

UNITED STATES OF AMERICA '98 OCT 13 P 3:34
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
OF HEARINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	Docket Nos. 50-317-LR
Baltimore Gas and Electric Company)	50-318-LR
)	
(Calvert Cliffs Nuclear Power Plant,)	ASLBP No. 98-749-01-LR
Units 1 and 2))	

**BGE'S ANSWER TO PETITIONER'S MOTION TO
VACATE AND RESCHEDULE THE PRE-HEARING CONFERENCE**

I. Introduction

Baltimore Gas and Electric Company (BGE) hereby answers and opposes Petitioner's Motion to Vacate and Reschedule the Pre-Hearing Conference (hereinafter "NWC Motion"), which the National Whistleblower Center (NWC) filed on October 1, 1998. NWC has now, for a third time, ignored NRC requirements or directives.¹ Instead of submitting its contentions as required by both the Commission and the Atomic Safety and Licensing Board, NWC makes meritless arguments for further lengthy extensions.

Because NWC's Motion conflicts with the prior rulings and is both legally and factually unsupported, NWC's Motion should be denied. Moreover, because NWC has again defaulted on its obligation to submit contentions,² NWC's intervention petition should also be dismissed. The

¹ NWC's Petition to Intervene and Request for Hearing ignored the NRC's requirement to identify the aspects of the subject matter as to which it wishes to intervene. NWC's Filing in Response to the Board's Initial Prehearing Order (September 11, 1998) refused to obey the schedule set in the Licensing Board's Initial Prehearing Order. NWC's current motion now refuses to obey both the Commission's September 17, 1998 Memorandum and Order and the Licensing Board's September 21, 1998 Memorandum and Order.

² NWC's "Status Report" identifies some "concerns," but NWC specifically states that this filing does not represent its contentions and does not provide a basis for contentions. Status Report (Oct. 1, 1998) at 2, 10.

Commission's September 17 Memorandum and Order states that the Board should be prepared to terminate the adjudication promptly should NWC submit no admissible contentions. CLI 98-19, 48 N.R.C. ____ (slip op. at 2). That is exactly what the Board should now do.

II. Argument

A. NWC Ignores the Standards for Seeking an Extension

NWC's motion to vacate and reschedule the prehearing conference is clearly nothing more than a thinly-veiled extension request. NWC claims that it should not be required to submit its contentions until after BGE has responded to requests for additional information (RAIs) and suggests that it needs at least a hundred days³ to study RAI responses in order to formulate its contentions. See NWC Motion at 5. See BGE's last responses to RAIs are due on December 6,⁴ NWC is in effect seeking five more months of delay, until mid-March, to file its contentions.

Just as it has ignored the Commission and Board's orders requiring submission of contentions, NWC ignores the standards established in this proceeding for extension requests. An extension request must be filed at least three days prior to the due date for the pleading and must demonstrate unavoidable and extreme circumstances supporting the request. Initial Prehearing Order (Aug. 20, 1998) at 10; CLI-98-14, 48 N.R.C. ____ (slip op. at 6). NWC fails to comply with these requirements, and this failure by itself justifies denial of NWC's motion.

³ NWC bases the hundred days on the time it thinks BGE needs to respond to the RAI (from August 28 to November 21). See NWC Motion at 4-5. Aside from having miscounted the days, NWC appears to have misunderstood BGE's counsel. BGE's counsel did not state that BGE "will not submit its response to the August 28, 1998 RAI until November 21," as NWC asserts at page 4 of its motion. Rather, BGE's counsel told NWC that November 21 was the date by which BGE had committed to complete its response. RAI responses could be completed and submitted earlier.

⁴ See Letter from C. Grimes to C. Cruse, "Proposed NRC Review Schedule for Baltimore Gas and Electric Company's Application for Renewal of Operating Licenses for Calvert Cliffs Nuclear Power Plant, Units 1 and 2" (June 17, 1998).

