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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

PUGET SOUND POWER & LIGHT COMPANY,
ET AL.

(Skagit Nuclear Power Project,
Units 1 and 2)

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Docket Nos. STN 50-522
STN 50-523

NRC STAFF'S RESPONSE TO MOTION TO DIRECT CERTIFICATION
STAY PROCEEDINGS, AND TO REVIEW ACTIONS OF THE LICENSING BOARD

I. BACKGROUND

On October 17, 1979, Intervenor SCANP submitted the above Motion which in general, requested the Appeal Board to (1) direct the Chairman of the Licensing Board to certify certain rulings and actions to the Appeal Board pursuant to 10 CFR §§ 2.730(f) and 2.718(i); (2) stay the proceedings below; and (3) vacate certain orders of the Licensing Board with further instructions to the Licensing Board to issue orders which comport with applicable NRC regulations, Commission instructions, the Administrative Procedure Act, and which afford SCANP due process of law (Motion, p. 1). Subsequently, on October 24, 1979, SCANP filed a Supplement to its Motion to Direct Certification which indicated that due to the postponement of the hearings on geologic-seismic issues that resulted from telephone conference calls between the Board and the parties on October 22, 1979, SCANP was withdrawing that part of the motion which relates to SCANP's assertion that the schedule imposed by the Board denied SCANP a reasonable opportunity to prepare for the hearings

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(Part IV of SCANP's Motion of October 17).^{1/} However, SCANP indicated that the other issues raised in SCANP's Motion pertaining to limitation of discovery, scope of geologic-seismic review, and Radon-222 are still proper issues to be considered by the Appeal Board. Accordingly, this response will address the remaining issues raised in SCANP's certification Motion -- namely (1) whether the Licensing Board properly excluded consideration of Radon-222 from the evidentiary proceeding, (2) whether the Licensing Board properly limited the scope of examination into geologic-seismic issues; and (3) whether the Licensing Board properly denied SCANP the opportunity for discovery on geologic-seismic issues.

II. INTRODUCTION

SCANP's Motion to direct certification is premised on two sections of the Commission's Rules of Practice -- 10 CFR § 2.730(f) and 10 CFR § 2.718(i). 10 CFR § 2.730(f) is a "referral" regulation that allows a presiding officer to refer a ruling to a higher Commission tribunal when it is determined by the presiding officer that a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense. In this case, SCANP did not request the Chairman of the Licensing Board to make such a judgment regarding the correctness of his ruling. Accordingly, the Chairman made no "referral" to the Appeal Board under 10 CFR § 2.730(f). Since "referral" under 10 CFR § 2.730(f) is at the discretion of the presiding officer, it is

^{1/} The NRC Staff would further note that since all evidentiary hearings in this proceeding have been postponed indefinitely (See Board Order Cancelling Hearings and Scheduling of NRC Staff Report, dated October 23, 1979), SCANP's motion to stay proceedings has become moot.

our opinion that SCANP's request to the Appeal Board to direct "referral" is directed to the wrong board. It should have been directed to the Licensing Board and, therefore, is improper and must be denied by the Appeal Board.

The Appeal Board's power to direct "certification" under 10 CFR § 2.718(i) is another question. It is beyond doubt that an Appeal Board has the power to direct the certification of legal issues raised in proceedings still pending before Licensing Boards. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). As stated in Seabrook, supra:

[T]here is nothing in Section 2.718(i) or its history to suggest an intent to place limitations upon the right of the Commission (and thus of this Board) to have brought up to it for consideration any question raised before a licensing board which is thought deserving of early dispositive resolution.

We therefore conclude that SCANP is entitled to file this motion for certification and that the relief sought is within the Appeal Board's authority to grant assuming that the Motion establishes sufficient basis for the Appeal Board's intervention at this time. We now turn to a discussion of the standards for certification that have been shaped by Appeal Board decisions and whether those standards are met in this case.

