IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 14-1090 (consolidated with Nos. 14-1091, 14-1092, 14-1113)

OPPOSITION OF NATIONAL ASSOCIATION OF BROADCASTERS TO MOTION TO TRANSFER CONSOLIDATED CASES TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 429-5430

Helgi C. Walker
Counsel of Record
Ashley S. Boizelle
Lindsay S. See
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

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INTRODUCTION

Four different parties filed four separate petitions for review challenging the Federal Communications Commission's ("Commission") recent order and further notice of proposed rulemaking regarding its statutorily mandated 2010 and 2014 reviews of the broadcast ownership rules.[1] Three of those four petitions were filed in this Court, and all of the cases were then consolidated and transferred here pursuant to the lottery process. *See* 28 U.S.C. § 2112(a). The filers of the fourth petition—Prometheus Radio Project, Office of Communication, Inc. of the United Church of Christ, National Association of Broadcast Employees and Technicians—Communications Workers of America, National Organization for Women Foundation, Media Alliance, Media Council Hawaii, Common Cause, Benton Foundation, and Free Press (collectively, "Prometheus et al." or "Movants")—insist that the cases should be transferred to the U.S. Court of

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[1] *See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services; Rule and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Further Notice of Proposed Rulemaking and Report and Order, FCC No. 14-28, 2014 WL 1466887 (rel. Apr. 15, 2014) ("*April 15 Order*"); 79 Fed. Reg. 28996 (May 20, 2014).

Appeals for the Third Circuit. Their motion should be denied because there is simply no basis for transfer under the factors set forth in 28 U.S.C. § 2112(a)(5).

First, the *April 15 Order* is the product of a separate and new review of the Commission's broadcast ownership rules and other attribution issues introduced in 2009, and involves a distinct administrative record. Accordingly, the Third Circuit's review of Commission actions from prior quadrennial review proceedings does not afford it any "expertise" that warrants transfer.

Second, the Third Circuit's retention of jurisdiction over two narrow issues from the 2006 review proceeding cannot trump the § 2112(a)(5) factors that favor resolution of the significant new legal questions now before this Court. The issues related to the remand are a minor piece of the larger order on review, and in fact are issues on which the Commission reached no final conclusion. They should not be the tail that wags the dog of venue. Indeed, the only issue on which the Commission actually made a final determination in the *April 15 Order* has never been before the Third Circuit. Transfer would also set a perilous precedent, effectively converting a narrow remand order into a hook that vests a single circuit with a virtual monopoly over review of any future agency proceeding that combines the remand with entirely new legal issues.

Finally, it is indisputable that transfer would not serve the convenience of the parties and counsel: *all* counsel—even Movants' counsel—are based in

Washington, D.C, as are many of the petitioning parties and the governmental Respondents. The gravitational center of this dispute is in this Circuit.

For all of these reasons, transfer is inappropriate in this case.

ARGUMENT

Section 202(h) of the Telecommunications Act of 1996 directs the Commission to review its broadcast ownership rules every four years to determine whether they continue to serve the public interest, and to repeal or modify any rule that does not. Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12. The Commission's *April 15 Order* is a direct response to this statutory mandate. The National Association of Broadcasters ("NAB"), Nexstar Broadcasting, Inc., Howard Stirk Holdings, LLC (collectively, "the Broadcast Parties"), and Prometheus et al. have each sought review of portions of that order on the ground that the Commission has violated Section 202(h) and the Administrative Procedure Act. Because the three Broadcast Parties filed separate petitions for review in this Court, while Prometheus et al. filed their petition for review in the Third Circuit, the Judicial Panel on Multidistrict Litigation conducted a lottery pursuant to 28 U.S.C. § 2112(a) and selected this Court as the venue in which to consolidate the petitions. *See* Consolidation Order, *In re 2014 Quadrennial Regulatory Review*, MCP No. 122 (J.P.M.L. June 4, 2014).

