BEFORE THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of	)	October 26, 1998
BALTIMORE GAS & ELECTRIC CO., et al.,	)	Docket Nos. 50-317 and 50-318 License Renewal
(Calvert Cliffs Unit 1 and Unit 2)	)	

PETITIONER'S BRIEF IN SUPPORT OF APPEAL OF ORDER DENYING INTERVENTION PETITION AND DISMISSING PROCEEDING

Petitioner National Whistleblower Center hereby submits its brief in support of its Notice of Appeal of the Atomic Safety and Licensing Board's October 16, 1998 Order Denying Intervention Petition and Dismissing Proceeding. In accordance with the October 22, 1998 letter from Emile L. Julian, Petitioner understands that there are no page limits for this filing.

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. Petitioner hereby reaffirms all of the grounds previously set forth in its motion to vacate, incorporates the additional legal and factual arguments contained herein and requests that the NRC Commission vacate CLI-98-14

On August 20, 1998 the Atomic Safety and Licensing Board ("Board") assigned to this proceeding 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. For the reasons set forth before the Board in the August 21st motion, and for additional reasons set forth herein, the Board's denial of the enlargement of time requested on August 21st was illegal, improper, an abuse of discretion, arbitrary and capricious and was not supported by substantial evidence.

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. On September 11, 1998 the Petitioner filed a Petitioner for Review of the August 27th ASLB Order with the Commission.

On September 17, 1998, the Commission issued a decision granting, in part, Petitioner's Petition for Review and the Commission remanded the case to the ASLB. However, the Commission directed the ASLB to require the Petitioner to file its contentions and supplemental and amended petition by September 30, 1998. In addition, the Commission denied the majority of claims set forth in that petition. For the reasons which were initially raised in Petitioner's September 11th petition for review, and for additional reasons set forth herein, Petitioner hereby requests that all of the relief which was denied in its September 11th petition be granted.

Without any opposition from any of the parties below, the Board granted Petitioner until October 1, 1998 to file its amended petition (September 30, 1998 fell on a very important Jewish holiday). Moreover, without any request from any party, the Board vacated the prehearing conference which was pending and re-set the prehearing conference for November 12, 1998.

October 1, 1998 the Petitioner filed a Status Report which placed on-the-record the names of some of the experts retained by the Petitioner to review the safety issues raised by BG&E's

application. This Status Report also highlighted some of the issues identified by the experts. Because the Board had moved the prehearing conference, through the Status Report Petitioner informed the Board of its intent to comply with 10 C.F.R. Part 2 and file its amended petition within fifteen days of the prehearing conference. In addition to the Status Report, the Petitioner also filed a "Reply" to the NRC Staff and BG&E's "Answer" to the initial Petition to Intervene. This Reply primarily addressed the issue of standing. However, the Reply raised a number of broad contentions concerning the application for license extension, including the contention that the Calvert Cliffs could not "safety operate" during the license renewal period, and the allegation that the "renewal" of the "license" would "pose an unacceptable health and safety risk." In addition, the Petitioner asserted the following contention: ". . . . the operating license not be renewed until such time as it is determined that the plant can, in fact, be operated safety and within the bounds of the law for the requested renewal term." Petitioner's Reply, p. 11.

Finally, the Petitioner filed a Motion to Vacate and Re-Schedule the Pre-Hearing Conference." This motion set forth a detailed explanation of why the Board should have vacated the prehearing conference and granted the Petitioner additional time to file its final supplement to its Petition to Intervene.

Thereafter Petitioner filed three Notices of filing. On October 7, 1998 and October 16, 1998 Petitioner filed notices related directly to the failure of the NRC Staff and BG&E to properly keep the Board and Petitioner informed of important events related to the license application. Moreover, Petitioner placed onto the record a number of "Requests for Additional Information" ("RAI") filed by the NRC Staff. These documents also supported Petitioner's request to vacate the prehearing conference and supported Petitioner's request(s) for additional

time to file its final supplemental petition.

On October 13, 1998 Petitioner filed another Notice of Filing in which the Petitioner formally set forth two contentions.

On October 16, 1998 the Board dismissed Petitioner's Petition to Intervene and dismissed the entire licensing proceeding.

