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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. <u>97-128</u>
)	
Martin W. Hoffman, Trustee-in-Bankruptcy)	
for Astroline Communications Company)	
)	
For Renewal of License of)	
Station WHCT-TV, Hartford, Connecticut)	File No. BRCT-881201LG
)	
and)	
)	
Shurberg Broadcasting of Hartford)	
)	
For Construction Permit for a New)	File No. BPCT-831202KF
Television Station to Operate on)	
Channel 18, Hartford, Connecticut)	

To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, Richard P. Ramirez ("Ramirez") hereby requests that the Commission reconsider the decision in its November 8, 2000, Memorandum Opinion and Order (the "Order") to approve the Joint Request for Approval of Settlement Agreement ("Joint Settlement Request"), filed by Martin W. Hoffman, Trustee-In-Bankruptcy for Astroline Communications Company Limited Partnership ("Trustee"), licensee of Station WHCT-TV, Hartford, Connecticut; Two If By Sea Broadcasting Corporation ("TIBS"), and Alan Shurberg d/b/a Shurberg Broadcasting of Hartford ("Shurberg") (collectively, the "Joint Parties") on April 4, 2000.

Ramirez contends herein that the Commission's approval of the Joint Settlement Request contravenes the Communications Act of 1934, the Commission's rules, recent Commission precedent, and the public interest.

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SUMMARY OF ARGUMENT

As discussed below, Ramirez does not oppose quick resolution of this matter, however, he believes that the Commission should deny the Joint Settlement Request, particularly with respect to Shurberg. Waiver of Section 73.3523 eviscerates the underlying purpose of the rule and contravenes the Communications Act. Waiver of Section 73.3523 also is not in the public interest, and encourages protracted, prolonged comparative hearings which will be rewarded by the Commission quick approval of a settlement agreement. This is not in the public interest because it wastes Commission resources which in this case extended over a 15 year period. Clearly, Shurberg has not incurred 7.48 million dollars worth of legitimate and prudent expenses. Also, Shurberg has not meet his burden of proof that a waiver of Section 73.3523 is justified. Indeed, Shurberg has been silent as to this Joint Settlement Request, submitting no documentation or support for his presence as a party or his settlement payment.

Finally, the Commission should strongly consider disposing of the license for WHCT-TV through competitive bidding to determine which entity, including Shurberg, places the highest value on the spectrum. Allocating this station via an auction is the fairest and most expeditious method. The auction would reward another public taxpayers, and not individuals or private parties seeking to exploit a administrative process.

I. Waiver of Section 73.3523 Eviscerates the Underlying Purpose of the Rule and of Section 311(d) of the Communications Act.

Waiver of Section 73.3523 and Section 311(d) of the Communications Act in this instance eviscerates the Act and the rule itself. The purpose of Section 311(d) of the Communications Act and Section 73.3523 is to prevent unjust enrichment of parties filing competing broadcast applications. Since 1983, Shurberg abused the Commission processes through protracted and constant prosecution of his dismissed application. Even in its reinstated state in 1991, Shurberg's application was defective and non-prosecutable. Although the Hearing Designation Order made Shurberg a party to this proceeding, Shurberg lost the ALJ's Initial Decision. He is entitled to only the legitimate and prudent expenses unless his Joint Settlement Request is supported by evidence to support a waiver of the Commission's rules.

It is well established Commission policy that:

"The applicant (seeking the waiver) must clearly demonstrate that the general rule is not in the public interest when applied to its particular case and that granting the waiver will not undermine the public policy served by the rule. Where a waiver is found to be in the public interest, it is generally expected that the waiver will not be so broad as to eviscerate the rule. Rather, the request must be tailored to the specific contours of the exceptional circumstances."¹

The Commission must reconsider its decision to waive Section 73.3523 of its rules. First, there has been no showing or record evidence by Shurberg, any of the settling parties, or the Commission that Shurberg's legitimate and prudent expenses in prosecuting this case is \$7.48 million. The burden of proof for seeking waiver of the Commission's rules first lies with the

1. *1997 Annual Access Tariff Filings US West Communications Petition to Eliminate Sharing as of January 1, 1997*, DA 97-1347, 12 FCC Rcd 8458 (CCB 1997), citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

party seeking a waiver. This burden has not been met – Shurberg has made no clear demonstration that waiver of the rule, as it applies to his unjust enrichment, is in the public interest. The unjust enrichment appears to be so astronomical that it is not specifically tailored to his circumstances.

