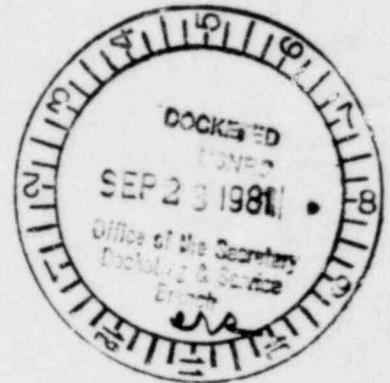


UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



FAIRFIELD UNITED ACTION,)	
)	
Petitioner,)	
)	
v.)	No.
)	
NUCLEAR REGULATORY COMMISSION,)	
)	
Respondent.)	

PETITION FOR REVIEW

Fairfield United Action hereby petitions the Court for review of the decision of the Respondent Nuclear Regulatory Commission denying its Petition to Intervene in the nuclear power plant operating license proceeding entitled SOUTH CAROLINA ELECTRIC AND GAS COMPANY, ET AL. (Virgil C. Summer Nuclear Station, Unit 1), Docket No. 50-395 OL. The decision of the Atomic Safety and Licensing Appeal Board, ALAB-642, June 1, 1981, reversing the April 30, 1981, order of the Atomic Safety and Licensing Board, which had granted Fairfield United Action's Petition in part is attached hereto as Exhibit A. This decision became final agency action on July 29, 1981, when the commission declined to grant review. The letter notice from the Secretary of the Commission dated July 31, 1981, is attached hereto as Exhibit B.

Pursuant to 28 U.S.C. Section 2344 Petitioner states as follows:

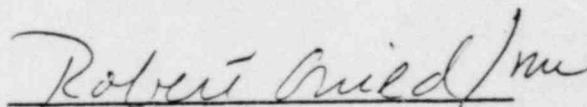
1) Fairfield United Action is a not-for-profit membership organization of persons residing and working in Fairfield County, South Carolina in close proximity to the Virgil C. Summer Nuclear Station, Unit 1, which is the subject of an operating license application by South Carolina Electric and Gas Company, et al. to the Respondent Nuclear Regulatory Commission as required by the Atomic Energy Act of 1954. The Licensing Board which was convened to conduct hearings on this application granted Fairfield United Action's late intervention request with respect to important emergency planning and management capability issues which had been the subject of significant revisions in commission policy in light of the Three Mile Island accident which occurred after the original intervention deadline in the proceeding had passed. The order granting this intervention was reversed on appeals by the Applicant and Commission Staff. By a vote of 2 to 2 the Commission itself declined to exercise review of the Appeal Board decision. The operating license application remains pending before the Licensing Board.

2) The Court's jurisdiction in this matter is provided for in 28 U.S.C. Section 2342 and 42 U.S.C. Section 2239. Venue in this Court is expressly provided for in 28 U.S.C. Section 2343.

-3) Relief is sought on the grounds that the Respondent Commission's action in denying the Petitioner's request to intervene violates the Administrative Procedure Act, the Atomic Energy Act and the United States Constitution.

4) Petitioner seeks for relief on order of this Court remanding this matter to the Respondent Nuclear Regulatory Commission with directions to admit Petitioner to this operating license proceeding and to permit Petitioner a full opportunity to be heard in support of its interest in this matter. Petitioner further requests that the Nuclear Regulatory Commission be directed to refrain from granting the operating license sought by the Applicants until such time as Petitioner has been provided such as opportunity to be heard.

September 22, 1981.



Robert Guild
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(803) 252-0929
Attorney for the Petitioner

UNITED STATES COURT OF APPEAL
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FAIRFIELD UNITED ACTION,)
)
 Petitioner,)
)
 v.) No.
)
 NUCLEAR REGULATORY COMMISSION,)
)
 Respondent.)
)
 _____)

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached "Petition for Review" were served upon the following persons by deposit in the United States mail, first class postage prepaid, this 23rd day of September, 1981.

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Washington, D.C. 20555

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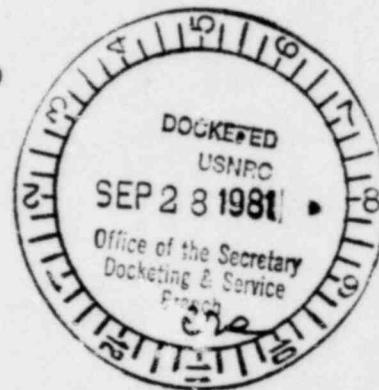
Robert Guild / new
Robert Guild

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



In the Matter of)

SOUTH CAROLINA ELECTRIC AND GAS)
COMPANY ET AL.)

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

Docket No. 50-395 OL

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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of both the applicants and the staffs,^{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 affirmation.^{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.

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

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).

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

^{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 pre-hearing 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.

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 ____ (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),

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 in-
to question the applicants' managerial capabilities: in contention

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

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 co-operation 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,

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".

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

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 pre-hearing 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"

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

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.

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. Burseley 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,

^{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).

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.