UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan
Greta J. Dicus
Jeffrey S. Merrifield

In the Matter of	)	
BALTIMORE GAS & ELECTRIC COMPANY	)	Docket Nos. 50-317-LR, 50-318-LR
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2)	)	

CLI-98-25

MEMORANDUM AND ORDER

This proceeding involves an April 8, 1998, application by Baltimore Gas & Electric Company ("BG&E") to renew its operating licenses for Units 1 and 2 of its Calvert Cliffs Nuclear Power Plant. The National Whistleblower Center ("NWC" or "petitioner") filed a timely intervention petition opposing the application. On October 16, 1998, the Licensing Board issued LBP-98-26, dismissing the proceeding on the ground that NWC had failed to submit contentions by the October 1, 1998, deadline prescribed by the Board. NWC appeals

LBP-98-26 pursuant to 10 C.F.R. § 2.714a.[1] For the reasons given by the Board in LBP-98-26, and for the reasons below, we affirm.

PROCEDURAL BACKGROUND

NWC's essential grievance is the Commission's alleged failure to provide sufficient information and time to develop contentions adequate to trigger a hearing under our rules. See 10 C.F.R. § 2.714. NWC challenges an array of procedural rulings by the Board and by the Commission itself. We therefore set out in some detail the chronology of the Calvert Cliffs proceeding and the series of orders and decisions leading ultimately to the Board's rejection of NWC's petition to intervene.

This proceeding began on April 27, 1998, when the Commission published in the Federal Register a notice that BG&E's April 8th application was then available for public inspection at the NRC Public Document Room. See 63 Fed. Reg. 20,633. On May 19th, the NRC published another notice, this one announcing its staff's determination that the application was sufficiently "complete" to be "acceptable for docketing." See 63 Fed. Reg. 27,601. This second notice also indicated that the docketing of the application "does not preclude requesting additional information as the [staff's] review proceeds, nor does it predict whether the Commission will grant or deny the application." Id. On July 8th, the Commission published a notice of opportunity for hearing, permitting interested persons to file petitions for intervention

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[1] NWC not only has challenged LBP-98-26 on appeal to the Commission, but also recently filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit challenging the same Board order. NWC cannot simultaneously challenge the same order before both the Commission and the court of appeals. See, e.g., Melcher v. FCC, 134 F.3d 1143, 1163 (D.C. Cir. 1998); Accura of Bellevue v. Reich, 90 F.3d 1403, 1407-08 (9th Cir. 1996). Nonetheless, as NWC's appeal to the Commission came first and has not been withdrawn, we proceed to decide it. NWC's premature lawsuit apparently results from a misunderstanding of our rules. Although petitions seeking discretionary Commission review are "deemed denied" if not acted on in thirty days (10 C.F.R. § 2.786(c)), no comparable provision governs appeals as of right, such as NWC's (see 10 C.F.R. § 2.714a). In the latter case, the final agency action is a Commission decision disposing of the appeal.

by August 7th. See 63 Fed. Reg. 36,966. The notice specified that petitioners must submit their contentions "not later than fifteen ... days prior to the first prehearing conference." Id. The notice, however, did not preclude the Board from establishing an earlier deadline for contentions.

On July 28th, the Commission issued a Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 63 Fed. Reg. 41,872 (Aug. 5, 1998) ("Policy Statement"), providing guidance for all adjudications. The Policy Statement was not part of the Calvert Cliffs proceeding, but expressed the Commission's general expectation that Licensing Boards would establish schedules for promptly deciding issues and specifically reminded the Boards of their authority under various provisions of 10 C.F.R. Part 2 to shorten filing and response periods to the extent practical in specific proceedings. The Policy Statement also addressed such subjects as establishing milestones in an adjudication, granting extensions of time, and staying discovery against the NRC staff.

On August 7th, NWC filed a petition for intervention and hearing with the Commission in the Calvert Cliffs license renewal proceeding. On August 19th, the Commission issued CLI-98-14, 48 NRC 39, referring NWC's petition to the Atomic Safety and Licensing Board, offering guidance on some of the matters that it had recently addressed in its policy statement, and setting out a suggested expedited procedural schedule for the case, with a goal of resolving the Calvert Cliffs proceeding within thirty months. On August 20th, the Board issued an unnumbered Memorandum and Order scheduling further filings in this proceeding. In that order, the Board scheduled the prehearing conference for the week of October 13th, established a September 11th deadline for the filing of contentions, and stated that contentions submitted after that date would be considered untimely and would therefore have to satisfy the "late filing" requirements of 10 C.F.R. § 2.714(a)(1)(i)-(v).

NWC responded to these two orders on August 21st by asking the Commission to vacate the scheduling and guidance portions of CLI-98-14 and by asking the Board both to postpone the prehearing conference until December 1st and to grant NWC a postponement of the deadline for contentions until fifteen days prior to the prehearing conference. On August 26th, the Commission issued CLI-98-15, 48 NRC 45, denying NWC's motion to vacate. On August 27th, the Board issued an unnumbered order denying NWC's request for an enlargement of time. In that order, the Board noted that the application was far more limited in scope than an initial license application, that NWC had not shown why -- given that NWC had had access to the application since April -- it would be unable to formulate contentions by September 11th, and that NWC had provided no examples of complex or novel issues warranting delay. Id. at 2-3.

