UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PUGET SOUND POWER & LIGHT COMPANY, et al.,	)	Docket Nos. 50-522 50-523
	)	
(Skagit Nuclear Power Project Units 1 and 2)	)	June 14, 1979
	)	

BRIEF OF SWINOMISH TRIBAL COMMUNITY, UPPER SKAGIT INDIAN TRIBE AND SAUK-SUIATTLE INDIAN TRIBE IN SUPPORT OF APPEAL

I. SUMMARY OF RELEVANT PROCEEDINGS

The three named Tribes filed their Petition for late intervention in these dockets on June 13, 1978. On November 24, 1978, after an extensive exchange of briefs, the Licensing Board issued a Decision and Order Granting Intervention. That was appealed by Applicants with the result that the Appeal Board, by a January 12, 1979, Memorandum and Order and a January 29, 1979 Decision, vacated the November 24 Decision and Order and remanded the matter to the Licensing Board.

On February 20, 1979, the three Tribes filed a Petition for Review before the Commission. The Commission, by its Order of March 8, 1979, deferred consideration of the Petition for Review "pending completion of action on the remanded issues." The Licensing Board did not "complete action" until the issuance on June 1, 1979 of its Order Not To Entertain Nontimely

Petition to Intervene, after the Tribe had moved to expedite issuance of an appealable Order.

At issue here is the legal sufficiency of the June 1 Order in the light of the Commission's rules and in the light of the January 12 and 29 Decisions of the Appeal Board. Those Decisions are the subject of the deferred Petition for Review and the Tribes, by filing this appeal, do not wish to acquiesce in the reasoning of the Appeal Board in construing the November 24, 1978, Decision and Order

The Tribes contend that the Licensing Board erred and abused its discretion in denying intervention on remand.

II. ARGUMENT

A. GOOD CAUSE FOR FAILURE TO FILE ON TIME.

1. Adjudication of Treaty Rights and Federal Recognition.

The existence of federally adjudicated treaty fishing rights was one ground for intervention. The Tribes, in attempting to show "good cause," explained that prior to the Decision in U.S. v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974); aff'd, 520 F.2d 676 (9th Cir. 1975), cert. den., 423 U.S. 1086, enforced, 573 F.2d 1123, cert. granted, U.S. (Oct. 16, 1978), they did not have adjudicated fishing rights and that two of the Tribes were only recently recognized by the Department of Interior. They argued that until that Decision these were "paper" rights, that only after the Decision was affirmed would it have been reasonable to assert these rights in

another forum. (Brief in Support of Petition [Brief] at 6, Petitioner Tribes' Reply Brief [Reply] at 12-13.)

Chairman Deale's Order does not address this argument. Instead, it simply observes that the federal court decisions and federal recognition did not confer any rights which were "prerequisite to their right of intervention," although the Court victory might have "energized the Indians." (Order of June 1, 1979 at 5.)

The meaning of the phrase "energized the Indians" is perhaps best not discussed. The Tribes had simply argued that the lack of exercisable rights, of an economic stake in the fishery, would have made intervention to protect the fishery a futile act. But the Licensing Board's June 1 Order does not even mention this.

Affirmation of treaty fishing rights not only changed the Tribes' interest in the outcome, it also operated to change their status with respect to the federal government. When the appeals were completed, the scope of the treaty resource, and the magnitude of the federal trust responsibility to protect it, were fully and clearly defined. The federal government's obligations under the Treaty of Point Elliott now included an obligation to protect and insure full on-reservation harvests, 50 percent of the off-reservation commercial harvest, and an additional ceremonial and subsistence share. Prior to that apportionment, there was, in reality, no asset to protect; and prior to those decisions it was

the position of the State of Washington, including the agencies which comprised the Thermal Power Plant Site Evaluation Council that Indians had no distinct, enforceable right in salmon and steelhead fisheries.

Federal recognition of the Sauk and Skagit Tribes also reflected directly on their status before the federal government, including this agency. By recognition, the federal government recognized the continued existence of the Tribes and its trust responsibility to them. These changes in status were not adverted to by the Licensing Board, although their relevance, in the light of the Appeal Board's rulings, is clear.

