

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 90-638
)	
HEIDI DAMSKY)	File No. BPH-880816MW
)	
WEDA, LTD.)	File No. BPH-880816NR
)	
HOMEWOOD PARTNERS, INC.)	File No. BPH-880816NU
)	
For a Construction Permit for a New)	
FM Station on Channel 247A in)	
Homewood, Alabama)	
)	

TO: The Full Commission

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules and Regulations, 47 C.F.R. Section 1.115, and Section 5(c)(4) of the Communications Act, 47 U.S.C. Section 5(c)(4), Heidi Damsky ("Damsky"), by her attorney, hereby respectfully requests the full Commission to review and set aside the action of the Chief, Audio Services Division, announced by Public Notice, Report No. 44299, released August 6, 1998, a copy of which is attached and marked Exhibit A, issuing a construction permit to Homewood Radio Co., L.L.C., for a new FM broadcast station at Homewood, Alabama. In support thereof, it is alleged:

1. This is a comparative FM proceeding, involving three competing applications, each for a construction permit for a new FM broadcast station at Homewood, Alabama. Over the strenuous objections of Damsky, two of the applicants, WEDA, Ltd., and Homewood Partners, Inc.,

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have merged and formed a new company, Homewood Radio Co., L.L.C. ("HRC"), which proposes to obtain the construction permit; build the radio station with money furnished by another broadcaster in the Birmingham market, Cox Radio, Inc.; and sell the radio station to Cox for \$5 million.

2. On May 6, 1998, and over Damsky's objections, the Commission issued a Decision, purporting to approve the settlement. Damsky promptly filed a Petition for Reconsideration, objecting to that portion of the Decision which found her to be financially unqualified and raising questions as to whether the arrangements between HRC and Cox Radio, Inc., violated the antitrust laws. On May 29, 1998, Damsky filed an Emergency Motion for Stay, asking the Commission to stay the effectiveness of its Decision pending Commission action on her Petition for Reconsideration.

3. By letter dated July 21, 1998, a copy of which is attached and marked Exhibit B, HRC requested the Commission staff to overrule Damsky's motion for stay and to immediately issue a construction permit to HRC. By letter dated July 29, 1998, a copy of which is attached and marked Exhibit C, Damsky opposed the request. By letter dated July 31, 1998, a copy of which is attached and marked Exhibit D, HRC responded again, arguing that the construction permit should be issued, immediately. By letter dated August 3, 1998, a copy of which is attached and marked Exhibit E, Damsky responded again, arguing for an issuance of the stay.

4. For the reasons set forth in Exhibits C and E, Damsky respectfully requests the Commission to review and set aside the staff's action, granting the construction permit.

5. While HRC cited a number of cases in which the Commission staff issued authorizations, notwithstanding the pendency of timely filed requests for administrative review, all

of the cases cited by HRC were transfer or assignment cases. HRC did not cite a single case involving a construction permit for a new broadcast station in which the Commission staff has issued a construction permit, notwithstanding the existence of a timely filed petition for reconsideration and motion for stay.

6. The effect of the staff's action is to pre-judge Commission action on Damsky's Petition for Reconsideration and Emergency Motion for Stay, i.e., to present the Commission with a fait accompli which cannot do otherwise than to affect the Commission's judgment in a manner prejudicial to Damsky. As the Court of Appeals observed in another context:

"It is suggested that to question this involves a challenge to the good faith of the Commission. But this is not a matter only of good faith. Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent . . . To argue, as appellant does, that this may weigh in the balance of an otherwise close question is not a challenge to the good faith or integrity of the triers; it is a recognition that they are mortal men." Community Broadcasting Co., Inc., v. FCC, 274 F.2d 753 (D.C. Cir. 1960) at p. 759. To the same effect: Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (1968).

7. Section 1.115(b)(1) of the Commission's Rules (47 C.F.R. Section 1.115(b)(1)) requires that an application for review state the questions presented for review. There are two.

(1) Whether the FCC staff had the authority to issue the construction permit where, as here, the full Commission had pending before it a timely filed petition for reconsideration and motion for stay, directed against the issuance of the permit; and

(2) Even assuming that the staff had the authority to act as it did, whether such actions deprived Damsky of her rights to due process of law.

