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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
PUGET SOUND POWER & LIGHT	)	Docket Nos. STN 50-522
COMPANY, et al.	)	STN 50-523
	)	
(Skagit Nuclear Power Project,	)	May 19, 1982
Units 1 and 2)	)	

APPLICANTS' RESPONSE IN OPPOSITION TO UNTIMELY PETITION  
TO INTERVENE BY COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

I. Introduction

On February 5, 1982, a notice was published in the Federal Register which stated that any person, who has an interest which may be affected by the construction permit proceeding for the Skagit/Hanford Nuclear Project (S/HNP), may file a petition to intervene by March 8, 1982. 47 Fed. Reg. 5554. On May 5, 1982, the Columbia River Inter-Tribal Fish Commission (Petitioner) served an untimely Petition to Intervene. Applicants hereby submit their response in opposition to this petition.

Untimely petitions to intervene are governed by the standards in 10 CFR § 2.714. First, in order to participate as a party to a proceeding, the petitioner must identify an

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interest which may be affected by the proceeding and must set forth with the requisite specificity and basis at least one admissible contention. Second, an untimely petition will not be entertained absent a determination that the petition should be granted based upon a balancing of the following factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Since a balancing of these factors depends in large part upon the interests and contentions of the petitioners, this response will first consider the interests of the Petitioner and the contentions it has presented, and then it will discuss the five factors that control untimely petitions.

## II. Interests and Contentions of the Inter-Tribal Fish Commission.

The Inter-Tribal Fish Commission consists of committees from the Confederated Tribes of the Warm Springs Indian Reservation, Confederated Tribes and Bands of the Yakima Indian

Nation, Nez Perce Tribe of Idaho, and the Confederated Tribes of the Umatilla Indian Reservation. Petition to Intervene, p. 1. The Petitioner has identified only one interest that may be affected by this proceeding; namely, that construction and operation of S/HNP may impact fish in the Columbia River, thereby adversely affecting the tribes' treaty fishing rights. Petition to Intervene, pp. 3-4. Based upon this allegation, Applicants have no objection to the standing of the Petitioner to intervene in this proceeding.

The Petitioner has submitted five contentions.<sup>1</sup> Each contention incorporates a contention filed by the NRDC or the NWF/OEC. Applicants' previous discussion of these contentions applies equally to the Petitioner's contentions.<sup>2</sup>

Additionally, Petitioner's Contention 4 raises two supplemental issues which were not addressed in the contentions filed by NRDC and NWF/OEC. First, Petitioner alleges that Applicant's environmental report does not fully consider potential environmental impacts including:

those impacts which may result from combined discharge of these and other pollutants; the toxic effects of radioactive material discharges, aside

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<sup>1</sup>Supplement to Petition to Intervene of Columbia River Inter-Tribal Fish Commission (May 5, 1982).

<sup>2</sup>Applicants' Answer to Supplemental Petitions to Intervene and Motion for Extension of Time (May 4, 1982), pp. 2-5.

from those effects related to radioactive doses; the acute toxicity effects of pollutants within the mixing zone; the depressed conditions of the local salmonid populations; and other relevant information regarding potential environmental impacts.

Supplement to Petition, pp. 2-3. This contention totally lacks specificity and basis. For example, the Petitioner does not identify the pollutants to which it is referring, nor does it provide any basis for the allegation that the project discharges will have "toxic effects." As the Board pointed out at the special prehearing conference, contentions which allege that the environmental report does not fully reflect the potential environmental impacts, with nothing more stated, should be avoided. Tr. 74-75. Consequently, this contention should be rejected.

Second, Petitioner alleges that construction and operation of S/HNP will adversely affect and violate the tribes' treaty rights to fish in the Columbia River and to hunt, gather roots and berries, and pasture horses and cattle upon the Hanford Reservation. Supplement to Petition: p. 3. This contention also lacks specificity and basis. The alleged treaties in question are not identified, there is no particularization of how any such alleged rights would be affected or violated, and no basis has been provided for the allegation that such alleged rights would be affected or violated. Moreover, to the extent

that the Petitioner is seeking to litigate alleged violations of treaty rights, as opposed to potential impacts of construction and operation of the project upon the environment and the public health and safety, it has proceeded before the wrong forum.

In sum, the Petitioner's contentions simply adopt contentions offered by other intervenors in this proceeding, and the Petitioner's attempt to elaborate upon one of the adopted contentions suffers from a lack of specificity and basis.

### III. Balancing of the Five Factors Governing Late Intervention.

A late petitioner must address each of the five factors of 10 CFR § 2.714 governing late intervention and affirmatively demonstrate that, on balance, they favor permitting his tardy admission to the proceeding. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980), and cases cited therein. As is demonstrated below, the Petitioner has failed to satisfy this burden and, in fact, each factor weighs against late intervention.

