

**In the  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

PROMETHEUS RADIO PROJECT, <i>et al.</i> ,	)	
	)	
Petitioners	)	
	)	
v.	)	<b>Nos. 03-3388, <i>et al.</i></b>
	)	
FEDERAL COMMUNICATIONS COMMISSION	)	
and THE UNITED STATES OF AMERICA,	)	
	)	
Respondents	)	

**RESPONSE OF FCC AND UNITED STATES  
IN SUPPORT OF JOINT MOTION TO TRANSFER VENUE**

Respondents Federal Communications Commission and United States hereby submit their response in support of the Network Petitioners’ Joint Motion to Transfer Venue filed by Fox Entertainment Group, Inc., Viacom, Inc., National Broadcasting Co., Inc. and others. As explained below, respondents agree that this litigation should be transferred “[f]or the convenience of the parties in the interest of justice” to the United States Court of Appeals for the District of Columbia Circuit. *See* 28 U.S.C. 2112(a)(5).

This matter involves nine petitions seeking review of the same FCC order that were originally filed in the Second, Ninth and District of Columbia Circuits, as well as in this Court. 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* Order, Docket No. RTC-67 (JPMDL Aug. 19, 2003).

Movants argue that these cases should be transferred to the District of

Columbia Circuit because, in addition to other things, (1) the agency order under review was adopted in part in response to remands in two separate cases in that court, (2) transfer would further the convenience of the parties as nearly all parties, including Prometheus Project that originally filed the petition for review in this Court, have Washington, D. C. counsel, and respondents' counsel are located there as well, and (3) the petitions originally filed in this Court as well as those in the Second and Ninth Circuits appear to reflect an effort by those petitioners to engage in forum shopping. *See* Jt. Mot. at 9-13. In addition, movants contend that there are “serious questions” whether Prometheus has standing to seek review. *Id.* at 14-15. Respondents agree with the network petitioners that the District of Columbia Circuit is the more appropriate forum in the circumstances here and that these cases should be transferred to that court.

The proposition that a petitioner's choice of forum ordinarily should be respected has less force when there are multiple petitions filed in various circuits that have been consolidated in one circuit by virtue of random selection. As movants note, courts have recognized that procedures provided for by 28 U.S.C. 2112(a) for consolidation of multiple petitions for review of a single agency order in one court “determines only ‘which court will determine venue, not which court will ultimately hear the case.’” Mot. at 9, *quoting Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C.Cir. 1981). The legislative history of the 1988 amendments to section 2112(a) adopting the lottery procedure states that the court selected by the lottery “will retain its existing power to transfer all review proceedings dealing with the same order. Thus, [the amendments to Section 2112

adding the lottery procedures do] not, in any way, prevent the selected court from transferring the challenges to the agency order to a more proper circuit ‘[f]or the convenience of the parties in the interest of justice’ 28 U.S.C. 2112(a)(5).” S. Rep. 100-263, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. \*5 (1987) 1987 WL 61562. Considerations discussed in the Joint Motion, we believe, favor transfer of these cases to the D. C. Circuit.

First, as the motion points out, the agency’s order in this case is closely related to two recent decisions of the D. C. Circuit remanding previous agency orders. In *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, rehearing granted in part, 293 F.3d 538 (D.C.Cir. 2002) and in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C.Cir. 2002), the D. C. Circuit considered challenges to three of the FCC’s media ownership rules and remanded each of them to the Commission for further consideration after finding the Commission’s explanation for its decision to retain the rules inadequate.<sup>1</sup> The agency’s 2002 *Biennial Review Report and Order* that is before the Court in this case contains the FCC’s response to the D. C. Circuit remands in *Fox* and *Sinclair*, in addition to addressing other ownership rules.

The Joint Motion properly points out that there is substantial and consistent case law that in these circumstances transfer to the court whose prior remand occasioned the order now on review is appropriate. Jt. Mot. at 11-12 and n.17.

---

<sup>1</sup> An additional petition for review challenging the FCC’s failure in an earlier proceeding to modify its newspaper-broadcast cross-ownership rule has been held in abeyance by the D. C. Circuit and remains pending in that court. See *Newspaper Ass’n of America v. FCC*, No. 00-1375 (D.C.Cir., filed Aug. 16, 2000).

Although not in the precise context of a remand, this Court has said that transfer to another circuit may be warranted in light of “the desirability of concentrating litigation over closely related issues in the same forum so as to avoid duplication of judicial effort.” *United Steelworkers of America, AFL-CIO v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979).

There is an additional consideration here that favors the D. C. Circuit as the appropriate forum for this case. That court has exclusive jurisdiction to hear appeals of FCC broadcast station licensing decisions. *See* 47 U.S.C. 402(b); *Hubbard Broadcasting, Inc. v. FCC*, 684 F.2d 594, 596 (8<sup>th</sup> Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983). As we point out in our opposition to the motions for stay that we have filed in these cases today, the revised rules at issue here simply establish standards relating to ownership of radio and television stations. The rules do not in themselves operate to approve any transactions. The FCC still must approve applications to construct new stations or acquire existing stations. *See* 47 U.S.C. 308, 310(d). These new rules have effect only in the context of such grants that are made permissible under the new rules but would not have been permissible under previous rules. *See* FCC Consolidated Opposition to Motions for Stay at 8-9.

