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Date: June 12, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

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

APPLICANTS' ANSWER IN OPPOSITION TO FAIRFIELD UNITED ACTION'S APPLICATION FOR STAY OF DECISION PENDING REVIEW

I. INTRODUCTION

Fairfield United Action ("FUA"), on June 5, 1981, moved this Appeal Board to stay its decision of June 1, 1981 in the above-captioned proceeding. ALAB-642, 13 NRC ___ (1981). The Appeal Board decision reversed an earlier decision by the Atomic Safety and Licensing Board, LBP-81-11, 13 NRC____ (1981), and remanded the cause with instructions to deny FUA's petition to intervene as untimely. 1/ Applicants South Carolina Electric and Gas Company and South Carolina Public Service Authority oppose FUA's Application for Stay.

1/ On June 3, 1981, the Licensing Board rendered its order dismissing FUA as a party in accordance with ALAB-642. FUA refers to the preservation of the status quo. Application for Stay at 1. Technically, the status quo is that FUA is not a party. They were a party only from April 30, 1981 to June 3, 1981. Their Application for Stay is dated June 5, 1981.

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FUA has failed to meet the requirements set forth in 10 C.F.R. § 2.788(e) which the moving party must fulfill in order to obtain a stay. The burden of persuasion to show compliance with the regulations is upon the moving party. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978). Specifically, FUA has made no strong showing that it is likely to prevail on the merits of its petition for review to the Nuclear Regulatory Commission and has totally failed to show that it will be irreparably injured in the absence of a stay. In addition, Applicants will show that granting a stay under these circumstances would be prejudicial to the interests of the other parties and that consideration of the public interest supports denial of the Application for Stay.

II. ARGUMENT

1. FUA Fails To Make A Strong Showing That It Is Likely To Prevail On The Merits

FUA wholly fails in its efforts to meet the first requisite for obtaining a stay under 10 C.F.R. § 2.788(e)--a strong showing that it is likely to prevail on the merits. FUA argues generally that the Appeal Board's decision fails to comport with the "abuse of discretion" standard for reviewing decisions of a Licensing Board. Yet, FUA points to no specific ways in which this alleged deficiency is manifest, and fails to come to grips with the Appeal Board's holding:

> [W]e 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. (ALAB-642 at 6).

FUA correctly notes that the Appeal Board reached conclusions

differing from those of the Licensing Board on a number of crucial issues, including whether FUA's intervention would disadvantage the other parties, cause delay, broaden the issues, and assist the Board in developing a record. FUA's Application for Stay at 2-3. FUA does not explain why these conclusions represent a failure of the Appeal Board to adhere to the appropriate standard of review. Indeed, FUA could not possibly make such a showing. The cases FUA relied upon (Application for Stay at 2) clearly contemplate that the "abuse of discretion" standard permits the Appeal Board to provide the kind of careful scrutiny of the record undertaken by the Appeal Board in the instant proceeding. 2/

FUA in no meaningful way challenges the Appeal Board's determination that FUA had failed to meet the five-factor test permitting late intervention. 3/ It is the function of the Appeal Board to review the written record to determine whether the Licensing Board has adopted an appropriate factual and legal

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2/ In Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976), the Appeal Board carefully weighed the facts on the record as they related to the factors permitting late intervention before affirming a licensing board's order denying untimely petitions to intervene. Similarly, the Appeal Board's review of the record in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 12 (1977), convinced the Board that an appropriate application of the five-factor test for late intervention demanded reversal of a licensing board's order permitting such intervention. FUA's attempts to distinguish these and other Appeal Board decisions (Application for Stay at 2) are immaterial and simply unavailing.

3/ FUA does not even address, in connection with the likelihood of prevailing on the merits, the Appeal Board's assessment of the good cause factor. (ALAB-642 at pp. 7-8).

analysis. Contrary to the implication of FUA (Application for Stay at 3), the Appeal Board is not obligated to accept without critical review any Licensing Board determinatic

FUA apparently argues that the Appeal Board erred in denying requests for oral argument. Application for Stay at 3. Whether to grant such a request is within the Board's discretion. When the entire record is before the Appeal Board, including transcripts of oral proceedings during the Prehearing Conference, it can properly evaluate the record without resort to oral argument.

