ADJUDICATORY ISSUE

(NEGATIVE CONSENT)

December 13, 1983 SECY-83-509

To: The Commissioners

From: James A. Fitzgerald
Assistant General Counsel

Subject: REVIEW OF ALAB-747 (WASHINGTON PUBLIC POWER SUPPLY SYSTEM)

Facility: WPPSS Nuclear Project No. 3

Purpose: To inform the Commission of an Appeal Board decision [which the General Counsel believes EX.5

Review Time Expires: December 28, 1983, as extended.

Discussion: In ALAB-747, a unanimous Appeal Board (with one member concurring) responded to Applicant's appeal by vacating the Licensing Board's grant of a petition by the Coalition for Safe Power ("Coalition") to intervene late in the WPPSS No. 3 operating license

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proceeding,[2] and remanded to the Licensing Board with instructions to require a further showing from intervenor on one of the five factors in 10 CFR 2.714.[3]

The Appeal Board agreed with the Licensing Board's treatment of four of the five factors in section 2.714. Nonetheless, it observed, there would be no hearing unless the Coalition's request

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[2]Unpublished Memorandum and Order dated April 21, 1983. As an aside, it should be noted that the Appeal Board also took the unusual step of critizing applicant's counsel for his over-zealous representations ("patent extravagancies") to the Board, and for his failure to cite caselaw adverse to his position, as required by legal ethics where an attorney is aware of such adverse authority. See id. at 8, n.17, and at 11, n.21.

[3] Section 2.714(a)(1) provides, in relevant part:

> Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those [as to "standing"] set out in paragraph (d) of this section:
>
> (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.

was granted since it was the only party to have asked for one. Consequently, it examined the Coalition's arguments on its ability to contribute to the development of a sound record perhaps more keenly than it might have had there been other parties already admitted. [We believe that

EX. 5

The Decisions

The notice of opportunity to request a hearing and to intervene was published in September 1982. October 15, 1982 was specified as the deadline for these requests. The Coalition did not file its petition until February 22, 1983--more than four months late. It argued that there was good cause for its tardiness because: 1) its simultaneous participation in another NRC proceeding caused it to overlook the notice; 2) it had expected the notice to be published in a Portland, Oregon newspaper, but it was not; 3) though having cause to expect that the NRC would inform the Coalition directly, the NRC did not do so; and 4) having learned of the notice two months after the deadline, the Coalition did not file for another two months because news reports indicated that the project would be terminated due to financial problems. ALAB-747 at 5. Both boards found these reasons insufficient to justify the delay in filing, especially the two month delay after the Coalition had learned of the notice. Likewise, both boards concluded that this increased the Coalition's burden on the other lateness factors in 10 CFR 2.714.

Both boards saw the second and fourth lateness factors favoring the Coalition's petition. The fourth factor--the extent to which petitioner's interest will be represented by other parties--favored the Coalition because there were no other parties to represent its interests except the staff, and here the staff[4] essentially disclaimed such a role.

Addressing the second factor--the availability of other means whereby the petitioner's interest will be protected--the boards were not persuaded that the availability under 10 CFR 2.206 of a request to the staff for enforcement action was an adequate substitute for the right to litigate issues in an adjudication, with right of appeal and opportunity then to petition for Commission review. ALAB-747 at 14-15. Any other view, said the Appeal Board, would require that this second lateness factor always weighs against late intervention, because the 2.206 remedy was always available to late intervenors. ALAB-747 at 17, n. 26.

On the fifth lateness factor--"the extent to which the petitioner's participation will broaden the issues or delay the proceeding"--both boards agreed that this factor weighed against the Coalition, but, in the Appeal Board's view, "not significantly so." Id. at 20. The factor on the one hand weighed against the Coalition because there would be no hearing but for its

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[4] See ALAB-747 at 13.

intervention; the adverse inference was mitigated, however, by the Applicant's construction "wind-down" of perhaps three years, and the staff's low priority for WPPSS No. 3, as reflected by the projected issuance of the FES and SER in April and August of 1984, respectively. Thus even if the Coalition's petition had been timely, the hearing probably would not have commenced prior to the latter part of 1984. Id. at 22. It follows that the Coalition's lateness is unlikely to cause any delay in completion of the proceeding that would not have been present had the filing been timely.

Only on the third lateness factor--"the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record"--did the Appeal Board disagree with the Licensing Board. In addressing this factor, the Coalition had argued to the lower board that: it had participated in prior NRC adjudications, presenting and cross-examining witnesses; that it had obtained an agreement "to participate in [the] proceeding" by a former WPPSS quality assurance employee; and that it was "in the process of working...to identify other expert witnesses...." Id. at 17. On this basis, "the Licensing Board concluded that the Coalition had made a 'sufficient' (albeit not the 'strongest' possible) showing..." on the third lateness factor, and thus that the factor weighed in the Coalition's favor. Id. at 17.

