

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 6, 1999 Decided November 12, 1999

No. 99-1002

National Whistleblower Center,  
Petitioner

v.

Nuclear Regulatory Commission and  
United States of America,  
Respondents

Baltimore Gas and Electric Company,  
Intervenor

Consolidated with  
No. 99-1043

On Petition for Review of an Order of the  
Nuclear Regulatory Commission

Stephen M. Kohn argued the cause for petitioner. With  
him on the briefs was David K. Colapinto.

Marjorie S. Nordlinger, Attorney, United States Nuclear Regulatory Commission, argued the cause for respondent. With her on the brief were Karen D. Cyr, General Counsel, John F. Cordes, Jr., Solicitor, E. Leo Slaggie, Deputy Solicitor, Lois J. Schiffer, Assistant Attorney General, United States Department of Justice, and Mark Haag, Attorney.

David R. Lewis and James B. Hamlin were on the brief for intervenor.

Before: Edwards, Chief Judge, Wald and Williams, Circuit Judges.

Opinion for the Court filed by Circuit Judge Wald.

Dissenting opinion filed by Circuit Judge Williams.\*

Wald, Circuit Judge: This appeal involves the dismissal by the Nuclear Regulatory Commission ("NRC" or "the Commission") of a petition by the National Whistleblower Center, a citizens' group ("Whistleblower"), to intervene in the first ever license renewal proceeding for a nuclear power plant, in this instance Calvert Cliffs. The NRC issued a referral order to an Atomic Safety Licensing Board ("Board") which prescribed a streamlined procedure for the proceeding, including a shortened time period for Whistleblower to file its contentions. In the referral order, NRC for the first time also adopted a stringent interpretation of the "good cause" standard in its published rules for extending prescribed time limits, to henceforth require a showing of "unavoidable and extreme circumstances." See NRC Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, 10 C.F.R. s 2.711 (1999). When Whistleblower asked the Board for an extension of time to file its contentions, the Board denied its request, applying the "unavoidable and extreme circumstances" standard, and the NRC affirmed the decision. The NRC subsequently dismissed Whistleblower's petition when Whistleblower failed to file contentions within the NRC's deadline.

---

\* Judge Williams' dissent will be filed at a later date.

Because we conclude that the "unavoidable and extreme circumstances" test is effectively an amendment of the Commission's regulations made without notice and comment required by the Administrative Procedure Act, we vacate the Commission's decision dismissing the petition to intervene and remand to the agency to consider Whistleblower's motion for an extension of time under its prior interpretation of the "good cause" standard. Recognizing that much progress has been made in processing the Calvert Cliffs renewal application since a year ago when the contested events occurred, we require only that the Commission provide Whistleblower with a meaningful opportunity to submit its contentions. If Whistleblower can show "good cause"--under the Board's prior interpretation--for its original request for an extension of time to file contentions and the contentions satisfy the agency's other published criteria, the agency must allow Whistleblower to participate meaningfully in the license renewal process.

### I. Background

On July 8, 1998, the NRC published a Notice of Opportunity for a Hearing in the Federal Register permitting any interested person to intervene in the proceeding regarding the license renewal application of the Baltimore Gas & Electric Company ("BG&E") to continue to operate the Calvert Cliffs Nuclear Power Plant. The Notice of Receipt of the application was published in late April but the application was not accepted for docketing until May 19. Whistleblower filed a petition to intervene on August 7. The July 8 hearing notice contained what the Commission later referred to as "ambiguous" language paraphrasing sections 2.714(a)(3) and 2.714(b)(1) of its published regulations to the effect that any petitioner to intervene could amend a petition or supplement contentions<sup>1</sup> not later than fifteen days before the first pre-

