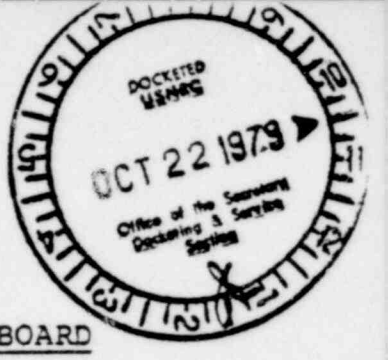

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PUGET SOUND POWER & LIGHT COMPANY, et al.,	)	DOCKET NOS. STN 50-522 50-523
	)	
	)	October 16, 1979
(Skagit Nuclear Power Project, Units 1 and 2)	)	
	)	

MOTION TO DIRECT CERTIFICATION, STAY PROCEEDINGS, AND TO REVIEW ACTIONS OF THE LICENSING BOARD

Because recent actions of, and failures to act by, the Licensing Board assigned to this docket have denied to Intervenor SCANP its rights under Nuclear Regulatory Commission regulations, the Administrative Procedures Act, and have effectively compromised due process of law, SCANP requests the Appeal Board to direct the Chairman of the Licensing Board to certify the follow described rulings and actions to the Appeal Board pursuant to 10 C.F.R. §2.730(f) and §2.718(i), to stay the proceedings below so that Intervenor's rights respecting their participation in those proceedings can be protected, and to vacate the orders of the Licensing Board which prejudice SCANP's rights, with further instructions to the Licensing Board to issue orders which comport with applicable NRC regulations, Commission instructions, the APA, and which afford SCANP due process of law.

1396 244

In its great haste to bring these proceedings to a hurried conclusion, see Licensing Board Order of October 4, 1979 ("Objection to SCANP's Discovery Undertaking Sustained"), at 4 (Attachment 1 to this Motion), the Licensing Board has shown an inability to conduct the proceedings so as to protect the substantial rights of the parties, and has failed both to abide by the Commission's regulations and to consider the rights of the parties. Therefore the supervisory powers of this Appeal Board must be exercised immediately to correct these errors and to vindicate the rights of the parties.

Within the past two weeks, the Licensing Board: has eliminated the Radon 222 issue from evidentiary hearing, without explanation, and contrary to Commission regulations, directives, and to the decisions of the Appeal Board; unlawfully limited the scope of crucial site suitability issues involving the geology and the seismicity of the plant area, contrary to the clear directives in 10 CFR, Part 100, Appendix A; foreclosed SCANP's right to discovery in an arbitrary and capricious manner and contrary to the understanding between the parties and the Board, and with the effect of frustrating SCANP's efforts to prepare its geology and seismology testimony and evidence; and scheduled extensive evidentiary hearings without due regard to the public interest, the nature of the proceedings, and the convenience

of the parties as required by 10 CFR §2.703(b) and 5 U.S.C. §554(b), and in a manner which denies due process to SCANP.

I. INTRODUCTION

The lengthy and complex litigation of the site suitability issues regarding the Skagit Nuclear Power Project have almost been concluded, and final evidentiary sessions are now in sight. These sessions will consider geology and seismology issues; site suitability respecting evacuation plans; alternative sources: coal vs. nuclear (excluding the effects of Radon 222); and floodplain management. But, after several years of proceedings* in which the Board strived to accommodate the convenience of parties and give full opportunity to prepare for evidentiary sessions, present a full case and be heard, the Board recently has conducted prehearing procedures and scheduled the forthcoming hearing in such a manner that it is impossible for SCANP (and, indeed, the other parties as well) to prepare fully its case on these crucial issues and to enjoy its constitutional right to be heard in a meaningful manner. See, e.g., Morgan v. United States, 304 U.S. 1 (1938).

Thus it is necessary for this Appeal Board to direct certification not only to insure due process, but also to

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*The present Board Chairman replaced the retiring Board Chairman in December, 1978. The two technical members of the Board have participated throughout.

insure an orderly administrative proceeding. As will be explained in greater detail infra, the proceedings below must be stayed pending certification and resolution of the issues presented by SCANP on this appeal because: first, relief will be meaningless if prior to consideration of this motion hearings are conducted without evidentiary presentation and proper consideration of crucial issues; second, important due process rights are at stake, which are linked directly to the conduct of the proceedings below, and which in the absence of a stay cannot otherwise be protected, see Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-468, 7 NRC 465, 468 (1978); third, because the need for an orderly administrative proceeding requires resolution of issues concerning the proper conduct of the hearing prior to the hearing itself, if a great deal of time and effort in litigating crucial issues improperly is not to be wasted; and fourth, the Licensing Board has so far departed from the course of proceedings authorized by the Commission, and has so openly ignored Commission regulations and abused its discretion, that the immediate exercise of the Appeal Board's supervisory powers is essential. Pacific Gas & Electric Company, ALAB-504, 8 NRC 406, 412 (1978).

II. THE LICENSING BOARD UNLAWFULLY HAS EXCLUDED THE RADON 222 ISSUE FROM CONSIDERATION, AND HAS DENIED SCANP THE RIGHT TO LITIGATE THE ISSUE, CONTRARY TO COMMISSION REGULATIONS AND DECISIONS AND WITHOUT EXPLAINING ITS BASIS THEREFOR.

