

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

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)	

MEMORANDUM OPINION AND ORDER

Adopted: October 26, 2000 ; Released: November 8, 2000

By the Commission: Chairman Kennard not participating.

1. This Memorandum Opinion and Order grants a Joint Request for Approval of Settlement Agreement, filed April 4, 2000 by Martin W. Hoffman, Trustee-in-Bankruptcy (“Hoffman” or “Trustee”) for Astroline Communications Company Limited Partnership (“Astroline”), Two If By Sea Broadcasting Corporation (“TIBS”), and Shurberg Broadcasting of Hartford (“Shurberg”) (collectively, the “Joint Parties”). Hoffman is the licensee of Station WHCT-TV. The Joint Request contemplates a resolution of this comparative broadcast renewal proceeding whereby the Trustee’s application for renewal of license for WHCT-TV would be granted, Shurberg’s mutually exclusive application for Channel 18 would be dismissed, and the pending application for the assignment of license for WHCT-TV from the Trustee to TIBS, as amended to substitute Entravision Holdings, LLC (“Holdings”), a non-applicant third party, for TIBS as the proposed assignee, would be granted.

2. On April 19, 2000, the Enforcement Bureau filed comments in support of the agreement.¹ Richard P. Ramirez, the former controlling general partner of Astroline and a party

¹ Pursuant to a recent amendment of the Commission’s rules, the newly created Enforcement Bureau now serves as trial staff in hearing matters. See Establishment of the Enforcement (continued....)

to this proceeding, filed an opposition to the Joint Request on May 17, 2000.² And on July 26, 2000, the Bureau filed further comments in support.

I. BACKGROUND

3. This proceeding grew out of the Commission's approval of the minority distress sale of Station WHCT-TV to Astroline in 1984. See Faith Center, Inc., 99 FCC 2d 1164 (1984). The Commission's distress sale policy permits a licensee whose license has been designated for revocation hearing, or whose renewal application has been designated for hearing on basic qualifications issues, to assign its license prior to commencement of the hearing to a minority controlled entity. The proposed assignee must be basically qualified and meet the Commission's definition of a minority controlled entity. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 855 (1982) ("1982 Minority Ownership Policy Statement"); Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 983 (1978) ("1978 Minority Ownership Policy Statement"). Shurberg, which had petitioned to deny the distress sale assignment, appealed the Commission's decision to federal court. The Supreme Court ultimately affirmed the Commission's action in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, pet. for rehearing denied, 497 U.S. 1050 (1990).

4. Meanwhile, in 1988, Astroline filed for bankruptcy. It also filed for renewal of license in December 1988. In 1991, the Mass Media Bureau granted Astroline's application to assign the license of WHCT-TV to the Bankruptcy Court approved trustee, Hoffman, under pro forma procedures in order to accommodate federal bankruptcy policies. In 1993, Shurberg, which had filed a competing application for the station in 1983,³ filed a petition to deny the pending WHCT-TV renewal application. Shurberg alleged that Astroline's ongoing representations to the Commission and the federal courts that it qualified as a minority controlled entity for the purpose of the minority distress sale policy were untrue. Additionally in 1993, the Trustee filed an application to assign the license of WHCT-TV to TIBS, which application Shurberg also petitioned to deny.

5. By Memorandum Opinion and Order & 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 on issues to determine whether Astroline misrepresented facts to the Commission and the federal courts concerning its status as a minority controlled entity, and in light

(Continued from previous page) _____
Bureau and the Consumer Information Bureau, 14 FCC Rcd 17924 (1999); 47 C.F.R. § 0.111(b). It replaces the Mass Media Bureau as a party to this proceeding.

² Ramirez was granted an extension of time to respond to the Joint Request. See Order, 15 FCC Rcd 7547 (OGC 2000).

³ Shurberg's 1983 application initially was not accepted for filing pursuant to the Commission's policy of not accepting competing applications for stations in hearing status. The Mass Media Bureau reinstated Shurberg's application in 1991, which afforded Shurberg status as a competing applicant against Astroline's 1988 renewal application. Public Notice, Report No. 14926, released February 8, 1991. See also ¶ 18, infra.

thereof, whether renewal of the Trustee's license would serve the public interest. In an Initial Decision ("I.D."), FCC 99D-1, released April 16, 1999, Administrative Law Judge John M. Frysiak ("ALJ") held that Astroline did not engage in misrepresentation and granted the Trustee's application for renewal of license. Shurberg filed exceptions to this conclusion and urged reversal. The Mass Media Bureau agreed with the ALJ that Astroline did not misrepresent its status.

