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September 30, 2003

*By E-Mail and Federal Express*

Marcia M. Waldron, Clerk  
United States Court of Appeals  
for the Third Circuit  
21400 United States Courthouse  
601 Market Street  
Philadelphia, PA 19106-1790

Re: Prometheus Radio Project, *et al.* v. FCC, No. 03-3388, *et al.*

Dear Ms Waldron:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, the network petitioners submit this letter to apprise the Court of a recent development bearing on their pending Petition for Rehearing En Banc.

Today, the Eighth Circuit issued a decision (a copy of which is attached) that, on facts virtually identical to those here, reached an outcome diametrically opposed to that reached by the panel in this case. The Eighth Circuit, like this Court, had been randomly selected under 28 U.S.C. § 2112 to hear consolidated appeals of an FCC order. Like the FCC order in the instant case, the order under review in the Eighth Circuit had been issued in a statutorily required periodic FCC review that had been merged with proceedings on remand from a prior D.C. Circuit decision.

In these circumstances, the Eighth Circuit stated: “Transfer of a case is appropriate where the same or inter-related proceeding was previously under review in a court of appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary to maintain continuity in the total proceeding.” Order at 2 (internal quotation marks omitted). The court further found that, because “the FCC’s Order on Remand was entered, in part, on remand from the D.C. Circuit,” it was “appropriate for the D.C. Circuit to hear the petitions for review.” *Id.*

The Eighth Circuit reached this result, moreover, despite vigorous oppositions that relied in significant part on the panel’s order denying a transfer in this case. The Eighth Circuit’s order accordingly reinforces the points set forth in the pending Petition for Rehearing En Banc.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Henk Brands', with a long horizontal flourish extending to the right.

Henk Brands

Enclosure

cc: All counsel

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

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No. 03-3212

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Eschelon Telecom, Inc.,

Petitioner

v.

Federal Communications Commission;  
United States of America

Respondents

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\* ORDER  
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Before **RILEY, BOWMAN and MELLOY, Circuit Judges.**

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PER CURIAM.

The consolidated cases before us concern a review of a Federal Communications Commission (“FCC”) order, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (“Order on Remand”). The Order on Remand represents the FCC’s third attempt to craft a decision that comports with the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., the previous order being vacated and remanded by the D.C. Circuit. United States Telecom Ass’n v. FCC, 290 F.3d 415 (D.C. Cir. 2002). Movants filed a petition for review of the Order on Remand in the D.C. Circuit, while other parties filed petitions for review in every other circuit except the Tenth. Pursuant to the random lottery procedure of 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation

transferred the petitions to this Court. Movants request that, as authorized by 28 U.S.C. § 2112(a)(5), the Court transfer the cases to the D.C. Circuit.

While these cases are properly before this Court, “[f]or the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.” 28 U.S.C. § 2112(a)(5). Transfer of a case is appropriate “where the same or inter-related proceeding was previously under review in a court of appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary ‘to maintain continuity in the total proceeding.’” Public Serv. Comm’n for New York v. FPC, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (quoting Pacific Gas and Elec. Co. v. FPC, 272 F.2d 510, 511 (D.C. Cir. 1958); See Arkansas Midland R.R. v. Surface Transp. Bd., No. 00-1206, 2000 WL 1093266, at \*1 (D.C. Cir) (D.C. Circuit transferring a case to this Court because “petitioner is now seeking review of an order entered, in part, on remand from the Eighth Circuit.”).

We find that the FCC’s Order on Remand was entered, in part, on remand from the D.C. Circuit. It is therefore appropriate for the D.C. Circuit to hear the petitions for review.<sup>1</sup> Thus, we grant Movants’ request and transfer the consolidated cases, including all docketed and undocketed cases transferred to the Eighth Circuit from other circuits, to the United States Court of Appeals for the D.C. Circuit. All pending motions, including the Motion to Stay, are included in this transfer order.

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<sup>1</sup> In addition, petitions for mandamus to enforce the D.C. Circuit’s mandate were filed by Movants and are currently pending before that Court, reinforcing the D.C. Circuit’s appropriateness as the venue for the cases currently before us. We also note most of the parties have D.C. counsel of record; consequently, the convenience of the parties prong of the analysis also supports the District of Columbia venue.

## CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of September 2003, I caused one copy of the foregoing letter filed pursuant to FRAP 28(j) to be served by U.S. first-class mail, postage prepaid, upon all parties listed below, and by e-mail upon each party whose name is marked with an asterisk(\*):

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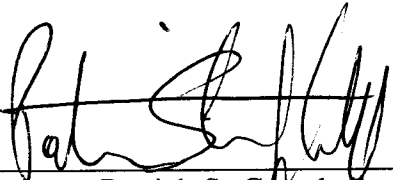
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