Following consolidation and transfer, Section 2112(a)(5) authorizes further transfer to another court of appeals "[f]or the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). Here, Movants seek transfer on the ground that the Third Circuit reviewed two prior Commission broadcast ownership review proceedings—*Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus I*"); and *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus II*")—and purportedly retained jurisdiction over discrete aspects of a 2008 Commission quadrennial review order in *Prometheus II*. *See* Mot. 2-5. Movants wholly ignore this Court's own extensive history with the broadcast ownership rules. In any event, general familiarity with similar, prior agency proceedings is not a statutory basis for transfer, and any purported familiarity with the issues in this case is negligible given that the *April 15 Order* is the product of a new, statutorily mandated review of the broadcast ownership rules, is based on a different record, and raises different legal issues than the orders the Third Circuit reviewed. In fact, the only issue resolved by the *April 15 Order* implicates an ownership rule that *this Court* previously found to be arbitrary and capricious and remanded to the Commission.

Moreover, the Third Circuit's remand order and any concerns about this Court's ability to grant full relief in light of it do not justify transfer. The issues implicated by the remand constitute only a minor potion of the Commission's 211-

page order. To require that the new, independent challenges at issue be transferred to the Third Circuit because of a narrow remand would thwart the outcome of the lottery, which is designed to give all parties a legitimate chance to be heard in the forum of their choosing. It would also undermine the convenience of the parties. For all of these reasons, the motion to transfer should be denied.

I. Transfer To The Third Circuit Would Not Advance The Interest Of Justice.

A. The *April 15 Order* Does Not Arise Out Of The Same Proceedings As Those At Issue In The Third Circuit's *Prometheus* Cases.

Movants assert that "[t]he decision under review was conducted pursuant to a remand from the Third Circuit, which specifically retained jurisdiction with respect to the remand" and directed that the case "be returned to the same panel." Mot. 1. That contention is misleading in three respects.

First, the agency proceedings that led to this action were required by Section 202(h) of the Telecommunications Act and were not undertaken solely in response to the Third Circuit's remand order. Irrespective of the remand order, the Commission must perform a review of its broadcast ownership rules every four years to determine whether those rules remain necessary. *See* Pub. L. No. 104-104, § 202(h); *see also* Mot. 2 (conceding that "the Commission *must* conduct periodic reviews of its broadcast ownership rules" under Section 202(h)) (emphasis added). Far from turning on "actions conducted pursuant to the prior Third Circuit

remands," Mot. 10, or the 2002 and 2006 reviews at issue in *Prometheus I* and *II*, the Commission's *April 15 Order* resulted from the Commission's required *2010* and *2014* reviews. That the Commission elected to combine its action on remand with the new 2010 and 2014 review proceedings, instead of addressing them in two or three separate orders, does not convert this action into a follow-on from an earlier Third Circuit decision.

Second, the *April 15 Order* involves a substantially different record than those at issue in *Prometheus I* and *II*. Here, for instance, the Commission held a series of public workshops between November 2009 and May 2010, sought new comments "on a wide range of issues to help determine whether the current media ownership rules continue to serve the Commission's policy goals," and commissioned eleven peer-reviewed economic studies to provide new, wide-ranging data to inform the Commission's review. April 15 Order at *4; *see also, e.g.*, *id.* at *78 (describing Media Bureau's 2012 report, the "first electronic analysis of commercial broadcast ownership data submitted pursuant to the revised biennial reporting requirements," which is part of a new series designed to study minority and women ownership trends). In fact, the "high level of interest and participation" in the 2010 review generated an unusually "extensive record that continues to attract significant and substantive input well after the formal comment periods have ended." *Id.* at *1. All of these efforts post-dated the 2008 order at

issue in *Prometheus II*, meaning that the *April 15 Order* relies on record evidence that has *never* been before the Third Circuit.

