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February 2, 2004

Marcia M. Waldron
Office of the 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, et al.*

Dear Ms. Waldron:

On behalf of Fox Entertainment Group, Inc., Fox Television Stations, Inc., the National Broadcasting Company, Inc., Telemundo Communications Group, Inc., and Viacom Inc., we respectfully submit the following response to the Court's order dated January 27, 2004:

As the Court's order correctly notes, the Consolidated Appropriations Act "sets the national television audience reach limitation at 39 percent." As explained in the FCC's letter responding to the Court's order, the Appropriations Act constitutes "a statutory directive to modify the national television ownership rule." Because the FCC's order modifying the rule will supersede the FCC's June 2003

order, any pending challenges to the June order will be moot.¹ NASA and the other anti-deregulatory petitioners have indicated that they agree.²

Challenges relating to the UHF discount will likewise be moot. As explained more fully in the letter submitted by Paxson/Univision, the Appropriations Act goes beyond instructing the FCC merely to substitute “39 percent” for “35 percent” in 47 C.F.R. § 73.3555(e)(1). The Act instructs the FCC to “increas[e] the national audience reach limitation for television stations to 39 percent.” An FCC regulation provides: “*National audience reach* means the total number of television households” reached by a firm’s stations, except that “UHF television stations shall be attributed with 50 percent of the television households” reached. 47 C.F.R. § 73.3555(e)(2)(i). Because it used an administratively defined term, Congress plainly intended its words to have the defined meaning.³ Thus, Congress instructed the FCC to increase the national audience reach limitation to 39 percent as calculated pursuant to the UHF discount.

¹ See, e.g., *Teledesic LLC v. FCC*, 275 F.3d 75, 78 (D.C. Cir. 2001) (“Just before oral argument in this case, the FCC revised the new rules so as to accede to the demands of Teledesic with respect to two issues. Teledesic’s challenges on these two issues are therefore moot.”); *Western Power Trading Forum v. FERC*, 245 F.3d 798, 800 (D.C. Cir. 2001) (“As a federal court, we can only adjudicate actual, ongoing controversies. . . . Most of this case has lost that character, thanks to a Commission order issued after initial briefing but before oral argument.”) (internal quotations omitted); *PLMS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C. Cir. 1999) (“Because the *Third Report and Order* superseded the disputed portions of the *Reconsideration Orders* . . . , [petitioners’] challenge to the *Reconsideration Orders* is moot.”). This is true of both the challenges of anti-deregulatory petitioners and those of the undersigned parties. Of course, if it were determined that NASA’s challenges are not moot, then those of the Networks would not be moot either.

² See Letter Dated Jan. 28, 2004, at 1 n.1 (“As a result of this legislation, it appears to be unnecessary for this Court to consider petitioners’ challenges to the Commission’s decision to set the national television ownership cap at 45 percent of television households.”) (submitted “[o]n behalf of the Citizen Petitioners and Intervenors, the Network Affiliated Stations Alliance, *et al.*, and Capitol Broadcasting Corp.”).

³ See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (“Congress’ repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.”).

If UHF-discount-related challenges are not dismissed as moot or for lack of jurisdiction, we agree with the FCC's suggestion that they are best deconsolidated from these consolidated appeals and placed in abeyance.⁴ A pending reconsideration petition is always a sufficient ground for abeyance: the FCC may on reconsideration moot grounds argued on appeal or give rise to new ones. And the passage of the Appropriations Act makes abeyance particularly appropriate here. On reconsideration, the FCC will be compelled to address the Appropriations Act's impact on the UHF discount: in considering Capitol's arguments that the agency erred in refusing to repeal the UHF discount, it must consider whether the Appropriations Act undermines those arguments. Abeyance would thus make it unnecessary for this Court to address a difficult issue in the first instance.

As for challenges to the other ownership rules, we believe that the Appropriations Act has no effect one way or another. We believe that the oral argument scheduled for February 11, 2004, is best devoted to those challenges alone.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized initial 'H' followed by a long, horizontal, wavy line that extends to the right.

Henk Brands

⁴ See *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 980 (D.C. Cir. 1996) (placing one issue in abeyance while adjudicating others where, after briefing and argument, it appeared issue was subject of reconsideration).

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of February 2004, I caused one copy of the foregoing letter to Marcia M. Waldron to be served by U.S. first-class mail, postage prepaid, upon all parties listed below, and by e-mail upon each party whose name is marked with an asterisk(*):

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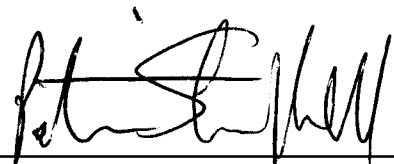
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