

**READING BROADCASTING, INC.**

WTVE(TV) TV-51

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Reading, Pennsylvania 19604

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April 24, 1999

Magalie R. Salas, Esq.  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

**RECEIVED**

**APR 26 1999**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

*Re: Reading  
Broadcasting, Inc.  
Commercial Television  
Station WTVE  
Reading, Pennsylvania  
File No. BMPCT-940811KL*

Dear Ms. Salas:

Reading Broadcasting, Inc., licensee of commercial television station WTVE, Reading, Pennsylvania ("RBI"), holds a construction permit to construct a new tower and transmitter facility on Fancy Hill, Pennsylvania, located in Earl Township, Pennsylvania, about 11 miles east of Reading (File No. BMPCT-940811KL).<sup>1</sup> By this letter, RBI requests an automatic extension of that construction permit to a three-year term, properly tolled to account for the current zoning litigation, based on the following circumstances:

RBI presently possesses the transmitter and associated equipment -- not including wave guide and new antenna -- which will be utilized at the new facility. RBI has entered into contracts with a company engaged in tower leasing to occupy the top position on the new tower which the company

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The construction permit to build a new tower and transmitter on Fancy Hill is literally a modification of a prior construction permit to build on Long Hill, filed in August 1994. Nevertheless, equity requires that RBI be deemed to have had the construction permit only since the grant of that modification -- which changed sites from Long Hill, a construction permit granted in May 1990, because of the refusal of the landowner to reach terms with RBI -- rather than from the original Long Hill construction permit.

is constructing, but the execution of that agreement is presently suspended pending resolution of a zoning dispute.<sup>2</sup> Ground has been broken for construction of the tower.

Earlier construction of the tower had been planned, but that construction was delayed by an abrupt and unanticipated reversal of position by the Earl Township Board of Trustees. As far back as 1991, the Trustees took the position that -- by virtue of its broadcasting operations -- RBI was a public utility under Pennsylvania law. Therefore, RBI's proposed tall tower on Fancy Hill, which was to be used primarily for broadcasting, was exempted by state law from having to comply with or having to seek a variance from local zoning regulations. In good-faith reliance on this opinion, which the Trustees provided through counsel to RBI, the Company purchased the Fancy Hill site and has expended over \$250,000 in site preparation, design, testing and initial construction (not including the value of equipment acquired or possessed for use at the site).

As tower erection was to commence in spring 1996, the Board of Township Trustees unexpectedly made it known informally to RBI that it had reassessed its position, and -- probably in light of opposition by Fancy Hill residents to the proposed structure -- it now tended to conclude that RBI was not a public utility by virtue of the fact that it was a broadcaster. It is clear to RBI that construction of the Fancy Hill tower will not be permitted as a "use" under existing zoning regulation, and that recently-formed citizen opposition to RBI's tower proposal makes grant of a zoning variance problematical at best.

RBI's Pennsylvania counsel began negotiations with counsel to the Earl Township Trustees in June 1996 in order to convince the Township that it would face substantial litigation from RBI if the Board refused to honor the 1991 opinion on which RBI had relied for five years. Additionally, in an attempt to ensure that its Fancy Hill proposal will qualify as a public utility, RBI sought in October 1996 to obtain authority to provide a communications common carriage service by transmission of digital data pursuant to the Commission's *Report and Order in Digital Data Transmission Within the Video Portion of Television Broadcast Station Transmissions (MM Docket No. 95-42)*, FCC 96-274, released June 28, 1996.

It is RBI's opinion, based on legal advice and a clear line of Pennsylvania judicial precedent, that if RBI operates a radio common carriage business from the Fancy Hill tower, it will qualify as a "public utility" under Pennsylvania law notwithstanding other communications uses of its proposed tower, including the operation of a commercial television station on Channel 51. The opportunity presented commercial television broadcasters by the *Report and Order, supra*, thus included for RBI not only the chance to develop a subsidiary communications business providing digital transmission services to customers, but as well a chance to enjoy the zoning law benefits which accrue from being a common carrier (and thus a "public utility") under Pennsylvania law. Therefore, RBI sought authorization using an existing Commission form and directed to the Wireless Telecommunications Bureau. On April 4, 1997, the Commission granted RBI an authorization to operate a paging and radiotelephone (File No. 21733-CD-P/L-97) from the Fancy Hill site using digital data transmission within the video portion of its television broadcast signal.

Meanwhile, in October 1996, the Company proceeded with construction. On or about October 18, 1996, Earl Township filed an action known as *Earl Township v. Reading Broadcasting, Inc.*, Case No. 96-11187, in the Berks County Court of Common Pleas, seeking a permanent injunction against RBI constructing the proposed Fancy Hill tower. The civil litigation in Pennsylvania has remained pending since that date (as is explained *infra*).

On September 15, 1997, the Berks County Court of Common Pleas held that RBI was obligated to obtain from the Earl Township Zoning Officer a determination of whether the proposed Fancy Hill tower construction is exempt from application of zoning regulation because of RBI's claim of status as a public utility corporation under Pennsylvania law. Additionally, the Court ruled that RBI's claim of variance by estoppel must be presented to the Zoning Officer for an administrative determination prior to adjudication before the Court. Thus, RBI has been enjoined from proceeding with the Fancy Hill construction pending exhaustion of its administrative remedies.

The Court did not rule on RBI's third issue, that of equitable estoppel. RBI timely filed a motion for reconsideration with the Court, asking for a ruling on the equitable estoppel issue.

Simultaneously with the filing of a motion for reconsideration, RBI appealed the Court's ruling on the first two issues. By an *Order* and accompanying decision released June 17, 1998, the Commonwealth Court of Pennsylvania reversed the Common Pleas Court's ruling, and ordered the Common Pleas Court to conduct evidentiary hearings on whether RBI met the Commonwealth's definition of a "public utility" and was thus exempt from zoning, and also to hear RBI's equitable estoppel argument.

