

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

SOUTH CAROLINA ELECTRIC & GAS
COMPANY

Virgil C. Summer Nuclear Station,
Unit 1

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Docket No. 50-395

NRC STAFF BRIEF IN OPPOSITION TO
PETITION FOR REVIEW OF ALAB-642

Steven C. Goldberg
Counsel for NRC Staff

June 26, 1981

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I. INTRODUCTION

On June 15, 1981, Fairfield United Action (FUA) filed a petition, pursuant to 10 C.F.R. § 2.786, for Commission review of the June 1, 1981 Decision of the Appeal Board in the captioned proceeding (ALAB-642). The Appeal Board decision reversed the Licensing Board's grant of the late FUA petition for leave to intervene in that Board's prehearing conference order of April 30, 1981.

Petitioner seeks review of ALAB-642 on the grounds that the Appeal Board erred in failing to accord the Licensing Board a proper measure of discretion in ruling on late intervention and in otherwise reversing the grant of late intervention to FUA. The Appeal Board properly held that a consideration of the factors relevant to late intervention mandated the denial of intervention and that the Licensing Board's ruling to the contrary constituted an abuse of the latter's discretion in such matters. Petitioner has not made a satisfactory showing to warrant Commission review under the applicable provisions of 10 C.F.R. § 2.786(b) and thus the Staff opposes the present petition.

II. DISCUSSION

Assuming the applicability of the review standards in 10 C.F.R. § 2.786(b), Commission review is unwarranted in the present matter.^{1/} The decision does not involve an "important question of fact, law or policy" let alone an "erroneous" one. Commission review of the Appeal Board decision on its own motion would seem to be even less appropriate given the provisions of 10 C.F.R. § 2.786(a) which confines such review to cases of "exceptional legal or policy importance."

A. Summary of Discussion

This proceeding was initiated almost four years ago upon publication of a notice of opportunity for hearing in the Federal Register on April 17, 1977.^{2/} One intervention petition was received and granted as a result of this notice. Pursuant to a February 21, 1981 conference call, the evidentiary hearing was scheduled to be held from June 22-July 2, 1981.

As relevant to this petition, FUA filed an untimely petition to intervene containing 27 proposed contentions on March 23, 1981. Both

^{1/} By its literal term, 10 C.F.R. § 2.786(b) does not contemplate filing with the Commission a petition for review of an Appeal Board decision on intervention rendered pursuant to 10 C.F.R. §2.714a. However, the Commission has entertained at least one such appeal. See Florida Power and Light Co. (St. Lucie, Unit 2), CLI-78-12, 7 NRC 939 (1978). On another occasion, it rejected such a petition yet exercised review of a decision on its own motion pursuant to 10 C.F.R. § 2.786(a). Puget Sound and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), Commission order (unpublished) (January 16, 1980).

^{2/} 42 Fed. Reg. 20203.

the Applicant^{3/} and Staff^{4/} opposed the late petition on the grounds that it was not justified upon balancing the factors governing nontimely petitions set forth in 10 C.F.R. § 2.714(a).^{5/} On April 30, 1981, the Board issued an Order granting the late intervention petition along with ten of its contentions.^{6/}

The Applicant and Staff separately appealed the Licensing Board's April 30, 1981 decision. The Appeal Board Decision of June 1, 1981 reversed the Licensing Board's grant of late intervention. ALAB-642. On June 5, 1981, FUA filed an application for a stay of ALAB-642 pending Commission review of this petition. The Applicant and Staff opposed this application in separate responses, dated June 12, 1981. On June 15, 1981, the Appeal Board issued a Memorandum and Order denying the stay application (ALAB-643). On June 19, the Commission took the same action. Accordingly, the evidentiary hearing commenced on June 22 and is currently in progress.

3/ See Applicant response, dated March 30, 1981.

4/ See Staff response, dated April 13, 1981.

5/ These factors are:

- (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.

6/ See Attachment A to Staff appeal brief, dated May 11, 1981, for Statement of admitted contentions.

B. Statement of Issue Prevented Below

The issue before the Appeal Board was whether the Licensing Board correctly decided that the late intervention petition of FUA was justified upon consideration of the relevant factors in 10 C.F.R. § 2.714(a).

