UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PUBLIC CITIZEN CRITICAL MASS ENERGY AND ENVIRONMENT PROGRAM, and NUCLEAR INFORMATION AND RESOURCE SERVICE,	)	
Petitioners,	)	
v.	)	No. 04-1359
U.S. NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

PETITIONERS' PARTIAL OPPOSITION TO RESPONDENTS' MOTION TO CONSOLIDATE PETITIONS FOR REVIEW AND TO TRANSFER PETITIONS TO THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Public Citizen Critical Mass Energy and Environment Program (PCCM) and Nuclear Information and Resource Service (NIRS) do not oppose consolidation of the above-captioned case with *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Commission and the United States of America*, No. 04-1145 (1st Cir.) (filed Jan. 27, 2004). Indeed, all parties to both cases agree that the cases should be briefed and argued together. *See* Petitioners' Unopposed Motion for Joint and Extended Briefing Schedule, filed in case No. 04-1359 on March 22, 2004. For the reasons set forth below, however, PCCM and NIRS oppose Respondents' motion to transfer this petition and the petition in No. 04-1145 to the D.C. Circuit.

BACKGROUND

Both petitions for review challenge a final rule issued by the U.S. Nuclear Regulatory Commission (NRC) on January 14, 2004. The petition in No. 04-1145 was filed in this Court on January 27, 2004, by Citizens Awareness Network, Inc. (CAN). Venue in No. 04-1145 is proper in this Court because CAN is incorporated and has its principal offices in Massachusetts. 28 U.S.C. § 2343. On February 13, 2004, the National Whistleblower Center (NWC) and the Committee for Safety at Plant Zion (CSPZ) moved to intervene in No. 04-1145 to challenge the agency order at issue. On February 18, 2004, the Nuclear Energy Institute, Inc. (NEI) moved to intervene in that same case in support of the NRC.

PCCM and NIRS filed their petition on February 20, 2004, in the D.C. Circuit. Venue was initially proper in the D.C. Circuit because both PCCM and NIRS maintain their principal offices in the District of Columbia. 28 U.S.C. § 2343. Because CAN's petition in this Court was the first petition for review of the agency order at issue, and because PCCM/NIR's petition was not filed within 10 days of the agency order, the NRC was required to file the record in this Court. 28 U.S.C. § 2112(a)(1). Under 28 U.S.C. § 2112(a)(5), the D.C. Circuit was required to transfer PCCM/NIR's petition to this Court, as it did on March 3, 2004. On March 17, 2004, NEI moved to intervene in this case in support of the NRC.

ARGUMENT

This Court should decline the NRC's invitation to transfer these petitions to the D.C. Circuit because venue is proper in this Court, CAN's petition was filed first, and the first-filer's choice of forum should be respected absent compelling reasons, none of which is present here. Specifically, the First Circuit is not an inconvenient forum in which to brief and argue this appeal, all the aggrieved parties are content to proceed in this Court, and the forum choice of the agency and the non-aggrieved intervenor is entitled to no weight. Finally, the D.C. Circuit has no special interest in hearing this case.

1. This Court Should Respect the Forum Choice Made by the Aggrieved Party Who Filed First.

There is a presumption in favor of the choice of forum of the aggrieved party who first files a petition for review. *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1204 (D.C. Cir. 1981) ("the court will generally respect the petitioning party's choice of forum," and "the court of first filing will hear the case absent a good reason to transfer it elsewhere"); *Public Service Commission v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (recognizing same presumption). CAN filed the first challenge to the agency order at issue, and the NRC offers no compelling reason to disturb CAN's choice of forum.

In its motion, the NRC never mentions the preference for the first-filer's forum selection. Instead, the NRC asserts that "this Court has not hesitated to transfer cases to

other circuits," NRC Motion at 5, but the cases it cites are inapposite. In *American Civil Liberties Union v. FCC*, 774 F.2d 24, 26 (1st Cir. 1985), venue was not proper in the First Circuit. Similarly, in *Clark & Reid Co., Inc. v. United States*, 804 F.2d 3, 7 (1st Cir. 1986), venue was no longer proper in the First Circuit after one of the petitioning parties was dismissed for lack of standing, and in *Natural Resources Defense Council v. EPA*, 465 F.2d 492, 495 (1st Cir. 1972), this Court transferred the case to the court where the first petition was filed. Where venue has been proper, the First Circuit never has held that the forum choice of a first-filer with standing may be disregarded.

The NRC cites *Liquor Salesmen* and *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 592 F.2d 693, 697 (3rd Cir. 1979), as authority for its list of factors to consider in deciding whether to transfer a case. NRC Motion at 5-6 n.1. However, *Liquor Salesmen* considered those factors only after determining that the first-filers' forum preference could be subordinated because, unlike here, the first-filers were not aggrieved by the agency action below. *Liquor Salesmen* thus found that it was faced with an exception to the "preference for the forum in which the first petition was filed," because the petitioners had been successful before the agency but had appealed first solely in order to forum-shop. 664 F.2d at 1205. Here, the NRC has not suggested that CAN filed its petition in this Court for any improper purpose. Similarly, the Court in *Steelworkers* considered the factors cited by the NRC only after determining that there

was no court of first filing, because the race to the courthouse had resulted in a tie. 592 F.2d at 695. Here, no one disputes that CAN filed first.

