UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.

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-98-15

MEMORANDUM AND ORDER

This proceeding involves an application by Baltimore Gas & Electric Co. ("BG&E" or "applicant") to renew its operating license for both units of its Calvert Cliffs Nuclear Power Plant in Lusby, MD. The National Whistleblower Center ("NWC" or "petitioner"), wishing to oppose BG&E's application, filed a timely petition for intervention and hearing. On August 19, 1998, the Commission issued CLI-98-14, referring to the Atomic Safety and Licensing Board NWC's petition for intervention and hearing, providing guidance for the conduct of the proceeding (assuming a hearing is granted), and setting out a suggested procedural schedule for the case. On August 24, 1998, NWC filed a motion to vacate portions of CLI-98-14 as contrary to the Commission's own regulations (10 C.F.R. §§ 2.711(a), 2.718(m), 2.740, 2.756), the Atomic Energy Act, 42 U.S.C. § 2231 ("AEA"), the Administrative Procedure Act, 5 U.S.C. § 551-558 ("APA"), and Constitutional due process. For the reasons set forth below, we deny NWC's motion.

The gist of NWC's complaint is that CLI-98-14 denies it "'meaningful public participation'" in this proceeding. Motion at 14, quoting Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1441 (D.C. Cir. 1984). According to NWC, the Commission's order demonstrated alleged hostility towards NWC and the public adjudicatory process. Id. at 14. NWC asks the Commission to vacate the scheduling and guidance portions of CLI-98-14 and thereby to remove an alleged "chilling effect" on petitioner's due process rights. Id. at 14-15.

CLI-98-14 derives not from hostility toward NWC but from the Commission's recognition that license renewal applications require a major commitment of resources and effort by the renewal applicant, the NRC staff, the Commission itself, and any party opposed to renewal. Our order is designed to prevent unnecessary delays and digressions, but at the same time to ensure a fair and meaningful process. In our view, thirty months to resolve license renewal controversies, as proposed in CLI-98-14, on its face seems sufficient time for NWC to make its case (should a hearing be granted) and for the Board and the Commission to consider all arguments. To be sure, diligence and effort will be required, but that is true in litigation of any stripe, at least where deadlines govern. With this perspective in mind, we turn now to NWC's particular concerns.

NWC first objects to the Commission's "mandat[ory]" thirty-month schedule as arbitrary, capricious and an abuse of discretion. NWC considers the issuance of such a schedule premature, given that the Commission knows nothing of what contentions NWC will offer, what conclusions the NRC staff will reach in its Safety Evaluation Report ("SER") and Final Supplemental Environmental Impact Statement ("FSEIS"), and what factors may require extending this first-of-its kind proceeding. Id. at 3, 5. According to NWC, the schedule will prevent petitioner from protecting both its procedural and substantive rights and the Board from fulfilling its regulatorily-imposed obligation to "'regulate the course of the hearing' and 'dispose

of procedural requests or similar matters.'" Id. at 4, quoting APA, 5 U.S.C. § 556(c). Moreover, given that the Commission did not seek input from the parties prior to issuing the schedule, NWC argues that the schedule violates the APA provision requiring agencies to manage their proceedings consistent with the "'convenience and necessity of the parties.'" Motion at 4, 6, quoting APA, 5 U.S.C. § 554(b), and referring to 5 U.S.C. §§ 556(c)(5), 557(d)(1)(E). Further, NWC contends that the schedule's timing milestones themselves are improper in that they preclude petitioner from "properly participat[ing] in this proceeding." Motion at 5.

