

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
PUGET SOUND POWER & LIGHT) Docket Nos. STN 50-522
COMPANY, et al.) STN 50-523
(Skagit Nuclear Power Project,)
Units 1 and 2)) May 25, 1982

APPLICANTS' RESPONSE IN OPPOSITION TO UNTIMELY PETITION
TO INTERVENE BY YAKIMA INDIAN NATION

I. Introduction.

On February 5, 1982, a notice was published in the Federal Register which stated that any person who has an interest which may be affected by the construction permit proceeding for the Skagit/Hanford Nuclear Project (S/HNP) may file a petition to intervene by March 8, 1982. 47 Fed. Reg. 5554. On May 10, 1982, the Yakima Indian Nation (Petitioner) served an untimely Petition to Intervene. Applicants hereby submit their response in opposition to this petition.

Untimely petitions to intervene are governed by the standards in 10 CFR § 2.714. First, in order to participate as a party to a proceeding, the petitioner must identify an interest which may be affected by the proceeding. Second, the

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petitioner must set forth with the requisite specificity and basis at least one admissible contention. Third, an untimely petition will not be entertained absent a determination that the petition should be granted based upon a balancing of the following factors:

- (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.
- (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.

Since a balancing of these factors depends in large part upon the interests and contentions of the petitioners, we will first consider the interests of the Petitioner. We will then point out that the instant petition is defective in that it does not include nor has it been supplemented by even one contention. We will then discuss the five factors above that govern untimely petitions and show that, on balance, they weigh against granting the instant petition.

II. Interests of the Yakima Indian Nation; No Contentions Stated.

The Yakimna Indian Nation is an Indian nation established by treaty with the United States. Petition to Intervene, p. 1. The Petitioner has identified two interests that may be affected by this proceeding. First, that S/HNP may affect the fishing, hunting and gathering rights allegedly reserved by the Petitioners under a treaty with the United States. Second, that S/HNP may allegedly affect the health and safety of member and non-member residents of the Yakima Indian Reservation. Petition to Intervene, pp. 2-3. Based upon these allegations, Applicants have no objection to the standing of the Petitioner to intervene in this proceeding.

The instant petition to intervene does not include nor has it been supplemented by even one contention that meets the basis and specificity requirements of 10 CFR § 2.714(b). Accordingly, this petition affords no basis for admission of the Petitioner as a party to this proceeding. 10 CFR § 2.714(b). Whether the Board should allow the filing of an amended petition or grant additional time for the filing of at least one admissible contention is a matter to be determined based upon a balancing of the factors set forth in 10 CFR 2.714(a)(1), to which we now turn. 10 CFR 2.714(a)(3) and (b).

III. Balancing of the Five Factors Governing Late Intervention.

A late petitioner must address each of the five factors of 10 CFR § 2.714(a)(1) governing late intervention and affirmatively demonstrate that, on balance, they favor permitting his tardy admission to the proceeding. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980), and cases cited therein. As is demonstrated below, the Petitioner has failed to satisfy this burden and, in fact, the factors weigh against its late intervention.

A. Good Cause, if Any, for Failure to File on Time.

A timely notice of this proceeding was published in the Federal Register on February 5, 1982. This notice was legally sufficient to alert petitioners of this proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 192 (1979). Furthermore, on January 7, 1982, Applicants served a copy of the Application for Site Certification/Environmental Report for S/HNP (Amendment No. 4) on the Petitioner.¹ Thus, the Petitioner had both constructive and actual notice that Applicants intended to construct and operate a nuclear plant at the proposed site for S/HNP. Petitioner makes no statement that it was not timely aware of the proceeding, nor could it.

¹Affidavit of Service (January 7, 1982).

Petitioner attempts to excuse its untimely filing by explaining that "[d]uring the times the filing of this petition had to be necessarily considered" (presumably, prior to the March 8, 1982 intervention petition deadline specified in the Commission's notice of hearing), the Yakima Tribal Council was undergoing elections and reorganization of committees, and thus evidently unable to reach a timely decision on whether to file a petition to intervene.² Petition to Intervene, p. 8. As far as we have been able to determine, this is an unprecedented excuse for an untimely petition to intervene. It is also an invalid excuse, in our opinion.

