IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SPRINT CORPORATION, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9563 (MCP No. 155)
VERIZON COMMUNICATIONS, INC., *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9566 (MCP No. 155)
PUERTO RICO TELEPHONE COMPANY, INC. *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9567 (MCP No. 155)

CITY OF SAN JOSE, *et al.*, *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9568 (MCP No. 155)
CITY OF SEATTLE, *et al.*, *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9571 (MCP No. 155)
CITY OF HUNTINGTON BEACH, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9572 (MCP No. 155)

JOINT RESPONSE IN OPPOSITION TO MOTION TO TRANSFER

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On November 29, 2018, petitioners in *City of San Jose v. FCC*, No. 18-9568 (10th Cir.), filed a Motion to Transfer the above-captioned matters to the Ninth Circuit. *See* ECF Doc. No. 10608837. Pursuant to the Court's order entered on November 30, 2018, the non-governmental parties opposing transfer hereby submit this Joint Response in Opposition to the Motion to Transfer.[1]

Under the relevant federal transfer statute, the petitions for review should be resolved in this Court. The Judicial Panel on Multidistrict Litigation consolidated the petitions in this Court, after a statutorily prescribed lottery, because each arose from a petition seeking review of "the same order" of the Federal Communications Commission (the "September Order"). *See* 28 U.S.C. § 2112(a). The Motion to Transfer is based on a separate petition pending in the Ninth Circuit, which seeks review of a *different* Commission order (the "August Order"). That petition is not relevant to this proceeding.

[1] The non-governmental parties opposing transfer are (1) the named petitioners in three of the above captioned matters: Sprint Corporation, Verizon, and Puerto Rico Telephone Company, Inc.; and (2) three defendant-intervenors in the remaining matters: CTIA – The Wireless Association®, the Wireless Infrastructure Association, and the Competitive Carriers Association.

Transfer to the Ninth Circuit also would not serve "the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). The San Jose Petitioners' suggestion that this Court is somehow ill-suited to resolve the relevant legal issues or is not as well situated to consider this case as the Ninth Circuit, is legally unsupported and a transparent attempt at forum shopping. Moreover, because serious jurisdictional questions cloud the petition pending in the Ninth Circuit for review of the August Order, transfer of this case to that court would be particularly inappropriate.

FACTUAL BACKGROUND

The petitions for review in this case each challenge "the same order" of the Federal Communications Commission. *See* 28 U.S.C. § 2112(a). The petitions all seek review of the order captioned *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 2018 WL 4678555 (rel. Sept. 27, 2018) (FCC 18-133) ("September Order"). The September Order—published in the Federal Register on October 15, 2018, *see* 83 Fed. Reg. 51867—adopted rules to streamline the process for state and local review of small wireless facilities or "small cells." The new rules were intended to facilitate and expedite the deployment of wireless broadband services, including fifth-generation or "5G" services.

Seven petitions for review were filed within 10 days of the September Order's publication.[2] Three were filed by coalitions of local governments and their allied organizations and seek to have the September Order vacated in its entirety. Although the entities supporting these petitions are located in circuits throughout the country—including in the Tenth Circuit, *see* No. 18-9571, ECF Doc. No. 10609513—all three petitions were filed in the Ninth Circuit.

Four wireless telecommunications carriers also sought review of the September Order. The wireless carrier petitioners—Sprint Corporation, Verizon, Puerto Rico Telephone Company, Inc., and AT&T Services, Inc.—all provide wireless service and deploy wireless facilities. Their petitions seek review of the Commission's decision, in the same September Order, not to adopt a "deemed granted" remedy when local authorities fail to act on applications for siting wireless infrastructure within a reasonable timeframe. The wireless carrier petitions were filed in the First, Second, Tenth, and D.C. Circuits. *See* 28 U.S.C. § 2343.

[2] Additional petitions were filed outside the ten-day window. *See Am. Public Power Ass'n v. FCC*, No. 18-1305 (D.C. Cir. filed Nov. 15, 2018); *Montgomery County v. FCC*, No. 18-2448 (4th Cir. filed Dec. 5, 2018); *City of Austin v. FCC*, No. 18-1326 (D.C. Cir. filed Dec. 11, 2018).

