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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY
AND LICENSING APPEAL BOARD

In the Matter of

WASHINGTON PUBLIC POWER
SUPPLY SYSTEM

(WPPSS Nuclear Project No. 3)

Docket No. 50-503-OL

APPLICANT'S BRIEF IN SUPPORT
OF ITS NOTICE OF APPEALNicholas S. Reynolds
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March 20, 1984

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY
AND LICENSING APPEAL BOARD

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

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APPLICANT'S BRIEF IN SUPPORT OF
ITS NOTICE OF APPEAL

I. Introduction

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.¹

On April 21, 1983, the Licensing Board issued a Memorandum and Order in which it granted an untimely request for hearing and a petition to intervene filed by the Coalition for Safe Power.² That Order was vacated by

¹ 47 Fed. Reg. 40736 (1982).

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

the Appeal Board on November 15, 1983, and the Appeal Board remanded the proceeding to the Licensing Board with instructions to require the Petitioner to make a further showing as to its ability to assist in developing a sound record in the proceeding, one of the five factors considered pursuant to 10 C.F.R. § 2.714(a) when passing on untimely intervention petitions.³

On December 6, 1983, the Licensing Board issued an Order requiring Petitioner to make such a showing.⁴ After considering the pleadings filed by the Staff, Applicant and Petitioner, the Licensing Board issued its March 2, 1984, Memorandum and Order holding that Petitioner had demonstrated its ability to assist in developing a sound record and reinstating its previous Order admitting Petitioner as a party intervenor to this proceeding.⁵

Applicant now brings this appeal pursuant to 10 C.F.R. § 2.714a. It does so because whether Petitioner has satisfied its obligation to demonstrate an ability to

³ Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC ___, Nov. 15, 1983, slip opinion.

⁴ Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 3), Docket No. 50-508-OL, Order (Requiring Further Showing by Petitioner), December 6, 1983.

⁵ Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 3), Docket No. 50-508-OL, Memorandum and Order (Ruling on Further Supplement to Petition for Leave to Intervene), March 2, 1984 ("March 2, 1984, Memorandum and Order").

contribute to the development of a sound record is dispositive of whether there is to be any adjudicatory hearing in this operating license proceeding. In such circumstances it is essential to assure at each step of the process that the NRC has a good reason for allowing an adjudicatory hearing to be triggered.⁶

II. Summary of Argument

The Licensing Board abused its discretion when it reinstated its earlier ruling admitting Petitioner as a party to this proceeding. Petitioner opted to satisfy the requirements of Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2)⁷ in order to demonstrate its ability to assist in developing a sound record and thereby to justify its untimely intervention. The record in this proceeding reveals that Petitioner failed to satisfy the requirements of Grand Gulf, ALAB-704, supra. While Petitioner identified at least one witness it intended to present, it did not provide sufficient detail respecting that witness' proposed testimony such that the Licensing Board could reach a reasoned conclusion as to the worth of that testimony on one or more contentions admitted to the proceeding.

⁶ See WNP-3, supra, Nov. 15, 1983 slip op. at 24-25.

⁷ ALAB-704, 16 NRC 1725, 1730 (1982).

III. Argument

The Licensing Board Abused its Discretion When it Admitted Petitioner as a Party in this Proceeding

A. Applicable Legal Standards

In WNP-3, ALAB-747, supra, the Appeal Board suggested three ways Petitioner could demonstrate its ability to contribute to the development of a sound record in this proceeding. First, Petitioner could have identified at least one witness and provided the details of that witness' testimony regarding one or more of the contentions admitted to this proceeding. To do so, Petitioner was required to provide sufficient detail respecting such testimony to permit the Board to reach a reasoned conclusion as to the likely worth of the testimony.⁸

Second, Petitioner could have relied on its participation in other NRC proceedings to demonstrate its ability to contribute to the record in this proceeding. It could have established a relationship between the issues Petitioner litigated in other NRC proceedings and those it sought to litigate here. Alternatively, Petitioner could have provided sufficient information to enable the Licensing Board to draw an informed inference

⁸ WNP-3, ALAB-747, supra, Nov. 15, 1983, slip op. at 26.

that based on its participation in earlier NRC proceedings Petitioner can and will make a contribution to the record in this proceeding.⁹

Third, Petitioner could have demonstrated its ability to contribute to the record through the use of effective cross-examination. Apparently the critical showing required of Petitioner in this regard would have been its ability to use cross-examination to develop its case.¹⁰

B. Rationale of March 2, 1984, Licensing Board Memorandum and Order

The Licensing Board in its March 2, 1984, Memorandum and Order applied these legal standards to the January 10, 1984, Supplement to Petitioner's Request for Hearing, in which Petitioner sought to demonstrate its ability to contribute to the development of a sound record in this proceeding. The Licensing Board concluded that Petitioner opted to demonstrate its ability to contribute to the development of a sound record by endeavoring to meet the requirements of Grand Gulf, ALAB-704, supra.¹¹

Upon reviewing Petitioner's showing, the Licensing Board held that Petitioner identified one witness and provided sufficient details regarding his testimony to permit a reasoned conclusion that Petitioner will be able

⁹ Id.

