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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Christine N. Kohl

SERVED JUN 1 1981

In the Matter of SOUTH CAROLINA ELECTRIC AND GAS COMPANY ET AL. (Virgil C. Summer Nuclear Station, Unit 1)	Docket No. 50-395 OL

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U.S. NUCLEAR REGULATORY COMMISSION

Mr. Joseph B. Knotts, Jr., Washington, D. C., for the appellants South Carolina Electric and Gas Company et al.

Mr. Steven C. Goldberg for the appellant Nuclear Regulatory Commission staff.

Dr. John C. Ruoff, Jenkinsville, South Carolina, and Mr. Robert Guild, Columbia, South Carolina, for the appellee Fairfield United Action.

DECISION

June 1, 1981

(ALAB-642)

This operating license proceeding involves Unit 1 of the Summer nuclear facility, located in Fairfield County, South Carolina. It was instituted more than four years ago by the publication of a notice of opportunity for hearing. 42 Fed. Reg. 20203 (April 18, 1977). In response to that notice, one intervention petition and

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request for a hearing (that of Brett Allen Bursey) was filed and, in 1978, granted. LBP-78-6, 7 NRC 209.[1/] In addition, the State of South Carolina was given leave to participate in the proceeding under the "interested State" provisions of 10 CFR 2.715(c).

The prehearing stage has extended over a protracted period of time. The proceeding is, however, now ready for trial. On March 9, 1981, the Licensing Board issued a memorandum in which, acting upon the agreement of the parties, it tentatively set the commencement of the evidentiary hearing for June 22, 1981. Subsequently, that date was confirmed.

As of March 9, the necessary contemplation was that the hearing would embrace those contentions of Mr. Bursey which had been admitted to the proceeding, together with certain questions which the Board itself had raised sua sponte. See 10 CFR 2.760a. The further expectation was that the participants would be four in number: the applicants; Mr. Bursey; South Carolina; and the NRC staff. But precisely two weeks later, on March 23, a new face appeared on the scene. Armed with a plethora of proposed contentions of its own, an organization comprised of Fairfield County residents -- entitled Fairfield United Action (hereafter FUA) -- filed a petition for leave to intervene.

It is the action taken by the Board below on that petition which has now brought the proceeding before us. Over the objection

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1/ The notice required petitions to intervene to be filed within 30 days (i.e., by May 18, 1977). 42 Fed. Reg. at 20204.

of both the applicants and the staff,[2] on April 30 the Board granted the FUA petition and accepted 10 of its 27 contentions for litigation. LBP-81-11, 13 NRC ___. Dissatisfied with that result, those parties have appealed under 10 CFR 2.714a. FUA urges affirmance.[3]

I.

No one disputes that, as the Licensing Board determined, FUA has satisfactorily demonstrated the requisite standing to intervene. On that score, its petition is supported by the affidavits of several of its members containing averments that they (1) reside, work and engage in outdoor recreational activities in the vicinity of the Summer site; and (2) have authorized FUA to represent their interests through participation in this proceeding. That is plainly sufficient to satisfy the interest requirements of 10 CFR

2/ Neither Mr. Bursey nor South Carolina took a position on the controversy.

3/ No appeal has been, or could be, prosecuted by FUA from the rejection of the remaining 17 contentions. This is because the Commission's Rules of Practice "do not permit a person to take an interlocutory appeal from an order entered on his intervention petition unless that order has the effect of denying the petition in its entirety". Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980), and authorities there cited.

At the conclusion of its brief in support of the grant of intervention, FUA requested oral argument. Such requests are addressed to the discretion of this Board and will be granted only if at least one member votes in favor of it. 10 CFR 2.763; Appendix A to 10 CFR Part 2, Section IX(e). In this instance, the Board unanimously concluded that the parties' positions on the issues presented by the appeals have been adequately developed in the briefs and that oral argument would not be helpful.

2.714(a). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979).