Instead of submitting contentions by September 11th, as required by the Board's August 20th and 27th orders, NWC again came to the Commission, this time with a petition for review of the Board's refusal to modify its schedule. On September 17th, we issued CLI-98-19 indicating that the Board had "acted entirely reasonably ... in refusing to extend [the deadline for filing contentions] until November" and we further "urge[d] the Board to continue its effort to move this proceeding forward expeditiously." 48 NRC at 134. Notwithstanding these statements and with the intention of giving NWC every reasonable opportunity to participate in this proceeding, we granted NWC an extension of nearly three weeks (until September 30th, one of several dates suggested by NWC) within which to file its contentions.

Subsequent to our issuance of CLI-98-19, the Board denied a motion filed by NWC (on September 18th) for "partial discovery" but granted an alternative motion for a second extension (for one day) within which to file contentions. The Board also set the staff's and BG&E's response deadline at November 2nd and scheduled the prehearing conference for the week of

November 9th. See Unnumbered Memorandum and Order, dated September 21, 1998, slip op. at 2-3. On September 29th, the Board set the prehearing conference for November 12th.

Despite NWC's two extensions of time, the October 1st deadline passed without NWC submitting contentions to the Board. Instead, it filed four pleadings on that date. In one of these (styled "Status Report"), NWC listed the experts from whom it had obtained commitments of assistance and also the "areas of concern" which those experts had raised as possible contentions or bases for contentions. NWC stated explicitly that, in listing these "areas of concern," it was not thereby filing contentions. In another October 1st filing (entitled "Motion to Vacate and Reschedule Prehearing Conference"), NWC brought to the Board's attention a request by the staff to BG&E for additional technical information ("request for additional information" or "RAI") regarding the license renewal application. NWC complained that the RAI had not been placed in the Public Docket Room until September 22nd, nearly a month after its August 28th issuance, that neither the staff nor BG&E had informed petitioners or the Board of the existence of the RAI, and that BG&E is not expected to respond to the RAI until November 21st, nine days after the then-scheduled November 12th prehearing conference. NWC went on to assert that, if BG&E needs more than 100 days [sic, actually 85] to "complete [its] renewal application" by responding to the August 28th RAI, then NWC should have 115 days within which to respond with contentions prior to the pre-hearing conference (i.e., until March 16, 1999). See NWC Motion to Vacate at 6. Finally, in its October 1st "Reply to NRC Staff and BG&E's Answer to NWC's Petition to Intervene and Request for Hearing," NWC set forth two arguments in support of its claim of standing -- arguments that NWC later characterized on appeal as "contentions." Motion at 11.

Later, on October 7th and 16th , NWC provided the Board with copies of thirty-four more staff RAIs, the existence of which purportedly "impacts this proceeding [and] provides a basis

for the Board's dismissal of the ... BGE ... license renewal application ... or in the alternative, for the Board's vacating and rescheduling of the pre-hearing conference that is scheduled to take place on November 12, 1998." NWC's Notice of Filing, dated Oct. 16, 1998, at 1. NWC considered the RAIs to be proof that BG&E had failed to file a "complete and acceptable" application.

On October 13th, relying solely upon the existence of staff's RAIs, petitioner filed two contentions: one claimed that BG&E's application was incomplete as a matter of law and must be either withdrawn or dismissed, and the other claimed in general terms that the application fails to meet aging and other safety-related requirements. Thus, as of the October 16th issuance date of LBP-98-26, the Board had pending before it these two contentions and NWC's request to reschedule the prehearing conference. The Board in LBP-98-26 determined that NWC had failed to submit any contentions by the Board's October 1st deadline or to show that the October 13th contentions had met the Commission's standards for late-filed contentions. Based on these conclusions, the Board denied NWC's petition to intervene and terminated the proceeding. The Board's order rendered moot NWC's motion to reschedule.

On October 26th, petitioner appealed LBP-98-26 to the Commission, challenged the Policy Statement (CLI-98-12) as constituting an improper rulemaking, and essentially sought reconsideration of all prior Commission decisions in this proceeding (CLI-98-14, -15, and -19). Further, it sought review of the Board's September 21st Memorandum and Order denying NWC's request to delay the prehearing conference and also the Board's August 20th and September 29th orders declining to postpone the contention filing deadline. Both BG&E and the staff submitted briefs opposing NWC's appeal.

DISCUSSION

Last summer the Commission reexamined its hearing process and issued a policy statement (described above) designed to streamline it. Several considerations prompted the , among them the potential number of hearings the agency was facing and recent experience with innovative adjudicatory techniques. At the beginning of its policy statement, the Commission said,

> With the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals.

CLI-98-12, 48 NRC at 1. Clearly, one of the Commission's leading considerations was the need to deal with license renewal in a fair and efficient way.

The Commission has long understood that the potential was there for a large number of utilities to seek license renewal soon, and that the renewal process would have to be both fair and efficient. Over the next twenty years, a little more than half the licenses for operating power reactors will expire (USNRC Information Digest, NUREG-1350, Vol. 10 (1998) at 49). There are already fifty-five units at thirty-eight sites eligible to apply for renewal licenses (id.). As the Commission said in 1991 when it first issued regulations on license renewal:

> In proposing the earliest date of application, the Commission considered the time necessary to plan for replacement of retired nuclear plants. Industry studies estimate that the lead time necessary for utilities to build a new electric generation plant is 10 to 12 years for fossil fuels and 12 to 14 years for nuclear or other new technologies. When the staff review is factored into the decision process, the Commission concludes that applications 18-20 years before expiration are not unreasonable. For these reasons, the final rule permits application for a renewed license to be filed 20 years before expiration of the existing operating license.

