

MM 97-128

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

MAR 18 1991

Federal Communications Commission
Office of the Secretary

In re Application of)
)
SHURBERG BROADCASTING OF HARTFORD,)
INC.)
)
For Construction Permit for a New)
Television Station on Channel 18)
in Hartford, Connecticut)

File No. BPCT-831202KF

FILED MAR 18 1991

MAR 19 1991

To: Clay C. Pendarvis, Chief
Television Branch

PETITION TO DENY

Astroline Communications Company Limited Partnership,
licensee of Station WHCT-TV, Channel 18, Hartford, Connecticut,
through counsel and pursuant to Section 73.3584 of the Federal
Communications Commission's Rules, 47 C.F.R. § 73.3584,
respectfully petitions the Commission to deny the above-referenced
application. In support thereof the following is stated:

BACKGROUND

1. On December 1, 1988, Astroline timely filed its renewal
application for Station WHCT-TV, BRCT-881201LG. Thereafter, on
March 1, 1989, five parties filed applications against the renewal
application of Astroline: Sage Broadcasting Corporation (BPCT-
890301KN), Lynette Ellertson (BPCT-890301KM), Gloria W. Stanford
(BPCT-890301KK), Edmund S. Cromartie (ARN-890301KL) and
Connecticut Public Broadcasting (ARN-890301KG). 1/

1/ Concurrently with this petition, Astroline has filed a
Petition to Deny the applications of Sage, Ms. Ellertson and
Ms. Stanford on technical grounds. Mr. Cromartie's
application was dismissed by the Commission on February 5,
1991, as substantially incomplete. Connecticut Public
Broadcasting's application was dismissed at its own request
on May 2, 1989.

2. Shurberg Broadcasting of Hartford, Inc., however, did not file an application against the 1988 renewal application of Astroline. Instead, Shurberg filed a letter on February 28, 1989, alleging that since it had filed an application in 1983, which was being litigated, it was not required to file a further application during the 1988-1989 filing window. Astroline submits that in 1989, Shurberg took a gamble on the final outcome of the then-pending litigation. The final outcome of the litigation, however, was not in Shurberg's favor, leaving it without an application pending before the Commission.

3. The origins of Shurberg's 1983 application lie in the Commission's 1980 designation for hearing of the renewal application of Faith Center, who at the time was the licensee of Station WHCT-TV (Channel 18) in Hartford, Connecticut. Faith Center's renewal application was designated for hearing to determine whether it was qualified to retain its license. See Faith Center, Inc., 83 F.C.C. 2d 401 (1980), recon. denied, 86 F.C.C. 2d 891 (1981). In response to the Commission's designation of its renewal application for hearing, Faith Center twice applied for, and received, the Commission's authorization to effect a distress sale ^{2/} of the license to minority buyers, but neither sale was consummated. Thereafter, in December 1983, Shurberg filed the above-referenced application with the Commission and in April 1984, it petitioned to have the application designated for a

^{2/} The Commission's distress sale policy permits licensees whose renewal applications have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualifications issues, to transfer or assign their licenses at a discounted "distress sale" price to applicants with a significant minority ownership interest.

comparative hearing with Faith Center's renewal application. Shurberg argued, inter alia, that the distress sale program was unconstitutional. In June 1984, Faith Center, for the third time, requested the Commission's permission to assign its license, this time to Astroline.

4. In December 1984, the Commission both denied Shurberg's petition and granted Faith Center's request for permission to assign its license for Channel 18 to Astroline pursuant to the distress sale policy. Faith Center, Inc., 99 F.C.C. 2d 1164, 1171 (1984). The assignment of the station to Astroline was consummated on January 23, 1985. In the meantime, Shurberg petitioned the Court of Appeals for review. Four years later a divided Court of Appeals found the distress sale policy unconstitutional. Shurberg Broadcasting of Hartford, Inc. v. FCC., 876 F.2d 902 (1989). Approximately a year later the Supreme Court of the United States reversed the Court of Appeals' decision, finding that the policy is constitutional. Metro Broadcasting, Inc. v. FCC., 110 S.Ct. 2997 (1990).

DISCUSSION

5. Of particular relevance here is the fact that although the Court of Appeals found that the distress sale policy was unconstitutional, it upheld, on procedural grounds, the Commission's 1984 refusal to accept for filing Shurberg's application. Shurberg Broadcasting of Hartford, Inc. v. FCC., 876 F.2d at 908, 909. The Court of Appeals concluded that if the distress sale policy had been found to be constitutional, the Commission's decision to maintain Station WHCT-TV in a protected status and thereby refuse to accept all competitive applications,

including Shurberg's application, would have been upheld. Id. Equally relevant is the fact that the Supreme Court did find the policy to be constitutional.

