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FCC MAIL SECTION

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

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In re Applications of	)	
DISPATCHED BY	)	
Jerome Thomas Lamprecht Middletown, Maryland	))	MM Docket No. 83-985 File No. BPH-820409AB
	)	
Barbara D. Marmet Middletown, Maryland	))	MM Docket No. 83-987 File No. BPH-820908AW

For Construction Permit
For a New FM Station on
Channel 276A

ORDER

Adopted: November 30, 1999; Released: December 17, 1999

By Assistant General Counsel, Administrative Law Division:

1. This order approves in part the Joint Petition for Approval of Agreement, Dismissal of Application, and Grant of Amended Application, filed August 19, 1999 by Jerome Thomas Lamprecht and Barbara D. Marmet.[1] It finds that the agreement complies fully with Section 311(c) of the Communications Act, and with Section 73.3525(a) of the Commission Rules except that, as discussed below, the dismissing applicant has inadequately substantiated certain expenses for which reimbursement is requested. In the absence of further documentation of the expenses in question, reimbursement is therefore limited to $151,240.78.[2]

2. Lamprecht and Marmet are the only remaining applicants for a new FM station on channel 276A in Middletown, Maryland. The Commission on May 5, 1999 referred the pending applications to the Mass Media Bureau for processing in accordance with the auction procedures for frozen hearing cases.[3] By Public Notice, DA 99-940, the Mass Media Bureau, in conjunction

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[1] The following related pleadings are also pending before the Commission: (a) Mass Media Bureau's Comments On Joint Petition For Approval Of Agreement, Dismissal Of Application, And Grant Of Amended Application, filed on September 1, 1999; and (b) Reply And Supplement Of Jerome Thomas Lamprecht, filed on September 10, 1999.

[2] Because the above captioned applications were filed before July 1, 1997, Marmet and Lamprecht would have been eligible to take advantage of the special 180-day settlement period ending February 1, 1998, prescribed by Congress in Section 309(l)(3) of the Communications Act, 47 U.S.C. § 309(l)(3). Thus, had they filed their settlement agreement by February 1, 1998, the Commission would have waived Section 73.3525(a)'s limitation on payments to a dismissing applicant. *See*, e.g., *Gonzales Broadcasting, Inc*, 12 FCC Rcd 12253, 12258-60 (1997), *aff'd sub nom. Lorenzo Jelks v. FCC*, 146 F.3d 878 (D.C. Cir. 1998), *petition for rehearing and suggestion for rehearing en banc denied*, Order (D.C. Cir. Oct. 20, 1998), *petition for writ of certiorari denied* (Feb. 22, 1999).

[3] *Jerome Thomas Lamprecht*, FCC 99-92 (rel. May 12, 1999). The auction procedures for cases in which competing

with the Wireless Telecommunications Bureau, on May 17, 1999 scheduled Channel 276A (Middletown, Maryland) for auction on September 28, 1999, unless the competing applicants submitted a universal settlement agreement by August 20, 1999. Following the filing of the proposed settlement agreement on August 19, 1999, the MX group for Middletown, Maryland (FM58) was removed from the auctions scheduled for September 28, 1999.[4] And, to permit Commission consideration of the universal settlement agreement, the United States Court of Appeals for the District of Columbia Circuit remanded the record concerning a pending court appeal filed by Marmet.[5]

3. Under the terms of the proposed settlement agreement, Lamprecht would dismiss his application, Marmet would pay Lamprecht up to $176,000 as reimbursement for reasonable and prudent expenses in prosecuting his application, and the parties would seek the dismissal of all litigation pending before the Court of Appeals relating to the Middletown proceeding. Attached to the Joint Request is a declaration under penalty of perjury from Lamprecht asserting legitimate and prudent expenses totaling $176,887.14, promising to submit documentation of professional fees if requested by the Commission, and stating that the expenses claimed for telephone, postage/Federal Express, and other miscellaneous charges are reasonable and conservative estimates based on available records. The declaration states further that the travel costs include at least twelve trips to Washington and/or Middletown in the 18 years since Lamprecht filed his application.

4. Additionally, the parties seek affirmation of previous actions assertedly granting Marmet's competing application for a construction permit (File No. BPH-8820908AW) and subsequently filed applications for a license to cover the construction permit and for assignment of the authorization to Frederick Broadcasting LLC. Alternatively, the parties ask that the Commission on its own motion grant these applications.