SCANP has put the effects of low level radiation, including emissions of Radon 222, into controversy from

1396 247

the beginning of this case. See SCANP Contentions D, J-13, J-9, PSAR 1(c). See also FOB/CFSP Contentions 6 and 7. In response to a request by the Licensing Board in the fall of 1978, SCANP indicated its particular areas of concern which required litigation by evidentiary hearings, and were not addressed in the Perkins proceeding, in "Intervenor SCANP's Response to Partial Initial Decision in Perkins," filed November 15, 1978 (Attachment 2). At that time, SCANP also identified witnesses which SCANP would produce respecting Radon 222, and the general areas which their testimony would address. Id. at 10. SCANP twice has reaffirmed its position on the Radon issue, e.g., Intervenor SCANP's Revised Statement of Issues, at 12 (filed March 16, 1979).

The NRC Staff agreed that SCANP has indicated in "quite concise statements exactly why they feel the Perkins record is inadequate," Tr. 14596, and that "some of them [SCANP's objections] are SCANP's own unique objections to the Perkins record." Tr. 14,607. Moreover, both Staff and the Board agreed that an evidentiary presentation would be the most appropriate means of resolving the Radon issue. Tr. 14,596-97. Again, the Board and Staff were in agreement that Staff's motion to incorporate wholly the Perkins record could not be granted as the motion stood, both because SCANP had presented concisely its unique objections to the Perkins record, and because of new information which had been produced

since the Perkins record was closed. Tr. 14,599, 14,607-09 (Board stating that it would "not rule on the motion before us").

Nevertheless, and without explanation or even so much as a written or oral order to such effect, the Licensing Board arbitrarily has exluded the Radon 222 issue from litigation at the forthcoming final evidentiary session in the proceeding. The parties are aware of the Board's intent to exclude Radon 222 only because, in issuing its scheduling order, the Board stated:

> The subjects of the hearings will be as follows: . . . Coal vs. Nuclear (Health Effects, Excluding Radon 222). . .

Licensing Board Order of October 1, 1979, at 1 (Schedule of Hearings) (Attachment 3).

In view of the Licensing Boards' "obligation 'to articulate in reasonable detail the basis for [their] determinations' on the questions coming before them for decision," Pacific Gas & Electric Co., supra, 8 NRC at 410, the Board's failure not only to explain in any detail the basis for its determination, but also its failure even to issue an order implementing its decision alone requires this Appeal Board to exercise its review functions. See Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (decisionmaker must state reasons for determination and indicate evidence upon which reliance is placed); Greater Boston Television

Corp. v. Federal Communications Commission, 444 F.2d 841, 851-53 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). As noted by the Appeal Board in Pacific Gas & Electric Co., supra at 412, the Appeal Board cannot let pass a ruling "of obvious crucial importance which has no reasoned basis assigned for it," when its failure to intercede "would constitute an abdication of the oversight responsibilities vested in" the Appeal Board.

Accordingly, the Appeal Board could stay the evidentiary hearing regarding the coal versus nuclear comparison, and remand "for prompt reconsideration and a full explication of the reasons underlying whatever result" the Board might reach upon remand. Id. at 412. But this may not be the wisest course here for several reasons. First, it may be most expeditious for this Board to resolve the question, so that in one evidentiary presentation the entire coal versus nuclear cost benefit comparison, including Radon 222, can be considered. Second, this Licensing Board has shown a disinclination to act in a timely manner in response to previous requests from this Board that the Licensing Board act expeditiously. See Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB 556, 10 NRC ____ (1979). Third, the Licensing Board was so plainly in error in excluding Radon 222 from consideration, that it would be pointless for this Board to remand for the purpose

of obtaining the Licensing Board's basis for its inexplicable treatment of the Radon issue.

Consideration of the full body of the NRC's law regarding Radon 222 leads inevitably to the conclusion that the issue must be addressed in an evidentiary session in this proceeding. Table S-3, 10 CFR, Part 51, Subpart B had at one time assigned a value for Radon 222 which was generically applied in ASLB licensing proceedings. But on April 14, 1978, the Commission recognized that the Radon 222 value in Table S-3 was incorrect, and directed that the effect of Radon 222 was an issue to be considered "in individual [licensing] proceedings," not only where raised in a party's contention (as here), but also in all other proceedings "still pending before Licensing or Appeal Boards." 43 Fed. Reg. 15613, 15615-16 (Apr. 14, 1978); 10 CFR Part 51, subpart B, Table S-3, n.1 (1979).

Subsequently, the Appeal Boards, at the NRC Staff's request, consolidated 17 appeals then pending before the various appeal boards to determine how to consider the Radon 222 issue most expeditiously. Philadelphia Electric Company, ALAB-480, 7 NRC 796 (1978). Because Staff viewed the issue as one which required identical litigation in all dockets, it asked the Appeal Boards to consolidate the issue in all the pending appeals into one presentation. The Staff requested this consolidation because it recognized

explicitly that the effect of a decision respecting Radon 222 in one docket could not be binding in subsequent consideration of the effects of Radon 222 in another docket. 7 NRC at 800-01. See also Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), CLI-78-3, 7 NRC 307, 309 (1978) (Commission adopts Staff recommendation that Table S-3 be amended to remove value for Radon releases, "and that the subject of Radon releases and associated health effects be declared litigable in all individual licensing proceedings.").

