

Before the  
**FEDERAL COMMUNICATIONS COMMISSION** FCC 00I-05  
 Washington, D.C. 20554 00246

In re Applications of	)	MM Docket No. <u>90-380</u>
	)	
RIO GRANDE BROADCASTING CO.	)	File No. BPH-880815MV
	)	
ROBERTO PASSALACQUA	)	File No. BPH-880816NN
	)	
IRENE RODRIGUEZ DIAZ	)	File No. BPH-880816OR
De McCOMAS	)	
	)	
UNITED BROADCASTERS COMPANY	)	File No. BPH-880816OW
	)	

For Construction Permit For A New FM  
 Station On Channel 247A  
 At Rio Grande, Puerto

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 25, 2000; Released: July 27, 2000**

By Assistant General Counsel, Administrative Law Division:

1. This order grants the Joint Request for Approval of Settlement Agreement filed on February 17, 2000 by Rio Grande Broadcasting Company (RGB), Roberto Passalacqua, Irene Rodriguez Diaz de McComas, and United Broadcasters Company.<sup>1</sup> It finds that the Settlement Agreement, as well the ancillary Merger and Consulting Agreements, complies fully with Section 311(c) of the Communications Act, 47 U.S.C. § 311(c), and Section 73.3525(a) of the Commission's Rules, 47 C.F.R. § 73.3525(a).

2. RGB, United, McComas, and Passalacqua are the remaining applicants for a construction permit for a new FM radio station on channel 247A at Rio Grande, Puerto Rico. Before the adoption of competitive bidding procedures to govern the resolution of frozen hearing cases involving competing broadcast applications filed before July 1,

<sup>1</sup> The following related pleadings are also pending before the Commission: (a) Petition for Leave to Amend, filed April 7, 2000, by United Broadcasters Company; (b) Amendment, tendered for filing April 7, 2000, by United Broadcasters Company substituting Rio Grande Radio, Inc. for the application of United Broadcasters Company; and (c) Letter and attached amendment, dated May 9, 2000, from Richard F. Swift, Counsel for United Broadcasters Company, to Magalie Roman Salas, Secretary, Federal Communications Commission, providing a completed Section II to FCC Form 301.

1997,<sup>2</sup> the Review Board had granted United's application on comparative grounds, and dismissed Passalacqua's application for lack of a viable transmitter site.<sup>3</sup> The Board had previously reinstated McComas, thereby reversing the ALJ's dismissal of her application because it was not accompanied by an original signature.<sup>4</sup> Applications for review of the Board's actions filed by RGB, McComas, and Passalacqua are pending before the Commission. Also pending before the Commission is a petition to add *ex parte*, abuse of process, and character issues against RGB. These pleadings were not previously considered because this case was subject to the freeze on comparative proceedings initiated February 25, 1994 after the United States Court of Appeals for the District of Columbia Circuit in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), invalidated the central comparative criterion for resolving comparative broadcast cases.

3. The Commission dismissed a previous settlement agreement between RGB and United because it was conditioned on the denial or dismissal of McComas's and Passalacqua's applications despite their right to compete in the competitive bidding procedures for this facility, and referred all four applications to the Mass Media and Wireless Telecommunications Bureaus for processing in accordance with the Commission's competitive bidding procedures.<sup>5</sup> In doing so, it stayed the hearing proceeding, indicating that, unless United won the auction, the hearing proceeding would resume to consider questions pertaining to the auction winner.<sup>6</sup> The four applications were designated for inclusion in Closed Broadcast Auction No. 28, scheduled to begin March 21, 2000 but, after the filing of the Joint Request for Approval of Settlement Agreement on February 17, 2000, the applicants were notified that their applications had been removed from the auction schedule.<sup>7</sup> And, to permit Commission consideration of the universal settlement, the United States Court of Appeals for the District of Columbia Circuit remanded the record concerning appeals filed by RGB and United.<sup>8</sup>

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<sup>2</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services* (First Report and Order), 13 FCC Rcd 15920 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *recon. dismissed*, DA 00-445 (MMB Mar. 1, 2000), *aff'd sub nom. Orion Communications Ltd., et al. v. FCC*, Nos. 98-1424 and consolidated cases (D.C. Cir. decided June 13, 2000). United Broadcasters Company was one of the petitioners in *Orion Communications Ltd., et al. v. FCC*.