¹⁰ Id. at 28-29 (Edles, J., concurring).

¹¹ March 2, 1984, Memorandum and Order at 2-3.

to assist in developing a sound record with respect to the contention on which the testimony will be proffered. That witness was Dr. Jack Smith.¹²

The Licensing Board reached the opposite conclusion with respect to another witness, Mr. Stuart Sandler. It held with regard to Mr. Sandler that Petitioner did not provide sufficient details regarding Mr. Sandler's testimony to establish that Petitioner will make a contribution to the development of a sound record as to the two contentions admitted in this proceeding on which Mr. Sandler would testify.¹³

The Licensing Board also ruled that Petitioner made only general comments as to the other methods set forth in WNP-3, ALAB-747, supra, by which it could demonstrate its ability to contribute to the development of a sound record in this proceeding. Accordingly, the Licensing Board gave the comments no consideration.¹⁴ It thereupon reinstated its earlier grant of intervention.

¹² Id. at 9-10.

¹³ Id. at 3-6.

¹⁴ Id. at 10.

C. The Licensing Board Abused its Discretion When it
Granted Petitioner Intervenor Status Based on
Representations Concerning Dr. Smith's Testimony

It is a basic precept of administrative law that adjudicatory decisions must stand or fall on the basis of the record upon which they rest. Accordingly, facts must be present on the face of the record which support the findings made by the decision-maker in an adjudicatory proceeding.¹⁵

In the context of this case, the Licensing Board was required to make a reasoned conclusion as to the likely worth of testimony proffered by Petitioner. As a result, Petitioner was obliged to state on the record and in sufficient detail the qualifications of the witnesses it would call and to set forth the nature of their testimony. Petitioner failed to do so. Accordingly, the Licensing Board abused its discretion when it found on the basis of the pleadings before it that Petitioner would contribute to the development of a sound record in this proceeding.

Witnesses' Qualifications. Petitioner identified Dr. Jack Smith as an expert witness it intended to call to testify concerning contention sixteen, which deals with the effects of the operation of WNP-3 on

¹⁵ E.g., Pacific Gas & Electric Co., ALAB-580, 11 NRC 227, 230-31 (1980).

aquatic biota of the Chehalis River. This obliged petitioner to establish that Dr. Smith was competent to testify as to this issue.

To do so, Petitioner represented that Dr. Smith is an "aquatic toxicologist with graduate degrees from Harvard University."¹⁶ Petitioner also stated that Dr. Smith had "broad experience with analysis of discharges into waterways, the control of chemical pollutants and the ecological impacts."¹⁷

The Licensing Board found that these statements were sufficient to establish Dr. Smith's expertise in the area on which he would testify. With respect to his education, the Licensing Board found that Applicant was "carping on . . . draftsmanship"¹⁸ when it argued that Petitioner failed to provide factual information regarding Dr. Smith's education.

The Licensing Board also found that "although his experience was not detailed,"¹⁹ Dr. Smith's work product indicated a capability that should assist in developing a

¹⁶ Intervenor's Further Supplement to Petition for Leave to Intervene, Dated January 10, 1984 ("Further Supplement") at 2.

¹⁷ Id.

¹⁸ March 2, 1984, Memorandum and Order at 8.

¹⁹ Id. at 8.

sour.d record.²⁰ A central element of this finding was the observation by the Licensing Board that Applicant stipulated²¹ to the admissibility of contention sixteen, the primary research for which was apparently provided by Dr. Smith, and that Applicant did not criticize the technical aspects of Dr. Smith's work product.²²

Applicant submits that the Licensing Board abused its discretion in holding that Petitioner demonstrated on the record that the proffered testimony of Dr. Smith bears on contention sixteen in a manner that will significantly assist in resolving the issues raised. The fact is that Petitioner never stated in what areas or when Dr. Smith received his graduate degrees from Harvard. Nevertheless, the Board found that Dr. Smith's standing as an aquatic toxicologist "relates to his receiving graduate degrees at Harvard University."²³ Without knowing the areas in which

²⁰ Id. at 8-9.

