

II-5H Puget-Skagit

November 19, 1982



SECY-82-463

**ADJUDICATORY ISSUE**  
(Information)

For: The Commissioners

From: Sheldon L. Trubatch  
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-700  
(IN THE MATTER OF PUGET SOUND POWER  
AND LIGHT COMPANY, ET AL.)

Facility: Skagit/Hanford Nuclear Power Project,  
Units 1 and 2

Petition  
For Review: None

Review  
Time Expires: December 8, 1982

Purpose: To inform the Commission of an Appeal  
Board decision reversing the Licensing  
Board's denial of a petition to  
intervene [and to recommend that

Discussion: In ALAB-700, the Appeal Board reversed  
the Licensing Board's decision denying  
for lack of standing the Columbia River  
Inter-Tribal Fish Commission's (CRITFC)  
petition to intervene in the  
construction permit proceeding for the  
Skagit/Hanford Nuclear Power Project.  
See LBP-82-74, 16 NRC \_\_\_\_, (Sept. 3,  
1982.)

CONTACT:  
Dan Berkovitz, OGC  
634-3224

Information in this record was deleted  
in accordance with the Freedom of Information  
Act, exemptions 5  
FOIA: 92-436

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In its petition to intervene, 2/ CRITFC stated that it is composed of the fish and wildlife committees of four Columbia River tribal governments which have treaty rights with the United States to hunt and fish throughout the Columbia River basin. 3/ CRITFC claimed that the construction and operation of the Skagit/Hanford Nuclear Project "would adversely affect the anadromous fish of the Columbia River and consequently the culture, religion, and commerce of the Columbia River tribes." 4/ Basically, CRITFC alleged that the project could impair various treaty rights of the Columbia River tribes. Applicant first challenged CRITFC's standing when CRITFC, in a supplement to its petition to intervene, included the statement that it "does not represent the four Columbia River treaty tribes." 5/

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- 2/ CRITFC petitioned to intervene on May 5, 1982, almost two months after the March 8, 1982 deadline set by the Commission. (Unpublished Order of February 5, 1982.) Applicant originally opposed CRITFC's petition on the grounds of untimeliness, but waived this objection in its October 6, 1982 response to CRITFC's appeal of the Licensing Board's decision.
- 3/ The tribes are the Confederated Tribes of the Warm Springs Indian Reservation, the Confederated Tribes and Bands of the Yakima Indian Nation, the Nez Perce Tribe of Idaho, and the Confederated Tribes of the Umatilla Indian Reservation.
- 4/ Anadromous fish are those that swim upstream for breeding.
- 5/ The supplement was in response to the Licensing Board's finding that CRITFC's petition was technically deficient in seven ways. (Unpublished Memorandum and Order of July 2, 1982.) Among the deficiencies was CRITFC's lack of authority to sign for the four tribal governments and CRITFC's inability to represent the Confederated Tribes and Bands of the Yakima Indian Nation since the Yakimas had filed their own petition to intervene. The Licensing Board subsequently granted the Yakima's petition to intervene in its September 3, decision, conditioned upon the Yakimas filing at least one acceptable contention on or before October 1, 1982.

In spite of further clarification by CRITFC, the Licensing Board denied CRITFC's petition for lack of standing, finding that CRITFC had not shown injuries to itself or to its members. 6/

On appeal, CRITFC stated that it does represent the four tribes on issues where their interests overlap 7/ and that this includes the protection and promotion of the Columbia River anadromous fisheries that may be adversely affected by the Skagit/Hanford project.

Applicant did not oppose CRITFC's appeal because the Yakima Tribe had been admitted and had raised similar

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6/ Applicant had contended that since CRITFC has no authority to assert the treaty rights of the tribes and has no treaty rights of its own at stake in the proceedings, CRITFC simply has an "academic interest" in protecting the tribal treaty rights. Applicant argued that this interest in the proceedings is insufficient to confer standing upon CRITFC. Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972). CRITFC replied that because each Fish and Wildlife Committee acts to protect and promote the reserved tribal treaty rights, each Committee would be adversely affected by a diminution of a treaty right, both individually and collectively as CRITFC. This adverse impact, argued CRITFC, was sufficient to give it standing.