Within ten days of the September Order's publication, six of the seven petitioners provided copies of their as-filed petitions to the Commission.[3] Pursuant to the random selection procedures established by Congress, 28 U.S.C. § 2112(a)(3), the Commission notified the Judicial Panel on Multidistrict Litigation of its timely receipt of six petitions for review. *See also* 47 C.F.R. §§ 1.4(b), 1.13(a). Upon receipt of that notification, the Judicial Panel "randomly selected the United States Court of Appeals for the Tenth Circuit" as the circuit "in which to consolidate these petitions for review." Consolidation Order, MCP No. 155 (JPML Nov. 2, 2018), ECF No. 3. Pursuant to the Consolidation Order, the First, Second, and Ninth Circuits transferred their proceedings to this Court; an unopposed motion to transfer is currently pending in the D.C. Circuit.

There are two additional Commission orders, released in the months prior to the September Order, that are relevant to considering the Motion to Transfer. The first is the "March Order." *See In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 2018 WL 1559856 (rel. Mar. 30, 2018) (FCC 18-30) (published May 3, 2018 at 83 Fed.

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[3] The seventh petition for review, *see AT&T Services, Inc. v. FCC*, No. 18-1294 (D.C. Cir. filed Oct. 25, 2018), was not provided to the Commission for inclusion in the lottery, *see* Notice of Multicircuit Petitions for Review, MCP No. 155 (JPML filed Nov. 1, 2018), ECF No. 1.

Reg. 19440). The March Order reexamined the types of wireless facility deployments that are subject to review pursuant to the National Historic Preservation Act and the National Environmental Policy Act of 1969 and, as relevant here, excluded "small wireless facilities" from those review processes. *See id.* ¶¶ 3–5; *see also* September Order ¶ 4 (describing this aspect of the March Order). A number of challenges to the March Order were filed following Federal Register publication, and are now consolidated and pending in the D.C. Circuit. *See United Keetoowah Band of Cherokee Indians v. FCC*, No. 18-1129 (D.C. Cir. filed May 9, 2018). Merits briefing is expected to be completed in January 2019.

The second relevant order, and the only one that the San Jose Petitioners mention, is the "August Order." *See In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 2018 WL 3738326 (rel. Aug. 3, 2018) (FCC 18-111) (published Sept. 14, 2018 at 83 Fed. Reg. 46812). The primary focus of the August Order was the adoption of rules to streamline the process of preparing utility poles for new attachments through a process known as "one-touch make-ready," or "OTMR." *See id.* ¶¶ 2–3. In addition to this primary holding, the August Order also determined that local government moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Communications Act, 47

U.S.C. § 253(a). *See id.* ¶ 4. Challenges to the August Order were filed in the Ninth and Eleventh Circuits. *See City of Portland v. FCC*, No. 18-72689 (9th Cir. filed Oct. 2, 2018); *Am. Elec. Power Serv. v. FCC*, No. 18-14408 (11th Cir. filed Oct. 19, 2018). Because neither petition was filed within ten days of publication of the August Order (which would have made the petitions eligible for a multicircuit lottery), the Commission moved the Eleventh Circuit to transfer its proceeding to the Ninth Circuit. *See* 28 U.S.C. 2112(a)(1). The Eleventh Circuit has not yet ruled.

Several parties, including some of the San Jose Petitioners, filed petitions for administrative reconsideration of the August Order. The Commission moved the Ninth Circuit to hold the petition to review the August Order in abeyance pending the agency's resolution of these administrative petitions. The Ninth Circuit has not yet ruled on that motion.

ARGUMENT

I. The Petitions Are Properly Before This Court Pursuant To The Multicircuit Lottery Conducted By The Judicial Panel On Multidistrict Litigation.

A. Random Selection Was Proper Because The Consolidated Petitions Seek Review Of The September Order.

Congress has established procedures that address the problems that arise when petitions to review "the same order" are filed in different circuits. *See* 28 U.S.C.

§ 2112(a). "If within ten days after issuance of the order the agency . . . concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals," the agency shall "notify the judicial panel on multidistrict litigation." 28 U.S.C. § 2112(a)(1), (3). "The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals . . . and shall issue an order consolidating the petitions for review in that court of appeals." *Id.* § 2112(a)(3); *see also, e.g.*, *In re FCC 11-161*, 753 F.3d 1015, 1040 (10th Cir. 2014) ("the Judicial Panel on Multidistrict Litigation consolidated the petitions in this court"). "In all other cases"—*i.e.*, those cases where two or more petitions are filed but not within ten days of publication—"the agency . . . concerned shall file the record in the court in which proceedings with respect to the order were first instituted." 28 U.S.C. § 2112(a)(1).

