

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

In the Matter of
Review of the Commission's
Rules and Policies
Affecting the Conversion
To Digital Television
MM Docket No. 00-39

THIRD MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: September 16, 2002

Released: September 23, 2002

By the Commission:

1. We have before us a Petition for Reconsideration, filed by Diversified Broadcasting, Inc., licensee of WCJB(TV), Gainesville, Florida ("Diversified"). Diversified requests reconsideration of the Memorandum Opinion and Order ("MO&O") in this proceeding, which addressed a number of issues related to the conversion of the nation's broadcast television system from analog to digital television ("DTV"). Specifically, Diversified objects to the determination in the MO&O that certain NTSC applications filed prior to July 1, 1997, must be protected by later-filed DTV area expansion applications. Community Television of Florida, Inc. ("CTF") filed an Opposition to Diversified's Petition. For the reasons discussed below, we deny Diversified's Petition.

2. The Report and Order and Further Notice of Proposed Rule Making ("Report and Order") in this proceeding addressed the procedures to be used in processing mutually-exclusive applications filed by licensees seeking to expand or "maximize" their DTV allotments (referred to herein as "expansion applications"). In the Report and Order, we gave processing and protection priority to then pending DTV expansion applications, filed on or prior to January 18, 2001, over previously filed NTSC applications except those NTSC applications that fell into one of three categories: post-auction applications, applications proposed for grant in pending settlements, and singleton applications cut off

1 Petition for Reconsideration, Diversified Broadcasting, Inc., MM Docket No. 00-39, filed January 17, 2002.

2 In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, 16 FCC Rcd 20594 (2001).

3 Opposition to Petition for Reconsideration, Community Television of Florida, Inc., MM Docket No. 00-39, filed January 30, 2002.

4 In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, 16 FCC Rcd 5946 (2001).

5 Maximization can also be called service area expansion and includes applications that increase power or change the site or height in such a way that increases a DTV service area in one or more directions beyond the area resulting from the station's allotment parameters.

from further filings.⁶ We stated that these applications must have been accepted for filing in order to be protected from DTV expansion applications. When a pending DTV application conflicts with an NTSC application in one of these categories, we stated that we would treat the applications as mutually exclusive (“MX”) and follow the procedures adopted in the *Report and Order* for MX applications – that is, we required that parties resolve their MX conflict within 90 days or we would subsequently dismiss both applications.⁷

3. In the *MO&O*, we revised the procedures for determining priority between conflicting DTV expansion applications and NTSC applications. We noted that in the *Broadcast Auctions Report and Order*⁸ we had found that, by application of Section 309(l) of the Communications Act,⁹ pending NTSC application groups on file prior to July 1, 1997, are entitled to compete in an auction that does not include applications filed on or after July 1, 1997.¹⁰ Pursuant to that statutory directive, we concluded that we may not find DTV expansion applications (all of which were filed after June 30, 1997) to be MX with NTSC application groups on file prior to July 1, 1997. This also is the case when an NTSC application that was cut-off as part of a group of NTSC applications filed before July 1, 1997, has become a singleton because other applications in the group have been dismissed.¹¹ We concluded in the *MO&O* that NTSC applications in these two categories -- NTSC application groups on file prior to July 1, 1997, and any singletons remaining from such a group -- should be protected against DTV expansion applications.¹² DTV expansion applicants are permitted to file minor amendments to resolve conflicts with NTSC applications in these categories.¹³

4. Diversified requests that we reconsider and reverse our decision that pending DTV expansion applications filed on or prior to January 18, 2001, must protect certain NTSC applications filed prior to July 1, 1997. Diversified argues that we should reinstate our initial decision (in the *Report and Order*) and treat these DTV expansion applications as MX with these NTSC applications so that the parties may work together to resolve interference issues. According to Diversified, under the determination in the *Report and Order*, its DTV expansion application for WCJB(TV) would have been MX with CTF’s competing NTSC application for Marianna, Florida, and the parties then would have had 90 days within which to negotiate a resolution to the interference conflict. Under the revised decision in the *MO&O*, however, the NTSC application for Marianna will take priority, as it was filed prior to July 1, 1997, and was cut-off as part of a group of two competing NTSC applications filed before July 1, 1997.¹⁴ Diversified argues that this processing change puts DTV applicants at a severe disadvantage despite the

⁶ *Id.* ¶ 52. We defined “post-auction” applications as the long form application (FCC Form 301) filed by the winning bidder following the completion of a broadcast auction. An application that is “cut off” receives priority over any later-filed competing application.

⁷ *Id.*

⁸ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97-234, 13 FCC Rcd 15920, 15945-47 (1998), *aff’d sub. nom. Orion Communications Ltd. v. FCC*, 221 F.3d 196 (D.C. Cir. 2000).

⁹ 47 U.S.C. § 309(l).

¹⁰ *MO&O*, 16 FCC Rcd 20594, ¶ 59.

¹¹ See *Broadcast Auctions Report and Order*, 13 FCC Rcd 15920, ¶ 68 (when multiple applications are filed before July 1, 1997, but only one application remains on file by the time they are processed, Section 309(l)(2) compels grant of the singleton application without soliciting further applications).

¹² *MO&O*, 16 FCC Rcd 20594, ¶ 59. This protection does not apply when only one NTSC application was filed for a particular allotment.

