

Before the
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC.,
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

No. 04-1145

March 19, 2004

**PETITIONER'S OPPOSITION TO RESPONDENTS'
MOTION TO CONSOLIDATE PETITIONS FOR REVIEW AND TRANSFER
PETITIONS TO THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioner Citizens Awareness Network, Inc. [CAN], pursuant to F.R.A.P. 27, hereby replies to Respondent's Motion to Consolidate Petitions for Review and transfer Petitions to the District of Columbia Circuit (March 12, 2004) [henceforth, 'Motion to Transfer'].

CAN does not object to consolidation of the petitions filed in this case.

CAN objects to transfer of the petitions to the District of Columbia Circuit. In support of this objection, CAN attaches hereto as Exhibit 'A', the declaration of its counsel Jonathan M. Block, setting forth facts that should be before this Court in consideration of the respondents' motion. CAN also incorporates by reference and urges the court to accept the arguments against transfer proffered by National Whistleblowers Center and Committee for Safety at Plant Zion (served by mail on March 19, 2004). Opposing transfer, CAN sets forth as follows not admitting any point in the Motion that may have been omitted from the points in argument set forth herein below.

I. BACKGROUND.

For the purposes of this motion, and without conceding any particular objections to statements therein as unsupported by affidavit, CAN accepts the statements of "background" provided in the Motion to Transfer. CAN also offers, as facts to be considered in deciding the Motion to Transfer, the facts set forth in the Exhibit 'A' attached hereto.

II. POINTS IN OPPOSITION TO THE MOTION TO TRANSFER.

A. Opposing NRC/DOJ's attack on CAN's right to Petition this Court for Review.

1. Opposing the NRC/DOJ backdoor attack on CAN's standing.

The NRC/DOJ Motion for Transfer makes a backdoor attack on CAN's right to appear before this Court even though in response to a previous NRC/DOJ motion this Court declined to rule on standing at this time. The NRC/DOJ Motion to Transfer strongly implies that the fact that CAN is not currently before the NRC in a proceeding subject to the regulations of 10 CFR Part 2 at issue in this case should be part of the Court's consideration of the appropriateness of its jurisdiction. CAN participated in the rulemaking that is the subject of its petition to this Court. Exhibit 'A', ¶ 9.

Counsel for CAN could find no case law, statute or regulation that requires such on-going participation in proceedings subject to the rulemaking at issue in order that in a petitioner have the right to file for review of an agency rulemaking. As this Court is aware, CAN already appeared before this court on a petition for review of NRC's action denying CAN a hearing on the decommissioning plan for the Yankee

W

Atomic Power Station in Rowe, Massachusetts. *CAN v. NRC*, 59 F.3d 241 (1st Cir. 1995). CAN has participated or attempted to initiate numerous proceedings before the NRC that are subject to 10 C.F.R. Part 2 rules and regulations. Exhibit 'A' at ¶ 8. CAN will likely attempt to initiate or choose to attempt to participate in proceedings before the NRC in which it would have standing to intervene, which proceedings would be subject to the revised NRC rules at issue in this case. *Id.* at ¶10.

Examples of such proceedings include the License Termination Plan for Yankee Atomic Power Station in Rowe, Massachusetts, and the Relicensing Application for Pilgrim Nuclear Power Station in Plymouth, Massachusetts. In pertinent part, CAN previously had standing to intervene in NRC proceedings on the Yankee (Rowe) decommissioning plan proceeding (which first required suing the NRC in this Court in order to get the hearing, *see generally CAN v. NRC, supra*) and the Yankee (Rowe) License Termination Plan (which also required first appealing a denial of standing to the entire Nuclear Regulatory Commission before be admitted to hearing). Without going to the merits of the petition before this Court, suffice it to say that CAN contends that the rules at issue in this case will make it more difficult for CAN to intervene in an NRC proceeding.

2. Opposing notion that D.C. Court is convenient to CAN.

The NRC/DOJ Motion to transfer ludicrously implies that it is equally convenient to CAN's counsel to appear in Boston or Washington, D.C. One can only hope that the NRC's mathematical calculations concerning the margins of safety in nuclear reactors are more accurate than its calculations concerning the distance of

Putney, Vermont, from these two courts. CAN counsel's office in Putney, Vermont, is approximately the same distance from the Court in Boston as it is from the Vermont state capital. Exhibit 'A' at ¶2. That distance is approximately 115 miles. *Id.* CAN counsel's office is located approximately 450 miles from Washington, D.C. *Id.* at ¶ 3. Plainly, in terms of travel time and cost of travel, CAN counsel's participating in a case in Washington, D.C. would be far more costly than like participation in a case in Boston.

