

The Appeal Board found that in granting intervention to the Petitioners the Licensing Board had incorrectly rested its decision on the theory that the Indians' 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.

ALAB-523, supra, at 5, 6.

The Appeal Board concluded that none of the decisions cited by the Licensing Board supported its theory equating the interest of the Petitioners with that of the United States, and that this theory was "neither sound nor decisive in this instance." Id. at 9. Further, the Appeal Board found that the Licensing Board failed to sufficiently address the factors that 10 CFR §2.714 required the Board to resolve prior to reaching a conclusion as to whether Petitioners had satisfied the regulatory requirements for untimely intervention. Id. at 7, 8 and 11. While observing that the Licensing Board's opinion did touch upon the factors covered in Section 2.714, the Appeal Board nonetheless concluded that "the Board leaves no doubt that those factors played at most a supporting role in the crafting of its opinion." Id. at 7.

The Appeal Board declined to decide the status of the Petitioners with respect to the United States or what role, if any, that status played in the resolution of the factors contained in Section 2.714. Instead, the Appeal Board vacated the Licensing Board's decision and remanded the issue of intervention to the Board for reconsideration as to how this

status, to the extent it legitimately came into play, as well as other factors, affect Petitioners' right to intervene when weighed against the requirements of Section 2.714. The Appeal Board expressly evidenced neither approval nor disapproval of the result that the Licensing Board reached, and stated that the Board was free to grant or deny intervention as it saw fit.

II. ALLEGED ERROR

In the present Petition,^{1/} the Petitioners request the Commission to review the decision by the Appeal Board to vacate and remand the Licensing Board's decision regarding intervention on the basis that the Appeal Board committed errors regarding important procedural issues and an important question of public policy.

Specifically, the Petitioners assert error on the part of the Appeal Board in two regards. The first alleged error is that the Appeal Board upset the proper exercise by the Board of the discretion vested in it by 10 CFR §2.714 to rule upon untimely intervention petitions. Petition at 3. Petitioners assert that the Licensing Board adequately articulated its reasons for finding that the Petition satisfied the factors set forth in Section 2.714(a), and that accordingly, the Licensing Board's conclusion that intervention should be granted was a proper exercise of the Board's discretion. Petitioners argue that Licensing Boards are given broad discretion in considering the factors as set forth in Section 2.714 and

^{1/} "Petition for Review of Intervenor Tribes" (Petition) dated February 20, 1979.

absent a clear showing - not found in the present case - that the discretion was abused, the Licensing Board's determination should not be overturned. Id. at 4.

Petitioners' second alleged statement of error is that the Appeal Board failed to acknowledge the Tribe's special status as beneficiaries of federally-protected treaty rights and the impact of that status. Petition at 3.

III. WHY COMMISSION REVIEW SHOULD NOT BE EXERCISED

In addressing the question of whether the Commission should or should not grant the present position, it is important, we believe, to first emphasize what issue is not presented by this Petition. In the decision below, the Appeal Board expressly refused to rule on the question of the Petitioners' right to intervene in this proceeding, and specifically directed that this determination should be made in the first instance by the Licensing Board.^{2/} Instead, the Appeal Board only considered the legal standard applied by the Licensing Board in ruling on the petition to intervene, and in rejecting that standard directed what factors the Board should consider when it again reviewed this Petition. Thus, the sole issue presented by the present petition is extremely narrow and does not involve the right of the Petitioners to intervene in this proceeding, but

^{2/} The remanded matter of whether Petitioners should be permitted to intervene notwithstanding the untimeliness of their Petition is currently pending before the Licensing Board. To the extent Petitioners seek to raise that question, it is premature since the matter currently rests with the Licensing Board and any determination it makes may be appealed to the Appeal Board.

rather, only the question of whether the Appeal Board applied a correct legal standard in remanding the present action to the Licensing Board.

