

19509

DOCKETED
USNRC

BEFORE THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'98 SEP 14 P12:16

COMMISSIONERS:

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

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)	
)	
BALTIMORE GAS)	Docket Nos. 50-317 and 50-318
& ELECTRIC CO.,)	License Renewal
et al.,)	
)	
(Calvert Cliffs Unit 1 and)	
Unit 2))	

PETITION FOR REVIEW

Pursuant to 10 C.F.R. §§ 2.786(b)(1) - 2.786(b)(6), Petitioner National Whistleblower Center petitions the Commission for review of the Board's August 27, 1998 Memorandum and Order Denying Petitioner's Motion for Enlargement of Time, on the grounds that the Board's Order has: 1) created a substantial question with respect to a necessary legal precedent cited by the Board which is without governing precedent or is a departure from or contrary to established law; 2) left open substantial and important questions of law and policy; 3) has resulted in the conduct of the proceeding such that it now involves a prejudicial procedural error, and 4) has created a situation which the Commission should deem in the public interest. In light of 10 C.F.R. § 2.786(b)(3), Petitioner requests the Commission's leave to reply to the answer of any party, either supporting or opposing this petition. Finally, in accordance with the procedures of the Commission, this petition is ten pages in length. However, Petitioner also incorporates by reference the all of the arguments raised before this Commission and raised below regarding the

9809160057 980911
PDR ADOCK 05000317
PDR

DS03

illegal nature of the procedures being followed in this proceeding.

PROCEDURAL BACKGROUND

On July 8, 1998 the Nuclear Regulatory Commission ("NRC") published a notice in the Federal Register concerning the above-captioned proceeding. 63 Federal Register No. 130, pp. 36,966-67 (July 8, 1998). On August 7, 1998 Petitioner filed its Petition to Intervene and Request for a Hearing in the above-captioned proceeding. On August 19, 1998 the NRC Commission issued its Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel. Petitioner objected to portions of this order and requested that the NRC Commission vacate the order. See Petitioner's Motion to Vacate Order CLI-98-14. The NRC Commission denied this motion.

On August 20, 1998 this Board issued a Memorandum and Order (Initial Prehearing Order) (hereinafter "Order"). Among other determinations, this Order required Petitioner to file its "supplement to its hearing petition/intervention request" and to file its "list of contentions and supporting bases" on or before September 11, 1998. Order at p. 3. This Order also ruled that any contention filed after September 11, 1998 would be "considered a late-filed contention." Id. The Order also stated that the first prehearing conference would be held during the week of October 13, 1998. Order at 4.

On August 21, 1998 Petitioner filed a Motion for Enlargement of Time in which the Petitioner asked that the date of the prehearing conference be postponed and that the date for filing the supplemental petition and contentions be set for 15 days prior to the prehearing conference. Petitioner also asked the Board to clarify its order concerning the right of Petitioner to file its supplemental petition to intervene and its list of contentions fifteen days prior to the

prehearing conference.

On August 27, 1998 Petitioner's August 21, 1998 motion was denied in its entirety. ASLB Memorandum and Order (Denying Time Extension Motion and Scheduling Prehearing Conference). Among other determinations, the Board held that the Petitioner did not have a right to file contentions up to fifteen days before the initial prehearing conference. The Board "established a deadline for filing intervention petition supplements that is not tied to the prehearing conference schedule" and reaffirmed its prior ruling that contentions submitted after September 11, 1998 would be "considered late-filed." August 27th ASLB Order pp. 3-4. Finally, this Board set a prehearing conference date of October 15, 1998. ASLB Order of August 27, 1998. The Petitioner hereby appeals the August 27th ASLB Order.