The Appeal Boards agreed with the Staff that parties could not be bound by the record in another proceeding where Radon 222 was considered:

> Obviously, nonparticipants in Perkins cannot be held bound by the record adduced in that proceeding.

7 NRC at 805. But the Appeal Boards noted that the Staff had not recommended a rule-making proceeding to amend Table S-3, and rejected the Staff's request for consolidation as unfair and unworkable. Id. at 803. But in order to save time and resources, the Appeal Boards designated the Perkins record as a lead case, while reserving explicitly to each party in a pending appeal the "opportunity in his proceeding to supplement, contradict, or object to anything in the Perkins record." Id. at 805.

Although the Appeal Boards' decision in Philadelphia Electric Company was addressed only to the 17 appeals then pending before the Appeal Boards, and was not applicable to Licensing Board proceedings, the Licensing Board here at the request of Staff followed a similar course, requesting the views of the parties on whether the Perkins record was adequate, and in what areas further litigation would be required. Although SCANP reserved its doubts as to the applicability of the Appeals Board' suggestion to a Licensing Board proceeding,* cf. Public Service Company of Oklahoma, (Black Fox Station, Units 1 and 2), LBP-78-26, 8 NRC 102, 134 (1978) (reopening record to allow two day evidentiary presentation regarding Radon 222), SCANP complied with the Licensing Board's request, and indicated its areas of concern not resolved in Perkins and listed potential witnesses. See Attachment 2.

Again, SCANP indicated its immediate willingness and preference to litigate the Radon 222 issues at the eviden-

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*In addressing the request for consolidation of all pending appeals, the Appeal Boards recognized that some limiting measures may be appropriate and desirable where the evidentiary records were otherwise completed in all of the pending appeals. In cases such as this which are at the Licensing Board level, and where the record remains open regarding several issues, there is less justification for unnaturally restricting evidentiary presentations, and consequently the right of a party not to be bound by records adduced in other proceedings must be assigned even greater weight than in the appeals considered in Philadelphia Electric Company.

tiary sessions convened at the end of August, 1979. See Tr. 14,610, 14613. But the Board has ignored SCANP's willingness to go forward, and without order or explanation, and without a revised Staff Motion for Summary Disposition as deemed necessary by the Staff and Board because of the concerns raised by SCANP and because of the newly produced evidence, see Tr. 14,599, 14,603, 14,607-10, 14,614 (Board cannot rule on present incomplete motion),* the Board has by fiat decreed that the issue may not be considered at the forthcoming evidentiary session.

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*Parenthetically, SCANP calls to the attention of the Appeal Board this cited portion of the transcript to demonstrate the need to remind the Licensing Board Chairman to abide by NRC regulations, and to preserve the appearance and reality of an impartial proceeding. At several points, the Board stated that the regulations provided only ten days to respond to a Motion for Summary Disposition which the Board Chairman actively was soliciting from the Staff. E.g., Tr. 14594, 14603, 14607 (advising Staff how to write motion), 14,610, 14,614 (10 days provided for response to Motion), 14,617-19 (same). Compare 10 CFR §2.749(a) (party may serve response to motion within 20 days after service of motion). Indeed, the record suggests that the Board changed its mind regarding a revision to the motion for summary disposition primarily because counsel for intervenor SCANP insisted upon having 20 days to respond to such a revised motion. Tr. 14,614-21. The Board would have been better advised to adhere to its own and the Staff's recognition that an evidentiary session was most appropriate, Tr. 14,596-97, or, at the very least, required the Staff to submits its revised motion and afford the other parties the proper time alloted in the regulations for response. SCANP questions further whether the Board's solicitation of a summary disposition motion was a proper venture by the Board Chairman. See generally Tr. 14,594-621. The confusion on the part of the Staff generated by this ill-advised invitation by the Board which led the counsel for the Staff to ask the Board exactly

In sum, the Licensing Board's failure to issue an order and explain the basis for its decision to exclude Radon 222 is sufficient grounds in itself to direct certification and order the Board to explain its decision. But because the Licensing Board clearly erred in purporting to deny SCANP its right to litigate the Radon 222 issue, as directed by the Commission, the Appeal Boards, and as recognized by the Staff, this Appeal Board should direct certification, and remand to the Licensing Board with instructions to schedule promptly an evidentiary session on Radon 222 prior to concluding its evidentiary hearings.

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* (Cont. from p. 11)

what it is that the Board wished the Staff to do, see Tr. 14,595-96, highlights the inappropriateness of the Board departing from its independent, impartial posture. We think this point especially pertinent because there can be little doubt, in light of the Chairman's statement, "The Board is of the mind to reach a conclusion about this Radon issue," Tr. 14,594, what conclusion the Chairman had in mind: that the issue should not be litigated. The Board should not prejudge the issues before it. Finally, the Chairman's response to SCANP counsel's assertion that SCANP was ready to proceed at once with its presentation of the Radon issue that the assertion "leaves me quite cold," Tr. 14613, and the Board's apparent lack of patience with SCANP's request for a reasonable time to respond to any further motion, was an intemperate display that should not go unnoticed by this Board. This is especially so in view of other similar occurrences involving the Chairman. See Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC ___ (Aug. 31, 1979); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-79-9, 9 NRC 361 (1979).

