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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
OF PETITION & SERVICE
BRANCH

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of)	
)	
ARIZONA PUBLIC SERVICE)	Docket Nos. STN 50-528
COMPANY, et al.,)	STN 50-529
)	STN 50-530
(Palo Verde Nuclear)	
Generating Station, Units 1,)	
2 and 3))	

APPLICANTS' RESPONSE TO INTERVENOR'S
PETITION FOR DIRECTED CERTIFICATION
PURSUANT TO 10 CFR §2.718(i)

The joint Applicants hereby respond to Inter-
venor's petition for directed certification of two questions
concerning this Board's exclusion of certain evidence relat-
ing to Applicants' contract for effluent and the Pima-
Maricopa Indian Community lawsuit. It is the Applicants'
position that this Board correctly held that evidence on
both issues is irrelevant. It is further Applicants' posi-
tion that Intervenor has not met the standard for directed
certification of questions on these evidentiary rulings and
such certification should be denied. Those points and argu-
ments of Intervenor which require a response are addressed
below. They are discussed in the order raised by Intervenor
and under corresponding readings.

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1 I. BACKGROUND

2 Intervenor presents a selected chronology of the
3 background of this case with which Applicants have no real
4 dispute. However, certain of Intervenor's statements which
5 purportedly reflect the evidentiary record are inaccurate or
6 misleading and deserve brief mention.

7 The first such instance is found in Intervenor's
8 discussion of the background to the Indian community law-
9 suit. Intervenor states, as though it were a matter of
10 record, that:

11 If the court were to grant the Indian
12 community's requested relief, the Secre-
13 tary would be forced to exercise his
14 power over all reclamation waters, in-
15 cluding return flow and effluent, to
16 satisfy these claims. Therefore, Appli-
17 cants' contract for effluent [is] seri-
18 ously threatened by the Indians' lawsuit
19 and the Indians' superior claim to ef-
20 fluent.

21 Petition, p.2.

22 This, however, is not true. First, the statement
23 concerning the "Indians' superior claim to effluent" is ob-
24 viously in error insomuch as it has not yet been determined
25 whether the Indians have a "superior claim to effluent."
26 That, in part, is the subject of the lawsuit. Secondly, it
is not as certain as Intervenor would characterize it that,
if the Indians were to prevail in the lawsuit, the Secretary
would be forced to exercise his power over all flow and
effluent to satisfy the Indians' claims. If the Indians

1 prevail, other relief might be granted as well as the obvi-
2 ous possibility no relief might be granted. Also, there is
3 a question about what actually constitutes the flow and ef-
4 fluent to which the Indians assert a claim. Even if the
5 Indians prevail in part there may be no significant effect
6 on Palo Verde's water supply depending on the determination
7 of the issue of what constitutes the flow and effluent in
8 question. In short, Intervenor's apparent position that the
9 Indian lawsuit problem is concrete and can be evaluated today
10 in terms of its effect on Palo Verde is simply inaccurate.
11 The outcome of that lawsuit is remote and speculative.

12 In her petition, Intervenor also recites, as though
13 it were evidence, that which her counsel had argued Appli-
14 cants had said. More specifically, she states:

15 In response to Board questions about the
16 effect on environmental costs of having
17 the effluent contract invalidated, Tr.
18 1001, Intervenor's counsel answered that
19 Applicants' had stated that the cost if
20 Palo Verde were shut down for one day
21 due to failure to receive effluent is
22 about \$760,000 per day per reactor and
23 that would be one indication of increased
24 environmental costs due to the invalidity
25 of the contract. Tr. 1005

26 Petition, p. 4.

To include such a statement in a petition for di-
rected certification, as though it were evidence in the
record, demonstrates a lack of understanding of both proce-
dure and evidence. Counsel's statement before this Board is
not evidence, much less relevant or material; and Inter-

1 venor's repetition of that statement in her petition herein
2 gives it no further evidentiary or persuasive value.

3 More importantly, however, even assuming the
4 statement concerning the cost of shutdown were accurate,
5 which staff counsel commented "maybe" would be true "[i]f
6 the units do not go on line", Tr. 1006, that information is
7 still irrelevant and immaterial to the issue before the
8 Board at this stage of the proceedings. As the Board noted,
9 these costs have already been incurred and therefore there
10 is not an adverse environmental impact on the cost/benefit
11 basis being considered. Tr. 1008.