B. Ignoring the Law of the Case, NWC Raises Arguments That Have Already Been Rejected

NWC's arguments also ignore earlier rulings. NWC asserts that as a matter of law it may file its list of contentions up to fifteen days prior to the first prehearing conference. NWC Motion at 6. The Board has already specifically rejected this argument. See Memorandum and Order (Denying Time Extension Motion and Scheduling Prehearing Conference) (Aug. 27, 1998) at 3 ("[W]e find no basis for NWC's assertion that section 2.714(a)(3) provides an absolute right to file contentions up to fifteen days before the initial prehearing conference."). Further, while the Commission subsequently gave NWC additional time to submit contentions, the Commission specifically left the Licensing Board's ruling in effect. See CLI-98-19, 48 N.R.C. ____ (slip op. at 3) ("For the reasons given by the Board itself in its August 27th order, it possesses considerable authority to modify general deadlines set out in our rules. . ."). Accordingly, the Board's prior ruling is the law of the case and cannot be disregarded,⁵ and NWC's failure to comply by itself justifies denial of NWC's motion and dismissal of NWC's petition.

C. NWC Has No Right to Review RAIs or RAI Responses Prior to Submitting Contentions

NWC's argument that it should not be required to submit contentions until BGE responds to RAIs is wrong as a matter of law and a matter of fact. As a legal matter, the NRC's Rules of Practice do not give a petitioner any right to review NRC staff's questions or an applicant's responses prior to formulating contentions. To the contrary, in promulgating section 2.714 governing the pleading of contentions, the NRC specifically stated:

⁵ Likewise, the Licensing Board has previously rejected NWC's claim, repeated at page 6 of NWC's motion, that the highly complex and technical nature of this proceeding warrants postponement. See ASLB Memorandum and Order (Aug. 27, 1998) at 3.

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"[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. . . .

* * *

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.

* * *

The Commission believes it to be a reasonable requirement that before a person or organization is admitted to the proceeding it read the portions of the application (including the applicant's safety and environmental reports) that address the issues that are of concern to it and demonstrate that a dispute exists between it and the applicant on a material issue of fact or law. Many intervenors in NRC proceedings already ably do what is intended by this requirement: they review the application before submitting contentions, explain the basis for the contention by citing pertinent portions and explaining why they have a disagreement with it.

The Commission also disagrees with the comments that § 2.714(b)(2)(iii) should permit the petitioner to show that it has a dispute with the Commission staff or 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 and SER.

54 Fed. Reg. 33,168, 33,170-171 (Aug. 11, 1989). These statements make it abundantly clear that a petitioner should base its contentions on the application and is not entitled to have prior access to NRC reports, documents, or discovery. There is no reason why RAIs or RAI responses should be treated any differently.

NWC's suggestion that it is entitled to RAIs and RAI responses prior to filing contentions is also inconsistent with the hearing milestones established by the Commission in CLI-98-14.

The Commission Order sets a goal of a decision on intervention petitions and contentions within

90 days of the date of the order (i.e., by approximately November 19). When the Commission set these milestones, the NRC staff had already published its review schedule, which called for BGE to complete RAI responses on technical issues by November 21 and on environmental issues by December 6. See NRC's June 17, 1998 letter (note 4, supra). Thus, the Commission's schedule contemplates a decision on contentions before RAI responses are due. On this basis alone, the Board should deny NWC's motion.

D. The NRC Does Not Require Service of Correspondence on Petitioners

NWC's complaint that it was not notified of the August 28 RAI is irrelevant. First, the NRC's rules do not require a petitioner to be served with correspondence between the applicant and the NRC staff.

Pursuant to 10 C.F.R. § 2.701(b), [intervenors are] entitled to service of all adjudicatory filings made by [the Licensee] or the Staff. However, this provision does not require service of documents exchanged between the Licensee and Staff in the review process. To the extent that Staff and Licensee have been required in other proceedings to serve intervenors with information that was not offered for filing, this requirement did not come from a particular regulation but was based on the circumstances in each case.

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 N.R.C. 135, 152-53 (1993).

Information exchanged between the Staff and a licensee is not considered offered for filing in an adjudication and, thus, is not subject to the provisions of 10 C.F.R. § 2.701. . . . The petitioners have access to such information that is placed in the public document room.

Id. at 152 n.46.⁶

⁶ Parties are required to inform the Board of new information that is relevant and material to matters being adjudicated. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 A.E.C. 623, 625

Second, while Licensing Boards have occasionally required that an intervenor be included on correspondence lists, they have done so after the intervenor was admitted as a party (i.e., after ruling on contentions) and in response to a specific request or discussion with the parties.⁷ Here, NWC is not yet a party, and as far as BGE is aware, has previously made no attempt whatsoever to have itself added to the distribution lists for correspondence related to the Calvert Cliffs license renewal. Certainly, NWC made no attempt to request correspondence from BGE. The only requests that NWC made of BGE were: (1) a request for an electronic copy of BGE's application, which BGE provided by hand delivery within an hour, and (2) a question whether BGE had responded to the August 28 RAI, which BGE also answered within an hour.

