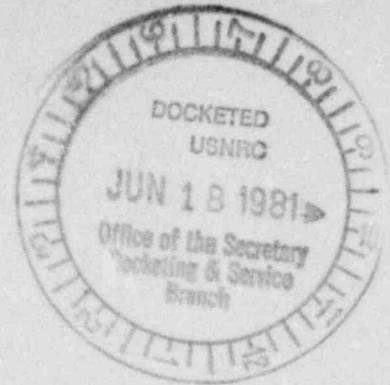


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of:)

SOUTH CAROLINA ELECTRIC AND GAS)
COMPANY, et al.)

(V. Virgil C. Summer Nuclear Station,)
Unit 1))

Docket No. 50-395-0L

June 15, 1981

PETITION FOR REVIEW



Dr. John C. Ruoff
P.O. Box 96
Jr. Wainville, South Carolina
29067
Authorized Representative

Robert Guild
314 Pall Mall
Columbia, South Carolina
29201
Counsel

For Petitioner
Fairfield United Action

G 8106220015

TABLE OF CONTENTS

	Page
SUMMARY OF DECISION OF WHICH REVIEW IS SOUGHT	1
CITATIONS TO THE RECORD BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD.	2
STATEMENT OF ERROR BY THE ATOMIC SAFETY AND LICENSING APPEAL BOARD.	4
STATEMENT OF REASONS FOR COMMISSION REVIEW	

I

THE COMMISSION SHOULD CONSIDER WHETHER REGULATORY DEVELOPMENTS IN THE AREAS OF EMERGENCY PLANNING AND CORPORATE MANAGEMENT CAPABILITY AFTER THE THREE MILE ISLAND (TMI) ACCIDENT CAN PROVIDE GOOD CAUSE FOR LATE INTERVENTION IN PENDING LICENSE CASES.	7
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II

THE COMMISSION SHOULD CONSIDER WHETHER A LICENSING BOARD HAS DISCRETION TO ADMIT A NEW PARTY WITH KNOWLEDGE AND EXPERTISE TO ASSIST IT IN DECIDING IMPORTANT TMI-RELATED HEALTH AND SAFETY ISSUES WHICH IT CONCLUDES WILL NOT OTHERWISE BE ADEQUATELY PRESENTED	9
CONCLUSION.	10

Fairfield United Action (FUA) hereby petitions the Commission pursuant to 10 CFR § 2.786 to review the decision of the Atomic Safety and Licensing Appeal Board reversing an order of the Licensing Board which granted FUA's Petition to Intervene, in part, and provided that FUA be admitted as a party but take the proceedings as they currently stood. Fairfield United Action respectfully requests the Commission grant this petition to review important questions of law, fact, procedure and policy affecting the public health and safety decided erroneously by the Appeal Board. FUA requests the Commission provide for expedited briefing and oral argument and that it enter an order granting FUA's Petition to Intervene in these proceedings.

SUMMARY OF DECISION OF WHICH REVIEW IS SOUGHT

In South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC ____ (June 1, 1981), the Appeal Board reversed the April 30, 1981, Order of the Licensing Board, LBP-81-11, 13 NRC ____, insofar as it granted the intervention petition of Fairfield United Action and remanded the cause with instructions to deny the petition as untimely.

The Appeal Board determined that Fairfield United Action's tardiness in seeking to intervene was not excused by revisions in Commission policy concerning emergency planning and corporate management capability following the Three Mile Island accident or by the other circumstances surrounding FUA's late filing. The Appeal Board also rejected the Licensing Board's

judgement to admit FUA on these post-TMI related contentions, without formal discovery or delay in commencement of the hearing, to assist in the development of a sound record in these areas in which FUA members were well-versed; and the Licensing Board's further determination that FUA should be permitted to cross-examine witnesses on issues raised in the only existing intervenor's contentions because of the Licensing Board's "lack of confidence in the other intervenor's ability to effectively prepare his case and because of the contribution we believe FUA might make on all of the issues." South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), Remainder of Order Following Fourth Prehearing Conference, at p. 10 (May 13, 1981).

CITATIONS TO THE RECORD
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

The Applicants, South Carolina Electric and Gas Company and South Carolina Public Service Authority, and the Nuclear Regulatory Commission Staff each appealed from the Licensing Board's decision which granted FUA's Petition in part on the grounds that FUA's Petition to Intervene should have been wholly denied pursuant to 10 CFR § 2.714a(c).

