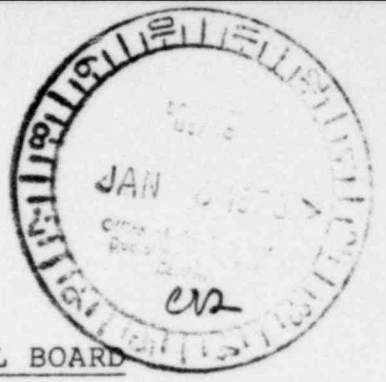

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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
	)	
	)	
(Skagit Nuclear Power Project, Units 1 and 2)	)	
	)	
	)	

INTERVENOR SCANP'S RESPONSE TO APPLICANT'S BRIEF IN SUPPORT OF APPEAL

On November 24, 1978, the Licensing Board issued a "Decision and Order Granting Intervention" (Decision) in which the board granted intervention to three Indian tribes (petitioner). On December 11, 1978, the applicants appealed this decision to this Appeal Board and filed a brief in support of their appeal. Applicants urge the appeal board to reverse the decision of the Licensing Board and to deny the petition for intervention.

On December 26, 1978, petitioner filed a brief in opposition to applicants' appeal, urging affirmance of the decision of the Licensing Board. (Petitioner's Reply Brief). On the same date, the NRC staff filed its response to the appeal, supporting the conclusion reached by the Licensing Board in granting intervention, but taking issue with some of the bases asserted by the Board for permitting intervention (NRC Response).

SCANP urges affirmance of the Licensing Board's decision. Although SCANP believes that petitioner has completely refuted every contention raised by applicant in its appeal, there remain a few points requiring further clarification.

Two major themes can be noted in applicants' appeal. First, applicants' attempt to characterize these proceedings as almost completed, with only a few issues remaining to be considered. It then follows, according to applicants, that there are no issues remaining in which petitioner can make a substantial contribution, and that to allow petitioner to intervene will serve only to unnecessarily delay the proceedings. But it is neither true that most of the issues have been foreclosed nor that intervenors' participation will cause any delay to these proceedings.

Petitioner seeks to raise three major contentions in intervention. First, petitioner urges analysis of the socio-economic effects of the proposed plant upon each of the tribal communities affected. This issue has never been addressed in these proceedings, and is therefore not foreclosed.

Second, petitioner urges inquiry into the effect of the proposed project upon the Skagit River fisheries system upon which the tribes rely so heavily. Although the effect of the project on water quality has been addressed in hearings before the ASLB, because of the applicants' changes

in design for the project and because since such hearings, further design information raising new water quality issues has been presented by applicants, such issues have not been disposed of. No preliminary decision has been proposed or rendered.

In particular, applicants have proposed relocation of the Ranney well collector system and have submitted new plans for delivery of the pressure vessel by barge up the Skagit River. See letter of June 8, 1978 from Chairman Jensch to Richard Black. Both of these changes from the original design now await staff review, consideration of which has by no means been concluded. In addition, there has been little or no study of the bed of the Skagit River and the effect upon the river bed and river of locating pipes across that bed. These three issues all have direct bearing on the condition of the Skagit River, water pollution, and the ability of the river to support the fisheries upon which petitioner relies. It is clear that issues concerning the effect of the proposed project on the Skagit River Fishery remain open and that participation as a party by petitioner is the only means available to petitioner to protect their unique interest in that fishery.

Petitioner's third issue relates to the effect of low-level radiation upon the isolated populations of each petitioner tribe. The health effects of low-level radiation have been recently opened in this proceeding and are by no

means concluded. The genetic impacts of such radiation on isolated populations such as those comprising petitioner tribes is an issue which has never been considered in this proceeding and is one which would be appropriate for consideration in connection with other issues concerning the effects of radiation. Among these is the applicants' evacuation plan, yet another related issue which is still open at this time.