12 Similarly, Intervenor's repetition in her petition
13 of Mr. Leshy's proffered testimony makes it no more rele-
14 vant. The issue, of which Intervenor loses sight, is
15 whether the NEPA, which requires consideration of environ-
16 mental effects of proposed action, requires consideration of
17 the type of remote and speculative matters as those which
18 are involved here, namely the legal rights to be declared in
19 a lawsuit pending in another forum. This Board has properly
20 held that question is too remote and speculative to be con-
21 sidered and therefore Mr. Leshy's testimony, were it ad-
22 mitted, concerning the alternatives based on the possible
23 outcome of that lawsuit would not make the initial issue
24 anymore relevant to these proceedings.

25 In conclusion, Intervenor's recitation of that
26 which she terms "background" is in part inaccurate and in

1 whole irrelevant to the only issue presented by her petition
2 for certification, which is whether she has met the standard
3 for directed certification pursuant to 10 C.F.R. §2.718(i)
4 on the two evidentiary questions she presents.

5 II. QUESTIONS FOR CERTIFICATION

6 Intervenor's first question for certification is:

7 Whether the licensing Board erred in re-
8 fusing to admit evidence about the pos-
9 sible invalidity of Applicants' contract
10 for effluent.

11 However, it is not clear whether, by this ques-
12 tion, Intervenor is referring to the evidence that Agreement
13 No. 13904 pursuant to which effluent will be supplied for
14 cooling Palo Verde is being renegotiated, or whether she is
15 referring to the effect the Indian lawsuit could have on the
16 validity of the contract. If she is referring to the fact
17 the Agreement is being renegotiated, there is no evidence to
18 support the assumption underlying the proposed question that
19 the renegotiations may in anyway effect the validity of the
20 contract. If Intervenor is referring to the effect the
21 Indian lawsuit could have on the validity of that contract,
22 it is covered by proposed question no. 2, which reads:

23 Whether the Licensing Board erred in re-
24 fusing to admit evidence about the pos-
25 sible effects of the Pima-Maricopa
26 Indian Community lawsuit on Applicants'
contract for effluent.

It is most probable that question no. 1 is a dup-
lication of question no. 2. Therefore, only question no. 2

1 will be directly referred to below, although the arguments
2 apply equally to both. Both should be denied for failure to
3 meet the standard for certification.

4 III. INTERVENOR HAS NOT MET THE STANDARD FOR CERTIFICATION

5 Intervenor correctly quotes 10 C.F.R. §2.718(i)
6 which governs the discretionary certification of the ques-
7 tions proposed by Intervenor. However, Intervenor incom-
8 pletely quotes portion of 10 C.F.R. Part 2, section V(f)
9 (4), which she contends governs the standard to be applied
10 by this Board in determining whether to certify a question.

11 Intervenor cites the portion which reads:

12 A question may be certified to the Com-
13 mission or the Appeal Board, as appro-
14 priate, for determination when a major
15 or novel question of policy, law or pro-
16 cedure is involved which cannot be re-
17 solved except by the Commission or the
18 Appeal Board and when a prompt and final
19 decision of the question is important
20 for the protection of the public inter-
21 est, or to avoid undue delay or serious
22 prejudice to the interests of a party.

23 She omits, however, the last sentence which reads:

24 For example, a board may find it appro-
25 priate to certify novel questions as to
26 the regulatory jurisdiction of the Com-
mission or the right of persons to in-
tervene. (emphasis added)

27 This last sentence is important. It illustrates
28 that which is considered a major or novel question. Evi-
29 dentiary rulings, such as the one involved in this case, do
30 not begin to rise to a comparable level of importance. To
31 the contrary, the law is overwhelmingly to the effect that

1 evidentiary issues are inappropriate for an interlocutory
2 appeal.

3 A. Evidentiary Issues Are Inappropriate For
4 Interlocutory Appeals

5 In general, only in extraordinary circumstances
6 can an appeal board review any interlocutory ruling by a
7 petition for directed certification pursuant to 10 C.F.R.
8 §2.718(i). Public Service Company of New Hampshire (Seabrook
9 Units 1 and 2), ALAB-271, 1 NRC 478 (1975). Rather, an
10 appeal board will undertake such discretionary interlocutory
11 review only where the Licensing Board ruling in question
12 "either (1) threaten[s] the party adversely affected by it
13 with immediate and serious irreparable impact which, as a
14 practical matter, could not be alleviated by a later appeal
15 or (2) affect[s] the basic structure of the proceeding in a
16 pervasive or unusual manner." Public Service of Indiana,
17 Inc. (Marble Hills, Units 1 and 2), ALAB-405, 5 NRC 1190,
18 1192 (1972).

19 Neither of these standards applies in the present
20 case. The future legal rights of the Indians is not going
21 to irreparably harm anyone, regardless of whether Applicants
22 are required at some future time to seek alternate sources
23 of water or not. Certainly, Intervenor Hourihan is not
24 going to be adversely affected with immediate and irreparable
25 harm. No one is.

