

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

January 30, 2004

OFFICE OF GENERAL COUNSEL
LITIGATION DIVISION

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
2100 United States Courthouse
601 Market St.
Philadelphia, PA 19106-1790

Re: Prometheus Radio Project v. FCC, Nos. 03-3388, et al.

Dear Ms. Waldron:

This letter is submitted in response to the Court's direction to counsel, in your letter of January 27, 2004, to file comments concerning the effect of recent legislation on the referenced case. On January 23, 2004, the President signed into law the Consolidated Appropriations Act, 2004, Pub. L. 108-199. Division B of that statute constitutes the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004. Section 629 of Division B (copy attached) amends Section 202(c)(1)(b) of the Telecommunications Act of 1996 to direct the FCC to modify its rules with respect to the national television ownership limitation. In addition, the new statute modifies the biennial review requirement of the 1996 Act to a quadrennial review requirement and excepts from the quadrennial review requirement "any rules relating to the 39 percent audience reach limitation in subsection (c)(1)(B)." We noted in our brief that this legislation was pending. *See Resp. Br.* at 17.

The Commission is thus under a statutory directive to modify the national television ownership rule. Once the Commission has amended the rule, challenges pending before the Court to the agency's action increasing the limit to 45% (*see Resp. Br.* at 96-100) will become moot. *See, e.g., PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C.Cir. 1999) ("Because the *Third Report and Order* superseded the portions of the *Reconsideration Orders*, *see* 12 F.C.C.R. 10, 943, ¶6 [petitioners'] challenge to the *Reconsideration Order* is moot."). In light of this change in circumstances, the Court may prefer to streamline the oral argument scheduled for February 11, 2004, by eliminating consideration of the national television ownership rule.

Intervenor Capitol Broadcasting has sought to challenge the UHF discount rule, which is an appendage to the national television ownership rule. We believe that the Court lacks jurisdiction over Capitol's challenge. Capitol has filed with the Commission a petition for reconsideration of the *Report and Order* on review in this case that raises the same issues it has raised in its brief here. As discussed in our brief, the Court lacks jurisdiction over arguments

raised by a party that has sought reconsideration of the same issues by the agency. In addition, as an intervenor, Capitol's arguments against the UHF discount are barred because no petitioner has raised that issue. *See* Resp. Br. at 100-01. If the Court, however, is not prepared to conclude that jurisdiction is lacking, it should hold the UHF discount issue in abeyance pending FCC action on Capitol's reconsideration petition. *See Teledesic LLC v. FCC*, 275 F.3d 75, 83 (D.C.Cir. 2001), *citing Wrather-Alvarez Broadcasting, Inc. v. FCC*, 248 F.2d 646, 649 (D.C.Cir. 1957). In either event, we do not believe that it will be necessary for the Court to hear oral argument on that aspect of this case.

Respectfully submitted,

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attachment

cc: certificate of service

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that the foregoing Letter to Marcia M. Waldron was served this 30th day of January 2004 by sending copies by first-class mail to the following persons at the addresses shown below.

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