8. 47 C.F.R. Section 1.115(b)(2) provides that an applicant for review must specify with particularity the questions which warrant Commission consideration of the questions presented.

Here, Damsky relies upon 47 C.F.R. Section 1.115(b)(2)(i), which provides for an application for review of a staff action which is conflict with established Commission policy; and 1.115(b)(2)(v), which provides for review where, as here, the staff has committed prejudicial procedural errors.

9. 47 C.F.R. Section 1.115(b)(4) requires an applicant for review to state the form of relief sought. The form of relief sought is simply rescission of the construction permit until the Commission has acted upon Damsky's pending Petition for Reconsideration and Emergency Motion for Stay.

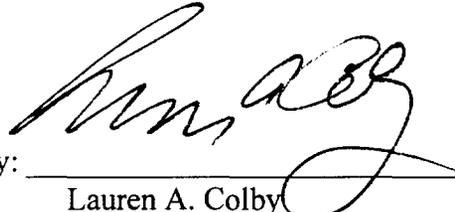
WHEREFORE, it is respectfully requested that the full Commission review and set aside the action of the Chief, Audio Services Division, issuing a construction permit to Homewood Radio Co., L.L.C., for a new FM broadcast station at Homewood, Alabama.

Respectfully submitted,

August 12, 1998

HEIDI DAMSKY

Law Office of
LAUREN A. COLBY
10 E. Fourth Street
P.O. Box 113
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By: 

Lauren A. Colby
Her Attorney

EXHIBIT A

BROADCAST ACTIONS

ACTION OF : August 3, 1998

8/6/98

AL BPH	-880816NR NEW 97.3 MHZ	HOMWOOD RADIO CO L.L.C. HOMWOOD, AL	APPLICATION GRANTED TO FM BROADCAST STATION CP FOR A NEW FM STATION ON: FREQUENCY 97.3 MHZ, ERP: 1.25 KW H&V; HAAT: 153 METERS H&V; 33 24 58 86 50 16 GRANTED IN MM DKT 90-638 REL 05/06/98 PETITION FOR RECONSIDERATION 05/22/98 MOTION FOR STAY 06/01/98
HI BAL	-980609EB KQNG 570 KHZ	SANCHEZ COMMUNICATIONS CORPOPATION LIHUE, HI	APPLICATION GRANTED TO AM BROADCAST STATION VOLUNTARY ASSIGNMENT OF LICENSE FROM: SANCHEZ COMMUNICATIONS CORPORATION TO: VISONARY RELATED ENTERTAINMNET, INC. (FORM 314)
HI BALH	-980609EC KQNG-FM 93.5 MHZ	SANCHEZ COMMUNICATIONS CORPORATION LIHUE, HI	APPLICATION GRANTED TO FM BROADCAST STATION VOLUNTARY ASSIGNMENT OF LICENSE FROM: SANCHEZ COMMUNICATIONS CORPORATION TO: VISONARY RELATED ENTERTAINMNET, INC. (FORM 314)
NY BPED	-980724MC NEW 90.9 MHZ	PEE WEE COMMUNICATIONS INC. ALBANY, NY	APPLICATN RETURNED TO NON-COMMERCIAL EDUCATIONAL FM APPLICATION FOR NCE STATION IN ALBANY, NY. REQUESTS SHARE-TIME WITH WCDB, ALBANY, NY. NO ENGINEERING DATA PROVIDED WITH APPLICATION. RETURNED 8/3/1998

10825

EXHIBIT B

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July 21, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 "M" Street, N.W.
Washington, D.C. 20554

Attention: Linda Blair, Esquire
Chief, Audio Services Division

**Re: File No. BPH-880816NR
File No. BMPH-980602II
Homewood, AL**

Dear Ms. Salas:

This Law Firm represents Homewood Radio Co., L.L.C. ("HRC") in matters before the Federal Communications Commission. HRC is construction permittee of a new FM station on Channel 247A at Homewood, Alabama (the "Station"). This letter constitutes a formal request to issue to HRC the construction permit for the Station, as modified, which the Commission has granted pursuant to its *Memorandum Opinion and Order* in Heidi Damsky, 13 FCC Rcd ____ (FCC 98-81, released May 6, 1998).

