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February 27, 2004

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Ms. Marcia M. Waldron, Clerk
U.S. Court of Appeals for 3rd Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Prometheus Radio Project *et al.* v. FCC & USA, No. 03-3388
(and consolidated cases) (argued February 11, 2004)

Dear Ms. Waldron:

Pursuant to Fed. R. App. P. 28(j), NAB addresses *Cellco Partnership v. FCC*, 02-1262 (D.C. Cir. Feb. 13, 2004) ("Cellco"). Cellco interpreted Section 11 of the Communications Act, which, as the D.C. Circuit acknowledged, involved a "different regulatory context" than does Section 202(h) of the Telecommunications Act of 1996, the provision at issue here.

1. Cellco does not affect NAB's contention that the Commission violated Section 202(b) when it replaced the longstanding contour method for defining local radio markets with Arbitron, thereby restricting consolidation Congress expressly authorized in § 202(b). Neither the Commission's general rulemaking power nor § 202(h) allows the FCC to override express congressional judgments. Cellco certainly did not hold that § 11 grants the FCC authority to do so, and thus Cellco does not justify the FCC's decision to prohibit consolidation that Congress expressly approved.

2. Cellco held principally that the word "necessary" in Section 11 could mean "useful," rather than "required." As stressed in briefing and argument, none of NAB's arguments depends on the word "necessary" in Section 202(h) being given one or the other meaning.

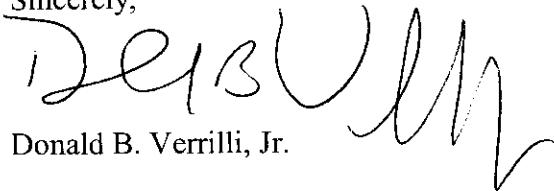
3. Cellco does not undermine the FCC's conclusion that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules." Order 11. Nor did Cellco purport to amend the holding in *Fox Broadcasting Co. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), that the FCC had to cite evidence, not "undeveloped and unsupported" speculation, to justify its ownership restrictions.

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4. Cellco, accordingly, does not affect NAB's challenge to the FCC's switch to Arbitron. The Commission failed to identify any evidence that the purported "anomalies" caused by the contour methodology ever caused real harm.

5. Nor does Cellco undermine NAB's challenge to the Commission's top-4 rule. The Commission's assertion of reduced benefits from mergers among top-4 stations was based on evidence concerning stations in only the largest markets. The Commission thus lacked any evidentiary support for applying the rule to all 210 markets, thus eliminating the benefits of consolidation in the smaller markets where the Commission found the benefits of consolidation were most needed.

Sincerely,

A handwritten signature in black ink, appearing to read "DeB Verrilli", written in a cursive style.

Donald B. Verrilli, Jr.