May 8, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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' BRIEF IN SUPPORT OF ITS NOTICE OF APPEAL FROM BOARD ORDER ADMITTING FAIRFIELD UNITED ACTION AS UNTIMELY INTERVENOR

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I. INTRODUCTION

The Atomic Safety and Licensing Board's "Partial Order Following Prehearing Conference . . .," dated April 30, 1981, succinctly and accurately sets forth the circumstances in which Fairfield United Action ("FUA" or "petitioner") filed its extremely late petition to intervene in the above-captioned licensing proceeding. The thrust of FUA's petition and most, but not all, 1/ of the essential points in the responses by Applicants and NRC Staff are also adequately set forth. (Partial Order at 1-3).

After stating the parties' positions, the Board proceeded to apply the five-factor test of 10 C.F.R. §2.714(a) separately, on the one hand, to FUA's contentions relating to corporate

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1/ The Board did not address the costs of delay to the Applicants and their customers. The impact of the delay, addressed at length in Applicants' answer to the petition to intervene, cannot be emphasized too strongly. See pages 11-17 infra for additional discussion.

management and emergency planning and, on the other hand, to all other contentions in the petition. The Board admitted FUA on the corporate management contentions (numbers 1, 2 and 27 in FUA's Supplement to Petition to Intervene) and emergency planning contentions (numbers 7-13), but denied intervention as to all remaining contentions. Obviously, this appeal does not implicate the Board's denial of these remaining contentions. Rather, the appeal necessarily presents the question whether the petition should have been wholly denied. In connection with each major aspect of the Licensing Board's assessment and balancing of the five factors permitting late intervention, the weight of the applicable case law and the other arguments, discussed infra, militate against admitting FUA at all, on any of the contentions raised in its extremely tardy petition to intervene.

II. ARGUMENT

A. The Licensing Board's analysis of FUA's "good cause" arguments is erroneous.

The Board properly rejected most of FUA's arguments that good cause existed for late intervention in the first paragraph of its discussion of that factor. (Partial Order at 4-5). 2/ However, the Board immediately proceeds to

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2/ Nonetheless, the Board seems to have credited some of these same arguments in its subsequent analysis of this and other factors. See notes 5, 16 and 22 infra and accompanying text.

undercut these proper conclusions by giving undue weight as good cause to post-TMI requirements concerning corporate management and emergency planning. (Partial Order at 5-7).

In concluding that good cause existed for FUA's failure to raise the emergency planning contentions, the Licensing Board relies heavily upon the decision by another licensing board in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), ALAB-80-14, 11 NRC 570, 574 (1980). As emphasized in Applicants response below, 3/ the merits of the Zimmer decision were not reached on appeal and the matter may not have been correctly decided. Certainly, the decision was not binding on the Board in the instant proceeding. Even if the Zimmer decision were correct when rendered under its particular circumstances, it is clearly distinguishable. 4/

Assuming arguendo that post-TMI requirements on emergency planning did at the time the petition to intervene was filed in Zimmer on March 21, 1980 afford a basis for late intervention (which is certainly not clear from the Policy Statements on TMI issues published at 45 Fed. Reg. 41738, June 20, 1980, and 45 Fed. Reg. 85236, December 24, 1980, dealing with expansion of contentions by existing parties), it does not follow that such requirements provide good cause for late intervention more than a year later. The pertinent

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3/ Applicants' Answer of April 3, 1981 at 8-9 and n.3.

4/ See id.

post-TMI requirements on emergency planning had evolved prior to August, 1980 to the point that petitioner should have acted at that time, rather than delaying until a few months before the evidentiary hearing. 5/ Indeed, the basic contours of the new emergency planning requirements, including the concept of 10- and 50-mile emergency planning zones, were established as early as late 1979.