6. Consequently, after nine years of complicated and protracted litigation, the highest Court in the land has spoken, affirming the Commission's refusal to accept Shurberg's 1983 application on both constitutional and procedural grounds. In light of the outcome of the foregoing litigation, Shurberg's decision to take a calculated risk by not filing an application during the 1988-1989 filing window has resulted in a missed opportunity for Shurberg.

7. Shurberg understood in 1989 that there were risks associated with its course of action. Therefore, it filed a letter on February 28, 1989, attempting to persuade the Commission that it had a "pending" application before the Commission. Specifically, Shurberg alleged that it was precluded by Section 73.3520 of the Commission's Rules, 47 C.F.R. § 73.3520, from filing a competing application during the 1988-1989 filing window. Shurberg's argument was frivolous, at best, in that it presumed the very issue which was being litigated -- whether Shurberg's application should be accepted for filing.

8. Section 73.3520 states in pertinent part that "[w]here there is one application for new or additional facilities pending, no other application for new or additional facilities for a station of the same class to serve the same community may be filed by the same applicant . . ." 47 C.F.R. § 73.3520 (emphasis added). The Commission, however, has precisely defined the period during which an application is "pending," as that period "from the time

it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court." 47 C.F.R. § 1.65(a) (emphasis added).

9. At the time the 1988-1989 filing window opened, Shurberg's 1983 application had not been accepted for filing by the Commission. See BAPS Facility Application Information Report, Attachment 1. Interestingly Shurberg, itself, emphatically pointed out that very fact to the Commission and Astroline in a February 7, 1985, pleading, arguing that,

[i]n its Motion Astroline suggests that SBH's application has been accepted for filing by the Commission. This suggestion is apparent in the fact that Astroline refers, both in the caption and the text of its Motion, to SBH's file number as "BPCT-831202KF." Of course, only applications which have been formally accepted are accorded a "BPCT-" prefix. See Public Notice ("Broadcast Bureau Implements New File Numbering System"), Mimeo No. 2784, released July 7, 1978, a copy of which is included as Attachment D hereto. SBH's application has not, however, been accepted for filing, and the correct prefix of its file number is therefore "ARN-" (i.e., application reference number).

See "Opposition to Motion to Dismiss" at para. 10 and n.3, Attachment 2. Clearly, Shurberg's application was not "pending" before the Commission in 1989. Moreover, the Court of Appeals and the Supreme Court affirmed the soundness of the Commission's decision not to accept Shurberg's 1983 application for filing. Therefore, contrary to Shurberg's frivolous allegations, nothing precluded Shurberg from filing an application during the 1988-1989 filing window -- that is nothing but its own overconfidence in the merits of its 1983 case.

CONCLUSION

10. Astroline submits that Shurberg's 1983 application has no place in the current proceeding. The Commission refused to accept the application in 1984, a decision which has been upheld by the Supreme Court. Additionally, Shurberg had an opportunity during the 1988-1989 filing window to file a competing application against Astroline's 1988 renewal application. Yet, instead of filing an application, Shurberg chose to take a calculated risk that the Commission's 1984 decision would be reversed. The decision, however, was upheld, and the 1988-1989 window of opportunity has closed. Shurberg therefore has no place in the 1988 renewal proceeding.

WHEREFORE, in view of the foregoing, Astroline respectfully requests that the Commission dismiss Shurberg's 1983 application as inadvertently accepted for filing.

Respectfully submitted,

ASTROLINE COMMUNICATIONS COMPANY LIMITED
PARTNERSHIP

By:



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Its Attorneys

March 18, 1991

ATTACHMENT 1

ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

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FCC
Office of the Secretary

In re Application of)
)
SHURBERG BROADCASTING OF HARTFORD, INC.)
Hartford, Connecticut)
)
For authority to construct and)
and operate a new commercial)
television station on Channel 18,)
Hartford, Connecticut)

File No. ARN-831202KF

TO: James C. McKinney, Chief
Mass Media Bureau

OPPOSITION TO MOTION TO DISMISS

1. Shurberg Broadcasting of Hartford, Inc. ("SBH") hereby opposes the Motion to Dismiss filed by Astroline Communications Company Limited Partnership ("Astroline") with respect to SBH's above-captioned application for a construction permit for a new television station to operate on Channel 18 in Hartford, Connecticut. At present Station WHCT-TV is authorized to operate on that channel in Hartford. As set forth in detail below, Astroline's Motion suffers from fatal factual and legal flaws which reflect a substantial lack of familiarity not only with the facts of this case, but also with the Commission's own rules and policies.