2. Preoccupation with Other Matters.

The Tribes also explained that litigation, even after trial, in United States v. Washington is almost constant, quoting the Ninth Circuit Court of Appeals:

> Agencies of the State of Washington and various of its constituencies continue to attack the judgment in United States v. Washington. Accordingly we will again set forth the treaty basis of that decision and reaffirm its validity. The State's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the State's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted] the district court has faced the most concerted official and private efforts to frustrate a decree of the federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the Court no reasonable choice.

Puget Sound Gillnetters Association, et al. v. United States District Court for the Western District of Washington, 573 F.2d 1123, 1126 (9th Cir. 1978); cert. granted ____ U.S. ____, 99 S. Ct. 277 (1978).

The Tribes pointed out that at the time these proceedings were commenced and until quite recently they had limited access to attorneys and expert witnesses. Chairman Deale's response to this argument is alarming.

First, in his discussion of "prerequisite rights" he notes "that a timely motion to intervene would not have been a drain on their limited resources." Perhaps the actual drafting of a petition would not have been burdensome, were attorneys available for this at that time. The fact is they were not. But surely active participation, something other than professional malpractice, can hardly be characterized as "not a drain on their limited resources." This could only have been true if the Tribes had remained passive and unquestioning participants; Chairman Deale is suggesting a meaningless form of intervention.

The Board cannot have it both ways: here it doubts that a timely motion would "have been a drain on their limited resources"; later it argues that "limited resources" prevent the Tribes from contributing to a sound record. (Order of June 1, 1979 at 14-15.)

Second, the Chairman justifies the conclusion that preoccupation with other matters was not an excusing factor with three unsupportive and questionable statements: "It

was for them to de[illegible]e what problems to ignore and what problems to address"; "Petitioners accepted the risk of not seeking to intervene when they should not have taken such risk"; "poor judgment or imprudence in the first place is not good cause for late filing." (Order of June 1, 1979 at 5-6.) No authority is given to support these statements, or to support the conclusion that extensive involvement in other litigation is no excuse. The Tribes hope that the quoted statements offered in support of the conclusion do not accurately characterize the policy of the Nuclear Regulatory Commission with respect to late intervenors.

The June 1 Order imposes a harsh, impractical and unduly legalistic choice on the Tribes, an "election" that had to be made in 1975: "to decide what problems to ignore and what problems to address." Worse, Chairman Deale cheerfully observes that the Indians made a mistake accepting a risk they should not have taken. But, he says, "poor judgment or imprudence are no excuse."

No attempt is made to determine whether there was "good cause" for not intervening on time, to discuss the arguments made by the Tribes. The Order admits that the Indians were having a difficult time, characterizes their late filing as "poor judgment or imprudence" and dismisses years of unending and exhausting litigation to obtain what they already owned by casually noting that they assumed the risk "when they should not have taken such a risk." The Tribes do not believe

that the common law doctrine of contributory negligence ("imprudence," assumption of "risk") underlies the Commission's adoption of 10 CFR § 2.714(a).

The Board's reasoning is unacceptable. We suggest that if analogies are to be made to common law, the doctrine of "nuisance" is more instructive than contributory negligence. In this case the Tribes are not "coming to" the nuisance, if that is what it is; the nuisance is coming to them. They live in and near the low-population zone; they have always lived there; they intend to live there in the future. They question the propriety of a federal administrative panel informing them, in an offhand manner, that they appear to have taken a risk which they should not have taken, and calling that "poor judgment."

Although they do not agree with the Appeal Board's two Decisions construing the November 24 Order Granting Intervention, the Tribes have understood the Appeal Board to require a full and carefully reasoned application of § 2.714(a). The portions of the June 1 Order just referred to actually seem to ignore the existence of any rule governing late intervention at all, and certainly ignore one of the primary reasons advanced.

3. Unawareness of Impact.

The Tribes had argued that there was not sufficient information available concerning the proposed nuclear plants to enable them to make an informed decision as to whether, and on what points, intervention was advisable. (Brief

at 7-8, Reply at 15-16.) (Indeed, even now, the Tribes are unable to determine exactly what immersion, inhalation, organ and whole-body radiation doses from normal and accidental releases will be received by Indians hunting, fishing and living in the LPZ or by Indians living on the Swinomish Reservation, which appears to be downwind more than half of the time.)

