. The Commission voted 5-0 on February 3, 1982 not to review the Appeal Board's Decision, and it became final agency action that day. No party appealed to the Court of Appeals from that Decision within the 60 days permitted by the Administrative Orders Review Act, 28 U.S.C. § 2344. Facts, ¶ 16.

In the two years since the Appeal Board's Decision, the York Intervenors have not sought further proceedings to substantiate their earlier allegations of prejudice. Neither did the prior Board request submissions from the parties with respect to its vacated finding of bad-faith use by PE of the ESR process. Indeed, nothing happened until the Appeal Board's December 7, 1983 Order in this docket directing the Licensing Board to dispose of this matter within 30 days or indicate why it could not; the December 12, 1983 reconstitution of this Board to its present membership; and this Board's December 14 Order and Proposed Decision and Order.3/ Facts, ¶ 17.

(Footnote continued)

> of the Commission's adjudicatory processes. Thus, in the circumstances of this case, we accept the Licensing Board's implicit finding that intervenors have made a threshold showing, adequate to justify further consideration.

3/ PE itself refrained from seeking to institute proceedings, despite its obvious interest in ending this case, simply because the Appeal Board's remand directed parties other than it to initiate any further proceedings.

II. ARGUMENT

The terms of the Appeal Board's remand are that absent demonstrations of bad faith by PE and of prejudice to a legally cognizable interest, this case must be dismissed without prejudice. There is no basis for findings either of bad-faith prosecution of its ESR application by PE or of injury to any legally cognizable interest. The proceeding should be summarily dismissed without prejudice.

A. There Is No Basis For A Finding Of Bad Faith Prosecution Of The ESR Application By PE

The attached statement of material facts and affidavit of Vincent S. Boyer, summarized above in this motion, demonstrate that PE, at all times, made a good faith effort to pursue a conventional construction permit and then an Early Site Review application for Fulton and never sought to compromise the Commission's adjudicatory process. See Facts, passim, especially ¶ 13. The facts establish that in late 1975, GA unilaterally ceased work on the Fulton project. During the succeeding two years, PE weighed the choices of withdrawing its application, and thus losing the benefits of the review process that had already completed, or of totally revamping the plant-oriented portion of its application from an HTGR to a LWR design. The issuance of the ESR regulations in 1977 provided PE with the first viable means of preserving the value of the evaluations

already performed. PE actively pursued this regulatory option and filed a two-volume ESR amendment with the NRC Staff in late 1978. The Staff did not even comment in writing on the suitability of the application for docketing until June 25, 1980. Meanwhile, intervening events in 1979 and 1980 -- the last and least of which was the Staff's proposal in November 1980 to amend its fee regulations -- convinced PE's management that further prosecution of its ESR application would not be productive. Accordingly, on December 5, 1980 PE filed a motion to withdraw its construction permit and accompanying ESR amendment.

During all this time, PE kept the Commission informed of its plans through monthly status reports to the prior Licensing Board, other ad hoc communications, and at least one meeting. On the basis of these communications, the Staff determined to permit PE to amend the construction permit application rather than requiring PE to start entirely anew with an original application for an ESR.4/ Similarly, in 1979, after PE's filing

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4/ In any event, the Staff never had in mind preventing PE from pursuing licensing of the Fulton site. Even if the Staff had favored dismissal of the Fulton construction permit application rather than its conversion to an ESR application, PE would still have been free to file an application for an ESR. Letter, Moore (NRC) to Everett (PE), August 25, 1978. This was acknowledged also in a contemporaneous letter from William J. Dircks (NRC) to Congressman Robert S. Walker, which states in pertinent part: "We regard that the NRC Staff position is not in accord with your urging that the . . . NRC discourage Philadelphia Electric's request for an Early Site Review. However, it should be made clear that even if the construction

(Footnote continued)

of the ESR application, the Solanco intervenors moved to terminate the ESR proceeding. PE opposed the motion, as did the Staff. The prior Licensing Board denied the motion, noting in the process the absence of any allegation of failure to meet required standards of conduct. See Facts, ¶ 13, note 3.

Thus, as of the summer of 1979, the Licensing Board found the ESR application to be proper, and found no basis for criticism of PE's conduct of the application through that time. It follows that any allegations of conduct on PE's part sufficient to conclude that PE prosecuted the ESR application in bad faith must be based primarily if not completely on events between August 1979 and the withdrawal of the application in December 1980.