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Introduction

2. In marked contrast to other matters relating to SBH and Astroline ^{1/}, the instant Opposition and the Motion to which it is responsive involve a relatively limited matter. Astroline is simply attempting to convince the Bureau that SBH's application should be dismissed because, according to Astroline, SBH is not financially qualified and has failed to comply with Section 1.65 of the Commission's Rules. The sole basis for these claims is an affidavit executed by SBH's sole principal, Alan Shurberg, and submitted to the Court of Appeals in connection with the Emergency Motion for Stay in Case No. 84-1600 referenced in Footnote 1. A copy of Mr. Shurberg's affidavit appears as Exhibit A to Astroline's Motion. However, even a cursory examination of the underlying facts -- as distinct from

^{1/} The SBH/Astroline/Faith Center, Inc. proceeding has been the subject of extensive pleadings before the Commission, the United States Court of Appeals for the District of Columbia Circuit ("the Court of Appeals") and the United States District Court for the District of Columbia ("the District Court"). See, e.g., SBH's Consolidated Comments and Reply Comments filed with the Commission in Docket No. 80-730 on July 23, 1984 and August 2, 1984, respectively; In re Shurberg Broadcasting of Hartford, Inc., Case No. 84-5363 (D.C. Cir., filed June 12, 1984); Shurberg Broadcasting of Hartford, Inc. v. FCC, Case No. 84-3406 (D.D.C., filed November 9, 1984); Shurberg Broadcasting of Hartford, Inc. v. FCC, Case No. 84-1600 (D.C. Cir., filed December 10, 1984). While these various proceedings include matters not directly related to Astroline's most recent Motion, consideration of that Motion should be undertaken with at least some familiarity of the facts and circumstances which have led the parties to their present positions. To that end, SBH's Consolidated Comments and Reply Comments, cited above, are hereby incorporated by reference, as is SBH's Emergency Motion for Stay, filed with the Court of Appeals in Case No. 84-1600.

Astroline's distorted and self-serving misreading of those facts -- demonstrates the total invalidity of Astroline's claims.

1. No violation of Section 1.65 has occurred.

3. The primary thrust of Astroline's Motion is that Mr. Shurberg's affidavit somehow proves that SBH is not financially qualified and that that "fact" should have been reported to the Commission pursuant to Section 1.65 of the Commission's Rules. Section 1.65, of course, requires an applicant to notify the Commission either when information contained in its application is no longer substantially accurate or when there has been a substantial change as to any matter which may be of decisional significance. According to Astroline, Mr. Shurberg's affidavit is inconsistent with SBH's application in which, in the words of Astroline,

SBH stated in Section III . . . that it was financially qualified to construct and operate Channel 18 for three months without commercial revenue if it was awarded the license. Specifically, Mr. Shurberg certified that SBH has "sufficient net liquid assets . . . on hand or . . . available from committed sources to construct and operate the requested facilities." (SBH's FCC Form 301 at 5).

Astroline Motion at 3.

4. In purporting to characterize and quote from SBH's application, however, Astroline is absolutely and shockingly incorrect with respect to the content of that application; in fact, the "quoted" language is nothing more than an invention by Astroline, a figment of its own imagination. Contrary to Astroline's purported quotation, SBH's application specifically

did not include a certification of financial qualification. Instead, without responding either "yes" or "no" to the two questions comprising Section III of the application, SBH stated in response to that section as follows: "Financial certification to be supplied." A copy of the relevant page of SBH's application is included herewith as Attachment A. 2/ Thus, even if Mr. Shurberg's affidavit did reflect some material change in SBH's financial qualifications, it would not alter the accuracy of the information contained in SBH's application and would not, therefore, trigger any obligation under Section 1.65.

2/ SBH is completely at a loss to understand how Astroline could possibly explain, much less justify, the purported "quotation" of materials which do not exist. After all, this is not an instance of misreading or misquoting; in the absence of anything to misread or misquote, Astroline has fabricated a "quotation". In this case the gravity of Astroline's error is worsened by the fact that the "quotation" is not merely an incidental aspect of its pleading; rather, the "quotation" is in large measure the lynchpin, the sine qua non of its Section 1.65 argument.

