

October 2, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---------------------------|---|------------------------|
| In the Matter of |) | |
| |) | |
| DUKE ENERGY CORPORATION |) | Docket Nos. 50-369-OLA |
| |) | 50-370-OLA |
| (McGuire Nuclear Station, |) | 50-413-OLA |
| Units 1 and 2, |) | 50-414-OLA |
| Catawba Nuclear Station, |) | |
| Units 1 and 2) |) | |

NRC STAFF'S OPPOSITION TO BREDL'S REQUEST
FOR AN EXTENSION OF TIME

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INTRODUCTION

On September 29, 2003, Blue Ridge Environmental Defense League ("BREDL") requested an extension of time to file its amended and supplemental petition to intervene, thus extending the deadline for the submittal of its contentions from October 14th to October 21, 2003. In support of its motion, BREDL asserts that its expert, Dr. Edwin Lyman, is unavailable to assist BREDL in the preparation of its contentions due to "previously made commitments to other parties" and plans to be out of the area from October 6th until October 14th. The NRC Staff opposes BREDL's petition because the alleged unavailability of an expert to help form contentions falls well short of the "unavoidable and extreme circumstances" standard that applies in this proceeding. *See Board Order Setting Deadlines, Schedules, and Guidance for Proceeding at 4 (Sept. 23, 2003) (Scheduling Order).*

BACKGROUND

On February 27, 2003, Duke Energy Corporation submitted a license amendment request (LAR), which was later limited by a September 23, 2003 supplement, seeking

authorization to allow the insertion of four mixed oxide (MOX) fuel lead test assemblies at Catawba Nuclear Station Units 1 and 2. The LAR became publically available on March 17, 2003. (ADAMS No. ML 030760734)

BREDL filed its petition to intervene on August 25, 2003, in response to the Notice of Opportunity for Hearing published by the NRC in the *Federal Register* on July 25, 2003. 68 Fed. Reg. 44107 (2003). On September 23, 2003, the Atomic Safety and Licensing Board (Board) issued an Order (Setting Deadlines, Schedule, and Guidance for Proceedings) that instructed BREDL to file its amended and supplemented petition no later than October 14, 2003. BREDL's petition for an extension of time to file its contentions followed on September 29, 2003.

DISCUSSION

A. Legal Requirements for Extension of Time

When deciding whether to grant a motion for extension of time, the licensing boards are instructed to look to whether the petitioner has stated in detail and with specificity the "unavoidable and extreme circumstances" that warrant an extension. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998). *See also, Scheduling Order* at 4 (adopting "unavoidable and extreme" standard). In the instant matter, BREDL has failed to demonstrate such "unavoidable and extreme circumstances."

B. BREDL's Circumstances Do Not Warrant an Extension of Time

Dr. Lyman's unavailability during the two weeks preceding the deadline for filing contentions is not an "unavoidable and extreme" circumstance that warrants an extension, because BREDL, which had access to the LAR as of March 17, 2003 (when it became publically available), had approximately seven months in which to utilize Dr. Lyman's assistance to prepare contentions. BREDL has failed to establish Dr. Lyman's unavailability or explain its

own failure to seek the necessary assistance from Dr. Lyman during the entire seven month period it had to review the application and frame its contentions. In addition, BREDL neglected to offer additional circumstances that, viewed collectively with Dr. Lyman's unavailability, rise to the level of "unavoidable and extreme circumstances" entitling it to an extension.

