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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

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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.

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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

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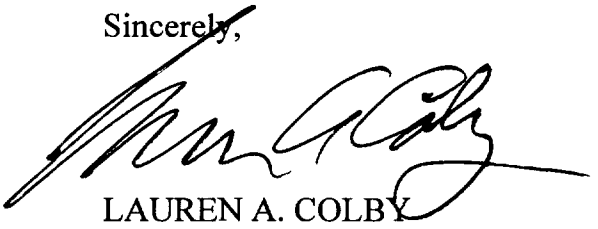
> challenge to the good faith or integrity of the triers; it is a recognition that they are mortal men." 274 F. 2d at p. 759. To the same effect: Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (1968).

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,



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Attorney

LAC/jjt

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