Earl Township thereafter filed a petition of *allocuter* with the Supreme Court of Pennsylvania, essentially a petition for writ of *certiorari*. RBI opposed that petition. On October 20, 1998, the Supreme Court of Pennsylvania denied the petition without comment.

On April 21, 1999, the Berks County Court of Common Pleas set May 11, 1999, as a trial date for the action, dependent only on availability of Earl Township counsel. As of the date of this application, the Court has notified RBI that counsel to Earl Township will not be available until sometime in the week of June 21, 1999, and that trial will occur at that time.

Since denial of the petition for *allocuter*, RBI has been preparing for trial. Such preparation has included providing counsel with substantial documentary evidence establishing its case as well as pursuing alternative means of resolution of the matter. In that vein, RBI has authorized and directed zoning counsel to pursue settlement with the Township in which the Township would abandon its zoning claims, thus permitting RBI to proceed with construction, in exchange for financial concessions to the Township by RBI. As of April 21, 1999, it appeared that Earl Township was unwilling to settle.

It remains the belief of RBI and its Pennsylvania counsel that the common carriage authorization which RBI has obtained from the Commission pursuant to 47 CFR §73.646(c) establishes its status as a public utility under Pennsylvania law, and that judgment in the pending legal action ultimately will be granted in favor of RBI.

The Commission is clear that -- were RBI's construction period run from the date on which its approval to move from the prior Long Hill site to Fancy Hill -- May 3, 1995 -- only 17 months would have elapsed prior to a tolling event, the filing of civil litigation by Earl Township to halt construction over zoning issues. *Report and Order (MM Docket No. 98-43)*, 13 F.C.C.Rcd. 23056, 14 Comm.Reg. (P&F) 351, para. 86 (October 22, 1998). However, rather than file for a construction permit in 1994 for Fancy Hill, RBI elected to file to *modify* the 1990 Long Hill construction permit, notwithstanding the fact that the Fancy Hill filing proposed a new tower location and entirely new tower/transmitter plant. RBI could have elected to return the Long Hill construction permit and ask the Commission to process an entirely new Form 301 for Fancy Hill -- a request which would have consumed substantially more of the Commission's and the parties' resources. Indeed, had the licensee reasonably foreseen that the Commission would act four years later to draw a distinction between a modification of a construction permit and an altogether new construction permit, the licensee would have filed for a construction permit to build in Fancy Hill rather than for a mere modification, notwithstanding the additional burden such a procedure would have imposed on RBI and the Commission.

The Commission's *Report and Order* declaring that any construction permit, however modified, which had already had a three-year uninterrupted period in which to build would not be granted an extension is a curious but nonetheless compelling example of governmental taking of property without due process of law. It is of no consequence that the taking is of a right -- the construction permit -- in which the licensee has no property interest. The licensee's reasonable expectancies -- based on the rules, policies and the decisions of the Commission contemporaneous to the time the licensee is pursuing construction -- invariably led it to devote substantial resources in litigation, construction, real property acquisition and ancillary costs. For example, RBI -- relying on the time allotted to construction on Fancy Hill in 1995 and the Commission's policies for granted extensions for reasonable bases -- purchased the Fancy Hill mountaintop site in 1995 to ensure that it would not again face loss of a reasonable-available site such as that which occurred on Long Hill. The licensee already has expended over \$250,000 in planning, pre-construction and initial construction costs, and stands ready to continue construction, but for the 18 months spent in Pennsylvania courts on zoning matters.

Unless a waiver is granted in the instant case, the Commission's decision to exclude construction permits which have been extended and -- as is the instant permit -- modified from its original terms from entitlement to tolling where the licensee already had three unencumbered years to

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Secretary  
April 24, 1999  
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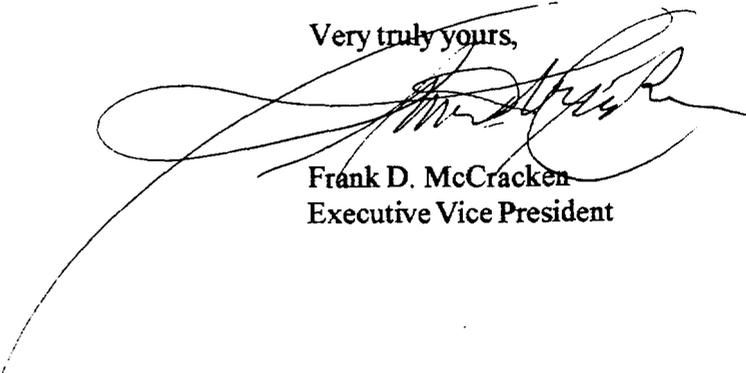
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construct (*see Report and Order, supra* at para. 89, subpart. 2) would represent a Draconian<sup>3</sup> arbitrary and capricious exercise of rulemaking authority, as well as a departure from the type of case-by-case adjudication which is appropriate where the circumstances of licensees and their prosecution of construction under a construction permit can vary so dramatically from case to case. Clearly, a waiver is justified to permit RBI to count its time to construct from May 3, 1995 (the date its move to Fancy Hill was approved), and to toll all time since litigation in Pennsylvania courts commenced.

Absent a waiver, the Commission's action denying RBI a tolling until conclusion of litigation -- and then 18 \_ months to complete construction, will violate the licensee's 5<sup>th</sup> Amendment due process and property rights. Therefore, an automatic extension of RBI's construction permit is warranted.

The foregoing letter was prepared under the direction of the undersigned, an officer of RBI.

Very truly yours,



Frank D. McCracken  
Executive Vice President

cc.: Station Public File  
Clay Pendarvis, Esq.

