

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

In re Application of)	
)	
WINSTAR BROADCASTING CORP.)	File No. BPCT-19960723KW
)	
For a Construction Permit for a New)	Facility Identification No. 83248
Television Station on Channel 21,)	
Virginia Beach, Virginia)	

ORDER ON RECONSIDERATION

Adopted: January 24, 2005

Released: January 27, 2005

By the Commission:

I. INTRODUCTION

1. The Commission has before it the Petition for Reconsideration filed by Robert O. Copeland (Copeland) requesting reconsideration of the Commission's *First Winstar Order*,¹ which denied Copeland's Application for Review that sought the denial of an application for a new television station on Channel 21 at Virginia Beach, Virginia, filed by Winstar Broadcasting Corporation (Winstar). For the reasons described below, we deny Copeland's Petition for Reconsideration.

II. BACKGROUND

2. Initially there were twenty-two applicants for the new Virginia Beach television station in Auction No. 25.² Only three applicants, however, were able to bid in Auction No. 25 for the station: Copeland, Winstar and Steven Soldinger d/b/a Tidewater Community Communications (Soldinger),³ because they were the only ones to submit a complete short-form application (FCC Form 175) to participate in the auction and to pay a sufficient upfront payment to be able to bid the minimum opening bid amount of

¹ Application of Winstar Broadcasting Corp., *Memorandum Opinion and Order*, 17 FCC Rcd 6126 (2002) (*First Winstar Order*). On May 1, 2002, in Case No. 02-1117, the U.S. Court of Appeals for the District of Columbia Circuit granted Copeland's motion to dismiss his petition for review. On July 24, 2002, in Case No. 02-1159, the same court granted Winstar's motion to dismiss its petition for review.

² Auction No. 25 was a "closed" auction; only those parties with a specified group of mutually-exclusive applications for particular broadcast allotments, pending as of July 1, 1997, were allowed to participate. Implementation of Section 309(j) of the Communications Act – Competitive Bidding Procedures for Commercial Broadcast and Instructional Television Fixed Television Service Licenses, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920, 15942 - 45 ¶¶ 60 - 65 (1998) (*Broadcast Competitive Bidding First Report and Order*); *id.*, *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999) (*Broadcast First Reconsideration Order*); *id.*, *Memorandum Opinion and Order*, 14 FCC Rcd 12541 (1999); *aff'd*, *Orion Communications Ltd. v. FCC*, 221 F.3d 196, No. 98-1424, slip op. (D.C. Cir. June 13, 2000) (unpublished opinion available at 2000 WL 816046 (D.C. Cir.); *aff'd*, *Orion Communications Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

³ A fourth applicant, George S. Flinn, Jr. (Flinn), submitted a short-form application for the Virginia Beach station, but did not submit a sufficient upfront payment to bid on the station. See Closed Broadcast Auction, *Public Notice*, 14 FCC Rcd 15475 (1999).

\$1,240,000 for the station.⁴ At the completion of the auction, Winstar was the winning bidder with a bid amount of \$8,752,000, and Copeland was the next highest bidder at \$7,956,000.⁵

3. Following the conclusion of the auction, Copeland filed a petition to deny Winstar's application, alleging that, prior to the auction, Winstar engaged in a transfer of control, thereby rendering it ineligible to bid in the auction.⁶ Winstar had revealed in its short-form application that it had transferred 49% of its stock to Equity Broadcasting Corporation (Equity) and had also granted Equity an option to acquire the remaining 51% of Winstar's stock (Equity option agreement), exercisable only upon prior Commission consent and only at such time as all of Winstar's pending broadcast applications were granted or dismissed.⁷ Following the conclusion of the auction, Winstar submitted an amendment to its application stating that the Equity option agreement was never consummated and had been cancelled by agreement of the parties. Copeland argued that, despite its representations, Winstar had transferred control to Equity and that Winstar had made a major change in control that should have resulted in the dismissal of its application.

4. In his petition to deny filed on December 10, 1999, Copeland also argued that Winstar was financially unqualified to acquire the Virginia Beach construction permit.⁸ In a subsequent Motion for Declaratory Ruling,⁹ Copeland argued further that, because Winstar's short-form application (Form 175) should have been dismissed or its long-form application denied, Copeland, as the next highest bidder, should be offered the Virginia Beach construction permit at his initial bid amount of \$1,240,000 minus his 35% "new entrant" bidding credit, for a net bid amount of \$806,000.

