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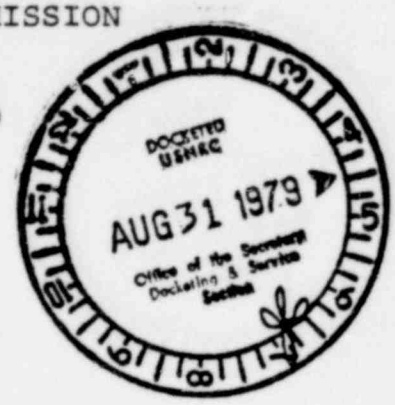
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

SERVED SEP 4 1979

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

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

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

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

DECISION

August 31, 1979

(ALAB-559)

In ALAB-552, 10 NRC ___ (July 9, 1979), we considered preliminarily the appeal of three Indian tribes from the June 1, 1979 order of the Licensing Board denying their extremely tardy petition for leave to intervene in this

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construction permit proceeding involving the proposed Skagit nuclear facility.[1/] Our focus was upon one of the several factors which 10 CFR 2.714(a) requires be applied in determining whether late intervention should be allowed: the sufficiency of the justification tendered by the tribes for their failure to have filed their petition on time. As we explained, it was appropriate to consider this factor at the threshold in light of our holding in prior cases that the substantiality of the excuse for lateness has a strong bearing on the showing which must be made by the tardy petitioner on the other factors enumerated in Section 2.714 (a). See ALAB-552, 10 NRC at ___ (slip opinion p. 7). In this connection, we observed:

> In the instance of a very late petition, the strength or weakness of the tendered justification may thus prove crucial. For, obviously, the greater the tardiness the greater the likelihood that the addition of a new party will delay the proceeding -- e.g., by occasioning the relitigation of issues already tried. Although the delay factor may not be conclusive, it is an especially weighty one. Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976).

1/ LBP-79-16, 9 NRC ___. As noted in ALAB-552, the Licensing Board had initially granted the petition. LBP-78-38, 8 NRC 587 (1978). On the applicants' appeal, however, we had vacated that grant and remanded the matter for further consideration. Unpublished order of January 12, 1979, explained in ALAB-523, 9 NRC 58 (1979).

Id. at ___ (slip opinion, pp. 7-8) (footnotes omitted).[2/]

A close look at the first two of the explanations given for the belated filing persuaded us that neither was meritorious. Id. at ___ (slip opinion, pp. 8-11).[3/] What that left was the tribes' remaining claim which, as we understand it, came down to this:

> Although in January 1975 they were fully aware of the proposal to build the Skagit facility in the vicinity of their fishery and community, they did not have at their disposal sufficient information on which to form an independent judgment respecting whether its construction and operation would adversely affect their interests. Rather than make their own endeavor to acquire such information, they chose to rely, as they assertedly were entitled to, upon the expressed opinion of both [the Department of the] Interior and the NRC staff that the aquatic and socioeconomic

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2/ We took note of the fact that, by the time the Licensing Board had its initial opportunity to consider the tribes' petition (which had been filed almost three and a half years after the prescribed deadline), extensive evidentiary hearings had already been conducted. Two of the three issues which the tribes now seek to litigate were treated during the course of those hearings. See ALAB-552, 10 NRC at ___, fn. 9.

3/ In essence, those explanations were: (1) that the tribes' treaty fishing rights were first adjudicated in a case decided in their favor by a federal district court in 1974 and the court of appeals in the following year; and (2) that the tribes were preoccupied with other matters. We need not here repeat the reasons why we found both of them to be insubstantial. Suffice it to say that further reflection has not led a majority of this Board to the same conclusion now reached by Mr. Farrar (see pp. 31-32, 33-36, infra); viz., that there is at least some merit to the explanations.

> effects would be insignificant. As a consequence of such reliance, they neither sought to intervene in the proceeding themselves nor (apparently) specifically requested Interior to do so on their behalf. At some point in 1977, however, they became concerned that in reality their interests might be harmed by the proposed facility and then asked Interior "to consider the possibility of United States intervention" as their trustee. Only after Interior indicated that it would not pursue that course did they seek for the first time to look into the matter of intervention themselves.

ALAB-552, 10 NRC at ___ (slip opinion, pp. 13-14).

We determined, however, that the record before us did not permit acceptance of that thesis. Noting that, from all that appeared, both Interior and the NRC staff had concluded after an actively pursued investigation that tribal interests would not be significantly affected by the construction and operation of the facility (and still adhered to that conclusion) we offered this analysis:

> Neither the NRC nor Interior purported to guarantee the correctness of their ultimate conclusions regarding impact upon the tribes. And our examination of the relevant jurisprudence discloses no basis upon which such a warranty might be implied as a matter of law. Thus, it is not enough for the tribes simply to assert that they were lulled into a false sense of security by the appraisals of impact given them by Interior or reflected in the FES 4/ prepared by the NRC staff. What the tribes must additionally establish is that, whether because of inadequate investigation on the part of the federal agency

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4/ Final Environmental Statement.