The controversy focuses instead upon the Licensing Board's treatment of the question whether FUA nevertheless should be denied intervention because of the extreme belatedness of its petition and the imminence of the evidentiary hearing. As the Board correctly recognized, in resolving that question it was required to look to the five factors which 10 CFR 2.714(a) mandates be balanced when a belated petition is at hand:

> (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.

In its decision, the Board discussed each of these factors in turn. LBP-81-11, supra, 13 NRC at ___ (slip opinion, pp. 4-12). Its ultimate conclusion was that, collectively, the factors justified allowing the eleventh hour introduction of some, but not all, of the FUA contentions and, thus, supported the grant of intervenor

status to the organization. Id. at ___ (slip opinion, p. 13). FUA was cautioned, however, that it must "take the proceeding as it currently stands * * *". Id. at ___ (slip opinion, p. 4).

It is well-settled that the appellate review of licensing board application of the five factors is governed by the "abuse of discretion" standard. See, e.g., Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 13 (1977); Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 389, 390 (1976), and cases there cited. But it is equally clear that this standard does not foreclose our close scrutiny of the factual and legal ingredients of the analysis underlying the board's ultimate conclusion. ALAB-420, supra; ALAB-354, supra; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612 (1977). And we think that the obligation to undertake such an examination is particularly apparent in the circumstances of this case.

As will be discussed in greater detail infra, the Licensing Board did not find that FUA was warranted in waiting until March 1981 before seeking to intervene. As also will be seen, our own appraisal of the record confirms that FUA's tardiness was manifestly unjustified. This being so, the validity of the grant of

the petition so close to the start of the hearing perforce hinges upon whether a compelling showing has been made by FUA on the other four factors. Once again, by March 9 when the hearing date was set (if not long before), the applicants and the staff had every right to assume that both the issues to be litigated and the participants had been established with finality. Simple fairness to them -- to say nothing of the public interest requirement that NRC licensing proceedings be conducted in an orderly fashion -- demanded that the Board be very chary in allowing one who had slept on its rights to inject itself and new claims into the case as last-minute trial preparations were underway.

For the reasons which follow, we are persuaded that FUA's showing on the controlling factors fell fatally short of what might have provided a sufficient foundation for a discretionary allowance of tardy intervention. Accordingly, the April 30 order cannot stand.

II.

For the purposes of its analysis, the Licensing Board divided FUA's contentions into two groups. The first consisted of the ten contentions which were ultimately admitted to the proceeding; they broadly dealt with corporate management (Nos. 1, 2, 27) and emergency planning (Nos. 7-13). The second group embraced the 17 rejected contentions -- covering such widely diverse subject matter

as financial qualifications (Nos. 3 and 4); seismicity (Nos. 5 and 6); steam generator tube integrity (No. 14); quality control (No. 15); diesel generator reliability (No. 16); class 9 accidents (No. 17); anticipated transients without scram (No. 18); license condition implementation (No. 19); storage and transportation of spent fuel (Nos 20-22); health effects of radiation releases during normal plant operation and as a result of the uranium fuel cycle (No. 23); systems interactions (No. 24); control room design (No. 25); and hydrogen control (No. 26).

A. In its decision, the Licensing Board summarized the variety of reasons assigned by FUA for the failure to have sought intervention on any issue at a much earlier date. LBP-81-11, supra, 13 NRC at ___ (slip opinion, pp. 2-3). In large measure, those reasons were found insubstantial. Id. at ___ (slip opinion, pp. 4-5). Nevertheless, the Board concluded that, in light of the revisions made in the Commission's criteria for emergency planning following the Three Mile Island accident, FUA had good cause to wait until the middle or latter part of 1980 before filing its contentions on that subject. "[B]ecause of the Commission's focus on management capability in the post-TMI era", the Board reached a similar conclusion with regard to "the delay in filing the management capability contentions". Id. at ___ (slip opinion, pp. 5-6).

