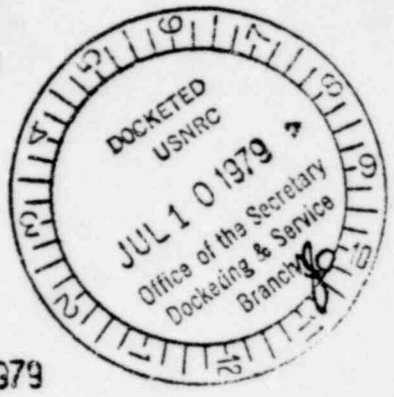
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Michael C. Farrar

SERVED JUL 10 1979

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

Mr. Russell W. Busch, Seattle, Washington, for the Upper Skagit Indian Tribe and the Sauk-Suiattle Indian Tribe, and Mr. Donald S. Means, LaConner, Washington, for the Swinomish Tribal Community, appellants.

Messrs. F. Theodore Thomsen and Douglas L. Little, Seattle, Washington, for the appellees, Puget Sound Power & Light Company, et al.

Messrs. Richard L. Black and Daniel T. Swanson for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

July 9, 1979

(ALAB-552)

We now have before us for a second time the untimely petition of three Indian tribes[1/] for leave to intervene in

1/ The Upper Skagit Indian Tribe, the Sauk-Suiattle Indian Tribe and the Swinomish Tribal Community (hereinafter "the tribes").

this construction permit proceeding involving the proposed Skagit nuclear facility, which would be located in the Skagit River Valley in the northwest portion of the State of Washington. Last January, we vacated (on the applicants' appeal) a Licensing Board decision[2] granting the petition and remanded the matter for further consideration. Unpublished order of January 12, 1979, explained in ALAB-523, 9 NRC 58[3]. On June 1, the Licensing Board entered an order denying the petition. LBP-79-16, 9 NRC ____.[4] The tribes appeal. The appeal is supported in part by the NRC staff[5] and opposed by the applicants in its entirety.

A. The tribes' intervention petition was filed on June 13, 1978 -- almost three and a half years after the

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2/ LBP-78-38, 8 NRC 587 (1978).

3/ The tribes petitioned the Commission for review of the January 12 order and ALAB-523. By order of March 8, 1979, the Commission deferred consideration of that petition "pending completion of action on the remanded issue by the Licensing Board and any subsequent review of it by the Appeal Board".

4/ The Board had orally announced that result during a conference on April 24 but had indicated that the appeal period would not commence to run until a written order in explanation of its ruling had issued (Tr. 11781-83).

5/ In the staff's view, the tribes should be permitted limited intervention for the purpose of participating in the proceeding on one of the several issues addressed in their late petition.

deadline (January 20, 1975) prescribed in the notice of hearing.[6/] The petition represented that each of the tribes possessed federal recognition and enjoyed fishing rights in the vicinity of the site by virtue of the Treaty of Point Elliot, 12 Stat. 927, which was proclaimed in 1859. According to the petition, the tribes' purpose in seeking belated participation in the proceeding was to pursue three special concerns possessed by them. "In very general terms", these concerns were described in ALAB-523 as being "(1) the socioeconomic impact of the plant on the tribes' fishery and community; (2) possible unique genetic impact of plant radiation due to the tribes' asserted greater exposure risk and higher than average rate of interrmarriage; and (3) the effects of various plant components and of construction work on the Skagit River environment and fish population". 9 NRC at 60, fn. 8.

Section 2.714(a) of the Commission's Rules of Practice, 10 CFR 2.714(a), contains provisions specifically dealing with late intervention petitions:

> Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer, or the atomic safety

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6/ See 39 Fed. Reg. 44065, 44066 (December 30, 1974).

