



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

March 12, 2004

Richard Cushing Donovan, Clerk
U.S. Court of Appeals for the First Circuit
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210

RE: *Citizens Awareness Network v. USNRC*, No. 04-1145, and
Public Citizen, et al., v. USNRC, No. 04-1359

Dear Mr. Donovan:

Enclosed you will find the original, three paper copies and one disk copy of the "Respondents' Motion to Consolidate Petitions for Review and to Transfer Petitions to the District of Columbia Circuit," in the above-captioned cases. Also enclosed are an appearance form for Shelly D. Cole, and an application by Ms. Cole for admission to the Court of Appeals Bar. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

A handwritten signature in cursive script that reads "Steven F. Crockett".

Steven F. Crockett
Special Counsel
Office of the General Counsel

Enclosures: As stated

cc: service list

IN 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

PUBLIC CITIZEN CRITICAL MASS ENERGY)
AND ENVIRONMENT PROGRAM, et al.,)

Petitioners,)

v.)

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

Respondents.)

No. 04-1359

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

Pursuant to 28 U.S.C. 2112(a)(5), the respondents -- the United States Nuclear Regulatory Commission (NRC) and the United States -- move to consolidate the two above-captioned petitions for review and to transfer the consolidated case to the United States Court of Appeals for the District of Columbia Circuit.

We urge consolidation because both petitions for review challenge the same recently-issued NRC rule. *See Changes to Adjudicatory Process; Final Rule*, 69 Fed. Reg. 2182 (Jan. 14, 2004). We urge transfer to the D.C. Circuit because several factors point in that direction: (1) Six of the seven parties involved in these cases reside outside this Circuit and are represented by counsel in or near the District of Columbia; (2) the challenged NRC rule -- reforming the NRC's process for adjudicatory hearings -- applies nationwide and has no peculiar effect on residents or nuclear facilities located in this Circuit; (3) in a series of prior decisions the D.C. Circuit has already spoken to what likely will prove a key issue in this litigation -- the NRC's alleged statutory obligation to provide formal adjudicatory hearings; (4) the sole petitioner headquartered in this Circuit, the Citizens Awareness Network, is not currently participating in any NRC adjudications, whereas other parties in this litigation, headquartered in the District of Columbia, are active participants in current NRC adjudications affected by the new NRC rule; and (5) this Court and the D.C. Circuit are equally busy, leaving no docket-driven reason to keep this case here.

In short, consolidation of the petitions for review and their transfer to the D.C. Circuit would serve the dual purposes of judicial economy and convenience of the parties in the interest of justice.

BACKGROUND

Pursuant to the Hobbs Act, 28 U.S.C. 2341 *et seq.*, these lawsuits seek judicial review of a final NRC rule promulgated on January 14, 2004. *See Changes to Adjudicatory Process; Final Rule*, 69 Fed. Reg. 2182 (Jan. 14, 2004). The new rule revised 10 C.F.R. Part 2, the portion of the NRC rules that sets out the procedural requirements for participating in NRC adjudicatory hearings under section 189 of the Atomic Energy Act, 42 U.S.C. 2239. The new Part 2 rule made significant changes in the prior adjudicatory system, including establishing more informal processes to handle some kinds of NRC hearings.

On January 26, 2004, petitioner Citizens Awareness Network (CAN) (headquartered in Massachusetts) filed a petition for review of the new Part 2 in this Court. Jointly, the National Whistleblower Center (NWC) (a Washington, D.C., group) and the Committee for Safety at Plant Zion (CSPZ) (an Illinois group) filed motions to intervene to support CAN's challenge. A nuclear industry trade group in Washington, the Nuclear Energy Institute (NEI), filed a motion to intervene in support of the new NRC rule. A few weeks later, on February 20, 2004, two Washington-based public interest groups -- Public Citizen Critical Mass Energy and Environment Program (PCCM) and Nuclear Information and Resource Service (NIRS) -- filed a separate petition for review of the new Part 2 in the D.C. Circuit.

