

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF RESPONSE TO INDIANS' BRIEF  
IN SUPPORT OF APPEAL

I. INTRODUCTION

In an Order dated June 1, 1979 (Order) which more fully sets forth the lengthy history of this proceeding, the Atomic Safety and Licensing Board (Board) denied a Petition to Intervene (Petition) filed on behalf of the Upper Skagit Indian Tribe, the Sauk-Suiattle Indian Tribe, and the Swinomish Tribal Community (Petitioners or the Indians) on June 13, 1978. Also filed on that date was a brief in support of the Petition (Petition Brief). Despite the fact that the Petition was filed nearly 3 1/2 years after the prescribed deadline for filing such petitions,<sup>1/</sup> the Board originally had granted the Petition in its "Decision and Order Granting Intervention" dated November 24, 1978. This ruling was vacated by the Appeal Board by its Memorandum and Order dated January 12, 1979 and then by its Decision dated January 29, 1979 (ALAB-523).

The Petitioners have appealed the Board's Order of June 1, 1979 and have filed their "Brief of Swinomish Tribal Community, Upper Skagit Indian Tribe and Sauk-Suiattle Indian In Support of Appeal" (Appeal Brief) dated June 14, 1979, charging that the Board erred and abused its discretion in denying intervention. The Staff's Response in support of the Appeal Brief follows.

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<sup>1/</sup> See 39 F.R. 44065, 44066 (December 30, 1974).

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## II. ISSUE ON APPEAL

The sole issue on appeal is whether the Board, in its June 1, 1979 Order, abused its discretion in applying the factors relating to late intervention set forth in 10 CFR §2.714(a) to the facts in this case.<sup>2/</sup>

## III. STATEMENT OF THE LAW

As this Appeal Board has declared before in this proceeding, the Petition must be evaluated against the Commission's criteria for granting late intervention set forth in 10 CFR §2.714(a).<sup>3/</sup> ALAB-523, supra, at 3. In applying these criteria, the Board can exercise broad discretion accorded it pursuant to §2.714(a). Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). However, the Appeal Board has declared that it will reverse a licensing board decision applying the factors of §2.714(a) when

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<sup>2/</sup> In relevant part, Section 2.714(a) provides:

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

- (1) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (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.

<sup>3/</sup> 10 CFR §2.714 also requires that a petitioner set forth adequate interest in a proceeding and at least one good contention. However, it is conceded that the Petitioners have met those requirements and would have been allowed to intervene if their Petition to Intervene had been properly drafted and submitted on time.

it determines that the licensing board has abused this discretion. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-339, 4 NRC 20, 24 (1976); see also, Florida Power and Light Co. (St. Lucie Unit 2), ALAB-420, 6 NRC 8, 13 (1977), aff'd., CLI-78-12, 7 NRC 939 (1978). The Tribes agree that this is a correct statement of the law. "Intervenor Tribes' Brief in Opposition to Applicants' Appeal and In Support of Licensing Board Decision and Order Granting Intervention", dated December 26, 1978, pp. 6-8.

#### IV. ARGUMENT

The Indians have advanced several arguments in support of their claim that the Board erred in denying their Petition. Although some of the arguments contain allegations of legal error, a close analysis of the arguments reveals that all involve alleged abuses of discretion by the Board. The Staff's responses to the Indians' arguments are set forth below.

##### A. Good Cause For Failure to File on Time

##### 1. Adjudication of Treaty Rights and Federal Recognition

The first alleged error on the part of the Board is the claim that the Board did not sufficiently consider as good cause for the Petitioner's untimely filing their assertion that the nature and extent of their treaty fishing rights were determined only after the Court of Appeals decision in United States v. Washington, 520 F.2d 676 (9th Cir. 1975, cert. den. 96 S.Ct. 877 (1976). Appeal Brief, p.2. However, as the Board concluded, this assertion is not persuasive, since United States v. Washington did not confer upon the petitioners any rights which were prerequisite to their right of intervention in this proceeding. Order at 5.

On pages 19 and 35 of the Petition Brief, the Indians refer to their rights of access to and use of their usual and accustomed fishing sites as having

been guaranteed since 1905 by the Supreme Court in United States v. Winans, 198 U.S. 371 (1905). Although U.S. v. Winans did not address the Petitioners by name, it did establish the legal interpretation of treaty language identical to that of the Treaty of Point Elliott, under which Petitioners claim fishing rights. In fact, the Court in U.S. v. Washington relied on U.S. v. Winans as a precedent in interpreting the language of the Treaty of Point Elliott, to which at least two of the Petitioners were parties. Accordingly, the Board was correct in denying this claim, in that Petitioners have been free, as residents of the Skagit River area, to assert their interests as fishermen even in the absence of special rights as treaty Indians.