III. CERTIFICATION STANDARDS

The general policy of the Commission does not favor the appellate examination of an issue which is still before a licensing board. The Appeal Board has held that directed certification is to be resorted to only in "exceptional

circumstances" and must be used "most sparingly." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697, 698 (1978). Thus a party seeking directed certification by the Appeal Board must, at a minimum, establish that a referral by the Licensing Board under 10 CFR § 2.730(f) would have been proper, i.e., that there will be a detriment to the public interest or unusual delay or expense will be encountered. Seabrook, supra at 483; Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975). Almost without exception, the Appeal Board has undertaken discretionary interlocutory review only where the ruling below either "(1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by later appeal, or (2) affected the basic structure of the proceeding in a pervasive or unusual manner." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), ALAB-405, 5 NRC 1190, 1192 (1977); Offshore Power Systems (Floating Nuclear Power Plants), ALAB-519, 9 NRC 8, 11 (January 4, 1979). In addition, directed certification will not be granted unless the Licensing Board has had a reasonable opportunity to decide the question as to which certification is sought. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 729 (1975). Finally, as indicated by the Appeal Board in Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-314, 3 NRC 98, 100 (1976):

In the last analysis, the potential for an appellate reversal is always present whenever a licensing board (or any other trial body) decides significant procedural questions adversely to the claims of one of the parties. The Commission must be

presumed to have been aware of that fact when it chose to proscribe interlocutory appeals (10 CFR 2.730(f)). That proscription thus may be taken as an at least implicit Commission judgment that, all factors considered, there is warrant to assume the risks which attend a deferral to the time of initial decision of the appellate review of procedural rulings made during the course of trial. Since a like practice obtains in the federal judicial system, that judgment can scarcely be deemed irrational.

IV. APPLICATION OF STANDARDS TO QUESTIONS
SOUGHT TO BE CERTIFIED

A. Exclusion Of Radon-222

By Licensing Board Order of October 1, 1979 (Scheduling Order), the Board apparently excluded the issue of Radon-222 from consideration in the evidentiary session scheduled to commence on October 25, 1979.^{2/} The Board did not articulate its reason for the exclusion of this issue from litigation in that hearing session in its Scheduling Order. For this reason, SCANP has requested the Appeal Board to direct certification on this issue and to (1) order the Board to explain its decision, or (2) remand to the Board with

^{2/} The Staff is generally in agreement with SCANP with regard to how the issue of Radon-222 became ripe for consideration in this proceeding which is set forth in its Motion on pages 8-10. Accordingly, the history of this issue need not be repeated here. However, we disagree with SCANP's statement (Motion, pp. 4-5) that it has put the issue of Radon-222 into controversy from the beginning of this case. Although SCANP has had contentions regarding the effects of low level radiation, it has never amended those contentions to include the Radon-222 issue. In fact, until the Commission deleted the value for Radon-222 from Table S-3 on April 14, 1978 (43 Fed. Reg. 15613), this issue could not have been litigated in any licensing proceeding, absent a showing of special circumstances, since it was subject to a rule by the Commission. See 10 CFR § 2.758.

instructions to schedule promptly an evidentiary session on Radon-222 prior to concluding its evidentiary hearings. (Motion, p. 12)

The Board's Scheduling Order did not give any basis for the exclusion of the Radon-222 issue. In addition, as is apparent from the history of this issue in this proceeding, much confusion and delay has surrounded the disposition of this matter. (See generally Tr. 14,594 - 14,621.) Accordingly, there is merit to SCANP's assertion that the Licensing Board has not articulated in reasonable detail the basis for its exclusion of this issue. The Board's Scheduling Order certainly could have cast a little more illumination on the Board's reasoning behind the disposition of the issue.

However, it has been the Staff's understanding that the Board never intended to totally exclude Radon-222 from consideration in this proceeding. With this understanding, we read the Board's Order as merely excluding the issue from evidentiary presentation in the October 25 hearing session and that it would be scheduled for a later session because the Board had not issued its ruling with regard to the Radon issue. (See Tr. 14,621) It was our understanding that the Board's ruling would delineate the scope of the Radon evidentiary examination. But, as indicated earlier, the Board's Scheduling Order of October 1, 1979 does not speak to this matter.

Our understanding was confirmed by a subsequent Board order of October 19, 1979 entitled "Reschedule of Hearing" which indicated that Radon was still an outstanding issue. In addition, the Board issued its Ruling on Radon on

November 9, 1979. In that Ruling, the Board indicated that the Perkins^{3/} record and decision will be admitted into evidence in this proceeding and that the additional evidence would be admitted to supplement the Perkins decision in order for the Board to properly consider and dispose of the issue. SCANP's request for certification of this issue should be dismissed since these subsequent Orders clearly indicate that all parties will be afforded an opportunity to present additional evidence concerning Radon-222 before the hearings in this proceeding are concluded.