Congress enacted the random selection procedures in 1988 to put an end to "unseemly races to the courthouse in an effort to secure favorable venues." *Sacramento Mun. Util. Dist. v. FERC*, 683 F.3d 769 (7th Cir. 2012) (Easterbrook, C.J., in chambers). Prior to their enactment, "[t]eams of runners would have been positioned in clerks' offices poised to file as soon as the agency released its order." *Id.* Courts were forced to referee timing disputes by "splitting minutes on the digital watches worn by parties and timed by calls to the Naval Observatory." *Mobil Oil*

Expl. Co. v. FERC, 814 F.2d 998, 1000 (5th Cir. 1987) (per curiam). Congress quite sensibly put a stop to this madness by establishing a multicircuit lottery that provides for random selection of a forum in the event multiple petitions are filed.

These random selection procedures apply to review of the September Order "because petitions were filed in multiple circuits within ten days of the Commission's order." *Sacramento Mun. Util. Dist.*, 683 F.3d at 770; *see* 28 U.S.C. § 2112(a)(3). The Commission issued the September Order on October 15.[4] By the close of the ten-day window, six petitions for review had been filed and received by the Commission. After the Commission notified the Judicial Panel on Multidistrict Litigation of those petitions, the Judicial Panel selected this Court to hear them. *See* Consolidation Order, MCP No. 155 (JPML Nov. 2, 2018), ECF No. 3. The petitions at issue here, therefore, are properly consolidated before this Court.

B. The August And September Orders Should Not Be Treated As "The Same Order."

Unsatisfied with the result of the random selection process (and this Court's jurisdiction), the San Jose Petitioners contend that venue is proper only in the Ninth

[4] The date of "issuance" of a Commission order is the date of its Federal Register publication. 47 C.F.R. §§ 1.4(b), 1.13(a); *see W. Union Tel. Co. v. FCC*, 773 F.2d 375, 376–78 (D.C. Cir. 1985) (Scalia, J.) (holding court lacks jurisdiction to review petition filed prior to Federal Register publication).

Circuit because a petition to review the separate August Order was filed there. Mot. 6. This argument is mistaken. The statute establishes procedures for consolidation of petitions to review "the same order." 28 U.S.C. § 2112(a). Those procedures do "not apply where competing petitions for review challenge closely related but nevertheless distinct agency orders." *N.C. Envtl. Policy Inst. v. EPA*, 881 F.2d 1250, 1256 (4th Cir. 1989) (Phillips, J., sitting as single circuit judge); *accord Mobil Oil Expl. Co. v. FERC*, 814 F.2d 1001, 1003–04 (5th Cir. 1987) (per curiam) (finding transfer not "advise[d] or compel[led]" to consolidate review of separate orders "issued by the same regulatory body under the same statutory authority to accomplish a cohesive scheme of regulation"). Because the August Order and the September Order are not "the same order," "jurisdiction to review the first order does not carry with it jurisdiction to review the second order." *See Midwest Video Corp. v. United States*, 362 F.2d 259, 260–61 (8th Cir. 1966). Thus, the pending petition for review of the August Order in the Ninth Circuit has no more bearing on this Court's review of the September Order than do the pending petitions for review of the March Order in the D.C. Circuit.

The San Jose Petitioners' contrary argument that "the August Order and the September Order [should] be treated as the same order" is unpersuasive. *See* Mot. 5. As explained in detail above, the three orders that have emerged from the

Commission's broadband acceleration proceedings—the March Order, August Order, and September Order—each addressing numerous, distinct, complex, and separate issues associated with the deployment of broadband facilities and next-generation 5G services. *See supra* 2–6. There is no statutory basis for treating even "substantially identical" orders as "the same order." *See, e.g.*, *Far E. Conference v. Fed. Mar. Comm'n*, 337 F.2d 146, 148 n.1 (D.C. Cir. 1964) (declining transfer because "substantially identical" orders "cannot be considered the 'same order' within the meaning of the statute"). *A fortiori*, separate orders cannot be treated as the same where, as here, they address subject matters that are related, but clearly distinct.

