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May 9, 2002

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MAY - 9 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

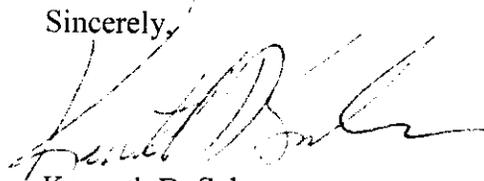
Re: Ex Parte Presentation in WT Docket No. 99-168 and IN Docket No. 01-74  
(Auctions 31 and 44)

Dear Ms. Dortch:

On May 8, Michael Hays, Jason Rademacher and the undersigned had a telephone conversation with Paul Margie of Commissioner Copps' office to discuss the Commission's legal obligation to proceed with Auctions 31 and 44. The substance of our discussion is reflected in the attached documents that were provided to Mr. Margie.

An original and one copy of this letter are provided for inclusion in the above referenced dockets. Please contact me if you have any questions or require additional information.

Sincerely,



Kenneth D. Salomon

Enclosures

No. of Copies rec'd 0+1  
List ABCDE

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**From:** Hays, Michael  
**Sent:** Wednesday, May 08, 2002 1:37 PM  
**To:** 'pmargie@fcc.gov'  
**Cc:** Salomon, Ken  
**Subject:** Cites you requested

Paul, there follows the cites we discussed with respect to certain principles of statutory interpretation. Please advise us if we can be of any further assistance. Thanks.

1. Look first to language of statute:

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. See Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) ("It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself'") (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); American Civil Liberties Union v. FCC, 823 F.2d 1554 (1987) (Commission's actions were "contrary to law" when it redefined "basic cable service" because the statute spoke with "crystalline clarity" and "provide[d] a precise definition in section 602(2) for the exact term the Commission . . . [sought] to redefine").

2. Term "shall" is mandatory:

The term "shall" is "language of an unmistakably mandatory character." Hewitt v. Helms, 459 U.S. 460, 471 (1983); see Her Majesty the Queen v. USEPA, 912 F.2d 1525, 1533 (D.C. Cir. 1990) ("shall" signals mandatory action); MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1191 (D.C. Cir. 1985) (holding that congressional use of the word "shall" establishes lack of agency discretion to act otherwise).

3. First task is to reconcile apparently conflicting statutes:

Stewart v. Smith, 673 F.2d 485, 492 (D.C. Cir. 1982) (stating that when courts are faced with apparently conflicting statutes, the first task is to examine their language to determine whether they may be reconciled); Citizens to Save Spencer County v. U.S. EPA, 600 F.2d 844, 870 (D.C. Cir. 1979) (stating that courts should wherever possible construe statutes so as to be consistent with each other); Wilderness Society v. Morton, 479 F.2d 842, 881 (D.C. Cir. 1973) (stating that when there are two acts on the same subject, courts should make every effort to reconcile allegedly conflicting statutes).

4. If statutes are conflicting, specific statute takes over the general:

Where a specific statutory provision conflicts with a general one, the specific provision governs. HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) ("It is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned . . ."). See also Halverson v. Slater, 129 F.3d 180, 186 (D.C. Cir. 1997) ("the more specific provision controls . . . according to the traditional tools of statutory construction").

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**From:** Salomon, Ken  
**Sent:** Thursday, May 09, 2002 2:20 PM  
**To:** 'pmargie@fcc.gov'  
**Subject:** 700 MHz Cites

Paul,

During our conversation yesterday, you asked when a legislative provision included in an appropriation act would expire at the end of the fiscal year covered by the legislation. I mentioned that one example was the ban that formerly was inserted annually in the Commission's appropriation prohibiting the use of that year's appropriated funds to process a swap of a public TV station's VHF channel assignment for the UHF assignment of a commercial station.

A more current example is found in the Commission's September 2001 Notice of Proposed Rulemaking reviewing the newspaper-broadcast cross-ownership rule (MM Docket No. 01-235 and MM Docket No. 96-197, FCC 01-262, released September 20, 2001). In paragraph 4, the Commission noted that for a period during the 1980s and 1990s, "Congress prohibited the Commission from spending any of its appropriations 'to repeal, retroactively apply changes in, or begin or continue a reexamination of the rules and policies established to administer' the newspaper/broadcast cross-ownership rule." Footnote 12 of the Notice is a listing of the various appropriation acts containing the restriction.

Please let me know if you have any questions.

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