C. Correctness of Appeal Board Decision

The Appeal Board reversed the Licensing Board's grant of late intervention on the grounds that a consideration of the relevant factors in 10 C.F.R. §2.714 mandated denial of the FUA petition and that the Licensing Board's ruling to the contrary constituted an abuse of discretion in such matters.^{7/}

The Appeal Board concluded in material part: (1) that the lateness of the FUA petition (filed shortly before the scheduled evidentiary hearing) was "manifestly unjustified"^{8/} (factor one); (2) that the grant of late intervention significantly expanded the issues in the proceeding with a concomitant delay in the progress of the proceeding^{9/} (factor five);

^{7/} Slip op. at 2-6.

^{8/} Id. at 5. In arriving at this opinion, the Appeal Board explicitly rejected the argument pressed by FUA in its current petition (Petition at 7-9) that post-TMI regulatory action provided good cause for FUA's late petition. The Appeal Board observed that, since whatever post-TMI events were germane to the contentions in FUA's petition were known by mid-1980, they could not possibly "serve to justify FUA's election to wait until the end of March 1981" to file its petition." Id. at 9. The Staff agrees. While there may have been continuous developments during the course of the Staff review of utility management and emergency planning as FUA notes, if FUA had an earnest interest in participating in the consideration of such matters, it should (and could) have done so when the issues first assumed added post-TMI importance in 1979 and 1980 not on the eve of the scheduled hearings.

^{9/} Id. at 9-10.

and (3) that the Licensing Board had attributed a greater ability on FUA's behalf to contribute to the proceeding than was warranted on the basis of the record^{10/} (factor three). The Appeal Board agreed with the Licensing Board that the remaining factors (factors two and four) tended to favor the grant of late intervention but were of no consequence given the counter-vailing weight of the other factors.^{11/} The Staff agrees.

The Appeal Board further observed that by remaining on the sidelines while the proceeding moved ever closer to trial, FUA voluntarily assumed the inevitable risk that its participation would not be allowed without "detrimental damage" to both the rights of the other parties (including denial of discovery and summary disposition) and the integrity of the litigative process itself.^{12/} The clear language of the Appeal Board decision underscores its decision that the merits of the FUA petition "fell fatally short" of warranting the "discretionary allowance" of late intervention.^{13/}

Petitioner argues that the Appeal Board failed to "defer to the proper exercise of broad discretion" by the Licensing Board in ruling on late intervention. (Petition at 5). This is not accurate. The Appeal Board recognized the discretion accorded a Licensing Board under such circumstances and applied the "abuse of discretion" standard for

^{10/} Id. at 20-22.

^{11/} Slip op. at 24.

^{12/} Id. at 24; See also Id. at 11-13.

^{13/} Id. at 6; See also Id. at 24.

appellate review of such decisions.^{14/} Accordingly, based on its "close scrutiny" of the Licensing Board decision, the Appeal Board found absolutely no justification for the Board's exercise of discretion in admitting FUA.^{15/} The entire opinion of the Appeal Board can lead to no other logical conclusion. The Appeal Board Memorandum and Order denying FUA's stay application (ALAB-643) reinforces this assessment.

The Staff believes that the Appeal Board reached the only decision proper under the circumstances. Whatever legitimate interest FUA may have had in the proceeding, such interest was waived by FUA's failure to seek intervention on anything resembling a timely basis. FUA's claim that its participation as a party is necessary to the development of a sound record is unavailing. Adjudicatory consideration of the subject areas presented in the FUA contentions (though admittedly not every detail) is assured by virtue of either a Board question (management competence) or Intervenor contention (emergency planning). Petitioner did not file any direct testimony on its management competence contentions. Instead, it intended to cross-examine Applicant witnesses relying on the familiarity gained through its past participation in state rate proceedings. The Appeal Board correctly found that it was "not immediately obvious" why this involvement in a state rate proceeding would provide unique expertise in the area of management competence to operate a nuclear facility.^{16/}

^{14/} Slip op. at 5.

^{15/} Id. at 6. This kind of independent analysis of the underlying record is appropriate in such circumstances. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 12 (1977); Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976).

^{16/} Slip op. at 20.

