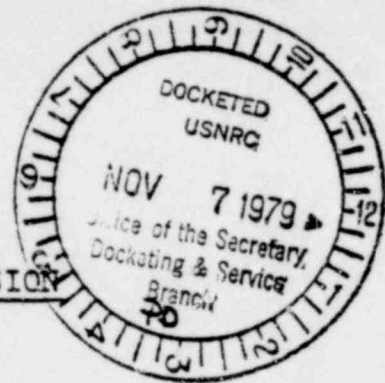


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION



In the Matter of)

PUGET SOUND POWER & LIGHT)
COMPANY, et al.,)

DOCKET NOS. STN 50-522
50-523

(Skagit Nuclear Power Project,)
Units 1 and 2))

November 5, 1979

INTERVENOR TRIBES' SUPPLEMENTAL
PETITION FOR REVIEW

INTRODUCTION

Almost seventeen months ago, the Upper Skagit, Sauk-Suiattle and Swinomish Tribes petitioned the Licensing Board for leave to intervene out-of-time. Since then they have filed numerous briefs, made specific contentions, and offered testimony on issues directly affecting the tribes. We pointed out then and we repeat now that of all possible parties to these dockets the tribes have perhaps the greatest stake in the outcome.

Indian participation has been the subject of two (inconsistent) Licensing Board decisions and four Appeal Board decisions.

Because there appeared to be at least a question of finality with respect to some of those earlier orders, the tribes thought it prudent to file a Petition For Review in

1391 042

the District of Columbia Circuit Court of Appeals in order to prevent expiration of any applicable statutory time limitations. The filing of such a "protective" petition is without prejudice to review here. It is our understanding that the circuit court proceedings can be held in abeyance to accomodate any review by the Commission.

We note that recent continuances, and the year that will soon have passed since Judge Jensch's decision granting intervention, bear out his observation:

...this proceeding reflects a changing scene, alterations, redesign, and new data which have been presented continuously since the hearings commenced.

Because of page and time limits and because of the number and complexity of issues which should be reviewed, this supplemental petition is drafted in compliance with 10 C.F.R. §2.786, but is not intended to limit the scope of review.

DECISIONS OF WHICH REVIEW IS SOUGHT

On February 20, 1979, petitioners asked this Commission to review ALAB-523 (January 29, 1979), which reversed the Licensing Board and remanded the matter to a reconstituted Licensing Board. The Commission deferred consideration of that petition pending action by the Licensing Board on remand and any subsequent review by the Appeal Board.

On June 1, 1979, the Licensing Board entered an order denying intervention. The tribes appealed on June 14. On

1391 043

July 9, the Appeal Board entered ALAB-552, rejecting much of the Tribes explanation for their tardiness and suggesting a supplemental memorandum. On August 31, the Appeal Board entered ALAB-559, affirming the denial of intervention.

On October 16, 1979, this Commission served by mail its order giving the tribes fifteen additional days to file a supplemental petition for review on ALAB-552 and ALAB-559. This petition responds to that order.

RECORD BEFORE THE APPEAL BOARD

The matters of fact and law raised in this petition are contained in the following pleadings and were a part of the record before the Appeal Board:

Brief in Support of Petition to Intervene of Upper Skagit Tribe, Sauk-Suiattle Tribe and Swinomish Tribal Community - June 13, 1978.

Petitioner Tribes' Reply Brief to Answers of NRC Staff and Applicant - September 5, 1978.

Petitioner Tribes' Response to the Board's Request of September 26, 1978 - October 27, 1978.

Intervenor Tribes' Brief in Opposition to Applicants' Appeal and in Support of Licensing Board Decision and Order Granting Intervention - December 26, 1978.

Intervenor Tribes' Response to December 22, 1978, Order for Conference - January 11, 1979.

Intervenor Tribes' Interim Statement of Issues in Response to the Order of February 8, 1979 - March 12, 1979.

Brief of Swinomish Tribal Community, Upper Skagit Indian Tribe and Sauk-Suiattle Indian Tribe in Support of Appeal - June 14, 1979.

1391 044

Petitioner Tribes' Supplemental Memorandum in Response
to Order of July 9, 1979 - July 30, 1979.

Two matters mentioned in this supplemental petition were not before the Appeal Board. First, the indefinite delay of proceedings with postponement of scheduled hearings, due to additional geologic information and new issues raised by TMI 2, was not before the Appeal Board because the information came to light subsequent to the filing of ALAB-559. Second, the tribes did not become aware that the Licensing Board Chairman did not perceive the tribes as intervening local governments until after ALAB-552 and after the filing of the supplemental brief suggested there.

ERRORS COMMITTED BY THE APPEAL BOARD

It is the contention of the tribes that the Appeal Board erred repeatedly in applying the various factors listed in 10 C.F.R. §2.714(a). This pervasive error not only raises the serious procedural questions necessary to justify full Commission review but also, in various particulars, raises additional policy questions.