As required by statute, 28 U.S.C. 2112(a)(5), the D.C. Circuit transferred the PCCM/NIRS lawsuit to this Court. *See* Order of D.C. Circuit, dated March 3, 2004. That statute requires all lawsuits challenging the same agency order to be transferred to the court of appeals where the first such suit was filed. Once the cases are transferred, however, section 2112(a)(5) gives the recipient court of appeals power, “[f]or the convenience of the parties in the interest of justice,” to “thereafter transfer all proceedings with respect to that order to any other court of appeals.” Pursuant to that provision, the NRC and the United States now move jointly to transfer these proceedings to the D.C. Circuit.

DISCUSSION

Our motion seeks both consolidation and transfer. The virtues of consolidation, we believe, are self-evident. Where, as here, multiple parties in separate lawsuits are challenging the same agency rule, the reviewing court should hear the challenges together rather than piecemeal. This approach serves judicial economy and avoids the possibility of conflicting rulings.

The transfer question raises more subtle questions. As noted above, in cases where multiple petitions for review are filed, 28 U.S.C. 2112(a)(5) allows the court of appeals where the first petition was filed to transfer all the proceedings to any other court of appeals “[f]or the convenience of the parties in the interest of justice.” While initially all petitions for review are transferred to the court of first filing, this Court has

recognized that this is a “mechanical rule for determining which court should determine venue in the case of conflicting petitions for review” and that the “court of first filing may then transfer the case to any other court of appeals for the convenience of the parties in the interest of justice.” *Superior Industries International, Inc. v. NLRB*, 865 F.2d 1, 2 (1st Cir. 1988). *See also* S. Rep. No. 100-263, 100th Cong., 1st Sess., at 3202 (1987) (28 U.S.C. 2112(a)(5) “does not, in any way, prevent the selected court from transferring the challenges to the agency order to a more proper circuit ‘[f]or the convenience of the parties in the interest of justice’”).

In the past, this Court has not hesitated to transfer cases to other circuits “in the interest of justice and for the convenience of the parties,” *American Civil Liberties Union v. FCC*, 774 F.2d 24, 27 (1st Cir. 1985), or as another decision put it, “in the interest of justice and sound judicial administration,” *Clark & Reid Co., Inc. v. United States*, 804 F.2d 3, 7 (1st Cir. 1986). *See also* *Natural Resources Defense Council v. EPA*, 465 F.2d 492 (1st Cir. 1972). Factors typically considered by this Court and other courts of appeals in deciding whether to transfer cases include convenience of the parties and counsel, national versus regional impact of the challenged action, pre-existing familiarity of one court with issues raised in the case, relative aggrievement of

the parties, and relative state of dockets.¹ Here, those factors, taken together, counsel transferring these cases to the D.C. Circuit.

1. *Convenience of the Parties.* Because an agency record is relatively portable, and judicial review directly in the court of appeals requires no discovery or witnesses, it is unlikely that choice of a particular circuit will be a great inconvenience to any party. For this reason, courts generally use convenience of the parties as a balancing, rather than a decisive, factor in determining whether to transfer a proceeding under section 2112(a)(5). See *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d at 1205-07; *Industrial Union Department, AFL-CIO v. Bingham*, 570 F.2d 965 (D.C. Cir. 1977).

Here, this Court has before it three petitioners (CAN, PCCM, and NIRS), two respondents (NRC and the United States²), and three intervenors (NEI, NWC, and CSPZ). Six of the eight parties are located in the D.C. Circuit, one is located in the First Circuit (CAN) and one is located (apparently) in the Seventh Circuit (CSPZ). As at least one court has recognized, in cases seeking direct review in the court of appeals,

¹ See, e.g., *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981); *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 592 F.2d 693, 697 (3rd Cir. 1979).