6. After exceptions were filed, the parties reached an agreement to settle this proceeding. Before turning to the proposed settlement, we address briefly the qualifications issue involving Astroline.

II. DISCUSSION

A. Astroline's Qualifications

7. As indicated above, the parties to this proceeding have jointly proposed a settlement of their hearing case. Although Shurberg is withdrawing its exceptions to the I.D.'s favorable resolution of the misrepresentation issue against Astroline as part of the settlement agreement (see ¶ 10, *infra*), we have reviewed the record under this issue. See Viacom Inc., 9 FCC Rcd 1577 (1994) (Commission is obligated to consider merits of petition to deny transfer of control application, regardless of subsequent dismissal of petition); Booth American Co., 58 FCC 2d 553 (1976) (withdrawal of petition to deny renewal application does not dispose of issues raised in petition).

8. The issue is whether Astroline misrepresented its status as a minority controlled entity to the Commission and the federal courts in connection with the distress sale of Station WHCT-TV. In defining a minority controlled entity in the case of a limited partnership such as Astroline, the Commission has stated that there is sufficiently "significant minority involvement" where the minority general partner owns more than twenty percent of the partnership and has "complete managerial control over the station's operations." See 1982 Minority Ownership Policy Statement, 92 FCC 2d at 855. In assessing where control resides, the Commission generally looks to determine who has authority over the basic operational policies of the station, and specifically to the areas of programming, personnel, and finances. See Southwest Texas Broadcasting Council, 85 FCC 2d 713, 715 (1981); Bennett Gilbert Gaines, 8 FCC Rcd 1405 (Rev. Bd. 1993), rev. denied, 9 FCC Rcd 533 (1994).

9. In this case, Astroline repeatedly represented that Ramirez, a minority and a general partner of Astroline, owned twenty-one percent of Astroline and had control over the station's affairs. After carefully reviewing the hearing record in this proceeding, we agree with the ALJ, despite the contentions in Shurberg's exceptions, that the preponderance of the evidence readily supports the validity of Astroline's representations. From the inception of the partnership and at all relevant times, Ramirez consistently maintained the necessary level of ownership and exercised control over the station's finances, programming, and personnel. Ramirez alone had managerial control over the station's day to day operations. For example, he acquired programming and negotiated with program suppliers, hired the station's department heads and senior personnel, and decided on purchases and incurred all station expenditures. Moreover, there is no evidence in the record of any conduct reflecting an intent to deceive by Astroline regarding its ownership and control. We therefore conclude that Astroline did not make statements to the Commission or the courts that misrepresented its status

as a minority controlled entity. See Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (intent to deceive is “an essential element of a misrepresentation or lack of candor showing”); Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983) (misrepresentation involves false statements of fact coupled with intent to deceive).⁴ In light of the foregoing, it follows that the Trustee is qualified for renewal of its license.

B. Settlement Agreement

10. The settlement agreement provides for: (a) dismissal of Shurberg’s competing application for the station and withdrawal of its exceptions to the I.D. and petition to deny the Trustee’s applications for renewal of license and assignment of license to TIBS; (b) renewal of the license for WHCT-TV; (c) grant of the assignment application for WHCT-TV, as modified to provide that Holdings, in place of TIBS, will become the licensee of the station; and (d) payment by Entravision Communications Company, L.L.C. (“Entravision”), which owns 99.999% of Holdings, to the Trustee of \$18 million, of which sum the Trustee, in turn, will pay \$9.52 million to TIBS and \$7.48 million to Shurberg, and retain \$1 million.⁵

11. In its comments in support of the agreement, the Bureau submits that approval of the settlement would be consistent with the public interest because it would terminate Commission litigation and a related bankruptcy proceeding. In this regard, the Bureau points out that the amount available to the Trustee under the settlement, \$1 million, is the amount previously approved by the Bankruptcy Court for the sale of WHCT-TV’s assets. The Bureau notes that there are arguable public interest detriments to the settlement because Shurberg would receive compensation of more than \$7 million for dismissing its construction permit application, contrary to the payment restrictions contained in 47 C.F.R. § 73.3523, and the license would be awarded to Holdings, contrary to Commission policy generally disfavoring settlements involving “white knights,” *i.e.*, non-applicant third parties. In this case, the Bureau maintains, countervailing public interest benefits outweigh the detriments and warrant waiver of the respective policies. Finally, because the assignment application is subject to the provisions of 47 C.F.R. §§ 73.3580 and 73.3584, which require public notice of the filing of the

⁴ As adverted to in the HDO, 12 FCC Rcd at 5227-28, substantial and material questions of fact have also been raised with respect to the qualifications of TIBS. See Two If By Sea Broadcasting Corporation, 12 FCC Rcd 2254 (1997). But in light of the substitution of Holdings for TIBS as the proposed licensee of WHCT-TV, there is no need to address those matters before resolving this proceeding.

