UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY
AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-508-OL
	)	
(WPPSS Nuclear Project No. 3)	)	

APPLICANT'S BRIEF IN SUPPORT OF ITS NOTICE OF APPEAL

Nicholas S. Reynolds
Sanford L. Hartman

DEBEVOISE & LIBERMAN
1200 Seventeenth St., N. W.
Washington, D. C. 20036
(202) 857-9817

Counsel for Applicant

October 12, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY
AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-508-OL
	)	
(WPPSS Nuclear Project No. 3)	)	

APPLICANT'S BRIEF IN SUPPORT OF ITS NOTICE OF APPEAL

Nicholas S. Reynolds
Sanford L. Hartman

DEBEVOISE & LIBERMAN
1200 Seventeenth St., N. W.
Washington, D. C. 20036
(202) 857-9817

Counsel for Applicant

October 12, 1983

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

AEC AND NRC ADJUDICATIONS

page

STATUTES

FEDERAL REGISTER

REGULATIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY
AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-508-OL
	)	
(WPPSS Nuclear Project No. 3)	)	

APPLICANT'S BRIEF IN SUPPORT
OF ITS NOTICE OF APPEAL

I. INTRODUCTION AND BACKGROUND

On September 15, 1982, Notice was published in the Federal Register that the Nuclear Regulatory Commission ("NRC") had received an application from the Washington Public Power Supply System ("Applicant") for a license to operate the Supply System's Nuclear Project No. 3 ("WNP-3"). The Notice provided that requests for a hearing and petitions for leave to intervene may be filed by any person whose interest may be affected by the proceeding. The deadline for filing such requests was October 15, 1982.[1]

On February 22, 1983, over four months late, the Coalition for Safe Power ("intervenor") filed a "Request for Hearing and Petition for Leave to Intervene" ("petition"). Intervenor conceded that its petition was untimely, although it argued that it satisfied the five-

---

1 47 Fed. Reg. 40736 (1982).

factor test governing late-filed intervention petitions set forth at 10 C.F.R. §2.714(a)(1), and that its request for a hearing and petition to intervene should be granted.

On April 21, 1983, the Licensing Board issued a Memorandum and Order in which it granted the untimely petition to intervene.[2] The Licensing Board found that intervenor had established representational standing either through the implicit authorization of one of its members to represent his interests in this proceeding or through the express authorization of that member to do so. Such standing, according to the Board, was based on the residence of this member within twenty-five miles of WNP-3. More important for purposes of this appeal, the Licensing Board also found that, based on its balancing of the factors set forth in 10 C.F.R. § 2.714(a)(1), a sufficient showing was made to overcome the fact that the intervention petition was not filed in a timely manner.[3]

In accordance with the Board's April 21, 1983, Memorandum and Order, intervenor on June 15 filed its supplemental petition setting forth proposed contentions and the alleged bases for those contentions. Applicant submitted a detailed response to the supplemental petition on July

---

2 Washington Public Power Supply System (WPPSS, Nuclear Project No. 3), Docket No. 50-508-OL, April 21, 1983, Memorandum and Order (Ruling on Petition for Leave to Intervene) ("April 21, 1983, Memorandum and Order").

3 Id. at 16-17.

6, after which a Special Prehearing Conference was held. On September 27, 1983, the Licensing Board issued another Memorandum and Order in which it held that nine valid contentions had been raised and that the petitioner should be admitted to this proceeding as an intervenor.[4] Applicant now brings this appeal pursuant to 10 C.F.R. §2.714a.[5]

II. SUMMARY OF ARGUMENT

The Licensing Board abused its discretion when it granted the untimely petition to intervene. By its own admission, intervenor deliberately elected to ignore, for about two months, its failure to file a timely intervention petition after discovering that it had missed the filing deadline. Under these circumstances, the "good cause" factor must be weighed more heavily against late intervention than it was by the Licensing Board. Applicant further contends that the other factors relied upon by the Licensing Board in granting the untimely intervention do not, upon proper analysis, support the conclusions reached. Accordingly, the April 21, 1983

---

4 Washington Public Power Supply System (WPPSS, Nuclear Project No. 3), Docket No. 50-508-OL, September 27, 1983, Memorandum and Order (Ruling on Proposed Contentions).

5 An appeal under 10 C.F.R. § 2.714a did not lie until the Licensing Board ruled on contentions and granted intervenor full party status. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 865 (1980).

Memorandum and Order of the Licensing Board holding that intervenor satisfied the requirements of Section 2.714(a)(1) governing untimely petitions should be reversed and the proceeding should be dismissed. In addition, the September 27, 1983, Memorandum and Order admitting certain of intervenor's contentions should be vacated.

III. ARGUMENT

THE LICENSING BOARD ABUSED ITS DISCRETION WHEN IT ADMITTED INTERVENOR TO THIS PROCEEDING, NOTWITHSTANDING INTERVENOR'S WILLFUL FAILURE TO FILE A TIMELY PETITION TO INTERVENE

A. Introduction and Scope of Review

It is well-established that the Appeal Board will not overturn the decision of a licensing board granting an untimely petition to intervene unless its analysis of the decision reveals an abuse of discretion.[6] However, it is also well-established that "this standard does not foreclose . . . close scrutiny [by the Appeal Board] of the factual and legal ingredients of the analysis underlying the [B]oard's ultimate conclusions."[7]

---

6 E.g., Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763-4 (1982).

7 South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 885 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982).

Applicant submits that when reviewing the April 21, 1983 Memorandum and Order of the Licensing Board, close scrutiny of the factual and legal ingredients underlying that decision is particularly appropriate. First, intervenor sought to participate in an operating license application proceeding, and not a hearing on a construction permit application. In the latter instance, a hearing is mandatory under Section 189 of the Atomic Energy Act. Moreover, intervenor was the only petitioner for intervention on the WNP-3 operating license application. Therefore, if the petition to intervene is denied, no hearing will be held on the operating license application.[8] Because of this, the Licensing Board was required to analyze carefully every factual and legal aspect of the petition to intervene and to render correct factual and legal findings on each of the five factors set

---

8 On this basis Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759 (1978) is distinguishable. In that proceeding the Appeal Board found that the Licensing Board did not abuse its discretion when it granted an inexcusably late petition to intervene, based primarily on the fact that the Applicant there had already halted voluntarily all activities with its construction permit application. However, in Greenwood a mandatory CP hearing would have been held regardless of whether the untimely intervention petition was granted. Here, in contrast, no such hearing would take place if the petition for intervention is denied. Thus, the prejudice suffered by Applicant here is considerably greater than that suffered in Greenwood.

forth in Section 2.714(a)(1) before admitting intervenor to this proceeding as a party.[9] As explained below, the Licensing Board failed to satisfy this duty.