Yet nothing of the sort occurred between the summer of 1979 and December 1980. The ESR application was undergoing predocketing review during most of that time: there was no action PE took, or could have taken, on it. PE received the Staff's written response, notifying it that significant changes needed to be made in the alternative-site review area because

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(Footnote continued)

permit proceeding were to be terminated, Philadelphia Electric Company would be free to apply for an early site review. . . . Therefore, uncertainty about the ultimate use of the Fulton site would not be removed by terminating the present proceeding. On the other hand, an early site review would lead to an early decision which would permit more orderly planning by local citizens and governing bodies."

of amendments to the regulations not even proposed until April 1980, only at the end of June 1980, 18 months after the ESR application had been submitted. Letter, James R. Miller (NRC) to J. L. Everett (PE), June 25, 1980. These changes were recognized by the Staff letter as being significant: no deadline for reply was set forth, and PE was merely requested that "If you intend to pursue your application, please advise me of your schedule for submitting the required information." Id.

This Staff letter represented a major shift in the Staff position and upset a major assumption underlying the ESR application: that because the site had been found acceptable earlier by the Staff under the construction permit review, it would be accepted again without significant additional expense or effort. It should be noted that the Staff's criticism did not go to the characteristics of the Fulton site itself, but to the completeness under the new regulations of PE's evaluation of alternatives. Later in the same year, while evaluation of the cost of meeting the Staff's new requirements was still underway, the year's peak load continued a trend of depressed growth rates. In addition, regulatory changes stemming from the Three Mile Island event were beginning to emerge. The Staff's proposal to amend licensing fee regulations was the final blow, and PE withdrew the application less than four weeks later.

There is nothing in PE's conduct during the year and a half summarized above warranting a finding of bad faith on its part: bad luck and bad circumstances, but not bad faith. When PE moved to withdraw its application and dismiss the application without prejudice, the Staff and Maryland supported it on both counts. The Solanco intervenors, the most active intervenors to that point, filed no papers. Nor did the local townships.

As is noted above, the Appeal Board found nothing in the record addressed by the prior Licensing Board which would sustain a finding of bad faith prosecution of the ESR application by PE. The factual record, addressed above in more detail than that recited by the prior Licensing Board, shows even more clearly that the facts, when fully developed, do not support a finding of bad-faith prosecution of the ESR application. Under the Appeal Board's Decision, the possibilities of legal harm redressable by dismissal with prejudice follow from bad-faith prosecution. Since that cannot be established, this motion should be granted.

B. There Is No Harm To Other Parties Or To The Public Interest From PE's Prosecution Of PE's Prosecution Of The ESR Application

The second factual requirement laid down by the Appeal Board for dismissal with prejudice is the demonstration of legally cognizable harm to parties or to the public. 14 NRC at

974, 978-79. Here, the Appeal Board found that the prior Licensing Board's decision did not establish any such harm. Id. PE submits that no such harm requiring the unusual remedy of dismissal with prejudice occurred.

Potential injuries come in numerous forms, the most obvious of which in a licensing case is injury to the land values. Here, of course, the Appeal Board noted the absence of anything beyond unsubstantited and nonspecific claims. 14 NRC at 979. Even more to the point for this motion, those persons and entities most immediately affected by the pendency of the Fulton application -- local landowners and the Townships of Fulton and Peach Bottom -- did not join in the request for dismissal with prejudice before the prior Board. Nor did they participate in the appeal from its decision, in which PE's brief pointed out the absence of immediate neighboring opposition. Thus, they receded as potential claimants of injury two years and two stages ago in this proceeding. See Facts, ¶ 2; 14 NRC at 979, note 14. As for the York intervenors, the papers filed by them with the prior Licensing Board, never amended, showed no person living closer than 12 miles from Fulton and most living 30 to 100 miles away. Facts, ¶ 2. PE pointed out this fact in its brief to the Appeal Board, and it was not controverted by the York intervenors in their reply. The York intervenors' initial papers had never even asserted an unverified value to this type of damage. PE submits that the

York intervenors lack standing to complain of property damage to property near the Fulton site not owned by their members; and that any damage to property values located in no cases less than 12, and in most cases 30 to 100, miles away from a long defunct project where not a spade of earth was ever turned for construction, is so speculative as to not warrant further inquiry at this time.