We need not determine here whether the Board was right in that view. Be that as it may, the post-TMI events cannot possibly serve to justify FUA's election to wait until the end of March 1981 to file its petition. In this connection, as the Board itself emphasized, the final rule establishing new and specific standards for on-site and off-site radiological emergency plans was published on August 19, 1980. 45 Fed. Reg. 55402. And we have been pointed to no more recent developments in the corporate management area which might be taken as having first triggered FUA's obligation to put forward its concerns on that subject.[4/]

4/ It appears from the petition to intervene (at p. 4) that FUA had assumed prior to mid-February 1981 that "its interests were being represented, to some extent, by" Mr. Bursey. Only then, when it was given reason to doubt the continuing validity of that assumption, did FUA undertake "an immediate and thorough inquiry into the status of this proceeding and its rights and remedies". As the Board below correctly observed, that excuse is not acceptable. See Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644-45 (1977).

Apart from stressing its [illegible]ced reliance upon the Bursey intervention, in its appellate brief (at p. 3) FUA reiterated its complaint below respecting the asserted lack "for several years" of a "properly managed" local public document room. Whether or not this assertion has factual substance, it too provides an inadequate explanation for the March filing of the intervention petition. As FUA acknowledges (Br. p. 2), its representatives attended a November 25, 1980 prehearing conference in this proceeding. At that time, if not before, it had a full opportunity to acquire whatever information may have been necessary to undergird its petition. Yet it waited another four months -- as it admits (Br. pp. 2-3), because of the Bursey intervention.

B. The Board below nevertheless found the "good cause" 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". 13 NRC at ___ (slip opinion, p. 7). Central to this finding was the Board's articulated belief that no other party to the proceeding had been disadvantaged by the filing in March (rather than considerably earlier) and that the progress of the proceeding would not be delayed. Id. at ___ (slip opinion, pp. 6-7).5/

We disagree with the Board on both scores. It seems manifest to us that the introduction of FUA and its accepted contentions

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5/ It is not entirely clear from an earlier statement in the Board's discussion on this point whether the Board might have thought that these considerations bear upon the existence of good cause for the tardy filing in March, as opposed to the possible significance of the absence of such cause. We have specifically in mind the observation that "[h]ad 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". 13 NRC at ___ (slip opinion, pp. 6-7).

Obviously, whether there is "good cause" for a late filing depends wholly upon the substantiality of the reasons assigned for not having filed at an earlier date. For their part, the consequences of the tardiness are to be looked at in connection with the other factors (most particularly the fifth one, dealing with delay and the broadening of the issues). We shall assume that the Licensing Board recognized this consideration and that its finding quoted in the text was intended to mean only that the "good cause" factor did not weigh heavily against FUA in the overall assessment of the delinquent petition.

into the proceeding less than two months before the scheduled trial date has prejudiced other parties. Further, a delay in the progress of the proceeding is not merely a theoretical possibility but rather a very likely proximate result of the belated intervention.[6/]

6/ At the April 7-8 prehearing conference, the Licensing Board announced that, if not completed during the June 22-July 3 period, the evidentiary hearing would resume on July 13 and continue through July 24 (Tr. 666). This was later confirmed in a May 14 "notice of scheduling of evidentiary hearing".

On May 12, FUA filed a "motion for continuance" in which it called attention to the fact that FUA and its representatives are also parties to a rate proceeding pending before the South Carolina Public Service Commission. That proceeding (involving one of the present applicants) is scheduled to commence on July 13. Asserting that it lacked the resources to appear simultaneously in both proceedings, FUA asked that, unless the state proceeding were rescheduled, the July 13 hearing session in the NRC proceeding be postponed.

On the date of the filing of FUA's brief with us (May 20), the motion was pending before the Licensing Board (and it still is). Yet, FUA did not refer to it in that brief. Particularly because one of the signatories was a member of the Bar (see fn. 12, infra), we find the omission disturbing. Clearly, were the motion to be granted, there might well be a delay in the completion of the evidentiary hearing as a direct consequence of FUA's intervention. This being so, FUA should have acknowledged the existence of the pending motion in the course of its argument (Br. pp. 11-12) that the late intervention would cause no "relevant" or "unproductive delay".

