



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:)
)
SOUTH CAROLINA ELECTRIC AND GAS)
COMPANY, et al.)
)
(Virgil C. Summer Nuclear Station,)
Unit 1))

Docket No. 50-395-OL

June 15, 1981

STATEMENT OF SOUTH CAROLINA CHAPTER OF THE SIERRA CLUB
IN SUPPORT OF INTERVENTION BY FAIRFIELD UNITED ACTION

The South Carolina chapter of the Sierra Club submits the following statement in support of the appeal by Fairfield United Action, Inc. (FUA or petitioner) of the Appeal Board's reversal of the Licensing Board's decision granting FUA's petition to intervene in the Virgil C. Summer licensing proceedings. In the opinion of the South Carolina chapter of the Sierra Club, the Licensing Board did not abuse its discretion in admitting FUA to the proceedings. On the contrary, the Licensing Board's decision reflects a careful application of the tests established in 10 CFR 2.714(a) for disposition of untimely intervention petitions. The resulting decision is well supported by the circumstances surrounding FUA's petition and by Commission law. It should be upheld.

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The key consideration in resolving cases ruling on untimely petitions to intervene is 'the Commission's admonition'

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that 10 CFR 2.714(a) was "purposely drafted to give Licensing Boards broad discretion" to consider the circumstances of individual cases Nuclear Fuel Services (West Valley Reprocessing Plant) CLI-75-4, 1 NRC 273, 275 (1975) . See also, Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2) ALAB 420, 6 NRC 8 (1977). As a consequence, the Appeal Board's role in reviewing Licensing Board decisions on intervention is limited. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2) ACAB 339, NRCI 76/7 20, 24 (July 27, 1976); Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB 354, 4 NRC 383, 389, 390 (1976).

[A]n Appeal Board should reverse a Licensing Board's order denying intervention only if it clearly appears that in combination the four factors of 10 CFR 2.714(a) weigh so heavily in petitioners' favor that abuse of discretion is involved.

Florida Power & Light, supra, 13.

The same principle applies to Licensing Board decisions granting intervention. The Appeal Board role is circumscribed to a determination of whether the Licensing Board has exceeded its substantial authority to conduct the licensing proceedings. The Appeal Board lacks the authority to substitute its judgment for that of the Licensing Board concerning the appropriate parties to a proceeding. Nor is the Appeal Board authorized to conduct an independent balancing of the factors set forth in 10 CFR 2.714(a).

Unless it is apparent from the Licensing Board's decision that its conclusion is not justified by reference to the requirements of the regulation, the decision is entitled to deference.

When examined in light of other cases in which intervention has been granted and the four factors of 10 CFR 2.714(a), it cannot be said that the Licensing Board abused its discretion in granting the intervention petition of Fairfield United Action.

The opinion of the Commission in West Valley (Nuclear Fuel Services, supra) provides a good illustration since it is the seminal case interpreting the requirements of 10 CFR 2.714. In West Valley the Commission stated that the regulation directs the Licensing Board first, to assess whether a late filing petitioner has made a showing of good cause for his failure to file on time, and second, to weigh the reasons given for tardiness against the four factors listed in the regulation. These factors are:

- (1) The availability of other means whereby petitioner's interest will be protected;
- (2) The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record;
- (3) The extent to which the petitioner's interest is represented by existing parties;
- (4) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

If good cause exists for the late filing, the four factors are less important to the intervention decision. If no good cause exists for the late filing, then significant countervailing reasons must be present to tilt the balance in favor of intervention.

In West Valley the Commission agreed with the Licensing Board that the grounds offered by Erie County for its late filing were "without merit." The Commission then proceeded to examine the four factors in the regulation to ascertain whether they would warrant admitting the County in spite of its tardiness. With respect to the third factor, the Commission found that other parties to the proceeding, both private and governmental, had advanced contentions that were "substantially identical" to those of the County. With respect to the second factor, the Commission found that the County had not shown any special expertise or access to evidence not available to existing parties. The Commission ruled that the County could make a limited appearance or avail itself of other means of protecting its interest (Factor 1). Finally, the Commission acknowledged that the fourth factor -- delay -- was a "particularly weighty consideration" and warned the County that it might be required to take the proceeding as it found it.

Despite the seeming lack of substantial reasons to do so, the Commission held that the County should be admitted to the proceeding, primarily because the existing parties "may not effectively represent the County's interests." The Commission also

acknowledged that the other means available to protect the County's interest, i.e. a limited appearance, were not an adequate substitute for participation in the proceeding.

