

February 19, 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*, No. 03-3388
(and consolidated cases) (argued February 11, 2004)

Dear Ms. Waldron:

Citizen Petitioners (CP) respond here to letters regarding *Cellco Partnership v. FCC*, 02-1262 (D.C. Cir. Feb. 13, 2004).

Cellco supports CPs' argument that the FCC merits *Chevron* deference in determining that "necessary in the public interest" mirrors the traditional public interest standard, slip op. at 3, 9, 12-14; see CP Br. at 27-30; 32, and adopting the "same standard used to adopt regulations under 47 U.S.C. §201(b)." Slip op. at 3. The 1996 Act's broad policy goals do not rewrite the public interest standard. Slip op. at 5. (citing Pub. L. No. 104-104, §601(c)(1), 110 Stat. 56).

Cellco confirms that the FCC misinterpreted *Fox* and *Sinclair* by employing a deregulatory presumption. Thus, this Court must reverse; it cannot affirm on different reasoning. *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001). *Cellco* makes clear that §202(h) does not "shift[] the traditional administrative law burden...to those seeking to retain [rules]." JA 141, see CP Reply Br. at 5. "Neither *Fox I* nor *Sinclair* adopted...the position that §11 embodies a presumption in favor of deregulation." Slip op. at 15. Furthermore, §11 "does not impose a special evidentiary burden." Slip op. at 3; see also 15. Thus, the Commission's should have employed normal APA standards, including predictive judgments, slip. op at 16, in determining whether the rules were no longer necessary in the public interest. It should not have employed a deregulatory presumption which improperly forced proponents to carry the burden of retaining the rules.

Cellco clarifies that, as CP argued, CP Br. at 25, CP RepBr. at 9 n.5, the presumption referred to in *Fox* was only "made in the context of discussing available remedies for the court." Slip op. at 16. Moreover, *Cellco* confirms the FCC's interpretation that section 11 creates "a presumption in favor of repealing or modifying covered rules" only after finding rules are no longer necessary. Slip Op. at 15, 17. As CP stated at oral argument the directive to "repeal or modify" permits adoption of stronger as well as weaker regulations.

Respectfully submitted,

Andrew Jay Schwartzman

cc. Counsel (listed on attached certificate)