Citing four prior NRC decisions, the Appeal Board held that the Coalition's showing on this factor was insufficient

because it had failed to "'set out with as much particularity as possible the precise issues it plan[ned] to cover, identify its prospective witnesses, and summar[ize] their proposed testimony.'" Id. at 18, quoting Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982) [further cites omitted]. The Appeal Board advised that this type of showing could assist the boards in determining whether petitioner might make a substantial contribution to a complete record. Instead, petitioner's bald claims did not even enable the boards to determine whether it had made a valuable contribution in the earlier proceeding and whether the issues litigated earlier bore any resemblance to those which might now be litigated. Id. at 19. Further, according to the Appeal Board, petitioner had not even claimed that it sought to litigate issues which were related to those litigated previously. Id.[5]

The Appeal Board noted that in most cases, agreement with the lower board on four of the five lateness factors would lead to affirmance under the abuse of discretion standard. What led to reversal here, it said, was the vital importance of the third lateness factor where, but for the late intervention,

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[5]Appeal Board Member Edles' concurring opinion noted his agreement with this analysis, but he further noted that he did not take this to foreclose the possibility that a petitioner might be able to gain entry to a proceeding without direct case, and instead on the basis of a cross-examination plan.

there would be no hearing. Id. at 25. Indeed, it asked, why initiate a hearing on a late request unless there is some cause to believe that petitioner is proposing not only to litigate important issues, but also that it is capable of illuminating those issues?[6]

OGC Analysis

In our view,

EX. 5

James A. Fitzgerald
Assistant General Counsel

Attachment:
ALAB-747

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[6] Id., citing Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

SECY NOTE: In the absence of instructions to the contrary, SECY will notify OGC on Wednesday, December 28, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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Attachment

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

November 15, 1983
(ALAB-747)

In the Matter of	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al.	)	Docket No. 50-508-OL
(WPPSS Nuclear Project No. 3)	)	

Nicholas S. Reynolds and Sanford L. Hartman, Washington, D.C., for the applicant, Washington Public Power Supply System.

Nina Bell, Portland, Oregon, for the petitioner, Coalition for Safe Power.

Donald F. Hassell for the Nuclear Regulatory Commission staff.

DECISION

We are once again confronted with a challenge to Licensing Board action on a tardy petition for leave to intervene in a licensing proceeding. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC ___, ___ (September 29, 1983) (Appendix). Here, the late petitioner is the Coalition for Safe Power (Coalition). On February 22, 1983, it sought intervention in this operating license proceeding involving the WPPSS

Nuclear Project No. 3.[1] This was some four months after the October 15, 1982 deadline prescribed in the notice of opportunity for hearing published in the Federal Register.[2]

In an unpublished April 21, 1983 memorandum and order, the Licensing Board determined both (1) that the Coalition possessed the requisite standing to intervene; and (2) that the five factors governing the acceptance of a belated petition did not, on balance, call for the denial of intervention in this instance.[3] Subsequently, in an unpublished September 27, 1983 memorandum and order, the

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[1] Although the Coalition's petition was dated February 18, the accompanying certificate of service reflects that it was actually filed four days thereafter.

[2] See 47 Fed. Reg. 40,736, 40,737 (1982). No intervention petitions were filed by that deadline and none but the Coalition's has been untimely submitted.

[3] Those five factors, set forth in 10 CFR 2.714(a)(1), are as follows:

(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.

Board passed upon the Coalition's proposed contentions and admitted several of them to the proceeding.

The applicant appeals from this result under 10 CFR 2.714a.[4] The appeal is confined to the claim that the petition should have been denied because of its untimeliness.[5] In response, both the Coalition and the NRC staff maintain that the Licensing Board did not abuse its discretion in granting the petition despite its lateness. Those parties thus urge affirmance.

For the reasons set forth below, we vacate the grant of the petition and remand the matter to the Licensing Board for the purpose of requiring the Coalition to make a further showing with regard to the extent to which its participation in the proceeding "may reasonably be expected to assist in developing a sound record."[6] Should that showing be found

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[4] The applicant is the Washington Public Power Supply System. It filed the operating license application on behalf of itself and the other co-owners of the nuclear facility.

[5] As above noted, the Licensing Board addressed this matter in its April 21 memorandum and order. Nonetheless, the applicant was obliged to await (as it did) the Board's September 27 ruling on the Coalition's proposed contentions before taking its appeal. See Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 863-66 (1980).

[6] This is the third of the Section 2.714(a) lateness factors. See fn.3, supra.

satisfactory by the Licensing Board, the grant of the petition is then to be reinstated.

I.