⁵ According to the Joint Parties, TIBS and the Trustee have also agreed, subject to the approval of the Bankruptcy Court, that the Trustee will retain an additional \$2.6 million from TIBS’s portion to increase the Trustee’s portion to \$3.6 million. This additional payment, however, is not part of the settlement agreement before the Commission. In this regard, the agreement provides that “[n]othing contained in this Agreement shall preclude TIBS from increasing the compensation paid to the Trustee, provided that such additional compensation is paid to the Trustee in accordance with applicable laws and is paid solely from the TIBS Compensation.” See Joint Request, Exh. B, p. 5; see also Joint Request, Exh. E (Hoffman Declaration).

application and an opportunity for the filing of petitions to deny, the Bureau urges that the Commission delay final approval of the settlement until the Mass Media Bureau can process the application and determine if Holdings is qualified to hold the license.

12. In further comments filed thereafter, the Bureau reports that the Mass Media Bureau has completed its assessment of the qualifications of Holdings and has concluded that the proposed licensee is qualified to operate the station. Accordingly, the Bureau supports grant of the Joint Request.

13. In his opposition, Ramirez submits that the Commission should deny the Joint Request or, at a minimum, deny the payment to Shurberg provided for in the agreement. First, Ramirez asserts, Shurberg lacks standing to be a party to the settlement agreement because Shurberg's construction permit application was never accepted for filing by the Commission. Second, Ramirez argues that the proposed payment to Shurberg violates 47 U.S.C. § 311(d)(3), which precludes the filing of an application for the purpose of reaching a settlement, because Shurberg's only motivation in continuing to press its application before the Commission, even after an unfavorable Supreme Court ruling in 1990, was to receive a settlement payment. Ramirez contends that the agreement would unjustly enrich Shurberg because Shurberg's challenge to Astroline's qualifications was in bad faith. Finally, Ramirez asserts that Shurberg lacks the character and other qualifications required to be a Commission licensee, and therefore should not be awarded the payment proposed in the Joint Request.

14. We will approve the settlement agreement. Approval will serve the public interest here by terminating a lengthy Commission proceeding, avoiding the need for a comparative renewal hearing to select a licensee for the station,⁶ and allowing for termination of the Astroline bankruptcy proceeding. See O.D.T. International, 9 FCC Rcd 2575, 2576 (1994), citing LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974) (Commission generally seeks to accommodate federal bankruptcy policies). As the parties recognize, however, there are two potential impediments to approval, inasmuch as Shurberg will receive \$7.48 million under the agreement, in contravention of 47 C.F.R. § 73.3523, and the license will be awarded to Holdings, a non-applicant third party. We do not believe that either of these factors requires denial of the agreement reached in this case.

15. First, with respect to the proposed reimbursement to Shurberg under the agreement, our rules provide that, in renewal cases, a competing applicant dismissing its application is entitled to reimbursement only of its legitimate and prudent expenses,⁷ and an applicant dismissing its application "prior to the Initial Decision stage of the hearing on its application" is not entitled to any payment in

⁶ Section 309(k)(4) of the Communications Act, 47 U.S.C. § 309(k)(4), enacted as part of the Telecommunications Act of 1996, which prospectively bars comparative challenges to renewal applications, does not apply to the WHCT-TV renewal application, which was filed in 1988. See Implementation of Sections 204(A) and 204(C) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), 11 FCC Rcd 6363, 6364 (1996) ("[A]pplications filed on or before May 1, 1995 will be subject to our current renewal standards and procedures, while applications filed after May 1, 1995 will be subject to the new renewal provisions adopted in Section 204 of the Telecom Act."); see also 47 C.F.R. § 73.3591(d).

⁷ See 47 C.F.R. § 73.3523(c).

consideration of its withdrawal. See 47 C.F.R. § 73.3523(b). In designating the Trustee's application for hearing, we specified that the hearing would not address the merits of the comparative proceeding involving Shurberg, and we therefore held Shurberg's application in abeyance pending the outcome of the hearing. HDO, 12 FCC Rcd at 5231 n. 11.⁸ Consequently 47 C.F.R. § 73.3523(b) on its face would disallow the proposed payment.