SUMMARY STATEMENT OF THE CASE

On August 5, 1998, the Commission issued a Statement of Policy (hereinafter "the Statement") which, *inter alia*, purported to "provide a fair hearing process, avoid *unnecessary* delays, and produce an informed adjudicatory record...".[1] Had this Statement reflect a mere iteration of NRC policy, it would have been legal. Unfortunately, the Statement disrupted the orderly adjudication of ASLB proceedings related to license renewal. Through this Statement, the Commission's subsequent orders, and the decisions and actions of the Atomic Safety Licensing Board Panel (the "Board"), an administrative regime was created that is particularly unfair to this Petitioner, inherently prejudicial to the public interest, and exemplify this agency's abuse of its discretion.

In its August 19th Order,[2] the Commission offers "specific guidance" to the Board, several of which are unlawful. First, the Commission orders the Board to move *sua sponte* to initiate contentions that the Board itself finds worthy only under extraordinary circumstances. The

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[1] Statement of Conduct on Adjudicatory Proceedings CLI-98-12, 63 Fed. Reg. 41872 (August 5th 1998) at 2 (hereinafter "Statement").

[2] Order Referring Petition to Intervene to Atomic Safety and Licensing Board Panel, CLI-98-14 (Comm. August 19, 1998).

"extraordinary circumstances" element of this order is not grounded in any evidence or showing of its necessity and is clearly an abuse of the Commission's discretion to manage these proceedings. Second, the Commission directs the Board to stay discovery against the NRC staff. The Commission makes this direction absent any request by the staff and effectively precludes any party from opposing this procedure. Third, the Commission establishes "milestones" for the conduct of this proceeding. While it is conceded that the Commission generally has the authority to manage and delegate management of these proceedings, the milestones violate material provisions of the Administrative Procedure Act (APA), are based upon no substantial evidence, suggest *ex parte* communications between the NRC staff, applicant and the Commission, and evidence the Commission's abuse of its discretion. Fourth, the Commission directs the Board to grant motions for extensions of time only upon a showing of "unavoidable and extreme" circumstances. This directive violates both the Administrative Procedure Act and the NRC's published regulations.

The prejudicial effect and illegality of the Commission's directives are magnified and given life by several of the Board's actions in this case. The Board has taken the "guidance," or directives, and acted upon them in such a manner as to apply the erroneous "unavoidable and extreme" circumstances standard for granting motions for extensions of time. It has interpreted the NRC's regulations, particularly 10 C.F.R. §§ 2.711, 2.718, to override the provisions of §2.714 – an interpretation that flies directly in the face of the language of the regulations itself. The Board has further taken the step of revising the pre-hearing conference and now holding it on November 12th, but at the same time has failed to grant Petitioner the right to have until 15 days before that date to file its amended petition. Each of these actions evidence bias, prejudice

and illegality on the part of the Board. Finally, the Board, in its rush to adhere to an unworkable schedule imposed by the Commission, simply failed properly consider Petitioner's contentions (whether they be considered late-filed or otherwise).

Notwithstanding the problems described above, the Board has completely removed Petitioner from this process, through its October 16th Order,[3] and in so doing has illuminated the problems inherent in this entire process. In this Order, the Board did not afford Petitioner the opportunity to participate in the pre-hearing conference and demonstrate that its contentions meet the § 2.714 standard (for late filed contentions, assuming that the Board's interpretation of the timing issues was correct), it dismissed Petitioner's argument that the newly-discovered RAI's should have been filed timely and placed in the public record, and it again rejected Petitioner's position that the license renewal application – upon which this entire process is predicated – is incomplete.

Because of the bias, prejudice and particular unfairness inherent in this regime as it currently stands, this Commission should vacate or modify its August 19th order such that it complies with the law as outlined below, vacate the Board's October 16th dismissal of Petitioner's petition to intervene, and reinstate these proceedings by essentially "resetting" them and having time begin to run when the applicant has filed a complete application.

ANALYSIS

I. The Commission's August 5th Policy Statement Constitutes Improper Rulemaking

The Board's dismissal of this proceeding was based on its adherence to the prior

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[3] *See*, Memorandum & Order (Denying Intervention Petition/Hearing Request and Dismissing Proceeding), ASLBP No. 98-749-01-LR (Board, Oct. 16, 1998).

"directives" issued by the Commission. These directives or policy statements must be withdrawn.

