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

In re Applications of)	
)	
Jerome Thomas Lamprecht)	MM Docket No. 83-985 ✓
Middletown, Maryland)	File No. BPH-820409AB
)	
Barbara D. Marmet)	MM Docket No. 83-987
Middletown, Maryland)	File No. BPH-820908AW
For Construction Permit		
For a New FM Station		

ORDER**Adopted: May 5, 1999;****Released: May 12, 1999**

By the Commission:

1. This order denies in part and dismisses in part a series of pleadings filed February 1, 1996, January 20 and October 1, 1998 by Barbara D. Marmet that seek the dismissal of Lamprecht's competing application and the termination of this adjudicatory proceeding,¹ and stays the above-captioned hearing proceeding pending the outcome of an auction to select the permittee for a new FM station on Channel 276A (Middletown, Maryland). These actions are appropriate in light of our Memorandum Opinion and Order, FCC 99-74 generally denying reconsideration of the competitive bidding procedures adopted in MM Docket No. 97-234 for mutually exclusive commercial broadcast applications² and specifically denying the petition for reconsideration filed

¹Three sets of related pleadings are pending before the Commission. First, Barbara Marmet filed a Motion to Dismiss Application of J.T. Lamprecht on February 1, 1996. Lamprecht filed an Opposition on February 16, 1996 and Marmet filed a Reply on February 28, 1996. Second, Marmet filed a Request for Action on Motion to Dismiss Application of J.T. Lamprecht and Request to Terminate Proceeding on January 20, 1998, Lamprecht filed an Opposition on January 29, 1998, and Marmet filed a Reply on February 10, 1998. Marmet also filed a Request for Leave to File and Tender of Supplement to Reply on March 19, 1998, and Lamprecht filed a Memorandum In Support of Marmet's Request for Leave to File and Tender of Supplement to Marmet Reply on March 31, 1998. Third, Barbara Marmet filed a Renewed Motion to Dismiss Application of J. Thomas Lamprecht and Waiver Request on October 1, 1998.

²Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licensees (MM 97-234) (First Report and Order), 13 FCC Rcd 15920 (1998), reconsideration denied (Memorandum Opinion and Order), FCC 99-74 (rel. Apr. 20, 1999) (Hereafter *Reconsideration Order*).

by Barbara D. Marmet.

2. Mutually exclusive applications for a new FM broadcast station in Middletown, Maryland filed by Jerome Thomas Lamprecht and Barbara Marmet were designated for a comparative hearing to determine which applicant would best serve the public interest. Prior to the court's decision in *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993) (*Bechtel II*), and the resulting freeze on the processing and adjudication of comparative broadcast applications,³ the Commission twice granted Marmet's application on comparative grounds.⁴ Lamprecht sought judicial review of both decisions, and on February 9, 1994 the court remanded the proceeding to the Commission for further consideration in light of its decision in *Bechtel II*, which invalidated the central comparative criterion used by the Commission in deciding comparative broadcast proceedings. And on May 8, 1998 the court denied Lamprecht's request for mandamus, stating that Lamprecht "has not established that he is entitled to the grant of his application."⁵ These matters were held in abeyance pending completion of the Commission's reexamination in GC Docket 92-52 of the Policy Statement on Comparative Broadcast Hearings. That rulemaking proceeding was terminated on August 5, 1998.⁶

3 In her motions, Marmet requests the immediate dismissal of Lamprecht's mutually exclusive application and the termination of this adjudicatory proceeding. The request is based on the September 19, 1990 admission of Lamprecht's attorney that the applicant's option to purchase property for a transmitter site expired on October 1, 1982.⁷ According to Marmet, Lamprecht lost its transmitter site in October 1982, concealed that loss from the Commission for eight years, and has not amended his application to specify a new site. Under these circumstances, Marmet, who first raised this matter in August 1990 when this case was pending before the Court of Appeals for the District of Columbia Circuit,⁸ maintains that the Commission must dismiss Lamprecht's technically ungrantable application and terminate this adjudicatory licensing proceeding. Lamprecht disputes Marmet's contentions on both the facts and the law.

4. In adopting competitive bidding procedures to resolve mutually exclusive commercial

³FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

⁴*Jerome Thomas Lamprecht*, 3 FCC Rcd 2527 (1988), *affirming*, 99 FCC 2d 1219 (Rev. Bd. 1984), *affirming*, 99 FCC 2d 1229 (A.L.J. 1984), *remanded*, *Lamprecht v. FCC*, 958 F.2d 382 (1992), *reconsidered on remand*, *Jerome Thomas Lamprecht*, 7 FCC Rcd 6794 (1992).