Thus, it is clear that participation of petitioner in this proceeding will not raise new issues nor require reconsideration of issues which have properly been disposed of in their entirety. In any event, applicants' place themselves in a most precarious position when they suggest that other parties are likely to cause delay in these proceedings. Throughout the proceedings, it has been clear that most of the delays caused have resulted from changes in plans and submissions made by the applicants and an inability on the part of the applicants to prepare their presentations in a timely fashion. See, e.g., letter of February 28, 1978 from Chairman Jensch to Governor Ray at 3 (applicants have substantially reworked their seismic and geologic data); TR-11,479-80 (noting late submittals by applicant as hearings begin); TR-8542 ("it is clear from the Applicants' own presentation that it wasn't ready to proceed with the hearing it requested. . .")

Applicants' second major theme is that the Licensing Board decision is a legal aberration arrived at totally without reference to the regulation which governs such decisions, 10 CFR §2.714. This contention is also curious, inasmuch as most of the decision is taken up with an elaborate and well-reasoned point by point consideration of applicants' arguments opposing intervention. After discussion of the points raised by applicants, the Licensing Board makes it clear that its decision was made with reference to the applicable regulations by setting forth a numbered summary of its findings in language which corresponds to the five factors which 10 CFR §2.714(a)(1) requires the Board to balance in determining whether intervention should be granted. See decision at 25-26; cf.10 CFR §2.714(a)(1)(i)-(v).

Applicants complain that the Board's consideration of factors not mentioned in 10 CFR §2.714(a) was an unwarranted departure from the regulation. These contentions are directed mainly at the discussion in the decision concerning the petitioners' unique Indian status, which, according to applicants, are considerations wholly inappropriate under the regulations. To support their contentions, applicants must overlook the applicability of 10 CFR 2.714(d) to the Licensing Board's consideration of the petition to intervene.

10 CFR §2.714(d) provides:

> "The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on petitions to intervene and/or requests for hearing shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:
>
> (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
>
> (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
>
> (3) The possible affect of any order which may be entered in the proceeding on the petitioner's interests."

This subsection makes it clear that the NRC's regulations provide sufficient flexibility to consider the unique status this petititioner has in representing the interest of Indian tribes. It should be obvious that an understanding of the nature of petitioner's treaty rights to take fish was necessary to enable to the Board to consider the nature and extent of the petitioner's property interest in the proceeding. 10 CFR §2.714(d)(2). Similarly, an understanding of the jurisdictional provision enabling tribes to bring actions when the United States chooses not to do so on their behalf is necessary to determine the nature of the petitioner's rights under the Act to be made a party to the proceeding. 10 CFR §2.714(d)(1). Contrary to the assertions of the applicants, consideration of these factors

by the Licensing Board was not only proper, but was essential under the applicable regulation. In discussing the staff's response below, SCANP will demonstrate that the Board correctly resolved these issues.

Finally, applicants urge this Appeal Board to reverse the decision of the Licensing Board and to usurp that Board's functions by determining for itself that intervention is inappropriate. This suggestion is not well taken.

First, 10 CFR §2.714 does not provide for consideration of a petition to intervene in the first instance by the Appeal Board. Second, applicants' reliance on Metropolitan Edison Company, 5 NRC 612, 618-19 (1977) for its suggestion that the Appeal Board abandon the usual and proper procedural practices of the Commission, is misplaced. In Metropolitan Edison Company, it was held that remand to evaluate a petition for intervention was not required by the facts of that case. There, the petitioner had failed to excuse its tardiness, submitted no evidence of expertise concerning the issues it sought to raise, and sought to raise issues in an attempt to justify abandonment of a project which was already ninety percent complete. In contrast, petitioner here has offered ample explanation for its late filing, has demonstrated clearly its expertise relating to issues it seeks to raise, and raises issues which have not been decided at the present time, let alone at the time of the

filing of the Petition to Intervene. Under these circumstances, it would be wholly inappropriate for the Appeal Board to undertake the balancing of factors required by 10 CFR §2.714(a) without the benefit of the familiarity with this record which the Licensing Board has.