#### A. Good Cause, if Any, for Failure to File on Time

A timely notice of this proceeding was published in the Federal Register on February 5, 1982. This notice was legally

sufficient to alert petitioners of this proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 192 (1979). Furthermore, on January 7, 1982, Applicants served a copy of the Application for Site Certification/Environmental Report for S/HNP (Amendment No. 4) on the Petitioner.<sup>3</sup> Thus, the Petitioner had both constructive and actual notice that Applicants intended to construct and operate a nuclear plant at the proposed site for S/HNP. Petitioner makes no statement that it was not timely aware of the proceeding, nor could it.

Petitioner attempts to excuse its untimely filing by referring to its alleged participation in other activities, both judicial and nonjudicial in nature, a number of which transpired after the deadline for filing a petition.<sup>4</sup> However, the Appeal Board has previously rejected just such an excuse:

In this respect, there is nothing unique about the tribes' situation. Participation in any complex adjudicatory proceeding--whether being conducted in the courts or before an administrative agency--is

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<sup>3</sup>Affidavit of Service (January 7, 1982). Previously, on June 2, 1981, Applicants had met with a representative of the Petitioner and others in Portland, Oregon and briefed them on S/HNP. ASC/ER, p. 12.2.

<sup>4</sup>Petition to Intervene, pp. 9-12.

both time-consuming and a drain on the often limited resources of the participants. This being so, what the tribes (in common with the Cherokee [ALAB-440, 6 NRC 642, 644] petitioner) ask is that the universally accepted practice of prescribing deadlines for intervention petitions be discarded by this Commission in favor of a rule which would permit each prospective intervenor to decide for himself the precise time at which he should transfer his attention and resources from the pursuit of other concerns. We repeat the thought expressed in Cherokee: were such a rule adopted the adjudicatory process likely would break down entirely. That consideration may explain why the tribes have not provided us with a single judicial or agency precedent in support of their "otherwise preoccupied" excuse.

Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 6-7 (1979).

Finally, the Petitioner implies that it is exempt from the Commission's rules on late filed petitions because it represents Indian tribes:

Also, it is apparent that were the United States to assert this petition solely on behalf of the Indian tribes no laches would effectively be asserted to bar the petition. The Indians have the same rights in this respect as does the government. In the Matter of Puget Sound Power & Light Company, 8 NRC 587, 597 f.n.9 (Nov. 24, 1978) citing United States v. Beehe, 127 U.S. 338 ( ), for the principle that the United States is not bound by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a interest is established past all controversy or doubt.

Petition to Intervene, p. 8. However, in citing this licensing board decision, the Petitioner fails to point out that the decision was vacated on appeal. The Appeal Board held that

Indian tribes, just as any other petitioner, must satisfy the requirements of 10 CFR § 2.714 in order to intervene in NRC proceedings after the filing deadline has expired. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 61-63 (1979). Consequently, the Petitioner cannot escape the obligation to justify its untimely petition with the excuse that it is not subject to Section 2.714.

In short, the Petitioner has not offered any valid justification for its failure to file on time. As a result, its "burden of justifying intervention on the basis of the other factors in the rule is considerably greater." Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLT-75-4, 1 NRC 273, 275 (1975); Virginia Electric and Power Co. (North Anna Station, Units 1 and 2) ALAB-289, 2 NRC 395, 398 (1975).

B. The Availability of Other Means Whereby the  
Petitioner's Interest Will Be Protected.

Petitioner claims that this proceeding is the last forum in which it can protect its treaty rights to fish and wildlife. This claim is patently without foundation.

A contemporaneous proceeding regarding S/HNP is presently ongoing before the State of Washington Energy Facility Site

Evaluation Counsel (EFSEC).<sup>5</sup> This proceeding includes applications for site certification, for a National Pollutant Discharge Elimination System (NPDES) permit, and for a Section 401 certification under the Federal Water Pollution Control Act, as amended. In particular, this proceeding encompasses issues related to the environmental impacts of S/HNP, including the effects of the project discharge on Columbia River water quality and fish.

Not only is the Petitioner aware of the existence of this proceeding, but it has filed a petition to intervene therein based upon a statement of interest essentially identical to that which appears in the instant Petition.<sup>6</sup> Furthermore, the Petitioner has already submitted oral and written statements on substantive evidentiary issues to EFSEC in the NPDES portion of the state proceeding.<sup>7</sup> Thus, the Petitioner does have an alternative means of protecting its interests and is actively pursuing this alternative.<sup>8</sup>

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<sup>5</sup>In the Matter of Puget Sound Power & Light Company (Skagit/Hanford Nuclear Project), Application No. 81-1.

<sup>6</sup>Amended Petition to Intervene of Columbia River Inter-Tribal Fish Commission (May 14, 1982). This petition was also untimely, and EFSEC has not yet ruled on it.