⁵Order, Case No.98-1052 (D.C. Cir. May 8, 1998).

⁶ First Report and Order, 13 FCC Rcd at 16009 ¶ 225.

⁷See Letter, dated September 19, 1990, from Michael Carvin, Counsel for J. Thomas Lamprecht, to Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission.

⁸See Letter, dated August 30, 1990, from Barbara D. Marmet to Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, explaining her decision not to file a brief in the Court of Appeals for the District of Columbia Circuit.

broadcast applications in the *First Report and Order* in MM Docket No. 97-234, the Commission determined that, even for pending hearing cases that had progressed at least through an Initial Decision before the court's *Bechtel II* decision, auctions would better serve the public interest than comparative hearings. Based upon its long experience with the delays associated with the comparative hearing process, the Commission disagreed that these cases could be expeditiously resolved through the comparative process and concluded that auctions would likely be speedier and fairer than comparative hearings. To avoid unnecessary litigation over potentially irrelevant issues, the Commission decided to follow its practice in prior auctions of deferring until after the auction consideration of all basic qualification issues and resolving such issues only with respect to an actual auction winner. On reconsideration the Commission reaffirmed its determinations to use auctions generally for pending cases and to consider basic qualifications issues after the auction, even in proceedings involving only two applications.⁹ It further clarified that in frozen comparative cases not resolved through settlement agreements executed by February 1, 1998 pending applicants would be eligible to participate in any such auction without regard to any unresolved questions as to their basic qualifications.¹⁰

5. Additionally, the Commission denied Marmet's petition for reconsideration of the *First Report and Order* and dismissed as moot her related motion for stay. Marmet had requested reconsideration of the auction rules only insofar as they pertain to the above-captioned adjudicatory proceeding. In doing so, she repeated arguments contained in various pending pleadings filed in this adjudicatory proceeding requesting that the Commission dismiss Lamprecht's application, including the argument that the immediate consideration of potentially dispositive questions relating to Lamprecht's basic qualifications would be consistent with the Commission's former comparative freeze policy. In her petition for reconsideration of the *First Report and Order*, Marmet also claimed that special circumstances -- including the age of this adjudicatory proceeding, her interim operation of the Middletown station, and her pending requests in this proceeding that the Commission resolve basic qualifications issues allegedly warranting the denial of Lamprecht's application -- militated against using an auction in this specific proceeding. Noting that the delays and costs incurred by Marmet were not appreciably different from those experienced by other applicants in the frozen hearing cases, the Commission "[was] not persuaded that Marmet's specific proceeding presents special circumstances making it inappropriate to use an auction"¹¹ Specifically regarding the request for immediate Commission consideration of the questions involving Lamprecht, the Commission was also not persuaded that this would be more expeditious or fairer, particularly to the losing applicant, than conducting an auction.¹²

6. It is appropriate to deny in part and dismiss in part the pending pleadings in light of the Commission's *Reconsideration Order* generally reaffirming its determinations to use auctions

⁹*Reconsideration Order*, *supra* note 2, at ¶¶ 16-17.

¹⁰*Id.* at ¶ 18.

¹¹*Id.* at ¶ 8.

¹²*Id.*

in pending cases and to defer until after the auction unresolved questions as to basic qualifications, and specifically denying Marmet's petition for reconsideration in the rulemaking proceeding. Having already considered, and rejected, Marmet's contentions that special circumstances unique to this specific adjudicatory case make it appropriate to consider immediately the merits of the issues involving Lamprecht's transmitter site and militate against the use of an auction to award the FM license for Middletown, Maryland, we deny the pending pleadings filed by Marmet to the extent that they request the immediate consideration of the questions relating to Lamprecht, the dismissal of Lamprecht's application, the resolution of this specific adjudicatory proceeding without conducting an auction, or otherwise seek a waiver of applicable competitive bidding procedures. Insofar as these pleadings raise matters that would be pertinent under our auction procedures if Lamprecht were the auction winner,¹³ however, they are dismissed without prejudice to being refiled after the auction if Lamprecht is the auction winner. Similarly, we will defer until after the auction any questions that have been raised (or that may be raised in the future) regarding Marmet's qualifications and will address such questions only if Marmet is the ultimate auction winner.¹⁴ And, in accordance with our auction procedures, the license will be offered to the low bidder at his or her respective bid if the auction winner is ultimately disqualified or defaults for any reason.¹⁵