---

<sup>1</sup> A contention is a specific issue of law or fact which a petitioner seeks to have litigated at a hearing. Under NRC rules, a contention must include a specific statement of the issue of law or fact to be argued and the petitioner must support it with a brief explana-

hearing conference. See Baltimore Gas & Elec. Co., Calvert Cliffs Nuclear Power Plant, Units 1 & 2; Notice of Opportunity for a Hearing Regarding Renewal of Facility Operating License, 63 Fed. Reg. 36,966, 36,966 (1998); 10 C.F.R. ss 2.714(a)(3), (b)(1). On August 19, however, the NRC referred the petition to intervene to an Atomic Safety and Licensing Board and gave "guidance" to the Board on how to conduct the proceeding. Among other things, the referral order directed the Board to adopt a streamlined schedule for the hearing. Significantly, the order directed that "the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances." Joint Appendix ("J.A.") at 28. Two days later, Whistleblower filed with the Commission a motion to vacate the referral order as contrary to the Commission's regulations prescribing extensions of time for "good cause" and allowing contentions to be filed fifteen days before an initial prehearing conference. See 10 C.F.R. ss 2.711(a), 2.714(a)(3), (b)(1). The Commission denied the motion on the ground that it has authority to shorten the time for filing contentions under section 2.711, and that limiting extensions to "unavoidable and extreme circumstances" merely gives content to the general "good cause" standard.

On August 20, the Board issued an initial prehearing order requiring Whistleblower to file its contentions by September 11, 1998, and scheduled the first prehearing conference for the week of October 13, later specifying October 15. In short, Whistleblower was required to file its contentions within three weeks after the prehearing order and thirty-four days before the prehearing conference. In addition, the Board reiterated that any motion for an extension of time must "demonstrate 'unavoidable and extreme circumstances' that support permitting the extension."

tion of its bases; a short statement of the facts or expert opinion which are intended to support it, together with references to the specific documents and sources upon which the petitioner will rely to establish the facts or opinion; and sufficient information to show that a genuine dispute exists between the intervenor and the applicant on a material issue. See Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, 10 C.F.R. s 2.714(b)(2) (1999).

The day after the Board's initial prehearing order, Whistleblower filed a motion to extend the time for filing contentions until mid-November. Whistleblower based the motion on its need to retain experts to review the application and to provide necessary technical input, the complexity of the three-volume relicensing application and the fact that this proceeding would inevitably involve novel issues since it was the first nuclear power reactor license renewal proceeding ever. A week later, on August 27, the Board rejected petitioner's motion for an extension of time, stating that Whistleblower failed to meet its burden of establishing "unavoidable and extreme circumstances" justifying an extension. Whistleblower petitioned the Commission for interlocutory review of the decision and on September 17 the Commission issued an order moving the deadline for contentions to September 30--subsequently extended to October 1 because of a Jewish

Holiday. The Commission explained its action by saying that Whistleblower might not have anticipated such an early date for filing contentions since the language in the July 8 notice stated that under section 2.714(b)(1), petitioners could file contentions not later than fifteen days prior to the first prehearing conference. However, the Commission expressed general satisfaction with the Board's streamlined agenda for the relicensing procedure, concluding that the Board acted reasonably in setting an earlier date for filing contentions than its published rules provided and in refusing to extend the time for filing, and reaffirmed the "unavoidable and extreme circumstances" test. In light of the Commission's action, the Board subsequently rescheduled the initial prehearing conference for November 12. This meant that Whistleblower had to file its contentions forty-two days before the prehearing conference, instead of fifteen days as set out in the Commission's rules.

On October 1, the due date for filing its contentions under the Commission's reprieve, Whistleblower filed a status report and a motion to vacate and reschedule the prehearing conference. The status report identified the experts that Whistleblower had retained, the "areas of concern" in the application the experts were studying, and recited various alleged defects and omissions in BG&E's license renewal application. In the status report and the motion to vacate,

Whistleblower included numerous references to its argument that it had "good cause" for an extension of time. In addition, Whistleblower asserted in its motion to vacate that the Board and Commission improperly and prejudicially applied the stringent "unavoidable and extreme circumstances" test in rejecting its motion for enlargement of time. However, Whistleblower specifically stated that the status report was not to be regarded as its contentions.