The Commission long ago referred to the "broad discretion" conferred by Section 2.714(a) upon licensing boards in the fulfillment of their responsibility to decide whether a particular intervention petition should be rejected because of untimeliness. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Accordingly, as we recently had occasion to observe, "neither this Board nor the Commission has been readily disposed to substitute its judgment for that of the Licensing Board insofar as the outcome of the balancing of the Section 2.714(a) [lateness] factors is concerned." Shoreham, ALAB-743, supra, 18 NRC at ___ (slip opinion at 14) (footnote omitted).

It follows that the applicant has a substantial burden on this appeal. It is not enough for it to establish simply that the Licensing Board might justifiably have concluded that the totality of the circumstances bearing upon the five lateness factors tipped the scales in favor of denial of the petition. In order to decree that outcome, we must be persuaded that a reasonable mind could reach no other result.

It is within this framework that we now turn to the Licensing Board's analysis of the lateness factors and the applicant's attack upon that analysis.

II.

A. In its petition, the Coalition asserted that "[a] combination of reasons" explained the four-month tardiness: (1) the publication in the Federal Register of the notice of opportunity for hearing[7] had been overlooked because, at the time, the Coalition was otherwise engaged in a discrete NRC licensing proceeding; (2) the Coalition had expected that the notice would also be published in a Portland, Oregon, newspaper (but it was not); (3) the Coalition had cause to assume that one of its members (a Mr. Duree) would be informed by the NRC of both the docketing of the operating license application and the opportunity for a hearing on it (but he was not); (4) after belatedly learning of the notice of opportunity for hearing, the Coalition waited another two months to file the intervention petition because news reports had indicated that the facility would be terminated "due to financial problems."[8]

The Licensing Board found this explanation unsatisfactory and hence determined that the first lateness

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[7] See fn.2, supra.

[8] Intervention petition at 5-6.

factor -- the existence of good cause for failure to file on time -- weighed against granting the petition.[9] The applicant, of course, does not dispute that determination. It maintains, however, that the Licensing Board did not attach sufficient significance to the fact that the Coalition "intentionally" had delayed filing the petition for another two months after the notice of opportunity for hearing came to its attention.[10] Additionally, it complains[11] of the Licensing Board's observation that, although the absence of "good cause for the late filing * * * placed a heavier burden on [the] Coalition with respect to the other factors," the "fact that the lateness in making the filing is measured in months rather than years reduced the level of the burden [the Coalition] had to meet."[12]

We disagree with the applicant on both counts. True enough, the Coalition should have filed the intervention

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[9] April 21 memorandum and order at 10. In this connection, the Licensing Board pointed out, inter alia, that the notice of opportunity for hearing had been published not only in the Federal Register but, as well, in three newspapers in the State of Washington (where the facility is located). The Board further noted that one of those newspapers is published in the very community where Mr. Duree resides.

[10] Applicant's Br (Oct. 12, 1983) at 7-9.

[11] Id. at 9-10.

[12] April 21 memorandum and order at 16.

petition promptly upon its discovery that the deadline established in the Federal Register notice had already arrived. But the applicant's repeated characterization of the failure to have done so as "willful"[13] cannot serve to obscure the fact that an honest error of judgment is all that reasonably can be laid at the Coalition's doorstep. As the applicant can scarcely dispute, even today the future progress of this project is far from certain.[14] Although the Coalition inappropriately relied upon erroneous news reports of impending project termination (at the very least it should have sought verification of the accuracy of those reports), there is nothing before us to suggest that the reliance was in the teeth of contrary information and, thus, in bad faith. In the circumstances, we see no reason why the Coalition's mistake should have enhanced its burden on the other lateness factors.[15]

Similarly, we find no fault with the significance attached by the Licensing Board to the extent of the

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[13] Applicant's Br. at 9, 12, 13, 14.

[14] We discuss this matter further in a later portion of this opinion, pp. 20-21, infra.

[15] Nor do we believe that the Coalition's prior involvement in NRC licensing proceedings (including those pertinent to this applicant's facilities) increases the gravity of the judgmental error. We therefore reject the applicant's insistence (Br. at 10-12) to the contrary.

Coalition's tardiness. Manifestly, as the Licensing Board itself recognized, even a four-month unjustified delay in seeking intervention is not to be ignored. See Shoreham, ALAB-743, supra, 18 NRC at ___ (slip opinion at 19-21). But it does not follow that, for the purpose of determining how compelling a showing must be made on the other Section 2.714(a) factors, a delay of that length must be equated with one extending over a period of years. In the final analysis, as Shoreham also explains, whether measured in months or years the true importance of the tardiness will generally hinge upon the posture of the proceeding at the time the petition surfaces. This is assuredly the case here.[16]

The short of the matter is that we concur fully in the Licensing Board's treatment of the first (good cause) lateness factor. In common with that Board, we conclude that the petition was inexcusably late and that that consideration increased (but not exceptionally so) the showing that the Coalition was required to make on the other factors.[17]

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[16] See pp. 20-23, infra.