Petitioners also contend that the Upper Skagit and Sauk-Suiattle tribes were not federally recognized until after U.S. v. Washington. Appeal Brief, pp. 2, 4. Presumably, these two tribes would argue that they could not assert fishing rights until they were recognized. However, the Board properly ruled that this contention does not advance Petitioners' claim of good cause resulting from newly created rights.<sup>4/</sup> The asserted new status of being federally recognized tribes (or lack thereof) was found to have no impact on Petitioners' vested treaty rights. Order at 5; see also, U.S. v. Washington, supra, at 692, 693. Accordingly, Petitioners were free to assert fishing rights in advance of U.S. v. Washington, and cannot claim as good cause the alleged creation of new rights via their recognition resulting from the decision.

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<sup>4/</sup> The Swinomish Tribal Community had been recognized by the federal government since 1934 (25 U.S.C. §476), and the Ninth Circuit found that the Upper Skagit Tribes were still not recognized as organized tribes (U.S. v. Washington, supra, at 692).

2. Preoccupation With Other Matters

Petitioners also claim that they have inadequate resources and that as a consequence they were unable to focus their attentions on this proceeding until recently (Appeal Brief, pp. 4-7). However, as the Board correctly indicated, preoccupation with matters other than an NRC proceeding cannot constitute good cause for an untimely filing. Order at 6. The Staff submits that the Appeal Board's ruling in ALAB-440 supports this conclusion, since a decision to the contrary would create a free license for potential intervenors to time their intervention petitions solely on the basis of personal convenience. In the Matter of Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 624, 644 (1977). Although Petitioners' preoccupation may well be considered more justifiable than was the excuse offered in Cherokee, the Appeal Board's principle announced in that proceeding is nonetheless applicable.

In sum, the Staff agrees with the Board's conclusion that Petitioners' preoccupation therefore does not constitute good cause for the untimely filing.

3. Unawareness of Impact

Petitioners' third asserted abuse of discretion is the Board's failure to properly evaluate the Petitioners' claimed difficulty in gaining sufficient information to enable them to make an informed decision whether to intervene. Appeal Brief at 7. Petitioners originally asserted as good cause that they had difficulty in getting sufficient information concerning the proposed project. Petition Brief, p.7. The Board concluded, however, that there was extensive publicity about the proceeding, and that the plans for the facility have been publicly available. Order at 6. In response, the Indians now focus their argument on the quality of the information that they possessed;

i.e. that they were not sufficiently informed concerning environmental impacts to make an intelligent decision concerning intervention. Appeal Brief at 8, 9.

In support of this claim, the Petitioners assert that they lack information regarding radiation doses from the facility as well as other matters. Appeal Brief at 8, 9. However, they assert no new information which was unavailable 3 1/2 years ago and which now leads them to the conclusion that radiation doses are unknown, or that there exist unresolved problems in areas in which Petitioners have indicated they have an active interest. Absent such a showing, Petitioners have failed to demonstrate good cause for delaying their filing of the Petition.

In sum, the Staff agrees with the Board that Petitioners' claim of alleged difficulty in obtaining or evaluating information does not constitute good cause for the untimely filing.

4. Reliance on the Federal Government

Petitioners finally claim as good cause that they had relied upon their federal trustee to ensure that their health and treaty resource would be protected. The Indians cite their reliance upon environmental conclusions contained in the Staff's FES as creating this false sense of security. Appeal Brief at 10. The Staff agrees with the Board, however, that this is not an adequate excuse for the delay in filing the Petition. Order at 8.

Presumably the references to the Staff's FES indicate that the Indians had turned to the NRC for their federal protection. However, the Indians offer no justification for initially having assumed that the NRC would protect their specialized interests in this proceeding. Nor have Petitioners shown any significant new information indicating that the NRC is failing to protect the

general public health and safety such as would justify their filing a petition nearly 3 1/2 years late. The Board correctly concluded that, absent such justification, the Indians' disappointment with the federal government does not constitute good cause for the delay.<sup>5/</sup> Order at 8.

The Staff thus submits that Petitioners have failed to demonstrate good cause for their failure to file in a timely manner. We must, next, address the other factors of 10 CFR §2.714(a) to determine whether Petitioners can overcome the lateness of the filing.