NWC's first line of argument reflects a basic misreading of CLI-98-14. That order did not impose an unalterable schedule, carved in stone, as petitioner suggests. See, e.g. CLI-98-14, slip op. at 4 n.1 (the Board still has the "discretion [to] allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the [FSEIS] or on environmental issues if the [FSEIS] is issued before the final SER"); accord id. at 5. (For further discussion of the procedural flexibility reflected in CLI-98-14, see discussion of petitioner's fifth argument, below.) Rather, CLI-98-14 was issued as "guidance" pursuant to the Commission's inherent supervisory authority to oversee the agency's own administrative adjudications, an authority that perforce includes instructions to its Licensing Board.[1] Like other kinds of Commission guidance, our case-specific scheduling guidance is nonbinding by nature,[2] as the

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[1] Hydro Resources, Inc., CLI-98-9, 47 NRC 326, 332 (1998) (regarding Commission's "inherent supervisory authority" over the Presiding Officer); Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990) ("the Commission has inherent supervisory authority over adjudicatory proceedings"); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569 (1988) (same); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 234 (1986) (same); Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977) (same).

[2] Cf. Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 98 (1995) ("NUREGs and Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements").

language of CLI-98-14 itself makes quite clear (again, see discussion of petitioner's fifth argument, below).

The Commission exercises its inherent supervisory authority both by issuing generic policy statements on the conduct of licensing proceedings and by issuing orders to the Board offering guidance that is specific to particular cases. For instance, the Commission quite recently issued a Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 47 NRC ___ (July 28, 1998), 63 Fed. Reg. 41,872 (Aug. 5, 1998), setting forth guidance on a number of procedural issues. To a large degree, CLI-98-14 reflects the generic guidance we offered in that Policy Statement.[3] Likewise, the Commission regularly issues case-specific guidance to the Board on both procedural and substantive issues. For instance, we not only offered both these kinds of guidance to a Licensing Board in the Yankee Rowe decommissioning proceeding, but also set out a proposed expedited schedule, just as we did in CLI-98-14. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996).[4] Such case-specific guidance is fully appropriate for the reasons given more than

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[3] The Commission also issued a general policy statement on this general subject in 1981. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 46 Fed. Reg. 28,533 (May 27, 1981).

[4] For further instances where the Commission offered guidance to its Licensing Boards, see Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-98-13, 47 NRC __, slip op. at 10-13 (July 29,1998) (noting that the Commission monitors all adjudicatory proceedings and offering guidance on two substantive issues); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-19, 38 NRC 81 (1993) (providing guidance on substantive issue); Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 429-30 (1993) (offering guidance on policy matter); Geo-Tech Assoc. (Geo-Tech Laboratories), CLI-92-14, 36 NRC 221, 222 (1992) (offering guidance regarding the scope of hearing held on enforcement sanctions imposed for failure to pay user fees); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 187-88 (1991) (providing guidance on the requirements for organizational standing); Curators of the University of Missouri, CLI-91-7, 33 NRC 295, 296-97 (1991) (providing guidance to the Board regarding implementation of section 2.1251(c) in initial decisions relating to Subpart L proceedings); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 237

(continued...)

twenty years ago in Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977):

> While we may deal with matters before us in adjudicatory hearings only on the basis of the record which has been compiled, the [NRC] is not a court constrained to the "passive virtues" of judicial action.... We have regulatory responsibility, which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings.... Ultimately the members of the Commission are responsible for the actions and policy of this agency, and for that reason we have inherent authority to review and act upon any adjudicatory matter before a Commission tribunal -- subject only to the constraints of action on the record and reasoned explanation of the conclusions....

Pursuant to its inherent supervisory authority, the Commission over the years repeatedly has issued orders expediting Board proceedings and suggesting time frames and schedules. See, e.g., Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-3, 45 NRC 49, 50 (1997); Yankee Atomic Elec. Co., CLI-96-1, 43 NRC at 9-11; State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 291 (1993); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-71 (1988). Although the Commission expects such guidance to be followed to the maximum extent feasible, the Licensing Board may deviate from the proposed schedule when circumstances require -- as CLI-98-14 itself suggests (slip op. at 5, 7).

(...continued)
(1991) (providing guidance regarding the admissibility of contentions); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61 (1991) (providing guidance to the parties regarding potential requests for NRC action to order operation of the Shoreham plant); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-1, 33 NRC 1 (1991) (providing guidance on the relationship of the "possession only" license and a decommissioning plan); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-11, 28 NRC 603, 603-04 (1988) (providing guidance as to the course of action to be followed if a problem is found with the scope of an emergency exercise). Cf. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-92-6, 35 NRC 86, 90 (1992) (announcing that, if the case developed in a particular direction, "the Commission will provide appropriate instructions and guidance for the conduct of further proceedings").