3. The question of what is in the interests of justice.

The NRC/DOJ Motion to Transfer raises the issue that the interests of justice favor transfer of the case to the D.C. Circuit. All other factors being equal, if, as a result of this Court acceding to the Motion to Transfer, CAN is no longer able to afford to pursue its petition for review the "interests of justice" will not have been served by such a decision. CAN is not as large an organization as Public Citizen, NIRS, or the National Whistleblower Center. On an average, CAN has operated for the past decade with budgets under \$100,000. Exhibit 'A' at ¶ 7. These budgets are made up of the funds that CAN's executive director and members are able to raise primarily from donations and gifts, and supplemented by some grants from other non-profit organizations. *Id.* CAN is having difficulty raising the funds necessary to pursue this case under its current budget. *Id.* at 11. CAN's executive director believes that it would likely be prohibitively expensive for CAN to participate in a case before the Court of Appeals for the D.C. Circuit. *Id.*

It is not in the interests of justice to transfer this case to a Court when that transfer will likely exclude the sole, initial petitioner in this matter.

B. Opposing Transfer on the Basis of 28 U.S.C. § 2112.

1. Nothing unique about this case that requires transfer.

The Ninth Circuit's handling of a far-more complex case than the instant one is instructive. In *Natural Resources Defense Council, Inc., et. al., v. EPA*, 863 F.2d 1420 (9th Cir. 1988), petitions challenging the EPA Regions IV and VI permits that established compliance conditions for discharge of pollutants from oil and gas operations located in the Outer Continental Shelf of the Gulf of Mexico were filed NRDC, Sierra Club, American Petroleum Institute [API], Conoco, Inc., and the State of Florida. *Id.* at 1424. NRDC and Sierra Club filed the first petition in the Ninth Circuit. Subsequently, American Petroleum Institute and Conoco, Inc., filed a petition in the Fifth Circuit. The State of Florida filed a petition in the Eleventh Circuit. All cases were transferred to the Ninth Circuit. The Court then consolidated the cases into three parties--NRDC, API and Florida. The EPA moved to transfer the cases to the Fifth Circuit. In pertinent part of all action taken, the Ninth Circuit denied the transfer motion and continued to exercise jurisdiction over all petitions. *Id.* at n1.

The case before this Court involves both fewer petitioners and jurisdictions. The relevant principle in deciding the motion is identical: CAN's was the first and timely petition filing; barring some substantive showing of convenience to the parties and that the interest of justice warrant transfer to another jurisdiction, the case should

remain in this Court. *See, e.g., Eastern Air Lines, Inc., et al., v. CAB*, 354 F. 2d 507, 511 (D.C. Cir. 1965) (in enacting 28 U.S.C. § 2112, Congress intended to prevent an agency from forum shopping by filing the record in the court of its selection; the statute “should be liberally applied to permit review by a single court of closely related matters where appropriate for sound judicial administration”); *accord NRDC, Inc., et. al, v. EPA*, 465 F. 2d 492, n7 (1st Cir. 1972) (on basis of these principles, First Circuit transferred a case back to the D.C. Circuit--the Court where NRDC filed its initial petition).

2. Cases NRC/DOJ cited for support do not apply.

The NRC/DOJ Motion to Transfer cites this Court’s case, *ACLU v. FCC*, 774 F.2d 24 (1st Cir. 1986) to support its position that the Court has taken similar actions in the past. However, the cited case is not at all appropriate to this situation. In the *ACLU* case, a membership organization was trying to take advantage of the venue of its affiliates when its choice of venue did not meet the Hobbs Act requirement of principal office. This Court properly rejected the ACLU’s attempt to predicate venue in that way, stating that Congress did not intend “to endow membership corporations with a choice of venue unavailable to other petitioners.” *Id.* at 26. In this case, CAN, an organization with affiliates in Vermont, Connecticut, New York, and New Hampshire—but with a principal office in Shelburne Falls, MA – properly filed a timely petition in this Court. The next filings were not petitions, but interventions, properly filed by National Whistleblower Center and Nuclear Energy Institute pursuant to 28 U.S.C. 2348 and FRAP 15(d). Public Citizen and Nuclear

Information and Resource Service then filed properly in the D.C. Circuit and requested that their petition be transferred to this Court. These are not contested facts. Yet, respondents ignore these facts when they offer *ACLU* as somehow on point with the facts in this case. In *ACLU*, it was the membership organization that was trying to forum shop and manipulate the jurisdiction of the Court. In this case, it appears that the government is the shopping party. Moreover, it is precisely such forum shopping by the government that Congress intended to bar in cases like this one. *Eastern Air Lines, Inc., et al., v. CAB*, 354 F. 2d 507, 511 (D.C. Cir. 1965); accord *NRDC, Inc., et. al, v. EPA*, 465 F. 2d 492, n7 (1st Cir. 1972.

III. CONCLUSION

C There is no basis in law or fact to support the transfer of this case to the D.C. Circuit. None of the arguments offered by the NRC/DOJ/NEI in the Motion to Transfer provide this Court with sufficient grounds to find that it is in the “interest or justice” or “convenience” to effectuate such a transfer.

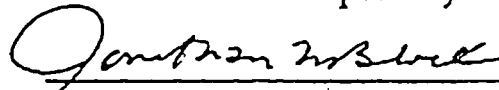
Neither Petitioner and intervenor herein nor Petitioner in No. 04-1359 oppose consolidation of their cases before this Court so long as the opportunity to address their individual clients’ concerns in the merits stage of this case are preserved.