The issuance of a construction permit is a ministerial act. Kyles Broadcasting, Ltd., 5 FCC Rcd 5846 (¶ 3) (1990) (validity of construction permit not affected by the fact that ministerial act of actually issuing the permit had not occurred). Nearly 3 months have passed since the Commission adopted the *Memorandum Opinion and Order* granting the HRC application, including approval of the relocation of the transmitter site to the Channel 68 tower. In light of the time that has passed, HRC requests that in this case, the Commission proceed expeditiously with the ministerial act of issuing the construction permit.

In this request, HRC is neither seeking action on nor arguing the merits of the pending Petition for Reconsideration and the Request for Stay that have been filed by Heidi Damsky. HRC simply seeks the issuance of the construction permit.

PATTON BOGGS, L.L.P.

Ms. Magalie Roman Salas

July 21, 1998

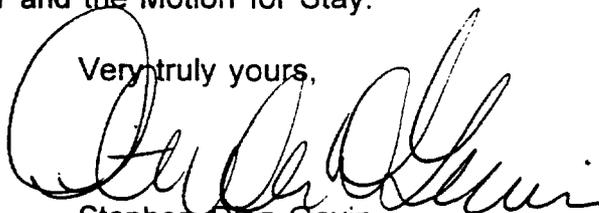
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HRC will bear the risk of an adverse ruling by the Commission or a reviewing court and the Commission should condition the construction permit upon any subsequent adverse action that the Commission may take with respect to the pending pleadings. The Commission routinely permits construction and operation of stations prior to final action. "The provision of service to the public would be long delayed if successful applicants were required to wait until every last appeal was resolved before beginning to broadcast." Orion Communications, Ltd. v. F.C.C., 1997 U.S. App. LEXIS 35675, *8 (D.C. Cir. 1997). The public interest is not served by having facilities, such as those authorized in the *Memorandum Opinion and Order*, to lie fallow. See generally, Highlands Broadcasting Co., 9 FCC Rcd 5746, 5747 (1994); David J. Bott, 9 FCC Rcd 6426, 6427 (1994). The public interest is served by allowing for the initiation of service by issuance of the construction permit.

HRC is ready and willing to begin construction of the Station. Based upon the *Memorandum Opinion and Order*, which granted HRC's application, HRC made a firm order for the transmission equipment for the Station; indeed, the equipment is ready for delivery. HRC has negotiated a tower site lease. HRC is in active negotiation with a prospective a General Manager and is trying to identify additional staff for the Station. HRC has contracted for and caused to be begun site preparation work, such as reinforcement of the Channel 68 tower base and the pouring of a concrete pad for the Station's transmitter building. The only matter delaying actual construction of the Station's transmission facility and beginning operation on what would be the first transmission facility licensed to Homewood, Alabama is the issuance of a construction permit by the FCC.

Accordingly, HRC respectfully requests that the Audio Services Division issue the construction permit for the Station, such construction permit to be conditioned upon the ultimate disposition by the Commission and any reviewing court of the pending Petition for Reconsideration and the Motion for Stay.

Very truly yours,



Stephen Diaz Gavin

cc: John F. Garziglia, Esquire
Lauren A. Colby, Esquire
James R. Shook, Esquire
John Riffer, Esquire

EXHIBIT C

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July 29, 1998

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VIA FEDERAL EXPRESS

Ms. Magalie Roman Salas
Secretary
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1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Ref: Heidi Damsky, MM Docket No. 90-638, Homewood, Alabama,
FM Proceeding

Dear Ms. Salas:

This comparative case originally involved three mutually exclusive applications, each for a construction permit for a new FM broadcast station at Homewood, Alabama, i.e., the applications of Heidi Damsky, Homewood Partners, Inc., and WEDA, Ltd. Two of the applicants, Homewood Partners and WEDA, have merged and formed a new company, Homewood Radio Co., L.L.C. ("HRC"), which proposes to acquire the construction permit and sell it to Cox Radio, Inc., for \$5,000,000. The full Commission has approved a settlement agreement which excludes Damsky from any participation in the settlement on the grounds that she is, allegedly, financially unqualified. Damsky has filed a Petition for Reconsideration, protesting her disqualification and raising questions concerning the compliance of the Cox deal with the antitrust laws. Additionally, Damsky has filed a motion, asking the Commission to stay the effectiveness of its Decision, awarding a construction permit to HRC, pending FCC consideration of Damsky's Petition for Reconsideration.

