



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF  
PUGET SOUND POWER & LIGHT CO., ET AL.  
(SKAGIT NUCLEAR POWER PROJECT,  
UNITS 1 AND 2)

) Docket Nos. STN 50-552  
) STN 50-553  
)

BRIEF AMICUS CURIAE  
SECRETARY OF THE INTERIOR

The Commission has before it an untimely petition of three Indian tribes -- the Upper Skagit, the Sauk-Suiattle, and the Swinomish Tribes -- to intervene in a construction permit proceeding involving the proposed Skagit Nuclear Plant, which is proposed to be located on the Skagit River in the vicinity of the communities of the three Tribes. To aid the Commission in its review of a decision of the Atomic Safety and Licensing Appeals Board (Appeals Board) denying the Tribes' petition, it has asked all parties to address the following issue:

Whether petitioner's status (American Indian tribes), separate from or in conjunction with the particular other facts and circumstances of and surrounding this case, gives rise to sufficient cause to excuse the extraordinary tardiness of the filing of the Tribes' petition to intervene.

In the same Order the Commission directed the NRC staff to invite the Department of Interior to express its views on that issue. The Secretary of the Interior accepts the invitation.

### Discussion

If the Commission's Order is asking whether the Tribes' trust relationship with the United States bestows a "special status" which would legally require intervention without regard to the Commission's Rules of Practice, we answer ... no. However, if the Commission is asking whether there exists other equities which should weigh heavily in favor of the Tribes' prayer for intervention, we answer with an emphatic ... yes!

Here is a proceeding wherein the Commission is required by law to pass upon an application filed by Puget Sound Power and Light Company to construct and operate twin nuclear plants on the Skagit River in close proximity to the communities of the Petitioners. In considering the Appellant's proposed nuclear facility the Commission is required to take into consideration the public health and safety, together with the environmental consequences of the proposed facility. The interest of the Petitioners with respect to the proposed nuclear facility is not challenged, 1/ yet the Appeals Board has chosen to take an uncompromising position with regard to the Tribes' attempt to participate in this proceeding in order to protect their natural resources. It is the Board's position that the Tribes have not demonstrated a good enough reason to justify being late in filing their intervention petition. Yet, the Appeals Board

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1/ The Treaty of Point Elliott guarantees to the petitioning Tribes the right to take harvestable fish from various points along the Skagit River, including the site of the proposed nuclear facility. Since the Tribes are highly dependent on the Skagit River fishery both economically and socially, and since the Tribes have an unusually high rate of unemployment in the area, any loss or adverse impact to that fishery as a result of the construction and operation of the nuclear facility will obviously have a more intensified effect on the Tribes than the public in general.

has conceded that no other party to this proceeding can adequately represent and protect the Tribes' interests and, moreover, the Board recognized that there does not exist any other means whereby the Tribes can fully and effectively protect their resource except by full participation in this proceeding. The Board even admits that there is a possibility -- we believe probability -- that the Tribes can make a contribution to the development of a sound record.

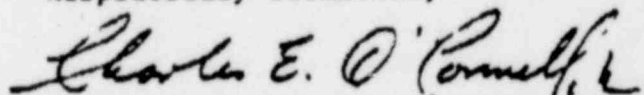
While the Board has said that the Tribes' excuses for its late petition are not persuasive, we read the Board's opinion as being bottomed on the fear that such intervention may cause further delays to the proceeding. The rationale behind the Appeals Board's Majority Opinion is indeed puzzling because this proceeding -- for reasons unrelated to the Tribes' petition -- has already experienced extraordinarily lengthy delays. Moreover, on March 6, 1980, the Licensing Board acknowledged that new information regarding the geology and seismology of the proposed site will require further investigation and has therefore ordered that, until those issues are addressed, all further hearings "on other matters... [regarding this application] will be shelved."