The August 5th Statement contains at least three substantive rule changes which are subject to the Administrative Procedure Act's notice and comment rulemaking requirements. First, the Commission establishes a caveat to the general standard for Board-initiated contentions, in that it requires the Board to do so only in "extraordinary" circumstances. *See*, Statement, *supra* note 1 at 41873. In that this direction affects a substantive change in the law, it must be seen as rulemaking. Second, the Commission goes beyond its established authority to set milestones by directing the Board to give written explanations for its departure from the milestones and to restore the proceeding to its overall two-and-a-half year schedule. *Id.* This unyielding schedule again implements a fundamental change to established rules. Third and finally, the Commission directs the Board to grant requests to extend time only upon a showing of "unavoidable and extreme" circumstances. This again is a fundamental change in the existing law and constitutes rulemaking.

The Administrative Procedure Act requires that agency rulemaking be done upon a general notice of the rule published in the Federal Register, a period of time for public comment, and only then may they agency publish and apply the new rule.[4] While it is not disputed that the Commission published its Statement in the Federal Register, *see* Note 1 *supra*, and asked for public comment, it has exceeded its authority by attempting to direct the Board to apply these new rules in this proceeding – *before the period for public comment had ended.* Further, though

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[4] *See*, 5 U.S.C. § 553(b)-(c).

the APA does provide for exceptions to the general rule, *see*, § 553(b)(3)(A), none of the exceptions apply to these discrete rules listed herein. There is a "general policy statement" exception, but that clearly does not apply here in that the Commission's statement goes beyond simply stating policy and formulates or changes particular rules. In addition, in order for an exception to the requirement to obtain, the agency must set forth findings and a brief statement why the exception applies. *Id.* The Commission has not done so here.

The law is well-settled in its requirement that at least 30 days pass before a proposed rule can be implemented.[5] Bringing specificity to the general complaint that the Commission attempted to implement its new rules before public comment ended is the fact that on August 19, *14 days later*, the Commission issued its Order in which it directed the Board to apply these rules to the Petitioner and this proceeding. This act clearly violates the facial provisions of the Administrative Procedure Act and cannot stand.

With particular respect to the Commission's changing the established for "good cause" standard[6] for granting motions to extend time, it cannot be argued that this did not comprise rulemaking. The Commission has directly altered what is an established, published regulation. If the Commission argues that this is merely an interpretation of an established regulation, it is clear that the interpretation flies in the face of the published regulation and will receive no deference.[7] Alternatively, if the Commission concedes that it is blatantly changing the standard,

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[5] *See*, 5 U.S.C. §553(d). *See also*, *Northwest Environmental Defense Center v. Brennen*, 958 F.2d 930, 934 (10th Cir. 1980).

[6] *See*, 10 C.F.R. § 2.711.

[7] *See*, *Union of Concerned Scientists v. NRC*, 711 F.2d 370 (DC Cir. 1983) (enjoining the NRC's suspension of notice and comment rulemaking where the agency's interpretation of its own rules flies in the face of the

such a move is clearly rulemaking and is subject to the provisions of the Administrative Procedure Act, as outlined above. For these reasons, Petitioner requests that the Commission's subsequent August 19th Order, in which the rule changes are applied, be vacated or modified until such a time that the rules have legal effect.

II The Commission's August 19th Order is Illegal and Must be Modified.

The Commission's Order of August 19th contains at least four unlawful directives.[8] First, the Order allows the Board to formulate and admit its own contentions, *sua sponte*, but only upon a showing that "extraordinary" circumstances exist. This caveat adds an additional element to the general rule for Board-initiated contentions, and is based upon no regulation and no showing of even a rational basis for its use. Second, the Commission directs the Board to stay discovery against the NRC staff. This improper order is an independent move on the part of the Commission and is neither prompted by the request of a party nor does it properly afford any other party the opportunity to oppose. Third, the Order establishes unreasonable and unwarranted "milestones" and an overall limit of two-and-a-half years on the conduct of this proceeding. The Commission offers no rational basis or substantial evidence for this decision, and as such is an abuse of the agency's discretion to promulgate directives. Finally, the

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language of the rules themselves).

[8]Additionally, the Petitioner has challenged the Commission's August 19th order on two other occasions. Petitioner hereby preserves the arguments raised in these prior appeals. When this case is taken to the Court of Appeals, Petitioner intends to directly challenge the two prior decisions entered by the Commission in this matter, and all of the actions of the Board which were previously challenged by the Petitioner. However, because of the continuing nature of the harmful impact of the Commission's prior rulings, additional arguments regarding these rulings are set forth in this petition.

Commission directs the Board to use a new, heightened standard and only grant motions to extend time upon a showing of "extreme and unavoidable" circumstances. There is no published regulation providing for such a move, and the standard itself flies directly in the face of the current NRC regulations as they are published. Each of these individually constitute abuses of the agency's discretion, and together make a compelling case for the August 19th Order to be vacated.

