

RAS 3191

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 07/03/01

SERVED 07/03/01

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER
(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

July 3, 2001

ORDER

(Granting in Part Motion for Extension of Time)

A. On June 27, 2001, Georgians Against Nuclear Energy (GANE) filed by electronic mail a motion for a 30-day extension of time for the filing of contentions. See Request for 30-Day Extension for Filing Contentions on Construction Authorization Request (June 27, 2001). Pursuant to the Commission's referral order, CLI-01-13, 53 NRC ___, ___ (slip op. at 9, June 14, 2001) and the Licensing Board's order (June 20, 2001) at 3 (unpublished), all the Petitioners' contentions are currently due July 30, 2001. In support of its motion, GANE states that its expert, Dr. Edwin Lyman, is unavailable to aid GANE in the formulation and preparation of its contentions until July 20, 2001 because of schedule conflicts. According to GANE, Dr. Lyman's prior commitments, which it sets out in the motion, present unavoidable and extreme circumstances justifying the grant of its extension request. In a July 1, 2001 supplement to its June 27 motion, GANE asserts that relevant information was "inadvertently omitted" from its earlier motion. Supplement to Request for 30-Day Extension for Filing Contentions on Construction Authorization Request at 1 (July 1, 2001). The supplement indicates that Ms. Glenn Carroll, the officer of GANE who is coordinating and conducting the intervention on

behalf of the organization, is enrolled in a training workshop conducted by the Institute for Energy and Environmental Research from July 17 to 22, 2001, and is traveling and attending the workshop from July 13 to 23, 2001. The supplement also states that Ms. Carroll's nonrefundable, nontransferable airline tickets have already been purchased and that Ms. Carroll's commitment to attend the workshop was made well in advance of the June 15, 2001 date on which the Licencing Board was established for this proceeding.

Petitioners Blue Ridge Environmental Defense League (BREDL) and Donald Moniak support GANE's extension request. See Blue Ridge Environmental Defense League (BREDL) and Donald Moniak Response to the June 27, 2001, motion for an extension of time filed by Georgians Against Nuclear Energy (June 29, 2001). These two Petitioners argue that the Applicant, Duke Cogema Stone & Webster, already offered the Petitioners a 5 to 10 day extension during the June 26, 2001 telephone conference for contentions involving proprietary information, and that the Applicant already has delayed the hearing process by submitting a controversial and contentious proposed protective order that caused an additional teleconference and the expenditure of substantial time and resources by the Petitioners in order to respond. These Petitioners also assert that both electronic and hard copy access to the Applicant's Construction Authorization Request (CAR) has been difficult stating, for example, that "[t]he electronic version posted by the NRC has . . . six electronic files ranging in size from 4 megabytes (MB) to 29 MB, approximately 250-300 blank pages . . . , 11 oversized graphics in separate electronic files and greater than 10 MB, . . . [and a 45 page] table of contents . . . contained in three different files . . . [that] are not searchable." Id. at 2-3. Finally, these Petitioners argue that

[t]he public should not have to work 3-5 times faster than the NRC staff, which took six months to submit its first Request for Additional Information on the smaller and less complex *Environmental Report* filed by Applicant on December 22, 2001

[sic]. NRC staff have yet to file any requests for additional information to the CAR and actually took 45 days simply to docket the CAR and accept it. . . . Given the time that the NRC staff requires to review these documents, a more reasonable time for Citizen Groups would be 60-90 days.

Id. at 3. Pursuant to the directions set forth in Licensing Board's order of June 27, 2001, Petitioner Environmentalists, Inc., which has neither electronic nor facsimile transmission capability, telephoned its response to the Chief Counsel to the Atomic Safety and Licensing Board Panel on June 29, 2001. Environmentalists, Inc. supports GANE's extension motion and, in addition, requested a 60-day extension for filing its contentions.

In opposing GANE's extension request, the Applicant argues that the alleged unavailability of an expert to review documents and help form contentions falls well short of the "unavoidable and extreme circumstances" standard the Commission directed the Licensing Board to apply in granting requests for extensions of time in this proceeding. See Duke Cogema Stone & Webster's Answer in Opposition to GANE's Request for 30-Day Extension for Filing Contentions on the CAR (June 29, 2001)[hereinafter Applicant's Opposition]. In this regard, the Applicant points to the Licensing Board's denial in an unpublished August 27, 1998 order in the Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 & 2) license renewal proceeding in which the Board applied the same standard and denied a petitioner's extension motion for filing contentions. According to the Applicant, the Calvert Cliff's Board denied the request "based on virtually identical circumstances" in which "a petitioner requested an extension of time based on the unavailability of experts to review the license renewal application and to provide technical input into contentions." Id. at 2. Relying on the Licensing Board's unpublished order denying an extension motion in the Florida Power and Light Company (Turkey Point, Units 3 and 4) license renewal proceeding, the Applicant also argues that the unavailability of GANE's expert owing to prior business or personal commitments is insufficient to meet the Commission's "unavoidable and extreme

circumstances” standard. According to the Applicant, the Turkey Point Board found that work and family commitments during the Christmas holiday season failed to arise to the level of unavoidable and extreme circumstances. For the same reason, the Applicant argues in its response to the supplement to GANE’s extension motion that Ms. Carroll’s prior commitments do not provide adequate justification to meet the Commission’s standard. See Duke Cogema Stone & Webster’s Answer in Opposition to GANE’s Supplement to Request for 30-Day Extension for Filing Contentions on the CAR (July 2, 2001).