III. THE LICENSING BOARD HAS RESTRICTED ITS CONSIDERATION OF GEOLOGY AND SEISMOLOGY ISSUES IN VIOLATION OF COMMMISSION REGULATIONS, AND CONTRARY TO THE PUBLIC INTEREST.

Whether the geology and seismicity of the area of the proposed Skagit plants are such that the site is an appropriate one for a nuclear reactor probably has been the most crucial issue in this proceeding. Two previous extensive evidentiary sessions have been held on these issues, the second of which was adjourned in March, 1978, when the Licensing Board concluded that further research would be required before the issue could be settled. Applicant has spent well over a year since that time actively engaged in geology and seismology research, has expended significant sums in such research ($250,000 for aeromagnetic data alone), and has produced 3 lengthy volumes and a great deal of other testimony as a result of its research. A significant amount of this testimony was circulated to the parties as late as October 11, 1979.

The United States Geologic Survey also has investigated the geology and seismology of the region, and produced on September 13, 1979, a report which recognized that a great deal of uncertainty and legitimate controversy still exists regarding the geology of the region. The Staff has spent a significant amount of time evaluating the Applicant's work, and all of the parties have been actively preparing for the forthcoming evidentiary session. See letters from Eric S.

Cheney to Roger M. Leed, dated October 8 and 11, 1979 (preparation for hearings time consuming and difficult) (Attachment 4).

Despite the obvious importance and complexity of these issues, and without due regard for the great public interest in assuring that the issues are resolved fully and conclusively, the Board has in its Order Scheduling Hearings (Attachment 3) constricted the geology and seismology issues by reference to three questions posed by the Board. Id. at 2 (para. 5). Particularly objectionable is the Board's question:

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

Id. ¶5(a)(emphasis added). The Board further warned:

> The parties are advised to bear in mind the Board's interest in the ultimate answers to the above three questions while they are examining witnesses on Geology and Seismology; otherwise, their examination of the witnesses, especially if tangential or remote to the Board's designated central interest, may prove to be of little or no value to the proceeding and indeed, may be curtailed.

Id. The Board's purported attempt to restrict geology and seismology testimony, and especially its "reasonable probability" standard, is clearly contrary to 10 CFR, Part 100, App. A.

The entire thrust of the appendix is to insure that geology and seismology investigations are guided by criteria which are sufficiently conservative to assure the public's

safety against the consequences of an event such as a severe earthquake. If the standard of proof evident throughout the appendix could be characterized, "forseeable possibility" would be much more applicable than "reasonable probability". The Appendix calls for even greater conservatism than those included in its criteria "for sites located in areas having complex geology or in areas of high seismicity," 10 CFR, Part 100, App. A, Subpart II, a standard even further removed from the Board's "reasonable probability" standard. The complex shearing and faulting evident in Northwest Washington, and the expensive and time-consuming efforts which have been required to attempt to learn the region, about which the USGS still recognizes uncertainties and controversy, demonstrate beyond doubt that the added conservatism required by the regulations is necessary here.

More specifically, the appendix requires investigation in sufficient scope and detail to provide "reasonable assurance" that the geologic, seismic, and engineering characteristics of a site are sufficiently well understood to permit an adequate evaluation of the proposed site, and to provide sufficient information to support the determinations required by the regulations. Id.; id. Subpart IV. The regulations require further that "the earthquake which could cause the maximum vibratory ground motion at the site should be designated the Safe Shutdown Earthquake." 10 CFR

Part 100, App. A, Subpart V(a) (emphasis supplied). In determining the design basis for the SSE, the regulations state that it may be necessary to assume an earthquake larger than that of the maximum earthquake historically recorded, and require further that conclusions must be based on the assumption that a historically reported earthquake, whose location cannot be pinpointed, occurred at the site, without attenuation for possible depth of the earthquake. Id., Subpart V(a)(1). The regulations provide explicitly that the investigatory procedures "shall be applied in a conservative manner" and state, in the event that geological and seismological data warrant, the Safe Shutdown Earthquake shall be larger than that derived by use of the procedure set forth in Section IV and V of the Appendix." Id. V(a)(1)(iv). This combination of events may not be within "reasonable probability," but the regulations nevertheless identify them as the benchmark by which site safety must be judged.

The "reasonable probability" standard adopted by the Licensing Board clearly implies an investigation of lesser scope than that required by the regulations, which regulations incorporated an important public policy determination by the NRC that earthquake hazards are of sufficient concern that a site cannot be deemed suitable unless it can be stated with confidence and on the basis of the fullest

scientific investigation possible that any reasonably conceivable dangers can be met. The "reasonable probability" standard imposed by the Licensing Board 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.