> or for some other reason, they were furnished erroneous information on matters of basic fact and that it was reliance upon that information which prompted their own inaction prior to June 1978.
>
> We find that, to this point at least, no such showing has been attempted. More specifically, the tribes have not endeavored to explain the respect(s) in which the NRC staff, Interior or other federal agencies misrepresented any fact (then known or ascertainable) which had a possible bearing upon the Skagit facility and the likely effects of its construction and operation upon tribal interests. Nor have we been pointed to any known or ascertainable material fact not disclosed by the agency which, had it been disclosed, might have induced the tribes to seek intervention at an earlier time.
>
> Beyond these deficiencies, the tribes' papers do not present a clear picture as to precisely when, and by what means, they discovered (if they did) that a misrepresentation or non-disclosure of a material fact had occurred (and what it was). Needless to say, the time element assumes crucial importance in judging whether the tribes were justified in not merely failing to meet the January 1975 filing deadline, but waiting until June 1978 before seeking to intervene. If, for example, they had first become aware in 1976 that the factual information made available to them by federal agencies might be materially inaccurate, there would remain the question why they had not then undertaken to assert their interests.

Id. at ___ (slip opinion, pp. 16-18).

As a matter of discretion, we decided to provide the tribes with an opportunity to fill these gaps in a supplemental

memorandum. In doing so, we stressed that

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

Id. at ___, fn. 20.

That memorandum, and the responses of the applicants and the staff to it, have been submitted. Consequently, we are now in a position both to complete our appraisal of the adequacy of the tribes' lateness excuse and, upon a consideration of their showing on the other Section 2.714(a) factors in the light of that appraisal, to decide the appeal before us.

A. At an early point in their supplemental memorandum (pp. 2-3), the tribes explicitly disavow agreement with the analysis contained in ALAB-552 and take pains to inform us that the memorandum was being submitted simply "to insure any required exhaustion of administrative remedies." An examination of the balance of the submission illumes the reason why they were constrained to take this approach.

In a nutshell, the memorandum does not disclose either the misrepresentation or non-disclosure by the NRC staff, the Department of the Interior or any other federal agency of a fact material to the assessment of the likely effects of the construction and operation of the Skagit facility upon trial interests.

1. One of the concerns expressed in the tribes' intervention petition related to the possible unique genetic impact of plant radiation upon them due to their assertedly greater exposure risk and higher than average rate of intermarriage. See ALAB-552, 10 NRC at ___ (slip opinion, p. 3). We are referred to statements in the staff's FES (at pp. 5-15, 7-2 and 10-2) to the effect that "[e]ffluents from plant operation will * * * be an extremely minor contributor to the radiation dose that persons living in the area normally receive from background radiation"; that "[i]t is concluded * * * that the environmental risks due to postulated radiological accidents are exceedingly small and need not be considered further"; and that "[t]he staff does not believe that any adverse radiological effects will occur since the radioactive effluents from the plant will be less than proposed Appendix I design objectives." The tribes insist[5/] that, "[w]ithout an evaluation of the

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5/ Supplemental memorandum, p. 5.

genetic and somatic susceptibility of Indian receptors," those conclusions were "judgmental and unsupported."

Whether or not that might be so, the fact remains that nothing in the FES gave the tribes the slightest cause to think that such an evaluation might have been undertaken in connection with the preparation of that document. Stated otherwise, although the tribes may believe there to have been warrant to look into the possibility that the plant's radiation releases might have an unusual genetic or somatic impact upon Indian receptors,[6/] there is no room for any claim that they had been misled by the FES into believing that the staff had shared that view and, accordingly, had done so. It follows that none of the FES statements in question can serve to explain satisfactorily the interval between the issuance in May 1975 of the document and the filing three years later of the tribes' intervention petition in which the concern regarding Indian receptors was first raised.

6/ Even today, that seemingly remains a mere possibility. See pp. 19-20, infra. In its response to the tribes' supplemental memorandum (at p. 3), the staff states that it now has the subject under study and, when completed, will make public its analysis and conclusions.

2. The second concern advanced in the tribes' petition related to the socio-economic impact which the plant might have on Indian communities. See ALAB-552, 10 NRC at ___ (slip opinion, p. 3). On this score as well, the tribes point an accusing finger at the FES -- more particularly, the statement (at p. 4-13) that

> The staff concluded that the applicant has properly identified the potential social and economic impacts of plant construction, that these impacts will be small, and that the applicant has taken adequate measures in collaboration with the local government authorities to mitigate them.

We are told that this statement "is clearly erroneous with respect to the Tribes, as there was no identification of impacts upon them or their members, nor were any mitigation measures indicated". Supplemental memorandum, p. 5.

The staff's rejoinder (at p. 4 of its response) is that the FES reveals that an evaluation had been made of the socio-economic impact upon the communities surrounding the facility which would attend upon both construction activities and plant operation.[7/] The staff acknowledges that the assessment had been in terms of "the population in general" and had not singled out for special evaluation "a unique

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7/ It cites Sections 4.5 and 5.6 in support of this assertion.

segment of that population, e.g. the Indians". It stresses, however, that the tribes have not identified the respects in which either (1) the stated conclusions were false or misleading or (2) the tribes had relied upon them to their detriment.

We need not pass judgment here on whether the staff correctly concluded that the socio-economic impacts upon the general population are small and that sufficient measures to mitigate them have been taken. Nor need we decide whether there is substance to the tribes' apparent belief that their members should not have been lumped together with other segments of the population in making the assessment. Be all that as it may, the pivotal consideration is that, insofar as appears from the tribes' filing, the staff neither misrepresented nor withheld any material fact pertaining to the scope or the fruits of its inquiry into socio-economic impacts. If the tribes thought that inquiry to have been incomplete because of its failure to have focused specifically upon tribal communities -- and that as a consequence the staff conclusion on socio-economic impacts was not worthy of acceptance -- they could have promptly sought to intervene in the proceeding to make precisely that point. Instead, to repeat, they maintained

their silence for several years, to a time beyond which the evidentiary hearing on this phase of the proceeding had been completed.