Under the statutory scheme noted above, only the D. C. Circuit has jurisdiction to review grants or denials of applications to construct new radio and television stations or to assign or transfer control of the licenses for existing stations. *See* 47 U.S.C. 402(b)(1)-(3). That court is also the exclusive forum for appeals from an FCC order denying a petition to deny such applications filed by a “party in interest” pursuant to 47 U.S.C. 309(d). *See* 47 U.S.C. 402(b)(6).

The D. C. Circuit's exclusive jurisdiction of FCC licensing decisions, combined with the *Fox* and *Sinclair* remands discussed above, in our judgment, make a persuasive case that the D. C. Circuit would be the most appropriate forum for this litigation. The network petitioners' Joint Motion should be granted.

Respectfully submitted,

Catherine G. O'Sullivan  
Nancy C. Garrison  
Attorneys

John A. Rogovin  
General Counsel

United States Department of Justice  
Washington, D. C. 20530

Daniel M. Armstrong  
Associate General Counsel

Jacob M. Lewis  
Associate General Counsel

C. Grey Pash, Jr.  
Nandan M. Joshi  
Counsel

Federal Communications Commission  
Washington, D. C. 20554  
(202) 418-1740  
Fax (202) 418-2819

August 25, 2003

## CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that the foregoing “FCC Response to Network Petitioners’ Joint Motion to Transfer Venue” was served this 25<sup>th</sup> day of August 2003 by sending copies by first-class mail to the following persons at the addresses shown below.

Michael D. Hays  
M. Anne Swanson \*  
Dow, Lohnes & Albertson  
1200 New Hampshire Ave., NW – Suite 800  
Washington, D. C. 20036-6802  
Counsel for Media General Inc.

Henry L. Baumann  
Jack N. Goodman \*  
National Ass’n of Broadcasters  
1771 N St., NW  
Washington, D. C. 20036  
Counsel for National Ass’n of  
Broadcasters

Donald B. Verrilli, Jr. \*  
Jenner & Block  
601 Thirteenth St., NW  
Washington, D. C. 20005  
Counsel for National Ass’n of  
Broadcasters

Robert A. Long, Jr. \*  
Covington & Burling  
1201 Pennsylvania Ave., NW  
Counsel for CBS Television Network  
Affiliates Ass’n, NBC Television  
Network Affiliates Ass’n, Network  
Affiliated Stations Alliance

Henk Brands \*  
Paul, Weiss, Rifkind, Wharton & Garrison  
1615 L St., NW – Suite 1300  
Washington, D. C. 20036  
Counsel for Fox Entertainment Group,  
Fox Television Stations, Inc.

Wade H. Hargrove \*  
Brooks, Pierce, McLendon, Humphrey &  
Leonard  
1600 Wachovia Capitol Center  
150 Fayetteville Street Mall  
Raleigh, NC 27601  
Counsel for ABC Television Network  
Affiliates Ass’n, Network Affiliated  
Stations Alliance

Andrew Jay Schwartzman \*  
Media Access Project  
1625 K St., NW – Suite 1118  
Washington, D. C. 20006  
Counsel for Prometheus Radio Project

Shelby D. Green \*  
Pace University School of Law  
78 North Broadway  
White Plains, NY 10603  
Counsel for The National Council of  
Churches of Christ in the United States

Ellen S. Agress  
The New Corporation, Ltd.  
1211 Avenue of the Americas  
New York, NY 10036  
Counsel for Fox Entertainment Group,  
Fox Television Stations, Inc.

Michael D. Fricklas  
Viacom, Inc.  
1515 Broadway  
New York, NY 10036

Angela J. Campbell \*  
Citizens Communications Center Project  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Ave., NW  
Washington, D. C. 20001  
Counsel for Media Alliance

Samuel L. Spear \*  
Spear, Wilderman, Borish, Endy, Spear &  
Runckel  
230 South Broad St. – Suite 1400  
Philadelphia, PA 19102  
Counsel for Prometheus Project

Maureen A. O’Connell  
The News Corporation, Ltd.  
444 North Capitol St., N. W. – Suite 740  
Washington, D. C. 20001  
Counsel for Fox Entertainment Group,  
Fox Television Stations, Inc.

Michael K. Kellogg \*  
Kellogg, Huber, Hansen, Todd & Evans  
1615 M St., N.W. – Suite 400  
Washington, D. C. 20036  
Counsel for National Broadcasting Co.,  
Inc., Telemundo Communications  
Group, Inc.

Lawrence Tu  
National Broadcasting Co., Inc.  
30 Rockefeller Plaza  
New York, NY 10112  
Counsel for National Broadcasting Co.,  
Inc., Telemundo Communications  
Group, Inc.

F. William LeBeau  
National Broadcasting Co., Inc.  
1299 Pennsylvania Ave., NW  
Washington, D. C. 20004  
Counsel for National Broadcasting Co.,  
Inc., Telemundo Communications  
Group, Inc.

---

C. Grey Pash, Jr.

\* Also served by email