² Under the Hobbs Act, the NRC, as an independent agency, and the United States appear as separate parties with their own counsel. See 28 U.S.C. 2348. Lawyers from the NRC's Office of the General Counsel represent the NRC, and Justice Department lawyers represent the United States. Typically in Hobbs Act cases, the NRC and Justice Department lawyers file pleadings jointly, as we have in this motion.

it is not really the convenience of the parties that is most relevant, but the convenience of counsel who will brief and argue the issues. *See United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 592 F.2d at 697. No party in the present case has counsel located within the First Circuit. With the exception of CAN, every party has counsel located in or near the D.C. Circuit. CAN's counsel is located in the Second Circuit (Vermont), and thus will be required to deal long-distance with whichever court hears this case. We submit that the convenience of the parties, and particularly the convenience of counsel, weigh heavily in favor of transferring this proceeding to the D.C. Circuit.

2. *Matter of National Interest.* One reason for transferring a case (or leaving it in place) is that the challenged agency action peculiarly affects persons or businesses in a particular region or Circuit. *See Peabody Coal Co. v. EPA*, 522 F.2d 1152, 1153 (8th Cir. 1975); *J.P. Stevens & Co., Inc. v. NLRB*, 388 F.2d 892, 896 (4th Cir. 1967). For example, where the challenged agency action relates to the licensing of a single facility, the most appropriate venue for an appeal might be the circuit where the facility is located -- on the theory that people in that circuit will be uniquely affected. The challenged rule in our case, however, is national in scope. The changes in the NRC hearing process will apply to all future NRC licensing proceedings, likely including NRC licensees and interested parties in nearly every state. It will have no unique

impact in the First Circuit. Thus, as we see the current controversy, it has no unique regional effect that might weigh in favor of retaining these proceedings in this Court.

3. *Familiarity with the Issues.* Some years ago this Court transferred a judicial review case to the D.C. Circuit in specific recognition of its “great familiarity with regulatory law.” *Clark & Reid Co. v. United States*, 804 F.2d at 7. In that case this Court also relied on the D.C. Circuit’s recent interpretation of the statute at issue. *See id.* Other courts have agreed that a court’s familiarity with the issues may weigh in favor of that court hearing the case. *See, e.g., Farah Manufacturing Co., Inc. v. NLRB*, 481 F.2d 1143 (8th Cir. 1973).³

Based on petitioners’ comments during the NRC rulemaking, one issue in this case will almost certainly be what kind of hearing is required under section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239, and more specifically, whether that statute requires formal, “on the record” hearings under the Administrative Procedure Act (APA). *See* 5 U.S.C. 554, 556, 557. This Court has addressed the “on the record” hearing question in general terms, in lawsuits involving agencies other than the NRC. *See Dantran, Inc. v. United States Department of Labor*, 246 F.3d 36 (1st Cir. 2001); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978). But on numerous occasions the D.C. Circuit has raised and considered the specific question

³ *Accord S.L. Industries, Inc. v. NLRB*, 673 F.2d 1, 5 (1st Cir. 1982). *See also Liquor Salesmen’s Union Local 2 v. NLRB*, 664 F.2d at 1205; *Municipal Distributor’s Group v. Federal Power Comm’n*, 459 F.2d 1367, 1368 (D.C. Cir. 1972).

whether the Atomic Energy Act requires formal APA hearings at the NRC. This Court never has had occasion to pass on that question. In the very rulemaking under challenge here, the NRC carefully reviewed and discussed many of the pertinent D.C. Circuit decisions. *See Final Rule*, 69 Fed. Reg. at 2184-85.

