

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

REMI RETAIL COMMUNICATIONS LLC,)	
)	
)	
Petitioner,)	
)	
v.)	No. 05-1629
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	

JOINT MOTION FOR EXPEDITED TRANSFER

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The United States Telecom Association (“USTA”), BellSouth Corporation, Qwest Communications International Inc. (“Qwest”), SBC Communications Inc., and the Verizon telephone companies (collectively, “movants”) respectfully request that the Court exercise its authority under 28 U.S.C. § 2112(a)(5) to transfer these cases to the D.C. Circuit “[f]or the convenience of the parties in the interest of justice.” Movants are authorized to state that respondents the Federal Communications Commission (“FCC” or “Commission”) and the United States do not oppose this motion.

These cases involve challenges to the FCC’s latest order purporting to implement the specific provisions of the Telecommunications Act of 1996 (“1996 Act”) that require the agency to determine what network facilities incumbent telephone companies must make available to their competitors at regulated rates. The D.C. Circuit has vacated and remanded two prior FCC orders that purported to fulfill that duty. The decision at issue here, the *Order on Remand*,¹ is the FCC’s latest order on these issues. As its name indicates, this FCC decision is in all respects a response to the D.C. Circuit’s most recent remand. The FCC has thus stated that the decision at issue “focuses on those issues that were remanded to [it].” *Order on Remand* ¶ 19.

Movants petitioned for review of the *Order on Remand* in the D.C. Circuit.² Other parties filed petitions for review in this Court as well as the Seventh and Ninth Circuits.³ On March 14, 2005, in accordance with the random selection procedure set forth in 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation consolidated the cases in this Court.

¹ *Order on Remand, Unbundled Access to Network Elements; Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, FCC 04-290 (rel. Feb. 4, 2005) (“*Order on Remand*”).

² *See USTA, et al. v. FCC, et al.*, No. 05-1058 (D.C. Cir.).

³ *See DataNet Systems, LLC v. FCC, et al.*, No. 05-1475 (7th Cir.); *Utility Telephone, Inc. v. FCC, et al.*, No. 05-71163 (9th Cir.).

See Exh. A attached hereto. Because “the same or inter-related proceeding was previously under review” in the D.C. Circuit, and the matter “is now brought for review of an order entered after remand,” these consolidated cases should be transferred to the D.C. Circuit to permit that court to determine whether the FCC has complied with its mandates. *Public Serv. Comm’n for New York v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (per curiam).

Indeed, that is precisely the course of action that the Eighth Circuit followed in the last round of appeals in these same proceedings. When the FCC issued an order in 2003 in response to a previous D.C. Circuit decision involving these same issues, the Eighth Circuit was randomly selected as the court for initial consolidation of the multiple petitions for review of the FCC’s decision on remand. The Eighth Circuit transferred the cases to the D.C. Circuit, holding that, because the FCC order at issue “was entered, in part, on remand from the D.C. Circuit,” it was appropriate for that court to decide whether the FCC had complied with the prior mandate. *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 682 (8th Cir. 2003) (per curiam). That principle applies with added force here, where the appeals at issue are from the FCC’s response to the D.C. Circuit’s *second* remand and where the central question is whether the Commission has finally adhered to *both* prior D.C. Circuit decisions.

Also weighing in favor of transfer here are additional factors that were not present in *Eschelon*. First, the D.C. Circuit currently has before it petitions for review of a prior FCC order, the *Interim Order*,⁴ in these same proceedings. Indeed, this Court recently transferred a petition for review of that order to the D.C. Circuit.⁵ The pendency of a related proceeding in the D.C.

⁴ Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783 (2004) (“*Interim Order*”), *petitions for review pending*, Nos. 04-1320 & 05-1062 (D.C. Cir.).

⁵ See Order, *Pennsylvania Pub. Util. Comm’n v. FCC*, No. 04-4303 (3d Cir. Feb. 23, 2005).

Circuit — a proceeding that the D.C. Circuit may well consolidate with this one — strongly supports transfer here.

Even beyond that, there is a significant question as to whether the petition for review filed in this Court is procedurally proper. Although well over 100 parties filed comments with the FCC in response to the August 2004 Notice of Proposed Rulemaking that gave rise to the *Order on Remand*, the lone petitioner here, Remi Retail Communications, was not one of them. *See Order on Remand*, Appendix A. Indeed, movants' research indicates that Remi last filed a document with the FCC in these dockets in 2002, well before the D.C. Circuit remand that gave rise to this FCC order. There is thus a substantial question as to whether Remi's petition is valid.

