

DOCKET NUMBER
PROPOSED RULE **2+50**
(64FR59671)

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PROPOSED RULE ON ANTI-TRUST COMMENTS ON BEHALF OF Citizens Awareness Network, Inc. [CAN]

Citizens Awareness Network, Inc.[CAN], contends that the NRC proposed rules abdicating NRC oversight on antitrust matters in license transfer proceedings do not adequately address the concerns Congress had in enacting the portions of the Atomic Energy Act of 1946, as amended 1954, et seq [AEA]. In particular, the proposed rules changes neither address the Congressional concerns and intentions in the enacting of sections 105, 184, 42 USC §§ 2135(c), 2234, and related portions concerning the licensing of nuclear facilities and the NRC's oversight authorities for such licensees, nor may the proposed changes to the substance of a federal statue be made by an agency rulemaking.

In particular, CAN contends that:

The NRC, in the interests of public and occupational health and safety, has an antitrust investigative power which Congress chose to mandate in all licensing actions. The purpose of this express grant of authority and mandate for action in AEA § 105 and 184 and related portions of the Act, is to prevent any regulatory gap in the approval of a highly dangerous activity--NRC licensee operations of nuclear powered electric generating facilities. Such NRC licensee operations endanger employees and persons living and working in nearby communities on a daily basis. They also endanger larger populations and the natural environment given the possibility of accidents which could contaminate rivers

and drinking water sources, as well as land, air, people, crops, livestock, and domestic animals. Plainly, such dangers are multiplied in the event an NRC nuclear licensee cannot meet its financial obligations due to financial shortfalls which could easily be triggered due to the effects of over-reaching in ownership of such facilities.

In addition, given the age of many of the facilities now up for sale, financial problems could also occur due to multiple closures of facilities precipitated by accidents, repairs, enforcement actions, decommissioning, and various combinations of such events. In the event that such incidents trigger acute cash flow problems, due to the fact that nuclear facilities are involved, the consequences could range from losses of power to large segments of the country during times when it is vital (e.g., winter cold conditions), failure to prevent or triggering of nuclear accidents, releases of nuclear material and radiation from facilities sites. Moreover, in a competitive environment, owners of a large number of nuclear facilities will likely try to cut costs in every available way to maximize their profits.

Under the NRC's claim of "lack of resources" to conduct antitrust evaluations at proposed licensed transfer, it will likely be forced--or, when the need arises, unable-- to exercise its enforcement authority in dealing with violations of significant health and safety regulations at multiple facilities owned by a single licensee. The NRC proposed rulemaking is notably silent on an analysis of the costs and benefits of exercising the antitrust authority at license transfer versus increased regulatory burdens on its already shrunken and overworked inspection staffs when multiple, widespread health and safety violations taken place in large scale licensee holdings (which could have been avoided by full evaluation of the antitrust implications of proposed license transfers). Additional potentially serious accident triggering scenarios arise when one considers overtime patterns within the nuclear industry. See, e.g. Union of Concerned Scientists, Overtime and Staff Problems in the Commercial Nuclear Power Industry (March 1999). Apparently, the NRC does not even have the resources necessary to follow out a simple risk assessment of the chains of events which plainly follow when a large-scale owner bent on maximizing profits takes either or both paths of increasing overtime coupled with staff-cutting, and/or firing qualified personnel and trades union members for replacement with lesser skilled and experienced contract labor. (Even when such contract labor is skilled and experienced, the skills and experience are not completely fungible--each nuclear facility, particularly the older ones which are now purchased on the cheap, having site-specific, particularistic configurations, problems, and out-of-usual design solutions.) Again, the NRC, in its rulemaking, does not bother to do what Congress most clearly and plainly authorized and mandated in the Atomic Energy Act: evaluate the health and safety and national security consequences of actions in the process of nuclear licensing, production, operations, waste storage, and clean-up. One would think, without much effort, that the AEA also contemplated that the NRC would apply the same considerations to its own proposals for rulemaking--even when they are beyond its authority.