[17] One additional observation is in order. A certain amount of hyperbole is, of course, an inevitable ingredient of advocacy. But when carried to an extreme, it does not assist the advocate's case; if anything, it disserves it.
(Footnote Continued)

B. We consider the second and fourth lateness factors together. The Licensing Board found both of these factors to weigh in favor of a grant of the petition. The applicant maintains, however, that each points in the other direction.

Because the Coalition is the only petitioner for intervention in this proceeding, should its petition be denied there will be no adjudicatory consideration of the operating license application.[18] Thus, there would not appear to be any "existing" party to whom the Coalition might look for representation of its interest (the fourth factor). Nor is it immediately obvious what other means for the protection of its interest might be available to the Coalition (the second factor).

(Footnote Continued)
In this instance, we found most unhelpful a number of patent extravagancies in the applicant's argument on the first factor. For example, there is absolutely no basis in the record for the claim that the Coalition's "conduct reflects an attitude of total disregard for NRC practice and procedure." Applicant's Br. at 13. Nor was it fair commentary to suggest that, "simply because" the Coalition was only four months late, the Licensing Board "minimized" its burden on the other four factors and "sent a clear message to anyone contemplating intervention before the NRC that the failure to file a timely intervention petition carries with it virtually no penalty." Id. at 13, 14. As is clear from its April 21 memorandum and order read as a whole, the Board did neither.

[18] It is only in the construction permit proceeding that an adjudicatory hearing is held in the absence of any intervenors. See Section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239.

We are told by the applicant, however, that it was the Coalition's burden to demonstrate that the NRC staff cannot (or will not) represent its interest and that that burden was not met.[19] In this connection, our attention is directed to the Licensing Board's decision in Consolidated Edison Co. (Indian Point, Unit No. 2), LBP-82-1, 15 NRC 37, 41 (1982). Further, according to the applicant, the Licensing Board erred in concluding that the Coalition could not adequately protect its interest through a request under 10 CFR 2.206 that the Director of Nuclear Reactor Regulation institute a show cause proceeding.[20] In this regard, the applicant points to Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1228-29 (1982) and Detroit Edison Co. (Enrico Fermi Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1766-69 (1982).

1. In placing heavy reliance on Indian Point, LBP-82-1, supra, for the proposition that, absent a showing to the contrary, it is to be presumed that the staff will

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[19] Applicant's Br. at 34-36. Any such representation necessarily would have to be undertaken in the course of the staff's review of the operating license application, a review mandated irrespective of whether there is an adjudicatory hearing on the application. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Comm'n., 679 F.2d 261 (D.C. Cir. 1982).

[20] Applicant's Br. at 15-18.

adequately represent the Coalition's interest, the applicant failed to refer to four other Licensing Board decisions cutting against its position. See Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-22, 10 NRC 213, 215 (1979); Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 194-95 (1979); Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 84 (1978); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 213 (1978). In each of those cases, the Licensing Board granted either a tardy intervention petition or late-filed contentions in circumstances where a different outcome would have precluded any hearing on the issues sought to be raised. In the course of reaching that result, each Board explicitly determined that, because it was not to be assumed that the petitioner's interest would be adequately represented by the staff, the fourth factor favored the grant of intervention.[21]

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[21] If aware of these decisions, applicant's counsel had a clear professional obligation to inform us of their existence. See Rule 3.3(a)(3) of the ABA Model Rules of Professional Conduct (1983), replacing ABA Model Code of Professional Responsibility, EC 7-23, DR 7-106(B)(1) (1982). We will therefore assume that the decisions somehow escaped their attention. But, inasmuch as counsel seemingly encountered little difficulty in locating the decision in

(Footnote Continued)

In three of those cases, the staff explicitly declined to endorse the notion that its ability to represent adequately a private party's interest can be presumed.[22] But that does not affect their pertinence here. Before the Board below, the staff acknowledged that "there may not be any other * * * party * * * which might afford protection to

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(Footnote Continued)
Indian Point (in which proceeding their firm was not involved), it is difficult to understand why a reasonable research effort would not likewise have uncovered the other four decisions on the particular point.

[22] In Turkey Point, the staff "noted that [the petitioner] failed to explain why his interest, as well as that of the general public, will not be effectively served by the NRC, which has the statutory responsibility for ensuring the public health and safety and protection of the environment. Nevertheless, [the staff] recognized that there is room for the advancement of individualized interests in these proceedings, and concluded that the fourth factor weighs in favor of [p]etitioner." 10 NRC at 194.