Third, the substance of the *April 15 Order* differs from the actions the Third Circuit reviewed in the *Prometheus* actions. In the Commission's prior proceedings, it conclusively determined whether to modify or repeal various broadcast ownership rules and set out in a separate 2008 order measures addressing broadcast ownership diversity.[2] *See Prometheus II*, 652 F.3d at 437. Here, the Commission declined to take *any* final action with respect to the modification or repeal of its broadcast ownership rules or their effects on minority and female ownership, insisting that it lacked sufficient information to make conclusive judgments at this time and requesting additional comments from industry participants. April 15 Order at *74; *see also id.* at *1 (explaining that the Commission rolled the 2010 review proceedings into a new 2014 review proceeding, and only "propos[ed]" new rules to be modified or adopted on the basis of a new 2014 record), *id.* at *74 (concluding that the Commission was "not in a position at this time" to adopt a standard "which expressly would recognize the race and ethnicity of applicants, or any other race- or gender-targeted

[2] *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) ("*Diversity Order*").

measures"). The only final rule the Commission *did* adopt concerns television joint sales agreements ("JSAs"),[3] *id.* at *107-18, which were not at issue in the 2008 proceeding and have never been on review in the Third Circuit, *see id.* at *4.[4] Any familiarity the Third Circuit retains with the intricacies of the rules at issue in previous Commission review cycles would thus be of little benefit when reviewing this new agency proceeding and order.

In any event, general familiarity with the regulatory background of the Commission's broadcast ownership rules is an insufficient basis for transfer to the Third Circuit, particularly given this Court's own extensive history with these rules. When applying § 2112(a)(5), courts may not presume that individual circuits—and especially a specific panel of judges—have specialized expertise merely because they have previously adjudicated cases involving that subject

[3] The Commission's rule provides that television JSAs for more than 15% of a television station's weekly advertising time will be attributable (i.e., counted) for determining compliance with the broadcast ownership rules. *See* April 15 Order at *107.

[4] Movants' insistence that the 2002 proceeding reviewed in *Prometheus I* resulted in a radio JSA rule, Mot. 2-3, is irrelevant. The different records that led to the two rules—directed at distinct sets of broadcasters and separated by over ten years of technological developments—make the Third Circuit's purported familiarity with the issues dubious at best. Furthermore, the Third Circuit rejected challenges to the radio JSA rule in *Prometheus I*, 373 F.3d at 429-30, and thus the radio JSA rule was never part of that Court's remand, much less the only remand order potentially relevant here, which was issued in *Prometheus II*. In fact, the Commission initiated an entirely separate proceeding for television JSAs, which was ultimately resolved in the *April 15 Order*.

matter. *See, e.g.*, *Am. Public Gas Ass'n v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976) (per curiam) ("familiarity with the background of the present controversy" is irrelevant when considering "the interest of justice"); *Pub. Serv. Comm'n for State of N.Y. v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972) ("This [transfer] motion . . . implicitly invokes a theory of specialization of tribunals. That is not what Congress has provided. The contention based on specialization of particular judges is even more debatable."). Rather, courts should presume that all circuits are equally capable of resolving a case and look only to practical circumstances at the time of transfer that might favor a different forum. To hold otherwise would thwart Congress's intent that venue be determined by lottery, not perceived judicial expertise. *Cf. id.* at 1272 (transfer based on transferee court's familiarity with issues would counteract pre-lottery statutory venue scheme).

Furthermore, Movants' theory that the Third Circuit possesses relevant expertise is suspect here. Even putting aside that the new record in this proceeding was not before the Third Circuit and that the *April 15 Order* does not resemble prior orders, *Prometheus II* was decided *three* years ago. It would be unrealistic to expect that the prior Third Circuit panel still has the complexities of the now-superseded 2008 record and case fresh in its memory. At best, the Third Circuit may have some general knowledge of similar proceedings.