5. On June 11, 2001, the Chief of the Mass Media Bureau's Video Services Division (Division)¹⁰ issued a letter decision, ruling that no substantial and material question of fact had been raised concerning Winstar's qualifications.¹¹ Specifically, the Division cited to Winstar's amendment wherein it stated that the Equity option agreement was never consummated and also to a statement by a Winstar official that Equity was never in control of Winstar.

⁴ *Broadcast Competitive Bidding First Report and Order*, 13 FCC Rcd at 15951 ¶ 83.

⁵ See "Closed Broadcast Auction No. 25 Closes," *Public Notice*, 14 FCC Rcd 17186 (1999). Soldering's highest bid was \$7,233,000.

⁶ See *First Winstar Order*, 17 FCC Rcd at 6126.

⁷ Winstar was an applicant/bidder for other television stations in Auction No. 25.

⁸ In subsequent submissions, Copeland asserted that Winstar Broadcasting Corporation was financially unqualified because its two parent companies, Winstar Communications, Inc. and Winstar New Media Company, filed for Chapter 11 bankruptcy protection in April of 2001. See *Winstar LMDS, LLC, Order*, 17 FCC Rcd 7084 (Auctions Div. 2002); see also *Winstar Communications, Inc. v. Shubert*, 284 B.R. 40, 42 (Bankr. D. Del. 2002). April of 2001 was well after the close of Auction No. 25, which closed on October 8, 1999.

⁹ On April 16, 2001, Copeland filed a Motion for Declaratory Ruling.

¹⁰ In March of 2002, the Commission combined the former Cable Services Bureau and the former Mass Media Bureau to form the new Media Bureau. Establishment of the Media Bureau And Other Organizational Changes, *Order*, 17 FCC Rcd 4510 (2002). As part of this reorganization, the former Video Services Division was renamed the Video Division.

¹¹ "For the reasons stated above, we conclude that petitioner has failed to make a *prima facie* case that Winstar engaged in an unauthorized transfer of control." Letter from Barbara A. Kreisman, Chief, Video Services Div., Mass Media Bur., to John M. Shoreman, Esq. (rel. June 18, 2001).

We find that Copeland has failed to establish a *prima facie* case or a substantial and material question of fact that Winstar underwent a transfer of control to Equity. Under Section 73.3572(b) of the Commission's rules, a transfer of a 49% interest to a new party does not constitute a "major change" in the ownership of an applicant. Furthermore, Copeland provides no evidence to contradict the truthfulness of Winstar's statement in its amendment that, while Equity obtained a 49% interest in Winstar, the 51% option agreement was cancelled. Finally, Copeland has not buttressed its allegation that a transfer of control to Equity occurred with any supported facts.¹²

The Division also found that, although Winstar reported incorrectly in its short-form application regarding the finality of the option agreement with Equity, that error appeared to be more indicative of simple mistake than an attempt to mislead. Finally, with respect to its financial qualifications, the Division found that Winstar had not itself filed for bankruptcy but rather its parent companies had filed for bankruptcy protection. The Division noted that Winstar had already submitted a substantial upfront payment of \$2.8 million and had committed to paying its winning bid.¹³ The Division denied Copeland's petition to deny and dismissed his motion for declaratory ruling.¹⁴

6. Following the release of the Division's letter decision, the Division issued a Public Notice announcing that it was prepared to grant Winstar's application and issue the construction permit for Virginia Beach upon Winstar's timely payment of the balance of its winning bid.¹⁵ The Public Notice set July 18, 2001, as the deadline for Winstar to pay, and August 1, 2001 as the deadline on which final payment could be made with a 5% late fee. Winstar did not make the required payment by August 1, 2001, and instead filed a Request for Stay seeking temporary relief from the requirement that it make its final payment until such time as its application was no longer subject to administrative or judicial review.