Inadvertent errors borne of carelessness and negligence may be unfortunately unavoidable from time to time, and SBH does not believe that Astroline -- or any other party, for that matter -- should be held to the unattainable standard of perfection. However, SBH believes that, at a bare minimum, Astroline should be expected not to invent "facts" out of whole cloth in an effort to create its arguments. Astroline's resort to precisely that tactic in this instance raises serious questions about the reliability of any past, present or future assertions by Astroline: if -- as has been demonstrated here -- it is willing to make up information in order to support its case, Astroline's credibility is virtually nil. Ironically, this is not the first instance, or the first proceeding, in which such questions have been raised relative to Astroline or its associates. See Minority Broadcasters of East St. Louis, Inc., 56 R.R.2d 275, 283-284 (Rev. Bd. 1984) ("disturbing pattern of carelessness" found with respect to an applicant whose principals include principals of Astroline as well as its counsel, Thomas Hart, who prepared the Motion in question here).

Astroline's argument in this regard is, as a result, wholly without merit.

II. SBH's application is not subject to dismissal for failure to provide financial certification.

5. As indicated above, SBH acknowledges that it has not to date certified its financial qualifications to the Commission. Neither that fact nor Mr. Shurberg's affidavit submitted to the Court of Appeals, however, warrants dismissal of SBH's application. As an initial matter, it is important to recognize precisely what SBH's application states with respect to its financial qualifications. SBH has not stated that it is financially qualified, and it has not stated that it is not financially qualified. Instead, SBH has represented to the Commission that its "[f]inancial certification [is] to be supplied." See Attachment A hereto. Thus, there is absolutely no basis whatsoever in SBH's application from which to conclude that SBH is not financially qualified.

6. Mr. Shurberg's affidavit, when read in its totality and against the backdrop of the relevant facts and circumstances, similarly affords no basis for Astroline's conclusion. As set forth in Mr. Shurberg's affidavit, his source of financing had notified Mr. Shurberg that he had seen a newspaper article in which SBH's efforts to prosecute its application had been described by counsel for Astroline as "frivolous". Further, concern was expressed about the likelihood of SBH's ability successfully to prosecute its appeal. In particular, it was

noted that denial of SBH's then-pending Emergency Motion for Stay could be interpreted as an indication of SBH could not claim that success of the merits of its appeal was likely. SBH's financial source informed Mr. Shurberg that "funding would continue to be available to the extent that the effectiveness of the Commission's grant remains stayed, since such a stay would indicate the likelihood of SBH's ultimate success on the merits, and also since such a stay would preclude Astroline from operating the station in the meantime." See Exhibit A to Astroline's Motion (emphases added). From this Mr. Shurberg concluded that, absent the stay, SBH would not be able to "proceed with the full course of appellate procedure in an effort to secure reversal of the Commission's decision." Id.

7. As Astroline correctly notes, the Court of Appeals ultimately denied SBH's Emergency Motion for Stay. In so doing, however, the Court specifically and repeatedly indicated that its decision was not based on any failure by SBH to demonstrate the likelihood that it would succeed on the merits of its appeal. To the contrary, the Court described the issues raised by SBH as being "serious, substantial, difficult and doubtful." See Attachment B hereto. Thus, concern about any likelihood of failure on the merits was substantially eliminated by the Court of Appeals in its denial of SBH's stay request. This, in turn, led to the continued availability of funding to SBH. And since this occurred after and as a result of the Court's decision, Astroline's charge that SBH has "arguably committed perjury

before the Court of Appeals" (Astroline Motion at 12) is clearly without merit: Mr. Shurberg's affidavit was true and accurate when it was executed and submitted to the Court, and it remained so until the Court of Appeals issued its Order. To the extent that any change may have occurred after, and as a result of, the issuance of the Order, SBH was under no obligation to notify the Court of that change. This is especially so in light of the fact that, in denying SBH's Emergency Motion for Stay, the Court of Appeals had specifically declined to attribute decisional significance to the matter of SBH's financial qualifications -- if the Court denied SBH's stay request despite SBH's claim of likely financial inability, the Court would most certainly not be interested to learn, subsequent to that denial, SBH's situation had changed for the better.