A. Board-initiated contentions

Under the Atomic Energy Act, the standard for admitting a contention in a proceeding initiated by an intervener is based upon a determination as to whether the contention is needed to "provide adequate protection to the health and safety of the public."[9] Further, any matter material to the public health and safety of the public is, as a matter of law, admissible as a contention in a licensing proceeding. *See, Union of Concerned Scientists, supra* note 7. There is, then, no basis in the law for the Commission to limit Board-initiated contentions to "serious safety, environmental or common defense and security matters," *see,* Statement, *supra* note 2, or to direct the Board to entertain and initiate these contentions only in "extraordinary" circumstances.

In fact, the only effect that this Order has is to effectively chill the Board's willingness to fully explore and initiate safety concerns that it notes on its own. This fact flies in the face of well-established law, and is detrimental to the public policy that these proceedings be about public safety. The Commission's goal of expediency is laudable, from an economic efficiency

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[9] *See*, 42 U.S.C. § 2232(a). *See also, Commonwealth of Massachusetts v. NRC*, 924 F.2d 311, 315 (DC Cir. 1991).

standpoint, but should not come at the expense of public safety and full public participation in these types of proceedings.

B. Stay of discovery on NRC staff.

The Commission's Order also directed a stay on discovery against the NRC staff. This stay order is not in accordance with the law and should be vacated. Specifically, the regulations which bind this proceeding grant the ASLBP only with the authority to "limit" discovery. *See*, 10 C.F.R. § 2.740(b)-(c). Under these regulations, the proper procedure for staying discovery comes upon the request of a party, where that party demonstrates "good cause" for the stay. *Id.* The effect of the Commission's order is many-fold.

First, it suggests the existence of *ex parte* communications. No party, or the record, requested this stay. We are left with the question of why, then, did the Commission so order it. The decision is not based upon substantial evidence. In fact, no evidence had been placed on the record justifying such a stay and the RAIs which were placed on the record by the Petitioner directly demonstrate why, had the NRC Staff actually requested the type of stay granted by the NRC Commission, such a request should have been denied.

Far from assisting the adjudicatory process, the stay was granted without the on-record input of the parties and without any discussion from the parties as to how the stay would impact the ability of the Petitioner to properly set forth contentions and/or adjudicate contentions.[10]

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[10]In this regard, on September 18, 1998 Petitioner requested the right to engage in discovery prior to submitting its final supplemental set of contentions. The Board illegally denied this motion. Again, had discovery been properly granted, the Petitioner would have been able to obtain proper access to the RAIs, formulate discovery based on these RAIs and formulate contentions based on these RAIs. Petitioner hereby appeals the Board's denial of the Sepember 18th motion to vacate the prehearing conference. Under the controlling regulation, Petitioner

Second, though the Commission likens its discovery process to that under the Federal Rules of Civil Procedure, the stay of discovery issued by the Commission did not afford parties the opportunity to oppose a motion for a stay. Petitioner was never given an opportunity to state why it would need discovery against the NRC Staff. The RAIs which were subsequently uncovered demonstrate, beyond doubt, why such discovery was in fact needed. It was legal error for the Commission, without allowing Petitioner to even address the stay issue, to grant a stay. Moreover, since the Commission granted the stay without even a request for a stay being filed, there was simply no facts on the record which could have justified the stay. Even granting the fact that the Board had some discretion on matters related to stays of discovery, without allowing for the creation of any factual record on this matter, the Commission's decision was illegal. It was not supported by any evidence, let alone substantial evidence. The stay evinced a prejudice toward the Petitioner which clearly impacted on the Board's adjudication of the various motions and filings made by the Petitioner.

Finally, the stay creates another hardship on the Petitioner by allowing the NRC staff up to 575 days to issue its SER and FES, but effectively only allows Petitioner and all other parties only 30 days to respond. It is unreasonable to think that such a complicated set of documents as the SER and FES could adequately be inspected and reviewed by Petitioner or any other party in such a short amount of time. If the Petitioner had the right to discover the RAIs through the normal course of discovery, and to question members of the NRC Staff about these RAIs (either

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should have had the opportunity to conduct discovery prior to submitting its final list of contentions. 10 C.F.R. § 2.752.

at depositions or through written discovery), the Petitioner may have been able to mitigate against the harsher aspects of the Commission's illegal stay order. However, blocking all discovery on the RAIs and RAI related matters was prejudicial as a matter of law and fact.