7. Meanwhile, on July 2, 2001, Copeland submitted an Application for Review of the Division's letter decision, denying his petition to deny. Copeland claimed that the Division erred when it failed to conclude that substantial and material questions of fact were raised as to whether Winstar engaged in a transfer of control, and whether Winstar was financially qualified. In a supplement, Copeland argued that both Winstar and the other bidder, Soldinger, should not have been eligible to bid in the auction. According to Copeland, Soldinger acknowledged in his short-form application that he had entered into a Local Marketing Agreement (LMA) with Second Generation of Iowa, Ltd. (Second Generation) that included Second Generation having a right of first refusal on the station and an option to purchase it from Soldinger at the end of the LMA term. Copeland argued that Soldinger, like Winstar, was also bidding for another party and should not have been eligible to bid in the auction.

8. On March 25, 2002, the Commission released its *First Winstar Order* addressing Copeland's arguments that Winstar engaged in a transfer of control, thereby rendering its application ineligible for

¹² *Id.*

¹³ When the Commission adopted the broadcast competitive bidding rules, it eliminated the requirement that bidders make a certification that they were financially qualified, concluding that such a requirement was no longer necessary because competitive bidding procedures would provide adequate assurance that broadcast applicants are financially qualified. *See Broadcast Competitive Bidding First Report and Order*, 13 FCC Rcd at 15990.

¹⁴ In its letter decision, the Video Services Division dismissed Copeland's declaratory ruling motion, based on the Division's conclusion that Copeland's petition to deny the Winstar application failed to make a *prima facie* case or raise a substantial and material question of fact.

¹⁵ *See* "FCC Announces It is Prepared To Grant Broadcast Construction Permit After Final Payment Is Made," *Public Notice*, 16 FCC Rcd 13134 (2001).

participation in the auction, and that Winstar was financially unqualified.¹⁶ The Commission found that the arguments raised by Copeland in prior pleadings were "thoroughly considered and properly resolved by the staff."¹⁷ The Commission upheld the staff decision for the reasons stated therein. With respect to Winstar's Request for Stay, the Commission found that there was no rule or case holding that a winning bidder may delay a final payment because a challenge to the winning bidder's application remains pending.¹⁸ The Commission noted that it had consistently held that, barring any unique or unusual circumstances, a winning bidder that fails to pay the balance of its bid by the late payment deadline will be in default and subject to applicable default payments.¹⁹ The Commission decided that Winstar had not justified a waiver of the payment deadline.²⁰ Finally, the Commission concluded that the public interest would not be served by grant of a waiver of the payment deadline because it would defeat the clear objective of Section 309(j) of the Communications Act, which requires that the Commission promote the "rapid deployment of new technologies, products and services for the benefit of the public...."²¹ The Commission found Winstar in default on its auction obligations and imposed a default payment. Accordingly, the issue of Winstar's disqualification for non-payment has been resolved and is no longer before us. In the same order, after declaring Winstar in default, the Commission offered the Virginia Beach construction permit to Copeland, at his last bid amount of \$7,956,000 (minus his 35% new entrant bidding credit pursuant to 47 C.F.R. § 73.5007) pursuant to the post-auction default procedure set forth in Section 1.2109 of the Commission's rules.²²

9. In his Petition for Reconsideration, Copeland once again seeks relief based on contentions that neither Winstar nor Soldinger was eligible to bid and neither should have been permitted to bid in Auction No. 25.²³ Copeland's view is that he was the only eligible bidder for the new Virginia Beach station, and therefore he should not have been required to bid against Winstar and Soldinger for the Virginia Beach construction permit in Auction No. 25.²⁴ Had Winstar and Soldinger been disqualified just prior to the start of the bidding in Auction No. 25, Copeland reasons, he could have won the construction permit for the minimum opening bid amount that had been set for the station (\$1,240,000), minus his 35% new entrant

¹⁶ *First Winstar Order*, 17 FCC Rcd at 6127.

¹⁷ *Id.*

¹⁸ *Id.*, 17 FCC Rcd at 6128.

¹⁹ *Id.*, 17 FCC Rcd at 6129.

²⁰ *Id.*

²¹ 47 U.S.C. § 309(j).

²² *First Winstar Order*, 17 FCC Rcd at 6131.

²³ Copeland Petition for Reconsideration at 2 - 3 (filed April 24, 2002). Copeland argues that both Winstar and Soldinger transferred control to another entity and their short-form applications should have been dismissed for this reason. In a supplement to his Petition for Reconsideration, Copeland proffers additional information which, he claims, indicates that the Equity option agreement had not, in fact, been cancelled and was in effect both prior to and during Auction No. 25. Copeland argues that, had the Commission known of this fact, it would have ruled differently and found that Winstar was not eligible to participate in the auction.

