IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ILLINOIS COMMERCE COMMISSION, Petitioner, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent.	No. 20-1645 Consolidated with Nos. 20-1759, 20-1760, 20-1761, 20-1762, 20-1819, 20-1849, 20-2010, 20-2016

INTERVENOR ELECTRIC POWER SUPPLY ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION TO TRANSFER

Intervenor Electric Power Supply Association ("EPSA") respectfully submits this reply in support of its motion to transfer.

1. Twenty-seven pending petitions for review relating to the same Federal Energy Regulatory Commission ("FERC") orders are currently pending. Nine cases are pending in this Court (the ICC petition was originally filed here; four cases were transferred here from the D.C. Circuit; and four cases were filed here after the MDL lottery). *See* EPSA Mot. to Transfer, App. A, Dkt. No. 51. Six "protective" petitions are pending in the D.C. Circuit; these were each filed well before the ICC filed its petition in this Court. *Id*. Finally, twelve additional cases are pending in the D.C.

Circuit, all of which were filed after the MDL lottery. *Id*.

There is no serious dispute that these twenty-seven petitions—which challenge the same underlying FERC orders—should be consolidated *somewhere*. That is why the procedures contained in 28 U.S.C. § 2112(a) exist. EPSA's motion to transfer is the only proposal anyone has offered to achieve this commonsense goal.[1]

FERC acknowledges the Court's authority to transfer these cases to the D.C. Circuit, and it "agrees with [EPSA] that all petitions for review of the challenged FERC orders should be consolidated in one court of appeals." Response of FERC to Mot. to Transfer, at 1, Dkt. No. 59. FERC, moreover, notes its "preference" for a transfer to the D.C. Circuit, in light of that court's "extensive and recent experience in two areas implicated by these appeals." *Id*. at 2.

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[1] As the parties have described, the D.C. Circuit has asked the parties to address whether it should transfer the twelve petitions for review filed *after the* MDL lottery to this Court. EPSA urged the D.C. Circuit to withhold resolving that issue until this Court addresses this motion to transfer.

The New Jersey Board of Public Utilities, the Public Service Commission of Maryland, the Public Service Commission of the District of Columbia, and the District of Columbia agreed with EPSA that the cases should be consolidated in the D.C. Circuit. *See* D.C. Cir. No. 20-1139, Document No. 1852033 (filed July 16, 2020). So too did the Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists, which have also appeared here. *See* Nonparty Response to Motion to Transfer, at 3 & Ex. A, Dkt. No. 58.

There are no pending motions or orders relating to the six protective petitions filed in the D.C. Circuit. Thus, even were the D.C. Circuit to transfer the twelve petitions filed after the MDL lottery to this Court, the initial six petitions would remain in the D.C. Circuit. EPSA's motion would solve this issue.

Meanwhile, the Environmental Defense Fund, the Natural Resources Defense Council, the Sierra Club, and the Union of Concerned Scientists—nonparties to the petitions presently in this Court, but parties to petitions pending before the D.C. Circuit—have joined EPSA's request for a transfer. *See* Nonparty Response to Motion to Transfer, Dkt. No. 58. They agree that 28 U.S.C. § 2112(a) identifies the D.C. Circuit as the proper venue (*id*. at 3), and additionally that, even if that were not so, a discretionary transfer pursuant to 28 U.S.C. § 2112(a)(5) is warranted (*id*. at 4).

Despite its vehement opposition to this motion, the ICC fails to offer any proposal for consolidating all twenty-seven cases.[2] While the Court's transfer authority in Section 2112(a)(5) may be "seldom" used (ICC Opp. 2, Dkt. No. 57), this case presents rather unusual circumstances. To avoid parallel review of the same orders, either this Court or the D.C. Circuit will have to direct a transfer. Thus, the question is not *whether* a Court should order a transfer. It is *which* Court should do so.

2. 28 U.S.C. § 2112(a) provides the objective guide to make this determination. As we described (EPSA Mot. 8-11), the plain text of Section 2112(a)(1) provides that the D.C. Circuit is the correct venue for the consolidated proceeding. In

[2] The ICC's accusation that our "motion represents obvious forum shopping" (ICC Opp. 2) is difficult to understand. EPSA did not file a petition for review *anywhere*. Rather, EPSA participates as an intervenor in support of respondent FERC. By contrast, when the ICC filed its petition for review in this Court on April 20, 2020, six petitions had previously been filed in the D.C. Circuit, the first of which was filed on February 28, 2020. *See* EPSA Mot. to Transfer, App. A, Dkt. No. 51.

light of *Allegheny Defense*, the petition filed on February 28, 2020, by the New Jersey Division of Rate Counsel is operative. *See* D.C. Cir. No. 20-1059. No one disagrees. Because no petition was filed in this Court until the ICC's petition on April 20, 2020, Section 2112(a)(1) directs that the petition filed by the New Jersey Division of Rate Counsel selects the venue for judicial review.[3]

The ICC's contrary argument (at 7-9) rests on FERC's unilateral referral of this matter to the MDL Panel pursuant to FERC's view at the time that the protective petitions in the D.C. Circuit were jurisdictionally defective. The ICC submits that our position would require this Court to "reverse" the MDL Panel's consolidation order, finding that it "committed a legal error." ICC Opp. 7. It asserts that any such review of the MDL Panel's order is "impermissible." *Id*. at 8. That position is flawed.

First, as we explained (EPSA Mot. 10), the Court's exercise of its Section 2112(a)(5) authority occurs *after*—and thus presupposes—the lottery at the MDL Panel. Our point is not principally that this Court should correct some legal error,

[3] The ICC does not directly join issue. The ICC misses the point when it says that including the protective petitions "in the Section 2112(a)(3) lottery would not have changed the result under the MDL Panel's rules, which give only one entry to each circuit in which a review petition has been filed." ICC Opp. 9 n.4. Plainly read, Section 2112(a) indicates that no lottery should have occurred at all.

