

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

In the Matter of)
)
CHANNEL 32 HISPANIC)
BROADCASTERS, LTD.) File No. BPCT-19960102KE
Pueblo, Colorado) Facility Identification No. 87488
)
For a Construction Permit for a)
New Television Station at)
Pueblo, Colorado)

ORDER

Adopted: October 23, 2000

Released: November 15, 2000

By the Commission:

1. The Commission had before it the above-referenced application for a construction permit for a new NTSC station on channel 32 at Pueblo, Colorado, filed by Channel 32 Hispanic Broadcasters, Ltd. (Channel 32). The application appeared on public notice dated September 21, 1999, announcing the acceptance for filing of Channel 32's application and advising that no competing applications could be tendered. Timely petitions were filed by The Pikes Peak Broadcasting Company (Pikes Peak), the licensee of KRDO-TV, channel 13, Colorado Springs, Colorado; Entravision Holdings, LLC, licensee of low power television station KGBH-LP, Pueblo; and Front Range Educational Media Corporation, licensee of KBDI-TV, channel *12, Broomfield, Colorado and television translator station K32EO, Colorado Springs. The petitioners argue, inter alia, that the Commission erred in refusing to allow the filing of competing applications. In addition, Fox Television Stations, Inc. (Fox), licensee of KDVR-DT, Denver, Colorado, filed an informal objection, alleging that Channel 32's proposed NTSC operation would result in an impermissible level of interference within the KDVR-DT proposed maximized service area. Channel 32 has opposed the pleadings, and the objectors have filed replies.

2. Background. Channel 32 filed its application on January 2, 1996, and requested a waiver of the Commission-imposed freeze on the filing of television applications and allotments in and around a number of metropolitan areas. In July 1996, in connection with the implementation of digital television, the Commission proposed to delete all vacant NTSC allotments, announcing that:

Consistent with our proposal to eliminate all existing vacant allotments, we will not accept additional applications for new NTSC stations that are filed after [September 20, 1996]. This will provide time for filing of any applications that are currently under preparation. . . . As we

1 On July 16, 1987, the Commission imposed a "freeze" on the acceptance of applications for new television stations within the minimum co-channel separation distances from 30 designated television markets. Advanced Television Systems, Mimeo No. 4074 (released July 17, 1987). The freeze was imposed because the high densities of existing television stations in those markets limited the spectrum available for high-definition television and advanced television service there, and was intended to preserve spectrum allocation options for such use.

process the applications on file now and those that are filed before the end of this filing opportunity, we will continue our current policy of considering requests for waiver of our 1987 freeze *Order* on a case-by-case basis. When applications for new stations are accepted for filing, we will continue our process of issuing Public Notices that "cut-off" the opportunity for filing competing, mutually exclusive applications. In connection with these cut-off notices, we will allow additional competing applications to be filed after the end of this filing opportunity.

Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service (Sixth Further Notice), 11 FCC Rcd 10968, 10992 (1996)(footnotes omitted).

3. On September 19, 1996, applications for new commercial television stations at Pueblo, Colorado, Hammond, Louisiana, and Vineland, New Jersey were submitted to the Commission's lockbox at Mellon Bank (Mellon) in Pittsburgh, Pennsylvania on behalf of Word of God Fellowship, Inc. (Word). Word, however, failed to submit the correct filing fee for each application,² and by letter dated September 25, 1996, the Chief, Billings and Collections Branch, notified Word that its "application package is being returned for . . . underpayment due to fee increase as of 9/12/96." Word did not retender the Pueblo application for filing with the correct fee, or file a petition for reconsideration pursuant to Section 405 of the Communications Act. Thus, at the close of the announced deadline for the filing of applications for vacant NTSC allotments, Channel 32's application was not subject to a competing application.