**THE MATTERS FACT OR LAW RAISED IN THIS PETITION
WERE BEFORE THE BOARD**

The propriety and legality of the Commission's Order, CLI-98-14, has been previously raised before the Board. Petitioner raised this issue in its August 21, 1998 Motion for Enlargement of Time (hereinafter "Petitioner's Motion for Enlargement of Time"): "...[T]he NRC Commission's guidance on this matter is in conflict with the published regulations of the NRC and in conflict with the Administrative Procedure Act.." See, Petitioner's Motion for Enlargement of Time, at p.2, note 1. The record below, and the record before this Commission, is replete with references to the proper, for "good cause" legal standard.¹

As discussed, *supra*, Petitioner clearly put before the Board the fact that the proper legal

¹ See, e.g., Petitioner's Motion for Enlargement of Time, at p. 1 (stating that the proper legal standard under 10 C.F.R. § 2.711 is "upon a showing of good cause"). See also, Petitioner's Motion to Vacate Order CLI-98-14, at p.7 (asserting that Commission's standard is violative of § 2.711 and that the Commission's directive to the Board concerning procedural matters was illegal).

standard to be applied in consideration of a motion for enlargement of time is the for "good cause" standard. Further, Petitioner alerted the Board to the fact that the proper legal standard must be applied with "due regard" for the "convenience and necessity of the parties," and that timetables must be established in a "reasonable period" taking into account the "rights and privileges of all interested parties." See, Petitioner's Motion for Enlargement of Time, at pp.1-2. As well, Petitioner has put the Board on notice that it must "evaluate each case on its own facts." *Id.*, at 2 [citing *United States v. Lussier*, 929 F.2d 25, 28 (1st Cir. 1991)]. In addition, at the same time the Petitioner filed its motion for enlargement of time it served on the Board a copy of the motion to vacate CLI-98-14 which was served on this Commission. It is clear, then, both explicitly and by implication, that Petitioner raised the argument to the Board that the Order of the Commission, CLI-98-14, was illegal, arbitrary and capricious, and an abuse of the Commission's discretion and that the Board was compelled to follow the published regulations when deciding procedural issues relevant to this proceeding.

Further, the Board established September 11, 1998 as the deadline for filing an amended petition to intervene (including contentions). Petitioner has made it eminently clear to the Board that 10 C.F.R. § 2.714(c)(3) mandates a right to amend the petition to intervene up to fifteen days prior to the initial (special) prehearing conference. See, Petitioner's Motion for Enlargement of Time, at p.4. Finally, the Board itself notes that the grounds for Petitioner's argument is that the "starter's pistol" for consideration of license renewal applications begins with the publishing of the Commission's acceptance of the application in the Federal Register — not when notice of the application is first published. See, Memorandum and Order Denying Time Extension Motion and Scheduling Prehearing Conference, at p.2.

ARGUMENT

For the reasons set forth below, the decision of the Board appealed in this Petition for review should be granted under the five criteria set forth in 10 C.F.R. § 2.786(b)(4).

I. THE BOARD'S RELIANCE UPON CLI-98-14 CONSTITUTES ERROR

The Board's denial of petitioner's motion for enlargement of time (ASLBP No. 98-749-01-LR, Aug. 21, 1998) and the Commission's timetable and accompanying guidelines (which has been relied upon by the Board in issuing its procedural orders) represent myriad violations of the Commission's own regulations, federal law, the Administrative Procedure Act, constitutional law, and the dictates of public policy.

Because the Commission's August 19th order is illegal, arbitrary and capricious, it is procedural error for the Board to follow it. See Petitioner's Motion to Vacate Order CLI-98-14 which was filed on August 21, 1998. Part II of the Commission's order violates the Administrative Procedure Act and the published NRC regulations. *See, e.g.* 5 U.S.C. §§ 554(b), 556(c), 556(c)(5), 556(c)(9), 557(d)(1)(E) and 558(c); 10 C.F.R. §§ 2.711(a), 2.718, 2.718(e) and (m), 2.740 and 2.714. The NRC is required under the APA to conduct this proceeding by taking into proper consideration the conveniences and necessities of the parties in fixing the time and place of the hearing. *See, e.g.* 5 U.S.C. § 554(b). Because the Board is functioning in a way similar to the Commission, *see* 10 C.F.R. § 2.718, *et seq.*, it is bound by the APA just as the Commission is, and for it to follow the Commission's unlawful order is a violation of the APA in and of itself.

