

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 22, 2008
LEONARD GREEN, Clerk

UNITED CHURCH OF CHRIST OFFICE OF)
COMMUNICATIONS, INC.; NATIONAL)
CABLE & TELECOMMUNICATIONS)
ASSOCIATIONS, INC.; VALUEVISION MEDIA,)
INC., dba ShopNBC; TIME WARNER CABLE,)
INC.; VERIZON,)

Petitioners,)

NATIONAL CABLE &)
TELECOMMUNICATIONS ASSOCIATION, et)
al.,)

Intervenors,)

v.)

FEDERAL COMMUNICATIONS)
COMMISSION; USA,)

Respondents,)

UNITED CHURCH OF CHRIST OFFICE OF)
COMMUNICATIONS, INC., et al.,)

Intervenors.)

ORDER

Before: CLAY, COOK, and McKEAGUE, Circuit Judges.

These five consolidated cases seek review of an order of the Federal Communication Commission (the “FCC”) amending its rules for commercial leased access of cable channels. National Cable & Telecommunications Association (“NCTA”) moves to transfer the cases to the United States Court of Appeals for the District of Columbia. The FCC, United Church of Christ Office of Communications (“UCC”) and ValueVision Media, Inc. oppose the motion to transfer.

NCTA also moves for a stay of the FCC order pending review by the court. The motion for a stay is supported by Verizon and Intervenor TV One, LLC, National Cable Satellite Corporation, Discovery Communications, LLC, and A & E Television Networks. The FCC, UCC, and Intervenor Caribe Vision Holdings, Inc., Caribe Vision TV Network, LLC, and Community Broadcasters Association oppose the motion for a stay. The NCTA filed a motion for a stay with the FCC on March 28, 2008. To date, there has been no ruling on that motion.

The FCC's order in *Matter of Leased Commercial Access*, MB Docket No. 07-42, was released on February 1, 2008. The multidistrict litigation panel, by random selection, transferred the cases seeking review of the FCC order to this court pursuant to 28 U.S.C. § 2112(a)(3). We may exercise our discretion to transfer the consolidated cases to any other court of appeals “[f]or the convenience of the parties in the interest of justice.” 28 U.S.C. § 2112(a)(5); *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 682 (8th Cir. 2003). NCTA argues that transfer to the D.C. Circuit is warranted because that court has considered the leased access issue in two prior cases, the D.C. Circuit is reviewing a series of FCC orders regulating the cable industry, its chosen forum should be given preference because it is the petitioner most aggrieved by the order, and a transfer will serve the convenience of counsel.

A transfer to another a court of appeals may be appropriate where the same or an interrelated proceeding was previously before that court. Although the D.C. Circuit addressed the prior commercial leased access rules promulgated by the FCC in *ValueVision Int'l, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998), the order on review stems from a separate FCC proceeding. NCTA has not demonstrated that either the prior leased access proceedings or the other proceedings regulating the cable industry currently on review before the D.C. Circuit are sufficiently related to the order before this court to require a transfer to that court. The D.C. Circuit is not to function as a specialized

tribunal with expertise in agency matters, and a “general familiarity with the legal questions presented by a case is decidedly different from acquaintance with the proceedings that gave rise to the order in suit.” *Am. Public Gas Assoc. v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976). In addition, NCTA’s choice of forum and the convenience of counsel do not support a transfer to the D.C. Circuit.

NCTA seeks a stay of the FCC’s order pending review by the court. In considering the motion for a stay, we balance the NCTA’s likelihood of success on the merits and possibility of suffering concrete irreparable harm, the effect of a stay on the numerous other interested parties, and the public interest. *See Grutter v. Bollinger*, 247 F.3d 631, 632 (6th Cir.2001) (order); *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *State of Ohio ex. re. Celebrezze v. NRC*, 812 F.2d 288, 290-91(6th Cir. 1987).

NCTA challenges the new rates set for commercial leased access on the basis that they violate the statutory mandate that the leased access rate must be at least sufficient to assure that the rate will not adversely affect the operations, financial condition, or market development of the cable system. *See* 47 U.S.C. § 532(c)(1). NCTA also argues that the rate formula is not supported by evidence in the administrative record and that the order was issued without a proper notice and opportunity for comment. The FCC and other parties opposing the motion for a stay argue that the NCTA has no likelihood of success on the merits because it has failed to exhaust its administrative remedies because it did not raise these issues in the proceedings below and did not file a petition for reconsideration. They also dispute the merits of NCTA’s arguments.

A petition for reconsideration is not a prerequisite for seeking judicial review except where the appellant “relies on questions of fact or law upon which the Commission, . . . has been afforded no opportunity to pass.” 47 U.S.C. § 405(a); *see Qwest Corp. v. FCC*, 482 F.3d 471, 474-77 (D.C.

Cir. 2007); *Cellnet Commc'n, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998). However, the exhaustion requirement does not require that the specific issue raised on appeal have been presented to the agency for consideration, but merely that the agency have an “opportunity to pass” on the issues. *See Comsat Corp. v. FCC*, 250 F.3d 931, 937 (5th Cir. 2001). A claim that the FCC resolved an issue “by invoking an authority inadequate to justify the decision does not itself raise a novel question of law; it merely asks whether the original question was correctly decided. The Commission necessarily had an opportunity to pass upon the validity of the rationale that it actually put forth.” *MCI Telecomm. Corp. v. FCC*, 10 F.3d 842, 845 (D.C. Cir. 1993); *see also AT&T Corp. v. FCC*, 394 F.3d 933, 938 n.1 (D.C. Cir. 2005). The comments filed with the FCC by NCTA and others assert that any rate set must comply with the statutory mandate and prior FCC orders and argue that any lowering of the rate would adversely affect the financial condition of the cable operators. It appears that the FCC had an opportunity to pass on many of the objections raised by NCTA, and that NCTA has raised some substantial appellate issues.

NCTA argues that the cable operators will suffer irreparable harm in the absence of a stay because the new rate formula sets rates for leased access unreasonable low, which is likely to result in a large increase in requests for leased access. This influx of leased access users, it is argued, will destroy the cable operators’ service tiers and require cable operators to replace other programming to accommodate the leased access users. The resulting disruption will cause customer dissatisfaction, resulting in some cable customers obtaining video programming from other sources, such as satellite and wireless services. The FCC and others assert that these claims of harm are speculative and that potential leased access users and the general public will suffer harm if the court stays the implementation of the new rate formula. NCTA has demonstrated some likelihood of irreparable

harm. The balance of the harms and the public interest, as well as NCTA's potential of success on the merits, supports a stay pending review of the FCC's order.

Therefore, the motion to transfer these appeals to the United States Court of Appeals for the District of Columbia is **DENIED**; the motion for stay of the FCC order pending review is **GRANTED**; and the clerk is directed to expedite these appeals for submission to the court.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, appearing to read "Leonard Green".

Leonard Green
Clerk