Final Rule, "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,963 (Dec. 13, 1991).

Similarly, decisions to invest in major replacements, such as steam generators, must be made early in a licensee's consideration of a renewal decision (NRC, The Price-Anderson Act ... A Report to Congress, NUREG/CR-6617 (Oct. 1998) at 26-27). Several sites have already announced that they will not seek renewal. After adding to the ten to fourteen years the three or more years the Commission was predicting in 1991 it would take the agency to review and reach a decision on an application for renewal, the Commission concluded that it would be reasonable to expect applications to come in as early as twenty years before their expirations, and so allowed in Part 54 of its regulations. 56 Fed. Reg. 64,963.

In light of these factors, the Commission has long understood the need for a predictable and stable license renewal process. In publishing revisions to the license renewal rule in 1995, the Commission noted that, as early as 1993, it had informed the staff that:

> it is essential to have a predictable and stable regulatory process clearly and unequivocally defining the Commission's expectations for license renewal. This process would permit licensees to make decisions about license renewal without being influenced by a regulatory process that is perceived as uncertain, unstable, or not clearly defined.

Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,462 (May 8, 1995).

With an eye on achieving "a prompt and fair resolution of proceedings," the Policy Statement sought "to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration." Policy Statement, CLI-98-12, 48 NRC at 18. Commission and Board scheduling orders in the current case reflect the concerns set out in the Policy Statement. *See* CLI-98-15, 48 NRC at 50.

NWC maintains that efforts by the Commission and the Board to expedite the Calvert Cliffs proceeding have resulted in a process that denies NWC a fair opportunity to make its case against license renewal. NWC's appeal raises numerous, often overlapping, procedural questions. Rather than address the same arguments repeatedly in different contexts, we break them below into several broad categories. Much of NWC's appellate brief simply recapitulates what NWC has argued to the Commission twice previously, both when it asked the Commission to vacate its original order referring this proceeding to the Licensing Board and when it sought Commission review of the Board's original scheduling orders. We continue to find NWC's claims unpersuasive, largely for the same reasons we have given before. See CLI-98-19, 48 NRC 132 (1998); CLI-98-15, 48 NRC 45 (1998).

In considering NWC's procedural arguments one more time, we remain mindful of our "broad regulatory latitude" under the Atomic Energy Act to establish our "'own rules of procedure ... and methods of inquiry.'" Nuclear Information Resource Service v. NRC, 969 F.2d 1169, 1177 (D.C. Cir. 1992) (en banc), quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 543 (1978); see Union of Concerned Scientists v. NRC, 920 F.2d 50, 53-54 (D.C. Cir. 1990). Only if we were convinced that the efficiency measures we and the Board have taken were unlawful or unjust would we backtrack from them. We are not so convinced.

A. Commission Authority to Modify its Procedures by Policy Statement

NWC asserts that our Policy Statement, CLI-98-12, amounts to an unlawful rule because it was issued without the prior notice and opportunity for comment required under the Administrative Procedure Act ("APA"). See Appeal at 8-9. We disagree. The Policy Statement reduced no one's substantive rights and changed no basic procedures. It simply updated the Commission's prior procedural guidance to the Boards (issued in 1981) and suggested various

procedural devices designed to foster more efficient and expeditious proceedings. See CLI-98-15, 48 NRC at 51. It continued the Commission's policy of giving the Boards sufficient discretion to handle cases in a way that ensures fair and accurate decisionmaking. See Policy Statement, CLI-98-12, 48 NRC at 20. In sum, CLI-98-12 is no more than it purports to be, a policy statement on adjudicatory procedures, and therefore it did not require notice-and-comment in advance of issuance. See 5 U.S.C. § 553 ("statements of policy" and "rules of agency organization, procedure, or practice" exempt from notice-and-comment requirement); see generally Troy Corp. v. Browner, 120 F.3d 277, 287 (D.C. Cir. 1997); American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046-47 (D.C. Cir. 1987).

B. Commission Authority to Modify its Procedures on a Case-By-Case Basis

1. Extensions of Time

NWC asserts, as it has before, that the Commission inappropriately changed the standard for granting extensions of time by establishing an "unavoidable and extreme circumstances" test (set forth both in the Policy Statement, CLI-98-12, 48 NRC at 21, and in CLI-98-14, 48 NRC at 44) in lieu of the "good cause" test set forth in 10 C.F.R. § 2.711(a). NWC argues that the Commission imposed this new standard without reference to the record in this proceeding, without support of substantial evidence, and in violation of both the APA and the Commission's own regulations (section 2.711(a)). See Appeal at 6, 10, 17. Earlier in this proceeding, we considered and rejected this very argument. See CLI-98-15, 48 NRC at 53 and n.5. NWC in its appeal has given us no reason to depart from that ruling. We continue to believe that our construction of "good cause" to require a showing of "unavoidable and extreme circumstances" constitutes a reasonable means of avoiding undue delay in this important

license renewal proceeding, and for assuring that the proceeding is adjudicated promptly, consistent with the goals set forth in the Policy Statement and the APA.[2]

