

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

In re Application of)	
)	
TODD STUART NOORDYK)	File No. BPH-970922ME
)	
For a New FM Station on Channel 260A at)	Facility ID No. 88444
Manistique, Michigan)	

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2001

Released: October 5, 2001

By the Commission:

1. Roy E. Henderson (“Henderson”) seeks review of the Mass Media Bureau’s (“Bureau’s”) denial of his Petition for Reconsideration.¹ In that petition, Henderson sought reconsideration of (1) the staff’s denial of his Petition to Deny the Application of Todd Stuart Noordyk (“Noordyk”) for a new FM broadcast station on Channel 260A at Manistique, Michigan; and (2) the staff’s denial of his “Petition for Partial Reconsideration,” in which he challenged the Bureau’s acceptance of Noordyk’s short-form application and his participation in the auction, despite Noordyk’s failure in his application to certify compliance with our policies regarding the media interests of immediate family members. For the reasons discussed below, we deny Henderson’s Application for Review.

2. **Background:** Henderson, Noordyk, and Phillip Robbins (“Robbins”) were mutually exclusive (“MX”) applicants for the Manistique construction permit. Subsequently, Henderson and Noordyk participated as members of FM MX Group 63 in Closed Broadcast Auction No. 25, commencing September 28, 1999.² On October 4, 1999, Henderson petitioned for partial reconsideration of the September 3, 1999 Public Notice, in which Noordyk’s application, among others, was listed as being accepted for participation in Auction No. 25. Henderson claimed that the Bureau was obliged to dismiss Noordyk’s application, due to his failure to certify that he was in compliance with the Commission’s policies relating to media interests of immediate family members.

3. Subsequently, in Auction No. 25, Noordyk submitted the high bid of \$196,000 for the Manistique construction permit, and Henderson timely petitioned to deny his application, alleging collusion between Noordyk and Robbins. Robbins, with whom Noordyk had reached a settlement in an unrelated rule making proceeding at about the time of Auction No. 25, did not participate in the auction

¹ *Letter to Mr. Roy E. Henderson and Mr. Todd Stuart Noordyk*, Ref. No. 1800B3-TSN (Audio Services Division, Mass Media Bureau, May 5, 2000).

² *Public Notice: Closed Broadcast Auction – Status of Applications to Participate in the Auction*, 14 FCC Rcd 14113, 14138 (Wireless Telecom. Bureau 1999).

after failing to make the required upfront payment. Henderson alleged that the settlement in the rule making proceeding included an agreement to secure Robbins's withdrawal from the auction, violating the anti-collusion provisions of 47 C.F.R. §1.2105(c).

4. On February 23, 2000, the Bureau issued a Letter Ruling denying both Henderson's Petition to Deny and his Petition for Partial Reconsideration ("Letter Ruling").³ The Bureau concluded that Henderson failed to present a substantial and material question of fact as to the alleged collusion between Noordyk and Robbins. The Bureau also found that Noordyk's omission of the family interest certification from his Form 175 "short-form" application did not require dismissal of the application, as requested by Henderson. In the Letter Ruling, the Bureau directed Noordyk to file the family interest certification, which he subsequently filed on February 28, 2000. On March 23, 2000, Henderson timely filed a Petition for Reconsideration of the Letter Ruling, reiterating his earlier argument regarding the Noordyk-Robbins Settlement, and challenging the Bureau's reasoning in the family interest certification issue. The Bureau denied the Petition for Reconsideration by letter dated May 5, 2000.⁴

5. **Discussion: Failure to File Family Interest Certification:** Henderson again argues that the Bureau should have dismissed Noordyk's application before Auction No. 25 commenced, due to his failure to certify compliance with the Commission's family media interest policies. This certification was to have been attached to Henderson's short-form application pursuant to the *Public Notice* dated July 9, 1999 ("July Public Notice").⁵ The July Public Notice set forth, among other things, the requirements for auction participants' short-form applications, including required certifications. Noordyk concedes he did not file the family interest certification with his short-form application, although as noted above he filed the certification after the Bureau directed him to do so.

6. Henderson cites 47 C.F.R. §73.5002(b), which states applicants must timely submit short-form applications that are to include "all required certifications . . . pursuant to the provisions of 47 C.F.R. §1.2105(a) and any Commission public notices," and §1.2105(b)(2), which states that "[t]he Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application." Since, Henderson argues, §73.5002(b) requires applicants to make all certifications set forth in "any Commission public notices," and since the term "certifications" is not qualified or limited in §1.2105(b)(2), "certifications" as used in §1.2105(b)(2) includes the family interest certification, and thus the Bureau should have dismissed Noordyk's application.