> and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:
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> (i) Good cause, if any, for failure to file on time.
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> (ii) The availability of other means whereby the petitioner's interest will be protected.
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> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.
>
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In obvious recognition of the pivotal importance of the five criteria to the outcome of their petition, the tribes addressed each of them and asserted that they favored allowing late intervention. As summarized in ALAB-523, on the matter of the existence of "good cause" for their extreme tardiness the tribes

> explain first that, at the time that they could have made a timely filing, they were deeply involved in litigation that ultimately led to judicial recognition of their treaty fishing rights. United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), affirmed, 520 F.2d 676 (9th Cir. 1975), certiorari denied, 423 U.S. 1086

> (1976). Subsequently, they claim, post-trial litigation and efforts to establish effective management and enforcement systems at their fisheries occupied both their time and their limited retinue of legal and scientific experts. Third, they contend that, due to newly available information, difficulty in gaining access to the record, and inadequate environmental statements, they had only recently formed an accurate picture of the potential effects of the Skagit project. Finally, they assert that the United States has a trust responsibility to protect the tribes' treaty resources and that they had therefore reasonably been relying on their trustee -- through the NRC, the Department of the Interior, or the Forest Service -- to act on their behalf. But, in their view, no Federal entity had fulfilled that responsibility; and they therefore concluded, "faced with the growing realization that they have a great deal to lose, [that] intervention [was] the only practical course." Petition to Intervene, p. 13.

ALAB-523, 9 NRC at 60, fn. 6.

In its decision last November which granted intervention,[7/] the Licensing Board took note of the Section 2.714(a) criteria. Nonetheless, as we read the decision, the result reached by the Board was not based upon an application of the criteria to the facts of this case. Rather, it appeared to us to rest on the premise that "the petition, having been filed by Indians, could not be denied in any circumstances, even if there were inexcusable delay or prejudice to other parties" -- a premise in turn founded upon the Board's conception of the trust obligation owed by the United States

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7/ LBP-78-38, fn. 2, supra.

to the tribes. See ALAB-523, 9 NRC at 61-62. In our view, the premise -- which had not been suggested by the tribes -- was unsupportable. More specifically, we held that, whatever might be "the relationship between the United States Government and treaty Indians in general, between the government and the particular tribes seeking intervention here, or between specifically named Federal agencies[8/] and those tribes", that relationship could not serve to justify simply ignoring the delay. Id. at 62-63. To the contrary, the status of the tribes was relevant only on the question of the adequacy of the excuse for the delay. Accordingly, in remanding for further consideration of the petition on a proper application of the factors set forth in Section 2.714(a), we said: "in now resolving that question the Board below may take into account, inter alia, whether and to what extent the tribes may have for a time justifiably relied on government agencies to protect their interests. In that regard, the Board should examine more closely than before any specific trust responsibilities owed the tribes". Id. at 63, fn. 16 (emphasis in original).

B. It is against this background that we turn now to examine the tribes' appeal from the June 1 order entered by

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8/ See 9 NRC at 62, fn. 13.

the Licensing Board following its reconsideration of the matter pursuant to the directive contained in ALAB-523. As earlier noted, that order denied intervention; the Board ruling that (1) the tribes' tardiness was inexcusable and (2) the showing made on the other four Section 2.714(a) factors was insufficient to overcome the want of good cause for the late filing.

The appropriate starting point of our inquiry is the substantiality of the reasons assigned by the tribes for waiting well over three years before seeking to intervene. As observed in ALAB-523, "a strong excuse for lateness will attenuate the showing necessary on the other four factors". 9 NRC at 63. See also, Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 22 (1977), affirmed, CLI-78-12, 7 NRC 939 (1978). The converse is, of course, equally true: "where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong". Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977) and cases there cited. In the instance of a very late petition, the strength or weakness of the tendered justification may thus prove crucial. For, obviously, the greater the tardiness the greater the likelihood that the

addition of a new party will delay the proceeding -- e.g., by occasioning the relitigation of issues already tried.[9] Although the delay factor may not be conclusive, it is an especially weighty one. Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976).[10]

1. The first excuse offered by the tribes for the lateness of their petition is that their treaty fishing rights were first adjudicated in United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), affirmed, 520 F.2d 676 (9th Cir. 1975), certiorari denied, 423 U.S. 1086 (1976). Prior to that time, they claim, they possessed only "paper" rights, insufficient to provide a practical basis for seeking intervention.