The York intervenors also alleged, in one phrase, that "the physical and mental health" of unnamed members of their organization had been "adversely affected" by "uncertainties imposed by" the pendency of the Fulton project. This allegation is totally nonspecific as to either the type of harm alleged, its severity, the number of members affected, or their identity. No offer of proof of any type was made by the York intervenors before the prior Licensing Board, nor was their allegation amplified on in their papers filed with the Appeal Board. PE believes that this totally nonspecific allegation is so speculative and non-probative as not to merit further evidentiary consideration. As the Appeal Board noted in the related North Coast case:

> 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), 14 NRC 1125, 1133-34.

The standard described in the North Coast case as a predicate for evidentiary proceedings has plainly not been met here. Nor does PE believe that the causal nexus necessary for evidentiary consideration realistically could ever be established here. On the same type of issue, 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).

The third type of harm summarily alleged by the York intervenors consisted of unspecified costs incurred in this case. These costs, whatever they may be,5/ are not cognizable by this

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5/ The record in the case reveals that the York intervenors have never retained an attorney and have never been compelled

(Footnote continued)

Board in making a determination with respect to prejudice. It is well established under the "American Rule" that parties to litigation bear their own costs in the absence of legislation modifying the rule, and no such legislation exists that is applicable to the NRC. 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. 938, 943-44 (1983).

Finally, to the extent that uncertainty over the possibility that the Fulton application might be refiled may be implicitly advanced by intervenors as a basis for dismissal with prejudice, it is clear that the prospect of a second application is not a basis for such dismissal. 14 NRC at 979 and cases cited thereat.

The Appeal Board also recognized the possibility that this Board might find, though its predecessor did not substantiate, harm to the public interest from PE's prosecution of its ESR Application. PE steadfastly denies any intent to have produced such a result, see Facts, ¶ 13. While this is a matter for this Board to pursue in its discretion, PE believes there is no basis for any finding adverse to it.

(Footnote continued)

in the course of the case to prepare written testimony, answer discovery, or indeed prepare any papers more complex than their intervention papers.

In short, PE believes that there is no alleged type of injury with enough basis to merit the conduct of evidentiary hearings.

C. Dismissal As Moot, Without Prejudice, Is The Appropriate Course

This Board is concerned about bringing this proceeding to a close; so is PE. This Board has observed that the Fulton application is totally moot; PE agrees. See Facts, ¶ 18. Dismissal with prejudice is "highly unusual" where, as here, the merits of the case have not yet in fact been reached. North Coast, supra, 14 NRC at 1433. This case cannot be dismissed with prejudice without findings of bad-faith conduct by PE and harm to parties or the public interest. Both of these matters must be established by substantial evidence; neither has been; PE believes that neither can be. This case should therefore be dismissed without prejudice, as moot. On a technical basis, it seems highly unlikely that any future application by PE at Fulton would be identical to the current HTGR application, given changes in technology and regulations, see Facts, ¶ 18. However, if the Board is concerned about guaranteeing that outcome, PE would not object to its attaching a condition to the dismissal requiring that any future application at Fulton not be identical to the one which, as amended, is presently pending before it. At least one Licensing Board has recognized the

utility of dismissal without prejudice, but with appropriate conditions. See Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134-35 (1982). PE does not believe that the record requires any conditions on dismissal, but would not object to dismissal as moot, without prejudice, subject to the condition just described.

III. CONCLUSION

For the reasons stated above and in the accompanying Statement of Material Facts and Affidavit, the pending application should be summarily dismissed, without prejudice, as moot.

Respectfully submitted,

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DATED: December 29, 1983

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STATEMENT OF MATERIAL FACTS

ACCOMPANYING MOTION OF PHILADELPHIA ELECTRIC COMPANY FOR SUMMARY DECISION AND FOR TERMINATION OF PROCEEDINGS AS MOOT AND WITHOUT PREJUDICE

Pursuant to 10 CFR § 2.749, Philadelphia Electric Company (PE) recites the following material facts as to which it contends there is no genuine issue:

