



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD



Before Administrative Judges:  
Herbert Grossman, Chairman  
Gustave A. Linenberger, Jr.  
Dr. Frank F. Hooper

SERVED MAY 1 1981

In the Matter of:

SOUTH CAROLINA ELECTRIC &  
GAS COMPANY, ET AL.

Docket No. 50-395

(Virgil C. Summer Nuclear  
Station, Unit 1)

April 30, 1981

PARTIAL ORDER FOLLOWING PREHEARING CONFERENCE  
(Admitting FUA on Contentions 1, 2, 7-13  
and 27, and Denying FUA's Other Contentions)

On March 22, 1981, nearly four years after the notice of opportunity for hearing in this operating license proceeding was published (42 Fed. Reg. 20203, April 18, 1977), and three months before the hearing had already been scheduled to begin (on June 22, 1981), Fairfield United Action (FUA) filed a petition to intervene, together with a supplement thereto setting forth 27 contentions. For each contention, petitioner stated a basis which, in many cases, included names or descriptions of potential witnesses and references to supporting documentation. By the time FUA's petition was filed, the Licensing Board had issued an order (on March 10, 1981) setting a final prehearing conference in the proceeding for April 7, 1981, and had requested the existing parties to file their suggestions by

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March 31, 1981 with regard to all actions to be taken by the Board at the conference. Applicant filed a response on March 30, 1981 and suggested, among other things, that FUA's petition be considered at the conference. Applicant served that response on FUA and the Board also arranged for its March 10, 1981 order setting the prehearing conference to be served on the petitioner.

Petitioner appeared at the prehearing conference by a non-attorney member, Dr. John Ruoff, to argue in support of the contentions it had raised and by an attorney, Robert Guild, Esq., a member of the bar of the State of South Carolina making a special appearance to argue the merits of the late intervention. The Staff joined applicant in arguing against allowing intervention at this late date, and later reaffirmed this position in a written opposition to the petition, which it filed on April 13, 1981. The main thrust of the applicant's and Staff's opposition to the petition is the purported lack of cognizable "good cause" for the late filing and the alleged delay that might be caused by allowing an intervention so shortly before the scheduled hearing date. The major reasons given by petitioner for the late filing were that the petitioner was only recently incorporated, on September 5, 1980; that its members have only recently educated themselves with regard to the Summer Nuclear Station through participation in petitioner's program; that some of petitioner's members have only recently moved to Fairfield County; that the members who have lived for many years in the County have until recently relied upon information from applicant concerning the operations of the plant, which they now believe to be false and misleading; that petitioner's members

who resided in proximity to the facility at the time of the filing of the application for the operating license in 1977 lacked knowledge that they had interests that might be adversely affected by the granting of the license, of their rights and remedies available to them, and of the notice of opportunity for hearing published in the Federal Register; that until mid-February 1981 petitioner believed that it had no right to participate as a party in this proceeding since the deadline for intervention had passed in May 1977; that it believed until mid- February 1981 that its interests were represented by the existing intervenor Brett Bursey, when it was informed that Mr. Bursey's ability to put on an affirmative case was restricted by the Licensing Board; and that the ability of petitioner to inform itself of developments in the proceeding had been severely hampered by the absence for several years of a properly managed local public document room in Fairfield County.

In addition to alleging a lack of good cause and inevitable delay that would result from admitting petitioner, applicant and Staff applied the other three factors contained in the five-factor test of 10 CFR §2.714(a)(1) against the petition to conclude that it should not be granted. They did not, however, challenge FUA's standing to intervene or the legal sufficiency of its contentions, and it is clear that they could not: the members reside well within the geographical limits required for intervention and many of the contentions were either encompassed in contentions admitted by the Board on behalf of intervenor Brett Bursey or would otherwise be ruled admissible in an operating license proceeding.

