

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
)
Martin W. Hoffman, Trustee-in-Bankruptcy)
for Astroline Communications Company)
Limited Partnership)
)
For Renewal of License of)
Station WHCT-TV, Hartford, Connecticut)
)
and)
)
Shurberg Broadcasting of Hartford)
)
For Construction Permit for a New)
Television Station to Operate on)
Channel 18, Hartford, Connecticut)

MM Docket No. 97-128

File No. BRCT-881202KF

File No. BPCT-831202KF

To: The Honorable John M. Frysiak
Administrative Law Judge

REQUEST FOR LEAVE TO FILE APPEAL

Richard P. Ramirez ("Mr. Ramirez"), by his attorneys, and pursuant to §1.301(b) of the Commission's Rules, 47 C.F.R. §1.301(b), hereby requests leave to appeal the Presiding Judge's Memorandum Opinion and Order, FCC 97M-140 (released August 21, 1997) ("MO&O"). The MO&O denied the Petition for Emergency Relief and Stay of Proceedings filed by Mr. Ramirez in this proceeding (the "Petition").

Leave to appeal should be granted because the MO&O raises a new or novel question of

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law and policy in accordance with §1.301(b).^{1/} The MO&O departed from the Commission's longstanding precedent regarding the deletion of issues and ignored the fact that the FCC must accord the decisions of the civil courts full faith and credit. Town of Deerfield, New York, 992 F.2d 420, 430 (2d Cir. 1993). In so doing, the MO&O has raised a new and novel question as to how the Commission should treat allegations against a licensee which have been resolved favorably in the civil court system. Denial of Ramirez's Petition unnecessarily prolongs this proceeding and wastes the time and resources of the Commission, the public, and the parties to this proceeding.

I. THE PRESIDING JUDGE HAS AUTHORITY TO GRANT THE RELIEF REQUESTED IN THE PETITION AND DEPARTED FROM COMMISSION PRECEDENT IN REFUSING TO GRANT SUCH RELIEF.

1. The Petition requested that the Judge stay the hearing and delete the misrepresentation issue. While the Petition also requested the Judge to certify this proceeding to the Commission for its reconsideration of the applicability of the Second Thursday doctrine in this case, it did not request the Judge to reconsider the HDO. The Mass Media Bureau agreed with Ramirez that the Petition was a request for deletion of the misrepresentation issue. Section 1.243(k) of the Commission's Rules provides that the Presiding Judge has the authority to act on motions to delete hearing issues. See also Practice and Procedure, 36 R.R.2d 1203 (1976). Consequently, the Presiding Judge has the authority to grant the relief requested in the Petition.

2. Not only can the Judge grant the requested deletion of the issue, but he must grant such relief in this case pursuant to prior Commission practice. It is the Commission's practice to

^{1/} While Section 1.301(b) also contemplates a showing that error would be likely to require remand should the appeal be deferred, it is impossible to meet this test when a petition to delete an issue has been denied. To the extent that the rule contains a requirement that is impossible of effectuation, a waiver of this aspect of the rule is appropriate.

delete an issue where there is a “compelling showing of unusual circumstances such as where the Commission overlooked or misconstrued pertinent information before it at the time of designation.” See Post-Newsweek Stations Florida, Inc., 52 F.C.C.2d 883, 885 (Rev. Bd. 1975).

3. It is difficult to imagine a more compelling set of circumstances than where the issues to be addressed in a hearing have already been addressed by the civil courts and the Commission overlooked the judicial resolution in designating the previously-resolved matter for hearing. Yet, that is exactly what happened in this case. The MO&O failed to address the fact that the compelling circumstances of this case mandate that the Judge delete the misrepresentation issue in light of the Commission’s failure to consider the Bankruptcy Court’s resolution of the issues to be considered in the hearing. Traditionally, the Commission has held that “[w]here . . . the issues had been inadvertently specified because all of the facts were not considered, petitions to delete will receive favorable consideration.” See Salter Broadcasting Company (WBEL) et al., 8 F.C.C.2d 212, 213 (Rev. Bd. 1967) (citing Cleveland Broadcasting, Inc., 1 R.R.2d 676 (Rev. Bd. 1963)). As a result, because the HDO failed to account for the Bankruptcy Court’s decision in favor of ACCLP, Commission policy requires that the Judge delete the misrepresentation issue.

II. MR. RAMIREZ HAD GOOD CAUSE FOR FILING THE PETITION AFTER THE NORMAL DEADLINE FOR FILING MOTIONS TO DELETE ISSUES HAD PASSED.

4. The MO&O stated that the deadline for petitioning to delete an issue in this case would normally be within 15 days after the summary of the designation order appeared in the Federal Register. The Judge acknowledged, however, that for good cause, a motion filed after the normal time period could be granted.

5. In this case, Mr. Ramirez had not even been made a party to this proceeding until

two business days before the expiration of the normal time period, and he did not learn that he had been granted leave to intervene until four days after that. The fact that Mr. Ramirez was not even aware that he had been made a party to the proceeding prior to the expiration of time for seeking deletion of the issues is certainly good cause for not requesting relief prior to that time.