In any event, Remi and all other petitioners from the FCC's order (other than movants) are represented by the same Washington-based counsel. Counsel for movants, as well as for the FCC and the United States, are likewise in Washington, D.C. For that reason, just as in *Eschelon*, "the convenience of the parties prong of the analysis also supports the District of Columbia venue." 345 F.3d at 682 n.1.

Movants request expedited consideration of this motion. Movants have filed in the D.C. Circuit a request to stay part of the new FCC rules that became effective on March 11, 2005. To allow the stay request to be addressed by the same court that ultimately will hear the merits appeal, movants respectfully request that this Court require responses to this motion to be filed within 6 calendar days (by March 22) and any reply to be filed 3 calendar days later (by March 25).⁶

⁶ To ensure expedited receipt of this motion, movants have served all parties to the various appeals by hand or overnight delivery, as well as by email. The Court should direct that any responses and the reply be similarly served.

BACKGROUND

A. The 1996 Act seeks to transform local telecommunications from a market characterized by exclusive franchises to one in which “meaningful facilities-based competition” flourishes. S. Conf. Rep. No. 104-230, at 148 (1996). Because new entrants into local telecommunications, known as competitive local exchange carriers (“CLECs”), might not be able to duplicate immediately *every* aspect of a local telephone network, the statute allows them to obtain “[s]ome facilities and capabilities” — known as “unbundled network elements” or “UNEs” — from incumbent local exchange carriers (“ILECs”), including movants here. *Id.*; *see* 47 U.S.C. § 251(c)(3). Section 251(d)(2) of the statute, however, imposes strict limits on the extent to which the FCC can require such sharing. *See id.* § 251(d)(2) (FCC may order unbundling only if competitors would otherwise be “impaired” in their ability to provide service).

B. Each of the FCC’s first three unbundling orders failed to adhere to the statutory limits on unbundling. Instead, those rules required ILECs to unbundle virtually every traditional facility everywhere in their networks.

In 1999, the Supreme Court vacated the first set of FCC unbundling rules as inconsistent with the text of the 1996 Act. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-91 (1999). The Court explained that, if Congress had intended to permit “blanket access to incumbents’ networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all.” *Id.* at 390.

Undaunted by this Supreme Court decision, when the FCC adopted new rules, it again required “blanket” unbundling of almost all narrowband facilities. *See generally USTA v. FCC*, 290 F.3d 415, 419-21 (D.C. Cir. 2002) (“*USTA I*”) (describing the FCC’s 1999 “unbundling” rules), *cert. denied*, 538 U.S. 940 (2003). USTA and Qwest, among the movants here, petitioned

for review of these 1999 unbundling rules in the D.C. Circuit. In *USTA I*, the D.C. Circuit vacated the FCC's unbundling rules for traditional facilities because the Commission had still not limited unbundling in the manner required by the 1996 Act. *See id.* at 422 (FCC had required unbundling "in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have [been] the object of Congress's concern"). The D.C. Circuit thus granted the petitions for review and "remand[ed]" the matter "to the Commission for further consideration in accordance with the principles outlined [in the opinion]." *Id.* at 430.

In August 2003, the FCC again adopted a new set of unbundling rules that, the agency claimed, adhered to the D.C. Circuit's *USTA I* decision. Yet again, however, the FCC's decision, which was known as the *Triennial Review Order*,⁷ effectively preserved blanket nationwide unbundling for traditional voice and data facilities. Indeed, FCC Chairman Powell himself emphasized in dissent that the unbundling determinations contained in the *Triennial Review Order* "flout[ed]" the D.C. Circuit's *USTA I* mandate. *Triennial Review Order*, Powell Statement at 4.

Movants again petitioned for review in the D.C. Circuit. In a concerted attempt to prevent the D.C. Circuit from reviewing the FCC's compliance with *USTA I*,⁸ other parties filed petitions for review in every other federal court of appeals except the Tenth Circuit. Pursuant to

⁷ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

⁸ As one CLEC explained in outlining this strategy, "it's critical to get this thing out of the D.C. Circuit almost at all costs," and "[t]he more [CLECs] that appeal this in the non-D.C. Circuit the greater likelihood you're going to get this litigated someplace else." TR Daily, Feb. 26, 2003 (quoting Rob Curtis, President of Z-Tel Network Services).

the random lottery system established under 28 U.S.C. § 2112(a)(3), the petitions for review were consolidated and transferred to the Eighth Circuit.