9/ In this connection, by the time the Licensing Board had its initial opportunity to consider the tribes' petition, evidentiary hearings covering approximately 11,000 transcript pages had already taken place. As we understand it, the first and third of the three issues which the tribes now seek to litigate (see p. 3, supra) were treated during the course of those hearings.

10/ In Clinch River, we quoted with approval our previous observation that "[u]ndeniably, the delay factor is a particularly significant one; indeed -- barring the most compelling countervailing considerations -- an inexcusably tardy petition would (as it should) stand little chance of success if its grant would likely occasion an alteration in hearing schedules". Long Island Light Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650-51 (opinion of Mr. Rosenthal speaking for the entire Board on the point).

We need not pause to consider the correctness of that claim, which is vigorously challenged by both the applicants and the NRC staff. We also may put to one side the question (not addressed by the tribes) whether -- and, if so, why -- the formal adjudication of their treaty rights was a condition precedent to the assertion of those concerns referred to in their petition which did not relate to those rights (e.g., radiation effects). Be all that as it may, the fact remains that United States v. Washington was decided by the district court in the tribes' favor in February 1974, some eleven months before the deadline for filing intervention petitions. Nor are the tribes helped by their insistence that only after the court of appeals affirmed that decision in mid-1975 "would it have been reasonable to assert [their treaty] rights in another forum". For, even were that dubious proposition to be accepted, the tribes would still be confronted with the necessity of explaining why another three years elapsed before the intervention petition was filed.

2. At least in part, that explanation appears to be that, in the wake of the court of appeals decision, the tribes and their limited retinue of legal and scientific experts were preoccupied with other matters. A similar excuse for a tardy filing was rejected by us in Duke Power Co.

(Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644 (1977):

> Most persons in our society are confronted with many and varied demands upon their time. The practical effect of acceptance of petitioner's explanation therefore would be free license to make the timing of an intervention petition a matter wholly dictated by personal convenience. The contemplation of the Commission's Rules of Practice is clearly otherwise. Nor could any adjudicatory process function effectively, if at all, in such circumstances.

A reconsideration of the matter has given us no cause to alter that view. In this respect, there is nothing unique about the tribes' situation. Participation in any complex adjudicatory proceeding -- whether being conducted in the courts or before an administrative agency -- is both time-consuming and a drain on the often limited resources of the participants. This being so, what the tribes (in common with the Cherokee petitioner) ask is that the universally accepted practice of prescribing deadlines for intervention petitions be discarded by this Commission in favor of a rule which would permit each prospective intervenor to decide for himself the precise time at which he should transfer his attention and resources from the pursuit of other concerns. We repeat the thought expressed in Cherokee: were such a rule adopted the adjudicatory process likely would break down entirely. That consideration may explain why the tribes have not provided

us with a single judicial or agency precedent in support of their "otherwise preoccupied" excuse.

3. What this leaves are the two other (and inter-related) justifications which have been offered by the tribes for the late filing. The first is (Br. p. 7) that "there was not sufficient information available concerning the proposed nuclear plants to enable them to make an informed decision as to whether, and on what points, intervention was advisable". On this score, the Licensing Board's rejoinder had been, in part, that the proposed nuclear facility had received extensive publicity in the Skagit River area and the applicants' plans had been made publicly available. By way of rebuttal, the tribes maintain (Br. p. 8) that much of the publicity was favorable to the facility and, in any event, it "should not be taken to overwhelm the simple argument that the Indians were unable to determine, in time, that these plants might pose a risk to their health and to their treaty fishery" (emphasis supplied).[11/] In this connection, they cite a February 28, 1975 letter sent to two of the tribes by an official of the Fish and Wildlife Service of the Department of the Interior, in which the opinion had been expressed that the "physical structure and operation" of the proposed facility would

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11/ The tribes do not illume what they mean by "in time". See discussion, pp. 17-18, infra.

have a "minimal adverse impact on existing resources of the Skagit River".[12/]

Secondly, the tribes renew (Br. p. 10) the claim that they had relied to their detriment upon "their federal trustee to insure that their health and their treaty resource would be protected" and, in addition, upon "environmental impact statements prepared by the NRC which created a false sense of security". For support for this claim, we are referred to the tribes' September 5, 1978 reply brief below.