6. The Commission has recognized that good cause exists for accepting late-filed petitions where a petitioner has entered the proceeding after the time for filing a motion had lapsed. See, e.g. Charlottesville Broadcasting Corp., 1 F.C.C.2d 1323 (Rev. Bd. 1965). Indeed, Mr. Ramirez filed his Petition swiftly after he had been granted leave to intervene in this proceeding considering the massive amounts of documents that had to be reviewed to prepare the Petition. In granting an extension of the procedural dates in this proceeding, the Judge acknowledged the enormity of the task in reviewing the “17 boxes, numbering in the tens of thousands of pages [of documents that] have been produced . . . includ[ing] trial testimony and several hundred exhibits from the Bankruptcy Court hearing as well as deposition transcripts and 14 boxloads of miscellaneous, unindexed documents compiled in the course of the bankruptcy proceeding.” See In re Applications of Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership For Renewal of License of Station WHCT-TV, Hartford, Connecticut, Order, FCC 97M-141 (released August 21, 1997).

III. THE MO&O ERRONEOUSLY REFUSED TO HONOR THE BANKRUPTCY COURT’S RESOLUTION OF THE ISSUE OF MR. RAMIREZ’S OWNERSHIP INTEREST IN ACCLP.

7. The MO&O refused to honor the Bankruptcy Court’s resolution of the issue of Mr. Ramirez’s ownership interest in and control of ACCLP. Administrative agencies cannot ignore federal court judgments. Town of Deerfield, New York, 992 F.2d 420, 428 (2nd Cir. 1993). Quoting Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S.

103, 113 (1947), the Second Circuit in Town of Deerfield said “[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.’ If an administrative agency were entitled to ‘completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render.’” Id. Here, the Commission is ignoring the judgments of civil courts which, based on an extensive hearing record, found that Mr. Ramirez controlled ACCLP and had a 21% ownership interest in the company. This action raises a new and novel question as to how the Commission should treat allegations against a licensee that have been resolved favorably in the civil court system. The Commission’s policy statements only deal with situations where a court has ruled that a licensee has violated a law, not where the licensee has been exonerated by the courts. Thus the Commission must address the appropriate action to be taken when it is confronted with allegations against a licensee which have already been addressed in favor of the licensee in the civil court system. Relitigating the case is not the answer since such action would place an undue burden on all parties concerned and it does not serve the public interest. Deletion of the issue is the appropriate remedy.

8. The MO&O failed to address the similarities between the civil proceeding and this case despite relying solely upon certain income tax filings, produced and considered in the previous proceedings, that allegedly call into question the level of Mr. Ramirez’s ownership of ACCLP. The MO&O erroneously assumed that information contained in these income tax filings reflects the level of Mr. Ramirez’s ownership of ACCLP. In reality, the legal document that governed Mr. Ramirez’s ownership of ACCLP was the Limited Partnership Agreement of ACCLP. This agreement consistently reflected that Mr. Ramirez’s ownership in the company always remained at 21%. What the MO&O failed to recognize is that the profit and loss

allocations that appeared in the tax filings were not indicative of ACCLP's actual ownership structure and therefore have no bearing upon the determination of ACCLP's ownership. The Bankruptcy Court received evidence that the Internal Revenue Code allows profit and loss allocations to differ from actual ownership percentages and considered this tax reporting methodology when it determined the ownership and control of ACCLP.

9. The MO&O acknowledged that the Bankruptcy Court decision found that Mr. Ramirez's ownership interest at ACCLP's inception was 21%. However, in concluding that "such finding is far from dispositive in resolving the question of whether [Mr.] Ramirez's ownership interests in ACCLP dropped below 20 percent during the period 1984-1991," the Judge overlooked the fact that the trial court's finding of fact was never qualified or altered. Moreover, the Second Circuit affirmed the Bankruptcy Court's findings of fact. See Summary Order of U.S. Court of Appeals for the Second Circuit (Ex. C to Petition).

IV. THE COMMISSION'S ARBITRARY AND CAPRICIOUS DEPARTURE FROM ITS ESTABLISHED SECOND THURSDAY DOCTRINE MUST BE REVISITED.

10. The Petition requested the Judge to certify this proceeding to the Commission for its reconsideration of the applicability of the Second Thursday doctrine in this case in light of the Commission's recent action in MobileMedia Corporation, FCC 97-197 (released June 6, 1997) ("MobileMedia"), where the Commission granted Second Thursday relief under facts far less compelling than those currently before the Commission.^{2/} In supporting the Commission's action in the HDO, the MO&O distinguishes MobileMedia from the instant case. The facts of MobileMedia do indeed differ significantly from those in this case; as set forth in Mr. Ramirez's

^{2/} The MO&O states that the Judge cannot review the Commission's failure to apply Second Thursday relief. However, Mr. Ramirez only requested that the Judge certify the issue to the Commission for reconsideration.

Petition, the *admitted* misrepresentations and gross abuse of the Commission's processes were dramatically *worse* in MobileMedia than in this case which involves mere *allegations* which have been disproven in civil court proceedings. As a result, the Commission's failure to afford Second Thursday relief in this case constitutes a sudden and radical departure from the application of this well-established doctrine.

V. CONCLUSION

As shown above, deletion of the designated issue is appropriate here. In the absence of deletion, Ramirez should be granted leave to appeal the MO&O to the Commission because this case presents a unique situation which requires Commission review.

Respectfully submitted,

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Dated: August 28, 1997

CERTIFICATE OF SERVICE

I, Margie Sutton Chew, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing **“REQUEST FOR LEAVE TO APPEAL”** was sent this 28th day of August, 1997, by first class United States mail, postage prepaid, to the following:

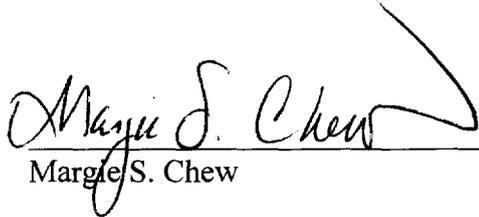
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