The Board rules on the intervention by dividing the contentions into two parts in applying the five-factor test of 10 CFR §2.714(a): (1) the corporate management contentions (1, 2, 27) and emergency planning contentions (7-13); (2) all other contentions. As specifically discussed below, by applying the five-factor test to these two categories of contentions in the current posture of the proceeding we admit FUA to the proceeding only on the corporate management and emergency planning contentions. In doing so, we require that the newly admitted intervenor take the proceeding as it currently stands with formal discovery concluded and only the specifics of FUA's affirmative case on those issues accepted as they were detailed in the supplemental petition and the prehearing conference.

#### Good Cause for the Late Intervention

The Board agrees with applicant and Staff that, with respect to the good cause requirement, petitioner has not substantiated its charges of misrepresentation by the applicant in its dissemination of information to the public; petitioner has not demonstrated that it exercised due diligence with regard to its rights, remedies and its potential interest in the proceedings; failure to read the Federal Register does not justify non-timely filing of a petition (New England Power and Light Co. (NEP Units 1 and 2), LBP-78-18, 7 NRC 932, 933-934, (1978)); newly acquired standing or organizational status is not an excuse for delay (Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979)); a petitioner cannot sit back and observe the proceeding, and then intervene upon deciding that its interest are not being adequately protected by existing parties (Puget Sound Power & Light Co. (Skagit

Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172-173 (1979), vacated as moot CLI-80-34, 12 NRC \_\_\_ (October 9, 1980); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 643, 644 (1977); Pacific Gas and Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), ALAB-583, 11 NRC 447, 448 (1980)); and, the poor maintenance of a local public document room (which the Board judges to be the fact upon reading the submittals and considering the discussion at the prehearing conference) does not justify the four years of delay and failure to raise the matter with NRC or the applicant.

With regard to petitioner's reliance upon post-TMI requirements as providing good cause for late intervention, however, the Board does not agree with applicant and Staff that they do not provide good cause for the late intervention with regard to corporate management and emergency planning contentions. Especially with regard to emergency planning, we agree with another licensing board, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), ALAB-80-14, 11 NRC 570, 574 (1980), that the criteria for emergency planning have undergone vast changes that have considerably expanded the scope of relief in operating license proceedings since the TMI-accident and especially during 1980. Without repeating in detail the changes summarized in Zimmer, we do note the example cited there (Id. at 573) of the extension of emergency planning from the low population zone (LPZ) to the Emergency Planning Zones (EPZs). This concept was formally adopted in the final rules published on August 19, 1980 (45 Fed. Reg. 55402) which established an EPZ for airborne exposure with a radius of about 10 miles from the facility and an EPZ for contaminated food and water with a radius of about 50 miles. The

affidavits submitted with the petition to intervene identify members of FUA who live within those zones and, consequently, who formally became principals in the Commission's concern over emergency planning. We note further that it was during this period in mid-1980 in which the Commission's policy on EPZs was evolving that the members of FUA began their involvement in NRC emergency planning meetings and organizational activities, culminating in FUA's incorporation in September of 1980. Tr. 586.

Had FUA filed this petition in the middle or latter part of 1980, we would have no hesitation in determining that there was good cause for the delay in filing the petition to the extent of the emergency planning issues. Similarly, although to a lesser extent, because of the Commission's focus on management capability in the post-TMI era we would have found good cause for the delay in filing the management capability contentions.

As it is, petitioner delayed some months longer in apparent reliance upon Mr. Bursey's intervention before filing its petition in March of 1981. As we have stated before, such reliance is legally insufficient to constitute good cause for the additional delay, although we can understand a reluctance to file a petition three years after the issuance of a notice of opportunity for hearing in the face of a strong possibility of rejection when there is an intervenor already participating in the proceeding. Had that added delay in filing disadvantaged any parties other than petitioner itself (by circumscribing its prehearing activities), or delayed the

proceedings, we might find a lack of good cause. However, since it does not delay the proceeding and there was good cause for the bulk of the delay in filing these contentions, we find that factor to be of almost no weight (or of slight weight against petitioner) in deciding upon the intervention with regard to the corporate management and emergency planning issues. With regard to the other contentions, we find an absence of good cause for the delay.

