

ENERGY LAW JOURNAL

Volume 25, No. 1

2004

BEYOND THE STOPWATCH: DETERMINING APPELLATE VENUE ON REVIEW OF FERC ORDERS*

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THIS ARTICLE explores possible improvements in the means by which venue is determined among the several courts of appeals on review of orders issued by the Federal Energy Regulatory Commission. The current state of the law' is intimated in the following dispatch from the frontiers of administrative law:

On the afternoon of December 14, 1978, Stephen L. Grossman, an FERC Administrative Law judge, stood poised, stopwatch in hand, waiting for an employee of the Commission to insert a document into a time-stamp machine located in the Commission's Office of Public Information. Nearby, a lawyer for a natural-gas producer also stood poised, one hand raised skyward. Watching the lawyer intently was another lawyer employed by his firm, positioned, arm likewise raised, in the office doorway; two other employees of the same firm completed a human chain to a colleague standing at a public telephone on the second floor of the same building.

As the document entered the time-stamp machine, the first lawyer's hand fell, and Judge Grossman clicked his stopwatch; almost simultaneously other hands along the human chain fell, and, an instant later, a Commission staff member, his ear to a telephone in the same room as the Judge, shouted, "File." Checking his stopwatch, the Judge announced to those present that .95 seconds had elapsed between the time-stamping of the document and the staff member's shout, a considerable improvement over the 2.11 and 1.16 seconds recorded for previous performances of the same exercise by the same actors.

The Judge then timed three heats by a different team, this one assembled by lawyers for a group of natural-gas distributors and a state public service commission. Their times were slower: 1.84 seconds, 1.66 seconds, and 1.36 seconds.

What was going on here? Judge Grossman was dutifully discharging his responsibilities under the Commission's order of November 20, 1978, in *Tenneco Oil Co.*¹, which in turn carried out instructions' by the Court of Appeals

* Originally published as 1 ENERGY L.J. 35 (1980).

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1. FERC Docket Nos. C175-45, *et al.* The author represented one of the petitioning parties in *Tenneco*, although not one of the two participants in the race described in the text.

for the Fifth Circuit² that the Commission make findings of fact as to the court of appeals in which a petition for review of the Commission's Opinion No. 10-A (a hotly contested and economically significant decision)³ had been filed first, and thus in which court venue lay under Section 2112(a) of the Judicial Code.⁴ It was undisputed that both the producer and the public service commission had, by use of relay teams (with open telephone lines to team members at the respective courts), filed shortly after the Commission had time-stamped its order on the afternoon of June 21, 1978. Since however, the producer's petition, filed in the Fifth Circuit, show the same time, in minutes, as the public service commission's petition, filed in the District of Columbia Circuit, since the Fifth Circuit time-stamp does not reflect seconds, and since, in any event, the two courts' clocks did not appear to be synchronized, the question of chronological priority had remained unresolved.

In seeking to illuminate the matter, Judge Grossman conducted three, days of hearings, including sessions not only at the Commission, but *in situ* at the federal courthouses in Washington and New Orleans. In addition to the timed re-enactment of the respective filings described above, evidence was taken from a range of witnesses, including the Clerks of the two circuits, the Secretary of the Commission (who had personally time-stamped the real Opinion No. 10-A), various court and commission personnel responsible for setting various clocks, and lawyers who had participated in the race. Among the issues ventilated on the record was whether the door to the Office of 11 Public Information had been open at the time of the race, and among the, facts disclosed was that one of the teams, anticipating a possible effort to obstruct its line of sight, had actually set up two separate human chains, one being a decoy.⁵

An initial report by Judge Grossman, dated January 19, 1979, was adopted by the Commission, but remanded by the Fifth Circuit for its failure to decide the ultimate issue (who had filed first). A second report, containing the requisite findings,⁶ was likewise adopted by the Commission and lodged with the court on October 3, 1979, some 15 months after the issuance of Opinion No. 10-A. Finally, on April 15, 1980, the Fifth Circuit concluded that it properly had the case and undertook to establish a briefing schedule on the merits.

I. LEGISLATIVE BACKGROUND AND JUDICIAL DEVELOPMENT

Tenneco arose out of the nexus of two separate statutory provisions. First, Section 19(b) of the Natural Gas Act provides that a party "aggrieved" by a Commission order may file a petition for review in the court of appeals for the circuit in which the "natural-gas company to which the order relates" is either

2. Order of Oct. 30, 1978, *Air Products and Chemicals, Inc. v. FERC*, No. 78-2011 (5th Cir. filed June 21, 1978).

3. Opinion No. 10-A concerned the Commission's policy on the reservation by producers of natural-gas reserves in the Outer Continental Shelf for use in their own facilities onshore, or for direct sale to industrial users, rather than for sale to interstate pipelines.

4. 28 U.S.C. § 2112(a) (1976).

5. Docket Nos. C175-45, *et al.*, Tr. at 104.

6. The report concluded that the producer's petition had been filed first.

“located”⁷ or has its principal place of business, *or* in the District of Columbia Circuit.⁸ Second, Section 2112(a) of the Judicial Code, enacted in 1958, specifies that, in cases where appeals from a single agency order have been filed in two or more circuits, the first-filed petition determines the forum.⁹ Matters do not end there, however, because that court may thereafter transfer the proceeding to any other circuit¹⁰ “for the convenience of the parties in the interest of justice.”¹¹ The contestants in cases such as *Tenneco*, therefore, are not necessarily competing to see which court will decide the merits of the order on appeal, but, quite possibly, which court is eligible to entertain motions to transfer venue.

While Section 19(b) applies by its terms only to appeals under the Natural Gas Act, Section 313(b) of the Federal Power Act sets forth virtually identical requirements for appeals under that statute.¹² Moreover, under the Natural Gas Policy Act of 1978 (“NGPA”)¹³ the same result now appears to obtain,¹⁴ except

7. The term “located” has been judicially construed to mean incorporated in the case of corporate petitioners. See *FPC v. Texaco, Inc.*, 377 U.S. 33, 37-39 (1964).

8. 15 U.S.C. § 717r(b) (1976). Section 19(b) reads in pertinent part as follows:

“Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such an order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.”

9. 28 U.S.C. § 2112(a) (1976).

“If proceedings have been instituted in two or more courts of appeals with respect to the same order—the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted.”

10. Thus, the court to which the appeal is transferred need not be one in which the petition could initially have been filed. See *Eastern Air Lines, Inc. v. CAB*, 354 F.2d 507, 511 (D.C. Cir. 1965).

11. 28 U.S.C. § 2112(a) (1976).

