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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 SECRETARY
REGULATORY AND
ADJUDICATIONS STAFF

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

NRC STAFF'S ANSWER
IN OPPOSITION TO PETITIONER'S MOTION TO VACATE
AND RE-SCHEDULE THE PRE-HEARING CONFERENCE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c) and the Atomic Safety and Licensing Board's order dated October 2, 1998 (October Order), the staff of the Nuclear Regulatory Commission (Staff) hereby answers "Petitioner's Motion to Vacate and Re-schedule the Pre-hearing Conference" dated October 1, 1998 (Motion). For the reasons set forth below, the Motion should be denied.

BACKGROUND

On August 27, 1998, the Atomic Safety and Licensing Board (Board) presiding over this proceeding issued a "Memorandum and Order" (Denying Time Extension Motion and Scheduling Prehearing Conference), in which the Board denied the National Whistleblower Center's (Petitioner) request to delay the submission of contentions in this proceeding from September 11, 1998, to November 15, 1998, at the earliest, and scheduled a prehearing conference for October 15-16, 1998.

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On September 11, 1998, the Petitioner filed a "Petition for Review" of the Board's denial of its motion with the Commission and filed "Petitioner's Filing in Response to the Board's Initial Prehearing Order" with the Board. On September 17, 1998, the Commission granted, in part, the Petition for Review by providing the Petitioner until September 30, 1998, to file contentions. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Plant, Units 1 and 2), CLI-98-19, 48 NRC , slip op. (Sept. 17, 1998). Subsequently, on September 18, 1998, the Petitioner filed "Petitioner's Motion to Vacate Pre-Hearing Conference or in Alternative for an Extension of Time." On September 21, 1998, the Board denied Petitioner's motion to vacate and granted Petitioner's request for a one-day extension to file contentions. "Memorandum and Order" (Scheduling Matters and Electronic Hearing Database), September 21, 1998. In that Memorandum and Order, the Board also provided that the Applicant and the Staff could respond to any intervention petition supplement by November 2, 1998, and that the prehearing conference would be held during the week of November 9, 1998. On September 29, 1998, the Board issued an "Order" (Revised Prehearing Conference Schedule) in which it set the prehearing conference for November 12-13, 1998.

On October 1, 1998, instead of filing a supplement to its petition containing a list of proposed contentions, the Petitioner filed its Motion, in which it seeks to reschedule the prehearing

conference.¹ Motion at 8. In addition, on October 7, 1998, Petitioner filed "Petitioner's Notice of Filing."² For the reasons set forth below, the Motion should be denied.

DISCUSSION

A. Petitioner does not establish good cause to delay the prehearing conference

Although not specifically entitled as a request for an extension of time, the Petitioner's Motion is, in essence, such a request. The Petitioner asks that the prehearing conference currently scheduled for November 12, 1998, be postponed until some 115 days after the Baltimore Gas & Electric Company (Applicant) submits its responses to the Staff 's requests for additional information (RAIs) dated August 28, 1998.³ Motion at 6. The Petitioner then reiterates its claim that it is entitled, as a matter of law, to wait to file its contentions until 15 days prior to the prehearing conference. *See id.* at 7. Accordingly, the Petitioner's request is tantamount to a request for an extension of time and the standards for granting such requests should apply. As set forth below, the

¹ Also on October 1, 1998, the Petitioner filed "The National Whistleblower Center's Reply to the NRC Staff and BGE's Answer to NWC's Petition to Intervene and Request for Hearing," a "Status Report," and "Petitioner's Motion Requesting To Be Informed of Communication Between the NRC Staff and Applicant." The Staff is responding separately to these filings, pursuant to the Board's October Order.

² On October 8, 1998, the Board issued an order (Schedule for Responses to Petitioner's Notice of Filing), in which the Board directed that if the Staff and Applicant wished to address the matters raised in the Petitioner's Notice of Filing, they should do so as part of their responses currently due on October 9, 1998. Thus, in accordance with the Board's order, the Staff will address the matters raised in the Petitioner's filing as referenced in this response and in its Response to Status Report and Petitioner's Motion to be Informed of Communications Between NRC Staff and Applicant.

³ Based on the Petitioner's representation that counsel for the Applicant stated that the Applicant will submit responses to the RAIs on November 21, 1998, the Petitioner would have the Board schedule the prehearing conference on or about March 15, 1999.