Petitioner and intervenor herein and Petitioner in No. 04-1359 all oppose transfer of this case (or a consolidated case) to the D.C. Circuit.

Wherefore this Court should deny the Motion to Transfer, consolidate the cases under its jurisdiction in an order that preserves the ability of the petitioners and

intervenor to address their concerns on the merits, and issue an appropriate schedule for the consolidated proceeding forthwith.

Respectfully submitted:

A handwritten signature in cursive script, appearing to read "Jonathan M. Block", is written over a horizontal line.

Jonathan M. Block, dated March 19, 2004
First Circuit Bar Number 30343
94 Main Street, P.O. Box 566
Putney, VT 05346-0566
(802) 387-2646

cc: Service List

Before the
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC.,
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

No. 04-1145

March 19, 2004

DECLARATION OF JONATHAN M. BLOCK,
COUNSEL FOR CITIZENS AWARENESS NETWORK, INC.

I, Jonathan M. Block, affirm that the following is true:

1. My name is Jonathan M. Block. I am an attorney licensed to practice law in the State of Vermont and admitted to practice before the United States Supreme Court, the United States Court of Appeals for the District of Columbia, First, Second, and Ninth Circuits, and the Federal District Court for the District of Vermont. My office is located at 94 Main Street, Putney, Vermont.
2. My office is approximately the same distance from United States Court of Appeals for the First Circuit in Boston, Massachusetts as it is from Montpelier, the capital of Vermont, that distance being about 115 miles.
3. My office is approximately 450 miles from the United States Court of Appeals for the District of Columbia, Washington, D.C.
4. I have represented and advised CAN on numerous occasions since 1994.
5. I have represented CAN before the United States Court of Appeals for the First Circuit in *CAN v. NRC*, 59 F.3d 241 (1st Cir. 1995).
6. CAN is a non-profit, environmental organization incorporated in the Commonwealth of Massachusetts and recognized by the Internal Revenue Service as a "501(c)(3)" tax exempt organization.
7. According to CAN's treasurer, the organization's average annual budgets since 1994 have been under \$100,000. According to CAN's executive director, all of the money CAN raised each year was comprised mostly of donations and gifts, and supplemented by grants from other non-profit organizations.

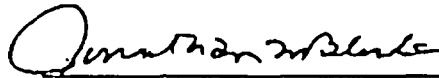
8. Since 1994, CAN has participated in or attempted to initiate many NRC proceedings under 10 C.F.R. 2. CAN has also initiated numerous petitions for enforcement action under 10 CFR Part 2.206. CAN's most recent 10 C.F.R. Part 2, subpart G proceeding ended November 24, 2003. All of the cases in which CAN has either participated or attempted to initiate may be obtained in the NRC databases viewable on LEXIS.

9. CAN joined fifty-one (51) other organizations filing comments opposing the rule changes at issue in the above captioned matter, which comments were prepared and filed by this declarant and comprise a portion of the record in this matter.

10. CAN intends to attempt to initiate NRC proceedings pursuant to 10 C.F.R. Part 2, the recently revised rules governing such proceedings being at issue in the above captioned case.

11. CAN's executive director informed me that CAN is having substantial difficulty raising funds to pursue this petition for review under the current Court's jurisdiction and that the additional costs of pursuing it in the United States Court of Appeals for the D.C. Circuit would likely prove prohibitive.

I declare under penalty of perjury that the forgoing is true and correct. Executed on March 19, 2004.


Jonathan M. Block

Before the
United States Court of Appeals
For the First Circuit

Citizens Awareness Network, Inc.,
Petitioner

No. 04-1145

-v.-
United States of America
and
United States Nuclear Regulatory Commission
Respondents

CERTIFICATE OF SERVICE

I, Jonathan M. Block, hereby certify that on March 4, 2004, I served on the parties listed below by way of postage pre-paid First Class United States Mail a copy of Citizens Awareness Network's "Opposition To Respondents' Motion to Consolidate Petitions For Review And Transfer Petitions To The District Of Columbia Circuit."

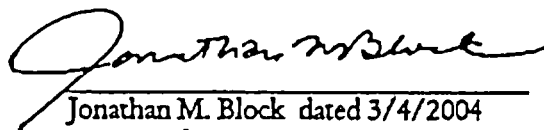
Settlement Counsel
Civil Appeals Management Program
1 Courthouse Way, Suite 3400
Boston, MA 02210

Steven Crockett, Esq.
Office of General Counsel
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Ellen C. Ginsberg, Esq.
Nuclear Energy Institute, Inc.
1776 T Street, N.W., Suite 400
Washington, D.C. 20006-3708

Robert Oakley, Esq.
Environmental and Natural Resources Division
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

Stephen M. Kohn
National Whistleblower Legal
Defense and Education Fund
3233 P Street, NW
Washington, D.C. 20007



Jonathan M. Block dated 3/4/2004
Attorney for C.A.N.
First Circuit Bar Number 30343
94 Main Street, P.O. Box 566
Putney, VT 05346-0566
(802) 387-2646