7. Having denied and dismissed the pending pleadings, it is also appropriate to refer Marmet's and Lamprecht's pending applications to the Mass Media Bureau for processing in accordance with our auction procedures for frozen hearing cases.¹⁶ Because of the allegations concerning the basic qualifications of both pending applicants, we will stay, rather than terminate, the hearing proceeding pending the outcome of the auction. The hearing proceeding will resume after the auction to consider the basic qualifications of the actual auction winner only. Depending on who wins the auction, we will adjudicate these matters to the extent that the allegations raise questions of substantial and material question of fact. Pursuant to Section 309(l), Lamprecht and Marmet, who filed their applications before July 1, 1997, are the only qualified bidders, eligible to participate in the auction,¹⁷ since theirs are the only applications for Channel 276A

¹³ In the *First Report and Order*, 13 FCC Rcd at 15956 ¶ 99, we indicated that we would consider unresolved site issues (or add new site issues if substantial and material questions of fact are raised in pending or new petitions to enlarge issues) against the winning bidder only to the extent the issues involve questions of false certification.

¹⁴We note, for example, that Lamprecht has raised questions regarding the propriety of Marmet's submission on March 19, 1998 of a letter affidavit from retired Administrative Law Judge Walter Miller.

¹⁵*Reconsideration Order*, *supra* note 2, at n.19.

¹⁶*See generally*, *First Report and Order*, 13 FCC Rcd at 15952-57 ¶¶ 88-100.

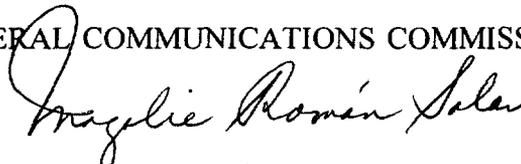
¹⁷Section 309(l) provides that the Commission "shall have the authority to conduct a competitive bidding proceeding pursuant to subsection [309](j)" in comparative broadcast cases involving competing applications filed before July 1, 1997, and that if the Commission does conduct a competitive bidding proceeding, it "shall treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding."

(Middletown, Maryland) pending before the Commission.¹⁸ In this regard, we disagree with Marmet that the Commission's 1992 decision granting her application is final, given Lamprecht's timely-filed court appeals challenging the grant of Marmet's application and the court's 1994 remand order. The date of the auction, as well as the deadline for filing the mandatory short-form application,¹⁹ will be announced by a Public Notice issued under delegated authority by the Wireless Telecommunications Bureau and the Mass Media Bureau. By that Public Notice, the Bureaus will also seek comment on a variety of auction-specific procedural issues concerning the day-to-day conduct of the auction for the construction permit for FM Channel 250A (Selbyville, Delaware).

8. ACCORDINGLY, IT IS ORDERED That the Motion to Dismiss Application of J.T. Lamprecht, filed February 1, 1996, by Barbara D. Marmet, the Request for Action on Motion to Dismiss Application of J.T. Lamprecht and Request to Terminate Proceeding, filed January 20, 1998, by Barbara D. Marmet and the Renewed Motion to Dismiss Application of J. Thomas Lamprecht and Waiver Request, filed October 1, 1998, by Barbara D. Marmet ARE DENIED in part and DISMISSED in part.

9. IT IS FURTHER ORDERED That the above-captioned hearing proceeding involving Docket Nos. MM 83-985 and MM 83-987 IS STAYED and the applications filed by Jerome Thomas Lamprecht (File No. BPH-820409AB) and Barbara D. Marmet (File No. BPH-820908AW) ARE REFERRED to the Mass Media Bureau for processing in accordance with the competitive bidding procedures for mutually exclusive commercial broadcast applications; and that Jerome Thomas Lamprecht and Barbara D. Marmet ARE IDENTIFIED as the only qualified bidders, eligible to participate in the auction for a construction permit for a new FM station on Channel 276A in Middletown, Maryland.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

¹⁸ Two additional applicants, Dragon Communications and Port Royal Broadcasting, prosecuted their applications through an Initial Decision by the Administrative Law Judge and a Decision by the former Review Board. However, Port Royal did not file an application for review of the Review Board's Decision and Dragon did not seek judicial review of the Commission's denial of its application. The denial of Port Royal's and Dragon's applications is therefore final.

¹⁹In order to participate in the auction, pending applicants must file short-form applications indicating their intention to compete in the auction. *First Report and Order*, 13 FCC Rcd at 15950 ¶ 82.