

5 K STREET NW  
WASHINGTON, DC 20006  
NE 202.719.7000  
202.719.7049

5 JONES BRANCH DRIVE  
E 6200  
AN, VA 22102  
NE 703.905.2800  
703.905.2820

wrf.com

February 17, 2004

Helgi C. Walker  
202.719.7349  
hwalker@wrf.com

**VIA OVERNIGHT DELIVERY**

Ms. Marcia M. Waldron  
Clerk, United States Court of Appeals  
for the Third Circuit  
James A. Byrne Courthouse  
601 Market Street  
Philadelphia, PA 19106

**Re: *Prometheus Radio Project, et al. v. Federal Communications Commission, Case Nos. 03-3388 (consolidated)***

Dear Ms. Waldron:

Pursuant to Fed. R. App. P. 28(j), Clear Channel Communications, Inc. ("Clear Channel") responds to the FCC's February 13, 2004 letter (enclosing *Cellco Partnership v. FCC*, 02-1262 (D.C. Cir. Feb. 13, 2003) ("*Cellco*")).

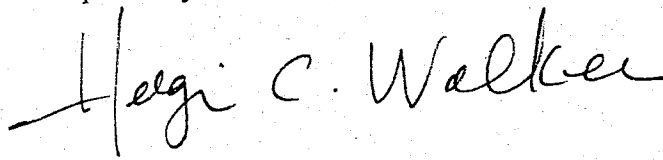
For the reasons set forth in its briefs and stated during oral argument, Clear Channel respectfully submits that the *Cellco* decision incorrectly upheld the FCC's interpretation of the "necessary in the public interest" test in Section 11, which governs the biennial review of telecommunications carriers, to require nothing more than an ordinary rulemaking analysis. *See* Clear Channel Br. 20-24. That reading ignores the avowedly deregulatory purpose of the biennial review and renders the mandated inquiry a nullity. *See id.*

Nonetheless, Clear Channel's arguments remain especially compelling in the context of Section 202(h), which is part of a statutory provision that eliminated or relaxed numerous media ownership restrictions. As the D.C. Circuit previously recognized, in Section 202(h) Congress mandated a biennial review of ownership rules "in order to continue the process of deregulation." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, *reh'g granted on other grounds*, 293 F.3d 537 (2002). Indeed, although Clear Channel believes that the same deregulatory purpose underlies Section 11, the *Cellco* court evidently considered the "the . . . regulatory context" of Section 202(h) sufficiently "different" to leave the question before this Court expressly open. Slip Op. 15.

In any event, the portions of the FCC's *Order* retaining the eight-station cap, prohibiting transfers of non-compliant combinations, and deciding to attribute and not to grandfather sales and additional marketing agreements must be reversed even under the more lax standard that the FCC suggests was approved by *Cellco* because

they are arbitrary and capricious. Among other errors, the FCC inexplicably departed from prior statements that it would *not* utilize the biennial review to increase regulatory burdens (Clear Channel Br. 31, Clear Channel Reply 11-13), reached numerous internally contradictory conclusions (Clear Channel Br. 32-42, 44-48, 53-58, Clear Channel Reply 16-17, 19-21, 24), and provided no explanation for its rejection of a proposal that was entirely consistent with its own economic analysis (Clear Channel Br. 34-35).

Respectfully submitted,

A handwritten signature in black ink that reads "Helgi C. Walker". The signature is written in a cursive style with a large initial "H" and a distinct "C" before the last name.

Helgi C. Walker

cc: Counsel of Record (per attached service list)