The NRC Staff also opposes GANE’s extension request. See NRC Staff’s Response to GANE’s Request for Extension of Time (June 28, 2001) [hereinafter Staff’s Opposition]. According to the Staff, the CAR has been publicly available for many weeks so any difficulty that GANE now has in obtaining expert review of the CAR is a problem of GANE’s own making, and the proceeding schedule should not be controlled by GANE’s choice of a particular expert.

B. In its referral order to the Atomic Safety and Licensing Board Panel, the Commission stated that “[t]o avoid unnecessary delays, the presiding officer should not grant requests for extensions of time absent unavoidable and extreme circumstances.” CLI-01-13, 53 NRC at ____ (slip op. at 10, June 14, 2001). Because of the relative newness of the Commission standard for judging time extension requests, the Commission has had little opportunity to amplify the types of circumstances warranting relief. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998). Nevertheless, it is clear from the immediate context of the Policy Statement announcing the standard as well as the referral order in this proceeding that the standard is not an absolute one, but rather one that depends upon the totality of the facts and circumstances of each case. Thus, as noted, the Commission in the referral order stated that the purpose of the standard was to avoid unnecessary delays. Further, it stated that “[i]n issuing and implementing a schedule, we do not expect the presiding officer to sacrifice fairness and sound decision-making” and that, “[a]s in all matters of

scheduling, the presiding officer will necessarily be guided by events as they arise.” CLI-01-13, 53 NRC at ____ (slip op. at 8, June 14, 2001).

In the circumstances presented here, the Board finds that Petitioner GANE is entitled to partial relief from the July 30, 2001 contention filing deadline. Although the situation presented does not warrant the 30-day extension GANE requests, the Board grants GANE an additional 14 days until August 13, 2001, to file its contentions. Because a staggered filing schedule in which one Petitioner files by one date and the other Petitioners file by another with corresponding staggered response dates for the Applicant and the Staff serves no useful purpose and, in any event, the Board cannot hold a prehearing conference on the standing issues and the admissibility of the proffered contentions until all contentions and responses are filed, all the Petitioners’ contentions shall be filed by August 13, 2001. GANE, however, has made no showing that it is entitled to relief from the July 30, 2001 deadline for filing any amendments to its intervention petition with regard to its standing to intervene. Accordingly, any amended intervention petition by GANE, as well as any amended intervention petition by any other Petitioner shall be filed by July 30, 2001. Further, any answers to the amended intervention petitions by the Applicant and the Staff shall be filed by August 10, 2001. The responses of the Applicant and the Staff to the Petitioners’ proffered contentions shall be filed by September 12, 2001.

Even though Petitioner GANE and the other Petitioners may have had significant difficulty obtaining a hard copy or an electronic version of the Applicant’s CAR, the Applicant and the Staff are correct that the CAR has been publicly available for a number of months. Therefore, GANE and its expert already have had an opportunity to review the CAR and begin preparation of GANE’s contentions, whether or not GANE has taken full advantage of that opportunity. GANE, along with the other Petitioners, however, have not yet had an opportunity to examine and review the proprietary version of the Applicant’s CAR so they can prepare

contentions encompassing that information. On June 29, 2001, the Licensing Board issued a protective order and nondisclosure affidavit to govern the access and use of proprietary information by the Petitioners in this proceeding. Unfortunately, the process that the Board's order initiated is, by necessity, not instantaneous and will take additional time before the Petitioners and any of their experts can obtain access to the proprietary version of the CAR. For GANE and Ms. Carroll the process is likely to take 7 to 10 days or longer and 2 weeks or longer for GANE's expert. Thus, that unavoidable circumstance, combined with Ms. Carroll's unavailability owing to her prior commitments and the similar unavailability of GANE's expert until after July 20, 2001, rise to the level of unavoidable and extreme circumstances entitling GANE to relief from the original July 30, 2001, contention deadline.

Contrary to the Applicant's assertion, the circumstance presented by GANE are not "virtually identical" to those addressed by the Licensing Board's unpublished August 27, 1998 Calvert Cliffs ruling denying an extension request. Applicant's Opposition at 2. In Calvert Cliffs, unlike the situation here, the National Whistleblower Center (NWC) had not yet even retained experts to conduct a review of the license application when it sought more time in order to complete those efforts and then have its experts review and prepare contentions even though the license application had been available for an extended time. It was the fact that NWC had not yet even retained experts that the Calvert Cliffs Board found precluded a finding of unavoidable and extreme circumstances. Here, of course, GANE has lined up its expert but the expert has schedule conflicts that keep him, and hence GANE, from meeting the original deadline -- a problem greatly exacerbated by the time needed for GANE and its expert to obtain access to the proprietary version of the CAR which is only now being made available to them.

