

19697

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '98 NOV -6 A8:17

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADMINISTRATIVE STAFF

In the Matter of)	
)	
BALTIMORE GAS & ELECTRIC COMPANY)	Docket No. 50-317-LR
)	50-318-LR
(Calvert Cliffs Nuclear Power Plant,)	
Units 1 & 2))	License Renewal Application

NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL OF
THE NATIONAL WHISTLEBLOWER CENTER

Robert M. Weisman
Marian L. Zabler
Counsel for NRC Staff

November 5, 1998

9811100171 981105
PDR ADOCK 05000317
G PDR

DS07

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL
OF THE NATIONAL WHISTLEBLOWER CENTER

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a(a), the staff of the Nuclear Regulatory Commission (Staff) hereby files its brief in opposition to the "Notice of Appeal" and accompanying supporting brief (Appeal Brief) dated October 26, 1998, filed by the National Whistleblower Center (NWC), in which NWC seeks review of the Atomic Safety and Licensing Board's decision in *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC ___, slip op. (Oct. 16, 1998)(denying intervention petition/hearing request and dismissing proceeding).¹ For the reasons set forth below, the Licensing Board's decision in LBP-98-26 should be affirmed.

¹ NWC also seeks review of the Licensing Board's "Memorandum and Order" (Scheduling Matters and Electronic Hearing Database) (Sept. 21, 1998), in which the Board denied NWC's September 18 request to delay the prehearing conference. Appeal Brief at 12, n.10. NWC also asserts that the Board committed error in its "Order" (Revised Prehearing Conference) (Sept. 29, 1998). *Id.* at 18-19. NWC notes that it intends to challenge all of the actions of the Board that it has previously challenged. *Id.* at 10.

BACKGROUND

On April 10, 1998, the Baltimore Gas & Electric Company (BG&E or Applicant) submitted an application pursuant to 10 C.F.R. Part 54 to renew the operating licenses for the Calvert Cliffs Nuclear Power Plant (CCNPP), Units 1 and 2.² On July 8, 1998, the Staff published a notice of opportunity for a hearing on the application. "Baltimore Gas & Electric Company, Calvert Cliffs Nuclear Power Plant Units 1 and 2," 63 Fed. Reg. 36,966 (1998) (Notice of Opportunity for a Hearing Regarding Renewal of Licenses). On July 28, 1998, the Commission issued a policy statement to provide guidance applicable to all licensing adjudicatory proceedings, including this license renewal proceeding. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998) (Policy Statement).

On August 7, 1998, NWC filed its "Petition to Intervene and Request for a Hearing of the National Whistleblower Center" (Petition to Intervene). On August 19, 1998, the Commission issued an order referring the Petition to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for designation of a Licensing Board to preside over the proceeding and, *inter alia*, set milestones for completion of the proceeding and standards for granting requests for extensions of time. *Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2)*, CLI-98-14, 48 NRC ___, slip op. (Aug. 19, 1998). Subsequently, the Board issued an order that, *inter alia*, set a deadline of September 11, 1998,

² On April 27, 1998, the Staff published a notice of receipt of the application. "Baltimore Gas & Electric Company, Calvert Cliffs Nuclear Power Plant Units 1 & 2," 63 Fed. Reg. 20,663 (1998)(Notice of Receipt of Application for Renewal of Licenses). On May 19, 1998, the Staff published a notice of acceptance for docketing of the application. "Baltimore Gas & Electric Company, Calvert Cliffs Nuclear Power Plant Units 1 & 2," 63 Fed. Reg. 27,601 (1998)(Notice of Acceptance of Application for Renewal of Licenses).

for NWC to submit a supplement to its Petition to Intervene setting forth contentions. "Memorandum and Order" (Initial Prehearing Order) (Aug. 20, 1998). The Board specifically stated that "any contention submitted after [September 11, 1998] will be considered a late-filed contention that must meet the requirements for admission set forth in [10 C.F.R. §] 2.714(a)(1)(i)-(v)." Initial Prehearing Order, slip op. at 3. On August 21, 1998, the Petitioner filed "Petitioner's [sic] Motion to Vacate CLI-98-14" (August Motion to Vacate) and "Petitioner's Motion for Enlargement of Time" (Enlargement Motion). On August 26, 1998, the Commission denied the Motion to Vacate. *Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC ___, slip op. (Aug. 26, 1998)*. On August 27, 1998, the Board denied NWC's Enlargement Motion in its entirety and scheduled a prehearing conference to commence on October 15, 1998. "Memorandum and Order" (Denying Time Extension Motion and Scheduling Prehearing Conference), slip op. at 4-5. (Aug. 27, 1998).

On September 11, 1998, the Petitioner filed a "Petition for Review" of the Board's August 27 Order 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.³ *Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant,*

³ Notwithstanding the Commission's decision in CLI-98-19, NWC continues to maintain that the Board's August 27 Order was illegal, improper, an abuse of discretion, arbitrary and capricious, and was not supported by substantial evidence. Appeal Brief at 2. In CLI-98-19, however, the Commission *granted* a portion of NWC's extension request, which, in combination with the Board's September 21 Order, added 20 days to the time for
(continued...)

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" (September Motion to Vacate). On September 21, 1998, the Board denied NWC's September Motion to Vacate but granted Petitioner's request for a one-day extension to file contentions. "Memorandum and Order" (Scheduling Matters and Electronic Hearing Database) (Sept. 21, 1998). In that order, the Board also provided that the Applicant and the Staff could respond to any intervention petition supplement by November 2, 1998. *Id.*, slip op. at 2-3. On September 29, 1998, the Board rescheduled the prehearing conference for November 12-13, 1998. "Order" (Revised Prehearing Conference Schedule) (Sept. 29, 1998).

On October 1, 1998, instead of filing a supplement to its petition containing a list of proposed contentions, NWC filed four pleadings, namely: (1) "The National Whistleblower Center's Reply to the NRC Staff and BGE's Answer to NWC's Petition to Intervene and Request for Hearing" (Reply); (2) a "Status Report"; (3) "Petitioner's Motion to Vacate and Re-schedule the Pre-hearing Conference" (October Motion to Vacate); and (4) "Petitioner's Motion Requesting To Be Informed of Communication Between the NRC Staff and Applicant" (Communication Motion). In its October Motion to Vacate and the Communication Motion, NWC complained about not being on distribution for requests for additional information (RAIs) the Staff sent to the Applicant and notices of public meetings between the Applicant and the Staff. NWC argued that the circumstances surrounding the

³(...continued)

NWC to formulate contentions. CLI-98-19, slip op. at 2.