Second, the April 21, 1983 Memorandum and Order of the Licensing Board suggests that to the extent some of the factors set forth in 10 C.F.R. §2.714(a)(1) were perceived to weigh in favor of granting the untimely intervention petition, those factors were barely adequate to do so. The Licensing Board specifically stated that the ability of petitioner to assist in developing a sound record was the dispositive factor sufficient to throw the overall balance in favor of granting the petition to intervene. However, with respect to that factor, the Licensing Board also stated that the petitioner "has not made the strongest of showings."[10] Therefore, even a slight error of the Licensing Board as to the underlying factual and legal ingredients on which its balancing of the five factors was based takes its analysis to the bounds of discretion, and any substantial error constitutes grounds to conclude that the Licensing Board abused its discretion in granting the untimely petition to intervene.

---

9 See Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8 (1976).

10 April 21, 1983, Memorandum and Order at 13.

The Licensing Board made a number of errors when it applied the five factor test to the untimely petition to intervene, and many of these errors were significant. As a result, the underlying factual and legal ingredients on which the Licensing Board based its April 21, 1983, Memorandum and Order cannot withstand Appeal Board scrutiny. The nature and extent of these errors are set forth below, where Applicant discusses each of the factors set forth in Section 2.714(a)(1) governing untimely intervention.

B. Good Cause (Factor One).

The Licensing Board correctly determined that intervenor failed to establish good cause for filing its intervention petition more than four months late and that, therefore, the first factor weighed against granting the petition. However, the Licensing Board erred in failing to assign sufficient weight to this factor by not requiring petitioner to make a compelling showing on the remaining four factors set forth in Section 2.714(a)(1).

Intervenor explained its willful failure to file in a timely manner, as follows:

> Following discovery [of petitioner's failure to file in a timely manner,] Petitioner then waited another two months to file this petition because news reports had indicated that the WNP-3 project was going to be terminated due to financial problems. Expecting imminent cancellation of the project,

> Petitioner waited to file because certain arguements [sic] on standing, contentions etc. would have been different.[11]

Intervenor thus concedes that it intentionally delayed filing its petition for two months even though it was aware then that it had an obligation to respond seasonably to the Notice of Opportunity published by the Commission and that it was already two months late. Intervenor adopted this course, fully aware of the consequences, apparently on the strength of rumor (erroneous and unidentified "news reports") and for no better purpose than to further some undisclosed litigation strategy regarding "standing, contentions etc."[12] As a result, this is not a situation where an intervenor did not know of its obligation to file its intervention petition or even offered a plausible explanation as to why its intervention petition was not filed in a timely manner. Rather, it is a situation where the intervenor elected, based on some undisclosed litigation strategy, to simply withhold filing its intervention petition until it perceived the time was appropriate for doing so.

---

11 Petition at 6.

12 Id.

In spite of this, the Licensing Board only acknowledged and recited the need for intervenor to "take responsibility"[13] for such actions. While the Board purported to take into account intervenor's willful failure to file a timely petition when balancing the five factors of Section 2.714(a)(1), it added, citing ALAB-559,[14] that "[p]etitioners for intervention who inexcusably missed the filing deadline by months do not have an enormously heavy burden to meet."[15] The Board also stated that "[t]he fact that the lateness in making the filing is measured in months rather than years reduced the level of the weight of the showing Petitioner had to meet."[16] Thus, because intervenor was "only" four months late, the Licensing Board reduced the weight of the showing intervenor had to make as to the other factors governing late intervention.

Applicant submits that for the two reasons explained below, the Licensing Board should have required intervenor to make a "compelling showing"[17] on the other four factors

---

13 April 21, 1983, Memorandum & Order at 10.

14 Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172 (1979).

15 April 21, 1983, Mermorandum & Order at 9.

16 Id. at 16.

17 Enrico Fermi, ALAB-707, supra, 16 NRC at 1765; Summer, ALAB-642, supra, 13 NRC at 886.

in Section 2.714(a)(1) to justify its late intervention, and that the Licensing Board should not have reduced the burden intervenor had to meet as to such factors simply because its petition was late by months rather than years. It is for these reasons that the failure of the Licensing Board to require a compelling showing as to the other factors in Section 2.714(a)(1) does not withstand close scrutiny.

First, where it served its purposes, intervenor claimed that it was "not a neophyte" in participating in NRC proceedings, and the Board so found.[18] In this regard, intervenor recited to the Board its participation in other hearings, including construction permit proceedings for the Skagit Nuclear Project, Units 1 and 2; the Pebble Springs Nuclear Plants, Units 1 and 2; and the Skagit/Hanford Nuclear Projects, Units 1 and 2. It also referenced its participation in two license amendment proceedings for the Trojan Nuclear Plant.[19] Given this previous participation in NRC proceedings, Applicant contends that intervenor should be held to the high standards expected of those who regularly appear before

---

18 April 21, 1983, Memorandum and Order at 10.

19 Petition at 2.

the Commission's adjudicatory bodies, and not to the lower standards at times applied to those lay intervenors unfamiliar with the Rules of Practice.[20]

Intervenor is also (or at least by now should be) familiar with the activities of the Applicant. It either has participated or is now participating in NRC proceedings involving every one of Applicant's projects in addition to WNP-3. Intervenor is currently engaged in an operating licensing proceeding[21] and construction permit amendment proceeding[22] involving WNP-1, and attempted unsuccessfully to intervene in a construction permit amendment proceeding involving WNP-2.[23] In addition, intervenor filed petitions with the NRC pursuant to 10 C.F.R. § 2.206 seeking the revocation of the construction permits for WNP-4 and WNP-5. Both petitions were denied.[24]

---

20 See 10 C.F.R. § 2.713 and Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973).

21 Washington Public Power Supply System (WPPSS Nuclear Project No. 1), Dkt. No. 50-460-OL, June 23, 1983, Memorandum.

22 Washington Public Power Supply System (WPPSS Nuclear Project No. 1), Dkt. No. 50-460-CPA, September 21, 1983, Memorandum and Order (Accepting Withdrawal of Intervenor Member and Affirming Continuation of Proceeding).