On October 13, Whistleblower filed its "first supplemental set of contentions." Whistleblower indicated that it retained the right to supplement its petition to intervene as provided in the Commission's published rules and that it was filing the contentions without prejudice to its October 1 motion to vacate and reschedule the prehearing conference. The filing contained two contentions, one alleging that the renewal application was incomplete and must be withdrawn or summarily dismissed and another alleging that the application failed to meet aging and other safety-related requirements. However, Whistleblower did not allege specific facts to support these contentions, but rather referred to the Requests for Additional Information filed by the NRC staff ("RAIs")<sup>2</sup> as setting forth the bases for each contention. On October 16, the Board concluded that Whistleblower had neither submitted contentions by the October 1 deadline nor demonstrated that the October 13 contentions met the late-filing standards of 10 C.F.R. s 2.714(a);<sup>3</sup> accordingly it dismissed Whistleblower's petition to intervene.

---

<sup>2</sup> A Request for Additional Information is a demand by the NRC staff for important information not present in a license application. During a review of any application by the staff, an applicant may be required to supply such additional information. See 10 C.F.R. s 2.102(a). An application may be denied if an applicant fails to respond to a request for additional information within 30 days from the request or any other time specified. See *id.* s 2.108.

<sup>3</sup> Even if contentions are filed after a deadline for filing, they can nonetheless be admitted as late-filed contentions. Late-filed contentions are admitted if the presiding officer makes a finding that the contentions satisfy a balancing of factors: good cause for failure to file on time; availability of other means to protect the petitioner's

The Commission on December 23, 1998 affirmed both the Board's decision to reject the motion for an extension of time and to dismiss the petition. The Commission said that the Board had "good cause" to shorten the normal time provided in the written regulations for filing contentions because a shorter deadline would make the prehearing conference more meaningful by allowing the Board and Whistleblower to consider the NRC staff's answer to the proposed contentions prior to the scheduled date of the conference. The Commission once again approved the Board's use of the "unavoidable and extreme circumstances" test to reject Whistleblower's motion for an extension of time. It reasoned that the test was a "construction of 'good cause' " intended as a "reasonable means of avoiding undue delay in this important license renewal proceeding, and for assuring that the proceeding is adjudicated promptly." J.A. at 345-46.

## II. Analysis

The nub of this controversy is whether NRC's new interpretation of a published regulation amounts to an amendment of the regulation requiring notice and comment under the Administrative Procedure Act. See 5 U.S.C. s 551(5) (1994). Whistleblower argues that the Commission departed from its own published rules when it rejected Whistleblower's motion for an extension of time to file contentions as failing the "extreme and unavoidable circumstances" standard instead of continuing to use the "good cause" standard applied in all previous requests for extensions. The Commission responds that the "unavoidable and extreme circumstances" test is merely an interpretation of the good cause standard, and an agency is entitled to deference in construing its own regulation. We conclude, however, that the Commission's new interpretation of "good cause" so fundamentally modifies that

---

interest; whether a petitioner's presence will help develop a sound record; whether petitioner's interest will be adequately represented by existing parties; and the extent to which a petitioner's participation will broaden the issues or delay the proceeding. See 10 C.F.R. s 2.714(a)(1), (b)(1).

standard, as previously interpreted by the agency, that it constitutes an amendment, requiring notice and comment.

A. The Incompatibility of the "Good Cause" and "Unavoidable and Extreme Circumstances" Standards

The NRC's published regulations provide that "not later than fifteen days prior to the holding ... of the first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of contentions which petitioner seeks to have litigated in the hearing." NRC Rules of Practice and Procedure for Domestic Licensing Proceedings and Issuance of Orders, 10 C.F.R. s 2.714(b)(1) (1999). However, a different provision of the same Rules provides: "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." Id. s 2.711(a) (emphasis added).<sup>4</sup> When Whistleblower filed a motion for an extension of time, the Board followed the directives of the Commission's referral order and applied the "unavoidable and extreme circumstances" test in rejecting the motion. Whistleblower alleges that the "unavoidable and extreme circumstances" test amounts to an amendment of section 2.711 and is therefore invalid because it was not adopted through notice and comment.

A basic tenet of administrative law is that an agency's interpretation of its own regulations is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). However, an equally well-established administrative law principle provides that an agency may not adopt an interpretation of its own regulation which either contradicts the plain meaning of the regulation, see *Ohio Power Co. v. FERC*, 954 F.2d 779, 783 (D.C. Cir.