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## **EXHIBIT D**

**Chronology prepared by  
RBI's zoning counsel**

LAW OFFICES

*De Santis, De Santis, Essig & Valeriano*

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April 30, 2001

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Thomas Hutton, Esquire  
Washington, D. C.

Re. Earl Township vs. Reading Broadcasting, Inc.

Dear Mr. Hutton:

Pursuant to your request of April 27, 2001, the following is a chronology of the above-referenced action:

October 18, 1996: Earl Township commenced its action in the Court of Common Pleas of Berks County, Pennsylvania to No. 96-11187.

August 13, 1997 Pretrial conference took place, and trial was scheduled to commence on October 20, 1997. Earl Township filed a motion for summary judgment.

September 15, 1997 The Court of Common Pleas of Berks County granted summary judgment upon the whole case in favor of Earl Township.

October 14, 1997 Reading Broadcasting took appeal to the Commonwealth Court of Pennsylvania from the grant of summary judgment.

June 17, 1998 The Commonwealth Court reversed the Court of Common Pleas of Berks County and remanded the case to the lower court for further proceedings.

*De Santis, De Santis, Essig & Valeriano*

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July 14, 1998 Earl Township filed a petition for allowance of appeal with the Supreme Court of Pennsylvania from the order of the Commonwealth Court.

October 19, 1998 The Supreme Court of Pennsylvania denied Earl Township's petition for allowance of appeal.

June 30, 1999 Second pretrial conference held before Court of Common Pleas of Berks County, and trial scheduled to commence August 30, 1999.

August 30-31, 1999 Trial in Court of Common Pleas

January 27, 2000 Berks County Court of Common Pleas issued Adjudication and Decree Nisi in favor of Earl Township.

February 7, 2000 Reading Broadcasting filed motion for post-trial relief with Court of Common Pleas of Berks County.

March 20, 2000 Court of Common Pleas denied Reading Broadcasting's motion for post-trial relief.

March 20, 2000 Reading Broadcasting enters judgment to permit appeal.

April 3, 2000 Reading Broadcasting filed appeal with the Commonwealth Court of Pennsylvania.

March 29, 2001 The Commonwealth Court of Pennsylvania affirmed the final decree of the Court of Common Pleas of Berks County

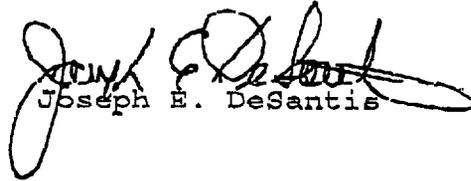
April 27, 2001 Reading Broadcasting filed a petition for allowance of appeal with the Supreme Court of Pennsylvania.

*De Santis, De Santis, Errigo & Valeriano*

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If you should need anything further, please advise.

Sincerely,

  
Joseph E. DeSantis

JED/ed

VIA FAX (202-955-5564)

**EXHIBIT E**

**Appeal to Pennsylvania  
Supreme Court**

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OPINIONS BELOW

The Opinion of the Commonwealth Court, dated March 29, 2001, is to be reported in the Atlantic Reporter, Second Series, according to the Commonwealth Court, but has not yet appeared in the advance sheets. The Adjudication and Final Decree of the Court of Common Pleas of Berks County have not been reported. The publishers of Pennsylvania District & County Reports have advised that publication of the same are presently on hold. Copies of the Opinion of the Commonwealth Court and the Adjudication and Final Decree of the Court of Common Pleas of Berks County are appended to this Petition for Allowance of Appeal.

II

TEXT OF ORDER IN QUESTION

AND NOW, this 29<sup>th</sup> day of March, 2001, the order of the Court of Common Pleas of Berks County in the above-captioned matter is affirmed on the bases of the opinion of the Honorable Albert A. Stallone filed in *Earl Township v. Reading Broadcasting, Inc.*, \_\_\_\_\_ Pa. D. & C. 4<sup>th</sup> \_\_\_\_\_ (No. 96-11187, filed January 27, 2000).

/s/ Charles P. Mirarchi, Jr.

CHARLES P. MIRARCHI, JR., Senior Judge

III

QUESTIONS PRESENTED FOR REVIEW

- A. WHETHER AN ABUSE OF DISCRETION OR AN ERROR OF LAW WAS COMMITTED IN THE DISPOSITION OF THE PETITIONER'S DEFENSE OF EXEMPTION, AS A PUBLIC UTILITY, FROM MUNICIPAL ZONING REGULATION THROUGH A FAILURE TO GIVE PROPER RECOGNITION TO THE EFFECT OF FEDERAL LAW UPON THE DETERMINATION OF THE NATURE OF THE PETITIONER'S OPERATIONS PURSUANT TO AUTHORITY GRANTED BY THE FEDERAL COMMUNICATIONS COMMISSION AND THROUGH A MISCONSTRUCTION OR MISAPPLICATION OF FEDERAL DECISIONAL AUTHORITY
- B. WHETHER AN ABUSE OF DISCRETION OR AN ERROR OF LAW WAS COMMITTED IN THE DISPOSITION OF THE PETITIONER'S DEFENSE OF EXEMPTION, AS A PUBLIC UTILITY, FROM MUNICIPAL ZONING REGULATION BY FAILING TO CONFORM TO PRIOR DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS CONSTRUING THE PROVISIONS AND EFFECT OF SECTION 619 OF THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE AND, TO THE EXTENT THAT THE NATURE OF THE PETITIONER'S OPERATIONS PRESENT A CASE OF FIRST IMPRESSION, BY FAILING TO CONFORM TO SAID PRIOR DECISIONS THROUGH A FAILURE OR REFUSAL TO GIVE EFFECT TO FINDINGS MADE CONCERNING THE NATURE OF THOSE OPERATIONS.
- C. WHETHER AN ABUSE OF DISCRETION OR AN ERROR OF LAW WAS COMMITTED IN THE DISPOSITION OF THE PETITIONER'S DEFENSE OF EQUITABLE ESTOPPEL BY HOLDING THAT ONLY REPRESENTATIONS CONCERNING MATTERS OF FACT CAN GIVE RISE TO AN ESTOPPEL, AND THEREBY FAILING TO CONFORM TO PRIOR DECISIONS OF THIS COURT CONCERNING THE NATURE OF THOSE MISREPRESENTATIONS WHICH MAY FORM THE BASIS FOR AN ESTOPPEL AGAINST A GOVERNMENTAL BODY RESPONSIBLE FOR KNOWING THE LAW AND SEEING THAT IT IS OBEYED.

