

January 26, 2004



Marcia M. Waldron
Clerk, United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

RE: *Prometheus Radio Project, et al. v. FCC and United States*
No. 03-3388

Dear Ms. Waldron:

This letter is submitted pursuant to Rule 28(j), FRAP.

The Consolidated Appropriations Act of 2004 was enacted on January 22, 2004, and will imminently become law. Section 629 (Attachment A) establishes a 39% television audience reach cap and provides for quadriennial review of other ownership rules. Therefore, appeals of the FCC's decision adopting a 45% cap may become moot.

This legislation does not moot anti-deregulatory petitioners and intervenors' challenges to the FCC's retention of the UHF Discount. Indeed, Section 629 does not even mention the Discount. Univision/Paxson suggest (at n.3 of their reply brief) that language added to Section 202(h) exempting from quadrennial review "any rules relating to" the 39 percent national audience reach limitation somehow prohibits the FCC from modifying the UHF Discount. This is clearly wrong. As amended, Section 202(h) (Attachment B) would, at most, preclude the FCC from considering the UHF Discount in future quadrennial review proceedings. It surely would not stop the FCC from modifying the UHF Discount using ordinary APA powers.

Since Section 202(h) as amended does not mention the UHF Discount, treating the legislation as freezing the UHF Discount would be illogical. "National audience reach," the measure used to calculate the 39% cap, *see* 47 CFR §73.3555(d)(2)(i) (2003), cannot be static, as it relies not only on the UHF Discount, but also on proprietary Nielsen DMA market definitions which are revised from time to time. Because Nielsen could go out of business, stop issuing DMA data, or come to be regarded as unreliable, it is inconceivable that Congress would prohibit the FCC from modifying Section (d)(2)(i).

The appropriations amendment was adopted because of widespread Congressional concern over the excessively deregulatory nature of the FCC's action. Thus, the 39% cap precludes further consolidation, and the quadrennial review significantly slows the pace of FCC deregulatory efforts. It is implausible that Congress would simultaneously freeze the UHF Discount, since that would promote consolidation and preclude further tightening of the UHF Discount.

The UHF Discount is ripe for review and this Court can and should decide the issue.

Respectfully submitted,

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ATTACHMENT A

administer Small Business Administration programs in Alaska, Hawaii, and the territories, including disaster loans to fishermen, programs benefitting Alaska Native Corporations and Native Hawaiians, including but not limited to section 8(a) and Historically Underutilized Business Zones, and all other programs serving Alaska Natives and Native Hawaiians. All disaster loans issued in Alaska shall be administered by the Small Business Administration and shall not be sold during fiscal year 2004.

SEC. 625. None of the funds made available in this Act may be transferred to any department, agency, or instrumentality of the United States Government, except pursuant to a transfer made by, or transfer authority provided in, this Act or any other appropriation Act.

SEC. 626. The Secretary of Commerce shall negotiate or reevaluate, with the consent of the President, international agreements affecting international ocean policy.

SEC. 627. The Departments of Commerce, Justice, State, the Judiciary, and the Small Business Administration shall each establish a policy under which eligible employees may participate in telecommuting to the maximum extent possible without diminished employee performance: *Provided*, That, not later than 6 months after the date of the enactment of this Act, each of the aforementioned entities shall provide that the requirements of this section are applied to 100 percent of the workforce: *Provided further*, That, of the funds appropriated in this Act for the Departments of Commerce, Justice, and State, the Judiciary, and the Small Business Administration, \$200,000 shall be available to each Department or agency only to implement telecommuting programs: *Provided further*, That, every 6 months, each Department or agency shall provide a report to the Committees on Appropriations on the status of telecommuting programs, including the number of Federal employees eligible for, and participating in, such programs, and uses of funds designated under this section: *Provided further*, That each Department or agency shall designate a “Telework Coordinator” to be responsible for overseeing the implementation of telecommuting programs and serve as a point of contact on such programs for the Committees on Appropriations.

SEC. 628. The paragraph under the heading “Small Business Administration—Disaster Loans Program Account” in chapter 2 of division B of Public Law 107–117 is amended by inserting “or section 7(b) of the Small Business Act” after “September 11, 2001”.

SEC. 629. The Telecommunications Act of 1996 is amended as follows—

(1) in section 202(c)(1)(B) by striking “35 percent” and inserting “39 percent”;

(2) in section 202(c) by adding the following new paragraphs at the end:

“(3) DIVESTITURE.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

“(4) FORBEARANCE.—Section 10 of the Communications Act of 1934 (47 U.S.C. 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B);” and

(3) in section 202(h) by striking “biennially” and inserting “quadrennially” and by adding the following new flush sentence at the end:

“This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).”.

SEC. 630. (a) Tracing studies conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives are released without adequate disclaimers regarding the limitations of the data.

(b) The Bureau of Alcohol, Tobacco, Firearms, and Explosives shall include in all such data releases, language similar to the following that would make clear that trace data cannot be used to draw broad conclusions about firearms-related crime:

(1) Firearm traces are designed to assist law enforcement authorities in conducting investigations by tracking the sale and possession of specific firearms. Law enforcement agencies may request firearms traces for any reason, and those reasons are not necessarily reported to the Federal Government. Not all firearms used in crime are traced and not all firearms traced are used in crime.

(2) Firearms selected for tracing are not chosen for purposes of determining which types, makes or models of firearms are used for illicit purposes. The firearms selected do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe. Firearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.

SEC. 631. Section 503(f) of the Small Business Investment Act of 1958 (15 U.S.C. 697(f)) shall be amended by substituting “March 15, 2004” for the last date that appears in the subsection.

SEC. 632. In addition to amounts otherwise appropriated in this Act, the unobligated balances previously made available by section 507(g) of Public Law 105–135 shall be available until expended for the cost of general business loans under section 7(a) of the Small Business Act.

SEC. 633. (a) There is established in the Treasury of the United States a trust fund to be known as the International Center for Middle Eastern-Western Dialogue Trust Fund. The income from the fund shall be used for operations of the International Center for Middle Eastern-Western Dialogue to promote dialogue and scholarship in the Middle East. The fund may accept contributions and gifts from public and private sources.

(b) It shall be the duty of the Secretary of the Treasury to invest in full amounts made available to the fund. Such investments may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. The interest on, and the proceeds from the sale or redemption of, any obligations held in the fund shall be credited to and form a part of the fund and shall remain available without fiscal year limitation.

(c) For each fiscal year, there is authorized to be appropriated from the fund for the operations of the International Center for

ATTACHMENT B

Provisions of the Telecommunications Act of 1996
(As Amended by the Consolidated Appropriations Act of 2004)

Section 202(c)(1)

(c) TELEVISION OWNERSHIP LIMITATIONS.--

(1) NATIONAL OWNERSHIP LIMITATIONS.-- The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)--

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 39 percent.

Section 202(h)

(h) FURTHER COMMISSION REVIEW.--The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest. This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).