FUA argues generally that the Appeal Board's determinations concerning the likelihood of delay that might result from FUA's motion for continuance have been disproved because the South Carolina Public Service Commission has issued an order changing the date for commencement of its rate hearing. Of course, ALAB-642 did not rely on FUA's motion for continuance as more than one illustration of the potential for delay. Cf. ALAB-642 at p. 10 n.6 with the discussion of other delay problems at ALAB-642, pp. 11-16. 4/

FUA also asserts that its ability to contribute to the record has been borne out by its recent submissions, including prefiled testimony and responses to motions for summary disposition of certain of Mr. Bursey's contentions. The Appeal Board dealt with FUA's abilities to contribute. ALAB-642 at 16-22. This is

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4/ In connection with FUA's discussion of its motion for continuance, FUA again refers to "collusion between Applicant South Carolina Electric & Gas Company and the South Carolina Public Service Commission." Application for Stay at 4. We would refer the Appeal Board to the Public Service Commission's Order (Attachment B to FUA's instant Application) at page 2.

probably not the place for a detailed assessment of the quality, competence, or comprehensiveness of the submissions by FUA. Suffice it to say that the principal submissions by FUA are in the nature of affirmative presentations on contentions as to which the Licensing Board denied them intervention. To assess their participation based upon their contributions in areas other than their own contentions would be at least a step toward interlocutory review of the denial of those contentions by the Licensing Board, and should not be permitted. In any event, there is nothing in the recent submissions by FUA to suggest that the Appeal Board's discussion (ALAB-642 at 16-22) would be in any way altered in result had such submissions been before the Licensing Board or the Appeal Board.

For these reasons, FUA has failed to show that it is likely to prevail on the merits in regard to the Appeal Board's assessment of the good cause, delay, and record contribution factors.

2. FUA Will Suffer No Irreparable Harm If A Stay Is Not Granted

As emphasized by the Appeal Board (ALAB-642 at 25), "it does not follow from FUA's exclusion from the proceeding that its concerns perforce will be ignored in the licensing of this reactor." The Licensing Board and the NRC Staff are themselves charged with the responsibility of insuring that adequate consideration of these issues is made. Whatever harm is suffered by FUA as a result of its exclusion from the proceeding is self-inflicted, but in any event, not particularly relevant to the instant

Application for Stay. The irreparable harm factor should not consider participation vel non. The proper measure is to consider participation at this time (with doubtful entitlement) as against participation at some later time (in the unlikely event entitlement is demonstrated on review).

Moreover, what is involved here is not the issuance of a license but commencement of a proceeding without a petitioner for party status. In this case, there is no irreparable harm and a stay is not appropriate. See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978).

Thus, the crucial point here, as FUA seems to concede (Application for Stay at 5), is that if FUA is successful in a petition for Commission review in this matter and prevails on the merits, one possible remedy is that the evidentiary hearings can be reopened if FUA demonstrates that such action is warranted. FUA's suggestion that the Commission or courts would be less likely to reopen the proceeding because of inertia or "political pressure" (id.) is baseless. 5/

3. Applicants Will Be Harmed If A Stay Is Granted

If a stay of the Appeal Board's decision is granted, FUA will

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5/ We will of course leave it to the Appeal Board to deal with FUA's astounding implication that the merits of NRC decisions have been, or may in the future be dictated by "political pressure." We find this suggestion especially remarkable in light of the February 19, 1981 date of the South Carolina Congressional delegation letter to the Commission (which is of course a proper schedule inquiry and specifically disavows expedience at the expense of safety or any view of the merits). See letter attached to FUA Application for Stay. FUA's petition to intervene bears the date March 23, 1981.

be able to participate as a "provisional" party in the evidentiary hearings scheduled to commence on June 22, 1981. A stay would be dissolved if the Petition for Review were filed and denied expeditiously. But there is no assurance when the Commission will reach a decision regarding whether to grant FUA's yet-to-be-submitted Petition for Review.

FUA urges that since Applicants and the Staff have prefiled testimony on FUA contentions, any injury occasioned by FUA's participation has already occurred. Application for Stay at 6. This is not the case. As Applicants argued in their Brief opposing intervention and as the Appeal Board properly recognized, "the introduction of FUA and its accepted contentions into the proceeding less than two months before the scheduled trial date has prejudiced other parties." ALAB-642 at 9-10. FUA's belated intervention has prevented the use of discovery mechanisms to obtain information concerning the bases for FUA's contentions and of summary disposition procedures to avoid litigation of some issues. ALAB-642 at 11-13.