3. What has been said above applies equally to the tribes' third concern -- the possible effects of various plant components and of construction work on the Skagit River environment and fish population. See ALAB-552, 10 NRC at ___ (slip opinion, p. 3). The tribes' supplemental memorandum rehearses their previous assertion that they had been left with the erroneous impression by both the FES and a Department of the Interior letter[8/] that the construction and operation of the Skagit facility would have a minimal adverse effect upon Skagit River resources. In common with their previous filings, however, the memorandum is singularly devoid of a citation to anything in either the FES or the Interior letter which conceivably might have misled them respecting a known or ascertainable fact relevant to the possible impact of the plant upon their fisheries. Once again, what is involved is simply their disagreement with the ultimate conclusion reached by the NRC staff and Interior -- a disagreement which the

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8/ See ALAB-552, 10 NRC at ___ (slip opinion, pp. 11-12).

tribes did not seek to inject into the licensing proceeding until long after the conclusion had been made public and they had become aware of it.

It is readily apparent from the foregoing that, in order to find that the tribes' extreme tardiness in seeking intervention was justified, we would have to accept their implicit (if not explicit) invitation to repudiate the views expressed by us in ALAB-552. See pp. 3-5, supra. We decline the invitation. It seems just as manifest to us today as it did last month that no person potentially affected by the construction or operation of a proposed nuclear facility is entitled to pursue the course followed by the tribes in this instance.

The short of the matter is that the tribes do not deny that they were aware of the Skagit proposal when it was noticed for hearing at the end of 1974. They likewise knew or should have known no later than mid-1975 of the ultimate conclusions which the NRC staff's environmental review had produced. Notwithstanding the absence of any misrepresentation or non-disclosure by the staff of a fact crucial to an informed appraisal of the merit of those

conclusions, another three years elapsed before the tribes sought to intervene in the licensing proceeding for the purpose of bringing the conclusions into question. This state of affairs would scarcely be countenanced in the instance of an intervention petitioner not occupying a special status vis a vis the United States. Although, as they have consistently stressed, the tribes do occupy such a status, we neither have been referred to nor have discovered on our own anything in the trustee relationship which might be thought to give them greater license to sleep on their rights over a protracted period.[9/]

B. Against the background of our conclusion that the tribes have not established the existence of good cause for their lengthy delay in seeking intervention, we turn now to the other four factors enumerated in 10 CFR 2.714(a):

> (ii) The availability of other means whereby the petitioner's interest will be protected.

9/ We reject the tribes' suggestion (supplemental memorandum, p. 2) that, even if none of their various assigned reasons for being late might be of itself sufficient, taken together those reasons "have the cumulative effect of excusing tardiness". In order to be accorded such effect, the offered explanations would have to possess at least marginal individual merit. We have found, instead, that each is wholly untenable.

(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.10/

More particularly, what must be decided is whether, notwithstanding the insubstantiality of the excuses offered for their extended period of inaction, the tribes' showing on those other factors is so compelling as to require a reversal of the result reached by the Board below.

1. There is sharp disagreement between the Licensing Board and the tribes respecting the availability of other

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10/ Section 2.714(a) also calls for examination of three additional factors set forth in Section 2.714(d), which must be considered by licensing boards in passing upon all intervention petitions -- whether timely filed or not. But these factors will rarely, if ever, be determinative on the question of whether an untimely intervention petition should be granted notwithstanding its tardiness. This is because they relate essentially to the matter of standing to intervene; viz., the nature of petitioners' statutory right to be made a party to the proceeding; the nature and extent of his interest in the proceeding; and the possible effect of the outcome of the proceeding on that interest. In this instance, the tribes' standing is clear; thus, the focus of all of the parties in their briefs below and to us was understandably on the five Section 2.714(a) factors which bear importantly and exclusively upon the grant or denial of late petitions.

means by which the tribes might protect the interests which they now seek to vindicate in this proceeding. The disagreement centers principally upon whether, as the Licensing Board suggested,[11] the tribes (1) might have asserted at least some of their concerns in certain earlier state and local site certification, NPDES[12] and zoning proceedings; (2) could now advance their "interest in radiation standards" by way of a request for rulemaking; and (3) may enforce in an independent judicial action their treaty fishing rights.

The record at hand leaves us unclear as to the extent, if any, to which the tribes can be properly faulted for not pursuing their interests in the state and local proceedings cited by the Board. As we see it, however, the question is not whether at some time in the past other forums might have been available to the tribes; rather, it is whether there are now alternative means by which the identified tribal interests "will be protected". On this score, we cannot concur in the Licensing Board's view that the tribes might seek to have their radiation effects concern taken up in a rulemaking proceeding. For, if we understand the tribes correctly, they

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11/ LBP-79-16, supra, 9 NRC ___ (slip opinion, pp. 9-12).

12/ National Pollution Discharge Elimination System.

are not challenging existing generic radiation protection standards but, instead, are claiming that those standards may not have been correctly applied to the allegedly unique circumstances obtaining in the case of their members. And, insofar as the existence of an independent judicial remedy to enforce treaty rights is concerned, the tribes might well be confronted with a reluctance on the part of a federal district court to delve into the issue of the possible impact of the facility upon Skagit River fisheries, given the fact that that issue is one of the central questions being explored in this licensing proceeding. Beyond that, the rights conferred upon the tribes by treaty relate to fishing activities alone; thus, it likely would not be open to the court to adjudicate the other concerns which the tribes now wish to litigate in this proceeding.