#### The Delay Factor

The Board agrees with applicant (Applicant's Answer to Untimely Petition, p. 10) that in cases of very late intervention the fifth factor specified in 10 CFR §2.714(a)(1), the extent to which participation by the late petitioner will broaden the issues or delay the proceedings, becomes very important. We further agree with both applicant and Staff as to the contentions other than those concerning corporate management or emergency planning that the admission of petitioner would broaden the proceeding and cause unwarranted delay at this late stage. We would weigh this factor as heavily against admitting petitioner on these contentions as we would weigh the lack of good cause. With regard to emergency planning and corporate management, however, we see no delay resulting from petitioner's admission if, as the Board orders, petitioner's admission on these contentions be subject to the same conditions prevailing with regard to the other parties. When a petitioner files a late petition he must generally take the proceedings as they are, and we see no reason to make any special accommodations for this petitioner that would result in delaying the proceeding. At the time the petition was filed, the hearing had been

scheduled to begin on June 22, 1981, and we intend to maintain that schedule. Furthermore, the parties' affirmative cases should have been disclosed and discovery concluded except on those issues on which the Staff's and applicant's positions were still evolving. We hold petitioner to the specifics disclosed in its supplemental petition or at the prehearing conference on the corporate management and emergency planning issues, except to the extent that the latter area is still evolving or has not been publicly disclosed.

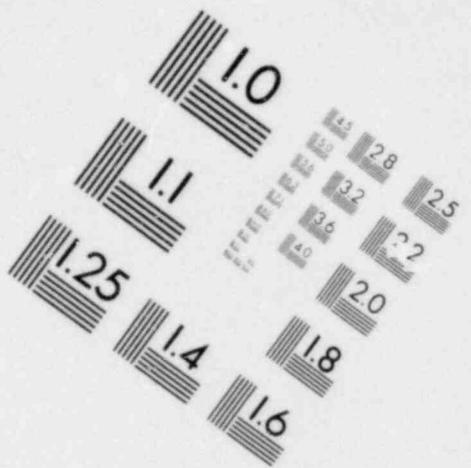
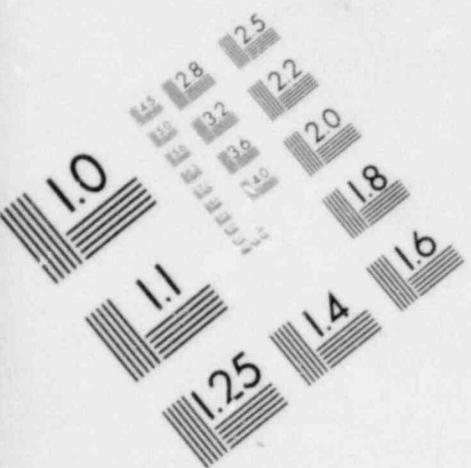
In view of the fact that the corporate management and emergency planning issues had already been admitted to the proceeding (by Board question or intervenor contention), we see no broadening of issues and only a desirable particularization of its position in FUA's detailed presentation of these contentions.

The Board expects that no delay will ensue from admitting petitioner on these contentions if the appropriate test of delay is employed, i.e., measuring the delay that could be attributed directly to the tardiness of the petition. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650, fn. 25 (1975). Had petitioner filed a timely petition, it would have served itself by having before it a full discovery period. While the other parties could have also discovered petitioner's case, discovery would not have benefitted them on the issues we are admitting. Petitioner has made full disclosure in its supplemental petition of the bases for its contentions, including the names or offices of its potential witnesses to the extent we are admitting its contentions,

