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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In re Applications of | ) | MM Docket No. 99-153 |
| | ) | |
| READING BROADCASTING, INC. | ) | File No. BPCT-940407KF |
| | ) | |
| For Renewal of License of | ) | |
| Station WTVE(TV), Channel 51 | ) | |
| Reading, Pennsylvania | ) | |
| | ) | |
| and | ) | |
| | ) | |
| ADAMS COMMUNICATIONS CORPORATION | ) | File No. BPCT-940630KG |
| | ) | |
| For Construction Permit for a New | ) | |
| Television Station to Operate on | ) | |
| Channel 51, Reading, Pennsylvania | ) | |

## MEMORANDUM OPINION AND ORDER

Issued: March 3, 2000 Released: March 6, 2000

### Background

1. Adams Communications Corporation ("Adams") filed a Request for Leave to Appeal on February 7, 2000. Oppositions to Request for Leave to Appeal were filed by the Enforcement Bureau ("Bureau") and by Reading Broadcasting, Inc. ("Reading") on February 16, 2000.[1]

2. In Memorandum Opinion and Order, FCC 00M-07, released January 20, 2000 ("MO&O"), the following issues were added:

> To determine whether Adams Communications Corporation has abused the Commission's comparative renewal processes by the filing of a broadcast application for a speculative and/or other improper purposes and;

[1] The time for filing responsive pleadings was extended by Order FCC 00M-15, released February 14, 2000. Adams was granted an extension of time within which to request leave to appeal. Order FCC 00M-12, released February 3, 2000.

> To determine whether such allegations of an abuse of process, if true, disqualify Adams Communications Corporation from receiving a Commission license.

3. A Motion to Enlarge Issues was filed by Reading on November 2, 1999. Reading contended, inter alia, that the Adams' application was filed for an improper purpose. The Presiding Judge rejected adding certain issues but ruled in favor of adding the above issues after hearing related and relevant testimony of an Adams principal during the first phase of this hearing. In seeking leave to appeal, Adams contends that the issues as added are vague and do not provide sufficient notice to Adams of the course of conduct that Adams is alleged to have engaged in which may be violative of the Communications Act or Commission's Rules and that Adams' conduct in choosing to file an application does not sufficiently fit the fact pattern of the Garden State precedent[2] that was relied on in adding the issues.

**Analysis**

4. For a ruling to qualify for interlocutory appeal, the request must raise a new or novel question of law or policy and the ruling must be such that an error would likely require a remand should the appeal be deferred and raised as an exception. 47 C.F.R. §1.301(b).

5. An overview of relevant circumstances will suffice to resolve the question of an appeal. The crux of the matter is whether there is a substantial question of fact raised under all of the relevant circumstances. See MO&O, supra at 24. It was not necessary for the Presiding Judge to find that Adams' conduct squarely fit all facets of the offending fact pattern of Garden State in order to justify adding the issues.[3] Adams was formed for the purpose of filing a competing application for any television station in the United States that was up for renewal and which was broadcasting a home shopping format. Formation of the venture occurred in November 1993, approximately five

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[2] WWOR – TV, Inc., 7 F.C.C. Rcd 636 (1992), aff'd sub nom. Garden State Broadcasting L.P. v. F.C.C., 996 F. 2d 386 (D.C. Cir. 1993).

[3] Adams' precise parsing of the facts under the Garden State precedent would be persuasive for purposes of summary decision. But for purposes of adding an issue there is no requirement to resolve material issues of fact. It is only necessary to show that substantial questions of fact have been raised taking into consideration all relevant circumstances. Citizens for Jazz v. F.C.C., 775 F.2d 392, 395 (D.C. Cir. 1993). Reading responded to Adams' efforts to demonstrate factual differences between Garden State and this case. See Reading's Opposition to Request for Leave to Appeal at 8-11. The Garden State decisions are apposite authorities for adding abuse of process issues in this case against Adams.

months after the Adams principals had received a final installment of a $17 million settlement. They settled after successfully acquiring the construction permit for a television station in Chicago.[4] Presumably, they would not have overlooked the settlement when Adams was formed in November 1993, and when the Adams' application was being filed for Reading in November 1994. The decision to file an application against any renewing "shopping channel" was a strategy conceived by these same principals even before the Video 44 settlement was finalized. (Gilbert, Tr. 1112 – 14.) Thus, the circumstances of filing for Reading after receiving a $17 million payoff are facts to be taken into account in determining Adams' intentions for filing.

