UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ARIZONA PUBLIC SERVICE	)	DOCKET NOS. STN 50-592
	)	STN 50-593
COMPANY, et al.	)	
	)	
(Palo Verde Nuclear	)	
	)	
Generating Station,	)	
	)	
Units 4 & 5)	)	
	)	

JOINT APPLICANTS' RESPONSE TO THE PETITION FOR LEAVE TO INTERVENE OF THE MORONGO BAND OF MISSION INDIANS

Joint applicants Arizona Public Service Company, Southern California Edison Company, El Paso Electric Company, San Diego Gas & Electric Company, Nevada Power Company, Department of Water and Power of the City of Los Angeles, City of Anaheim, City of Burbank, City of Glendale, City of Pasadena, and City of Riverside (the "Joint Applicants") oppose the petition to intervene ("Petition") of the Morongo Band of Mission Indians (the "Band") served by mail on May 11, 1979. Joint Applicants submit that the Petition should be denied for the reasons that the Band has not justified its late filing, has not demonstrated that it has standing, and has not set forth a valid contention.

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Untimely Petition

In its Petition the Band lists several concerns respecting the location of the Devers to Mira Loma portion of the proposed 500 kV transmission system from the Palo Verde site to the Mira Loma substation near Ontario, California. On December 8, 1978, the Atomic Safety and Licensing Board designated to preside in the Palo Verde Units 4 and 5 proceeding published a supplemental notice of hearing in the Federal Register (43 Fed. Reg. 57694-95) which provided that petitions for leave to intervene respecting environmental issues were to be filed by January 8, 1979. As the concerns listed by the Band in its Petition are environmental in nature, the Petition was filed approximately four months late.

With respect to untimely petitions, 10 C.F.R. §2.714(a)(1) provides in pertinent part:

> Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:
>
> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.

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(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In its Petition the Band states several reasons for the untimely filing. (Petition at 1-3). While these "reasons" may be regarded as an attempt to establish good cause for failure to file on time, the simple fact is that the Band has failed to address the remaining four factors in its Petition. Nor does the Band argue that it is immune from meeting the requirements of Section 2.714(a)(1). In Puget Sound Power and Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), LBP-78-38, 8 N.R.C. 587 (1978), the Licensing Board basically ignored the requirements of Section 2.714(a)(1) in considering the grant of an untimely petition to intervene of three Indian tribes. The Board took the position that the tribes' particular status and their relationship with the United States Government should be the controlling factors. It added that, because of this situation, the petition should be treated as though filed by the United States, the tribes' trustee. Id. at 595-97. The Board then held that "the factors recited in the Commission's regulations for a late filed petition to intervene [should]

yield to the public interest which the government represents." Id. at 597. The Appeal Board vacated the Licensing Board's order and remanded with directions to the Board to consider the petition in light of Section 2.714(a)(1). Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 N.R.C. 58 (1979). In so doing, it noted that none of the decisions relied on by the Board supported the thesis that the delay did not have to be justified but could simply be ignored. Id. at 62. In view of the Puget Sound decision, the requirements of Section 2.714(a)(1) apply to federally recognized Indian tribes. And since the Band has failed to address the factors listed in that regulation, there is no basis upon which this Licensing Board can grant the Band's Petition.

While the Band's failure to address four of the five factors of Section 2.714(a)(1) is by itself a sufficient basis for denial of the Petition, Joint Applicants further submit that the reasons offered by the Band do not demonstrate good cause for the late filing.

The Band first alleges that it did not receive actual notice of the Palo Verde Units 4 and 5 proceeding until March 9, 1979. (Petition at 1-2). This does not constitute good cause since the Atomic Energy Act, as amended, (the "Act"), does not require actual notice to individuals potentially affected by the outcome of a proceeding conducted under the Act. The Act simply requires that the

notice of hearing be published in the Federal Register. 42 U.S.C. §2239(a).

Furthermore, Joint Applicants submit that the Band did have notice of the plans to construct Palo Verde Units 4 and 5, and a transmission line from the Palo Verde site to the Mira Loma substation, prior to March 9, 1979. In a letter dated August 22, 1978, Burl R. McDaniel of the Southern California Edison Company advised Tom Lyons, Chairman of the Morongo Business Committee, that Joint Applicants would file transmission line route proposals with the Nuclear Regulatory Commission (the "Commission"), and that the preferred route could impact the Morongo Indian Reservation. Mr. McDaniel requested permission to proceed with a historical and ethnological study of the area from the Devers substation to the Mira Loma substation. Mr. McDaniel also stated that the information gathered would be presented to the Morongo Business Committee for comment prior to preparation of a final report. In a letter dated September 9, 1978, Mr. Lyons responded that the Business Committee decided to reject the request.

The Band also alleges that the supplemental notice of hearing published in the Federal Register on December 8, 1979, "did not provide constructive notice to [the Band] in that said notice was insufficient to adequately and reasonably apprise [the Band] of the real scope of the proposed project." (Petition at 2). The fact is that the content

and publication of the supplemental notice of hearing were in compliance with the Act and the Commission's regulations. And the Band does not allege otherwise. Furthermore, the supplemental notice did give the approximate location of Palo Verde Units 4 and 5, did list all the participants in the project, including those from California, and did list addresses where relevant documents were available for review.