The NRC issued its proposed rule on emergency planning on December 19, 1979, 44 Fed. Reg. 75167. It set forth specific standards for both on-site and off-site radiological emergency plans. While the final rule, 45 Fed. Reg. 55402 (August 19, 1980), elaborated upon the initial proposed requirements, its major aspects remained essentially unchanged throughout the rulemaking process. In addition, NRC and the Federal Emergency Management Agency jointly issued a criteria document (commonly referred to as NUREG-0654) for interim use and comment in January, 1980, which spelled out in greater detail the requirements for radiological emergency plans. 6/

5/ The Board seems to rely on FUA's incorporation in September 1980 despite FUA's admission that it was active as an unincorporated association (Tr. 586) as early as March, 1980 and despite the Board's acknowledgment that newly acquired standing or organizational status is not an excuse for delay. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979) (cited by the Licensing Board at page 4 of its order).

6/ Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants, NUREG-0654/FEMA-REP-1 (January, 1980).

The fact that emergency planning reached such an advanced stage of development well over one year ago leads to the inescapable conclusion that a responsible intervenor group, particularly one whose members claim to have educated themselves on these issues, 7/ would have had sufficient information to raise the issues now presented in FUA's emergency planning contentions much earlier than March, 1981. More specifically, FUA now asserts in Contention 7 that emergency plans in support of the Summer plant do not conform with a number of requirements in NUREG-0654, Rev. 1. Those requirements were initially proposed in the January, 1980 version of NUREG-0654 and have been in interim use since that date. Many of the major requirements , such as the 15-minute notification requirement to which contention 7(c) alludes, were a part of the proposed rule as well. There is no good cause for FUA's excessive delay in raising contentions based on these requirements.

The same can be said for FUA's corporate management contentions. Following the accident at the Three Mile Island facility in March, 1979, the NRC and other groups conducted extensive evaluations and made numerous recommendations to improve reactor safety, including recommendations

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7/ See Affidavits accompanying FUA's Petition to Intervene and Request for Hearings. It is surprising that a group professing such interest did not comment on the TMI-related rulemakings or take other action prior to March 23, 1981 when the instant petition was filed.

with respect to management and operations personnel qualifications and resources. The issues raised in Contentions 1, 2 and 27 were widely discussed from the earliest stages of the evaluations of the TMI accident, and their relationship to proceedings for new operating licenses were clearly established in the first half of 1980. Thus, the basis for admitting those late-filed contentions, viz, new requirements as a result of TMI, existed almost a full year ago. Subsequent developments in the field were no more than a detailing of the previously established requirements and do not constitute "new information" on which to base a finding of good cause for the extreme lateness of filing the contentions.

In May 1979, the NRC Office of Nuclear Reactor Regulation formed an interdisciplinary team of engineers and scientists to identify and evaluate the safety concerns originating from the accident at TMI, the TMI Lessons Learned Task Force. That Task Force developed numerous recommendations regarding, inter alia, nuclear power reactor operations which is set forth in a report published in October, 1979. 8/ Among those recommendations were measures concerning corporate management involvement in the qualification of operating personnel, qualification of reactor operators (including senior reactor operators and shift

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8/ TMI-2 Lessons Learned Task Force-Final Report, NUREG-0585 (October 1979).

supervisors) and the capabilities and role of technical management personnel in the normal operation of the plant and during an emergency.9/

Also, in October 1979, the President's Commission on the Accident at Three Mile Island (Kemeny Commission) published its report. 10/ That report included numerous recommendations for improvements in operator and supervisor qualifications, organizational and management standards for licensees and training of operating personnel. 11/ Subsequently, in December, 1979, the President responded to the Kemeny Commission Report by directing, inter alia, that the recommendations made therein be implemented, and that other actions be taken with respect to operator qualifications. 12/.

Further, the impact of the new guidance on operating license applications was evaluated in depth by the Commission during early 1980. The culmination of this evaluation came in May, 1980 when the Commission approved both the TMI

9/ Id. at pp. A-4 through A-8. In addition, the NRC solicited public comments on the management and technical resource capability of utilities to cope with events including those similar to TMI. 44 Fed. Reg. 62086 (October 29, 1979).

10/ Report of the President's Commission on the Accident at Three Mile Island (October 1979).

11/ Id., See, e.g., recommendations A4.a., 5, 8.b.; B.1.a, 3.; and C. at pp. 61-71.

12/ President's Response to the Kemeny Commission Report, December 7, 1979, 15 Wkly. Comp. of Pres. Docs. 2202.

