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July 2, 1999

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Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MM Docket No. 90-380
Opposition to Petition for Reconsideration

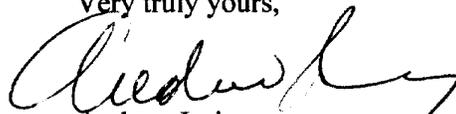
Dear Ms. Roman Salas:

Enclosed for filing, on behalf of Irene Rodriguez Diaz de McComas, are an original and fourteen (14) copies of her Opposition to Petition for Reconsideration. Also enclosed is an additional copy of this letter for stamping and return in the enclosed self-addressed stamped envelope.

Please address all correspondence and phone inquiries pertaining to this matter to:

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Very truly yours,



Andrew Irving
Attorney For Irene Rodriguez Diaz de McComas

AI/jaj
Encs.

cc: Richard Swift, Esq.
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Roy F. Perkins, Esq.
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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 90-380

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In re: Applications of)
RIO GRANDE BROADCASTING CO.) File No. BPH-880815MV
ROBERTO PASSALACQUA) File No. BPH-880816NN
IRENE RODRIGUEZ DIAZ DE McCOMAS) File No. BPH-880816OR
UNITED BROADCASTERS COMPANY) File No. BPH-880816OW

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Irene Rodriguez Diaz De McComas, by her undersigned attorneys, submits this Opposition to Petition for Reconsideration in opposition to the June 24, 1999 Petition for Reconsideration filed by Rio Grande Broadcasting Co. ("Rio Grande") and United Broadcasters Company ("United").

1. The Petition for Reconsideration presents no basis for reconsideration for reversal of the Commission's Memorandum Opinion and Order adopted May 19, 1999 and released May 25, 1999 (FCC 99-111) (the "Memorandum Opinion and Order") dismissing the Joint Request for Approval of Settlement Agreement filed by Rio Grande and United (the "Joint Request"). The Memorandum Opinion and Order's dismissal of the Joint Request is consistent

with and implemented provisions of the First Report and Order in MM Docket No. 97-234 implementing § 307(l) of the Communications Act.¹

2. In the First Report and Order, the Commission decided to use the authority granted by Congress under § 309(l)(1) of the Act to conduct competitive bidding with respect to competing applications for construction permits that were filed with the Commission before July 1, 1997 and which were not settled under the special provisions of § 309(l)(3). First Report and Order at ¶80. The Commission further decided to "permit all pending applicants to participate in the auction, without regard to any unresolved hearing issues (or outstanding petitions to enlarge) as to the basic qualifications of a particular applicant. We will do so regardless of the number of remaining applicants or whether the adverse resolution of outstanding basic qualifying issues would eliminate all but one applicant." *Id.* at ¶89. In the Reconsideration Order, the Commission confirmed that unresolved issues as to basic qualifications would not render an applicant ineligible to participate in the auction in the absence of a settlement made during the one hundred eighty (180) day window period established by § 309(l)(3), which expired February 1, 1998. *See* Reconsideration Order at ¶18.

3. The Settlement Agreement between Rio Grande and United was executed long after the February 1, 1998 deadline expired. Since both McComas and Roberto Passalacqua ("Passalacqua") are applicants as to whom qualification issues remain unresolved, the Commission properly applied the rules established in the First Report and Order to defer until

¹ Implementation of § 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, 13 FCC Rcd. 15920 (1998) ("First Report and Order"), recon. denied, Memorandum Opinion and Order, FCC 99-74 (rel. Apr. 20, 1999) ("Reconsideration Order").

after an auction consideration of the qualification issues effecting McComas, Passalacqua and, indeed, Rio Grande.²

4. The Petition for Reconsideration simply rehashes arguments already rejected by the Commission in the Memorandum Opinion and Order in this proceeding, the First Report and the Reconsideration Order.

5. The Petition for Reconsideration makes the curious argument that the Commission has no "rational basis" for treating Rio Grande and United's settlement agreement differently from settlement agreements made prior to February 1, 1998. The argument is curious because the distinction arises directly from the provisions of the Act.

6. The Commission has rationally decided to expedite the commencement of auctions and avoid unnecessary litigation by deferring consideration of qualification issues until after the auction in all auctions conducted under § 309(j), consistent with "its established practice of determining qualifications only with respect to the winning bidder." First Report and Order at ¶ 91; Reconsideration Order at ¶ 16. The Commission also decided to follow that practice for auctions conducted under § 309(l), such that all pending applicants in "frozen hearing" cases will be permitted "to participate in the auction, without regard to any unresolved hearing issues . . . as to the basic qualifications if a particular applicant. First Report and Order at ¶ 89. The distinction of which Rio Grande and United complain consists of the exception to this general

² United and Rio Grande did not explain in their Joint Request how their settlement agreement would render moot the serious ex parte, abuse of process and character issues still pending as against Rio Grande. Since Rio Grande would be a fifty percent (50%) owner of the new entity that United and Rio Grande proposed to form pursuant to their settlement agreement, the new entity would be tainted by Rio Grande's conduct in these areas.