The Applicants' appeal presented the question, inter alia, of whether the Licensing Board improperly assessed the good cause factor, "particularly in treating as good cause mid-1980 TMI requirements on emergency planning and management capability," Applicants' Notice of Appeal, pp. 1-2 (May 8, 1981), which question they argued extensively, Applicants' Brief, pp. 2-11 (May 8, 1981). The Staff, likewise, challenged "the Board's finding that under the circumstances of this case, Petitioner's reliance upon post-TMI requirements provided good cause for late intervention with regard to cor-

porate management and emergency planning contentions," NRC Staff Brief at p. 3. Fairfield United Action argued that application of the analysis of the Board in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980), to the circumstances of its late filing established good cause with respect to its TMI-related contentions. FUA Brief, pp. 6-8 (May 20, 1981). The Appeal Board declined to pass on the Licensing Board's determination that FUA had good cause to wait until the middle or latter part of 1980 before filing its TMI-related contentions, but did conclude that "post-TMI events cannot possibly serve to justify FUA's election to wait until the end of March 1981 to file its petition," ALAB-642 at pp. 7-8.

Both the Applicants and the Staff challenge the Licensing Board's exercise of discretion in admitting FUA to assist it in the development of a sound record for decision on important health and safety issues. Both complain that admission of FUA would convert and essentially default proceeding into a more or less contested case:

. . . the Board's action turns a moderately contested proceeding into a seriously contested one without adequate consideration of the Applicants' rights and obligations to their customers.
(Applicants' Brief, p. 18 (May 8, 1981))

One genuine effect of the Board's Order is to "shore-up" the existing intervenor, who, as the Board aptly noted has been less than diligent in presenting his case the entry of a fresh litigant in opposition to the license is fundamentally unfair to the other litigants and establishes an undesirable precedent for future cases.
(NRC Staff Brief, p. 9 (May 11, 1981))

Fairfield United Action argued that such considerations were inappropriate, FUA Brief, p. 6 (May 20, 1981), and that the Licensing Board properly admitted FUA to protect the integrity of the adjudicatory process and ensure that it had available a sound record for decision on vital health and safety issues affecting the public. Id., p. 14.

The Appeal Board conceded the applicability of the "abuse of discretion" standard in reviewing Licensing Board decisions on late interventions, but understood it to permit "close scrutiny of the factual and legal ingredients" of the decision. ALAB-642, at 5. It expressed concern for "simple fairness" to the applicants and staff and the need to conduct licensing in "an orderly fashion," Id. at 6. The Appeal Board acknowledged the Licensing Board's "conviction that Mr. Bursey (the existing intervenor) was incapable of making a significant contribution to the development of the record," Id. at 17, acknowledged the Licensing Board's conclusion that FUA's contribution would likely be "substantial," Id. at 16, but rejected both the Licensing Board's factual findings on FUA's ability to contribute, Id. at 16-22, and the legal propriety of the Licensing Board's consideration of the existing intervenor's incapacity to contribute:

As we see it, the Board's perception of Mr. Bursey's abilities and his likely contribution to the proceeding could not possibly serve as justification for allowing FUA to come into the proceeding at the last moment.
(Id. at 17)

Instead of admitting FUA to remedy such deficiencies, the Appeal Board concluded that the Licensing Board was empowered only to "take a more active role in the proceeding itself" through interrogation of witnesses "to insure that the issues were thoroughly explored," Id. at 17.

STATEMENT OF ERROR
BY THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the view of petitioner Fairfield United Action the decision of the Appeal Board in this matter, ALAB-642, reversing the Order of the Licensing Board, LBP-81-11, 13 NRC ____ (April 30, 1981) which granted FUA's Petition to Intervene in part, is clearly erroneous with respect to necessary factual

issues and represents improper resolution of important questions of law, policy and procedure affecting the public health and safety, 10 CFR § 2.786, in the following particulars.

The Appeal Board erroneously applied the five factor test provided for at 10 CFR § 2.714(a)(1) in failing to defer to the proper exercise of broad discretion by the Licensing Board under the circumstances of this case to consider FUA's reasons for tardiness as well as the extent to which FUA may be expected to assist in developing a sound record, the unavailability of other means or existing parties to protect FUA's interest, and the limited degree by which FUA's participation will broaden the issues or delay the proceedings in light of the procedural measures adopted by the Licensing Board. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

The Appeal Board erroneously failed to recognize recent developments in Commission policy and in Applicant compliance in the areas of emergency planning and corporate management capability after the Three Mile Island (TMI) accident as representing the basis for the consideration of new or amended contentions on such issues in pending operating license proceedings. See, Statement of Policy; Further Commission Guidance for Power Reactor Operating Licenses, CLI-80-42, 45 FR 85236, at 85238 (December 24, 1980):

The Commission believes that where the time for filing contentions has expired in a given case no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 CFR § 2.714(a)(1).