The administrative record associated with each order also is different. The San Jose Petitioners acknowledge that the record pertaining to each is not identical because new submissions were filed following the release of each order. Mot. 5 n.2. The differences are even more significant than that, however. Many of the commenters—including some of the San Jose Petitioners—filed pleadings or submissions that were expressly limited to the topics of individual orders. *Compare, e.g.*, Letter from Boston et al. to Marlene H. Dortch, Sec'y, Fed. Commc'ns Comm'n (Mar. 14, 2018) (commenting on NEPA/NHPA issues in "draft text" of March Order), *available at* https://www.fcc.gov/ecfs/filing/103142254023800, *with, e.g.*,

Letter from County of Los Angeles to Marlene H. Dortch, Sec'y, Fed. Commc'ns Comm'n (Sept. 18, 2018) (addressing potential impacts of September Order on rights-of-way management), *available at* https://www.fcc.gov/ecfs/filing/10919246717985. It makes no difference that such submissions were entered in the same docket; for purposes of judicial review, submissions addressed to the issues in one order "are immaterial" to the issues addressed by a different order "[r]egardless of the docket number assigned." *See Nat'l Ass'n Of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1247–48 (11th Cir. 2006) ("*NASUCA*") (holding party submission re First Report and Order could not confer statutory standing re Second Report and Order).

Moreover, while each order addresses its own complex set of issues associated with the broader goal of promoting infrastructure deployment, these issues are distinct from one another—which is the very reason that the Commission dealt with them in separate orders in the first instance. As a result, treating these orders as "the same order" on appeal is not only legally unnecessary, it would be administratively complex and counter-productive.

The cases the San Jose Petitioners cite are not to the contrary. Their lead authority is a brief, non-precedential D.C. Circuit order that transferred to the Eighth Circuit petitions for review of two orders arising out of "a single agency undertaking

to implement the provisions in the Telecommunications Act of 1996 requiring introduction of competition into local telephone markets." *See Bell Atl. Tel. Companies v. FCC*, No. 96-1333, 1996 WL 734326, at *1 (D.C. Cir. Nov. 25, 1996) (per curiam) (unpublished). Critically, in *Bell Atlantic*, there was an established appellate history in a single circuit at the time the petitions were transferred. The Eighth Circuit had been selected by the Judicial Panel to hear a challenge to the first order, *see Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 421 (8th Cir. 1996), and had published an opinion staying that order pending a final decision on the merits, *see id.* at 427. That context is nothing like the situation here, where no court has yet ruled on any of the pending petitions, and each petition seeks review of only one order.[5] *Cf. Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 (8th Cir. 2003) ("Transfer of a case is appropriate 'where the same or interrelated proceeding was previously under review in a court of appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary to maintain continuity in the total proceeding.'" (quoting *Public*

[5] The D.C. Circuit's order in *Bell Atlantic* does not give much detail about the then-ongoing proceedings in the Eighth Circuit. That is not unusual for an unpublished order of that vintage. *See* D.C. Cir. R. 32.1(b)(1)(A) ("Unpublished orders . . . entered before January 1, 2002, are not to be cited as precedent."); *cf.* 10th Cir. R. 32.1.

Serv. Comm'n for New York v. FPC, 472 F.2d 1270, 1272 (D.C. Cir. 1972)). Similarly, *ACLU v. FCC*, 486 F.2d 411 (D.C. Cir. 1973), concerned two orders that each denied petitions for reconsideration of the *same prior order*, not two orders with different records. *See id.* at 413.

Moreover, the San Jose Petitioners' conduct in this litigation reveals the insincerity of their claim that the August and September Orders should be treated as "the same." Three of the San Jose Petitioners—the City of Los Angeles, the County of Los Angeles, and Yuma, Arizona—are among the entities that have sought administrative reconsideration of the August Order. *See* Pet. for Recons. i n.1, WC Dkt. No. 17-84, WT Dkt. No. 17-79 (FCC filed Sept. 4, 2018), *available at* https://www.fcc.gov/ecfs/filing/10904323720005. If the San Jose Petitioners truly believed that the August Order and September Order were the same order, they would not have moved for administrative reconsideration of the August Order because that would render their petition for review of the September Order unreviewable. *See, e.g., United Transp. Union v. ICC*, 871 F.2d 1114, 1116 (D.C. Cir. 1989) ("a pending petition for rehearing must render the underlying agency action nonfinal (and hence unreviewable) with respect to the filing party"); *accord Stone v. INS*, 514 U.S. 386, 392 (1995). The fact that these parties have done both—

using the same counsel—reveals that the San Jose Petitioners understand that the August Order and the September Order are distinct agency actions.