12. See 16 U.S.C. § 8251(6) (1976). In addition to the District of Columbia Circuit, petitioners may file in a circuit “wherein the [hydroelectric project] licensee or public utility to which the order relates” either is located or has its principal place of business. Because of the two provisions’ closely similar wording, Supreme Court decisions construing Section 19(b) of the Natural Gas Act have been held applicable to Section 313(6) of the Federal Power Act. See *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1347 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

13. 15 U.S.C.A. § 3301, *et seq.* (Supp. 1979).

14. Section 506(a)(1)(4) of the NGPA (15 U.S.C.A. § 3416(a)(1)(4)) provides that adjudicative orders issued under that statute may be appealed to the District of Columbia Circuit or the circuit in which the “party to which such order relates” is located or has its principal place of business. Use of the term “party” rather than “natural-gas company” apparently reflects the applicability of certain portions of the NGPA to entities other than “natural-gas companies.”

Appeals from NGPA rulemaking orders are governed by Section 506(b) (15 U.S.C.A. § 3416(b)), which provides for judicial review in “. . . any appropriate circuit pursuant to the provisions of Chapter 7 of Title 5, United States Code . . .” The cited provisions of Chapter 7, however, nowhere indicate what constitutes an “appropriate” circuit. In *Ecee, Inc. v. FERC*, 611 F.2d 554 (5th Or. 1980), the Fifth Circuit noted that the cited references “only increase the number of dead ends within the statutory labyrinth.” *Id.* at 561. The court held that, for the purposes of the requirement that the questions on appeal have been raised on rehearing before the Commission, Section 506(a) would be construed as applicable. One of the court’s reasons for so holding was to avoid circumstances in which an order issued under both the Natural Gas Act and the NGPA would be at once reviewable and unreviewable the same reasoning applies to venue. Indeed, the court explicitly stated that:

with respect to certain emergency orders that may be issued under Subtitle III A.¹⁵ Commission orders under the Interstate Commerce Act¹⁶ initially reviewable in the courts of appeals may be appealed to the District of Columbia Circuit, or to the circuit in which the petitioner resides or has its "principal office."¹⁷ Thus the potential for a *Tenneco*-style determination of appellate venue exists on appeal from virtually all FERC orders initially reviewable in the courts of appeals.¹⁸

Indeed, since the race in *Tenneco*, two more races, involving the same courts, the same racing techniques (with some refinements) and some of the same contestants have occurred in the wake of the FERC's Order No. 23.¹⁹ As in *Tenneco*, the Commission has made factual findings at the direction of the Fifth Circuit as to who filed first,²⁰ and, as was true in *Tenneco*, the threshold issue of venue remains unresolved many months after issuance of the orders on review.

A. Legislative History of Section 2112(a)

Prior to the enactment of Section 2112(a), in cases where timely appeals from an agency had been filed in more than one circuit, the choice of appellate forum was not governed by statute. Instead, the agency selected the forum simply by filing the record on appeal with one circuit or another for reasons it deemed good and sufficient.²¹ That initial filing was nonetheless subject to the courts' inherent powers to transfer venue where justified by the particular circumstances before them.²² In the specific case of orders issued by the Federal Power Commission, such transfer was made possible, in part, by the Supreme Court's conclusion that all circuits had *jurisdiction* to review Commission orders and that the specification in Section 19(b) of the Natural Gas Act of the circuits

"Under the view we adopt today, the detailed provisions of [§ 506(a)]1, relating to such questions as venue and the filing of the record, control when rules are involved."

611 F.2d at 565.

15. Section 506(c) of the NGPA (15 U.S.C.A. § 3416(c)) vests in the 'temporary Emergency Court of Appeals exclusive jurisdiction over orders issued under Sections 301, 302, and 303, which provide certain emergency powers to the President. The President is authorized to delegate those powers under Section 304(d) (15 U.S.C.A. § 3364(d)), and in 1977 he delegated similar powers under the Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 4 (1977), to the Chairman of the Federal Power Commission. Exec. Order No. 11969, 42 Fed. Reg. 6791 (1977).

16. 49 U.S.C. §§ 10101 *et seq.* Certain functions under the Interstate Commerce Act were transferred to the FERC under Section 402(b) of the Department of Energy Organization Act, Pub. L. 95-91, 95 Stat. 584 (1977).

17. 28 U.S.C. § 2343 (1976). *See also* 28 U.S.C. § 2321 (1976).

18. Certain orders issued by the FERC under Section 402(d) of the Department of Energy Organization Act are re-viewable in the district courts.

19. Issued March 3, 1979, in Docket No. RM79-22, *rehearing denied in part*, May 11, 1979, appeals pending *sub nom.* Associated Gas Distributors v. FERC, Nos. 79-1276 and 79-14.10 (D.C. Cir.), and Pennzoil Co., *et al.* v. FERC, Nos. 79-1247 and 79-1602 (5th Cir.).

20. *See* order of April 3, 1980, in Docket No. RM79-22. The Commission there adopted the findings of January 3 1980, by an administrative law judge.

21. *See* Hearings on H.R. 6682 Before a Subcomm. of the H. Comm. on the Judiciary. 84th Cong. 2d Sess. 17 (1956). *See also* L. J. Marquis & Co. v. SEC, 134 F.2d 822 (3rd Cir. 1943).

22. *See* Pacific Gas & Electric Co. v. FPC, 272 F.2d 510 (D.C. Cir. 1958).

in which petitions could be filed went only to *venue*.²³

As initially submitted, the legislative proposal that ultimately became Section 2112(a) would simply have narrowed the agency's discretion to require that the forum be chosen on the basis of the parties' convenience.²⁴ The American Bar Association and various federal agencies opposed this solution on the ground that agencies would be able to select the circuit most likely to affirm their orders, and proposed instead the "first-instituted" rule ultimately enacted.²⁵ The ABA also proposed that the new provision specifically codify the courts of appeals' power to transfer venue for the parties' convenience, which change was likewise adopted.

B. "First-Instituted"

If the road to *Tenneco* began with the enactment of Section 2112(a), then *Ball v. NLRB*²⁶ certainly commands 'recognition as a landmark along the way. At issue there was an order issued by the Labor Board in Washington at 10 a.m. The union had filed in the D.C. Circuit within the hour, and the employer had filed with the Fourth Circuit in the afternoon. Citing the venerable principle that "the law does not allow a fraction of a day," the employer sought a writ of mandamus in the Fourth Circuit, directing the Board to file the record there. Not to be outdone, the court (per Judge Sobeloff) invoked, among other things, a 1763 King's Bench decision by Lord Mansfield²⁷ in holding that fractions of a day *do* count and concluding that "first instituted" under Section 2112(a) meant literally that. In terms of policy, the court noted the need for a "definite and easily administered rule" to avoid "unseemly contests" between two or more courts as to which heard the case.²⁸ The court's underestimation of the speed-filing prowess of future petitioners is indicated by its reference to an "hour-and-minute rule," with no mention of seconds.²⁹

23. *Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635, 638-39 (1945) (although venue did not lie with the circuit that heard the case below, the objection, not having been raised, was waived, since it did not go to the question of jurisdiction). The distinction between venue and jurisdiction was also applied in *Georgia-Pacific Corp. v. FPC*, 512 F.2d 782, 783 (5th Cir. 1975), where the petitioner had filed in a circuit not available to it under Section 19(b). Although the time to file had run, the court transferred venue to an "eligible" circuit.