The Appeal Board erroneously failed to consider the cumulative effect of each of the undisputed facts and circumstances advanced by FUA in explanation for its late-filing as establishing "good cause" but instead considered each only in isolation. In failing to credit FUA with substantial

good cause for its lateness the Appeal Board erroneously required FUA to shoulder a "considerably greater" burden to justify its intervention on the basis of the other factors.

The Appeal Board was clearly erroneous in resciving the factual issues of FUA's ability to assist in developing a sound record and the extent to which FUA's participation will broaden the issues or delay the proceedings in a manner contrary to the resolution of the necessary factual issues by the Licensing Board.

The Appeal Board erroneously failed to defer to the Licensing Board's proper exercise of discretion in admitting FUA to assist it in developing a sound record upon which to decide important TMI-related health and safety issues when it concluded that the assistance it required in reaching such decisions would not be available from the existing parties, particularly from the only existing intervenor who "was incapable of making a significant contribution to the development of the record." ALAB-642, at 17.

The Appeal Board improperly credited Applicants' and Staff's reluctance to meet Fairfield United Action in what would become a "seriously contested" case, Applicants' Brief, supra, p. 18, as a basis for its decision, ALAB-642 at 6, in the face of the Licensing Board's conclusion that FUA's participation in the proceeding was necessary for it to make the findings required for the issuance of an operating license, 10 CFR § 50.57, based on a sound record produced in a truly adversary proceeding.

STATEMENT OF REASONS FOR COMMISSION REVIEW

I

THE COMMISSION SHOULD CONSIDER WHETHER REGULATORY DEVELOPMENTS IN THE AREAS OF EMERGENCY PLANNING AND CORPORATE MANAGEMENT CAPABILITY AFTER THE THREE MILE ISLAND (TMI) ACCIDENT CAN PROVIDE GOOD CAUSE FOR LATE INTERVENTION IN PENDING LICENSE CASES.

The Commission should grant Fairfield United Action's Petition for Review to consider the circumstances where Licensing Boards should be able to admit new parties as in Zimmer, supra, and new TMI-related contentions, Summer, LBP-81-11, supra, in pending power reactor operator license cases.

The Commission clearly has anticipated that evolving regulatory policies in the aftermath of the Three Mile Island accident will impact on Licensing Boards in their conduct of pending proceedings and may alter the showing required to be made by applicants for approval of operating licenses:

In reaching their decision, the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island Accident. In this regard, it should be understood that as a result of analyses still underway, the Commission may change its present regulations and regulatory policies in important aspects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application.

Suspension of 10 CFR 2.764 and Statement of Policy on Adjudicatory Proceedings, 44 FR 65050 (November 9, 1979); quoted in Further Commission Guidance for Power Reactor Operating Licenses; Statement of Policy, 45 FR 41738 (June 20, 1980), and in Statement of Policy; Further Commission Guidance for Power Reactor Operating Licenses, CLI-80-40, 45 FR 85236 at 85238 (December 24, 1980). The Commission has determined that pending operating license applications are to be judged against present NRC regulations as supplemented by TMI-related

requirements reflected in Requirements for Operating Licenses, NUREG 0694 (June 1980), now superseded by Clarification of TMI Action Plan Requirements, NUREG 0737 (October 1980); and that individual adjudicatory hearings are the appropriate forum for resolving at least some claims with respect to these new requirements. 45 FR at 85238.

With respect to new requirements regarding emergency planning, the Licensing Board in this proceeding adopted the analysis of another Board in Zimmer, supra, that the expanded scope of relief now available in the license proceeding, particularly the extension of emergency planning to an Emergency Planning Zone (EPZ) of about 10 miles, 45 FR 55402 (August 19, 1980), justified tardiness in filing on this issue at least until the middle or latter part of 1980. LBP-81-11, slip opinion at 6. This Licensing Board adopted a similar analysis in finding justification for an equal delay in filing on corporate management capability issues which have been the object of Commission focus in the post-TMI era. Id.

Commission policy and Applicants' compliance in the area of emergency planning remained in a state of development at the time of FUA's filing in March 1981, e.g. Functional Criteria for Emergency Response Facilities, NUREG 0696, was published in February 1981. Local county plans related to the plant were published between December 1980 and April 1981. The South Carolina state plan was published April 17, 1981, 46 FR 22459, and the Applicants' emergency exercise was conducted May 1, 1981. SER, Supp. 2, p. 22-2.