---

<sup>4</sup> Moreover, 10 C.F.R. s 2.714(b)(1) provides that "additional time for filing" a supplement to contentions may be granted based on the same balance of factors for admitting late-filed contentions. 10 C.F.R. s 2.714(a)(1), (b)(1).



1992) ("[N]o deference is owed an interpretation at odds with the plain meaning of the text."); *Guard v. NRC*, 753 F.2d 1144, 1148-49 (D.C. Cir. 1985) (noting that "high regard" of deference to NRC interpretation of its own regulation "is appropriate only so long as the agency's interpretation does no violence to the plain meaning of the provision at issue"); *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (D.C. Cir. 1983) ("[W]hen an agency's interpretation of its own rules flies in the face of the language of the rules themselves, it is owed no deference."), or fundamentally changes the agency's own prior interpretation of the regulation. See *Hudson v. FAA*, -- F.3d --, --, No. 98-1295, 1999 WL 798067, at \* 4 (D.C. Cir. Oct. 8, 1999) (noting that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." ) (quoting *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (striking down new agency interpretation that was contrary to advice given for 30 years by its Alaska office and informal agency statements as an effective amendment of FAA regulations); *National Family Planning and Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 239-40 (D.C. Cir. 1992) (striking down a Department of Health and Human Services interpretation of its own regulation to allow Title X physicians to counsel abortion as a method of family planning contrary to earlier interpretation by agency barring all Title X personnel from discussing the possibility of abortion). The reason behind this ban on radical reinterpretation of published regulations is that "to allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine those APA requirements." *Paralyzed Veterans*, 117 F.3d at 586; see also *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (concluding that notice and comment rulemaking would be required if an agency were to effect "a substantive change" in its regulations by adopting a new position inconsistent with its existing regulations). This principle applies

whether the agency adopts the fundamental change in interpretation in a purported policy statement, interpretative rule or adjudication. See, e.g., *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 92 (D.C. Cir. 1997) (reinterpretation advanced in FDA publication labeled a notice and referred to in its text as a policy statement); *Paralyzed Veterans*, 117 F.3d at 588 (interpretative rule); *Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (Department of Labor "interpretative" statement expounded in the course of an adjudication).

While "good cause" appears at first blush an exceedingly flexible term (some might say a near-empty vessel, waiting to be filled), there are limits to its meaning and to the concept it represents. The Supreme Court itself recognized this recently. See *Jones v. United States*, -- U.S. --, --, 119 S. Ct. 2090, 2098 (1999) (holding that phrase "good cause" in 18 U.S.C. s 3593(b)(2)(C), which provides for impaneling a new jury in a sentencing hearing if the trial jury has been discharged for good cause, "cannot be read so expansively as to include the jury's failure to reach a unanimous decision"). Furthermore, this court has held that even though a word in an agency rule may not have a precise meaning, an agency's interpretation of the word is invalid if it is far removed from the recognized meaning of the term. See *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (concluding that while the word "premises" does not have a single fixed meaning, that "does not convert the word into a sort of Rorschach test, permitting the Commission to read into the word anything it pleases" and rejecting as plainly erroneous agency interpretation divorced from term's established definition).

Section 2.711 does not itself define "good cause," but the history of the regulation makes clear that its purpose was to give the Commission flexibility to alter the time limits in its proceedings when that course would not unfairly prejudice the parties. In 1962, when the agency amended the precursor to section 2.711, it explained that it was "designed to expedite proceedings without sacrificing the fair and impartial consideration of the issues." Revision of Rules, 27 Fed. Reg. 377, 377 (1962). In 1972, the Commission codified section 2.711 in its present form and included a specific finding that

section 2.711 allowed modifications of time limits "in appropriate cases, where it would not prejudice a party." Restructuring of Facility License Application Review and Hearing Processes, 37 Fed. Reg. 15,127, 15,129 (1972). Clearly, a balance of the Commission's administrative convenience and fair opportunities for parties to participate meaningfully in its proceedings was intended.