<sup>3</sup> *Rio Grande Broadcasting Co.*, 8 FCC Rcd 6256 (Rev. Bd. 1993), *recon. denied*, 8 FCC Rcd 8726 (Rev. Bd. 1993), *applications for review pending*.

<sup>4</sup> *Rio Grande Broadcasting Co.*, 6 FCC Rcd 5519 (Rev. Bd. 1991), *reversing Memorandum Opinion and Order*, FCC 91M-2432 (ALJ Aug. 6, 1991), *application for review pending*.

<sup>5</sup> *Rio Grande Broadcasting*, 14 FCC Rcd 11088 (1999), *recon. denied*, FCC 99-261 (rel. Sept. 28, 1999).

<sup>6</sup> 14 FCC Rcd at 11093-94 ¶¶ 13-14.

<sup>7</sup> Letter, dated February 18, 2000, from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, Federal Communications Commission, to Messrs. Richard F. Swift, Esq., Timothy K. Brady, Esq., Jerome S. Boros, Esq., and Roy F. Perkins, Esq.

<sup>8</sup> *Rio Grande Broadcasting, et al. v. FCC*, Case Nos. 99-1432 and 99-1499 (D.C. Cir. June 8, 2000) (remanding the record to the Commission, holding the case in abeyance pending further order by the court, and directing the Commission to file status reports at 60-day intervals).

4. The proposed settlement agreement provides for the merger of the interests of United, RGB, and McComas into a newly formed entity, Rio Grande Radio, Inc. (RGR), the amendment of United's application to substitute RGR as the applicant, and the dismissal of McComas's, RGB's, and Passalacqua's applications. The proposed permittee of the station, RGR, is a Puerto Rico corporation to be jointly owned by United, McComas, and RGB, with each applicant having one-third equity and one-third voting interests. Pursuant to the settlement agreement, Passalacqua will dismiss his application in exchange for a payment of \$90,000, or such lesser reimbursement as the Commission shall approve. Additionally, for a period of one year after a final Commission order approving the Joint Request and granting a construction permit to RGR, the station will employ Passalacqua as a consultant, who will be obligated to devote up to 50 hours a month to tasks requested by the permittee. Passalacqua will receive a retainer of \$30,000.00 to be paid in monthly installments of \$2500.00. Finally, the parties have agreed that, upon the finality of an order approving the Settlement, Merger, and Consulting Agreements, RGB and United shall request the dismissal of their pending court appeals. The Enforcement Bureau, based on its review of the Joint Request and its discussions with the Mass Media Bureau, has orally indicated that it does not oppose approval of the Joint Request or acceptance of the related amendments to United's application.<sup>9</sup>

5. It is appropriate to grant the Joint Request for Approval of Settlement Agreement. The Joint Request complies in all respects with the requirements of Section 311(c) of the Communications Act, and Section 73.3525(a) of the Commission's Rules governing settlement agreements among competing applicants for new broadcast stations. Attached to the Joint Request are copies of the Settlement Agreement and of the ancillary Merger and Consulting Agreements. By paragraph 7 of the Settlement Agreement each party to the agreement certified under penalty of perjury: (1) that this agreement would serve the public interest by expediting the inauguration of new radio service in Rio Grande, Puerto Rico; (2) that its respective application was not filed for the purpose of reaching or carrying out this Agreement or any settlement agreement; and (3) that, except as set forth herein, no consideration will be paid or provided to the parties in connection with this Agreement and no other consideration, direct or indirect, has been paid or promised, to any party or its principals, in exchange for the mutual promises contained in the Agreement.

