UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of	)	
ARIZONA PUBLIC SERVICE COMPANY, et al.,	)	Docket Nos. STN 50-528 STN 50-529 STN 50-530
(Palo Verde Nuclear Generating Station, Units 1, 2 and 3)	)	

APPLICANTS' RESPONSE TO INTERVENOR'S PETITION FOR DIRECTED CERTIFICATION PURSUANT TO 10 CFR §2.718(i)

The joint Applicants hereby respond to Intervenor's petition for directed certification of two questions concerning this Board's exclusion of certain evidence relating to Applicants' contract for effluent and the Pima-Maricopa Indian Community lawsuit. It is the Applicants' position that this Board correctly held that evidence on both issues is irrelevant. It is further Applicants' position that Intervenor has not met the standard for directed certification of questions on these evidentiary rulings and such certification should be denied. Those points and arguments of Intervenor which require a response are addressed below. They are discussed in the order raised by Intervenor and under corresponding readings.

LAW OFFICES
SNELL & WILMER
3100 VALLEY BANK CENTER
PHOENIX, ARIZONA 85073

D523

I. BACKGROUND

Intervenor presents a selected chronology of the background of this case with which Applicants have no real dispute. However, certain of Intervenor's statements which purportedly reflect the evidentiary record are inaccurate or misleading and deserve brief mention.

The first such instance is found in Intervenor's discussion of the background to the Indian community lawsuit. Intervenor states, as though it were a matter of record, that:

> If the court were to grant the Indian community's requested relief, the Secretary would be forced to exercise his power over all reclamation waters, including return flow and effluent, to satisfy these claims. Therefore, Applicants' contract for effluent [is] seriously threatened by the Indians' lawsuit and the Indians' superior claim to effluent.

Petition, p.2.

This, however, is not true. First, the statement concerning the "Indians' superior claim to effluent" is obviously in error insomuch as it has not yet been determined whether the Indians have a "superior claim to effluent." That, in part, is the subject of the lawsuit. Secondly, it is not as certain as Intervenor would characterize it that, if the Indians were to prevail in the lawsuit, the Secretary would be forced to exercise his power over all flow and effluent to satisfy the Indians' claims. If the Indians

prevail, other relief might be granted as well as the obvious possibility no relief might be granted. Also, there is a question about what actually constitutes the flow and effluent to which the Indians assert a claim. Even if the Indians prevail in part there may be no significant effect on Palo Verde's water supply depending on the determination of the issue of what constitutes the flow and effluent in question. In short, Intervenor's apparent position that the Indian lawsuit problem is concrete and can be evaluated today in terms of its effect on Palo Verde is simply inaccurate. The outcome of that lawsuit is remote and speculative.

In her petition, Intervenor also recites, as though it were evidence, that which her counsel had argued Applicants had said. More specifically, she states:

> In response to Board questions about the effect on environmental costs of having the effluent contract invalidated, Tr. 1001, Intervenor's counsel answered that Applicants' had stated that the cost if Palo Verde were shut down for one day due to failure to receive effluent is about $760,000 per day per reactor and that would be one indication of increased environmental costs due to the invalidity of the contract. Tr. 1005 . . . .

Petition, p. 4.

To include such a statement in a petition for directed certification, as though it were evidence in the record, demonstrates a lack of understanding of both procedure and evidence. Counsel's statement before this Board is not evidence, much less relevant or material; and Inter-

venor's repetition of that statement in her petition herein gives it no further evidentiary or persuasive value.

More importantly, however, even assuming the statement concerning the cost of shutdown were accurate, which staff counsel commented "maybe" would be true "[i]f the units do not go on line", Tr. 1006, that information is still irrelevant and immaterial to the issue before the Board at this stage of the proceedings. As the Board noted, these costs have already been incurred and therefore there is not an adverse environmental impact on the cost/benefit basis being considered. Tr. 1008.