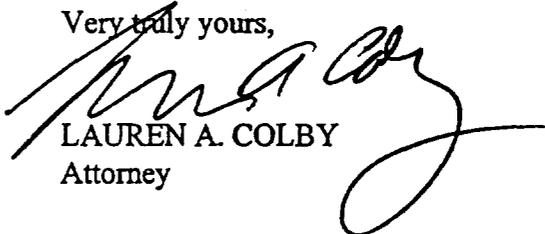
By letter dated July 21, 1998, counsel for HRC asks the Mass Media Bureau to effectively deny Damsky's Motion for Stay and issue an immediate construction permit to HRC. The letter is disingenuous in a number of respects. It alleges, for example, that "HRC is in negotiation with a prospective a [sic] general manager". That is nonsense. Newspaper accounts printed in the Birmingham News make it clear that HRC is reserving only an hour a week of programming on the station; all the rest will belong to Cox, under a local marketing agreement (Damsky's Emergency Motion for Stay, Exhibit A). HRC should have no problem finding a general manager to handle an hour of programming.

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Additionally, the letter blatantly misstates the applicable law. It states that, "The Commission routinely permits construction and operation of stations prior to final action". However, no authority is given for this broad proposition. Instead, HRC cites three cases: two at the Commission level and one at the level of the Court of Appeals, in which, after a full hearing and disposition of all administrative remedies at the Commission level, the Commission issued construction permits during the time period while someone was going to court. Clearly, that is not the situation here; Damsky has had no opportunity to go to court, because her Petition for Reconsideration and Motion for Stay have not been acted upon by the full Commission.

What HRC is trying to do is to get the FCC staff to moot Damsky's Petition and Motion to the full Commission, by issuing the very construction permit which is the subject of these pleadings. With all due respect, that is a misuse of the Commission's processes. For the staff to act at this point in time, before Damsky has exhausted her remedies before the full Commission, is not only unprecedented, but is also an unseemly effort to obtain through the back door, from the staff, relief which the Commission has not yet seen fit to grant, *i.e.*, an actual order denying the stay and issuing the permit. If the staff were to grant the relief HRC seeks, Damsky would be severely prejudiced and deprived of her rights to due process of law. Therefore, Damsky opposes the HRC request.

Very truly yours,



LAUREN A. COLBY
Attorney

LAC/tdm

cc: Ms. Linda Blair (Fax/Mail)
Mr. James Shook (Fax/Mail)
Stephen Diaz Gavin, Esq.
John F. Garziglia, Esq.
Mrs. Heidi Damsky

EXHIBIT D

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July 31, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 "M" Street, N.W.
Washington, D.C. 20554

Attention: Linda Blair, Esquire
Chief, Audio Services Division

Re: **File No. BPH-880816NR**
File No. BMPH-980602II
Homewood, AL

Dear Ms. Salas:

This Law Firm represents Homewood Radio Co., L.L.C. ("HRC") in matters before the Federal Communications Commission. HRC is construction permittee of a new FM station on Channel 247A at Homewood, Alabama (the "Station"). See Heidi Damsky, 13 FCC Rcd ____ (FCC 98-81, released May 6, 1998). By letter dated July 21, 1998, HRC requested that the Commission issue the construction permit for the Station, as modified. By letter dated July 29, 1998, Heidi Damsky ("Damsky") opposed the request. This letter constitutes HRC's reply to Damsky's letter in opposition. As has been the case throughout the lengthy comparative proceeding for the Station, MM Docket No. 90-638, Damsky ignores the record facts and the applicable law.

Damsky contends that HRC is seeking to have the Audio Services Division effectively deny her pending Petition for Reconsideration and her Motion for Stay of the effectiveness of the grant of the construction permit for the Station. (Damsky Letter, p. 1). This is directly contradicted by the stated purpose of the request:

HRC is neither seeking action on nor arguing the merits of the pending Petition for Reconsideration and the Request for Stay that have been filed by Heidi Damsky. HRC simply seeks the issuance of the construction permit.

(July 21st Request, p. 1). Certainly, Damsky cannot refute what the Commission has

PATTON BOGGS, L.L.P.