1. Had FUA sought and obtained intervention in a more timely fashion, the applicant and the staff could have instituted discovery against it without jeopardizing the present commencement date for the evidentiary hearing. The Licensing Board acknowledged that fact but went on to express the opinion that "discovery would not have benefitted them on the issues we are admitting". This is said to be so because FUA "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". 13 NRC at ___ (slip opinion, pp. 8-9).

The principal difficulty with that line of reasoning is that it ascribes too limited a role to the discovery process. Parties to a proceeding are entitled to obtain in advance of hearing much more than simply a summary statement of the bases for their adversaries' claims and some identification of potential witnesses whose testimony might support those claims. Rather, as we had recent occasion to stress, "[i]n modern administrative and legal practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial". Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322 (1980),

quoting from Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978). In the same vein, the Supreme Court has noted that, as a result of the availability of discovery, "[t]he way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial". Hickman v. Taylor, 329 U.S. 495, 501 (1947).

The short of the matter is that, because of FUA's inexcusable tardiness, the other parties to the proceeding have been effectively deprived of the opportunity to obtain "the fullest possible knowledge" of what FUA proposes to adduce in support of its contentions. To be sure, the Board directed that "the parties cooperate in informal discovery" with respect to the "applicant's and [s]taff's evolving positions on emergency planning". 13 NRC at ___ (slip opinion, p. 9). But, irrespective of precisely what the Board may have had in mind in that regard, it seems reasonably apparent that the contemplation was not that either the applicants or the staff would undertake to determine the metes and bounds of FUA's case by means of interrogatories, depositions, document discovery and requests for admissions. In any event, time would have not permitted such an exploration -- at least so long as the June 22 hearing date remained inviolate.7/

7/ In this connection, it is our understanding that the prefiled testimony was due on May 28.

2. Equally unpersuasive is the Licensing Board's treatment of the impact of the tardy intervention upon the ability of the applicants and the staff to seek summary disposition of one or more of FUA's admitted contentions. The Board opined that neither the corporate management nor the emergency planning issues are now susceptible of summary disposition. 13 NRC at ___ (slip opinion, p. 9). By that, the Board presumably meant that a trial could not be entirely avoided on those issues. But it scarcely follows that none of the specific claims set forth in FUA's numerous contentions would be disposable summarily -- in part if not in whole.[8/] Thus, by countenancing FUA's intervention at such a late date that pre-trial resort both to discovery and to summary disposition procedures became practical impossibilities, the Board has created the substantial danger that hearing time will be unnecessarily expended and, thus, wasted.

3. The Licensing Board reasoned that, because "the corporate management and emergency planning issues had already been admitted to the proceeding (by Board question or intervenor [i.e., Bursey] contention)", the issues would not be broadened by FUA's admission to the proceeding on those subjects. 13 NRC at ___ (slip opinion, p. 8). We cannot agree.

Only one of Mr. Bursey's contentions even remotely brings into question the applicants' managerial capabilities: in contention

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8/ Some of those specific claims are summarized infra, pp. 14-15.

A2, that intervenor asserted that the applicants lack the financial qualifications to operate and decommission the facility both safely and in compliance with NRC regulations. For its part, the Licensing Board manifested at a November 25, 1980 prehearing conference its "concern" that the proposed addition of the South Carolina Public Service Authority as a co-owner of the facility might "compromise management responsibility for the public health and safety". See December 30, 1980 memorandum and order (unpublished), at pp. 6-7.

The FUA contentions go well beyond those matters, into applicants' competence to operate a nuclear facility. Contention 1, for example, asserts broadly that the "overall corporate management of the Applicant is sufficiently inexperienced in the operations of a nuclear power facility and is generally deficient in management abilities essential to the safe operation of a nuclear power plant or properly to respond under accident conditions". Contention 2 challenges the adequacy of the "hands on" experience of the applicants' "reactor operator staff".[9/] And contention 27 disputes the adequacy of the applicants' technical and management resources to fulfill new regulatory requirements imposed as a consequence of the Three Mile Island accident.