Commission orders expediting cases do not reflect inflexible or arbitrary action, but rather the Commission's best judgment on how to speed up the adjudicatory process without prejudicing anyone's rights to participate meaningfully. NWC's objections to the Commission's order ignore the Commission's express statements in CLI-98-14 that, although the Board should narrow the issues requiring discovery and limit the rounds of discovery, it should nevertheless ensure that these actions were "consistent with fairness to all parties" and that "[w]e do not expect the Licensing Board to sacrifice fairness and sound decision-making to expedite any hearing granted under this application." Slip op. at 4, 5.

NWC's second line of argument is that CLI-98-14 violates the Commission's own procedural rules. According to petitioner, the Commission is bound to follow its own regulations and any deviation from these regulations constitutes a violation of law. More specifically, petitioner complains that (1) the Commission's restriction of extensions of time to situations involving unavoidable and extreme circumstances violates 10 C.F.R. § 2.711(a) which provides that such restrictions may be imposed "for good cause;" (2) the thirty-month period and the deadlines within that period preclude a "fair and impartial" conduct of the hearing, as required in 10 C.F.R. § 2.718; (3) the schedule interferes with the authority of the Board under 10 C.F.R. § 2.718(e) to "regulate the course of the hearing and conduct of the parties" as well as the Board's obligation under 10 C.F.R. § 2.718(m) to act in accordance with the APA; and (4) the Commission's restrictions on discovery contravene 10 C.F.R. § 2.740(b) and (c) which purportedly grant such restricting authority only to the Board and which require the exercise of that authority to be preceded by a motion for such relief. Motion at 7-11.

This second line of argument runs afoul of the same well-established legal principles discussed above.[5] Contrary to NWC's view, the Commission has traditionally exercised plenary

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[5] It is also not clear that CLI-98-14 departs from the Commission's procedural rules. For (continued...)

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). Indeed, 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. The Commission, as the agency's ultimate adjudicator, also has full authority to define the scope of its proceedings. In Geo-Tech Assoc. (Geo-Tech Laboratories), CLI-92-14, 36 NRC 221, 222 (1992), the Commission limited the case's scope for reasons similar to those applicable to the instant proceeding, i.e., a prior rulemaking had already resolved most of the issues that the licensee would probably raise:

> The hearing scope shall be quite narrow. Neither the fee schedule nor its underlying methodology may be properly challenged in this type of proceeding. They have been fixed by rulemaking which this proceeding cannot amend.... If a Board determines that a hearing of substantially broader scope is warranted, it must receive authorization from the Commission before proceeding further.

Cf. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991) (directing the Licensing Board to suspend consideration of all but two issues), reconsid'n denied, CLI-92-6, 35 NRC 86 (1992).

Third, NWC asserts that the Commission's limitation of the proceeding "to a review of the plant structures and components that will require an aging management review for the period of extended operation of the plant's systems, structure and components" violates the provisions of 10 C.F.R. § 2.714. According to NWC, that regulation gives petitioners "the right to file any contentions which they determine, in good faith, to be related to Applicant's renewal process." Motion at 11-12 (emphasis added), referring to CLI-98-14, slip op. at 2.

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[5](...continued)
example, limiting extensions of time to situations involving unavoidable and extreme circumstances simply gives content, under the circumstances of this case, to our rule's general "good cause" standard.