If, then, there may not be sufficient alternative means by which the tribes can themselves adequately protect their interest, is that interest being acceptably represented by the existing parties to the proceeding? With regard to the fisheries and socio-economic impact issues, the Licensing Board noted the existence of an "obvious community of interests" between the tribes and the intervenor Skagitonians Concerned About Nuclear Power (SCANP) and that those interests

have been prosecuted by SCANP through the introduction of its own affirmative evidence and the extensive cross-examination of the witnesses for the applicant and the staff. 9 NRC at ___ (slip opinion, pp. 15-16). In reply, the tribes dispute that SCANP has either "the resources or the expertise" to represent their particular interest and further maintain that that intervenor has not done so in the past. They also point to the Board's acknowledgement that the radiation impact issue raised by them "would not rise as a major point of concern in the proceeding if the Indians did not become a party". 9 NRC at ___ (slip opinion, pp. 16-17).[13/]

It does seem reasonably apparent that, in a broad sense at least, the interest of SCANP and its members in the potential effect of the proposed facility upon the Skagit River and the surrounding communities is akin to that of other persons who reside in the area and may depend upon river resources for their livelihood. What is less

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13/ The Licensing Board seemingly attached little significance to this acknowledgement because of its belief that, as framed by the tribes, the radiation impact issue is not cognizable in this licensing proceeding but is an appropriate subject for a generic rulemaking proceeding. See 9 NRC at ___ (slip opinion, p. 17). As earlier indicated (see p. 15, supra), we do not share that belief.

certain is the extent to which, because of their assertedly unique situation, the tribes may have legitimate concerns on that score which either are not fully shared by the existing parties or have not been adequately addressed in the extensive evidentiary hearings already held on the environmental aspects of plant construction and operation. The most that can be said with any degree of confidence is that, as indeed all concede, SCANP has no discernible interest in the question whether radiation releases pose an unusual health risk to Indian receptors and that that question has not received attention in the hearings conducted to date.

2. The tribes also attack the Licensing Board's conclusion that "the extent to which the record would be improved if the [tribes] were allowed to intervene is problematical". 9 NRC at ___ (slip opinion, p. 14). They stress that the list of prospective witnesses which they supplied to the Board included experts in various disciplines relevant to the issues they seek to litigate and, further, that they have received several monetary grants (including one in the amount of approximately $50,000 from the Department of the Interior) to conduct or complete fisheries, health and socio-economic evaluations.

Past experience teaches that predictions on the ability of a prospective late intervenor to make a substantial contribution to the development of a sound record often rest upon little more than rank speculation. And so it is here. The tribes' participation in this proceeding might well be expected to shed light upon the respects, if any, in which the life styles or activities of their members might differ significantly from those of the general population in the vicinity of the proposed facility. But it is wholly conjectural whether they will be able, either through expert testimony or the results of the studies said now to be underway, to improve materially upon the record already adduced on the environmental effects of plant construction and operation. In this connection, the tribes' intervention petition -- filed little more than a year ago -- asserted (at p. 21) that the Upper Skagit Tribe was then "engaged in the design and initial phases of a study to determine the degree of intermarriage and the frequency with which recessive genes are manifested in the tribal population" (emphasis supplied). Even if that study is now well along the road to completion (and we have not been told that it is), it seems highly unlikely that the tribes are as yet in a position to supply any hard evidence bearing upon their hypothesis that

"through exposure to radiation releases in the area a higher rate of birth defects may become apparent in the Indian population" (ibid.).

3. We agree with the Board below[14/] that the proceeding would be inevitably delayed were the now-completed environmental phase of the hearings to be reopened to allow the Indians both to relitigate two of the issues already fully tried and to raise a new one. True, the delay factor would not have loomed as large had the tribes been permitted to intervene immediately upon the filing of their petition in June 1978. But, contrary to their possible belief, we think it appropriate to apply that factor on the basis of the effect of a grant of intervention today, rather than 14 months ago. A person who endeavors to enter a proceeding three and a half years after the deadline for intervention petitions has no right to expect that his entitlement to do so will go unchallenged; rather, he has every reason to assume that one or more of the parties will both interpose and press a strenuous objection and that, before the matter is ultimately settled, the appellate process may be invoked. In this instance, regretably, the controversy has taken an

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14/ 9 NRC at ___ (slip opinion, p. 17).

unusually long time to resolve -- involving, as it has, two Licensing Board decisions and two appeals. But, although the second decision below might have been rendered more promptly,[15/] most of the interval between the filing of the petition and our action today may fairly be attributed to the difficulties inherent in the task of deciding whether a colorable basis exists for permitting an exceptionally tardy intervention.

C. On this analysis of all five Section 2.714(a) factors, we are constrained to conclude that the result reached by the Licensing Board should not be disturbed. To repeat, petitioners for intervention who inexcusably miss the filing deadline by not merely months, but by several years, have an enormously heavy burden to meet. This is particularly so where, as here, they call upon the Licensing Board to put aside the Commission's admonition that "[a] tardy petitioner with no good excuse may be required to take the proceeding as it finds it"[16/] and to allow them to traverse ground which has already been plowed (albeit not to their satisfaction). Even viewing the record in the light most favorable to the tribes,

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15/ See ALAB-556, 10 NRC ___ (July 30, 1979).

16/ Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975).

that burden has not been discharged by them. The most that can be said on their behalf is that (1) there may be no other effective means whereby they can now protect fully their interest; (2) that interest may not be adequately represented by the present parties to the proceeding; and (3) the possibility cannot be excluded that their participation might make some contribution to the development of a sound record. Whether taken singly or collectively, those considerations are, however, insufficient to overcome the high potential for delay which would attend upon a grant of intervention at this very late stage of an already protracted proceeding.

