

October 1, 2003

Via E-Mail and U.S. Postal Service



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

RE: *Prometheus Radio Project, et al. v. FCC and United States*
No. 03-3388 (and consolidated cases)

Dear Ms. Waldron:

The Network Petitioners' September 30, 2003 letter is unauthorized. Nor do Rule 28(j), FRAP, or this Court's Local Appellate Rules and Internal Operating Procedures contemplate unsolicited response to petitions for rehearing. Citizen Petitioners thus face a dilemma, as silence might be deemed acquiescence. To the extent leave is necessary, Citizen Petitioners respectfully ask the Court to accept this response.

The Network Petitioners incorrectly state that the Eighth Circuit's new decision was based "on facts virtually identical to those here."

The many distinctions between this case and the Eighth Circuit's case underscore that the difference between the *Prometheus* panel majority and dissent is not a dispute as to "the statement of the law;" and that "the controverted issue is solely the application of the law to the circumstances of the case." IOP, 9.3.2.

The decision on review before the Eighth Circuit was styled *by the FCC* as an "Order on Remand." Here, by contrast, the FCC terminated the two dockets reviewed in *Fox* and *Sinclair* and initiated a new proceeding, with a new docket number, to review *all* its ownership rules. The judicial remand in *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) was dramatically different, and the D.C. Circuit closely monitored the proceeding. The Court entirely vacated two FCC decisions, then granted a limited stay of its *vacatur* and withheld its mandate based on the FCC's stated intent to adopt new rules by the end of 2002. *Order, USTA v. FCC*, No. 00-1012 (D.C. Cir. September 4, 2002). The FCC sought and received an additional extension of the stay through February 20, 2003 to complete its actions on remand and issue new rules. *Order, USTA v. FCC*, No. 00-1012 (D.C. Cir. December 23, 2002); *Emergency Consent Motion of the FCC to Extend Partial Stays of Mandates* (filed December 4, 2002).

Another key distinction is that there are two related *mandamus* petitions pending in the D.C. Circuit.

Thus, the discretionary transfer requested is not appropriate and will not interfere with “continuity in the total proceeding.” *Public Service Commission v. FPC*, 470 F.2d 1270 (D.C. Cir. 1972).

Respectfully submitted,

/s/

Andrew Jay Schwartzman
Counsel for Citizen Petitioners

cc. Counsel (via email and U.S. Postal Service)

CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, certify that, on this 1st day of October, 2003, I caused to have the foregoing letter served by First Class Mail upon each party listed below and by email upon each party whose name is marked by an asterisk:

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