

FCC MAIL SECTION

FEDERAL COMMUNICATIONS COMMISSION

FCC 98-202

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Applications of)	MM Docket No. 90-638
)	
HEIDI DAMSKY)	File No. BPH-880816MW
)	
WEDA, LTD.)	File No. BPH-880816NR
)	
HOMEWOOD PARTNERS, INC.)	File No. BPH-880816NU
)	
For Construction Permit for)	
a new FM Station on Channel 247A)	
Homewood, Alabama)	

ORDER

Adopted: August 18, 1998 ; Released: August 25, 1998

By the Commission:

1. This Order denies a Petition for Reconsideration, filed May 22, 1998, and dismisses as moot an Emergency Motion for Stay, filed June 1, 1998, by Heidi Damsky. Damsky's pleadings are directed at the Commission's Memorandum Opinion and Order, FCC 98-81, released May 6, 1998, which approved a settlement in this proceeding. Homewood Radio Co., L.L.C. ("Homewood Radio") filed a Consolidated Opposition to Damsky's requests on June 15, 1998, and Damsky filed a Reply on June 23, 1998.

2. The Memorandum Opinion and Order approved a settlement agreement between Homewood Partners, Inc. ("HPI") and WEDA, Ltd. ("WEDA"), and affirmed an initial decision which found that the third applicant in this proceeding, Damsky, was financially disqualified. The settlement provided that HPI and WEDA would merge to form a new entity, Homewood Radio, in which each would have a fifty percent interest. WEDA's application would be amended to substitute Homewood Radio and HPI's application would be dismissed. The settlement also called for Homewood Radio to enter into a local marketing agreement ("LMA") with a nonparty, Cox Radio, Inc. ("Cox"). Cox would furnish Homewood Radio with a line of credit to fund construction of the station and reimbursement of WEDA and HPI, and provide programming for the station on a full time basis and retain revenues from the sale of advertising in return for a monthly payment. The LMA provides that Homewood Radio will retain ultimate control over all operations of the radio station. Cox would also have a two-year option, beginning with the commencement of program test authority, to purchase the radio station. In turn, Homewood Radio would have the right, beginning thirty days after commencement of program test authority, to buy out Cox's rights and, beginning five years after commencement of program test authority,

to require Cox to purchase a forty-nine percent interest in the station.

3. In her Petition for Reconsideration, Damsky first challenges her financial disqualification. Damsky asserts, contrary to the Commission's finding that her husband did not commit his funds to her proposal, that Mr. Damsky's resources are available for construction of the station and that the Damskys have the wealth to complete the project. Next, Damsky argues that Gonzalez Broadcasting, Inc., 12 FCC Rcd 12253 (1997), aff'd sub nom. Jelks v. FCC, No. 97-1544 (D.C. Cir. June 16, 1998), cited in the Commission's opinion in support of the settlement, is inapposite. Finally, Damsky objects to the Commission's finding that HPI is qualified and that there are no undisclosed interests involving two of its principals. We will not reconsider these questions. The Commission fully considered and discussed each one of the matters raised involving Damsky's and HPI's qualifications and the terms of the proposed settlement in its opinion. See Memorandum Opinion and Order, ¶¶ 6-7, 13, 16-17, 21, 27, 29-32. We will not grant reconsideration merely to rehash points upon which we have already deliberated and spoken. WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal C. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).¹

4. Next, Damsky argues that the time brokerage agreement in the settlement enables Cox to acquire control of and operate Homewood Radio's station in violation of the antitrust laws. Damsky states that Homewood, Alabama is a suburb of Birmingham, Alabama and that there are a total of thirty-four radio stations in the Birmingham market, as defined by BIA Research, Inc. Relying on an article in the Birmingham News, Damsky asserts that Cox currently has six radio stations in the Birmingham, Alabama market, that Cox plans to operate a seventh station pursuant to the terms of the LMA, and that the Department of Justice ("DOJ") required Cox to sell one of its Birmingham stations, WENN-FM, last year in order to comply with the antitrust laws. Damsky also alleges, based on BIA figures, that Cox controls more than 42% of the broadcast revenues in the market, that this figure exceeds DOJ's "40% threshold," as reflected in a Competitive Impact Statement submitted by DOJ in connection with a Rochester, New York radio merger involving American Radio Systems Corporation and The Lincoln Group, L.P., and that Cox's LMA for a seventh station pursuant to the settlement will further increase Cox's dominance in the Birmingham radio market. In her Emergency Motion for Stay, Damsky attaches a second article from the Birmingham News, which indicates that Cox will soon implement its "lease" of the Homewood station pursuant to the LMA. Damsky also asserts that DOJ required Cox to sell WENN-FM because Cox already controlled over 40% of the Birmingham market revenues.

