

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ESCHELON TELECOM, INC.,)	
Petitioner,)	
)	
v.)	No. 03-3212 (and
)	consolidated cases).
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
Respondents.)	

**RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION
TO JOINT MOTION FOR EXPEDITED TRANSFER**

The Federal Communications Commission¹ respectfully submits this response to the joint motion for expedited transfer to the D.C. Circuit filed by the incumbent local exchange carrier ("incumbent LEC" or "ILEC") parties.² This case involves the latest chapter in multi-stage litigation regarding the Commission's implementation of the network element unbundling obligations of the Telecommunications Act of 1996. *See* 47 U.S.C. §§ 251(c)(3) & 251(d)(2). Over the past six years, various aspects of that litigation have been before this Court on multiple occasions, as well as before the D.C. Circuit and the Supreme Court. As explained below, we respectfully suggest, in these circumstances, that this Court (no less than the D.C. Circuit) has strong ties to this litigation and is equally qualified to hear this proceeding. There is no compelling reason to transfer this case now that the Judicial Panel on Multidistrict Litigation has duly selected this Court as the circuit in which all proceedings with respect to the

¹ This Response does not reflect the views of Chairman Powell and Commissioner Abernathy, who do not join in its filing. They believe that the Commission should not oppose the transfer motion.

² The moving parties are the United States Telecom Association (the trade association of the incumbent LEC industry), and the four Bell companies (BellSouth, Qwest, SBC, and Verizon).

Commission's *Triennial Review Order*³ shall be consolidated. Accordingly, we urge the Court to deny the ILEC parties' motion.

This matter involves petitions seeking review of the FCC's *Triennial Review Order* that were originally filed in multiple courts of appeals. The Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 2112(a)(3), consolidated the cases and, by random selection, designated this Court as the Court where the record is to be filed. *See Consolidation Order, Judicial Panel Docket No. RTC-68, filed September 16, 2003.* The random selection process prescribed in section 2112 is Congress's chosen means of determining, in a fair and neutral way, the appropriate forum for review of agency orders that are challenged in more than one circuit. Indeed, the FCC and the United States recently moved to transfer to this circuit a mandamus petition concerning the *Triennial Review Order* filed by the ILEC parties in the D.C. Circuit.⁴

Section 2112(a)(5), however, permits the selected court to transfer the consolidated cases to another court of appeals "[f]or the convenience of the parties in the interest of justice," and one recognized basis for exercising this discretionary power is where closely related cases previously have been decided by that other court. *See, e.g., Farah Manufacturing Co. v. NLRB*, 481 F.2d 1143, 1145 (8th Cir. 1973). Invoking *Farah* and similar precedent regarding discretionary transfers under section 2112(a)(5), the ILEC parties argue that this Court should transfer these consolidated cases to the D.C. Circuit, because the *Triennial Review Order* was issued on remand from the D.C.

³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (CC Docket Nos. 01-338, 96-98, and 98-147), FCC 03-36 (released August 21, 2003), 68 Fed. Reg. 52276 (September 2, 2003) ("*Triennial Review Order*").

⁴ Preliminary Response of Federal Communications Commission to Petitions for Writ of Mandamus, Motion to Transfer or Deny the Petitions, and Contingent Request for Extension of Time, DC Circuit Nos. 00-1012, 00-1015 *et al.*, filed Sept. 22, 2003.

Circuit's decision in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”). See motion at 3, 9-14. Although the D.C. Circuit has close ties to the instant litigation, this circuit is equally connected and equally qualified to hear these cases. Such a transfer is not mandatory, and there are reasons for a contrary result in this instance.