23 Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546 (1983).

24 Washington Public Power Supply System (WNP Nos. 4 & 5), DD-82-6, 15 NRC 1761 (1982).

In view of these activities, it is remarkable that intervenor simply missed for several months the fact that the operating license application for WNP-3 was filed and docketed, and for two months that a notice of opportunity for hearing had been published. It is even more remarkable that intervenor could then conclude rationally that it was permitted to sit back for another two months, relying on rumors of plant cancellation, all the while free to intervene when it perceived the time was right for doing so. At bottom, intervenor claims expertise in NRC proceedings and, based on its previous claims and activities involving this Applicant, certainly should have the ability to monitor such basic activities as the filing and docketing of an operating license application. Yet by its own admission it ignored the fundamental obligation of a would-be party seasonably to file critical documents. Under these circumstances, intervenor's willful failure to file its intervention petition timely in the first instance, and promptly when its error was discovered, is particularly egregious. Therefore, the Licensing Board should have required intervenor to make a compelling showing as to the remaining factors set forth in Section 2.714(a)(1).

The intervenor should have been required to make a compelling showing for another equally valid reason, viz., because the Commission's Rules of Practice are entitled to respect.[25] In this case intervenor willfully ignored for two months a Commission deadline by which time it was required to petition for intervention. Such conduct reflects an attitude of total disregard for NRC practice and procedure. Accordingly, it misses the point to conclude (as did the Licensing Board) that, while intervenor willfully declined to cut short its untimeliness, the burden it had to meet was nevertheless minimized simply because "the lateness in making the filing is measured in months rather than years."[26] In short, Applicant submits that when a petition to intervene is untimely because the petitioner elects to delay filing for reasons of litigative strategy, the length of the delay associated with the filing should not provide any basis to lighten the compelling showing which would otherwise have to be made to justify admission to the proceeding.[27]

---

25 See Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-424, 6 NRC 122, 125 (1977).

26 April 21, 1983, Memorandum and Order at 16.

27 On this basis alone, dicta in Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172 (1979), vacated as moot, CLI-80-34, 12 NRC 407 (1980), relied upon by the Licensing Board to support its

(footnote continued)

Moreover, by using a less stringent standard for the balance of intervenor's showing under Section 2.714(a)(1), the Licensing Board has sent a clear message to anyone contemplating intervention before the NRC that the willful failure to file a timely intervention petition carries with it virtually no penalty. Applicant submits that this holding will make it even more difficult to maintain any control over adjudicatory proceedings by enforcing lawfully established deadlines, which no party should be permitted to ignore willfully. The Appeal Board should reverse for this policy reason alone.

(footnote continued from previous page)
conclusion that intervenor's burden could be reduced is not on point. There was no claim raised in Skagit that the petitioners there withheld filing a petition to intervene because "certain arguments" it could have raised would have been different, depending on the status of the project. Rather, the untimely petition was filed in Skagit because of other litigation involving petitioners' interests, because petitioners were involved with other matters, and because petitioners decided initially to rely on others to represent their interests but later concluded those entities were not capable of doing so. Id. at 164. Beyond that, Skagit was a construction permit proceeding involving a mandatory hearing. Similarly, Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644 (1979), is also distinguishable. In that case, the Appeal Board suggested that an "overwhelming" showing was not required on the factors governing late intervention when the intervention petition was four months late. However, the Appeal Board was also careful to point out that applicant's claim regarding lateness rested on a technical point of law, viz., whether an intervention petition filed in a timely manner by an organization is late if the organization's standing is based on a member newly acquired four months after the deadline for intervention. That situation is entirely different from this case, where the organization knowingly refrained from filing any type of intervention petition.

At bottom, because of intervenor's willful disregard of its obligation to file its petition to intervene in a timely manner, the Licensing Board should have required it to make a "compelling showing" as to the remaining factors set forth in Section 2.714(a)(1). Accordingly, the decision of the Licensing Board to reduce the burden petitioner had to satisfy because intervenor sought to participate in this proceeding "only" a few months (and not years) late is error and should be reversed.

C. Availability of Other Means to Protect Petitioner's Interest (Factor Two).

Applicant argued before the Licensing Board that one alternative to intervenor's participation in this proceeding is filing a petition under 10 C.F.R. § 2.206. The Licensing Board summarily rejected this argument, stating that this procedure "is not another means to protect Petitioner's interest as [Section 2.206] relates to enforcement matters, which is not a significant interest of Petitioner, who is concerned with public health and safety issues in licensing the operation of the plant."[28] It accordingly weighed this factor in favor of granting the late-filed petition to intervene.

Such disposition by the Licensing Board of Applicant's argument is flatly at odds with recent decisions of both the Commission and Appeal Board and is

---

28 April 21, 1983, Memorandum and Order at 11.

therefore reversible error. In Enrico Fermi,[29] the Appeal Board, recognizing that an untimely intervenor in an operating license proceeding had raised "potentially significant issues" which "obviously . . . must not be ignored"[30] but which could not fit into the adjudicatory process, forwarded the untimely petition to the Director of Nuclear Reactor Regulation and requested that he treat the papers as a Section 2.206 petition. The holding of the Licensing Board that Section 2.206 is concerned only with enforcement matters and not "concerned with public health and safety issues in licensing the operation of the plant"[31] is patently inconsistent with the action by the Appeal Board in Enrico Fermi. At bottom, just as a concern raised by an individual seeking to intervene after the record is closed in an operating license proceeding can be addressed by means of a Section 2.206 petition, so can concerns of the willfully late intervenor in this case be addressed.