At a minimum, the Commission should require Shurberg to itemize his expenses in this case, so to permit the Commission to quantify the magnitude of the windfall and the extent of the waiver. The Commission can not arbitrarily grant a waiver without knowing the facts behind the scope or “specific contours” of the amount that is being waived. For example, a waiver amounting to a \$100,000 windfall should be evaluated differently than a \$7,000,000 windfall.

Secondly, the Commission erroneously concluded that Shurberg’s 1983 application was not filed for an abusive purpose, and he has not regularly abused the Commission processes. Nothing can be further from the truth. There is a distinction between diligent prosecution of an application and filings made for the sake of harassment, slander, anti-competition and financial gain. But for the numerous and frequently unsuccessful attempts to disqualify Astroline as a *bona fide* applicant, Astroline was always found to be legally, financially and technically qualified to bring quality television broadcast service to the Hartford, Connecticut community, and was repeatedly adjudicated as being so. Shurberg clearly lost on the merits of the case at the earliest stage of this proceeding.² Therefore, this matter could have been resolved years ago, but for the protracted and extortionist filings of Shurberg. Certainly, the Commission must not unjustly enrich an applicant who intentionally prolonged a proceeding at the expense of driving a

2. MO&O at ¶19. “. . .we disagree with the *merits* of Shurberg’s adversarial position under the Astroline misrepresentation issue. . . .”

bona fide business into bankruptcy and expending valuable Commission resources.³ That is why the FCC has often stated that “. . . [t]he adjudicated wrongdoer will allegedly receive no more than legitimate and prudent expenses. . . .”⁴ Shurberg lost the Initial Decision and was found to have made baseless and frivolous claims. He should not be made wealthy in defeat.

II. Waiver of Section 73.3523 is Not in the Public Interest.

An award of millions of dollars to Shurberg sends the wrong message to other participants in Commission proceedings – it promotes prolonged hearings for the sake of seeking large settlements that will be routinely approved by the Commission. The very objective that Section 73.3523 and Section 311(d) of the Act attempt to preclude is promoted by the Commission’s waiver of Section 73.3523 and approval of the Joint Settlement Request as to Shurberg. Other competing broadcast applicants will interpret this decision as a reason to continue litigating their cases until a “white knight” comes along and makes a large payment. This delay tactic will extend FCC cases and promote frivolous claims like those brought for nearly a decade by Shurberg since he lost his Supreme Court case. Astroline v. FCC (1989). The Commission should not permit Shurberg to receive a payment beyond his legitimate and prudent expenses. The public interest benefit of terminating a lengthy Commission proceeding, avoiding the need for a comparative renewal hearing to select a licensee for the station, and allowing for termination of the Astroline bankruptcy proceeding is “offset by the far greater

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3. The Commission asserts that there is no evidence that Shurberg filed his application for abusive purposes, but the record speaks for itself. Moreover, the Commission misplaces the burden of proof in this instance by shifting the burden to Ramirez. The burden of proof that waiver of the Commission’s rules lies with the party seeking the waiver in first instance. *See supra*.
 4. *In re Chameleon Radio Corporation*, MM Docket No. 96-173, released December 1, 2000 at ¶6 (“Chameleon”).

detriment that would occur if [the Commission] approved a transaction involving” an applicant who lost on the merits of the case several years ago.⁵

III. Alternatively, the Commission Should Auction the Spectrum for Channel 18.

The quickest resolution of this matter is to simply auction the spectrum. In light of recent cases and legislative developments, auctioning the spectrum in question is the better approach to resolving this matter.⁶ It is a true test to determine the fair market value of this station and is a way to transfer the license to a qualified licensee without rewarding a wrongdoer. It also lets the profits of the sale go to the real owners of the spectrum – the public.