By that metric, however, this Court is an equally if not more suitable forum, given its extensive history with challenges to the Commission's ownership regulations. *See, e.g.*, *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (reviewing "eight voices test" in local television ownership rule); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040-45 (D.C. Cir. 2002) (reviewing national television ownership limit); *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998) (reviewing request for waiver from newspaper cross-ownership rule); *NCCB v. FCC*, 555 F.2d 938 (D.C. Cir. 1977) (reviewing newspaper/broadcast cross-ownership ban). Indeed, the rule on television JSAs adopted in the *April 15 Order* adversely affects the Broadcast Parties primarily because it makes the vast majority of JSAs illegal under the Commission's local television ownership rule – a rule that has remained unchanged since 1999, even though this Court found it to be arbitrary and capricious and remanded it to the Commission in 2002. *See Sinclair*, 284 F.3d at 169; *see also id.* at 171-72 (Sentelle, J., concurring and dissenting in part) (noting that he would have vacated, not merely remanded, the rule). This Court, accordingly, has relevant history with the ownership rule that is of central concern to the Broadcast Parties in this case.

B. The Third Circuit's Purported Retention of Jurisdiction Over Minor Aspects Of The Commission's 2008 Order Does Not Trump The Statutory Factors Favoring Venue In This Court.

Despite the significant differences between the actions and record under review here, and those before the Third Circuit in *Prometheus I* and *II*, Movants argue that transfer is necessary because "the decision under review involves actions conducted pursuant to prior Third Circuit remands, over which the Third Circuit explicitly retained jurisdiction." Mot. 10. That contention is meritless.

As an initial matter, there is no support for the idea that § 2112(a)(5) *requires* transfer where a matter properly subject to the lottery process resulted in part from a remand order by another circuit. The standards Congress prescribed—whether another court has a practical advantage in terms of judicial administration and whether transfer would benefit the parties—still govern such cases. Movants' own authorities illustrate this point: In *Arkansas Midland Railroad Co. v. Surface Transportation Board*, 2000 WL 1093266 (D.C. Cir. June 8, 2000), for instance, this Court explicitly noted that "venue is proper in this Court" pursuant to § 2112(a)(1) over an agency order that—as here—was entered in part on remand from another court. *Id.* at *1 (cited at Mot. 9); *see also Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 n.1 (8th Cir. 2003) (case was "properly before [the Eighth Circuit]" even though the order under review "represents the FCC's third attempt to craft a decision that comports with the Telecommunications Act of 1996" and

another court had vacated and remanded the prior order). As long as there is a valid basis for jurisdiction in this Court for an agency challenge—which is indisputably true here given the lottery process—the existence of a remand does not mandate that the *April 15 Order* be reviewed by the Third Circuit. At most, a prior remand is a factor this Court may consider in its discretionary venue analysis.

This Court should not exercise its discretion to transfer based on the Third Circuit's purported retention of jurisdiction. As explained above, the *April 15 Order* resulted from a distinct proceeding—the Commission's brand new, statutorily-mandated 2010 and 2014 reviews—that was initiated four years after the proceeding the Third Circuit reviewed in *Prometheus II*, and almost a decade after the 2002 actions at issue in *Prometheus I*. The latest proceeding with its different record and order cannot reasonably be described as an "action on remand" within the meaning of either prior *Prometheus* action.

Furthermore, the issues implicated by the *Prometheus II* remand are only a small part of the *April 15 Order*. The Third Circuit's remand was limited to two issues: (1) the Commission's newspaper/broadcast cross-ownership rule, and (2) the Commission's actions with respect to broadcast opportunities for minorities and women. *Prometheus II*, 652 F.3d at 437-38, 471-72. As Movants candidly admit, the Commission did nothing to address either issue in the *April 15 Order*. Mot. 7. Rather, as described above, the Commission simply rolled its 2010

quadrennial review into a new 2014 review cycle, effectively punting its decision on these issues until after the conclusion of yet another quadrennial review. And—more importantly—the Commission considered numerous *other* issues that cannot plausibly be interpreted as falling within the remand order by seeking comment on *all* of its broadcast ownership rules and issuing a new order regarding attribution of television JSAs. Of the 211 pages comprising the order on review, the issues even remotely related to the Third Circuit's remand cover a mere 56 pages.