In addition, the Commission itself recently emphasized, in a proceeding to which this intervenor was party, the importance of Section 2.206. It stated, as follows:

> The invocation of this procedure . . . requires that the NRC staff give serious consideration to requests for

---

29 ALAB-707, supra, 16 NRC at 1766-69.

30 Id. at 1767.

31 April 21, 1983, Memorandum and Order at 12.

> regulatory action concerning a licensed facility so long as the request specifies the action sought and sets forth the facts that constitute the basis of the request. The staff must analyze the technical, legal, and factual basis for the relief requested and respond either by undertaking some regulatory activity or, if it believes no show-cause proceeding or other action is necessary, by advising the requestor in writing with a statement of reasons explaining that determination. Further, the Commission reviews each of these decisions sua sponte to insure that the staff's decision is not an abuse of discretion. Past practice clearly indicates that, as the Appeal Board in [Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980)] concluded, the agency has "faithfully discharged" its responsibility to give full consideration to petitions seeking relief under section 2.206.[32]

In view of the foregoing, Applicant submits that the Licensing Board was simply incorrect when it summarily rejected Section 2.206 as a viable means through which Intervenor's interest in the health and safety aspects of WNP-3 operation could be protected. Its rejection is particularly inappropriate given intervenor's total failure even to address in its petition to intervene whether Section 2.206 is a mechanism by which it could

---

32 Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1228-29 (1982). See also Porter County Chapter of the Izaak Walton League of America, Inc. v. Nuclear Regulatory Commission, 606 F.2d 1363 (D.C. Cir. 1979).

protect its interest.[33] It follows, therefore, that the Licensing Board committed reversible error in disposing of this factor.

D. Assist in Developing the Record (Factor Three).

Although the Licensing Board acknowledged and recited the need for intervenor to identify with as much particularity as possible the issues it plans to cover, the identity of its prospective witnesses and the content of their testimony,[34] the analysis in which the Licensing Board actually engaged demonstrates clearly that it applied a standard considerably less stringent than that called for by NRC precedent.[35] For this reason the conclusion of the Licensing Board that intervenor made a "sufficient" showing for this factor to weigh in favor of intervention is erroneous and an abuse of discretion.[36]

---

33 Petition at 6-7.

34 Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

35 See, e.g., Summer, ALAB-642, supra, 13 NRC at 891-94.

36 In its April 21, 1983, Memorandum and Order, the Licensing Board stated that "Applicant placed undue reliance on Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2) ALAB-420, 6 NRC 8, 23 (1977), to conclude that the third and other factors are not applicable in a proceeding where there would be no hearing absent permitting intervention." April 21, 1983, Memorandum and Order at 13 (emphasis added). In fact, intervenor advanced this view and addressed these other factors only in a most summary fashion (see Petition at 8), while Applicant specifically argued that all five factors were applicable to the late filed petition to intervene. Applicant's Answer in Opposition to Request

(footnote continued)

When the showing made by intervenor in this case is compared with the showing of those seeking intervention in other NRC proceedings who have in fact satisfied the burden set forth in Grand Gulf, supra, ALAB-704, the inadequacy of intervenor's showing is manifest. For example, in Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station),[37] some weight in favor of late intervention was given to this factor when an organization seeking untimely intervention to raise emergency planning contentions had members who possessed "some practical working knowledge as to transportation and traffic conditions" which "could be of assistance in developing a sound record."[38] A similar observation was made in Enrico Fermi.[39]

More recently, in Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3),[40] the Licensing Board granted an untimely intervention

---

(footnote continued from previous page)
for Hearing and Petition for Leave to Intervene ("Applicant's Answer"), March 9, 1983, at 26 and 29.

37 LBP-80-14, 11 NRC 570, 576 (1980).

38 Id.

39 ALAB-707, supra, 16 NRC at 1766 ("While . . . the County has not identified its prospective witnesses, nevertheless the nature of the subject matter -- the County's ability to implement its own emergency plan -- provides reason to believe that the County could present witnesses whose testimony would be useful.")(emphasis in original).

40 LBP-82-117, 16 NRC 2024, 2029 (1982).

position absent a showing of good cause. However, the intervenor there made a particularly strong showing concerning the extent to which it could be expected to assist in developing a sound record. It did so by identifying and providing to the Board the reports of three experts which specifically addressed the contention intervenor sought to raise. Intervenor further represented to the Board that these experts, identified by name, would be available to testify.[41]

In contrast to the showings made in those cases, intervenor here merely represented in the most general terms how it could contribute to developing the record in this case. It stated with respect to only one of its areas of concern, quality assurance, that it had knowledgeable help available, viz., a "former WPPSS quality assurance worker" who "agreed to participate in this proceeding."[42] However, intervenor did not disclose the identity of this individual, specify the area of quality assurance, if any, in which he has experience (for example, concrete, welding, vendor surveillance, administration of the QA program itself), outline his

---

41 See also, Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 108-109 (1976) (company which fabricated supports for steam generator and reactor coolant pumps seeking untimely intervention "fared particularly well" in establishing that it could assist in developing record concerning issues involving supports).

42 Petition at 7.

proposed testimony, or even state in what areas this individual would be willing to testify. Nor did intervenor relate that individual's participation in this proceeding to the issues it would seek to raise.

As to other areas of concern identified by intervenor, the Licensing Board noted intervenor made an even weaker showing. The Licensing Board stated, as follows:

> On other possible issues the presentation by Coalition is weaker. It is only in the process of attempting to identify experts in areas such as radiation, health physics, geology, hydrology engineering, fisheries and nuclear safety. Until such experts are identified, there can be no naming of witnesses or outlining of their proposed testimony.[43]

It then concluded:

> Although petitioner has not made the strongest of showings on the third factor, it is sufficient for us to conclude Coalition may reasonably be expected to assist in developing a sound record based upon its past performance. It is expected it can do so in this proceeding at least in the area of quality assurance and very possibly in others.[44]

Applicant submits that the Licensing Board's overall finding as to the ability of petitioner to significantly aid in the development of the record is wholly unsupported

---

43 April 21, 1983, Memorandum and Order at 13.

44 Id.

and constitutes reversible error. First, intervenor nakedly claimed that it had "expertise" based on its participation in numerous other proceedings and could, therefore, contribute significantly to the record in this proceeding.[45] The Licensing Board accepted this statement at face value.[46] Second, the intervenor stated that it was "in the process of working with other intervenors" to identify experts in numerous areas,[47] which claim the Licensing Board also took at face value.[48]

