

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

In re) MM DOCKET NO. 96-173
)
CHAMELEON RADIO CORPORATION)
)
Order to Show Cause Why the)
License of Station KFCC(AM),)
Bay City, Texas Should Not)
Be Revoked)
)
Request for Extension of Special)
Temporary Authority)
)
)

ORDER

Adopted: November 6, 2000; Released: December 1, 2000

By the Commission:

1. This Order denies a petition for reconsideration of a Commission Decision that affirmed an Initial Decision revoking the license of Chameleon Radio Corporation for Station KFCC(AM), Bay City, Texas, Chameleon Radio Corporation, 13 FCC Rcd 13549 (1998), affirming, 12 FCC Rcd 19348 (ALJ 1997), but directs the Mass Media Bureau to waive the engineering rules to permit replication of Station KFCC(AM)'s service area by another, fully qualified licensee. This action serves the public interest by preserving AM service to the areas and populations presently served by Station KFCC(AM), Bay City.

2. On May 22, 1998, Chameleon filed a Petition for Reconsideration that argued the penalty of revocation was too harsh. As an alternative disposition Chameleon requested leave to assign the station to another party, who according to Chameleon is an African-American with no media interests, in exchange for the legitimate and prudent expenses that Chameleon had incurred in connection with the license revocation proceeding. Chameleon claimed the expenses it would recover were substantially less than the actual value of the station to be assigned. The Mass Media Bureau responded in opposition arguing the requested assignment was inconsistent with the Commission's policy of prohibiting assignments after the commencement of an evidentiary hearing to

determine whether a license should be revoked. The Bureau withdrew its opposition on the grounds that the price received by the licensee would be substantially below the station's actual value, the identified assignee has no other media interests, and the community's AM allotment would otherwise be irretrievably lost. These facts, taken together, persuaded the Bureau the requested assignment would serve the public interest.

3. Before considering the proposed assignment request, we address the licensee's contention that the penalty of revocation is too harsh under the circumstances of this case. In seeking reconsideration on this point, the licensee does not challenge the Commission's determination that Chameleon's principal, Don Werlinger, made numerous misrepresentations to the Commission and lacked candor concerning a request made by Chameleon for special temporary authorization. Instead, it asserts that, given the uniqueness of the station's multilingual format, revocation of the license would not serve the public interest. However, in affirming the ALJ's determination that Chameleon is unfit to retain its license, the Commission specifically rejected assertions regarding the station's purportedly unique programming format and other allegedly mitigating circumstances. *Decision*, 13 FCC Rcd at 13553 ¶ 18. A different result was not warranted, in the Commission's view, given that "honesty and trustworthiness are fundamental obligations of Commission licensees." *Id.* It is well established that the Commission does not grant reconsideration for the purpose of debating matters on which it has already deliberated and spoken. *See WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965). Thus, to the extent that Chameleon again challenges the determination to revoke the license, its petition for reconsideration is denied.

4. The proposed assignment of Station KFCC(AM) to Smoots is also not a basis to grant reconsideration. Authorizing the assignment of the station, even for a substantially lowered sales price equaling only 50 percent of the licensee's legitimate and prudent expenditures,¹ would contravene the public interest. Under consistent Commission precedent, Chameleon, having been adjudicated unqualified by both the Administrative Law Judge and the Commission, now has nothing to assign. The potential loss of the current allotment, moreover, is not a basis to depart from this policy.

5. We rejected a similar argument in *Dorothy O. Schulze and Deborah Brigham*, 12 FCC Rcd 2602 (1997), *recon. denied*, 13 FCC Rcd 3259 (1998), *aff'd sub nom.* 168 F.3d 1354 (D.C. Cir. 1999). *Schulze* involved an applicant for a new station rather than an existing licensee. In particular, the sole remaining applicant in a comparative proceeding for a new analog television station in Blanco, Texas, having been disqualified for misrepresentation by both the Review Board and the Commission, entered into a settlement agreement providing for the grant of a construction permit to a

¹ Attached to the Petition for Reconsideration is a letter from John W. Saunders, Media Broker, estimating that the station's fair market value is \$210,000. In its June 18, 1998 Reply to Opposition, Chameleon claimed to have incurred legitimate and prudent expenses of \$70,569.14, but did not itemize the claimed expenditures. By its November 23, 1998 Supplement to Reply, Chameleon submitted an itemized list reflecting expenses totaling \$121,826.72. Documentation has not been submitted to corroborate either amount, however.

non-party. The settlement agreement was proposed as the only way to preserve the digital allotment for a community that had long awaited new television service. Although the Commission took steps to preserve a digital allotment that would have otherwise been deleted, it refused to grant the requested relief, because the applicant “ha[d] not shown itself qualified to receive the grant of a construction permit and thus ha[d] nothing to assign.”² It was not persuaded to reconsider that rejection, either because the adjudicated wrongdoer would receive no more than out-of-pocket expenses under the tendered settlement, or because of the potential impact of the digital proceeding on the proposed Blanco facility.³ 13 FCC Rcd at ¶¶ 4-8. On appeal, the court found “nothing irrational in the Commission’s expert determination that deterring the kind of serious misconduct engaged in by [the applicant] better serves the public interest than expediting UHF service to Blanco.” *SL Communications*, 168 F.3d at 1360.