The closest annalogy of which we are aware occurred previously in this proceeding, when the Appeal Board rejected an "otherwise preoccupied" excuse tendered by different tribes under different circumstances:

In this respect, there is nothing unique about the tribes' situation. Participation in any complex adjudicatory proceeding--whether being conducted in the courts or before an administrative agency--is both time-consuming and a drain on the often limited resources of the participants. This being so, what the tribes (in common with the Cherokee [ALAB-440, 6 NRC 642, 644] petitioner) ask is that the universally accepted practice of prescribing deadlines for intervention petitions be discarded by this Commission

²Previous correspondence between the parties indicates that a decision to intervene may have been made by the prior Tribal Council. See the attached letter of December 30, 1981 from the Petitioner to Applicants (in reply to Applicants' letter of December 18, 1981, also attached) wherein the writer states "In closing let me assure you that the Yakima Indian Nation intends to be an Intervenor in this matter . . ."

in favor of a rule which would permit each prospective intervenor to decide for himself the precise time at which he should transfer his attention and resources from the pursuit of other concerns. We repeat the thought expressed in Cherokee: were such a rule adopted the adjudicatory process likely would break down entirely. That consideration may explain why the tribes have not provided us with a single judicial or agency precedent in support of their "otherwise preoccupied" excuse.

Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 6-7 (1979).

On balance, we submit that the Petitioner has not offered a valid justification for its failure to file on time. As a result, its "burden of justifying intervention on the basis of the other factors in the rule is considerably greater."

Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLT-75-4, 1 NRC 273, 275 (1975); Virginia Electric and Power Co. (North Anna Station, Units 1 and 2) ALAB-289, 2 NRC 395, 398 (1975).

B. The Availability of Other Means Whereby the Petitioner's Interest Will Be Protected.

The Petitioner acknowledges that judicial actions to protect its reserved treaty rights "could be considered." Petition to Intervene, p. 8. It thus claims only that this is the last administrative forum in which it can protect its rights, citing Puget Sound Power & Light Company (Skagit Nuclear Power Plant, Units 1 and 2), LBP-78-28, 8 NRC 587

(1978). This decision was vacated on appeal. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58 (1979). Furthermore, the Petitioner's claim is in error.

A contemporaneous proceeding regarding S/HNP is presently ongoing before the State of Washington Energy Facility Site Evaluation Counsel (EFSEC).³ This proceeding includes applications for site certification, for a National Pollutant Discharge Elimination System (NPDES) permit, and for a Section 401 certification under the Federal Water Pollution Control Act, as amended. In particular, this proceeding encompasses issues related to the environmental impacts of S/HNP, including the effects of the project discharge on Columbia River water quality and fish, matters in which the Petitioner expresses a particular interest.

Not only is the Petitioner aware of the existence of this state proceeding, but just yesterday, May 24, the Petitioner's representative, the Columbia River Inter-Tribal Fish Commission (which currently has a petition to intervene pending in this proceeding), was admitted as a party to the state proceeding as the representative of the Petitioners and three other tribes. Thus, the Petitioner does have alternative means of protecting its interests and is actively pursuing one of these alternatives. This factor weighs against allowing intervention here.

³In the Matter of Puget Sound Power & Light Company (Skagit/Hanford Nuclear Project), Application No. 81-1.

C. The Extent to Which the Petitioner's Participation May Reasonably be Expected to Assist in Developing a Sound Record.

Although the Petitioner states that it "has in its employment biological, statistical and legal capabilities which it can and will devote to this proceeding as the need arises," the Petitioner has not identified the specific individuals in question or provided a statement of their qualifications.

Based upon the information provided by the Petitioner, it is not possible to verify whether the Petitioner's employees are capable of making any contribution to this proceeding. As the Appeal Board has previously held, a petitioner cannot demonstrate its ability to contribute to a proceeding simply by alleging that its members have technical expertise without providing a "bill of particulars" to support such an allegation. Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-426, 7 NRC 759, 764 (1978). Since the Petitioner has the burden of establishing its justification for untimely intervention, Perkins, supra, this factor must weigh against the Petitioner.

D. The Extent to Which the Petitioner's Interest Will Be Represented by Existing Parties.

Since the Petitioner has not submitted any contentions, it is difficult to judge this factor. However, the petition as filed suggests that this factor would weigh in favor of intervention.

E. The Extent to Which the Petitioner's Participation
Will Broaden the Issues or Delay the Proceeding.

Although we don't know what contentions the Petitioner may seek to assert, it seems likely, based on its statement of "aspects" (7) through (13), that admission of the Petitioner as a party to this proceeding would broaden the issues and cause delay. Petition to Intervene, pp. 6-8. Thus this factor must be counted as weighing against the Petitioner.

IV. Conclusion.

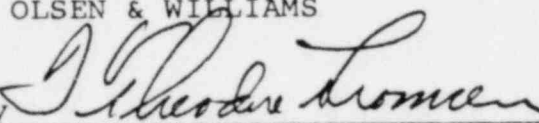
The Petitioner has not shown good cause for its untimely filing, and three of the other four factors weigh against its admission as a party to this proceeding. Consequently, the Petitioner's belated request to intervene should be denied.

DATED: May 25, 1982.

