

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

RECEIVED
2007 SEP 23 10:36
FCC WASH DC

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 a Construction Permit for a New)	
FM Station on Channel 247A in)	
Homewood, Alabama)	
)	
TO: The Full Commission		

MOTION TO SUPPLEMENT RECORD

Heidi Damsky (“Damsky”), by her attorney, hereby respectfully requests leave to supplement the record in this proceeding by the submission of the attached pleadings. In support thereof, it is alleged:

1. On September 21, 1998, Damsky filed a Further Petition for Reconsideration, asking the Commission to rule that she is eligible to participate in the forthcoming spectrum auctions applicable to the frozen comparative cases, and provided for in the Commission’s First Report and Order in Docket No. 97-234, Implementation of Section 309(j) of the Communications Act, FCC 98-194, released August 18, 1998. An opposition was filed by Homewood Radio Co., L.L.C. (“HRC”), in which HRC argued, in substance, that Damsky is a special case and that the

No. of Copies rec'd 0+14
List A B C D E

Homewood proceeding should not be the subject of an auction. On October 15, 1998, Damsky filed a reply to HRC's opposition.

2. In the meantime, on October 13, 1998, HRC filed a Contingent Petition for Reconsideration in the auction proceeding, Docket No. 97-234. Thereafter, on October 22, 1998, Damsky filed an Opposition to the Contingent Petition.

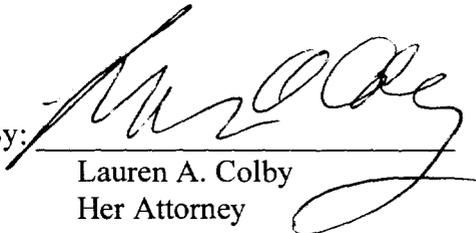
3. Copies of HRC's Contingent Petition and Damsky's Opposition are attached hereto. The matters discussed in these pleadings bear directly on the issues in this comparative proceeding. Damsky does not know, however, whether the same person will be processing the pleadings in Docket No. 97-234 and the pleadings in this docket. Damsky respectfully requests, therefore, that the attached pleadings be made a part of the record in this docket and taken into account when the Commission issues its decision on Damsky's Further Petition for Reconsideration in this proceeding.

Respectfully submitted,

October 23, 1998

HEIDI DAMSKY

Law Office of
LAUREN A. COLBY
10 E. Fourth Street
P.O. Box 113
Frederick, MD 21705-0113

By: 

Lauren A. Colby
Her Attorney

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

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

To: The Commission

CONTINGENT PETITION FOR RECONSIDERATION

HOMEWOOD RADIO CO., L.L.C. ("HRC"),^{1/} pursuant to Section 405(a) of the Communications Act of 1934, as amended (the "Act"),^{2/} and Section 1.429(a) of the Commission's Rules,^{3/} hereby submits this contingent request for reconsideration in part of the Commission's *First Report and Order* in 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), 13 FCC Rcd ____ (FCC

^{1/} By *Memorandum Opinion and Order*, 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 the application of WEDA, as amended, in the name of HRC. Heidi Damsky, 13 FCC Rcd 11688 (1998) (hereinafter "*Memorandum Opinion and Order*").

^{2/} 47 U.S.C. § 405(a).

^{3/} 47 C.F.R. § 1.429(a).

98-194, released August 18, 1998).^{4/}

A. HRC Is A Party In Interest

1. HRC is construction permittee of a new FM station at Homewood, Alabama. As noted in footnote 1, supra, the Commission awarded the construction permit to HRC Commission following approval of merger between two formerly mutually exclusive applicants for the Homewood FM station and denied the application of Heidi Damsky, who was found to be financially unqualified. Heidi Damsky, 13 FCC Rcd 11688 (1998), recon. denied, 13 FCC Rcd ____ (FCC 98-202, released August 25, 1998 (the "*Reconsideration Order*"). In approving the settlement and merger that created HRC, 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 of 1997].

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

2. Presently before the Commission in the Homewood case, MM Docket No. 90-638, is a pleading styled a "Further Petition for Reconsideration," filed September

^{4/} HRC's Petition is timely filed. 47 C.F.R. § 1.429(d) (petitions for reconsideration due no later than 30 days from the "public notice" of the action in question). The summary of the *First Report and Order* was published in the Federal Register on September 11, 1998. 63 Fed. Reg. 48615 (Sep. 11, 1998). Where rulemaking documents are published in the Federal Register, "public notice" commences on the date of publication in the Federal Register. 47 C.F.R. § 1.4(b)(3).

21, 1998 by Damsky. In the Further Petition, citing *First Report and Order* at ¶ 89, she contends that the Commission's adoption of auction rules for selection among broadcast station applicants compels setting aside the *Memorandum Opinion and Order* and allowing her to bid for the Station's authorization. In its Opposition, HRC demonstrated that this was not so, given that the Commission had fully resolved against Damsky the questions about her financial qualifications and denied both her exceptions and request for reconsideration of her disqualification. Further, HRC pointed out that the Commission had specifically terminated the case and had held in the *Memorandum Opinion and Order* that the settlement approved therein avoided mutual exclusivity and the need for any auction.

