

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

SPRINT CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION, et al.,

Respondents.

Case No. 18-9563 (MCP No. 155)

VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION, et al.,

Respondents.

Case No. 18-9566 (MCP No. 155)

PUERTO RICO TELEPHONE COMPANY,
INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION, et al.,

Respondents.

Case No. 18-9567 (MCP No. 155)

THE CITY OF SAN JOSE, CALIFORNIA; et al.,

Petitioners,

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION

Respondents

Case No. 18-9568 (MCP No. 155)

CITY OF SEATTLE, WASHINGTON, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

Case No. 18-9571 (MCP No. 155)

CITY OF HUNTINGTON BEACH,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

Case No. 18-9572 (MCP No. 155)

MOTION TO TRANSFER

Pursuant to 28 U.S.C. § 2112(a)(5), Petitioners in *City of San Jose v. F.C.C.*, Case No. 18-9568¹ (“San Jose Petitioners”) respectfully move this Court to transfer this case to the United States Court of Appeals for the Ninth Circuit. San Jose Petitioners in this case seek review of the FCC’s Declaratory Ruling and Third Report and Order, FCC 18-133, 83 Fed. Reg. 51,867 (Oct. 15, 2018). The San Jose Petitioners are local governments within the Ninth Circuit that originally filed a timely appeal of the FCC Order in that Circuit. However, pursuant to 47 C.F.R. § 1.13(a)(1), this case was transferred to this Court pursuant to 28 U.S.C. § 2112(a)(3) and the Rules of the Judicial Panel on Multidistrict Litigation. Nonetheless, as explained below, San Jose Petitioners believe that the interests of justice and the plain language of 28 U.S.C. § 2112(a)(5) require that the matter be heard by the Ninth Circuit. The San Jose Petitioners have an interest in having this matter heard by the Ninth Circuit, and have been granted intervention in all of the cases before this Court that appeal the FCC’s order. They are filing an identical

¹ The “San Jose Petitioners” are San Jose, California; Arcadia, California; Bellevue, Washington; Burien, Washington; Burlingame, California; City of Culver City, California; Town of Fairfax, California; City of Gig Harbor, Washington; City of Issaquah, Washington; City of Kirkland, Washington; City of Las Vegas, Nevada; City of Los Angeles, California; County of Los Angeles, California; City of Monterey, California; City of Ontario, California; City of Piedmont, California; City of Portland, Oregon; City of San Jacinto, California; City of Shafter, California; and City of Yuma, Arizona.

Motion in all the cases as a matter of caution, since the cases are not yet consolidated.

Counsel for San Jose Petitioners has contacted counsel for the other parties listed in the docket of this case and is authorized to make the following representations. The following parties support the motion to transfer: the City of Seattle, Washington; the City of Tacoma, Washington; the City of Coconut Creek, Florida; the City of Lacey, Washington; the City of Turnwater, Washington; the Colorado Communications Alliance; Rainier Communications; the County of Thurston, Washington; the City of New York, New York; the City of Huntington Beach, California; the League of Oregon Cities; the League of California Cities; the League of Arizona Cities and Towns; the City of Bakersfield, California; the City of Rancho Palos Verdes, California; the City of Eugene, Oregon; the City of Huntsville, Alabama; the City of Bowie, Maryland; the City of Westminster, Maryland; and the County of Marin, California. The following parties oppose the motion to transfer: the FCC; Sprint Corporation; Verizon Communications, Inc.; CTIA; Puerto Rico Telephone Company, Inc.; and the Competitive Carriers Association. The Department of Justice takes no position on the transfer motion at this time.

Background

San Jose Petitioners are one of six groups seeking review of an FCC order released in September 2018: *In the Matter of Accelerating Wireless Broadband by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order*, FCC 18-133 (rel. Sep. 27, 2018) (“September Order”). The September Order was published in the Federal Register on October 15, 2018. *See* 83 Fed. Reg. 51867. Six petitions were filed in four different courts of appeals—three in the Ninth, and one each in the First, Second, and this Circuit—within ten days triggering the MDL lottery. The cases were filed on October 24 and 25, 2018 and received by the FCC on October 25, 2018. As a result of the lottery process, the case was consolidated in this Court.

Currently pending in the Ninth Circuit and Eleventh Circuit are petitions for review of an FCC order arising from the same administrative docket, based upon the same record, and on which the FCC relies as legal foundation for the matter before this Court. In August 2018, the FCC issued *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling*, FCC 18-111 (rel. Aug. 3, 2018) (“August Order”). The August Order was published in the Federal Register on September 14, 2018. *See* 83 Fed. Reg. 46812. No one sought judicial review of the August Order during the initial 10-day lottery period. On October 2, 2018, the

City of Portland, Oregon filed a petition for review of the August Order in the Ninth Circuit. *City of Portland v. FCC*, 9th Cir. 18-72689. On October 18, 2018, American Electric Power Service Corporation filed a petition for review in the Eleventh Circuit. *See American Electric Power Service Corp. v. FCC*, 11th Cir. No. 18-14408. The former appeal addressed the portion of the August Order concerning local and state authority to control the placement of wireline and wireless facilities. The latter addressed the unrelated issue of the terms and conditions under which companies may themselves perform “make-ready” work on FCC-regulated utility poles. On October 30, 2018, the FCC moved to transfer the Eleventh Circuit appeal to the Ninth Circuit pursuant to 28 U.S.C. § 2112(a)(5). That motion is currently pending before the Eleventh Circuit.

