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)

MONTGOMERY COUNTY, MARYLAND Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, et al. Respondents	Case No. 18-9586 (MCP No. 155)
CITY AND COUNTY OF SAN FRANCISCO Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, et al. Respondents.	Case No. 18-9588 (MCP No. 155)

REPLY OF SAN JOSE PETITIONERS TO OPPOSITIONS TO MOTION TO TRANSFER

The FCC, the Department of Justice, CTIA, the Competitive Carriers Association, Wireless Infrastructure Association, Sprint, and Verizon (collectively, "Opponents") oppose the San Jose Petitioners' motion to transfer this case to the Ninth Circuit on three grounds. First, Opponents argue that the San Jose Petitioners are incorrect in asserting that the *August* and *September Orders* constitute the "same order" because these Orders were released months apart, address different subjects, and are allegedly based on separate records. As discussed in greater detail below, these claims are misleading and improperly focus on superficial differences in an attempt to distract the Court from the interlocking issues at the core of these *Orders*. Second, Opponents challenge the San Jose Petitioners' assertion that transfer is appropriate for the convenience of the parties in the interest of justice. Specifically, Opponents argue that counsel will not benefit from transfer, that potential jurisdictional issues mitigate against transfer to the Ninth Circuit, and that conflicting holdings will not result in a fragmented regulatory scheme. However, these arguments are also without merit because they either ignore relevant facts or rely on conclusory assertions lacking explanation. Lastly, Opponents argue against transfer on the grounds that the Ninth Circuit recently granted a motion to hold the matter before it in abeyance for 60 days. However, as explained below, this development actually favors transfer.

I. FAILURE TO TREAT THE *AUGUST* AND *SEPTEMBER ORDERS* AS "THE SAME ORDER" WILL LIKELY RESULT IN A FRAGMENTED REGULATORY SCHEME

Opponents attempt to undermine the San Jose Petitioners' motion to transfer by focusing on superficial differences between the *August* and *September Orders*. For example, as support, Opponents note that the *Orders* were "adopted by separate votes on separate documents at separate times based on differing records," and that the Orders address "separate and discrete subjects." (FCC Opposition to Motion to Transfer ("FCC Opp."), at p. 2.) Regarding the subjects of each order, Opponents emphasize that the *August Order* concerns pole attachments and state and local moratoria and deals with both wireline and wireless infrastructure, whereas the *September Order* focuses solely on wireless issues such as fees charged by local and state governments, aesthetic requirements, and the timeliness of state and local government authorizations. (*Id*. at pp. 5–6.) While Opponents' arguments note the obvious – that is, the order are not identical - they overstate the differences. In contrast to a decision issued earlier in the year in the wireless docket only, see n. 2 *infra,* the *August* and *September Orders* are issued in the same dockets, and rely on inseparably intertwined interpretations of the Telecommunications Act. The *Orders* together compose a "staggered implementation of a single, multi-faceted agency undertaking," *ACLU v. FCC*, 486 F.2d 411, 414 (D.C. Cir. 1973), that seeks to redefine the relationship between

state and local governments and telecommunications providers by introducing new interpretations of 47 U.S.C. §§253 and 332.

Because of the inseparability of the decisions, and despite Opponents' claims to the contrary, failure to transfer in this instance will result in "fragment[ed] review of directly related and dependent issues." *Mobil Oil Exploration v. FERC,* 814 F.2d 1001, 1003 (5th Cir. 1987). For example, one of the key components of the *September Order* is a Declaratory Ruling that adopts an interpretation of the phrase "prohibit or effectively prohibit" as it appears in both sections 253(a) and 332(c)(7)(B)(i)(II). That interpretation finds an effective prohibition where a requirement inhibits, *inter alia*, "improvements to service," or imposes costs that may prevent a provider from investing in deployment in other areas. The new interpretation is first made in the *August Order*, which declares that moratoria violate section 253(a) because they impede "the introduction of new services or significant improvements to existing services . . . ." (*August Order* at ¶ 162 n. 594). The *September Order* cites to the *August Order* in support of its conclusion (*September Order*, ¶37 n. 87.).

The new interpretation put forth by the *August* and *September Orders* conflicts with Ninth Circuit *en banc* precedent holding that the plain language of Section 253 and Section 332 require an actual prohibition; speculative impacts or mere barriers are not enough. *Sprint Telephony PCS, L.P. v. County of San Diego,*

543 F.3d 571, 578 (9th Cir. 2008). It is very likely that portions of the *August* Order on which the Commission relies will be struck down by the Ninth Circuit, while this Circuit is considering whether the *September* Order can stand. Both Circuits will be considering whether the decision of the Commission to apply Sections 253 and 332 in a manner that does not require an actual prohibition is error. The risk of fragmentation is thus real, and distinguishes this case from those relied upon by opponents of the transfer, *see, e.g., Midwest Video Corp. v. U.S.*, 362 F.2d 259, 260–61 (8th Cir. 1966) (holding transfer not necessary when a second order presented issues "not raised by the first order . . . .").

