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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

PUGET SOUND POWER & LIGHT CO., ET AL.

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

}
}
}
}
} Docket Nos. STN-50-522
STN-50-523

NRC STAFF BRIEF IN SUPPORT OF PETITIONER
CRITFC APPEAL FROM DENIAL OF INTERVENTION

I. INTRODUCTION

On September 23, 1982, Columbia River Inter-Tribal Fish Commission (CRITFC or Petitioner) filed a "Notice of Appeal" from the Atomic Safety and Licensing Board's September 8, 1982 Memorandum and Order denying CRITFC's petition to intervene in the Skagit construction permit proceeding.^{1/} For the reasons set forth below, the decision of the Licensing Board denying CRITFC's intervention should be reversed.

II. BACKGROUND

By an application dated September 18, 1974, Puget Sound Power & Light Company, acting for itself and as agent for Pacific Power and Light

^{1/} The Notice of Appeal was mislabeled and mistakenly filed with the Licensing Board instead of the Appeal Board. The NRC Staff, however, has responded to this appeal as if properly filed with the Appeal Board.

Attached to the Notice of Appeal was Petitioner's "Memorandum in Support of Appeal of the Columbia River Inter-Tribal Fish Commission" dated September 23, 1982 (Brief on Appeal).

Company, The Washington Water Power Company, Idaho Power Company, and Washington Public Power Supply System applied for construction permits for two boiling water nuclear reactors designated as the Skagit Nuclear Power Project, Units 1 and 2, each of which was designed for operation at 3800 thermal megawatts with a net electrical output of approximately 1300 megawatts per unit. The proposed facilities were to be located at the applicants' site 5 miles northeast of Sedro Woolley in Skagit County, Washington. On September 26, 1981, Puget Sound Power & Light Company amended its application following a decision to relocate the proposed nuclear facilities at the Department of Energy's Hanford Reservation in Benton County, Washington and changing the name of the project from Skagit Nuclear Power Project to Skagit/Hanford Nuclear Project. The proposed facilities, designated Skagit/Hanford Nuclear Project, Units 1 and 2, will retain the same design boiling water reactors as the original application.

On February 5, 1982, the U.S. Nuclear Regulatory Commission (NRC) published in the Federal Register (47 Fed. Reg. 5554) a notice of hearing on the amended application for construction permits for the Skagit/Hanford Nuclear Project (the Skagit project). That Notice established March 1, 1982 as the deadline for filing requests for a hearing and petitions for leave to intervene.

On May 5, 1982, CRITFC filed an untimely petition to intervene. CRITFC asserted that it was a commission consisting of the wildlife committees of four Columbia River tribal governments and that it was duly authorized to represent these tribal governments to protect treaty reserved rights to fish and wildlife. Petition to Intervene, p. 6. On May 19,

1982 and May 25, 1982, the Applicant and the NRC Staff, respectively, submitted their responses to the untimely petition and contentions. Both Applicant and Staff acknowledged that CRITFC met the "interest" and "specific aspect" requirements of 10 CFR § 2.714(a). However, Applicant objected to the CRITFC petition on grounds of untimeliness whereas the Staff concluded that the balance of the five factors set forth in 10 CFR § 2.714(a)(1) weighed in favor of CRITFC being permitted to intervene in this proceeding.

On July 2, 1982, the Licensing Board issued a Memorandum and Order concerning CRITFC's petition. It concluded that CRITFC's petition was technically deficient in that express authorization from CRITFC's members was lacking and that the petition was not properly signed. The Board further noted that it would rule on the admissibility of CRITFC's contentions after the deficiencies were corrected and the late filing question was resolved.

On July 16, 1982, CRITFC submitted its response to the Board's July 2, 1982 Memorandum and Order which included a signed affidavit of the Vice-Chairman of CRITFC authorizing the petition to intervene. Since the NRC Staff did not note any technical deficiencies in the intervenor's petition when originally filed, it did not take any position as to whether the Board-noted deficiencies were cured. NRC Staff Response, dated August 5, 1982. The Applicant submitted its response to the CRITFC motion on July 30, 1982. In addition to again objecting to CRITFC's petition on grounds of untimeliness, the Applicant objected to the standing of CRITFC to intervene in this proceeding. It based this objection on CRITFC's statement in its July 16, 1982 Response

that CRITFC did not represent the Columbia River treaty tribes, but instead is an independent body which assists in some of the actions of the tribes. Thus, the Applicant concluded that the "Petitioner simply has an academic interest in protecting the tribal treaty rights." Applicants' Response, p. 4.

