

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC.,)
Petitioner,)
v.) No. 04-1145
U.S. NUCLEAR REGULATORY COMMISSION)
and the UNITED STATES OF AMERICA,)
Respondents.)

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

**RESPONDENTS' REPLY TO OPPOSITION TO
RESPONDENTS' MOTION TO TRANSFER PETITIONS
TO THE DISTRICT OF COLUMBIA CIRCUIT**

On March 12, 2004, pursuant to 28 U.S.C 2112(a)(5), the respondents -- the United States Nuclear Regulatory Commission (NRC) and the United States -- moved (1) to consolidate the two above-captioned petitions for review of a new NRC rule on adjudicatory hearings, and (2) to transfer the consolidated case to the United States Court of Appeals for the District of Columbia Circuit. All the petitioners, and the intervenors on the petitioner's side in case No. 04-1145, have

now responded to the motion.¹ Everyone agrees that the cases should be consolidated,² but the petitioners and the intervenors on their side oppose transfer. We now reply to their responses.

Our motion gave several reasons why that transfer to the D.C. Circuit would serve both judicial economy and "the convenience of the parties in the interest of justice" (28 U.S.C. 2112(a)(5)): Six of the seven parties in these cases are represented by counsel in or near the District of Columbia; the sole petitioner headquartered in this Circuit is not currently participating in any NRC adjudications, but other parties, headquartered in the District of Columbia, are active in current NRC adjudications; the D.C. Circuit has already spoken to a key issue in this litigation; the challenged NRC rule applies nationwide and has no unique effect on residents or nuclear facilities located in this Circuit; and it does not appear that the D.C. Circuit is busier than this Circuit.

To these arguments the petitioners and the intervenors on their side argue principally three propositions: that there is a presumption -- in effect irrebuttable - that venue belongs where the first petitioner files, that the convenience of

¹The National Whistleblower Center (NWC) and the Committee for Safety at Plant Zion (CSPZ) responded jointly on March 17, 2004; Citizens Awareness Network (CAN) responded on March 19; and Public Citizen Critical Mass Energy and Environment Program (PCCM) and the Nuclear Information and Resource Service (NIRS) responded jointly on March 24. On March 19, the NRC and the United States wrote the Clerk of this Court to say that they would be filing a single reply to these responses.

²Partly on this basis the parties agreed to PCCM's and NIRS' March 17, 2004 motion proposing a briefing schedule that would have the petitioners' briefs due May 28, rather than April 19, as in the current schedule.

counsel does not matter, and that there is no reason of judicial economy why it might be better for the D.C. Circuit to rule on these cases. For the reasons below, we disagree. We take up first the responses' notion of a presumption, for it in essence says that this Court has nothing to decide here.

1. *The first filer's choice does not automatically determine the forum.*

PCCM and NIRS argue that "[t]here is a presumption in favor of the choice of forum of the aggrieved party who first files a petition for review." PCCM/NIRS Response at 4. Although PCCM and NIRS say that this presumption can be overcome by "compelling reasons" (*id.* at 3), their argument in effect treats the presumption as irrebuttable, for they argue that the factors we said a court should consider in deciding whether to transfer a case cannot override the first filer's choice of forum. *Id.* at 4-5; *see also* NWC/CSPZ Response at 2 (first aggrieved party has the "privilege of choosing forum").

PCCM and NIRS say that our motion does not mention this -- apparently irrebuttable -- presumption. PCCM/NIRS Response at 3. That is true, because we believe that no such presumption exists. One would look in vain in section 2112 for evidence of an irrebuttable presumption in favor of the first aggrieved filer. Indeed, were there such a presumption, the words in section 2112 permitting transfer "for the convenience of the parties in the interest of justice would be superfluous in almost all cases. Here is ground enough for rejecting PCCM's and NIRS' argument.