5. The Mass Media Bureau generally supports the settlement agreement. It asserts, however, that Lamprecht's declaration is insufficient, without documentation, to support his itemization of legitimate and prudent expenses. Accordingly, the Bureau suggests that the Commission withhold approval of the settlement agreement pending the submission of appropriate documentation to support his claimed expenses.

6. In reply, Lamprecht submits a further declaration, as well as written documentation of the professional expenses. Lamprecht has attached declarations from members or former members of the law firms of Haley, Bader & Potts and Shaw, Pittman, Potts & Trowbridge, and

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applications were designated for hearing and prosecuted at least through an Initial Decision by an Administrative Law Judge before February 1994, when the Commission initiated a freeze on the adjudication of such cases, are set forth in *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses* (MM 97-234) (First Report and Order), 13 FCC Rcd 15920, 15952-57 ¶¶ 88-100 (1997), *reconsideration denied,* 14 FCC Rcd 8724 (1999).

[4] *Closed Broadcast Auction: Status of Applications to Participate in the Auction* DA 99-1800 (rel. Sept. 3, 1999), at Appendix D "MX Groups Removed From Auction 25."

[5] *Frederick Broadcasting and Barbara D. Marmet v. FCC*, Case No. 99-1221 (D.C. Cir. Sept. 27, 1999) (remanding case without prejudice to the filing of a motion to reopen if the universal settlement agreement is not approved and vacating in part the court's August 13, 1999 order consolidating No. 99-1221 with No. 98-1424, *et al.).*

billing statements from the law firms of Hinton & Williams and Bechtel & Cole.[6] Written documentation is also submitted to substantiate charges for services provided by accountants, engineers, and court reporters.[7] The further declaration from Lamprecht provides additional information concerning the basis for expenses that are not easily documented. Particularly in light of the extraordinary length of this adjudicatory proceeding, Lamprecht submits that his good faith estimates of certain expenses (travel, postage, telephone, and other miscellaneous costs) should be deemed sufficient. It would be burdensome, Lamprecht asserts, to require him to review 18 years of documents in order to produce more detailed corroboration of these expenditures. The Bureau has not commented on Lamprecht's further showing.

7. Because the proposed settlement agreement provides for the grant of Marmet's application, it is now appropriate to consider any outstanding questions as to Marmet's basic qualifications. There are no unresolved hearing issues against Marmet. Lamprecht, however, previously questioned the propriety of her submission of a letter affidavit from the retired Administrative Law Judge, who presided in this proceeding. The affidavit in question was submitted to support Marmet's previous request that the Commission adjudicate Lamprecht's basic qualifications and terminate this proceeding, rather than conduct an auction to select the permittee for Middletown. The Commission denied that request, but indicated that, if Marmet won the auction, such matters would be considered insofar as a substantial and material question of fact was raised.[8]

8. Based upon our review of the pleadings,[9] we find no substantial and material question of fact warranting the specification of an issue against Marmet. Marmet's submission of the former ALJ's letter affidavit does not raise a substantial and material question as to *Marmet's* qualifications. The affidavit concerned an issue that was never specified against Lamprecht, and the affidavit is explicit that the former ALJ's views are based on factual observations of events that have occurred since the June 14, 1984 release of his Initial Decision. These circumstances do not, in our view, provide a basis for impugning Marmet's conduct in soliciting the affidavit from the former ALJ, let alone raise a substantial and material question of fact warranting the specification

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[6] The declarations of John Crigler (Haley, Bader & Potts) and Michael A Carvin (former partner of Shaw, Pittman, Potts & Trowbridge) reflect legal expenses of at least $44,518.18 and $56,800.00, respectively. A detailed, computerized print-out from the law firm of Hinton & Williams reflects $33,052.50 in legal charges. An invoice, dated August 27, 1999 from Bechtel & Cole reflects legal services totalling $11,940.00 rendered through August 20, 1999, and miscellaneous expenses of $833.50.

[7] Lamprecht submits a letter from certified public accountant Jeffrey D. Ring estimating that he provided services in the range of $12,975.00 to $14,375.00, in connection with the Middletown application. Although Lamprecht initially claimed engineering expenses of $3,630.89, invoices from two engineering firms, Smith & Powstenko and du Treil & Rackley, reflect expenses of $3462.87 and $125.00, respectively. Invoices directed to Haley, Bader & Potts from two firms for deposition transcripts reflect charges of $402.65 and $106.08.

