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October 26, 1983

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

Adm. Judge Howard A. Wilber
Atomic Safety and Licensing
Appeal Board
U. S. Nuclear Regulatory
Commission
Washington, D. C. 20555

Adm. Judge Gary J. Edles
Atomic Safety and Licensing
Appeal Board
U. S. Nuclear Regulatory
Commission
Washington, D. C. 20555

Re: Washington Public Power Supply System
(WPPSS Nuclear Project No. 3)
Docket No. 50-508-OL

Gentlemen:

In accordance with our obligation to identify and address recent developments in the law which affect pending cases, the Washington Public Power Supply System ("Applicant") hereby addresses the impact of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC ___ (September 30, 1983, slip op.), on the captioned WNP-3 proceeding. Applicant filed its Notice of Appeal and Supporting Brief on October 12, 1983, in which it urged the Appeal Board to reverse the decision of the WNP-3 Licensing Board granting an untimely petition of the only petitioner requesting a hearing regarding the WNP-3 operating license application, and to dismiss the proceeding. Applicant's counsel received a copy of the slip opinion in Shoreham through the normal NRC distribution process after the filing of the October 12 Notice and Brief.

The Appeal Board in Shoreham affirmed the decision of a licensing board denying an untimely petition to intervene. Applicant believes that portions of the Appeal Board's analysis are directly applicable in the case at

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bar. In addition, Applicant believes that Shoreham supports its position that the Licensing Board here abused its discretion by granting the untimely petition to intervene.

In Shoreham, the Appeal Board again stressed the requirement that a petitioner, when addressing the third factor governing late intervention, set forth with particularity the precise issues it plans to cover, identify its prospective witnesses and summarize their proposed testimony.¹ The Appeal Board also observed that while the petitioner there may have participated in the construction permit proceeding for Shoreham, such participation did not "permit the conclusion that [petitioner's] participation in that proceeding made a substantial contribution to development of the record."²

Applicant argues in its Brief in Support of its Notice of Appeal that the Licensing Board could not simply assume that mere party status in other proceedings demonstrates an ability to contribute to the record which is transferable to the instant case and that the Licensing Board could not have weighed this factor in favor of late intervention given intervenor's failure to identify its proposed witnesses and the substance of the testimony they would offer.³ The Appeal Board decision in Shoreham confirms that the participation by the intervenor at bar in other NRC proceedings does not itself establish that intervenor will make a substantial contribution to the evidentiary record. Nor has intervenor made an adequate showing as to its proposed witnesses and the substance of their testimony. Therefore, the holding by the Licensing Board in this proceeding to the contrary cannot withstand scrutiny.

¹ Shoreham, ALAB-743, supra, Sept. 30, 1983, slip op. at 22. The third factor governing late intervention is the extent to which the petitioner's participation might reasonably be expected to assist in developing a sound record. 10 C.F.R. § 2.714(a)(1)(iii).

² Shoreham, ALAB-743, supra, Sept. 30, 1983, slip op. at 24.

³ Washington Public Power Supply System (WPPSS Nuclear Project No. 3), Docket No. 50-508-OL, Applicant's Brief in Support of its Notice of Appeal, October 12, 1983, ("Applicant's Brief") at 20-27.

Second and equally significant, the analysis by the Licensing Board here is directly at odds with the Appeal Board decision in Shoreham regarding the significance of intervenor's unjustified lateness in filing its petition to intervene. The Licensing Board in WNP-3 reduced the showing intervenor had to make with respect to the remaining factors governing intervention because "the lateness in making the filing is measured in months rather than years. . . ."4 Applicant contends in its Brief that the Licensing Board should have required intervenor to make a "compelling showing" as to the remaining factors governing intervention because of its unjustified tardiness.5 Shoreham confirms Applicant's view. The Appeal Board stated in Shoreham, as follows:

To our knowledge, it has never been suggested, let alone held, that one whose interest in the outcome of a proceeding is clearly affected by a new development is entitled to withhold asserting that interest to await the result of preliminary legal skirmishing concerned with the development. To the contrary, the expectation has always been that, upon learning of the development, the would-be intervenor will spring into action.6

The Appeal Board also observed that simply because unjustified tardiness may be measured in months rather than years does not, depending on the status of the proceeding, alter the burdens materially.7 In short, when without any justification an untimely petition to intervene is filed, those seeking to intervene must make a compelling showing as to the remaining factors governing

4 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") at 10.

5 Applicant's Brief at 9-14.

6 Shoreham, ALAB-743, supra, Sept. 30, 1983, slip op. at 19.

7 Id. at 20.

intervention, and the burden associated with that showing may not be reduced, as the Licensing Board held, simply because untimeliness is measured in months and not years.

One final observation is appropriate. A suggestion could be made that Shoreham may be distinguished because the late intervention sought there was only months before the hearing was to begin whereas here late intervention was sought well before commencement of the hearing. Applicant submits that this suggestion should be rejected. As an analytical matter, when a hearing is likely to commence bears only on the fifth factor governing untimely intervention, viz., whether and if so, to what extent, a grant of late intervention will have the potential for delay. Manifestly, it does not bear on the first or third factors governing untimely intervention, viz., whether petitioner had good cause for filing its untimely intervention petition or whether a petitioner will make a substantial contribution to the record.

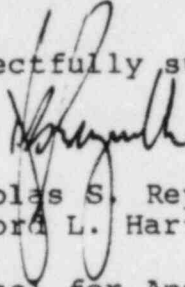
Moreover, undergirding the Appeal Board's analysis in Shoreham was its belief that the policy favoring public participation in nuclear licensing adjudications "must be viewed in conjunction with the equally important policy favoring the observance of established time limits"⁸ and that to conclude that public participation transcends in importance all other considerations would make a "mockery of the intervention petition deadline that is included in every notice of hearing or opportunity for hearing"⁹ Applicant submits that these underlying policy considerations, expressly recognized and applied in Shoreham, were misapplied by the Licensing Board in this proceeding and compel the reversal of the Licensing Board's decision granting untimely intervention.

⁸ Shoreham, ALAB-743, Sept. 30, 1983, slip op. at 15 n. 37 (emphasis added).

⁹ Id. at 29 n. 50.

We appreciate this opportunity to provide the Appeal Board with our views on this recent development in NRC case law.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'N. Reynolds', is written over the typed names.

Nicholas S. Reynolds
Sanford L. Hartman

Counsel for Applicant

cc: Service List