The Applicants' submitted their "Comparison of Management/Technical Resources to Regulatory Guidance," to the NRC Staff by transmittal dated January 31, 1981, in response to the Commission's "Draft Report for Interim Use and Comment," Guidelines for Utility Management Structure and Technical Resources, NUREG 0731, which was published September 1980.

The Commission should consider whether these developments represent such new information as to establish good cause for the belated filing of contentions on these subjects, under the circumstances of the case.

II

THE COMMISSION SHOULD CONSIDER WHETHER A LICENSING BOARD HAS DISCRETION TO ADMIT A NEW PARTY WITH KNOWLEDGE AND EXPERTISE TO ASSIST IT IN DECIDING IMPORTANT TMI-RELATED HEALTH AND SAFETY ISSUES WHICH IT CONCLUDES WILL NOT OTHERWISE BE ADEQUATELY PRESENTED.

The Commission has recognized that individual adjudicatory proceedings are the appropriate forum for the resolution of claims regarding operating license applicants' compliance with post-TMI regulatory requirements. 45 FR at 85238. In its recent Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8 (May 20, 1981), the Commission recognized the Three Mile Island accident "required a reexamination of the entire regulatory structure," Id., p. 1, and that Commission attention and resources have since been focused on the preparation of an action plan specifying changes necessary for reactors as a result of the accident. Id. In light of the backlog of pending license applications resulting from the focus of attention, the Commission emphasized the responsibility of licensing boards to manage "the balanced and efficient conduct of all phases of the hearing process." Id. at 2.

The licensing boards themselves must resolve the difficulties presented by the potentially conflicting goals of ensuring a thorough review of applicant compliance with post-TMI regulatory developments in efficiently and expeditiously conducted proceedings.

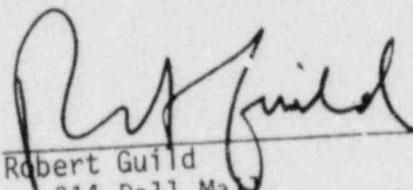
The Commission should consider whether a licensing board may accomplish this difficult task through the exercise of the "broad discretion" granted it under the authority of West Valley, supra, 1 NRC 275, by the admission

of a new party with knowledge and expertise to assist it in building a record, under appropriate procedural restrictions, where otherwise evidence on vital health and safety issues will not be adequately presented.

CONCLUSION

For the foregoing reasons, the Petition for Review should be granted and an order entered admitting Fairfield United Action as an Intervenor in these proceedings.

June 15, 1981



Robert Guild
314 Pall Mall
Columbia, South Carolina
29201
Counsel

Dr. John C. Ruoff
P.O. Box 55
Jenkinsville, South Carolina
29065
Authorized Representative

For Petitioner
Fairfield United Action

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June 15, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of "Petition for Review" were served upon the following persons by deposit in the United States mail, first class postage prepaid, this 15th day of June 1981.

Commissioner John F. Ahearne
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Commissioner Peter A. Bradford
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Commissioner Victor Gilinsky
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Commissioner Joseph M. Hendrie
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Samuel J. Chilk
Secretary to the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Chase R. Stephens, Chief
Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington DC 20555

Herbert Grossman, Esq.
Chairman, Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. John H. Buck, Member
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Christine N. Kohl, Member
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Frank F. Hooper
School of Natural Resources
University of Michigan
Ann Arbor, MI 48109

Gustave A. Linenberger
Member, Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Chairman, Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Steven C. Goldberg, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory Commission
Washington, DC 20555

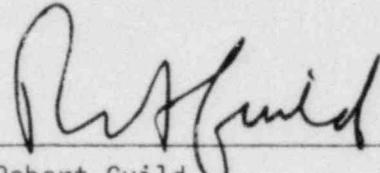
Richard P. Wilson, Esq.
Assistant Attorney General
South Carolina Attorney General's
Office
P.O. Box 11549
Columbia, SC 29211

George Fischer, Esq.
Vice President and Group Executive -
Legal
South Carolina Electric & Gas Company
P.O. Box 764
Columbia, SC 29218

Mr. Brett Allen Bursey
Route 1, Box 93-C
Little Mountain, SC 29076

Randolph R. Mahan
South Carolina Electric & Gas Company
P.O. Box 764
Columbia, SC 29218

Joseph B. Knotts, Jr., Esq.
Debevoise & Liberman
1200 17th Street, N.W.
Washington, DC 20036



Robert Guild