Action Plan 13/ and the list of TMI-related guidelines for new operating licenses. 14/ Shortly thereafter, on June 16, 1980, the Commission issued a statement of policy detailing the manner in which licensing boards were to consider issues relating to the TMI-related guidance. 15/ With the issuance of that Statement of Policy, the Commission identified the TMI-related issues which could be litigated in individual proceedings and the manner in which they could be litigated. Thus, from the time this policy statement was issued, a party or prospective party should not be able to claim a lack of knowledge of the TMI-related issues which could be litigated in individual proceedings.

Reliance upon the Zimmer decision raises an additional policy issue. The Three Mile Island accident has fostered a myriad of new and evolving regulatory requirements for nuclear power plants over the ensuing years, and appears likely to continue to do so. In view of these many altered requirements and the potential for delay in licensing, closer scrutiny seems warranted to determine whether a licensing board rule which treats any regulatory change as a new basis for intervention (implicit in the ruling below) is workable.

The Board indicates that it would have had no hesitation

13/ NRC Action Plan Developed as a Result of the TMI-2 Accident, NUREG-0660 (May 1980).

14/ TMI-Related Requirements for New Operating Licenses, NUREG-0694 (June 1980).

15/ Further Commission Guidance for Power Reactor Operating Licenses, Statement of Policy, 45 Fed. Reg. 41738 (June 20, 1980).

in determining that there was good cause for the delay in filing with regard to emergency planning issues had FUA filed a petition to intervene by the middle or latter part of 1980. Similarly, the Board would have found good cause for a late filing in that time frame as to the management capability contentions. (Partial Order at 6). Concededly, if FUA had filed at an earlier hypothetical date, there would be a greater likelihood that a strong showing of its ability to contribute to the proceeding would have overcome a weak good cause showing and less likelihood that the delay factor have weighed heavily against the petitioner. That is the converse of the Skagit decision upon which applicants relied below. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172-173 (1979), vacated as moot CLI-80-34, 12 NRC___(October 9, 1980). But the simple facts are that Petitioner did not file in mid-1980; it waited until the end of March, 1981. That the Board would have allowed FUA to intervene in 1980 does not constitute good cause to permit late intervention in 1981, on the eve of scheduled licensing hearings.

In the final paragraph of the Board's analysis of the good cause factor (Partial Order at 6-7), the compounding of error which apparently led the Board to its result is articulated. Having failed to recognize the total lack of good cause by placing unwarranted reliance on petitioner's recitation of post-TMI requirements on corporate management and emergency planning, the Board proceeds to confuse its analysis of the good cause factor by adding the unsupported and

astonishing notion that intervention will not disadvantage other parties or delay the proceeding. 16/ The Board states:

> "However, since [intervention on corporate management and emergency planning] does not delay the proceeding and there was good cause for the bulk of the delay in filing these contentions, we find that factor to be of almost no weight (or of slight weight against petitioner) in deciding upon the intervention with regard to the corporate management and emergency planning issues." (Partial Order at 7)

The good cause factor must stand on its own; either petitioner has shown good cause or it has not. If it has not, then lack of good cause weighs heavily against permitting late intervention. Skagit, supra. Delay (including prejudice to other parties) is an entirely separate factor (as to which the Board's conclusion, discussed infra, was also erroneous), but it is incorrect to mingle it from the outset with analysis of the good cause requirement. This can only confuse the issues.

In sum, FUA did not in any way show that it was precluded from intervening at a much earlier date. It did not and indeed could not show that the issues it sought to raise were previously beyond the scope of the proceeding. Rather, it sought to use post-TMI reactor licensing requirements in a manner making them, in effect, a new notice of hearing. The Board permitted that

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16/ The Board also draws a fine line between legal insufficiency and its sympathy with FUA in its statement "we can understand a reluctance to file a petition three [sic] years after the issuance of a notice . . . when there is an intervenor already participating in the proceeding." (Partial Order at 6)

effect. The delay factor was both incorrectly analysed and irrelevant to the good cause analysis. An appropriate assessment of the good cause factor would have concluded that this factor should be heavily weighted against FUA.

