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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE
GENERAL COUNSEL
ADJUTANT GENERAL

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

NRC STAFF'S ANSWER
TO PETITIONER'S MOTION FOR ENLARGEMENT OF TIME

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c) and the Atomic Safety and Licensing Board's Order of August 24, 1998, the staff of the Nuclear Regulatory Commission (Staff) hereby answers the "Petitioner's Motion for Enlargement of Time," dated August 21, 1998 (Motion). For the reasons set forth below, the Motion should be denied.

BACKGROUND

On August 7, 1998, the National Whistleblower Center (Petitioner) filed its "Petition to Intervene and Request for a Hearing" (Petition) with respect to the Baltimore Gas & Electric Company's (BG&E or Applicant) application of April 10, 1998, to renew its licenses for the Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2. On August 19, 1998, the Commission issued an Order referring the Petition to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for assignment of an Atomic Safety and Licensing Board to preside over this proceeding. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Plant, Units Nos. 1 and 2), CLI-98-14, 48 NRC ___, slip op. (1998). The Commission's

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Order also provided guidance to the Board regarding the scope of the proceeding, discovery management, and the schedule for the proceeding.¹ On August 19, 1998, the Chief Administrative Judge appointed this Licensing Board to preside over the proceeding. 63 Fed. Reg. __ (1998). The Board then issued a "Memorandum and Order," which, *inter alia*, scheduled further filings regarding the Petition. "Memorandum and Order," ASLBP No. 98-749-01-LR (Aug. 20, 1998)(Initial Prehearing Order or Order).

Pursuant to the Initial Prehearing Order, on or before September 11, 1998, Petitioner may file a supplement to its Petition, which must include its list of contentions and supporting bases. Initial Prehearing Order at 3. The Board's Order further provided that any contention submitted after this date will be considered a late-filed contention that must meet the requirements for admission set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). *Id.* The Board's Order also indicated that the Board intends to hold a prehearing conference during the week of October 13, 1998. *Id.* at 4.

Petitioner requests an enlargement of time such that the prehearing conference be held on or after the week of December 1, 1998, with its contentions due 15 days prior to this prehearing conference. Motion at 1, 4. The Motion does not establish good cause for the Board to grant the requested delays and, therefore, should be denied.

DISCUSSION

The Commission's Rules of Practice in 10 C.F.R. Part 2, Subpart G, set schedules for the filing of various submissions during a proceeding. *See, e.g.*, 10 C.F.R. §§ 2.714 and

¹ On August 21, 1998, Petitioner also filed a "Motion to Vacate Order CLI-98-14" before the Commission.

2.730 (setting times for filings regarding petitions to intervene and answers to motions, respectively). Section 2.711 explicitly authorizes the Commission and presiding officers to shorten or extend these times. That section states:

Except as otherwise provided by law, whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer[.]

10 C.F.R. § 2.711(a)(1998).

In addition, the Commission has inherent supervisory authority over adjudicatory proceedings. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990), *quoting United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976).

By issuing its Order of August 19, 1998, the Commission did just that. The Commission's Order contains explicit instructions regarding the schedule in this proceeding, in particular, providing that the Licensing Board should, within 90 days of the date of this order, issue its decision on intervention petitions and contentions. Commission Order, slip op. at 5. With regard to extensions of time, the Commission's Order further provided that "to avoid unnecessary delays in the proceeding, the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances." Commission Order, slip op at 6. This establishes the threshold for circumstances which might constitute "good cause" for the purposes of 10 C.F.R. § 2.711 in this proceeding.

Petitioner argues, that in ruling on its motion, the Board should consider three of the factors considered in the case-by-case approach set forth in *U.S. v. Lussier*, 929 F.2d 25, 28

(1st Cir. 1991), and that those factors weigh heavily in favor of granting Petitioner's requested extension. Motion at 2. That case, however, involves consideration of a continuance requested in a criminal proceeding; it does not concern a standard such as that articulated by the Commission in this license renewal administrative proceeding. *Lussier*, 929 F.2d at 26-27.

Petitioner has not identified any particular circumstance that was unavoidable and extreme. Rather, Petitioner claims that "the NRC regulations concerning admissible contentions are very burdensome," and that "given the complexity of this proceeding, and the need to obtain expert witnesses . . . there is not enough time available for proper preparation of the contentions" by September 11, 1998. Motion at 2-3. Petitioner further asserts that:

Petitioner's need to postpone the prehearing conference and deadline for filing contentions is "unavoidable" and constitutes an "extreme circumstance." The need for sufficient time to retain experts who can be properly prepared to assist in the preparation of contentions is "unavoidable." This is an "extreme circumstance" given the very short time period set forth in the [Board's] order for the Petitioner to prepare . . . contentions[.]

Id. at 2, n.1.

Petitioner cannot claim that the need to comply with the Commission's Rules of Practice and the Board's order in this proceeding is, in and of itself, an unavoidable or extreme circumstance on which Petitioner may establish "good cause" for a request for an extension. If such a claim could be made, unavoidable circumstances would *always* be established by a petitioner seeking an extension of time for submission of contentions, and this is an absurd interpretation of 10 C.F.R. § 2.714(b).