SCANP therefore requests that this Board take whatever action is necessary to assure that the Licensing Board applies correct standards in receiving testimony and evaluating the geology and seismology issues. This Board must act immediately, for it would be wasteful and extremely inattentive to the public interest to allow a third extensive hearing on geology and seismology to go forward, only to recognize subsequent to the hearing that further consideration is required because the Licensing Board did not guide its inquiry in accordance with the regulations. Public policy and administrative economy require that geology and seismology be addressed in one comprehensive hearing, and that these issues not be addressed until they are ready for a presentation which comports fully with the Commission's regulations.

The Licensing Board has further cast into doubt its ability to resolve geology and seismology issues correctly by denying SCANP the opportunity to conduct discovery on these issues, and by scheduling the evidentiary session in a

manner which is contrary to the public interest, and is so arbitrary that it denies due process. These issues are addressed below.

IV. THE LICENSING BOARD HAS RESTRICTED AND DENIED DISCOVERY CONTRARY TO THE UNDERSTANDING OF THE PARTIES AND THE BOARD.

In ruling that SCANP's attempt to undertake discovery respecting the Applicant's geology presentation was untimely, see Attachment 1, the Licensing Board has relied upon a discovery deadline which was not intended by the Board or the parties to be applicable to this issue, and has in effect completely denied SCANP's access to discovery.

The Commission previously has recognized that:

> In modern administrative and legal practice, pre-trial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, . . . and prepare adequately for a more expeditious hearing or trial.

Pacific Gas & Electric Company, LBP-78-20, 7 NRC 1038, 1040 (1978). Further recognition has been given to the position of intervenors, who because of their limited resources and inability to independently obtain data are at a substantial disadvantage in determining whether generic safety issues have been resolved satisfactorily. Pennsylvania Power & Light Company, 9 NRC 291, 311 (1979).Thus, denial of an intervenor's discovery rights places in jeopardy the intervenor's ability to prepare for hearing, and is contrary to the commission's policy.

The Board held that June 1, 1979 was set as a discovery cut-off date regarding any subject scheduled for hearing beginning July 17, which the Board asserted included geology and seismology. Attachment 1, at 3. Indeed, the June 1, 1979 discovery deadline was limited explicitly to matters to be taken up at the July 17 session. Tr. 11945-46; see Order of June 29, 1979, at 5 (Attachment 5). However, any suggestion that the parties or the Board contemplated that geology and seismology issues would be considered at the July 17 session, or that the June 1 discovery deadline applied to these issues, is completely contrary to the record, and the understanding between the parties and the Board.

Immediately prior to considering an appropriate discovery cut-off, the Staff made abundantly clear that the geology review conducted by it and the USGS would continue through the summer, Tr. 11871, that the Staff would "hopefully" issue its SER supplement on geology and seismology in September, Tr. 11868-69, and that the Staff would be ready to go forward with hearings in geology and seismology no sooner than the September date. Id. at 11908, 11930-31; Attachment 5, at 4. Subsequent events proved that even this estimate was optimistic. See letter from Richard Black to Valentine Deale, dated August 15, 1979 (all issues to be taken up in August except geology and seismology, issues on which Staff is not prepared to offer testimony until October,

1979); Miscellaneous Order dated September 13, 1979, at para. 7 (Licensing Board again recognizes uncertainty as to when geology can be heard).

Moreover, when the parties considered a discovery schedule, they were well aware that SCANP would need to undertake extensive discovery regarding geology and seismology, Tr. 11872-73, and that SCANP would rely extensively on discovery to obtain information from Applicant and Staff which would otherwise be unavailable to SCANP, and which was essential for SCANP's preparation regarding these issues. Tr. 11883-84.

At the same time that the Board set June 1 as a discovery cut-off date regarding issues to be considered July 17, it also set June 1 as a deadline for Applicant's submission of its prefiled testimony regarding geology. Tr. 11887-91; Attachment 5, at 5. In fact, Applicant completed distribution of its three-volume report on geology, (without important "proprietary" data) accompanying a letter of May 25, 1979, and submitted further prefiled testimony on October 8, 1979. Most important, Applicant asserted that the aeromagnetic data accompanying its three-volume report was proprietary information, and accordingly did not distribute this data to the parties. However, the aeromagnetic data are essential to understanding Applicant's report, and were not obtained by SCANP until after September 1. Attach-

ment 4 (October 11 letter, at 1). Thus, it was impossible for SCANP to formulate discovery requests regarding Applicant's geology and seismology testimony prior to June 1, 1979, because SCANP did not have access to crucial elements of Applicant's report until some three months later. The same is true, of course, regarding testimony of two witnesses prefield by Applicant on October 8, over four months after the alleged deadline. By asserting contrary to the record that the June 1 deadline was applicable to geology and seismology, and to discovery requests regarding information provided only some three or four months later, the Licensing Board has attempted to eliminate SCANP's right to discovery completely, a result clearly not agreed to by the parties nor intended by the Board. Not only is the Board's interpretation contrary to the understanding regarding discovery which was clear among the parties, but it is also in direct conflict with the Appeal Board's declaration that discovery is to be allowed liberally, Pacific Gas & Electric, supra, 7 NRC at 1040, especially with regard to Intervenors who have no other means of obtaining facts necessary to prepare their case. It is abundantly clear that, given the late date on which the aeromagnetic data were obtained, it would have been impossible to formulate discovery requests prior to September, 1979, see Attachment 4 (letter of October 11), and the record cannot reasonably be interpreted to suggest

that SCANP agreed to forego its right to conduct discovery with respect to geology and seismology. Cf. Pennsylvania Power & Light Company, supra 9 NRC at 327 (setting discovery schedule which directly ties discovery deadlines to receipt of important evidence, allowing discovery for 30 days after service of important documents or any new evidence subsequently submitted).