Chairman Deale considers this argument "contradicted by extensive publicity...and the public availability of the plans of the Applicant." Much of that "publicity" was favorable, most of the information available concerning the plants coming from the Applicants. Sheer mass of "publicity" should not be taken to overwhelm the simple argument that the Indians were unable to determine, in time, that these plants might pose a risk to their health and to their treaty fishery. In fact, it can be safely assumed that publicity concerning accidental releases and health effects was based in large part upon the now disavowed executive summary of the Rasmussen Report. With respect to risks to the fishery, the Tribes have already cited and supplied a copy of a letter from the Fish and Wildlife Service minimizing fisheries impacts. (Reply at 32-33.)

Chairman Deale repeats the argument advanced by Applicants that the Swinomish Tribal Community "had been aware of the proceeding from its outset." (Order of June 1 at 6-7.) What appears to be the case is that the Swinomish Tribal

Community was aware of the proceeding on February 19, 1975. Again, we must point out that the Tribes are not advancing the argument that they were totally oblivious to this proceeding, rather that they were not sufficiently informed concerning environmental impacts to make an intelligent decision concerning intervention. The Licensing Board goes on to say:

> Further, the ordinary development of facts and positions in this complex case...does not afford a basis...for extending the time to petition for leave to intervene. The magnitude of the project was evident from the beginning, and it is not an unreasonable expectation that specific details unforseen at first would later surface.

This characterization of the proceedings seems at odds with the earlier characterization by the Licensing Board at pages 21-22 in the November 24 Order Granting Intervention. It is difficult for intervenors to understand how that earlier characterization of the proceedings could have been "infected" by the alleged error concerning "preferential status." And, as a practical matter, what information the Tribes are able to gain concerning geology indicates that what has occurred is not "an ordinary development." That the "magnitude" of the project would somehow require intervention is also difficult to understand. Sheer size and complexity do not, any more than sheer masses of publicity, warn of serious impact.

The inflexibility of this position, requiring intervenors to make their judgment early on while Applicant and Staff make continuous changes in the proposal, seems especially

hard since the incident at Three Mile Island. Without meaning to be facetious, Petitioners must point out that a member of the public gets more warning concerning possible hazards to health from a pack of cigarettes than the Indians received from notices and environmental impact statements published in connection with this proceeding. This anomaly should be viewed in light of the fact that the NRC staff does support intervention, largely because of the possibility of unquantified genetic risk.

4. Reliance on the Federal Government.

One "good cause" for later intervention advanced by the Tribes was their reliance on their federal trustee to insure that their health and their treaty resource would be protected. They relied, in addition, upon environmental impact statements prepared by the NRC which created a false sense of security. (Brief at 7-10, Reply at 16-18, 20-34.) The Tribes had understood from the Appeal Board's two rulings that the Licensing Board could properly consider arguments based upon the federal trust responsibility, so long as it did not find an absolute right of intervention because of "preferential status."

But in the June 1 Order the Tribes are once again faced with the statement that the federal trust responsibility does not create a right to late intervention. The Tribes had argued that misplaced reliance on the federal government was one factor of "good cause for failure to file on time." The

Appeal Board made a point of this, stressing the distinction between advancing reasons for tardiness and insisting upon an absolute right. But the Licensing Board simply says "there is no right extending the time limit for moving to intervene, either to Indians generally or to Indians who are parties to a treaty with the United States government." (Order of June 1, 1979 at 8.) Surprisingly, there is absolutely no discussion of reliance, whether or not justifiable, upon the federal government as an excuse for late intervention.

The federal trust responsibility was extensively briefed in the Reply of September 5, 1978 at pages 20 through 31. Since that brief has already been submitted to the Licensing Board, and acknowledged by the Appeal Board, it would seem to be redundant to repeat it here. Rather, it is incorporated by reference. The Tribes do not believe that it is within the Licensing Board's discretion to simply ignore the argument. They find it exasperating, when they make the argument, to find themselves characterized repeatedly as insisting on nothing more than an absolute right to late intervention. They may have a right to late intervention, within the Commission's rules or otherwise, but they certainly also have the right to have this specific argument dealt with fully.