²⁴ Copeland contends that in the *First Winstar Order* the Commission failed to address arguments raised in his declaratory ruling motion. We address in this order Copeland's contentions, raised in his declaratory ruling motion (and raised again in his petition for reconsideration), that the Commission should have ruled that Winstar and Soldinger were ineligible to bid in the auction, and that Copeland should be allowed to acquire the Virginia Beach construction permit at the amount of his opening bid. See Section III, *infra*.

bidding credit, resulting in a net payment of \$806,000.²⁵ Copeland requests, to the extent necessary, waiver of Section 1.2109 of the Commission's rules, which provides the Commission with discretion in the event of a default by the winning bidder to offer licenses to other highest bidders in descending order at their final bids.²⁶ Finally, Copeland seeks to reserve the right to acquire the construction permit for the amount of his net high bid of \$5,171,400, yet notes that "he simply should not be required to pay that much."²⁷ We deny Copeland's reconsideration petition for the reasons described below.

III. DISCUSSION

A. Copeland's Reconsideration Petition Is Procedurally Defective.

10. The underlying theory of Copeland's arguments – namely, that a complete review of the qualifications of Winstar and Solding should have been undertaken and should relate back to the time just prior to the start of the bidding in Auction No. 25, so that Copeland would not have had any competition in the bidding process – is in essence a challenge to the two-phased auction application process the Commission long ago established for its system of competitive bidding.²⁸ The Commission adopted a two-phased auction application process which contemplates that potential licensees file streamlined, short-form applications in which applicants certify under penalty of perjury as to their qualifications.²⁹ Eligibility to participate in bidding is based on the applicants' short-form applications and certifications. In the second phase, winning bidders file a more comprehensive long-form application.³⁰ The Commission has observed that our "broadcast auction procedures follow the Commission's Part 1 auction rules, under which only winning bidders are required to submit long-form applications and petitions to deny are entertained only against the long-form applications of winning bidders."³¹ The Commission's auction procedures and rules envision exactly the sort of post-auction review that occurred with regard to the Winstar application for Auction No. 25.³²

²⁵ Pursuant to our competitive bidding rules, Copeland was required to submit an upfront payment amount of \$1,240,000 to participate in Auction No. 25, which is \$434,000 more than the amount that Copeland is proposing to pay for this construction permit. "Closed Broadcast Auction, Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999, Minimum Opening Bids and Other Procedural Issues," *Public Notice*, 14 FCC Rcd 10632, 10681 (1999); see 47 C.F.R. § 1.2104.

²⁶ Copeland Petition for Reconsideration at 5.

²⁷ *Id.*

²⁸ See Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum, *Order*, 17 FCC Rcd 19746, 19749 – 50 ¶ 7 (Wireless Telecomm. Bur. 2002) (*Telesaurus Order*) (explaining the two-phase auction process in detail).

²⁹ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2376 ¶ 163 (1994) (*Competitive Bidding Second Report and Order*).

³⁰ See 47 C.F.R. § 73.5005; see also 47 C.F.R. § 1.2107.

³¹ *Broadcast First Reconsideration Order*, 14 FCC Rcd at 8750 ¶ 52.

³² 47 C.F.R. § 1.2108. See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376 ¶¶ 162 – 63 ("Submission of a short-form application prior to the auction, we noted, would reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the initiation of service, and encourage applicants to participate in the process.").

In adopting this two phased approach, the Commission balanced the importance of limiting participation in its auctions to those entities that are legally, technically and financially qualified to hold a Commission license with the need to conduct auctions expeditiously. The efficiency of the auction process would be substantially undermined if the Commission were to conduct a full-fledged inquiry of each applicant before an auction. In contrast, by screening each winning bidder in more detail after the auction has closed during the long-form application process, the agency has substantially reduced the workload and associated delay while ensuring compliance with all pertinent rules.³³