Moreover, to deny SCANP discovery regarding Applicant's allegedly proprietary data made available to SCANP in September would be to allow Applicant to take unfair advantage of its claim of privilege, to SCANP's prejudice. Such a result would encourge parties to claim that testimony was proprietary, in order to delay or prevent other parties from reviewing and rebutting the testimony. In the context of rulemaking proceedings, the Third Circuit held recently that the owner of proprietary information is free to submit its information to the NRC, but not under conditions which will in effect deprive other interested parties of the opportunity to review and challenge the data. Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission, 555 F.2d 82 (1977). The reasoning of the case clearly is applicable here, and its result controlling. SCANP should not be denied a reasonable opportunity to conduct discovery and otherwise prepare to meet Applicant's evidence regarding geology and seismology. See Attached 4 (Letter of October

11) ("proprietary" aeromagnetic data essential to geology review).

The Licensing Board's holding that the parties agreed to curtail geology and seismology discovery by reference to a date prior to the distribution of much of the geology and seismology prefiled testimony, is contrary to the record, and is arbitrary and capricious. In order to allow SCANP to fully prepare its case, and in order to satisfy the overwhelming public interest in assuring that all parties have full opportunity to be heard with respect to this crucial issue, this Board should vacate the Licensing Board's decision of October 4 (Attachment 1), and enter an Order requiring the Board to permit SCANP to conduct appropriate discovery, and directing the Applicant to respond to such discovery. Of course, the Applicant should be directed to respond prior to any evidentiary hearings in which geology and seismology is considered.

V. THE LICENSING BOARD HAS, IN SCHEDULING EVIDENTIARY SESSIONS, VIOLATED THE COMMISSION'S REGULATIONS, THE ADMINISTRATIVE PROCEDURES ACT,AND DENIED SCANP DUE PROCESS OF LAW.

In setting the forthcoming evidentiary session with unseemly haste and "during a period when tight scheduling was known to be the order of the day," Attachment 1, at 4, the Licensing Board has violated 10 CFR, Section 2.703(b), 5 U.S.C. §554(b), has denied SCANP due process, and has caused unresolvable conflicts with other obligations of the parties which are directly related to this proceeding.

10 C.F.R. §2.703(b) provides:

> The time and place of hearing will be fixed with due regard for the convenience of the parties or their representatives, the nature of the proceeding, and the public interest.

See also 5 U.S.C. §554(b) (requiring due regard for convenience and necessity of parties). The schedule fixed by the Board provided "due regard" for none of these concerns, and was especially prejudicial to Intervenor SCANP.

First, there was no regard for the convenience of the parties. SCANP was neither advised nor consulted about the proposed hearing date prior to the Board's Order, contrary to the usual practice of the board. See Attachment 4 (Letter of October 8), at 1. The Order, received on October 5, 1979, affords SCANP but three weeks to prepare its presentation for the most complex issues to be considered by the Board in this proceeding. This time period is clearly and hopelessly inadequate. See Affidavit of Robert Carr, attachment 6. The inconvenience to SCANP is especially great, because SCANP is afforded only a few weeks to review and respond to the voluminous presentations of Applicant and Staff, much of which has been received only recently. Id.; See Attachment 4 (Letter of October 11). Indeed, the Staff's prefiled testimony was not distributed until after the Board's Order fixing the schedule (Attachment 3) was sent, and Applicant has submitted yet more data (offshore

seismic surveys) recently (September 13, 1979) which has not been made available to SCANP because of its alleged proprietary nature. See Westinghouse Electric Corp. v. U.S. N.R.C., supra. Applicant has prefiled yet more voluminous testimony, received on October 11, 1979. This short notice does not allow SCANP sufficient time to prepare a response to Applicant's testimony. DiLuigi v. Kafkalas, 437 F. Supp. 863 (D.C. Pa. 1977).

Second, due regard for the nature of the proceeding requires postponement of the hearings. These proceedings involve complex and technical issues, and require detailed and time consuming review and preparation, which cannot be performed adequately within the short time afforded by the Board's Order. See Attachment 4. For these reasons, a schedule is required which incorporates reasonable time for preparation of evidentiary presentations. See T. A. Moynahan Properties, Inc. v. Lancaster Village Coop, Inc., 496 F.2d 1114 (7th Cir. 1974).