The Commission's decision to roll the remand issues into its 2010 review, and now its ongoing 2014 review, does not automatically sweep every issue addressed in the *April 15 Order*—not to mention, presumably, all of the issues that will be addressed in the Commission's order at the conclusion of the 2014 proceedings—into the scope of the Third Circuit's jurisdiction over remanded issues. Even that court apparently did not foresee or intend such a result. *See Prometheus II*, 652 F.3d at 471 (instructing the Commission to address the remanded issues "before it completes its 2010 Quadrennial Review"). The Commission's failure to act with respect to two discrete issues as part of a comprehensive review of all broadcast ownership rules should not be the tail that wags the dog of venue.

Nor do the authorities cited by Movants, Mot. 9-10, support their suggestion that the Third Circuit's limited remand should be construed to confer a monopoly

over future, related broadcast ownership rule challenges. This Court's unpublished decision in *Arkansas Midland* involved transfer of the last of three fact-specific disputes—the last partially resulting from a remand—concerning the sale of a specific "52-mile stretch of railroad in Southwestern Arkansas." *GS Roofing Prods. Co. v. Surface Transp. Bd.*, 262 F.3d 767, 770 (8th Cir. 2001). *Arkansas Midland* thus does not support the notion that a specific panel of one circuit could effectively lay claim to jurisdiction over an entire subject matter area by remanding limited aspects of one order in a distinct proceeding. 2000 WL 1093266, at *1 (transferred because Eighth Circuit had previously resolved "same or interrelated" proceedings). And there are no difficult law-of-the-case issues like those that appear to have governed the specific adjudicatory disputes in *Arkansas Midland*.[5]

Likewise, the Senate Report to the 1988 amendment of § 2112(a) and cases cited therein stand for nothing more than the proposition that courts retain

[5] Given the limited nature of the Third Circuit's remand, only two areas could even conceivably raise law-of-the-case concerns, and neither is relevant in light of the different record and substantively different order on review here. First, the Third Circuit's rejection of the Commission's permanent waivers to its newspaper/broadcast cross-ownership rule on procedural grounds is irrelevant in light of the independent procedural posture of the *April 15 Order* and the Commission's call for additional public comment before determining whether to modify or repeal that rule. *See* April 15 Order at *31-32. Second, the Third Circuit's rejection of the Commission's revenue-based eligibility standard in its Diversity Order as unsupported by the then-existing administrative record will not affect this Court's assessment of the Commission's *failure* to adopt a new diversity standard now, nor its decision to compile a new record on the issue. *Id.* at *74.

discretion within the lottery system to transfer sequential and closely related agency orders to the circuit that reviewed the original order. The rationale for this practice is that some orders issued "in the course of the same or interrelated administrative proceedings" are so similar to previous orders that they may effectively be treated as "the *same* order." S. Rep. No. 100-263, at 5 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3198, 3201 (emphasis added); *see also, e.g.*, *Am. Civil Liberties Union v. FCC*, 486 F.2d 411, 414 (D.C. Cir. 1973) (cited in S. Rep. No. 100-263) (subsequent order should be treated as "same order" where it was "issued during the course of the same proceeding" and would be "reviewed on the same record"). As explained above, the *April 15 Order* cannot be said to be "the same order" as that reviewed in *Prometheus II*.