In Kewaunee, the Licensing Board took note of the applicant's argument that the "petitioners have produced no factual basis to support the conclusion that their interests are not adequately represented by" the staff. The Board went on to observe that the staff had stated that the Board "should not assume that it will represent the petitoners' concerns." 8 NRC at 84.

In Summer, the applicant argued that the representation factor weighed against grant of the late petition because the staff "always has the obligation of protecting the public health and safety whether a hearing is held or not." In response, the Board pointed out that the staff had conceded that the factor weighed in the petitioner's favor "presumably with full knowledge that [p]etitioner's individualized interest may better be advanced by him." 7 NRC at 213.

[the Coalition's] interest."[23] Before us, the staff was even more direct on the matter: "It is not at all clear that the [s]taff can represent the private interests of the Coalition."[24]

If the staff is not prepared to say that it will represent the particular interest of the Coalition (as opposed to the general public interest), we see no reason why the Licensing Board should have assumed such representation. It need be added only that, had the staff remained silent on the subject, our assessment on the fourth factor would have been no different. The annals of NRC adjudications reflect that the position taken by staff on a specific safety or environmental issue (in the fulfillment of its role as the protector of the general public interest) often is at odds with the views espoused by an intervenor seeking to vindicate either its personal interest or its independent perception respecting where the public interest lies. Indeed, it was doubtless in recognition of the potential for such divergence that the Congress elected to provide hearing rights to private citizens and organizations

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[23] Staff Response to Untimely Petition to Intervene filed by the Coalition for Safe Power (Mar. 14, 1983), at 13.

[24] Staff Br. (Oct. 27, 1983) at 19 fn.68.

in Section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239.[25]

2. We are similarly unconvinced that the Section 2.206 remedy is an adeq e substitute for participation in an adjudicatory proceeding concerned with the grant or denial ab initio of an application for an operating license. Among other things, all that Section 2.206 allows is a request of the Director of Nuclear Reactor Regulation that he institute a show cause proceeding looking to the possible

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[25] The fourth factor could be read, of course, as referring to the representation of the petitioner's interest by existing parties to an adjudicatory proceeding. So read, the fourth factor would always be in the petitioner's favor in circumstances where, as here, the denial of its petition would leave no proceeding and thus no parties to it.

As the applicant correctly notes, the same is likely true if, although qualifying as an "existing party" despite the lack of an adjudicatory proceeding, the staff nonetheless is not regarded as a representative of the interest of the petitioner. All this means, however, is that, in cases where there are no other intervenors, the fourth factor may always favor a grant of a late intervention petition. That consideration does not disturb us inasmuch as it is compelled by the terms of the regulation. Moreover, if the applicant's thesis were accepted, the probable result would be that in all cases the fourth factor would weigh in favor of denial of the petition. This is because it would be virtually impossible for a late petitioner to ascertain, in advance of filing its petition, precisely what conclusions the staff review will reach on any particular safety or environmental issue. Without such knowledge, the petitioner could scarcely fulfill the burden (that the applicant would impose upon it) of establishing affirmatively that the staff review will not adequately represent it on those issues affecting its interest.

modification, suspension or revocation of a license or the taking of "such other action as may be proper." If the request is denied, the Commission may on its own motion review the Director's decision to determine if he abused his discretion. The requester may not, however, file a petition or other request for review. 10 CFR 2.206(c).

On the face of it, this procedure can hardly be equated with the ability to litigate issues in an adjudicatory setting, accompanied by a right of appeal to this Board and an entitlement to petition for Commission review if dissatisfied with the appellate result. And neither the Commission's decision in WPPSS 1 & 2, CLI-82-29, supra, nor our decision in Fermi, ALAB-707, supra, suggests otherwise.

In WPPSS 1 and 2, the Commission was not faced with a late intervention petition and thus was not called upon to consider the Section 2.714(a) factors. Instead, the issue at hand was the proper scope of a proceeding on an application for the extension of a construction permit. The Commission's discussion of the Section 2.206 procedure was in the context of determining the remedy available to one who desires to put its health, safety and environmental concerns before the agency in advance of the commencement of the operating license proceeding.

For its part, Fermi did involve a late intervention petition (filed by a Michigan county). But we did not there

hold that the availability of the Section 2.206 remedy meant that the second factor disfavored intervention. To the contrary, we explicitly found in the County's favor "the lack of availability of other means to protect its interest (factor two) -- the fact that absen admission to this licensing proceeding it is not assured f an adjudicatory hearing on the claims it seeks to raise." 16 NRC at 1767 (footnote omitted). Nonetheless, because on balance the five factors "point[ed] decisively against the grant of the County's petition," we concluded that the Licensing Board denial of it "was plainly not an abuse of discretion." Ibid. This left the question as to what was to be done with the "potentially significant issues" that had been raised by the County. Our answer was a referral of the petition to the Director of Nuclear Reactor Regulation with the request that he treat it as a Section 2.206 petition. Id. at 1767-69. In short, the availability of the Section 2.206 remedy was not invoked by us in connection with our appraisal of the second lateness factor but, rather, only following a determination that, all five factors considered, the Licensing Board had not erred in declining to allow the