C. Establishment of "milestones"

The Order also establishes a two-and-a-half year schedule for the conduct of this proceeding, and creates several "milestones" for the accomplishment of particular goals. This entire regime is unwarranted, unreasonable and in violation of the mandates of both the Atomic Energy Act and the APA. The schedule suggests *ex parte* communications between the Commission and the staff/applicant, is based upon no substantial evidence, and is an abuse of discretion.

The APA applies to actions taken by the NRC. *See*, 42 U.S.C § 2231. The APA mandates that this proceeding be conducted in a fair and just manner, taking into account the "conveniences and necessities of the parties or their representatives," with particular respect to fixing the time and place of hearings. *See*, 5 U.S.C. § 554(b). Additionally, in licensing matters the NRC is required to conduct proceedings with "due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time shall set and complete the proceedings." *See*, 5 U.S.C. § 558(c). Moreover, it is the presiding officer at an adjudicatory proceeding who is empowered to make these decisions, including the regulation of the course of the proceeding and the disposition of procedural requests. *See*, 5 U.S.C. §556(c). The result is that it is not the place of the NRC Commission to make such a broad statement and order governing this proceeding, these decisions should instead be made in individual circumstances by the presiding officer who is intimate with those circumstances.

With regard to the establishment of the two-and-a-half year schedule, the Commission's ruling is arbitrary, capricious and an abuse of discretion. At the early stage of the proceeding where that ruling was made, the Commission had no information regarding the complexity of Petitioner's contentions and was completely unaware of the factors that might arise to require extension beyond the established goal. Further, it is clear that this arbitrary timetable does not take into account the individual conveniences and necessities of the parties, and in fact completely disregards them. While it is true that the Commission provides leeway in its guidance for the Board to allow deviations from the milestones, the Commission's guidance also mandates that the Board mitigate these deviations by developing plans to return to the overall timetable. This regime inherently overlooks the parties conveniences and necessities by not allowing for *overall* deviation from the timetable – meaning that at some point the conveniences and necessities are necessarily subsumed to the Commission's agenda. Additionally, practice has seen these dangers borne out. There are now on file at least eighteen Requests for Additional Information from the NRC staff to the applicant, all of which suggest that the application, though initially docketed, is not complete and evinces serious safety concerns. This reason alone should suffice to point this Commission toward the truth, but when coupled with the problems discussed above, it can only be clear that this unreasonable schedule must be vacated.

Again, when confronted with the RAIs placed on-the-record by the Petitioner, and Petitioner's request(s) for additional time to file its contentions, the Board was hampered by the "milestones" set forth by the Commission. Granting Petitioner the relief its requested would have resulted in an abandonment of the milestones. This the Board could not do. Thus, the existence of the milestones prejudiced the Petitioner's ability to have the Board properly review

the merits of its various motions, requests and the contentions filed by the Petitioner.

D. "Unavoidable and Extreme Circumstances"

The Commission's Order unlawfully dictates that the Board grant extensions of time upon a showing of "unavoidable and extreme" circumstances. This directive is facially without legal basis, and even if it is argued that it is a mere interpretation of agency regulations, flies in the face of the plain language of those regulations.

The NRC's own regulations, in 10 C.F.R. § 2.711 mandate that the time fixed or prescribed for accomplishing acts that have time limits or deadlines may be shortened "for good cause." The Commission and the Board have both, rather disingenuously, argued that the power of the presiding officer under 10 C.F.R. § 2.718 to set schedules and regulate the proceedings supercedes this directive in § 2.711. While Petitioner agrees that the presiding officer has general authority to regulate these proceedings, it is also clear that the presiding officer must do so fairly and in conjunction with the law. In that § 2.711 clearly states that its "for good cause" standard obtains except where otherwise provided by law, it makes it clear that for the "good cause" standard not to apply requires some explicit law which overrides. Such a law does not exist. This is even more apparent when taken in conjunction with 10 C.F.R.§ 2.3, which resolves conflict in favor of special rules. Where § 2.718 is a general rule laying out the presiding officer's authority, § 2.711 is a specific rule pertaining to the extension and reduction of time limits. When read together, the provisions of this section of 10 C.F.R. make it clear that the presiding officer's authority does not extend to arbitrarily changing the "good cause" standard. To that extent, the Commission is not free to simply change it through its August 19 order, and can only arguably do so through proper rulemaking procedures. As discussed, *supra*, those procedures were not met

and, as such, this ruling cannot stand.