And indeed, the NRC has in the past consistently interpreted good cause for extending or shortening time to file contentions as the presence of a "good reason" why either the parties or the Commission desire changing normal time schedules. See, e.g., *In re Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), 18 N.R.C. 1400, 1401 (1983) ("Section 2.711 permits the Board to reduce time limits where there is a good reason to do so."); *United States Dep't of Energy Project Management Corp. Tenn. Valley Auth. (Clinch River Breeder Reactor Plant)*, 17 N.R.C. 158, 162 (1983) (construing 10 C.F.R. s 2.714(a)'s requirement of "good cause" for failure to file on time as "good reason"); *In re Virginia Elec. & Power Co. (N. Anna Power Station, Units 1 & 2)*, 4 N.R.C. 98, 101 (1976) (same); *In re Duquesne Light Co. (Beaver Valley Power Station, Unit 2)*, 7 A.E.C. 959, 968 (1974) (same). Neither party here disputes that the new "unavoidable and extreme circumstances" test for "good cause" requires a significantly stronger showing than a "good reason" for an extension of time to file a contention. There can be little doubt that the "unavoidable and extreme circumstances" test inevitably reflects a significant change from the Commission's prior interpretation of the "good cause" standard; as such, it falls under the doctrine that when an agency has given a regulation an authoritative interpretation, and later significantly changes that interpretation, it has effectuated an amendment of that rule which will be invalid unless it gives notice and comment. See *Alaska Prof'l Hunters*, 177 F.3d at 1034; *Paralyzed Veterans*, 117 F.3d at 586; see also *Syncor*, 127 F.3d at 94-95 (noting that a modification of an interpretation of an agency rule "will likely require a notice and comment procedure").

The Commission's rejection of Whistleblower's asserted justifications for an extension of time--the need for its experts to study the voluminous application to formulate contentions and the novelty and complexity of issues raised by the application in the context of the first license renewal proceeding for a nuclear power plant--is also inconsistent with prior NRC cases in which the Commission has granted extensions of time based on the complexity of the issues involved or the need to give experts time to review an application, or both. See *In re Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation)*, No. 72-22-ISFSI, 1997 WL 687737, at \*3 (N.R.C. Oct. 7, 1997) (granting extension of time for filing contentions based on need of party to provide its experts with additional time to review application and the length and complexity of the application); *In re Northern Ind. Pub. Serv. Co. (Bailey Generating Station, Nuclear 1)*, 12 N.R.C. 191, 217 (1980) (finding good cause to treat as timely contentions filed after deadline due to the short time for preparation set by Prehearing Conference Order as well as the complexity of the newly-filed contentions); *In re Commonwealth Edison Co. (Zion Station, Units 1 & 2)*, 6 A.E.C. 827, 827 (1973) (finding good cause under section 2.711 for an extension of time for filing exceptions and supporting briefs for appeal of decision due to the length of the initial decision and the number and complexity of the issues involved). Indeed, our court has held that an agency has an obligation in an adjudication to follow, distinguish, or overrule its own precedent and we have not hesitated to strike down agency action when it fails to meet this obligation. See *Steger v. Defense Investigative Serv. Dep't of Defense*, 717 F.2d 1402, 1406 (D.C. Cir. 1983) (reversing Merit Systems Protection Board decision to deny attorney's fees which disregarded without explanation factors used in prior Board decisions for determining if attorney's fees are appropriate); *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 872, 882 (D.C. Cir. 1979) (refusing to enforce NLRB interpretation of "employee" and "independent contractors" in 29 U.S.C. s 152(3) which did not explain inconsistency with most recent NLRB opinion on subject). When Whistleblower offered reasons for

an extension of time similar to those which the Commission has approved in the past, the Board rejected them out of hand and the Commission affirmed the Board's decisions, using the "unavoidable and extreme circumstances" test without explaining or distinguishing its own prior precedent approving such reasons as qualifying for "good cause". At no time did the Commission ever address its own prior interpretation of "good cause" in circumstances like this one when a party asks for more time to have its experts review material in a complex case. Moreover, the Commission in this case seems to have effectuated a result entirely different from its prior cases where it found that reasons for delay similar to those encountered by whistleblower constituted "good cause" for an extension of time.