11. We note that the Commission specifically rejected pre-auction qualification review for broadcast applicants in the Broadcast Competitive Bidding proceeding.³⁴ This particular issue was much debated and received full consideration by the Commission in that proceeding. Despite the insistence of some commenters that it was necessary to review the qualifications of each of the pending applicants prior to the beginning of competitive bidding in Auction No. 25, the Commission declared “that the time and expense entailed in adjudicating fully all unresolved issues relating to the basic qualification issues as to all pending applicants would greatly exceed any additional delay that might result from the eventual disqualification of a winning bidder. For these reasons, we find that deferring consideration of basic qualifying issues until after the auction is fairer and ultimately more efficient than resolving any issues relating to the basic qualifications of all pending applicants”³⁵ Moreover, in a subsequent reconsideration order in the same proceeding, with regard to a specific proposal very similar to Copeland's request here, the Commission explicitly rejected post-auction demonstrations that “competitors in an auction were in some way ‘unqualified’ and that the winning bidder should be relieved of its [final bid] payment obligations . . . due to the absence of ‘qualified’ competing applicants.”³⁶ We note further that the decision not to conduct a full pre-auction qualification review of all applicants to

³³ *Telesaurus Order*, 17 FCC Rcd at 19749 – 50 ¶ 7 (explaining the two-phase review process in detail).

³⁴ The Commission explained its rationale.

We will not, prior to the auction, review the long-form applications previously filed by the pending applicants, nor will we accept amendments to these previously-filed long-forms. In addition, before the auction we will not consider petitions to deny already filed, or accept additional petitions, against pending applications, nor consider any questions raised in such petitions relating to the tenderability or acceptability of the pending long-form applications. Although some commenters called for the review of all pending applications and petitions to deny prior to the auction, we believe that the interests of this group of pending applicants will be best served overall by our approach. Only those pending applicants who ultimately become winning bidders will need to expend time and resources to amend their long-form applications. Moreover, if we were to review all of the considerable number of pending applications, and any petitions to deny against them, prior to the auction, we would delay the commencement of bidding significantly. Proceeding to the auction as expeditiously as possible will not only end the administrative limbo in which these pending applications have been caught, but will also result in the licensing of new broadcast stations to serve the public more quickly.

Broadcast Competitive Bidding First Report and Order, 13 FCC Rcd at 15951 ¶ 84 (footnotes omitted).

³⁵ *Id.*, 13 FCC Rcd at 15953 ¶ 90.

³⁶ *Broadcast First Reconsideration Order*, 14 FCC Rcd at 8751 ¶ 54.

participate in broadcast auctions was upheld on appeal by the U.S. Court of Appeals for the District of Columbia Circuit.³⁷

12. For these reasons, we reject Copeland's challenge to the other applicants' qualifications as inconsistent with our competitive bidding rules. To the extent that Copeland's reconsideration petition is seeking that we engage in a full review of Winstar's and Soldinger's pre-auction qualifications, it contradicts explicit rulings made by the Commission in the 1998 *Broadcast Competitive Bidding Order*. Copeland fails to justify our reversal at this time of the explicit rulings made in that 1998 rulemaking order.

13. In a supplement to his reconsideration petition, Copeland presents additional arguments and information that he contends is relevant to Winstar's qualifications. This information includes an affidavit and other evidence in a separate bankruptcy proceeding. Copeland, however, filed this supplement on July 19, 2002, which was 86 days after the April 24, 2002 deadline for the filing of his reconsideration petition. Copeland fails to provide any reason for the late filing of his supplement.³⁸ The U.S. Court of Appeals for the District of Columbia Circuit recently counseled this Commission not to accept such untimely submissions.

On the timeliness issue, this Court has held often enough that the Commission does not abuse its discretion when it "decline[s] to entertain a late-filed petition in the absence of extenuating circumstances prohibiting a timely filing." . . . In fact, we have gone so far as to discourage the Commission from entertaining late-filed pleadings "in the absence of extremely unusual circumstances." . . . Here, we need not question whether the circumstances presented by [the applicant for review] are adequately "extenuating" because [the applicant for review] has never presented *any* excuse for its failure to raise its arguments in a timely manner. It follows that the Commission did not abuse its discretion by dismissing the untimely arguments.³⁹

For these reasons, we need not consider the information presented in the supplement.⁴⁰ The supplement is hereby dismissed as late-filed.