4. On August 5, 1997, President Clinton signed the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), which expanded the Commission's competitive bidding authority under Section 309(j) of the Act to include mutually exclusive applications for certain types of broadcast stations. Except for certain pending applications, and for categories of broadcast service expressly exempted from the Commission's auction authority, the Act required the Commission to use competitive bidding to resolve mutually exclusive applications for construction permits for commercial broadcast stations. Section 309(l), which governs the resolution of pending mutually exclusive applications for new commercial radio and television stations filed before July 1, 1997, granted the Commission permissive authority to resolve these proceedings by competitive bidding and, as discussed more fully below, required that the Commission "treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceedings." 47 U.S.C. § 309(l)(2). The Act also directed the Commission to waive its policies and rules for the settlement of pending comparative proceedings for a period of 180 days. 47 U.S.C. § 309(l)(3).

5. On January 28, 1998, Word filed an application for review of the return of its application some fifteen months earlier. Channel 32 and Word then filed a Joint Request for Approval of Universal Settlement Agreement on January 29, 1998, proposing to make Word a limited partner in Channel 32, and requesting the grant of Channel 32's application. By letter dated February 5, 1999, the Video Services Division denied approval of the settlement agreement, reasoning that because Word's application had been returned in 1996, it had no standing to participate in a settlement agreement. The Division letter also stated that the "application filed by Channel 32 will be placed on public notice for the filing of competing applications at the appropriate time." Shortly thereafter, on March 15, 1999, the Division concluded that Word had failed to justify a waiver of Section

² Each of Word's applications was accompanied by a check in the amount of \$2,915. However, on August 7, 1996, more than a month before Word submitted its applications to Mellon, the Commission had announced changes in the required fees for various applications, effective September 12, 1996. *Public Notice*, FCC 96-332, 61 Fed.Reg. 41967, 41975 (August 13, 1996). The fee for new commercial television construction permit applications increased from \$2,915 to \$3,080.

1.115 to permit the filing of its grossly untimely application for review,³ and dismissed Word's pleading.

6. Neither party challenged the Division's March 15th dismissal of Word's application for review. Channel 32, however, filed a petition for reconsideration of the denial of the settlement agreement on March 5, 1999, requesting that the Commission either: (1) reinstate Word's application and approve the settlement agreement, or (2) interpret Section 309(l)(2) of the Act as precluding the acceptance of mutually exclusive applications for the Pueblo station. By letter dated September 8, 1999, the Division reconsidered its earlier denial and approved the settlement, based upon the fact that at the time the settlement was filed with the Commission, Word had a pleading pending before the Commission, which would be withdrawn as part of the settlement. The Division did not however, reinstate Word's application, instead stating that because the Commission's action of September 25, 1996 returning Word's application was final, no further action was contemplated with respect to that application. By Public Notice released September 21, 1999, the Commission announced that the Channel 32 application was accepted for filing, and that "because the application . . . is the result of a settlement of applications," no mutually-exclusive applications would be accepted. As noted above, Pikes Peak, Front Range and Entravision filed petitions to deny by October 31, 1999, primarily arguing that the Balanced Budget Act requires the Commission to accept competing applications and to resolve these applications through competitive bidding.

7. Procedural Issues. Channel 32 argues that the petitions to deny must be dismissed because the petitioners lack standing. We disagree. With regard to Channel 32's assertion that petitioners "cannot sustain their burden of establishing the three elements of standing required by Article III of the United States Constitution and applicable case law," a licensing proceeding before the Commission is not an Article III proceeding to which either the "case or controversy" or prudential Article III standing requirements apply. *See Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976); *California Association of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826, n.8 (D.C. Cir. 1985)("[t]he Commission may choose to allow persons without Article III 'standing' to participate in FCC proceedings.") Moreover, it is well-settled that the licensee of a competing station has party-in-interest status, under 47 U.S.C. § 309, to file a petition to deny. *See FCC v. Sanders Brothers*, 309 U.S. 470(1940); *Kin Shaw Wong*, 11 FCC Rcd 11,928 (1996). Here, Pikes Peak and Entravision would compete with Channel 32 in the Colorado Springs-Pueblo market if the pending application is granted.⁴ In addition, it appears that Front Range's translator station on channel 32 in Colorado Springs would be displaced by a full service television operation on channel 32 in Pueblo. Accordingly, we conclude that the petitioners have standing.⁵

³ Section 1.115(d) provides that an application for review shall be filed within 30 days of public notice of the action sought to be reviewed. The Division's conclusion was based on the fact that: (1) Word admitted that it had timely notice of the return of its application, but made a deliberate decision to forego the appeal process because it knew it would have an opportunity in the future to resubmit the applications and wished to defer incurring the necessary filing fees, and (2) accepting Word's application would prejudice Channel 32, which had filed a timely application, as well as "potential future applicants."

