Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

TO: The Full Commission

OPPOSITION TO "CONTINGENT PETITION FOR RECONSIDERATION"

Heidi Damsky ("Damsky"), by her attorney, hereby opposes the "Contingent Petition for Reconsideration", filed in this proceeding by Homewood Radio Co., L.L.C. ("HRC"), on October 13, 1998. In opposition thereto, it is alleged:

1. In a Contingent Petition for Reconsideration, filed in this proceeding on October 13, 1998, HRC asks the FCC to "clarify", i.e., change, its First Report and Order in this proceeding to make it clear that the right to an auction does not accrue to Damsky. HRC's petition amounts to an unjustified request for private relief. With only one possible exception, Damsky's case is the only one that would be affected by the clarification which HRC requests.

2. There were, originally, two such cases, in which the Commission approved partial settlements in which it allowed some applicants to merge and obtain a construction permit, while freezing another applicant out of the settlement by denying his/her application on the grounds that he/she was not financially qualified. The other case was Gonzales Broadcasting, Inc., 12 FCC Rcd 12253 (1997). In that case, an applicant by the name of Jelks was apparently reluctant to settle, so the Commission attempted to force a settlement by allowing the opponents to merge, while denying Jelks' application for want of financial qualifications. Jelks did not seek further relief from the Commission but chose, instead, to go directly to the Court of Appeals. Unfortunately for Jelks, the Court of Appeals upheld the denial of his application on financial grounds. Jelks v. FCC, Case No. 97-1544 (Slip Op., D.C. Cir. 1998).[1]

3. Damsky's situation is quite different from Jelks. Unlike Jelks, she had long and vigorously sought to settle her case. Also the factual situations in the Damsky and Jelks cases are drastically different. In his original application, Jelks did not certify that he was financially qualified. Therefore, he was required to amend his application to change his certification to show that he was qualified. The Court of Appeals held, in substance, that his amendment was untimely. Damsky by contrast certified initially that she was fully qualified financially. At the hearing, when financial issues were specified against her, she sought to submit evidence demonstrating that she was, in fact, qualified and had always been qualified. Express Commission precedent permitted her to do that. Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon. denied, 5 FCC Rcd 3075 (1990), aff'd. sub nom. Northampton Media Assocates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991). The ALJ, however, refused to accept the evidence and judged her to be financially unqualified, although he

[1]Jelks has, however, requested rehearing, en banc.

declined to make any adverse findings against her under a false certification and/or lack of candor issue.

4. Whatever the case, the point is simply that Damsky's case is unique. She stands alone, and there are, so far as we have been able to determine, no other similarly affected applicants. Thus, HRC is asking for relief which will benefit just one party, i.e., HRC.

5. When the Commission released its First Report and Order, Damsky filed a Further Petition for Reconsideration with the Commission in the proceedings in Docket No. 90-638. In that Further Petition for Reconsideration, Damsky claimed her rights to participate in the forthcoming auction, as contemplated by the First Report and Order. HRC opposed Damsky's Further Petition, contending without equivocation that Damsky had no right to participate, because her application had been "finally denied". Of course, the First Report and Order contemplated that many applications which had been "finally denied" would be resurrected and allowed to participate in the auction. In fact, the First Report and Order stressed that only those applicants who had failed to timely request administrative or judicial review would be excluded. Nevertheless, HRC argued that Damksy should be frozen out. Now, apparently, HRC is not so sure of its position; otherwise, it would not be seeking the "clarification" which it is requesting in its Contingent Petition for Reconsideration.

6. HRC is a merger of two other applicants, WEDA, Ltd., and Homewood Partners, Inc. These two applicants filed a joint request for approval of their merger and for exclusion of Damsky from the settlement on September 12, 1997. Thereafter, on November 26, 1997, while the joint request was still pending, the Commission released its Notice of Proposed Rulemaking in ths proceeding, looking towards the establishment of auction procedures. Implementation of Section

309(j) of the Communications Act, 12 FCC Rcd 22363 (1997). Thereafter, on May 6, 1998, while the Commission was still considering rules to implement the auction procedures, the Commission issued a Memorandum Opinion and Order in Docket No. 90-638, granting the joint request. Finally, on August 18, 1998, the Commission issued its First Report and Order in which it decided to open the auction proceedings to all applicants in the frozen comparative cases, even if those applicants had been denied, so long as they had preserved their administrative and judicial remedies. From this sequence of events, it can be seen that the Commission was well aware of the Damsky case when it issued its First Report and Order. If it had intended to exempt Damksy, or for that matter Jelks, it would have said so. It did not.

7. As it has done before, HRC invokes the provisions of Section 309(j)(6)(E)of the Communications Act in support of its requested relief. That section does, indeed, mandate that the Commission resolve conflicts where possible without an auction. However, it does not condone arbitrary and capricious arrangements such as the treatment meted out to Damsky, in which two applicants are enabled to settle without the participation of a third applicant, by disqualifying the third applicant for violation of a threshold qualification standard (i.e., financial qualifications), which the Commission has chosen to abolish.

8. The Commission should not grant the relief requested by HRC. In its First Report and Order, the Commission has decided to eliminate the sole basis upon which Damsky's application was denied, i.e., the financial qualifications threshold test. It has also decided to reactivate all of the old frozen hearing cases, e.g.. Damsky, and to allow all of the parties to those hearings to compete for the construction permits through a system of competitive bidding. To exclude Damsky from that process would violate the fundamental principle that all similar applicants must be treated with

parity. Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965). Therefore, the Contingent Petition for Reconsideration should be denied.

Respectfully submitted,

October 22, 1998

HEIDI DAMSKY

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CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 22nd day of October, 1998, to the offices of the following:

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