RAIs, in addition to NWC's interpretation of the schedule requirements for filing contentions in 10 C.F.R. § 2.714(b), warranted delaying the prehearing conference.⁴ October Motion to Vacate at 4-8. On October 13, 1998, NWC filed "Petitioner's Notice of Filing," in which it filed its first supplement to its Petition to Intervene, and which included two statements identified as contentions. Thus, as of October 16, 1998, the Board had pending before it: (1) the two contentions in NWC's October 13 filing; (2) NWC's request to reschedule the prehearing conference (October Motion to Vacate at 8); and (3) NWC's request that the Staff and Applicant include NWC on the service list for all written communications directly or indirectly related to the application (Communication Motion at 1).

THE LICENSING BOARD'S DECISION IN LBP-98-26

On October 16, 1998, the Licensing Board issued LBP-98-26, in which it determined that: (1) NWC had not submitted any contentions on October 1, as required by the Commission and the Board (LBP-98-26, slip op. at 13); (2) NWC made no attempt to show that either of the two contentions submitted on October 13 met the standards in 10 C.F.R. § 2.714(a) so as to permit late-filing (*id.* at 13-14); and (3) NWC failed to establish good cause

⁴ On October 7, 1998, NWC filed "Petitioner's Notice of Filing," in which NWC reiterated its arguments regarding the RAIs. Pursuant to the Board's Orders of October 2 and 8, 1998, the Staff filed two pleadings dated October 9, 1998, in which the Staff responded to this filing and NWC's four October 1 pleadings. See "Order" (Schedule for Responses to Petitioner's Filings) (Oct. 2, 1998); "Order" (Schedule for Responses to Petitioner's Notice of Filing) (Oct. 8, 1998). The Board's October 2 Order provided that the Staff and Applicant would respond to NWC's October 1 Reply by November 2, 1998.

for extending the October 1 deadline for filing contentions (*id.* at 14-19).⁵ Therefore, the Board denied the Petition to Intervene and terminated the proceeding (*id.* at 20).⁶

DISCUSSION

In its Appeal, NWC asserts that (1) the Board failed to comply with the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1); (2) NWC had, in fact, filed contentions by the established deadline; (3) the provisions of 10 C.F.R. § 2.714(b) and the mere issuance of the Staff's RAIs warranted delaying the prehearing conference; and, therefore, (4) the Commission should "vacate the Board's October 16 dismissal of [NWC'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."⁷ Appeal Brief at 7. In

⁵ Although not specifically entitled as a request for an extension of time, the October Motion to Vacate was, in essence, such a request. In rejecting NWC's arguments regarding the RAIs and the schedule for submitting contentions in 10 C.F.R. § 2.714(b), the Board treated it as such.

⁶ NWC also filed "Petitioner's Second Notice of Filing (Concerning RAIs)," dated October 15, 1998, and "Petitioner's Second Revised Notice of Filing (Concerning RAIs)," dated October 16, 1998, in which NWC continued to complain about not being on distribution for RAIs sent to the Applicant by the Staff. Through these filings, NWC added the RAIs to the purported basis for its two late-filed contentions. *See* October 16 filing at 1; October 15 filing at 1.

⁷ NWC also requests the Commission to provide relief by: (1) vacating CLI-98-14 (Appeal Brief at 2); (2) granting all the relief requested in its September 11 Petition for Review previously denied by the Commission (*id.* at 3); and withdrawing the Policy Statement (*id.* at 8). These requests are, in essence, requests to reconsider CLI-98-15 and CLI-98-19.

A motion for reconsideration may not rely upon entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC __, slip op. at 7 (Aug. 5, 1998) (citing Louisiana (continued...))

addition, NWC challenges LBP-98-26 and the Board's September 21 Order, insofar as these decisions deny NWC's requests to delay the prehearing conference, by raising collateral arguments involving: (1) the Administrative Procedure Act (APA); (2) the Commission's Rules of Practice in 10 C.F.R. Part 2 governing requests for extensions of time; (3) milestones set in CLI-98-14 and the Policy Statement; (4) the Commission's regulations governing Licensing Board admission of matters not in controversy in the proceeding *sua sponte*; and (5) prohibited *ex parte* communications. Beginning with NWC's arguments regarding its contentions, the Staff addresses each of these arguments *seriatim*. As set forth in more detail below, the Atomic Safety and Licensing Board's decision in LBP-98-26 should be affirmed.

⁷(...continued)

Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997)). Nor may a motion for reconsideration rely upon previously presented arguments that have been rejected. *See id.* (citing *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980)). Rather, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. *See id.*; *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994). "Motions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced." *Central Electric Power Coop., Inc.* (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981).

NWC states that it "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 [sic] vacate CLI-98-14." Appeal Brief at 2. The Appeal Brief does not elaborate upon or refine any of the arguments NWC presented in the August Motion to Vacate and the September 11 Petition for Review and, therefore, does not meet the Commission's standards for reconsideration with respect to CLI-98-15 and CLI-98-19. Accordingly, these arguments should be rejected and the requests for relief described above should be denied.

A. Contentions

In LBP-98-26, the Board determined that NWC failed to file any contentions on or before the October 1 filing date set by the Commission and the Board. LBP-98-26 at 13. The Board also held that NWC made no attempt to demonstrate that the proposed contentions filed by NWC almost two weeks after the established deadline met the late-filed contention standards of 10 C.F.R. § 2.714(a)(1). *Id.* The Board, therefore, held that NWC had not met its burden of establishing the admissibility of its two contentions and, in accordance with the Commission's September 17 directive, the Board terminated the proceeding. *Id.* at 13-14.

NWC, in its Appeal Brief, first argues that it had in fact filed contentions by the established deadline. Appeal Brief at 4, 23. Second, NWC argues that with respect to its proposed contentions filed on October 13, the Board failed to balance the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1).⁸ *Id.* at 23. As discussed below, neither of NWC's arguments supports its Appeal. The Board's Order in LBP-98-26 should, therefore, be affirmed.

⁸ NWC also asserts that given the importance of public participation in this proceeding, the Commission should vacate the Board's decision and remand this case to the Board. Appeal Brief at 25. However, the exclusion from a proceeding of persons or organizations who have slept on their rights does not offend any public policy favoring broad citizen involvement in nuclear licensing adjudications. Any such public policy must be viewed in conjunction with the equally important policy favoring the observance of established time limits. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396 n.37 (1983).