Second, the NRC has directed the Board to complete the license renewal proceeding and ensure the "issuance of a Commission decision on the pending application in about two and one

half years." See Order, CLI-98-14, at 2. This ruling is arbitrary, capricious and an abuse of discretion, and as argued *supra* the Board violates the APA by following it. The Board erred by relying upon NRC Commission Order CLI-98-14.

II. THE BOARD'S DENIAL OF A CONTINUANCE CONSTITUTES ERROR

The Board's Order denying Petitioner a continuance was error. The Board failed to apply the mandatory standard for considering enlargements of time set forth in 10 C.F.R. § 2.711 (setting forth a "good cause" standard). Instead, the Board erred by following the Commission's guidance set forth in CLI-98-14 and applying the improper "unavoidable and extreme circumstances" test. ASLB order of August 27, 1998, p. 3. Requiring Petitioner to file its amended petition for leave to intervene by September 11, 1998 is blatantly unlawful and a clear misapplication of the published rules of the Commission.

III. THE BOARD'S FAILURE TO FOLLOW THE FIFTEEN DAY RULE CONSTITUTES ERROR

As set forth above, the Board ruled that Petitioner was required to file its supplement to the petition to intervene and its list of contentions on September 11, 1998. The Board also held that any contentions filed after that date would be considered "late-filed." ASLB Order pp. 3-4 (August 27, 1998). This holding of the Board is in violation of the filing notice published by the NRC on July 8, 1998 and in violation of the published regulations of the NRC. See 63 Federal Register No. 130, p. 36,996-67 (July 8, 1998) ("Not later than fifteen [15] days prior to the first pre-hearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of contentions"); 10 C.F.R. § 2.714(a)(3).

Consequently, Petitioner should have had, under the current schedule before the Board,

until September 30, 1998 to make the required filings and to further address matters related to standing, contentions and other issues relevant to its right to participate in this proceeding pursuant to the July 8th Federal Register notice and the Atomic Energy Act. The published regulations of the NRC Commission have the force and effect of law and are binding upon this Board and the NRC Commission. The Board erred by failing to follow these requirements.

Additionally, given the arbitrary, capricious and improper scheduling "milestones" established by the Commission in their August 19th Order, the Board clearly felt constrained in following the legal requirements. The Commission's August 19th Order has created a procedural atmosphere which seriously undermines the ability of Petitioner to obtain due process or a fair adjudication before the Board. The Board's failure to follow 10 C.F.R. § 2.714. As was set forth in Petitioner's request to the Commission to vacate its August 19th Order, which was also served upon the Board, any adjudication conducted under the regime mandated by the NRC Commission's directive could not be conducted consistent with the above-referenced regulations, the Atomic Energy Act and/or the Administrative Procedure Act.

Petitioner also respectfully maintains that the Commission's August 19, 1998 Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel is, for reasons already set forth before the Commission, illegal, improper, arbitrary, capricious, an abuse of discretion and otherwise inconsistent with law and controlling regulations. Additionally, Petitioner respectfully maintains that the Board committed error when it followed the "direction" of the Commission and allowed this "direction" to impact on the scheduling of this proceeding and adopted the Commission's improper standard for reviewing requests for enlargement of time.

IV. THE BOARD'S REASONING REGARDING WHEN PETITIONER SHOULD HAVE STARTED FORMULATING ITS CONTENTIONS IS IN ERROR

Petitioner's fourth issue is that the Board has erroneously determined that citizens and the public must begin to mount a challenge to applications for license renewal at the precise time that the application is announced in the Federal Register. The Board's position on this issue is inconsistent with the controlling public policy and law which mandates that the public must be given an effective opportunity to participate in intervention proceedings, and flies in the face of stated Congressional intent in enacting and amending the Energy Reorganization Act.²

It is unreasonable, inefficient, and wasteful for this Commission to rule that an intervenor, or potential intervenor, must begin to act at the first publishing in the Federal Register that a license has filed a renewal application in order to stand a chance at formulating contentions to challenge the renewal application. Not even the Commission recognizes an application as formal at this point. Instead, the Commission reviews the application to make certain that it passes minimal muster, and then publishes in the Federal Register a second time once it determines that the application is sufficient to go forward. It is entirely possible, perhaps even likely that an application will be rejected, materially modified or withdrawn³ between the time that application is first published and the time that the Commission provides notice that it will continue with the review process. To require an intervenor to invest vast amounts of time and money by retaining

² See, e.g., 42 U.S.C. §§ 2201(a) - (b) (Declaring that the policy of the United States is for atomic energy to make the maximum contribution to the general welfare, and that the development, use and control of such energy shall be directed to also improve the general welfare). See also, James T. Ramey, "The Role of the Public in the Development and Regulation of Nuclear Power," 12 Atomic Energy L.J. 3 (1970).