1. On July 3, 1973, PE filed in Docket Nos. 50-463 and 50-464 its construction permit application and Environmental Report for the Fulton Generating Station, planned as a pair of twin 1100MW High Temperature Gas Cooled Reactors (HTGRs) to be manufactured by the General Atomic Company (GA). Two Interested States (Maryland and Pennsylvania) were admitted to the proceeding, along with three distinct groupings of intervenors: (1) Save Solanco Environment Conservation Fund, George W. Hough and Allen D. Weicksel ("Solanco"); (2) The Townships of Fulton and Peach Bottom, Pennsylvania ("Townships"); and (3) the York

Committee for a Safe Environment, the Central Pennsylvania Committee on Nuclear Power, and the Committee for Responsible Energy Sources of Philadelphia ("York"). The membership of the Solanco intervenors included, inter alia, persons who lived or owned property adjacent to or near the Fulton site. Fulton Township includes most of the Fulton site (the balance is located in Drumore Township, which did not become a party to the proceeding); Peach Bottom Township is immediately across the Susquehanna River from the site. York, Pennsylvania is some 30 miles from Fulton; State College, the mailing address of the Central Pennsylvania Committee, is approximately 100 miles away; Philadelphia is approximately 60 miles away. None of the papers filed by the York, Central Pennsylvania or Philadelphia groups disclosed any members living closer than 12 miles from the Fulton site; the vast majority of the York intervenors, and all of those in the Central Pennsylvania and Philadelphia groups, were listed as living in York, State College, and Philadelphia, respectively. None of these papers was ever amended in a fashion to assert that members lived closer to the site than is stated here.

2. Following the filing of the application, the NRC Staff evaluated it and issued a Safety Evaluation Report (NUREG-75/015, March 1975) and a supplement to that report (NUREG-75/015 Supp. 1, June 1975), and the Advisory Committee on Reactor Safeguards issued a letter (April 8, 1975), all

favorably resolving site-related safety issues of the application. The NRC Staff also published a Final Environmental Impact Statement (NUREG-75/033, April 1975) recommending issuance of a construction permit subject to various conditions for protection of the environment.

3. In mid-September 1975, GA unilaterally ceased work on the Fulton project. PE so informed the Atomic Safety and Licensing Board (Board) by letter dated September 17, 1975, and in the same letter stated that it was assessing the Fulton application and would report its results to the Board and all parties upon the ccmpletion of its assessment. The contractual relationship between PE and GA was dissolved in eary 1976. Subsequently, GA ceased to manufacture commercial HTGRs.

4. At the time of GA's cessation of work, no evidentiary hearings had been held before the Atomic Safety and Licensing Board, nor had any date for them been set, nor had any prefiled testimony been submitted. However, substantial discovery of PE by intervenors had taken place. The vast majority of it, involving 19 separate sets of interrogatories including 930 individually numbered questions and over 90 requests for production of documents, had been filed by the Solanco intervenors. The York intervenors had filed on PE only one discovery request, containing six interrogatories and eight requests for production, on August 29, 1974. No discovery had been compelled of any of the intervenors by PE at the time of GA's

cessation of work. PE's first and only discovery request, a set of interrogatories filed August 5, 1975 and still pending at the time of cessation of work, was directed only to the Solanco intervenors.

5. Upon PE's notice of GA's action, the construction permit proceedings were suspended. Intervenors were not required to reply to pending interrogatories. In addition, at the request of the prior Board, PE commenced in November 1975 to file monthly reports on its reassessment of the Fulton application.

6. GA's cessation of work left PE with two principal alternatives available under the Commission's then-effective regulations. PE could withdraw the Fulton application. Alternatively, PE could select a new reactor design and vendor and fully amend the application. Withdrawal would result in the presumptive loss of any benefit in future applications from the arduous and costly two-year review process already conducted. This was undesirable to PE since the Fulton site was considered an excellent, licensable site, since PE believed at that time that it would need the Fulton reactors by about 1990 in any event, and since substantial work and money had already been spent on the application. Amending the application would also have been a difficult matter. Even though baseline site-related information would remain unchanged, amendment would require recasting the application for a light-water reactor (LWR). This would have been a major task, given the basic

conceptual differences between HTGR and LWR designs and the fact that GA was the sole manufacturer of HTGRs. (Early Site Review or other methods not requiring submission of a detailed analysis of a specific reactor design were not yet available.) PE did not regard either of the available choices as ideal, and thus chose to weigh its options before committing itself to either. For the next two years, with the Licensing Board's permission, PE pursued its deliberative process and reported monthly on its progress to the Board and other parties. During this period no party complained about the pace of PE's deliberations.