1. The Board Correctly Ruled that NWC Failed to File Contentions by the Established Deadline.

NWC first claims that it did, in fact, timely file contentions. Appeal Brief at 4, 23. Specifically, NWC asserts that its October 1 filing entitled "The National Whistleblower Center's Reply to the NRC Staff and BGE's Answer to NWC's Petition to Intervene and Request for Hearing" (Reply) contained "a number of broad contentions concerning the application for license extension." *Id.* at 4. Although claiming to have raised a number of contentions, (Appeal at 4, 23), NWC only mentions two statements contained in its Reply. These "contentions" can be stated as:

- (a) Baltimore Gas & Electric cannot safely operate Calvert Cliffs Units 1 and 2 past the original specified lifetime and if the license were extended, it would pose an unacceptable health and safety risk, and
- (b) The Applicant should not be granted a renewed license until after it has demonstrated that it can safely operate Calvert Cliffs Units 1 and 2 for the requested renewal term of 20 years and that the operating license not be renewed until such time as it is determined that the plant can be operated safely within the law.

Reply at 11. It is clear, however, that these statements were never intended to be NWC's proposed contentions. As its very title suggests and as the NWC concedes here (Appeal Brief at 4), the Petitioner's Reply is a response to the Staff's and the Applicant's arguments that NWC lacked standing. NWC's Reply did not even attempt to address the Commission's requirements regarding contentions in 10 C.F.R. § 2.714(b)(2) and these requirements are not even referenced in its Reply. The section of the Reply NWC references in its Appeal as containing contentions, contains, instead, NWC's response to the Applicant's assertion that

NWC's Petition to Intervene lacks specificity and does not demonstrate redressability. *See* Reply at 10. To counter the Appellate argument, NWC claims its Petition to Intervene did indicate a redressable injury. *Id.* at 11. NWC then goes on, in its Reply, to raise the concerns that it claims now, in its Appeal Brief, are contentions. *See id.*; *see also* Appeal Brief at 4. Moreover, NWC implies in its Reply that, as clearly stated in its Status Report, it did not intend to file contentions at this stage of the proceeding.⁹ *See* Reply at 11; Status Report at 2, 10. NWC clearly did not file any contentions on or before the established deadline for the filing of contentions. The broad statements in its Reply were never intended to be contentions. NWC, in its Appeal, is merely attempting, after the fact, to cure its failure to file contentions on time. The Board's holding that NWC did not file contentions on time should,

⁹ Specifically, in its Reply, NWC states:

Before considering issues of specificity, particularity and redressability NWC must be afforded the opportunity to file an amended and supplemental petition and *its list of contentions* in accordance with the controlling law, regulations, rules of practice and rule of law.

Reply at 10 (emphasis added).

therefore, be affirmed.¹⁰ See *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142-143.

2. The Board Correctly Ruled that NWC Failed to Establish that its Contentions met the Standards for Late Filing of 10 C.F.R. § 2.714(a)(1).

NWC next argues that the Board's Order failed to comply with the rules regarding late-filed contentions. Appeal Brief at 23. NWC references its October 13, 1998 filing in which it provided two proposed contentions. *Id.* at 23, referencing "Petitioner's Notice of Filing," (October 13 Notice).¹¹ NWC asserts that, even if the deadlines set by the Board and the Commission were valid, the Board erred by not applying the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1). *Id.* Specifically, NWC claims that it was the Board's obligation to balance the late-filed contention criteria and that the Board's failure to do so requires that

¹⁰ Because these statements were clearly not intended to be contentions, the Board correctly did not consider whether these statements met the Commission's requirements regarding contentions at 10 C.F.R. § 2.714(b)(2). See LBP-98-26 at 13. Even if NWC's broad statements were intended to be considered as contentions, and correctly labeled as such, they would not have met the requirements of 10 C.F.R. § 2.714(b). These two statements raise the same issue of whether Calvert Cliffs can be safely operated for the renewal term. This issue clearly lacks the specificity required of an admissible contention. See 10 C.F.R. § 2.714(b)(2). See also *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). NWC does not support these "contentions" with an explanation of the bases of the contentions and with a concise statement of the alleged facts or expert opinion together with references to specific sources on which NWC intends to rely to establish those facts or expert opinion. See 10 C.F.R. § 2.714(b)(2)(i), (ii). Nor has NWC provided sufficient information to demonstrate that a genuine dispute on a material issue of law or fact exists. See 10 C.F.R. § 2.714(b)(2)(iii). Thus, even if these statements were intended to be contentions, they would have failed to meet the Commission's requirements regarding contentions.

¹¹ The October 13 Notice stands in contrast to NWC's Reply in that the October 13 Notice, at least, clearly articulates that NWC intended this filing to comprise its contentions. See October 13 Notice at 1.

its decision be reversed. *See id.* at 23-24. NWC also claims that it "fully complied with the rules regarding the filing of even late-filed contentions." *Id.* at 24. Next, NWC asserts, without any reference to law, that it was "incumbent" upon the Board to provide for additional briefing of this issue. *Id.* Finally, NWC appears to assert that it did not need to address the late-filed contention criteria because when it filed its contentions, it did not know that they would later be ruled as late. *See id.*

NWC's arguments are without merit and do not support its Appeal. If a petitioner files contentions after they are due, a petitioner must address the factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). The five factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). The petitioner bears the burden of demonstrating that a balancing of these factors weighs in its favor. *See Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992). Although the regulations call for a balancing test, where a petitioner fails to show good cause for filing its contention late, the other four factors must weigh heavily in its favor in order for its petition to be

granted. *Id.* at 73, citing *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977). In addition to the showing that a balancing of the five factors weighs in its favor, a petitioner must also meet the requirements for setting forth a valid contention. *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 207 (1993).

A licensing board has broad discretion in balancing the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1). *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 481 (1989) citing *Nuclear Fuel Services Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Thus, the standard of review on appeal is whether the licensing board abused its discretion. *Id.* at 482. Furthermore, it is not enough for a petitioner to show that the licensing board could have weighed the criteria in the petitioner's favor, rather a petitioner must demonstrate that "a reasonable mind could reach no other result." *Id.* As discussed below, NWC's assertions fail to demonstrate that the Board abused its discretion in determining that NWC failed to address the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1). NWC's Appeal should, therefore, be denied.