The staff also has strayed from applicable regulations in implying that the Appeal Board should limit petitioner's intervention to the issue of special genetic damage to them as a result of the effects of low-level radiation. Staff Response at 9. If the staff is suggesting that because it is satisfied that petitioner has made the required showing on at least one issue the petitioner should be admitted as intervenors in accordance with the decision of the Licensing Board, SCANP is in agreement with staff. But if the staff is suggesting that the Appeal Board modify the decision of the Licensing Board to limit petitioner's intervenor status to one issue, the staff position is unnecesarily restrictive, and squarely conflicts with Commission regulations.

First, to suggest that this Appeals Board may modify the Licensing Board decision is inconsistent with NRC regulations. 10 CFR §2.714a(c) provides:

> "An order granting a petition for leave to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question whether the petition and/or the request for a hearing should have been wholly denied."

Thus, staff, like the other parties, has a choice between only two positions. The staff may appeal the order granting

intervention on the question whether the petition should have been wholly denied, or it may urge affirmance. Staff has not appealed, and staff has not urged reversal of the Licensing Board. Any suggestion by staff that the Licensing Board decision is subject to modification or affirmance goes beyond the authority of the Appeals Board.

The staff's position is internally inconsistent as well. The staff concedes, modifying its position taken in earlier filings on the intervention question, that the petition satisfies the applicable regulations. Staff Response at 2. Then, without setting forth any areas or issues in which the petition is deficient according to the regulations, the staff suggests that petitioner's participation be limited to issues concerning low-level radiation. SCANP suggests that the limitations on petitioner's participation contained in the Licensing Board's order, Decision at 28, allowing petitioner to intervene to the extent of changes made in the designs and processes made by the applicant and submitted after the filing of the original application and supporting data, and other matters yet to be examined at further hearings in the proceeding and should not be tampered with. This limitation is sufficient to prevent relitigation of matters concluded before the petition to intervene was filed, while honoring the right of petitioner to participate in the proceeding insofar as its interests are affected. See also Decision at 23-24 (issues enumerated by petitioner

are matters awaiting further presentation and examination; petitioners participation will cause no undue delay; petitioners as real parties in interest respecting treaty rights are the only party fully capable of representing their interests.).

The staff's response implies that issues concerning socio-economic impacts on the tribes and the effect of the project on the Skagit fishery need not be considered with respect to petitioner's interests. Socio-economic impacts of the project on minority groups have been touched upon in this proceeding briefly and inadequately; the impacts on petitioner tribes has not been dealt with at all. Therefore, this issue is clearly open. To allow the tribes to intervene while precluding them from raising issues concerning the effect of the project upon the Skagit Fishery, the single most important resource to the tribes, would make a mockery of their intervention.

The staff, while not going as far as to suggest that this issue is closed, relies on an incorrect interpretation of petitioner's treaty rights in suggesting that petitioner really does not have an interest in the Skagit River fishery which can be protected in this proceeding. Incredibly, the staff states that:

> "The treaty of Point Elliott grants only the right of access of the Indians to the Skagit River system, and nothing more. This access will not be denied the Indians by the proposed project and cannot be asserted as a basis for special consideration in determining whether the Indians should be admitted to the proceeding." Staff response at 8.

This characterization of tribal treaty fishing rights has been asserted in court by the State of Washington periodically for the past 80 years. See United States v. Winans, 198 U.S. 371 (1905); United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), affirmed, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). It has never been accepted. The adherance of the staff and the applicants to this thoroughly discredited viewpoint serves only to emphasize the need to allow petitioner to intervene to protect its treaty rights. See Puget Sound Gillnetters Association v. United States District Court, No. 77-3129 (9th Cir. April 24, 1978), at 2-3 (detailing concerted official and private efforts to frustrate tribal treaty rights). As the Ninth Circuit explained in Puget Sound Gillnetters Association, the tribal treaty right is similar to a co-tenancy with non-treaty users to the resources of the fishery. It is a property right. It is most certainly not "nothing more" than the right of mere access to the banks of the Skagit River. The suggestion that applicant may construct this project and proceed to totally destroy the Skagit fishery without infringing upon petitioner's treaty rights, because such destruction will not infringe upon the tribe's ability to walk down to the river bank, is too frivolous to warrant any consideration.

