

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**

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In re Applications of	MAY 19 1999 )	MM DOCKET NO. 91-309
KIMLER BROADCASTING, INC.	)	File No. BPH-900122MN
ARTISTIC AIRWAVES BROADCASTERS	)	File No. BPH-900122MP
LAURA WILKINSON HERRON	)	File No. BPH-900122MY
For a Construction Permit for a New FM	)	
Station on Channel 233A at	)	
Temecula, California	)	

To: The Commission

**MASS MEDIA BUREAU'S CONSOLIDATED COMMENTS ON  
 JOINT PETITION FOR APPROVAL OF AGREEMENT  
 AND DISMISSAL OF APPLICANTS AND AMENDMENT**

1. On May 5, 1999, Kimler Broadcasting, Inc. ("Kimler"), Artistic Airwaves Broadcasters ("Artistic") and Laura Wilkinson Herron ("Herron") (collectively, "Joint Petitioners") filed a "Joint Petition for Approval of Agreement and Dismissal of Applications" ("Joint Petition"). Also, on May 5, 1999, Artistic filed an "Amendment."<sup>1</sup> The Mass Media Bureau submits the following comments.

2. The Joint Petitioners are the three remaining applicants in this proceeding. Kimler, Artistic and Herron propose to merge, with each holding 1/3 of the ownership of a new company, Temecula FM LLC ("TFM"). Artistic's amendment seeks to substitute TFM as the

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<sup>1</sup> The Joint Petition and Amendment were initially filed without a docket number and misdirected to the Chief, Mass Media Bureau. Moreover, the Amendment was not accompanied by a petition for leave to amend in accordance with Section 73.3522(b)(2). Nevertheless, the Bureau does not object to grant of the Amendment if Artistic submits all of the information required by FCC Form 301, Section II, in the event the Commission chooses to grant the Joint Petition. See n. 5, *infra*.

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applicant. In exchange for their interests in TFM, Kimler and Herron will dismiss their applications. Artistic and Herron also request that pending petitions to enlarge each filed against the other be dismissed.<sup>2</sup> The Joint Petitioners maintain that approval of their agreement would serve the public interest because it would terminate this proceeding and hasten the provision of a new broadcast service.

3. In its Amendment, Artistic has submitted, in addition to its proposed substitution of TFM, a "Purchase Option Agreement" ("POA") and a draft "Asset Purchase Agreement" ("APA"). The POA reflects that a non-applicant, Magic Broadcasting, Inc. ("Magic"), has paid \$300,000 for an option to acquire the new Temecula station for a total of \$1,500,000. According to the POA, Magic has the right to exercise its option as early as the date of the permit's grant and as late as six (6) months after the date of the permit's grant. Exercise of the option would include Magic's submission of a signed copy of the APA and its purchase of equipment and property owned by Artistic for a price of \$75,000. The APA basically provides for sale of the station and related specified assets.

4. Review of the settlement and merger agreement, including the declarations of the principals of Kimler, Artistic and Herron reflect that they have addressed the requirements of Section 73.3525 of the Commission's Rules, which implement Section 311(c) of the Communications Act of 1934, as amended. Specifically, the Joint Petitioners have: submitted their agreement; proffered a public interest justification for grant of the Joint Petition;

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<sup>2</sup> Consistent with its past practice, the Bureau did not analyze or file pleadings relative to the charges Artistic and Herron had made against one another. Consequently, the Bureau expresses no opinion on the merits of those allegations or on their impact with respect to the proposed merger.

affirmed that their applications were not filed for the purpose of reaching or carrying out a settlement agreement; and certified that their arrangement constitutes a *bona fide* merger. Nevertheless, as explained further herein, the proposed arrangement may conflict with the Commission's policy concerning "white knight" settlements and the rule which limits payments to dismissing applicants.

5. In combination, the proposals contemplate the sale of the station to Magic. According to the POA, Magic has already paid \$300,000 for an "exclusive and irrevocable option." That money will ultimately be paid to TFM, unless TFM breaches the POA or the Commission denies an assignment of the permit to Magic for reasons unrelated to Magic's qualifications or the failure of Magic to perform its obligations under the APA. The POA further gives Magic a right to specific performance in the event TFM were to breach its obligation to sell the station to Magic. Finally, neither the POA nor the APA requires TFM to build the station or even begin construction thereof. It thus appears that both TFM and Magic intend and have every incentive to have the permit assigned to Magic at the earliest possible moment for a price that, in all likelihood, will allow the three applicants to recoup their expenses and pocket a profit as well.