6. The agreement complies with the payment limitations set forth in Section 73.3525(a), requiring certification that neither the applicant nor its principals has received money or other consideration in excess of the applicant's legitimate and prudent expenses. First, the agreement reflects a *bona fide* merger of the interests of United, RGB and McComas, and is thus exempt from the rule limiting any party to a settlement

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<sup>9</sup> Pursuant to Section 0.111(b) of the Commission's Rules, 47 C.F.R. § 0.111(b), the Enforcement Bureau serves as the Commission's trial staff in adjudicatory proceedings.

agreement to its legitimate and prudent expenses.<sup>10</sup> Each of these three applicants is contributing its pro rata share of equity in RGR, and none is receiving a cash payment, in addition to its one-third equity and voting interests, that would subject the merger to heightened scrutiny.<sup>11</sup> To facilitate the merger, RGR, in which United, RGB and McComas will each have a one-third equity interest, will be substituted for United. Thus, as consideration for their respective interests in the permittee, McComas and RGB are dismissing their applications, and United is giving up two-thirds of its interest in the construction permit. Provisions relating to the issuance of stock, the capitalization of the corporation, the election of corporate officers and directors, and the termination of corporate affairs likewise confirm that this is a *bona fide* merger. Specifically, only voting shares are authorized and all are to be issued proportionally to the applicants (or their respective principals).<sup>12</sup> Each applicant is obliged to contribute \$45,000 to the capital of the corporation and unanimous consent is required to approve expenditures (or indebtedness) in excess of \$135,000.00 and to approve any modification of the corporation's organizational documents. A three-member Board of Directors will govern the corporation, with each applicant (or its principals, collectively) entitled to elect one member. Although corporate officers are to be elected by majority vote of the Board, the Merger Agreement provides that McComas will serve as president for the first six months, Jorge Figueroa for the next twelve months, and Josantonio Mellado for the next eighteen months.<sup>13</sup> Finally, any shareholder, with five days notice, can cause the assets or shares of the corporation to be sold if, for a period of ninety days during the first six months of the corporation's existence or for a period 15 days thereafter, all the shareholders and/or directors are unable to agree as to any action necessary to carrying out the business of the corporation.

7. Second, the provisions relating to the dismissal of Passalacqua's application comply with Section 73.3525(a)'s restriction on payments to dismissing applicants. As consideration for his agreement to dismiss his application, Passalacqua will be paid \$90,000.00 or such lesser amount as the Commission shall approve.

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<sup>10</sup> See Section 73.3525(a)(3), expressly exempting participants in a *bona fide* merger from having to submit "[a] certification that neither the applicant nor its principals has received any money or other consideration in excess of the legitimate and prudent expenses of the applicant."

<sup>11</sup> See *Amendment of Section 73.3525*, 6 FCC Rcd 2901, 2902 (1991), in which the Commission stated that it would examine with a heightened level of scrutiny any merger proposal where the dismissing applicants receive cash. This agreement is therefore distinguishable from the one initially rejected in *Gonzales Broadcasting, Inc.*, 12 FCC Rcd 4665 ¶¶ 13-20 (OGC 1997), *recon. granted*, 12 FCC Rcd 12253 (1997), as contrary to Section 73.3525(a)'s restriction on payments to dismissing applicants. Pursuant to the 180-day waiver provision set forth in Section 309(1)(3), the agreement in *Gonzales* was ultimately approved. This settlement agreement, having been filed after the expiration of the 180-day period, is ineligible for a waiver of the restriction on settlement payments, however. See *First Report and Order*, 13 FCC Rcd at 15947-49 ¶¶ 73-77.

<sup>12</sup> McComas filed her application as an individual. United and RGB, however, are partnerships. The Merger Agreement provides that United's one-third interest in the permittee will be divided among its partners in accordance to their partnership shares, and that RGB's one-third interest will be divided among its partners in accordance to their partnership shares.

<sup>13</sup> Figueroa is a partner of RGB, and Mellado is a partner of United.

Declarations attached to the Joint Request are sufficient to corroborate legitimate and prudent expenses in prosecuting Passalacqua's application of at least \$90,000.00, as required by Section 73.3525(a)(5). Specifically, a declaration from Roy F. Perkins, who has represented Passalacqua since the inception of this proceeding in September 1990, reflects legal expenses of \$83,885.90, and is sufficiently detailed, under guidelines permitting itemization of professional fees in statement form, to document that this amount was legitimately and prudently expended in connection with Passalacqua's Rio Grande application.<sup>14</sup> Additionally, a declaration from Passalacqua claims legitimate and prudent expenses totalling \$100,045.00. No additional supporting documentation has been provided, however. Nevertheless, Passalacqua's declaration demonstrates sufficient additional expenditures, including the \$1,800.00 application filing fee and the \$6,760.00 hearing fee, to justify reimbursement in the amount of \$90,000.