The Appeal Board could discern no basis for the Licensing Board's firm opinion to the contrary. This was particularly true, in the Appeal Board's estimation, given the inexcusable lateness of the petition and the collective ability of the experienced Board members to insure the development of a sound record on these matters.^{17/}

The only direct testimony filed by FUA consists of the testimony of two individuals concerning one aspect (public information) of one emergency planning contention. The gravamen of their prefiled testimony is that the Applicant's public information literature about emergency procedures and preparedness is too complicated for the less educated residents in the area. The Staff believes that this may be a valid criticism and would encourage the Applicant to take this into account in the development and expansion of its public information program concerning accident risks and emergency preparedness. FUA did not prefile any other proposed testimony.

Finally, as the Appeal Board aptly noted, the introduction of a new party and new issues in a proceeding initiated over four years ago for which hearings are imminent compromises the integrity of the adjudicatory process.^{18/} This mirrors the reasoning applied by the Appeal Board in the North Anna decision on late intervention. VEPCO (North Anna Nuclear Power Station, Units 1 and 2), ALAB-289, 2 NRC 395 (1978). As the Appeal Board stated therein, even if, as here, a petitioner is required to take the proceeding as it finds it "experience teaches that the admission

^{17/} Id. at 20-21.

^{18/} Slip op. at 24.

of a new party just before a hearing starts, is bound to confuse or complicate matters." Id. at 400. The Appeal Board further stated that:

[D]elay can otherwise be avoided only if the parties adverse to the [petitioner] forego important procedural rights, including the right to discovery.....It is scarcely equitable to give the [petitioner] credit for not causing delay when that result could be achieved only because the circumstances would coerce other parties into waiving substantial rights.

Id. Here, as in North Anna, an appeal was inevitable whichever way the Board ruled. Therefore, like North Anna, Petitioner's procrastination "made it inevitable that its entitlement to intervene could not be finally resolved until just before the hearing began, if then. Simple fairness to all parties in these proceedings mandates that such practices not be condoned." Id.

D. Commission Review Should Not Be Exercised

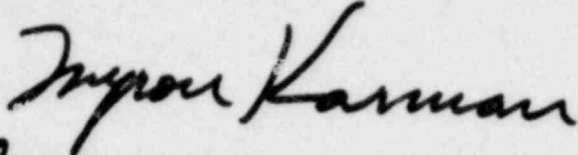
The decision below properly determined that there was insufficient justification for the Licensing Board to grant petitioner's "crucially tardy"^{19/} intervention under the circumstances of this case. The Appeal Board Decision is amply supported by the operative law and facts. It does not entail an "important question of fact, law or policy" let alone an "erroneous" one so as to merit Commission review. Reinstitution of the Licensing Board decision would operate as a hardship on the other parties and disrupt the orderly conduct of the proceeding. It would establish an undesirable precedent for future cases.

^{19/} Slip op. at 24.

III. CONCLUSION

In light of the foregoing, the petition for review of ALAB-642 should be denied.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Steven C. Goldberg".

for Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of June, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF BRIEF IN OPPOSITION TO PETITION FOR REVIEW OF ALAB-642 in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 26th day of June, 1981.

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. John H. Buck
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Christine N. Kohl
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

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

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

Mr. Gustave A. Linenberger
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

George Fischer, Esq.
Vice President and General Counsel
South Carolina Electric & Gas Co.
P.O. Box 764
Columbia, South Carolina 29202

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

Mr. John Ruoff
P.O. Box 96
Jenkinsville, S.C. 29065

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

Joseph B. Knotts, Esq.
Debevoise & Liberman
1200 Seventeenth Street, N.W.
Washington, D.C. 20036

Randolph R. Mahan, Esq.
S.C. Electric & Gas Company
P.O. Box 764
Columbia, S.C. 29218

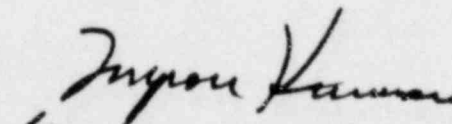
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Atomic Safety and Licensing Appeal
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

*Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Leonard Bickwit, Esq.
General Counsel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555


for Steven C. Goldberg
Counsel for NRC Staff