

FEDERAL COMMUNICATIONS COMMISSION

FCC 99-221

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Before the
FEDERAL COMMUNICATIONS COMMISSIONS
 DIS. Washington D.C. 20554

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

ORDER

Adopted: August 12, 1999

; Released: August 17, 1999

By the Commission:

1. This order approves a settlement agreement in the above-captioned proceeding providing for the merger of the above-captioned applicants into a single entity, Temecula FM LLC (Temecula FM), for the dismissal of the applications filed by Kimler Broadcasting, Inc., and by Laura Wilkinson Herron and for the grant of the application filed by Artistic Airwave Broadcasters as amended to substitute Temecula FM as the applicant.¹

¹ The following pleadings are pending before the Commission: (a) Joint Petition for Approval of Agreement and Dismissal of Applicants, filed May 5, 1999, by Kimler Broadcasting, Inc., Artistic Airwave Broadcasters and Laura Wilkinson Herron; (b) Amendment, filed May 5, 1999, by Artistic Airwave Broadcasters; (c) Consolidated Comments on Joint Petition for Approval of Agreement and Dismissal of Applicants and Amendment, filed May 19, 1999, by the Mass Media Bureau; (d) Supplement to Joint Petition for Approval of Agreement and Dismissal of Applicants, filed June 2, 1999, by Kimler Broadcasting, Inc., Artistic Airwave Broadcasters and Laura Wilkinson Herron; and (e) Amendment, filed on June 2, 1999 and supplemented on June 8, 1999, by Artistic Airwave Broadcasters.

2. By Order, FCC 99I-12 (OGC rel. May 12, 1999), the Assistant General Counsel, acting under delegated authority, as provided in *Implementation 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, 15954-55 ¶ 94 (1998), indicated that the permittee for Channel 233A should be selected by auction, identified Kimler, Herron and Artistic as the only eligible, qualified bidders to participate in the auction, and stayed the hearing proceeding in MM Docket No. 91-309 pending the outcome of the auction. In referring these applications to the Mass Media Bureau for processing in accordance with the Commission's auction procedures, the order indicated that any settlement agreements should be filed with the Commission rather than with the Mass Media Bureau. By Public Notice, DA 99-940 (May 17, 1999), the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, subsequently scheduled Channel 233A (Temecula, California) for auction on September 28, 1999.² Following the filing of the proposed settlement, however, that frequency was deleted from the list of commercial broadcast frequencies scheduled to be auctioned on September 28, 1999.³

3. Under the terms of the proposed settlement agreement, the three remaining applicants, Artistic, Herron and Kimler, propose to merge into a newly created limited liability company, Temecula FM. Each applicant will have a one-third ownership interest in Temecula FM. Artistic will amend its application to specify Temecula FM as the applicant. In exchange for one-third ownership interests in Temecula FM, Herron and Kimler will dismiss their respective applications. Additionally, Herron and Artistic seek the dismissal of their respective pending motions to enlarge issues against each other.

4. The proposed settlement, as originally filed, included a Purchase Option Agreement reflecting the payment of \$300,000 by non-applicant Magic Broadcasting, Inc. for an option to purchase the station for a total of \$1,500,000 and a draft Assets Purchase Agreement reflecting that Magic would purchase related equipment and property from Artistic for \$75,000. The Mass Media Bureau opposed the proposed settlement agreement because, in combination with the Purchase Option Agreement, it contemplated the sale of the station to a non-applicant. According to the Bureau, the agreement thus contravened the Commission's prohibition against so-called "white knight" settlements, in which a non-applicant is awarded the construction permit, as well as the restrictions on payments to dismissing applicants set forth in Section 73.3525(a) of the

² Although the joint petition for approval of settlement agreement was filed on May 5, 1999, it was not filed with the docket number. Due to this omission, neither the Office of General Counsel nor the Mass Media Bureau was aware of the proposed settlement until after the case had been identified as ripe for inclusion in the first group of commercial broadcast auctions.

³ *Closed Broadcast Auction: Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled For September 28, 1999*, DA 99-1346 (rel. July 9, 1999) at 42.

Commission's rules, 47 C.F.R. § 73.3525. In response to the Bureau's comments, Artistic, Herron and Kimler on June 2, 1999 filed a supplement to Joint Petition for Approval of Agreement, reflecting the termination of the Purchase Option Agreement. Also in response to concerns raised by the Mass Media Bureau, Artistic Airwave has filed a further amendment, dated May 25, 1999, providing all of the Legal Qualifications information regarding Temecula FM required by FCC Form 301, Section II.

5. We will approve the settlement agreement. It complies fully with Section 311(c) of the Communications Act, 47 U.S.C. § 311(c), and with Section 73.3525 of the Commission Rules, 47 C.F.R. § 73.3525, governing settlement agreements among mutually exclusive broadcast applicants. Attached to the Joint Petition is a copy of the Settlement and Merger Agreement. Included in the settlement agreement is a certification that none of the parties to the agreement filed their respective applications for the purpose of entering into or carrying out a settlement agreement. It also contains a certification that none of the parties has paid or promised any consideration for the merger or for the dismissal of their respective applications other than the mutual promises contained in the agreement. In the agreement the parties further state under penalty of perjury that the agreement will serve the public interest by expediting the inauguration of new FM service to the community of Temecula and by eliminating the need for further Commission proceedings.