rule in order to give effect to the "special circumstances" of a settlement made under § 309(1)(3), which expressed Congress' intent to encourage settlements made within 180 days of its enactment, i.e., prior to February 1, 1998. Reconsideration Order at ¶ 18, and cases cited therein. Congress has evidenced no intention that the Commission take special steps to encourage settlements after that date and the Commission has already decided not to extend the February 1, 1998 deadline by administrative action. First Report and Order at ¶¶ 73-77. Rio Grande United made their settlement after the statutory deadline, and the Joint Request therefore did not present the "special circumstances" justifying pre-auction litigation of the non-settling applicants' qualifications.

7. Rio Grande and United, therefore, are reduced to challenging the general rule of the auction procedure approved in the First Report and Order and Reconsideration Order that qualification issues would be resolved only with respect to the winner of the auction. The Petition for Reconsideration argues in this regard that Congress only authorized the Commission to conduct auctions in situations in which there were mutually exclusive applications filed by qualified applicants, so that qualification determinations would have to be made before there could be an auction. The problem with the argument is that the statute does not support it. Section 309(j)(1) provides, "If, consistent with the obligations described in [§ 309(j)(6)(E)], mutually exclusive applications are accepted for any initial license or construction permit, then . . . the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding" The word "qualified" does not appear until the statute refers to the granting of a license or permit. The circumstance that triggers the auction is the existence of

"mutually exclusive applications." While the granting of a permit is restricted only to a "qualified applicant," auction participation is available to any "mutually exclusive" applicant.

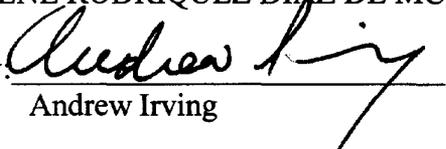
8. Thus, the Commission's decision in the First Report and Order to defer qualification decisions until after the auction has identified a winning bidder from among the mutually exclusive applicants does not violate either the statute or Congressional intent. In a case such as the present one, involving pre-July 1, 1997 applications, the argument is even stronger since § 309(l) authorizes competitive bidding with respect to "competing applications . . . filed with the Commission before July 1, 1997. . . ." and the word "qualified" does not appear at all.

9. In short, then, nothing in the statute requires that the Commission make pre-auction qualification decisions with respect to mutually exclusive applications. The Commission's decision to make an exception to that rule with respect to settlement agreements made within the statutory window that expired February 1, 1998 was an appropriate method to promote Congressional intent in favor of settlements made promptly after the enactment of § 309(l). United and Rio Grande having failed to make their settlement in a timely manner, the Commission was correct in dismissing their Joint Request

Conclusion

10. For the reasons set form above, McComas respectfully requests that the Petition for Reconsideration be dismissed.³

Respectfully submitted,
IRENE RODRIQUEZ DIAZ DE MCCOMAS

By: 
Andrew Irving

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Dated: July 2, 1999

³ In the unlikely event that the Commission grants the Petition for Reconsideration, the issue of McComas' qualifications would have to be addressed, since the Memorandum Opinion and Order deferred the issue until after the auction. We respectfully refer the Commission to the arguments set forth in ¶¶17 through 22 of McComas, Motion to Dismiss Joint Request for Approval of Settlement Agreement and Opposition to Joint Request for Approval of Settlement Agreement demonstrating that McComas is in fact a qualified applicant. We also respectfully submit in that regard that if the Commission were to overrule the decisions in Josephine M. Rodriguez d/b/a Cielo Communications, 3 FCC Rcd. 6752 (Audio Services Div. 1988), Radio South Burlington, Inc., 5 FCC Rcd. 1688 (Audio Services Div. 1990) and Dasan Communications Corp., 7 FCC Rcd. 7550 (1992), applying the new doctrine retroactively would implicate the doctrine that retroactive administrative rule making that prejudices a party whose conduct met the standards being overruled is "condemned" unless necessary to avoid "mischief . . . greater than the ill effect of the retroactive application of a new standard." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). Finally, as set forth in note 2, supra, the issues involving Rio Grande must also be addressed before the merged entity's settlement agreement can provide the basis for issuance of the construction permit at issue.

CERTIFICATE OF SERVICE

I, Judith Janon, a secretary in the law offices of Robinson Silverman Pearce Aronsohn & Berman LLP, do hereby certify that on this 2nd day of July 1999 I have caused to be mailed a copy of the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION to the following:

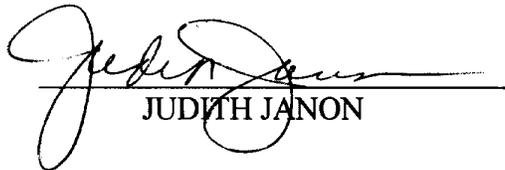
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Dated: July 2, 1999