⁴ Channel 32 cites to several cases in which the Commission precluded non-parties or former parties from challenging Commission approval of a settlement agreement among competing applicants. *See Roxanne Givens*, 7 FCC Rcd 489 (Rev. Bd. 1992); *Stephen D. Tarkenton*, 7 FCC Rcd 1357 (Rev. Bd. 1992); *Warren Price Communications, Inc.*, 6 FCC Rcd 4424 (1991). Those cases, however, are inapposite, in that none of the persons found to lack standing was a competitor in the relevant market.

⁵ Front Range and Entravision state that they intend to file competing applications for channel 32. Because they clearly have standing as licensees in the Colorado Springs-Pueblo market, we do not find it necessary to decide whether standing has been established on the basis of their expressed intention to file for the channel. We disagree, however, with the argument that in order to have standing, petitioners were required to file their own (continued....)

8. Channel 32 also argues that the petitions to deny, which were filed by the deadline specified in a public notice announcing the acceptance of Channel 32's application for filing, should be dismissed as untimely requests for reconsideration of the Division's September 8, 1999 letter ruling approving the settlement agreement between Channel 32 and Word. The petitions, however, were timely filed in response to a public notice announcing a deadline for the filing of petitions to deny, and as discussed more fully below, they primarily challenge the Commission's decision, first stated in the public notice, that the filing of competing applications would not be allowed. Accordingly, we conclude that the petitions to deny are timely.

9. Finally, Channel 32 asserts that the petitioners have failed to comply with Section 309(d)(1) of the Communications Act, which requires that petitions to deny "be supported by affidavit of a person or persons with personal knowledge" of the allegations of fact. 47 U.S.C. § 309(d)(1). Section 309(d)(1) does not, however, require that facts "of which official notice may be taken" be supported by affidavit. *Id.* Based upon our review of the pleadings, it is clear that the facts alleged in the petitions regarding the processing of Channel 32's application are independently supported by Commission records, and accordingly, no supporting affidavit is required.

10. Informal Objection. NTSC proposals may not cause interference to digital television (DTV). In calculating interference, the Commission considers predicted interference from an NTSC station of less than 0.5% of a DTV service area to be non-cognizable. *See Public Notice, Additional Application Processing Guidelines for Digital Television*, Ref. No. 84889 (August 10, 1998)(Commission will round the determination of interference to the nearest percent).

11. Fox, the permittee of KDVR-DT, channel 31, Denver, Colorado, asserts that Channel 32's application must be denied, because it would cause interference to the reception of KDVR-DT's maximized signal by nearly 14,000 people, or 0.64 percent of KDVR-DT's service population. Channel 32 disputes Fox's engineering analysis, and submits its own analysis which shows that Channel 32's proposed station would only cause theoretical interference to 9,508 persons, or 0.43% of KDVR-DT's population. The staff has conducted its own engineering analysis of Channel 32's application, and concludes that it is predicted to cause interference to less than 0.5% of the KDVR-DT maximized service area.⁶ Accordingly, the informal objection will be denied.