On August 19, 1982, CRITFC filed a "Motion for Leave to Reply to Applicant's Response in Opposition to CRITFC's Motion for Admission of Second Supplement to Petition to Intervene." In its response, CRITFC asserted that it had a definite substantial stake in the outcome of the proceeding because, in essence, the four Fish and Wildlife Committees of the respective Columbia River tribes individually and collectively as CRITFC would be affected by diminution of fishery treaty rights. Since each Fish and Wildlife Committee is vested with authority to engage in actions or programs, or to enact rules and regulations to protect, promote and enhance the Columbia River fishery resources, CRITFC asserted that any impact on treaty reserved rights would necessarily affect the ability of the committees and CRITFC to carry out their authorized functions. CRITFC's Reply, p. 7.

In a Memorandum and Order dated September 3, 1982, the Licensing Board denied CRITFC's intervention on the basis of a lack of standing. Its reason for doing so was its belief that CRITFC was not authorized to represent the Columbia River treaty tribes in this proceeding. It thus concluded that CRITFC had only an academic interest in this proceeding, which was insufficient to grant it standing.^{2/}

^{2/} September 3, 1982 Memorandum and Order at 4-5.

On September 23, 1982, CRITFC filed a Notice of Appeal pursuant to 10 CFR § 2.714(a) with an accompanying brief in support. CRITFC bases its appeal regarding lack of standing on its contention that it both (1) represents the Columbia River Treaty Tribes and individual Indians who will be injured by the Skagit facility and (2) will itself be directly injured by the construction of the facility. As a matter of relief, it requests that the Appeal Board rule that CRITFC has the requisite standing to intervene or, alternatively that the Appeal Board remand its petition to the Licensing Board for further clarification on the question of its standing.

III. ISSUE ON APPEAL

1. Whether the Licensing Board erred in determining that CRITFC lacked standing to intervene in the Skagit construction permit proceeding.

IV. DISCUSSION

A. The Requirements To Establish Standing

In determining whether to allow intervention in NRC licensing proceedings, petitioners must establish that they possess standing -- that is, an "interest" which may be affected by the proceeding. The Commission has noted that in determining whether an interest has been satisfactorily alleged by a petition, contemporaneous judicial concepts of standing are to be applied. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). Persons have standing to obtain judicial review of federal

agency action under § 10 of the Administrative Procedure Act (5 U.S.C. §§ 551 et seq.) where they have alleged that the challenged action has caused them "injury in fact" and where the alleged injury is an interest arguably within the "zone of interests" to be protected or regulated by the statute that the agencies are claimed to have violated. Sierra Club v. Morton, 405 U.S. 727, 733 (1972); Data Processing Service v. Camp, 397 U.S. 150 (1970). Accord, Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 & 2), CLI-00-10, 11 NRC 438, 439 (1980).

In determining whether there is standing under the "injury in fact" test, it is well established that a court's jurisdiction can be invoked only when the petitioner himself has suffered some threatened or actual injury resulting from the complained of activity. Warth v. Seldin, 422 U.S. 490, 499 (1975); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). A mere interest in a problem, no matter how long standing the interest or how well qualified the petitioner, is not by itself sufficient to establish standing. Sierra Club v. Morton, 405 U.S. 727, 739 (1972). Accord, In the Matter of Ten Applications for Low Enriched Uranium Exports to EURATOM Member Nations, CLI-77-24, 6 NRC 525, 531 (1977) [hereinafter cited as EURATOM Member Nations].