II. Transferring These Petitions To The Ninth Circuit Would Not Serve "The Convenience Of The Parties In The Interest Of Justice."

Because there is no basis upon which it can treat two separate, distinct administrative actions as "the same order," it would not be appropriate to transfer the petitions unless the Court finds that transfer would serve "the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). The party moving to change venue "bears the burden of establishing that the existing forum is inconvenient." *Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1167 (10th Cir. 2010) (citation omitted) (affirming district court's denial of transfer under 28 U.S.C. § 1404(a)).

The San Jose Petitioners cannot carry this burden. Their principal argument rests on the mistaken belief that the Commission "ignored" a Ninth Circuit interpretation of the Communications Act. Mot. 7. It did not. The September Order resolved a division of authority about what it means for a state or local legal requirement to have the "effect of prohibiting" services under 47 U.S.C. §§ 253(a) and 332(c)(7)(B). In doing so, the Commission made clear that it would "reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set

forth in *California Payphone*." September Order ¶ 35. Under that test, "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *Id.* (quoting *California Payphone*). The Commission then observed that *California Payphone* had been endorsed by the Ninth Circuit in the very decision the San Jose Petitioners believe the Commission ignored, *see id.* ¶ 35 n.78 (citing *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc)), and by this Court, *see id.* (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004)).

In addition to reaffirming *California Payphone*, the September Order explained its proper application. "In doing so, [the Commission] confirm[ed] the First, Second, and Tenth Circuits' understanding that under this analytical framework, a legal requirement can 'materially inhibit' the provision of services even if it is not an insurmountable barrier." September Order ¶ 35. The Commission also recognized that the Eighth and Ninth Circuits had misapplied its *California Payphone* standard in some cases by requiring proof of "an existing or complete inability to offer a telecommunications service." *See id.* ¶¶ 41–42. Contrary to the suggestion of the San Jose Petitioners, the fact that this Court and the Ninth Circuit have reached different conclusions when applying the *California Payphone* test—

and that the Commission agreed with this Court's reasoning and disagreed with that of the Ninth Circuit—does not somehow render the Ninth Circuit the more competent or appropriate forum for reviewing the September Order.

To the extent the San Jose Petitioners imply that the Ninth Circuit held that its particular application of the *California Payphone* standard was unambiguously compelled by the text of 47 U.S.C. § 253(a), that is wrong. In *County of San Diego*, the Ninth Circuit recognized that an earlier panel decision of that court had misquoted the relevant text of the statute—"may prohibit or have the effect of prohibiting"—which led that panel erroneously to apply a "might possibly" prohibit standard instead of an "actual or effective prohibition" standard. *See* 543 F.3d at 576–78. In correcting the panel's error, the en banc Ninth Circuit stated that the "actual or effective prohibition" standard "rests on the unambiguous text of § 253(a)." *Id.* at 578. The court then noted that this conclusion was "consistent with" *California Payphone*. *See id.* Contrary to the apparent belief of the San Jose Petitioners, the Ninth Circuit did not hold that its application of the correct standard to the particular facts before it was compelled by the unambiguous text of the statute. *See id.* at 579–80. Nor did it hold that the statute unambiguously sets forth the full universe of what constitutes an effective prohibition; rather, the Ninth Circuit merely held that "*potentially* prohibit" was not within the plain meaning of the statutory

phrase "may prohibit or have the effect of prohibiting." *See id.* at 579. There is no argument that the Commission's decision here contradicts that holding.

There is likewise no merit to the argument that the San Jose Petitioners should have their choice of forum because local governments "are far more affected" by the September Order than are wireless telecommunications carriers. Mot. 8. As a factual matter, this is incorrect: wireless telecommunications carriers are the entities responsible for deploying the next generation of wireless facilities, and those deployments are the precise subject of the September Order. More fundamentally, the argument has no bearing on the "convenience of the parties" inquiry this Court must conduct. *See* 28 U.S.C. § 2112(a)(5); *cf. Employers Mut. Cas. Co.*, 618 F.3d at 1167 ("Merely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue." (citation omitted)). The Tenth Circuit is no less convenient for the parties than the Ninth Circuit. Indeed, counsel for many of the local governments in the above-captioned matters keeps his office in Denver, less than five miles from this Court. *See* No. 18-9571, ECF Doc. No. 10609513. Some of the represented entities are also located in the Tenth Circuit, including, for example, the Colorado Communications and Utility Alliance. Similarly, Sprint Corporation, one of the wireless carrier petitioners, has its headquarters in the Tenth Circuit, in Overland Park, Kansas.