24. See H.R. 6682, 84th Cong., 1st Sess. § 2 (1955). The proposal was advanced by the Securities and Exchange Commission. Hearings on H.R. 6682, *supra* note 21, at 11-12.

25. See *Authorizing Abbreviated Records in Reviewing Administrative Agency Proceedings: Hearings on H.R. 6788 Before Subcommittee No. 3 of the House Comm. on the Judiciary*, 85th Cong., 1st Sess. 38 (1957). Congressman Crumpacker of Indiana stated the grounds for the opposition:

"[A]n agency through experience may learn which courts tend to uphold their viewpoint and which do not uphold their viewpoint, and, on the basis of such experience may develop the practice of selecting the forum where they feel they have a better opportunity of winning their side of the case."

See Hearings on H.R. 6682, *supra* note 21, at 13. The Federal Power Commission was not among the agencies opposing the initial proposal.

26. 299 F.2d 683 (4th Cir.), *cert. denied*, 369 U.S. 838 (1962).

27. "'But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done: For, it is not like a mathematical point, which cannot be divided.'" 299 F.2d at 686 n.4, quoting *Combe v. Pitt*, 3 Burrow 1423, 97 Eng. Rep. 907, 913 (K. B. 1763).

28. 299 F.2d at 686.

29. *Id.*

Since *Ball*, races on appeal from administrative orders have become not only swifter but more common. In the specific case of the FPC and FERC, the area and national rate proceedings concerning wellhead prices under the Natural Gas Act³⁰ as well as other major generic proceedings involving large numbers of parties, seem to have provided some of the impetus. A variety of racing techniques have emerged, ranging from the open telephone line *cum* human chain employed in *Tenneco* to the use of walkie-talkie communications.³¹ In one case, a party simply began filing one petition after another at about the time that the agency order was to issue.³² Moreover, petitions no longer need analyze the issues on appeal,³³ so that petitioners may file without having examined the substance of the agency order.

Some decisions have reflected judicial distaste for the resulting operation of the first-filed test. In *Municipal Distributors Group v. FPC*,³⁴ the District of Columbia Circuit expressed doubt as to whether a "difference of two seconds . . . is sufficiently meaningful to establish the automatic application of 28 U.S.C. § 2112(a),"³⁵ and went on to find that the case should in any event, be transferred to the Fifth Circuit because of its close relation to an area-rate case decided there. In *Saturn Airways, Inc. v. CAB*,³⁶ the same court went out of its way to express its "disapproval of instantaneous petitions for review filed without proper reflection."³⁷ Likewise, in *American Public Gas Association v. FPC*,³⁸ the D.C. Circuit essentially declined to decide the threshold issue, stating that it was "unimpressed . . . by arguments that . . . one or the other filing [is] prior."³⁹

In other cases, however, the courts have entered more heartily into the spirit of the statute, parsing seconds to determine a winner.⁴⁰ These decisions reflect recognition that the very goal of adopting the first-filed test was to establish initial venue clearly and decisively. Thus, in rejecting claims based on other than simple chronology, the First Circuit has observed:

"The statute's purpose is amply demonstrated by the motions which we have addressed; it is to provide a mechanical rule easy of application to avoid confusion and duplication by the courts."⁴¹

30. See, e.g., *Permian Basic Area Rate Cases*, 390 U.S. 747, 755-66 (1968).

31. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 599 (1969).

32. *Shell Oil Co. v. FPC*, 509 F.2d 176 (5th Cir. 1975).

33. See Fed. R. App. P. 15(a) and accompanying notes of the Advisory Committee on Appellate Rules.

34. 439 F.2d 1367 (D.C. Cir. 1972).

35. *Id.* at 1368.

36. 476 F.2d 907 (D.C. Cir. 1973).

37. *Id.* at 910. The same warning was repeated in *Industrial Union Department v. Bingham*. 570 F.2d 963, 970 (D.C. Cjr. 1977).

38. 555 F.2d 852 (D.C. Cir. 1976).

39. *Id.* at 856.

40. See, e.g., *Shell Oil Co. v. FPC*, *supra*, 3119 F.2d at 179, upholding a 25-second priority in the Fifth Circuit.

41. *NLRB v. Wayside Enterprises, Inc.* 314 F.2d 475, 476 (1st Cir. 1973). The court noted, in a footnote to the quoted language, the possible exception of transfer on discretionary grounds, citing a decision in which first filing was not disputed. See also, *United Steelworkers v. Marshall*, 592 F.2d 693, 696 (3rd Cir. 1979).

C. Prematurity of Filing

As a result of claims that the party filing first had jumped the statutory, gun, the courts have been drawn inexorably into the details not only of who filed first, but also of when the agency's order issued for purposes of review. The decisions provide considerable leeway to those who have filed before full, and formal agency action. Thus, in *Saturn Airways, supra*, the District of Columbia Circuit rejected claims that a petition filed after the issuance of an agency press release, but before issuance of the actual regulations at issue, was premature. Likewise, in 1977 the D.C. Circuit upheld the validity of a petition filed after the labor-union petitioner had been briefed with others (including employers) by the Occupational Safety and Hazard Administration s on the substance of the order on review, but before the full text of the OSHA order had actually been issued to the public.⁴² More recently, a petition to review an NLRB order was held valid despite the fact that it had not yet been served on the parties at the time of appeal.⁴³ In so holding, the D.C. Circuit expressed exasperation with the failure of federal agencies to "promulgate straightforward regulations explaining how and when their reviewable orders are to issue"⁴⁴

Some agencies have adopted procedures with respect to specific orders explicitly fashioned to assure a fair start in the courthouse race, and the courts have responded favorably. In early 1979 the Consumer Product Safety Commission provided that a particular rule would not become effective for the purposes of appeal until noon, eleven days after the date of publication in the *Federal Register*. The Fifth Circuit rejected earlier-filed petitions as premature and upheld the agency's procedure.⁴⁵ A closely similar mechanism incorporated into an Environmental Protection Agency order was thereafter approved by the Fourth Circuit as

"A reasonable effort to avoid at least some of the confusion and expense and unseemliness that had developed in the statutorily inspired races to the courthouse."⁴⁶

The EPA has further proposed to make pre-publication the general rule, applicable to all appeals, under the Clean Water Act.⁴⁷ Noting that "lawyers suing the government are placing increased emphasis on racing skills," and specifically condemning *Tenneco* as an "insult to the legal process," the EPA proposes to fix promulgation of its actions under the Act at 1:00 p.m. eastern time, one week after publication in the *Federal Register*.