A comparison of the West Valley decision with the Licensing Board's decision admitting FUA establishes that the Board was on much firmer ground in approving FUA's untimely intervention than was the Commission in admitting Erie County. To begin with, unlike West Valley, the Licensing Board found the existence of good cause for the delay of FUA in filing its Three Mile Island related contentions. As discussed in the Licensing Board decision and in the pleadings of FUA, ample evidence exists to support this finding, since regulatory policy and requirements are still evolving in the aftermath of the Three Mile Island accident. Even the Staff acknowledges that it has not yet completed its review of emergency planning considerations. It is well settled that new information and recent regulatory developments do constitute "good cause" for delay, even though the issues conceivably could have been raised at an earlier time. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station) LBP 80-14, 11 NRC 570 (April 1980).

Even in the absence of good cause for late filing, the Licensing Board's decision to admit FUA was well within the sound exercise of

its discretion. With respect to the first factor in 10 CFR 2.714(a), the Commission has previously concluded that a limited appearance statement, which the Staff suggests would be a suitable means for FUA to protect its interest, is not an adequate substitute for participation as a party, with a party's attendant procedural rights. Nuclear Fuel Services, supra at 275. The other means suggested by the staff, "bringing [FUA's] concerns to the NRC," or "furnishing financial technical or legal assistance to the Intervenor" are similarly inadequate. Historically, the NRC has paid little attention to the expression of "concerns" by groups which are not parties to licensing proceedings. The assertion that FUA interests will be protected by helping an intervenor who has made no contribution to the proceeding and who has not raised the same issues is absurd. Unlike West Valley, no party to the Summer proceedings has raised contentions "substantially identical" to those of FUA. Thus, FUA is not represented by existing parties and has no means, other than intervention, to protect its interest.

The second factor in 2.714(a), the extent to which petitioner may reasonably be expected to assist in developing a sound record, was obviously the most significant consideration in the Board's decision to admit FUA. Once again, unlike West Valley, the Summer Licensing Board found that FUA had shown special expertise not possessed by the existing intervenor. The Board concluded that FUA was likely to make a substantial contribution to the proceedings.

The second factor of 2.714 is the one which a Licensing Board has the greatest ability to assess. It is the Licensing Board and not the Appeal Board, after all, which has the responsibility for the conduct of the licensing proceedings. It is the duty of the Licensing Board to develop a sound record upon which a rational and defensible decision can be based. The record must contain sufficient evidence to support the findings required by the Atomic Energy Act and the Commission's regulations that the health and safety of the public will be adequately protected when a nuclear plant is licensed. For all these reasons the Licensing Board's judgment concerning an intervenor's contribution to the record should not be disturbed absent significant countervailing considerations.

Neither the Applicant nor the Staff have advanced reasons sufficient to warrant reversal of the Licensing Board's decision. The Staff has complained about strained resources and an interrupted litigation game plan, yet concedes that the licensing proceedings are the best forum to litigate radiological health and safety issues. The Applicant is concerned that a "fresh" opponent will be allowed to enter the ring.

Both arguments miss the critical point. The licensing proceeding is not a game. Its purpose is to gather evidence with which to make a decision about licensing a nuclear power plant, a highly complicated and potentially dangerous piece of machinery. The consequences of error in the decision may be severe. The Staff and Applicant concerns pale in comparison to the importance of the issues raised by FUA. The questions of the Applicant's competence

to operate the facility and the effectiveness of emergency plans are central to the Licensing Board's ultimate findings under the Atomic Energy Act. They are also matters which the Staff and Applicant are required to consider, even in the absence of an intervenor. The presence of FUA as a new intervenor does not alter this obligation or render the proceeding unfair to the Applicant.

Finally, with respect to the factor of delay, the Licensing Board carefully circumscribed FUA's participation in order to avoid delay. It warned, as did the Commission in West Valley, that FUA had to take the proceeding as it found it. Certainly the Licensing Board has sufficient authority to control the proceedings to avoid undue delay. See 10 CFR 2.757. However, the mere fact that some delay may occur does not lessen the importance of a full consideration of the issues raised by FUA to the record and to the decision of the Licensing Board.

In sum, the Commission should examine the decision of the Licensing Board in the context of its earlier rulings on intervention and the requirements of 2.714(a). This examination will establish that the Licensing Board did not abuse its broad discretion in deciding to admit FUA to the V.C. Summer licensing proceedings. The Licensing Board's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Statement of South Carolina Chapter of the Sierra Club in Support of Intervention by Fairfield United Action" and "Request for Leave to File Statement in Support of Fairfield United Action Appeal" were served upon the following persons by United States mail, first class postage prepaid, this 21st day of July 1981.

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Subscribed and sworn to before
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