The third reason offered by the Band is that the United States failed to meet its duty under its trust obligation and give actual notice to the Band. (Petition at 2-3). This reason is insufficient to justify the delay as the Band has failed to demonstrate that such a duty exists or that the breach of such duty entitles the Band to enter the proceeding. Cf. Pugit Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 N.R.C. 58, 62-63 (1979).

The final allegation made by the Band is that the Joint Applicants failed to give actual notice to the Band and that this failure was contrary to law. (Petition at 3). This allegation is in error for at least two reasons. First, neither the Act nor the Commission's regulations impose a requirement on an applicant for a construction permit to seek out individuals who may be aggrieved by the outcome of a proceeding. Rather, the burden is on the person who may be aggrieved to come forward, establish his interest, and state how his interest may be affected. 10

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C.F.R. §2.714. Neither of the two cases cited by the Band would impose such a requirement on Joint Applicants. The case of Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), specifically dealt with Rule 23 of the Federal Rules of Civil Procedure. That rule requires that, in a class action maintained under the rule, "individual notice to all members who can be identified with reasonable effort" shall be given. Federal Rules of Civil Procedure, Rule 23(c)(2); see Eisen v. Carlisle & Jacquelin, 417 U.S. at 173. Rule 23 has no relevance to the construction permit proceeding for Palo Verde Units 4 and 5. Schroeder v. City of New York, 371 U.S. 208 (1962), involved the adequacy of notice in a condemnation proceeding. It is obvious that the proceeding for Palo Verde Units 4 and 5 cannot be classified as a condemnation proceeding. Even the Band itself alleges that "[t]he lands of [the Band] may not be utilized for such transmission line purposes without the consent of the governing body of [the Band]." (Petition at 4).

Second, as has already been discussed in response to the Band's first reason for the late filing, Joint Applicants had in fact advised the Morongo Business Committee in August 1978 of their intent to file with the Commission proposed transmission line routes which could impact the Morongo Indian Reservation.

In sum, Joint Applicants submit that the Petition should be denied for the reasons that the Band has failed to

establish good cause for its late filing and has failed to address the other factors of Section 2.714(a)(1).

Standing

Any person who desires to become a party to a proceeding must file a petition to intervene which sets forth with particularity the interest of the petitioner, how that interest may be affected by the results of the proceeding, and the specific aspects of the subject matter of the proceeding as to which the person wishes to intervene. 10 C.F.R. §2.714(a)(2). The Band states as its grounds for intervention that it is the beneficial owner of the lands of the Morongo Indian Reservation and that these lands "lie within the proposed and alternate locations of the proposed Devers to Mira Loma corridor of the 500 Kilovolt transmission line." (Petition at 4). The preferred route from the Devers substation to the Mira Loma substation does pass through the Morongo Indian Reservation. See U.S. Nuclear Regulatory Commission, Draft Impact Statement related to construction of Palo Verde Nuclear Generating Station Units 4 and 5, NUREG-0522, Figure 9.4 (April, 1979). However, Joint Applicants have also proposed alternatives to the preferred route, some of which would bypass the Reservation. Id. at 9-47 to -56.

The Band also alleges that its lands may not be utilized for transmission line purposes without its consent. (Petition at 4). Assuming the truth of this allegation, the

environmental impacts of concern to the Band cannot come to pass without its consent. Accordingly, Joint Applicants conclude that the Band has failed to establish how its interest may be affected by the outcome of the proceeding, and therefore lacks standing to intervene.

Contentions

Under 10 C.F.R. §2.714(b), in order for a person to be admitted as a party, it is first necessary that he specify at least one contention which is admissible as an issue in controversy, and that the basis of such contention be stated with reasonable particularity. Simple allegations which are non-specific and unaccompanied by factual bases are inadmissible as contentions. Offshore Power Systems (Floating Nuclear Power Plants), LBP-77-48, 6 N.R.C. 249, 250 (1977); Tennessee Valley Authority (Browns Ferry Nuclear Plants, Units 1 and 2), LBP-76-10, NRCI-76/3 209, 212 (1976).

The Band's Petition lists several "concerns" respecting the proposed transmission system. The concerns identified are "hazards created by electrical and magnetic fields. . . ; impact . . . on archaeological and cultural resources. . . ; impact . . . on the [Band's] present and long-range plans. . . ; visual impact . . ; [and] physical hazards . . . (e.g., fire hazards and hazards to aviation)." (Petition at 4-5). None of these concerns satisfies the contention requirements of Section 2.714(b). The concerns are in each instance general allegations. No factual basis

is provided for any of them. For instance, the Petition does not provide any basis for its statements that fire and other hazards would be created. Nor does the Petition describe with specificity what archaeological and cultural resources would be affected, or what long-range plans would be interfered with. In brief, the Band has failed to state a valid contention as required by Section 2.714(b).

Conclusion

In summary, the Band has failed to meet the requirements of Section 2.714(a)(1) respecting untimely filings; it has failed to establish its standing to intervene; and it has failed to state a valid contention.

Based on the foregoing, Joint Applicants submit that the petition for leave to intervene of the Morongo Band of Mission Indians should be denied.

The Band also requests that, should its petition to intervene be denied, it be permitted to make a limited appearance pursuant to 10 C.F.R. §2.715. Joint Applicants are not opposed to the Band's participation in this manner.

RESPECTFULLY SUBMITTED this 29th day of May, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid.

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