7. We disagree with Henderson's contention, for the reasons more fully discussed in our opinion in *Liberty Productions, A Limited Partnership*, 16 FCC Rcd 12061 (2001), *appeal docketed sub nom., Orion Communications Limited, et al. v. FCC*, No. 01-1279 (D.C. Cir. June 21, 2001) ("*Liberty Productions*"). In *Liberty Productions*, as here, an application was challenged and dismissal sought due to the applicant's failure to provide the family interest certification. We held, first, as did the Bureau in the case before us, that the "certification as to media interests held by family members is not one of the

³ *Letter to Mr. Roy E. Henderson and Mr. Todd Stuart Noordyk*, Ref. No. 1800B3-TSN (Audio Services Division, Mass Media Bureau, February 23, 2000).

⁴ See footnote 1.

⁵ *Public Notice: Closed Broadcast Auction: Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, FM and TV Translator Construction Permits Scheduled for September 28, 1999*, 14 FCC Rcd 10632, 10699 (1999) ("*Also, bidders or attributable interest holders in bidders must certify under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members.*" (italics in original))

certifications specified in Section 1.2105(a), the omission of which renders a short-form application unacceptable for filing and subject to dismissal under Section 1.2105(b), if provided after the short-form filing deadline.”⁶ Second, in *Liberty Productions* we found that the July Public Notice did not give explicit notice that omission of the family interest certification would render the short-form application defective pursuant to Section 1.2105(b), such that it could not later be amended,⁷ and that the staff in that case (as in this one) did not issue a public notice advising the applicant of its omission and affording it the opportunity to supply the missing certification.⁸ In these circumstances, we will not dismiss an application. Finally, as in *Liberty Productions*, here Henderson argues that his bidding strategy was adversely affected by Noordyk’s failure to provide the family interest certification. This reasoning was also rejected in *Liberty Productions*. Henderson’s mistaken assumption that our rules compelled dismissal of Noordyk’s application is not a basis to dismiss Noordyk’s short-form application and we will not do so.⁹

8. *Collusion Between Noordyk and Robbins*: Henderson also renews his argument that a hearing must be conducted on the issue of whether Noordyk agreed with Robbins to have Robbins withdraw from the Manistique auction in exchange for undisclosed consideration. This allegation, if true, would constitute a serious breach of the rules prohibiting bidding and settlement collusion between competing applicants, as this prohibition is designed to “ensure the competitiveness and integrity of the auction process.”¹⁰ Henderson bases his contention on the settlement reached between Noordyk and Robbins in connection with a rule making proceeding involving a frequency change by WCMM-FM, Gulliver, Michigan, owned by Noordyk-controlled Great Lakes Radio, Inc. (“Great Lakes”).¹¹ Robbins’s company, Bay-Lakes-Valley Broadcasters, Inc. (“BLV”), sought an upgrade for its station WGBM(FM) at Mishicot, Wisconsin, which required that WCMM-FM change frequency. After negotiation between Great Lakes and BLV, the parties reached a settlement as to reimbursement from BLV to Great Lakes for the frequency change.

9. Henderson argues that the BLV-Great Lakes agreement, which preceded Robbins’s withdrawal from the Manistique auction, mandates a hearing to determine whether there was collusion between Noordyk and Robbins to secure Robbins’s withdrawal. Henderson reiterates his contention that the July Public Notice prohibited parties from communicating about “bids, bidding strategies, or settlements,”¹² and claims that the Bureau, in its Letter Ruling, found that he had “built a *prima facie* case,” thus putting the onus on Noordyk to produce evidence that the settlement in the Mishicot proceeding did not involve collusion in the Manistique auction.¹³

⁶ *Liberty Productions*, ¶ 15.

⁷ *Liberty Productions*, ¶¶ 16, 18 (citing *Salzer v. F.C.C.*, 778 F.2d 869, 871-72 (D.C. Cir. 1985)). As noted in paragraph 6 of the text, Noordyk’s family interest certification is now part of the record of this application proceeding.

⁸ *Liberty Productions*, ¶ 16.

⁹ *Liberty Productions*, ¶ 19.

¹⁰ July Public Notice, 14 FCC Rcd at 10635; *see also* 47 C.F.R. §1.2105(c).

¹¹ *Mishicot, Wisconsin and Gulliver, Michigan*, 14 FCC Rcd 2193 (1999); *proceeding terminated*, 14 FCC Rcd 21412 (1999).

¹² 14 FCC Rcd at 10635.

¹³ Application for Review, ¶ 33.