B. The Availability of Other Means Whereby the Petitioners' Interest Will Be Protected

The Staff position on this factor remains unchanged. See NRC Staff Response, dated November 21, 1978, p.7. This proceeding is the only effective remaining forum whereby Petitioners' interest can be protected. The Licensing Board was of the opinion that the Petitioners could have resorted to the Skagit County zoning proceeding and the state site certification proceeding to protect their interest. (Order, pp. 9-11). In response to the Board's position on this factor, the Petitioners have offered several reasons why they did not choose to participate in the state and local proceedings. The major reason advanced is that at the time of the state hearing, the Petitioners assert that it would have been futile to try to protect their fishing treaty rights

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<sup>5/</sup> The Appeal Board rejected a similar claim as being good cause for a late filing in the Cherokee decision, supra. There a petitioner who filed 3 years late claimed that she first became aware, after attending some of the hearings and examining the documents in the proceeding, that her interests were not being adequately protected by any of the participants (ALAB-440, supra, at 644, 645). The Appeal Board ruled that, since none of the parties claimed to represent the interests of the petitioner specifically, as opposed to the public interest generally, the petitioner assumed the risk that the parties' degree of involvement in the proceeding would not fulfill her expectations (Id.). The Cherokee decision is clearly applicable to this proceeding.

in a forum where the state agency adversaries had taken a position that the Indians did not have separately enforceable shares in salmon and steelhead fisheries (Appeal Brief, p.13). While we do not find this argument totally persuasive, since we believe that the only issue pertaining to the Skagit River fishery that is crucial in both the state and NRC proceedings is whether the Skagit project will have an adverse impact on the fishery -- protected or not, the fact remains that this proceeding is the only effective forum remaining (outside of recourse to a federal court) where the Petitioners can litigate their concerns.<sup>6/</sup> Thus the Staff believes that the consideration of this factor does ultimately weigh slightly in favor of the Petitioners.

C. The Extent to Which Petitioners' Participation May Reasonably Be Expected to Assist in Developing a Sound Record

The Licensing Board identified three areas of concern that appeared to be the thrust of the Indians' intervention in this proceeding -- 1) impact of plant construction and operation on Skagit River fishery, 2) the socio-economic impact on Indian economic and social cultures, and 3) the genetic and somatic effects upon the Indians from low level radiation (Order, p.12). The Board,

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<sup>6/</sup> The Licensing Board is also of the opinion that the Indians' interest in radiation standards can be brought to the Commission's attention and factored into a rulemaking process without their involvement in this proceeding (Order, p.11). We agree with the Petitioners that they are not challenging radiation protection standards or numerical guides for design objectives in this concern. Rather, they have raised a contention that those standards may not have been appropriately applied to them because their unique genetic patterns and health histories may cause a lower threshold for somatic and genetic effects from low-level ionizing radiation (Appeal Brief, pp. 17-18). The Staff has previously taken the position that it appears that the Indians could make a valuable contribution to this proceeding on this issue if they establish that they live close enough to the facility to be exposed to low-level radiation. (See NRC Staff Response to Applicants' Brief In Support of Appeal, dated December 26, 1978, p.9). Since this issue involves the question of whether the radiation standards have been properly applied to the unique situation of these Indians, the Staff agrees with the Petitioners that rulemaking is not appropriate for resolution of this site-specific concern.

after considering the issues, the facts and evidence to be presented by the Indians, and their list of witnesses, concluded that the extent to which the record would be improved if the Petitioners were allowed to intervene is problematical and that the Petitioners' story had not been convincing (Id., pp. 14-15).

The Petitioners on appeal assert that this judgmental finding by the Board was in error in that it was arbitrary and capricious (Appeal Brief, p.19).

In considering this issue, the Staff is unable to concur completely in the Board's conclusion, in that we believe that the Indians' participation on the issue of genetic and somatic effects can reasonably be expected to assist in the development of a sound record in this proceeding. We take this position because it is quite clear that there is no evidence on the record concerning this issue and we believe that this concern should be addressed. It is also clear, in the Staff's mind, that the Indians have taken steps and committed resources to assist in the development of a sound record on this issue. Furthermore, they are in the unique situation of being able to supply the information necessary for this assessment. Accordingly, we believe that the Licensing Board improperly weighed the contribution factor, and that the Indians are in a position to assist in the full development of this issue.