Furthermore, in an opinion reviewing an unpublished decision in which a licensing board denied an extension, the Commission upheld the Board's reasoning for denying the extension even though it granted the petitioner an extension based on other grounds. *Baltimore Gas and Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998) (Calvert Cliffs). The Board's reasoning for denying the extension was that petitioner's inability to retain experts and prepare contentions did not rise to the level of "unavoidable and extreme circumstances" where the petitioner had four months from when the application was made publically available to formulate its contentions.¹ *Baltimore Gas and Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), ASLBP 98-749-01-LR, slip opinion at 2-3, 1998 WL 634570, *1 (1998) (Attached), *vacated in part on other grounds, Calvert Cliffs*, 48 NRC at 134. With respect to the Board's reasoning, the Commission stated that the two and one half week extension "by no means suggests any dissatisfaction with the Board's handling of the matter. . . . The Board acted entirely reasonabl[e]. . . in refusing to extend it." *Id.* Rather than finding that the Board erred in holding that petitioner's inability to obtain experts and formulate contentions over a four month period did not constitute an "unavoidable and extreme circumstance," the Commission explained that it extended the deadline based on its conclusion that "at the time [petitioner] requested a hearing in early August, it might not have anticipated that the Board would set a date as early as September 11th [a period of four weeks] as the deadline for filing contentions. . . ." *Id.* By granting the two and one half week extension,

¹ The licensing board expounded that the "starter's pistol" for application review and contention formulation sounds not when a petitioner's hearing request is filed, but rather when the application becomes publically available. *Baltimore Gas and Electric Company, supra*, slip opinion at 2, 1998 WL 634570, *1.

the Commission increased the period between the date of petitioner's request and the deadline for filing contentions from four to six and a half weeks. *Id.*

In this case, because seven weeks will have elapsed between BREDL's request for a hearing (August 25, 2003) and the date that BREDL's contentions are due (October 14, 2003), which is more time than the petitioner in *Calvert Cliffs* had even after the Commission granted the extension, the Commission's reasoning for extending the deadline in *Calvert Cliffs* does not apply. The Calvert Cliffs licensing board's finding that the petitioner's inability to retain experts and prepare contentions within a four month period did not rise to the level of "unavoidable and extreme circumstances," which the Commission upheld, does apply, however, to the case at hand. Consequently, applying the prior Board's reasoning in the instant case, Dr. Lyman's unavailability to assist in preparing contentions does not constitute an "unavoidable and extreme circumstance" warranting an extension.

CONCLUSION

For the reasons set forth above, BREDL's motion for an extension of time should be denied.

Respectfully submitted,


Kathleen Kannler

Dated at Rockville, MD
This 2nd day of October 2003

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

98 AUG 27 P1:37

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Thomas D. Murphy

OFFICE
RUL
ADJUD
STAFF

In the Matter of

BALTIMORE GAS AND ELECTRIC
COMPANY

(Calvert Cliffs Nuclear
Power Plant, Units 1 & 2)

Docket Nos. 50-317-LR
50-318-LR

ASLBP No. 98-749-01-LR

August 27, 1998

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MEMORANDUM AND ORDER
(Denying Time Extension Motion
and Scheduling Prehearing Conference)

By motion filed August 21, 1998, petitioner National Whistleblower Center (NWC) seeks revision of the Board's August 20, 1998 initial prehearing order as it (1) established a September 11, 1998 deadline for filing any supplement to its intervention petition; and (2) proposed holding an initial prehearing conference the week of October 13, 1998. See Petitioner's Motion for Enlargement of Time (Aug. 21, 1998) [hereinafter NWC Extension Motion]. Petitioner seeks to move the prehearing conference back to at least December 1, 1998, and asserts its purported right, under 10 C.F.R. § 2.714(a)(3), to file petition supplements up to fifteen days prior to the initial prehearing conference. In submissions filed August 24 and August 26,

1998, respectively, applicant Baltimore Gas and Electric Company (BG&E) and the NRC staff oppose the NWC extension request.

For the reasons given below, we deny the motion. In addition, based on the responses from the participants relative to our proposed initial prehearing conference date, we establish a schedule for that prehearing conference.