The Appeal Board misapplies the "good cause" factor by requiring an especially strong showing on this factor, by imposing such a showing as a threshold before going on to the other four factors, and by failing to include "good cause" as one of five co-equal factors to be considered. The Appeal Board also pre-judges the weight to be given this factor by effectively making it a barrier.

1391 045

The Appeal Board majority's treatment of the factor "assist in developing a sound record" is callous, judgmental and wrong. The majority relies upon "past experience." Petitioners doubt that the Appeal Board has sufficient experience with Indian governments to support its bias. Further, the Appeal Board misstated the test under this factor, imposing the requirement of a "substantial contribution."

For the tribes, the issue of sufficiency of the record is less academic. They offer the following, inter alia:

A completed engineering study based upon field measurements indicating that pressurized reactor vessel transport will require dredging of one portion of the river, involve extremely close tolerances with respect to certain bridges, and interfere not only with salmon habitat, but treaty fishing activities.

An engineering study, based on field measurements, showing extreme flood scour depths at the diffuser site; showing extreme adverse fisheries impacts during diffuser construction; showing that the diffuser structure will, during floods, cause erosion of the opposite stream bank, change the stream channel configuration over the diffuser and possibly in the wild and scenic area, and result in the deposition of stream bed sediments on the upstream side of the diffuser.

A study by a fisheries toxicologist indicating the probability of a definitely toxic-to-salmon situation outside of the mixing zone at the diffuser.

A review, using ground water pumping boundaries, of Ranney collector interference with surface salmon streams and sloughs.

A review and assessment of construction impacts on fisheries, which Staff admits but does not quantify, especially as to Indians.

Computation of actual ground level concentrations and doses (presently unavailable) for Indians fishing or otherwise present in the LPZ and adjacent area. Indian fishermen were not listed as a transient population and no assessment of genetic and somatic effects can be made until some determination is made as to dosage.

Studies tending to show unresolved genetic and somatic risks to Indian receptors and their progeny, not only as closed populations, but also due to higher exposures and distinct health indicator patterns.

A socio-economic review assessing risks to Indian communities not presently addressed by NRC Staff or Applicant.

A critical review of the interference of a warm water hatchery with present state and tribal management of Skagit River fisheries.

A much more concise assessment of the extreme importance of the Skagit River wild fish runs to American and Canadian fisheries.

When dealing with representation by existing parties, the Appeal Board majority makes similar errors. It fails to recognize the tribes as governments and instead treats them as public interest intervenors. It also fails to make a distinction between any representation and the extent of representation.

Lastly, the Appeal Board errs in applying the "broaden and delay" factor, focusing on whether there will be delay, rather than its extent. But overshadowing this, and affecting the entire decision, is the unfairness of including the time between the tribes' petition and ALAB-559, plus any additional appeal time here, in the time to be

counted against the tribes, particularly in view of the delays to these proceedings from other causes.

The majority further compounded its error by failing to note that Indian intervention would not unduly broaden the issues.

In addition, the majority neglected to take subsection (d) factors into account, thus failing to put in the balance the unusually large extent of the tribes' interest in the proceedings and the extent to which they may be affected by the proceedings.

WHY COMMISSION REVIEW SHOULD BE EXERCISED

Defining good cause as a special threshold factor and requiring a more substantial showing thereon is directly contrary to the 1978 amendments to §2.714(a) and constitutes adjudicative rule making. This and the other procedural errors already detailed raise several important procedural issues.

Instead of responding to the appeal from the June 1 Licensing Board Order, the Appeal Board simply reviewed the question of intervention for itself, acting de novo outside its discretion and expertise as a second licensing board.

In addition, the decision to impose agency delay on petitioners when reviewing extent of delay raises both policy and procedural questions, as well as questions of fairness.

1391 048

The majority's lack of familiarity with Indian fishing rights adds to the unfairness. The United States Supreme Court finally resolved the fishing rights controversy earlier this year, as noted by Mr. Farrar. This is a major factor with respect to good cause for failure to file on time and with respect to the unique status of the fishing right.

The final irony is that Commission policy allows Skagit County to participate (even though four and one-half years out-of-time) as an interested local government, yet denies federally recognized tribal governments intervention.

CONCLUSION

As the dissent to ALAB-559 points out, this is an extremely significant case. The exclusion of federally recognized governments whose members live and fish in, and near, the LPZ cannot help but override technical considerations and casts doubt upon the entire licensing process.

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1391 049

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CERTIFICATE OF SERVICE

I hereby certify that the following:

INTERVENOR TRIBES' SUPPLEMENTAL
PETITION FOR REVIEW

in the above-captioned proceeding was served upon persons shown on the attached list be depositing copies thereof in the United States Mail with proper postage affixed for First Class Mail and upon Roger M. Leed, attorney for Intervenor, SCANP, and F. Theodore Thomsen, attorney for Applicant, by depositing the same with Legal Messengers, Inc.

Dated: November 5, 1979.

A handwritten signature in cursive script, appearing to read "Russell W. Busch".

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1391 050

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