Again, this rule forced the Board to illegally reject the motions to vacate filed by the Petitioner. The Board was not permitted to properly rule on any of Petitioner's requests for enlargement of time due to the fact that the Board had adopted the illegal standard mandated by the Commission. This illegal standard must be vacated. The standard was imposed on this proceeding without any reference to the record of this case. The standard is not and cannot be supported by substantial evidence. In fact, the RAIs placed on-the-record in this proceeding demonstrate that the scientific and technical issues relevant to this proceeding could not be adjudicated under the regime dictated, without any reference to the factual record, by the Commission.

III. THE BOARD HAS COMMITTED A NUMBER OF ERRORS THAT MUST BE ADDRESSED AND REVERSED

Petitioner contends that the actions of the board subsequent to the Commission's publication of its new statement of policy and issuance of its order referring the matter to the board have included a number of errors that must be addressed and reversed. The Board has consistently and arbitrarily ignored the 10 CFR 2.714 requirement that contentions be file-able up to 15 days before the prehearing conference. The Board has also adhered in error to the "unavoidable and extreme circumstances" standard for granting motions for extension of time.

A. THE BOARD IGNORED IN ERROR THE 15 DAY RULE ENUNCIATED IN 10 CFR 2.714

10 CFR 2.714(b)(1) provides that "Not later than fifteen (15) days prior to the holding of the special prehearing conference ... the petitioner shall file a supplement to his or her petition to intervene that must include a list of contentions which petitioner seeks to have litigated in the

hearing." Under this section it is clear that that the NWC had until October 28th (assuming the prehearing conference was still set to be conducted on November 12, 1998) to file its contentions. Instead of granting the NWC such time, the board claimed that under 10 CFR §2.711 and §2.718 it had the authority to set the deadline at some time other than 15 days before the prehearing conference. This assertion is clearly in error. 10 CFR §2.3 precludes this argument: "In any conflict between a general rule in subpart G of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs." §2.711, cited by the Board as granting it the authority to alter time limits is a *general* rule governing extensions. In fact, the rule even states that it applies "Except as otherwise provided by law." Not only does §2.714 so provide, 2.711 is general where 2.714 is specific, and thus 2.714 "trumps" any authority granted under 2.711 because of §2.3.

The Board also claims that 10 CFR §2.718 grants it the authority to set some limit on filing contentions other than the 15 day rule. §2.718, granting *general* authority to the presiding officer of a proceeding has the same problems reaching the 15 day rule as §2.177 has. First, in that §2.718 is general where §2.714 is specific, §2.3 requires that §2.714 control. Second, though §2.718(e) gives the presiding officer the general authority to "Regulate the course of the hearing..." §2.718 also imposes a "duty to conduct a fair and impartial hearing *according to law*..." §2.714, which is as much "law" as §2.718, imposes the 15 day rule which the Board is bound, even by §2.718 to apply.

In failing to apply the §2.714 15 day rule, the Board perpetuated the error each time it altered the timing of the proceeding by failing to alter the time granted to file contentions accordingly. On August 20, having set the prehearing conference at October 15, thus the deadline

for contentions should have been September 30, not September 11 as the Board required. On September 29, the Board moved the Prehearing conference to November 12, without moving the deadline for filing contentions; at this time the contention deadline should have been moved to October 28. Each time the Board failed to apply the 15 day rule constituted error that this commission should consider and reverse.

B. THE BOARD INCORRECTLY ADHERED TO THE WRONG STANDARD FOR GRANTING EXTENSIONS OF TIME

The Board committed error in applying to motions for extension of time an "unavoidable and extreme circumstances" standard rather than the "for good cause" standard of 10 CFR §2.711[1]. Even if the Board were to argue, as it did regarding the 15 day rule, that 10 CFR §2.711 and §2.718 granted it the authority to apply this new standard, the board would be wrong for the same reasons it is wrong about the 15 day rule. Furthermore, as noted above, the new standard represents improper rulemaking, and thus should be reconsidered and overturned.