In any event, throughout this proceeding, NWC has provided the Board and the Commission only the scantiest of details regarding its health-and-safety or environmental concerns. Prior to its October 1st deadline for filing contentions, NWC had more than five months within which to prepare contentions, yet it offered no meaningful explanation of the grounds for its opposition to BG&E's application. It merely stated, in the most general terms possible, that it doubts the plant "can safely operate past [its] original specified lifetime" and that license renewal "poses an unacceptable health and safety risk to the public." See Petition for Intervention, dated Aug. 7, 1998, at 4. Prior to October 1st, NWC's pleadings never expanded on either of these conclusory statements. NWC's complete failure to provide specific information about its concerns precluded any finding that "good cause," in a meaningful sense, justified NWC's requested extensions of time prior to that date. (Later in this order, we find that NWC's October 1st and 13th filings offer similarly insufficient explanation of its health-and safety and environmental concerns.)[3]

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[2]The Board's application of the "unavoidable and extreme circumstances" test to petitioner was consistent with not only the Commission's own directive in CLI-98-14 and Policy Statement (CLI-98-12, 48 NRC at 21) but also with the Board's own extensive authority under 10 C.F.R. § 2.718 to schedule and regulate proceedings. Petitioner argues that 10 C.F.R. § 2.3 requires the Commission and the Board to apply the "specific rule" of section 2.711(a) setting forth the "good cause" standard rather than the "general rule" of section 2.718 permitting the Board to establish the proceeding's schedule. We see no conflict between the two rules. In any event, section 2.3 applies only to conflicts between rules within Part 2, Subpart G and rules outside that subpart. It is irrelevant to purported conflicts between rules within Subpart G.

[3] NWC offers two related arguments -- (1) that the Board applied the new standard selectively by not applying it to the NRC staff and to BG&E when giving them more time in which to respond to any contentions NWC might file on October 1st, and (2) that the Board ignored recent precedent in which two of the instant Board's members applied the "good cause" rather than the "unavoidable and extreme circumstances" standard in another proceeding. See Appeal at 19-20. These arguments warrant only brief responses. The first is unpersuasive as the Board order did not address a motion for an extension of time, for good cause or otherwise,

(continued...)

2. Milestones

NWC complains generally that CLI-98-14 inappropriately established an unalterable thirty-month schedule for this proceeding. See Appeal at 8, 10, 15. More specifically, NWC asserts that the Commission exceeded its authority when it instructed the Board to provide written explanations for any departures from the Commission's proposed timetable and then to restore the proceeding to the proposed timetable. Id. at 8. Therefore, it asserts, the Board erred in following the Commission's milestones. Id. at 7. In CLI-98-15, the Commission rejected NWC's attack against our "milestones" approach and pointed out that our suggested milestones were neither inflexible nor bereft of mechanisms for taking unexpected developments into account. See 48 NRC at 51-52, 55-56.[4] We adhere to the views we expressed there.

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[3](...continued)
but simply provided a schedule that gave the staff and BG&E response times "roughly equivalent" to NWC's time to prepare initial pleadings. See LBP-98-26, 48 NRC at __, slip op. at 16 n.8. The second ignores the fact that unreviewed Board rulings do not constitute precedent or binding law at this agency. See, e.g., Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988)).

[4] NWC asserts that the milestones and other procedural devices set out in the Commission's initial referral order (CLI-98-14, 48 NRC 39 (1998)) violate the APA's requirements that agencies conduct proceedings with "due regard for the rights and privileges of all the interested parties or adversely affected persons," taking into account the "conveniences and necessities of the parties or their representatives." See Appeal at 6, 14-15, citing 5 U.S.C. §§ 554(b), 558(c)). We do not doubt our obligation to treat all parties to our proceedings fairly -- indeed, our original scheduling order could hardly have been clearer on our commitment to fairness (CLI-98-14, 48 NRC at 42-43) -- but we cannot see how our effort to expedite the Calvert Cliffs proceeding prejudiced NWC's right to participate meaningfully in it. In addition, as a formal matter, one of the APA provisions cited by NWC (5 U.S.C. § 554(b)) applies only to agency proceedings required by statute to be "on the record." See 5 U.S.C. § 554(a). The Commission's position, reiterated several times in recent years, is that NRC licensing proceedings are not governed by APA requirements for formal on-the-record adjudications, except in particular situations where Congress has so mandated. See, e.g., Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998).

3. Authority to Shorten Period for Filing Contentions

NWC argues that the Commission and the Board unlawfully shortened the period for filing proposed contentions by establishing a deadline earlier than fifteen days prior to the first prehearing conference. See Appeal at 6, 17-19. But, as we explained in CLI-98-15, "10 C.F.R. § 2.711 explicitly provides that the Commission may extend or shorten the time for action set forth in the rules and may set time limits where the rules do not prescribe a limit." 48 NRC at 53. We also stressed that:

> the Commission has traditionally exercised plenary supervisory authority over its adjudications and adjudicatory boards. This authority allows it to interpret and customize its process for individual cases. See, e.g., Safety Light Corp., CLI-92-13, 36 NRC 79, 91 (1992) (Commission exercises its authority to modify applicable procedural rules).

Id.

More specific to the issue at bar, it has long been the practice at this agency that Boards may change the deadline for filing contentions to allow sufficient time for responses prior to the prehearing conference -- a practice which our Appeal Board explicitly approved at least twice, in situations all but identical to ours. See Houston Power and Light Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 & n. 15 (1980); Houston Power and Light Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 (1979). As the Appeal Board commented in Allens Creek, "it makes a good deal of sense to structure the proceeding so that all participants know, before they arrive at the conference, what position the proponents of the plant are taking on the various contentions." 10 NRC at 523.