Petitioner has failed to demonstrate "unavoidable and extreme circumstances," which is necessary to show good cause for such an extension. The Petitioner's request should, therefore, be denied.

In its Initial Prehearing Order, the Board provided the standard for requesting an extension of time. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), slip op. at 10 (Aug. 20, 1998) (Initial Prehearing Order). Specifically, a motion must demonstrate "unavoidable and extreme circumstances" supporting such a request. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Plant, Units 1 and 2), slip op. at 3 (Aug. 27, 1998) (Order Denying Time Extension Motion) (citing CLI-98-14, slip op. at 6). The Commission has reaffirmed this standard and urged the Board to continue its effort to move this proceeding forward expeditiously. *Calvert Cliffs*, CLI-98-19, slip op. at 3;⁴ *see generally Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC ___, slip op. at 6 (1998) (discussing schedules and the parties' obligations in NRC proceedings).

In its Motion, the Petitioner requests that the Board delay the prehearing conference until 115 days after the Applicant responds to the Staff's RAIs dated August 28, 1998. Motion at 8; Notice of Filing at 1, 7. In support of its Motion, the Petitioner first claims that since the Applicant's responses to the RAIs would "significantly" impact the Petitioner's list of contentions, the prehearing conference should wait until after the Applicant responds to the RAIs of August 28, 1998. Motion at 4-5. The Petitioner asserts that holding the prehearing conference before the RAI

⁴ In CLI-98-19, the Commission already permitted the Petitioner in this proceeding an additional amount of time in which to file contentions. In that decision, the Commission also advised that, for contentions received after September 30, 1998, the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1) must be met. *Id.* at 2.

responses are submitted is, somehow, "highly prejudicial to [the Petitioner]." *Id.* at 5; Notice of Filing at 5.⁵

The Petitioner's claims, however, fail to establish unavoidable or extreme circumstances warranting an extension of time. The Petitioner does not explain why it would be prejudiced if the prehearing conference were held prior to when the Applicant responds to the RAIs, or why the Petitioner is unable to file proposed contentions until after that time. A petitioner in an NRC

⁵ Petitioner also complains that the Staff did not include Petitioner on its distribution list for the notice of the public meeting concerning the renewal application held on September 28, 1998. Notice of Filing at 5. The short answer is that while the Petitioner may not have been afforded an individual invitation to the public meeting or notification of the issuance of the RAIs, the RAIs *were* placed in the PDR, and information regarding the public meeting was available, in accordance with NRC policy, on a recording at the designated toll-free telephone number and on the electronic bulletin board, as well as at the NRC's web site. *See Commission Policy Statement on Staff Meetings Open to the Public*, 59 Fed. Reg. 48,340, 48,345 (1994).

The Petitioner also asserts, in a footnote, that the Staff and the Applicant be ordered to disclose whether there are other RAIs or significant outstanding issues and also be required to serve all relevant correspondence to the Board and "parties" to the proceeding. Motion at 4, n.2. Notwithstanding that the Petitioner has not been granted intervention in this proceeding, and, therefore, is not a party to this proceeding, *see* 10 C.F.R. § 2.714(h), the Staff will place the Petitioner, as an interested person, on its distribution list for its correspondence to the Applicant related to the Calvert Cliffs license renewal application and for notices of meetings between the Staff and the Applicant regarding the license renewal application. *See* "NRC Staff's Response to Status Report and Petitioner's Motion to be Informed of Communication Between NRC Staff and Applicant," filed today, at 6-7. Petitioner's assertion, however, is tantamount to a discovery request, which the Commission's Rules of Practice explicitly prohibit at this point in the proceeding. As the regulations state:

no request [for production of NRC records and documents] pursuant to this section shall be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer, or after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer for good cause shown.