12. Petitions to Deny. As discussed above, Section 309(l)(2) of the Communications Act, which became effective on August 5, 1997 as part of the Balanced Budget Act, states that:

APPLICABILITY OF COMPETITIVE BIDDING TO PENDING COMPARATIVE LICENSING CASES. – With respect to competing applications for . . . construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall—

- (1) have the authority to conduct a competitive bidding proceeding . . . to assign such . . . permit;

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applications for channel 32 on or before September 20, 1996. The Commission has expressly rejected the argument that the September 20, 1996 deadline for the filing of applications for vacant NTSC channels constituted a filing window. *See Implementation of Section 309(l) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920, 15946-47 (1998)(*Competitive Bidding*), *recon. denied*, FCC 9407 (released April 20, 1999); *modified*, FCC 99-201 (released August 5, 1999); *petitions for recon. dismissed*, 15 FCC Rcd 4543 (MMB 2000), *aff'd*, *Orion Communications Ltd. v. FCC*, Case No. 98-1424 (D.C. Cir., June 13, 2000)

⁶ The staff's analysis can be obtained from the Video Services Division's engineering files.

- (2) treat the parties filing such applications as the only persons eligible to be qualified bidders for purposes of such proceedings; and
- (3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180 day period beginning on the date of enactment of the [Act].

In giving the Commission authority to use competitive bidding to award broadcast licenses, Congress also expected that “where a single application for a radio or television broadcast license has been filed with the Commission, but that no competing applications have been filed because the Commission has yet to open a filing window,” the Commission “will provide an opportunity for competing applications to be filed,” regardless of whether the application was filed before July 1, 1997.⁷

13. Petitioners assert that Channel 32’s application cannot be granted at this time, because the Balanced Budget Act, as well as the Commission’s pronouncements in the DTV proceeding regarding the processing of freeze waiver applications, mandate that the Commission accept competing applications for the new NTSC station at Pueblo. According to petitioners, Channel 32’s application is a “single application,” which, consistent with the legislative history of the Act, must be subject to competing applications and competitive bidding.

14. In response, Channel 32 argues that Word’s application was filed prior to July 1, 1997, and that the Commission must treat those two applications “as the only persons eligible to be qualified bidders . . .” Channel 32 also cites to discussion in the Commission’s *Competitive Bidding Order* implementing provisions of the Balanced Budget Act of 1997, in which the Commission considered whether Section 309(1)(2) applied to mutually-exclusive freeze waiver applications submitted for filing before July 1, 1997, thus precluding the acceptance of additional applications that would be eligible to compete in an auction. In the *Competitive Bidding Order*, the Commission concluded that for purposes of the Balanced Budget Act, freeze waiver applications constitute “applications . . . filed with the Commission before July 1, 1997” within the meaning of Section 309(1), and that accordingly, “to the extent that there are multiple pending applications with waiver requests for a single television allotment, that, if granted, would result in mutually exclusive applications, the restrictions on bidder eligibility set forth in Section 309(1)(2) would apply.” *Competitive Bidding Order*, 13 FCC Rcd at 15945 (1998).⁸ The Commission further explained that:

No auction would be required . . . where multiple applications with waiver requests were filed but by the time they were processed only one application with a waiver request remained on file.

In the event that we grant the remaining waiver request, we would simply grant the related pre-July 1, 1997 application without soliciting further applications. We believe that this result is compelled by the express language of Section 309(1)(2). By contrast, if only one application with a freeze waiver request was filed for a single allotment, such that there would be no mutually exclusive applications, Section 309(1)(2) would not apply because the threshold requirement for “competing applications . . . filed with the Commission before July 1, 1997” has

⁷ H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 573-74 (1997)(Conference Report).

⁸ Prior to adoption of the *Competitive Bidding Order*, the Commission did not consider freeze waiver applications “to be pending.” See, e.g., *Second Memorandum Opinion and Order*, 14 FCC Rcd 1348, 1366 (1998). The *Competitive Bidding Order* acknowledged “some degree of unfairness” in this decision, especially given the earlier pledges, in connection with the DTV proceeding, to provide an opportunity for competing applications, but concluded that the Commission was compelled by the statutory language to reach this result.

not been satisfied.

Id. at 15946. According to Channel 32, there is no question that Word's application was "filed," and the fact that it was subsequently dismissed does not render Channel 32's application subject to pending applications under the Commission's interpretation of Section 309(l)(2) of the Act.