6. There also appear to be other substantial questions of fact with regard to the motives and intentions for the filing of Adams' application. Adams testified through Mr. Gilbert that it formed an intention to challenge a renewing home shopping channel because it did not believe that such programming served a public interest. (Gilbert, Tr. 1040 – 41, 1112 – 14.) Yet the Adams' principals did not participate in a rule making on that very same subject of public interest vel non with respect to home shopping programming.[5] After passing up an available opportunity to state its case to the Commission, Adams filed for the Reading permit in the hope or expectation that this proceeding might serve as a means of achieving a "precedent" that home shopping broadcasting is not in the public interest. (Gilbert, Tr. 1115, 1118-19.) A question arises as to why a related rule making would be by-passed.

7. Finally, there are questions of fact under the totality of circumstances as to whether Adams ever intended to operate a broadcast facility at Reading, Pennsylvania. Adams could have filed its application for the purpose of obtaining a settlement that would change the format of the current licensee to something other than exclusive home shopping, with Adams being compensated for legitimate and prudent expenses. See MO&O, supra at Para. 24. That outcome might provide a "precedent" consistent with the adopted public interest goal to which Mr. Gilbert testified. Compare Video 44 settlement. It would accord with the fee agreement dated June 30, 1999, which Adams represented to be a reduction to writing of fee terms that had been orally agreed to at or before Adams application was filed in June, 1994. See MO&O, supra at Para. 6 and Reading Exh. 21.

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[4] A partial history is contained on Harriscope of Chicago, Inc., on remand to Review Board at 3 F.C.C. Rcd 3587 (Review Bd 1988), review denied, 4 F.C.C. Rcd 1209 (1989), remanded sub nom, Monroe Communications Corp. v. F.C.C., 900 F.2d 351 (D.C. Cir. 1990), challenging application granted, 5 F.C. C. Rcd 6383 (1990), recon. denied, 6 F.C.C. Rcd (1991) ("Video 44"). The Settlement is contained in Reading Exh. 19 and the Commission approval dated December 1992 is contained in Reading Exh. 22.

[5] As indicated in the MO&O, supra at n.5, a Notice of Proposed rulemaking was adopted on January 14, 1993, to address that very question which ultimately was answered by the Commission in Home Shopping Issue, 8 F.C.C. Rcd 5321 (1993).

8. The above circumstances require an inquiry into whether there has been an abuse of process. WWOR-TV, Inc., 7 F.C.C. Rcd 636, 641 (1992). An abuse of process has various forms.

> The term "abuse of process" can be generally defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure or rule in a manner which subverts the underlying intended purpose of that process, procedure or rule.

Formulation of Policies and Rules Relating to Broadcast Renewal Applications, 4 F.C.C, Rcd 4780 at n. 4. The Communications Act categorically rejects settlements that involve the payment of money to a dismissing applicant if such dismissing applicant filed its application for the purpose of achieving such an agreement. See 47 U.S.C. §311 (d)(3). But, there may be other unauthorized motives besides a cash buyout. See James C. Sliger, 70 F.C.C. 2d 1565, 1571 (Review Bd 1979) (there can be an abuse of process by a threat to file or by actually filing a competing application when the purpose of filing in market A is to convince an opponent to withdraw an application for a station in market B).

9. The Communications Act provides with respect to settlements in renewal cases:

> If there are pending before the Commission an application for renewal of a license granted for the operation of a broadcasting station and one or more applications for a construction permit relating to such station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications in exchange for the payment of money, or the transfer of assets **or of any other thing of value** by the remaining applicant or applicants.