10 C.F.R. § 2.744(g). Here, Petitioner has not shown good cause under section 2.744 for permitting such discovery. Thus, the request should be denied.

proceeding is obligated to examine the publicly available information to enable it to uncover any information that could serve as the foundation for a specific contention. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1045 (1983). Here, as of the date the Petitioner's contentions were due (October 1, 1998), the Petitioner has had 135 days to review the application and formulate contentions. See *Calvert Cliffs*, CLI-98-19, slip op. at 2, n.1.⁶

The Commission's requirements with respect to the submission of contentions do not contemplate that a petitioner be permitted to simply sit back and await the results of the Staff's review and then parrot back that review in the formulation of contentions. Rather, as provided in *Catawba*, a Petitioner has an affirmative obligation to review all information then available to it and independently derive contentions. Should a petitioner formulate contentions based on the Staff's

⁶ The Petitioner admits that, based on its own review of the application, it had the same kind of questions as stated by the Staff in the RAIs. Motion at 6. The Petitioner does not explain why it could not have formulated contentions based on its review. Nor should the fact that the Staff has issued RAIs be a surprise to the Petitioner. As explained in the Notice of Acceptance for Docketing, the docketing of the application does not preclude the request of additional information. 63 Fed. Reg. 27,601 (May 19, 1998). Indeed, the Commission's Rules of Practice anticipate 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). Moreover, requests for additional information do not indicate that an application should be rejected. See *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 395 (1995) ("application may be modified or improved as NRC review goes forward").

The Staff has issued RAIs relating to the safety review transmitted by cover letters dated July 9; August 6, 11, 21 (two letters), 26 (two letters), 27 (four letters), 28 (two letters), and 31; and September 1 (four letters), 2 (six letters), 3 (five letters), 4 (three letters) and 7 (three letters), 1998. The Staff also requested information regarding pre-application reviews by letters dated February 13 and 19, 1998. As indicated in the proposed schedule for review of the application enclosed with a letter dated June 17, 1998, from the Staff to the Applicant (Attachment), the Staff anticipates that the Applicant will respond to these RAIs by November 21, 1998. This letter is available in the Commission's Public Document Room (PDR). The Staff has also issued RAIs relating to its environmental review transmitted by cover letters dated September 9 and 28, 1998. As indicated in the proposed schedule in the enclosure to the Attachment, the Staff anticipates that the Applicant will respond to these RAIs by December 6, 1998.

RAIs and an applicant's response and submit them after the date set for filing contentions, the Board will admit them or deny their admission based on the application of the factors governing late-filed contentions in 10 C.F.R. § 2.714(a)(1). *See Catawba*, CLI-83-19, 17 NRC at 1045. Moreover, the Staff conducted a pre-acceptance review of the application and determined that it was sufficiently complete to docket. *See Notice of Acceptance for Docketing*, 63 Fed. Reg. 27,601 (1998). The Staff's review of the application is not the subject of the hearing and, as set forth above, Staff questions do not indicate that the application is inadequate. *See University of Missouri*, CLI-95-8, 41 NRC at 395-96. Rather, the issue is whether the application is sufficient. *See* 10 C.F.R. § 2.732 (1998). Accordingly, the Petitioner's inability to consider Staff RAIs and the Applicant's responses to those RAIs does not establish extreme or unavoidable circumstances warranting a delay of the prehearing conference scheduled for November 12-13, 1998, in this proceeding.⁷

The Petitioner also argues that the Commission and Board have failed to "strictly" adhere to the Rules of Practice in 10 C.F.R. Part 2 in setting schedules in this proceeding, and that this is a

⁷ Petitioner argues that 10 C.F.R. § 2.108(c) "envision[s] a licensee providing additional information in support of a renewal application within 30 days from the date of request by the NRC staff, and provide[s] for denial of the application if the licensee fails to provide the information within that time." Notice of Filing at 6. Section 2.108(c) simply provides the procedure for the Staff to file a motion requesting a ruling on whether an application should be denied if an applicant fails to respond to an RAI, and does not set any substantive standard, as Petitioner would lead the Board to believe. The controlling provision is 10 C.F.R. § 2.108(a), which authorizes, but does not require, the Staff to deny an application if an applicant fails to provide such information on a timely basis. Section 2.108(a) states that "[t]he Director of Nuclear Reactor Regulation . . . may deny an application if an applicant fails to respond to a request for additional information within thirty (30) days from the date of the request, or within such other time as may be specified." 10 C.F.R. § 2.108(a)(emphasis added). In keeping with this provision, each of the cover letters to the RAIs that Petitioners have obtained and complain about states "[p]lease provide a *schedule* by letter or telephonically for the submittal of your responses within 30 days of the receipt of this letter." *See* Exhibit 1 to Petitioner's Motion. Accordingly, Petitioner's argument is so inaccurate as to be misleading.

violation of law. Motion at 6. Petitioner, however, flouts CLI-98-15 and CLI-98-19, both of which reject these arguments and establish the law-of-the-case on this issue in this proceeding. The Petitioners also appear to take issue with the fact that, although it received an extension of time to file its contentions, the Staff and the Applicant also were given an extension of time to respond. *Id.* at 7. The fact that the Staff and the Applicant also received additional time to respond to the Petitioner's proposed contentions is irrelevant to the issue of whether the Petitioner should be afforded an additional extension of time. Despite the Petitioner's unsupported assertions of violations of law, the Commission's and the Board's rulings regarding filing schedules were lawful.