I. NWC Extension Motion

Central to NWC's extension request is its asserted inability within the Board-established time frame to complete its efforts to retain "eminent experts" to review the BG&E license renewal application and have those experts provide it with the necessary technical input to frame its contentions. NWC Extension Motion at 1-2. Its unspoken premise for this argument is that for this and other agency licensing proceedings, the "starter's pistol" for application review and contention formulation does not sound until a petitioner's hearing request is filed. It is mistaken. As both BG&E and the staff point out, the application in question has been publically available since late April 1998, some four months ago, at which time the public, including NWC, was advised that a hearing could be offered on the application. See 63 Fed. Reg. 20,663, 20,664 (1998). NWC has not made any showing as to why, in light of

this extended period during which the BG&E application was available, it is unable to complete its contention composition efforts by the September 11 deadline. Thus, its expert review claim does not provide the requisite "unavoidable and extreme circumstances" that warrant an extension. CLI-98-14, 48 NRC ___, ___ (slip op. at 6) (Aug. 19, 1998).

As a basis for its extension request, NWC also proffers the "voluminous and complex" nature of the application and the fact this is the "first" power reactor license renewal proceeding. NWC Extension Motion at 3. The three-volume application, while not light reading, clearly has a much more limited scope compared to initial license applications for power reactors and other facilities. Moreover, while NWC has asserted repeatedly that its contentions will present complex and novel issues, neither its intervention petition nor its extension motion present a single example of what those would be. Again, we are unable to find that NWC has met its burden to establish the requisite "unavoidable and extreme circumstances" to warrant an extension.

Finally, we find no basis for NWC's assertion that section 2.714(a)(3) provides an absolute right to file contentions up to fifteen days before the initial prehearing conference. As the staff points out, this provision sets an

automatic outside limit for the filing of contentions, but only in the absence of licensing board action in accordance with its 10 C.F.R. §§ 2.711(a), 2.718 authority to regulate the proceeding by, among other things, setting schedules. In this instance, exercising that recognized authority, see Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 (1980), consistent with the Commission's scheduling guidance we have established a deadline for filing intervention petition supplements that is not tied to the prehearing conference schedule. And, as we noted in our initial prehearing order, contentions submitted after that date will be considered late-filed.

II. Initial Prehearing Conference Schedule

In our initial prehearing order, we asked the parties to advise us "immediately" of any conflicts relative to conducting a prehearing conference the week of October 13, 1998. Licensing Board Memorandum and Order (Initial Prehearing Order) (Aug. 20, 1998) at 4 (unpublished). Taking into account the responses of counsel, we will convene a prehearing conference in this proceeding beginning at 9:30 a.m. on Thursday, October 15, 1998, in the Atomic Safety and Licensing Board Panel Hearing Room, Room T-3B45, Third Floor, Two White Flint North Building, 11545 Rockville

Pike, Rockville, Maryland. Although the prehearing conference will continue until completed, the Board currently anticipates it should take no more than two days.

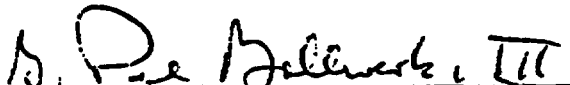
In this connection, we note that BG&E has suggested we consider the issue of petitioner's standing on a more expedited basis, separate from the question of contention admissibility. See [BG&E] Answer to Petition to Intervene and Request for Hearing of [NWC] (Aug. 24, 1998) at 11-12. Given the already expedited schedule in this proceeding, the efficiencies of this approach are not altogether apparent. Thus, at the prehearing conference we will entertain arguments on (1) the issue of standing, based on the information in the petitioner's August 7, 1998 hearing request/intervention petition and any additional information NWC supplies in conjunction with its petition supplement; and (2) the admissibility of NWC's proffered contentions.

For the foregoing reasons, it is this twenty-seventh day of August 1998, ORDERED, that:

1. Petitioner NWC's August 21, 1998 motion for extension of time is denied.

2. An initial prehearing conference will be held in this proceeding in accordance with the provisions of section II above.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD*


G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 27, 1998

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* Copies of this memorandum and order were sent this date to counsel for applicant EG&E and to counsel for petitioner NWC by Internet e-mail transmission; and to counsel for the staff by e-mail through the agency's wide area network system.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

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| Units 1 and 2, and |) | 50-414-OLA |
| Catawba Nuclear Station |) | |
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OPPOSITION TO BREDL'S REQUEST FOR AN EXTENSION OF TIME" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (**), this 2nd day of October, 2003.

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