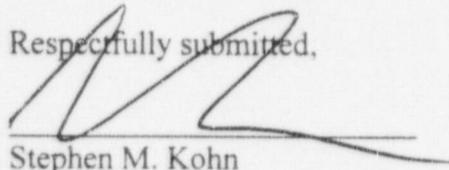
³ An applicant is free to rescind its application at any time before the printing of the second notice in the Federal Register. 10 CFR § 2.107(a) (stating that withdrawal of an application after an issuance of a notice of hearing shall only be on such terms as the presiding officer may prescribe.)

experts and reviewing the application (which, as in this case, may be truly voluminous) before even the Commission or the applicant must commit to the proceeding is nothing short of absurd, and constitutes an abuse of discretion. Additionally, it is inconsistent with and in violation of the notice requirements mandated by regulation and law, which initiate the public's right to commence participation in licensing proceedings through the intervention process.

CONCLUSION

Given the importance of public participation in this proceeding,⁴ as recognized by the Atomic Energy Act, the Energy Reorganization Act and the U.S. Court of Appeals for the District of Columbia Circuit,⁵ a timely resolution of the procedural matters set forth above is in the public interest and the Commission should grant this petition for review. In this regard, either the NRC must insure that this proceeding is conducted consistent with Administrative Procedure Act, the Atomic Energy Act and the published regulations of the NRC.

Respectfully submitted,



Stephen M. Kohn
Michael D. Kohn
David K. Colapinto
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-6980
Attorneys for Petitioner

September 11, 1998

⁴Significantly, the NRC home page on the internet concerning the renewal application by the licensee indicates over 3 million people live within the 50-mile radius of the Calvert Cliffs nuclear plant and that an accident at that facility would impact on the operations of the entire United States government. Moreover, the NRC home page indicates that it normally takes between 3-5 years for a licensee and the NRC staff to draft, evaluate and review a license renewal application. To force an intervenor to conduct its review and formulate contention in a matter of days violates the law.

⁵See, e.g. Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

DOCKETED
USNRC

'98 SEP 14 P12:15

BEFORE THE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

_____)	
In the Matter of)	
)	
BALTIMORE GAS)	
& ELECTRIC CO.,)	Docket Nos. 50-317 and 50-318
et al.,)	License Renewal
)	
(Calvert Cliffs Unit 1 and)	ASLBP No. 98-749-01-LR
Unit 2))	
_____)	September 11, 1998

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Petition for Review filed before the NRC Commission and a copy of Petitioner's Filing in Response to the Board's Initial Prehearing Order was served this September 11, 1998 on the following persons by First Class Mail and, where marked, by facsimile:

* Shirley Ann Jackson
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Fax No. 301-415-1672

Nils J. Diaz
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Edward McGaffigan, Jr.
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

* John C. Hoyle
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Fax No. 301-415-1672

* Janice E. Moore
Robert Weisman
Marian Zabler
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Fax. No. 301-415-3725

* G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Rapifax No. 301-415-7393

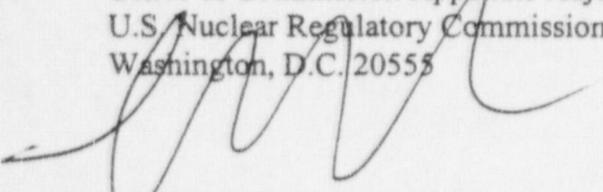
* Dr. Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

* Thomas D. Murphy
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

* David Lewis
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W, 3rd Floor
Washington, D.C. 20037
Fax No. 202-663-8007

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
U.S. NRC
Washington, D.C. 20555
(2 copies)

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555



Stephen M. Kohn