The same parties that are movants here immediately asked the Eighth Circuit to transfer those consolidated cases to the D.C. Circuit under section 2112(a)(5) “[f]or the convenience of the parties in the interest of justice.” In *Eschelon*, the Eighth Circuit granted that request. The court reasoned that transfer was “appropriate” because the *Triennial Review Order* “was entered, in part, on remand from the D.C. Circuit.” 345 F.3d at 682. Additionally, the Eighth Circuit noted that “most of the parties have D.C. counsel of record,” which meant that “the convenience of the parties prong of the analysis also supports the District of Columbia venue.” *Id.* at 682 n.1.

Once the matter was transferred to the D.C. Circuit, that court scheduled highly expedited briefing and argument. Then, in its March 2004 *USTA II* decision,⁹ the D.C. Circuit determined that, with respect to unbundling of traditional facilities, the FCC had again failed to adhere to the plain language of the 1996 Act or to that court’s prior instructions. *See* 359 F.3d at 595. Indeed, the D.C. Circuit expressly rebuked the FCC for its “failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings.” *Id.* The Court again vacated the FCC’s unbundling rules for traditional facilities and stayed its vacatur for only 60 days to ensure prompt FCC action. *See id.*

C. Instead of adopting new, lawful rules within the 60-day window, the FCC in August 2004 adopted an *Interim Order* that reinstated the agency’s blanket unbundling rules for up to six months while the agency considered new rules. *See Interim Order* ¶ 29. Movants again petitioned for review in the D.C. Circuit. That petition is currently pending in that court,

⁹ *See USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) (“*USTA II*”), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

as is a separate petition for review of the *Interim Order* that this Court transferred to the D.C. Circuit in February 2005.¹⁰

D. In February 2005, the FCC adopted the *Order on Remand* at issue here. As the very title of that document suggests, that order is the FCC's latest response to the D.C. Circuit's remand instructions. *See, e.g., Order on Remand* ¶ 19 ("Our decision today . . . focuses on those issues that were remanded to us."). The FCC's decision, however, still requires wide unbundling of certain basic facilities (known as high-capacity loops and transport) that are used to serve business customers even though competitors can and do compete without UNE access to that equipment. By the FCC Chairman's own account, the *Order on Remand* continues to mandate UNE access to these high-capacity facilities in the "overwhelming majority of markets." *Order on Remand*, Powell Statement at 1.

Movants have again petitioned for review in the D.C. Circuit and, on March 7, 2005, filed a motion for expedition and limited stay.¹¹ The stay request applies to the FCC's conclusion in the *Order on Remand* that competitors that are already competing successfully using tariffed services may nevertheless "convert" those same facilities to UNEs. *See Order on Remand* ¶¶ 229-232. These conversions allow competitors to receive the same service that they always have, but at "subsidized and below cost[]" UNE rates,¹² instead of special access rates. That result is directly contrary to the guidance provided by the D.C. Circuit in *USTA II*. *See, e.g.,* 359 F.3d at 593 ("the presence of robust competition in a market where CLECs use critical ILEC

¹⁰ *See Order, Pennsylvania Pub. Util. Comm'n v. FCC*, No. 04-4303 (3d Cir. Feb. 23, 2005). On March 2, 2005, the D.C. Circuit re-docketed that appeal as No. 05-1062 and consolidated it with movants' appeal, No. 04-1320.

¹¹ Movant Qwest did not join the expedition/stay motion.

¹² *See* Jeremy Pelofsky, *FCC Chief Denies Leaving, Outlines Media Agenda*, *The Star-Ledger* (Newark, NJ), Aug. 19, 2003, at 32 (quoting FCC Chairman Powell).

facilities by purchasing special access . . . precludes a finding that the CLECs are ‘impaired’ by lack of access to the element” as a UNE).

Other parties filed petitions for review in this Court, as well as in the Seventh and Ninth Circuits. On March 14, 2005, the Judicial Panel on Multidistrict Litigation, acting under 28 U.S.C. § 2112(a)(3), randomly selected this Court as the initial forum in which to consolidate the petitions for review. *See* Exh. A.