IV

STATEMENT OF THE CASE

Earl Township ("Township") brought this action for the purpose of seeking to have the court of common pleas enjoin Reading Broadcasting, Inc. ("RBI") from constructing and operating a certain transmission tower on land referred to in the Township's Complaint as the "Fancy Hill property," until such time as RBI had applied for and received approval from the Township to build and operate the tower in accordance with applicable federal, state and local laws, ordinances and regulations pertaining thereto (R. 4a 7a). In its Answer and New Matter to the Township's Complaint, RBI asserted that it was exempt from regulation by the Township as a "public utility" within the meaning of Section 619 of the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. §10619, and Section 706 of the Earl Township Zoning Ordinance then in effect (R. 12a-21a, ¶s 16, 21, 22, 34, 35, 36 & 37). In addition, RBI contended that, even absent consideration of its status as a public utility with respect to its construction and operation of the tower, the Township was estopped in equity from the application and enforcement of its zoning and land use ordinances and regulations by reason of its prior representations to RBI and RBI's actions taken in good faith reliance upon those representations (R. 12a-21a, ¶s 10, 13 & 23-29). Subsequent to the time of the filing of RBI's pleadings, the Township enacted a new Zoning Ordinance, and the disposition of RBI's defense of exemption was made by reference to the Earl Township Zoning Ordinance of 1996 (R. 426a-465a, Exhibit No. 1), to the extent that the same could have any bearing upon the issue. As to the matter of RBI's defense of equitable estoppel, all of the representations made and actions

taken in reliance upon the same occurred while the Earl Township Zoning Ordinance of 1974, as amended, was in effect (R. 151a-168a).

Between matters established through Stipulated Facts (R. 247a-259a), filed by the parties on August 23, 1999, and the evidence presented at trial, the following was proven:

#### **As to Exemption**

RBI is a Pennsylvania corporation which, at all times relevant to the within action, has owned, operated and been the licensee of television broadcast station WTVR (R. 747a, Stipulated Facts, ¶s 2 & 3). It broadcasts its television signal in the UHF band at Channel 51, in the assigned frequency range of 692-698 megahertz, pursuant to a Television Broadcast Station License issued by the Federal Communications Commission ("FCC") (R. 568a, Exhibit No 13; B3, Adjudication, ¶1). RBI is a privately held corporation (B2, Adjudication, ¶2; R. 286, N.T., Linton). Its television broadcast license is currently valid (R. 292a, N.T., Parker).

On December 8, 1993, RBI entered into an agreement of sale to purchase a tract of land situate upon what is commonly referred to as Fancy Hill, in Earl Township, Berks County, Pennsylvania (B6, Adjudication, ¶11; R. 321a, N.T., Linton). On or about January 11, 1996, the Federal Aviation Administration issued to RBI an Acknowledgment of Notice of Proposed Construction or Alteration for an antenna tower on the Fancy Hill site, which constituted a revision of an earlier aeronautical study from 1994, and which indicated that a tower height of 711 feet at the site would not be a hazard to air navigation (R. 251a, Stipulated Facts, ¶15). RBI was granted a construction permit from the FCC on or about May 3, 1995 to erect a tower, 217 meters (approximately 668 feet) in height, on the Fancy Hill tract for the transmission of its

television signal (R. 251a, Stipulated Facts, ¶16; R. 487a-490a, Exhibit No. 5; R. 281a-282a, N.T., Topel). On December 5, 1995, RBI acquired fee simple ownership of the Fancy Hill tract (B6, Adjudication, ¶13; R. 250a, Stipulated Facts, ¶12; R. 321a, N.T., Linton). The Fancy Hill property is located in a Woodland Agricultural Conservation ("WAC") zoning district under the terms and conditions of the Earl Township Zoning Ordinance of 1996 (R. 258a, Stipulated Facts, ¶27).

On or about July 10, 1996, it became possible for television broadcasters to become authorized by the FCC to provide paging and radiotelephone service, as communications common carriers, through the insertion of digital data into the video portion of their television signal (B7, Adjudication, ¶17; R. 257a-258a, Stipulated Facts, ¶25). RBI initially applied to the FCC on or about September 25, 1996 for a construction permit and authorization to provide such a communications common carrier service from the tower to be erected on the Fancy Hill site through the transmission of digital data into the vertical blanking interval and video portions of its television signal (R. 255a, Stipulated Facts, ¶23; R. 466a-467a, Exhibit No. 2; R.273a, N.T., Topel). On or about October 1, 1996, RBI gave actual notice of the filing of the application to the Township (R. 256a-257a, Stipulated Facts, ¶24; R. 569a-574a, Exhibit No. 14; R. 287a-289a, N.T., Linton). The FCC requested of RBI that it resubmit its application and, on or about January 27, 1997, RBI resubmitted its application for a construction permit and authorization to provide paging and radiotelephone service on FCC Form 600 (B7, 8, Adjudication, ¶s 19, 22; R. 257a-258a, Stipulated Facts, ¶s 25 & 31; R. 468a-480a, Exhibit No. 3; R. 274a, N.T., Topel; R. 294a, N.T., Parker). Public notice of the filing of RBI's application

was then published by the FCC on February 26, 1997 (B8, Adjudication, ¶23; R. 536a, Exhibit No. 10; R. 511a-512a, Exhibit No. 8, Crispin Deposition).