Conversely, we do agree with the Board's determination on the remaining two issues. Much has been developed in this proceeding on the impact to the Skagit River fishery, and the Staff has evaluated socio-economic impacts in the FES and the Final Supplement to the FES, as well as its prefiled testimony on this subject matter (prefiled February 1978 to be presented in July 1979). Certainly the Licensing Board considered this evidence, as it should do, in

its evaluation of this factor. Its determination that the information presented by the Indians regarding these matters would not assist in the development of the record is clearly a decision properly and uniquely within its discretion. We believe that the Board's decision with respect to these two issues -- Skagit River fishery impacts and socio-economic impacts -- should not be overruled on appeal because there is nothing on the record to indicate that the Licensing Board abused its discretion in its consideration of the facts on the record.

In conclusion, the Staff is of the opinion that the Indians will aid this decision-making process on the limited issue of genetic and somatic effects. Consequently, this factor must be weighed in favor of the Indians' intervention.

D. The Extent to Which Petitioners' Interest Will be Represented by Existing Parties

In its evaluation of this factor, the Licensing Board found "an obvious community of interest" between the Petitioners and the present intervenor SCANP. (Order, p.15). Consequently, the Board concluded that through the efforts of SCANP, the issues of fisheries impact and socio-economic impacts have been and will be well developed. Petitioners generally except to this finding because they contend that SCANP "does not appear to have either the resources or the expertise to represent Petitioner Tribes and it has not done so in the past." (Appeal Brief, p.22).

The Staff agrees with the Petitioners that SCANP has not and probably cannot represent the unique interests of the Indian Tribes. However, that is not to say that the Petitioners' interests will not be considered during the course

of this proceeding. As indicated earlier, we believe that the issue of impacts on the Skagit fishery has been fully developed on the record.<sup>7/</sup> Furthermore, the Staff is confident that the issue of socio-economic impacts on the local communities will be fully explored.<sup>8/</sup>

However, with respect to the issue of genetic and somatic effects, we would agree with the Licensing Board's statement that the issue probably would not be considered in this proceeding if the Indians did not become a party (Appeal Brief, pp. 16-17). Consequently, it is clear that this issue would not be represented by existing parties.<sup>9/</sup>

In summation, we believe that at least two of the three Indians' concerns have been or will be fully explored on this record by the existing parties and that whatever additional information the Indians could contribute to these matters will not significantly change the overall results of this proceeding. Consequently, the Staff believes that the weighing of this factor has been proper by the Licensing Board and overall balances against the Indians' intervention, exception with respect to the issue of genetic and somatic effects.

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<sup>7/</sup> Petitioners indicate that NRC witnesses have admitted large gaps as to diffuser impacts. We believe the NRC witness statements have been either misunderstood or taken out of context by Petitioners. If we felt that there were large gaps in the record, we would obviously take the necessary steps to correct that situation -- including further study if warranted. However, the Staff is of the opinion that the record is fully developed on this issue and that no further evidence needs to be proffered.

<sup>8/</sup> At the present time, the Staff perceives the issue of socio-economic impact to Indian cultures to be largely interdependent with the issue of impact to the Skagit River fishery. That is, if there is a significant loss to the Skagit River fishery then, obviously, this would cause an impact to established Indian economic and social cultures which generally revolve around fishing. However, the Staff's assessment indicates that the impacts to the fishery will be very insignificant.

<sup>9/</sup> This issue is, however, being presently evaluated by NRC Staff. Again, it would be incumbent upon the Staff to apprise the Licensing Board of this evaluation if it might significantly affect its consideration of this subject matter.

E. The Extent to Which the Petitioners' Participation Will Broaden the Issues or Delay the Proceeding

The Licensing Board concluded that if intervention were allowed, it would inevitably lead to a broadening of the issues and result in delay (Order, p.17). The Petitioners counter by pointing out that if their petition had been properly considered after it was filed one year ago, their intervention might not have resulted in delay (Appeal Brief, p.24). In any event, they argue that a proper balancing of this factor under 10 CFR §2.714 must necessarily allow for some broadening of the issues and delay in the proceeding by tardy petitioners. Thus, they conclude that the Licensing Board improperly weighed this factor (Id, pp. 24-25).

The Staff does not believe that the Licensing Board abused its discretion in its consideration of this factor. Again, we think it is clear that the Indians' intervention at this juncture would broaden the issues and delay the proceeding -- particularly since the environmental hearing is scheduled to commence on July 17, 1979 and continue until all of the environmental issues have been examined. However, there is a certain amount of validity in the Indians' assertion that they should not be held responsible for the delay in deciding their intervention status. Certainly it is possible that if their status was ascertained in a timely manner, they would be able to comply with the present hearing schedule and, therefore, their participation would not delay the proceeding.<sup>10/</sup> Thus, even though the Staff does not believe that the

<sup>10/</sup> We cannot say for certain, however, that a timely decision on their status would not delay this proceeding. It is the Staff's understanding that since the Indians filed their petition, they have submitted proposals to the Bureau of Indian Affairs to do certain studies relative to their concerns about the Skagit project and have contracted with Dr. Lynn Robbins to do certain studies relative to the environmental and socio-economic impacts on Indian cultures (See, Appeal Brief, pp. 15 and 21). Since these studies have not been completed, it is possible that the Indians might have sought a delay in the hearing schedule to await the results. Perhaps the studies could have been expedited and perhaps the results could have been accommodated at another hearing date that is necessary in the near future to examine the geology and seismology issues. But at this time it is clear that allowing the Indians to intervene will broaden the issues and result in some delay.