26

1 Likewise, the basic structure of the proceeding is
2 not going to be affected in a pervasive or unusual manner.
3 These are but evidentiary rulings, rulings which can be
4 reviewed on direct appeal. A failure to review them now
5 does not effect the present proceedings at all, much less in
6 a pervasive or unusual manner.

7 Furthermore, an evidentiary ruling relates to fac-
8 tual matters and an interlocutory certification is basically
9 not intended for resolution of mainly factual questions.
10 Offshore Power Systems (Floating Nuclear Plants) ALAB-517, 9
11 NRC 8 (1979). In Offshore Power Systems, the Board refused
12 to admit a contention concerning whether estuarine or riverine
13 sites are suitable for floating nuclear plants. In affirming
14 the Licensing Board's refusal to certify this question, the
15 Appeal Board stated:

16 The short of the matter is that what the
17 NRDC characterizes as an "important legal
18 question" of first impression is actually
19 a mixed question of law and fact -- with
20 the factual element predominant. Our
21 certification authority was not intended
22 for this situation.

23 Id. at 12. (emphasis added)

24 In the present case, the evidentiary rulings in-
25 volve factual disputes, namely what will occur if the
26 Indians prevail and how will that effect Palo Verde's water
supply. No legal issues are involved beyond the issue of
whether this is admissible evidence. Certainly no major or
novel questions of law are involved.

1 There are good policy reasons behind not allowing
2 evidentiary issues to be the subject of interlocutory
3 appeals. The Appeal Board in Pacific Gas and Electric Co.
4 (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504,
5 8 NRC 406 (1978), explained it this way:

6 [D]uring the course of lengthy proceed-
7 ings licensing boards must make numerous
8 interlocutory rulings, many of which
9 deal with the reception of evidence and
10 the procedural framework under which it
11 will be admitted. It simply is not [an
12 appeals board's] role to monitor these
13 matters on a day to day basis; were we
14 to do so, 'we would have little time for
15 anything else'. (citations omitted)

16 Presented with a petition for certification of
17 evidentiary questions, the Appeal Board in Long Island
18 Lighting Company (Jamesport Nuclear Power Station, Units 1
19 and 2), ALAB-353, 76/10, 381 (1976), declared:

20 We have endeavored to make our disincli-
21 nation to exercise our authority to
22 direct certification to review interloc-
23 utory ruling of licensing boards dealing
24 with garden-variety evidentiary matters.
25 (citations omitted). Apparently uncon-
26 vinced that we meant what we said . . .
intervenor . . . has now filed another
petition The petition is
denied. (emphasis supplied by court)

27 Id. at 381-82.

28 B. The S-3 Decision Has No Relevance To This
29 Petition.

30 Intervenor concludes her argument in favor of this
31 Board certifying her evidentiary questions with reference to

1 the recent "S-3 decision", NRCC v. NRC, Nos. 77-1148, 79-2110
2 and 79-2131 (D.C. Cir. April 27, 1982). She cites lack of
3 understanding and the need for further clarification of the
4 implications of that case as reason for certification. Be-
5 side the fact that decision is not unclear, as this court
6 noted in its June 4, 1982 memorandum and order, even if it
7 were unclear the issue raised by that case remains an evi-
8 dentiary issue and one which can be dealt with on direct
9 appeal. The S-3 decision does not rise to the level neces-
10 sary for certification under 10 C.F.R. §2.718(i). Addition-
11 ally, evidence of the type of cost uncertainties discussed
12 in that case does not exist in this case. However, even
13 assuming applicability of the S-3 decision to the case at
14 hand, the preclusion of the evidence in issue here does not
15 threaten immediate and serious irreparable harm, nor does it
16 affect the basic structure of the proceeding in a pervasive
17 or adverse way. The S-3 decision simply does not have a
18 bearing on the standard for certification.

19 IV. CONCLUSION

20 Based on the foregoing, argument to be presented
21 at a hearing on this matter, and the entire record in this
22 case, Applicants respectfully submit that the two evidentiary
23 questions requested certified by Intervenor do not meet the
24 standard for certification under 10 C.F.R. §2.718(i), and
25 request such certification be denied.

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DATED this 16th day of July, 1982.

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_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to Intervenor's Petition for Directed Certification Pursuant to 10 CFR §2.718(i)" have been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid, this 16th day of July, 1982.

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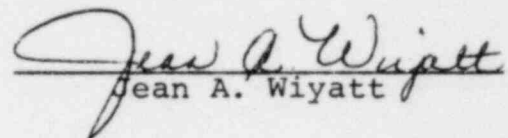
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