DISCUSSION

The same statute that establishes the lottery system also makes clear that the court selected under the lottery may, “[f]or the convenience of the parties in the interest of justice,” transfer the consolidated proceedings “to any other court of appeals.” 28 U.S.C. § 2112(a)(5). The lottery determines only “which court will determine venue, not which court will ultimately hear the case.” *Liquor Salesmen’s Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981) (emphasis omitted). “In evaluating a transfer motion, a court will consider the policies of sound judicial administration, such as: one circuit’s familiarity with the issues and parties from prior litigation; the need for continuity and consistency in reviewing a series of agency decisions; and, the facilitation of judicial economy.” *Abourezk v. FPC*, 513 F.2d 505, 505 n.1 (D.C. Cir. 1975) (statement of Bazelon, C.J.).

A. The circumstances here overwhelmingly argue for transfer of the proceedings to the D.C. Circuit to permit that court to determine whether the FCC has adequately complied with that court’s prior mandates. Indeed, the argument for allowing the D.C. Circuit is even more compelling than it was when the Eighth Circuit, in *Eschelon*, transferred petitions for review from the *last* FCC unbundling order to that court of appeals. In *Eschelon*, the court concluded that the fact that the FCC acted, “in part, on remand from the D.C. Circuit” made it “appropriate

for the D.C. Circuit to hear the petitions for review.” 345 F.3d at 682. Here, the FCC order is a response to the D.C. Circuit’s *two* prior mandates in *USTA I* and *USTA II*.

Moreover, *Eschelon* itself is firmly rooted in decades of precedent establishing that, in this Court’s words, it is “desirab[le]” to “concentrat[e] litigation over closely related issues in the same forum so as to avoid duplication of judicial effort.” *United Steelworkers v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979). Transfer is thus appropriate when, as here, “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.” *Public Serv. Comm’n*, 472 F.2d at 1272. A long series of cases support that conclusion.¹³

As in *Eschelon* and these prior cases, transfer is also supported by considerations of comity to a co-equal court. The D.C. Circuit, the court that issued the decisions vacating the prior FCC orders and providing the guidance to which the FCC was required to adhere on remand, should be permitted to determine whether and to what extent the FCC has in fact

¹³ See, e.g., *Arkansas Midland R.R. Co. v. Surface Transp. Bd.*, No. 00-1206, 2000 WL 1093266, at *1 (D.C. Cir. June 8, 2000) (per curiam) (“Although venue is proper in this court, the same or interrelated proceedings were previously under review in the Eighth Circuit Court of Appeals, and petitioner is now seeking review of an order entered, in part, on remand from the Eighth Circuit. Transfer to the Eighth Circuit, therefore, is appropriate ‘[f]or the convenience of the parties in the interest of justice.’”) (quoting 28 U.S.C. § 2112(a)(5)) (citation omitted; alteration in original); *ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980) (“there is a significant interest in transferring a case to a court that has already ruled on an identical or related case”); *American Pub. Gas Ass’n v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976) (per curiam) (where review is sought of an “order entered after remand, . . . the desirability of continuity in the total proceeding calls strongly for handling by the same reviewing tribunal”) (internal quotation marks omitted); *Farah Mfg. Co v. NLRB*, 481 F.2d 1143, 1145 (8th Cir 1973) (per curiam) (transfer appropriate where a “court has already passed on some controversies between and among the contending parties and is familiar with the background of th[e] case”); *Pacific Gas & Elec. Co. v. FPC*, 272 F.2d 510, 511 (D.C. Cir. 1958) (per curiam) (review of agency order in the D.C. Circuit was proper “to maintain continuity in the total proceeding, and because our prior order is involved”); S. Rep. No. 100-263, at 6 (1987) (amendment to section 2112 is “not intended to change the practice of having sequential or closely related orders issued in the course of the same or interrelated administrative proceedings reviewed by the circuit court reviewing the initial order”).

complied with that court's mandates. Otherwise, this Court will be in the position of "constru[ing] a prior order of another circuit," which could lead to unnecessary inter-circuit tension. *Pan Am. World Airways, Inc. v. CAB*, 380 F.2d 770, 775 (2d Cir. 1967), *aff'd mem.*, 391 U.S. 461 (1968) (per curiam); *cf. EEOC v. University of Pennsylvania*, 850 F.2d 969, 974 (3d Cir. 1988) ("Comity must serve as a guide to courts of equal jurisdiction . . . to avert conflicts and to avoid 'interference with the process of each other.'" (quoting *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922))); 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3937.1, at 699 (2d ed. 1996) ("[I]n practice, it is better that enforcement be controlled by the court that is responsible for the judgment, that understands the reason for the judgment and the limits of those reasons, and that can — when warranted — reconsider or modify the judgment.").