8. Finally, the limitation on payments to dismissing applicants is not contravened by the one-year Consulting Agreement between Passalacqua and the Merging Applicants providing for Passalacqua's employment as a consultant, obligated to devote a maximum of 50 hours a month to the station in exchange for a \$30,000.00 retainer, payable in monthly installments of \$2500.00. As specified by Section 73.3525(a), requiring the submission of copies of any ancillary agreement, a copy of the Consulting Agreement is attached to the parties' Joint Request. The agreement reflects that Passalacqua has over 20 years of broadcast programming and managerial experience and that, as a long-term local resident with significant civic participation in the service area, he is especially knowledgeable about successfully operating a radio station in this particular market. It reflects further that the Merging Applicants, whose principals have less extensive broadcast experience than Passalacqua,<sup>15</sup> are desirous of taking advantage of his greater experience. Given Passalacqua's substantial experience in the Rio Grande market and his obligation to devote up to 50 hours each month to the station, the Consultant Agreement appears to be an arms-length transaction in which Passalacqua will receive fair compensation for services performed for the benefit of the proposed station. Although the agreement does not specify a minimum number of hours to be provided each month, its clear intent, as illustrated by the duty to perform, at the permittee's discretion, a variety of services related to station construction and operation (including planning, equipment purchases, facility design, installation and construction), is that RGR will utilize Passalacqua's considerable experience during the critical first

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<sup>14</sup> *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85, 87 & 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 Rcd 1047 (1982).

<sup>15</sup> The ALJ found that since 1966 Passalacqua had worked at radio and television stations in Puerto Rico as an announcer, news reporter, writer, producer, and program host. *Initial Decision*, 7 FCC Rcd at 7685 ¶ 31. Of the other applicants, only the integration proposal of United's principal, Luis Arturo Guzman, was found to be qualitatively enhanced by past broadcast experience. 7 FCC Rcd at 7688-90 ¶¶ 56, 72.

year after the construction permit is issued. In these circumstances, the compensation is commensurate with Passalacqua's unique experience and is not excessive.<sup>16</sup>

9. The provisions relating to the termination of the Consultant Agreement confirm, moreover, that the \$30,000.00 retainer is not additional consideration, in excess of legitimate and prudent expenses, for Passalacqua's promise to dismiss his application. Significantly, the agreement provides that, with 60 days notice, Passalacqua may terminate the agreement for any reason, and that the Merging Applicants may terminate the agreement at any time if Passalacqua acquires an ownership interest in any AM or FM broadcast station serving the Rio Grande or San Juan radio markets. In the event of termination, the retainer will be prorated on a monthly basis and Passalacqua will be obligated to refund any unearned portion of the retainer.

10. It is also appropriate to approve the amendments, submitted April 7, and May 9, 2000 substituting RGR, in lieu of United, as the applicant. Because there are no unresolved questions pertaining to United, there is no impediment to the grant of its application. There are, however, unresolved questions pertaining to McComas and RGB, each of which will have one-third equity and voting interests in the surviving permittee, RGR. These interests are cognizable under the Commission's multiple ownership rules that define interests having "that degree of influence or control over the licensee and its facilities as should subject it to limitation." *Attribution of Ownership Interests*, 97 FCC 2d 997, 999 ¶ 2 (1984). In contrast to other cases without such an interest,<sup>17</sup> it is appropriate to consider the unresolved questions relating to RGB and McComas.

11. There is an unresolved motion, filed by McComas, seeking to reopen the record and add *ex parte*, abuse of process, and character issues against RGB. The motion is without merit and may be denied. It is premised on RGB's filing of comments in GC Docket No. 92-52, a separate notice and comment rulemaking proceeding initiated to reexamine the policy statement on comparative broadcast hearings, that were not served on the other parties to this hearing proceeding. The *ex parte* rules, however, would require such service only insofar as comments filed in the rulemaking proceeding addressed the merits of the competing applications at issue in this particular hearing proceeding. Despite identifying RGB as an applicant in this restricted proceeding, RGB's rulemaking comments merely addressed the continuing viability of various comparative criteria after *Bechtel* without focusing on the merits of its own particular application. Comments of such general applicability, filed in a separate notice and comment proceeding and not directed to the outcome of this particular proceeding, did not

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<sup>16</sup> See *Tracy A. Moore*, 8 FCC Rcd 3577 (Rev. Bd. 1993), *application for review granted*, 9 FCC Rcd 314 (OGC 1993), approving a settlement agreement that included an agreement that a dismissing applicant would receive \$60,000.00 over a two-year period during which she was obligated to provide at least 400 but not more than 800 hours of consulting services.