That brief pointed (at pp. 16-18 and 32-34) to various statements in the Skagit FES[13/] and by Interior[14/] which had suggested that, in the view of their authors, the proposed facility would have minimal effect upon the Skagit River fishery and (from a socioeconomic standpoint) the surrounding communities. In addition, as requested by the Licensing Board,[15/] that brief addressed the question whether the

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12/ The letter had gone on to indicate that "[t]here is a potential impact, however, if a channel must be dredged up the Skagit River to accommodate the barge which is to deliver the large reactor vessel. This is being investigated".

13/ The FES was published in May 1975. A final supplement to it issued in April 1977.

14/ Most particularly, the February 1975 letter referred above.

15/ See the August 28, 1978 letter from the then Chairman of that Board to the tribes' counsel.

tribes had asked Interior's Bureau of Indian Affairs to participate in this proceeding on their behaif and, if not, whether they had believed that the Department "would automatically and sua sponte" do so. The response was (pp. 31-34) that, although the proposed project had been discussed with Interior lawyers during meetings in 1976 and 1977 concerning dam construction on the Skagit River, it could not be determined whether at those meetings -- or prior thereto -- tribal representatives had called upon Interior to intervene or to provide "help of a more general nature" (or had believed that Interior would do so on its own initiative). Subsequently, in the fall of 1977, an Interior lawyer had been requested to "consider the possibility of United States intervention" and that, "after a period of time", the tribes' attorneys had been advised that Interior "would not be intervening and [thus] the [tribes] should prepare their own intervention". According to the tribes, it was at that point that they "sought to become familiar with the record in this proceeding, to seek expert opinion and to determine whether intervention was warranted".

In short, if we understand the tribes' position correctly, at bottom it is this: Although in January 1975 they were fully aware of the proposal to build the Skagit

facility in the vicinity of their fishery and community, they did not have at their disposal sufficient information on which to form an independent judgment respecting whether its construction and operation would adversely affect their interests. Rather than make their own endeavor to acquire such information, they chose to rely, as they assertedly were entitled to, upon the expressed opinion of both Interior and the NRC staff that the aquatic and socioeconomic effects would be insignificant. As a consequence of such reliance, they neither sought to intervene in the proceeding themselves nor (apparently) specifically requested Interior to do so on their behalf. At some point in 1977, however, they became concerned that in reality their interests might be harmed by the proposed facility and then asked Interior "to consider the possibility of United States intervention" as their trustee. Only after Interior indicated that it would not pursue that course did they seek for the first time to look into the matter of intervention themselves.

On the record before us, we have several difficulties with this line of reasoning. To begin with, giving the widest possible reach to the trustee relationship as it has been defined over the years in the numerous judicial

decisions cited by the tribes to the Licensing Board[16/] -- as well as affording full recognition to the sanctity of treaty rights possessed by Indians[17/] -- it does not seem to us that Interior (or any other federal agency) was perforce under an obligation to intervene in this proceeding on the tribes' behalf.[18/] To be sure, the tribes may have had a right to look to Interior, and other federal agencies as well, to scrutinize the proposal closely from the standpoint of the protection of tribal interests. And we may further assume for present purposes that, upon an agency determination that those interests might be threatened by the proposal, some affirmative federal action -- possibly including intervention -- would have been required to avoid the threat becoming a reality. From all that appears, however, both Interior and the NRC staff pursued actively whatever duty of investigation they may have owed the tribes and concluded that tribal interests

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16/ E.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); United States v. Kagama, 118 U.S. 375, 384 (1886); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); Morton v. Mancari, 417 U.S. 535 (1974).

17/ E.g., Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968).

18/ We do not read the tribes' papers as suggesting the existence of such an obligation.

would not be significantly affected by the construction and operation of the facility.[19/] It is our further impression that the passage of time has not altered that conclusion; i.e., that no federal agency which has examined the proposed facility now shares the tribes' concerns.