B. Admission of petitioner will result in considerable delay and prejudice the rights of the other parties.

The Licensing Board emphasizes, in rationalizing its conclusion that the delay attributable to FUA would be minimal, that petitioner will be required to take the proceeding as it finds it, and dismisses the prejudice to Applicants. The Board asserts that FUA's petition revealed everything that discovery would have revealed and that the Board would not have entertained motions for summary disposition in any event on FUA's admitted contentions. (Partial Order at 8-9). This line of reasoning does not square with the realities of trial preparation and scheduling in this case.

At the outset, we would stress that the Board's analysis does not comport with the teachings of Virginia Electric & Power Company (North Anna Station, Unit 1 and 2), ALAB-289, 2 NRC 395 (1975), in which the Appeal Board pointed out "experience teaches that the admission of a new party just before a hearing starts is bound to confuse or complicate matters." The Appeal Board went on to say 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." (2 NRC at 400)

If the North Anna rule had properly been applied below, the delay and prejudice factors would have been weighed heavily against FUA.

The crux of the Board's error in its assessment of the delay factor inheres in the following excerpts from its reasoning:

> "With regard to emergency planning and corporate management, however, we see no delay resulting from petitioner's admission if, as the Board orders, petitioner's admission on these contentions be subject to the same conditions prevailing with regard to the other parties. [i.e.: discovery is closed]" (Partial Order at 7)
>
> "In view of the fact that the corporate management and emergency planning issues had already been admitted to the proceeding . . . we see no broadening of issues . . . .
>
> "While the other parties could have also discovered petitioner's case, discovery would not have benefitted them on the issues we are admitting." (Partial Order at 8)
>
> "We direct... that the parties cooperate in informal discovery with regard to the evolving [emergency] plans." (Partial Order at 9)
>
> "Nor, do we see any way in which petitioner's sooner entrance into this proceeding could have resolved the issues being admitted. Emergency planning is not yet ripe for resolution, and neither the corporate management nor emergency planning issues are susceptible to summary disposition regardless of their state of preparedness. . . To be sure, the hearing may last longer because of petitioner's participation. . . the Board anticipates very little unproductive delay." (Partial Order at 9) (Emphasis added)

Apparently, the Board maintains that Applicants' discovery would have revealed nothing of benefit to its preparation except what is already stated in petitioner's contentions, supporting bases, and prehearing conference arguments. On the contrary, had petitioner earlier sought intervention and raised its contentions, Applicants would have had the right (and the time) to depose or interview each of FUA's members and proposed witnesses, to obtain answers to interrogatories, to discover documents in FUA's possession or on which its witnesses would rel and to seek admissions from FUA. But those rights were ignored. In the realities of trial preparation, Applicants are now held to the choice of either foregoing all of these discovery rights or most of them (assuming the Board would grant it leave to do so and Applicants were willing to sacrifice other planned preparation), or else asking for a delay in the proceedings which would be extremely prejudicial to Applicants. Applicants' affidavit (Attachment C to its Answer below) concerning the costs of delay have not been rebutted by counteraffidavits of competent persons.

Second, the Board is opening up "informal" discovery on emergency planning at this late date. 17/

17/ Applicant is already taking steps to implement the Board's directive in this regard without prejudice to this appeal.

The Board's reasoning is flawed when it asserts that there could have been no other discovery via subpoenas or otherwise until now had FUA been made a party in mid-1980. Although the ultimate question of the acceptability of applicable state and local emergency planning is not ripe for resolution, it does not follow that most of FUA's contentions could not have been the subject of discovery by all parties if FUA had sought and been granted intervention several months earlier. That same flawed reasoning leads the Board to conclude that Applicants could not successfully have moved for summary disposition on some contentions or portions of contentions. Even though the management issue is apparently similarly viewed by the Licensing Board, an examination of FUA's contentions regarding corporate management reveals that there are a number of matters which could have been resolved at an earlier stage, given time for orderly discovery, including admissions and motions for summary disposition.