²¹ As discussed below, the stipulation to which the Licensing Board refers states expressly that it shall not be dispositive or probative in any way of any issue raised by any party on appeal of the April 21, 1983 Memorandum and Order. The instant appeal is one aspect of Applicant's appeal from that Memorandum and Order, which was reinstated in the Licensing Board's March 2, 1984 Memorandum and Order. See notes 27 and 28, infra, and accompanying text.

²² Id. at 9.

²³ Id. at 8.

his graduate degrees were received, there was no factual basis in the record for the Licensing Board to conclude that such is the case.

Moreover, even if the Licensing Board could assume from the language in Petitioner's Further Supplement that Dr. Smith's standing as an aquatic toxicologist "relates to his receiving graduate degrees at Harvard University,"²⁴ this assumption fails to provide a verifiable basis to establish Dr. Smith's educational qualifications. The Licensing Board and parties to this proceeding were entitled to sufficient information to allow them to verify, independent of Petitioner's representations, the relationship of Dr. Smith's graduate degree to his standing as an aquatic toxicologist.²⁵ Without knowing the date on which Dr. Smith graduated or the exact graduate degrees attained from Harvard, it was virtually impossible to perform this verification. Indeed, Applicant's counsel attempted and was unable to verify Dr. Smith's credentials by contacting Harvard and

²⁴ Id.

²⁵ Cf., Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-95 (1979) (where organization seeking to intervene in operating license proceeding stated that a certain number of its members lived within close proximity to the site of a power reactor but refused to disclose the names and addresses of those members, the licensing board properly denied intervention because, absent disclosure of the name and address of one such member, it was not possible to verify that such members existed).

providing both the School of Public Health (which has a Toxicology Department) and the Central Alumni Office with the information provided by Petitioner.

The Licensing Board also abused its discretion when it held that Dr. Smith's work product was indicative of his ability to contribute to the development of a sound record in this proceeding. In large measure, this finding rested on Applicant's stipulation to contention sixteen and on the fact that Applicant has "not criticized the technical aspects of Dr. Smith's work product."²⁶

However, neither of these observations support the conclusion of the Licensing Board.

The stipulation regarding contention sixteen to which the Licensing Board referred states that "Applicant makes no concession as to the veracity of such [contention] or whether [it is] admissible as a matter of law."²⁷ It further states, as follows:

This stipulation shall not prejudice the right of any party to raise on appeal any issue in connection with the April 21, 1983 Memorandum and Order of the Atomic Safety and Licensing Board. Nor shall this stipulation be dispositive or in any

²⁶ March 2, 1984, Memorandum and Order at 9.

²⁷ Washington Public Power Supply System (WPPSS, Nuclear Project No. 3), Transcript of Special Preparing Conference, August 17, 1983, at 7, 77-78 and Collective Counsels' Exhibit 1 at 1-2.

way probative of any issue raised by any party on appeal of the April 21, 1983 Memorandum and Order.²⁸

Therefore, while stipulating to the admissibility of the contention, Applicant did not in any way recognize or even comment upon the technical merits of the basis for contention sixteen. More importantly, the parties to the stipulation all agreed that it would not be probative or dispositive of any issue raised by any party on appeal of the April 21, 1983 Memorandum and Order. This is an appeal from the March 2, 1984 Memorandum and Order reinstating the Board's earlier orders granting petitioner intervenor status. Those orders include the April 21, 1983 Memorandum and Order. Accordingly, it was an abuse of discretion for the Licensing Board to view that stipulation as support for its views regarding the substance of Dr. Smith's work product as bearing on Petitioner's ability to contribute to the development of the record, given the agreement of the parties that the stipulation would not be probative of any issues raised on appeal as to whether Petitioner should be granted intervenor status.

Similarly, the Licensing Board could not logically draw a favorable inference as to the work product of Dr. Smith because the Applicant did not criticize

²⁸ Collective Counsels' Exhibit 1 at 2.

technical aspects of the basis for contention sixteen, which Dr. Smith prepared.²⁹ When Applicant challenged contention sixteen on legal grounds, it did so in its Response in Opposition to Supplement to Request for Hearing and Petition for Leave to Intervene filed on July 6, 1983. The case law is clear that in such pleadings the technical merits of the bases for contentions are not to be addressed.³⁰ Similarly, at this pretrial stage, Applicant was proscribed from addressing the merits of the proffered testimony when responding to Petitioner's Further Supplement. Thus, the Licensing Board could not now draw an inference unfavorable to Applicant on the ability to contribute issue because it did not address the technical validity of contention sixteen at this pretrial stage. In sum, the Licensing Board abused its discretion when it based its finding on the ability to contribute issue on the conclusion that Dr. Smith was qualified to testify as to issues raised in contention sixteen.