<sup>17</sup> See *RKO General (KHJ-TV)*, 3 FCC Rcd 9057, 5066 n.19 (1988), in which the Commission held that "the character qualifications of owners whose interests are not attributable under the multiple ownership rules and who do not participate in station management are not considered." See also *Gonzales*, 12 FCC Rcd at 12256-57 ¶ 13, indicating that the broadcast-related character qualifications of holders of non-cognizable interests, who will not actively participate in station affairs, are not considered.

constitute an *ex parte* presentation in this proceeding, as defined by Section 1.1202, or otherwise violate Section 1.1208's prohibition against *ex parte* presentations in a restricted proceeding. Thus, the outstanding motion does not make a *prima facie* showing that RGB has violated any Commission rule or abused any Commission process. RGB's one-third ownership interest in the ultimate permittee is, therefore, not an impediment to accepting amendments substituting Radio Grande Radio, Inc. for the application of United Broadcasters Company.

12. McComas's one-third interest in the ultimate permittee is also not a basis to reject the amendments. The only outstanding question pertaining to McComas's application was raised in Passalacqua's pending application for review challenging the Review Board's reinstatement of McComas's application, previously dismissed by the ALJ because it contained facsimile-transmitted signatures.<sup>18</sup> Given McComas's agreement to dismiss her application, however, there is no need to consider the merits of a matter not involving alleged misconduct but only the acceptability of that application. There is thus no question of basic qualifications that must be resolved in order to grant a construction permit to an entity that is one-third owned and voted by McComas, and Passalacqua's application for review may be dismissed as moot.

13. 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 Request for Approval of Settlement Agreement, filed February 17, 2000, by Rio Grande Broadcasting Company, Roberto Passalacqua, Irene Rodriguez Diaz de McComas, and United Broadcasters Company IS GRANTED, and the attached Settlement Agreement, Merger Agreement, and Consulting Agreement ARE APPROVED.

14. IT IS FURTHER ORDERED, That the Motion to Reopen the Record and Enlarge the Issues Against Rio Grande Broadcasting Company, filed August 5, 1994, by Irene Rodriguez De McComas IS DENIED and that the Applications for Review filed on October 1, 1993, by Rio Grande Broadcasting and by Irene Rodriguez De McComas and on January 13, 1994, by Roberto Passalacqua ARE DISMISSED.

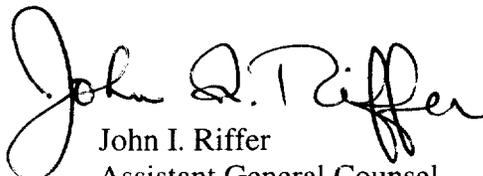
15. IT IS FURTHER ORDERED, That the applications filed by Rio Grande Broadcasting Company (File No. BPH-880815MV), Roberto Passalacqua (File No. BPH-880816NN), and Irene Rodriguez Diaz de McComas (File No. BPH-880816OR) ARE DISMISSED; that the Petition for Leave to Amend, filed April 7, 2000 by United Broadcasters Company IS GRANTED, and the Amendments tendered for filing on April 7, and May 9, 2000 by United Broadcasters Company ARE ACCEPTED; and that the application filed by United Broadcasters Company (File No. BPH-880816OW), as amended to substitute Rio Grande Radio, Inc. as the applicant, IS GRANTED.

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<sup>18</sup> In its application for review, Passalacqua also requested Commission review of the Board's dismissal of his application for lack of a transmitter site and of its comparative analysis.

16. IT IS FURTHER ORDERED, That the adjudicatory proceeding in MM Docket No. 90-380 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "John I. Riffer". The signature is written in a cursive style with a large initial "J" and "I".

John I. Riffer  
Assistant General Counsel  
Administrative Law Division  
Office of General Counsel