B. Limitation Of Examination Into Geologic-Seismic Issues

SCANP asserts that the Board has improperly limited the scope of examination into geologic-seismic issues by indicating that the Board will focus its interest on three basic questions. (Scheduling Order, p. 2) Particularly objectionable to SCANP is the following Board question:

What is the worst-case seismic event having reasonable probability of occurrence affecting the proposed plant during its lifetime?

SCANP alleges that this "reasonable probability" standard is contrary to the provisions of 10 CFR Part 100, Appendix A and it therefore "nullifies the consideration of the public interest contained in the Commission's regulations, and cannot conceivably be permitted to guide the inquiry in this proceeding." (Motion, p. 17) Accordingly, SCANP requests that the Appeal Board certify this question because the public interest would suffer and

^{3/} Duke Power Company (Perkins Station, Units 1, 2 and 3), LBP-78-25, 8 NRC 87 (1978).

it might conceivably result in undue delay if the Licensing Board improperly limited SCANP's scope of examination on geologic-seismic issues. The NRC Staff opposes this request for certification and submits that it must be denied for the following reasons.

1. Board has not limited scope of examination

The Staff thinks it is clear that the Licensing Board has not attempted to limit any party's scope of examination into geologic-seismic issues. As indicated in the Board's Scheduling Order, it merely wished to advise the parties of the "Board's interest in the ultimate answers to the above three questions." The Board further advised that examination which "may prove to be of little or no value to the proceeding . . . may be curtailed." (Scheduling Order, p. 2) In the Staff's mind, the above direction and advice is proper and in no way indicates that the Board's focus on three principal areas was meant to convey any absolute "standard" for examination of witnesses as SCANP asserts. Indeed, the Board's Order is clear that even though the Board's interest was of limited focus, SCANP would not be curtailed in examination of witnesses if it could show that its questioning was not tangential or remote and would be relevant and material to the proceeding. Accordingly, it is our opinion that this Order is not inconsistent with the Commission's regulations which gives any party the right "to present such oral or documentary evidence as may be required for full and true disclosure of the facts." 10 CFR § 2.743(a)

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2. Board's focus is not inconsistent with 10 CFR Part 100, Appendix A

Even though we do not believe that the Board's Scheduling Order in any way established a prior constraint on SCANP's examination of witnesses, it is also our opinion that the Board's focus on "the worst-case seismic event having a reasonable probability of occurrence affecting the proposed plant during its lifetime" is consistent with 10 CFR Part 100, Appendix A. SCANP argues that the "reasonable probability" standard is not "sufficiently conservative to assure the public's safety against the consequences of an event such as a severe earthquake." (Motion, pp. 14-15) They further point out that the regulations require more conservative determinations for "sites located in areas having complex geology or in areas of higher seismicity." See 10 CFR Part 100, App. A, Sec. II.

There can be no doubt that the Skagit site is located in an area of complex geology and high seismicity. This fact is certainly reflected in the lengthy investigations and complex determinations that have been conducted and made on the geologic and seismic issues in this proceeding to date by all parties. To be sure, conservative determinations should be made on these issues in this case because of the limited historical data and the complex geology. See 38 Fed. Reg. 31279 (Nov. 13, 1973) However, it is our opinion that the Board's proposed focus on the worst-case seismic event having a reasonable probability of affecting the site does not conflict with the Appendix A requirement of making conservative determinations in this situation. The

regulations require that several determinations be made in order to ascertain the safe shutdown earthquake at the site. As required by 10 CFR Part 100, App. A, Sec. IV(a)(5), an applicant must list all "historically reported earthquakes which have affected or which could reasonably be expected to have affected the site." See in general, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 at 55-62 (1977), dissenting opinion (August 3, 1979), supplemental opinions (September 6, 1979). Thus, the Appeal Board, after thorough consideration of the subject, has affirmed that a "reasonable" standard is applied to the determination of those historical seismic events which have or could reasonably be expected to have affected the site.

After these seismic events are considered, other procedures come into play in order to determine the vibratory ground motion at the site. See 10 CFR Part 100, App. A, Sec. IV(a)(6) and V. These determinations and procedures must be applied in a conservative manner, and if certain geological and seismological data warrant, a stronger safe shutdown earthquake may be required. 10 CFR Part 100, App. A, Sec.V(a)(1)(iv).