Third, the public interest demands that the hearings be rescheduled. The most important public interest factor clearly is whether the schedule assures a presentation which is sufficiently detailed and understandable to form the basis for an informed decision which assures the public safety. As we have demonstrated above, the schedule fixed by the Board does not meet the public interest because it

does not afford Intervenor SCANP the opportunity to make a complete and adequate presentation, and may cause important and relevant evidence to be omitted. This public interest factor also weighs heavily with respect to the presentations of Applicant and Staff, which cannot be prepared adequately by the time the hearings are convened. Applicant submitted further seismology data to the U.S.G.S. on September 13, 1979, the same date on which the U.S.G.S. submitted its supplemental report. Until this new data is evaluated by Staff and submitted to all the parties for their further review and evaluation (which will be time-consuming because Applicant asserts that the data is proprietary), the geology and seismology issues will not be ripe for presentation. Any hearing which includes the geology and seismology issues without evaluation of the new data submitted by Applicant would be premature at this time.

It is clearly not in the public interest to allow yet another incomplete and partial presentation of geology and seismology to go forward in this case. Several such partial presentations have been offered in the past, and have led only to further delays. The geology and seismology issues should be held in abeyance until such time as a full presentation on these issues can go forward, so that the issues may be resolved completely and fully by the Board.

The Board's Order violated not only its own regulations, but also denies SCANP due process of law. With respect to the rights of an intervenor in an administrative proceeding, it is basic to due process that the intervenor is afforded an adequate opportunity to participate meaningfully in the administrative process. Morgan v. United States, 304 U.S. 1 (1938); Goldberg v. Kelly, 397 U.S. 254, 266 (1970). Due process does not contemplate requiring parties to do the impossible, by scheduling hearings with wholly inadequate time for preparation. Goldberg v. Kelly, supra (notice must be adequate); DiLuigi v. Kafkalas, supra. Professor Davis' summary of the due process requirement in administrative proceedings is pertinent here:

> . . . time must be adequate for preparation, . . . proceedings once instituted must not move too fast to allow full and fair hearing.

Administrative Law Text, at 202.

It may well be that in certain circumstances it is essential to schedule an administrative or judicial hearing promptly, and without affording one or more parties full opportunity to prepare. But the Licensing Board has cited no such circumstances here, nor has it explained why "tight scheduling. . . was the order of the day." To the contrary, the complexity of the issues to be considered, and the need and public interest in their complete and accurate resolution which guarantees the public safety, mandates the opposite

conclusion that these proceedings take place only after every party has had a full and reasonable opportunity to prepare its case.

Moreover, the schedule set by the Board is clearly unworkable. The Board has allowed no leeway, setting regular sessions for Saturdays, contrary to its usual practice, and at great inconvenience to SCANP, whose counsel does not maintain staff nor usual business hours on Saturdays. Not only is SCANP afforded an insufficient opportunity to prepare, but so is the Applicant. Indeed, Applicant objected to SCANP's discovery partly because responding to discovery would interfere with Applicant's preparation of its case.

Similarly, the Board's requirement that SCANP prefile all of its testimony by October 18 is also unworkable, as many of its expert witnesses had not received Applicant's recently distributed testimony until just prior to the deadline. See Atachment 6.

The schedule further conflicts with other obligations of the parties. SCANP was required to submit its proposed Findings of Fact on October 12, 1979, which was an extremely burdensome effort culminating in submission of a 126 page document. SCANP is required to submit further proposed Findings of Fact on October 26, 1979, the day after the hearings are scheduled to reconvene. These obligations cannot be met simultaneously with preparation for the

upcoming hearings. In addition, the failure to give the customary amount of notice has created similar unresolvable conflicts for SCANP's expert witnesses, who have scheduled their other obligations in reliance upon adequate notice in this proceeding. See Attachment 4 (Letter of October 8), at 1.

In addition, the parties now have other obligations which are directly related to this proceeding, and which conflict with the Board's schedule. Applicant has applied to Skagit County for an extension of its rezone contract, and has insisted that the County Commissioners schedule hearings on the application beginning October 29, 1979. SCANP must, of course, protect its interests by participating in those hearings, but it is doubtful whether SCANP can appear there and at the Licensing Board proceedings which are scheduled simultaneously. Additionally, SCANP's reply brief in the Washington Supreme Court appeal regarding the state certification of the Skagit site is due on November 4, 1979.

It is evident that even if the hearings were not scheduled to reconvene on October 25, 1979, counsel for SCANP would be fully occupied in attempting to meet the other obligations presented in this case, including preparation of proposed findings, conduct of discovery, evaluation of testimony, and participation in the county hearings.

This does not even take into account several unrelated obligations which counsel must meet, and which cannot be postponed. Neither the Commission's regulations nor due process envision that a party's right to be heard can be conditioned upon it performing tasks which are impossible, yet it is all too clear that this is the effect of the Board's schedule.

VI. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, it is clear that this Appeal Board should intercede and restore order to the proceedings, in order to best serve the public interest and protect SCANP's rights under the Commission's regulations and the Constitution.

The substantive relief requested by SCANP is easily administered. SCANP asks this Board to vacate the Licensing Board's order scheduling hearings (Attachment 3), and to direct that Board to guide the presentation and consideration of Geology and Seismology in accordance with the Commission's regulations rather than the Board's contrary inquiries: the Board further should be directed to include the effects of Radon 222 in the evidentiary hearing respecting Cost/Benefit Analysis: Coal vs. Nuclear, or to defer its site suitability determination until Staff has submitted a revised summary disposition motion, and the parties have been allowed to respond in accordance with 10 C.F.R. §2.749

(as Staff and the Board agreed, the former option remains preferable and more efficient).