9/ At the April 7-8 prehearing conference, the Board below alluded to a "question" raised by the Advisory Committee on Reactor Safeguards in the corporate management "area" (Tr. 478-79). The question was not there identified more precisely. From the April 30 order, 13 NRC at ___ (slip opinion, pp. 10-11), it appears that the question dealt in part with the applicants' "hands-on operating experience". What the Board left unclear was whether it was then raising that question itself. If not, the ACRS concern necessarily will have to receive staff attention before an operating license is issued. See p. 25, infra.

Insofar as emergency planning is concerned, Mr. Bursey's single contention in that area (A8) focused upon the applicants' asserted lack of adequate preparations for "the implementation of [its] emergency plan in those areas where the assistance and cooperation of state and local agencies are required". Our examination of the record does not disclose that the Board has undertaken on its own to raise additional emergency planning issues. Yet the FUA contentions manifestly have done precisely that. Thus, it is claimed in various subparts of contention 7 that, among other things, the applicants' plan does not meet minimum staffing requirements; that realistic estimates of evacuation times have not been developed; that adequate means have not been provided for the protection of those without access to motor vehicles; that no provisions have been made for the distribution and use of "radioprotective" drugs; that on-site emergency first aid capability is inadequate; and that the applicants' meteorological monitoring equipment does not satisfy NRC requirements. The other FUA emergency planning contentions (8 through 13) likewise contain assertions which broaden significantly what Bursey contention A8 called upon the applicants and the staff to confront in their prefiled testimony and at the hearing.

The Licensing Board undoubtedly was aware of the expansive reach of the FUA contentions. It is a fair inference, therefore,

that the Board thought that, for the purposes of Section 2.714(a), a belated petition can be held to "broaden the issues" only if it introduces an entirely new subject matter. But such an interpretation is at odds with the commonly understood meaning of "broaden", i.e., "to extend the limits of".[10/] And there is no reason to assume that the Commission had any other meaning in mind. To the contrary, in assessing this factor in West Valley, CLI-75-4, supra, 1 NRC at 276, the Commission emphasized the fact that "substantially identical" issues to those presented in the late petition had been raised by other parties. As has been seen, FUA's contentions are far from "substantially identical" to either those of Mr. Bursey or the Board's management responsibility question.

C. We now turn to the factor which the Licensing Board thought weighs "most heavily" in FUA's favor with respect to its corporate management and emergency planning contentions. According to the Board, FUA can be expected to make a substantial contribution to the development of a sound record on those subjects. Its explanation for this conclusion was contained in one sentence: "As is apparent from FUA's pleadings and from the general discussion at the prehearing conference, petitioner's members have become well versed [on corporate management and emergency planning matters], independently

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10/ Webster's Third New International Dictionary (1971), at p. 280.

of any intention of intervening in this proceeding, through their participation in rate-making proceedings and in the ongoing emergency planning". 13 NRC at ___ (slip opinion, p. 10).

In addition, while acknowledging that it "perhaps" did not constitute grounds for allowing FUA intervention, the Board recorded its conviction that Mr. Bursey was incapable of making a significant contribution to the development of the record. The Board pointed to that intervenor's manifested "inability to effectively manage his case" and suggested that it could not count on assistance from him in the resolution of the corporate management question that it had raised (although "valuable assistance" on that question was to be expected of the staff). 13 NRC at ___ (slip opinion, pp. 10-11).

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. It is often the case that one or another of the parties to a proceeding will give the presiding board legitimate cause to question its ability to make an effective presentation on the issues in controversy. When confronted with such a situation, the board may well have to take a more active role in the proceeding itself. For example, it may find it necessary to undertake its own interrogation of the witnesses.[11/]

11/ See 10 CFR 2.718(g). See also, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 20 (1975), where "the Board made a determined effort to insure that the issues were thoroughly explored".