Finally, BGE is amazed at NWC's statement that it did not learn that the NRC had requested information from BGE until September 25. See NWC Motion at 3. A set of RAIs dated August 11 have been in the public document room (PDR) since August. Further, February RAIs related to the integrated plant assessment (IPA) report on the diesel fuel oil system (which like other sections of the applications had been pre-submitted to the NRC) have been in the PDR since March, and BGE's July 30 response to these RAIs was placed in the PDR in August.

Moreover, the Staff and BGE have been extremely open in their discussions. The NRC's review schedule, including the schedule for RAIs and RAI responses, was spelled out in the NRC

(1973). The purpose of this requirement is to protect reasoned decision making, so that decisions are not based on inaccurate evidence. Id. at 625-26. In the current proceeding, because there are no contentions, there are not yet any "matters being adjudicated" or any basis to determine materiality. As a practical matter, the McGuire doctrine has served to require communication of significant new information (such as application amendments) that might affect the outcome of a proceeding. It has not been interpreted as requiring notification or service of routine RAIs and RAI responses. Cf. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 N.R.C. 1387, 1389-93 (1982) (chronicling RAIs and an amendment to the application but only holding that the Board and parties should have been notified of the amendment).

staff's June 17 letter (note 4, supra), which was placed in the PDR on July 8. In addition, BGE has had a number of public meetings with the NRC staff to discuss the NRC staff's review and RAIs. BGE held a public meeting with the NRC staff on May 6 to discuss RAIs on the pre-submitted IPA reports on the feedwater and diesel fuel oil systems. Subsequently, to help the NRC understand where information was located and how BGE's application had been put together, and to facilitate the NRC staff's review and development of RAIs, BGE held three days of public meetings with the NRC staff – on June 24 through June 26. BGE met publicly again with the NRC staff on August 13 to discuss the fire protection report; on August 20 to discuss the status of the NRC's review, including specifically the progress on RAIs; and on September 28 again to discuss the status of the NRC's review, RAIs, and RAI responses. Every one of these meetings related in some measure to the RAIs or RAI responses that are being developed. Every one of these meetings was publicly noticed.⁸ NWC did not attend a single one.

In sum, NWC has chosen not to attend any of the public meetings above, and has not, as far as BGE is aware, made any attempt to have itself added to correspondence lists. In this regard, NWC is no newcomer to NRC practice and procedure. The attorneys for NWC represented an intervenor, Allen Mosbaugh, in the multi-year hearing on Georgia Power Company's application to transfer the Vogtle operating licenses to Southern Nuclear Operating Company. Michael Kohn recently attended a meeting between the NRC staff and Southern Nuclear on Southern Nuclear's license renewal efforts. NWC's attorneys are thus experienced

⁷ See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 N.R.C. 5666, 590-91 (1982); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 N.R.C. 2069, 2112-13 (1982). Accord Rancho Seco, supra, CLI-93-3, 37 N.R.C. at 153.

⁸ The NRC provides notice of such meetings by sending a copy of a meeting notice to the Public Document Room and to all persons who have requested to be placed on the correspondence list for a plant, by posting the information in its web page and on an electronic bulletin board, and by announcements on a telephone recording.

NRC practitioners who know exactly how to find out about meetings and obtain correspondence from the NRC. In this proceeding, however, rather than making even a modicum of effort to stay informed, NWC has sat on its hands and now complains that it was not spoon-fed information it never asked for.

E. NWC's Arguments Are Factually Infirm

NWC's arguments also suffer from significant factual errors. Foremost, NWC incorrectly claims that "the August 28, 1998 RAI demonstrates that a substantial portion of BGE's license renewal application requires clarification and supplementation" and that the application is "not complete in significant respects." NWC Motion at 3, 4.

First, NWC's assertions are inconsistent with the NRC's acceptance and docketing review. As stated in the NRC staff's acceptance letter:

The staff has determined that BG&E has submitted sufficient information that is complete and acceptable for docketing, in accordance with 10 CFR 54.19, 54.21, 54.22, 54.23, and 51.53(c). However, the staff's acceptance and sufficiency determination does not preclude requests for additional information as the review proceeds.