First, although the ILEC parties characterize the *Triennial Review Order* as an order on remand from the D.C. Circuit's *USTA* decision, it is more than that. In 1999, the FCC had announced that it would conduct a "triennial review" of its network element unbundling rules in three years.⁵ The Commission commenced that promised proceeding and began compiling a record in December 2001⁶ -- five months before the D.C. Circuit issued its *USTA* decision. And although the Commission broadened the *Triennial Review* proceeding expressly to seek comment on the impact of the *USTA* decision on its unbundling policies,⁷ the *Triennial Review Order* itself also addresses numerous issues that are beyond the scope of the D.C. Circuit's remand.⁸

Second, although the *Triennial Review Order* clearly responds in part to the D.C. Circuit's *USTA* decision, it also relates to orders that previously were on review in this Court. In particular, the *Triennial Review Order* is part of the same administrative docket

⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, 15 FCC Rcd 3696, 3766 (1999) ("UNE Remand Order").

⁶ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (CC Docket Nos. 01-338, 96-98, and 98-147), Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001).

⁷ Public Notice, *Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceeding*, 17 FCC Rcd 10512 (2002).

⁸ See, e.g., *Triennial Review Order*, paras. 200, 288-95 (declining to require unbundling of "next-generation" loops for the provision of broadband services, largely on the basis of a separate statutory directive to encourage the deployment of advanced telecommunications capability, rather than the section 251(d)(2) "impairment" analysis at issue in *USTA*); paras. 649-691 (addressing issues relating to Bell company entry into the long-distance market under 47 U.S.C. §271, and network element pricing under 47 U.S.C. § 252(d)(1)).

(CC Docket No. 96-98) that produced the *Local Competition Order*⁹ that this Court reviewed in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*IUB I*"), and *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997). It also is part of the same docket that produced the *Shared Transport Order*¹⁰ that this Court reviewed in *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998). In both *IUB I* and *Southwestern Bell*, this Court addressed earlier attempts by the FCC to define and implement the network element unbundling obligations of section 251(d)(2) that also are at issue in the *Triennial Review Order*. See *IUB I*, 120 F.3d at 810-812 (addressing the FCC's interpretation of the "impair" standard of section 251(d)(2)); *Southwestern Bell*, 153 F.3d at 604-606 (addressing the FCC's implementation of the "impair" standard to require access to the shared transport element).¹¹

Finally, we note that this Court has previously declined to transfer cases to a remand court. In *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998), this Court was selected, pursuant to section 2112(a), to review challenges to a 1997 FCC order that had adopted rules to govern the "access charges" that incumbent LECs could charge long-distance carriers for use of their local networks to originate and terminate long-distance calls. Some of those rules were adopted in response to the D.C. Circuit's earlier decision in *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996), but other parts of those rules were arguably pertinent to the local competition proceedings

⁹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

¹⁰ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration, 12 FCC Rcd 19738 (1997) ("*Shared Transport Order*").

¹¹ The Supreme Court reversed pertinent portions of *IUB I* in *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 387-392 (1999) ("*AT&T v. IUB*"), and subsequently vacated and remanded the *Southwestern Bell* decision for further consideration in light of *AT&T v. IUB*. See *Ameritech Corp. v. FCC*, 526 U.S. 366 (1999).

that this Court had reviewed in *IUB I* and elsewhere. In these circumstances, the Court denied motions to transfer review of that 1997 access charge order to the D.C. Circuit,¹² and heard all challenges to that order, including claims that it was inconsistent with the D.C. Circuit's *CompTel* decision. *Southwestern Bell*, 153 F.3d at 544, 549-51. *Cf. also Prometheus Radio Project v. FCC*, Third Circuit Nos. 03-3388 (and consolidated cases), Order, filed September 15, 2003, at pages 3-5, *petition for rehearing en banc pending* (copy attached) (declining to transfer to the D.C. Circuit a case that had been assigned to the Third Circuit under section 2112(a), reasoning that FCC rulemaking order was broader than narrower subset of issues that the D.C. Circuit had remanded to the agency).

In sum, the Federal Communications Commission respectfully suggests that there is no compelling reason to transfer these cases to the D.C. Circuit and, accordingly, we urge the Court to deny the ILEC parties' motion.

Respectfully submitted,

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¹² *Southwestern Bell Telephone Co. v. FCC*, Eighth Circuit No. 97-2618 (and consolidated cases), Order, filed August 12, 1997 (copy attached).