Standing under the "injury in fact" test can be obtained by organizations as well as individuals. Thus, an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Warth v. Seldin, supra, 422 U.S. at 511; EURATOM Member Nations, supra. Even in the absence of injury to itself, an association may have

standing solely as the representative of its members. To obtain standing in this manner, however, it must allege that, as a result of the challenged action, its members are suffering immediate or threatened injury of the sort that would make out a judicable case had the members themselves brought suit. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 342-343 (1977); Warth v. Seldon, 422 U.S. at 499; Sierra Club v. Morton, 405 U.S. at 739; Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. at 40. Accord, Houston Lighting & Power Co., (South Texas Projects, Units 1 & 2), ALAB 549, 9 NRC 644, 646 (1979).

Insofar as the "zone of interests" requirement is concerned, it has been held that the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 et. seq., and its implementing regulations, require that a petitioner's connection with a facility fall within the zone of interests which Congress was protecting or regulating in that Act or the National Environmental Policy Act, 42 U.S.C. §§ 4321, et. seq. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); accord, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976).

B. CRITFC Has Met The Requirements of Standing

There does not appear to be any dispute that CRITFC has met the "zone of interest" standing prerequisite. The area of interest alleged by CRITFC, inter alia, is that:

Construction and operation of the Skagit/Hanford Project will entail the risk of accidental release of fission [products], which could adversely affect the anadromous fish of the Columbia River and consequently the culture, religion and commerce of the Columbia River tribes. (May 5, 1982 Petition to Intervene, p. 3).

The protection of anadromous fish species in the Columbia River basin is clearly a particularized interest within the zone of interests protected by either the Atomic Energy Act or the National Environmental Policy Act (NEPA).

The only remaining question concerning CRITFC's standing to intervene is therefore whether CRITFC has met the "injury in fact" test. Staff agrees with the Petitioner that CRITFC has met this test in two ways. First, CRITFC has established a potential injury to itself as an organization. Second, CRITFC has also established its right to represent certain fishing interests of Indians and tribes of the Columbia River that could potentially be adversely affected by the licensing of the Skagit project. If CRITFC establishes standing by either of these methods, the requisite standing for intervention will be satisfied.

1. Direct Injury To CRITFC As An Organization

In its pleadings in this case, CRITFC has alleged that as an organization it has a definite and substantial stake in the outcome of this proceeding. According to CRITFC:

The inference that the tribe alone sustains injury due to loss of the treaty right is erroneous. Rather all tribal members and organizations may be affected by diminution of a treaty right including the four Fish and Wildlife Committees individually and collectively as the Columbia River Inter-Tribal Commission. (August 19, 1982 Motion at p. 6).

The Petitioner has further explained that CRITFC's specific functions include the duty to protect, promote and enhance the Columbia River fishery resources, and it has contended in this regard that any diminishment of the viability of these resources would necessarily affect the ability of CRITFC to carry out these authorized functions. It also

has specifically noted that much of CRITFC's work would be moot if the Hanford Reach salmon stock were destroyed by the Applicant's project.^{3/}

Supporting Petitioner's statements concerning CRITFC's authorized functions with respect to tribal fishing interests are the Constitution and Bylaws of this organization which were attached to the Petitioner's Appeal Brief. The Preamble of this document provides:

WE, THE INDIANS OF THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, RECOGNIZE THAT OUR FISHERIES ARE A BASIC AND IMPORTANT NATURAL RESOURCE AND OF VITAL CONCERN TO THE INDIANS OF THESE STATES AND THAT THE CONSERVATION OF THIS RESOURCE IS DEPENDENT UPON EFFECTIVE AND PROGRESSIVE MANAGEMENT. AND THAT IT IS FURTHER RECOGNIZED THAT FEDERAL COURT DECISIONS HAVE SPECIFICALLY ESTABLISHED THAT THE TRIBES HAVE TREATY RIGHTS TO AN EQUITABLE SHARE OF THE COLUMBIA BASIN FISHERY RESOURCE. WE FURTHER BELIEVE THAT BY UNITY OF ACTION WE CAN BEST ACCOMPLISH THESE THINGS, NOT ONLY FOR THE BENEFIT OF OUR OWN PEOPLE BUT FOR ALL OF THE PEOPLE OF THE PACIFIC NORTHWEST.