Simply stated, it is difficult to reconcile the second of these two statements with an avowed ability to contribute based on intervenor's own acquired expertise, which itself was only assumed and not demonstrated. If intervenor is in fact entitled to recognition as an "experienced" participant in previous NRC licensing proceedings, intervenor should have been required at least to identify, when it filed its late petition to intervene, those experts who would be available to assist it as well as the nature of that assistance. Its failure to do so is particularly significant because all of the proceedings in which intervenor claimed it participated were in the

---

45 Petition at 7-8.

46 April 21, 1983, Memorandum and Order at 12-13.

47 Petition at 7-8.

48 April 21, 1983, Memorandum and Order at 12-13.

Pacific Northwest and concerned both operating plants and plants under construction.[49] Given this failure, the Licensing Board committed error and abused its discretion in finding that intervenor was indeed sufficiently experienced, based on its participation in those proceedings, to overcome its flagrant disregard for NRC deadlines and gain admission to this proceeding. Based on the record before it, the Licensing Board could not logically have found that intervenor's past experience warranted intervention in this proceeding.

The converse of this statement is also true. If intervenor cannot be expected to name its witnesses or outline their testimony because intervenor has yet to identify its experts, as the Licensing Board suggests,[50] then intervenor's past experience in other NRC licensing proceedings hardly can be counted as warranting its intervention in this proceeding.

We now turn to the Licensing Board's assumption that participation in other NRC proceedings is a "free ticket" to a favorable ruling on the third factor of those governing late intervention. The Licensing Board accepted without inquiry intervenor's statements that it had participated in other NRC proceedings and that it had in

---

49 Petition at 7-8.

50 Id. at 13.

one case presented witnesses and in another conducted "extensive cross-examination."[51] Its conclusion that intervention is warranted here based on this participation does not withstand scrutiny.

NRC licensing proceedings are not fungible. Participation in one proceeding, even if "effective," does not assure (or even suggest) effective participation in another. It is for this reason that in every proceeding, those with an avowed expertise in areas of nuclear power seeking to intervene on an untimely basis must establish why in the case at bar intervention is warranted.[52] The burden to show what, if any, ability to contribute is demonstrated by virtue of participation in other proceedings is on the petitioner for intervention. It is simply insufficient for a petitioner to pin on the badges of past NRC wars and to rest on those alleged laurels. That is precisely what the intervenor did here, and yet the Licensing Board found in its favor.

This is particularly true here. Intervenor asserted (and the Licensing Board recited) that intervenor had full party status in construction permit proceedings for Skagit, Units 1 and 2; Pebble Springs, Units 1 and 2; and

---

51 Id. at 12-13.

52 See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239 (1980).

Skagit/Hanford, Units 1 and 2.[53] However, it does not follow, as the Licensing Board apparently assumed, that such participation was effective or meaningful. It was important for intervenor to identify precisely what it did in those construction permit proceedings, which would support a finding by the Licensing Board that its experience there would be of particular value in this operating license proceeding. Intervenor failed to do so.

Nor could the Licensing Board bridge this gap by simply assuming that mere party status in those proceedings demonstrated an ability to contribute which is transferable to the instant case. In each of those proceedings there were numerous intervenors raising a number of claims.[54] Yet in this proceeding intervenor did not identify whether it was lead intervenor in the earlier proceedings and, if so, for which contentions. Nor did intervenor identify for the Licensing Board any contentions in the earlier proceeding which it alone raised and endeavored to litigate. Therefore, the finding by the Licensing Board that intervenor may have been

---

53 April 21, 1983, Memorandum and Order at 12.

54 See Puget Sound Power & Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-683, 16 NRC 160 (1982) and 47 Fed. Reg. 15186 (1982); Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30 (1979) and ALAB-572, 10 NRC 693 (1979); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-362, 4 NRC 627 (1976).

admitted as a "full party" to those proceedings, without more, fails to provide adequate basis for the conclusion that intervenor is possessed of such expertise that intervention here is justified.

Similarly, the assertion that intervenor presented witnesses in the Trojan Spent Fuel Pool hearing does not support a finding that intervenor's participation in that proceeding warrants intervention here. A careful reading of the Licensing Board decision in Trojan reveals that an individual intervened on her own behalf and on behalf of intervenor.[54] Yet, intervenor did not claim in its petition that this same individual will be representing its interest in this proceeding. Nor did intervenor represent that it (and not the individual representing its interests) in fact developed, secured expert witnesses on and litigated the contentions raised in Trojan. In any event, even if the Licensing Board could have simply assumed that intervenor did so, an assumption which on its face has no basis, every one of those contentions ultimately was rejected.[55]

Finally, the Licensing Board recited intervenor's participation in the Trojan Control Room License Amendment case and noted that intervenor's participation led to the

---

54 Portland General Electric Co. (Trojan Nuclear Plant), LBP-78-32, 8 NRC 413, 415 (1978).

55 Id. at 458-59.

imposition by the Staff of additional technical specifications.[56] The Licensing Board decision in Trojan, however, belies such a finding. At the most, intervenor "suggested" that both trains of equipment for maintaining cold shutdown be operable during one aspect of control room repairs, a suggestion which was incorporated in the Final Decision issued in Trojan.[57] However, there is no indication in that decision that either the Licensee or Staff objected to it or that intervenor was required to litigate the underlying technical basis, if any, for it. Moreover, the Licensing Board ultimately found that all of intervenor's contentions were meritless.[58]

That intervention is unwarranted based on intervenor's past expertise is confirmed by the poor quality of its supplemental petition to intervene in this proceeding. Although intervenor claimed that a "former WPPSS quality assurance worker" agreed to participate in this proceeding, its proposed contention twelve (which purports to address quality assurance) is riddled with errors and misrepresentations. When responding to this proposed contention, Applicant identified approximately thirteen allegations which intervenor attempted to support

---

56 April 21, 1983, Memorandum and Order at 13.

57 Portland General Electric Co. (Trojan Nuclear Plant), LBP-80-20, 12 NRC 77, 106 (1980).

58 Id. at 107.

by materially misrepresenting the content of NRC Inspection Reports.[59] Further, in virtually every case in which intervenor purported to rely on those reports in support of its contentions, intervenor failed to disclose that the matters with which it was concerned were either closed in full by NRC or that corrective action was being undertaken. This lack of candor and poor pleading practice raises serious questions concerning intervenor's assertion that a "WPPSS quality assurance worker" will "participate" in this proceeding.[60] It also confirms, as Applicant argued to the Licensing Board, that intervenor simply has not met its burden to demonstrate how it will materially contribute to the record in the area of quality assurance.