This, it seems to us, is the appropriate course to follow -- rather than opening the door, as the hearing date approaches, to another would-be party which seeks not merely to participate in the record development on the then-existing matters in controversy, but also to expand the issues to be heard.

In appraising the ruling below on the factor at hand, we accordingly eschew any comparison of FUA's seeming capabilities with those of Mr. Bursey. Instead, our inquiry is restricted to whether the record supports the Licensing Board's conclusion that FUA's likely contribution is of sufficient magnitude to favor strongly allowing its intervention at this time.

1. FUA is represented in this proceeding primarily by Dr. John C. Ruoff.[12/] According to his affidavit appended to the intervention petition, Dr. Ruoff possesses a PhD in history and is a self-employed "research consultant to a variety of nonprofit and community-based organizations". In recent years (1979-80), he participated as an intervenor on his own behalf in a rate proceeding conducted before the South Carolina Public Service Commission,

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12/ On the second day of the April 7-8 prehearing conference, Robert Guild, Esquire, of the Bar of South Carolina entered a special appearance for the purpose of addressing on FUA's behalf the legal issues raised by the untimeliness of the intervention petition (Tr. 494). Along with Dr. Ruoff, Mr. Guild also signed the brief which has been submitted to us on the instant appeals. It appears from FUA's May 12 motion for a continuance (see fn. 6, supra) that Mr. Guild's participation at the evidentiary hearing would be restricted to providing FUA with assistance on any legal issues which may arise. We therefore assume that Dr. Ruoff would be solely responsible for the examination of witnesses and anything else required to develop FUA's position on the substantive issues.

which involved the lead applicant (South Carolina Electric and Gas Company). "[T]hrough that proceeding", it is averred, he "became educated and informed about the organization, management and operation of the Applicant and the design, construction, and plans for the operation" of the Summer facility. Further, his participation in the programs of FUA over the past year has enabled him to "become educated on the subject of the design and operation of nuclear power plants and the probable effects of [Summer] operation".

2. At the April 7-8, 1981 prehearing conference which, inter alia, addressed the FUA petition, Dr. Ruoff told the Licensing Board that he did not have an available witness to support the management capability contentions in that petition (Tr. 467). Instead, it is his apparent intention to restrict himself to the cross-examination of applicant (and possibly staff) witnesses (Tr. 477, 479, 482, 657-58). And, as previously noted (p. 11, supra), in its April 30 order the Board made it plain that FUA will not be permitted to add witnesses at this point.

Without far more particularization of his experience and knowledge than is set forth in his affidavit or was provided at the April 7-8 conference, we are unable to discern any basis for concluding that Dr. Ruoff's participation as a cross-examiner is imperative to the development of a comprehensive record on the

applic[illegible]' management capability. While his involvement in the state rate proceeding may well have acquainted him with details of the financial structure of the lead applicant, it is not immediately obvious why it would have provided unusual insight into that company's competence to operate a large nuclear facility (as raised by FUA's contentions 1, 2 and 27). Nor was the Board below given reason for confidence that such insight might have been supplied by Dr. Ruoff's unspecified role in unspecified FUA programs.

We do not intimate, of course, that Dr. Ruoff would be incapable of making any contribution through cross-examination of applicant or staff witnesses. All that we determine, or need decide, is that FUA's showing on the "record development" factor was not strong enough to warrant, standing alone, the grant of its inexcusably and materially late petition. In this connection, as noted above it is both the right and the responsibility of the Licensing Board to examine witnesses itself, if necessary in the interest of insuring that a proper record is compiled on all matters in controversy (or raised by it sua sponte). We take official notice that the two technical members of the Board below have served on the Licensing Board Panel for nine and eight years respectively, during which period each has sat on numerous licensing proceedings. That being so, it surely does not demean Dr. Ruoff's credentials to suggest that the Board is at least as well-equipped

to pursue any relevant lines of inquiry as might be Dr. Ruoff on the basis of his participation in a single rate proceeding and less than one year's association with a community-based organization.