In this regard, we once again must record our belief that the promiscuous grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. See ALAB-552, supra, 10 NRC at ___ (slip opinion, p. 10), quoting from Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644 (1977). More specifically, persons potentially affected by the licensing action under scrutiny would be encouraged simply to sit back and observe the course of the proceeding from the sidelines unless and until they became persuaded that their interest was not being adequately represented by the existing

parties and thus that their own active (if belated) involvement was required. No judicial tribunal would or could sanction such an approach and it is equally plain to us that it is wholly foreign to the contemplation of the hearing provisions of both the Atomic Energy Act[17/] and the Commission's regulations. Although Section 2.714(a) of the Rules of Practice may not shut the door firmly against unjustifiably late petitions, it assuredly does reflect the expectation that, absent demonstrable good cause for not doing so, an individual interested in the outcome of a particular proceeding will act to protect his interest within the established time limits.[18/]

17/ Section 189a., 42 U.S.C. 2239(a).

18/ We have taken note, of course, of the two "compromise solutions" offered by Mr. Farrar (see pp. 37-39, infra). Neither warrants adoption. Without passing judgment at this interlocutory stage on the sufficiency of the evidence adduced on the now fully-tried fisheries issue, in the totality of circumstances it seems to us much too late in the day to allow the tribes to reopen that issue even on the limited basis which our dissenting colleague suggests. Once again, if the tribes thought themselves to possess a vital and possibly unique interest in the fisheries matter, the time to have sought to insure that an adequate record was developed on it was when the matter was heard -- not years later. With regard to Mr. Farrar's alternative proposal, as we understand it the tribes would be required to accept the record as it currently stands but would be permitted, in the capacity of a party, to file proposed findings and conclusions and to appeal from any result deemed by them to be unsatisfactory. We perceive no good reason to confer such special rights upon one who, totally without justification, failed to participate from the beginning. It should be observed, however, that nothing will preclude the tribes from requesting leave to furnish their views to the Licensing Board, and (if thought necessary) to this Board, by way of an amici curiae filing.

It need be added only that, in arriving at the foregoing conclusions, we have not overlooked the trustee relationship which obtains between the tribes and instrumentalities of the United States such as this Commission. Although not rendering the provisions of Section 2.714(a) inapplicable to the tribes,[19/] that relationship will, of course, have to be borne in mind by the Board when it embarks upon the discharge of its decisional responsibilities.

The June 1, 1979 order of the Licensing Board, LBP-79-16, is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

The opinion of Mr. Farrar, dissenting in part, follows, pp. 25-41, infra.

19/ ALAB-523, 9 NRC 58 (1979).

Opinion of Mr. Farrar, dissenting in part:

We face here what I believe to be the most difficult intervention question that has ever come before us. On the one hand, the Indian tribes' petition was so tardy -- nearly three and one half years late[1/] -- that it is somewhat surprising that there is still a hearing going on for them to intervene in.[2/] On the other hand, there are some very

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1/ To my knowledge, no petition this late has ever been granted. On one previous occasion, however, an intervenor was successful with a petition that was filed in an antitrust proceeding over two and a half years late. Florida Power & Light Co. (St. Lucie Unit 2), LBP-77-23, 5 NRC 789, affirmed, ALAB-420, 6 NRC 8 (1977), affirmed, CLI-78-12, 7 NRC 939 (1978). (Because there had been no other intervention petitions filed in that proceeding, no hearing had been convened prior to the filing of the belated petition, and none would have been held in its absence.)

2/ In the past, the Licensing Board laid the lengthy delay in bringing the hearing to a conclusion at the applicants' doorstep, stating that design changes and inadequate preparation on their part had been the cause of the problem. See, e.g., the February 28, 1978 letter from then Board Chairman Jensch to Governor Ray, and the original intervention ruling of the Board below, LBP-78-38, 8 NRC 587, 590 fn. 3, 592 fn. 5, 595, 597, 599 (1978). The applicants would assign different reasons for the delay. I have not analyzed the record thoroughly enough to form my own conclusions in this regard.

good reasons for granting them a measure of relief, not only to allow them to protect their valuable interest in treaty-granted fishing rights but more importantly to assist the Board below and us in fulfilling our ultimate decision-making responsibilities.

The Commission's Rules of Practice tell us to examine certain factors to determine whether late petitioners should be allowed to participate.[3/] Foremost among these is how good a justification they have for being late. On that factor and one other my views differ greatly from those of my colleagues. That is, I think more of the Indians' excuses for their lateness than the majority does,[4/] and I would weigh in the balance the vital nature of the interest that brings the tribes here.[5/] With respect to the other factors, it is more a matter of emphasis. For I do not disagree substantially

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3/ These appear in 10 CFR 2.714. Our decisions have generally focused on only five factors, i.e., the justification for the tardiness and the other four factors set out in paragraph (a)(1) of the rule. That paragraph, however, incorporates by reference the three additional factors contained in paragraph (d). Those have ordinarily, and understandably, received less attention from us. But one takes on major significance here. See section 1, infra, and ALAB-523, 9 NRC 58, 64, fn. 21 (1979); compare the majority's opinion, p. 14, supra, fn. 10.

4/ See pp. 31-32 and 33-36, infra.