The Licensing Board, also relying on CRITFC's "clarification" that it did not represent the Columbia River tribes, stated that CRITFC could not derive its standing from the standing of the Columbia River tribes. The Board held that CRITFC had to base its standing on its own interests or those of its members. Since CRITFC had not shown any injury to itself or to the members it represented, but only had shown injuries to interests of the Columbia River tribes, the Licensing Board denied it standing to intervene.

7/ CRITFC's cited its constitution and bylaws support of this characterization of its representational status: "The Commission shall have the following powers: 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."

contentions. 8/ Nonetheless, the Appeal Board evaluated the merits of CRITFC's appeal, and held that whether or not the applicant contests a petition to intervene, the petitioner still must satisfy the Commission's standards for intervention. On the merits, the Appeal Board found that CRITFC had standing since it did represent certain interests of the Columbia River tribes and dismissed the apparently contradictory statement that CRITFC did not represent the tribes as intended to mean that each tribe retains the right to represent itself despite its representation by CRITFC on certain matters.

In our opinion,

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8/ Applicant's Response to Appeal by Columbia River Inter-Tribal Fish Commission, October 6, 1982. (NEPA).

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EX. 5

Thus, in our view,

Sheldon L. Trubatch  
Acting Assistant General  
Counsel

Attachment:  
ALAB-700

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ATTACHMENT

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

- Stephen F. Eilperin, Chairman
- Christine N. Kohl
- Dr. Reginald L. Gotchy

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In the Matter of )	
PUGET SOUND POWER AND LIGHT COMPANY, )	Docket Nos. 50-522
ET AL. )	50-523
(Skagit/Hanford Nuclear Power )	
Project, Units 1 and 2) )	
_____ )	

Mr. S. Timothy Wapato, Portland, Oregon, for the petitioner, Columbia River Inter-Tribal Fish Commission.

Mr. F. Theodore Thomsen, Seattle, Washington, for the applicants, Puget Sound Power and Light Company, et al.

Mr. Lee Scott Dewey for the Nuclear Regulatory Commission staff.

DECISION

October 29, 1982

(ALAB-700)

This is an appeal by the Columbia River Inter-Tribal Fish Commission (CRITFC) from the Licensing Board's decision denying for lack of standing its petition to intervene in the construction permit proceeding for the Skagit/Hanford Nuclear Power Project. See LBP-82-74, 16 NRC \_\_\_ (Sept. 3, 1982). The NRC staff supports the appeal; the applicants agree with the Licensing Board's decision but, in the

interest of avoiding extended litigation over the admission of CRITFC as an intervenor, do not oppose the appeal. 1/ For the reasons stated, we reverse the Licensing Board's decision and direct the Board to grant the petition to intervene subject to the Board's finding of at least one admissible contention proffered by CRITFC. 2/

I.

On February 5, 1982, the Commission published a notice of opportunity for interested persons to file petitions for leave to intervene in the Skagit/Hanford proceeding no later than March 8, 1982. 47 Fed. Reg. 5554. CRITFC filed its intervention petition late, on May 5, 1982. It described itself as an organization composed of the fish and wildlife committees of four Columbia River tribal governments that have rights secured by treaties with the United States to

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1/ Applicants' Response to Appeal (October 6, 1982) at 2-3.

2/ The affirmative absence of opposition to this appeal places it in an unusual posture. A licensing board is not obliged to grant an intervention petition simply because it is unopposed; the board must still evaluate it for compliance with Commission intervention requirements. By the same token, we will not overturn a licensing board's denial of intervention without reviewing that decision on the merits, even if the appeal is unopposed. For this reason, we reach the merits of CRITFC's appeal.



fish and hunt in and around the Columbia River. <sup>3/</sup>  
CRITFC claimed that construction and operation of the Skagit/Hanford project could threaten the existence of anadromous fish in the Columbia River. <sup>4/</sup> In broad terms, CRITFC identified several ways in which the Skagit/Hanford plant posed a risk to the Columbia River anadromous fisheries, among them the possibility of accidental release of fission products and the risk from long-term storage of the plant's radioactive waste. Thus, CRITFC asserted the Skagit/Hanford project might impair the tribes' treaty-secured interests and consequently injure their culture, religion, and commerce. <sup>5/</sup> Neither applicants nor