3. FUA does propose to present one or more witnesses in support of its emergency planning contentions. At the April 7-8 prehearing conference, Dr. Ruoff made specific reference to Dr. Janet Greenhut and Marlene Bowers Andrews (Tr. 592-96). Dr. Greenhut is a physician and FUA member. Dr. Ruoff informed the Board that, because he had not been able to obtain "as yet" an expert on radiological health, he might call upon her to testify. He noted that "Dr. Greenhut has done some research into that area with some medical literature" (Tr. 596). Ms. Andrews was described by Dr. Ruoff as "an expert in psychology who has been doing work on nuclear emergencies, radiological emergencies" (Tr. 595). She was said to have agreed to appear as a FUA witness (ibid.).

Apart from those named individuals, Dr. Ruoff expressed an interest in calling "the emergency preparedness people from the four county area, the four counties within the plume exposure pathway, emergency planning zone" (Tr. 593). He conceded, however, that he had not obtained a commitment from any such persons to testify on FUA's behalf (ibid.). He also reaffirmed the assertion in the FUA petition (as part of the basis for contention 7) that FUA has members (including himself) who possess "unique"

knowledge of the demography, roads, traffic patterns and topography of the area surrounding the Summer site (Tr. 596). It is unclear, however, whether he proposed to produce the testimony of some of those members and it is even more doubtful that the Board below would now permit him to add them to the witness list.[13/]

What appears from these disclosures is no more than that FUA may be in a position to assist the development of the record on a few -- but well short of all -- of the numerous assertions made in its emergency planning contentions. Just how significant that assistance might be is problematic. It depends, of course, on the state of the knowledge of FUA's proposed witnesses on the subjects they would address. Dr. Greenhut and Ms. Andrews are the only potential witnesses who have been specifically identified. What the Board was told about their qualifications and possible testimony was plainly too sparse to permit an informed judgment regarding their likely contribution.[14/]

13/ FUA contention No. 13 is concerned with off-site radiation monitoring. In a colloquy with the Board, Dr. Ruoff noted that the derivation of that contention was discussions FUA had had with the Union of Concerned Scientists. He conceded that he had not obtained a witness to support the contention. He also acknowledged that the contention did not parallel any of Mr. Bursey's contentions. Tr. 621.

14/ At several points both in its petition and during the prehearing conference, FUA made mention of various employees of the lead applicant who assertedly would shed some light on the corporate management and emergency planning questions raised by the petition. In a May 13, 1981 order (at p. 9), (FOOTNOTE CONTINUED ON NEXT PAGE)

D. We have no quarrel with the Licensing Board's conclusions respecting the remaining two factors.[15] 13 NRC at ___ (slip opinion, pp. 11-12). Given the Board's appraisal of the manner in which Mr. Bursey is carrying forward his own intervention, there is little reason to suppose that he would adequately represent FUA's interest. Moreover, once again, the FUA and Bursey claims differ in significant measure. And while the applicants and the staff point out that FUA members might choose to make limited appearance statements, we are not persuaded that, in the circumstances of this case, their interest would be fully protected by such restricted participation in the proceeding. Nor do we perceive other means which might serve that purpose.

But, as the Licensing Board itself correctly observed, those factors "are given relatively lesser weight than the other factors". 13 NRC at ___ (slip opinion, p. 11). Indeed, it is most difficult

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14/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
the Licensing Board directed that those employees be made available at the hearing for FUA examination. We do not deem them to be FUA witnesses and, further, find no basis for conjecture on how fruitful FUA's examination of them might prove to be.

In the same order (at pp. 9-11), the Board ruled that FUA also would be permitted to cross-examine on the issues raised by Mr. Bursey's contentions -- which encompass several subjects (e.g., seismicity) apart from corporate management and emergency planning. There is an equal lack of basis for an informed prediction respecting the utility of FUA's exercise of that privilege.