This Court's unpublished decision in *Prometheus Radio Project v. FCC*, Nos. 03-3388 *et al.* (3d Cir. Sept. 15, 2003), does not suggest a different result. The *Prometheus* Court did not dispute that petitions that relate closely to cases that were previously before a federal court of appeals should be transferred to that court. Instead, it found that the case at issue was "not closely enough related to warrant transfer." *Id.*, slip op. at 4. The order at issue was a "comprehensive" and "statutorily mandated" review of media ownership rules, and only two of those rules were implicated by a prior court of appeals decision. *Id.* (internal quotation marks and emphasis omitted). Indeed, any similarity between the prior case, which had been litigated in the D.C. Circuit, and the matter then before this Court was so "highly generalized" that, if transfer were appropriate there, "then all appeals from FCC media ownership rulemaking would effectively be placed before the D.C. Circuit Court." *Id.* at 5.

Here, far from being a statutorily required review that encompassed many matters not related to the prior D.C. Circuit rulings, the *entire* FCC order at issue here responds to the D.C.

Circuit’s vacatur of the Commission’s prior unbundling rules. That is why the FCC entitled the order an *Order on Remand*, and why it “focuse[d] on those issues that were remanded to [it]” by the D.C. Circuit. *Order on Remand* ¶ 19. Indeed, throughout its decision, the FCC repeatedly referred to the D.C. Circuit’s extensive remand instructions.¹⁴ *Compare Prometheus*, slip op. at 4 (suggesting that the remand instructions in that case were not of a “complicated sort”).

¹⁴ *Order on Remand* ¶ 20 (“As described above, the *USTA II* court . . . sought several clarifications and, in several cases, criticized the manner in which the Commission applied that framework to particular elements. In this section, we address those concerns that relate generally to the standard itself, to the extent that such concerns apply to more than one element. In the sections that follow, we revisit the unbundling obligations associated with several elements in a manner consistent with the *USTA II* decision and other controlling precedents.”); *id.* ¶ 22 (“[I]n response to the *USTA II* court’s directive, we modify our approach regarding carriers’ unbundled access to incumbent LECs’ network elements for provision of certain services, setting aside the *Triennial Review Order*’s ‘qualifying service’ interpretation of section 251(d)(2), but nevertheless prohibiting the use of unbundled elements exclusively for the provision of telecommunications services in sufficiently competitive markets.”); *id.* ¶ 24 (“The *USTA II* court found that the Commission had failed to answer the question, ‘Uneconomic by whom?’ We therefore take this opportunity to resolve any uncertainty, and hereby clarify that our standard, as written, referred to a reasonably efficient carrier.”) (footnote omitted); *id.* ¶ 37 (“We believe this application of our at a minimum authority is the most faithful implementation of *USTA II*. There, the court recognized that the structure of the Act ‘suggests that “impair” must reach a bit beyond natural monopoly,’ and thus, before making an unbundling determination, the Commission reasonably may examine the full context of that decision, including the costs of unbundling, under the ‘at a minimum’ language of section 251(d)(2).”); *id.* ¶ 87 (“[T]he D.C. Circuit criticized the Commission’s *Triennial Review Order* framework for dedicated transport for failing to provide a meaningful method to identify which routes were similar to other routes, and thus failing to make inferences where possible. We find that the best way to respond to this concern is by categorizing similar end-points, and then making determinations of impairment or non-impairment for the resulting combinations (i.e., routes) connecting different classes of end-points.”) (footnote omitted); *id.* ¶¶ 137-138 (“In response to the court’s remand, we reinstate the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities, but we find that requesting carriers are not impaired without unbundled access to entrance facilities. . . . As the court suggested, we now conduct an impairment analysis with respect to entrance facilities and find that the economic characteristics of entrance facilities that we discussed in the *Triennial Review Order* support a national finding of non-impairment.”); *id.* ¶ 156 (“Our choice of the wire center service area as the appropriate level of geographic granularity at which to assess requesting carriers’ impairment without access to high-capacity loops is grounded on two specific directives set forth in the *USTA II* decision.”).

B. Although the fact that this FCC order is in all respects a response to prior vacatur by the D.C. Circuit provides more than ample basis for transfer, there are additional, independent reasons why that course of action is appropriate.