Intervenor's ability to cite documents accurately in support of its other contentions is also equally highly suspect. For example, Applicant identified eight significant factual inaccuracies in the alleged basis for contention 4 (decay heat removal).[61] Applicant also discovered numerous errors in the purported bases identified by intervenor in support of contention 7

---

59 See July 6, 1983, Applicant's Response in Opposition to Supplement to Request for Hearing and Petition for Leave to Intervene ("Response") at 96, 97, 99, 102, 105, 108, 109, 110, 115, 117 and 123.

60 Petition at 7.

61 Response at 40-45.

(seismic capability of Category I equipment)[62]; contention 9 (inspection and enforcement)[63]; contention 10 (maintenance of structures during construction deferral)[64]; and contention 15 (emergency core cooling).[65] In short, intervenor's performance in this proceeding to date belies its claim that expertise purportedly garnered from participation in other NRC proceedings warrants its participation here.[66]

---

62 Id. at 60-65.

63 Id. at 79.

64 Id. at 83-86.

65 Id. at 130-132.

66 Without belaboring the obvious, Applicant is not seeking review by the Appeal Board of several contentions which were admitted on the basis of bald misstatements of fact because it recognizes that doing so is, unfortunately, proscribed by Section 2.714a of the Rules of Practice. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973). Of course, Applicant would welcome interlocutory sua sponte review by the Appeal Board of the Licensing Board's September 27, 1983 Memorandum and Order admitting contentions. Applicant believes that the Licensing Board incorrectly admitted all but the two contentions on which the parties stipulated as to admissibility.

Applicant brings these contentions to the attention of the Appeal Board to suggest that if the Licensing Board was inclined in April to grant the untimely intervention petition on the grounds that intervenor could contribute significantly to the record, the Licensing Board should not have rendered its ruling until intervenor filed its supplemental petition identifying those issues it wished to litigate, until the Special Prehearing Conference was conducted, and until preliminary factual disputes governing intervention were resolved. In this manner the Licensing Board could have ascertained firsthand whether intervenor in fact had

(footnote continued)

One final observation is pertinent. The Licensing Board stated that the petition to intervene, in which factual representations were made as to intervenor's earlier participation in NRC proceedings, was accompanied by an affidavit stating that the facts set forth therein are true and correct to best of intervenor's knowledge. The Licensing Board then stated that "no opposing affidavits were filed,"[67] as if that somehow afforded more weight to intervenor's claims. Such statement, combined with the factual findings the Licensing Board made in connection with this (and the other) factors governing late intervention, suggest that the Licensing Board expected Applicant to look behind intervenor's intervention petition and controvert, by affidavit, the facts set forth therein.

Our reading of the Rules of Practice reveals no such requirement. Pleading practice during the intervention stage is not evidentiary. It is designed to test whether certain legal standards have been fulfilled (10 C.F.R. §2.714), not to establish facts. In order for Applicant to probe behind the intervention petition to challenge its

---

(footnote continued from previous page)
sufficient expertise or resources to justify a grant of late intervention. See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 582 (1978). See note 69 and accompanying text.

67 April 21, 1983, Memorandum and Order at 4.

underlying facts, Applicant would have to learn (presumably through discovery) much more about the resources and expertise of intervenor, including its role in earlier NRC proceedings, than is possible by reviewing pleadings on file in the Public Document Room and the decisions of NRC tribunals before which intervenor practiced. Yet, it is clear that discovery before the Special Prehearing Conference is prohibited,[68] and, in any event, the Special Prehearing Conference took place after the Licensing Board issued its April 21, 1983, Memorandum and Order. As a result, Applicant had no opportunity to dispute to any extent the factual underpinnings of the untimely intervention petition. Yet the Licensing Board apparently credited intervenor because Applicant did not oppose the petition with "opposing affidavits." This procedural error of the Licensing Board is itself sufficient grounds to set aside the April 21, 1983, Memorandum and Order.[69]

---

68 Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 448 n. 3 (1979); Enrico Fermi, supra, LBP-78-37, 8 NRC at 579-81 (1978).

69 Because it is clear that intervenor failed to make an adequate factual showing as to the five factors governing late intervention and that as a matter of law the Licensing Board should have denied its intervention petition, a remand to allow further development of the record is unwarranted.

At bottom, the Licensing Board simply accepted intervenor's bald assertion that, in view of its past participation in NRC proceedings, intervenor can make a significant contribution to the record in this proceeding as to all of the issues it seeks to raise. The Licensing Board also unquestioningly adopted intervenor's claim that it had available to participate in this proceeding an unidentified "former WPPSS quality assurance worker."[70] It did not require intervenor to draw any nexus between the issues it seeks to raise and its alleged resources in those areas. Nor did it require intervenor to identify those witnesses upon which it would rely or even summarize their testimony. The failure of the intervenor to do so and the consequent void in the record should have led the Licensing Board to find that this factor weighed against intervenor and indeed tipped the balance against granting the petition.[71] As the Appeal Board stated in an analogous situation,

---

70 Petition at 7.

71 Compare the record in this proceeding with Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1149 (1977), in which the petitioner for intervention identified the prospective witness to the Licensing Board but that Board failed to discuss his qualifications. The Appeal Board admonished that the witness' qualifications should also have been presented. In the instant case, the intervenor did not even identify the prospective witness.

