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 31 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. Eric Stachon, Boring, Oregon, for the movants, Forelaws on Board and Coalition for Safe Power.

MEMORANDUM AND ORDER

July 30, 1979

(ALAB-556)

On July 17, 1979, pursuant to prior notice, the Licensing Board commenced an evidentiary hearing session in Seattle, Washington, to examine certain of the issues presented in this construction permit proceeding. Following the presentation of limited appearance statements, intervenors Forelaws on Board and Coalition for Safe Power tendered a motion to disqualify the Chairman of that Board from further participation in the proceeding (Tr. 12,112). The motion was accompanied by the affidavit of intervenors' representative, Eric Stachon. The next day, July 18, the Licensing Board referred the motion

to us under 10 CFR 2.704(c), with the notation that it "did not grant the motion, and its Chairman did not remove himself".[1/] For the reasons hereinafter stated, we deny the motion.

A. It appears from Mr. Stachon's affidavit that the disqualification motion relates exclusively to the course pursued by the Licensing Board in the wake of the action taken by us last January on an untimely petition for leave to intervene which had been filed in this proceeding by three Indian tribes. On an appeal by the applicants, we had vacated the decision of the Licensing Board which had granted the tribes' petition[2/] and had remanded the matter for further consideration. Unpublished order of January 12, 1979, explained in ALAB-523, 9 NRC 58 (1979).

According to the Stachon affidavit, following the issuance of our remand order the Licensing Board Chairman had stated that the Board would expedite its reconsideration of

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1/ Section 2.704(c) makes such a referral obligatory in circumstances where the motion is not granted by the Licensing Board and the Board member in question does not recuse himself.

2/ LBP-78-38, 8 NRC 587 (1978). At virtually the same time that decision was rendered, the then Chairman of the Licensing Board retired. On November 27, 1978, he was replaced by the present Chairman.

the tribes' intervention petition although the licensing proceeding would continue to move forward while that reconsideration was in progress. The affidavit then recites that the expedition commitment had not been honored. More specifically, the Board did not issue its written order denying the tribes' petition until June 1, 1979.[3/] While an announcement of the denial had been made during a conference with the parties held on April 24, the Board Chairman had then indicated that the appeal period would not begin to run pending the rendition of a written order in explanation of the ruling.[4/]

In the view of Mr. Stachon (affidavit, pp. 3-4), the Licensing Board Chairman's "lack of desire in resolving the Indian issue, while at the same time taking action to speed up the ultimate conclusion of the proceedings, has severely prejudiced the rights of the petitioning tribes". Beyond that, we are pointed to the statement in the Licensing Board's June 1 order[5/] that the tribes' success several years ago in

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3/ LBP-79-16, 9 NRC ___.

4/ On May 15 the tribes filed a motion to expedite the issuance of the written order to enable them to prosecute their appeal from the denial of intervention. Once the order did issue on June 1, a timely appeal was taken from it. For the reasons set forth in ALAB-552, 10 NRC ___ (July 9, 1979), our ultimate disposition of the appeal must await supplemental briefing.

5/ LBP-79-16, supra, 9 NRC at ___ (slip opinion, p. 5).

a judicial proceeding involving their fishing rights "might have energized [them] to try another legal battleground * * *". The Stachon affidavit (at p. 4) would have it that this statement, with its reference to Indians and battlegrounds, "conjures up visions of the white man's stereotyped image of Native Americans as 'savages'".

From all of this, Mr. Stachon concludes (ibid.) that the Board Chairman's "words, as well as his actions, constitute grounds for his removal". In this connection, we are reminded of our observation several years ago that "an appearance of prejudgment is as much a ground for disqualification as is prejudgment itself". Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 and 2), ALAB-102, 6 AEC 68, 71, reversed on other grounds, CLI-73-8, 6 AEC 169 (1973).