This court has long held that an agency may not use its interpretative powers to " 'constructively rewrite [a] regulation' or 'effect a totally different result.' " *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992) (quoting *National Family Planning and Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992)). This case is not dissimilar to both *Alaska Professional Hunters and Syncor*. In *Alaska Professional Hunters*, we invalidated a Federal Aviation Administration ("FAA") interpretation of its own rules to treat hunting guides who flew clients to and from hunting sites as commercial operators contrary to the prior interpretation of those rules given as advice to guides by the FAA's Alaska Region office for more than thirty years and informal statements by the agency that guides were noncommercial operators. See 177 F.3d at 1035-36. Similarly, in *Syncor* we held invalid 1995 Food and Drug Administration ("FDA") guidelines which interpreted the registration provisions of the Federal Food Drug and Cosmetic Act ("FFDCA") to apply to positron emission tomography ("PET") radiopharmaceuticals because they differed from 1984 FDA guidelines which stated that nuclear pharmacists using the process by which pharmacies compound PET radiopharmaceuticals were not required to register under the FFDCA. See 127 F.3d at 95-96. Like the FAA in Alaska

Professional Hunters and the FDA in Syncor, the NRC in this case has adopted an interpretation that effects a totally different result for a motion for an extension of time premised upon the need to give experts time to review an application and to address novel and complex issues from that which would have occurred under the prior "good cause" standard.

Another indicator that the Commission was significantly changing the usual meaning of "good cause" when it adopted the "unavoidable and extreme circumstances" test is that it did not apply the same test to determine if its own reduction of the normal time allotted to intervenors to file contentions was valid. Curiously, the Commission made no mention of the "unavoidable and extreme circumstances" standard when it shortened intervenor deadlines "for good cause" in order to expedite proceedings. The Commission concluded that it had "good cause" to do so because the alteration of the time frame would permit both the Board and Whistleblower to consider the NRC staff's answer to the proposed contentions prior to the scheduled date of the prehearing conference whereas under the NRC's published rules the staff's answer would not be due until the day of the conference. Surely such a reason does not qualify as an "unavoidable and extreme circumstance" and the Commission never said it did. In the absence of any explanation of the differing ways in which it interpreted the same phrase depending on whose interests were at stake, it appears that the Commission was amending the test for the intervenors only, even though the rule itself makes no such distinction.

Additionally, we note that the Commission has commonly employed standards similar to "unavoidable and extreme circumstances" elsewhere in its rules, yet has never suggested that they are the same as "good cause." For example, the Commission has interpreted "special circumstances" in its rule allowing a complete waiver of a rule where "the application of the rule ... would not serve the purposes for which the rule or regulation was adopted," 10 C.F.R. s 2.758, to mean that a waiver will only be granted in "unusual and compelling circumstances." Public Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), 30 N.R.C. 231, 235 (1989);

Public Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), 29 N.R.C. 234, 239 (1989); In re Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), 5 A.E.C. 25, 26 (1972). The Commission has also interpreted its rule allowing interlocutory review of an order only if it "[t]hreatens ... immediate and serious irreparable impact which ... could not be alleviated through a petition for review of the ... final decision," or "affects the basic structure of the proceeding in a pervasive or unusual manner," 10 C.F.R. s 2.786(g), as allowing such review only "in the most compelling circumstances." In re Sequoyah Fuels Corp. (Gore, Okla. Site), 40 N.R.C. 55, 59 (1994) (citing In re Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), 8 N.R.C. 406, 410 (1978)). However, we are not aware of a single prior instance in which the NRC has described or interpreted "good cause" as requiring "unusual," "extreme," "unavoidable" or "compelling" circumstances.

There may be good reason for this omission. "Good cause" does not ordinarily convey a meaning of "unavoidable and extreme circumstances." Virtually every dictionary published around the time that section 2.711 was amended to its present form defined "good cause" as a legally sufficient cause that is reasonable under the circumstances. See, e.g., Webster's Third New International Dictionary 978 (1976) ("cause or reason sufficient in law: one that is based on equity or justice or that would motivate a reasonable man under all the circumstances"); Black's Law Dictionary 623 (5th ed. 1979) ("substantial reason, one that affords a legal excuse. Legally sufficient ground or reason ... cause as would compel a reasonably prudent person ... under similar circumstances ... that cause that to an ordinary intelligent man is a justifiable reason for doing or not doing a certain thing"); Ballentine's Law Dictionary 527 (3d ed. 1969) ("substantial reason, a legal excuse ... legal cause ... reasonable cause"). In contrast, "unavoidable and extreme" has a quite different meaning. Although some definitions of "unavoidable cause" might conceivably fit within the meaning of "good cause," see, e.g., Black's Law Dictionary 1366 ("a cause which reasonably prudent and careful men under like circumstances do not and

