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Before the  
FEDERAL COMMUNICATIONS COMMISSION

FCC 94M-147  
41119

Mar 14 3 40 PM '94  
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 93-264 ✓
DISSEMINATED BY	)	
FRANK B. DUROSS	)	File No. BPH-920512MC
	)	
KENNETH F. ROSER, JR.	)	File No. BPH-920513MI
	)	
For Construction Permit for a	)	
New FM Station on Channel 250A	)	
in Whitesboro, New York	)	

MEMORANDUM OPINION AND ORDER

Issued: March 10, 1994 ; Released: March 14, 1994

1. Under consideration is the Motion to Enlarge Issues Against Kenneth F. Roser, Jr., filed by Frank B. DuRoss (DuRoss) on November 18, 1993; the Opposition to Motion to Enlarge Issues, filed by Kenneth F. Roser, Jr. (Roser) on December 1, 1993; the Reply to Opposition to Motion to Enlarge Issues, filed by Mr. DuRoss on December 13, 1993; the Supplement to Opposition to Motion to Enlarge Issues, filed by Mr. Roser on February 14, 1994; the Joint Petition for Approval of Settlement Agreement, Leave to File Amendment and Withdrawal of Application, filed by Mr. Roser and Mr. DuRoss on February 8, 1994; and the Mass Media Bureau's Comments on Joint Petition for Approval of Settlement Agreement Leave to File Amendment and Withdrawal of Application, filed on February 24, 1994.

Motion to Enlarge Issue

2. Mr. DuRoss seeks the designation of a financial qualifications and related misrepresentation issue against the application of Mr. Roser. The request is based on Mr. Roser's statement that he had no documentation on hand to support his financial certification at the time he executed his application. Mr. DuRoss contends that at the very least, Mr. Roser, who is relying on his own assets to finance his proposed station, should have had a contemporaneous personal financial statement as well as a breakdown of the family's income for the previous two years. He submits that Mr. Roser's failure to have these documents available to him at the time he completed his application raises a substantial and material question as to whether or not Mr. Roser actually had the necessary funds available to him at the time he completed his application to construct and operate his proposed station and, whether he misrepresented his financial qualifications to the Commission.

3. In response to the Motion, Mr. Roser states that he was relying on a line of credit from the Marine Midland Bank at the time he certified to the Commission that he had the necessary funds to realize his proposal, and that he drew down this line of credit in November 1993 in order to eliminate any question as to the availability of the required funds. In his recently filed supplement to his opposition statement, Mr. Roser submits a statement

from the Marine Midland Bank which indicates that as of February 8, 1994, he continues to have on deposit with the Bank a balance of \$100,464.08. Mr. Roser submits that this most recent statement supports his claim that he had at the time he filed his application and continues to have the necessary funds to construct and operate his proposed facility; and that the designation of financial and misrepresentations issues is not warranted.

4. The Presiding Judge finds that Mr. Roser, in his opposition statement and in his supplement thereto, has properly responded to the arguments set forth by Mr. DuRoss in support of his motion to enlarge the issues, and he has properly demonstrated that he had and has sufficient liquid assets on hand to meet his financial commitment to the proposed facility; and that, therefore, good cause has not been shown for granting Mr. DuRoss' motion. Accordingly, the request to enlarge issues will be denied in its entirety.

Joint Request for Approval of Settlement Agreement

5. Mr. DuRoss and Mr. Roser seek approval of a joint settlement agreement which provides, in pertinent part, for a merger of the DuRoss and Roser interests into a new entity, Professional Broadcasting Corporation (PBC); and the amendment of the Roser application to reflect this new entity, PBC, as the applicant in lieu of Kenneth F. Roser, Jr., as well as a change in Mr. Roser's technical proposal to reflect an increase in the height above average terrain from that specified in his original application. Each party to the agreement will hold 50 percent of the voting stock of the new applicant, PBC, and no payment of any sort will be made by either Mr. DuRoss or Mr. Roser to the other. Mr. DuRoss also agrees to seek the voluntary dismissal of his application. According to the terms of the settlement agreement, each party to the merger will be individually responsible for his own expenses incurred prior to the merger, and each will contribute equally to those expenses incurred by PBC in the construction and operation of the proposed radio station, including the payment of \$15,000, to the former applicant, Kevin O'Kane, for the dismissal of his application. See *Memorandum Opinion and Order*, FCC 94M-04, released in this proceeding on January 6, 1994.

6. The Presiding Judge finds that the parties to the agreement are in substantial compliance with the requirements of Section 73.3525 of the Commission rules, which implements Section 311(c)(3) of the Communications Act of 1934, as amended; and that the parties have entered into a *bona fide* merger. In addition, the Parties declare that their respective applications were not filed for the purpose of reaching or carrying out a settlement agreement. He further finds that approval of the tendered settlement agreement would be in the public interest since it would permit the authorization of a new radio service to Whitesboro, New York without the delay and expense that a comparative hearing would involve. Accordingly, the joint request will be granted, the settlement agreement approved, and this proceeding will be terminated.

Rulings

IT IS ORDERED, that the Motion to Enlarge Issues Against Kenneth F. Roser, Jr., filed by Frank B. DuRoss on November 18, 1993, IS DENIED.

AND IT IS FURTHER ORDERED, that the Joint Petition for Approval of Settlement Agreement, Leave to File Amendment and Withdraw of Application filed by Kenneth F. Roser, Jr. and Frank B. DuRoss on February 8, 1994, IS GRANTED, and the settlement agreement IS APPROVED; that the application of Kenneth F. Roser, Jr. (File No. BPH-920513MI) IS AMENDED to reflect the Professional Broadcasting Corporation as the new applicant, as well as an amendment to the applicant's technical proposal; that the application of Frank B. DuRoss (File No. BPH-920512MC) IS DISMISSED with prejudice; and that the application of Professional Broadcasting Corporation, formerly Kenneth F. Roser, Jr., for a new FM station on Channel 250A in Whitesboro, New York (File No. BPH-920513MI) IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph P. Gonzalez  
Administrative Law Judge