7. In May 1977, the Commission issued its Early Site Review (ESR) regulations, 10 CFR §§ 2.101(a-1), 2.600, et seq.; 42 Fed. Reg. 22882 (May 5, 1977). These regulations permit adjudicatory site review in the context of a construction permit without the designation of an actual vendor or a specific reactor design. They presented PE with the first potentially feasible alternative to withdrawing the application and losing the value of the evaluations already performed. PE undertook internal evaluation of this option.

8. On January 30, 1978, the NRC Staff notified PE of its intention to file a motion to terminate the existing construction permit proceeding absent a plan by PE for early use of the Fulton site (Letter, Richard P. Denise to J. Lee Everett, January 30, 1978). The Staff's letter to PE clearly indicated

that termination of the construction permit proceeding would not affect PE's future ability to file a new application to utilize the Fulton site, though it gave PE no assurance that any value would be attributed to the review to date of the HTGR application, even in its site-related aspects. The letter also forwarded information on the NRC's newly implemented ESR program.

9. On February 10, 1978, PE initially notified the Commission that it intended to convert the Fulton application, pursuant to the new ESR regulations, from a standard construction permit application to an application for an Early Site Review. A more detailed discussion of PE's determination was set forth in a letter dated March 8, 1978 from PE to the Commission (Letter, J. Lee Everett to Richard P. Denise, March 8, 1978). As is stated in more detail in Mr. Everett's letter, PE's preference for filing the ESR amendment in the context of the existing construction permit application, rather than filing a de novo application, was based on the fact that the Fulton site had already received favorable Staff review on safety and environmental grounds. PE sought to avoid, if possible, both the costs in money and time and the inevitable duplication of effort, that would have been associated with dismissal of the initial application and a de novo filing of a later application, either for a CP or an ESR. A meeting was held among PE, the Staff, various intervenors and others on May 11, 1978 to

discuss the proposed amendment. Unofficial minutes of the meeting, later relied on by the prior Licensing Board, were taken. Later that summer, the Staff wrote to PE, formally permitting PE to file its ESR application by amending the existing CP application rather than making PE start anew with an original application for an ESR. (Letter, Voss A. Moore to J. L. Everett, August 25, 1978.) On December 29, 1978, PE timely filed its two-volume ESR amendment.

10. Within the two-year period following the filing of PE's ESR amendment, a series of events occurred, as a result of which PE reversed its earlier conclusion that proceeding with Early Site Review was feasible at Fulton at that time. These events are as follows:

a. The NRC Staff's requirements for processing an ESR application expanded substantially beyond PE's expectations, and considerably beyond those prevailing at the time of the initial CP review. The NRC Staff formally notified PE by letter dated June 25, 1980 (Letter, James R. Miller to J. Lee Everett) of additional informational requirements, stemming from regulatory changes since suspension of the review of the initial Construction Permit application, that it would impose as a prerequisite to docketing the ESR amendment. Prime among these was the proposal of new requirements for evaluation of alternative sites,

published in the Federal Register on April 9, 1980 (45 Fed. Reg. 24168). The proposed regulations did not contain any provisions that called into question the substantive suitability of the Fulton site itself, or the adequacy of PE's discussion of it. However, they contained numerous new requirements for discussion of alternative sites. Despite the fact that the rule was only in proposed form, the Staff's letter indicated that the Staff intended that PE comply with it as though it were a final regulation, and requested new evaluations of alternative sites from PE. PE's internal evaluation led it to conclude that compliance with the Staff's informational requirements would require major new studies taking on the order of a year and costing substantial sums, and that they would be sufficiently costly and time-consuming as to significantly lessen the perceived value of pursuing Early Site Review. Although PE had been informally notified in 1979 of the likelihood of some of the new alternative site evaluation requirements, the June 25, 1980 letter -- some 18 months after PE's submission of its ESR application -- was the first written indication of the Staff's position.

b. PE's weather-adjusted peak load growth rate from 1977 through 1980 had slowed to about 1.4%

annually, in contrast to the long-range growth rate of about 2.7% which had been forecast at the time PE sought an Early Site Review. This fact, which became known only after the 1980 summer peak, indicated a several-year delay in the date by which the capacity represented by Fulton would be needed to supply peak load, to well into the 1990s.