[8] See *Jerome Thomas Lamprecht*, supra n.3, at ¶¶ 6-7 & n.14.

[9] Lamprecht did not formally seek the specification of a character issue against Marmet. His allegations are set forth in his Memorandum In Support Of Marmet's Request For Leave To File And Tender Of Supplement To Marmet Reply, filed March 31, 1998. This pleading was filed in response to Marmet's March 19, 1998 Request For Leave To File And Tender Of Supplement To Marmet Reply. (The former ALJ's Letter Affidavit was attached to Marmet's March 19, 1998 Request.)

of an issue for a further evidentiary hearing in this proceeding. There is thus no impediment to the grant of Marmet's application.

9. It is appropriate to approve the settlement agreement but to limit Lamprecht's reimbursement to $151,240.78 in the absence of further documentation of certain expenses for which Lamprecht seeks reimbursement. The Joint Request complies in all respects with the requirements of Section 311(c) of the Communications Act, 47 U.S.C. § 311(c), and, except for the failure to substantiate adequately certain expenses as discussed below, it complies fully with Section 73.3525(a) of the Commission's Rules, governing settlement agreements among competing applicants for new broadcast stations. Attached to the Joint Request is a copy of the Universal Settlement Agreement. By paragraph 14 of the settlement agreement, Lamprecht and Marmet certify under penalty of perjury that the settlement agreement is in the public interest because its approval will expedite the resolution of this proceeding and will permit Marmet's continued operation of Station WAFY(FM) on Channel 276A, Middletown. (Since May 7, 1990 Marmet has served as the interim operator of Station WAFY(FM) on channel 276A.) The parties further affirm that they did not file their Middletown applications for the purpose of reaching or carrying out this settlement agreement, that Lamprecht has not received and will not receive any money or consideration in excess of his legitimate and prudent expenses, that the exact nature and amount of consideration is set forth in the agreement, and that Lamprecht will submit an itemized demonstration of the expenses for which he claims reimbursement.

10. The itemization submitted by Lamprecht reflects claimed expenses of $176,887.14. In accordance with the guidelines permitting the itemization of professional fees in statement form that contains a brief description of the services rendered and their relationship to the instant comparative new proceeding,[10] Lamprecht has adequately documented $147,144.18 in legal expenses[11] and $3587.87 for engineering services. Material submitted to support these expenses, including statements from attorneys representing Lamprecht, computerized billing records, and written invoices, are sufficiently detailed to reflect expenses legitimately and prudently expended in connection with the Middletown application. Contemporaneous invoices for transcript services rendered in connection with the Middletown application are also sufficient to substantiate expenditures of $508.73. Reimbursement with therefore be allowed for these three items totalling $151,240.78.

11. Further documentation is required to verify the remaining claimed expenses, however. First, Lamprecht seeks reimbursement of $14,375.00 for services rendered by an accounting firm. With the exception of $775 for recent tax advice, no billing records exist to corroborate this amount. Lamprecht relies instead on a letter providing a good-faith estimate for services previously provided by a certified public accountant in connection with the Middletown application. Personal recollection of services rendered several years ago falls far short of what is required to support professional expenses, and Lamprecht does not explain his claim for the full

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[10] *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85, 87 ¶ 17 & n.54 (1990), *modified*, 6 FCC Rcd 2901 (1991), *citing Re-evaluation of Standards for Professionals Seeking Reimbursement Pursuant to Section 73.3525*, 88 FCC 2d 1047 (1982).

[11] This amount also includes itemized out-of-pocket expenses, reflected on the invoice from the law firm of Bechtel & Cole, for telecopying ($179.50), photocopying ($382.95), long distance telephone ($23.65), postage ($28.30), messenger service ($88.30), taxi/parking/metro($16.80), filing fee ($100.00), and overnight delivery service ($14.00).

$14,375.00 when the accountant estimated that he provided services in the range of $12,975.00 to $14,375.00. The $775 charge, moreover, represents advice setting forth the tax implications of Lamprecht either entering into a settlement or acquiring the license at auction, and thus appears, without more, to be unrelated to prosecuting Lamprecht's application. These expenses are therefore not recoverable, and the entire amount claimed for accounting services will be disallowed.

