

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
PUGET SOUND POWER & LIGHT ) Docket Nos. 50-522  
COMPANY, et al. ) 50-523  
)  
(Skagit Nuclear Power Project, ) November 20, 1979  
Units 1 and 2) )

APPLICANTS' RESPONSE TO  
PETITIONER TRIBES'  
SUPPLEMENTAL PETITION FOR REVIEW

Introduction

On November 5, 1979, the Upper Skagit, Sauk-Suiattle, and Swinomish Tribes ("Tribes") filed a Supplemental Petition for Review. This pleading by the Tribes is the most recent step in a lengthy procedural history, which is as follows:

- January 29, 1979 In ALAB-523, the Appeal Board reversed the Licensing Board's grant of intervention to Tribes and remanded the matter for proper consideration.
- February 20, 1979 The Tribes filed a petition for review of ALAB-523. Both the NRC Staff and Applicants later filed answers in opposition.
- March 8, 1979 The Commission deferred action on the petition for review pending completion of action on the remanded issue by the

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Licensing Board and any subsequent review of it by the Appeal Board.

June 1, 1979           The Licensing Board denied the Tribes' petition for intervention.

July 9, 1979           In ALAB-552, the Appeal Board noted substantial deficiencies in the Tribes' excuses for the extreme tardiness of their petition to intervene, but gave them an opportunity to file a supplemental memorandum to cure the deficiencies.

August 31, 1979       Following review and consideration of the Tribes' supplemental memorandum, the Appeal Board issued ALAB-559, affirming the denial of the petition to intervene.

October 1, 1979       The Commission extended until October 15, 1979 the time in which it may determine whether to review ALAB-559.

October 15, 1979      The Commission issued an order allowing the Tribes 15 days to file a supplemental petition for review on ALABs -552 and -559.

October 29, 1979      The Tribes petitioned the United States Court of Appeals for the District of Columbia Circuit for review of ALABs -523, -552 and -559 and the Appeal Board's unpublished order of January 12, 1979.

November 5, 1979     The Tribes filed a supplemental petition for review with the Commission, seeking review of ALABs -552 and -559.

Timeliness of Supplemental Petition for Review

In their supplemental petition for review, the Tribes seek review by the Commission of ALAB-552 and ALAB-559 pursuant to 10 CFR 2.786(b). Section 2.786(b)(1) provides, in pertinent part:

Within fifteen (15) days after service of a decision or action by an Atomic Safety and Licensing Appeal Board under § 2.785 . . . a party may file a petition for review with the Commission on the ground that the decision or action is erroneous with respect to an important question of fact, law, or policy.

ALABs -552 and -559 were served on July 10, 1979 and August 31, 1979, respectively. The Tribes did not file a petition for review of either Appeal Board decision within the 15-day period required by the regulation. Neither did they request an extension of time within which to file such a petition for review. In fact, the Tribes' first action, two months after issuance of ALAB-559, was to file a petition for review, not here, but in the Court of Appeals. Therefore, the supplemental petition for review should be denied for the failure to file it within the 15-day period of Section 2.786(b)(1).

In Applicants' view, the lateness of the supplemental petition for review is not excused by the Commission's order of October 16, 1979. The Commission's order, which granted the Tribes an opportunity to file a supplemental petition for review, was made pursuant to 10 CFR 2.772 and 10 CFR 2.786. Order, p. 2. Section 2.786, however, contains no authority for extending the time for filing a petition for review. Section 2.772(e) authorizes the Commission to extend the time for ruling on a petition for review, but is inapplicable to extending the time for filing a petition for review. Section

2.772(a) authorizes the Commission to prescribe schedules for the "filing of briefs, motions or other pleadings where such schedules may differ from those elsewhere prescribed in these rules." Here, the Commission's order of October 16, 1979 was issued one month after the Tribes should have petitioned under Section 2.786(b)(1). Regulatory time limits are not usually extended after the fact, i.e., after expiration of the time limit, especially where as here there has been no good cause shown for extension of the time limit. The Tribes should be bound by the 15-day requirement of Section 2.786(b)(1); therefore, the supplemental petition for review should be denied as untimely.

