

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

In the Matter of)	
)	
Applications of)	Fee Control Nos. 9701108195067002 &
Wade Communications, Inc.,)	9511288195347001 &
Ellen R. Evans d/b/a Heartland)	9304268195092005
Communications, and)	
B.R. Clayton and Martha S. Clayton d/b/a)	
Middleton Radio)	

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 2001 Released: November 16, 2001

By the Commission:

I. INTRODUCTION

1. The Commission has before it a joint Application for Review, filed by Wade Communications, Inc., Ellen R. Evans d/b/a Heartland Communications, and B.R. Clayton and Martha S. Clayton d/b/a Middleton Radio (collectively, "Applicants"). The Applicants seek review of three decisions of the Office of Managing Director denying the Applicants' requests for refunds of filing fees.¹ For the reasons below, we deny the Application for review.

II. BACKGROUND

2. Each of the three Applicants, in separate proceedings, had filed an application for an FM radio station construction permit, located respectively in New York, Missouri, and Tennessee. Each application was mutually exclusive with other applications.² All of the applications had been filed prior to the enactment of the Balanced Budget Act of 1997, which amended section 309(j) of

¹ See letters dated November 18, 1999, from Mark A. Reger, Chief Financial Officer, to Timothy K. Brady, Esq.

² See Request for Refund of Filing Fee filed on December 2, 1998, by Timothy K. Brady, attorney for Wade Communications, Inc, ("Wade Request") at p.1; Request for Refund of Filing Fee filed on December 2, 1998, by Timothy K. Brady, attorney for Ellen R. Evans d/b/a Heartland Communications, ("Evans Request") at p.1; Request for Refund of Filing Fee filed on December 2, 1998, by Timothy K. Brady, attorney for B.R. Clayton and Martha S. Clayton d/b/a Middleton Radio, ("Clayton Request") at p.1.

the Communications Act (“Act”), 47 U.S.C. 309(j), to require competitive bidding, rather than comparative hearings, to award licenses to mutually exclusive applicants for commercial broadcast licenses.³ However, the Balanced Budget Act also amended the Act to add a new section 309(l) that authorized the Commission, in its discretion, to use competitive bidding or comparative hearings to award licenses to pending mutually exclusive broadcast applicants if the competing applications had been filed prior to July 1, 1997.⁴ In addition, section 309(l) provided for an 180-day period during which such pre-July 1 broadcast applicants could enter into settlement agreements that would resolve mutual exclusivity and be entitled to mandatory waivers of FCC rules limiting the amount of settlement payments between the applicants.⁵ Each of the instant Applicants took advantage of these provisions, and in January 1998, filed settlement agreements with the Commission. The agreements were subsequently approved and resulted in dismissal of the Applicants’ applications in April and September 1998, and award of each license to a remaining applicant.⁶

3. Subsequent to the filing of the Applicants’ settlement agreements, the Commission completed a rulemaking proceeding in August, 1998, in which it determined that any remaining pre-July 1, 1997 broadcast applications should be awarded by competitive bidding.⁷ Specifically, it noted that “despite the 180-day period during which we waived our settlement rules as required by Section 309(l)(3), there are approximately 150 proceedings involving more than 600 pre-July 1, 1997 mutually exclusive applications that remain to be decided.”⁸ Concluding that the use of auctions would “generally expedite service and better serve the public interest in these cases, the Commission concluded that “auctions will generally be fairer and more expeditious than deciding the pending mutually exclusive applications filed before July 1, 1997 through the comparative

³ *Id.*

⁴ 47 U.S.C. § 309(l).

⁵ *Id.*

⁶ See Wade Request, at p.2 (settlement agreement filed for Commission approval on January 30, 1998; approval granted March 3, 1998); Evans Request, at p.2 (settlement agreement filed for Commission approval on January 28, 1998; approval granted April 16, 1998); Clayton Request, at p.2 (settlement agreement filed for Commission approval on January 30, 1998; approval granted September 21, 1998).

⁷ See *First Report and Order 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, 15931-32 (1998).

⁸ See *First Report and Order*, 13 FCC Rcd at 15933.

hearing process.”⁹ The Commission stated, however, that “pending applicants in all comparative licensing cases subject to resolution by competitive bidding pursuant to Section 309(l) may file a pleading disavowing intent to participate in the auction and seek dismissal of their applications.”¹⁰

The Commission further stated that, “[o]nce dismissal of any such application is final, we will entertain requests for refunds of any hearing and filing fees actually paid by such applicants.”¹¹ Finally, in contrast to the *NPRM*, which had proposed that such refunds would be paid “once the grant of the construction permit to the winning bidder is final and the license has been paid for in full,”¹² the Commission determined that refunds would be paid “once dismissal of any such application is final”¹³

4. On December 4, 1998, Applicants filed requests for refund of their filing fees. Applicants stated that their applications were “subject to section 309(l)” and they “elected not to have the disposition of their applications determined by competitive bidding.”¹⁴ Applicants stated that they were therefore entitled to refunds under the *First Report and Order*.¹⁵

5. The Office of Managing Director, by the Chief Financial Officer, denied Applicants’ requests. The Chief Financial Officer found that the Applicants were not entitled to refunds because their applications had been resolved by negotiated settlements and thus did not qualify for the refunds authorized in the *First Report and Order*.¹⁶

III. DISCUSSION

6. In the Application for Review, Applicants argue that the Office of Managing Director erred in not refunding the filing fees in these matters and the decisions should be reversed.¹⁷ For

⁹ *Id.*

¹⁰ *Id.* at 15957.