5/ See pp. 28-31, infra; compare p. 14, supra, fn. 10.

with much of what the majority has to say in applying those factors to the circumstances presented (see pp. 14-21, supra); and even where we disagree, I recognize that my colleagues' opinion is balanced, measured and thoughtful. For example, the majority sums up its views this way (p. 22, supra):

> The most that can be said on [the Indians'] behalf is that (1) there may be no other effective means whereby they can now protect fully their interest; (2) that interest may not be adequately represented by the present parties to the proceeding; and (3) the possibility cannot be excluded that their participation might make some contribution to the development of a sound record.

With respect to these three factors, then, I need say little. I would simply weigh the first two more heavily in the Indians' favor than do my colleagues. As far as the third is concerned, I think the matter less speculative than do they,[6/] for I believe that we already have in hand evidence that the Indians are capable of assisting substantially in the development of a sound record on the fisheries issue.[7/]

Particularly in light of the unique responsibility generally owed by the government to Indians, I thus cannot join the majority in holding that these petitioners must be entirely rebuffed. Yet their petition was so late that I

6/ See pp. 19-20, supra, and the summary quoted in the text above.

7/ See pp. 32-33, infra.

do not think it warranted to let them intervene unconditionally. In order to minimize any possible short-term delay and perhaps to save time in the long run, I believe that what is called for is a compromise measure; i.e., allowing them to intervene in a limited fashion, along the lines of one of the alternatives that I propose later in this opinion.

1. We decided last January that the Licensing Board had erred when, in granting intervention initially, it had in an entirely impermissible manner put the petitioners' status as Indians ahead of all other considerations.[8/] But we stressed then that this status could nonetheless legitimately come into play in certain ways.[9/] In this

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8/ Unpublished Memorandum and Order of January 12, 1979, pp. 1-2; ALAB-523, 9 NRC 58, 60-61. The Board below had said, for example (LBP-78-38, 8 NRC 587, 595): "Interesting as it may be to review the scope of the Commission's regulations on late filing of petitions to intervene, the precise issue is whether the Indians come within the broad scope of protection that the legislation and the court decisions have accorded them." It had gone on to hold (8 NRC at 597) that the tribes' petition should be treated as though filed by the United States on their behalf and that, consequently, "the factors recited in the Commission's regulations for a late filed petition to intervene [should] yield to the public interest which the government represents."

9/ January 12th Memorandum, supra, p. 2, fn. 4; ALAB-523, supra, 9 NRC at 63 (fn. 16), 64 (fns. 20-21 and accompanying text).

regard, one respect in which the tribes' status is relevant is in connection with the second of the three factors set forth in Section 2.714(d) of the Rules of Practice (and incorporated by reference in Section 2.714(a)).[10/] This has to do with the nature and extent of a petitioner's "interest".

The vital nature of the Indians' fishing rights -- which are central to their way of life (see fn. 12 and p. 36, infra) -- by itself makes the "interest" factor highly important here.[11/] And no one can read the history, recounted in judicial opinions, of the Indians' endeavors to hold on to these valuable treaty rights against the "extraordinary machinations" the State of Washington went through in the past to deny them those rights, without realizing that the "interest" which

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10/ See fn. 3, supra.

11/ In their intervention pleadings, the tribes advanced interests and contentions other than those related to fishing rights. But with respect to those other topics, the showing they have made on the relevant factors does not approach that made in connection with their fishing rights. Accordingly, I do not dissent from the majority opinion insofar as those other aspects of the case are concerned.

brings them to this proceeding is precious in many ways.[12/]

12/ See United States v. State of Washington, in which the district court analyzed the Indians' pre- and post-treaty fishing practices in exhaustive fashion. 384 F.Supp. 312, 350-58 (W.D. Wash. 1974). At one point, it found (384 F.Supp. at 357-58, citations omitted):

> Subsequent to the execution of the treaties and in reliance thereon, the members of the Plaintiff tribes have continued to fish for subsistence, sport and commercial purposes at their usual and accustomed places. Such fishing provided and still provides an important part of their livelihood, subsistence and cultural identity. The Indian cultural identification with fishing is primarily dietary, related to the subsistence fishery, and secondarily associated with religious ceremonies and commercial fishing. Indian commercial fishermen share the same economic motivation as non-Indian commercial fishermen to maximize their harvest and fishing opportunities. Indians allow non-Indians to fish on their reservation in sport fisheries for which Indians serve as guides and charge a license fee. (emphasis added.)

That helps to explain the nature of the interest. The fight to retain it was described by the appellate courts in subsequent proceedings in this fashion:

> The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decree. Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978), quoted in State of Washington v. Washington Fishing Vessel Ass'n, ___U.S.___, 47 U.S.L. Week 4978, 4988 fn. 36 (July 2, 1979). The Ninth Circuit went on to point out that enforcement of the federal decrees "is a problem because the state, its courts, and the non-Indian fishers have never fully accepted the principle that treaty rights can be claimed by a politically impotent minority." 573 F.2d at 1128.

Perhaps, in a legalistic sense, their efforts in securing this interest does not give it any more exalted status than the same interest would have when possessed by someone who could take it for granted. But, in a larger sense, the hard-earned quality of the interest should not be ignored when weighing its value in the balance.