The regulation governing the filing period for proposed contentions states simply that they must be filed "not later than ... fifteen ... days prior to the holding of the first prehearing conference." 10 C.F.R. § 2.714(b)(1) (emphasis added). By its very terms, this regulation establishes only the latest time for filing proposed contentions; it nowhere precludes either the

Board or the Commission from shortening that time frame. Indeed, section 2.718(e) provides the Board with broad authority to "[r]egulate the course of the hearing" and section 2.711(a) permits the Commission or Board to "shorten[]" regulatory time frames "for good cause."[5] The Board here had "good cause" in that the alteration of the time frame[6] would permit the Board and NWC to consider the staff's answer to the proposed contentions prior to the scheduled date of the prehearing conference (pursuant to 10 C.F.R. § 2.714(c), the staff's answer would otherwise be due the day of the prehearing conference).

Moreover, in setting an October 1st filing deadline for contentions, the Board properly concluded that NWC would have by then had ample time within which to develop contentions -- a conclusion with which we agree. To paraphrase only slightly our comment in CLI-98-19: by October 1st, NWC had had more than five months (157 days) since the April 27th publication of the NRC's notice of the application's filing (63 Fed. Reg. 20,663), more than four months (135 days) since the May 19th publication of the NRC's notice of acceptance for docketing of BG&E's application (63 Fed. Reg. 27,601), nearly four months (113 days) since the NRC announced the

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[5] 10 C.F.R. §§ 2.718(e), 2.711(a). See also Policy Statement, CLI-98-12, 48 NRC at 20; Final Rule, "Restructuring of Facility License Application Review and Hearing Processes," 37 Fed. Reg. 15,127, 15,129 (1972) (the Statement of Consideration which the Commission issued when promulgating section 2.711):

> Many of the time limitations prescribed by the current rules were set to allow the maximum time for the parties to the proceedings to perform various activities. There are instances where the activities covered by the limitations can be performed in much less time. In appropriate cases where it would not prejudice a party, the presiding officer is authorized to reduce the time limits by order. (Emphasis added.)

[6] In claiming that the Board "shortened" the time frame within which NWC was required to submit its contentions, NWC improperly relies on the fact that Board postponed the prehearing conference by more days than it postponed NWC's contentions deadline. This comparison gives the superficial -- and incorrect -- impression that the Board actually reduced the number of days available to NWC (from 15 days prior to the conference to 42 days prior thereto). Contrary to NWC's argument, the period for filing contentions was in fact lengthened twice -- from September 17th to 30th and later, as a further accommodation, from September 30th to October 1st.

beginning of the public scoping process under the National Environmental Policy Act (63 Fed. Reg. 31,813 (June 10, 1998)), and nearly three months (85 days) since the NRC published the Notice of Opportunity for Hearing (63 Fed. Reg. 36,966 (July 8, 1998)). See CLI-98-19, 48 NRC at 134 n.1.[7]

4. Sua Sponte Board Contentions

NWC challenges the Commission's caveat in its July Policy Statement and CLI-98-14 that the Boards interject their own contentions sua sponte only in "extraordinary" circumstances. According to petitioner, this caveat not only has the effect of "chill[ing]" the Board's willingness to raise health-and-safety contentions on its own motion but also results in a substantive change in our regulations, requiring notice and comment. See Appeal at 5-6, 8, 10, 11-12. In refusing to vacate our original referral order, we rejected essentially the same NWC argument. See CLI-98-15, 48 NRC at 55. As we pointed out there:

> The extent of the Board's authority to raise contentions sua sponte is a matter within the Commission's supervisory authority, and depends largely on an appropriate division of authority between the Board and the agency's regulatory staff -- a question of resources and expertise peculiarly within the Commission's province to decide. FN7/
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> FN7/ Moreover, the sua sponte standards to which Petitioner objects mirror the language in 10 C.F.R. § 2.760a....

It is difficult to understand, in any event, what relevance the sua sponte question has to NWC's current appeal. Given NWC's failure to raise any admissible contentions itself, the Board has had no occasion to raise contentions sua sponte and, indeed, lacks authority to do so. See

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[7] NWC also argues that, under 10 C.F.R. § 2.3, the general rule set forth in section 2.718 must yield to the specific fifteen-day rule in section 2.714(b)(1). See Appeal at 18. As noted earlier, petitioner misreads section 2.3. That section applies only to conflicts between Subpart G rules and rules outside Subpart G; it does not govern conflicts within that subpart. In any event, we do not consider sections 2.714(b)(1) and 2.718 to be at odds with each other. The former establishes a "default" filing deadline for contentions in proceedings in cases where the Board issues no order under sections 2.711 and 2.718(e) setting such a deadline.

Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188-89 (1991).

C. Timeliness of Purported "Contentions" Submitted October 1st

On appeal, NWC asserts, for the first time, that in actuality it filed timely contentions in its October 1st "Reply to the NRC Staff and BG&E's Answer to NWC's Petition to Intervene and Request for Hearing." See Appeal at 4, 23, citing Reply at 11. NWC's supposed "contentions" state as follows:

> [T]he original Petition to Intervene does indicate a redressable injury. NWC alleged that BGE cannot safely operate Calvert Cliffs Units 1 and 2 past the original specified lifetime and that if the renewal license was extended it would pose an unacceptable health and safety risk. NWC also requested that the licensee not be granted its renewal license until after it has demonstrated at a hearing that BGE can safely operate Calvert Cliffs Units 1 and 2 for the requested renewal term of 20 years and that the operating license not be renewed until such time as it is determined that the plant can, in fact, be operated safely and within the bounds of the law for the requested renewal term.