The Board's dismissal of these contentions because NWC failed to address the late-filed contention standards was in accord with prior Commission decisions and was not an abuse of discretion. *See Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 255 (1993) (Commission summarily dismissed a late-filed intervention petition for failure to address the five factors for a late-filed petition). The Board was under no obligation to consider, on its own, the late-filed contention criteria. *See id.*; *see also Comanche Peak*, CLI-92-12, 36 NRC at 69. NWC had the burden of demonstrating that

the balancing of the factors favored the admission of its proffered contentions, as well as demonstrating that the proffered contentions met the requirements of section 2.714(b). *Id.* Despite NWC's assertions that it "fully complied" with the late-filed contention factors, these factors are not even mentioned in its October 13 Notice. Thus, it is incomprehensible how NWC can argue that it "fully complied" with these factors.

NWC's excuse for its failure to address these criteria is that it did not need to do so because it did not know, until after the Board ruled, that its proffered contentions were late. *See id.* NWC was well aware of the deadline established for the filing of contentions, and thus, its lateness should not be excused. *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC ___, slip op. at 11 (Oct. 23, 1998). In *Yankee*, the Commission dismissed an appeal that was filed two days after the due date holding that a petitioner is expected to comply with basic procedural rules, especially one as "simple to understand as those establishing filing deadlines." *Id.* Based on the above, NWC has failed to demonstrate that the Board's decision dismissing the proceeding for NWC's failure to address the late-filed connection criteria was an abuse of discretion. The Board's decision should, therefore, be affirmed.

3. NWC's Late-Filed Contentions do not Satisfy the Basic Requirements of 10 C.F.R. §2.714(b).

With respect to the two contentions filed late by NWC, the Board stated it need not address the question of the sufficiency of the contentions because NWC's failure to address the late-filed contention criteria was sufficient to support their rejection. LBP-98-26, slip op. at 13 n. 6. The Board, however, went on to provide that based on its discussion regarding the

Staff application acceptance and license review process, the validity of the two contentions was "at best, problematic." *Id.* The Board correctly held that the Staff's review of the application is not the focus of the proceeding. *Id.* at 17, citing *The Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 395-96 (1995). Rather, the focus of this proceeding is the adequacy of the application. *Id.* Moreover, requests for additional information (RAIs) do not indicate that an application should be rejected. *Id.* at 17-18 citing *University of Missouri*, CLI-95-8, 41 NRC at 395. *See also infra* at 22-23. Other than stating in its Appeal that these contentions "were legally sound. . . [and that] the worst that can be said about the October 13 contentions is that they were filed two weeks late," NWC does not provide any further support for its proposed contentions. NWC, further, fails to demonstrate that the Board's characterization of its contentions was in error.

It is clear that NWC's proposed contentions do not meet the requirements of 10 C.F.R.

§ 2.714(b). NWC's first proposed contention provides:

As a matter of law and fact, Baltimore Gas & Electric Company's (BGE) license renewal application to operate Calvert Cliffs Nuclear Power Plant (CCNP) Unit 1 and Unit 2 is incomplete and must be withdrawn and/or summarily dismissed.

October 13 Notice at 1. NWC provides, as a basis for this contention, the fact that the Staff has sent requests for additional information (RAIs) to the Applicant. *Id.* NWC's second contention provides:

As a matter of law and fact, Baltimore Gas & Electric Company's (BGE) license renewal application to operate Calvert Cliffs Nuclear Power Plant (CNPP) Unit 1 and Unit 2 fails to meet the aging and other safety-related requirements mandated by law and/or NRC regulations and must be denied.

October 13 Notice at 2. As a basis for this contention, NWC, again, relies on the Staff's RAIs.

Id.

As correctly noted by the Board, the Staff's review of the Application is not the focus of this proceeding nor does the fact that the Staff issued RAIs indicate that the Application must be rejected. LBP-98-26, slip op. at 17-18. Nor do the Commission's requirements with respect to the submission of contentions 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. *See Rancho Seco*, CLI-93-3, 37 NRC at 146-147 (The Commission ruled that reference to the Staff's questions to a licensee was insufficient to support the admissibility of a proffered contention that the application was inadequate and did not establish that a genuine dispute exists with the Licensee on a material issue of law or fact). Rather, a petitioner has an affirmative obligation to review all information then available to it and independently derive contentions. *See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1045 (1983). Moreover, NWC's contentions do not meet the requirements of 10 C.F.R. § 2.714(b)(2) because they lack the requisite specificity, are not supported by a concise statement of alleged facts or expert opinion, or demonstrate that a genuine dispute on a material issue of law or fact exists.

Based on the above, the Board correctly determined that NWC failed to file any contentions on or before the October 1 filing date and that NWC failed to demonstrate that the proposed contentions filed by NWC almost two weeks after the established deadline met the late-filed contention standards of 10 C.F.R. § 2.714(a)(1). None of NWC's arguments on

Appeal demonstrate that the Board abused its discretion in rejecting these contentions. NWC's Appeal should, therefore, be denied.

B. The Board Did Not Abuse its Discretion in Denying NWC's Requests to Delay the Prehearing Conference.

NWC argues that the Board erred by not granting its requests to delay the prehearing conference. Specifically, NWC argues that the Board committed error in applying an "unavoidable and extreme circumstances" standard, rather than the "good cause" standard of 10 C.F.R. § 2.711, to requests for extensions of time. Appeal Brief at 19. In addition NWC protests that the Board, in LBP-98-26 and its September 29 Order, failed to apply the "15 day rule" (ostensibly reflected in 10 C.F.R. § 2.714(b)(1)) for submitting contentions. *Id.* at 17-19. Further, NWC asserts that the Board committed error by failing to (1) mandate that the type of information in the RAIs be placed on the record (*id.* at 20-21) and (2) dismiss the application, based on the RAIs, as incomplete (*id.* at 21-22). NWC also claims that the Board should have granted it discovery to assist it in formulating contentions, and, therefore, the Board's September 21 Order refusing to delay the prehearing conference was in error. As set forth below, the Board did not abuse its discretion in denying NWC's requests to delay the prehearing conference, and LBP-98-26 should be affirmed.

1. Standard of Review.

Scheduling is a matter of licensing board discretion, and the Commission does not inject itself into scheduling controversies, absent a truly exceptional situation. *See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986).* An abuse of discretion only occurs if no reasonable person could take the view

adopted by the tribunal. See *INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1293 (7th Cir. 1993). Where a scheduling order is involved, a showing that the schedule deprives a party of its right to procedural due process is required. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988) (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417 at 420-21). An appeal will be denied if the schedule at issue cannot be said to be so draconian as to raise an issue of constitutional (due process) dimensions. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-4, 243, 244 (1989).