In response to RBI's application, on or about April 4, 1997, the FCC granted to RBI a permit to construct a radio transmitting station on the Fancy Hill site and authorization to provide paging and radiotelephone services from the same as a communications common carrier (B8, Adjudication, ¶24; R. 258a-259a, Stipulated Facts, ¶33; R. 491a-492a, Exhibit No. 6; R. 274a-275a, 282a, N.T., Topel; R. 499a-500a, 503a-504a, Exhibit No. 8, Crispin Deposition). In response to questioning by the Court at trial, counsel for the Township acknowledged that the Township does not question that RBI qualifies as a "common carrier" with respect to the paging and radiotelephone service to be provided pursuant to the authorization granted by the FCC (R. 307a, Stipulation of counsel for the Township). Although the initial term of RBI's permit and authorization relative to the paging and radiotelephone services was limited to one year, on or about May 17, 1999, the FCC granted an extension of the same to April 4, 2007 (B9, Adjudication, ¶26; R. 259a, Stipulated Facts, ¶34; R. 282a-283a, N.T., Topel; R. 504a-506a, Exhibit No. 8, Crispin Deposition).

The paging and radiotelephone service that RBI sought authority to provide is to be accomplished through the transmission of digital data into the video portion of its television signal, and such services will be provided, pursuant to the authority granted by the FCC, by way of a digital data transmission within the vertical blanking interval and video portions of RBI's television broadcast signal on its assigned UHF radio frequency band (B9, Adjudication, ¶s 27 & 28; R. 259a, Stipulated Facts, ¶35). This is the only manner by which the transmission of the

paging and radiotelephone signals is permitted under the authorization given to RBI by the FCC (R. 275a, N.T., Topel). Pursuant to the authorization granted to RBI by the FCC relative to the paging and radiotelephone services, those services must be provided from the exact same facility as its television broadcasting service and from the same antenna (B9, Adjudication, ¶29; R. 508a, Exhibit No. 8, Crispin Deposition). The equipment that is utilized to broadcast the paging and radiotelephone signals is the same transmitter, transmission line and antenna that is used to broadcast the television signal (R. 298a, N.T., Parker). Since the portions of the television signal into which the paging and radiotelephone signals are inserted can exist only while RBI is transmitting its television signal, it is not possible to broadcast the paging and radiotelephone signals without simultaneously broadcasting the television signal (B10, Adjudication, ¶30; R. 275a, N.T., Topel; R. 298a, N.T., Parker). If RBI were prevented from broadcasting its television signal, it would thus be unable to transmit the signals utilized in its paging and radiotelephone service (B24, Adjudication, Endnote No. 7; R. 275a, N.T., Topel; R. 298a, N.T., Parker).

#### As to Equitable Estoppel

On or about October 23, 1989, RBI executed an agreement of sale to purchase real estate owned by Paul and Brenda Groff and located on "Long Hill" in Earl Township, Berks County, Pennsylvania (B3, Adjudication, ¶6; R. 247a, Stipulated Facts, ¶4). Prior to entering into the agreement of sale, Mr. Parker was taken by Brenda Groff to the office of her attorney, Terry Parish, Esquire, who was also the attorney for the Township at the time (R. 323a-324a, N.T., Parker). During that meeting, Mr. Parish told Mr. Parker that, under Pennsylvania law, a

television station was a public utility and, under Earl Township's ordinances, RBI could build a tower on the Groff property or in any other zoning district in Earl Township without any problems (R. 328a, N.T., Parker). RBI relied upon that representation by Mr. Parish in entering into the agreement of sale with the Groffs (R. 329a, N.T., Parker).

When Mr. Parker came to RBI in 1989, he became involved in attempting to develop a plan of reorganization to bring RBI out of a Chapter 11 bankruptcy. In order to survive economically, RBI needed to reach a larger television broadcast area than what was possible from its tower location on Mt. Penn. As a result, Mr. Parker, on behalf of RBI, entered into the contract with the Groffs for the purpose of relocating RBI's television transmission tower to the Long Hill site, from where its signal would reach from Harrisburg to beyond Philadelphia.

The relocation of the tower represented RBI's chance for economic viability and, upon that plan, Mr. Parker was able to persuade RBI's secured creditor, Meridian Bank, to reduce RBI's indebtedness from approximately \$4,000,000.00 to approximately \$2,000,000.00, in exchange for the opportunity to acquire an ownership interest in RBI of over 6%. In addition, other creditors were persuaded to exchange debt for equity in RBI, and the stock of the company was reissued in order to accommodate the mentioned conversions and to raise additional revenue to finance the relocation of the tower (R. 322a-328a, N.T., Parker; R. 592a-671a, Exhibits Nos. 24, 25, 26 & 27).