Neither the NRC nor Interior purported to guarantee the correctness of their ultimate conclusions regarding impact upon the tribes. And our examination of the relevant jurisprudence discloses no basis upon which such a warranty might be implied as a matter of law. Thus, it is not enough for the tribes simply to assert that they were lulled into a false sense of security by the appraisals of impact given them by Interior or reflected in the FES prepared by the NRC staff. What the tribes must additionally establish is that, whether because of inadequate investigation on the part of the federal agency or for some other reason, they were furnished erroneous information on matters

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19/ It may well be that neither agency focused upon whether, because of interrmarriage considerations, radiation releases during normal plant operation or under accident conditions might have a greater effect upon the tribes' members than upon the population as a whole. This was quite understandable, however, given the seeming unavailability (even today) of any concrete information on the subject. Moreover, the tribes do not assert that they had been supplied reason to believe that any federal agency was looking into that possibility. And, insofar as the record discloses, they did not request that it be investigated.

of basic fact and that it was reliance upon that information which prompted their own inaction prior to June 1978.

We find that, to this point at least, no such showing has been attempted. More specifically, the tribes have not endeavored to explain the respect(s) in which the NRC staff, Interior or other federal agencies misrepresented any fact (then known or ascertainable) which had a possible bearing upon the Skagit facility and the likely effects of its construction and operation upon tribal interests. Nor have we been pointed to any known or ascertainable material fact not disclosed by the agency which, had it been disclosed, might have induced the tribes to seek intervention at an earlier time.

Beyond these deficiencies, the tribes' papers do not present a clear picture as to precisely when, and by what means, they discovered (if they did) that a misrepresentation or non-disclosure of a material fact had occurred (and what it was). Needless to say, the time element assumes crucial importance in judging whether the tribes were justified in not merely failing to meet the January 1975 filing deadline, but waiting until June 1978 before seeking to intervene. If, for example, they had first become aware

in 1976 that the factual information made available to them by federal agencies might be materially inaccurate, there would remain the question why they had not then undertaken to assert their interests.

C. The burden of persuasion on the "good cause" question rests, of course, upon the tardy petitioner. Our just-reached conclusion that there are crucial gaps in the tribes' showing thus would allow us to decide now that good cause was lacking and to proceed to consider and weigh on that basis the other four factors set forth in Section 2.714(a).

In the exercise of our discretion, however, we have elected to provide the tribes with a fresh opportunity to fill the gaps. As earlier noted, in light of the extreme tardiness of the tribes the determination on "good cause" may well turn out to be decisive. And, although we have held that the special status which is enjoyed by the tribes vis a vis the United States is not of itself a sufficient foundation for ignoring the dictates of Section 2.714(a), nonetheless every reasonable precaution should be taken to insure that they have not been excluded from this proceeding simply because of ignorance of the ingredients of the demonstration required to overcome their lateness in arriving on the scene.

Accordingly, the tribes may file a supplemental memorandum within 21 days of the date of this order for the sole purpose of curing those deficiencies in their presentation to date which have been identified in this opinion, pp. 17-18, supra. We wish to emphasize that the memorandum is to be so confined and should cover each of the identified deficiencies with particularity.[20/] A mere rehearsal of the generalities contained in prior submissions to this Board or to the Board below will not suffice. Nor will any advantage be derived from a further discussion of either the excuses for lateness which we already have found to be insubstantial or the tribes' view of the extent of their special rights as Indians or as treaty beneficiaries.

20/ In other words, in the instance of an asserted reliance on an erroneous statement of material fact, the memorandum should specify (1) where that statement appeared; and (2) when, and through what source, the tribes first learned that the statement was likely or possibly in error. If the claim is that there was a failure on the part of a federal agency to disclose to the tribes a germane fact which either was or should have been known to that agency, the memorandum should similarly specify (1) the nature of that fact; and (2) when, and through what source, the fact first came to the tribes' attention.

The other parties may respond to the supplemental memorandum within 10 days of the date on which it is served upon them. Upon receipt of the responses, we will act expeditiously on the tribes' appeal.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board