With regard to Petitioner's need to obtain expert assistance in formulating contentions, Petitioner has had notice of the asserted "complexity" of this proceeding since the Staff published its notice of acceptance for docketing of the application (acceptance notice) on May 19, 1998. *See* 63 Fed. Reg. 27,601 (1998). In the May 19, 1998 acceptance notice, as well as in the April 27, 1998 Notice of Receipt of Application for Renewal (63 Fed. Reg. 20663), the Commission stated that an opportunity to request a hearing would be the subject of a subsequent notice. At the very least, Petitioner could have been preparing contentions since the Staff published the notice of opportunity for a hearing in this proceeding on July 8, 1998. *See* 63 Fed. Reg. 36,966 (1998). Petitioner does not present any reason why the 115 days from the date of the acceptance notice to the Board's September 11, 1998, deadline for submitting contentions or the 65 days from the date of the notice of opportunity for a hearing to that deadline is not enough time to prepare contentions.

Petitioner states that it has "already obtained agreements from a number of eminent experts to provide assistance" in preparing contentions, but simply asserts that they "cannot provide appropriate opinions" by the deadline. Motion at 3. Petitioner, however, does not identify a single expert it has retained and gives no reason whatsoever why any of these experts are unable to provide assistance within the time allotted. Moreover, the Petitioner states that it is "obtaining additional experts to assist in the formulation of valid contentions." *Id.* Petitioner admits that it has not yet even retained all of the experts it needs to formulate contentions. As set forth above, Petitioner has had sufficient time to do so.

Petitioner requests that the prehearing conference in this proceeding be set for the first week in December, 1998, with contentions filed 15 days before the conference. If the prehearing conference were delayed to the first week of December, 1998, as requested by Petitioner, contentions would be due, according to Petitioner, no earlier than November 15, 1998. This would afford Petitioner at least 130 days from the notice of opportunity for a hearing to formulate contentions, and Petitioner has presented no reason why such an excessive delay should be introduced into this proceeding.²

Petitioner states that it seeks "clarification" of the Board's Initial Prehearing Order and refers to 10 C.F.R. § 2.714(a)(3) to support the proposition that it may amend the Petition and submit contentions after September 11, 1998, as long as this is done at least 15 days prior to the first prehearing conference. Petitioner, however, ignores 10 C.F.R. §§ 2.714(b)(1) and 2.718(e), which authorize the Board to require the Petitioner to submit all its contentions earlier, in this instance by September 11, 1998. The Commission's regulations in 10 C.F.R. § 2.714(b) control the admission of contentions. Section 2.714(b) states:

Not later than fifteen days prior to the holding of the . . . first prehearing conference, the petitioner shall file *a supplement* to his or her petition that

² The scope of this proceeding is limited. *Calvert Cliffs*, CLI-98-14, slip op. at 2. Even in a construction permit proceeding, a broad scope proceeding, a special prehearing conference would be held within 90 days after a notice of hearing is published. 10 C.F.R. § 2.751a (1998). This notice of hearing is published as soon as practicable after the application is docketed. 10 C.F.R. § 2.104(a) (1998). Contentions would be due, at the latest, 15 days before the prehearing conference. 10 C.F.R. § 2.714(b)(1). A petitioner in a construction permit hearing would, therefore, have a maximum of 75 days from the date of the notice of hearing to prepare contentions under the Rules of Practice. Petitioner in this limited-scope proceeding makes no showing why it needs so much more time to prepare contentions.

must include a list of the contentions which the petitioner seeks to have litigated in the hearing. . . . Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

10 C.F.R. § 2.714(b)(1) (1998)(emphasis added).

This provision sets the latest time for filing contentions and its plain language does not restrict the Board from shortening that time. As 10 C.F.R. § 2.718(e) grants the Board all powers necessary to "[r]egulate the course of the hearing," the Board has the authority to shorten the time set in section 2.714(b)(1). *See also* section 2.711. The "factors in paragraph (a)(1) of this section" that must be balanced to allow additional time for filing the supplement are, of course, the factors applicable to late-filed contentions, and the Board may impose these standards on any contentions or bases for contentions filed after a Board-ordered deadline. In view of the foregoing, the Board was well within its authority under the regulations to set the schedule as it did in the Initial Prehearing Order, and the order needs no clarification.

CONCLUSION

Petitioner has failed to establish good cause for delaying the submission of contentions and the prehearing conference. Accordingly, the Motion should be denied.

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO PETITIONER'S MOTION FOR ENLARGEMENT OF TIME" in the above-captioned proceeding have been served on the following by deposit in the United States 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, this 26th day of August, 1998:

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T 3F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to GPB@NRC.GOV)

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T 3F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to JRK2@NRC.GOV)

Thomas D. Murphy
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T 3F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to TDM@NRC.GOV)

Adjudicatory File (2)
Atomic Safety and Licensing Board
Mail Stop: T 3F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Commission Appellate
Adjudication
Mail Stop: 16-C-1 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary
ATTN: Rulemaking and Adjudications
Staff
Mail Stop: 16-C-1
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to SECY@NRC.GOV)

Atomic Safety and Licensing Board
Panel
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Michael D. Kohn, Esq.*
Stephen M. Kohn, Esq.
David K. Colapinto, Esq.
National Whistleblower Legal Defense
and Education Fund
3233 P Street, NW
Washington, DC 20007
(E-mail copy to mdk@whistleblower.org)
(E-mail copy to smk@whistleblower.org)
(E-mail copy to dc@whistleblower.org)

R. S. Fleishman, Esq.*
General Counsel Baltimore Gas and
Electric
P.O. Box 1479
Baltimore, MD 21203
(E-mail copy to
robert_s_fleishman@bge.com)

David R. Lewis, Esq.*
Shaw, Pittman, Potts & Trowbridge
2300 N. Street, N.W.
Washington, D.C. 20037-1128
(E-mail copy to
david_lewis@shawpittman.com)



Janice E. Moore
Counsel for NRC Staff