Nor is there any merit to the argument that transfer would serve the purposes of the Hobbs Act. *See* Mot. 6–7. The Hobbs Act establishes "exclusive jurisdiction" in the "court of appeals." 28 U.S.C. § 2342. The Eleventh Circuit decision cited by the San Jose Petitioners has nothing to do with the choice of one circuit over another, but rather with the vesting of jurisdiction in the court of appeals rather than the district court. This Court is no less capable of rendering a decision that will serve that purpose than is the Ninth Circuit.

Finally, there are two additional considerations that counsel against transfer. The first is jurisdictional. Portland is the sole petitioner in the challenge to the August Order currently pending in the Ninth Circuit. *See City of Portland v. FCC*, No. 18-72689 (9th Cir. filed Oct. 2, 2018). But Portland's statutory standing—*i.e.*, its status as a "party" within the meaning of the Hobbs Act, 28 U.S.C. § 2344—is in question because Portland did not adequately participate in the proceeding from which the August Order emerged. Portland did not file comments in the proceeding, and presumably bases its claim of statutory standing on *ex parte* submissions addressed to different issues or made after the record had closed. The letter Portland joined in March does not make it a "party" because that letter addressed only the "draft text" of the March Order. *See* Letter of Boston et al., *supra*. 10, at 1; *see also NASUCA*, 457 F.3d at 1247–48 (holding comments filed re First Report and Order

could not confer "party" status re Second Report and Order). Nor does a procedurally defective *ex parte* letter, filed in July, which the Commission properly excluded from the record. *See Notice of Prohibited Presentations*, 2018 WL 3991253, at *1 (OGC Aug. 17, 2018) (DA 18-860) (excluding Portland's letter filed during Sunshine Agenda Period); *see also NASUCA*, 457 F.3d at 1248–50 (holding *ex parte* letter improperly filed during Sunshine could not confer "party" status). The fact that some other local government entities have intervened in the Ninth Circuit case cannot cure these jurisdictional defects. *See Simmons v. ICC*, 716 F.2d 40, 46 (D.C. Cir. 1983) (Scalia, J.).

The second is prudential. The Commission has moved to stay the petition to review the August Order pending its resolution of several administrative petitions for reconsideration. While the Ninth Circuit has not yet acted on the motion, such motions are routinely granted in order to conserve judicial resources and avoid unnecessary review of agency holdings that may, in fact, be revised upon further administrative review. There is no reason for this Court to transfer the review of a different agency order to a court that may well hold the original petition in abeyance.

At bottom, the Motion to Transfer expresses nothing more than a preference for Ninth Circuit precedent over that of this Court. That is no justification for transfer. *Cf. Wakaya Perfection, LLC v. Youngevity Int'l, Inc.*, No. 17-4178, 2018

WL 6495113, at *7 (10th Cir. Dec. 11, 2018) (courts should not "reward forum shopping"). This Court should "follow the procedures specified by law" and hear this case pursuant to the random selection by the Judicial Panel on Multidistrict Litigation. *See Sacramento Mun. Util. Dist.*, 683 F.3d at 771.

CONCLUSION

For the forgoing reasons, the Court should deny the Motion to Transfer.

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December 17, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify:

This motion complies with the type-volume limitation of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because this motion contains 4,516 words, excluding the accompanying documents authorized by Rule 27(a)(2)(B) of the Federal Rules of Appellate Procedure.

This motion complies with the typeface and type-style requirements of Rule 27(d)(1)(E), Rule 32(a)(5), and Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this motion has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman.

Respectfully Submitted,

/s/ Joshua S. Turner
Joshua S. Turner

December 17, 2018

CERTIFICATE OF DIGITAL SUBMISSION

In accordance with the Court's CM/ECF User Manual, I hereby certify that (1) all required privacy redactions have been made pursuant to Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5; (2) hard copies of this pleading that may be required to be submitted to the Court are exact copies of the ECF filing; and (3) this submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Cylance PROTECT version 2.0.1490.27, last updated on December 17, 2018, and, according to the program, is free of viruses.

Respectfully Submitted,

/s/ Joshua S. Turner
Joshua S. Turner

December 17, 2018

CERTIFICATE OF SERVICE

I, Joshua S. Turner, hereby certify that on December 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully Submitted,

/s/ Joshua S. Turner
Joshua S. Turner