16. We agree with the Enforcement Bureau, however, that a waiver of the payment restrictions contained in 47 C.F.R. § 73.3523(b) would serve the public interest in this case. See 47 C.F.R. § 1.3; WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972). The rule restricting payments is primarily intended to deter abuse in the filing of competing applications. Where the circumstances establish that the competing applications were not filed “for speculative or other improper purpose,” we are willing to waive the limitations on payments to dismissing applicants in comparative renewal proceedings in light of the time-consuming and expensive nature of these hearings. See Implementation of Section 309(j) of the Communications Act (First Report and Order), 13 FCC Rcd 15920, 16006 ¶ 214 (1998).

17. In fact the Commission has had occasion to waive the monetary limits in the comparative renewal context in order to facilitate settlements. See EZ Communications, Inc., 12 FCC Rcd 3307 (1997). Consistent with our announced waiver policy, we find no evidence here that Shurberg filed its application in 1983 for an abusive purpose. Indeed, as indicated below, Shurberg has continued to prosecute its application diligently throughout the course of this proceeding. Furthermore, we have also held that, in light of Section 309(k) of the Communications Act, 47 U.S.C. § 309(k), which prospectively disallows comparative challenges to renewal applications, strict enforcement of the rule is not needed to deter the filing of abusive applications in the future. See EZ Communications, Inc. 12 FCC Rcd at 3308; Trinity Broadcasting of Florida, Inc., 14 FCC Rcd 20518 (1999). This factor lends additional support to our decision to waive the limitations in this case.

18. In reaching our decision to waive the payment restrictions under the rule, we have considered the objections raised by Ramirez. First, we disagree with Ramirez that Shurberg lacks standing to participate in the settlement because its application was not accepted for filing. As noted earlier, although Shurberg's 1983 application was not accepted for filing at that time pursuant to the Commission's policy of not accepting competing applications for stations in hearing status, the Mass Media Bureau subsequently reinstated Shurberg's application in 1991, thereby affording Shurberg status as a competing applicant against Astroline's 1988 renewal application. See HDO, 12 FCC Rcd at 5225 ¶ 2 and n. 2, 5226 ¶ 4. In addition, as noted in the HDO, Shurberg took steps to continue to assert its interest in prosecuting its 1983 application, including subsequently amending its application to

⁸ At the time the hearing was designated, comparative renewal proceedings remained frozen in the wake of Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). See FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994); Modification of FCC Comparative Proceedings Freeze Policy, 9 FCC Rcd 6689 (1994).

certify to its financial qualifications. *See id.* at 5230 ¶ 13. The HDO made Shurberg a party to the proceeding; as such, Shurberg may participate in the settlement.⁹

19. Second, Ramirez has not proffered any facts to substantiate his claim that Shurberg challenged Astroline's application only in order to ultimately extract a sizable payment upon settlement in violation of 47 U.S.C. § 311(d)(3). Although, for the reasons given earlier, we disagree with the merits of Shurberg's adversarial position under the Astroline misrepresentation issue, Ramirez has not shown that Shurberg acted in bad faith in opposing Astroline's application during the course of this proceeding. Finally, contrary to Ramirez's unsupported allegations regarding Shurberg's lack of qualifications as a licensee, we found in the HDO that Shurberg had complied "with all pertinent Commission requirements vis-a-vis its construction permit application," and that its application would be grantable, but for its mutual exclusivity with the Trustee's renewal application. 12 FCC Rcd at 5230 ¶ 13. In any event, Shurberg's qualifications are not at issue here because it would not receive the license under the proposed settlement. *See Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980) (dismissing applicant's character qualifications not relevant to approval of settlement).

20. We also find that the award of the license to Holdings -- a "white knight" -- will serve the public interest in this case. The policy generally disfavoring settlements involving buy-outs by non-applicant third parties, first enunciated in Rebecca Radio of Marco, 5 FCC Rcd 937 (1990), like the rule limiting settlement payments, was intended to deter the filing of abusive applications in the future. We did not wish to create an economic incentive for the filing of sham applications by individuals who had no serious interest in operating broadcast stations. *See* 5 FCC Rcd at 937-38. Here, however, as explained above, we have found no evidence of abuse in the filing or prosecution of Shurberg's competing application. In addition, as we also indicated, the need to deter abusive challenges to future renewal applications has been eliminated as a consequence of the enactment of 47 U.S.C. § 309(k). Accordingly, waiver of the policy is appropriate in these circumstances. *See also ITFS Mutually Exclusive Applications - Settlement Period*, 15 FCC Rcd 5916 (2000) (Commission permits "white knight" settlements involving mutually exclusive ITFS applications); Implementation of Section 309(j) of the Communications Act (Notice of Proposed Rulemaking), 12 FCC Rcd 22363, 22374-75 ¶ 26 (1997) (Commission will waive policy against "white knight" settlements to foster resolution of frozen comparative cases).

