

May 18, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-460 OL
(WPPSS Nuclear Project No. 1)	)	

NRC STAFF RESPONSE TO APPLICANT'S MOTION TO STRIKE

I. INTRODUCTION

Applicant has moved to strike from the record in this proceeding a Wall Street Journal article appended to "Petitioner's Response to Applicant's Motion for Reconsideration and/or Certification," and to strike all reference to that article in Petitioner's response. Applicant's Motion to Strike, dated April 28, 1983. For the reasons set forth below, the Staff opposes Applicant's motion.

II. DISCUSSION

At the outset, it should be noted that the Licensing Board already has ruled on Applicant's Motion for Reconsideration, to which Petitioner's response appending the newspaper article relates. Memorandum and Order dated April 26, 1983. In ruling, the Board did not rely on or reference the information contained in the Wall Street Journal article. Accordingly, there has been no apparent harm to Applicant resulting from the fact that the article was appended to Petitioner's pleading.

Applicant sets forth three arguments in support of its motion. First, Applicant argues that the article is of "insufficient probative value to

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warrant inclusion in the record and is not admissible because it is not reliable evidence of petitioner's allegation." Motion at 1-2. In arguing admissibility, Applicant's concern is misplaced. Petitioner has not moved that the article be introduced into evidence,<sup>1/</sup> a fact that Applicant recognizes. Motion at 3. fn. 5. Accordingly, since no proffer of evidence has been made, no determination as to admissibility has been sought or given. The mere fact that the article has been appended to a pleading, and referenced therein, does not make it evidence. Arguments of counsel in a brief or oral argument are not evidence and may not be accepted as such. Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 14 n.18 (1977). Petitioner's references to the article in its pleading are on precisely the same footing. Accordingly, Applicant's argument as to probative value and admissibility is misplaced.

Applicant's second reason in support of its Motion is that Petitioner has "apparently erroneously" identified the publication date of the article submitted. Assuming, arguendo, that this is true, it does not constitute reason to strike the article from Petitioner's response, but only reason to correct the stated date.

Applicant's third reason for its motion is that Petitioner has a "burden . . . to demonstrate the propriety of including such article

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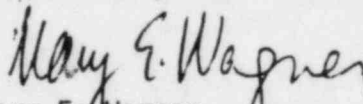
<sup>1/</sup> Under Commission rules, documentary evidence may be offered in evidence as provided by 10 CFR § 2.743. It must meet the tests of relevance, materiality and reliability before it can be admitted.

in the record", which it has not met. (Motion at 3). In support of its proposition that Petitioner has such a burden, Applicant cites Consolidated Edison Company of New York, Inc. (Indian Point, Units 2 and 3), CLI-77-2, 5 NRC 13, 14 (1977), and 10 CFR § 2.732. Both references are simply inapposite, as they impose a burden of proof on an applicant or the "proponent of an order". Clearly, neither Indian Point nor § 2.732 contemplates imposing such a burden in the instant situation.

III. CONCLUSION

For the foregoing reasons, Applicant's Motion to Strike should be denied.

Respectfully submitted,



Mary E. Wagner  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 18th day of May, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANT'S MOTION TO STRIKE" 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, by deposit in the Nuclear Regulatory Commission's internal mail system this 18th day of May, 1983:

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