In CLI-98-14, the Commission merely reiterated a decision on the scope of the license renewal inquiry that it had made three years ago when promulgating Part 54 of its regulations. See 60 Fed. Reg. 22,461 (May 8, 1995). See generally Geo-Tech Laboratories, CLI-92-14, 36 NRC at 222. In the Part 54 rulemaking, the Commission determined that the scope of the relicensing proceedings would be limited in precisely the manner set forth in CLI-98-14. Indeed, CLI-98-14 even cited the regulations governing the scope of such proceedings -- 10 C.F.R. § 54.21(a) and (c). Slip op. at 2.[6] Moreover, although petitioner is entitled to file any contention that it believes is germane to the requested licensing action, it is not entitled to have each of those contentions admitted for litigation. The Commission in CLI-98-14 was appropriately indicating the proper scope of the proceeding, thereby saving the time and resources of the Board, licensee, staff and petitioner. See Perry and Geo-Tech Laboratories, supra. See generally Bellotti v. NRC, 725 F.2d 1380, 1381-82 (D.C. Cir. 1983).

Fourth, petitioner complains that the Commission has established a new standard for the Board's raising of issues sua sponte, i.e., that they be raised by the Board itself only in "extraordinary" circumstances and that such issues must present "serious safety, environmental, or common defense and security matters" in order to be admissible. NWC asserts that any matter material to public health and safety is admissible as a contention. It further argues that the procedures of CLI-98-14 will have a "chilling effect" on the Board's willingness to initiate a contention sua sponte. Motion at 12-13, referring to CLI-98-14, slip op. at 3. Again, we disagree. 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

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[6] To the extent that petitioner is attempting to attack the regulations directly, it is precluded from doing so under 10 C.F.R. § 2.758.

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.[7]

Fifth and finally, NWC argues that, to the extent CLI-98-14 is an advisory opinion, it is improper and should be vacated. Oddly, petitioner's supporting arguments all focus on the purportedly mandatory nature of the Commission's order. Motion at 13-14. As noted above, although the order is an expression of the Commission's inherent supervisory authority over the Board, its scheduling provisions constitute guidance rather than a mandate to the Board. The language on which NWC itself relies makes this clear:

> The Commission directs the Licensing Board to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of a Commission decision on the pending application in about two and one half years from the date that the application was received.
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> * * * * * *
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> [t]he Licensing Board [should] conduct this proceeding in accordance with the guidance specified in this order.

Slip op. at 4, 8. See also id. at 2 ("We also provide the Licensing Board with guidance .... and a suggested schedule"), 4 ("proposed schedule"), 5 ("the goal of issuing a decision ... in about two and one half years") (emphases added). Again, while we expect the Board to adhere to our scheduling guidance to the maximum extent possible, we recognize that particular circumstances may justify deviations from our guidance (see slip op. at 5, 7). Consequently, we have refrained from mandating a schedule.

Similarly, as previously noted, the Commission in CLI-98-14 provided that, although the Board should narrow the issues requiring discovery and limit the rounds of discovery, it should nevertheless ensure that these actions were "consistent with fairness to all parties" and later

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[7] Moreover, the sua sponte review standards to which petitioner objects mirror the language in 10 C.F.R. § 2.760a, applicable to proceedings on facility operating license applications. See also Cincinnati Gas and Elec. Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109, 110-11 (1982).

stated that "[w]e do not expect the Licensing Board to sacrifice fairness and sound decision-making to expedite any hearing granted under this application." Slip op. at 4, 5. Likewise, the Commission provided that the Board still has the "discretion [to] allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the [FSEIS] or on environmental issues if the [FSEIS] is issued before the final SER"). Slip op. at 4 n.1. Accord id. at 5. None of the words quoted above suggests that the provisions of CLI-98-14 were, as petitioner suggests, carved indelibly in stone. Unforeseen circumstances, or unexpected complexity, may require adjustments in the expected course of the proceeding. CLI-98-14 contains sufficient flexibility to deal with such situations.

For all the reasons set forth above, we conclude that petitioner is in no way being denied "meaningful public participation" in this proceeding. We therefore deny NWC's motion to vacate.

It is SO ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of August, 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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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 COMMISSION MEMORANDUM AND ORDER (CLI-98-15) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by asterisk or through deposit in the Nuclear Regulatory Commission's internal mail system, with copies by electronic mail as indicated.

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Docket Nos. 50-317/318-LR
COMMISSION MEMORANDUM AND ORDER
(CLI-98-15)

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Dated at Rockville, MD this
26th day of August 1998

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