County to intervene belatedly in the adjudicatory proceeding.[26]

C. The Licensing Board found that the Coalition had made a "sufficient" (albeit not the "strongest" possible) showing that "its participation may reasonably be expected to assist in developing a sound record" and that therefore the third lateness factor weighs in its favor.[27] We agree with the applicant that this finding is of very dubious validity. The Board was told simply that:

> The Coalition has previously participated in several NRC proceedings: presenting witnesses in the Trojan Spent Fuel Pool Licensing Amendment case and conducting extensive cross examination in the Trojan Control Building Licensing Amendment which led to additional technical specifications to be imposed by the Staff. The Coalition has, at present, a former WPPSS quality assurance worker who has agreed to participate in this proceeding. The Coalition is also in the process of working with other intervenors in the region to identify other expert witnesses in the areas of radiation, health physics, geology, seismology, hydrology, engineering, fisheries and nuclear safety.[28]

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[26] Needless to say, if the availability of the Section 2.206 remedy had the significance attributed to it by the applicant here, the second factor would lose all possible meaning. Under the applicant's theory, that remedy is at the disposal of every late petitioner.

[27] April 21 memorandum and order at 12-14.

[28] Intervention petition at 7-8.

Under our prior decisions, this was manifestly inadequate.[29]

Almost a year ago, we observed that, because of the importance of the third factor, "[w]hen a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing Summer, ALAB-642, supra, 13 NRC at 886; Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978). In our very recent opinion in Shoreham, ALAB-743, supra, we took note of that observation in the course of ruling that the tardy petitioner there (an organization) had failed to sustain its burden on the factor. 18 NRC at ___ (slip opinion at 22).

Shoreham also addressed the significance of the fact that some of the petitioner's members had participated many

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[29] In its appellate brief (at 7-8), the Coalition endeavors to expand upon what was put before the Licensing Board. Because, however, appeals must be considered and decided on the basis of the Licensing Board record, we normally do not consider assertions of fact not presented below. See Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981). For this reason, we have not passed upon the Coalition's new representations but leave them for Licensing Board evaluation (should they be reasserted before that Board on the remand).

years earlier in the construction permit proceeding for the same facility. We concluded that little weight should attach to that consideration because (1) there was nothing before us that would permit the conclusion that the participation in the construction permit proceeding made a substantial contribution to the development of the record; and (2) the issues that the petitioner proposed to litigate in the operating license proceeding bore no resemblance to any issue that might have confronted the Licensing Board in the construction permit proceeding. Id. at ___ (slip opinion at 24-25).

We need not undertake to examine the now closed records in the two Trojan licensing proceedings cited by the Coalition. Even were such an examination to reflect that the Coalition made a significant contribution to the development of those records, the question would remain whether a similar contribution is likely in this case. In common with the Shoreham petitioner, the Coalition has not claimed, let alone demonstrated, that the issues it proposes to litigate here bear any relationship to those presented in the Trojan cases.[30] Absent such a demonstration, it was

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[30] That no such relationship can be assumed is clear from the nature of the questions posed and decided in the two Trojan proceedings. See Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, and ALAB-534, 9

(Footnote Continued)

incumbent upon the Coalition to explain why an inference favorable to it on the third factor nevertheless could be drawn from the fact of past involvement in our proceedings. This, too, was not attempted below.

D. Moving on to the fifth lateness factor, we find ourselves in agreement with the Licensing Board's conclusion that it weighs against the Coalition but not significantly so.[31] Obviously, a grant of intervention will broaden the issues because, to repeat, there would be no hearing at all if the petition were denied. It is not equally apparent, however, that, had the petition been filed by the October 15, 1982 deadline, the Coalition's issues would or could have been heard and decided more expeditiously than is now possible. On the contrary, the facts before us strongly suggest that the lateness of the petition has not of itself delayed the progress of the proceeding.

On this score, applicant's counsel advised the Licensing Board by July 12, 1983 letter of "an immediate construction delay of WNP-3 until an assured source of funding for continued construction can be obtained." Attached to that communication was an undated confirmatory

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(Footnote Continued)
NRC 287 (1979) (control building); id., ALAB-531, 9 NRC 263 (1979) (spent fuel pool capacity expansion).

[31] April 21 memorandum and order at 16.

letter sent by an official of the applicant to the Director of Nuclear Reactor Regulation. The Director was advised that the applicant would "attempt to preserve [construction] capability for a reasonably efficient restart during the next 3 to 9 months by retaining the key class 1 contractors" and that it would "continue to seek to remove the impediments preventing further financing of WNP-3 in order to resume project construction activities."