The FERC has not, to date, proposed or adopted any comparable triggering

42. *Industrial Union Dept. v. Bingham*, note 37, *supra*. Cf. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), (expressing doubt that an FPC certificate had "issued" for the purposes of a contractual right to terminate, where the certificate had been adopted but not made public).

43. *International Union of Electrical Radio, and Machine Workers v. NLRB*, 610 F.2d 956 (D.C. Cir. 1979).

44. *Id.* at 964.

45. *Southland Mower Co. v. Consumer Product Safety Commission*, 600 F.2d 12 (5th Cir. 1979).

46. *Virginia Electric Power Co. v. EPA*, 610 F.2d 187, 188-189 (4th Cir. 1979).

47. *Judicial Review Under Clean Water Act*, 44 Fed. Reg. 32006 (1979). Other major statutes administered by the EPA vest exclusive appellate jurisdiction in the District of Columbia Circuit and thus do not give rise to courthouse races, *Id.*

mechanism, or indeed promulgated any rules as to the hour when its orders are issued for the purposes of judicial review.⁴⁸ The FERC's "sunshine rule,"⁴⁹ under which the Commission's agenda and deliberations are public, allows those who are present or represented in Washington to learn the general substance, and perhaps even the precise letter, of Commission orders before formal issuance.⁵⁰ *Saturn Airways* might thus suggest that filing after a public vote by the Commission on an order is appropriate. The Fifth Circuit nonetheless held in 1979 that "the agency's official time, the time stamped on the [order] is the time of issuance for FERC orders."⁵¹

D. Party "Aggrieved"

Because substantive statutes such as the Natural Gas Act, the NGPA and the Federal Power Act vest in parties "aggrieved" the right to file petition for review, and thereby (if first in time), to lodge venue in a given circuit, litigants may have an incentive to claim aggrievement even where the agency order confers all, or virtually all, of the relief they sought. Indeed farsighted forum shoppers may be induced to advance unrealistic claims before the agency to assure they they will be "aggrieved" by the agency's order.

The courts have been reluctant to reject petitions outright on the ground of inadequate aggrievement. Thus in *Ball v. NLRB*, *supra*, the Fourth Circuit criticized a test that would require it to examine the petitioner's motives.⁵² Similarly, the District of Columbia Circuit has stated that it will only look behind a claim of aggrievement to the extent that the inconsequential nature of the claim is readily apparent.⁵³ Similarly, *comparatively* greater aggrievement has been rejected as a ground for discretionary transfer of venue.⁵⁴

E. Determining Who Filed First

As petitioners have honed their filing techniques, the courts have been harder put to determine chronological priority. They have sometimes looked to the parties' affidavits,⁵⁵ but, as appellate bodies, courts of appeals are inherently ill-equipped to resolve conflicting factual claims. Accordingly, in October, 1978, the Fifth Circuit adopted its present Local Rule 11.5, applicable only to appeals

48. The Commission's rules provide that the day of issuance shall be "the day the Office of the Secretary mails or delivers copies of the order (full text) to the parties or their attorneys of record or makes such copies public, whichever be the earlier."

18 C.F.R. § 1.13(b) (1979).

49. 18 C.F.R. § 1.3a (1979).

50. Conversely, orders are not always available from the Commission's Office of Public Information until after the formal date of issuance that they bear. The result is to shorten the statutory period for appeal for those parties who have not attended the agenda meeting or otherwise been informed of the result beforehand.

51. Order of August 31, 1979, in *Pennzoil Co. v. FERC*, note 19, *supra*.

52. 299 F.2d at 689.

53. See *UAW v. NLRB*, 373 F.2d 671, 673-674 (D.C. Cir. 1967). Lack of aggrievement was found in *Insurance Workers International Union v. NLRB*, 360 F.2d 823 (D.C. Cir. 1966), on the basis of the petitioner's stipulation below as to the scope of the proceeding.

54. See *United Steelworkers v. Marshall*, *supra*, 592 F.2d at 696.

55. See, e.g., *Shell Oil Co. v. FPC*, *supra*, 509 F.2d at 179 n.5.

from the FERC, which provides that

“Any dispute as to priority of institution of proceedings will be referred to the Commission for findings of fact.”⁵⁶

In contrast, the Third Circuit has simply stated that, absent extraordinary circumstances, the respective time stamps will be deemed conclusive.⁵⁷ As a somewhat less absolute position, Judge Bazelon proposed in 1975 that time stamps be conclusive as to which court received the record, with that court free thereafter to look behind time stamps on the issue of priority.⁵⁸

F. Discretionary Transfer

Application of the last sentence of Section 2112(a), allowing discretionary transfer of venue “for the convenience of the parties in the interest of justice” necessarily turns upon the individual facts of each case. The courts have repeatedly held that transfer may be justified where the “receiving” court has reviewed, or has pending before it, another phase of the same controversy or proceeding. Where, for example, an agency order on remand from one circuit is later appealed to a different circuit, transfer to the former has been granted.⁵⁹ Likewise, in *Municipal Distributors Group, supra*, review of one area-rate case was transferred to the circuit in which a prior rate order for the same area had been reviewed.

In contrast, transfer on the basis of another court’s greater familiarity with the general subject matter or with the same legal issues has been denied. In *Public Service Commission v. FPC*, the District of Columbia Circuit declined to transfer one area-rate case to the Fifth Circuit simply because the latter had heard other area-rate cases:

“This motion . . . implicitly invokes a theory of specialization of tribunals. That is not what Congress has provided.”⁶⁰

The same result obtained in *American Public Gas Association*, where the Fifth Circuit’s review of one national-rate order was held insufficient as a ground for transfer of a subsequent order.

G. Deficiencies of the “First-Filed” Test

The drawbacks of Section 2112(a) as a means of determining venue on appeal from the orders of the FERC and other agencies have become self-evident. The problems lie not with the exercise of discretion under the last sentence of the section, but rather with ascertaining initial venue. The court-house race is not only demeaning and wasteful, but unfair to parties that lack the

56. At the time that is first proposed the present Rule 11.5, the Fifth Circuit also proposed to eliminate the notation of minutes on its time stamp. See Proposed Local Rule 24(b), circulated to members of the bar with a letter from the court’s Deputy Clerk dated June 17, 1977, requesting comments. The minute notation was ultimately retained although, as seen in *Tenneco*, the Fifth Circuit’s time-stamp does not show seconds.