And Article III states that the governing body of CRITFC "shall consist of the Fish Committees designated by the tribal resolution from each member tribe." In addition, Article VIII, "Powers of the Commission", provides, inter alia, that CRITFC has the responsibility to:

- A. FORMULATE, IN CONSULTATION AND CONSENT WITH LOCAL TRIBAL COUNCILS, A BROAD GENERAL FISHERIES PROGRAM DESIGNATED TO PROMOTE AND COORDINATE THE CONSERVATION PRACTICES OF THE MEMBERS.
- B. REQUEST TECHNICAL ADVICE AND/OR ASSISTANCE FROM ANY SOURCE WHATEVER FOR THE PURPOSE OF ASSISTING INDIAN FISHERIES AND TO CONSULT WITH ANY AND ALL INDIVIDUALS, ORGANIZATIONS, INSTITUTIONS, AND GOVERNMENTS (TRIBAL, LOCAL, STATE, FEDERAL, AND INTERNATIONAL) ON MATTERS PERTAINING TO FISHERIES.

^{3/} CRITFC's August 19, 1982 Motion at pp. 7-8.

Additional clarification regarding the direct injury to be suffered by CRITFC as an organization by the Skagit licensing proceeding has been furnished by CRITFC in its July 16, 1982, reply to the Licensing Board Order of July 6, 1982, directing CRITFC to set forth its basis for standing to intervene. As asserted in that document:

The Columbia River Inter-Tribal Fish Commission (CRITFC) is an independent body composed of the Fish and Wildlife Committees of the Yakima, Nez Perce, Warm Springs and Umatilla tribes. While CRITFC coordinates its work very closely with the Columbia River treaty tribes, it does not speak for or on behalf of the tribes. Rather CRITFC by the direction of its Commissioners assists the four Fish and Wildlife Committees in their coordinated programs and actions to protect, promote, and enhance the fish, wildlife, and water resources secured by treaties with the United States. Such coordinated programs and actions have included continuing negotiation of a U.S./Canadian Pacific Salmon Interception Treaty, the development of Initial 4(h) Recommendations for the Protection Mitigation and Enhancement of Anadromous Fish in the Columbia River Basin (P.L. 96-501), and establishment of Inter-Tribal fishery regulations. Much of this work would be fruitless if Columbia River Hanford Reach or Yakima River anadromous fishery stocks were destroyed by the Skagit/Hanford Nuclear Project (S/HNP). While individual tribal members do have standing to assert a treaty rights infringement, See Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969), aff'd and remanded, 529 F.2d 570 (9th Cir. 1976), the tribal Commissioners of CRITFC, members of either the Warm Springs, Yakima, Nez Perce, or Umatilla tribes, do not at this juncture claim infringement of treaty rights. Rather, CRITFC seeks to ensure through this formal administrative procedure that treaty rights will not be subsequently infringed by the construction or operations or other occurrences of the S/HNP. (Attachment of July 16, 1982 Reply.)

The Courts have recognized that alleged interests which may confer standing include injury to "aesthetic, conservational and recreational as well as economic values." Sierra Club v. Morton, 405 U.S. at 737; Data Processing

v. Camp, 405 U.S. at 154. The ability to carry out an organization's assigned duties would certainly appear to be as important an interest as those deemed sufficient to warrant standing in Sierra Club, and accordingly CRITFC has a litigable interest in this case.

Furthermore, although perhaps not stated clearly by CRITFC in its earlier pleadings in this proceeding, it is clear that CRITFC's primary duty as an organization is to conserve fish resources of the Columbia River. CRITFC's pleadings to the Licensing Board have claimed that the exercise of this duty would be harmed. The interests in question are not the "academic interests" or "generalized grievances" of a national organization set up to promote general conservation values which are shared in substantial equal measures by all or a large class of citizens, as in Sierra Club v. Morton. Rather, they are specific personal interests in protecting the fishing resources of the Columbia River upon which its organizational existence depends. As explained by CRITFC in its August 19, 1982 Reply,

It is the ability to protect, promote and enhance the Columbia River fishery resource as measured by the integrity of treaty secured rights which may be affected by the instant proceeding. Any impact to treaty reserved rights, viz. authorization to diminish the viability of the fishery resource, necessarily affects the ability of each Fish and Wildlife Committee individually and as CRITFC to carry out their authorized functions. (Reply at p. 7).