In or about January of 1991, Marvin Mercer, Esquire, as counsel for RBI, and at the direction of RBI, requested advice from the Township concerning whether a permit would be needed from the Township for Network Communications, Inc. to construct a tower on Long

Hill for use by RBI (B3, Adjudication, ¶7; R. 247a-248a, Stipulated Facts, ¶6). In response to that request from Mr. Mercer, and similar requests by other representatives of RBI, Terry L. Parish, Esquire, the Township Solicitor, sent to Mr. Mercer, as counsel for RBI, a letter dated April 5, 1991, in which Mr. Parish recited that he understood that RBI was proposing to broadcast its television signal from a portion of a transmission tower to be constructed by an outside company; that RBI's use of the tower and the right to construct the tower would be approved and licensed by the FCC; that RBI would lease a portion of the tower, utilizing the top of the tower; and, that the tower was to be constructed primarily for use by RBI, although the owner intended to allow others to lease space on the lower portions of the tower. Mr. Parish then went on to state that he would recommend to the Supervisors and the Zoning Officer that construction of the tower be allowed without requiring a building permit, subject to the conditions that (1) a plan showing all structures, earth disturbances, drainage plan and calculations, access routes, etc., be submitted for review and comment by the Zoning Officer and/or Engineer, and (2) that the stated facts upon which he based his opinion were certified to be correct (B3, 4, Adjudication, ¶8; R. 248a-249a, Stipulated Facts, ¶7; R. 589a-590a, Exhibit No. 22, emphasis added). Mr. Parish acknowledged that the plan to which he referred was only for review, comment and approval by the Zoning Officer and Engineer. He did not intend for it to be submitted to the planning commission (R. 315a, N.T., Parish).

On or about April 12, 1991, Douglas A. Hawley, of Network Communications, Inc., wrote to Mr. Parish. In his letter, Mr. Hawley recited his receipt of Mr. Parish's letter of April 5, 1991, to Mr. Mercer, and advised Mr. Parish that Network Communications intended to

construct the tower and lease space on it to RBI. Mr. Hawley went on to request a letter from the Supervisors and/or Zoning Officer to the effect that no permit would be required for construction of the tower (R. 591a, Exhibit No. 23).

Thereafter, and on or about April 17, 1991, Leroy J. Heimbach, Chairman of the Board of Supervisors, sent a letter to Mr. Mercer, wherein he acknowledged his awareness of the foregoing communications, and advised that Network Communications could construct a transmission tower in Earl Township without a building permit, provided that the tower was authorized/permitted by applicable state and/or federal agencies and built in compliance with that authorization. Mr. Heimbach went on to state that the tower must be primarily intended, now and in the future, for the use of a public utility company, as set forth in Mr. Parish's prior correspondence, and that the tower owner must submit to the Zoning Officer a plan which was described as per Mr. Parish's letter (B5, 6, Adjudication, ¶9; R. 249a-250a, Stipulated Facts, ¶8; R. 580a, Exhibit No. 19). Mr. Parish testified that, at the time, he was of the opinion that a television broadcast tower was exempt from Township regulation as a public utility structure (R. 312a-313a, N.T., Parish; R. 579a, Exhibit No. 18).

For a number of reasons, the transaction with the Groffs for the Long Hill site was not concluded, and RBI eventually found the Fancy Hill site owned by the Dolentis (B6, Adjudication, ¶10; R. 320a, N.T., Linton). RBI entered into an agreement of sale to purchase the Fancy Hill site on or about December 8, 1993 (B6, Adjudication, ¶11; R. 321a). Prior to settlement upon that transaction, and in or about September of 1995, Mr. Linton telephoned Mr. Parish in order to advise that RBI intended to proceed with the tower and to seek reassurance

that the representations made in the 1991 correspondence from Mr. Parish remained accurate. Mr. Parish stated that his opinion had not changed (R. 319a-320a, N.T., Parish; R. 321a, N.T., Linton). On or about December 5, 1995, RBI settled on the transaction to acquire the Fancy Hill site for the sum of \$100,000.00, and on the same day gave to the Dolentis a mortgage note in the amount of \$99,900.00, payable over 15 years with interest at 8.75% per annum (B6, Adjudication, ¶13; R. 250a-251a, Stipulated Facts, ¶s 12 & 13). RBI relied upon the representations contained in the letters from Mr. Parish and Mr. Heimbach (Exhibits Nos. 72 & 19) in entering into and settling upon the transaction with the Dolentis (R. 329a, N.T., Parker).

In or about April of 1996, RBI delivered a plan to the Earl Township Secretary, detailing the construction of the proposed tower and access routes, together with a drainage plan and calculations (B6, 7, Adjudication, ¶15; R. 252a, Stipulated Facts, ¶18). Mr. Parish said that his opinion concerning the public utility status of a television broadcasting tower changed approximately five to six months before he received the plan submitted by RBI (R. 316a-317a, N.T., Parish). Mr. Parish acknowledged, however, that he never wrote to RBI, or to anyone else, to tell them that he had a change of opinion (R. 316a, N.T., Parish).

STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

A. THIS COURT SHOULD GRANT ALLOWANCE OF APPEAL TO CORRECT THE ERRORS OF THE COMMONWEALTH COURT IN FAILING TO GIVE EFFECT TO FEDERAL STATUTES AND REGULATIONS WHICH DETERMINE THE NATURE OF THE PETITIONER'S OPERATIONS AND IN MISAPPLYING FEDERAL DECISIONAL AUTHORITY IN MAKING SUCH DETERMINATION.

There was never any dispute that the paging and radiotelephone services which RBI had been given authority from the FCC to provide were to be provided by RBI as a common carrier. The federal Communications Act of 1934, June 19, 1934, ch. 652, 48 Stat., as amended (47 U.S.C. §§151 et seq.), and the regulations promulgated thereunder impose specific obligations upon RBI in conjunction with the exercise of its authorization to provide those services. Pursuant to the authorization granted by the FCC, RBI is obligated to (1) furnish such services upon reasonable request (47 U.S.C. §201(a)); (2) charge just and reasonable rates for the services (47 U.S.C. §201(b)); (3) print and keep open for public inspection its schedule of charges (47 U.S.C. §203(a)); and (4) modify service only with the approval of the FCC (47 U.S.C. §214(a)). A former requirement for the filing of tariffs was waived pursuant to authority conferred by Congress in 1993, 47 U.S.C. §332(c)(1)(A); 47 C.F.R. §20.15(c). RBI must continue, however, to maintain a schedule of charges for public inspection, which charges are subject to regulation by the FCC. 47 U.S.C. §203(a).