57. See *United Steelworkers v. Marshall, supra*, 592 F.2d at 696.

58. Statement of Bazelon, J., in *Abourezk v. FPC*, 513 F.2d 504 (D.C. Cir. 1975).

59. See *Pacific Gas & Electric Co. v. FPC, supra*, 272 F.2d 510.

60. 472 F.2d at 1272. The court cited the rule of *Eastern Airlines, Inc. v. CAB*, note 10, *supra*, allowing one court to review the “same or interrelated” orders and held that “similarity of legal issues” does not suffice.

resources or sophistication to mount a relay system in the style of *Tenneco*. Worst of all, perhaps, the system fails to produce an instantaneously cognizable result, one way or another. The very *least* desirable resolution of a venue dispute is no immediate resolution at all, but rather delay and uncertainty in the interim.

There remains, in addition, the continuing possibility that troubled Judge Sobeloff in *Ball*: two circuits may disagree as to which had received the first petition, with both claiming (or disclaiming) the honor. Conceivably, two courts could issue conflicting orders concerning interim relief.⁶¹ While the courts have apparently resolved these matters to date by informal contacts,⁶² there is no guarantee of continued success in that regard. The very possibility that such a matter could require the Supreme Court's intervention is ample condemnation of the present system. There simply must be a better way.

II. POSSIBLE SOLUTIONS

A. Limitation of Appeals to a Single Court

Responsibility for *Tenneco*-style races can be attributed not only to Section 2112(a), but also to the substantive statutes administered by the FER that allow petitioners to file in any of two or more circuits. The wisdom of having more than one court available to review a given order is not self evident; nor has it been universally applied. As noted above, several major statutes administered by the EPA confine review to the District of Columbia Circuit.⁶³ Section 402(b) of the Communications Act of 1934⁶⁴ provides the same as to certain orders of the FCC, and the House-passed version of the Natural Gas Policy Act contained a similar provision.⁶⁵

At present, only the District of Columbia Circuit has appellate jurisdiction under any of the statutes that limit review of administrative orders to a single circuit. That court's existing prominence among the circuits as a forum for review of agency actions, as well as its convenience to the specialized bar and agencies located in Washington, would make it the most probable choice if jurisdiction to review FERC orders were restricted to a single circuit.

Some commentators, however, have suggested that subject-matter specialization might be distributed among the several circuits:

"SEC cases for example, might be parceled out to the Second Circuit; FPC cases to

61. In *American Public Gas Assn. v. FPC*, *supra*, the D.C. Circuit observed that it had been "in communication" with the Fifth Circuit. 555 F.2d at 861. *See also* *United Steelworkers v. Marshall*, *supra*, 592 F.2d at 695.

62. Sections 19(b) of the Natural Gas Act, 313(b) of the Federal Power Act, and 506(a)(4) of the NGPA all confer upon a court in which a petition for review has been filed jurisdiction to issue stays. When the record is filed with a particular court, that jurisdiction becomes exclusive. In an Order of, June 6, 1979 in *Associated Gas Distributors v. FERC*, note 19, *supra*, the D.C. Circuit disapproved an effort by the Commission to finesse this requirement by filing copies of the record in both circuits in which petitions has been filed.

63. *See* note 47, *supra*.

64. 47 U.S.C. § 402(b) (1976).

65. *See* H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 122 (1978).

the Fifth, CAB cases to the Third, and so on.”⁶⁶

Indeed, if expertise is to be measured by volume, the D.C. Circuit might not be deemed the most expert as to FERC matters; during the twelve-month period ending June 30, 1979, more appeals from FERC orders were filed in the Fifth Circuit than in any other court of appeals.⁶⁷ A wholly new appellate court confined to hearing administrative appeals has also been proposed⁶⁸ and, if created, could likewise serve as an alternative to the D.C. Circuit as an exclusive forum for FERC appeals.

The claimed advantages of limiting all appeals under a given statute or from a given agency to a single court go far beyond elimination of venue contests. As the court becomes particularly familiar with the business of the agency and the industries it regulates, its decision-making is likely to become more surefooted, and to reflect a better feel for individual issues within the broader context of the agency's work. Considerations of economy also apply. The savings in time to lawyers and judges in not having to review, for example, the history of Commission natural-gas curtailment policy in each case involving curtailment is an additional benefit of having a single appellate forum. Another is the absence of potential conflict between circuits.⁶⁹

Pointing in the other direction, however, are factors that, taken in sum, are more compelling. Frequently cited, but perhaps least persuasive with respect to review of FERC orders, is the convenience of the parties. Allowing a petitioner to choose among circuits may reduce or eliminate both the travel required for oral argument and the mail delays between parties and the court. It is unlikely, however, that lawyers for all intervenors and petitioners will be located in a single circuit, other than the D.C. Circuit. As communications and travel have improved, moreover, the physical location of the court has become less and less significant. Litigants on appeal from FERC orders are, generally, large organizations: corporations, associations, or governmental entities. The monetary sums that hang in the balance, even in relatively routine rate cases, not to mention major rulemakings, simply dwarf the costs of taking an appeal in a distant circuit. From the petitioner's standpoint, therefore, the choice of forum is far more likely to be determined by the perceived predisposition of each of the available circuits towards the merits of the particular case than by the inconvenience of proceeding in one court or another. A friendly forum, rather than convenience, is what races to the appellate courthouse are all about.

It should be noted that appeals of FERC orders will differ in this respect from appeals of other agencies' orders. Decisions of the National Labor Relations Board, or the Board of Immigration Appeals, for example, will involve

66. Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L.Rev. 1, 75 (1975).

67. Administrative Office of the United States Courts, *Annual Report of the Director* 49 (1979). The breakdown of FERC appeals among circuits was as follows: D.C.-94; First-5; Second-1; Third-10; Fourth-4; Fifth-107; Sixth-0; Seventh-3; Eighth-0; Ninth-9; Tenth-10.

68. See Currie and Goodman, *supra*, at 80.

69. The need for “even and consistent national application” was cited as the reason for giving the District of Columbia Circuit exclusive appellate jurisdiction over the Clean Air Act. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970).

individuals or smaller organizations, to whom travel costs may be a more meaningful factor.