Tellingly, the Third Circuit itself has rejected a version of Movants' argument: It refused to transfer *Prometheus I* to this Court even though the underlying order was issued in part in response to prior remands from this Court in *Sinclair* and *Fox*, concluding instead that the order resulted from different proceedings and the issues were not sufficiently similar to warrant transfer. *See Prometheus Radio Project v. FCC*, No. 03-3388, Order 4-5 (3d Cir. Sept. 15, 2003). As the Third Circuit observed, some remands, as here, simply do not involve "the sort of specific mandate[s] that require[] hands-on stewardship by the same judges that issued the prior decision." *Id.*

Finally, adopting Movants' theory in this case sets a dangerous precedent by effectively enabling the Third Circuit to retain jurisdiction over the Commission's future broadcast ownership proceedings in perpetuity—an outcome surely not intended by Congress in light of Section 2112(a)(5) and the review provisions of the Communications Act, 47 U.S.C. § 402(a), (b). Holding that a narrow remand confers jurisdiction over unrelated Commission action that is statutorily required to take place every four years essentially ensures that any future challenges must be heard by the Third Circuit, particularly given the Commission's apparent habit of rolling prior quadrennial reviews into new proceedings. To interpret *Prometheus II* in that manner would undermine the well-settled principle that federal courts "possess only that power authorized by the Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Missouri v. Jenkins*, 515 U.S. 70, 134 (1995) (Thomas, J., concurring) (admonishing courts to end oversight after issuing a remedy rather than retaining jurisdiction over implementation of the court's order).

The statutorily mandated venue lottery has occurred, this Court has been selected, and the cases have been consolidated here. That the order on review touched on (but did not determine) two issues related to the Third Circuit's remand in the course of conducting a new quadrennial review of all of the broadcast ownership rules is not reason to deprive the Broadcast Parties of the forum of their

choice—or to attribute the same court or panel exclusive jurisdiction over an entire regulatory field for years to come.

C. Movants' Requested Relief And The Doctrine Of Comity Do Not Support Transfer.

Movants raise two additional grounds for transfer—this Court's supposed inability to issue a writ of mandamus, which Movants requested in the alternative in their petition for review of the *April 15 Order*, and the doctrine of comity among sister circuits. Both of these arguments are meritless.

Movants argue first that transfer is necessary "in light of the relief Prometheus has requested": a writ of mandamus compelling compliance with the Third Circuit's *Prometheus II* remand. Mot. 10. Without support or analysis, Movants baldly assert that "only the Third Circuit, and indeed, the same panel in the Third Circuit," can grant such relief. Mot. 11. But this Court is equally capable of granting the extraordinary relief of mandamus. *See* 28 U.S.C. § 1651(a) (granting "all" federal courts authority to issue writs "necessary or appropriate in aid of their respective jurisdictions"). Given that this Court's jurisdiction to review Commission proceedings is not in question, it is difficult to see how it would lack the ability to grant mandamus relief if it determines that such relief is appropriate.

Finally, contrary to Movants' claims, the doctrine of comity is not applicable here. The proposition that this Court should defer to the purportedly superior jurisdictional claim of another circuit flies in the face of § 2112(a), which does not

include comity as a factor and *already* provides a mechanism through the lottery process to resolve potential jurisdictional disputes between coequal courts.

The authority that Movants marshal for their extra-statutory position is also inapposite. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (quoted at Mot. 11), is about "*concurrent* federal proceedings," *id.* at 819 (emphasis added), not the factors governing transfer of a proceeding already consolidated in one court based on the outcome of a lottery. This fact answers Movants' concern regarding the avoidance of "piecemeal litigation": Only one court will decide these actions regardless of how this motion is resolved, so transfer is not necessary to avoid the potential for divergent holdings. Movants' reliance on *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 (8th Cir. 2003) (cited at Mot. 11), is similarly misplaced. There, the Eighth Circuit transferred an action to this Court because a *separate* mandamus petition was already pending in this Court, and thus there was a potential for conflicting decisions in substantially similar cases. *Id.* at 682 n.1. This threat is absent here because the Third Circuit already transferred to this Court Movants' request for mandamus relief together with their petition for review.

This Court has sufficient authority to issue all necessary and appropriate relief in these cases, and such action would not improperly invade the sphere of a coequal court.