B. THE AVAILABILITY OF OTHER MEANS WHEREBY PETITIONERS' INTERESTS WILL BE PROTECTED.

1. Improper Application of 10 CFR § 2.714(a)(ii).

The language in question is "the availability of other means whereby the Petitioners' interests will be

protected" [emphasis supplied]. The June 1 Order does not address itself to such means, except to suggest that if the Indians are concerned with the impacts of this nuclear plant, their proper recourse is federal court. The Order discusses (9-10) zoning proceedings and State siting and water quality hearings but it is apparent from the face of the Order that access to those forums, quite independent of whether or not they would insure protection of Indian interests, has never been available during the pendency of the tribal Petition for Intervention. Thus they were not "other means whereby the petitioners' interests will be protected."

2. Choice of Forums.

A further legal error on the part of the Licensing Board is the suggestion that if county zoning proceedings or state siting and water quality proceedings were still open, these would be a more proper forum than the Nuclear Regulatory Commission. This is curious, since it does not appear that either the staff or the Licensing Board has ever declined jurisdiction over environmental impacts, including fisheries, health and socio-economic impacts.

The Tribes find it incredible that a county zoning proceeding would be offered as a more appropriate alternative than these proceedings. The fact that the Swinomish Tribal Community is alleged to have supported this plant in those proceedings, if it is true, hardly adds anything. As a practical matter, we are unable to locate any evidence (and

certainly none was placed before the Board) that the Swinomish Tribal Community did in fact support Applicants in the county proceeding. The Licensing Board apparently relied upon this unsupported assertion in one of Applicants' briefs.

The Licensing Board feels that the State Thermal Power Plant Site Evaluation Council (now Energy Facility Site Evaluation Council) was a more suitable forum in which to assert Indian treaty fishing rights. We are at a loss as to how this conclusion could be reached and must suggest that it involves an abuse of discretion. It has already been pointed out, and it is beyond any serious dispute, that at the time of the State hearings (and even now) it has been the position of the State of Washington, including its fisheries agencies and the other agencies which make up the Site Evaluation Council, that Indian treaty tribes do not have separately enforceable shares in salmon and steelhead fisheries. This position, the historical repression of Indian fishing, and the refusal to allow Indians to participate in fisheries management certainly justify a conclusion on the part of the Tribes that they would not see their interests protected in a forum composed of adversary agencies. This is the reason that the Justice Department and the Department of Interior brought United States v. Washington, and the difficulty the Tribes had is well documented in the opinions issued by the federal courts.

The Tribes agree with the statement staff made in its November 21, 1978 Response to the September 26 Board Request:

> This proceeding remains the only effective remaining forum that the staff is aware of whereby petitioners' interest can be protected.

3. Use of Courts as Alternative Means.

Chairman Deale points out that treaty fishing rights cannot be taken by the Nuclear Regulatory Commission and that is certainly true. But treaty fishing rights may be severely burdened, reduced in value, by actions taken in this proceeding. That is why the Tribes sought intervention. But the Chairman's Order suggests that the Tribes always have access to a federal court. This may be true, and the Tribes hope that it is true. But they cannot help but note the reluctance of federal courts to deal with matters requiring agency expertise, such as these proceedings. Nor can they ignore the fact that a federal lawsuit will not only be burdensome to the Tribes but to the other parties here, and the agency, and will involve a "multiplicity" of actions. To have to bring lawsuits concerning improper construction and operation practices, quite often after the harm will already have been done, because this agency failed to adequately insure protection, would be very costly for all concerned.

4. Reliance on Inadequate Data.

The Board, (June 1 Order at 10-11) says that it has taken the liberty of determining tribal populations because

the Petitioners failed to identify their members or their locations in briefs in support of intervention. This comes as something of a surprise to the Tribes, since the Board never requested this information and the regulations don't indicate any such requirement. Staff had suggested, prior to the November 24 Order, that it would like this sort of information. But the Board, on granting intervention, said this could be obtained by discovery. Subsequent to that, the Tribes had met with NRC staff and had undertaken to provide demographic information as it became available. What is ironic is that demographic information referred to by the Board is not available because the Bureau of Indian Affairs has never compiled it. All of the Tribes are in the process of gathering that information, largely under contract with the Bureau of Indian Affairs. The information obtained by the Licensing Board refers only to Indian populations on or adjacent to trust lands in Skagit County and even the Bureau of Indian Affairs admits that it is woefully inaccurate. There are tribal members living other than on or adjacent to trust lands and other than in Skagit County who are well within the area of impact from these plants. The actual number of Upper Skagits, to date, totals around 500 enrolled members. The number of on-reservation Swinomish is near 600, exclusive of Swinomish members living off the reservation.