We find NWC's position disingenuous. On its face, NWC's "Reply" did not purport to advance contentions. It merely made arguments supporting NWC's argument that its Petition to Intervene had asserted a "redressable" injury, for purposes of standing to intervene. Indeed, NWC's Reply stated both that "NWC is not required to file its list of contentions at this time" and that "[b]efore considering the issues of specificity, particularity and redressability, NWC must be afforded the opportunity to file ... its list of contentions ...." Reply at 10. NWC's after-the-fact restyling of its Reply as a "contentions" filing is incompatible with these statements' clear implication that NWC had not yet filed contentions. NWC's restyling also cannot be squared with its oft-repeated assertions that it need not file contentions until fifteen days prior to the prehearing conference and that the Board allotted insufficient time to prepare contentions. See, e.g., NWC "Status Report," filed October 1, 1998, at 2 (demanding "adequate time to review the relevant material and set forth contentions").

More fundamentally, NWC's Reply nowhere satisfies, or attempts to satisfy (or even refers to), any of the "contention" requirements of 10 C.F.R. § 2.714(b)(2): that petitioner provide "a brief explanation of the bases of the contention;" "a concise statement of the alleged facts or expert opinion which support the contention;" "those specific sources and documents ... on which the petitioner intends to rely ...;" "sufficient information ... to show that a genuine dispute exists;" and either "references to the specific portions of the application ... that the petitioner disputes and the supporting reasons for each dispute" or "identification of each failure" "to contain information on a relevant matter as required by law." Indeed, NWC's Reply ignores not only these regulatory requirements but also explicit instructions in both the Policy Statement and CLI-98-14 on contention-specificity. CLI-98-14, 48 NRC at 41; CLI-98-12, 48 NRC at 22.

For all these reasons, we reject NWC's belated argument that its October 1st Reply can be construed as including timely-filed contentions.

D. Satisfaction of Late-filing Criteria by Contentions Submitted October 13th

NWC next asserts that the Board erred in failing to balance the late-filing criteria of 10 C.F.R. § 2.714(a)(1)[8] prior to rejecting as untimely two contentions presented for the first time in NWC's October 13th Notice of Filing. See Appeal at 23-24. In that Notice, NWC contended that the license renewal application (1) is incomplete and must be withdrawn and/or summarily dismissed, and (2) fails to meet the aging and other safety-related requirements mandated by law and/or NRC regulations. See Petitioner's Notice of Filing, dated Oct. 13, 1998, at 1-2. But, as the Board pointed out, NWC failed even to address our late-filing criteria, and that default

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[8] These five factors are: (i) good cause for failure to timely file, (ii) availability of other means of protecting petitioner's interests, (iii) extent to which petitioner's involvement may assist in the development of a sound record, (iv) extent to which existing parties will represent petitioner's interests, and (v) extent to which petitioner's participation will broaden the issues or delay the proceeding.

alone warrants rejection of late-filed contentions. See LBP-98-26, 48 NRC at ___, slip op. at 13-14.

NWC misconstrues our regulations when it asserts (Appeal at 24) that it is the Board's burden to show that untimely contentions do not satisfy our late-filed requirements. Rather, longstanding NRC practice obliges petitioner to show that its contentions satisfy those requirements.[9] Indeed, the Commission has itself summarily dismissed petitioners who failed to address the five factors for a late-filed petition.[10] NWC also argues that the Board erred in preventing NWC from arguing at a prehearing conference that it had satisfied the late-filing standards. See Appeal at 7. NWC's failure to address the required standards in its written October 13th submission prevents it from now complaining that it was denied an opportunity to do so, orally, at a prehearing conference.[11]

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[9] See, e.g., Texas Util. Elec. Co. (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992) ("petitioner must ... demonstrate that a balancing of the five criteria set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) weighs in favor of their intervention"); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982) ("the State has an extremely heavy burden to justify an intervention petition on those latter issues"); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980) ("Needless to say, the late petitioner must address each of those five factors and affirmatively demonstrate that, on balance[,] they favor permitting his tardy admission to the proceeding"). Given that NWC is in essence (though not in form) seeking an order permitting it to raise late-filed contentions, our conclusion in the text is also consistent with 10 C.F.R. § 2.732 that "the applicant or the proponent of an order has the burden of proof."

[10] Texas Util. Elec. Co. (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-11, 37 NRC 251, 255 (1993). See also Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-66 (1985) ("given its failure even to address the section 2.714 lateness factors, [the] intervention petition was correctly denied because it was untimely"). Moreover, based on our review of the current record in this proceeding, it would seem unlikely that NWC could have satisfied the late-filing criteria, even had it tried. The most important criteria by far is "good cause." It seems to us beyond dispute that, by October 1st, NWC had been given ample time within which to develop its contentions in this proceeding.

[11] NWC points to a recent case, Private Fuel Storage, L.L.C. (ISFSI), LBP-98-7, 47 NRC 142 (1998), where a Board permitted a petitioner to appear at the prehearing conference and to argue that its contentions satisfied the late-filing criteria. See Appeal at 20. Assuming that NWC's representations regarding the Board's action in Private Fuel Storage are correct, the

(continued...)