In *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985), for example, the D.C. Circuit suggested in *dicta* that the APA's formal adjudication procedures do in fact cover NRC hearings. *See id.* at 1445 n. 12. The D.C. Circuit returned to the issue, again in *dicta*, in *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989), this time backing away from a presumption of an "on the record" hearing, as suggested in *Union of Concerned Scientists*, but at the same time saying that Congressional intent may require formal NRC hearings. *See id.*

In two subsequent decisions, one of them an *en banc* decision involving one of the petitioners in the current litigation (NIRS), the D.C. Circuit again discussed the "on the record" question as applied to the NRC but, finding other ways to decide those cases, left open definitive resolution of the question. *See Nuclear Information Resource Service v. NRC*, 969 F.2d 1169, 1180 (D.C. Cir. 1992); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53-54 & n. 3 (D.C. Cir. 1990). The D.C. Circuit also has addressed this issue in at least three other cases. *See Philadelphia Newspapers, Inc. v. NRC*, 727 F.2d 1195, 1202-1203 (D.C. Cir. 1984); *Porter County Chapter of the Izaak*

Walton League of America, Inc. v. NRC, 606 F.2d 1363, 1368 (D.C. Cir. 1979); *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 785-86 (D.C. Cir. 1968).

The bottom-line is that the D.C. Circuit has extensive case law on what surely will be a key issue in the current litigation, as well as extensive experience with the NRC in general. This Court, by contrast, has had, and likely will have, comparatively few opportunities to review NRC decisions,⁴ and it has never spoken to the specific question whether the NRC must conduct “on the record” hearings. Indeed, given the relative frequency of judicial review actions in the D.C. Circuit involving the NRC, were this Court to retain the current cases, it may create the potential for conflicting judicial rulings. Minimizing the risk of such conflicts is one common reason to transfer (or not transfer) multiple-petition cases. *See Peabody Coal Company v. EPA*, 522 F.2d at 1153; *Farah Manufacturing Co., Inc. v. NLRB*, 481 F.2d at 1145. *Accord S.L. Industries, Inc. v. NLRB*, 673 F.2d at 5.

In short, as we see the situation, judicial prudence calls for transferring this case to the D.C. Circuit, which has considered the key issues in the past and is likely to see similar or closely related issues in the future.

⁴ The Hobbs Act makes the D.C. Circuit an appropriate venue for any challenge to an NRC decision. 28 U.S.C. 2343. According to cases reported on WESTLAW, since the NRC’s establishment in 1975, the District of Columbia Circuit has issued 117 decisions in NRC cases, while this Court has issued 8 such decisions.

4. *Relative Aggrievement of the Parties.* Courts have also considered the relative “aggrievement” of the parties in determining whether to transfer a case under section 2112(a)(5). *See, e.g., ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980); *J.L. Simmons Co. v. NLRB*, 425 F.2d 52, 55 (7th Cir. 1970). Here, it is clear that some of the parties -- those headquartered in the District of Columbia -- are more immediately affected by the new rule than others.

Public Citizen, of which petitioner PCCM is a division, NIRS, and NEI are all currently participating in NRC adjudications governed by 10 C.F.R. Part 2. Public Citizen and NIRS have sought intervention in three proceedings involving applications for an early site permit. In a recent order, CLI-04-08, dated March 3, 2004, the Commission directed that each of these proceedings be governed by the new Part 2 rules and referred the petitions to the agency’s hearing board.⁵ NIRS also is active in a proceeding involving an application to amend an operating license to allow the use of mixed oxide fuel. *See* LBP-04-04, dated March 5, 2004 (order of NRC Licensing Board).⁶ And NEI is participating as an *amicus curiae* in an NRC enforcement adjudication. *See Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1;

⁵ Available at <http://www.nrc.gov/reading-rm/adams/web-based.html>, ADAMS accession number ML040620405.

⁶ Available at <http://www.nrc.gov/reading-rm/adams/web-based.html>, ADAMS accession number ML040700189.

Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), CLI-03-9, 58 NRC 39, 43-45 (2003).

By contrast, CAN and the intervenors in this Court supporting CAN (NWC and CSPZ) are not currently participating in any NRC proceeding and thus are not currently affected by the NRC's changes in Part 2. We submit that the relative effect on the parties should be a factor that the court weighs in deciding whether to transfer a case under 2112(a)(5). In this case, the fact that both D.C. Circuit petitioners are currently involved in NRC proceedings governed by the challenged rule, whereas the First Circuit petitioner and intervenors are not, weighs in favor of transfer to the D.C. Circuit.