15. We have carefully reviewed the statute and the parties' arguments, and conclude that the better reading of the 1997 Balanced Budget Act requires the Commission to accept competing applications for the new NTSC station at Pueblo, and to use competitive bidding to resolve the mutual exclusivity. First, Channel 32's freeze waiver application has never been cut-off for the filing of competing applications. In the *Competitive Bidding Order*, the Commission expressly rejected the argument that it had effectively opened a filing window for competing applications when it afforded a 30 day period ending on September 20, 1996 for the filing of applications for vacant NTSC allotments before it ceased accepting such applications. Instead, the Commission concluded that single freeze waiver applications, for which "no competing applications have been filed because the Commission has yet to open a filing window," should be subject to competing applications and competitive bidding, consistent with Congress' intent,⁹ and that accordingly:

In the event we grant a freeze waiver request and accept a single television application for a NTSC allotment filed prior to July 1, 1997, we will, consistent with the statute and Conference Report, solicit additional applications, and, if mutually exclusive applications are filed, resolve these applications through competitive bidding.

Competitive Bidding Order, 13 FCC Rcd at 15946-47.

16. With respect to Channel 32's assertion that its application is protected from the filing of mutually exclusive applications by Section 309(l)(2) of the Act, that provision applies only to "pending comparative licensing cases" involving applications filed before July 1, 1997.¹⁰ On August 5, 1997, when the Balanced Budget Act of 1997 was enacted, Channel 32's application was not subject to a pending, mutually-exclusive application. Because no multiple applications were pending, "the threshold requirement for 'competing applications. . . filed before July 1, 1997' had not been satisfied," and Channel 32's application was not within the class of applicants affected by Section 309(l)(2). In this regard, we note that Word did not file its application for review until January 28, 1998, long after the decision returning its application was final, and almost seven months after the July 1, 1997 statutory cut-off. Accordingly, the late filed application for review did not create any mutual exclusivity as contemplated by the Balanced Budget Act. At the time the Act was passed, the action on Word's application was final and Channel 32 was no differently situated than any other single freeze waiver applicant, with the expectation that if its freeze waiver was granted, the Commission "would continue [its] process of issuing Public notices that 'cut-off' the opportunity for filing competing, mutually exclusive applications." *Second Memorandum Opinion and Order*, 14 FCC Rcd at 1366.

17. Even if one were to read Section 309(l)(2) to apply where a mutually exclusive application was no longer pending on July 1, 1997, we disagree with Channel 32 that Word's unsuccessful attempt to file an

⁹ Conference Report at 573-74.

¹⁰ See Title, Section 309(l)(2)(Applicability of Competitive Bidding to Pending Comparative Licensing Cases); Conference Report at 573 ("[W]here a single application . . . has been filed with the Commission, but no competing applications have been filed," the Commission "will provide an opportunity for competing applications to be filed," regardless of whether the application was filed before July 1, 1997).

application for channel 32, Pueblo in September 1996, would have somehow conferred mutually-exclusive status on Channel 32 at the time of enactment of the Balanced Budget Act, and now makes Channel 32's application eligible for grant as the lone survivor of a pre-July 1, 1997 multiple application group. Channel 32's analysis turns on whether Word's application was "filed" by September 20, 1996. Channel 32 is correct that if statutory language is clear, an agency has no discretion to change the meaning, but instead "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). Here, however, Congress did not define the term "filed," and there is nothing in the Balanced Budget Act or the legislative history to suggest that Congress intended to alter the Commission's procedural rules regarding the filing of applications.

18. Channel 32 argues that that because Word of God's application reached Mellon Bank prior to the September 20, 1996 deadline for filing for new NTSC stations, the application must be deemed as filed. While it may be said in common parlance that Word "filed" an application with the Commission when it successfully arranged to have the application delivered to Mellon, we believe that for an application to achieve filed status – a status which confers certain administrative rights on the applicant – requires more than the physical act of delivering a document to the Commission or its lockbox. Based upon our review of the Commission's rules of practice and procedure, we conclude for the following reasons that Word's application was not filed in September 1996, as contemplated by the Commission in the *Competitive Bidding Order*.