E. Admissibility of Contentions

NWC's two October 13th contentions not only were impermissibly late, but they also failed to meet our specificity requirements for contentions. The only basis NWC offers in support of its two late-filed contentions is the existence of the NRC staff's requests for additional information, or "RAIs." NWC provides no explanation how or why the RAIs are germane to either contention. This omission contravenes our regulatory requirements that a contention be accompanied by

> [a] concise statement of the alleged facts or expert opinion which support the contention ..., together with references to those specific sources and documents ... on which the petitioner intends to rely [and also] ... [s]ufficient information ... to show that a genuine dispute exists with the applicant on a material issue of law or fact ... includ[ing] references to the specific portions of the application ... that the petitioner disputes and the supporting reasons for each dispute.

10 C.F.R. § 2.714(b)(ii)-(iii) (emphasis added). See also Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). Mere reference to documents does not provide an adequate basis for a contention. See Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989). This absence of specificity and support is, without more, a sufficient ground for rejecting the two contentions. See Sacramento Munic. Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144

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[11](...continued)
Board's decision would not support NWC's position. First, it would have been merely an act of discretion on the Private Fuel Storage Board's part. See Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 (1985). Second, as noted in note 3, supra, Board rulings not reviewed on appeal do not constitute precedent at this agency and therefore do not bind other Boards. Third, the actual controlling Commission precedent on this issue yields the opposite result from that sought by NWC. In Pilgrim, 22 NRC at 468, the Appeal Board concluded that a petitioner had "no right to respond to the applicant and staff answers to his petition -- i.e., a second opportunity to make the 'substantial showing' on the five lateness factors that should have been included in the petition itself.... [A]lthough the Licensing Board might have accorded him that opportunity as a matter of discretion, it was not obliged to do so." (Emphasis in original.) See also id. at 467 n.22 ("late petitioners['] obligation is to establish affirmatively at the threshold (i.e., in the late petition itself) that a balancing of the five lateness factors warrants overlooking the tardiness").

(1993) (upholding Board ruling that the petitioner's "assertion did not comply with specific pleading requirements for admissible contentions in that [petitioner] failed to describe the matters to which Staff questions are addressed or why they might constitute a defect in the Environmental Report").

"Neither Section 189a of the Atomic Energy Act nor § 2.714 ... permits the filing of a vague, unparticularized contention." See Final Rule, "Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). NWC attempts to excuse its failure to submit specific contentions on the ground that the staff's failure to submit RAIs to the Board created a "glaring inadequacy in the record" and called for a postponement of the contentions deadline to allow an examination of the RAIs and BG&E's responses. See Appeal at 7, 20-21. But our regulations do not require the staff to submit RAIs to the Board or to serve them on petitioners. Rancho Seco, 37 NRC at 152-53. Under our longstanding practice, contentions must rest on the license application, not on NRC staff reviews. The Statement of Consideration accompanying our Contentions Rule (section 2.714) made our approach entirely clear:

> The Commission ... disagrees with the comments that § 2.714(b)(2)(iii) should permit petitioner to show ... that petitioners not be required to set forth facts in support of contentions until the petitioner has access to NRC reports and documents.... [B]ecause the license application should include sufficient information to form a basis for contentions, we reject commenters' suggestions that intervenors not be required to set forth pertinent facts until the staff has published its FES [Final Environmental Impact Statement] and SER [Safety Evaluation Report].

54 Fed. Reg. at 33171. Accord, Rancho Seco, 37 NRC at 153-54.

Contrary to NWC's view (Appeal at 7, 21-23), the NRC staff's mere posing of questions does not suggest that the application was incomplete, or that it provided insufficient information to frame contentions, and NWC has cited no language in the RAIs suggesting otherwise. Indeed, were the application as rife with serious omissions as NWC suggests, then NWC

should have had no problem identifying such inadequacies -- yet NWC has not done so. What NWC ignores is that RAIs are a standard and ongoing part of NRC licensing reviews. Questions by the NRC regulatory staff simply indicate that the staff is doing its job: making sure that the application, if granted, will result in safe operation of the facility. The staff assuredly will not grant the renewal application if the responses to the RAIs suggest unresolved safety concerns.

The regularity of the RAI process can be seen in Commission's Notice of Acceptance For Docketing of the Application, which expressly stated that although the staff had "determined that BG&E has submitted information ... that is complete and acceptable for docketing," "[t]he docketing of the renewal application does not preclude requesting additional information as the review proceeds, nor does it predict whether the Commission will grant or deny the application." 63 Fed. Reg. 27,601 (May 19, 1998). Likewise, our rules specify that "[d]uring review of an application by the staff, an applicant may be required to supply additional information." 10 C.F.R. § 2.102(a).

The Commission considers many applications sufficiently complete for purposes of docketing, and for starting the adjudicatory process, even though the staff subsequently poses questions to the applicants regarding those applications. For instance, the Commission in Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395 (1995), ruled that an "application may be modified or improved as NRC review goes forward" and that any view to the contrary "is incompatible with the dynamic licensing process followed in Commission licensing proceedings." As we stated above, it is the license application, not the NRC staff review, that is at issue in our adjudications. See, e.g., id. at 395-96; Rancho Seco, 37 NRC at 146-47. The NRC staff will consider and resolve all safety questions regardless of whether any

hearing takes place. NWC can trigger a separate adjudicatory review only if it comes forward with timely and concrete concerns of its own.