A second reason for providing a choice of appellate courts that is, like-wise, relatively *unpersuasive* with respect to appeals from the FERC is to bring cases before judges familiar with the locale and circumstances from which the controversy arose. Whatever validity this ground may have with respect to trial-level courts whose job it is to find facts diminishes when one reaches the appellate level, and all but disappears with respect to FERC appeals. For one thing, the Commission often acts by nationwide rulemakings. Moreover, adjudicative proceedings are likely to turn on issues that far transcend the local conditions from which they arose, and in many proceedings the controversy cannot logically be "sited" in any single circuit.⁷⁰

A somewhat more compelling argument in favor of multiple-circuit jurisdiction, advanced by Judge Leventhal in a different context, is that a variety of judicial perspectives actually enhances the quality of appellate decision-making:

"[T]he addition of another view at the intermediate level on an issue of national consequence and highest significance provides a different focus that is not necessarily an evil, but may, on the contrary, serve like a stereopticon to enhance depth perception."⁷¹

Short of outright conflicts, drawing on the experience and ability of judges in several circuits may be preferable, particularly if they are not utter strangers to the general subject at hand. In the particular case of the FERC, appeals are heard predominantly in three or four circuits,⁷² and thus a panel totally unfamiliar with the Commission's business is unlikely.

Perhaps the best reason for not confining appeals from the orders of the FERC, or any agency, to a single court, however, is precisely to *avoid* a degree of familiarity with Commission business that, at least in the minds of the judges, approaches that of the agency itself. Such expertise in the long run is likely to induce the court to exceed the proper scope of review and to arrogate the policy-making function properly vested in the agency.⁷³ The more expert the court, the less inclined it may be to defer to the expertise of the Commission.⁷⁴

70. Interstate oil or gas pipelines, of course, are likely to operate in several different circuits, and their rates and allocation policies cross circuit borders. The strongest case for having a "local" court hear the appeal can presumably be made with respect to hydroelectric proceedings, where circumstances peculiar to the particular project may bear importantly on the decision.

71. Leventhal, A Modest Proposal For a Multi-Circuit Court of Appeals. 24 American U.L.Rev. 881, 908 (1975), quoting *Dellinger v. Mitchell*, 442 F.2d 782, 788 (D.C. Cir. 1971).

72. See note 66, *supra*.

73. See *Currie and Goodman, supra*, at 71.

74. Illustrative of judicial excess in this respect was the District of Columbia Circuit's decision in *Transcontinental Gas Pipe Line Corp. v. FPC*, No. 74-2036 (D.C. Cir, Aug. 1. 1975) On review there was the FPC's rejection of compensation as an element of a curtailment settlement, which had been attacked and defended on the basis of statutory construction. The court *sua sponte* declared itself unable to determine the legality of the compensation scheme without first determining whether in fact a true gas shortage existed on the Transco line. After directing the parties to submit evidence (to the court itself) on the site of Transco's reserves, and finding such evidence inconclusive, the court retained jurisdiction, and ordered the FPC to subpoena Transco's books, conduct a field investigation, and report within 30 days to the court on whether the claimed

It is recognized, of course, that matters of law and policy cannot be neatly delineated and set apart. Even the purest policy decision is subject to reversal, and properly so, if the Commission fails adequately to explain it; or offers an explanation that is manifestly unreasonable. At the same time there remains a sphere of decision-making that rightly belongs to the agency, and that cannot appropriately be invaded upon review. It seems fair to suppose that, in the long run, a multiplicity of reviewing courts will tend to diminish the incidence of such usurpation.

The practical chances of enactment also merit consideration in connection with any proposal to vest exclusive appellate jurisdiction of FERC orders in the D.C. Circuit (or any other court for that matter). The zeal with which parties dash to the D.C. Circuit and Fifth Circuit, for example, suggests the controversy that would surround any proposal that significantly alters access to those circuits on appeal from the FERC. Other things being equal, a less controversial proposal may be preferable, if only because it is more capable of enactment.

B. Amendment of the First-Filed Rule

1. Proposals to Date

Instead of limiting appeals to a single court Congress could, of course, amend Section 2112(a) to provide a different means of determining venue when petitions have been filed in two or more circuits. A number of proposals for such amendment have been advanced, all of which would apply to the orders of other agencies, as well as the FERC.

One commentator has urged the creation of a strong presumption that appeals be heard on the merits by the District of Columbia Circuit, a presumption that could be overcome only by a "rational basis for another choice."⁷⁵ As amended, Section 2112(a) would require that petitions for review be filed with the court of appeals in whose circuit the administrative determination was issued. That court would then transfer to the circuit where the convenience of the parties or the "interests of justice" would best be served, but if those considerations fail to "commend" any circuit, to the District of Columbia. The underlying assumption of the proposal is that "the District of Columbia contains courts and lawyers uniquely familiar with administrative law."⁷⁶

The advantages of the proposed revision are clear. It would determine initial venue instantly, and leave only one court with jurisdiction to issue stays or other orders with respect to the case at any given time.

On the other hand, since all FERC orders are issued in Washington, the

shortage was real. The Supreme Court vacated and remanded the interlocutory order per curiam, *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976). The D.C. Circuit persisted on remand in twice more demanding additional proof that a shortage existed. *Transcontinental Gas Pipe Line Corp. v. FPC*, 562 F.2d 554 (1976), *cert. denied*, 436 U.S. 930 (1978).

75. See Comment, *A Proposal to End the Race to the Court House in Appeals from Federal Administrative Orders*, 68 Colum.L.Rev. 166 (1968).

76. *Id.* at 173-174.

effect of such a proposal would be to lodge all appeals from the FERC initially with the D.C. Circuit, which would be burdened with making discretionary venue determinations regardless of whether they had been sought. Transfer, moreover, would be relatively rare. As noted above, convenience of the parties is unlikely, in the particular context of FERC cases, to point compellingly toward any circuit. The same is true of other considerations that have been given weight under the standard of "the interests of justice," notably relation of the issues on review to a particular locale or region. Thus the D.C. Circuit would, under this proposal, decide virtually all appeals from Commission orders. If, as argued above, that result is an undesirable one from the broader perspective of proper court-agency relationship, the proposed revision would not prove beneficial, at least with respect to FERC orders. Like an outright limitation of appeals to the D.C. Circuit, moreover, it would be perceived as altering the present balance among interests having business before the agency, and thus be less capable of enactment than a solution that essentially preserves that balance.⁷⁷

A second proposal, advanced in 1978 by the Justice Department's Office for the Improvement in the Administration of Justice, would amend Section 2112(a) to require that all petitions for review be transferred, "in the absence of compelling circumstances" to the circuit

"in which a substantial part of the events or omissions giving rise to the proceedings occurred or a substantial part of the property that is the subject of the action is located."⁷⁸

"Compelling circumstances" would be measured in terms of the "convenience to the parties in the interest of justice, sound judicial administration and the application of judicial expertise." Moreover, conflicts between the circuits in making this initial determination would be referred to the Judicial Panel on

77. The author of the proposal dismisses this element of the problem in a puzzling way:

"Perhaps the proposed rule favors those who think that the District of Columbia Circuit tends to be sympathetic to their position. But the favoritism, because random, is unobjectionable."

Comment, *supra*, at 174. If the proposal does entail "favoritism," it is hard to see how that favoritism is "random."