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<sup>3/</sup> The four tribes are the Confederated Tribes of the Warm Springs Indian Reservation; Confederated Tribes and Bands of the Yakima Indian Nation; Nez Perce Tribe of Idaho; and Confederated Tribes of the Umatilla Indian Reservation. The Yakima Indian Nation filed its own intervention petition on May 10, 1982, which the Licensing Board has conditionally granted. See LBP-82-74, supra, 16 NRC at \_\_\_ (slip opinion at 5-7).

<sup>4/</sup> Anadromous fish are those, like salmon, that swim upstream for breeding. See generally Washington v. Washington State Commercial Passenger Fishing Ass'n, 443 U.S. 658, 662-66 (1979).

<sup>5/</sup> CRITFC Intervention Petition (May 5, 1982) at 3-4.

the staff contested CRITFC's standing to intervene. 6/

On July 2, 1982, the Licensing Board issued an unpublished memorandum and order citing several technical deficiencies in CRITFC's petition, including the supposed problem that CRITFC could not represent the tribes because the Yakima Indian Nation had filed its own intervention petition. 7/ In response, CRITFC submitted a "clarification" to the effect that it did not represent the Columbia River treaty tribes but was "an independent body" that

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. 8/

Citing these statements, applicants argued for the first time that CRITFC's petition should be denied because the

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6/ Applicants did, however, oppose the intervention petition on lateness grounds, an objection it has since waived. Compare Applicants' Response in Opposition to Untimely Petition to Intervene (May 19, 1982) with Applicants' Response to Appeal (October 6, 1982) at 2-3.

7/ See note 3, supra. See also note 12, infra.

8/ CRITFC Response (July 16, 1982), Attachment 1.

petitioner lacked the requisite standing to intervene. 9/  
On August 19, 1982, CRITFC filed a motion for leave to reply  
to the applicants on the question of standing. See 10 CFR  
2.730(c). CRITFC asserted (at 6) that all tribal members  
and organizations (including each fish and wildlife  
committee individually and collectively as CRITFC) may be  
affected by the diminution of the tribes' treaty-secured  
fishing rights. 10/

In the memorandum and order before us on appeal, the  
Licensing Board denied CRITFC's petition. The Board  
determined that CRITFC does not represent the four Columbia  
River tribes and is not authorized to represent their treaty  
rights. CRITFC's interest in protecting those rights is, in  
the Board's view, only "academic" and it therefore lacks the  
requisite standing to intervene. LBP-82-74, supra, 16 NRC  
at \_\_\_ (slip opinion at 2-5).

## II.

Whether CRITFC has standing to intervene in this  
proceeding depends on whether it has alleged (1) an "injury

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9/ Applicants' Response in Opposition to Motion for  
Admission of Second Supplement to Petition to Intervene  
(July 30, 1982) at 3-6.

10/ The Licensing Board did not rule on CRITFC's August 19  
motion.

in fact" that has occurred or will probably result from the issuance of construction permits for the Skagit/Hanford facility, and (2) an interest that is within the "zone of interests" protected by the Atomic Energy Act. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). There is apparently no dispute that the petitioner's stated interest in protecting and conserving the anadromous fish resources of the Columbia River comports with the zone of interests requirement. <sup>11/</sup> We find that CRITFC has also made the requisite showing of injury as an authorized representative of the collective fishing interests of the Columbia River treaty tribes that might be affected by this proceeding.