B. The Board may set the date for the submission of contentions

The Petitioner again argues that it is entitled to file contentions to up to 15 days prior to the prehearing conference. *See id.* at 6-7. Thus, given the current schedule for the prehearing conference, Petitioner seeks to submit contentions by October 28, 1998. *Id.* at 6.⁸ As set forth below, however, the Board has all power necessary to set a schedule for the submission of a supplement to the petition for leave to intervene that must include a list of the contentions Petitioner seeks to litigate.

The Commission's regulations state that "[n]ot later than . . . fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing." 10 C.F.R. § 2.714(b)(1). In contrast, section 2.714(a)(3) allows for amendment of a petition for leave to intervene "without prior approval of the presiding officer." 10

⁸ If Petitioner's Motion to delay the prehearing conference were granted, contentions would not be due until March 1, 1999, according to Petitioner's proposed schedule.

C.F.R. § 2.714(a)(3). The portion of 10 C.F.R. § 2.714(a)(3) dispensing with the presiding officer's approval is not included in 10 C.F.R. § 2.714(b)(1). Section 2.714(b)(1) sets the *latest* time for filing contentions and its plain language does not restrict the Board from shortening that time.⁹

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). Pursuant to § 2.718(e), the Board may alter the schedule set by §§ 2.714(b)(1) and (c) to permit the Board and the Petitioner to consider the Staff and Applicant's answers to proposed contentions prior to the prehearing conference.¹⁰ As held by the Board in its previous ruling on the Petitioner's first request for an extension of time, section 2.714(a)(3) does not provide an absolute right to file contentions up to fifteen days before the initial prehearing conference. Order Denying Time Extension, slip op. at 3-4 (Aug. 27, 1998). Thus, the Board may set a deadline for filing contentions that are not tied to a prehearing schedule. *Id.* Although providing the Petitioner with additional time in which to file contentions upon review, the Commission stated that, for the reasons given by the Board in its order, the Board possesses considerable authority to modify general deadlines set out in the Commission's regulations. *Calvert Cliffs*, CLI-98-19, 48 NRC at ____, slip op. at 3. Petitioner's unsupported assertion that the regulations provide otherwise is not to the contrary. *See* Motion at 6. The

⁹ The Staff has previously responded to Petitioner's argument on this score. *See* "NRC Staff's Answer to Petitioner's Motion for Enlargement of Time" at 6-7 (Aug. 26, 1998).

¹⁰ Licensing boards have exercised such authority, so that the answers to contentions are received prior to the prehearing conference rather than the same day, as would be the case if the submission schedules in 10 C.F.R. §§ 2.714(b) and (c) were not modified. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), slip op. (Sept. 23, 1997) (unpublished order providing for the filing of contentions on October 24, 1997 and a prehearing conference the week of November 17, 1997, *i.e.*, at least 24 days after the submission of contentions, with all answers to contentions due on November 10, 1997).

Petitioner, therefore, fails to establish such extreme or unavoidable circumstances to warrant any further delays of this proceeding.

CONCLUSION

For the reasons set forth above, the Petitioner has failed to establish extreme or unavoidable circumstances warranting a delay of the prehearing conference or an extension of time for the Petitioner's submission of proposed contentions. Accordingly, the Motion should be denied.