The above requirements for conservative procedures and determinations when deriving the safe shutdown earthquake are not inconsistent with the Board's focus on the worst historical seismic event having a reasonable probability of affecting the site. It is our belief that the Board merely wanted the parties to focus on those seismic events which "have affected or which could

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reasonably be expected to have affected the site" as required by App. A, Sec. IV(a)(5). Seismic events that are remote and speculative and cannot be reasonably correlated to the determination of the safe shutdown earthquake should and need not be considered. Accordingly, we submit that the Board's focus is reasonable and proper under the Commission's regulations.

3. Question does not meet certification standards

SCANP has asserted that an improper limitation of examination of geologic-seismic issues will result in undue delay and expense because another hearing may be required. However, as indicated above, we do not perceive the Board's Order as placing a prior constraint on SCANP's opportunity to conduct reasonable cross-examination, nor do we find the Board's intended focus to be inconsistent with the Commission's regulations. To the contrary, the Board's advice and direction to the parties as to the ultimate areas of interest of the Board is a proper discretionary power of the presiding officer to regulate the course of the hearing and the conduct of the participants pursuant to 10 CFR § 2.718(e). In addition, a licensing board has the power to ensure that cross-examination is kept within proper bounds and scope. 10 CFR § 2.757 (c); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 868 (1974); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975).

It would be total conjecture at this point to allege that the Board's limitation on the scope of examination, if any, would result in another hearing

and undue delay and expense. At the interlocutory stage, the Appeal Board does not decide or review abstract questions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-419, 6 NRC 3, 6 (1977). At this juncture, it must be assumed that the Board will allow proper and reasonable inquiry into these matters that may affect the Board's determinations on the ultimate geologic-seismic issues and, accordingly, further hearings would not be required as a result of an improper limitation of examination. During the course of the hearing, SCANP can raise whatever arguments it desires regarding any unreasonable limitation of cross-examination. If the Board overrules SCANP's objections, they can be advanced at the appellate level. However, it is the Staff's opinion that the Board's Order does not indicate that it will improperly limit cross-examination. Therefore, the Appeal Board should deny this request for directed certification because SCANP has not established that (1) the public interest will suffer or that unusual delay or expense will be encountered if certification is denied, (2) it will be threatened with immediate and serious irreparable impact which could not be alleviated by later appeal, or (3) the basic structure of the proceeding is affected in a pervasive or unusual manner.

In summation, it is our opinion that this request for directed certification on the question of limitation on examination should be denied because (1) the Board's Order cannot be construed as a prior constraint on proper and reasonable examination, (2) the Board's intended focus on ultimate issues is not inconsistent with the Commission's regulations, and finally (3) the question does not warrant Appeal Board intervention at this juncture.

C. Denial Of Discovery On Geologic-Seismic Issues

On October 4, 1979, the Licensing Board issued a ruling denying SCANP's discovery request to the Applicant which was submitted on September 14, 1979. The Applicant objected to the discovery requested on September 21, 1979 and SCANP filed a Motion to Compel Discovery on October 3, 1979. The Board denied the discovery request on the basis of timeliness noting that a schedule for discovery had been established and agreed to by all parties which established a June 1, 1979 cut-off date for discovery. The Board further noted that no change was ever requested to this schedule by any party. (Board Ruling, p. 3) Since SCANP waited until some three and a half months after the Bechtel Report had been made available,^{4/} the Board was of the opinion that SCANP's discovery was untimely, particularly when "tight scheduling was known to be the order of the day."^{5/} (Board Ruling, p. 4) The Board finally noted that if SCANP needed further time for the preparation of additional discovery, it "might have solicited the Board for the needed time in regular form." (Id.)

SCANP asserts that this denial of discovery jeopardizes its ability to prepare for the hearing, is contrary to Commission policy recognizing liberal discovery rights, is contrary to the understanding between the Board and the parties with regard to the discovery schedule, and denies SCANP a reasonable

^{4/} The Bechtel Report consisted of three volumes on supplemental geologic-seismic issues and was submitted on May 10 and 25, 1979. This Report was the focus of SCANP's discovery undertaking.