In its various filings with the Licensing Board, CRITFC did not always artfully describe its organization and thus may have unintentionally misled the Licensing Board to its own detriment. While CRITFC in its original petition described itself as an organization composed of the fish and wildlife committees of four Columbia River tribal governments with treaty-secured rights to fish in that river, its July 16, 1982 "clarification" was to the effect that CRITFC did not speak for or on behalf of the Columbia River tribes. Yet its constitution and bylaws now filed with us explicitly provide that those tribes form the

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<sup>11/</sup> See NRC Staff Brief in Support of CRITFC Appeal (October 8, 1982) at 7-8.

membership body of the organization, and that CRITFC is empowered to "[f]ormulate, in consultation and consent with local tribal councils, a broad general fisheries program designated to promote and coordinate the conservation practices of the members." <sup>12/</sup> CRITFC is also authorized to seek advice and consult with any and all organizations (including the federal government) on matters pertaining

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<sup>12/</sup> Constitution and Bylaws of the Columbia River Inter-Tribal Fish Commission, attached as Exhibit A to CRITFC Appeal Memorandum (September 23, 1982). The confusion about CRITFC's representational status may be traceable to the Licensing Board's mistaken suggestion in its July 2, 1982 memorandum and order that an organization is not entitled to intervene in a proceeding where one of its constituent members has already intervened. (It is not uncommon for both a trade association and several of its members to participate as separate parties in a lawsuit. See, e.g., American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 494 n.2 (1981).) Be that as it may, the constitution and bylaws make plain CRITFC's delegated power to represent the tribes on fishing rights issues. Read in context with its constitution and bylaws, CRITFC's "clarification" filed with the Licensing Board, in our view, only means that each tribe retains the right to represent itself, as the Yakima Indian Nation has done in this proceeding.

It would have been preferable for CRITFC to have filed its constitution and bylaws with the Licensing Board so that it could have had the benefit of reviewing CRITFC's delegated powers. Although we are usually not inclined to take notice of materials submitted for the first time on appeal, we do so here because no one has objected to consideration of the document, it is the organization's basic charter, and it crystallizes the information presented in CRITFC's filings with the Licensing Board.

to fisheries. <sup>13/</sup> Petitioner's main function is to protect, promote, and enhance the Columbia River fishery resource as measured by the integrity of treaty-secured rights held by its members. <sup>14/</sup> This work, CRITFC asserts, would be "fruitless" if the Columbia River fishery stocks were somehow depleted as a result of construction and/or operation of the Skagit/Hanford project. <sup>15/</sup>

These allegations suffice to demonstrate CRITFC's standing as a representative of its members' interest. Warth v. Seldin, 422 U.S. 490, 511 (1975); Sierra Club v. Morton, 405 U.S. 727, 739 (1972). CRITFC's purpose is to protect the Columbia River fishery resources and to assist its members in coordinated efforts to conserve that resource. <sup>16/</sup> Plainly, injury to the Columbia River

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<sup>13/</sup> CRITFC Constitution and Bylaws, note 12, supra.

<sup>14/</sup> See CRITFC Response (July 16, 1982), Attachment 1.

<sup>15/</sup> Ibid.

<sup>16/</sup> Ibid.; CRITFC Appeal Memorandum (September 23, 1982) at 5. CRITFC has participated in other non-NRC proceedings to represent and vindicate those precise interests. CRITFC Intervention Petition (May 5, 1982) at 9-12; CRITFC Response (July 16, 1982), Attachment 1.

anadromous fisheries would adversely affect the tribes that form CRITFC's membership. Nothing more need be shown to fulfill our standing requirements. An organization specifically empowered by its members to promote certain of their interests has those members' authorization to act as their representative in any proceeding that may affect those interests. See Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 342-45 (1977); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 n.2 (1979); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 395-96 & n.25 (1979). 17/

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The Licensing Board's decision is reversed and the cause is remanded with instructions to grant CRITFC's petition to intervene, subject to the Board's finding of at least one admissible contention proffered by CRITFC. 18/

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17/ In view of our holding that CRITFC has standing to intervene in a representational capacity, we need not and do not decide whether CRITFC is entitled to intervene in its own right.

18/ Applicants have effectively waived further objection to the untimeliness of CRITFC's petition. See note 6, supra.

It is so ORDERED.

FOR THE APPEAL BOARD

A handwritten signature in cursive script, reading "Barbara A. Tompkins". The signature is written in dark ink and is positioned above the typed name.

Barbara A. Tompkins  
Secretary to the  
Appeal Board