¹agIn her Reply, Damsky makes additional arguments pertaining to her financial disqualification not raised in her Petition and not specifically limited to matters raised in the Consolidated Opposition, as required by the rules. See 47 C.F.R. § 1.106(h). In any event, these points were also addressed in the Memorandum Opinion and Order, at ¶¶ 29-30, and will not be considered ain here.

5. We deny this aspect of Damsky's Petition for a number of reasons. First, Damsky did not raise the antitrust allegations at the time the settlement agreement was pending before the Commission, and a petition for reconsideration that relies on facts not previously presented to the Commission may not be granted unless there are changed circumstances or the facts were not known and could not have been learned earlier. See 47 C.F.R. § 1.106(c). These criteria were not met in this case. In submitting the settlement, WEDA and HPI clearly set forth the terms of their agreement, including the planned LMA with Cox for programming the station and Cox's option to purchase the station from Homewood Partners. Thus, there appears to be no reason, and Damsky offers no convincing explanation for, why she did not timely raise her objection when she opposed the joint request to approve the agreement in September 1997.

6. Furthermore, we do not find that consideration of the facts relied on is required in the public interest. Id. To begin with, insofar as Damsky relies on reports in the Birmingham News to support her allegations, the Commission does not accept newspaper articles as a substitute for affidavits based on personal knowledge that are required to substantiate serious allegations. See Mississippi Authority for Educational TV, 79 FCC 2d 577, 579 (1980); CBS, Inc., 49 FCC 2d 743 (Rev. Bd. 1974). In this regard, in contrast to Damsky's pleadings and in direct rebuttal of her allegations, Homewood Radio submits with its Consolidated Opposition a declaration under penalty of perjury from Timothy J. O'Rourke, an attorney who represents Cox on matters involving antitrust law, who attests based on personal knowledge of the transaction, that Cox's decision to sell WENN-FM in 1997 was not required or mandated by DOJ, and was based on format, not revenue share, considerations.

7. Moreover, Homewood Radio also disputes Damsky's assertion based on the Rochester, New York case that radio revenue shares in excess of 40% per se violate DOJ's antitrust guidelines, and Homewood Radio cites a number of more recent cases involving various markets where DOJ has approved radio transactions in which the acquiring company's post-merger market revenue share exceeded 40%. In her Reply, Damsky concedes, at 5, "that the acquisition of 40% of the revenues in a particular market does not automatically create an antitrust issue." Nevertheless, relying on more newspaper articles, Damsky asserts that radio mergers in this range in large markets such as Birmingham may prompt DOJ concern. Damsky cites a report in The Wall Street Journal that DOJ is seeking to block Chancellor Media Corporation from acquiring four Long Island, New York stations that would give it control of 65% of the local revenues, but makes no showing that this situation is comparable to the case before us. Similarly, relying on a report in Broadcasting & Cable regarding the Mass Media Bureau's recent approval of an assignment of four radio stations in the Redding, California area, which was criticized by two FCC Commissioners in a Joint Press Statement, Damsky also alleges, without explanation or support of any kind, that the Commission staff would have prevented Cox from directly acquiring the Homewood station through assignment or transfer of control. And, finally, Damsky cites no precedent holding that an LMA, such as the one presented here, which specifies that the licensee will retain ultimate control over operation of a new station, and in circumstances where the Commission would have to consent to any future exercise of an option that would give Cox

control of the station, constitutes a merger in violation of the antitrust laws. In sum, we do not find any of this argument persuasive.

8. In light of our action herein, we will dismiss as moot Damsky's request to stay the proceeding pending action on the Petition for Reconsideration.

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed May 22, 1998 by Heidi Damsky IS DENIED, and the Emergency Motion for Stay filed June 1, 1998 by Heidi Damsky IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Magalie Roman Salas WFC
Secretary