Respectfully submitted,

Robert M. Weisman

Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 9th day of October, 1998

ATTACHMENT TO NRC STAFF'S ANSWER
IN OPPOSITION TO PETITIONER'S MOTION TO VACATE
AND RE-SCHEDULE THE PRE-HEARING CONFERENCE

June 17, 1998

Mr. Charles H. Cruse, Vice President
Nuclear Energy Division
Baltimore Gas & Electric Company
1650 Calvert Cliffs Parkway
Lusby, Maryland 20657-47027

SUBJECT: PROPOSED NRC REVIEW SCHEDULE FOR BALTIMORE GAS & ELECTRIC
COMPANY'S APPLICATION FOR RENEWAL OF OPERATING LICENSES FOR
CALVERT CLIFFS NUCLEAR POWER PLANT, UNITS 1 AND 2

Dear Mr. Cruse:

This letter forwards the staff's proposed safety and environmental review schedule for the Baltimore Gas & Electric (BG&E) application submitted on April 10, 1998, to renew the operating licenses for the Calvert Cliffs Nuclear Power Plant (CCNPP) Units 1 and 2. The NRC staff will follow established review procedures and the enclosed schedule to complete the safety and environmental reviews required by Parts 54 and 51, respectively. The enclosed schedule does not address any hearing that might be held in the proceeding.

I would like to stress that this is a very ambitious schedule and the staff will make every effort to meet or exceed the milestones. We therefore request that you inform the staff as early as possible should potential schedule delays arise in your support for the milestones.

If you have any questions on this matter, please contact David L. Solorio, the License Renewal Project Manager for CCNPP Units 1 and 2 at 301-415-1973.

Sincerely,

/signed/
Christopher I. Grimes, Director
License Renewal Project Directorate
Division of Reactor Program Management
Office of Nuclear Reactor Regulation

Docket Nos. 50-317, 50-318

Enclosure: As stated

cc w/enclosure: See next page

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Mr. Charles H. Cruse, Vice President
Nuclear Energy Division
Baltimore Gas & Electric Company
1650 Calvert Cliffs Parkway
Lusby, Maryland 20657-47027

SUBJECT: PROPOSED NRC REVIEW SCHEDULE FOR BALTIMORE GAS & ELECTRIC COMPANY'S APPLICATION FOR RENEWAL OF OPERATING LICENSES FOR CALVERT CLIFFS NUCLEAR POWER PLANT, UNITS 1 AND 2

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If you have any questions on this matter, please contact David L. Solorio, the License Renewal Project Manager for CCNPP Units 1 and 2 at 301-415-1973.

Sincerely,
/original signed by/
Christopher I. Grimes, Director
License Renewal Project Directorate
Division of Reactor Program Management
Office of Nuclear Reactor Regulation

Docket Nos. 50-317, 50-318

Enclosure: As stated

cc w/enclosure:

See next page

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**NRC REVIEW SCHEDULE FOR BALTIMORE GAS & ELECTRIC COMPANY'S
APPLICATION FOR RENEWAL OF OPERATING LICENSES FOR CALVERT CLIFFS
NUCLEAR POWER PLANT, UNITS 1 AND 2**

Milestone	Date
Receive Renewal Application	04/10/98
Notice Application Tendered	4/25/98
Complete Acceptance & Docketing	5/10/98
Public Meeting & EIS Scoping	7/9/98
Staff Complete Technical RAIs	9/7/98
Staff Complete Environmental RAIs	10/7/98
Applicant Complete Technical RAI Responses	11/21/98
Applicant Complete Response to Environmental RAIs	12/6/98
Issue DES for Comment	3/6/99
Staff Complete SER and Identify Open Items	3/21/99
Public Meeting	4/5/99
Complete DES Comments	5/20/99
Applicant Complete Response to Open Items	7/19/99
Staff Issue SSER & FES	11/16/99
ACRS Meeting	2/14/00
Commission Decision on Application	TBD

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TEssig/MMalloy (THE/MXM)

LSpessard (RLS)

RCorreia (RPC)

RLatta (RML1)

VDricks (VLD)

DSolorio (DLS2)

Mr. Charles H. Cruse
Baltimore Gas & Electric Company

Calvert Cliffs Nuclear Power Plant
Unit Nos. 1 and 2

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD 98 OCT 13 AM 11:49

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO PETITIONER'S MOTION TO VACATE AND RE-SCHEDULE THE PRE-HEARING CONFERENCE" in the above-captioned proceeding have been served on the following by electronic mail, with conforming copies deposited in Nuclear Regulatory Commission internal mail system, or as indicated by an asterisk, by e-mail with conforming copies deposited in United States mail, first class, or as indicated by a double asterisk by deposit in NRC internal mail system, this 9th day of October, 1998:

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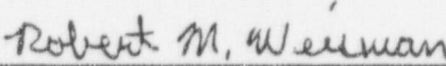
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