Furthermore, the *Orders* appear to present conflicting rulings on what constitutes permitted rights-of-way management by state and local governments pursuant to section 253(c). For example, after noting that the TCA does not define "manage[ment of] rights-of-way," the *August Order* limits section 253(c) to "protect[ing] certain activities that involve the actual use of the right-of-way." (*August Order*, ¶160.) However, the *September Order* provides a different definition of rights-of-way management, concluding "that, as a general matter, 'manage[ment]' of the [rights-of-way] includes *any conduct* that bears on *access to* and use of those [rights-of-way] . . . ." (*September Order*, ¶ 94 (emphasis added).) "Any conduct that bears on access" easily encompasses moratoria, especially some of the examples of moratoria listed in the *August Order* such as frost and freeze

laws that are designed to prohibit access to particular roads at particular times to avoid costly structural damage. Thus, refusal to transfer can result in fragmented review of the agency's approach to Section 253(c).

Both *Orders* appear to impermissibly broaden the scope of section 253(a). In the *August Order*, the FCC relies exclusively on section 253(a) to prohibit moratoria that impede the placement and construction of *wireless* facilities. (*See August Order*, ¶142 ("Section 253 applies to wireless and wireline telecommunications services."), ¶144 ("We find that [express and *de facto*] moratoria violate section 253(a) . . . ").) The *September Order* cites section 253 over 300 times, and mimics the *August Order* in explicitly stating that "both [sections 253(a) and 332(c)(7)] apply to wireless telecommunications services..." (*September Order*, ¶36.) That the FCC is issuing orders pursuant to section 253(a) that limit or affect state and local government's ability to regulate the placement, construction, and modification of personal wireless service facilities flies in the face of the plain language of section 332(c)(7)(A) and is a major point of contention in both *Orders*.[1] Once again, the risk of fragmentation is impermissibly high.

[1] Section 332(c)(7)(A) states: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."

Ultimately, failure to transfer will fly in the face of "[t]he public policy underlying section 2112(a), [which] requires that it 'be *liberally applied* to permit review by a single court of closely related matters where appropriate for sound judicial administration.'" *ACLU v. F.C.C.*, 486 F.2d 411, 414 (D.C. Cir. 1973) (quoting *Eastern Air Lines, Inc. v. C.A.B.*, 354 F.2d 507, 511 (D.C. Cir. 1965))(emphasis added); *see also Natural Resource Defense Council v. EPA*, 673 F.2d 392 (D.C. Cir. 1980) ("[C]ourts have recognized that the statutory reference to the 'same order' should be broadly construed."). "[F]ragment[ed] review of directly related and dependent issues" does not constitute sound judicial administration. *Mobil Oil*, 814 F.2d at 1003.

Nor should the Court be persuaded to deny transfer based on Opponents' contention that the *Orders* are based on different records, and separated by time. The *Orders*, issued a little more than a month apart, were driven by the timing of public meetings and not by some bright substantive consideration. Opponents' claim that the record for the *September Order* contains 700 additional *ex parte* letters is disingenuous. The vast majority of these submissions were from individuals who were opposed to 5G deployments because of concerns over RF emissions. All such submissions were summarily dismissed by the FCC in the *September Order* and did not impact its holdings concerning sections 253(a) and

3329(c)(7). (*See September Order* at ¶ 33 n. 72 (dismissing letters concerning RF emissions).)[2]

II. DISCRETIONARY TRANSFER IS ALSO APPROPRIATE PURSUANT TO 28 U.S.C. § 2112(A)(5)

Opponents' arguments against discretionary transfer for the convenience of the parties and for the interest of justice also lack merit.

First, Opponents argue that discretionary transfer for the convenience of the parties is inappropriate because counsel for the San Jose Petitioners are not located in the Ninth Circuit. This is only partially correct. While the lead counsel for the San Jose Petitioners is located in Washington, D.C., two attorneys from his firm's Los Angeles office have substantially contributed to the briefing in these matters.[3] The Los Angeles office is located less than 10 miles from the Ninth Circuit's courthouse, making it much more convenient for the lead counsel for the San Jose Petitioners to plan, prepare, and subsequently argue the cases in the Ninth Circuit than in the Tenth Circuit. *See United Steelworkers of Am. v. Marshall*, 592 F.2d

[2] Opponents also contend that if transfer pursuant to 28 U.S.C. § 2112(a) is appropriate, then the Court should technically transfer the case to the D.C. Circuit, which is reviewing an Order the FCC issued in March in Docket 17-79 in *Nat'l Resources Def. Council et. al. v. FCC*, Nos 18-1135 *et. al.* The *March Order* is not issued in both dockets, and concerns the National Historic Preservation Act and the National Environmental Policy Act of 1969, and not local and state authority. The risk of fragmentation is not as great. Second, the parties have already completed briefing in the D.C. Circuit, so there is no practical way to consolidate the proceedings.