The NRC also fails to even evaluate, based upon any study of its own records in this regard, whether there are

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increased numbers of violations of NRC regulations among those facilities already owned in bulk by some licensees, the overtime and hiring practices of such licensees, and related matters. In this way, also, the NRC's proposed rulemaking should not go forward, as the NRC has not conducted even a merely reasonable cost benefit analysis, considered alternatives, and, significantly, evaluated potential environmental impacts from the proposed rule change. If it has done any of these necessary steps to proper rulemaking they are nowhere to be found in the rule or its references--just conclusory statements based upon the narrowest interpretation of the potential effects of relinquishing antitrust regulation. In this way, the NRC's proposed rulemaking violates the National Environmental Policy Act, as this proposed rule change cannot be said to not be a major federal action affecting the quality of the human and natural environment absent any consideration or study of the question in the rulemaking process.

The NRC states that "there will be no realistic gap in antitrust law enforcement if the NRC no longer performs antitrust reviews of post-operating license transfer applications." *Kansas Gas and Electric Company* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 1999 NRC LEXIS 85 at *57, n22 (June 18, 1999). This conclusion, which represents an historic alteration in the NRC's attempt to maintain regulatory hegemony over all matters nuclear, fails to consider that Congress mandated such reviews in operating licenses under its grant of discretion and authority to the NRC to ascertain that ANY licensing which takes place--and reading the statute *pari in materia*--any transfer of a license under § 184--must NOT be to a foreign power or owner in any way or form, and must be neither inimical to public and occupational health and safety nor national security.

No other agency is empowered to examine the antitrust implications of a licensing (or transfer of license) from the perspective of such an action upon occupational and public health and safety and national security. Abdication of this Congressional charge to act in a particular way, to make particular types of findings in granting (or transferring) of a license creates a plain, and simple gap in the regulatory scheme that Congress enacted under the Atomic Energy Act, §§105, 184, and related sections on licensing and issues related to licensing.

In *Wolf Creek*, the NRC cites *General Am. Transp. Corp. v. ICC*, 883 F.2d 1029 (D.C. Cir 1989) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)), and *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998), attempting to justify the use of rulemaking to discharge its federal statutory duties under AEA § 105 (as applied to license transfers under § 184). *Id.* at *61-62. This is the most incredible act of agency hubris one can imagine--an agency created by Congress attempting to alter a federal statute by agency rulemaking.

Congress, in the Atomic Energy Act, does not separate initial licensing and subsequent transfers in any way recognizing or characterizing the latter as deserving lesser attention from the NRC in antitrust matters. Nor, significantly, does the Atomic Energy Act or any other legislation lift from the NRC's shoulders the "burden" of making the requisite inquiries under AEA § 105 and 184. Furthermore, any silence on this difference, or lack of clarity which might be found in the statute, should be resolved using common sense and customary practice in language not the NRC's disinclination to deal with the issues or alleged lack of resources. It should also be resolved by reading the entire statute *pari in materia* given the broad charge to the NRC to conduct its investigations for the purpose of assuring that public health and safety be protected and that the national interest be safeguarded in dealing with ALL aspects of the licensing of nuclear production, utilization, and waste disposal. If the NRC's alleged "lack of resources" were intended as a message from Congress, Congress would have, by LEGISLATION, tied resource allocation to specific acts or omission, and to changes laws governing NRC practices IF IT SO DESIRED. To date Congress has not done so. In fact, Congress, by law, stated that the NRC shall conduct such evaluations. The agency does not have the power to change the law, only congress can do that. In this regard, the NRC's attempt to alter federal law by agency rulemaking is an unbelievable act of hubris and entirely *ultra vires*.

The NRC should withdraw the proposed rulemaking immediately and seek any action in this regard from the Congress.

Respectfully submitted:

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