The mere application of the wrong standard would be insidious enough, were it not for the Board's selective and biased application of that standard. In rejecting the NWC's initial request for and extension of time, the Board's August 27 order found that "[the NWC's] claim does not provide the requisite 'unavoidable and extreme circumstances' that warrant an extension." Memorandum and Order Denying Time Extension Motion and Scheduling Prehearing Conference, August 27, 1998. This is peculiar in that the same Board granted an extension on September 29, neither requiring BGE to meet the heightened standard or even asking them for

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[1] It is interesting to note that the Board applies the "unavoidable and extreme circumstances test" despite citing to 10 CFR §2.711 as its authority for dictating the course of the proceeding.

input—at least not on the record.[2]

Furthermore, the ALJ's Bollwerk and Kline have failed to even apply the standard to all of the cases before them. In the *Private Fuel Storage L.L.C.*, Memorandum & Order (Additional General Schedule Guidance), ASLBP No. 97-732-02-ISFSI (ASLB, August 20, 1998) Bollwerk and Kline apply the "good cause" standard to discovery deadlines and "other deadlines."

C. THE BOARD'S FINAL ORDER IS RIFE WITH ERROR

1. The Board's Summary Dismissal Ignores Prior Board Precedent and Must be Overturned

In its October 16 final order the Board wrongfully dismissed the NWC from the BGE license renewal proceeding. Finding that "If the October 1 contentions deadline thus is controlling, these contentions are not admissible and, in accordance with the Commission's September 17 Directive, this proceeding must be terminated." This, however, flies in the face of agency precedent. ALJ's Bollwerk and Kline also presided over the *Private Fuel Storage, L.L.C.* 47 NRC 142 (1998) case, where they allowed the petitioner who was filing late-filed contentions to at least appear at the prehearing conference and show that its late-filed contentions met the applicable standard 2.714 factors—**rather than summarily dismissing the petitioner.** Here, at the very least, the NWC should remain a party until it can argue that its contentions meet the applicable standard at the prehearing conference.

2. The Board's Rejection of the Argument that the RAIs were Substantial Information that should have been in the Record must be Overturned

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[2] Throughout these proceedings there has been some question as to how tightly "in the loop" the NWC has been. We note that NWC did not receive any sort of notice of the Commissions Requests for Additional information for weeks after they had been submitted, and that both the NRC staff and BGE have received a number of benefits, including extensions of time and a stay of discovery, without ever asking for them on the record.

By failing to notify the Board and thereby the NWC about the RAI's BGE and the Staff have created a glaring inadequacy in the record. Because of this inadequacy, further proceedings should be postponed pending the clarification of the record. "The obligation to provide information to adjudicatory bodies requires that information be submitted to them directly. Parties should not assume that information made available to a component of the Commission's staff will necessarily find its way into the record and come to the attention of the decisional body." *Tennessee Valley Authority*, 15 NRC 1387 (1982) *See also Duke Power Co.* 6 AEC 623 (1973) (where proceedings were remanded to Board for sole purpose of having record clarified).

The Board's failure to mandate that the type of information contained in the 35 RAIs identified by the Petitioner be placed on-the-record (or at least provided to the parties in the proceeding) constituted error. The information in the RAIs was vital to the public proceedings mandated by Congress through the intervention process. The failure of the Board to punish t he other parties for failing to place this material on the record, and the failure of the Board to grant Petitioner the time it needed to fully review the RAIs and set forth proper contentions constituted error. Finally, the existence of the RAIs, and the type of technical information contained therein, demonstrates why the milestones set forth by the Commission were improper and were not properly based on evidence or argument contained in the record of this case.

3. The Board's Rejection of the Argument that BGE's Application was Incomplete was in Error.

Since the time BGE's application for renewal was docketed, the NRC has made not less than 35 Requests for Additional Information. The RAI's reveal that BGE's renewal application requires clarification in several generic areas and was incomplete. *See*, Letters and Request for

Additional Information from NRC Staff to BGE contained in Petitioner's October 1 Motion to Vacate, October 7, 1998 Notice of Filing and October 16, 1998 Notice of Filing. In fact, BGE does not plan to have responded to the RAI's until after the scheduled November, 12, 1998 Prehearing conference. Unfortunately, the Board was unaware of the RAI's, despite the fact that when it issued its prehearing schedule it assumed the application was complete.

It is nothing short of patently unreasonable to expect the NWC to file contentions based on an application so incomplete that even the NRC staff requires radical clarification, especially not before that clarification has been made. In asking the NWC to file its contentions before the RAI's have been answered (especially without the benefit of discovery), the Board is essentially asking NWC to either anticipate the responses or simply forego the opportunity to file contentions regarding them without facing the unlawfully heightened "unavoidable and extreme circumstances" standard. NWC would even go so far as to argue that the failure of BGE to complete its application constitutes "good cause" or even "unavoidable and extreme circumstances" requiring the Board to either 1) grant a significant extension so that NWC can not only receive the answers to the RAI's but also consider them carefully or 2) dismiss BGE's renewal application from the docket, pending its completion, thus restarting the proceedings and giving the NWC time to consider the completed application.