Respectfully submitted,

PERKINS, COIE, STONE,
OLSEN & WILLIAMS

By



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CONFEDERATED TRIBES AND BANDS

Yakima Indian Nation

POST OFFICE BOX 151
TOPPENISH, WASHINGTON 98948

GENERAL COUNCIL
TRIBAL COUNCIL

RECEIVED
DEC 31 1981

December 30, 1981

RECEIVED

DEC 31 1981

W. J. Finnegan, Director
Environmental and Resources
Services
Puget Sound Power and Light
Company
Puget Power Building
Bellevue, WA 98009

cc: R. V. Myers
✓ F. T. Thomsen
D. F. Spellman
T. Van Decar
M. V. Stimac
R. W. Clubb
C. L. Feldmann

Dear Mr. Finnegan:

It is perhaps unfortunate for you that no meeting has yet been arranged between the Yakima Indian Nation and Puget Power. But you first suggested a meeting only three weeks ago.

Please understand that we believe that Puget Power should have tried to get our input long before the month of December, 1981, since December 31, 1981 is a cut-off date for certain formal actions in your world. We believe you should have shown us respect since our Sovereign Homeland is so close to Hanford; since our Nation is such a large proportion of the lands adjacent to Hanford; and since the Government of the Yakima Indian Nation does business as a Democracy and instant reactions are neither possible nor advisable in matters of such great import.

Since you are not available until January, and since we at our end are still absorbed in the annual General Council meeting which has been under way since late November, let us try to meet soon in the new year.

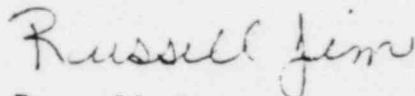
Please understand the Yakima Indian Nation considers that the passing of the December 31, 1981 date without our meeting lies at your door and in no way releases Puget Power of the need to incorporate the concerns of the Yakima Indian Nation in any of your future plans.

In closing let me assure you that the Yakima Indian Nation intends to be an Intervenor in this matter, and since your purpose is to make a profit, we feel it only fair that our Intervention be at your expense.

W. J. Finnegan, Director
Environmental and Natural
Resources Services
Page Two
December , 1981

Since the matters to be discussed between the Yakima Indian Nation and Puget Sound Power and Light Company are grave, know that we are concerned when we look at your title whether you are in a position of sufficient authority at Puget Power to meet us at the required level of responsibility and authority. If you are in fact to be the one who should represent Puget Power in these matters between Puget Power and the Yakima Indian Nation, please be prepared to satisfy us on this point when you next get in touch with us.

Sincerely,

A handwritten signature in cursive script that reads "Russell Jim".

Russell Jim, Councilman
Yakima Indian Nation

**PUGET
POWER**

RECEIVED

FEB 11 1982
OLSEN & WILLIAMS

December 18, 1981

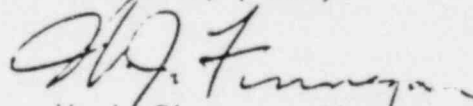
Mr. Russell Jim
Tribal Councilman
Consolidated Tribes and Bands
Yakima Indian Nation
Post Office Box 151
Toppenish, WA 98948

Dear Mr. Jim:

I regret that we were unable to arrange a meeting in early December, and hope that a mutually acceptable time can be set for January to discuss the Skagit/Hanford Nuclear Project. We are planning to submit our Application for Site Certification/Environmental Report to the Washington State Energy Facility Site Evaluation Council and the Nuclear Regulatory Commission on December 31, and I have arranged to have a copy of those documents sent to you for your information.

I will be on vacation until January 4, and will call you when I return. If you have any questions in the mean time, please contact Mike Stimac (206) 453-6721 of my staff.

Very truly yours,



W. J. Finnegan, Director
Environmental & Resource Services

MVS/js

bcc: M. V. Stimac
C. T. Van Decar
Ted Thompson ✓
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
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PUGET SOUND POWER & LIGHT COMPANY,)	DOCKET NOS.
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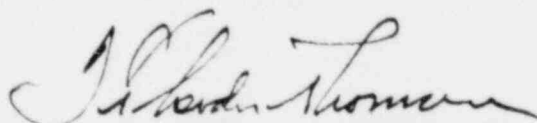
CERTIFICATE OF SERVICE

I hereby certify that the following:

APPLICANTS' RESPONSE IN OPPOSITION TO UNTIMELY PETITION
TO INTERVENE BY YAKIMA INDIAN NATION

in the above-captioned proceeding have been served upon the persons shown on the attached list by depositing copies thereof in the United States mail on May 25, 1982 with proper postage affixed for first class mail.

DATED: May 25, 1982



F. Theodore Thomsen
Attorney for Puget Sound Power &
Light Company
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SKAGIT/HANFORD NUCLEAR PROJECT
NRC Service List
Docket Nos. STN 50-522 and STN 50-523

DATE May 25, 1982

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