Similarly, Intervenor's repetition in her petition of Mr. Leshy's proferred testimony makes it no more relevant. The issue, of which Intervenor loses sight, is whether the NEPA, which requires consideration of environmental effects of proposed action, requires consideration of the type of remote and speculative matters as those which are involved here, namely the legal rights to be declared in a lawsuit pending in another forum. This Board has properly held that question is too remote and speculative to be considered and therefore Mr. Leshy's testimony, were it admitted, concerning the alternatives based on the possible outcome of that lawsuit would not make the initial issue anymore relevant to these proceedings.

In conclusion, Intervenor's recitation of that which she terms "background" is in part inaccurate and in

whole irrelevant tc the only issue presented by her petition for certification, which is whether she has met the standard for directed certification pursuant to 10 C.F.R. §2.718(i) on the two evidentiary questions she presents.

II. QUESTIONS FOR CERTIFICATION

Intervenor's first question for certification is:

> Whether the licensing Board erred in refusing to admit evidence about the possible invalidity of Applicants' contract for effluent.

However, it is not clear whether, by this question, Intervenor is referring to the evidence that Agreement No. 13904 pursuant to which effluent will be supplied for cooling Palo Verde is being renegotiated, or whether she is referring to the effect the Indian lawsuit could have on the validity of the contract. If she is referring to the fact the Agreement is being renegotiated, there is no evidence to support the assumption underlying the proposed question that the renegotiations may in anyway effect the validity of the contract. If Intervenor is referring to the effect the Indian lawsuit could have on the validity of that contract, it is covered by proposed question no. 2, which reads:

> Whether the Licensing Board erred in refusing to admit evidence about the possible effects of the Pima-Maricopa Indian Community lawsuit on Applicants' contract for effluent.

It is most probable that question no. 1 is a duplication of question no. 2. Therefore, only question no. 2

will be directly referred to below, although the arguments apply equally to both. Both should be denied for failure to meet the standard for certification.

III. INTERVENOR HAS NOT MET THE STANDARD FOR CERTIFICATION

Intervenor correctly quotes 10 C.F.R. §2.718(i) which governs the discretionary certification of the questions proposed by Intervenor. However, Intervenor incompletely quotes portion of 10 C.F.R. Part 2, section V(f)(4), which she contends governs the standard to be applied by this Board in determining whether to certify a question. Intervenor cites the portion which reads:

> A question may be certified to the Commission or the Appeal Board, as appropriate, for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when a prompt and final decision of the question is important for the protection of the public interest, or to avcid undue delay or serious prejudice to the interests of a party.

She omits, however, the last sentence which reads:

> For example, a board may find it appropriate to certify novel questions <u>as to the regulatory jurisdiction of the Commission or the right of persons to intervene</u>. (emphasis added)

This last sentence is important. It illustrates that which is considered a major or novel question. Evidentiary rulings, such as the one involved in this case, do not begin to rise to a comparable level of importance. To the contrary, the law is overwhelmingly to the effect that

evidentiary issues are inappropriate for an interlocutory appeal.

A. Evidentiary Issues Are Inappropriate For Interlocutory Appeals

In general, only in extraordinary circumstances can an appeal board review any interlocutory ruling by a petition for directed certification pursuant to 10 C.F.R. §2.718(i). Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-271, 1 NRC 478 (1975). Rather, an appeal board will undertake such discretionary interlocutory review only where the Licensing Board ruling in question "either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner." Public Service of Indiana, Inc. (Marble Hills, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1972).

Neither of these standards applies in the present case. The future legal rights of the Indians is not going to irreparably harm anyone, regardless of whether Applicants are required at some future time to seek alternate sources of water or not. Certainly, Intervenor Hourihan is not going to be adversely affected with immediate and irreparable harm. No one is.

. . . . .

Likewise, the basic structure of the proceeding is not going to be affected in a pervasive or unusual manner. These are but evidentiary rulings, rulings which can be reviewed on direct appeal. A failure to review them now does not effect the present proceedings at all, much less in a pervasive or unusual manner.