In the appeal of this matter the NRC Staff took the position that the Petitioners should be permitted to intervene in this proceeding, and we continue to adhere to that position.^{3/} However, as to the narrow question presented by the present petition - the legal standard applied by the Appeal Board - we do not believe this issue is appropriate for Commission review.

Section 2.786(4) of 10 CFR provides for the exercise of discretion on the part of the Commission in reviewing decisions of the Appeal Board only in those circumstances where it "appears [that] the case involves an important matter that could significantly affect the environment, the public health and safety, ... the common defense and security ... [or] an important procedural issue, or ... [raises] important questions of public policy." Neither of the errors asserted by Petitioners satisfies these criteria.

The first alleged error - that the Appeal Board improperly rejected the exercise of the Licensing Board's discretion - is simply without merit. While it is, as Petitioners contend, the role of the Appeal Board to

^{3/} "NRC Staff Response to Applicants' Brief In Support of Appeal" dated December 26, 1978. This Staff position, as indicated in its brief, was a reversal of its earlier position set out in its filings with the Licensing Board.

determine whether the discretion granted to the Licensing Board has been abused (Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-339, 4 NRC 20, 24 (1976)), and to only reject such an exercise when that conclusion is reached (Florida Power and Light Company (St. Lucie Unit 2), ALAB-420, 6 NRC 8, 13 (1977); affirmed, CLI-78-12, 7 NRC 939 (1978)), it is also the function of the Appeal Board, indeed its duty, to determine whether the legal foundation upon which that determination is grounded is sufficient. Cf. Northern States Power Company (Prairie Island Units 1 and 2), ALAB-104, 6 AEC 179, 179 n. 2 (1973). In the present case the Appeal Board's conclusion that the Licensing Board improperly accorded the Petitioners' "preferential status," thus permitting the untimely filing of their Petition, was not an improper rejection of the Board's exercise of discretion, but rather, was a correct and proper exercise of the Appeal Board's authority to review the legal premise upon which the Licensing Board purported to rely in reaching its decision.

Likewise, the Appeal Board's determination that the Licensing Board did not sufficiently evaluate the factors set forth in 10 CFR §2.714(a) did not constitute a rejection of the Board's exercise of discretion, but rather, represented only a conclusion that the Licensing Board simply had not yet fully exercised the discretion granted to it under the regulation, and sufficiently articulated the results of its findings.

In the present case the Appeal Board specifically rejected the urging of the Applicant that it determine the issue of the Petitioners' right

to intervene in this proceeding, and instead, limited its decision to a directive to the Licensing Board to fully and completely consider all of the requirements of Section 2.714 in ruling upon the intervention petition, and to articulate the results of its review. Such a decision is not, we believe, either novel or unique, and thus under the standards set forth in 10 CFR §2.786(4) does not present an issue meriting consideration by this Commission.

Similarly, the second alleged error, that the Appeal Board failed to acknowledge the Tribe's special status, is likewise without merit. Petitioners assert in their Petition (Petition at 5) that the Appeal Board rejected the Licensing Board's discussion of the Tribe's special position. That statement simply does not comport with the Appeal Board's decision. The Appeal Board expressly declined to determine whether or not a special relationship existed between the United States Government and treaty Indians in general or with the Petitioners specifically. ALAB-523, supra, at 8, 9. Indeed, the Appeal Board left it for the Licensing Board's determination whether a special status existed and, if so, to what extent it legitimately comes into play in resolving the factors of Section 2.714. Id. at 12, 13.

Thus, this alleged error, as well as the first, does not present an issue of exceptional legal, factual or policy importance warranting review by this Commission, and accordingly, the present petition should be denied in all respects.

IV. CONCLUSION

For the above stated reasons, the Staff urges the Commission to deny the Petition for Review.

Respectfully submitted,

Daniel T. Swanson

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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 5th day of March, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO PETITION FOR REVIEW" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 5th day of March, 1979:

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