6. We perceive no basis for a different result here. As in Blanco, the proposed assignment involves a party already disqualified by the Commission, the disqualification is subject to judicial appeal, the adjudicated wrongdoer will allegedly receive no more than legitimate and prudent expenses, and, as discussed in greater detail below, the assignment will allegedly preserve an allotment that might otherwise be lost. Because this case involves an existing licensee (rather than an applicant for a new broadcast station), failure to approve the assignment to Smoots entails the termination of an existing AM service. Whatever the public interest benefit of preserving that existing service, however, it is offset by the far greater public detriment that would occur if we approved a transaction involving a licensee that has been adjudicated unqualified by the Commission. Nor do any of the other arguments relating to KFCC(AM)’s existing service provide an adequate basis for the requested relief. Chameleon, moreover, has not cited any mitigating circumstances pertaining to the licensee’s culpability that might make it equitable to permit the assignment.⁴

7. Nevertheless, we believe that it is appropriate to take steps to preserve an allotment that might otherwise be lost. In the case involving Blanco, Texas, the digital allotment was jeopardized by the termination of a comparative proceeding without the grant of a construction permit for a new analog station on channel 52. Rather than delete that channel (or approve a settlement agreement involving a disqualified applicant), the Commission directed the Mass Media Bureau to accept applications for the channel,

² 12 FCC Rcd at 2605 ¶ 9, citing *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057, 5061 ¶ 27 (1988).

³ *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1109 (1978), cited for the proposition that the public interest is harmed by allowing one of a few stations in a community to go dark, is not to the contrary. There, the Commission concluded that the loss of a broadcast outlet was not a basis for allowing a sale after the licensee’s disqualification for lack of candor and misrepresentation. Instead, the Commission issued a Public Notice accepting applications for permanent or temporary authority to operate the station so that the community would not be permanently deprived of service. As in *Golden*, the impact that the revocation of the license would have on existing service is not a basis to depart from the policy that a disqualified licensee should not be permitted to assign his license.

⁴ See, e.g., *Catherine C. Murphy*, 42 FCC 2d 346, 347-48 ¶¶ 4-5 (1973) (finding it equitable due to the unusual nature of the licensee’s illness to permit the assignment, despite her disqualification for misrepresentation, where the record indicated that she may have not been totally responsible for her actions due to illness, and where neither the licensee, nor her conservator, would benefit financially from the assignment).

recognizing that “it would be equitable to take steps to ensure that the community is not deprived of this long-awaited television service.” *Dorothy Schulze*, 13 FCC Rcd at 3264 ¶ 10. Similar policy considerations apply here. Station KFCC(AM) operates on 1270 kHz, 1.0 kw, U, DA-N. Future allocation of that frequency in the Bay City area, with parameters replicating Station KFCC(AM)’s service area, would likely be impossible under current technical standards, if the station’s authorization is terminated. The problem is that the station both produces and receives overlap from first adjacent Station KWHI (Brenham, Texas). This interference, although previously permitted, is now prohibited under 47 C.F.R. § 73.37(a) of the Commission’s rules, but the current operation could continue pursuant to a “grandfather” provision if the license were assigned.

8. A waiver of the revised technical standards to permit replication of KFCC’s current service area would serve the public interest. In revising those standards to alleviate congestion and interference in the AM band generally, the Commission deleted former Section 73.37(b), which had authorized KFCC’s current operation, insofar as it allowed a first local AM service to receive interference up to the 1.0 mV/m contour.⁵ It did so because “[o]n balance, [it] no longer believe[d] that the establishment of a first local service automatically overrides other public interest considerations.”⁶ As the Bureau notes, however, the Commission’s action did not foreclose the possibility of allowing such interference where there is an overriding public interest in preserving existing service to an area having few broadcast outlets. Significant rural areas are encompassed within Station KFCC’s current service area. The permanent loss of an existing AM radio service to those residing in or visiting these areas would not serve the public interest.⁷ We therefore direct the Mass Media Bureau to waive Section 73.37(a) and other pertinent technical standards as necessary to permit a new station licensed to operate on 1270 kHz to replicate KFCC(AM)’s existing service area. The Bureau is further directed to solicit and process, in accordance with its usual competitive bidding procedures for commercial broadcast services, applications for a construction permit for a new AM station on that frequency, so that the service now provided by KFCC(AM) can be provided by a new, qualified licensee.

9. Chameleon's final concern, that the proposed assignment to the identified assignee represents a unique opportunity to advance the Commission's diversification goals is meritless. The competitive bidding procedures for commercial broadcast services, to which that assignee would be subject, include a new entrant bidding credit that would reduce a winning bid for applicants with no or very few other media interests.⁸ This measure was adopted to fulfill the Commission's obligations under 47 U.S.C. § 309(j)(4)(D) and its long-standing commitment to promoting the diversification of

⁵ *Review of the Technical Criteria for the AM Service*, 6 FCC Rcd 6273, 6286 ¶ 39 (1991), *recon. granted in part*, 8 FCC Rcd 3250 (1993).

⁶ *Id.* at 6286 ¶ 39.

⁷ *Id.* at 6275 ¶ 3 (“Indeed, AM often offers the only radio service to listeners in a variety of circumstances, particularly those living in and traveling through rural areas”).

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, 15994-95 ¶ 189 (1998) (subsequent history omitted).

ownership of broadcast facilities. The competitive bidding procedures will permit the prompt selection of a new, qualified licensee upon termination of Chameleon's authority to operate Station KFCC(AM) on 1270 kHz.⁹

10. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration, filed May 22, 1998, by Chameleon Radio Corporation IS DENIED.

11. IT IS FURTHER ORDERED, That the Mass Media Bureau IS DIRECTED to take further action consistent with paragraph 7, above.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁹ If Chameleon seeks further review of our action denying the petition for reconsideration, it is entitled to continue operating Station KFCC(AM) until the final disposition of any such appeal. *Chameleon Radio Corp.*, 13 FCC Rcd at 13555 ¶ 25.