12. Second, there is insufficient documentation to warrant reimbursement for a variety of miscellaneous expenses (e.g., postage, telephone charges, and market studies) totaling $3865.84. Calculation of these expenses, according to Lamprecht's September 9, 1999 declaration, is based on a review of his records, including bills, cancelled checks, journal entries, and other materials from which he made a good-faith, conservative estimate of expenditures incurred in nearly 20 years of litigation. He estimates, for example, that he incurred monthly expenses of approximately $5.00 for postage or Federal Express, and $7.50 for telephone calls during that period. While it might be appropriate to accept partial documentation, given the lengthy delays involved in this particular proceeding, there is no explanation, or any supporting documentation, of how the telephone or postal charges for a typical month were derived. Additionally, the calculations appear to assume a steady level of activity during the entire proceeding without taking into account the more than four years during which the Commission had stayed the adjudication of all comparative proceedings, or other periods when it would be reasonable to expect less activity relating to the Middletown application while the parties were awaiting rulings on matters under review. In these circumstances, Lamprecht's wholly uncorroborated assertions are insufficient to justify reimbursements for postage ($1212.96) and telephone costs ($1,643.00). Nor is there a basis to permit reimbursement for a variety of other unsubstantiated expenses totalling $1009.88, such as the cost of local notice publication ($64.88), an FM Market Study ($375), photocopying and related office supplies ($570).

13. Finally, Lamprecht's estimate of travel costs totalling $7,362.50 is similarly deficient, and, absent further documentation, is disallowed. Neither the number of trips claimed nor the asserted cost per trip is unreasonable *per se*. However, in the absence of some actual documentation as to the cost per trip, the frequency of such trips, and their connection with the Middletown proceeding, there is no basis to determine, pursuant to Section 73.3525(a), that the claimed reimbursement does not exceed Lamprecht's legitimate and prudent expenses in this proceeding. Particularly given the significant costs claimed for travel and despite the delays experienced in this proceeding, it would not be unreasonable or burdensome to require at least some documentation as to the actual amounts involved and the frequency of the charges. Thus, as in the case of the claimed charges for telephone, postage and other miscellaneous expenses, the $7,362.50 travel claim will be disallowed.

14. One further matter warrants comment. Following the court's decision in *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993), the Commission initiated a freeze on the adjudication of comparative broadcast licensing cases pending resolution of the questions raised by that decision.[12] In that context the Commission addressed the status of cases in which the award of a construction permit had turned on the comparative issue but the Commission's decision, as here, had not become final, specifically directing that "any application for license to cover a construction permit w[ould]

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

be held in abeyance until the issues raised by the *Bechtel* remand are resolved."[13] Because the grant of Marmet's application has never become final, the actions granting her application (File No. BLH-900514KB) for a license to cover the construction permit and her application (File No. BALH-951120GE) to assign the license to Frederick Broadcasting LLC. were therefore premature. With the approval of the settlement agreement providing for the dismissal of Lamprecht's application, however, it is now appropriate to reaffirm the previous grant of Marmet's application and to terminate this adjudicatory proceeding. It is also appropriate to refer the above described license and assignment applications previously filed by Marmet and Frederick Broadcasting LLC to the Mass Media Bureau for consideration in light of this order, in accordance with its usual application procedures.

15. ACCORDINGLY, IT IS ORDERED That, pursuant to the authority delegated under Section 0.251(c) of the Rules, 47 C.F.R. § 0.251(c), the Joint Petition for Approval of Agreement, Dismissal of Application, and Grant of Amended Application, filed August 19, 1999 by Jerome Thomas Lamprecht and Barbara D. Marmet IS GRANTED to the extent reflected herein; that the application filed by Jerome Thomas Lamprecht (File No. BPH-820409AB) IS DISMISSED; and that the application filed by Barbara D. Marmet (File No. BPH-820908AW) IS GRANTED.

16. IT IS FURTHER ORDERED That the application (File No. BLH-900514KB) for a license to cover the construction permit and the application (File No. BALH-951120GE) to assign the license to Frederick Broadcasting LLC filed by Barbara D. Marmet ARE REFERRED to the Mass Media Bureau; and that the following related pleadings ARE DISMISSED as moot: (a) Motion For Rescission Of License and Consent To Assignment, filed February 16, 1996 by Jerome Thomas Lamprecht; and (b) Motion To Stay Consideration Of Motion For Rescission Of License And Consent To Assignment, filed February 28, 1996 by Barbara D. Marmet and Frederick Broadcasting LLC.

17. IT IS FURTHER ORDERED, That the above captioned adjudicatory proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

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[13] *Modification of FCC Comparative Freeze Order*, 9 FCC Rcd 6689, 6691 (1994).