^{5/} By Board Order dated October 1, 1979, the resumption of evidentiary hearings on geologic-seismic issues were scheduled to begin on October 25, 1979.

and full opportunity to be heard with respect to this issue. (Motion, pp. 18-23). Accordingly, SCANP submits that the ruling is arbitrary and capricious and should be vacated by the Appeal Board with instructions to the Licensing Board to permit such discovery. The NRC Staff is of the opinion that discretionary interlocutory involvement by the Appeal Board is not warranted on this issue for the following reasons.

First of all, it appears that SCANP is merely requesting the Appeal Board to vacate and remand a Board order which denied discovery. This is not a request for directed certification under 10 CFR § 2.718(i) whereby a party requests the Appeal Board to direct the Licensing Board to certify a question to the Appeal Board for its review. It is our opinion this is nothing more than a request for interlocutory review as a matter of right of a Board action which is prohibited by 10 CFR § 2.730(f). Accordingly, it should be summarily denied.

On the other hand, if this request is interpreted as a motion for directed certification, it should also be denied. SCANP may encounter delay and expense if this discovery request is denied in that it may have to allocate additional time and resources to seek those answers that it sought through discovery. However, it is our opinion that that allocation of additional time and resources is not "unusual" nor will the public interest suffer inasmuch as SCANP can pursue these questions through cross-examination of witnesses. While we believe that discovery might reduce the need for some cross-examination resulting in the reduction of hearing time and therefore,

would have been the preferable way to get these answers had discovery been sought in a timely manner, we do not think that the denial of discovery will threaten SCANP with immediate and serious irreparable harm nor will the denial affect the basic structure of the proceeding in a pervasive or unusual manner. The proceeding may be prolonged, but SCANP will not be denied due process or a reasonable opportunity to obtain a full disclosure of the facts. If SCANP should obtain new information during its examination of witnesses that would require further investigation by SCANP or any other party, SCANP or another party can make an appropriate motion to the Licensing Board to have this matter considered.

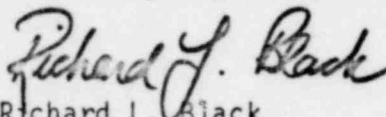
In the final analysis, although we believe that it would be appropriate and reasonable for the Board to allow SCANP limited discovery on geologic-seismic issues in light of the indefinite postponement of hearings on these matters,^{6/} it is our opinion that the Appeal Board should not direct certification on rulings on objections to interrogatories at the discovery stage. See Long

^{6/} We agree with SCANP that the June 1, 1979 discovery deadline originally was established to be the cut-off date for only those issues that were scheduled for the July 17, 1979 hearing session. Tr. 11,946. Geology-seismology was not scheduled for that hearing session. Accordingly, since new information and data was forthcoming from the Applicant with respect to geologic-seismic issues, it would have been reasonable and proper to allow SCANP an opportunity to undertake limited discovery on that new information. Whether SCANP waived its opportunity to undertake discovery by waiting 3 1/2 months to submit interrogatories is a question that need not be answered at this point. But it appears that the Board would have been willing to allow discovery beyond the June 1 date if a proper and timely request had been made. Since the geologic-seismic hearings have been indefinitely postponed, we would strongly suggest and, in fact, the Staff will initiate a new agreement between the Board and the parties with respect to a discovery schedule. This is a matter that can be resolved between the Board and the parties without Appeal Board intervention.

Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-318, 3 NRC 186 (1976) where the Appeal Board denied an intervenor's motion for a directed certification of questions raised by interlocutory discovery rulings of the Licensing Board which declined to require responses to some interrogatories. Such interlocutory rulings at the discovery stage are not the "exceptional circumstances" that would trigger the Appeal Board's intervention where, as here, the disagreements can easily be resolved by an agreement between the Licensing Board and the parties. Accordingly, we submit that this motion pertaining to discovery should be denied.

V. CONCLUSION

The NRC Staff submits that based on the foregoing reasons this Motion should be denied in toto.


Richard L. Black
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 13th day of November, 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO MOTION TO DIRECT CERTIFICATION, STAY PROCEEDING, AND TO REVIEW ACTIONS OF THE LICENSING BOARD" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 13th day of November, 1979:

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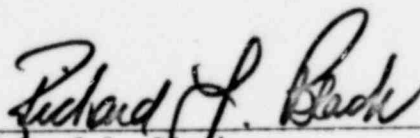
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