As was set forth in Petitioner's October 1, 1998 Motion to Vacate, BGE's application was incomplete and should have been dismissed. If the application was allowed to stand, Petitioner had the right to incorporate the responses to the RAIs in its contentions. The prehearing conference should have been scheduled for a time in which Petitioner could have properly

reviewed the RAIs and the responses to the RAIs and then set forth helpful contentions designed to properly protect the public interest.

D. THE BOARD'S FINAL ORDER FAILED TO COMPLY WITH THE RULES ON LATE FILED CONTENTIONS

On October 13, 1998 Petitioner filed two contentions. Prior to that date Petitioner had raised a number of contentions in its filings, although these contentions were not set forth in the technical form preferred for such matters.

In any event, the two contentions set forth on October 13th were valid and timely contentions. They were submitted prior to fifteen days before the prehearing conference and thus, as a matter of law, had to be considered timely file contentions. The Board erred as a matter of law in failing to consider these timely filed contentions.

Even if one assumes that every prior ruling of the Board and the Commission were legally sound, the worst that can be said about the October 13th contentions is that they were filed two weeks late. Thus, the Board, if it had assumed that all of the prior determinations made by the Board and the Commission were valid, still had to treat the October 13th filings under the rules related to late filed contentions. These rules are set forth in 10 C.F.R. § 2.714 and countless decisions by the NRC. The rules on late filed contentions are simple: "Nontimely filings will not be entertained absent a determination by the Commission (or Board) . . . that the petition . . . should be granted . . . based upon a balancing of . . . factors." 10 C.F.R. § 2.714(a)(1).

Thus, the Board had to "balance" certain factors in deciding whether to admit the October 13th contentions. The Board did not follow this rule and did not balance any factors as mandated by this rule. The Board's dismissal of the two contentions must be summarily dismissed.

The Board's alleged that Petitioner failed "met its burden to establish the admissibility of its two contentions." Board Order of October 16, 1998, p. 16. However, the Petitioner fully complied with the rules regarding the filing of even late-filed contentions. It was incumbent upon the Board to file an additional briefing schedule on the admissibility of the two contentions and/or address the admissibility issue at its scheduled prehearing conference. In this regard, the rules are very clear. The requirements of a petition (or amended petition) are set forth in 10 C.F.R. § 2.714(a)(2). Petitioner adhered to the requirements set forth therein when it filed its Reply to the filings of the other parties on October 1, 1998. Additionally, contentions must be set forth pursuant to 10 C.F.R. § 2.714(b)(2). The contentions filed on October 13th adhered to this form. There is no requirement whatsoever that the Petitioner be required to address the four factors set forth in 10 C.F.R. § 2.714(a)(1) at the time a Petitioner files contentions which are later ruled to be late filed. The Board completely violated the regulations and due process requirements when it summarily denied the two contentions filed by the Petitioner.

Again, the denial of these two contentions not only violated the published regulations of the NRC, but further evidenced that prejudicial impact of the Commission's August 19th order. The milestones set forth therein simply did not afford the Board with the leeway it needed to properly adjudicate this proceeding. The milestones must also be vacated.

CONCLUSION

Given the importance of public participation in this proceeding,[3] as recognized by the Atomic Energy Act, the Energy Reorganization Act and the U.S. Court of Appeals for the District of Columbia Circuit,[4] 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, 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. The NRC Commission must vacate the October 16, 1998 Memorandum and Order of the Board and remand this case for a proper adjudication consistent with the arguments set forth above. In addition, the NRC Commission must vacate its August 19th order and require that the Board handle all future adjudications in a manner consistent with the published regulations. In the alternative, the Commission must vacate the decision of the Board and remand this case for proceedings related to a proper disposition of the two contentions filed by the Petitioner on October 13, 1998.

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[3]Significantly, 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.

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

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

October 26, 1998

BEFORE THE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
BALTIMORE GAS & ELECTRIC CO., et al.,	**Docket Nos. 50-317 and 50-318** **License Renewal**
(Calvert Cliffs Unit 1 and Unit 2)	**ASLBP No. 98-749-01-LR**
	October 26, 1998

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Petition for Review and supporting brief were filed before the NRC Commission this October 26, 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 Zobler
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

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