In Commonwealth PUC v. WVCH Communications, Inc., 23 Pa.Cmwlth. 292, 351 A.2d 328 (1976), the foregoing criteria were expressly held to be sufficient to constitute an

entity as a "public utility corporation" within the meaning of Section 619 of the MPC: (53 P.S. §10619). In the more recent decision of the Supreme Court in Crown Communications v. Zoning Hearing Board of the Borough of Glenfield, 550 Pa. 266, 705 A.2d 427 (1997), the same criteria were adopted for use in the determination of whether an entity is a "public utility," when the subject ordinance does not define the term. Both the common pleas court and the Commonwealth Court failed to consider the effect of the aforementioned federal statutes and regulations in making a determination concerning the nature of RBI's operations with respect to its provision of the paging and radiotelephone services that the FCC has authorized it to provide.

It appears that both the common pleas court and the Commonwealth Court failed to consider the mentioned federal statutes and regulations, and thus failed to give effect to the same, upon an erroneous construction of the decision of the U. S. Supreme Court in F.C.C. v. Midwest Video Corp., 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). The issue in that case was whether cable television service providers could properly be compelled to provide nondiscretionary public access to a designated proportion of their available cable channels under a system of regulated charges for doing so. Cable operators were already regulated as television broadcasters, but not as common carriers. The holding in the case was simply that persons engaged in radio (which includes television) broadcasting may not be regulated as common carriers insofar as they are engaged in such broadcasting. The opinion expressly recognized that the FCC was given authority under Title II of the Communications Act of 1934 (47 U.S.C. §§201, et seq.) to regulate certain activities as common carriage. It is beyond

dispute that the authority given to RBI to provide paging and radiotelephone service was granted under Title II of the Communications Act. Although RBI may not be regulated as a common carrier with respect to its television broadcasting, the common pleas court and the Commonwealth Court clearly misapplied the holding in Midwest Video when they seized upon it as a basis for ignoring the federal statutory provisions and regulations under which RBI was authorized to provide its paging and radiotelephone services and for concluding that it may not be considered a common carrier with respect to its provision of such services.

Both the common pleas court and the Commonwealth Court appear to place significance upon the fact that the FCC used such terms as "ancillary" and "secondary" in reference to the provision of paging and radiotelephone service through the medium of television broadcasting. Of course, it is "ancillary" or "secondary" in the sense that it cannot be carried out without an operating television broadcasting system. Such characterizations are absolutely meaningless, however, in reaching a judicial determination concerning the matter of whether RBI is, in the provision of those services, a common carrier. The authorization to provide the services was obtained through proceedings separate and distinct from any by which RBI obtained its television broadcasting license and of the same nature as those by which any other entity would seek and obtain authorization to act as a communications common carrier. Under federal law, RBI is unquestionably a common carrier in the provision of the paging and radiotelephone services which the FCC has separately given it authority to provide, and refusing to recognize it as such is nothing more than a refusal to give recognition and effect to federal law.

B. THIS COURT SHOULD GRANT ALLOWANCE OF APPEAL TO CORRECT THE DECISION OF THE COMMONWEALTH COURT, WHICH CONTRAVENES PRIOR DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS CONCERNING THE EXEMPTION OF PUBLIC UTILITIES FROM ZONING REGULATION AND WHICH, TO THE EXTENT THAT IT DECIDES AN ISSUE OF FIRST IMPRESSION, DOES SO INCORRECTLY.

At least since the time of this Court's decision in Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954), in which the Court construed a provision of the former First Class Township Law (53 P.S. §19092-3110) which was virtually identical to the present Section 619 of the MPC (53 P.S. §10619), municipalities have been held to be without power to regulate structures of public utilities by zoning ordinance. The Commonwealth Court itself reaffirmed that holding in South Coventry Township v. Philadelphia Electric Company, 94 Pa. Cmwlth. 289, 504 A.2d 368 (1986), and found it applicable not merely to structures actually involved in the physical transmission of the service provided by the public utility, but to all facilities of a public utility, which would include, without limitation, any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for or in connection with the business of any public utility. The principle consistently applied throughout in decisions involving the interplay between public utilities and municipalities is that the need for the rendition of efficient service by public utilities transcends the legitimate objectives of any one political subdivision and compels the entrustment of their regulation to authority of broader jurisdiction.

Although the aforementioned cases involved public utility facilities which were within the jurisdiction of the Pennsylvania Public Utility Commission, the exemption provided by

Section 619 of the MPC has been consistently construed by the appellate courts of this Commonwealth to be equally applicable to public utilities which are subject to the jurisdiction of the FCC with respect to the use at issue. Commonwealth, PUC v. WVCH Communications, Inc., supra; Hawk v. Zoning Hearing Board of Butler Township, 152 Pa. Cmwlth. 48, 618 A.2d 1087 (1992). If the entity demonstrates that it is required by law to meet the four criteria set forth in the WVCH case, it is a public utility for purposes of Section 619 of the MPC. As previously demonstrated in this Petition, there can be no dispute that RBI satisfies all of those criteria with respect to the common carrier paging and radiotelephone service it has been granted authority by the FCC to provide. Its satisfaction of those criteria also constitutes more than sufficient basis for finding that, in the provision of those services, it acts as a common carrier, as that term has been defined by Pennsylvania law. Masgai v. Public Service Commission, 124 Pa. Super. 370, 188 A. 599 (1936).