But even more, the theory PCCM and NIRS put forward cannot explain those instances in which a case has been transferred out of the circuit in which an aggrieved first-filer, or simultaneous filer, had filed. Our motion cites some such cases. For example, in *United Steelworkers of America v. Department of Labor*, 592 F.2d 693 (3rd Cir. 1979), one petitioner had filed in the Third Circuit and another, simultaneously, in the Fifth. Over the opposition of the petitioners, the cases were transferred to the *D.C.* Circuit, on the grounds of "a strong institutional interest in having these petitions considered in the District of Columbia forum." *Id.* at 698.³

Moreover, PCCS and NIRS cite no First Circuit case in support of their claim, and the cases they do cite do not support their claim. Of the two *D.C.* Circuit cases they cite, the more recent explicitly calls into question even the notion of a *rebuttable* presumption, let alone an *irrebuttable* one. In that case, the *D.C.* Circuit laments the "fierce race to the courthouse" caused by the "commonly held belief ... that the courts of appeals read into § 2112(a) a *rebuttable* presumption that the court of first filing will also decide the case." *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1204 (*D.C.* Cir. 1981) (emphasis added). The court acknowledges that an earlier *D.C.* Circuit opinion

³See also *Peabody Coal Co. v. EPA*, 522 F.2d 1152 (8th Cir. 1975).

suggests a presumption. *Id.* at 1205, n. 6.⁴ But the court goes on to note that "[n]one of the most recent opinions of this court which discuss § 2112(a) refers to any sort of presumption or forum preference" *Id.*

We grant that, as PCCM and NIRS argue (Response at 5-6), one purpose of section 2112(a) is to assure that the agency does not get to choose the forum. We also grant that the court in *Liquor Salesmen's Union* says that it "has respected and will continue to respect an aggrieved party's choice to file a petition for review in this circuit" (664 F.2d at 1204), and that, as PCCM and NIRS say, this Court "never has held that the forum choice of a first-filer with standing may be disregarded." Response at 4. But "respect" and "regard" for the first filer's choice do not amount to an irrebuttable presumption in favor of the first filer. To the contrary, the court in *Liquor Salesmen's Union* says, "Transfer is *entirely* discretionary with the court of first filing." 664 F. 2d at 1205 (emphasis added). That belies the notion that the forum is mechanically determined by the first aggrieved filer. As this Court has pointed out, *see* the cases cited in our motion, at 4-5, under section 2112 the first filer automatically determines which court decides *venue*, but not which court decides the *case*.

We can therefore turn once again to the factors that our motion says courts generally consider in exercising their discretion to transfer a case or not.

⁴The earlier case is *Public Service Commission v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (cited by PCCM and NIRS in their response, at 3).

2. *The convenience of counsel is a relevant factor, and on balance argues for transfer.* NWC and CSPZ claim that the convenience of counsel is not a relevant factor for this Court to consider. NWC/CSPZ Response at 3. They also argue that the First Circuit cannot be inconvenient for the government, because, according to the NWC and CSPZ, the government resides in all judicial circuits, there are nuclear power plants in all circuits, and the NRC has offices and counsel in the First Circuit. *Id.* at 3.

This approach looks for convenience in all the wrong places. To begin with, the cases NWC and CSPZ cite for the proposition that convenience of counsel is not to be considered are all cases under 28 U.S.C. 1404(a), which governs transfers among federal *district* courts, where the convenience of parties and witnesses is of course going to be more important than the convenience of counsel. But even more, NWC and CSPZ simply ignore the cases our motion cites (at 6-7) in which the convenience of counsel was indeed a relevant factor. Indeed, the Third Circuit has gone so far as to say that "[t]he *only* significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions." *United Steelworkers*, 592 F.2d at 697 (emphasis added). There, the union had argued for keeping the litigation in the Third Circuit, because there were 15,000 workers in that Circuit who would be affected by the OSHA rule being challenged. That Circuit itself rejected the union's position: "Neither the location of the plants nor

the location of the workers bears ... on the issue of relative convenience for the review of an OSHA standard Neither the officials of the employers nor the affected employees will appear in court." *Id.*

Similarly here: The nuclear power plants (or their personnel) will certainly not appear in court, the inspectors the NRC has stationed at all the plants in the First Circuit will not be arguing the case, and (despite NWC's and CSPZ's claim, Response at 3) the NRC in fact has no counsel in the First Circuit.