> In the circumstances of this case, there is particularly strong reason why discretionary intervention should not be allowed in the absence of some clear indication that the petitioner has a substantial contribution to make on a significant safety or environmental issue appropriate for consideration at the operating license stage. As petitioner herself acknowledges, in the absence of a successful petition for intervention there is no hearing at that stage. Certainly, before a hearing is triggered at the instance of one who has not alleged any cognizable personal interest in the operation of the facility, there should be cause to believe that some discernible public interest will be served by the hearing. If the petitioner is unequipped to offer anything of importance bearing upon plant operation, it is hard to see what public interest conceivably might be furthered by nonetheless commencing a hearing at his or her behest.[72]

E. Possible Representation by Existing Parties (Factor Four).

The Licensing Board found that there are no other intervenors in this proceeding which could represent the interests of intervenor. It also found that, while the Staff represents the public interest, that interest may not be identical to (or possibly even incompatible with) the interests of intervenor. Accordingly, it weighed this factor in favor of intervention.[73]

---

72 Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977) (footnote omitted).

73 April 21, 1983, Memorandum and Order at 14.

Again, the record is totally devoid of any basis upon which to premise such a finding. Intervenor asserted only that "[i]n many instances, contentions which would be filed . . . where Staff and Petitioner's positions, for example, would differ on the regulatory application of the results of the same tests."[74] Intervenor did not identify for purposes of its showing on factor four how its positions on contentions would depart from Staff evaluations or conclusions. Rather, its example seemed to be a contrived and empty formula of words. Nor did intervenor provide any details as to the tests with which it was concerned. Its failure to do so is particularly significant given its avowed expertise in NRC proceedings.

Applicant submits that where the burden is on the intervenor to demonstrate that existing parties (in this case the NRC Staff) cannot represent its interest, such a conclusory showing as that made by the intervenor and relied upon by the Licensing Board does not provide any basis for weighing this factor in favor of intervention. We submit that the logic of the Licensing Board in Indian Point, when faced with an untimely petition for intervention, is applicable here, as follows:

---

74 Petition at 7.

> The third of the remaining four factors, the extent to which Petitioners' interest will be represented by existing parties, weighs in Petitioners' favor only to the extent that, if Petitioners' request is denied, there will be no proceeding and hence no parties. However, as the staff points out, it has a duty to see to it that the public interest in the enforcement of the Atomic Energy Act's requirements is met. In the circumstance of an unjustifiably late request which does not indicate what benefits to the public will result from its allowance, we believe it appropriate to assume that the Petitioners' interest will be adequately represented by the Staff. Consequently we do not weigh this factor in Petitioners' favor.[75]

At bottom, the Licensing Board here was willing to assume that the interest of intervenor cannot be satisfied by the Staff, because were the Staff able to do so, "there would be no need ever for having intervenors in licensing proceedings, for which the regulations provide."[76] Such observation, which suggests that this factor will <u>always</u> favor a grant of a single, late petition for intervention, ignores the need for intervenor to make affirmatively the requisite factual showing in every case that this factor can be weighed in its favor. It is important to distinguish those legitimate issues that are cognizable in NRC licensing cases from those issues that are not. To

---

75 <u>Consolidated Edison Co. of New York</u> (Indian Point, Unit No. 2), LBP-82-1, 15 NRC 37, 41 (1982).

76 April 21, 1983, Memorandum and Order at 14.

the extent intervenor seeks to vindicate its antinuclear viewpoints, obviously its views will not be represented by the NRC Staff because they are not cognizable by this agency. Intervenor should take those value preferences to the Congress. To the extent that intervenor seeks to litigate legitimate factual disputes, there has been no adequate showing that the Staff will not resolve those matters during its normal review of the application. Accordingly, this aspect of the April 21, 1983, Memorandum and Order cannot withstand scrutiny.

The Appeal Board should resolve what appears to be a conflict between Licensing Boards on this factor (compare Indian Point, supra, with the instant case). Applicant believes that the Indian Point Board was correct as a matter of law and policy in its consideration of this factor, and that its rationale should be applied here to swing the balancing of this factor against intervenor. There has been no meaningful showing by intervenor, or finding by the Board, on the benefits to the public that will result from granting the late petition. In these circumstances it is appropriate to rely on the NRC Staff to represent whatever legitimate interest intervenor may have in issues that are cognizable by the NRC.

F. Possibly Broadening the Issues or Delaying the Proceeding (Factor Five).

The Licensing Board concluded that because the late filing resulted in delay of the proceeding, this factor must be evaluated as weighing against intervention, "but the weight to be given to the factor it [sic] should not be significant."[77] The underlying basis for this holding was that "[i]f there are outstanding questions involving public health and safety relating to operation of the plant, the necessary action to resolve them should be undertaken rather than attempting to quiet the matter by invoking the doctrine of estoppel by laches."[78]

This aspect of the April 21, 1983, Memorandum and Order does not withstand scrutiny. First, by weighing such factor lightly against intervenor, the Licensing Board simply ignores the fact that were it not for intervenor no hearing in this proceeding would be held. This approach is inconsistent with a recent decision of the Appeal Board in a different factual setting, which states that such intervention "will perforce broaden the now non-existent adjudicatory issues and delay conclusion of the proceeding."[79] Consequently, to charge intervenor

---

77 Id. at 16.

78 Id.

79 Grand Gulf, ALAB-704, supra, 16 NRC at 1730.

only with the time the late filing has taken and "any additional time that may further be expended in resolving the matter of lateness"[80] was incorrect.

Second, the Licensing Board suggests that an operating license proceeding is the only means available to resolve whatever questions may be raised concerning the operation of WNP-3. As discussed in connection with factor two, this simply is not the case. If in fact intervenor has significant concerns, they can be brought to the Commission's attention by filing a petition pursuant to 10 C.F.R. § 2.206.[81] Beyond that, the Licensing Board eviscerates Section 2.714 with its interpretation that "estoppel by laches" should not be invoked when "questions involving public health and safety relating to operation of the plant"[82] are raised. By that logic, the Board apparently has rejected any argument based on timeliness because safety questions are raised. This is patent legal error.

In addition, such consideration of whether issues can be raised in connection with the operation of WNP-3 has no bearing on the analysis performed when assessing whether late intervention will broaden the issues or delay the

---

80 April 21, 1983, Memorandum and Order at 16.

81 See text accompanying note 32, supra.

82 Id. at 16.

proceeding. Rather, these concerns are taken into account under factors two and four, discussed earlier. Therefore, to the extent that the Licensing Board mitigated the negative effect factor five had on the late filed intervention petition given its concerns that issues intervenor may raise will go unaddressed, the Licensing Board acted incorrectly.