Section 1212A of the Earl Township Zoning Ordinance of 1996 exempts public utilities from the Ordinance in the same language employed by Section 619 of the MPC. The qualification in the definition of "public utility," at Section 302 of the Ordinance, which requires regulation as a common carrier if not subject to the jurisdiction of the Pennsylvania Public Utilities Commission, creates no circumstance to be satisfied that is not met through satisfaction of the criteria set forth in the WVCH case. The decision of the Commonwealth Court, in failing to find exemption under Section 619 of the MPC and Section 1212A of the Earl Township Zoning Ordinance of 1996, thus contravenes prior decisions of this Court and other appellate courts construing the language and effect of Section 619 of the MPC.

To the extent that RBI's operations involve the dual functions of television broadcasting, which is not exempt from municipal zoning regulation, and the provision of common carrier paging and radiotelephone services, which are exempt, its situation may be viewed as presenting a case of first impression. The findings made by the court of common pleas concerning the manner in which RBI must perform its common carrier function demonstrate, however, that the television signal and all related apparatus and facilities necessary to generate and broadcast it must exist and be in operation in order for the paging and radiotelephone service to be provided. It is thus physically impossible for RBI to carry out the public utility function for which it has been separately authorized by the FCC to construct a tower and operate, if the municipality may be permitted to regulate the television broadcasting aspect of its operations. Allowing such regulation would contravene this Court's prior decisions which hold that the need for the rendition of efficient service by public utilities transcends the legitimate objectives of political subdivisions, and it would engraft upon Section 619 of the MPC an exception which is not justified by its language nor any construction heretofore given to it.

C. THIS COURT SHOULD GRANT ALLOWANCE OF APPEAL TO CORRECT THE DECISION OF THE COMMONWEALTH COURT, WHICH CONTRAVENES PRIOR DECISIONS OF THIS COURT CONCERNING EQUITABLE ESTOPPEL AS IT APPLIES TO GOVERNMENTAL ENTITIES, AND TO CLARIFY THE PRECISE NATURE OF THE ELEMENTS REQUIRED FOR ITS PROPER APPLICATION.

At the time when the Township made its representation to RBI to the effect that a television transmission tower constituted a "public utility" which would be exempt from the application of its zoning ordinance, the ordinance in effect was the Earl Township Zoning Ordinance of 1974. That Ordinance recognized not one, but two forms of "public utility," neither of which was defined. At Section 706 of the 1974 Ordinance, one undefined form of "public utility" was made exempt from the application of the Ordinance by language which mirrored Section 619 of the MPC. Elsewhere, the Ordinance recognized some other undefined form of "public utility," which it allowed as a permitted use in certain zoning districts (e.g. Section 302(8), Section 400.2(7) and Section 511 (7)).

The Commonwealth Court disposed of RBI's defense of equitable estoppel by saying that the Township's representation constituted nothing more than an incorrect legal opinion, and that a mistake of law, as opposed to a mistake of fact, does not support an estoppel. This was consistent with the holding of the court of common pleas and with the language found in the Commonwealth Court and Superior Court decisions upon which that court relied. It does not appear, however, that the decision is in accord with prior decisions of this Court in so limiting the nature of those representations which may form the basis for an equitable estoppel.

In Chester Extended Care Center v. Com. Department of Public Welfare, 526 Pa. 350,

586 A.2d 379 (1991), this Court set forth the elements of an estoppel as (1) misleading words, conduct, or silence by the party against whom the estoppel is asserted; (2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel; and (3) the lack of a duty to inquire on the party asserting the estoppel. The case was on appeal from the Commonwealth Court, which had found that reliance upon the subject agencies' actions was unreasonable because those actions were in derogation of statutory law and the plaintiff had a duty to know what the law was. The Supreme Court held that the Commonwealth Court's determination in that regard was erroneous.

The representation which formed the basis for the asserted estoppel was the Department of Public Welfare's representation to the medical provider that it would continue to remain eligible to participate in the Medical Assistance program, despite an earlier termination of the provider by the U.S. Department of Health and Human Services. Under the applicable law, the termination by Health and Human Services was irrevocable, and further participation required formal readmission. The provider failed to seek formal readmission in reliance upon the Department of Public Welfare's representation.

This Court held that it would be unconscionable to require the provider to repay funds received from the Department of Public Welfare during its performance in reliance upon the misrepresentation after fully cooperating with the agencies responsible for knowing the law and seeing that the law is obeyed. The Court noted that, although an estoppel generally will not lie against the government where the acts of its agents are in violation of the positive law, even that rule could not be slavishly applied where its application would result in a fundamental

Injustice.

The foregoing decision clearly appears to provide for the application of the doctrine of equitable estoppel in cases where the subject representation is one concerning a matter of law, as opposed to a matter of fact. In disposing of the issue solely upon the grounds that the subject representation involved a matter of law, rather than a matter of fact, it would appear that the Commonwealth Court's decision contravenes this Court's prior decision concerning the elements necessary to support an equitable estoppel.

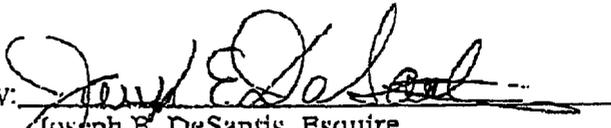
There is no question, however, that the law of this Commonwealth is replete with appellate decisions which explicitly hold that representations concerning matters of law cannot support an estoppel. One may also find appellate decisions which find an estoppel on the basis of representations which clearly can only be viewed as involving matters of law. If there is a basis for distinction, such as the nature of the entity making the representation and its responsibility for administering the law, it would appear that a decision which clearly draws that distinction is needed.

CONCLUSION

For the reasons and upon the authority hereinbefore mentioned, the Petitioner, Reading Broadcasting, Inc., respectfully requests that this Court grant its Petition for Allowance of Appeal, reverse the Order of the Commonwealth Court and the Final Decree of the Court of Common Pleas of Berks County, and remand the record to said common pleas court with a direction to enter judgment in favor of the Petitioner and against the Respondent, Earl Township.

Respectfully submitted,

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