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made plain: the issuance of a construction permit is a ministerial act. Kyles Broadcasting, Ltd., 5 FCC Rcd 5846 (¶ 3) (1990). In light of this principle, the time is ripe for issuance of the permit.

Damsky alleges, without any basis in fact, that the letter request is "disingenuous" insofar as HRC had indicated that it was in negotiations with a prospective general manager, which she dismissed as "nonsense" on the basis of an inaccurate newspaper article suggesting that HRC would only be reserving one hour per week under a local marketing agreement ("LMA").

In fact, as a result of the delay in obtaining the construction permit, HRC has had to put "on hold" its discussions with its prospective general manager, who would have a full-time position and is a person with many years' managerial experience in broadcasting. HRC has sought such a qualified individual because it takes seriously its obligation to have a "meaningful management and staff presence" at the Station. WGPR, Inc., 10 FCC Rcd 8140, 8143 (¶ 18) (1995).

Equally erroneous is Damsky's suggestion, based upon an incorrect newspaper article,^{1/} that the LMA between HRC and Cox Radio, Inc. will not provide sufficient for programming by HRC. In fact, contrary to the Damsky letter, the LMA will require that HRC receives *at least* two hours of programming per week for production of public interest programming that HRC deems necessary. (See Letter of Intent, dated August 12, 1997, at p. 5, copy of which was included in the Joint Request for Approval of Settlement, filed September 11, 1997). As a matter of law, the Commission has stated that it is not interested in the amount of time that a licensee might broker. Policy Statement on Time Brokerage, 82 FCC 2d 107, 114 (¶ 17) (1980). In fact, the Commission has approved agreements where 100% of the broadcast time would be brokered by the licensee. Gisela Huberman, 6 FCC Rcd 5397 (M. M. Bur. 1991); Brian M. Madden, 6 FCC Rcd 1871 (M. M. Bur. 1991).

Finally, HRC has stated unequivocally that it is prepared to accept the risk of an adverse ruling by the Commission or a reviewing court and the Commission should condition the construction permit upon any subsequent adverse action that the Commission may take with respect to the pending pleadings filed by Damsky. In the situation of the closing of a sale of a station prior to finality, the Commission has held that the parties doing so bear the risk that the transaction might have to be undone because the Commission or a reviewing court might require the sale to be set aside.

^{1/} News International, P.L.C., 97 FCC 2d 349, 358 (1984) (Commission will not take official notice of news accounts).

PATTON BOGGS, L.L.P.

Ms. Magalie Roman Salas

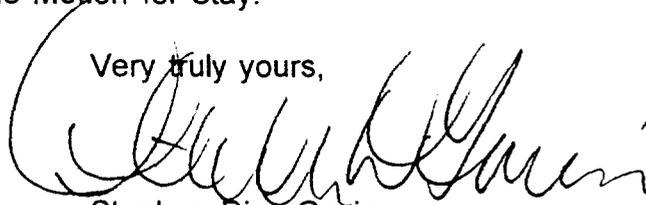
July 31, 1998

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Improvement Leasing Co., 73 FCC 2d 676, 684, aff'd sub nom. Washington Ass'n for Television and Children v. F.C.C., 667 F.2d 1264 (D.C. Cir. 1984). The Commission has similarly conditioned construction permits for new stations issued prior to finality. Further, HRC would not seek any equities for itself from the Commission as a result of the construction and operation of the Station. In such instances, the law is clear that the applicant whose application has been granted by the Commission is entitled to receipt of its construction permit and to proceed with construction and operation of its facilities. David J. Bott, 9 FCC Rcd 6426, 6427 (1994). Damsky's attempt to suggest that there is a difference in this case because she has continued her administrative appeals is without merit. The grant of HRC's application became effective upon the release of the *Memorandum Opinion and Order* on May 6, 1998 -- nearly 3 months ago. 47 C.F.R. § 1.103(a).

In view of the foregoing, as well as the matters contained in the July 21st request, HRC respectfully requests that the Audio Services Division issue the construction permit for the Station, such construction permit to be conditioned upon the ultimate disposition by the Commission and any reviewing court of the pending Petition for Reconsideration and the Motion for Stay.

