

RECEIVED MAIL ROOM

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

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

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ORDER

Adopted: May 16, 2001

Released: May 21, 2001

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

1. In this Order, we deny the Petition for Reconsideration filed December 8, 2000 by Richard P. Ramirez. Ramirez seeks reconsideration of the Commission's Memorandum Opinion and Order ("M O & O"), FCC 00-387, released November 8, 2000. Our M O & O approved a settlement of this comparative broadcast renewal proceeding involving the application for renewal of license for WHCT-TV of Martin W. Hoffman, Trustee-in-Bankruptcy ("Hoffman" or "Trustee") for Astroline Communications Company Limited Partnership ("Astroline"), and the competing application for Channel 18 of Shurberg Broadcasting of Hartford ("Shurberg").¹

2. The Commission approved the minority distress sale of Station WHCT-TV to Astroline in 1984. See Faith Center, Inc., 99 FCC 2d 1164 (1984). In 1988, Astroline filed for bankruptcy and, in 1991, the Mass Media Bureau granted Astroline's application to assign the license of WHCT-TV to Hoffman, the Bankruptcy Court approved trustee. In 1993, Shurberg, which had filed a competing application for the station in 1983 and had unsuccessfully appealed the Commission's grant of the distress sale assignment to Astroline in federal court, filed a petition to deny the pending WHCT-TV renewal application. By Memorandum Opinion and Order &

¹ Petitioner Ramirez is the former controlling general partner of Astroline and a party to this proceeding.

Hearing Designation Order, 12 FCC Rcd 5224 (1997) ("HDO"), the Commission designated the Trustee's application for renewal of license of WHCT-TV for hearing to determine whether Astroline made misrepresentations concerning its status as a minority controlled entity, and in light thereof, whether renewal of the Trustee's license would serve the public interest. See M O & O, ¶¶ 3-5.

3. In our M O & O, we affirmed the conclusion of the Initial Decision, FCC 99-1, released April 16, 1999, that Astroline did not misrepresent its status as a minority controlled entity. It therefore followed that the Trustee was qualified for renewal of its license. Next, we approved the proposed settlement agreement between two competing applicants, Shurberg and the Trustee. In keeping with the terms of the agreement, we granted the Trustee's renewal application for WHCT-TV, dismissed Shurberg's mutually exclusive application for Channel 18, and granted the application for assignment of license for WHCT-TV from the Trustee to Two If By Sea Broadcasting Corporation ("TIBS"), as amended to substitute Entravision Holdings, LLC ("Holdings"), a non-applicant third party, for TIBS as the proposed assignee.

4. Under the agreement, Shurberg would receive payment of \$7.48 million for dismissing its construction permit application. This raised an issue because our rules provide that, in renewal cases, a competing applicant dismissing its application is entitled to reimbursement only of its legitimate and prudent expenses, see 47 C.F.R. § 73.3523(c), and an applicant dismissing its application "prior to the Initial Decision stage of the hearing on its application," the case here,² is not entitled to any payment in consideration of its withdrawal. See 47 C.F.R. § 73.3523(b). We found, however, that waiver of 47 C.F.R. § 73.3523(b) would be in the public interest. The settlement also provided that Holdings would become the licensee of WHCT-TV, notwithstanding the Commission's policy generally disfavoring settlements involving white knights. We concluded that waiver of this policy, too, would serve the public interest.

5. In support of reconsideration of the Commission's action, Ramirez asserts that the Commission should reject the settlement, particularly as it applies to Shurberg. Ramirez maintains that the Commission erred in waiving the payment restrictions contained in Section 73.3523 to allow the proposed compensation of \$7.48 million to Shurberg. In Ramirez's view, Shurberg may recover only its legitimate and prudent expenses. To permit more, Ramirez states, would unjustly enrich Shurberg because Shurberg abused the Commission's processes through its "protracted and extortionist" prosecution of its application. (Petition at 4.) Ramirez contends that a rule waiver is not in the public interest because it will encourage other applicants to continue frivolous litigation in order to obtain large settlement payments. Alternatively, Ramirez submits, the Commission should auction the spectrum for Channel 18 because this will provide the fairest and most

² Because comparative renewal proceedings were frozen at the time of hearing designation, we specified that the hearing would not address the merits of the comparative proceeding involving Shurberg. We therefore held Shurberg's application in abeyance pending the outcome of the hearing involving Astroline's qualifications. See HDO, 12 FCC Rcd at 5231 n. 11.

expeditious resolution of this proceeding.³

6. We deny Ramirez's petition. In seeking reconsideration, Ramirez does not rely on new facts, changed circumstances, or material errors or omissions in our opinion. Instead, he largely reiterates arguments that we previously considered and rejected. As such, he has not provided a sufficient basis for reconsideration. See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966); Contemporary Media, Inc., 14 FCC Rcd 8790, 8792 (1999).