[3] These attorneys include Gail Karish and Avi Rutschman.

693, 697 (3d Cir. 1979) (noting that "[t]he only significant convenience factor which affects petitioners seeking review on an agency record is the convenience of counsel who will brief and argue the petitions . . . ."). As Opponents note in the oppositions, counsel for the Seattle (and Huntington Beach) petitioners are also in the Ninth Circuit.

Second, Opponents argue against transfer for jurisdictional and prudential reasons. Specifically, Opponents contend that the sole petitioner in the Ninth Circuit matter has questionable statutory standing in that matter, and that the FCC filed a petition seeking to hold proceedings in abeyance pending the resolution of several administrative petitions for reconsideration of the *August Order*. As to the first, it is not the job of this Court to determine jurisdictional issues that may or may not be before other circuits. There is no statute or case law that grants a circuit court such authority. And, whatever concern certain Opponents may have, it is not shared by the FCC, which has asked the Eleventh Circuit to move challenges to the *August Order* to the Ninth Circuit. As to the second, the basic assumption of the oppositions as initially filed – that such motions are routinely granted – was belied by the actual action of the court, discussed in the next section.

Lastly, Opponents summarily assert that that there is not "any merit to [the San Jose Petitioner's] claim that the interest of justice requires that the two orders be heard by the same court to ensure consistent outcomes." (FCC Opp. at p. 13.)

Opponents argue this is because the *Orders* stand on their own. (*Id*. at pp. 14–15.) As shown above, there is significant concern that inconsistencies could result if the *Orders* are reviewed by different courts. Moreover, whatever the FCC says, the actual rationale for the *September Order* is dependent in part on the *August Order.* Having chosen to tie the two together, the FCC cannot claim that the interrelationship can be ignored, *SEC v Chenery Corporation*, 318 U.S. 80 (1943).

III. THE NINTH CIRCUIT'S DECISION TO HOLD THE PETITION BEFORE IT ABEYANCE FOR 60 DAYS SUPPORTS TRANSFER

On December 20, 2018, the Ninth Circuit granted in part the motion filed by the FCC seeking to hold the petition before it in abeyance., staying the proceeding before it for 60 days. In its December 21, 2018, supplementary letter pursuant to the Federal Rules of Appellate Procedure 28(j) , the FCC argues that the order provides an additional basis on which to deny the San Jose Petitioners' motion to transfer because it is necessary to resolve this case quickly.

There is a bit of double-speak here. The FCC argues that decision in this docket should not be delayed while at the same time seeking delay in another circuit; and at the same time causing delay by sitting on a motion for reconsideration. The Commission should not be permitted to avoid an otherwise appropriate transfer by delaying action on long-pending motions for

reconsideration.[4] While we agree that speed of resolution is important, the proper solution here, and one which avoids decisional fragmentation, is for the FCC to act on the reconsideration petitions before the 60 days extension expires. If the FCC does not do so, there is no reason to suppose this Circuit or the Ninth need grant any further extensions.

Second, the 60-day abeyance supports transfer by ensuring that when this petition is transferred to the Ninth Circuit, briefing can be coordinated among all pending appeals, and a schedule can be set that will allow all parties time and opportunity to prepare their briefs, without delaying final resolution. Duplicative briefing will be avoided, and issues can be addressed in a manner that ensures the action on issues raised by the *Orders* are subject to a single appellate determination.

[4] The delay in action now exceeds the 90 days that the Commission finds is sufficient to issue wireless permits, traffic control permits, land leases, franchises and all other documents required to permit placement of new poles and towers in rights of way.

IV. CONCLUSION

For the reasons stated above, Opponents arguments lack merit and the Court should transfer the case to the Ninth Circuit pursuant to 28 U.S.C. § 2112(a).

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 and Intervenors

December 24, 2018

CERTIFICATE OF WORD COUNT AND VIRUS PROTECTION

I, Joseph Van Eaton, certify that, pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), this reply, produced using a computer, contains 2,401 words.

I further certify that a virus detection program (Symantec Endpoint Protection version 9.0.1.1000) has been run on the file and that no virus was detected.

/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 and Intervenors

December 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on December 24, 2018, I caused the foregoing to be electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users. All participants in the case are registered CM/ECF users, and service will be accomplished through the CM/ECF system.

/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 and Intervenors

December 24, 2018