Moreover, in citing the Calvert Cliffs Board's unpublished ruling, the Applicant indicates that the order was affirmed by the Commission in CLI-98-25, 48 NRC 325 (1998). Id. The Applicant's citation and indication of Commission affirmance is incorrect. As the decision in

CLI-98-25, 48 NRC at 337, makes clear, the Commission granted, and disposed of, NWC's petition for review of the Calvert Cliffs Board's August 27, 1998, ruling in CLI-98-19, 48 NRC 132, 134 (1998). Although the Commission indicated that "[t]he Board acted entirely reasonably both in establishing the . . . deadline and, in the absence of Commission guidance, in refusing to extend it," the Commission -- presumably applying the same "unavoidable and extreme circumstances" standard -- granted NWC a 21-day extension of time for filing contentions. CLI-98-19, 48 NRC at 134. The Commission stated that "[t]o ensure that NWC has an adequate opportunity to introduce matters of safety or environmental concern into the Calvert Cliffs proceeding, we have decided to grant NWC [a 21-day extension] to file contentions." Id. Additionally, the Commission stated that

[w]e recognize that our grant of an extension of time to NWC may require the Board to postpone, by two weeks or so, the issuance of its initial decision on standing and on the admissibility of contentions. Given the threshold stage of this proceeding, however, this short delay will not compromise the Commission's ultimate goal to resolve all license renewal issues within 30 months of our initial hearing notice.

Id.

The Applicant's reliance on the Licensing Board's unpublished ruling denying an extension motion for failing to meet the "unavoidable and extreme circumstances" standards in Florida Power and Light Company (Turkey Point, Units 3 and 4) (Dec. 15, 2000), is also unavailing. First, of course, the Licensing Board's Turkey Point ruling has never been reviewed and "unreviewed Board rulings do not constitute precedent or binding law at this agency." Calvert Cliffs, CLI-98-25, 48 NRC at 343 n.3. Further, as a reading of the Board's order and the extension motion shows, the circumstances underlying the Petitioner's extension request in Turkey Point were primarily of an adjustable personal nature (and thus more readily able to be controlled by Petitioner) and not business related as in the case of the schedule conflicts of both GANE's expert and Ms. Carroll. Moreover, it should be noted that, in the Turkey Point

proceeding, a second Petitioner requested an 8-day extension of time from the Commission to file an appeal from the Licensing Board's decision in LBP-01-06, 53 NRC 138 (2001). The extension request merely recited that the Petitioner was appearing pro se and that the extension was needed because the Petitioner was going to be out of the country. See Petitioner Oncavage's Request for Additional Time to File an Appeal Concerning a Terminated Evidentiary Hearing (March 2, 2001). The Commission, through the Secretary of the Commission, granted the extension request presumably applying the "unavoidable and extreme circumstances" standard. See Commissioner Order (March 3, 2001)(unpublished).

Similarly, the Staff's argument that the proceeding schedule should not be controlled by GANE's choice of an expert is without merit. Contrary to the apparent premise of Staff's argument that there are numerous other experts with the expertise that GANE needs, the Board cannot close its eyes to the fact that GANE is a pro se, financially limited, environmental organization and that the universe of experts available to such an organization is extremely limited.

C. For all the foregoing reasons, GANE's motion for an extension of time is granted in part. Accordingly, all the Petitioners' contentions shall be filed by August 13, 2001. Any amendments to any Petitioner's intervention petition relating to standing shall be filed by July 30, 2001. The answers of the Applicant and Staff to any amended intervention petitions shall be filed by August 10, 2001. The responses of the Applicant and the Staff to the Petitioners' proffered contentions shall be filed by September 12, 2001. The oral request of Petitioner

Environmentalists, Inc., for a 60 day extension of time for filing its contentions made as part of its telephonic response to GANE's extension motion is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING BOARD¹

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 3, 2000

¹ Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| In the Matter of |) | |
| |) | |
| DUKE COGEMA STONE & WEBSTER |) | Docket No. 70-3098-ML |
| |) | |
| (Savannah River Mixed Oxide Fuel |) | |
| Fabrication Facility) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (GRANTING IN PART MOTION FOR EXTENSION OF TIME) have been served upon the following persons by U.S. mail, first class, as indicated by an asterisk (*) or through the Nuclear Regulatory Commission's internal distribution as indicated by double asterisks (**), with copies by electronic mail or fax as indicated.

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Docket No. 70-3098-ML
LB ORDER (GRANTING IN PART
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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of July 2001