In this regard, upon reflection I believe that our opinion last month did not give sufficient recognition to the extent of the legal battles the Indians have been fighting to retain their fishing rights in the past few years. That is, we placed great emphasis (in evaluating the tendered excuse for their late filing) on the formal adjudication of their fishing rights that they had in hand in the mid-1970's. See ALAB-552, 10 NRC ___, ___ (slip opinion, pp.8-9). I did not then fully appreciate how all-encompassing the enforcement efforts continued to be in later years.[13/] Had I understood that, I would not have joined my colleagues (ALAB-552, 10 NRC at ___, slip opinion, pp. 9-10) in applying to the Indians' situation what we had said elsewhere in rejecting the

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13/ The rendition of the July 2nd Supreme Court opinion referred to in fn. 12, supra (which did not come to my attention until after our July 9th decision was issued), has led me to focus on the enforcement proceeding more closely than I had previously.

belated petition of a housewife who offered the excuse that she had been caught up in the performance of her domestic chores.[14/] To be sure, it now appears that the Indians might have been well advised to pay more attention to this nuclear licensing proceeding from its inception. But, from their perspective, our proceeding could have looked then like only a minor skirmish which did not warrant the diversion of their efforts -- or which they did not have the capacity to deal with -- while the major legal battle against those who were threatening their very way of existence was still going on.[15/] This excuse, therefore, has some merit.

As I see it, the Indians have attempted to atone for their late appearance. Since arriving, they have filed a number of papers with the Board below or with us. Many of these are quite lengthy and obviously took a great deal of effort to prepare. All appear to be relatively well thought out; in sum they reflect a reasonably thorough job of analyzing

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14/ Duke Power Co. (Cherokee Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644 (1977).

15/ In this connection, see their June 13, 1978 Supporting Brief, pp. 6-7; see also the Department of Interior's letter of September 20, 1978 (other portions of which are quoted at pp. 35-36, infra), pointing out that "these tribes were involved in protracted and intense litigation to secure their treaty fishing rights" in United States v. Washington (fn. 12, supra) and that "the struggle to implement this decision continues." In light of this, it seemed to Interior "to ask too much to expect the tribes to anticipate and respond to such challenges to their rights [as posed by the nuclear plant] while they are still engaged in a struggle to establish their rights."

the record.[16/] I am prepared to take this as an indication that the tribes have the capacity and the willingness to make a valuable contribution to the development of the record on the matter of the plant's impact on the fishing rights granted them by treaty.

2. That brings me to a related point. I agree with the majority that short-term delay would result if we let the tribes intervene to press their contention on the nuclear plant's impact on fisheries. A record has already been made on the effect the plant's cooling system may have in this regard. And because the tribes did not appear on the scene in timely fashion, they did not participate in the compilation of that record. But there are reasons, involving to some extent the Indians' peculiar status, why we ought not focus too sharply on that default.

Specifically, the tribes have repeatedly argued (1) that the federal government generally has the duty to act as their trustee; (2) that consequently they were entitled to rely for

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16/ See Petition to Intervene and Supporting Brief (June 13, 1978); Reply Brief (September 5, 1978); Response to Board's Request and Preliminary Designation of Witnesses (October 27, 1978); Brief in Opposition to the Applicant's Appeal (December 26, 1978); Brief in Support of the Tribes' Appeal (June 14, 1979); and Supplemental Memorandum (July 30, 1979).

the protection of their interests on particular federal agencies, including the NRC; and (3) that these agencies did not fulfill their responsibilities in this respect. To be sure, the majority correctly points out that the tribes have not pointed to any misrepresentations in key documents "respecting a known or ascertainable fact relevant to the possible impact of the plant upon their fisheries." (p. 11, supra) (emphasis added). But that does not mean that the documents in question could not have misled them. For we should not overlook that the Final Environmental Statement for this facility, like others written in the same era, is not a model of full disclosure; the practice at the time seemed to be to avoid taking pains to highlight those areas where questions about the plant, or the adequacy of the staff's environmental review, might be raised.[17/] Again in keeping with what was then the norm, the FES is sometimes at crucial stages relatively short on facts.[18/] In that regard, it is not difficult to perceive how the tribes

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17/ See Florida Power & Light Co. (St. Lucie Unit 2), ALAB-335, 3 NRC 830, 834-41 (1976); ALAB-435, 6 NRC 541, 543-44 (1977); and Boston Edison Co. (Pilgrim Unit 2), ALAB-479, 7 NRC 774 (1978).

18/ See e.g., Pilgrim, ALAB-479, supra, 7 NRC at 787.

could have been misled by the soothing tenor of the conclusions used to describe the effect of plant construction and operation on fisheries; these do convey the impression that any adverse impacts would be negligible or temporary.

The government's failures to live up to the high standards demanded of a trustee were not limited to any possible problems with the FES. The Department of the Interior's Fish and Wildlife Service told the Indians in 1975 that there would be "minimal adverse impact on existing resources of the Skagit River."[19/] And that same Department's Bureau of Indian Affairs apparently did not fulfill its obligations. For Interior's Assistant Secretary for Indian Affairs eventually took the extraordinary step of writing to this Commission in 1978 to admit that his agency had not done its job properly:[20/]

> We are also aware that, during the period set for petitioning for intervention, this Department's Bureau of Indian Affairs perhaps should have advised your agency of the potential for impacts on these tribes. In its dealings with the Indian tribes, the United States is a trustee, and its representatives are to be held to "the most

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19/ February 28, 1975 letter from Northwest Fisheries Program Manager Heckman to Chairman Wilbur of the Swinomish Tribal Community.

20/ September 20, 1978 letter from Assistant Secretary Gerard to Commission Chairman Hendrie.

> exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297 (1942). This trusteeship is not limited to the Department of Interior, but extends to the other executive agencies and the Congress. To deny the tribes' petition because the Federal trustee failed to ensure that tribal concerns were addressed would not measure up to "the most exacting fiduciary standards."
>
> The fish in the Skagit River system are important to these tribes. Salmon have been the basis of tribal economies, cultures, and religions since time immemorial. Now that the tribes have established their treaty fishing rights, they have begun to make real progress toward self-determination and self-sufficiency. We ask that you give their petition to intervene the consideration it so deserves.