These population figures are erroneous, and yet the Board appears to have relied upon them without benefit of more accurate information available.

5. Socio-Economic Impacts.

The Licensing Board simply states that "the Indians' interest in the socio-economic impact...is now most suitably represented in the proceeding..." (June 1 Order at 11-12). This, if it is true, is apparently based upon information which the Tribes have not received. At the present time, tribal consultants have been contacted by NRC staff and asked to answer long series of questions in the area of socio-economic impacts. The Tribes have not been able to resolve, in certain instances, whether these questions can be answered without further study. In other instances, the drafting of answers to the staff questions involves preparation of a professional report and will require a consultant contract funded either by the Tribes, the staff or the Applicants. If Indian socio-economic interests have been adequately addressed, it has been behind closed doors, and not on the Licensing Board record.

6. Radiation Effects.

Under the heading "Weighing of Factor Two", the Chairman suggests that:

> The Indians' interest in radiation standards, which involve rulemaking by the Commission, may be brought to the Commission's attention without regard to the Indians' formal participation in this proceeding.

(Order of June 1 at 11.) He seems to characterize the Tribes' fears as some sort of abstract, academic interest in generic standards. That is not the sort of "interest" advanced

by the Tribes here. They articulated, rather more carefully than the June 1 Order, a carefully thought-out concern that Indian receptors, because of unique "habits," might receive internal radiation doses in excess of the average receptor population and that they and their children, because of unique genetic patterns and health histories (the Indian health unit for Skagit and Whatcom Counties shares, with Northern Idaho, the highest Indian infant morbidity and mortality rates in the United States), might have a lower threshhold for somatic and genetic effects from low-level ionizing radiation. The report released earlier this year by the National Academy of Science's Committee on the Biological Effects of Ionizing Radiation acknowledges that there may be some genotypes with a lower health threshhold. Indian populations may contain such genotypes; Navajo uranium miners seem to have experienced an 85-fold increase in certain cancers.

The record in this proceeding will be woefully inadequate unless it contains a full and exhaustive scrutiny of the risk to Indian receptors from normal releases, which are in the thousands of curies per year and do not involve simply "noble" gases, and from accidental releases which do not even appear to have been quantified in the proceeding. It is noteworthy that half of the Upper Skagit tribal fishing effort occurs on the river in the Low Population Zone and that this was not included in population dose calculations. Maps showing the location of Upper Skagit fishing sites, showing the various

tribes located within the 50-mile radius, and providing demographic information were available to the Board--had the Board requested them.

The Tribes are also able to compute coefficients of inbreeding and provide Indian health profiles. They take this matter a great deal more seriously than the Board appears to have done.

The characterization of the Indian concern as an interest in "rulemaking" is untenable. In their reply, at 4-9, the Tribes briefed this rather thoroughly; but the Licensing Board appears to have ignored those arguments and simply repeated the rather cynical observation of Applicants that the Indians ought to find some other forum for their concern. Briefly put: the Tribes are not challenging radiation protection standards or numerical guides for design objectives. 10 CFR, Appendix I, § III, A1 and A2, contemplates just such a site- and population-specific evaluation as the Tribes propose.

Staff supported the tribal governments' intervention largely on the basis of the genetic concern. It is neither naive nor unfounded. To the extent that administrative discretion is accorded to a licensing board because of technical and regulatory expertise, the Tribes must seriously question whether much deference-to-discretion should be accorded the chairman's treatment of the health issue.

C. EXTENT TO WHICH PETITIONERS' PARTICIPATION MAY REASONABLY BE EXPECTED TO ASSIST IN DEVELOPING A SOUND RECORD.

In its "Factor Three" discussion, the Licensing Board judges the future evidentiary offerings of the Tribes as being

too "general." Petitioners have the impression that the Chairman is engaged not in an application of § 2.714(a), but in premature weighing of evidence that has not been submitted.

The Licensing Board first focuses on the health effects issue just discussed. As before, it simply concludes that the Tribes wish to:

> speculate tentatively about possibilities or to provide limited factual observations leading nowhere about a subject on which the Commission has already set standards based on concluded studies.

(Order of June 1 at 13.)