2. The Board Applied the Proper Standard to NWC's Requests for Extension of Time.

NWC asserts that the Board adhered to the wrong standard for granting extensions of time. Appeal Brief at 19. The Commission, in CLI-98-14, interpreted the "good cause" standard for considering requests for such extensions as indicating that such requests should be granted only if based on "unavoidable and extreme circumstances." CLI-98-14, slip op. at 6. Upon NWC's challenge to this standard, the Commission affirmed its determination, and this decision is now binding. CLI-98-15, slip op. at 6-7. The Board consistently applied this standard in LBP-98-26, finding that NWC had not explicitly requested an extension of time to submit contentions and had not made any attempt to address the standard of "unavoidable and extreme circumstances." LBP-98-26, slip op. at 14, 16. The Board applied that standard

to NWC's arguments regarding 10 C.F.R. § 2.714(b)(1) and the RAIs. *Id.* at 16-19. Accordingly, the Board did adhere to the proper standard.¹²

3. The Board's Interpretation of 10 C.F.R. § 2.714(b)(1) is Correct.

NWC once again argues that it is entitled to file contentions up to 15 days prior to the prehearing conference.¹³ Appeal Brief at 4, 17-19, 23. Thus, NWC believed that contentions should have been due on September 30, 1998, in view of the Board's August 27 Order, which set the prehearing conference for October 15, 1998. *Id.* at 18-19. Similarly, NWC asserts that when the Board issued its September 29 Order revising the schedule such that the prehearing conference would begin on November 12, 1998, its contentions would then be due, by operation of the regulation, by October 28, 1998. *Id.* at 18-19.¹⁴ As set forth below, however, the Board has all the 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 a 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

¹² NWC's challenge to the Policy Statement, CLI-98-14, and CLI-98-15 are irrelevant to NWC's appeal of LBP-98-26. Its arguments on the "good cause" standard are addressed *infra* at 27-30.

¹³ 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); "NRC Staff's Answer in Opposition to Petitioner's Motion to Vacate and Re-schedule the Pre-hearing Conference" at 8-9 (Oct. 9, 1998).

¹⁴ Had the Board granted NWC's September Motion to Vacate and delayed the prehearing conference, contentions would not have been due until March 1, 1999, according to NWC's proposed schedule. September Motion to Vacate at 5-6.

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 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). Accordingly, 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. The Rules of Practice state:

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all powers necessary to those ends, including the powers to:

(e) Regulate the course of the hearing[.]

10 C.F.R. § 2.718(e). Thus, a licensing board may set a deadline for filing contentions that is not tied to a prehearing conference. *See Northern States Power Co.* (Independent Spent Fuel Storage Installation), LBP-96-22 44 NRC 138, 141 (1996). The Board did just that in this proceeding. Order Denying Time Extension, slip op. at 3-4 (Aug. 27, 1998).¹⁵

Pursuant to § 2.718(e), the Board may alter the schedule set by §§ 2.714(b)(1) and (c) to permit the Board and a petitioner to consider the Staff's and applicant's answers to proposed contentions prior to the prehearing conference, as was done here.¹⁶ Although

¹⁵ In LBP-98-26, the Board ruled that it was its prerogative under its general scheduling authority to override the automatic limits in sections 2.714(a) and (b) as is warranted in a particular situation. LBP-98-26, slip op. at 15 n.7.

¹⁶ 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., Northern States Power*, LBP-96-22, 44 NRC at 141 (providing for the filing of contentions
(continued...)

providing NWC with additional time in which to file contentions, the Commission stated that, for the reasons given by the Board in its August 27 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. NWC's arguments that the regulations provide otherwise do not require a contrary conclusion.

In challenging the Board's denials of its extension requests, NWC also asserts that 10 C.F.R. § 2.3 resolves conflicts in favor of special rules, and that since section 2.718 is general and section 2.714 is specific, section 2.714 must control. Appeal Brief at 17-18. NWC, however, ignores section 2.2, which states:

Each subpart *other than subpart G* sets forth special rules applicable to the type of proceeding described in the first section of that subpart. Subpart G sets forth general rules applicable to all types of proceedings except rule making, and should be read in conjunction with the subpart governing a particular proceeding.

10 C.F.R. § 2.2 (emphasis added). Moreover, section 2.3 states that "[i]n any conflict between a general rule in subpart G of [Part 2] and a special rule in another subpart or other part of [10 C.F.R.] applicable to a particular type of proceeding, the special rule governs." 10 C.F.R. § 2.3. Both 10 C.F.R. § 2.714 and § 2.718 are general rules in Subpart G, and, therefore, section 2.3 does not apply. As section 2.714 is not a "special rule" in a subpart other than Subpart G, it does not govern. The short answer is that section 2.714 establishes deadlines in the absence of a Board order doing so, and does not override the Board's authority to set schedules.

¹⁶(...continued)

on November 25, 1996, and a prehearing conference on December 17-19, 1996, *i.e.*, at least 22 days after the submission of contentions, with all answers to contentions due on December 10, 1996).

4. NWC's Argument with Respect to the Staff's RAIs Does Not Establish a Basis for Reversing LBP-98-26.

NWC protests that "[b]y failing to notify the Board and thereby NWC about the RAI's BGE and the Staff have created a glaring inadequacy in the record." Appeal Brief at 21. NWC claims that, because of this asserted inadequacy, the Board should have delayed the prehearing conference so that NWC could review the RAIs and the responses to the RAIs in order to formulate contentions. *Id.* at 22-23. Further proceedings should have been postponed. *Id.* The decisions NWC relies upon for this proposition, however, are inapposite, as both involve decisions on the merits of issues raised in proceedings, rather than the grant or denial of intervention, where there is no evidentiary record. See *Tennessee Valley Authority* (Browns Ferry Nuclear Power Plant, Units 1, 2, and 3), ALAB-677, 15 NRC 1387 (1982); *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623 (1973). Furthermore, NWC does not identify any regulation or Commission precedent requiring the Staff to place RAIs on the record of a proceeding. NWC's claim regarding the RAIs is baseless, and is no reason to reverse LBP-98-26.¹⁷

In addition, NWC suggests that, because of the RAIs, the application is incomplete and should have been dismissed.¹⁸ Appeal Brief at 15, 21-23. NWC's argument again misses the

¹⁷ After NWC first requested, in its October 1 filings, that the Staff place NWC on the Staff's distribution list for its correspondence to the Applicant related to the Calvert Cliffs license renewal application, the Staff did so. As set forth above, the Staff was not under any obligation to include the RAIs in the record of this proceeding. NWC's suggestion that the Staff be "punished" is baseless.