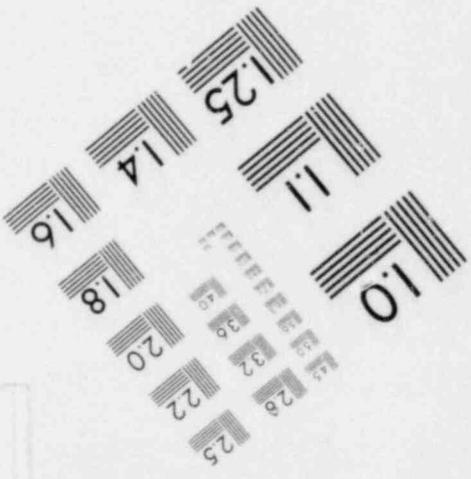
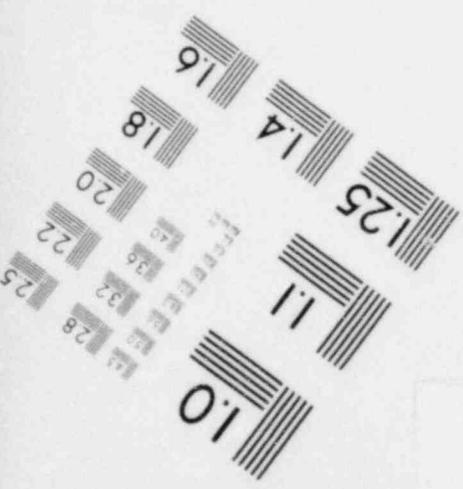
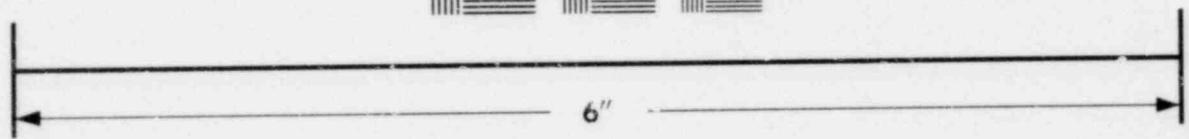
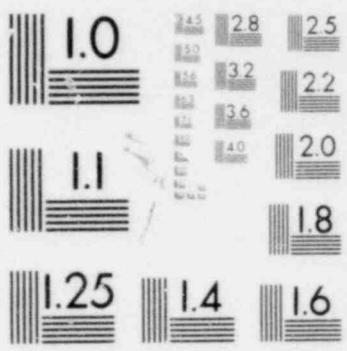
for the Board will not allow additional witnesses. Consequently, FUA's late entrance into the case has not occasioned a delay in discovery that could prolong the proceeding. With regard to applicant's and Staff's evolving positions on emergency planning, discovery is presently where it would have been had petitioner been admitted when the notice of opportunity was issued. We direct, in this regard, for the benefit of all of the parties, that the parties cooperate in informal discovery with regard to the evolving plans. While the Board intends to adhere firmly to the hearing starting date of June 22, 1981, notwithstanding any failure in cooperation with regard to informal discovery, the Board intends to exercise its prerogatives in controlling the proceeding to penalize an offending party either by restricting its case or by providing a further hearing at a later time for the benefit of an aggrieved party.

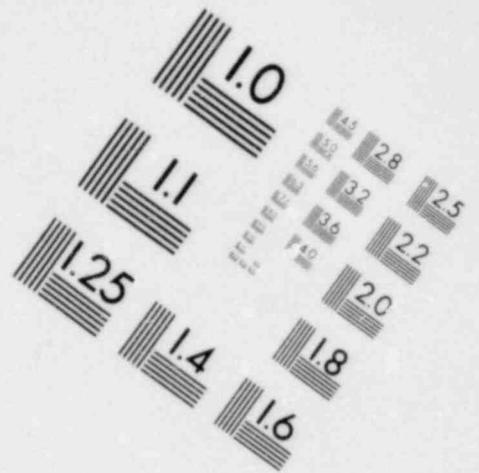
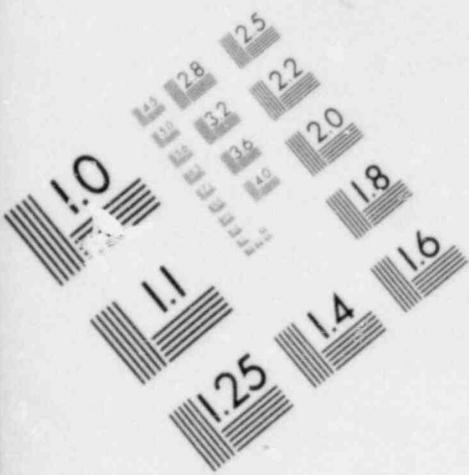
Nor, do we see any way in which petitioner's sooner entrance into this proceeding could have resolved the issues being admitted. Emergency planning is not yet ripe for resolution, and neither the corporate management nor emergency planning issues are susceptible to summary disposition regardless of their state of preparedness.