Very truly yours,



Stephen Diaz Gavin

cc: John F. Garziglia, Esquire
Lauren A. Colby, Esquire
James R. Shook, Esquire
Brad Deutsch, Esquire
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EXHIBIT E

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August 3, 1998

VIA FACSIMILE/FIRST CLASS MAIL

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 "M" Street, N.W.
Washington, DC 20554

Attention: Linda Blair, Esquire
Chief, Audio Services Division

Ref: Homewood, AL., Comparative FM Proceeding, MM Docket No. 90-638

Dear Ms. Salas:

I have a letter from Steven Diaz Gavin, in which Mr. Gavin again asks the staff to effectively deny the Motion for Stay, filed in the referenced proceeding by Heidi Damsky, and immediately issue a construction permit to his client, Homewood Radio Co., L.L.C.

Leaving aside the core issue of whether it is proper for the staff to unilaterally take action which moots a Motion for Stay, pending before the full Commission, the relief requested by Mr. Gavin is contrary to long-standing Commission policy. That policy, administered by the now defunct Dockets Division, was not to even send the Docket to the Audio Services Division for the issuance of a construction permit until all administrative appeals were exhausted. In fact, I have never known of a case, and Mr.

Ms. Magalie Roman Salas
August 3, 1998

Gavin cites none in his letter, where a construction permit was issued, conditionally or unconditionally, when a timely filed administrative appeal or petition was on file and had not been disposed of.

It is true, as Mr. Gavin points out, that in cases involving assignments and transfers, the Commission has held that the parties to a transaction are free to close as soon as the Commission acts. The Commission, however, has been careful to point out that these cases are in a special category, because Commission action in such cases is permissive only, not compulsory, and the parties close at their own risk. See, e.g., Paso Del Norte Broadcasting Corporation, 12 FCC Rcd 6876 (1997) at Paragraph 5; Arnold L. Chase, 4 FCC Rcd 5085 (1989). The issuance of a construction permit, on the other hand, creates substantive rights. If construction is completed under the permit, the permit holder is entitled as a matter of law, to a license.

Where, as here, the commission has not yet disposed of Damsky's administrative remedies, and a construction permit is issued - conditionally or not - the issuance of such a permit constitutes an interim operating authority. That interim authority specifically authorizes the permit holder to go forward, build its station (with money supplied by Cox Radio) and operate same, pending disposition of Damsky's administrative remedies before the Commission. The Court of Appeals, however, has warned against the issuance of such interim authorizations, lest they cloud the judgement of the agency.

In Community Broadcasting Co., Inc., v. FCC, 274 F.2d 753 (D.C. Cir., 1960), the FCC had before it several mutually exclusive applications for a television station in Baton Rouge, La. The FCC proposed to issue an interim authorization to one of the applicants, asserting that it would give no weight to the investment to be made by the interim operator, in picking the ultimate winner of the comparative hearing. The Court of Appeals rejected this assertion. The Court said,

“It is suggested that to question this involves a challenge to the good faith of the Commission. But this is not a matter only of good faith. Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent....To argue, as appellant does, that this may weigh in the balance of an otherwise close question is not a

Ms. Magalie Roman Salas
August 3, 1998

challenge to the good faith or integrity of the triers; it is a recognition that they are mortal men." 274 F. 2d at p. 759. To the same effect: Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (1968).

If and when the FCC denies Damsky's Petition for Reconsideration and Motion for Stay, Damsky will be free to appeal that denial to the Court of Appeals, where she may seek a stay. The Judges of the Court Appeals are also "mortal men". Damsky should not be required to go to court, and ask the Court to reverse a fait accompli. Neither should she be required to exhaust her remedies before the Commission, itself, in the face of a fait accompli. Damsky is relying on the good faith of the Commission's staff, not to take actions which have the practical effect of either mooting her administrative and/or appellate remedies, or impermissibly raising the barriers which she faces in pursuing those remedies.

Sincerely,



LAUREN A. COLBY
Attorney

LAC/jjt

cc: John F. Garziglia, Esquire
Stephen Diaz Gavin, Esquire
James R. Shook, Esquire
Brad Deutsch, Esquire
John Riffer, Esquire
Heidi Damsky

CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 12th day of August, 1998, to the offices of the following:

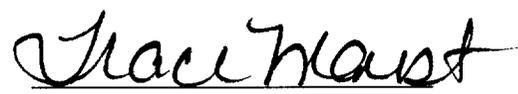
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