5. *State of the Dockets.* Relative state of the dockets is another factor that courts have invoked in deciding whether to transfer cases under section 2112(a)(5). *See, e.g., Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d at 1205; *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 592 F.2d at 697. Here, nothing indicates that this Court is in a position to deal with this case more expeditiously than the D.C. Circuit. We have reviewed publicly available federal court management statistics for the year ending September 30, 2003.⁷ The statistics indicate that this Court received a higher number of appeals filed during the year (1844 vs. 1121), and

⁷ *See Federal Court Management Statistics*, (2003), available at <http://www.uscourts.gov/fcmstat/index.html>.

had a higher number of appeals pending at the end of the year (1522 vs. 1031), than the D.C. Circuit. To be sure, these numbers do not reflect likely variations in the type and complexity of cases, but on their face they do show that, by transferring this case, this Court would not be moving the case from a lightly burdened court to a more congested one.

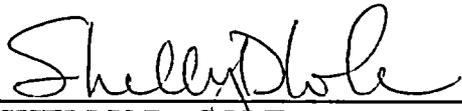
CONCLUSION

For the foregoing reasons, the NRC and the United States respectfully request that this Court consolidate these petitions for review and transfer them to the United States Court of Appeals for the District of Columbia Circuit. Because the first briefs in case No. 04-1145 are due April 19, 2004, we would ask this Court to rule on this request as soon as is practicable.⁸

Respectfully submitted,


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⁸The parties have authorized us to report that NEI supports this motion, but CAN, NWC, CSPZ, PCCM, and NIRS oppose transfer of the cases, and CAN reserves judgment on consolidation.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEARANCE FORM
(Please type or print all answers)

Case No.: 04-1145 and 04-1359

Case Name (short): CAN v. NRC and Public Citizen, et al. v. NRC

FAILURE TO FILL OUT COMPLETELY MAY RESULT IN THE REJECTION
OF THIS FORM AND COULD AFFECT THE PROGRESS OF THE APPEAL

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

U.S. Nuclear Regulatory Commission as the
(Specify name of person or entity represented.)

If you represent a litigant who was a party below, but who is not a party on appeal, do not designate yourself as counsel for the appellant or the appellee.

appellant(s) appellee(s) amicus curiae

petitioner(s) respondent(s) intervenor(s)

not a party on appeal



(Signature)

Name & Address:

Shelly D. Cole

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Has this case or any related case previously been on appeal?

Yes

Court of Appeals No.

No X

* I am applying for admission to the Court of Appeals Bar. My application is attached.

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
(617-748-9057)**

**APPLICATION FOR ADMISSION TO PRACTICE
(Please type or print all answers)**

Name Shelly D. Cole
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Firm Address Office of the General Counsel, Mail Stop 0-15D21
City Washington State D.C. Zip 20555-0001
Telephone (301) 415-2549
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Name one court before which you have been admitted to practice, and in which you are in good standing, and give the date of your admission to the court.

Name of Court New York Supreme Court Date of Admission July 23, 2003
Appellate Division

Have you ever changed your name or been known by any name other than that appearing on the application? If so, please elaborate.

Shelly D. Davis - maiden name (changed 7/3/99)

Have you ever been disbarred or suspended from practice before any court, department, bureau, or commission of the United States or of any state, or have you ever received any reprimand from any such court, department, bureau, or commission pertaining to your conduct or fitness as a member of the bar? If so, attach a separate statement.

No.

CERTIFICATION AND OATH

I certify that the foregoing answers are true, and further,

I do solemnly swear (or affirm) that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

3/12/04
(Date)

Shelly D. Cole
(Signature of Applicant)

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2004, a copy of "Respondents' Motion to Consolidate Petitions for Review and to Transfer Petitions to the District of Columbia Circuit" in Nos. 04-1145 and 04-1359 (1st Cir.) was served by mail, postage prepaid, upon the following counsel:

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