Proposed Testimony. With regard to the substance of Dr. Smith's testimony, Petitioner stated that this witness will "support" Contention Sixteen. It then provided a summary of Dr. Smith's "initial review" of the

²⁹ See March 2, 1984, Memorandum and Order at 9.

³⁰ E.g., Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974).

WNP-3 operating license application and various Staff review documents.³¹ Again, the Licensing Board abused its discretion by improperly assuming that such initial review constituted proposed testimony as required by Grand Gulf, ALAB-704, supra.

Petitioner was required to summarize the likely content of Dr. Smith's testimony.³² Instead, it summarized an initial review of certain documents performed by Dr. Smith. Petitioner did not state that this initial revision would constitute Dr. Smith's testimony.

The Licensing Board found that it was "caviling to state the summary was not indicate^d to be Dr. Smith's testimony."³³ The Licensing Board further stated that Petitioner represented that this summary will constitute Dr. Smith's testimony "when in the paragraph following the summary [petitioner] states that the information in the supplement is in no way a representation of Coalition's entire case and it reserves the right to expand on the testimony of the named experts."³⁴

³¹ Further Supplement at 3.

³² WNP-3, ALAB-747, supra, at 18.

³³ March 2, 1984, Memorandum and Order at 9.

³⁴ Id. at 9.

Applicant respectfully submits that the Licensing Board assumed the key finding that it was required to make, i.e., that Dr. Smith's initial review would constitute his testimony. As a result, it abused its discretion. Petitioner stated flatly with respect to its other proposed witness, Mr. Sandler, that he would testify as to certain matters.³⁵ Petitioner did not unambiguously make this representation as to Dr. Smith. It could be that the difference in terminology used by Petitioner was deliberate. In any event, the record is not clear that Dr. Smith's initial review would constitute his testimony. Accordingly, the Licensing Board abused its discretion when it found, based on a general conclusion at the end of Petitioner's Further Supplement, that Dr. Sandler's initial review would constitute his testimony.

Construction of Petitioner's Pleading. Underlying much of the Licensing Board's March 2, 1984, Memorandum and Order is its conclusion that as a pro se participant in this proceeding, Petitioner may be held to a lower standard than those represented by counsel.³⁶ Based on this observation, it apparently read Petitioner's Further Supplement with a more forgiving eye than might otherwise have been the case.

³⁵ Further Supplement at 2.

³⁶ March 2, 1984, Memorandum and Order at 2.

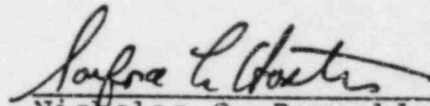
Applicants submit that the Licensing Board abused its discretion by incorrectly applying this less stringent standard. Although Petitioner may not be represented by counsel, it has stated that "its involvement since 1976 in NRC cases has resulted in an understanding of NRC regulations" ³⁷ Further, by its own count Petitioner has actively participated in several NRC cases, implying that it has gained a certain degree of sophistication in NRC practice and procedure. Under these circumstances, the policy behind holding pro se participants to a lower standard than those represented by counsel should not be applied, and Petitioner should not be treated as a novice, pro se participant. The Licensing Board abused its discretion by doing so when it liberally construed Petitioner's Further Supplement as it would a pleading filed by a novice in NRC practice and procedure.

³⁷ Intervenor's Answer to Applicant's Appeal, October 27, 1983, at 8.

IV. Conclusion

In light of the foregoing, Applicant submits that the Licensing Board abused its discretion by reinstating its prior Order granting Petitioner intervenor status. Accordingly, the March 2, 1983 Memorandum and Order should be vacated and this proceeding dismissed.³⁸

Respectfully submitted,



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March 20, 1984

³⁸ Applicants are filing simultaneously with this Appeal a Motion with the Licensing Board requesting that it reconsider its March 2, 1984 Memorandum and Order and/or refer or certify to the Appeal Board the question of whether, in light of the Licensing Board's findings as to the ability of Petitioner to contribute to the development of a sound record only on contention sixteen, the Licensing Board should have limited the scope of Petitioner's intervention to contention sixteen. In this Motion Applicant contends that it was arbitrary and capricious for NRC to hold that Petitioner may litigate all of its admitted contentions even though as to two of them the Licensing Board found that it was unable to contribute to the development of a sound record and where as to the balance of its contentions (excluding contention sixteen) no findings were made regarding its ability to contribute.

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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 20th day of March, 1984:

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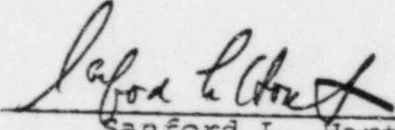
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