If FUA participates as a party in the proceeding, delay is inevitable because of the extended examination and cross-examination which would be necessary to develop the facts and resolve the matters raised in FUA's contentions, and by examination on Mr. Bursey's contentions and Licensing Board questions which the Licensing Board Order of May 12, 1981 would have permitted. Remainder of Order Following Fourth Prehearing Conference, para. 12 at pp. 9-11. The result will be an extended delay in completion of the evidentiary hearings and a corresponding delay in

the licensing of this project. Depending upon the timing of a ruling on whether 10 C.F.R. § 2.786 review is granted and, if so, a ruling on the merits, proposed findings and even the initial decision might have to cover a more complicated and more extensive record. Delay is extremely costly to the Applicants and their customers. 6/

If FUA is ultimately unsuccessful on review, as is most likely, the deleterious consequences of FUA's participation in the hearings cannot be undone. Applicants would prefer to risk the remote possibility that a later delay will be occasioned by a need to reopen the hearings in the unlikely event that FUA is successful on review, rather than the certain prospect of delay if a stay is granted.

4. The Public Interest Does Not Support Granting A Stay.

The public interest lies in resolving the outstanding issues concerning the licensing of the Virgil C. Summer Nuclear Station in the most expeditious manner possible

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6/ FUA again refers to installed reserves and the timing of the need for the Summer facility. An examination of Applicants' response, cited by FUA (Application for Stay at 7), explains that substantial time is required between fuel loading (which cannot occur without an operating license) and commercial operation. FUA's discussion of reserve capacity is misleading and patently incomplete in failing to address, inter alia, Applicant Public Service Authority's reserve deficiencies and the limitations on Applicant Company's energy production capability from hydro-electric (including pumped storage), oil and combustion turbine resources. Even if FUA's assertions were close to being correct, prior Appeal Board decisions have recognized that the adverse consequences of a potentially insufficient generating capacity greatly outweigh the consequences of having a plant on line somewhat before it is absolutely necessary. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 368-69 (1975).

consistent with the public health and safety. As discussed supra, granting FUA's request for a stay can only result in further delay in the licensing of the project and consequent cost to the Applicants and, ultimately, to their ratepayers in South Carolina.

FUA has made no showing that its participation in these proceedings is essential or even desirable for a proper resolution of health and safety-related issues. Indeed, the Appeal Board properly concluded that FUA's ability to contribute to the record on these and other issues is at best problematic. ALAB-642 at 20-22. As noted in the Appeal Board decision (ALAB-642 at 25) and discussed supra, the Licensing Board's and NRC Staff's participation is designed to ensure that health and safety issues are fully considered. The incantation of "public health and safety" raised by FUA in its Application for Stay does not provide a basis for granting a stay. With or without the participation of FUA, the Summer plant will not be licensed until the Commission has fulfilled its statutory obligation under Section 103 of the Atomic Energy Act, 42 U.S.C. § 2133, to ensure the public health and safety.

FUA places much reliance on the "adversarial process" to resolve the issues in the this proceeding. Application for Stay at 8. It again suggests that a comparison be made between the relative capabilities of Mr. Bursey and FUA - a position firmly rejected by the Appeal Board. ALAB-642 at 17. While FUA's rhetoric about the benefits of an adversary system may be true as a generality, the short answer is that FUA has not demonstrated

that it is entitled to claim the benefits of that system in this instance.

III. CONCLUSION

In the final analysis, the Application for Stay calls upon the Appeal Board to conclude that its decision in ALAB-642 is of doubtful correctness and to impose the certainty of prolonged proceedings on the parties without a showing of irreparable harm. Applicants are confident of the correctness of ALAB-642; we prefer the potential for some duplication of effort at a later stage (in the unlikely event that FUA obtains party status upon review) to the present certainty of prolonged proceedings. To grant the stay would be to create a situation in which the adverse consequences of extremely untimely intervention, improvidently granted, could not be effectively remedied.

FUA has failed to make an adequate showing in compliance with 10 C.F.R. § 2.788(e) to justify granting a stay of the Appeal Board's decision. For all of the foregoing reasons, Applicants urge that FUA's Application for Stay be denied.

Respectfully submitted,

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Date: June 12, 1981

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer in Opposition to Fairfield United Action's Application for Stay of Decision Pending Review" in the above captioned matter, were served upon the following persons by deposit in the United States mail, first class postage prepaid or by hand delivery as indicated by an asterisk this 12th day of June, 1981.

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