8. But the more fundamental flaw in Astroline's Motion is its assumption that the Commission will dismiss an application in which the applicant fails to establish its financial qualifications. In fact, both the Communications Act of 1934, as amended, and the Commission's own longstanding processing policies require that, in such instances, the applicant be given an additional opportunity to demonstrate its financial qualifications. For example, the Communications Act requires that the Commission designate for hearing applications in which a substantial and material question of fact is presented with respect to, inter alia, the applicant's qualifications. See 47 U.S.C. §307(e). Thus, even if SBH were to certify that it is

not financially qualified, the result would not be the dismissal of its application. Instead, the Commission would normally afford SBH an opportunity, even after adoption of a hearing designation order, to certify its financial qualifications. Even in the worst case, the Commission (or the Presiding Administrative Law Judge) would simply add an issue to permit consideration of the financial qualifications matter in hearing.

9. This is precisely the routine course taken by the Commission and the Mass Media Bureau. A review of hearing designation orders released since January, 1984, reveals that many broadcast hearing proceedings commenced during the pendency of SBH's application have included applicants about whose financial qualifications questions remained at the time of designation. Included herewith as Attachment C is a sample listing of 24 such proceedings. In none of these cases was any application dismissed because of questions concerning its financial qualifications. By contrast, in several of the cases where such questions existed, no financial qualifications issue was added, and the applicant was permitted to tender a certification of financial qualifications to the Presiding Judge. And at least one proceeding -- Essential Communications Co., MM Docket Nos. 84-389 et al., 49 Fed. Reg. 19115 (Mass Media Bureau 1984) -- included an applicant who had, instead of answering "yes" or "no" to the questions in Section III of FCC Form 301, simply stated that financial certification would be supplied at a later date. In all of these instances the

applications had been fully processed by the Bureau's staff, had been accepted for filing ^{3/}, and were duly designated for hearing despite the fact that questions remained with respect to the applicants' financial qualifications.

10. It is clear that Astroline's position is based on a lack of understanding relative to the difference between standards for acceptance of an application, on the one hand, and standards for grant of an application, on the other. See, e.g., KALE, Inc., 35 R.R.2d 357 (1975) (where apparent deficiencies involve financial qualifications, acceptability is not in issue: "That an application may be acceptable for filing and yet not demonstrate the requisite qualifications to justify a grant is well established."). SBH's application was, and continues to be, complete and in compliance with the Commission's technical rules. It can, therefore, be accepted for filing and given a "B" cut-off date notwithstanding that the application may not presently be "grantable". Following acceptance of its application, SBH will have ample opportunity to establish its financial qualifications.

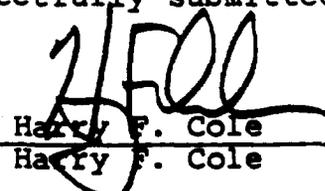
^{3/} In its Motion Astroline suggests that SBH's application has been accepted for filing by the Commission. This suggestion is apparent in the fact that Astroline refers, both in the caption and the text of its Motion, to SBH's file number as "BPCT-831202KF". Of course, only applications which have been formally accepted are accorded a "BPCT-" prefix. See Public Notice ("Broadcast Bureau Implements New File Numbering System"), Mimeo No. 2784, released July 7, 1978, a copy of which is included as Attachment D hereto. SBH's application has not, however, been accepted for filing, and the correct prefix of its file number is therefore "ARN-" (i.e., application reference number).

Conclusion

11. By confusing the distinct concepts of "acceptance" and "grant" and the separate standards underlying each, Astroline is seeking relief which the Commission does not as a routine matter -- and cannot, as a statutory matter -- provide. Even if SBH were found to be not financially qualified -- and there is no basis for such a finding before the Commission -- the Commission cannot, consistent with the Communications Act and the Commission's own routine processing standards, dismiss SBH's application. Thus, even if Astroline's plainly incorrect factual assertions had any validity at all, its Motion would still have to be denied.

WHEREFORE, for the reasons stated, Shurberg Broadcasting of Hartford, Inc. submits that the Motion to Dismiss filed by Astroline Communications Company Limited Partnership should be denied.

Respectfully submitted,


/s/ Harry F. Cole

Harry F. Cole

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Counsel for Shurberg Broadcasting
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February 7, 1985

CERTIFICATE OF SERVICE

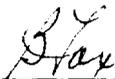
I, Bonnie Fox, a secretary in the law firm of Baker & Hostetler, do hereby certify that the attached Petition to Deny was mailed this 18th day of March, 1991, by first class postage prepaid mail to the following:

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