The elimination of formal discovery on the emergency planning and corporate management issues will have the unintended and paradoxical effect of actually lengthening the license hearings. In the absence of an unprecedently stringent exercise of the Board's powers to confine examination, an almost inevitable consequence of this late intervention is that FUA will use the opportunity to examine witnesses as an opportunity to obtain information that otherwise would

have been available through the discovery process. The result will be more lengthy examination of witnesses and prolonged hearings. This effect has been recognized and opposed by both the utility industry and environmental groups in comments on the proposed elimination of formal discovery of the NRC Staff. 18/ Thus, while the Board implies that only FUA is prejudiced by a lack of formal discovery (Partial Order at 8), the Applicants will in fact suffer its consequences through prolongation of the hearings and delay of plant operation.

Moreover, the Licensing board has ignored the fact that the hearings could have been scheduled to begin earlier and schedules for such matters as Staff documents could have been expedited if the parties had been apprised by the latter part of 1980 that the hearing would probably last for several months because of FUA's participation, rather than two weeks as would otherwise be the case. In all likelihood, the time required for development of proposed findings and for the decisional process will also be extended by a more extensive and complex (though not necessarily better) record.

The Licensing Board's assertion that admission of FUA's emergency planning contentions does not constitute a

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18/ See Comments of South Carolina Electric & Gas Company, et al. on Proposed Amendments to Rules of Practice for Domestic Licensing Proceedings, PR-2 (46 FR 17216) (April 7, 1981); Comments of the Union of Concerned Scientists and the Natural Resources Defense Council on Proposed Rules of Practice for Domestic Licensing Proceedings, PR-2 (46 FR 17216)(April 6, 1981).

broadening of the issues (Partial Order at 8) is specious. It is true that a general contention relating to emergency planning raised by intervenor Bursey was previously admitted by the Board. That contention states, in its entirety, as follows:

> Contention A8: The Applicant has made inadequate preparations for the implementation of his emergency plan in those areas where the assistance and cooperation of state and local agencies are required. (Prehearing Conference Order at 9).

This straightforward contention bears little resemblance to highly specific, complex and technical emergency planning contentions now presented by FUA. Much delay will accompany resolution of the many factual and other issues implicit in FUA's contentions 7-13.

The Board acknowledged that the hearing may last longer because of petitioner's participation, but apparently believes that such participation is always warranted so long as it will be "productive". However appealing that reasoning may be on a superficial level, use of hearing time by intervenors should always be productive. Late intervention cannot be permitted without regard to cost. Delay is very, very expensive to the Company, to the Authority and, ultimately, to their ratepayers. The costs of delay are uncontroverted on the record (Attachment C to Applicants' Answer), but ignored in the Partial Order. Moreover, extension of proceedings imposed at the eleventh hour is much more difficult to compensate or adjust for than similarly protracted proceedings

when it is known well in advance that they will occur. 19/

The Licensing Board erred in simply discounting both prejudice to the Applicants in trial preparation and scheduling, and the many millions of dollars that the unwarranted extension of these proceedings will cost the people of South Carolina. That error is inconsistent with North Anna and Skagit, supra. The delay and prejudice factors should have weighed heavily against FUA's petition to intervene.

C. Consideration of FUA's ability to contribute to a sound record provides no basis for intervention.

The Board concluded that FUA's ability to contribute to a sound record weighed heavily in favor of admitting petitioner on the corporate management and the emergency planning contentions. (Partial Order at 10). In Applicants' view, FUA's ability to write literate pleadings and pose acceptable contentions was indeed demonstrated by its petition, but its ability to contribute to the record was not borne out by petitioner's discussion of its contentions at the prehearing conference. (Tr. 473-490, 591-658). With regard to the contentions that were admitted, FUA will call no experts not otherwise available to the Board. But even assuming, arguendo, that this factor weighs slightly in favor of petitioner, it should not in a proper analysis

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19/ See pages 13-15 of Applicant's Answer below where the schedule impact is detailed.

be weighed so heavily. Much less should it tip the balance in favor of petitioners, when proper weight is given to the good cause and delay factors discussed, supra.