¹¹ *Id.*

¹² 12 FCC Rcd 22363, 22370-71 (1997).

¹³ 13 FCC Rcd 15920, 15957.

¹⁴ Wade Request, at p.1; Evans Request, at p.1; Clayton Request, at p.1.

¹⁵ *Id.* at 2.

¹⁶ See letters dated November 18, 1999, from Mark A. Reger, Chief Financial Officer, to Timothy K. Brady, Esq.

¹⁷ Application for Review at 5.

the reasons below, we deny the Application for Review.

7. The Applicants first argue that nothing in the *First Report and Order* suggests they are not eligible for the refunds of filing fees that they have requested.¹⁸ Applicants further argue that “the *First Report and Order* gave no hint that entering into a settlement agreement would preclude an applicant of obtaining a refund of its filing fee.”¹⁹ We disagree. As indicated in paragraph 3 above, both the general context and specific language of the *First Report and Order* clearly state our intention that refunds of filing fees would only apply to the remaining pre-July 1, 1997 applicants for licenses or permits who had not resolved mutual exclusivity through negotiated agreements during the 180-day period and whose pending mutually exclusive applications would therefore be resolved pursuant to our decision to use competitive bidding.²⁰ The permits for which Applicants applied, in contrast, were not awarded by auction but pursuant to the settlement agreements into which the Applicants separately entered prior to the Commission’s decision in the *First Report and Order*.

8. Similarly, Applicants argue that their requests for refunds should be granted because they “anticipated receiving such refunds, based on the clear language of the *First Report and Order*, and took that expectation into consideration in determining to request dismissal of their applications.”²¹ At the outset, none of the Applicants could have so relied on the *First Report and Order* because they entered into and filed their settlement agreements with the Commission before we adopted it on August 6, 1998.²² In any event, as discussed above, nothing in the *First Report and Order* indicated that refunds of filing fees would be granted to applicants that had already settled and resolved mutual exclusivity during the 180-day period; rather the relevant language refers only to remaining, pending mutually exclusive application proceedings for which it was necessary to award the licenses by auction. Nor could Applicants or others have relied on the *Notice of Proposed Rulemaking* in that proceeding (“*NPRM*”), 12 FCC Rcd 22363 (1997). As noted above, in the *NPRM*, our tentative proposal was to refund filing fees to applicants choosing not to participate in the related auction, with “*all* such refunds [to] be paid once the grant of the

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 4-5

²⁰ 13 FCC Rcd 15920, 15957.

²¹ Application for Review at 5.

²² See Wade Request, at p.2 (settlement agreement filed on January 30, 1998); Evans Request, at p.2 (settlement agreement filed on January 28, 1998); Clayton Request, at p.2 (settlement agreement filed on January 30, 1998).

construction permit to the *winning bidder* is final.”²³ Our proposed relief was clearly limited to situations in which the construction permit at issue was awarded by auction, not pursuant to a settlement agreement.

9. Finally, the Applicants argue that the Commission’s rationale for granting refunds applies with equal weight to the Applicants, pointing to the Commission’s statement in the First Report and Order that the “extraordinary step” of refunding filing fees was “in recognition of the fact that these applicants might not have filed their applications if they had known the permit would be awarded by competitive bidding.”²⁴ We note, however, that any applicants that settled within the 180-day period were entitled to negotiate payments from the other mutually exclusive applicants that would cover their costs, including their filing fees, and moreover, pursuant to the statutorily mandated waiver requirement in section 309(l), could also negotiate payment amounts that exceeded their costs.²⁵ Therefore, any equities that might apply to non-settling applicants and warrant refund of filing fees do not apply with the same force to these applicants.²⁶

10. After careful review of the issues raised in the Application for Review, we do not find any basis for modifying the decision of the Office of Managing Director denying Applicants’ requests for refunds of filing fees.

IV. ORDERING CLAUSES

ACCORDINGLY, IT IS ORDERED that the Application for Review, filed on December 20, 1999, by Wade Communications, Inc., Ellen R. Evans d/b/a Heartland Communications, and B.R. Clayton and Martha S. Clayton d/b/a Middleton Radio IS DENIED.

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²³ 12 FCC Rcd 22363, 22370-71 (1997) (emphasis added).

²⁴ 13 FCC Rcd 15920, 15957-58.

²⁵ 12 FCC Rcd 22363, 22375.

²⁶ See also Federal Communications Commission, Public Notice, Report No. 44629A, Notice of Mass Media Bureau Action on AM and FM Broadcast Settlement Agreements and Applications (Dec. 10, 1999) (granting request of short-form applicants to settle, but rejecting request for refund of filing fees as outside scope of First Report and Order refund provisions and noting that parties to settlement are permitted to reimburse dismissing applicants for previously paid application filing fees.)

Magalie Roman Salas
Secretary