

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
)
HEIDI DAMSKY) MM Docket No. 90-80)
) File No. BPH-880816MW)
) File No. BPH-880816NR)
WEDA, LTD.)
) File No. BPH-880816NU)
HOMEWOOD PARTNERS, INC.)
)
For Construction Permit for a)
New FM Station on Channel 247A)
in Homewood, Alabama)

To: The Commission

OPPOSITION TO PETITION FOR FURTHER RECONSIDERATION

HOMEWOOD RADIO CO., L.L.C. ("HRC"),^{1/} pursuant to Section 1.106(g) of the Commission's Rules, 47 C.F.R. § 1.106(g), hereby opposes the Petition for Further Reconsideration ("Further Petition") filed September 21, 1998 by Heidi Damsky ("Damsky").^{2/} Without any regard for the requirements of Commission process, Damsky has filed yet another unauthorized pleading.^{3/} This is the fourth time since the Commission granted HRC's application for a new FM radio station at Homewood, Alabama (the "Station") and affirmed the disqualification of Damsky, see Heidi Damsky, 13 FCC Rcd ____ (FCC 98-81, released May 6, 1998) (the "*Memorandum Opinion and*

^{1/} By Memorandum Opinion and Order, FCC 98-81, released May 6, 1998, the Commission granted the Joint Request for Approval of Settlement that provided for the merger of Homewood Partners, Inc. ("Partners") and WEDA, Ltd. ("WEDA") into HRC and granted application of WEDA, as amended, in the name of HRC.

^{2/} HRC's Opposition is timely filed. See 47 C.F.R. §§ 1.4(h) and 1.106(g).

^{3/} This is only the latest such instance. See, e.g., "Opposition to Motion for Extension of Time," filed July 2, 1997 by WEDA.

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Order") that Damsky has sought to delay Commission process and inauguration of radio service to Homewood by the Station by seeking to appeal or stay grant of HRC's application. Damsky's Further Petition is an unauthorized filing and should be dismissed without further consideration. Even assuming *arguendo* that the Further Petition were not procedurally defective, it is without merit. Now that the Commission has twice affirmed her disqualification, Damsky contends that the Commission's adoption of auction rules for selection among broadcast station applicants where, unlike this case, proceedings were not terminated, compels setting aside the *Memorandum Opinion and Order* and allowing her to bid for the Station's authorization. See First Report and Order in MM Docket No. 97-234 (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses), 13 FCC Rcd ____ (FCC 98-194, released August 18, 1998) (the "*First Report and Order*"). Damsky has incorrectly interpreted the holding of the *First Report and Order*, as well as the status of her case. The Commission should promptly dismiss or deny the Further Petition.

A. The Commission Must Dismiss The Further Petition As An Unauthorized Filing.

1. Under Section 1.106(k)(3) of the Rules, 47 C.F.R. § 1.106(k)(3), a petition requesting reconsideration of an order denying reconsideration is not contemplated by the Commission's rules and may be dismissed as repetitious. Warren Price Communications, Inc., 7 FCC Rcd 6850 (¶ 2) (1992), citing United Broadcasting of Florida, Inc., 39 RR 2d 448, 450 (1976). As the Commission noted in Warren Price:

"...there must be some finality to the administrative process; and, absent extraordinary circumstances, the Commission's decision on a petition for reconsideration exhausts a party's administrative remedies. If this were not the case, we would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion."

Id., at n. 1, citing VHF Drop-Ins, 3 RR 2d 1549, 1551, n. 3 (1964). The time for finality has arrived for Damsky.

2. The Commission has already denied Damsky's exceptions to the Initial Decision and the ultimate conclusion that she was not financially qualified. See, *Memorandum Opinion and Order*. The Commission has already denied her requests for reconsideration and stay of the grant of the HRC application, which she premised in part on an appeal of her disqualification. *Reconsideration Order*. Thus, the Commission has already fully considered all Damsky's requests for relief regarding her own qualifications and denied reconsideration thereof. The issue of her lack of financial qualifications is not unresolved.

3. After an initial denial of reconsideration, the Commission will only allow consider further reconsideration in extraordinary circumstances. Warren Price, supra, citing 47 C.F.R. § 1.106(b)(2). This requires a showing by a petitioner that it relies on facts or circumstances changed since the last opportunity to present such facts or if the petitioner is relying on facts which could not have been learned prior to such opportunity. Id. Damsky cannot meet this test. Damsky was put on notice by the Commission's *Notice of Proposed Rulemaking* in the auction proceeding that it was considering use of auctions in hearing cases not resolved by settlement even where there remained *unresolved* questions about the qualifications of any applicant.

Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (Notice of Proposed Rulemaking), 12 FCC Rcd 22363, ____ (¶ 30) (1997). Keeping in mind that this is not the case with Damsky given the resolution of her lack of qualifications, see, Sections B and C, infra, the time for Damsky to have addressed her claim that she would be entitled to participate in an auction was in her original Petition for Reconsideration, which she failed to do so. Accordingly, the Commission should dismiss the Further Petition as an unauthorized filing. 47 C.F.R. § 1.106(k)(3).

B. There Are No Unresolved Questions About Damsky's Qualifications.

4. Damsky premises the Further Petition on the Commission's conclusion to allow even applicants with *unresolved* questions about their qualifications to participate in any auction held where there are still mutually exclusive applications. However, the Commission has already resolved the questions about her financial qualifications -- adversely -- after a full hearing on the record, review of exceptions and denial of reconsideration.

5. The *First Report and Order* deals with *unresolved* hearing issues (or outstanding petitions to enlarge) as to the basic qualifications of a particular applicant. *First Report and Order* at ¶ 89. This is not a case of unresolved questions about Damsky. There has been a full hearing on the record about her financial qualifications and the Administrative Law Judge concluded that she was not qualified. Her exceptions to the Initial Decision have been the subject not only to review by the full

Commission, but also reconsideration. In both instances, Damsky's qualifications were found wanting.^{4/}

6. That Damsky's case is not encompassed by the *First Report and Order* is also demonstrated by the fact that this case has been terminated, *Memorandum Opinion and Order* (¶ 39), and thus there are no more mutually exclusive applications. The Commission cited this in approving the settlement, where the Commission noted that:

... given our disqualification of Damsky, the settlement agreement is a full-market settlement agreement between all qualified parties. Thus, the settlement here would avoid mutual exclusivity and the potential need for competitive bidding to award the license, thereby falling squarely within the underlying purpose of the waiver provision [of the Balanced Budget Act].

(*Memorandum Opinion and Order*, at ¶ 8). In other words, the Commission specifically took account of the possible application of auctions to this case and chose to exempt the case from auction.

7. Damsky contends that she is entitled to participate in an auction because the denial of her application is not final. (Further Petition, at ¶ 2, citing ¶ 89 of the *First Report and Order*). However, Damsky ignores the fact that the Commission has terminated the Homewood proceeding. The case is not yet final only because she had filed what the *Reconsideration Order* has demonstrated was clearly a meritless Petition

^{4/} Thus, there is no question in this case about implicating the Commission's expressed concern about the "time and expense in adjudicating fully all unresolved issues relating to the basic qualifications" of an applicant. *First Report and Order*, at ¶ 90. The Commission has already adjudicated Damsky's qualifications, including the review of her exceptions to the ALJ's conclusion to disqualify her.

for Reconsideration.^{5/}

8. As a result of the Commission's approval of the settlement between WEDA and Partners and grant of the HRC application, there are no more mutually exclusive applications for the Station. By definition, there cannot be any auction. Therefore, the Commission can dismiss the Further Petition on this basis alone.

**C. Damsky's Contentions Fly In Face
of Congressional Intent**

9. Acceptance of Damsky's interpretation of the *First Report and Order* would fly in the face of the Congressional directive that Congress' grant of auction authority not:

be construed to relieve the Commission of the obligation in the public interest to continue to use ... threshold qualifications ... in order to avoid mutual exclusivity in application and licensing proceedings.

47 U.S.C. § 309(j)(6)(E). In adopting the Balanced Budget Act of 1997, which extended the Commission's authority to use competitive bidding to broadcast applications, the Conference Committee specifically cautioned the Commission that it not overlook this obligation. As the first matter in its Conference Agreement regarding the new auction authority, Congress emphasized that it did not intend that auctions be blindly used in all cases:

^{5/} It is important to note that the Commission issued its *Reconsideration Order*, which it released on August 25, after adopting the *First Report and Order*, which was released on August 18. This is not a situation where a delegated authority acts without prior knowledge of a Commission action. The Commission itself must be presumed to have known about the language in the *First Report and Order* dealing with *unresolved* questions of fact about basic qualifications and specifically chose not to apply it to Damsky. If the Commission had any intentions to make this case subject to auction, it would have said so.

[T]he conferees emphasize that notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under Section 309(j)(6)(E). The Conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under Section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or *other tools that avoid mutual exclusivity*.