There appears, then, to be good reason to view the tribes' belatedness in a less severe light than we would use were non-Indian petitioners involved. More importantly, we might do ourselves a service by allowing them to participate in some fashion in the Licensing Board proceeding. This is because, as the last paragraph of the majority's opinion quietly reminds the Board below, it has -- as do we -- certain "decisional responsibilities" that must be fulfilled even if the Indians do not participate (p. 24, supra). My colleagues were referring, of course, to the duty imposed by the National Environmental Policy Act and the Commission's regulations on all boards -- even in an

uncontested case -- to weigh carefully in the balance a proposed plant's likely impact upon aquatic life. It certainly would aid those endeavors to have the assistance of a vitally interested party who could be counted upon to point to any deficiencies in the proposed plans.

In the long run, it might save time for the Board below to have that assistance now. For whether or not the Indians are allowed to intervene, if their assertion that the record has not been adequately developed proves correct, either the Licensing Board or we will have eventually to say so. Experience teaches that the delay attendant upon reopening or remanding the proceeding at a later date would be far greater than would occur were the Board below to take up the matter at this point.

3. In these circumstances, two possible compromise solutions suggest themselves. Both recognize that a record on fisheries impact has already been made without the Indians' participation, and that in no event are they entitled to relitigate that matter fully.

The first would be to admit the tribes for the limited purpose of letting them try to convince the Board below that there are indeed serious gaps in the existing record or that

they have additional evidence that deserves to be heard. If successful on that score, they would then be allowed to participate fully in the subsequent evidentiary sessions.21/ If unsuccessful, they would still be allowed to file below proposed findings of fact and conclusions of law based on the existing record. In either event, if later dissatisfied with the ultimate decision on the merits of the fisheries issue, they would be accorded full appellate rights before us.

Adoption of this approach would, of course, leave open the possibility that the conclusion of the evidentiary hearing would be delayed beyond the time still needed to consider the other issues now pending. The other alternative I have in mind would not have that disadvantage. Under it, the Indians would be permitted to intervene but only for the more limited purpose of (1) filing proposed findings and conclusions based on the existing record and (2) appealing to us from a decision they deemed adverse to their interests. If we could be certain now that the record were fully developed, this approach would be ideal. For, without delaying the proceeding at all, it would serve to protect the

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21/ Of course, there would be no need to go into any special effect which damage to the fisheries would have on the Indians until there was an indication that the proposed plant would indeed have an adverse impact on the fisheries.

tribes' fishing interests while at the same time assisting both the Board below and us in reaching the correct decision on a matter which will in any event come before us. The disadvantage of this suggestion, of course, is that it would not offer the Indians the opportunity to establish now that the record is less than fully developed; rather, it would put off any decision on that score until our review of the ultimate decision rendered below.

4. Before concluding, I must express my opinion about an aspect of this proceeding's evolution which, though important in any event, could become particularly significant if either of my compromise solutions were to be adopted. As already noted, when we vacated the initial grant of intervention we observed that the Board below had paid too little attention to the determinative factors set forth in the regulations (see fn. 8 , supra). But to the extent the Board had touched on those factors in its opinion, it had generally found them to weigh in favor of the Indians. For example, with respect to the matter of the petitioners' likely contribution to the development of a sound record, it had found (8 NRC at 599-600) that

> The petition with the supporting brief and the supplementary material filed which designate the areas of interest,

> the proposed witnesses who could be called, all combine to establish that the Petitioners can reasonably be expected to assist in developing a sound record in view of their commitment to submit witnesses with expertise in those areas of interest designated. ***.

To some extent on the other factors as well, comments can be gleaned from the first opinion which are favorable to the tribes.[22/]

Later, however, the Board -- under a new Chairman but with the other two members the same -- found the relevant factors to weigh almost entirely against the Indians.[23/] Even giving full recognition to the impact of our intervening decision, I for one am unable to understand how a Board member could have subscribed both (1) to what was said about the relevant factors in the Board's first opinion and (2) to the almost diametrically opposed findings contained in the Board's recent decision.[24/] This points to the unfortunate conclusion that in at least one instance that Board's decision was decreed by its Chairman alone. If this did happen -- and I hope that I am wrong about it -- I can only stress that on all questions in every proceeding, each member of a board has the right -- and the obligation -- to cast an independent vote

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22/ "Good cause" - 8 NRC at 597-98; "other means" - id. at 592, 593; "representation by existing parties" - id. at 598, 599; "extent of delay" - id. at 590 fn. 3, 592, 595, 597-98.

23/ See, e.g., LBP-79-16, 9 NRC ___, ___ (slip opinion, pp. 12-15).

24/ Lest I be misunderstood, I can understand how a Board member could have voted for a different result on the two occasions, the second time free of the undue significance earlier attributed to the Indians' status. It is the difference in the characterization of the relevant factors that concerns me.

based on his own appreciation of what the record establishes, and to express his views separately if they cannot be reconciled with those of his colleagues.

As I said at the outset, this is an extremely difficult case for me. At this late date, nothing we can do is entirely satisfactory. On the one hand, for the reasons the majority has spelled out, letting the Indians intervene without restriction is not desirable. But, on the other hand, keeping them out entirely may be costly in the long run, in terms either of delay or of the rendition of a decision which does not do justice to the important considerations involved here. And even though the compromise solutions I have suggested are less than optimal, I believe they offer the best approach now open to us.

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