¹⁸ If, as NWC asserts, the application "is so incomplete that even the NRC staff requires radical clarification" (Appeal Brief at 22), then NWC should have had ample
(continued...)

mark. As explained in the Notice of Acceptance for Docketing, the docketing of the application does not preclude requests for additional information. 63 Fed. Reg. 27,601 (May 19, 1998). Nor should the fact that the Staff has issued RAIs be a surprise to the NWC, for the reasons set forth above. 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's review of the application is not the subject of the hearing. *Id.* at 395-96. Accordingly, the Petitioner's inability to consider Staff RAIs and the Applicant's responses to those RAIs did not establish extreme or unavoidable circumstances warranting a delay of the prehearing conference in this proceeding, nor should the application have been dismissed.¹⁹

As set forth above, the Board appropriately determined that it could override section 2.714(b)(1) in setting a schedule for filing contentions. It also correctly determined that the mere existence of RAIs did not warrant a delay of the prehearing conference. NWC does not present any arguments in its Appeal to establish that the schedule for submitting

¹⁸(...continued)

material to identify in specific contentions as inadequacies in the application. NWC's failure to do so indicates that the application, in fact, is not incomplete.

¹⁹ NWC 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. October Motion to Vacate at 6. NWC does not explain why it could not have formulated contentions based on its review.

contentions and the prehearing conference raise a due process concern. Accordingly, the Board's determination to adhere to the scheduled date for the prehearing conference cannot be said to be an abuse of discretion, and LBP-98-26 should be affirmed.

5. The Board did not Abuse its Discretion in Denying NWC's Request to Delay the Prehearing Conference in Order to Conduct Discovery.

NWC argues that it is entitled to discovery prior to submitting its final list of contentions and that the Board's September 21 denial of its request to delay the prehearing conference in order to do so was illegal. Appeal Brief at 12, n.10. NWC simply flouts the long-standing agency precedent that precludes a petitioner from obtaining discovery to assist it in framing contentions. *See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2)*, ALAB-107, 6 AEC 188, 192, *reconsideration denied* ALAB-110, 6 AEC 247, *aff'd* CLI-73-12, 6 AEC 241 (1973). In addition, the Rules of Practice provide that "parties may obtain discovery." 10 C.F.R. § 2.740(a), (b)(1) (emphasis added). As NWC had only petitioned to intervene and was not admitted as a party to this proceeding, *see* 10 C.F.R. § 2.714(h), NWC was not entitled to any discovery in this proceeding. NWC's argument is baseless; the Board did not abuse its discretion in denying, in its September 21 Order, NWC's request to delay the prehearing conference in order to conduct discovery.²⁰

²⁰ Notwithstanding that NWC was never entitled to discovery in this proceeding, it complains that the Commission, in CLI-98-14, directed the Board to stay discovery against the NRC Staff. Appeal Brief at 6, 10, 12-14. The Board, however, did not rely on the guidance regarding discovery in CLI-98-14 in issuing any ruling in this proceeding. Even if there were some defect in this guidance, which there is not, it would not be a reason to reverse LBP-98-26.

C. NWC's Other Arguments.

NWC raises several collateral attacks on LBP-98-26 through arguments regarding CLI-98-14 and the Commission's Policy Statement in CLI-98-12. NWC argues that the Policy Statement constituted improper rule making. Appeal Brief at 7-10. In a similar vein, NWC asserts that the Commission's interpretation of "good cause" and establishment of milestones in the Policy Statement and CLI-98-14 violate the Administrative Procedure Act (APA). *Id.* at 6, 8, 10. Further, NWC claims that the provisions of the Policy Statement and CLI-98-14 relating to Board-initiated, or *sua sponte*, issues violate the APA. *Id.* at 8, 11-12. NWC also invokes the Commission's rules governing *ex parte* communications. *Id.* at 12, 14, 20 n.2. Because these arguments do not challenge the basis of the Board's decision in LBP-98-26, they are irrelevant to that decision and, accordingly, do not provide a basis to support NWC's appeal. Except for NWC's argument that interpretation of the "good cause" standard requires rulemaking, the Commission, in CLI-98-15, has rejected NWC's APA arguments, and they do not warrant reconsideration here.²¹

1. The Commission's Policy Statement is Not a Rulemaking Requiring Notice and Comment.

NWC protests that the Commission's Policy Statement in CLI-98-12 effected a fundamental change in existing law and constitutes rulemaking, which requires notice and

²¹ Previously, in its August Motion to Vacate, its August 11 Enlargement Motion, and its September 11 Petition for Review, NWC asserted that CLI-98-14 violated the Commission's regulations and the APA. August Motion to Vacate at 2-9; Enlargement Motion at 3-4; Petition for Review at 5-6. In CLI-98-15 and CLI-98-19, the Commission explicitly rejected these arguments. CLI-98-15, slip op. at 2-4, 6-7; CLI-98-19, slip op. at 3.

comment under the APA. Appeal Brief at 8. As set forth below, this argument is without merit.

The APA specifically exempts general statements of policy from the notice and comment process. 5 U.S.C. § 553(b)(A).²² A general statement of policy has been defined as "an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Telecommunications Research and Action v. F.C.C.*, 800 F.2d 1181, 1186 (D.C. Cir. 1986). It is different from a substantive rule in that it does not have a binding effect.²³ *Id.* A general statement of policy is also flexible, allowing agency decision makers the ability to use discretion in the decision making process.

Applying these standards, it is clear that the Policy Statement did not change any Commission requirement, is not a rule, and is not subject to the notice and comment requirements of 5 U.S.C. § 553. The language of the Policy Statement is general in nature and does not address particular parties or proceedings. The Policy Statement focuses on certain methods licensing boards can employ in future adjudications so that issues are resolved efficiently and expeditiously. The Commission noted in CLI-98-15 that the Policy Statement

²² NWC states that for the general policy statement exception from rulemaking in 5 U.S.C. § 553(b)(A) to apply, an agency is required to set forth findings and reasons for its use of the exception. This is incorrect. An agency is required to set forth findings only when it determines that there is good cause to engage in rulemaking without notice and opportunity for comment. *See* 5 U.S.C. § 553(b)(B).