H.R. Conf. Report 217, 105th Congress 1st Sess. 572. The Commission specifically recognized that Congress has emphasized the importance of not creating auction situations where not necessary. *First Report and Order*, at ¶ 74.

10. Damsky's Further Petition seeks to create mutual exclusivity where it no longer exists. The disqualification of Damsky and approval of the HRC settlement are consistent with Congress' directive in Section 309 (j)(6)(E). Grant of the Further Petition would be inconsistent with this directive. Accordingly, the Commission should deny the Further Petition.

D. Damsky Is Not Eligible To Hold The Station License Without Further Hearing

11. Even assuming *arguendo* that Damsky had not already had questions about her financial qualifications fully heard and adversely resolved, there would still remain outstanding questions about her character qualifications under Section 308(b). Notwithstanding that the Commission has concluded not to hold further hearings on *unresolved* questions of financial qualifications, *First Report and Order* at ¶99, Congress still directed that licensees awarded by auction only be held by qualified applicants. *Conference Report*, at 573. See also, 47 U.S.C. §309 (j)(5).

12. Damsky has recently misrepresented the status of her case and sought

to convey the impression that the only question regarding her qualifications was a financial qualifications issue. See, "Emergency Motion for Stay, Pendente Lite," dated September 11, 1998, at ¶ 5 (The ALJ ... "did not questions Damsky's character; he had previously rejected a request that he add a false financial representation issue against Damsky."). In fact, the ALJ specified character issues against Damsky in addition to the financial qualifications issues.

13. In the event of an auction, as now sought by Damsky, were she the winning bidder, there would still have to be a hearing on whether she falsely certified her financial qualifications. The Commission should take note that the ALJ specified the following issues designated against Damsky:

- a. To determine whether Damsky is financially qualified to construct and operate the station for three months without revenue.
- b. To determine in light of the above whether Damsky has lacked candor and/or made misrepresentations to the Commission in her Application.

Order, FCC 91M-2870, released September 19, 1991. In his Initial Decision, after cataloguing all the evidence for his conclusion that Damsky was financially unqualified under Issue "a", he concluded that it was unnecessary to reach Issue "b", the character issue. Heidi Damsky (Initial Decision), 7 FCC Rcd 5244, 5259 (¶ 183) (Admin. L. J. 1992). The *First Report and Order* specifically states that any such character issue would still have to be resolved before granting a construction permit to Damsky in the event that she were the winning bidder. (*First Report and Order* at d 99, citing Dorothy O. Schulze and Deborah Brigham, A General Partnership, 13 FCC Rcd 3259, 3264

(1998). The result of the ensuing disqualification of Damsky would be grant of HRC's application without a further auction. *First Report and Order*, n. 81. In other words, there would be many months' delay to obtain the same outcome that the Commission already reached in May 1998, all the while further delaying service to Homewood.

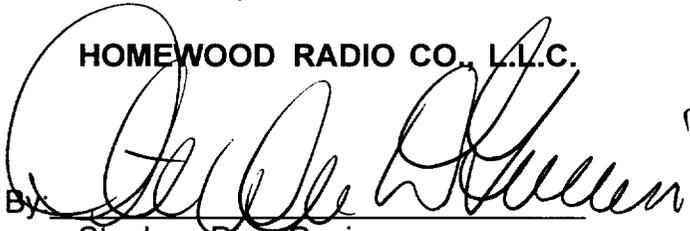
D. Conclusion

14. There is no basis for Damsky's contention that she is entitled to participate in an auction for the Station. There are no *unresolved* questions about Damsky's financial qualifications. Further, to adopt Damsky's position would reject Congress' directive to avoid auctions where possible. 47 U.S.C. § 309(j)(6)(E). The Commission should promptly deny the Further Petition.

WHEREFORE, in light of the foregoing HRC respectfully requests that the Commission promptly deny the Further Petition for Reconsideration.

Respectfully submitted,

HOMEWOOD RADIO CO., L.L.C.

By: 

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Dated: October 5, 1998

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CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law firm of Patton Boggs LLP, do hereby certify that a copy of the foregoing "**OPPOSITION TO PETITION FOR FURTHER RECONSIDERATION**" has been sent via U.S. Mail, First-Class postage prepaid, this 5th day of October, 1998 to the following:

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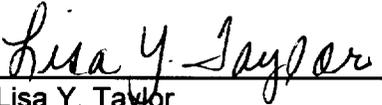
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