B. Apart from its untimeliness,[6/] there are at least

6/ "The failure of a party to file a motion for disqualification once the information giving light to such a claim is available to him amounts to a waiver of the disqualification objection". Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 63 (1973), citing Gilligan, Will & Co. v. SEC, 267 F.2d 461, 468 (2nd Cir. 1959). See also, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 384 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 247 (1974). In this instance, the intervenors sat back until the commencement of an evidentiary hearing session -- more than six weeks after the June 1 order issued -- before filing the disqualification motion. Because of that unexplained delay, the Licensing Board and its Chairman were deprived of an opportunity to consider the motion prior to the hearing.

two independent reasons why the disqualification motion is wholly insubstantial.

1. To begin with, the intervenors do not assert any invasion of their own rights; rather, as we have seen, the claim is that the Licensing Board Chairman "severely prejudiced the rights of the petitioning tribes".[7/] Yet the intervenors do not explain the basis for their standing to complain on the tribes' behalf. And if such basis exists, it is not immediately obvious to us. The tribes are represented by competent counsel, who have taken an appeal from the Licensing Board's June 1 order (see fn. 4 , supra). Had counsel believed that, in connection with the reconsideration of the tribes' petition, the Board Chairman had conducted himself in a manner warranting his disqualification, it is reasonable to suppose that they would have said so.[8/] Be that as it may, there is nothing to indicate that the tribes have clothed these intervenors with the authority

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7/ This theme is repeated at the end of the Stachon affidavit (at p. 4): "There is no doubt that, at the very least, [the Board Chairman] appears to have prejudiced the rights of the petitioning tribes and has caused them needless harassment".

8/ Although the tribes are not now parties to the licensing proceeding, they obviously had the right to seek to disqualify a Licensing Board member from participation in any aspect of the proceeding which related directly to them.

to speak for them. (Assuredly, the intervenors' status as parties to the proceeding does not of itself make them the spokesmen for others.)

2. Secondly, the recitations in the Stachon affidavit fall far short of establishing that the Licensing Board Chairman might have prejudged facts relevant to the outcome of the Board's reexamination of the tribes' intervention petition in accordance with the instructions contained in ALAB-523. Indeed, the total absence of even a hint of possible prejudgment in the content of the affidavit prompts the suspicion that Mr. Stachon (a layman) actually meant to convey the thought that the Board Chairman had manifested personal bias against the tribes -- another of the recognized grounds for disqualification.[9/] But to give the intervenors the benefit of all doubt in that regard does not assist their motion. For, even viewing the Licensing Board's course of conduct pertaining to its reconsideration of the tribes' intervention petition in the light most favorable to the motion (and additionally assuming for present purposes that the Board Chairman dictated that course), there is manifestly insufficient evidence of bias.

9/ See Midland, ALAB-101, supra n. 6, 6 AEC at 64.

One may readily agree that the Board below both might and should have acted on the remand with considerably greater dispatch. Although our January 12 order may not have more than briefly outlined the foundation for our conclusion that the prior disposition of the tribes' petition had been erroneous, it did clearly apprise the Board below (at p. 2) of what was expected of it on the remand; viz., "the Board must now reconsider the intervention petition, this time determining, first, whether the Indian tribes had a good excuse for their late filing and, second, how the other factors relevant to late intervention petitions[10/] weigh in the balance." Even if it be nonetheless assumed that the Board had warrant to await the issuance of ALAB-523 (in further explanation of the January 12 order) before embarking upon this task, that event occurred on January 29. To be sure, the tribes thereafter asked the Commission to review our decision. That development did not, however, operate to stay the effectiveness of the instructions which we had given the Board below. Moreover, when on March 8 it announced that it would not act upon the petition for review until after the completion of the proceedings on the remand, the Commission expressly directed that the Board "consider the matter expeditiously". Yet another twelve weeks elapsed before the

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10/ Those factors are spelled out in 10 CFR 2.714(a).