10. Henderson mis-characterizes the nature of the pleading burden on a petitioner, as set forth in 47 U.S.C. §309(d) and cases such as *Astroline Communications Co. v. F.C.C.*¹⁴ and *Citizens for Jazz on WRVR v. F.C.C.* (“*Citizens for Jazz*”).¹⁵ While the Bureau correctly noted that Henderson had alleged a *prima facie* case, this is only the first step in meeting petitioner’s pleading burden under the law. A petitioner must also support those allegations with proper evidence. See *Citizens for Jazz*, 775 F.2d at 394 (“Even if it does meet the requirement [of pleading a *prima facie* case], however, the Commission must determine, second, whether ‘on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,’ ‘a substantial and material question of fact is presented.’”). See also *Mobile Communications Corp. of America v. F.C.C.*, 77 F.3d 1399, 1410 (D.C. Cir. 1996) (negative resolution of the second *Astroline* determination satisfies Section 309(d) requirements, citing *Citizens for Jazz*).

11. Contrary to Henderson’s argument, the burden of pleading did not shift to Noordyk merely because Henderson pleaded the elements of a *prima facie* case. Henderson was still charged with supporting those allegations with proper evidence. However, Henderson’s evidence consisted merely of the existence of an agreement between Noordyk- and Robbins-controlled entities in the Mishicot proceeding, followed by Robbins’s withdrawal from the Manistique auction. Henderson asks us to infer that, because Robbins’s withdrawal occurred after the Mishicot agreement, the withdrawal *must* therefore have been caused by the agreement. Such speculation fails to constitute “specific evidence that collusive behavior has occurred.”¹⁶ Absent some specific evidence linking the two events, we find that Henderson has not met his burden. See, e.g., *Nevada Wireless*, 13 FCC Rcd 11973, 11977-78 (Wireless Telecom. Bureau 1998) (mere evidence that competing bidders were represented by attorneys in same law firm insufficient to show collusion; specific, credible evidence of actual communications regarding bidding strategy is required).

12. Moreover, we do not agree with Henderson that Noordyk and Robbins were precluded from negotiating a settlement in the Mishicot proceeding merely because they were mutually exclusive applicants in the Manistique auction. Our rules do not require the suspension of all relations among auction participants while an auction is pending.¹⁷ Rather, the rules preclude only communications relating to auction bids, bidding strategies, or settlements. See *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, 15982-83 (1998) (“As a general matter, the anti-collusion rule does not prohibit non-auction related business negotiations between auction applicants that have applied for the same geographic area service areas.”); *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 467,

¹⁴ 857 F.2d 1556 (D.C. Cir. 1988).

¹⁵ 775 F.2d 392 (D.C. Cir. 1985).

¹⁶ July Public Notice, 14 FCC Rcd at 10636.

¹⁷ See 47 C.F.R. § 1.2105(c)(1) (“Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the short-form application filing deadline, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder’s short-form application pursuant to § 1.2105(a)(2)(viii).”).

¶ 163 (1997) (Commission cautioned auction applicants “that discussions concerning, but not limited to, issues such as management, resale, roaming, interconnection, partitioning and disaggregation may all raise impermissible subject matter for discussion because they may convey pricing information and bidding strategy.”). *See also* July Public Notice, 14 FCC Rcd 10635-36, 10640; *Letter to Robert Pettit, Wiley Rein & Fielding, Counsel to Noverr Publishing, Inc., from Margaret W. Wiener, Chief, Auctions Division, Wireless Telecommunications Bureau*, DA 00-2905 (rel. December 26, 2000); *Letter to David L. Nace, Lukas McGowan Nace & Gutierrez, from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau*, 11 FCC Rcd 11363 (1996); *Public Notice, “Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E, and F Block Bidders,”* 11 FCC Rcd 10134 (1996). Henderson has not shown that any negotiations or discussions between Noordyk and Robbins resulted in the disclosure of any prohibited information. Thus, Henderson has not raised a substantial and material question of fact as to collusion between Noordyk and Robbins, and thus we deny his petition to deny Noordyk’s application.

13. **Conclusion / Action:** For the foregoing reasons, the Petition for Partial Reconsideration filed by Henderson IS DENIED, and the Petition to Deny filed by Henderson IS DENIED. We further find Todd Stuart Noordyk fully qualified to be a Commission licensee, and that grant of Noordyk’s application would be in the public interest, convenience, and necessity. Therefore, the Chief, Audio Services Division, Mass Media Bureau, IS HEREBY DIRECTED to issue a Public Notice listing Todd Stuart Noordyk’s Application for an FM Broadcast Station construction permit on Channel 260A at Manistique, Michigan, File No. BPH-970922ME, as ready to be granted.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Román Salas
Secretary