UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

June 7, 2000

The Honorable James M. Inhofe, Chairman
Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

RE: National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir., decided April 11, 2000)

Dear Chairman:

This lawsuit arose out of the Calvert Cliffs license renewal proceeding. On November 12, 2000, a split panel of the D.C. Circuit issued a decision requiring the Commission to reconsider whether to grant the sole potential intervenor in the Calvert Cliffs proceeding an extension of time to formulate and file contentions. The panel reasoned that the Commission improperly had stiffened its extension-of-time standards, moving from a "good cause" test to an "unavoidable and extreme circumstances" test, without providing advance notice and opportunity for public comment.

Ten days later, on its own motion, the court reconsidered. It vacated the panel decision and set the case for supplemental briefing and oral argument before a reconstituted panel. (One of the judges on the original panel had retired.) Chief Judge Edwards explained that the vacated panel opinion "fails to address some critical issues in this case," pointing in particular to the apparent "procedural" nature of the extension-of-time rule and to the Commission's legal flexibility to alter procedural rules without prior notice and comment. After rebriefing and reargument, the court of appeals (Edwards, C.J., Williams & Sentelle, JJ.) ruled in favor of the NRC on all issues.

The court held, "first, that the NRC was free to adopt, without resort to notice-and-comment rulemaking, the 'unavoidable and extreme circumstances' standard for application in the Calvert Cliffs proceeding." The court pointed out that the Commission had given advance notice of the new standard, both in a policy statement and in a case-specific order, and that the standard was a reasonable means to accomplish "expedited case processing." No notice and comment were necessary, said the court, because the new standard "embodies a procedural rule." Finally, commenting that "this case appears to be much ado about nothing," the court concluded that the new extension-of-time standard had not harmed petitioners, because the Commission granted petitioners one extension of time, and they never sought another.

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Petitioners have 45 days to seek rehearing in the court of appeals and 90 days to seek review in the Supreme Court.

Sincerely,

John F. Cordes, Jr.
Solicitor

Senator Bob Graham