¹³ *Id.*

¹⁴ Diversified Petition ¶¶ 3-5.

importance of DTV to the future of television broadcasting. Diversified also argues that we incorrectly interpreted Section 309(l) of the Communications Act, which Diversified claims was intended to resolve exclusivity only among competing analog television applications. According to Diversified, that provision was not intended to address processing of subsequently filed DTV expansion applications, and Congress did not intend that DTV expansion applications be treated as secondary to analog station applications.¹⁵ In its Opposition, CTF argues that Diversified's application must be dismissed as a result of the Commission's decision in the *MO&O* according priority to NTSC applications filed prior to July 1, 1997.

5. We decline to revise our determination that Section 309(l) of the Communications Act entitles pending NTSC application groups on file prior to July 1, 1997, to compete in an auction that does not include applications filed on or after July 1, 1997. Section 309(l) provides:

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall –

...

(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding ...

6. Statutory construction must begin with the language employed by the statute and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose.¹⁶ The language of Section 309(l)(2) is unambiguous that, where competing applications were filed with the Commission before July 1, 1997, "the Commission shall ... treat the persons filing such applications as the only persons eligible to be qualified bidders."¹⁷ The Conference Report confirms that "[t]he Commission shall limit the class of eligible applicants who may be considered qualified bidders ... to the persons who filed applications with the Commission before that date [July 1, 1997]."¹⁸

7. In implementing section 309(l) the Commission determined, first, that it would resolve by competitive bidding any mutually exclusive application group not resolved by a settlement agreement¹⁹ and, second, that pending NTSC applications submitted for filing by September 20, 1996²⁰ constituted pre-July 1st competing applications within the meaning of section 309(l) even if the related freeze area waiver had not been processed.²¹ Except for the circumstance in which only one application (and waiver request) was ever submitted for a particular allotment, the Commission determined that it was precluded

¹⁵ Diversified Petition ¶¶ 5-8.

¹⁶ *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975) (Powell, J., concurring)).

¹⁷ *Broadcast Auctions Report and Order*, 13 FCC Rcd 15920, ¶ 68.

¹⁸ H.R. Conf. Rep. 217, 105th Cong. 1 Sess. 573(1997).

¹⁹ *Broadcast Auctions Report and Order*, 13 FCC Rcd 15920, 15933 ¶ 34

²⁰ See *Sixth Further Notice*, 11 FCC Rcd 10968, 10992 (1996) (indicating that the Commission would provide an additional 30-day filing period [by September 20, 1996] to accommodate applications already in progress and that thereafter it would continue to process on a case-by-case basis freeze waiver requests and, upon the grant of a waiver request and acceptance of the related application(s), would issue a Public Notice that cut-off the opportunity to file competing, mutually exclusive applications).

²¹ 13 FCC Rcd at 15945-46 ¶¶ 68-70.

by the unambiguous language of subsection (2) from soliciting additional potentially mutually exclusive applications, despite its earlier explicit pledge to provide the opportunity for the filing of competing applications with respect to any analog television application accepted for filing.²² This interpretation was upheld in *Orion Communications, Ltd v. FCC*, 221 F.3d 196 (D.C. Cir. 2000) (Table).

8. Consistent with the determination to resolve competing NTSC applications by competitive bidding and the resulting obligation to insulate such applicants from having to compete for the construction permit against post-June 30, 1997 applicants, the Commission may not require NTSC applications within the scope of section 309(l) to resolve any interference conflicts with pending DTV expansion applicants or face dismissal or otherwise direct that the rights of this category of broadcast applicants are secondary to those of DTV expansion applicants. To do so would vitiate completely the special protections Congress expressly extended to “[c]ompeting applications . . . for commercial radio or television stations filed with the Commission before July 1, 1997.” Congress, although clearly aware in 1997 of the impending transition to DTV, did not offer any guidance either in the statutory language or in the Conference Report as to how the Commission is to accommodate the competing spectrum needs of this group of applicants and of DTV expansion applicants. Even without such express guidance, however, the Commission must devise a solution faithfully effectuating the express protections afforded this category of competing commercial broadcast applications.²³ Notwithstanding Diversified’s contention, the Commission’s original procedure, requiring the dismissal of certain NTSC applicants within the scope of section 309(l), contravened Congress’s manifest intent regarding these particular applicants.²⁴ Its repeal in the *MO&O* was therefore compelled by the unambiguous language of section 309(l).

9. Diversified has advanced no argument that leads us to a different conclusion. Diversified claims that Section 309(l) was intended to resolve mutual exclusivity among analog television applications only, and that it was not intended to determine priority among competing analog and DTV expansion applications.²⁵ Nothing in the statutory text suggests that DTV expansion applications were intended to be treated differently under Section 309(l), or that they were intended to be treated as MX with applications filed prior to July 1, 1997. Elsewhere in the statute Congress did expressly provide for different treatment of digital stations when, for example, in Section 309(j)(2), it expressly excluded certain digital stations from our competitive bidding authority.²⁶ Congress made no provision for disparate treatment of DTV expansion applications under Section 309(l), however, and the unambiguous language of that provision compels the result we reached in the *MO&O*.

²² *Id.* at ¶ 68, acknowledging that there is some degree of unfairness in this result, but finding that “we have no choice under the statute [because] [t]he language of paragraph (2) is unambiguous.”

²³ See generally, *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842 (1984), quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress”).

²⁴ Diversified Petition at ¶¶ 7-8.

²⁵ Diversified Petition ¶ 7.

²⁶ Section 309(j)(2) provides: “The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission— . . . (B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses . . .” 47 U.S.C. § 309(j)(2).

10. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed January 17, 2002, by Diversified Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary