

was approved granting two years to complete implementation; the Roberts Licensees' rejustification was denied. This blatantly disparate result is nowhere explained on any basis by the FCC and is not explainable under any standard announced by the FCC. The D.C. Circuit has long held that an agency must provide adequate explanation before it treats similarly situated parties differently. The failure to treat similarly-situated applicants in the same fashion, without any rational explanation, is reversible error. Petroleum Communications, Inc. v. F.C.C., 22 F.3d 1164, 1172 (D.C. Cir. 1994). The denial of the Roberts Licensees rejustification request and the grant of the DCL rejustification request was inconsistent and was not explained. The denial of the Roberts Licensees rejustification request was reversible error. The Roberts Licensees therefore are likely to succeed on the merits.

19. Even assuming *arguendo* that the Roberts Licensees could not demonstrate with some degree of mathematical probability that they will prevail on reconsideration on the issues outlined above, the serious legal questions raised by them in and of themselves compel grant of the stay, where as here, the other three factors strongly favor grant of a stay. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., *supra*, 559 F.2d at 843; *see also* Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam); Costandi v. AAMCO Automatic Transmissions, Inc., 456 F.2d 941 (9th Cir. 1972).¹¹¹ As the D.C. Circuit of the U.S. Court of Appeals has noted, in interpreting the standard enunciated in Virginia Petroleum Jobbers, *supra*:

An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable harm on the movant. There is

¹¹¹ As the Charlie's Girls Court held: One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury *or that serious questions are raised and the balance of hardships tips sharply in his favor*. *Id.*, at 954 (emphasis supplied).

substantial equity and the need for judicial protection, *whether or not movant has shown a mathematical probability of success [on the merits].*"

Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., *supra*, 559 F.2d at 844

(emphasis supplied).

IV. Failure To Grant Stay Would Irreparably Harm The Roberts Licensees.

20. Irreparable injury inflicted on the Roberts Licensees also compels a tolling of the May 20 Order's reduced construction period. Virginia Petroleum Jobbers, *supra*. The Commission has held that such an injury must be certain and great, and must be actual and not theoretical. Private Land Mobile Radio Services (Consolidation), 1 CR (P&F) 838 (Wireless Bur. 1995). The Roberts Licensees have clearly suffered such injury.

21. The Roberts Licensees' EIA originally gave them 5 years (i.e., until March of the year 2000) to complete construction and initiate operation of their facilities. The December 1995 Order, which came 9 months after grant of the EIA and before the Roberts Licensees had even received the bulk of their licenses, indicated that, at best, the extended period would be cut back severely. Rejustification would cut back the Roberts Licensees' construction period to two years from the date on which the Commission granted the rejustification. The Roberts Licensees filed for rejustification, answering each question posed by the December 1995 Order. Having complied with the announced standard the Roberts Licensees proceeded with the reasonable expectation that they would now have to compact their combined 5 year business plan into a maximum of two years after rejustification.

22. Now, however, as the Roberts Licensees are implementing the condensed business plan, despite the uncertainty created by the pending rejustification request, they are told

that they have six months to complete construction of the rest of their facilities. Yet they have constructed a number of their licensed facilities, have secured financing and begun a detailed implementation schedule to complete construction prior to May 20, 1999.^{12/}

23. The consequence of the failure to timely complete construction is automatic cancellation of the authorizations. May 20 Order, at ¶ 29. Yet the Roberts Licensees are faced with the daunting task of completing in 6 months an EIA that, in terms of licenses, only filled out in the spring of 1996. Thus, given the impossibility of completing the construction of all the Roberts Licensees within the drastically-shortened time period prescribed, the severely-reduced construction deadline now set by the May 20 Order constitutes a harsh and extreme (i.e., irreparable) injury. In the absence of tolling this deadline, this injury will be visited upon the Roberts Licensees notwithstanding the clear error of the Commission in imposing such a sanction on the basis of a standard of which the Roberts Licensees had no notice.^{13/} See Salzer v. F.C.C., *supra*.

^{12/} As noted in the Roberts Petition, since the rejustification filing the Roberts Licensees have entered into management agreements with entities wholly-owned by an established, publicly-traded SMR operator, to provide for the ongoing construction of the licensed facilities. Through these agreements the Licensees have gained access to a \$5 million financing by Motorola. Equipment has been ordered, received and has been installed and scheduled for installation pursuant to the management agreements. Furthermore, as of the date of the Petition's filing certain of Roberts Licensee stations were constructed and commercially operational in the cities of Lewiston, Maine; Pinebluff, Arkansas; Fayetteville, North Carolina; Naples, Florida; Mankato, Minnesota; Portland, Maine; Bowling Green, Kentucky; Syracuse, New York and Baton Rouge, Louisiana. Additional commercial operations were to be brought on line in the next 90 days in Gulfport, Mississippi; Bay City, Michigan; Mobile, Alabama; Ft. Myers, Florida; and Lake Charles, Louisiana.

^{13/} The potential economic injury resulting from the loss of the Roberts Licensees' authorizations is far greater than the mere expenditure of funds pending an appeal, which the Virginia Petroleum Jobbers court deemed an insufficient injury. Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., *supra*, 559 F.2d at 843, n. 2.

24. The harm that the Roberts Licensees will suffer is also unquestionably "irreparable" in that the Roberts Licensees have no remedy at law to compensate for what will be unrecoverable economic losses -- the canceled authorizations and the destruction of their ability to deploy a wide-area system -- if the Commission fails to act to toll promptly the construction period. The D.C. Circuit considers such a loss significant. In Wisconsin Gas, Inc. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985), the Court said "monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." The Roberts Licensees' injury is not merely the loss of profits but also the loss of an entire business as a result of the May 20 Order. See also Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., *supra*, 559 F.2d at 843 n. 2.

25. The threat of such unrecoverable economic loss clearly qualifies as irreparable harm. Iowa Utilities Board v. F.C.C., 109 F.3d 418, 426 (8th Cir. 1997). Therein the Eighth Circuit granted a stay lest local exchange carriers be forced to charge below-cost rates. The Roberts Licensees cannot simply bring suit to recover damages. Compare National Ass'n of Broadcasters v. F.C.C., 554 F.2d 1118, 1122 n. 3 (D.C. Cir. 1976).^{14/} Like the incumbent local exchange carriers who would not be able to bring suit to recover their loss and thus found entitled to stay by the 8th Circuit, Iowa Utilities v. F.C.C., 109 F.3d at 426, the Roberts Licensees will not be able to recover business damages from the Commission for the loss of their authorizations and resulting thwarting of their wide-area system, even if the Commission later

^{14/} In NAB, the licensees could sue to recover the fees paid to the FCC. In this case, suit for money damages would not be sufficient to replace licensees that will expire because of the Commission's error.

reversed the May 20 Order (or if the Order was reversed on appeal).^{15/} The authorizations would have likely already canceled.

26. The Roberts Licensees clearly have demonstrated and the D.C. Circuit will clearly agree that they will suffer an irreparable injury in the absence of a tolling of the construction period. The Court, in the PSWF Corporation case, supra, already recognized that the expiration of the licenses would moot any opportunity to obtain judicial review. PSWF Corporation v F.C.C., No. 96-1097, Order, April 25, 1997.

V. The Issuance Of The Stay Will Not Substantially Harm Other Interested Parties.

27. No interested party will be substantially harmed if the subject request for stay is granted. The Roberts Licensees have demonstrated the errors of law in the May 20 Order which would mandate reversal of the order on reconsideration. Moreover, no other applicant has a vested interest in the forfeiture of the Roberts Licensees' authorizations. See generally Crosthwait v. F.C.C., 584 F.2d 550, 555 (D.C. Cir. 1978) (applicant has no vested interest in disqualification of competing applicant, citing Azalea Corp., 31 FCC 2d 561, 563 (1971); see also RRAD, Inc., 104 FCC 2d 876, 879 (¶ 8) (1986) (no applicant had vested interest in competing applicant's dismissal).

28. Potential bidders on wide-area 800 MHz SMR authorizations will not be substantially harmed. The presence of the Roberts Licensees will not delay any auction that the Commission might schedule as the Commission must allow all other rejustifications which were

^{15/} See Toomer v. Witsell, 334 U.S. 385, 391-92 (1948) (no adequate remedy at law where government immune from suit for commercial losses).

granted to run their course. As the Commission is well aware, the 800 MHz SMR service is extremely mature and there are many other incumbents particularly in the more valuable, metropolitan area locations. Furthermore, although the Commission has just issued final rules for 800 MHz SMR auctions and has scheduled an auction, said rules are likely to be subject to reconsideration and further litigation. So it is unlikely that any new licenses would be issued before next year. At that point, the Roberts Licensees would be heading into the final year of their EIA (as rejustified), while the new wide-area licensees would have 3 years themselves to meet their first construction benchmark. Moreover, the location and extancy of the Roberts Licensees will be known to all bidders.

VI. Grant Of The Requested Stay Is In The Public Interest.

29. The public interest is served by deployment of fully developed 800 MHz SMR service throughout the country. As more fully developed in the Petition for Reconsideration, the Roberts Licensees focused on identifying and engineering transmitter sites in areas that were underserved, many in second-tier cities or more rural areas where 800 MHz SMR service was not widely available.^{16/} Indeed, the approach would be of continued assistance to existing, smaller companies already operating in some of these areas.^{17/} Providing service to such areas assists the Commission in carrying out its statutory mandate to provide service to the many states and

^{16/} As noted by the Industrial Telecommunications Association, Inc. ("ITA"), "[b]y design, the proposed systems will accommodate communications requirements in predominantly smaller markets - markets that are likely to be relegated to second-tier status by larger commercial providers." Affidavit of Mark E. Crosby in support of Extended Implementation Re-justification, May 17, 1996.

^{17/} See Letter of James L. Flather, Infrastructure Sales Manager, Motorola Communications and Electronics, Inc., dated May 13, 1996, Roberts Licensees Extended Implementation Rejustification, Exhibit 8.

communities, 47 U.S.C. § 307(b), not just the larger, more commercially attractive markets. The public interest represents all these potential users of 800 MHz SMR service. Accordingly, the public interest would be served by granting a stay to prevent the potential loss of service to smaller communities to be provided by the Roberts Licensees.

30. In addition, the Roberts Licensees are uniformly small businesses, many owned and controlled by women, cooperatively working to implement a consolidated business plan, seeking entry into the competitive telecommunications marketplace. As such, by the Commission's own admission, they face a continuing array of entry and other barriers not confronted by large, established telecommunications enterprises.^{18/} The public interest is thus served by the Commission's assisting the Roberts Licensees, in accordance with the mandate of Section 257 of the Telecom Act.

VII. Conclusion

The Roberts Licensees have demonstrated beyond peradventure that the serious legal errors by the Bureau compel a stay of the constructing deadline pending actions on their pending Petition for Reconsideration. Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., *supra*. The December 1995 Order set forth the criteria. The Roberts Licensees met all the criteria for EIA rejustification contained in the December 1995 Order. Commencement of construction by December 15, 1995 or even the date of the filing was not one of these criteria. The Commission cannot now subject the Roberts Licensees to loss of the benefit earlier accorded them and the possible loss of their authorizations due to the imposition of a new and different

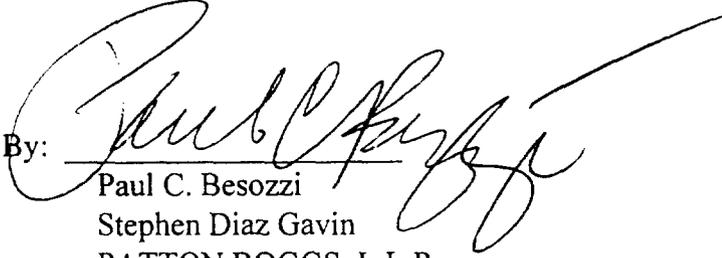
^{18/} See In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), FCC 97-164, released May 8, 1997 ("Small Business Barriers Report").

standard without prior notice. Salzer v. F.C.C., supra; Algreg Engineering, supra. In addition, the disparate treatment accorded the Roberts Licensees and is arbitrary and capricious conduct prohibited by the APA. Petroleum Communications v. F.C.C., supra; Green County Mobilephone, Inc. v. F.C.C., supra. Further, the Roberts Licensees have demonstrated the irreparable injury that they will suffer if the stay is not granted -- loss of their authorizations. No injury will be suffered by any third party. Finally, the public interest will be served by grant of the stay because it increases the likelihood of 800 MHz SMR service in smaller markets that might otherwise receive less competitive service. These factors compel the tolling of the May 20 Order's deadline pending reconsideration of that erroneous decision.

WHEREFORE, in light of the foregoing, the Roberts Licensees request that the Commission toll the running of the November 20, 1997 EIA construction date stated in the May 20 Order for completion of construction of their 800 MHz SMR authorizations pending action on the Roberts Licensees Petition For Consideration.

Respectfully submitted,

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