Earlier we advised you that the trust relationship between the Tribes and the United States cannot be the sole justification for ignoring the Commission's Rules of Practice. However, we do not want to leave you with the impression that the trust relationship is meaningless. The trust relationship does indeed warrant that "special treatment" be given to the Tribes. As the Supreme Court declared in the early 19th century, the trust relationship existing between American Indians and the United States is "unlike any two people in existence." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 1831. The petitioning Tribes' trust relationship with the United States is founded on the Treaty of

Point Elliott, 384 F. Supp. 312 (W.D. Wash. 1974); 520 F.2d 676 (9th Cir. 1975); cert. denied 423 U.S. 1086 (1976). In interpreting this particular treaty, the Supreme Court has recently announced that the benefits conferred to the petitioning Tribes justifies that special treatment be given by the United States (and its agencies) when dealing with the protection and enforcement of its treaty-protected rights. We believe that the trust relationship existing between the Tribes and the United States justifies a less stringent interpretation of the Commission's Rules of Practice when considering their late intervention petition. After all, the Tribes are merely requesting an opportunity to assist in the formation of a full record concerning the potential impact of the proposed nuclear facility on their natural resource. The Tribes have not, to our knowledge, expressed opposition to the construction of the nuclear plant at the proposed site. They merely want to be satisfied that this Commission is fully informed of potential impacts resulting from the construction and operation of the facility. We can appreciate the need to bring proceedings of this nature to a conclusion within a reasonable period of time. But it is our understanding that the Tribes are not desirous of reopening the record as to those issues that have been fully tried. We do understand, however, that the Tribes are asserting that some important findings relative to the fisheries issue have not been fully developed on the record. In this regard we note, with interest, that the Appeals Board's Dissenting Opinion has offered two compromising solutions to the Tribes' intervention, i.e. intervention for the sole purpose of allowing the Tribes to convince the Licensing Board that the record is deficient or, in the alternative, intervention for the sole purpose of allowing

the Tribes to file proposed findings of fact and conclusions of law based on the existing record, with the right to appeal. 2/ We appreciate Mr. Farrar's attempt to allow the Tribes a measure by which they could protect valuable interests in their treaty-protected fishery but more importantly to assist the Board to develop a full record upon which the Commission can make an informed judgment. However, we would wish that Mr. Farrar's first suggestion be slightly adjusted. Accordingly, we respectfully request that the Tribes be permitted to intervene as full parties regarding all issues to be tried in the future with the caveat that, as to matters which the hearing Board feels have already been fully addressed, the Tribes would have the burden of showing that there are serious gaps in the existing record or that additional evidence developed by the Tribes' experts deserves to be heard.

Respectfully submitted,



Charles E. O'Connell, Jr.  
Attorney for the Assistant  
Secretary of the Interior,  
Indian Affairs

4/17/80  
Date

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2/ We are dismayed at the cavalier manner in which the Majority of the Appeals Board summarily dismissed the suggested solutions offered by Mr. Farrar. However, we note with interest that Skagit County was recently granted intervention in this proceeding -- some 4 1/2 years after the Company's application was formally noticed by the Commission.



CERTIFICATE OF SERVICE :

I hereby certify that I have this day served the foregoing document upon each party listed below.

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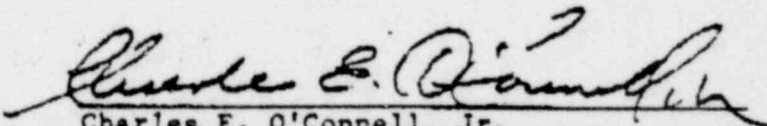
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Date



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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE THREE DAYS OUT OF TIME

Because the preparation of the Brief Amicus Curiae was unavoidably delayed due to the unexpected leave of absence taken by the undersigned's secretary, it is respectfully requested that the Commission accept the attached brief three days beyond its due date, April 14, 1980.

Charles E. O'Connell, Jr.

Attorney for the Assistant  
Secretary of the Interior,  
Indian Affairs

4/17/80  
Date