78. See the Office's unpublished memorandum, "Proposal for Improvements in the Federal Appellate Courts" (June 21, 1978) at 3:

"[The proceeding shall be heard and determined by the court of appeals that can do so with the greatest convenience to the parties in the interest of justice, sound judicial administration, and the application of judicial expertise. In the absence of compelling circumstances, that court of appeals will be the one in which a substantial part of the events or omissions giving rise to the proceedings occurred or a substantial part of the property that is the subject of the action is located. Each court of appeals, on its own motion or that of a party, shall transfer such proceedings to the appropriate court of appeals. A proceeding instituted in a court of appeals in which venue is improper may be so transferred by the court. A proceeding instituted in a court of appeals by a party who has received substantially all the relief sought by that party shall be transferred to any other court of appeals in which a proceeding with respect to the same or a closely-related order is pending. If the courts of appeals do not agree on which court of appeals is the appropriate forum under this subsection and multiple proceedings as to the same or closely related orders would result, the issue shall be certified by the courts of appeals or any one of them for resolution to the Judicial Panel on Multidistrict Litigation authorized by section 1407 of this title. The agency, board, commission, or officer concerned shall file the record in the court ultimately so designated by the courts of appeals or said panel."

Multidistrict Litigation. That panel was established in 1968 to avoid conflict and duplication in the conduct of pre-trial proceedings where civil actions involving common questions of fact (e.g., an airplane crash) have been instituted in different districts. It is empowered under Section 1407 of the Judicial Code to transfer such cases to a single district for consolidated pre-trial proceedings.⁷⁹ The panel consists of seven circuit and district judges designated by the Chief Justice.⁸⁰

The Justice Department proposal has little to commend it in the particular case of appeals from FERC orders. The primary standard for determining venue, the situs of the underlying transaction giving rise to the order on review, would not point to any particular circuit in the case of rulemakings and in the case of many, if not most, adjudicative proceedings. That would leave the various circuits in which petitions had been filed with the task of independently determining what venue best served the convenience of the parties and the interests of justice. As noted above, however, those considerations are likely to be inconsequential in appeals from FERC proceedings. The courts would be left, in effect, to weigh feathers.

Apart from the wasted judicial effort (doubly-wasted, since two or more; separate circuits could be engaged simultaneously in the exercise) and delay in the determination of who ultimately hears the merits, the Justice Department proposal would leave no court with exclusive jurisdiction to act on stay requests⁸¹ until all courts in which petitions had been filed had acted upon the motions to establish venue, or, if the courts disagreed with each other, until the Multidistrict Panel had resolved the conflict. In short, the proposal suffers from the lack of what the "first-instituted" test in Section 2112(a) was intended to provide: a quick, mechanical, decisive means of establishing exclusive venue initially, subject to transfer in those cases where the parties' convenience or another consideration so justifies.⁸²

William Warfield Ross and Greer S. Goldman, members of the private bar, have recently advanced a third proposal, which would require an enlarged Judicial Panel on Multidistrict Litigation to determine venue in all cases involving multi-circuit appeals, rather than just in those cases where the circuits disagreed.⁸³ The panel would make its decision on the basis of: (1) the interest of the party most aggrieved by the agency order, (2) the pendency of related proceedings, (3) the local nature of the subject matter of the agency order, and (4) the public interest. If none of the foregoing applied, the court would look to "the facilitation of judicial administration" and "such other considerations as may be relevant." The panel would be required to decide venue within 30 days and its decision could be reviewed only by extraordinary writ. No subsequent

79. 28 U.S.C. § 1407(a) (1976).

80. 28 U.S.C. § 1407(d) (1976).

81. See note 62, *supra*.

82. The Department ultimately decided not to seek enactment of its proposal as to Section 2112(a). The Administration's legislative proposal on court reform contained no provision addressed to courthouse racing. See S. 678 and S. 1477, 96th Cong., 1st Sess. (1979) (the "Federal Courts Improvement Act of 1979.")

83. See Ross and Goldman, "Racing to the Court: An 'Unseemly' Way to Challenge Agency Orders," *The National Law Journal*, March 3, 1980, at 27, col. 1.

motions to transfer venue would be entertained.

This solution, like the Justice Department's, lacks the virtue of an instant, clear-cut, presumptively final venue determination. Like the Department's proposal, it would require judges and lawyers to spend time arguing about the relative weight of factors that are likely to be insubstantial or mutually offsetting.

The factors to be considered are troubling in themselves. Weighing degrees of aggrievement poses particular problems, since it draws the court well into the merits of the case. Moreover, there is no apparent reason why a case should be heard, other things being equal, in the circuit selected by the party who has received the least relief below, even when this consideration is measurable.⁸⁴

Another drawback is that the time spent by the Multidistrict Panel in familiarizing itself with each controversy to the extent necessary to rule on venue would be utterly wasted time with respect to adjudication on the merits, since that adjudication would always be performed by another tribunal. Finally, even if the 30-day limit on its decisions were observed,⁸⁵ the Multidistrict Panel's decision would entail at least some delay in the de-termination of venue, during which time no court would have exclusive jurisdiction to issue stays.

A fourth proposal, also advanced by Mr. Ross and Ms. Goldman, differs from the third only in that the *agency*, rather than the Multidistrict Panel, would determine venue.⁸⁶ The factors to be considered in selecting the appropriate circuit would not change.

This solution brings us essentially full circle, back to the situation prior to the enactment of Section 2112(a), when agencies chose among the eligible circuits, or, perhaps more accurately, back to the original legislative proposal, which would have made clear that the agency's choice was to be determined on the basis of the parties' convenience.⁸⁷ The objection cited then, that the agency would be inclined to choose a friendly forum, remains applicable. Moreover, the selection of the appropriate forum would still be made on the basis of generally inconsequential factors. The burden of weighing such factors would simply be transferred to the agency level.

2. A Further Proposal

The experience under Section 2112(a) has not disproved the wisdom of the idea underlying the "first-filed" rule, that venue is best determined initially on a mechanical basis, to be transferred thereafter if unusually persuasive considerations, either of convenience or otherwise, obtain. What has happened instead is that technology, "sunshine rules," revised requirements as to the content of the petition, and the ingenuity of litigants have overtaken the

84. See text accompanying notes 90-91, *infra*.

85. A statutory requirement that Article III judges render their decisions within a fixed time could be deemed an unconstitutional intrusion by Congress upon the judicial function, which is vested, under Article III, in the judicial branch. The 30-day limit is presumably a severable feature of the proposal, but it points up the fact that referral to the Multidistrict Panel adds some time to the period between agency action and the ultimate decision on review.

86. The proposal accompanies Mr. Ross's unpublished letter of January 10, 1980, to the Administrative Conference of the United States, which has commissioned a study of the courthouse-race problem.