Letter from J. Roe to C. Cruse (May 8, 1998). See also 6 Fed. Reg. 27,601 (1998). In sum, the NRC has found BGE's application to be complete, and the RAIs do not suggest otherwise.

Second, NWC's characterization of the August 28 RAI is absurd. The first question in the RAI (attached to NWC's Motion) suggests that BGE has included some items within its application that may not require review under the rule. The question therefore suggests that perhaps BGE has provided more information than was necessary. The second question refers back to the July 30 RAI response pertaining to the diesel fuel oil system. In the July 30 RAI response, BGE indicated that no components in the diesel fuel oil system were excluded based on

a hypothetical replacement scenario. In the August 28 RAI, the NRC staff now asks BGE to make the same representation for other systems (which BGE intends to do). The RAI in no way suggests that any necessary information has been excluded from BGE's application. The next three questions in the August 28 RAI ask for page references where certain information is found and again do not signal any incompleteness in the application. The last question asks about choices between one-time or periodic inspections. None of these questions suggests that BGE's application "was not complete in significant respects" or that a "substantial portion of BGE's license renewal requires clarification and supplementation," as NWC asserts.

NWC also mischaracterizes the Licensing Board's September 21, 1998 Memorandum and Order. NWC states that the Board enlarged the time afforded to BGE and the NRC staff to respond to contentions, "from 10 and 15 days respectively, to more than 30 days . . ." NWC Motion at 7. The Licensing Board's Initial Prehearing Order gave BGE and the NRC staff 21 days to respond to contentions. See Initial Prehearing Order at 3, 4. Since NWC was subsequently given three more weeks in which to develop contentions, it is hardly unreasonable for the Licensing Board to have given BGE and the NRC staff one more week for the response.

NWC further argues that NWC's time has been "shortened" by 27 days, while BGE and the NRC's staff's time has been extended. This remarkable characterization flies in the face of reason. The Commission extended by three weeks the time by which NWC may submit its contentions, with the result that NWC has now had nearly six months to formulate its contentions. The Licensing Board's decision to reschedule the prehearing conference in no way reduced this period. The only effect of the Licensing Board's decision was to provide BGE and the NRC staff an additional week and give the Licensing Board a reasonable opportunity to

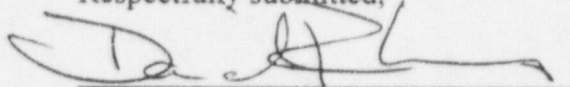
consider pleadings before a prehearing conference. There is absolutely no prejudice to NWC from any of the Licensing Board's rulings. Characterizing these reasonable rulings as "administrative anarchy," as NWC does at page 6 of its motion, is simply insulting.

III. Conclusion

As discussed above, NWC has had nearly six months to formulate contentions, and it has yet to proffer a single one. It has made absolutely no attempt to provide its contentions. Instead, it has deliberately chosen to challenge the authority of the Commission and the Licensing Board to regulate their proceedings. This conduct should not be tolerated any longer.

Further, BGE is just as entitled to fair treatment as NWC. Fairness to BGE demands that it be given reasonable notice of the issues which it must defend. Fairness to BGE demands reasonable adherence to schedules, observance of the rulings of the case, and a stable process. Any further continuation of this proceeding, where the petitioner seems much more interested in delay and disruption than in adjudication, would in BGE's estimation deny BGE this basic fairness. Accordingly, the Board should deny NWC's Motion, dismiss NWC's intervention petition, and promptly terminate this adjudication in accordance with CLI-98-19.

Respectfully submitted,



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Dated: October 9, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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RULEMAKINGS AND
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "BGE's Answer to Petitioner's Motion to Vacate and Reschedule the Pre-Hearing Conference," dated October 9, 1998, were served upon the persons listed below by deposit in the United States mail, first class, postage prepaid, this 9th day of October, 1998. Where indicated by an asterisk, conforming copies were also served by facsimile or electronic mail this same date.

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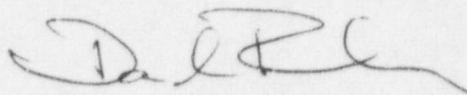
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