19. Word's application was returned for an incorrect filing fee. The Commission has stated that applications submitted with insufficient remittance are not considered as "received by the Commission." See *Notice of Proposed Rulemaking* in Gen. Docket 86-285, 51 F.R. 25792, ¶39 (July 16, 1986); see also *Report and Order* in Gen. Docket 86-285, 2 FCC Rcd 947, 956-97 (1987) ("payment of the correct fee continues to be a pre-condition to Commission processing of an application or filing" and applicants who fail to do so "may be denied an opportunity to compete for the right to provide a communications service").¹¹ Moreover, Section 1.1116(a) explicitly states that while "a defective fee may be corrected by resubmitting the application or other filing, together with the correct fee . . . **the date of resubmission with the correct fee will be considered the date of filing.**" See also *Memorandum Opinion and Order*, 6 FCC Rcd 5919, 5922-23 (1991)(Commission specifically rejected allowing corrected fee advice forms and accompanying applications to be accepted *nunc pro tunc*.) Accordingly, the Commission considers applications submitted with an incorrect fee as not having been "filed" with the Commission.

20. We disagree that the Commission's decision in *Hooten Broadcasting, Inc.*, 13 FCC Rcd 15023 (1998), supports Channel 32's argument that Word's application was filed in 1996. In *Hooten*, the permittee of a radio station submitted a modification application during the first half of its construction period, accompanied by an insufficient application fee. The Commission returned the application, and Hooten resubmitted the application with the correct fee within a day. The resubmission, however, was within the second half of Hooten's authorized construction period, when the standard for requesting permission to modify an unbuilt facility became stricter. See 47 C.F.R. §73.3535(b) (1998). The Commission did not, however, as Channel 32 suggests, treat Hooten's application as being "filed" during the first nine months. Instead, the Commission treated the application as "filed" during the second nine months, and waived the stricter requirements of Section 73.3535(b).

¹¹ Similarly, applications submitted at the incorrect filing location are not considered "received by the Commission until received at the correct location." 51 Fed. Reg. at ¶ 35; see also *Amendment of the Commission's Practices and Procedure*, 9 FCC Rcd 4427, n.1 (1994).

21. Finally, with respect to Channel 32's argument¹² that "filed" "mean[s] nothing other than the submission of a document to the Commission," and that "if Congress wanted to empower the Commission to limit" the meaning of the term filed, "it could have easily added language to achieve that purpose [such as] . . . "applications that were 'pending,'" Congress did in fact limit the exception set forth in Section 309(l)(2) to "pending comparative licensing cases," in existence on enactment of the Balanced Budget Act. Accordingly, we believe that our application here of the Commission's long-standing interpretation of when an application achieves "filed" status is consistent with the purpose of Section 309(l)(2), which was to insulate comparative cases pending in July 1997 from the filing of additional competing applications. Because we conclude that at enactment of the Balanced Budget Act, Channel 32's application was not subject to competing applications, and had not been cut-off, we are required to accept competing applications, and to resolve the applications using competitive bidding.

22. *Other Matters.* Front Range questions whether grant of Channel 32's application would serve the public interest, convenience and necessity, alleging that Channel 32 intends to transfer its authorization to Acme Communications, Inc., "an organization set up by the WB Network to acquire stations to become WB affiliates." Pursuant to the Commission's competitive bidding procedures, petitions to deny may only be filed against the winning bidder. In the event that Front Range files a competing application, and Channel 32 is the winning bidder, Front Range will be permitted an opportunity to raise these arguments in a petition to deny.

23. In view of the foregoing, the informal objection filed by Fox Television Stations, Inc. IS DENIED. The petitions to deny filed by The Pikes Peak Broadcasting Company, Entravision Holdings, LLC, and Front Range Educational Media Corporation ARE GRANTED to the extent indicated herein, and the Commission will, at the appropriate time, issue a public notice announcing an opportunity for the filing of applications for NTSC channel 32, Pueblo, Colorado.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹² November 12, 1999 Opposition to Petitions to Deny at 11.