87. See text accompanying note 24, *supra*.

assumption that the rule would yield an uncontroverted, quickly ascertainable result.

Short of fundamentally restricting petitioners' access to the several circuit courts on appeal of FERC orders, a solution whose drawbacks and uncertain prospects of enactment have been described, the most sensible solution at this point is not one that injects judgment and discretion into the initial determination of venue. Instead, it may be well to find a mechanical test that *does* produce a clear-cut result, without the costs, in resources and professional dignity, imposed by the courthouse race.

One such test would be automatically to prefer the circuit selected by the regulated entity (*i.e.*, the natural-gas company, project licensee, or public utility "to which the order relates") over the circuit selected by intervenors. The fact that the Natural Gas Act and Federal Power Act provide for venue in the "home circuit" of the regulated entities, but not in the home circuit of intervenors before the Commission, may suggest that the regulated entities' convenience or preference was given particular weight by the Congress before enactment of Section 2112(a). Vesting the choice in the regulated entities were parties in the proceeding on review, which, as indicated above, is precisely the sort of proceeding most likely to result in a courthouse race.

A more encompassing solution is preferable and available: If petitions had been filed in two or more circuits, the agency would choose among them by lot. Venue could thereafter be transferred upon appropriate showing under the present discretionary standard.

Selection by lot bespeaks solicitude that extraneous factors not intrude upon the result. We have thus resorted to it not only to select which football team receives the kick-off, but which registrants are drafted into the Army. In comparison with the present method, selection by lot would be faster, more decisive, cheaper, and no less dignified.

Likewise the benefits of mechanical determination for this particular type of decision outweigh the benefits of having a discretionary decision on venue in every case as under the proposals described above. It is enough that discretion be applied in those cases where at least one party feels that convenience or the "interests of justice" are sufficiently compelling factors to justify a transfer motion, and another party resists.⁸⁸

Discussion to this point has focused on FERC orders and, as noted, certain factors (notably the relative unimportance of the court's locale, and of the local conditions from which the controversy arose) may not apply similarly to venue on appeal from other agencies. On the other hand, multi-circuit appeals from at least some major agencies, *e.g.*, the CAB, the FCC, and the EPA, would seem amenable to the same solution. Section 2112(a) could be amended to provide selection by lot for multi-circuit appeals from all agencies,⁸⁹ or, if necessary,

88. As under the present system, parties should be able to stipulate to transfer of the appeal to any circuit, regardless of where petitions could initially have been filed.

89. Amendment could be accomplished by striking out the fourth sentence and substituting:

"If proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall select one of such courts by lot and

from some agencies but not others.

Even with selection by lot, courts would still be called upon to determine in specific cases whether a petitioner was sufficiently "aggrieved" within the meaning of the substantive statutes. It cannot, however, be taken as given that only petitioners, as distinct from intervenors, should choose the initial forum on review of agency orders. Intervenors in appeals from FERC and other agency orders include the party or parties who prevailed below, and who may have no less an interest, or even a greater one, than the petitioner in the outcome of the proceedings on review. The statutes might therefore be amended to provide that any party to the proceedings below may file as an intervenor in support of a Commission order within any circuit, and within the time that would be allowed to it as a petitioner, regardless of whether a petition had in fact been filed in the same circuit. Thereafter the selection by lot would include that circuit.⁹⁰ Such an amendment would, of course, remove the need to demonstrate or measure aggrievement, as well as any incentive to ask for more relief from the agency than the litigant really thinks possible.

There are strong arguments against such an amendment. It would encourage interventions by parties with only limited interest in the litigation on appeal, who, unlike petitioners, would not have to file a brief, and who were seeking nothing more than to establish one or another circuit as a candidate for venue.⁹¹ Paperwork for lawyers, the Commission, and courts, as well as the number of cases to be determined by lot, would thereby multiply. Additionally, it is the Commission, and not supporting intervenors, that bears primary responsibility for defending the order on review, particularly at oral argument. Thus, although an intervenor may have as great an interest in the outcome of a proceeding, a petitioner has a greater interest in where the proceeding is conducted, at least from the standpoint of convenience. On balance, the advantages of abolishing the aggrievement standard cannot, at this point, be said to outweigh the disadvantages, but the idea may merit further consideration.

C. Non-statutory Improvements Under the First-Filed Rule

In the absence of statutory amendment, some steps can be taken at least to alter the nature of the present problems, and perhaps to reduce them.

To provide a starting gun clearly and simultaneously audible to all would-be racers, the FERC could adopt a regulation similar to that proposed by the EPA⁹² for publication in the *Federal Register* of all new rules (other than those issued on an emergency basis) prior to their date of issuance for purposes of appeal. Adjudicative orders, which are not presently published in the *Federal Register*, do not lend themselves to this procedure; delay in the time at which such orders

promptly file the record in the court thus selected."

90. If no petition were filed in any circuit, the Commission's order would become final and the intervention notice would be dismissed.

91. Allowing more parties to influence the determination of initial venue does not, however, increase the number of circuits in which petitions may be filed. The available circuits depend, as seen above, on the situs of the entity "to which the order relates" rather than that of the filing party.

92. See note 47, *supra*.

are deemed issued (and thus effective⁹³ could, moreover, have adverse effects (in slowing certificate approvals, for example), extending far beyond the courthouse-race problem. At best the regulations could provide clearly the hour at which adjudicative orders are deemed issued.⁹⁴

The limitations of such starting-gun regulations are self-evident. While fairer to parties outside of Washington, and eliminating the human chains at the Commission, they will leave racers poised, petitions in hand, at the clerk's counter in the several courts, waiting for the second-hand to sweep by issuance-hour. Resolution of venue will turn upon the comparative re-flexes and cooperation of the clerks' office staffs.

Reform at the finish line can likewise achieve some modest gain. Regular synchronization of the respective courts' time-stamp clocks and inclusion of seconds in the time-stamped notation would allow the parties, the agency, and the courts properly to rely upon the notation as conclusive, thereby at least eliminating post-filing evidentiary proceedings such as *Tenneco*. After all, other athletes receive an on-the-spot decision. Surely courthouse racers are entitled to no less.

93. It is doubtful that the Commission could by rule provide that an order becomes appealable at some fixed time *after* it has become effective. The effect would be temporarily to foreclose to petitioners their statutory right to seek a judicial stay, which attaches only upon the filing of the petition. *See* note 62, *supra*. Parties seeking a stay would be remitted to seeking an extraordinary writ. *Cf. American Public Gas Ass'n, supra*, 555 F.2d at 856.

94. All such orders might, for example, be deemed issued at 3:00 P.M. eastern time, allowing racers in all time zones ample time (by *Tenneco* standards) to lodge their petitions while the courts are open.