²³ *But see, Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1732 n.9 (1982)(noting that a Commission policy statement is binding on its adjudicatory boards). Although as a general rule, Commission policy statements are binding on licensing boards, the Commission has stated that CLI-98-14 reflects the generic guidance in the Policy Statement, and that the scheduling guidance of CLI-98-14 is non-binding by nature. CLI-98-15, slip op. at 3-4.

only provides generic guidance on certain procedural issues. CLI-98-15, slip op. at 4. The Policy Statement states, "Many provisions in Part 2 establish schedules for various filings, which can be varied 'as otherwise ordered by the presiding officer.' Boards should exercise their authority under these options[.]" Policy Statement, CLI-98-12, 48 NRC at 20. This statement allows licensing boards sufficient flexibility to manage proceedings. Moreover, CLI-98-14 (the case-specific order) also reflects the Board's flexibility to manage the schedule in this proceeding. See CLI-98-14, slip op. at 5,7; CLI-98-15, slip op. at 5.

Since the guidance in the Policy Statement is not being used as a rule to impose obligations and since it allows the licensing boards and the Commission sufficient flexibility to apply the guidance on a case-by-case basis, it meets the criteria to be exempt from the notice and comment requirements of rulemaking. See *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (stating policy guidance exception to rulemaking applies if statement does not impose obligations or rights and allows flexibility in decision making).²⁴ NWC's argument to the contrary is unfounded and should be rejected.

2. The Commission's Interpretation of the "Good Cause" Standard for Extensions of Time is Guidance and Did Not Require Notice and Comment Rulemaking.

With regard to the "good cause" standard for considering a request for an extension of time, NWC also argues that the Commission violated the APA in that "the Commission is not free to change [the "good cause" standard] through [CLI-98-14], and can only arguably do so through proper rulemaking procedures." *Id.* at 16-17. Specifically, NWC states that this

²⁴ Since the Policy Statement is not a rule, NWC's arguments that the policy cannot be applied until 30 days after publication in the *Federal Register* is not applicable.

standard "flies in the face of the plain language" of 10 C.F.R. § 2.711(a) and constitutes a change in this rule which governs extensions of time. *Id.* at 6, 9. NWC goes on to assert that the Board's implementation of this standard provided by the Commission is also improper. *Id.* at 19. The standard for considering requests for extensions of time under section 2.711 enunciated by the Commission and applied by the Board does not constitute a change requiring notice and comment rulemaking, is not a new standard, and is a proper exercise of the Commission's inherent authority to regulate specific proceedings.

The Commission's Rules of Practice, with respect to requests for extensions of time, provide:

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

10 C.F.R. § 2.711(a). The Rules of Practice, however, do not specifically define what is meant by "good cause"; thus, within their sound discretion, the Commission and the presiding officer may interpret that term, either in general or in the context of a particular proceeding. *See* CLI-98-15, slip op. at 6-7.

In CLI-98-14, the Commission directed the Licensing Board to set a schedule for any hearing granted in this proceeding, with the goal of issuing a Commission decision on the application in about two and one half years from the date the application was received. CLI-98-14, slip op. at 4. The Commission suggested schedule milestones that the Licensing Board should adopt to achieve this goal, and case-management techniques to meet the milestones. *Id.* at 5-7. One of the case-management techniques suggested in CLI-98-14 is

the avoidance of unnecessary delay in the various phases of the proceeding. To that end, the Commission interpreted the 10 C.F.R. § 2.711 "good cause" standard by stating that "the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances."²⁵ CLI-98-14, slip op. at 6.

The Commission's interpretation of "good cause" in CLI-98-14 is not a new standard. The Commission's explication of the "good cause" standard in section 2.711 is consonant with Commission precedent. In particular, good cause for an extension to file an appeal has been interpreted "historically . . . [as] extraordinary and unanticipated circumstances." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI 98-21, 48 NRC ____, slip. op. at 12 (1998) (citing *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165, n.3 (1982)); see also *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-117, 6 AEC 261, 262 (1973) (holding that future extensions of time to file appeal would be denied absent "most extraordinary circumstances"). This interpretation is not inconsistent with section 2.711(a), as that section does not specifically define "good cause." Additionally, the Commission's interpretation of "good cause" as "unavoidable and extreme circumstances" is a reasonable method for assuring that its goal of

²⁵ NWC argues that 10 C.F.R. § 2.3, if read in concert with sections 2.711 and 2.718, requires that section 2.711 control. Appeal Brief at 18-19. This assertion suffers the same infirmities as NWC's other argument invoking section 2.3, namely, that sections 2.711 and 2.718 are both in Subpart G, so that section 2.3 does not apply.

prompt resolution of adjudicatory matters is met.²⁶ Therefore, the application of the Policy Statement in this particular proceeding is proper.

Finally, the Commission has properly exercised its inherent supervisory authority by interpreting the "good cause" standard in this proceeding. The application of policies set forth in statements of policy is properly addressed on a case-by-case basis, when the policy is actually applied. See *Bechtel v. F.C.C.*, 10 F.3d 875, 878 (D.C. Cir. 1993); *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974). Further, the Commission has already ruled in this proceeding that it has full authority to issue guidance to licensing boards for specific cases. See CLI-98-15, slip op. at 4. Such guidance often includes devices to expedite schedules and for adherence to time frames. *Id.* at 5. Therefore, the Commission properly interpreted the good cause standard contained in 10 C.F.R. § 2.711(a). In view of the foregoing, the Commission should reject NWC's assertions with regard to the application in this proceeding of the policies laid down in CLI-98-12.²⁷

²⁶ Circumstances arising in a proceeding involving the Yankee Nuclear Power Station provide an example of "unavoidable and extreme" circumstances warranting an extension of time. In that proceeding, a petitioner to intervene had sought additional time to file its appeal because its counsel had become seriously ill and was unable to work, temporarily, on the proceeding. New counsel had undertaken to prepare the appeal but requested additional time in order to assemble and become familiar with the record of the case and prepare an appellate brief. See "New England Coalition on Nuclear Pollution's Motion for Extension of Time to File Appeal and Request for Expedited Consideration," dated June 22, 1998. The Secretary to the Commission, pursuant to his authority under 10 C.F.R. § 2.772(b), granted the request without comment. The Staff submits that such circumstances constitute a fair example of "unavoidable and extreme" circumstances establishing good cause for an extension under the Commission's Policy Statement.

²⁷ NWC cites 5 U.S.C. § 554(b), which states that "[i]n fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties." Appeal
(continued...)

3. The Commission's Schedule Goals in the Policy Statement and Milestones in CLI-98-14 are a Reasonable Exercise of its Inherent Supervisory Authority.

NWC asserts that the Policy Statement sets an unyielding two-and-a-half year schedule and implements a fundamental change to established rules. Appeal Brief at 8. Similarly, NWC complains that the milestones set forth in CLI-98-14 do not allow flexibility by not allowing for deviation from the overall schedule, and that they hampered the Board in considering NWC's requests to delay the proceeding. *Id.* at 14-16. Again, as set forth below, this argument is meritless.