Licensing Board abused its discretion in its consideration of this factor, in our view the weighing of this factor should not be tilted either in favor of or in opposition to the Indians' intervention because of the delay in the resolution of their status.

V. CONCLUSION

There can be no doubt that a late-filed petition (particularly a petition filed 3 1/2 years late) must be subjected to very careful examination under the Commission's rules. We have examined the issues presented in this Petition and discussed them at length with the Indians. We are certain the Licensing Board has given careful and deliberate consideration to this Petition as well. The Indians' intervention presents a very close question that probably ultimately hinges on a balancing of the extreme tardiness of the petition at this stage of the proceeding against the unique interests advanced. In any event, a complete examination of the merits of this late intervention must weigh the factors set forth in 10 CFR §2.714. Accordingly, as indicated above, the factors that weigh against Indians' late intervention are (1) no good excuse for failure to file on time, (2) Petitioners' interests have been or will be largely represented by existing parties, and (3) Petitioners' participation will broaden the issues and delay the proceeding.<sup>11/</sup>

In the Staff's view, the factors that weigh in favor of allowing the Indians to intervene at this late juncture are (1) this is the only effective forum remaining where their interests can be protected, and (2) their participation can reasonably be expected to assist in developing a sound record.

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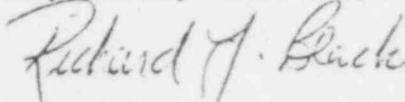
<sup>11/</sup> We have indicated, however, that this last factor should not be weighed against the Indians because any delay caused by their participation may have been alleviated by more prompt action relative to their intervention status.

After considering the above factors, the issues raised by the Indians, the studies undertaken by them, and, finally, the state of the current record in this proceeding, the Staff concludes that the Indians should be allowed to intervene on the one issue raised by them that probably will not be explored on the record but for their intervention; that is, the genetic and somatic effects on the Indians from low-level radiation. As indicated earlier, it is our opinion that the other two issues raised by the Indians have been or will be fully explored on this record and the Indians have not raised any new points or information that will significantly effect the results reached regarding these issues. Consequently, their participation on these issues cannot reasonably be expected to assist the Licensing Board in developing a sound record and it will inevitably broaden the issues and delay the proceeding. Accordingly, the only factor that weighs in Petitioners' favor on these two issues is that this proceeding is the only effective forum left for them to protect their interests. However, we believe that consideration of the other factors heavily outweighs their right to participate on these issues.

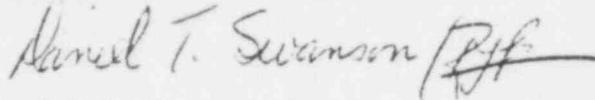
Further, we support the Indians' limited intervention on this one issue because it has not been previously considered by the Staff and we believe that it should be. We believe the Indians should be admitted as parties because they are in a unique position to supply the necessary facts that would enable the Staff to assess this concern. In addition, the Indians' concern is sufficiently particularized at this point to enable the Staff to proceed with its evaluation of these somatic and genetic effects. Consequently, the Board's consideration of this issue would not involve a relitigation of old issues nor should it delay the ultimate issuance of an LWA or construction

permits for the Skagit units. Obviously, whether the Indians are allowed to intervene or not, the Staff will continue its assessment and report the results both to the Indians and to the Licensing Board. However, we support intervention on this one issue because the concern is legitimate and well-founded and, consequently, deserves the attention of the NRC Staff and the Licensing Board.

Respectfully submitted,



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Counsel for NRC Staff



Daniel T. Swanson  
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Dated at Bethesda, Maryland  
this 29th day of June, 1979

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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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 RESPONSE TO INDIANS' BRIEF IN SUPPORT OF APPEAL" 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 29th day of June, 1979:

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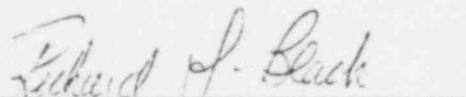
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