6. It is also appropriate to deny pending pleadings that were not considered previously due to the freeze on the adjudication of comparative broadcast cases initiated by the Commission in February 1994.⁴ These include exceptions to the Initial Decision⁵ challenging the ALJ's favorable resolution of a misrepresentation/lack of candor against Artistic, as well as motions to reopen the record and enlarge issues that Artistic and Herron filed against each other while exceptions to the Initial Decision were pending before the Review Board.

7. First, we will deny the pending exceptions filed by Herron, Kimler, and Los Amigos,⁶ all of which urge that the misrepresentation/lack of candor issue should have been

⁴ The Commission stayed the adjudication of comparative cases after the D.C. Circuit in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), invalidated the principal criterion previously used to decide comparative broadcast cases. See *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

⁵ *Frank K. Spain*, 8 FCC Rcd 4831 (ALJ. 1993), in which the Administrative Law Judge determined that Artistic was the comparative winner.

⁶ After this case became subject to the comparative freeze instituted in February 1994 the Review Board approved a settlement agreement between Artistic and Los Amigos Media. *Los Amigos Media*, 10 FCC Rcd 4973 (1995). Although the Board dismissed Los Amigos's application, it did not dismiss Los Amigos's exceptions to the Initial Decision.

resolved against Artistic. Specified at the request of Kimler, Los Amigos and a third applicant whose application was subsequently dismissed (Joint Petitioners), this issue concerned the circumstances surrounding Station KRTM going dark in the summer of 1982. At issue was whether Stephen Cilurzo had testified falsely in this proceeding that he had not taken KRMT off the air, that the station was still operating when he resigned as its general manager, and that he had not anticipated that the station would go dark. Faced with conflicting evidence as to whether an electric company employee, Douglas Davies, had advised Stephen Cilurzo that the station's power was about to be shut off for nonpayment, the ALJ resolved the issue in Artistic's favor. Specifically, he found the oral testimony of Stephen and Audrey Cilurzo regarding the circumstances surrounding Station KRTM going dark to be credible.⁷ By contrast, the written testimony of witnesses presented by the Joint Petitioners was, in the ALJ's view, riddled with internal inconsistencies, and the dispute regarding the date of Cilurzo's actual resignation, which had led to the specification of the issue, was based, the ALJ found, on a mischaracterization of Cilurzo's earlier testimony.⁸ Under these circumstances, the ALJ refused Joint Petitioners' post-hearing request that they be permitted to call Mr. Davies as a witness in surrebuttal. The Joint Petitioners, the ALJ reasoned, should have anticipated that Audrey and Stephen Cilurzo's oral testimony might contradict Davies' written testimony, and, in any event, they had had ample opportunity during the three-day hearing on the misrepresentation/lack of candor issue to produce Mr. Davies as a rebuttal witness.

8. The ALJ's refusal to reopen the hearing for additional testimony that would allegedly contradict the Cilurzoes' testimony was within the ALJ's broad discretion to regulate the course of the hearing.⁹ Thus, the exceptions do not provide a basis to overturn the ALJ's resolution of the misrepresentation issue in Artistic's favor. The pending exceptions may therefore be denied.

⁷ Audrey Cilurzo is Stephen Cilurzo's stepmother. She testified that she never gave Douglas Davies Stephen's telephone number in Pasadena, as Davies had claimed in his written testimony.

⁸ In particular, the ALJ found that Cilurzo had testified that he was uncertain as to whether he tendered his resignation to KRMT's Board of Directors before or after he left town, but that the record was clear that, as he had testified, he notified the Board in August 1985 that he had accepted employment elsewhere. *Initial Decision*, at ¶ 158.

⁹ *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 ¶ 3 (1986) ("Consistent with the determination that new service should be provided to the public in the most efficient, expeditious manner possible, ALJs must be given broad discretion to regulate the course of multiparty comparative hearings"). See also *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988) (upholding the dismissal of an application for failure to file proposed findings and conclusions of law within the time allotted by the ALJ).

9. Second, we deny the pending issue requests filed by Artistic and Herron, neither of which raises a substantial and material question of fact warranting the specification of basic qualifying issues. In a motion filed March 1, 1995, Artistic sought the addition of site availability and misrepresentation issues against Herron. According to Artistic, Herron never had reasonable assurance of her original transmitter site, her amendments to specify a second transmitter site, and then to correct the coordinates of that second transmitter site were therefore without good cause, and Herron likewise lacks reasonable assurance of its current site. Citing Herron's affirmative assertions of reasonable assurance for each site, Artistic maintains that a misrepresentation issue should be specified against Herron.