This is legal error. The Tribes wish to submit evidence concerning what they contend is a unique group of receptors at increased risk from low-level ionizing radiation. The Licensing Board may not wish to be bothered by such details, but it ought to have more convincing reasons. The Tribes have attempted to take advantage of Commission regulations providing for an examination of doses and responses in unique populations. The Appeal Board is referred to the previously referenced argument in the reply brief and to Appendix I. A decision which does not accurately describe contentions and disposes of major issues in peremptory fashion may well be characterized as arbitrary and capricious.

The Licensing Board next, seven months after it was submitted, finds fault with the Tribes' Preliminary Designation of Witnesses. That document was prepared in hurried response to a Board request at the end of September. In

the interim the Board had several months to seek whatever specifics were lacking in that list of witnesses. There was ample time, had the Licensing Board not delayed the Decision after remand, for Petitioners to have drafted and submitted prefiled testimony which would have satisfied the Board's perceived difficulties.

The qualifications of expert witnesses were given in brief, not only in the Preliminary Designation, but also in the March 12 Statement of Issues requested by the Chairman. Their subject areas were also well defined. Their resumes could presumably have been requested during the period of January to June, 1979, or during the long January pre-hearing conference in which the Tribes participated. NRC staff went to the trouble of contacting the Tribes and obtaining more information concerning the qualifications of witnesses. NRC staff also obtained grant proposals containing the resumes of various expert witnesses and made these available to the Licensing Board. The Licensing Board thus had in hand, before its denial of intervention, the information claimed to be sought.

It is noteworthy that staff, in its response to the September 26, 1978, Order, suggested that the Tribes should make more information available concerning witnesses and testimony and that the Licensing Board mooted this request by its initial grant of intervention, pointing out that such information could later be obtained by discovery.

The Board also seems to feel that Indian witnesses' "credentials" must be given. We are frankly at a loss as to what this means. It should be noted that the list of witnesses submitted to the Board in October included more than just Indian witnesses. It included Dr. Rosalie Bertell, an NRC consultant on health matters; Dr. Barbara Lane, an accepted authority on northwest Indian cultures; Dr. Lynn Robbins, a professor of anthropology specializing in environmental and socio-economic impacts on Indian cultures; and a consulting engineering firm with special expertise in the area of surface and ground water hydrology, as well as stream hydraulics. If the Board had bothered to update the list of witnesses, it would have also included Barbara Anderson, a health researcher working with the Indian Health Service and John Lord, a professor of economics at Western Washington University focusing on resource economics.

The Tribes must repeat that this information was available to the Licensing Board, and much of it was in the Board's hands. But the Board says that the Indians have "limited resources and lack of expertise" although NRC staff advised the Board that the Department of Interior had granted the Tribe approximately $50,000 to study fisheries impacts connected with these dockets. That study had already been started when the grant was received. The Tribes also received a grant from a small foundation and from Small Tribes Organization of Western Washington, as well as other Bureau of Indian Affairs money,

all of which is being used to complete fisheries, health, and socio-economic evaluations.

The Tribes, a distinct group occupying a special relationship with the federal government, and the group with the greatest stake in the outcome of these proceedings, offered considerably more expertise on the environmental and health impacts of these plants upon them than either the NRC or the Applicant has ever made available. The simple, unsupported and unsupportable statement "limited resources and lack of expertise" constitutes an abuse of discretion, a careless and capricious misrepresentation of the now considerable efforts of three tribal governments.

D. THE EXTENT TO WHICH PETITIONERS' INTERESTS WILL BE REPRESENTED BY EXISTING PARTIES.

In disposing of Factor Four, the Chairman finds "an obvious community of interest between the Petitioners and the Intervenor...[SCANP]." (Order of June 1 at 15.) He cites three SCANP contentions to show this. But the question is not whether there is a "community of interest," but the extent of representation of Indian interests by SCANP. SCANP does not appear to have either the resources or the expertise to represent the Petitioner Tribes and it has not done so in the past. The Order then goes on to make several conclusions (Order of June 1 at 16): (1) "the subject of fisheries will be well developed..."--it has not been well developed as yet, NRC witnesess admitting large gaps as to diffuser impacts, and there

being no testimony at all from State, federal or tribal fisheries agencies; (2) "socio-economic impact...will also be well developed on a general population basis"--but Indian impacts vary considerably in both kind and intensity, a concern which the Board recognizes, suggesting that the tribal governments "induce" the previously unconcerned intervenor or staff to be their advocates on this issue; (3) the Indian health question "would not rise as a major point of concern without tribal intervenors," but the Board goes on to say it is not "certain what would be the status of the issues if the Indians did become a party"--this uncertainty hardly justifies dismissing the question entirely.