Even if we consider delay in terms of the time of concluding the proceeding measured with or without petitioner's participation, we cannot foresee unwarranted delay. To be sure, the hearing may last longer because of petitioner's participation but, in view of petitioner's apparent intensive preparation of its pleadings and its demonstrated knowledge of the areas on which it is being admitted, together with the Board's resolve to prohibit repetitious examination, the Board anticipates very little unproductive delay.

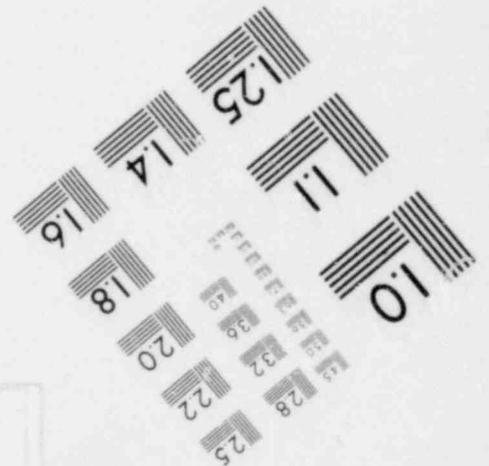
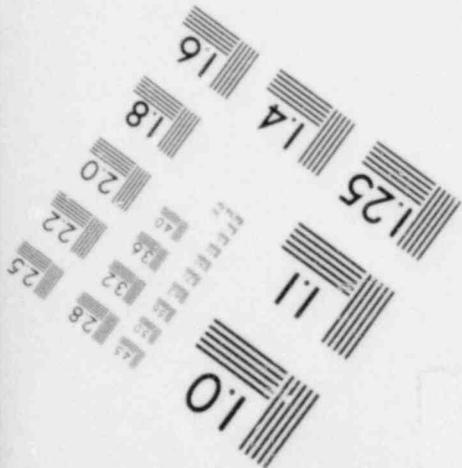
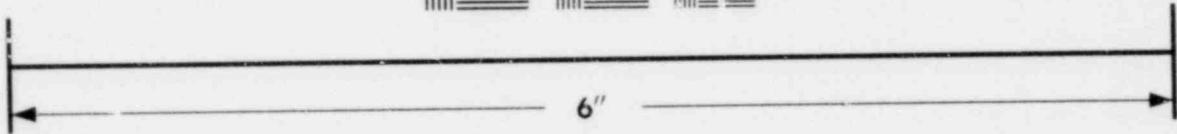
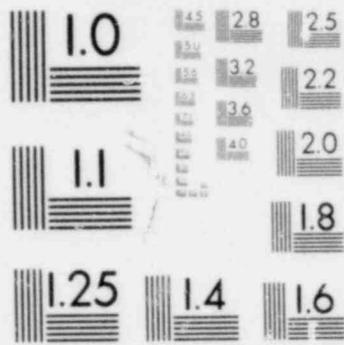


**IMAGE EVALUATION  
TEST TARGET (MT-3)**





**IMAGE EVALUATION  
TEST TARGET (MT-3)**



Ability to Contribute to a Sound Record

It is this factor that the Board weighs most heavily in favor of admitting petitioner to this proceeding on the corporate management and emergency planning contentions and which it weighs most heavily against petitioner with regard to the other contentions. As is apparent from FUA's pleadings and from the general discussion at the prehearing conference, petitioner's members have become well versed in the former areas, independently of any intention of intervening in this proceeding, through their participation in rate-making proceedings and in the ongoing emergency planning. We can only contrast petitioner's familiarity with the substance of these issues with its lack of prior involvement or expertise in the other issues it raised. On those other issues, it named few or no witnesses committed to testifying on its behalf but sought mainly the opportunity to search for such witnesses. In view of the late date, we see no reason to afford that opportunity.