As the Board pointed out, "[t]his is not to say" that RAIs are always "irrelevant to the adjudicatory process." See LBP-98-26, 48 NRC at ___, slip op. at 19. "[I]f a petitioner concludes that a staff RAI or an applicant RAI response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a)." Id. See, e.g., Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-39 (1991). Indeed, one reason for having a generic late-filed contention provision in the regulations is to have a logical, pre-noticed method for intervenors to raise concerns in proceedings that relate to newly-developed information. Here, NWC has done nothing like this, offering no specific safety concerns arising out of the RAIs but choosing instead to rest on their mere existence. If the Commission were to take NWC's preferred approach, and allow petitioners to await completion of the RAI process before framing specific contentions, the hearing process frequently would take months or years even to begin, and expedited proceedings, such as the Commission contemplated for license renewal, would prove impossible.

F. Propriety of Board's stay of discovery from NRC Staff

NWC challenges the Commission's directive in CLI-98-14, 48 NRC at 42, staying all discovery against the staff. Petitioner claims that this directive was not prompted by a request from a party, was not based on evidence (let alone substantial evidence), and did not permit NWC an opportunity to oppose the ruling. See Appeal at 10, 12, 13. NWC loses sight of the fact that this directive in CLI-98-14 had its origin in the Policy Statement, CLI-98-12, 48 NRC at

24,[12] and that policy statements need not be based on evidence in one individual case. There is, in any event, ample and obvious reason for the Commission's directive: the Commission was determined that the NRC staff complete its safety and environmental reviews promptly, without simultaneously facing the unnecessary distraction of discovery. The Commission's approach allows for discovery against the NRC staff at an appropriate time.

NWC nonetheless asserts that the Board erred in denying NWC's motion to delay the prehearing conference and the contention deadline until NWC had been given the opportunity to conduct discovery of the staff pursuant to 10 C.F.R. §§ 2.740(b) & (c), 2.752. See Appeal at 12 n.10, 21. This assertion contravenes the terms of the cited regulation, as well as longstanding NRC case law. Sections 2.740 and 2.752 apply only to "parties" -- a status NWC does not have in this proceeding. Moreover, other regulations applicable to obtaining discovery from the staff likewise apply only to "parties." See 10 C.F.R. § § 2.720(h)(2)(ii), 2.744(a)-(e). Finally, as the Board correctly pointed out in its September 21st order (slip op. at 2):

> longstanding agency precedent precludes an intervenor from obtaining discovery to assist it in framing contentions. See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, reconsid'n denied, ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

See also Wisconsin Elec. Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974); Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 n.12, 468 (1982).

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[12] "Except for establishment of the case file, generally the licensing board should suspend discovery against the Staff until the Staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the Staff before the Staff's review documents are issued will expedite the hearing, discovery against the Staff on safety issues may commence upon the issuance of the SER, and discovery on environmental issues upon issuance of the FES."

When promulgating the Contentions Rule in 1989 the Commission stated, in words fully applicable here:

> We reject the arguments that the new rule is unfair and a denial of due process because it requires intervenors to allege facts in support of its contention before the intervenor is entitled to discovery. Several months before contentions are filed, the applicant will have filed an application with the Commission, accompanied by multi-volume safety and environmental reports. These documents are available for public inspection and copying in the Commission's headquarters and local public document rooms.... [This] rule will preclude a contention from being admitted where an intervenor has no facts to support its position and ... contemplates using discovery ... as a fishing expedition which might produce relevant supporting facts. The Commission does not believe this is an appropriate use of discovery....

54 Fed. Reg. at 33,170-71. Over the years, our requirement that contentions rest on the license application rather than on the NRC staff's review has not prevented innumerable petitioners, some quite recently, from framing admissible contentions and moving forward toward a hearing. See, e.g., Private Fuel Storage, L.L.C. (ISFSI), LBP-98-7, 47 NRC 142 (1998). NWC, however, has failed to do so.

G. Purported Ex Parte Contacts

NWC claims that wrongful ex parte contacts between the Commission and the NRC staff or BG&E are somehow suggested by the Commission's establishment of milestones in CLI-98-14, by its guidance in the same order regarding a stay of discovery against the staff, and by the Board's failure in its September 29th order to require BG&E and the staff to meet the purportedly heightened standard for extensions of time. See Appeal at 6, 12, 14, 19-20. But BG&E and the NRC staff sought no extensions of time, so NWC's implication that the Board failed to act evenhandedly on extension requests is incorrect. Moreover, the Commission's inclusion of the milestone and discovery sections of CLI-98-14 is in fact attributable to a cause much more benign than supposed improper influence -- they each derive directly from similar terms in the Commission's earlier Policy Statement. Compare CLI-98-12, 48 NRC at 20 (regarding the expeditious handling of proceedings and the authority to modify filing deadlines),

21 (regarding the establishment of milestones), 24-25 (regarding the stay of discovery against the staff). NWC points to no actual evidence of improper ex parte contacts by BG&E or separation-of-functions contacts by the staff, nor are we aware of any.

CONCLUSION

For all the reasons set forth above, as well as the reasons set forth in LBP-98-26, NWC's appeal is denied and LBP-98-26 is affirmed.[13]

IT IS SO ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of December, 1998.

[13] As an alternate ground for affirmance, BG&E argues that NWC has not demonstrated standing to intervene. Like the Licensing Board, we do not reach the standing question in light of NWC's failure to file any timely contentions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
BALTIMORE GAS & ELECTRIC COMPANY	)	Docket Nos. 50-317/318-LR
	)	
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM MEMORANDUM AND ORDER (CLI-98-25) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail as indicated.

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Docket Nos. 50-317/318-LR
COMM MEMORANDUM AND ORDER (CLI-98-25)

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Dated at Rockville, MD this
23rd day of December 1998

Office of the Secretary of the Commission