c. NRC activities following and related to the Three Mile Island event in March 1979 necessitated major diversion of staff personnel from routine licensing review, resulting in near-term delays, e.g., an 18-month interval between the filing of PE's ESR amendment and the issuance of the Staff's predocketing letter. It also resulted in the publication of numerous regulatory guidance documents by the Staff, principally the TMI Action Plan, NUREG-0660, and Clarification of TMI Action Plan Requirements, NUREG-0737 (November 1980). These documents, while directed in the short term primarily at operating reactors and operating license applications, implied the likelihood of substantial changes and instability for some period in licensing requirements at the Construction Permit stage. This perception, if accurate, could have affected not only specific plant design requirements but also site

requirements of the type evaluated in an Early Site Review. These facts made pursuit of an ESR application more uncertain to PE and less attractive than would be the case in a more stable regulatory climate.

11. The Commission proposed in the fall of 1980, 45 Fed. Reg. 74493 (November 10, 1980), to amend its licensing fee regulations to specify assessment of fees in connection with withdrawal of construction permit applications.1/ PE estimated that the increased cost of application withdrawal attributable to these regulations, once they became effective, would have been on the order of $800,000. The proposed regulations were characterized in the Federal Register as being "interpretive" and were proposed to apply retroactively to all applications on file as of March 23, 1978. PE was advised by counsel that the regulations would likely be held valid if applied prospectively to all license applications pending after their date of final promulgation, but that their retroactive application was less supportable; and that PE's best chance for avoiding their imposition, if the Fulton application was no longer tenable, was to

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1/ The Commission's regulations, as in effect at the time of the proposed amendment, required payment of an initial filing fee of $125,000 for a two-unit station like Fulton, and another fee of $1,118,000 upon issuance of construction permits for the two units. No fees were specified for withdrawal of applications. 10 C.F.R. § 170.21.

file for withdrawal of the application prior to the regulations' effective date.2/

12. Based on its perception of the ramifications of these intervening events, PE withdrew its Fulton application on December 5, 1980 and requested the same day that the Construction Permit proceeding be terminated without prejudice. The three factors outlined in ¶ 10 above had convinced PE, by about mid-autumn of 1980, that the Fulton ESR application was no longer basically viable in its current form. The proposed fee regulations referred to in ¶ 11 did not determine the decision to withdraw the license application, nor affect its timing except to serve as a near-term incentive to take promptly an inevitable step in the interest of avoiding substantial additional costs. Each of the factors mentioned in ¶¶ 10 and 11 was mentioned in the papers filed by PE with the Licensing Board in connection with withdrawal of the application. None of them was elaborated on at length; no request for such elaboration

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2/ The final regulations were issued by the NRC on October 7, 1981 (46 Fed. Reg. 49,573) after PE had filed its papers to withdraw the Fulton application. PE joined in a successful appeal challenging the retroactive application of the regulations to licensing applications withdrawn before the regulations' effective date. New England Power Company, et al. v. NRC, 683 F.2d 12 (1st. Cir. 1982). PE had meanwhile been served notice by the NRC Staff, by letter dated December 14, 1981, that the Staff would seek to collect approximately $855,000 in licensing fees, less sums already paid, pursuant to the then-proposed regulations. That notice was withdrawn by the Staff following the decision of the Court of Appeals, by letter dated September 16, 1982.

was ever made, nor were the factors outlined by PE disputed by any party. The Staff and the State of Maryland supported the request for dismissal without prejudice. Of the Intervenors, Solanco and the Townships filed no papers. Only York responded: they supported dismissal, but urged that it be with prejudice, and, in an unsworn pleading unsupported by affidavit or offer of proof, alleged various kinds of prejudice to unnamed members from the pendency of the application.

13. At no time during the entire period of proceedings before the prior Licensing Board prior to PE's withdrawal of its application did PE seek to manipulate the Commission's regulations or Licensing Board or other parties improperly. At no time did PE seek to deceive the Board or any other party about its intentions. During this entire period, intervenors advanced contentions in opposition to the Fulton plant and the Staff in late 1977 suggested that the Fulton application, as a conventional CP application, was losing its viability (¶ 8 above). But at no time during this entire period did any party complain on the record about either the manner or pace of PE's prosecution of its construction permit application or supplemental ESR application.3/

3/ In the only actual challenge to the continued viability of the application, the Solanco intervenors, not joined by the York intervenors, sought in May 1979 to prevent PE from utilizing the Early Site Review Procedures but did not complain about PE's conduct. The prior Licensing Board upheld PE's right to avail itself of them, Memorandum and Order re Petition

(Footnote continued)

14. On February 27, 1981, without a hearing or request for or receipt of sworn pleadings, the prior Board issued its unpublished Decision and Order dismissing the Fulton proceeding with prejudice.