2. The Convenience of the Aggrieved Parties Does Not Favor Transfer.

The NRC recognizes that in cases involving judicial review of an agency rulemaking, "it is unlikely that choice of a particular circuit will be a great inconvenience to any party" and that convenience of the parties generally will not be a decisive factor in determining whether to transfer venue. NRC Motion at 6. Nevertheless, it argues that because seven of the eight parties have counsel "in or near the D.C. Circuit," "the convenience of the parties, and particularly the convenience of counsel, weigh heavily in favor of transferring this proceeding to the D.C. Circuit." *Id.* at 7.

Despite the NRC's claim to the contrary, this Court is not inconvenient for counsel representing the five parties who seek relief from the NRC rule at issue (Petitioners CAN, PCCM, and NIRS, and Intervenors NWC and CSPZ), as is obvious, since those counsel all oppose the NRC's motion to transfer venue. Further, the forum choice of the aggrieved parties is entitled to greater weight than the choice of the agency or the non-aggrieved intervenor who seeks to support the agency's position. *ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980) ("It is a well recognized principle that the interests of justice favor placing the adjudication in the forum chosen by the party that is significantly aggrieved by the agency decision."). As several courts have emphasized, the transfer statute was changed in 1958 for the very

purpose of taking the choice of forum away from the agency and giving it to those aggrieved by the agency action. *See, e.g.*, *NRDC*, 465 F.2d at 496 (Congress "was particularly concerned with preventing the agency from selecting the forum"); *Steelworkers*, 592 F.2d at 696; *Industrial Union Department, AFL-CIO v. Bingham*, 570 F.2d 965, 976 n.10 (D.C. Cir. 1977).

The NRC also asserts that CAN's choice of forum is entitled to less weight than the place of the principal office of the other aggrieved parties because CAN is not participating currently in a NRC adjudication governed by the agency rule at issue. NRC Motion at 11-12. However, the fact that CAN has not yet participated in a proceeding subject to the rule at issue does not mean that CAN is not aggrieved or that its injury from the NRC's final rule is somehow diminished. CAN participated in the rulemaking that is the subject of its petition to this Court, and CAN intervenes regularly in the types of proceedings affected by the rule at issue. *See* Petitioner's Opposition to Respondents' Motion to Consolidate Petitions For Review and Transfer Petitions to the District of Columbia Circuit, and Declaration attached thereto, filed in No. 04-1145 on March 22, 2004.

3. Neither the National Scope of the Rule Nor Familiarity with the Issues Favors Transfer to the D.C. Circuit.

Although the NRC argues that the agency rule at issue "will have no unique impact in the First Circuit . . . that might weigh in favor of retaining these proceedings in this Court," NRC Motion at 7-8, neither does the challenged rule — which is national in

scope — have any unique impact in the D.C. Circuit that would militate in favor of transfer. Thus, the rule's place of impact does not favor any forum and does not provide a basis for this Court to disregard the first petitioner's choice of forum and transfer the petitions over the objections of the aggrieved parties.

Similarly, the fact that the D.C. Circuit often addresses issues of administrative law does not favor transfer of these petitions. Congress provided for review of the agency rule at issue in "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." 28 U.S.C. § 2343. That Congress provided petitioners with a choice of venue other than the D.C. Circuit shows that there is no inherent preference for having agency orders reviewed in the D.C. Circuit. Further, the D.C. Circuit has not reviewed the particular specific agency action challenged in these petitions for review. Thus, it has no special familiarity with the issues sufficient to justify transfer from the venue chosen by the petitioner who filed first.[1] As the Second Circuit explained in denying a motion to

[1] Although the NRC speculates about what issues these petitions are likely to present and then argues that the D.C. Circuit has greater familiarity with such issues than does this Court, NRC Motion at 8-10, such speculation regarding the merits of these petitions should play no role in determining whether this Court will transfer venue. *Steelworkers*, 592 F.2d at 697 ("it would be improper, in making a venue determination 'for the convenience of the parties in the interest of justice' to take into account factors bearing on the merits of the agency action under review rather than factors bearing on convenience in carrying on the litigation."). Moreover, as the NRC concedes in its motion, the D.C. Circuit has not resolved the issue that the NRC believes will be key, *i.e.*, the need for formal hearings under the Atomic Energy Act. NRC Motion at 9.

transfer a petition for review to the D.C. Circuit, though "[t]he D.C. Circuit has recognized that there is a significant interest in transferring a case to a court that has already ruled on an identical or related case, . . . that same Circuit has rejected the notion that a case should be transferred to a circuit that has regularly considered cases involving the same industry, or the same type of legal questions." *ITT World Communications*, 621 F.2d at 1208 (citations omitted). The Second Circuit further explained that "[t]he basis for this distinction is apparent: there is no general federal policy of developing specialized appellate tribunals, with established areas of expertise, but there is a policy of unifying related proceedings in a single court, and obtaining consistent results." *Id.* (citations omitted). Denial of the NRC's motion to transfer would serve that policy.

CONCLUSION

For the reasons set forth above, this Court should deny the NRC's motion to transfer this petition and No. 04-1145 to the D.C. Circuit.

Respectfully submitted,

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Dated: March 24, 2004

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