For these reasons, CRITFC as an organization has an interest sufficient to give it standing in this proceeding. Hunt v. Washington Apple Advertising Commission, 432 U.S. at 342-343; Warth v. Seldin, 422 U.S. at 511; Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 263 (1979).

2. CRITFC's Standing In A Representational Capacity

As discussed above, in addition to demonstrating a direct injury to its organizational interest, an organization may obtain standing by alleging that some or all of its members are suffering immediate or threatened injury. In ruling against CRITFC's petition to intervene, the Licensing Board concluded that CRITFC does not actually have a representational status in this proceeding. It based this conclusion on one of CRITFC's earlier pleadings that specifically stated that ". . . . the Columbia River Inter-Tribal Fish Commission does not represent the Columbia River Treaty Tribes."^{4/}

The above statement has been clarified by subsequent CRITFC submissions regarding its organizational status vis a-vis the four Columbia River Treaty Tribes. For instance, in its Reply of August 19, 1982, CRITFC asserts that each Fish and Wildlife Committee of the respective tribes is empowered to engage in actions or programs through CRITFC to protect, promote, and enhance the treaty protected Columbia River fishery resources.^{5/} Thus, it appears that CRITFC is duly authorized to represent the treaty tribes in any proceeding, activity or program which may have some impact on the fishery or wildlife resources secured by treaties with the United States.

^{4/} July 16, 1982 Response at CRITFC to July 2, 1982 Licensing Board Memorandum and Order, p. 1.

^{5/} See also CRITFC's Memorandum in Support of Appeal, September 23, 1982, p. 5.

To support CRITFC's allegation with respect to its representational capacity, it has attached a copy of its constitution and bylaws to its Appeal Brief.^{6/} As we have stated, Article VIII, Item A of these bylaws gives CRITFC the power to:

Formulate, in consultation and consent with local tribal councils, a broad general fisheries program designated to promote and coordinate the conservation practices of the members.

As previously discussed, fishing interests have been designated by CRITFC as its area of concern in this proceeding. Since its bylaws vest it with responsibility over fisheries programs, it follows that CRITFC would have the requisite authority to represent the treaty tribes in proceedings concerning fishing or wildlife interests.

The Staff believes it is clear that an organization that is empowered to promote, protect, or enhance the discrete interests of its individual members has standing to protect those same interests in an NRC proceeding. See Hunt v. Washington Apple Advertising Commission, 432 U.S. at 342-342, where the Supreme Court held that even though the Apple Advertising Commission was a state agency organized to promote and protect the State of Washington's apple industry, it was not precluded from asserting the apple growers' claims before a federal court. The rationale of Hunt is directly applicable to CRITFC's representation of the fish and wildlife interests of the treaty tribes in this proceeding since both CRITFC and the Apple Advertising Commission have been charged

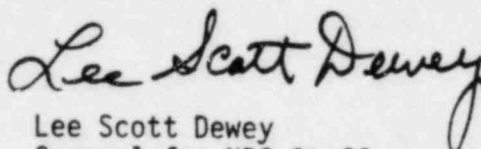
^{6/} See Attachment to CRITFC's September 23, 1982 Memorandum in Support of Appeal.

with certain duties and both were attempting to carry out these duties by bringing action before a legal tribunal.

V. CONCLUSION

For all of the above reasons, the Licensing Board's Order dismissing CRITFC's Petition for Intervention due to a lack of standing should be overruled.

Respectfully submitted,



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Dated at Bethesda, Maryland
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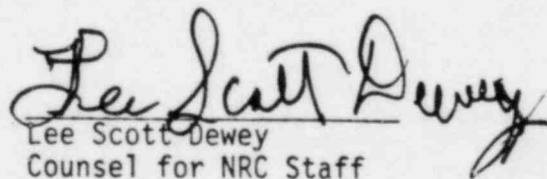
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