Although admitting that its argument is for precedential purposes only, Staff Response at 8, the staff

erroneously suggests that there is no trust relationship between petitioner tribes and the United States. This contention further underscores staff's shallow an understanding of the most basic principles of Indian Law. While, as staff and applicants suggest, a trust duty does not exist in the absence of a statute, treaty or agreement creating such a duty, the document creating the duty need not declare or spell out the duty expressly.

In Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), the Secretary of the Interior had refused to bring suit on plaintiffs' behalf, claiming that there was no treaty and therefore no trust responsibility owed plaintiff tribe. The court disagreed, finding such responsibility in the Indian Non-Intercourse Act. This Act no more explicitly establishes a trust relationship than do the treaties upon which petitioner relies here. 528 F.2d at 372, n.2, 374 n.5. The court recognized the principle that the trust relationship derives not from an express declaration of trust, but from the nature of the dealings between the federal government and Indian tribes:

> "Over the years, the federal government has recognized many Indian tribes, specifically naming them in treaties, agreements, or statutes. The general notion of a 'trust relationship', often called a guardian-ward relationship, has been used to characterize the resulting relationship between the federal government and those tribes, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). . ."

Thus, Congress not only restricted alienation of Indian property in its 1790 Act, but also created a trust relationship between the United States and all Indian tribes with respect to the subject matter of that Act. Similarly, in entering a treaty with petitioner tribes to preserve tribal fishing rights, the United States undertook a trust responsibility to protect those rights. Surely, if no such trust relationship existed, the United States would not have undertaken litigation at the expense of millions of dollars to vindicate the treaty rights of Western Washington Tribes, including the petitioner tribes herein. See Chase v. McMasters, 573 F.2d 101, 1017 (8th Cir. 1978); Joint Tribal Council, 528 F.2d at 379 ("extensive body of cases" holds that when Federal Government enters into a treaty with a tribe the government commits itself to a guardian-ward relationship with that tribe.)

Finally, staff asserts that the Licensing Board erred in applying the co-plaintiff approach suggested in 28 USC §1362 and confirmed in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 470-75 (1976). The staff relies on authority suggesting that the government must be treated like any other applicant when seeking a license from the NRC, but fails to cite authority to support its contention that this proposition is equally true when the government seeks to intervene. There

is good reason why no such authority exists. The Atomic Energy Act recognized clearly the dangers of nuclear power, and sought to protect society from those dangers whether or not private parties or the government sought to use nuclear power. Entirely different considerations govern intervention practice. SCANP will not bore the Appeal Board with speculation as to the nature of the circumstances which could motivate the United States to seek intervention. Suffice it to say that its representation of the public interest would undoubtedly tip the scales in favor of the United States when a Licensing Board evaluated such an intervention under 10 CFR §2.714.

CONCLUSION

The decision and opinion of the Licensing Board has both answered all the contentions of the applicants and set forth its findings in accordance with 10 CFR §2.714. Applicants resort to mischaracterizations of the Licensing Board's decision in their attempt to undermine its validity, while the staff profers erroneous interpretations of well settled Indian law in attempting to nitpick at the legal underpinnings of the Board's decision. But the Licensing Board's decision easily withstands these attacks, and was clearly not an abuse of the Board's discretion. SCANP submits that the decision of the Licensing

Board granting an intervention should be affirmed without modification.

DATED this ___ day of January, 1979.

Respectfully submitted,

ROGER M. LEED
Counsel for Intervenor SCANP

Michael W. Gendler, on the Brief.

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CERTIFICATE OF SERVICE

I hereby certify that copies of:

INTERVENOR SCANP'S RESPONSE TO APPLICANT'S BRIEF IN SUPPORT OF APPEAL

have been served on the following by depositing the same in the United States mail, postage prepaid, on this 4th day of January, 1978.

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