Unlike in *Eschelon*, the D.C. Circuit *already* has before it petitions for review of a closely related FCC order issued in these same dockets, the August 2004 *Interim Order*. That fact, coupled with the likelihood that the D.C. Circuit may wish to consolidate those petitions with the ones at issue here, makes it particularly appropriate for the D.C. Circuit to hear challenges to this order. See *United Steelworkers*, 592 F.2d at 697-98 (transferring petitions from this Court to the D.C. Circuit when it already had related issues before it, creating “a strong institutional interest in having these petitions considered in the District of Columbia forum”); *Westinghouse Elec. Corp. v. United States*, 598 F.2d 759, 767 (3d Cir. 1979) (explaining that, “in keeping with the purposes of the statute, courts have interpreted the term, ‘the same order,’ so as to insure the consolidation in one court of petitions from sequential orders arising from the same administrative background and cumulative record”); *BASF Wyandotte Corp. v. Costle*, 582 F.2d 108, 111, 112-13 (1st Cir. 1978) (stressing Congress’s purpose of “sav[ing] time and expense” in concluding that interim and final orders issued in the “same or interrelated proceedings” should be considered the “same order” under section 2112 and thus reviewed in the same court) (cited in *Westinghouse Elec.*, 598 F.2d at 767 n.32); *ACLU v. FCC*, 486 F.2d 411, 414 (D.C. Cir. 1973) (orders issued as part of the “same proceeding” as part of a “staggered implementation of a single, multi-faceted agency undertaking” should be treated as the “same order” under section 2112 and reviewed in a single court; decisions should be transferred where that will “permit review by a single court of closely related matters where appropriate for sound judicial administration”); *Public Serv. Comm’n*, 472 F.2d at 1272 n.4 (decisions may be treated as the

same order under section 2112 where they arise out of what may “fairly be called a single ‘total proceeding’”).

Transfer is particularly appropriate here, moreover, because the petition filed in this Court by Remi Retail Communications — the petition that led to this Court’s inclusion in the section 2112 lottery — appears to be invalid. Remi’s petition invokes this Court’s review authority under 47 U.S.C. § 402(a), which in turn incorporates the provisions of the Hobbs Act. The Hobbs Act states that “[a]ny party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.” 28 U.S.C. § 2344(1) (emphasis added). That “party aggrieved” requirement “has uniformly been interpreted to require that petitioners be parties to any proceedings before the agency preliminary to issuance of its order.” *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1367 (D.C. Cir. 1988) (citing *Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983)); see also, e.g., *Sierra Club v. United States Nuclear Regulatory Comm’n*, 825 F.2d 1356, 1360 (9th Cir. 1987); *Packard Elevator v. ICC*, 808 F.2d 654, 655 (8th Cir. 1986); *Clark & Reid Co. v. United States*, 804 F.2d 3, 5 (1st Cir. 1986); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 799 F.2d 317, 334 (7th Cir. 1986); *American Trucking Ass’ns, Inc. v. ICC*, 673 F.2d 82, 84-85 (5th Cir. 1982) (per curiam).

Here, Remi apparently did not file any comments or other pleadings in response to the August 2004 Notice of Proposed Rulemaking that led to the *Order on Remand*;¹⁵ indeed, Remi appears not to have filed anything at the FCC since 2002, and even then it filed only an *ex parte* document, not a formal comment.¹⁶ In this circumstance, there is at least a substantial question whether Remi’s petition is properly before this Court. See, e.g., *ACLU v. FCC*, 774 F.2d 24, 26

¹⁵ Appendix A to the FCC’s *Order on Remand* lists all the commenters in this proceeding, and that list does not include Remi.

¹⁶ See Ex Parte Letter from Michael B. Hazzard, Kelley Drye & Warren LLP (counsel for Remi Retail Communications, LLC), to Marlene H. Dortch, Secretary, FCC (Oct. 9, 2002).