7. With respect to both the proposed payment to Shurberg under the agreement, which Ramirez objects to, and the monetary limits contained in 47 C.F.R. § 73.3523(b), we explained in our earlier opinion that this rule was primarily intended to deter abuse in the filing of competing applications and that the Commission was willing to waive the limitations where the competing applications were not filed for "speculative or other improper purpose." M O & O, ¶ 16. In this case, we found no evidence, in terms of the rule's intent, that Shurberg filed its 1983 application for an abusive purpose; in fact, Shurberg continued to prosecute its application diligently throughout the lengthy course of the proceeding. Id. at ¶ 17. In addition, Ramirez did not demonstrate that Shurberg acted in bad faith in opposing Astroline's application during the proceeding. Id. at ¶ 19. Although Ramirez alleges broadly that our findings of non-abusive conduct "can [not] be further from the truth," Petition at 4, he again fails to provide any specific support for his assertion or otherwise demonstrate any new basis for reconsideration. Insofar as Ramirez also argues for the first time that Shurberg has not met its burden of proof in establishing a rule waiver to justify such a large settlement payment, we point out that, for the reasons already given, waiver of the rule's payment limitations would serve the public interest by terminating this lengthy proceeding. Having made that determination, the amount of the payment is irrelevant. See Trinity Broadcasting of Florida, Inc., 14 FCC Rcd 20518 (1999).

8. We also disagree with Ramirez that a rule waiver in this case will encourage future applicants to file insubstantial applications. As we pointed out in our M O & O, at ¶ 14 n. 6, and ¶¶ 17 & 20, there is no such danger because 47 U.S.C. § 309(k), enacted as part of the Telecommunications Act of 1996, prospectively bars comparative challenges to renewal applications. Insofar as Ramirez relies on our recent opinion in Chameleon Radio Corporation, FCC 00-397, released December 1, 2000, to support denial of the proposed payment to Shurberg, we do not perceive how that proceeding is apposite here. In keeping with long-standing Commission policy, the licensee in that case was not permitted to assign its license because it was adjudicated to be unqualified to retain its license. Here, by contrast, the Trustee has been found qualified for renewal of license, and Shurberg's qualifications are not in issue because the settlement results in the license being assigned to a third party, Holdings. As we previously noted in our M O & O, at ¶ 19, a dismissing applicant's character qualifications are not relevant to the Commission's approval of a settlement agreement. See Allegan County Broadcasters, Inc., 83 FCC 2d 371 (1980).

³ Holdings filed an opposition to Ramirez's Petition on December 19, 2000, and Shurberg and the Enforcement Bureau filed oppositions on December 21, 2000.

9. Lastly, we reject Ramirez's suggestion that we conduct an auction for Channel 18. We see no basis for taking such action. In Section 309(j)(1) of the Communications Act, 47 U.S.C. § 309(j)(1), Congress generally empowered and required the Commission to employ a system of competitive bidding when resolving mutually exclusive applications "for any initial license or construction permit." That section, by its terms, does not apply in a comparative renewal context such as this. See Implementation of Section 309(j) of the Communications Act (First Report and Order), 13 FCC Rcd 15920, 15923 ¶ 7, 16004-06 ¶¶ 209-214 (1998); see also Implementation of Section 309(j) of the Communications Act (Notice of Proposed Rulemaking), 12 FCC Rcd 22363, 22405 ¶ 101 (1997). Ramirez notes that the First Report and Order, at ¶ 79, rejected rule waivers for future settlements of initial licensing cases (*i.e.*, beyond the 180 day period mandated by Section 309(l)(3)), but that does not have any bearing on the renewal situation presented here. Finally, nothing in Orion Communications Limited v. FCC, 213 F.3d 761 (D.C. Cir. 2000), also cited by Ramirez, which denied review of the First Report and Order, supports a different result.

10. ACCORDINGLY, IT IS ORDERED That the Petition for Reconsideration filed December 8, 2000 by Richard P. Ramirez IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth**Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company
Limited Partnership**

I dissent from the majority's opinion because there are apparitions of greenmail haunting this proceeding. I cannot condone any practice, past or present, explicitly or implicitly, that encourages payoffs where government licenses are at stake. The Commission, by rule, limited payments by successful applicants to other parties for the specific purpose of discouraging payoffs. Without substantial evidence and a compelling explanation, the Commission should not now waive these limits in the context of past proceedings. To do so unwisely beckons the evil spirits of greenmail and extortion back into the halls of this agency.