Concluding on its "Factor Four," the Licensing Board is "unable to say that the overall results would be significantly different" if the Indians were parties, although it admits that "more questions would probably be posed for the Applicants or the NRC staff to answer." (Order of June 1 at 17.) One begins to wonder whether these Indian Tribes must completely prove their case just to obtain Intervenor status. It would seem to be in violation of federal environmental law, most notably the National Environmental Policy Act (42 U.S.C § 4321 et seq.) and the federal trust responsibility (see Reply Brief at 20 et seq.) to ignore these "questions." Certainly it is arbitrary and capricious to admit their existence and then leave their effect on the outcome to "speculation."

E. THE EXTENT TO WHICH PETITIONERS' PARTICIPATION WILL BROADEN THE ISSUES OR DELAY THE PROCEEDING.

In November the Licensing Board found that the Tribes would not reasonably broaden the issues or delay the proceedings, pointing out that their participation would be limited. Now the same Licensing Board, although reconstituted, is saying the opposite. This sudden reversal of a previous finding seems well beyond the scope of administrative discretion.

The tribal governments were ready to begin preparation of evidence in late November. Because of the appeal and the long delay of decision on remand, they were put in a "holding pattern." It would be grossly unfair to now attribute this six-month hiatus to the Indian Petitioners.

The Chairman does not speak of the extent to which intervention would delay the proceeding. It is thus difficult to frame a response to his arguments. He merely observes that participation would in fact broaden and delay. Petitioners submit that a proper "balancing" requires a more precise evaluation of the extent, as the rule is drafted. It does not appear that the Commission, in drafting § 2.714(a) intended that intervention should not delay proceedings or broaden issues at all.

From their participation in the January prehearing conference, and from the June 1 Order at pages 17 through 18, the Tribes obtained the impression that the issues before the Nuclear Regulatory Commission are strictly limited, as

far as Intervenors are concerned, to those which were raised early on. This bears an unsettling resemblance to common law pleading which has long since been abandoned, at least in federal court proceedings, by Supreme Court rules. Implied in the Chairman's arguments is the concession that there may be issues which should be addressed, that fisheries and socio-economic questions "would doubtlessly be the subject of attempted redefinition and relitigation so as to insure that the point of view of the Skagit County Indians [sic] have been properly considered." If those issues exist, they cannot be ignored, and they are not the subject of "redefinition and relitigation," but the subject of contentions made for the first time on behalf of the local Indian populations.

In summary, the Licensing Board does not appear to have weighed Factor 5, or to have placed that weight in the balance with the other factors specified in § 2.714(a). The Board ignored its powers under § 2.714 to limit repetition and delay--instead it held that any delay tips this factor against the Petitioner--thereby failing to "balance."

III. CONCLUSION.

The Petitioner tribal governments do not believe that the Licensing Board has complied with either the Commission's rules or the Appeal Board's January 29 Decision. In particular, the Licensing Board arbitrarily fails to examine reasons advanced by the Tribes under 10 CFR § 2.714(a)(i). The Licensing Board did not "examine more closely than before any specific trust

responsibilities owed the Tribes." (ALAB 523 at 10, n. 16.) If anything, the Board was less "specific" than before.

There is no evidence in the record that it engaged in any decision-making process concerning justifiable reliance on government agencies. There is no evidence that it conducted a thorough examination of the federal trust responsibility.

Nor is there any indication of a "balancing process," as required by the rules and the Appeal Board's Decision. There is, instead, an incomplete list of conclusory statements, sometimes supported by inapposite arguments, sometimes misrepresenting the Petitioners' position, often adversary in tone.

The Licensing Board has misstated facts, misconstrued Petitioners' arguments, and misinterpreted NRC rules. The Tribes submit that the Order of June 1, 1979, evidences widespread abuse of discretion, is arbitrary and capricious, and should be reversed.

Respectfully submitted,

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