Our argument now is not that the ICC's petition in this Court "was jurisdictionally untimely." ICC Opp. 9 n.4. (Though, to be clear, we reserve the right to advance that argument later.) Rather, our point is that, regardless, the first filed petition in the D.C. Circuit governs venue under the rule established by Section 2112(a)(1).

but rather that the rules established in Section 2112(a) should guide how this Court chooses to exercise its discretionary authority under Section 2112(a)(5) to resolve the unusual situation presented here, where the MDL lottery did not in fact result in all cases winding up in the same place.

Second, the ICC substantially overstates the weight of the MDL Panel's Consolidation Order. To begin with, contrary to the ICC's assertion (at 8), the Order was not a "decision" by the "MDL Panel." No judge on the MDL Panel addressed FERC's notice. Rather, in accordance with the Panel's local rules, the "Consolidation Order" was entered by the clerk's office.[4] MDL Panel R. Pro. 25.5.

What is more, nothing in the MDL Panel rules so much as contemplates an adversarial proceeding regarding the propriety of a lottery. Rather, the rules establish that, when an agency submits a notice of multi-circuit petitions to the MDL Panel, the clerk automatically conducts a lottery as a ministerial matter. MDL Panel R. Pro. 25.1-25.6. That is why, after FERC provided the MDL Panel notice on May 5, 2020, the clerk ran the lottery the very next day, on May 6, 2020. *See* MCP No. 160, Dkt. Nos. 1 & 3.

As the ICC apparently sees it, an order issued by a *clerk* at the MDL Panel—entered without the involvement of any judge and done in response to an *ex parte*

[4] The order was signed by Delora Davis, an operations supervisor. And it was witnessed by John W. Nichols, Clerk of the Panel. MCP No. 160, Dkt. No. 3.

proceeding that does not provide for adversarial submissions—binds this *Court*. That would be a surprising conclusion. In fact, it is quite incorrect.

The Wright & Miller passage that the ICC quotes (at 7-8) demonstrates why the ICC is mistaken. Wright & Miller explain, expressly, that the lottery process at the MDL Panel does *not* make legal judgments; it is not, for example, "responsible for determining whether any of the review petitions were properly filed." Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3944 (3d ed.). Rather, if the lottery chooses "a court that lacked review authority or whose review authority was invoked by petitioners who lack standing," whether to transfer the case elsewhere—that is, whether to question the inputs that led to the lottery—is a question "left … to the court selected by the Panel." *Id*. In sum, after an MDL Panel lottery directs cases to a particular court, *that* court then may review questions relating to the lottery through the exercise of its Section 2112(a)(5) authority.

That is just what we urge here: Exercising its Section 2112(a)(5) authority, this Court surely can review whether there was a flawed input at the MDL Panel. If it were otherwise, *no* judge would play any role in the process.[5]

[5] *Beverly California Corp. v. N.L.R.B.*, 227 F.3d 817, 827 (7th Cir. 2000), does not, as the ICC asserts (at 8), hold that "review" of the MDL Panel decision is "impermissible." In *Beverly*, the Court merely recounted the procedural history of the case and added the brief parenthetical to Section 2112(a)(3) of "conferring this responsibility on the Panel." 227 F.3d at 827. That is no basis to hold that actions by the MDL Panel clerk are unreviewable by any court. In fact, as *Beverly* recounts, the MDL Panel had picked the Third Circuit for the consolidated petitions; the Third

Third, the MDL Panel's order was issued prior to the *en banc* D.C. Circuit's decision in *Allegheny Def. Project v. Fed. Energy Regulatory Comm'n*, 2020 WL 3525547, at *6 (D.C. Cir. June 30, 2020). Even if the Panel's Consolidation Order could be understood to resolve the *legal* question whether a lottery was appropriate (to be clear, for the foregoing reasons, the Order entered by a clerk does not make such a legal judgment), *Allegheny Defense* gutted the foundation on which that Order rested. And "the general rule" is that "an appellate court must apply the law in effect at the time it renders its decision." *Henderson v. United States*, 568 U.S. 266, 271 (2013). *Allegheny Defense* cannot, accordingly, be disregarded in the analysis.

3. If the Court disagrees with the foregoing, the question would still remain—whether these cases should be consolidated before this Court or the D.C. Circuit. The prudential and equitable factors weigh—even if only slightly—in favor of the D.C. Circuit. That court is more convenient for the vast majority of parties (which may explain why twenty-two of the twenty-seven cases were originally filed in D.C.), it has a comparatively lighter caseload, and it has substantial expertise relating to FERC proceedings. EPSA acknowledges that these considerations are not overwhelming, and further that this Court has full capability to resolve these petitions. But a consolidation decision needs to be made, and the ICC has not identified any

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Circuit then transferred the case to this Court following the lottery. *Id*. Courts can and do exercise their Section 2112(a)(5) authority to transfer a case after a lottery.

prudential or equitable factors favoring this Court as opposed to the D.C. Circuit.

Whatever the result, EPSA's principal request is a prompt judicial resolution of this unusual situation, so that these cases may proceed to expeditious briefing on the merits.

CONCLUSION

Ultimately, EPSA seeks a prompt and efficient resolution of the twenty-seven pending petitions. Because EPSA's motion is the only mechanism any party has offered to achieve consolidation of these cases before a single court, it should be granted. In all events, EPSA respectfully requests judicial action that results in consolidation of these cases *somewhere*—either in the D.C. Circuit or in this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 23, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system. All parties or their counsel are registered users.

/s/ *Paul W. Hughes*
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