Furthermore, an evidentiary ruling relates to factual matters and an interlocutory certification is basically not intended for resolution of mainly factual questions. Offshore Power Systems (Floating Nuclear Plants) ALAB-517, 9 NRC 8 (1979). In Offshore Power Systems, the Board refused to admit a contention concerning whether estuarine or riverine sites are suitable for floating nuclear plants. In affirming the Licensing Board's refusal to certify this question, the Appeal Board stated:

> The short of the matter is that what the NRDC characterizes as an "important legal question" of first impression is actually a mixed question of law and fact -- with the factual element predominant. Our certification authority was not intended for this situation.

Id. at 12. (emphasis added)

In the present case, the evidentiary rulings involve factual disputes, namely what will occur if the Indians prevail and how will that effect Palo Verde's water supply. No legal issues are involved beyond the issue of whether this is admissible evidence. Certainly no major or novel questions of law are involved.

There are good policy reasons behind not allowing evidentiary issues to be the subject of interlocutory appeals. The Appeal Board in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406 (1978), explained it this way:

> [D]uring the course of lengthy proceedings licensing boards must make numerous interlocutory rulings, many of which deal with the reception of evidence and the procedural framework under which it will be admitted. It simply is not [an appeals board's] role to monitor these matters on a day to day basis; were we to do so, 'we would have little time for anything else'. (citations omitted)

Presented with a petition for certification of evidentiary questions, the Appeal Board in Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-353, 76/10, 381 (1976), declared:

> We have endeavored to make our disinclination to exercise our authority to direct certification to review interlocutory ruling of licensing boards dealing with garden-variety evidentiary matters. (citations omitted). Apparently unconvinced that we meant what we said . . . intervenor . . . has now filed another petition . . . . The petition is denied. (emphasis supplied by court)

Id. at 381-82.

B. The S-3 Decision Has No Relevance To This Petition.

Intervenor concludes her argument in favor of this Board certifying her evidentiary questions with reference to

the recent "S-3 decision", NRCC v. NRC, Nos. 77-1148, 79-2110 and 79-2131 (D.C. Cir. April 27, 1982). She cites lack of understanding and the need for further clarification of the implications of that case as reason for certification. Beside the fact that decision is not unclear, as this court noted in its June 4, 1982 memorandum and order, even if it were unclear the issue raised by that case remains an evidentiary issue and one which can be dealt with on direct appeal. The S-3 decision does not rise to the level necessary for certification under 10 C.F.R. §2.718(i). Additionally, evidence of the type of cost uncertainties discussed in that case does not exist in this case. However, even assuming applicability of the S-3 decision to the case at hand, the preclusion of the evidence in issue here does not threaten immediate and serious irreparable harm, nor does it affect the basic structure of the proceeding in a pervasive or adverse way. The S-3 decision simply does not have a bearing on the standard for certification.

IV. CONCLUSION

Based on the foregoing, argument to be presented at a hearing on this matter, and the entire record in this case, Applicants respectfully submit that the two evidentiary questions requested certified by Intervenor do not meet the standard for certification under 10 C.F.R. §2.718(i), and request such certification be denied.

. . . . .

DATED this 16th day of July, 1982.

SNELL & WILMER

By_____
Arthur C. Gehr
Charles A. Bischoff
3100 Valley Bank Center
Phoenix, Arizona 85073
Attorneys for Joint
Applicants

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ARIZONA PUBLIC SERVICE	)	
COMPANY, et al.	)	Docket Nos. STN 50-528
	)	STN 50-529
(Palo Verde Nuclear	)	STN 50-530
Generating Station,	)	
Units 1, 2 and 3)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to Intervenor's Petition for Directed Certification Pursuant to 10 CFR §2.718(i)" have been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid, this 16th day of July, 1982.

Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chairman, Maricopa County Board of Supervisors
111 South Third Avenue
Phoenix, Arizona 85004

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert M. Lazo, Esq.
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Dixon Callahan
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

Lee Scott Dewey, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edwin J. Reis, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Rand L. Greenfield, Esq.
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504

Lynne Bernabei, Esq.
Harmon & Weiss
1725 I Street, N.W.
Suite 506
Washington, D.C. 20006

Jean A. Wiyatt

Jean A. Wiyatt