In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMR NETWORK, Petitioner v. FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents	**No. 03-1336**

MOTION TO STRIKE A PORTION OF THE REPLY BRIEF

The Court should strike "Point II" of EMR Network's reply brief. *See* EMR Network Reply 8-11. The arguments contained in Point II are based on a British report's recommendations concerning the placement of cellular base stations near schools and EMR Network's "offer of proof" that such stations have been placed near schools in New York City. *Id.* at 9 n.6. EMR Network also cites 42 U.S.C. § 4332(F) for the argument that the Commission must "lend support" to British policies on exposure to radiofrequency energy and that that the Commission must "initiate research" into the health effects of such exposure "in the spirit of international cooperation." *Id.* at 10.

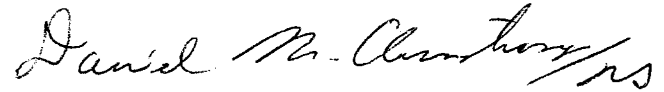
EMR Network's opening brief did not mention the British report or allege any facts concerning the specific situation in New York City, and it did not contain any argument concerning the Commission's responsibilities under 42 U.S.C. § 4332(F). Nor did EMR Network present this information or make such an argument to the Commission. By raising these questions for the first time in its reply brief, EMR

Network is seeking to support its petition for review with contentions to which the Commission has had no opportunity to respond—either in the order on review or in its respondent's brief.

While EMR Network's new contentions, even if considered, would not render the Commission's decision in this case unreasonable, it is nonetheless improper for EMR Network to attempt to raise new issues in its reply brief. This Court has consistently held that it will not consider arguments raised in a reply brief to which the opposing party has had no opportunity to respond. *Board of Regents of the Univ. of Washington v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) ("By failing to make any specific objection until their reply brief, petitioners deprived the EPA of the opportunity to respond. To prevent this sort of sandbagging of appellees and respondents, we have generally held that issues not raised until the reply brief are waived"); *see also Swanks v. Washington Metropolitan Area Transit Auth.*, 179 F.3d 929, 936 (D.C. Cir. 1999). Indeed, just two months ago, the Court reiterated the importance of this basic rule to the regularity of the judicial-review process. *See Amgen, Inc. v. Smith*, 357 F.3d 103, 117 (D.C. Cir. 2004).

When a party attempts to raise new grounds for relief in its reply brief, the appropriate remedy is for the Court to strike the portion of the reply brief containing the offending material. *See The Power Company of America, L.P. v. FERC*, 245 F.3d 839, 845 (D.C. Cir. 2001). Because Point II of the reply brief relies solely on information and arguments that were not presented in EMR Network's opening brief, the Court should strike that portion of the reply brief and decline to consider the information or the arguments raised therein.

Respectfully submitted,



Daniel M. Armstrong
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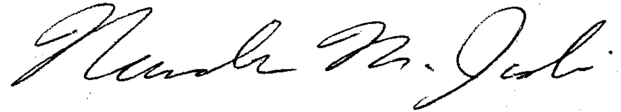

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April 21, 2004