<sup>7</sup>NPDES Permit Testimony for the Columbia River Inter-Tribal Fish Commission. Tr. \_\_\_\_ (May 6, 1982).

<sup>8</sup>Presumably, the Petitioner can also file suit in court to redress alleged violations of its treaty rights.

C. The Extent to Which the Petitioner's Participation May Reasonably be Expected to Assist in Developing a Sound Record.

Petitioner expressly "recognizes that it has little specific expertise in the area of liquid effluent discharge from nuclear power projects."<sup>9</sup> Petition to Intervene, p. 8. Although Petitioner does state that it has employed lawyers, fisheries biologists, and a civil engineer with credentials in Columbia River water management, Petitioner has not identified the specific individuals in question or provided a statement of their qualifications.

Based upon the information provided by the Petitioner, it is not possible to verify whether the Petitioner's employees are capable of making any contribution to this proceeding. As the Appeal Board has previously held, a petitioner cannot demonstrate its ability to contribute to a proceeding simply by alleging that its members have technical expertise without providing a "bill of particulars" to support such an allegation. Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-426, 7 NRC 759, 764 (1978). Since the

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<sup>9</sup>Petitioner states that it is taking unidentified steps to obtain such expertise. Petition to Intervene, p. 8.

Petitioner has the burden of establishing its justification for untimely intervention, Perkins, supra, this factor must weigh against the Petitioner.

D. The Extent to Which the Petitioner's Interest Will Be Represented by Existing Parties.

Petitioner has submitted only five contentions, each of which merely adopts the contentions of the NRDC or NWF.<sup>10</sup> Both of these intervenors are established national organizations, and there is no reason to believe that either will be unable to obtain a complete and thorough airing of the contentions which they have drafted and the Petitioner has adopted. Consequently, it may reasonably be expected that the present intervenors will adequately represent Petitioner's interest as reflected in the adopted contentions.

E. The Extent to Which the Petitioner's Participation Will Broaden the Issues or Delay the Proceeding.

Since the Petitioner's contentions merely adopt the contentions of existing intervenors, its participation on those contentions probably would not broaden the issues in this proceeding.

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<sup>10</sup>To the extent that Petitioner's Contention 4 includes allegations which were not part of the adopted contentions, Applicants have previously demonstrated that those allegations do not form acceptable contentions. See Section II, supra.

Nevertheless, the Petitioner's participation in this proceeding does present the potential for delay. First, to the extent that the Petitioner is attempting to use the adopted contentions as a vehicle for initiating an inquiry into alleged violations of treaty rights, such an inquiry would be extraneous to the purpose of this proceeding; i.e., consideration of potential environmental and health and safety impacts of S/HNP. Second, admission of another intervenor inevitably would result in some delay, due to such matters as additional cross-examination, presentation of additional witnesses, additional appeals, etc. Finally, it is conceivable that, if admitted as a party, the Petitioner may file additional untimely contentions for consideration and litigation. Consequently, this factor does not weigh in favor of the Petitioner's late intervention.

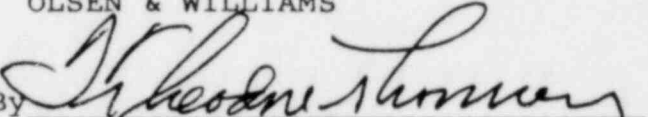
#### IV. Conclusion.

The Petitioner has not shown good cause for its untimely filing, and none of the other four factors weighs in favor of its admission as a party to this proceeding. Consequently, the Petitioner's belated request to intervene should be denied.

DATED: May 19, 1982.

Respectfully submitted,

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED & SENT  
BRANCH

In the Matter of	)	
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PUGET SOUND POWER & LIGHT COMPANY,	)	DOCKET NOS.
et al.	)	
	)	
(Skagit/Hanford Nuclear Project,	)	STN 50-522
Units 1 and 2)	)	STN 50-523
_____	)	

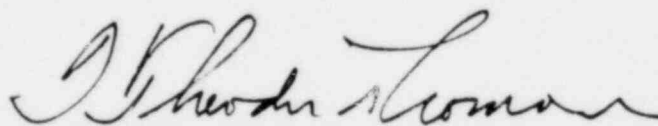
CERTIFICATE OF SERVICE

I hereby certify that the following:

1. APPLICANTS' RESPONSE TO LICENSING BOARD QUESTION
2. APPLICANTS' RESPONSE IN OPPOSITION TO UNTIMELY PETITION TO INTERVENE BY COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION.

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 May 19, 1982 with proper postage affixed for first class mail.

DATED: May 19, 1982



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SKAGIT/HANFORD NUCLEAR PROJECT  
NRC Service List  
Docket Nos. STN 50-522 and STN 50-523

DATE May 19, 1982

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