15. PE appealed the Decision and Order to the Atomic Safety and Licensing Appeal Board (ALAB). On November 17, 1981, the ALAB issued a Decision vacating the prior Licensing Board's Decision and Order, finding that the ESR regulations did not require a "present intention" or "firm plan" to construct a nuclear power plant. In the Matter of Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 975-76 (1981). The Appeal Board also did not accept the prior Licensing Board's conclusion that PE had shown bad faith in the prosecution of the ESR application, finding it without basis in anything addressed by the prior Licensing Board. Id. at 978. The Appeal Board also concluded that even if PE were assumed, arguendo, to have acted in bad faith, the record did not show any legally cognizable harm to either intervenors as to the public intent from it. Id. at 977-78. The

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(Footnote continued)

to Terminate Docket and the Quash Preapplication and Early Review of Site Suitability (August 8, 1979). In that Memorandum and Order, at 5, the prior Board noted the absence of any allegation of failure by PE to meet required standards of conduct. The Solanco intervenors did not thereafter join the York intervenors in urging that the application be dismissed with prejudice.

Appeal Board found that the prior Licensing Board had abused its discretion, and ALAB remanded the proceeding to it for proceedings in conformity with the Appeal Board Decision. Id. at 979. In such proceedings, the prior Board was to permit the parties "the opportunity to produce relevant, material, and reliable evidence" to demonstrate any injury to a legally cognizable interest. Id. at 978. Absent such a showing, the Appeal Board's decision stated, the license application should be finally dismissed without prejudice. Id. at 979.

16. No party sought review of the Appeal Board's decision. The Commission determined not to review it and it became final agency action. No party appealed from that decision to the Court of Appeals.

17. In the period since the Appeal Board's decision, PE has not received any request by any other party for an opportunity to make the evidentiary showing required by the Appeal Board in order to sustain any decision other than final dismissal without prejudice; nor, until receipt of this Board's December 14, 1983 Order and Proposed Decision and Order, had PE.

18. PE believes, from a technical standpoint, that any application it may file in the future for a High Temperature Gas Cooled Reactor at Fulton would not be identical to the application, as amended, now pending before this Board, given the technological advances and regulatory changes which have

occurred since 1975. The Fulton application has been defunct as a technical project at PE since, at the latest, 1980, and no significant work has been performed on it since that time other than clearing up files so as to make use of existing information, to the extent still applicable, in a future application if one is ever made.

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)	)	
	)	

CITY OF PHILADELPHIA	)	
	)	ss.
COMMONWEALTH OF PENNSYLVANIA	)	

AFFIDAVIT OF VINCENT S. BOYER

VINCENT S. BOYER, being duly sworn, deposes and says as follows:

1. My name is Vincent S. Boyer. I am Senior Vice President, Nuclear Power, Philadelphia Electric Company. My business address is 2301 Market Street, Philadelphia, Pennsylvania 19101. I make this Affidavit in support of the Motion for Summary Decision and Statement of Material Facts dated December 29, 1983 and being filed in this matter by Philadelphia Electric Company.

2. During the entire period since Philadelphia Electric Company filed its application to the Atomic Energy Commission in 1973 for a construction permit for the Fulton Generating Station, Units 1 and 2, matters relating to that application

have been within my area of responsibility, and have been worked on by me and by employees and consultants of Philadelphia Electric Company acting under my supervision and direction.

3. I have knowledge, personally or through informati from Philadelphia Electric Company employees and consultant acting under my supervision and direction, of each of the matters asserted in the Statement of Material Facts with which this Affidavit is being filed. On the basis of that knowledge, I believe that each of the matters asserted in that Statement of Material Facts is true and correct.

_____
Vincent S. Boyer

Subscribed and sworn to before me this _____ day of January, 1984.

_____
Notary Public

My Commission Expires:_____