Approximately one month later, at the special prehearing conference convened to consider the Coalition's proposed contentions, applicant's counsel provided the Licensing Board with a further oral report on the status of construction. According to counsel:

> On July 8th a one-year wind-down construction was commenced. The project is in the process, in the early process of coming down from construction. The projected outside limits of the construction deferral is three years. The Supply System is hopeful and optimistic that a financial plan can be organized in the near future such that the delay period will be much shorter than three years. The plant is 75 percent complete, they were constructing at a rate of two percent a month when they stopped construction. The Supply System's intention is to restart construction at the earliest possible time, and to complete the project at the earliest possible time.[32]

Given these developments, it should come as no surprise that the staff seemingly is attaching a low degree of

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[32] Tr. 56-57.

priority to the safety and environmental review of the operating license application for this facility. In that connection we take official notice of the content of the September 1983 Regulatory Licensing Status Summary Report (NUREG-0580, Vol. 12, No. 9). It appears at page 2-31 of that document that, as of September 30, 1983, the contemplated dates of issuance of the staff's final environmental statement and safety evaluation report were April 6 and August 9, 1984, respectively.

It follows that, even if the Coalition had filed its petition on time, it is doubtful at best that the adjudicatory hearing would have commenced any earlier than the latter part of 1984. In any event, it is a virtual certainty that the final curtain would not -- indeed could not -- have fallen on the proceeding in advance of the public availability of the safety evaluation report.

All in all, the situation at bar does not differ materially from that in Greenwood, ALAB-476, supra. That decision involved an intervention petition that had been filed in a construction permit proceeding more than two and one-half years after the prescribed deadline. Notwithstanding the extreme -- and unjustified -- tardiness, we held that the delay factor did not loom large. This was because the applicant had suspended "the engineering and licensing effort" in connection with the project in light of a then inability to finance construction. 7 NRC at 762.

To be sure, in view of that action, the Greenwood applicant had acquiesced in a suspension of the licensing proceeding. But that consideration does not provide a crucial distinction. It matters not whether the consequence of an applicant's cessation of work on a nuclear project is an agreed upon, and indefinite, formal halt to the proceeding (as in Greenwood) or, instead, simply a more leisurely staff pre-hearing review process (as here). In either circumstance, the pivotal question is whether an additional consequence of the cessation of work on the project is that the late petition is not apt to be a contributor to delay in the progress and completion of a hearing on the license application. In this case, as in Greenwood, that question requires an affirmative answer.

Finally, the applicant stresses that, if the Coalition were denied intervention, the adjudicatory proceeding would now be at an end. (Br. at 37). We regard that happenstance to be irrelevant. For purposes of the fifth factor, the question is whether, by filing late, the Coalition has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Cf. Long Island Lighting Co. (Jamesport

Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650 fn.25 (1975).[33]

III.

In sum, we concur in the Licensing Board's appraisal of four of the five lateness factors. In most instances, such a broad area of agreement would lead to an affirmance of the result below -- particularly given the prevailing "abuse of discretion" appellate review standard. Here, however, we have concluded that a different course is warranted.

As seen, our disagreement with the Licensing Board pertains to the sufficiency of the Coalition's showing on the third factor -- its ability to contribute to the development of a sound record. Although that factor is important in the determination of all late petitions, we think it assumes yet greater importance in cases, such as that at bar, in which the grant or denial of the petition will also decide whether there is to be any adjudicatory

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[33] In this connection, there is no merit to the applicant's reliance upon Grand Gulf, ALAB-704, supra. There, the intervention petition had been filed almost four years late and more than a month after the issuance of a low power operating license for the Grand Gulf facility. It was in this context that we stated that "it is manifest to us that the grant of an intervention petition at this very late hour, after the Director of Nuclear Reactor Regulation has issued a low power operating license in an uncontested proceeding, will perforce broaden the now non-existent adjudicatory issues and delay conclusion of the proceeding." 16 NRC at 1730 (emphasis supplied). As just seen, the situation in the case at bar is markedly different.

hearing. See Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), 5 NRC 1418, 1422 (1977). Stated otherwise, there appears to us to be no reason to allow an inexcusably belated intervention petition to trigger a hearing unless there is cause to believe that the petitioner not only proposes to raise at least one substantial safety or environmental issue but, as well, is equipped to make a worthwhile contribution on it.