would not ordinarily anticipate"); Ballentine's Law Dictionary 1311 ("a cause which reasonably prudent and cautious men under like circumstances do not and would not ordinarily anticipate"), we think the additional requirement that the circumstances be "extreme" as well as "unavoidable" takes it into a different realm of outlier causes rather than reasonable causes. See, e.g., 5 Oxford English Dictionary 618-19 (2d ed. 1989) ("Outermost, farthest from the centre ... opposed to moderate ... Of a case, circumstance, supposition: Presenting in the utmost degree some particular characteristic ... the utmost point or verge ... an end ... the utmost imaginable or tolerable degree of anything"); Black's Law Dictionary 528 ("[a]t the utmost point, edge or border; most remote. Last; conclusive. Greatest, highest, strongest, or the like."); Webster's Third New International Dictionary 807 ("existing in the highest or the greatest possible degree; ... most severe; most stringent ... going beyond the limits of reason, necessity or propriety ... situated at the farthest possible point from the center"); Ballentine's Law Dictionary 447 ("Outermost; utmost"). These dictionary definitions make the difference between the two standards apparent: whereas "good cause" would allow an extension of time in situations not due to negligence that would ordinarily cause delay, the "unavoidable and extreme circumstances" standard would allow extensions only in the most extraordinary situations. The transfer from the reasonable to the most unusual results in a significant reduction of a litigant's ability to obtain an extension of time to file contentions.

While we conclude that "unavoidable and extreme circumstances" is a fundamental modification of the Commission's "good reason" definition of "good cause" requiring notice and comment, we acknowledge that the term "good cause" itself initially affords the agency a great deal of flexibility and discretion to decide its content under individual circumstances.<sup>5</sup> Given the expertise and experience of the NRC

---

<sup>5</sup> The meaning of "good cause" may also be substantially influenced by congressional intent in providing for a "good cause" exception. See, e.g., *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d



with licensing, it is most favorably situated to make such a determination through the reasonable balancing of agency and intervenor interests that is inherent in the term "good cause"; and its judgment will in the vast majority of cases be upheld. It can for instance require a greater showing of need for an extension of time in cases where the Commission's need to expedite proceedings significantly outweighs a party's need for more time. However, this flexibility does not include authority to constructively amend a "good cause" standard by adopting an interpretation that departs radically from its own precedent, without notice and comment, and which it applies only to third parties, not to itself.

B. Prejudice to the Petitioner to Intervene

Only if there is prejudice to a challenging party can agency action be invalidated under the APA. See 5 U.S.C. s 706 ("[D]ue account should be taken for the rule of prejudicial error."); see also *Fried v. Hinson*, 78 F.3d 688, 690-91 (D.C. Cir. 1996) (citing *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)). The Commission argues that even if it applied the wrong standard to Whistleblower's motion for an extension of time, Whistleblower was not harmed by this error because the contentions it ultimately submitted were patently deficient under NRC regulations governing the specificity of contentions. See 10 C.F.R. s 2.714(b)(2). The contentions Whistleblower submitted did not set forth any specific grounds for its allegations and merely referred to NRC staff RAIs for their bases. The NRC has consistently held that mere references to RAIs are

---

1141, 1144 (D.C. Cir. 1992) (holding that the APA "good cause" exception to notice and comment requirement of agency rulemaking was intended by Congress "to be narrowly construed" and limited to "emergency situations"); *Environmental Defense Fund v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) (same); *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (deriving "emergency situations" test from Senate Report). But cf. *Bjella v. McPeters*, 806 F.2d 211, 216 (10th Cir. 1986) (holding that "good cause" exception to sanction for late-filed transcripts in Judicial Conference Report was not incompatible with individual court plan allowing exception only in "unusual or extreme circumstances").

insufficient to meet the specificity requirements under 10 C.F.R. s 2.714. See Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (1989) (noting that the Commission rejects the argument that "petitioners not be required to set forth facts in support of contentions until the petitioner has access to NRC reports and documents"); In re Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), 36 N.R.C. 135, 136 (1992) (holding that the attempt to incorporate by reference the questions asked by the staff concerning environmental report fails to comply with the Commission's pleading requirements).