15/ I.e., the availability of other means whereby the petitioner can protect its interest and the extent to which other parties will represent that interest.

to envisage a situation in which they might serve to justify granting intervention, after the hearing date was set, to one who (1) is inexcusably late; (2) seeks to expand materially the scope of the proceeding; and (3) offers, at best, a marginal showing with respect to its ability to make a truly significant, substantive contribution. In the present context, for the very reason that, as FUA puts it (Br. p. 9), "[t]his proceeding represents the best forum for the protection of [its] interest in health and safety matters regarding the Summer Nuclear Station", the organization should have filed its intervention petition at a much earlier date. By instead remaining on the sidelines while the proceeding moved closer and closer to trial, it voluntarily assumed the precise risk which has now materialized: that its participation in the proceeding could no longer be sanctioned without destructive damage to both the rights of other parties and the integrity of the adjudicatory process itself.

E. For the foregoing reasons, the denial of the FUA petition was mandated. Although understandably hesitant to deprive FUA of the opportunity to ventilate its seemingly genuine concerns at the hearing which is about to commence, in the totality of circumstances the Licensing Board simply had insufficient justification under the Commission's Rules of Practice for allowing this crucially tardy intervention.

It does not follow from FUA's exclusion from the proceeding that its concerns perforce will be ignored in the licensing of this reactor. Insofar as they overlap either matters placed in controversy by Mr. Bursey or issues raised by the Board sua sponte (see 10 CFR 2.760a), it will be the Board's responsibility to require their adequate evidentiary exploration. To the extent that they go beyond the bounds of the hearing as fixed prior to the belated FUA intervention attempt, under the long-prevailing regulatory scheme these concerns fall within the province of the staff. In all events, an operating license may not issue unless and until this agency makes the findings specified in 10 CFR 50.57 -- including the ultimate finding that such issuance "will not be inimical to * * * the health and safety of the public". As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted[16/]), it is the staff's duty to insure the existence of an adequate basis for each of the requisite Section 50.57 determinations.

Insofar as it granted the intervention petition of Fairfield United Action, the April 30, 1981 order of the Licensing Board,

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16/ On the operating license level, a hearing is required only in response to a successful petition for leave to intervene and request therefor. Section 189a. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239(a).

LBP-81-11, 13 NRC ___, is reversed and the cause is remanded with instructions to deny that petition as untimely.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

Ms. Kohl, concurring:

I join fully in the Board's opinion. I take this opportunity only to make two brief additional points.

1. FUA's papers, particularly those prepared by Dr. Ruoff and filed before the Licensing Board, represent an impressive -- albeit unsuccessful -- effort to participate in and contribute to this important proceeding. Given the quality of these pleadings and the asserted interest of its members in the Summer facility, it is especially difficult to understand why FUA, which was incorporated in early September 1980, waited over six months before taking any formal action in furtherance of that interest.[1/]

1/ Even after FUA's representatives attended a November 25, 1980, prehearing conference, the organization took no immediate action to formalize its involvement. See fn. 4, supra.

None of the reasons FUA offered for the delay -- set forth by the Licensing Board, 13 NRC at ___ (slip opinion, pp. 2-3) -- proves persuasive. Indeed, its inaction is inconsistent with its professed concern about this plant and this proceeding.

2. One means does exist, however, by which FUA can contribute to this proceeding without being afforded party status. The organization can furnish financial, technical, legal, or other assistance to the sole existing intervenor, Mr. Bursey. Virginia Electric and Power Co. (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 399 (1975). This, of course, provides no fully satisfactory substitute for direct participation (see p. 23, supra). But if FUA is sincere in its interest -- and there is no reason to doubt that it is -- it will grasp this opportunity enthusiastically.[2/]

2/ I note in this connection that FUA's counsel, Mr. Guild (see fn. 12, supra), at one time was to have appeared in this proceeding as a witness for Mr. Bursey on his Contention A2 (May 13, 1981, Order at pp. 3, 11-12). Thus, there is an ostensible connection between FUA and the intervenor that would facilitate an offer (and acceptance) of assistance from the former.