Moreover, while perhaps not grounds for admitting this petitioner, we cannot help but consider what the state of the record might be on the issues we admit without its participation. The existing intervenor, Mr. Bursey, throughout this proceeding has exhibited an inability to effectively manage his case, which includes the area of emergency planning. Moreover, considering the difficulties Mr. Bursey has encountered in preparing his own case, we expect little help from him in assisting the Board with regard to the issue raised by the Board regarding corporate management. (However, in this regard, we would expect the Staff to render valuable assistance since it, too, has raised serious questions with regard

to applicant's engineering organization and hands-on operating experience. See reference to SER in ACRS letter of March 18, 1981, pp. 2-3.) However, with petitioner admitted on the corporate management issues it raised itself, we anticipate a much fuller development of the record, in a more adversarial manner.

Other Means to Protect Petitioner's Interest and Extent to Which  
Petitioner's Interests will be Represented by Existing Parties

As is ordinarily the case, this proceeding represents the best forum to consider the admissible contentions and petitioner is best qualified to represent its own interests. For that reason, these factors almost always weigh in a petitioner's favor but are given relatively lesser weight than the other factors. The Board has, however, taken these factors into account with regard to the specifics of this petition. We note that, with regard to emergency planning, petitioner has had dealings with NRC and other public officials without benefit of this formal proceeding but, on the other hand, has encountered considerable difficulty in gaining full access to the counties' evolving emergency plans. Tr. 597-603.

Petitioner's admission into this proceeding on the emergency planning contentions should not only facilitate its being heard on those issues in this forum, but should also serve to open some of the emergency planning to public input and scrutiny as should have been the case from the first.

With regard to petitioner's being adequately represented by the existing parties, we have already expressed our opinion on the manner in which the existing intervention has been handled. We see no reason why petitioner should have any confidence that Mr. Bursey will represent its interests any better than he has, so far, represented his own.

In summary, we have applied the five-factor test to FUA's proposed intervention on the corporate management and emergency planning issues and have concluded that, while the good cause factor weighs slightly against admission, petitioner's ability to contribute to a sound record and the lack of delay or broadening of the proceedings weigh heavily in its favor, and the other two factors weigh slightly in its favor. We, therefore, conclude that the five factors weigh in favor of admitting FUA on the corporate management and emergency planning issues.

On applying the five-factor test to the remainder of the issues raised by FUA, we conclude that the good cause, delay, and ability-to-contribute to-a-sound-record factors weigh heavily against admission, and that only the lesser factors of availability of other means to protect petitioner's interest and the extent to which petitioner's interest will be represented by existing parties weigh slightly in its favor. We must, therefore, reject petitioner's intervention on those other issues. Had we not been able to separate its petition into two discrete parts for applying the five-factor test, we would have denied the petition as a whole, because the factors of lack of good cause for failure to file on time and the extent to which admitting petitioner on those issues would broaden the issues and delay the proceeding would outweigh any benefits from admitting petitioner.

ORDER

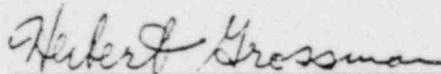
For all of the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 30th day of April 1981

ORDERED

That Fairfield United Action is admitted as an intervenor in this proceeding on contentions 1, 2, 7-13, and 27, subject to all of the rights, obligations, and restrictions of the other parties as discussed above and determined in other Board orders; and,

That the remainder of the contentions raised in FUA's supplemental petition are not admitted.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Herbert Grossman, Chairman  
ADMINISTRATIVE JUDGE