We accordingly vacate the relevant portion of the Licensing Board's April 21 memorandum and order and remand the intervention petition to that Board with instructions to require the Coalition to make an additional showing on the third factor.[34] Should the Board find the showing to cure the deficiencies we have discerned in the cursory and unilluminating recitation on the third factor contained in the Coalition's petition, the grant of intervention is to be reinstated. Otherwise, intervention is to be denied. In either event, any further appeal to us must rest on a clear

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[34] A similar opportunity was not provided to the late petitioner in Shoreham. But the circumstances of that case were entirely different. We need not now catalog the differences because (although not recorded in ALAB-743) the Shoreham petitioner's counsel expressly stated at oral argument that her client was prepared to rest on the third factor showing that had been made to the Licensing Board and did not wish an opportunity to bolster that showing were we to hold (as we later did) that it was insufficient.

demonstration of an unmistakable abuse of discretion on the Licensing Board's part.

In exercising its discretion, the Licensing Board will, of course, apply the guidance provided in Grand Gulf, ALAB-704, supra; Shoreham, ALAB-743, supra; and this opinion. To the extent that the Coalition continues to rely on its participation in other NRC licensing proceedings, the Board should wish to satisfy itself that enough information has been provided to enable the drawing of an informed inference that the Coalition can and will make a valuable contribution in this proceeding. Insofar as the discharge of its Grand Gulf obligation is concerned (see p. 18 supra), the Coalition should both (1) identify specifically at least one witness it intends to present; and (2) provide sufficient detail respecting that witness' proposed testimony to permit the Board to reach a reasoned conclusion on the likely worth of that testimony on one or more of the contentions admitted to the proceeding in the Board's September 27 memorandum and order.

The Licensing Board's April 21, 1983 memorandum and order is vacated insofar as it addressed the third Section 2.714(a) factor and ultimately concluded that the Coalition's intervention petition should not be denied

because of its untimeliness. The cause is remanded for further proceedings consistent with this opinion.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

The concurring opinion of Mr. Edles follows, pp. 28-30, infra.

Opinion of Mr. Edles, concurring:

I join in the Board's opinion but offer two brief observations.

First, I agree that on remand the Coalition should provide sufficient detail respecting any affirmative case it plans to present. This will permit the Licensing Board to make a reasoned decision as to the likely value of the petitioner's participation. But I do not read our opinion as imposing an absolute requirement that every late intervenor must put forth an affirmative case.

Our cases clearly recognize that cross-examination can be an especially valuable tool in the development of a full record and that an intervenor may even establish its entire case through its use. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 n.30 (1983). And we have at least suggested that the ability to cross-examine effectively is a relevant consideration when considering a petition to intervene late. See Summer, ALAB-642, supra, 13 NRC at 892-93.[1] Despite the general language in our Grand Gulf opinion and the majority

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[1] In the Summer case, the prospective intervenor fell short of demonstrating that it could contribute to the record sufficiently, whether by way of witnesses or in combination with an ability to cross-examine.

opinion in Shoreham about the need to identify witnesses and summarize their proposed testimony, we were not called upon in either of these cases (or in this case) to consider an argument regarding the role of cross-examination as an element of the factor three evaluation.[2] Although I suspect it will be easier to satisfy a licensing board where a late intervenor plans to put forth an affirmative case (the Coalition, for example, has already indicated its intention to present at least one witness), we do not rule out the possibility that some future late intervenor may be able to prevail on factor three by reliance on cross-examination, either alone or in combination with an affirmative presentation.

Second, I agree that a petitioner's track record in other proceedings may be considered in evaluating whether it is likely to contribute effectively in a later case. I also agree that, in this case, the Coalition has thus far failed

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[2] In the Shoreham case, the petitioner did not seriously argue that its ability to cross-examine was critical to its presentation. Although I noted in my dissenting opinion that the ability to ask questions on cross-examination was a matter to be evaluated in determining whether the petitioner could make a useful contribution to the record (see 18 NRC at ___ (slip opinion at 37)), the majority plainly (and quite reasonably, given the petitioner's presentation) focused on the petitioner's ability to contribute to the record through the presentation of testimony and the introduction of affirmative evidence (id. at ___ (slip opinion at 22-27)).

to make a satisfactory connection between its past participation and the likeliHood that it will participate constructively in this proceeding. But our opinion today should not be read as foreclosing reliance on a track record where the issues on which a petitioner participated successfully in the past have no resemblance to the issues to be confronted in the new case.

Obviously a demonstration of ability to participate constructively will be easier where the issues are identical or, at least, similar. Such demonstration of similarity of the issues may even be required in some factual settings. There may be cases, however, in which a prospective participant possesses generalized knowledge on scientific and environmental issues and asks us to consider its participation on other issues in other cases as an illustration of its ability to marshall its resources, recruit any expertise it may need, and participate effectively on matters of interest to it.

A balancing of the five factors is, in the final analysis, a highly judgmental appraisal in which the adequacy of a presentation on any of the factors will depend on the specific facts of each case. We are not attempting to circumscribe in advance the Licensing Board's ability to rely on <u>any</u> information that could genuinely assist in that appraisal.