(1st Cir. 1985) (per curiam) (“Had NHCLU or CLUM wished to participate in the proceedings or review process as individual parties, they could have filed comments with the agency or petitioned for reconsideration of the FCC’s final order. Failure to do either precludes them from petitioning for review of that order.”) (citations omitted); *Alabama Power*, 852 F.2d at 1368 (“[T]he degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted[.]’ . . . [H]ere the ICC conducted an informal *rulemaking* in which parties were invited to (and did) make full presentations of their views. . . . Conrail merely submitted affidavits to a trade association, which in turn presented them to the ICC as part of the trade association’s submission. Conrail was thus ‘present’ only in the exhibits; it was scarcely a commenter in the proceedings, having chosen to rely on its trade association to represent its interests.”) (citation omitted). Remi’s petition may thus be subject to dismissal, and a dismissable petition should not determine the forum in this case. *See, e.g., J.P. Stevens & Co. v. NLRB*, 592 F.2d 1237, 1239 (4th Cir. 1979) (per curiam). At the least, Remi has demonstrated only an attenuated interest in this proceeding, which should give its choice of forum particularly little weight.

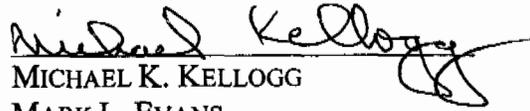
Finally, even assuming that Remi’s petition is properly before this Court, the statutory consideration of the “convenience of the parties” further argues for transfer. *See* 28 U.S.C. § 2112(a)(5). Movants are represented by District of Columbia counsel, and the petitions for review filed by the other petitioners in the Seventh and Ninth Circuits likewise all list the same Washington, D.C. firm that represents Remi as counsel. Washington, D.C. is, of course, also where respondents (the FCC and the United States) are based. As the Eighth Circuit explained in *Eschelon*, that fact means that “the convenience of the parties prong of the analysis also supports the District of Columbia venue.” *Eschelon*, 345 F.3d at 682 n.1. This Court’s precedent accords with that conclusion. *See United Steelworkers*, 592 F.2d at 697 (“The only significant

convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions.”); *see also Sunland Constr. Co. v. NLRB*, Nos. 93-1173 & 92-1667, 1993 WL 341017, at *1 (D.C. Cir. Aug. 6, 1993) (per curiam) (“in ruling on [a] motion to transfer under 28 U.S.C. § 2112(a), courts consider location of parties and location of counsel”).

CONCLUSION

The Court should transfer this case to the D.C. Circuit.

Respectfully submitted,


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EXHIBIT A

MAR 14 2005

FILED
CLERK'S OFFICE

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BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

**IN RE FEDERAL COMMUNICATIONS COMMISSION, IN THE MATTER OF
UNBUNDLED ACCESS TO NETWORK ELEMENTS, ORDER ON REMAND, FCC 04-290,
ISSUED ON FEBRUARY 24, 2005**

United States Telecom Ass'n, et al. v. FCC & USA, D.C. Circuit, No. 05-1058
Remi Retail Communications LLC v. FCC & USA, Third Circuit, No. 05-1629
DataNet Systems, LLC v. FCC & USA, Seventh Circuit, No. 05-1475
Utility Telephone, Inc. v. FCC & USA, Ninth Circuit, No. 05-71163

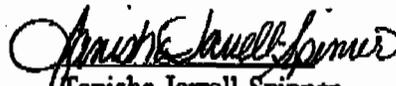
CONSOLIDATION ORDER

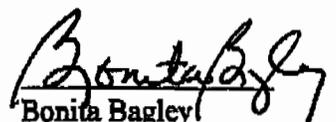
The Federal Communications Commission issued an order dated February 24, 2005. On March 14, 2005, the Panel filed, pursuant to 28 U.S.C. § 2112(a)(3), a notice of multicircuit petitions for review of that order. The notice included four petitions for review pending in four circuit courts of appeal as follows: D.C. Circuit, Third Circuit, Seventh Circuit and Ninth Circuit.

The Panel has randomly selected the United States Court of Appeals for the Third Circuit in which to consolidate these petitions for review.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 2112(a)(3), the above-captioned petitions for review are consolidated in the Third Circuit and that this circuit is designated as the circuit in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

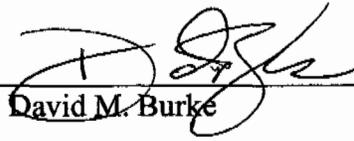
FOR THE PANEL:


Tanisha Jarrell-Spinner
Deputy Clerk
Random Selector


Bonita Bagley
Supervisory Deputy Clerk
Witness

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of March 2005, I caused copies of the Joint Motion for Expedited Transfer to be served upon each of the parties on the attached service list by electronic mail (as indicated on the attached list) and by hand or overnight courier delivery (designated with an asterisk).



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