3. It is clear to HRC in light of the portion of the *Memorandum Opinion and Order* at ¶ 8 cited above that the Commission has already disposed of this issue in the Homewood case. The Commission has fully adjudicated the qualifications of Damsky and disqualified her. The Commission's disqualification of Damsky is not yet final only because of her repeated, meritless requests for reconsideration and stay.^{5/}

4. HRC would be injured by an interpretation of the *First Report and Order* consistent with Damsky's overreaching view of Paragraph 89, which would overturn by rulemaking the Commission's prior conclusion in an adjudication that this case would

^{5/} 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.

not be subject to auction. Accordingly, HRC is a party in interest qualified to seek reconsideration.

5. HRC understands that various parties have sought reconsideration of the *First Report and Order*. In the unlikely event that the Commission does not dispose of this matter in the Homewood case, the Commission should on reconsideration of the *First Report and Order* clarify Paragraph 89 to make plain that it does not apply to situations like Damsky's where there has been a full hearing questions about her qualifications, including denial of exceptions and reconsideration.

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

6. HRC does not generally take issue with the First Report and Order, including its decision to employ competitive bidding even in those hearing cases that did not produce a universal settlement. 47 U.S.C. § 309(l). The Homewood case is not one of those cases because the Commission concluded that there had been a universal settlement. *See Memorandum Opinion and Order*, at ¶ 8

7. If the Commission does not dispose of Damsky's interpretation in the Homewood case, the Commission should clarify the distinction between cases, such as the instant one, where the Commission has resolved basic qualifications issues and those where there remain *unresolved* questions about an applicant's qualifications. In this case, the Commission has already held a full evidentiary hearing on Damsky's qualifications, denied her exceptions and denied reconsideration of the denial of her exceptions. This is not a situation involving unresolved questions regarding an

applicant's qualifications.

8. Acceptance of a contrary 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:

[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*.

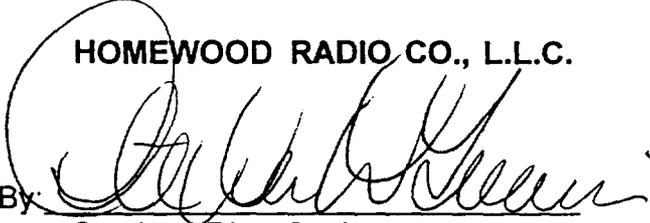
H.R. Conf. Report 217, 105th Congress 1st Sess. 572. The Commission specifically recognized that Congress has emphasized the importance of not creating auction situations where not necessary. *First Report and Order*, at ¶ 74. The Commission should not ignore Congress' directive that it not create mutual exclusivity where it does not or should not exist.

C. Conclusion

9. The arguments advanced by Damsky seek 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). Accordingly, in the event that the Commission does not do so in the context of the Homewood case and its action upon Damsky's Further Petition for Reconsideration, the Commission should modify the *First Report and Order* to clarify that auctions do not apply to situations such as the Homewood case, where the Commission has fully adjudicated the disqualification of an applicant and there has otherwise been a full market settlement.

Respectfully submitted,

HOMEWOOD RADIO CO., L.L.C.

By: 

Stephen Diaz Gavin
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Its Counsel

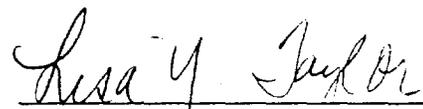
Dated: October 13, 1998

b:\reconro1.pld\8283.100

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 "**CONTINGENT PETITION FOR RECONSIDERATION**" has been sent via U.S. Mail, First-Class postage prepaid, this 13th day of October, 1998 to the following individual:

Lauren A. Colby, Esquire
10 East Fourth Street
P.O. Box 113
Frederick, MD 21701
Counsel for Heidi Damsky



Lisa Y. Taylor

**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 Associates 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

¹Jelks 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 Damsky 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 this 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 Damsky, 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.

October 22, 1998

Law Office of
LAUREN A. COLBY
10 E. Fourth Street
P.O. Box 113
Frederick, MD 21705-0113

Respectfully submitted,

HEIDI DAMSKY

By: 

Lauren A. Colby
Her Attorney

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:

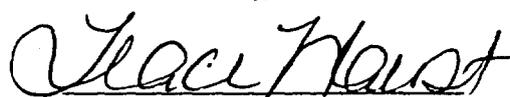
John I. Riffer, Esq.
Assistant General Counsel - Adm. Law
Office of the General Counsel
F.C.C.
1919 M Street, NW
Washington, D.C. 20554

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, NW
Suite 200
Washington, D.C. 20006

Stephen Diaz Gavin, Esq.
Julie A. Barrie, Esq.
Patton Boggs, L.L.P.
2550 M Street, NW
Washington, D.C. 20037

Cox Radio, Inc.
1400 Lake Hearn Drive
Atlanta, GA 30319

Craig Conrath
U.S. D.O.J.
AntiTrust Division
1401 H Street, N.W.
Suite 4000
Washington, D.C. 20530


Traci Maust

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 23rd day of October, 1998, to the offices of the following:

John I. Riffer, Esq.
Assistant General Counsel - Adm. Law
Office of the General Counsel
F.C.C.
1919 M Street, NW
Washington, D.C. 20554

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, NW
Suite 200
Washington, D.C. 20006

Stephen Diaz Gavin, Esq.
Julie A. Barrie, Esq.
Patton Boggs, L.L.P.
2550 M Street, NW
Washington, D.C. 20037

Cox Radio, Inc.
1400 Lake Hearn Drive
Atlanta, GA 30319

Craig Conrath
U.S. D.O.J.
AntiTrust Division
1401 H Street, N.W.
Suite 4000
Washington, D.C. 20530


Traci Maust