Argument

The Ninth Circuit is the proper venue for the six petitions currently pending before this Court. Pursuant to 28 U.S.C. § 2112(a)(1), when a petition for review is not filed within ten days after the issuance of an order, but instead filed after this ten-day window, the agency must “file the record in the court in which proceedings with respect to the order were first instituted.” If petitions for review of the “same order” are subsequently filed in other courts of appeal, those courts “shall transfer those proceedings to the court in which the record is so filed.” 28 U.S.C. § 2112(a)(5). Furthermore, petitions challenging different orders will be treated as

the “same order” if they “are associated with the same dockets, arise out of the same administrative proceeding, and govern aspects of a single agency undertaking to implement . . . provisions in the Telecommunications Act of 1996” *Bell Atlantic Tel. Cos. v. FCC*, Nos. 96-1333, 96-1337, 1996 WL 734326, at *1 (D.C. Cir. Nov. 25, 1996). “The public policy underlying section 2112(a) requires that it be ‘be liberally applied to permit review by a single court of closely related matters where appropriate for sound judicial administration.’” *See American Civil Liberties Union*, 486 F.2d 411, 414 (quoting *Eastern Air Lines, Inc. v. C.A.B.*, 354 F.2d 507, 511 (D.C. Cir. 1965)).

Here, the August Order and September Order can be treated as the same order. Both orders are associated with the same dockets, arise out of the same administrative record,² and govern aspects of an agency undertaking intended to accelerate deployment of wireline and wireless infrastructure. “Any other construction would result in two courts reviewing at least some portions of the same administrative record.” *Bell Atlantic*, 1996 WL 734326, at *1; *see also American Civil Liberties Union v. FCC*, 486 F.2d 411, 414 (D.C. Cir. 1973) (holding petitions challenging different orders were to be treated as the “same order” for purposes of § 2112(a) because “the orders were issued during the course

² The records, to the extent that they are different, are different because entities did file *ex parte* comments between the time of the adoption of the August and September Orders.

of the same proceeding and [we]re to be reviewed on the same record made in [the same docket].”). Because petitions challenging the August Order and the September Order may be treated as the same order for purposes of determining where the appeal should be heard, the Court must next look to see when these petitions were filed to determine where the agency must file the record and where all related petitions for judicial review must be transferred.

A review of the timing of the various filings shows that the Ninth Circuit is the proper venue. Portland’s petition in the Ninth Circuit was the first to be filed on October 2, 2018. The MDL wasn’t triggered until nearly three weeks later. Thus, because the Ninth Circuit was the court in which proceedings were “first instituted,” that is the Court in which the FCC must file the record from which both the August Order and September Order arise and this Court should accordingly transfer the petitions challenging the September Order to the Ninth Circuit. *See* 28 U.S.C. § 2112(a)(1); 28 U.S.C. § 2112(a)(5).

Furthermore, it will also be in the interests of the justice for this Court to transfer to the Ninth Circuit. First, the September Order under review in this Court expressly and repeatedly relies on the August Order. *See, e.g.*, August Order at pp. 17 n. 84, 18 n.87, 50 n.272. One of the purposes of the Hobbs Act is to vest “an appellate panel rather than a single district judge with the power of agency review,” and to allow a “uniform, nationwide interpretation of the federal statute

by the centralized expert agency” *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014). Transferring the cases ensures that the decision of the Ninth Circuit on the Third Report and Order and Declaratory Ruling and the decision on the Declaratory Ruling and Third Report and Order will be consistent.

One of the central issues presented in the petition lodged by the City of San Jose and in the *Portland* case is the meaning of the phrase “prohibit or have the effect of prohibiting,” which appears in 47 U.S.C. Section 253 and 47 U.S.C. Section 332(c)(7). In *NCTA v. Brand X*, 545 U.S. 967 (2005), the Supreme Court noted that a Court of Appeals “prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute” *Id.* at 982. The Ninth Circuit adopted an interpretation of the phrase “prohibit or effectively prohibit” based on the unambiguous terms of the statutes in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), and that interpretation was ignored by the FCC in adopting the Order now before the Court. August Order at ¶¶ 34–35. The Ninth Circuit is in the best position to determine if (as we believe is clearly the case) the Order improperly ignored the binding interpretation of the Circuit in issuing the Order that is at issue here.

Finally, it is at least worth noting that, as to appeals before this Court, states and their subdivisions' interests are far more affected by this Order than are the interests of other petitioners. We suspect that the arguments will center around the issues raised by local government petitioners, and those issues will substantially overlap those raised in *Portland*.

Conclusion

For the above stated reasons, San Jose Petitioners believe this Court must transfer all cases appealing the FCC's September Order to the Ninth Circuit.

Respectfully submitted,

/s/ Joseph Van Eaton
Joseph Van Eaton
Best Best & Krieger LLP
2000 Pennsylvania Ave, N.W. Suite 5300
Washington, DC 20006
Phone: (202) 785-0600
Fax: (202) 785-1234

Counsel for San Jose Petitioners

November 29, 2018

CERTIFICATE OF WORD COUNT

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), this motion, produced using a computer, contains 1,822 words.

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018 I filed the foregoing Motion to Transfer with the Clerk of the United States Court of Appeals for the Tenth Circuit through the CM/ECF system. Participants in the cases are all registered CM/ECF and will be served by the CM/ECF system.

Respectfully submitted,

/s/ Joseph Van Eaton

Joseph Van Eaton
Best Best & Krieger LLP
2000 Pennsylvania Ave, N.W.,
Suite 5300
Washington, DC 20006
Phone: (202) 785-0600
Fax: (202) 785-1234

Counsel for Petitioners

November 29, 2018