

February 2, 2004

Marcia M. Waldron
Clerk
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
2100 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Prometheus Radio Project v. FCC
Nos. 03-3388 *et al.*

Dear Ms. Waldron:

Capitol Broadcasting Company, Inc., submits this letter-brief pursuant to the directive of the Clerk by letter of January 27, 2004.

As the Federal Communications Commission effectively acknowledges in its submission, the Consolidated Appropriations Act has no impact on the challenge in this proceeding to the Commission's failure to properly reconsider the UHF Discount. That this is so is apparent from several different facts.

First, the legislation itself takes no action relating to the Discount. It does not raise it, lower it, direct that it remain the same, or direct the FCC to do or consider doing any of these things or anything else, with respect to the Discount. It is simply silent on the subject.

Second, the only language in the legislation that conceivably bears on the Discount is the directive in Section 202(h) of the legislation relating to the Commission's conduct of its periodic reviews. Even assuming that this provision sweeps up the Discount in its reach, it relates only to the Commission's obligation going forward to address the Discount issue in the future. It too

says nothing about the correctness of the Commission's actions heretofore with respect to the Discount.

Those actions are the ones now on review before this Court, and the legislation does nothing to make it possible for the Commission to escape judicial challenge of its now-completed actions. The Commission has done what it has done, and those actions are now subject to judicial challenge as arbitrary and capricious. Nothing in the legislation supercedes those actions or makes the judicial challenges in any way less pressing.

In contravention of the Court's directive of January 27, 2004, directing the parties to address the impact of the new legislation on this appeal, the Commission has addressed another issue, entirely unrelated to the new statute. The Commission's January 30, 2004, letter brief to the Court addresses Capitol Broadcasting's attack on the UHF Discount, notwithstanding the fact that the Commission itself makes no attempt to argue that the new legislation has any impact at all on the propriety of the Court's addressing the Discount at this time.

Instead, the Commission points to Capitol's Petition for Reconsideration, pending before the agency, and repeats its already-briefed request that this Court decline to address the merits of the UHF Discount. The Commission's effort is not only inappropriate given the confines of the Court's January 27 directive: it is also wrong on the merits.

First, as Capitol explained in its Reply Brief, at 13, the UHF Discount is appropriately before this Court because the Discount was effectively raised by petitioner Prometheus. Capitol showed in its Reply Brief, at 14, that in September of 2003, when the Motion for Stay was argued, Petitioner Prometheus stated that the UHF Discount would be an important element of the challenges presented to the Commission's Order. And indeed, following this Court's directive that petitioners and intervenors who are substantively aligned should divide the issues

they wished to address among their respective briefs, and should avoid repetition, Capitol briefed this issue, and Prometheus relied upon and adopted Capitol's argument on the Discount. This Prometheus itself made clear in its own Reply Brief. See *id.* at 47. There is thus no room for the Commission's argument that the propriety of the Commission's actions with respect to the UHF Discount is not properly before this Court.

The Commission's next argument – that even if the Court has jurisdiction it should defer the issue until the agency chooses to resolve Capitol's Reconsideration Petition – is also wrongheaded, particularly in light of the position the Commission has previously taken in this case with respect to abeyance.

As noted at page 5 of the Joint Reply Brief of Prometheus Radio, et al., in Support of Motion for Stay Pending Judicial Review ("Joint Reply"), it is the Commission's normal practice to file a motion asking a court reviewing one of the agency's orders to hold the judicial appeal in abeyance pending the Commission's action on petitions for reconsideration. When such a request is made courts typically grant it. See *ibid.*, at n. 5, and authority cited there.

In this case the Commission chose not to file such a motion, notwithstanding its clear awareness that Petitions for Reconsideration were pending - including Capitol's, which addresses the UHF Discount – and notwithstanding the Commission's awareness that the Discount would be a central issue on this appeal.

Now, after the parties have fully briefed the issues, including that one, the Commission has in effect retroactively decided to go back and ask that certain parts of the appeal be held in abeyance. Coming two weeks before oral argument, and after all issues have been briefed at great length by numerous parties and intervenors, the effort comes far too late.

Capitol also notes that holding this issue in abeyance for however long the Commission

chooses to take to resolve the Reconsideration Petition will also create a substantial risk of irreparable harm. As explained in the Joint Reply, *supra*, at 2, while the Petition for Reconsideration is pending the Commission will approve mergers consistent with its newly issued rules. If this Court ultimately strikes down those regulations, the Commission will be faced with the choice between leaving these mergers in place when they violate the correct interpretation the statutes, or attempting to unscramble eggs that should never have been scrambled in the first place. That, indeed, was one of the justifications for this Court's earlier decision to stay the effect of the Commission's Decision. The Commission's request that Capitol's appeal be held in abeyance is nothing more than an effort to persuade the Court to selectively reverse itself on the Stay.

That issue has been litigated and resolved, and Capitol submits that no reason has been proffered justifying the Court's reversing itself as the Commission requests.

Respectfully submitted,

Jerome M. Marcus
Counsel for Capitol Broadcasting Company, Inc.

Cc: All Counsel