Finally, to a large extent this last factor is concerned with questions of fundamental fairness, viz., whether Applicant is entitled to assume, after a certain period of time, that the parties to a hearing have been established with finality or, for similar reasons, whether there is to be a hearing or not.[83] There is absolutely no indication that the Licensing Board took this aspect of factor five into account. Clearly, Applicant was entitled to assume after the deadline for intervention passed that intervention was unlikely. Yet, the Licensing Board accorded this assumption no significance even though Applicant's assumption was based on the premises that deadlines established in NRC proceedings are to be followed and that, while late intervention can occur if justified, in no event would willful deviation from

---

83 Enrico Fermi, ALAB-707, supra, 16 NRC at 1766.

intervention deadlines be condoned. Accordingly, because the Licensing Board failed to weigh factor five heavily against intervention, its analysis is incorrect.

G. Balancing of the Five Factors.

The Licensing Board abused its discretion when balancing the five factors set forth in Section 2.714(a)(1). The first reason why it did so follows from errors in the legal and factual analysis underlying its analysis of each of the factors. As discussed above with respect to factor one, because intervenor willfully failed to comply with the deadline by which petitions to intervene were to be filed, the Licensing Board erred by reducing the otherwise heavy burden intervenor had to satisfy with respect to the other factors set forth in Section 2.714(a)(1) simply because the petiton was only months late. Applicant submits that intervenor should have been required to make a "compelling showing" as to those factors given its willful and knowing failure to file an intervention petition immediately after it learned the deadline for doing so had passed, and that no such showing has been made.

Second, there are valid and effective means available to intervenor for bringing to the attention of the Commission matters with which it is concerned, viz., filing a petition with NRC pursuant to 10 C.F.R. Section

2.206. Indeed, this intervenor has availed itself of that procedure. Yet the Licensing Board summarily discounted this process, contrary to clear Commission and Appeal Board precedent. Moreover, intervenors never even identified this option and discussed in its petition why such procedure was inadequate to bring its concerns to the attention of the Commission. As a result, this factor should have been weighed against intervention.

Third, a review of the record in this proceeding contradicts the holding of the Licensing Board that intervenor demonstrated its ability to make a significant contribution to the development of the record. Despite numerous decisions of the Appeal Board and other licensing boards requiring an affirmative showing on this factor, intervenor did not identify specifically its area of expertise, identify expert witnesses who would be available to testify in its behalf, and summarize the content of that testimony. The record is totally devoid of this essential information. At bottom, the Licensing Board had no basis for concluding that intervenor made any showing, let alone a compelling one, on this factor. Factor three, therefore, should have weighed against intervention.

Fourth, the Licensing Board could not assume that the interests of the intervenor would not be represented by the Staff. Intervenor was required to make a showing as to the interests or issues of concern to it which the Staff would not be able to address. It failed to do so. The Licensing Board accordingly had no basis to weigh this factor in favor of intervention.

Finally, the Licensing Board did not give sufficient weight to the possibility that this proceeding would be delayed or the issues broadened should the intervention petition be granted. In accordance with Appeal Board precedent, the Licensing Board should have taken into account the fact that but for these intervenors no operating license hearing would be held. The Licensing Board also should have recognized that Applicant was entitled to assume after the filing deadline passed that intervention was unlikely, or at least that the willful disregard of such deadline would not be condoned.

In sum, even treating all five factors with equal importance (as did the Licensing Board), it was an abuse of discretion to grant the untimely intervention petition. A close scrutiny of the underlying legal and factual ingredients indicate that in many instances the reasoning

of the Licensing Board was legally flawed and factually baseless. On these grounds alone, the decision of the Licensing Board should be reversed.

The second reason why the Licensing Board abused its discretion is that it apparently assigned all five factors the same level of importance. The Appeal Board has often stressed that the first, third and fifth factors should be of primary concern when deciding whether a late-filed petition to intervene should be granted.[84] Factors two and four are to be accorded relatively less weight. In fact, it is "most difficult to envisage a situation in which [these two factors] might serve to justify granting intervention" to one who fails to make an affirmative showing on the other three factors.[85]

The failure of the Licensing Board to take into account the relative importance of each of the factors clearly constitutes an abuse of discretion. Had it properly done so, factors one and five clearly would have outweighed factors two and four, even assuming the Licensing Board's underlying analysis of factors two and four was correct. Moreover, had the Licensing Board given the correct weight to factor one, intervenor would have been required to make a compelling showing as to factor

---

84 Grand Gulf, ALAB 704, supra, 16 NRC at 1730-31.

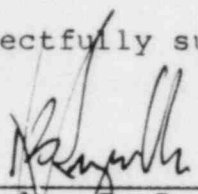
85 Summer, ALAB-642, supra, 13 NRC at 895.

three. As a result, it would have been impossible to conclude rationally that intervenor made such a showing given its conclusory statements regarding its ability to contribute to the record. Overall, this would have compelled rejection of the intervention petition.

IV. CONCLUSION

Accordingly, Applicant submits that the Licensing Board abused its discretion by granting the untimely petition to intervene, and urges the Appeal Board to reverse the Licensing Board and terminate the proceeding.

Respectfully submitted,



Nicholas S. Reynolds
Sanford L. Hartman
DEBEVOISE & LIBERMAN
1200 Seventeenth St., N. W.
Washington, D. C. 20036
(202) 857-9817

Counsel for Applicant

October 12, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-508-OL
	)	
	)	
(WPPSS Nuclear Project No. 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Brief in Support of Its Notice of Appeal" in the captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid this 12th day of October, 1983:

Morton Margulies, Esq.
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Adm. Judge Frederick J. Shon
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Adm. Judge Richard F. Foster
P. O. Box 4263
Sunriver, Oregon 97702

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

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

Stuart A. Treby, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Gerald C. Sorensen
Washington Public Power
Supply System
3000 George Washington Way
Richland, Washington 99352

Mr. Scott W. Stucky
Docketing & Service Branch
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. Kenneth W. Cook
Licensing Project Manager
Washington Public Power
Supply System
P. O. Box 1223
Elma, Washington 98541

Mr. Eugene Rosolie
Coalition for Safe Power
Suite 527
408 South West 2nd
Portland, Oregon 97204

Nicholas S. Reynolds