The Commission exercises its inherent supervisory authority by providing guidance in general policy statements or in the context of a specific proceeding. *See* CLI-98-15, slip op. at 4. It is well established that the Commission may suggest time frames and schedules and that a licensing board may deviate from the proposed schedule in a specific proceeding when circumstances require. *Id.* at 5. CLI-98-14 itself suggest this. CLI-98-14, slip op. at 5, 7. The Policy Statement contains the same flexibility. CLI-98-15, slip op. at 4. The Commission's guidance to the Board to explore ways to restore the schedule in case of delay and report its findings to the Commission is not intended to make the overall schedule inflexible. *See id.* at 9. Rather, in following this guidance, the Board will ensure that all reasonable options for eliminating delays are considered. Accordingly, the milestones in both

²⁷(...continued)

Brief at 14. NWC, however, has not described to the Board or the Commission how NWC's "convenience" or "necessity" would have required the Board to revise its schedule in this proceeding. The Commission already rejected this argument in CLI-98-15. CLI-98-15, slip op. at 3-6.

the Policy Statement and CLI-98-14 are a reasonable exercise of the Commission's inherent supervisory authority over its licensing boards and NWC's argument should be rejected.²⁸

4. The Commission's Guidance Regarding Board-Initiated Contentions is Irrelevant to LBP-98-26.

NWC asserts that the guidance in the Commission's Policy Statement and CLI-98-14 regarding Board-initiated, or *sua sponte*, issues effects a substantive change in law, which requires notice and comment rulemaking. Appeal Brief at 5-6, 8, 10,-12. How this might have a bearing on LBP-98-26 NWC does not explain. The standards governing *sua sponte* review of matters not put into controversy by the parties have nothing to do with LBP-98-26 and cannot be a basis for reversal of that decision.

Notwithstanding the irrelevance of the *sua sponte* contention standards to LBP-98-26, NWC's assertions with respect to the criteria set forth in the Commission's Policy Statement and CLI-98-14 are simply wrong. First, the Commission's Rules of Practice state that "[m]atters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists." 10 C.F.R. § 2.760a. In this proceeding, the Commission stated that "matters within the scope of this proceeding but not put into controversy will be considered by the Licensing Board only where the Licensing Board finds that a serious safety, environmental, or common defense and security matter exists."

²⁸ NWC argues that the milestones set in CLI-98-14 are based upon no substantial evidence. *Id.* at 6, 10-11, 14. NWC offers no support for the proposition that the milestones should be supported by "substantial evidence." With regard to the milestones, the "record" is the Commission's statement of policy considerations in CLI-98-14 and the Policy Statement. These policy considerations are adequate to support the milestones.

CLI-98-14, slip op. at 3. The Policy Statement contains similar language. 48 NRC at 22-23. The Commission's paraphrase of its regulation is identical in substance to the regulation itself. Moreover, in the Statements of Consideration for section 2.760a, the Commission stated that the "authority with respect to new issues not in controversy among the parties will be exercised sparingly and only in *extraordinary* circumstances." Final Rule: Part 2-Rules of Practice, 40 Fed. Reg. 2973 (Jan 17, 1973) (issues not raised by parties) (emphasis added). Accordingly, the Policy Statement adds nothing to the requirements of section 2.760a, and NWC's argument with respect to the criteria for *sua sponte* review should be rejected.

5. NWC's Suggestions Regarding Asserted *Ex Parte* Communications are Baseless.

NWC asserts that the milestones set by CLI-98-14 suggest *ex parte* communications between the NRC Staff, the Applicant, and the Commission, which would be evidence of the Commission's abuse of discretion. Appeal Brief at 6, 14. NWC also asserts that the Commission's guidance in CLI-98-14 regarding discovery against the Staff suggests the existence of *ex parte* communications. *Id.* at 12. In addition, NWC complains about the Board's rescheduling of the prehearing conference through its September 29 Order.²⁹ *Id.* at 19-20 & n.2. This argument is without merit, as set forth below.

²⁹ NWC cites a decision in another proceeding for the proposition that Judges Bollwerk and Kline, both of whom participated in the other decision and are on the Board presiding over this proceeding, failed to apply the same standard for granting extensions in both proceedings. Appeal Brief at 20. The only extension granted by the decision in the other proceeding cited by NWC, however, was supported by both the applicant and the intervenor in that proceeding. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), "Memorandum and Order" (Additional General Schedule Guidance and Informal Discovery Status Conference Schedule), slip op. at 2-4 (Aug. 20, 1998).

Pursuant to the Board's September 21 Order, NWC's contentions were due on October 1, 1998; therefore, in that same order, the Board provided that the Staff and Applicant should file their responses to contentions on or before November 2, 1998 (those responses had previously been due on October 2, 1998). The Board described its reasons for doing this in LBP-98-26. LBP-98-26, slip op. at 15-16, n.8. When the Board issued its September 29 Order, the prehearing conference was scheduled for October 15, 1998, and, given the schedule for the filing of contentions and responses thereto, the Board reset the date of the prehearing conference for November 12, 1998. The Board's schedule was obviously intended to afford NWC, the Staff, the Applicant, and the Board itself an opportunity to consider all the filings regarding contentions before the prehearing conference, so that the conference would best serve its purpose. Moreover, NWC does not set forth even a scintilla of evidence to show that the "suggested" *ex parte* communications might have taken place.³⁰ Indeed, the Staff has no knowledge of any violation of the Commission's rules governing *ex parte* communications or separation of functions, and these suggestions do not establish any infirmity in the Board's or the Commission's application of its Rules of Practice in this proceeding. NWC's assertion that there is some suggestion of *ex parte* communication based upon these facts is simply groundless.

³⁰ While the Applicant is governed by the rules prohibiting *ex parte* communications in 10 C.F.R. § 2.780, the Staff is subject to the rules governing separation of functions in 10 C.F.R. § 2.781.

CONCLUSION

For the reasons set forth above, the Licensing Board's decision in LBP-98-26 should be affirmed.

Respectfully submitted,

Robert M. Weisman

Robert M. Weisman
Marian L. Zabler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of November, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '98 NOV -6 A8:17

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL OF THE NATIONAL WHISTLEBLOWER CENTER" 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 5th day of November, 1998:

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

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

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

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

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

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

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

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

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

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

Robert M. Weisman

Robert M. Weisman
Counsel for NRC Staff