PCCM's and NIRS' argument here is less categorical. They point out that all five parties opposed to the NRC's new rules on adjudication are also opposed to the transfer. However, the test is convenience, not willingness, which is a more subjective standard. The fact remains PCCM and NIRS themselves are represented by Washington lawyers, as is every other party in this case except CAN. Fewer resources will be expended if the case is argued in the D.C. Circuit.

That said, we have nonetheless recognized from the beginning that the choice of a particular circuit is unlikely to be a great inconvenience to any party. *See* Motion at 6. One party, however -- CAN -- takes a different view. In the affidavit attached to CAN's response, counsel for CAN avers that the Executive Director of CAN says that "the additional costs of pursuing [the case] in the ... D.C. Circuit would likely prove prohibitive."

No case, to our knowledge, has considered whether one party's claim of "prohibitive costs" should be decisive in a venue dispute among multiple parties.

Moreover, it seems unlikely to us that transfer in the present case would force CAN to drop its lawsuit. The claim in CAN's affidavit is only that the marginal costs of pursuing the case in the D.C. Circuit would "likely" be prohibitive. CAN's affidavit does not detail the extent of the extra costs it fears, but one could reasonably believe that, assuming transfer, CAN may well choose to pay the extra cost, rather than forgo the opportunity to obtain judicial review of a rule that CAN claims will affect it significantly. That extra cost is likely to be quite small compared to the total costs CAN will bear in pursuing its petition, and not much larger than the costs CAN would have to bear in sending its counsel from his home office in Vermont to Boston to argue the case. Other than travel for oral argument, all other appellate costs would be the same, whether this case is heard in Boston or in Washington, D.C.

3. *Judicial economy would be better served by transferring this case to the D.C. Circuit.* Contrary to the impressions left by the responses, we do not favor the development of specialized appellate courts (*see* PCCM/NIRS Response at 8), nor do we say that the D.C. Circuit has already ruled on any issue likely to be raised in this litigation (*see* NWC/CSPZ Response at 4 and PCCM/NIRS Response at 7), nor do we believe that only the D.C. Circuit should rule on matters of "national interest" (*see* NWC/CSPZ at 4).

Our argument simply points to certain evident facts: The issues, being national, are unlikely to affect residents of this Circuit uniquely (Motion at 7-8);

the D.C. Circuit has addressed -- albeit sometimes in conflicting *dicta* or in ways that did not determine the outcome of the case -- issues relevant to this litigation, as amply demonstrated by the preamble to our new rule, which cites several D.C. Circuit cases (Motion at 9-10). Moreover, the D.C. Circuit is likely to deal with the NRC much more often than this Court is, and with NRC hearing issues in particular (Motion at 10).

Our reliance on these factors does not imply that we believe that only the D.C. Circuit should hear administrative law cases, or cases of national interest. We do not, every time someone sues us outside the D.C. Circuit, move to have the case transferred to the D.C. Circuit. We are saying only that the development of the law, particularly the avoidance of conflicts among the circuits, would be served by transfer of these particular cases, which raise issues already considered in the D.C. Circuit and likely to recur there.

Our approach is fully consistent with case law. Again, *United Steelworkers* is relevant. There, as we noted above, the Third Circuit transferred cases originally filed in the Third and Fifth Circuits to the D.C. Circuit, because of such "institutional interests" as the "relative expertise of a given court of appeals in the area of law under review," and "the desirability of concentrating litigation over closely related issues in the same forum so as to avoid duplication of judicial effort." 592 F.2d at 697-8. Similarly, in *Peabody Coal*, the Eighth Circuit transferred a case to the Tenth Circuit, despite the petitioners' having sued in the

Eighth, because "future litigation on this subject will more probably be in the Tenth Circuit than in any other. It is plain that inconsistent adjudications ... could result if we would hear this case, a result which federal courts must avoid whenever possible" 522 F.2d at 1153.

CONCLUSION

In sum, fewer resources will be spent, and judicial economy will be better served, if this Court transfers these cases to the D.C. Circuit. The NRC and the United States therefore respectfully request that this Court grant their motion to transfer these cases.

Respectfully submitted,

/RA/

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