#### Response to Tribes' Statements of Error

The Tribes contend that the Appeal Board made numerous errors in its application of various factors listed in 10 CFR 2.714(a)(1). Supplemental Petition, p. 4. The Section 2.714(a)(1) factors present issues that are largely factual in nature. The resolution of these factual questions did not differ in the decisions of the Licensing Board and the Appeal Board. Therefore, several of the Tribes' contentions are deficient under Section 2.786(b)(4)(ii). These deficiencies will be detailed below.

The first alleged misapplication of the late intervention factors concerned the "good cause" factor (§ 2.714(a)(1)(i)). The Tribes claim that the Appeal Board placed inordinately great weight on this factor in comparison with the other four factors of Section 2.714(a)(1). Supplemental Petition, p. 4. The Tribes' claim is deficient in several respects. First, the Tribes failed to raise the alleged error before the Appeal Board, even though the Appeal Board had earlier announced its view of the relation between the good cause factor and the four other factors. See, Memorandum and Order (unpublished), pp. 2, 3 (January 12, 1979); ALAB-523, p. 12. The failure to raise before the Appeal Board their arguments on the good cause factor means that the supplemental petition for review must be denied, as required by Section 2.786(b)(4)(iii). Second, ALABs -552 and -559 are fully consistent with existing decisional law, particularly where, as here, the petition for intervention is very late. See, ALAB-552, pp. 7, 8; ALAB-559, pp. 2, 3. Finally, the Tribes offer no record citations for their allegations, especially those that the Appeal Board made the good cause factor into a "threshold" or "barrier". To the contrary, the Appeal Board analyzed and weighed all five Section 2.714(a)(1) factors in its review. ALAB-559, pp. 21-22.

The Tribes' second allegation of error by the Appeal Board is equally groundless. That allegation concerns the Appeal

Board's treatment of the third factor under Section 2.714(a)(1) (the likelihood of assisting in the development of a sound record). In the Appeal Board's evaluation, the Tribes' ability to contribute to an already extensive record was conjectural. ALAB-559, pp. 18-20. The Licensing Board reached a similar factual conclusion. 9 NRC \_\_\_\_\_ (slip opinion, pp. 14, 15). Pursuant to Section 2.786(b)(4)(iii), a petition for review of this factual issue must be denied.

The Tribes also contend that the Appeal Board misstated the test under the third factor, by requiring a "substantial contribution" from a late intervenor. The Appeal Board's statement, on which the Tribes rely, is a general observation, not a restatement of the regulation. See, ALAB-559, p. 19. More to the point, the Appeal Board expressly weighed the extent of the Tribes' possible contribution, as is required by the regulation. ALAB-559, pp. 21, 22.

The Tribes offer a number of studies and reviews on a variety of subjects. Supplemental Petition, pp. 5, 6. However, these subjects have been considered in detail in the present record. In fact, the record has been closed and findings of fact submitted on these subjects. Since the particular information that the Tribes' studies might contain has yet to be made available, the Tribes' contribution remains as speculative as it was during the evaluations by the Licensing



Board and Appeal Board. Allowing the Tribes to intervene for the purpose of introducing their studies and reviews would cause the relitigation of a substantial portion of the now closed record. Such duplication should not be condoned, except under the most extreme conditions, which are not present here.

The Tribes also contend that the Appeal Board erroneously considered the fourth factor of Section 2.714(a)(1), which is the extent to which the Tribes' interests are represented by existing parties. They claim that they should be recognized as local governments. Supplemental Petition, pp. 4, 6. Presumably, the Tribes are now seeking to participate as an "interested State, county, or municipality" under Section 2.715(c), which has no timeliness requirement. However, they have previously sought to intervene only pursuant to Section 2.714. Their "local government" argument was not made in either their petition to intervene or their appeal. They belatedly raised the matter in a supplemental memorandum filed with the Appeal Board following ALAB-552. Petitioner Tribes' Supplemental Memorandum, dated July 30, 1979, pp. 2, 3. While they now claim to be entitled to the same treatment afforded Skagit County (a participant in this proceeding), they gloss over the obvious fact that they are neither a county nor a municipality and, hence, are not within the scope of Section 2.715(c).