21. The Joint Request complies with the requirements of 47 U.S.C. § 311(d) and, except for the limitations on payments to dismissing applicants, which we have waived, it complies with the pertinent provisions of 47 C.F.R. § 73.3523(b). The Joint Parties have attached to the Joint Request declarations under penalty of perjury from their respective principals. Shurberg's declaration states that Shurberg's application was not filed for the purpose of reaching or carrying out a settlement. The declarations filed by Shurberg and TIBS also reflect that approval of the settlement agreement will serve the public interest by terminating a lengthy Commission proceeding and allowing Holdings to provide television service to the Hartford community. As noted earlier, the Mass Media Bureau has

⁹ The HDO also denied a petition to deny Shurberg's application, filed by Astroline, in which Astroline similarly argued that Shurberg should not be considered a competing applicant because Shurberg did not have a pending application. *See* 12 FCC Rcd at 5230 ¶ 13, 5232 ¶ 16.

examined the qualifications of Holdings and determined that it is fully qualified to be the licensee of WHCT-TV.

22. Finally, we also address comments on the Joint Request filed May 18, 2000 by First Millennium Communications, Inc. (“First Millennium”).¹⁰ First Millennium asserts that, pursuant to a prior understanding it has with Holdings’ parent company, Entravision, it is entitled to receive a ten percent ownership interest in any entity formed to acquire the license of WHCT-TV. Accordingly, First Millennium requests that we defer action on the Joint Request until such time as the assignment application is further amended to change the proposed assignee to an entity that includes it.

23. We will not grant First Millennium’s request that we defer action on the proposed settlement. The matter to which First Millennium refers appears to involve a private contractual dispute between it and Entravision, which is best resolved in a local court with appropriate jurisdiction. See Listeners Guild, Inc. v. FCC, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting longstanding Commission policy of refusing to adjudicate private contract law questions for which a forum exists in state court). In fact, First Millennium informs us that there is litigation currently pending in the Superior Court for the District of Columbia to resolve the parties’ various claims against each other. Our approval of the settlement agreement is without prejudice to the Superior Court’s determination of the parties’ contractual rights. Accordingly, we see no reason to delay action on the Joint Request, particularly where the settlement serves the public interest by resolving a lengthy Commission proceeding, and First Millennium has not raised any questions bearing upon the qualifications of the parties to the agreement or the issues before us that need to be addressed.

24. ACCORDINGLY, IT IS ORDERED, That the Request for Oral Argument filed June 28, 1999 by Shurberg Broadcasting of Hartford and the Motion for Waiver and Application for Review filed September 25, 1997 by Richard P. Ramirez ARE DISMISSED as moot; and that Shurberg Broadcasting of Hartford's Petition to Dismiss or Deny the applications for renewal of license and for assignment of license IS DENIED insofar as it pertains to the qualifications of Astroline Communications Company Limited Partnership and IS DISMISSED in all other respects as moot.

25. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement filed April 4, 2000 by Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership, Two If By Sea Broadcasting Corporation, and Shurberg Broadcasting of Hartford IS GRANTED and the attached settlement agreement IS APPROVED; that Shurberg Broadcasting of Hartford's Consolidated Exceptions and Brief ARE DISMISSED; that the application of Shurberg Broadcasting of Hartford (File No. BPCT-831202KF) IS DISMISSED; that the application of Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership for renewal of license of station WHCT-TV (File No. BRCT-881201LG) IS GRANTED with a license term expiring on April 1,

¹⁰ Entravision filed a response to First Millennium’s comments on May 20, 2000, and First Millennium filed a reply to the response on June 9, 2000.

2007¹¹; that the application for assignment of license for WHCT-TV from Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership to Two If By Sea Broadcasting Corporation (File No. BALCT-930922KE), as amended April 4, 2000 to substitute Entravision Holdings, LLC for Two If By Sea Broadcasting Corporation as the proposed assignee, IS GRANTED and the amendment IS ACCEPTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹¹ See 47 C.F.R. § 73.1020(a)(16).