II. The Convenience Of The Parties Overwhelmingly Favors Resolution In This Court.

Prometheus et al. make only passing reference to § 2112(a)(5)'s requirement that the Court consider the "convenience of the parties" before transferring these actions, Mot. 11-12, but this statutory mandate is an independent factor that *overwhelmingly* supports venue in this Court. Movants assert that transfer "will not cause material inconvenience to the parties," Mot. 11, but the test under § 2112(a)(5) is which circuit is *most convenient*. On that score, there can be no doubt that this Court is the more appropriate forum. Section 2112(a)(5)'s test "center[s] around the physical location of the parties," *ITT World Commc'ns, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980), considering both "the location of counsel [and the] location of the parties," *Liquor Salesmen's Union Local No. 2 of State of N.Y. v. N.L.R.B.*, 664 F.2d 1200, 1205 (D.C. Cir. 1981); *see also Eschelon*, 345 F.3d at 682 n.1 ("[M]ost of the parties have D.C. counsel of record; consequently, the convenience of the parties prong of the analysis also support the District of Columbia venue"). Here, as Movants concede, *all* counsel are located in Washington, D.C., Mot. 11, as are many of the parties, including NAB and the governmental Respondents. Movants attempt to avoid this basic fact by arguing that counsel are "already familiar with practice in the Third Circuit" and that "technology has made the geographical distance between Philadelphia and Washington a trivial consideration." Mot. 11. But experience and technology

cannot trump Congress's assessment of the relevant factors, including physical proximity of the parties and their counsel, when weighing the burdens of transfer.

Movants' claim that the parties will be burdened by the process of "familiarizing this Court with the history of this litigation and addressing the difficult issues of applying the Third Circuit's law of the case," Mot. 11-12, does not dictate a different result. As explained above, there is no need for this Court to wade into the intricacies of the Commission's record in either the 2006 or 2002 quadrennial reviews. *See supra* pp. 6-7. Rather, this Court need only consider the new 2010 record—a record with which the Third Circuit has no experience or expertise—and only to the extent that it finds the Commission's record relevant to the *legal* question of whether the Commission complied with its statutory review mandate and its obligations under the APA. As for the purported difficulty of applying the Third Circuit's prior *Prometheus* decisions, this amounts to nothing more than analyzing and applying prior decisions to this case, to the extent they may be relevant. These are not "burdens"—and certainly not an imposition on counsel to brief and explain, whose job it is to do so—that can outweigh the inconvenience to the parties of litigating outside of this Court.

CONCLUSION

For the foregoing reasons, NAB respectfully requests that this Court deny the Motion to Transfer.

Dated: July 3, 2014

Respectfully submitted,

/s/ Helgi C. Walker

Helgi C. Walker
Counsel of Record
Ashley S. Boizelle
Lindsay S. See
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Attorneys for Petitioner National Association of Broadcasters

Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 429-5430

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2014, I caused a copy of the foregoing Opposition to the Motion to Transfer to be filed with the Clerk of the Court via the Court's CM/ECF filing system. I further certify that service was accomplished on the parties listed below via the Court's CM/ECF system.

James M. Carr
Richard Kiser Welch
Jacob M. Lewis
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Counsel for the Federal Communications Commission

Robert J. Wiggers
Kristen C. Limarzi
Chief, Appellate Section,
Antitrust Division
U.S. Department of Justice
Room 3222
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-00001
Counsel for United States of America

Patrick F. Philbin
Kirkland & Ellis LLP
655 Fifteenth St., NW
Washington, DC 20005
Counsel for Nexstar Broadcasting, Inc.

Angela J. Campbell
Andrew Jay Schwartzman
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, D.C. 20001
Counsel for Free Press, et al.

Colby M. May
Colby M. May, Esq. P.C.
PO Box 15473
Washington, DC 20003
Counsel for Howard Stirk Holdings, LLC

/s/ Helgi C. Walker
Helgi C. Walker
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036