10. All questions concerning the availability of the various sites specified by Herron are moot inasmuch as she proposes to dismiss her application and the merged applicant, Temecula FM, does not propose to use any of these sites. By contrast, Herron will have a one-third ownership interest in the ultimate licensee. Thus, her propensity for truthfulness, which reflects on her basic qualifications to be a Commission licensee, remains relevant. Artistic's motion fails to raise a substantial and material question of fact that Herron made material misrepresentations concerning the availability of any of her proposed transmitter sites. As to the original site specified in Herron's application, the site owner indicated that he could see how she had inferred reasonable assurance from their discussions of her possible use of his property as a transmitter site. Letters from the property owner likewise establish a basis for Herron's belief that she had reasonable assurance of her current site. Upon learning that she had incorrectly specified the coordinates of that site, Herron diligently amended her application to correct the coordinates. Contrary to Artistic's contentions, subsequent correspondence from the site owner does not establish that it advised Herron that it had changed its mind about the availability of her current site.

11. In a motion filed May 17, 1995 Herron sought the specification of misrepresentation, lack of candor, abuse of process, and character issues against Artistic. Herron's allegations relate to pleadings filed by Artistic in connection with its earlier request for site and misrepresentation issues against Herron. Specifically, Herron claimed that Artistic: (1) concealed material evidence confirming the continued availability of Herron's present transmitter site; (2) falsely denied the awareness of its principal, Stephen Cilurzo, of reasonable assurance letters for Herron's present site that were issued first to Herron and 18 months later to another Temecula applicant who subsequently dismissed its application; (3) falsely stated that the site owner told Herron it had changed its mind about letting Herron use the site; and (4) abused the Commission's processes by filing frivolous pleadings designed merely to coerce Herron into settlement.

12. Herron's motion fails to raise substantial and material questions warranting the specification of misrepresentation, lack of candor, abuse of process and character issues against Artistic. First, to the extent that Herron's concealment claim focuses on the April 20, 1994 letter Cilurzo received from the site owner, that letter merely summarizes the site owner's practice

regarding requests to use its land generally without articulating any specific understanding concerning Herron's proposal, and under these circumstances there would be no apparent motive for Artistic to withhold it. Second, Artistic explains that, although copies of Herron's reasonable assurance letter from the landowner were exchanged during discovery, the letters were never properly delivered to Cilurzo or his attorney, presumably because Artistic had changed attorneys about the time of the document exchange and because its new counsel had recently changed his address. Third, the allegation concerning the site owner's purported "change of mind" concerning the use of Herron's present site consists of Cilurzo's hearsay statements as to what the site owner's employees told him about their conversations with Herron. Without corroborating statements from the employees as to what they said to Cilurzo (and to Herron), however, there is no basis to determine what was actually said, let alone any basis to find that there is a substantial and material question of fact warranting the addition of a misrepresentation issue against Artistic. Finally, as to Herron's abuse of process claim, Artistic's motion was not devoid of any merit. In fact, it resulted in Herron's filing a site amendment, after discovering that the coordinates originally specified for her present site were erroneous.

13. ACCORDINGLY, IT IS ORDERED, That, pursuant to the authority delegated under 47 C.F.R. § 0.251(c), the Joint Petition For Approval Of Agreement And Dismissal Of Applicants, filed May 5, 1999 and supplemented on June 2, 1999, by Kimler Broadcasting, Inc., Artistic Airwave Broadcasters and Laura Wilkinson Herron IS GRANTED, the attached settlement agreement, as supplemented on June 2, 1999, IS APPROVED, and the applications filed by Kimler Broadcasting, Inc. (File No. BPH-900122MN) and Laura Wilkinson Herron (File No. BPH-900122MY) ARE DISMISSED.

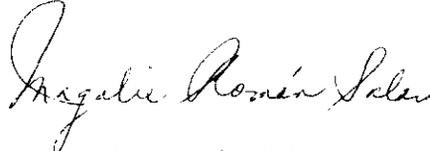
14. IT IS FURTHER ORDERED, That the Motion To Reopen The Record And Enlarge Issues Against Laura Wilkinson Herron, filed March 1, 1995, by Artistic Airwave Broadcasters, and the Motion To Reopen The Record And Enlarge Issues, filed May 17, 1995, by Laura Wilkinson Herron ARE DENIED; and that the Exceptions to Initial Decision filed on August 16, 1993 by Kimler Broadcasting, Inc., on August 18, 1993 by Los Amigos Media, and on August 18, 1993 by Laura Wilkinson Herron ARE DENIED in part and DISMISSED in part.¹⁰

15. IT IS FURTHER ORDERED, That the Amendment, filed May 5, 1999 and supplemented June 2, and 8, 1999, by Artistic Airwave Broadcasters IS ACCEPTED, and that the application filed by Artistic Airwave Broadcasters (File No. BPH-900122MP), as amended on May 5, June 2, and June 8, 1999 to substitute Temecula FM LLC as the applicant IS GRANTED.

¹⁰ To the extent that the exceptions challenge the ALJ's resolution of the standard comparative issue, they are moot and may be dismissed.

16. IT IS FURTHER ORDERED, That the adjudicatory proceeding in MM Docket No. 91-309 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Magalie Roman Salas".

Magalie Roman Salas
Secretary