6. In *Amendment of Parts 1, 73 and 74 - Competitive Bidding*, 13 FCC Rcd 15920, 15947-50 (1998), recon. FCC 99-74, released April 20, 1999 ("*Auction Order*"), the Commission determined that its existing settlement rules and policies were adequate to fulfill

its statutory obligation to avoid mutual exclusivity under Section 309(j)(6)(E)<sup>3</sup> for applicants in frozen cases that were not settled by February 1, 1998. *Auction Order*, 13 FCC Rcd at 15948. One such policy is the prohibition against "white knight" settlements. See *Rebecca Radio of Marco*, 5 FCC Rcd 937, recon. denied, 5 FCC Rcd 2913 (1990). Here, although Magic does not directly acquire the construction permit as a result of the settlement, the totality of the circumstances makes it clear that Magic is to receive the permit as soon as it chooses to exercise its option, while the Temecula applicants are likely to receive money in excess of their expenses. Thus, for all practical purposes, the proposed arrangement is contrary to both the prohibition against "white knight" settlements as well as Section 73.3525 of the Commission's Rules, which, *inter alia*, limits the amount of money a dismissing applicant may receive to its legitimate and prudent expenses.<sup>4</sup> Finally, although the Commission allowed that it would consider a waiver request of its settlement rules and policies, no such request has been submitted here. *Auction Order*, 13 FCC Rcd at 15949.

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<sup>3</sup> That subsection provides:

(6) Rules of Construction. - Nothing in this subsection, or in the use of competitive bidding, shall --

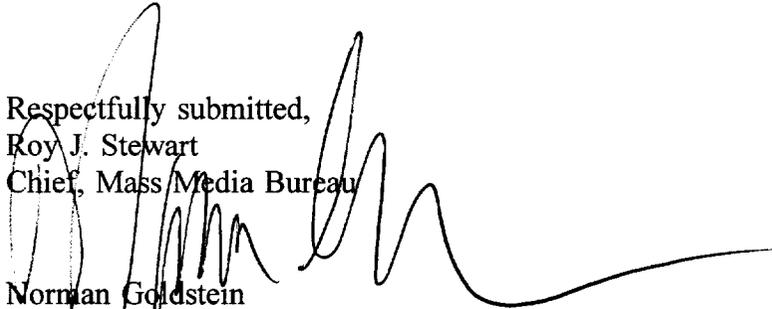
...

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

<sup>4</sup> In this regard, while the limitation regarding payments to dismissing applicants does not apply to *bona fide* mergers, e.g., *Amendment of Section 73.3525 - Settlement Agreements*, 6 FCC Rcd 2901, 2902 (1991), the circumstances here suggest that the applicants' "merger" here is not for the purpose of building and operating the station but merely a condition precedent to the applicants' sale of the station to Magic. *Id.* See also, *Harrison County Broadcasting Company*, FCC 921-072, released September 8, 1992.

8. Accordingly, unless the Commission determines that Magic's role is not akin to that of a "white knight," the Joint Petition should be denied insofar as the settlement agreement is inconsistent with the both the "white knight" policy and the rule which limits payments to dismissing applicants.<sup>5</sup>

Respectfully submitted,  
Roy J. Stewart  
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May 19, 1999

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<sup>5</sup> In the event the Commission chooses to approve the Joint Petition and grant the application of Artistic, as amended to substitute TFM as the applicant, the Bureau requests that such grant be subject to the submission by Artistic of a completed Form 301, Section II.

## CERTIFICATE OF SERVICE

Talya Lewis, secretary of the Complaints and Political Programming Branch, Mass Media Bureau, certifies that she has on this 19th day of May, 1999, sent by first class United States mail, copies of the foregoing "Mass Media Bureau's Comments on Joint Petition for Approval of Agreement and Dismissal of Applications and Amendment" to:

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