Even though Whistleblower ultimately submitted contentions on October 13 that were deficient under the Commission's specificity requirements, we think it was nonetheless prejudiced by the Commission's use of the "unavoidable and extreme circumstances" test to deny its requests for extensions at two earlier points in the proceeding. First, the extension which Whistleblower originally requested in August would have moved the time for filing contentions back two months. The Commission's decision to grant Whistleblower an extension to September 30th did little to remove any prejudice from the Board's denial of its earlier request because by the time it was granted, Whistleblower had only two weeks left in which to file. Additionally, it reinforced the Board's use of the "unavoidable and extreme circumstances" test. We cannot know whether Whistleblower's original request for a two month extension would have been granted in full under the good cause standard. At the very least, it is strongly possible that Whistleblower would have received the extension because it had asserted factors which had been approved by the Commission in the past as sufficient to justify good cause for an extension. See, e.g., In re Northern Ind. Pub. Serv. Co. (Bailey Generating Station, Nuclear 1), 12 N.R.C. 191, 217 (1980) (finding good cause to treat as timely contentions filed after deadline due to the short time set for filing contentions in the Order Setting the Prehearing Conference and the complexity of the newly-filed contentions).

As the Status Report and Motion to Vacate and Reschedule the Initial Prehearing Conference filed by Whistleblower on

October 1 demonstrate, Whistleblower continued to assert throughout the aborted proceeding that the "unavoidable and extreme circumstances" test was improper, thereby adequately preserving the issue that it never had time to prepare adequate contentions. Moreover, although the October 13 contentions were inadequate, Whistleblower clearly indicated on the face of the contentions that it desired to preserve its objection that it needed more time (the contentions were filed "without prejudice to Petitioner's October 1, 1998 Motion to Vacate"). J.A. at 225 n.1. Formally, Whistleblower labeled its October 13 set of contentions a "first supplemental set of contentions," specifically asserting its right to file contentions up until fifteen days before the prehearing conference as set out in 10 C.F.R. s 2.714(b)(1). Therefore, Whistleblower preserved its argument that the Commission improperly used the "unavoidable and extreme circumstances" test to deny its motion for an extension of time even as it filed contentions on October 13.

Whistleblower was obviously scrambling to come up with the most specific contentions it could within the short time it had to file. Significantly, Whistleblower actually submitted additional information to the Board on October 16, the day the petition to intervene was finally rejected. If the "good cause" standard had been used to adjudicate Whistleblower's motion to extend the time for filing contentions until mid-November, Whistleblower by that time would likely have submitted sufficient information to support an adequate contention. In sum, the strong possibility that Whistleblower would have been granted an extension until mid-November had the "good cause" standard been applied and that it could have by that time submitted adequate contentions is sufficient to show prejudice. See *Presbyterian Med. Ctr. of the Univ. of Penn. Health Sys. v. Shalala*, 170 F.3d 1146, 1151 (D.C. Cir. 1999) (concluding that prejudicial error exists if there is a possibility that the error would have resulted in some change in the final outcome) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983)); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 n.27 (D.C. Cir. 1978) (concluding that prejudicial error exists "[I]f [agency] action is improper, and if we cannot be sure that the

Agency would have reached the same conclusion" if it acted properly).

### III. Conclusion

For the foregoing reasons, we vacate the order of the Nuclear Regulatory Commission denying the National Whistleblower Center's petition to intervene and dismissing the hearing in connection with Baltimore Gas and Electric Company's license renewal application for the Calvert Cliffs Nuclear Power Plant. We remand to the agency to determine whether Whistleblower had "good cause" for an extension of time to file contentions under the interpretation of "good cause" the Commission had employed prior to the Calvert Cliffs application. If National Whistleblower Center meets that standard and if it subsequently files adequate contentions before a new deadline, the Commission must allow it an opportunity to meaningfully participate in the remainder of the proceeding.

So ordered.