Board issued its written order illuming the basis for its denial of the petition.[11/] This was so even though there was no additional briefing or argument and, as noted in ALAB-523 (9 NRC at 63), at least the two technical members of the Board were familiar with the history of the proceeding as it might bear upon the application to the tribes' petition of the criteria governing late intervention attempts.[12/]

11/ We do not regard the Board's April 24 oral announcement of the result it had reached to have constituted the full measure of the action required on the remand. As the Board itself recognized, it was obliged to spell out the reasons underlying the denial of the tribes' intervention petition and, until that obligation had been fulfilled, the tribes could not invoke their appellate remedy.

12/ We have not overlooked that the members of the Licensing Board undoubtedly had many other demands upon their time during the four and a half month interval between January 1 and June 1. Nonetheless, it seems to us, as it obviously did to the Commission as well, that the resolution of the question of the tribes' entitlement to intervention at this late stage of a licensing proceeding initiated years ago justified priority attention, especially inasmuch as the Board had decided -- quite understandably -- not to hold up the progress of the proceeding in the meanwhile. Our belief in this regard is not at all affected by the fact that the Board ultimately ruled against the tribes. The Board had every reason to expect that the tribes would seek appellate review and, no matter its level of confidence that the ruling was correct, also had to appreciate that at least the possibility existed that we (or the Commission) might decide the question differently. And, as it has turned out, we have found it necessary to withhold action on the tribes' appeal pending the receipt of additional information which appeared to us to be germane to its proper disposition. See n. 4, supra.

But these considerations are of no present moment. Standing alone, the failure of an adjudicatory tribunal to decide questions before it with suitable promptness scarcely allows an inference that the tribunal (or a member thereof) harbors a personal prejudice against one litigant or another. Nor are there any attendant circumstances which would permit that inference to be drawn in the case of the tribes here. Indeed, if anything, it would appear that it is the applicants -- and not the tribes -- who have the most to lose by reason of the seeming tardiness of the entry of the June 1 order. For, should we eventually reverse that order and direct the grant of intervention to the tribes, the very possible consequence will be a still further extension of this already protracted proceeding.

What that leaves is the intervenors' quarrel with the Licensing Board's employment in the June 1 order of the term "legal battleground". See p. 4, supra. Whether or not we would have selected the same metaphor (in the course of making what seems to us to have been a reasonable point),[13/] we reject summarily Mr. Stachon's thesis that its choice by the Board below must be taken as a calculated insult to Indians in general and the tribes hereinvolved in particular. Adjudicatory contests are quite commonly thought of as "legal

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13/ See ALAB-552, supra n. 4, 10 NRC at ___ (slip opinion, p. 9).

battles"; thus viewed, they are waged on "legal battlegrounds". This being so, we believe there to be no room for legitimate suggestion that, in the context of litigation involving Indians, that figure of speech has such offensive connotations as to warrant the presumption that animus undergirded its use.[14/]

The referred motion to disqualify the Chairman of the Licensing Board is denied.[15/]

14/ It is worthy of passing note that, in their brief in support of the appeal from the June 1 order (at p. 3), the tribes took mild exception to the Licensing Board's use of the verb "energized" which was contained in the same sentence of the order (see p. 4, supra). They did not assert, however, that the choice of that word was a manifestation of prejudice against them; nor were they critical of the employment of the term "legal battleground".

15/ Before referring the motion to us, the Licensing Board invited the parties to present orally their position on it. See Tr. 12,114 (July 17), 12,150-60 (July 18). We perceived no necessity to call for a written elaboration of the views expressed in response to that invitation. Suffice it to say that, although there was not total agreement on the question of the intervenors' standing to complain of the treatment accorded the tribes, none of the other parties urged that the motion should be granted.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

Mr. Farrar's review of the intervenors' motion and supporting affidavit satisfied him that no cause has been presented therein to disqualify the Chairman of the Licensing Board. He did not, however, participate in the preparation of this opinion.