Insofar as the Board considered the relative assistance in compiling a record likely to be offered by FUA in contrast to the existing intervenor, Mr. Bursey, such consideration was plainly improper. To the extent the Licensing Board considered such relative ability and then weighed that factor against Applicants, they were penalized for what the Board perceived to be the weakness of their existing opponent. From the standpoint of scheduling, the Board's action turns a moderately contested proceeding into a seriously contested one without adequate consideration of the Applicants' rights and obligations to their customers.

D. In a case like this one where the untimely intervenor failed to take advantage of its rights, the factors which involve other means to protect petitioner's interest and representation by existing parties should be accorded less weight.

To the extent the Board recognized that petitioner had prior dealings with NRC and other public officials without benefit of this proceeding, it did not draw the logical conclusion that FUA has slept on its rights. Instead, the Board gives weight to petitioner's assertion that they encountered difficulty in gaining full access to the counties' evolving emergency plans (Partial Order at 11). Even if it is true that FUA and its members, as citizens of South Carolina, had difficulty obtaining information from county officials, it does not follow either that

such is a proper concern of NRC or that Applicants should be penalized therefor. NRC has no requirements of general applicability purporting to dictate administrative procedures to local governments concerning the information (drafts and the like) to which local governments will provide citizens access or the timing of its release. 20/ Federal Freedom of Information and Sunshine Act principles are applicable to federal government agencies, but not to local governments. Any NRC attempt to extend these principles to local governments would be an unwarranted invasion into matters of local law and local relationships.

It is, frankly, preposterous to penalize Applicants by delaying the conclusion of this proceeding on the ground, not that Applicants have failed to provide information to a person entitled to receive it, but that local officials have failed to provide information. Indeed, there has been no showing that the requester was entitled to receive it. The Board has apparently already concluded that local procedures are defective and that granting intervention is needed to correct deficiencies in local procedures. The Board stated in this regard:

> "Petitioner's admission into this proceeding on the emergency planning contentions should not only facilitate its being heard on those issues

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20/ Indeed, the Federal Emergency Management Agency gave notice on April 17, 1981 that the local plans, inter alia, were available from its regional office. (46 Fed. Reg. 22459).

> in this forum, but should also serve to open some of the emergency planning to public input and scrutiny as should have been the case from the first." (Partial Order at 11).

That conclusion is disturbing in view of the Commission's holding in Commonwealth Edison Company (LaSalle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169 (1973), but for present purposes Applicants simply urge that it has no proper relation to late intervention. If FUA needed access to the subpoena power of some agency or court, it should have initiated litigation or sought intervention herein much earlier.

In addition, the Board did not discuss the availability of the limited appearance mechanism to FUA, argued by both NRC Staff and Applicants below, 21/ an alternative means to raise matters for the Board to pursue.

With regard to petitioner's not being adequately represented by the existing intervenor, the Board apparently weighed this factor in FUA's favor, indicating that it could "see no reason why petitioner should have any confidence that Mr. Bursey will represent its interests any better than he has, so far, represented his own." (Partial Order at 11). The Board has adopted a wrong view of this factor.22/

21/ NRC Staff Opposition to Untimely Petition for leave to Intervene at 7-8 (April 13, 1981); Applicants' Answer to Untimely Petition to Intervene of Fairfield United Action, Inc. at 18-19 (April 3, 1981).

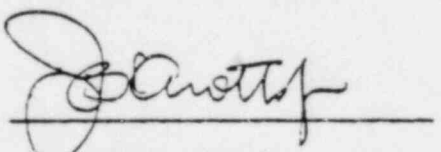
22/ Its position is seemingly inconsistent with the Board's proper refusal to credit prior reliance on existing intervenors as good cause.

If the fact that Mr. Bursey has not adequately represented FUA (which he never claimed to do and which Applicants do not understand FUA seriously to contend he should have) is to be weighed against anyone, then the burden for misplaced reliance should fall on FUA and not upon the Applicants.

III. CONCLUSION

The Licensing Board gave insufficient weight to the lack of good cause and delay factors in permitting late intervention; its balancing of the relevant factors under 10 C.F.R. § 2.714 (a)(1), resulting in the admission of FUA, was erroneous and an abuse of discretion under the applicable authorities. For all of the foregoing reasons, FUA should be denied intervention. The Partial Order should be reversed.

Respectfully submitted,



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