Similarly, the procedural relief necessary can be administered with no serious disruption or delay. The Licensing Board's order denying discovery (Attachment 1) should be vacated, and the Board directed to permit SCANP to conduct necessary discovery. SCANP previously informed the Board that if SCANP's discovery requests are met promptly, and other obligations (i.e., to prepare proposed Findings of Fact by October 26, 1979) are rescheduled, SCANP should be able to proceed by about November 15. See also Attachment 4 (Letter of october 8), at 2. Since SCANP made this representation to the Licensing Board, the Skagit County proceedings were set to begin October 29. SCANP therefore requests an additional two weeks, until December 1, to prepare for the hearing before the Licensing Board, unless applicant is willing to reschedule the County proceeding after geology and seismology are presented. Thus, if Applicant and Staff cooperate fully to expedite discovery, and other conflicts can be resolved, an order directing the Licensing Board to reconvene its evidentiary session on or after November 15 would redress the prejudice to SCANP's rights and restore order and due process to this proceeding.

Finally, SCANP asks the Appeal Board to admonish the Chairman of the Licensing Board of his obligation to deal

with all parties in a fair and impartial manner, and to keep in mind the standards and protections afforded by the Commission's regulations when issuing orders that may prejudice a party.

Dated this 11th day of October, 1979.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

Objection to SCANP's Discovery Undertaking Sustained

1. On September 14, 1979, SCANP presented to Applicants interrogatories and requests for production. The interrogatories numbered 120, and many of these were subdivided into several parts; the interrogatories and the requests for production covered 88 pages. The interrogatories were in regard to the three volumes entitled "Report of Geological Investigations in 1978-1979" prepared by Bechtel Incorporated for Puget Sound Power & Light Company.

2. The three volumes had been distributed to the parties in this proceeding in two installments via letters dated May 10 and May 25, 1979 from Puget Sound Power & Light Company's representative, James E. Mecca. By letter of its counsel of May 31, 1979, Puget Sound Power & Light Company committed the three volumes of the Bechtel Report to be offered in evidence at the then scheduled July 17 evidentiary session. The same letter identified witnesses planned to

be called from Bechtel in support of the report among those who supervised or performed many of the investigations and prepared the report.

3. Applicants objected to SCANP's interrogatories and request for production by a pleading dated September 21, 1979. Applicants' objection consisted of four points: First, Applicants maintained that SCANP's discovery was untimely. Applicants also noted that SCANP had made timely discovery submissions to Applicants on Geology and Seismology dated May 24, 1979. Second, Applicants objected to many of the questions in SCANP's discovery undertaking of September 14, 1979 because they called for additional work or revised documents. In effect, according to the Applicants, SCANP went beyond the proper scope of discovery and sought to have studies reperformed and data newly presented in a manner suitable to SCANP. Third, Applicants objected to the burdensome nature of SCANP's discovery, contending the interrogatories to be extremely lengthy and much of the details sought to be of questionable materiality. According to Applicants, preparation of answers would be by persons who are preparing themselves as witnesses for the upcoming hearing on the subject of Geology and Seismology and therefore, answering SCANP's untimely discovery would prejudice Applicants' preparation for the critical hearing. Fourth, to the extent that its questions are relevant and material, SCANP can pursue them more efficiently by cross-examination.

4. At the conference among the parties and the Board on April 24, 1979, it was decided by the Board with concurrence of the parties that June 1 would be the cut-off date for discovery requests and that supplemental discovery requests based on unsatisfactory answers to initial discovery requests may not be made after ten days following receipt of the answer to the initial discovery request which occasioned the supplemental request (Tr. 11,945-949). No change in this cut-off arrangement for discovery about any subject scheduled for hearing beginning July 17, which included the subject of Geology and Seismology, was ever made. See Order for Evidentiary Hearing and Related Matters, June 29, 1979, pp. 1-5. Nor can any change be inferred from the fact that the time for holding hearings on Geology and Seismology was eventually rescheduled to a hearing session beginning October 25, 1979.

5. The Board upholds the cut-off day for discovery set as June 1, 1979 and accordingly sustains Applicants' objections to SCANP's interrogatories and requests for production on the basis of their untimeliness. The focus of SCANP's discovery undertaking was the Bechtel Report, which had been available prior to the cut-off date for discovery and which prior to that time had occasioned interrogatories and requests for production by SCANP to the Applicants. If SCANP

needed further time for the preparation of additional discovery SCANP might have solicited the Board for the needed time in regular form. Instead, SCANP waited until some three and a half months after the Bechtel Report had been made available to it before SCANP presented its extensive interrogatories and request for production to the Applicants, and it was during a period when tight scheduling was known to be the order of the day.

6. In sustaining Applicants' objection on the basis of the untimeliness of SCANP's discovery, the Board refrains from ruling on the propriety or materiality of individual parts of SCANP's discovery undertaking.

Done this 4th day of October, 1979 at Washington, D.C.

ATOMIC SAFETY & LICENSING BOARD

By _____,
Valentine B. Deale, Chairman