Pursuant to the Balanced Budget Act of 1997, Congress gave the Commission the authority and the discretion to use competitive bidding to resolve any mutually exclusive applications filed prior to July 1, 1997.⁷ The Commission noted that “resolving the pending comparative licensing cases subject to Section 309(i) through competitive bidding would service the public interest.”⁸ The Commission also noted that

auctions will generally be fairer and more expeditious than deciding the pending mutually exclusive applications filed before July 1, 1997 through the comparative hearing process. We conclude that auctions will generally expedite service and better serve the public interest in these cases. Based upon our long experience with the comparative process, we believe that once the competitive bidding procedures, as well as any special processing rules for these pending comparative case are in place, auctions will result in a more

5. *Chameleon* at ¶6.

6. See generally *Chameleon*.

7. The Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251, 258 (1997), codified at 47 U.S.C. § 309(i) (“1997 Budget Act”).

8. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, Report and Order, 13 FCC Rcd 15920 at ¶32. (1998) (“Broadcast Auction Proceeding”).

expeditious resolution of each particular case, thereby expediting the initiation of new broadcast service to the public.⁹

Using the competitive bidding process to resolve this matter will: (1) encourage the efficient use of the frequency, (2) assign the frequency to the eligible party (like Shurberg) that values it the most and (3) recover for the public (not private parties that have worked to “game” the FCC process) a portion of the financial value of spectrum made available for commercial use.¹⁰

The policy against “white knights” was stated in *Rebecca Radio of Marco* 5 FCC Rcd 937 (1990).

In 1997, the Commission’s authority to use auctions was expanded by Congress as a way to promote competitive bidding rather than “white knight settlement agreements.” See First Report and Order MM Docket No. 97-234 at ¶30. Congress and the FCC created a narrow window and a limited number of circumstances when “white knight settlements” would be permitted in most comparative hearing cases before February 1, 1998. The Commission clearly stated that “we are not inclined to waive any of our settlement rules and policies beyond that period.” *Id.* at ¶31. Earlier this year, the U.S. Court of Appeals reenforced the Commission’s obligation to utilize auctions rather than settlements and white knight transfers. In Orion Communications v. FCC, 213 F.3d 761 (June 13, 2000), the Court denied the requested settlement procedure because it undermined the auction process.

“Moreover, given our statutory obligation to utilize auctions as a primary licensing tool, the protection of the integrity of the auction process is of paramount importance, and we are consequently concerned about the actions that compromise the integrity of the process. *Id.*”

9. *Id.* at ¶34.

10. *Id.* at ¶40.

Therefore, the Commission should direct the Mass Media Bureau to solicit and process, in accordance with its usual competitive bidding procedures for commercial broadcast services, applications for a construction permit for a new TV station on Channel 18, so that the service provided on WHCT-TV can be continued in the public interest without a need to bend the FCC rules.

Respectfully submitted,

Date: December 8, 2002


Richard Ramirez

DECLARATION OF RICHARD P. RAMIREZ

I, Richard P. Ramirez, former general partner of Astroline Communications Company Limited Partnership, hereby certify under penalty of perjury that I was an active participant in the captioned proceeding. I also certify that I have read the foregoing "Petition For Reconsideration". All of the statements contained therein are true and accurate to the best of my knowledge and belief. I also certify that this declaration was not given under fraud, coercion or duress.

December 8, 2000
Date

Richard P. Ramirez
Richard P. Ramirez

CERTIFICATE OF SERVICE

I, Richard Ramirez, hereby certify that a copy of the foregoing "Petition For Reconsideration" was deposited into the first class mail on December 8, 2000, postage prepaid, to each of the following:

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