47 U.S.C. §311(d)(1). (Emphasis added.) The amount of money paid could be a payment of expenses. The other thing of value could be a promise by Reading to eliminate or curtail home shopping broadcasting, which would be a settlement commitment or "precedent" of value to Adams. Cf. Reading Exh. 19 (settlement agreement with provision for Spanish broadcasting was approved in Video 44.)

10. If a similar type agreement were to be reached here, it also must be submitted for approval. And there are conditions set under the Act for granting approval.

> The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) **no party to the agreement filed its application for the purpose of reaching or carrying out such agreement**.

47. U.S.C. §311(d)(3). (Emphasis added.) The Act prohibits a settlement from being approved if there are findings that Adams filed its application for the purpose of achieving a settlement. In order to address that question as a disputed issue in this proceeding, issues should be added under the abuse of process rubric because the conduct of Adams, if found to be true, could fall within the definition of abuse of process quoted above. See WWOR-TV, Inc., 7 F.C.C. Rcd 636, 641 at Para. 42 (conduct warranting rejection of settlement and denial of challenging applicant's application for an abuse of process).

11. The Adams principals are experienced business persons who made a lengthy and successful challenge in Video 44. So they know what can be expected and what is necessary to achieve an objective by settlement. There may have been no business plan for construction, operation and programming if the permit is awarded to Adams. The bona fides of ascertainment efforts of the station's public service programming are questionable. There was no inspection of the station's public file. But there was a valuation of the station after the filing of the Adams application under questionable circumstances. The valuation was obtained by Telemundo, a large broadcaster that apparently expressed to Adams some interest in the station. Evidentially, at least one of Adams' principals is very much interested in having a Spanish format on Channel 51. (Gilbert, Tr. 1125-27.) The Adams principals actually had dealt with Telemundo in the Video 44 case. (Gilbert, Tr. 1008.) According to Mr. Gilbert, Adams, Telemundo and Reading's president, Mr. Micheal Parker, shared one third each in the valuation's cost. (Gilbert, Tr. 1096.) These are circumstances which raise substantial questions of fact.

## Conclusion

12. It is concluded that there is no new or novel question and no threat of remand if the points for appeal raised by Adams await resolution after exceptions. However, in an abundance of caution and to assure adequate notice to Adams of the scope of abuse of process issues that are expected to be litigated, the added issues are restated below.

**Restated Issues**

A. To determine whether the principals of Adams Communications Corporation ("Adams") filed, or caused to be filed, an application for construction permit in the hope or expectation of achieving through litigation and settlement, a "precedent" or other recognition that the home shopping television broadcasting format does not serve the public interest.

B. To determine in light of findings and conclusions as to issue A above, whether the principals of Adams Communications Corporation had, and continue to have, from June 30, 1994, to the present, a bona fide intention to construct and operate a television broadcasting station at Reading, Pennsylvania.

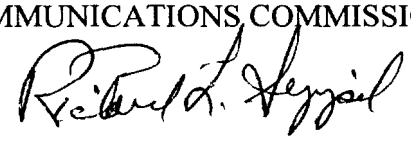
C. To determine in light of findings and conclusions as to issues A and B above, whether Adams Communications Corporation has engaged and/or is engaging in an abuse of process, i.e., an abuse of the Commission's comparative renewal litigation and settlement process.

D. If issues A and/or B and/or C are true, to determine whether Adams Communications Corporation is qualified to receive a Commission license, even if Adams would be willing to accept a settlement payment that is limited to legitimate and prudent expenses in return for dismissing its application.

**Order**

Accordingly, IT IS ORDERED that the Request for Leave to Appeal that was filed by Adams Communications Corporation on February 7, 2000, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION[6]



Richard L. Sippel
Administrative Law Judge

[6] Copies of this ruling were e-mailed to all counsel on date of issuance.