The Tribes also assert that the Appeal Board failed to consider the extent of representation of their interests by other parties. Supplemental Petition, p. 6. That characterization of the Appeal Board's decisions is erroneous. See, ALAB-559, pp. 16-18. 22. Furthermore, the extent of representation is a factual matter which has been similarly decided by the Appeal Board and the Licensing Board. Hence, this portion of the supplemental petition for review should be denied pursuant to Section 2.786(b)(4)(ii).

The Tribes further allege that the Appeal Board misapplied the fifth factor of Section 2.714(a)(1). They mistakenly and without citation claim that the Appeal Board did not focus on the extent of delay. Supplemental Petition, p. 6. Quite clearly, what the Tribes seek to present as evidence would inevitably and extensively delay the licensing proceeding. The Appeal Board did assess the extent of delay, agreeing with the Licensing Board. ALAB-559, p. 3, fn. 2, p. 20. The Tribes also argue that the delay question should be based upon circumstances as of the time of filing their petition to intervene, and not at the time of appellate consideration. This position is inconsistent with the Tribes' attempts elsewhere in the supplemental petition for review to exploit developments which have occurred since the filing of their petition to intervene. See, e.g., Supplemental Petition, pp. 4-6. The Appeal Board



was consistent, and in Applicants' view correct, in deciding based upon the status of the case then before it. ALAB-559, p. 20. The Tribes finally claim that their intervention would not unduly "broaden the issues." Supplemental Petition, p. 7. Ignored in this argument is the Tribes' attempt to raise a new issue (genetic and somatic impacts of radiological releases on Indian receptors), which was recognized and weighed by the Appeal Board. ALAB-559, pp. 7, 8, 20.

The Tribes' final statement of error is that the Appeal Board majority neglected to take into account the factors set forth in Section 2.714(d). These factors, which must be considered with respect to every petition to intervene, were resolved by the Appeal Board favorably to the Tribes. ALAB-559, p. 14, fn. 10. Hence, these factors were taken into account. The Appeal Board's and the parties' emphasis was appropriately concentrated upon the five (5) factors of Section 2.714(a)(1) that pertain only to late filed petitions to intervene.

#### Why Commission Review Should Not Be Exercised

The Tribes seek to review an inherently factual determination, i.e., the application of Section 2.714(a)(1) factors to the Tribes' extremely late filed petition to intervene. The Appeal Board and Licensing Board have consistently and responsibly resolved the factual issues raised in the supplemental

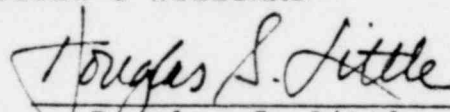
petition for review. To allow the Tribes to intervene at this time, almost five (5) years after the deadline for filing petitions to intervene, would make a shambles of the administrative process. Such an action would be unprecedented. It should not be taken. The supplemental petition for review should be denied.

DATED: November 20, 1979

Respectfully submitted,

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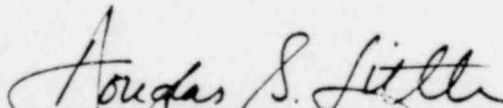
CERTIFICATE OF SERVICE

I hereby certify that the following:

APPLICANTS' RESPONSE TO  
PETITIONER TRIBES'  
SUPPLEMENTAL PETITION FOR REVIEW

in the above-captioned proceeding have been served upon the persons shown on the attached list by depositing copies thereof in the United States mail on November 20, 1979 with proper postage affixed for first class mail.

DATED: November 20, 1979



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