14. Copeland in his reconsideration petition argues that the Commission in the *First Winstar Order* failed to address his declaratory ruling motion,⁴¹ in which he asserts that he is entitled to purchase the Virginia Beach construction permit at the amount of his opening bid.⁴² As Copeland admits in his reconsideration petition, the same arguments were made in a Motion for Leave to Supplement Application for Review, filed prior to the release of the *First Winstar Order*. Copeland fails to discuss how his

³⁷ *Orion Communications Ltd. v. FCC*, 221 F.3d 196, No. 98-1424, slip op. (D.C. Cir. June 13, 2000) (unpublished opinion available at 2000 WL 816046 (D.C. Cir.)) ("We also find nothing arbitrary or capricious in the FCC's decision to decline to pursue unresolved claims that applicants had not met the filing requirements in place at the time they filed their applications, as well as its decision to evaluate the qualifications of only the winning bidder. Petitioners have offered us no persuasive reason to question the FCC's conclusion that both decisions were justified by its desire to avoid unnecessary litigation.").

³⁸ A review of Commission records fails to reveal a separate pleading filed by Copeland requesting leave to file a late supplement as required by 47 C.F.R. § 1.106(f).

³⁹ *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (citing *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 - 200 (D.C. Cir. 2003)).

⁴⁰ 47 C.F.R. § 1.106(f).

⁴¹ See *supra* note 14.

⁴² Copeland Petition at 5.

reconsideration petition complies with Sections 1.106(b) and (c)(1),⁴³ which require that a petition for reconsideration must rely "on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters"⁴⁴ in Copeland's Application for Review, or rely "on facts unknown to [Copeland] until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity."⁴⁵ In his reconsideration petition, Copeland failed to show that new facts, changed circumstances, or unknown facts have come to light as required by Sections 1.106(b) and (c)(1). Moreover, Copeland's reconsideration petition fails to demonstrate that our consideration of the facts upon which Copeland relies "is required in the public interest" as specified by Section 1.106(c)(2).⁴⁶ Accordingly, we find that Copeland's reconsideration petition fails to meet the requirements of Sections 1.106(b) and (c).⁴⁷ Nevertheless, we believe that this order addresses all of the contentions raised in his "Motion for Declaratory Ruling."

B. Copeland's Arguments Contravene Established Commission Rules and Auction Policies.

15. As noted above, the Commission adopted a two-phased approach to the review of auction applications and winning bidders' qualifications.⁴⁸ In the first phase, each applicant's short-form application (FCC Form 175) is reviewed to ensure compliance with the Commission's rules.⁴⁹ By submitting the short-form application, applicants declare, under penalty of perjury, that "all matters and things stated in [the] application and attachments, including exhibits, are true and correct."⁵⁰ A determination that an applicant is eligible to participate in an auction, however, is merely indicative that the applicant has passed the Commission's initial screening process. It does not preclude the Commission from subsequently

⁴³ Because Copeland filed his reconsideration petition after we denied his application for review, Section 1.106 requires that Copeland's reconsideration petition must rely "on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters," or rely on "facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity." 47 C.F.R. § 1.106. The staff may dismiss as repetitious Copeland's reconsideration petition if it "fails to rely on new facts or changed circumstances." 47 C.F.R. § 1.106(b)(3).

⁴⁴ 47 C.F.R. § 1.106(b)(2)(i).

⁴⁵ 47 C.F.R. § 1.106(b)(2)(ii).

⁴⁶ Section 1.106 specifies that to the extent Copeland's reconsideration petition relies on facts not previously presented to the Commission, it may be granted only if it falls within the categories described in Section 1.106(b)(2) (new facts, changed circumstances, or unknown facts) or if the Commission determines that the public interest requires consideration of the facts on which Copeland relies. 47 C.F.R. § 1.106(c).

⁴⁷ We find further deficiencies with Copeland's arguments. We could not find that Winstar was ineligible at the time of the start of the auction on financial grounds because the bankruptcy of Winstar's parent companies did not occur until 2001, which is after the close of competitive bidding in 1999. Moreover, without considering the untimely supplement, we note that Copeland repetitiously argues in his reconsideration petition that Equity owned a 49 percent interest and had an option for 51 percent of Winstar, and was thus unqualified to bid. We are unpersuaded by these repetitious arguments. Nothing in Copeland's reconsideration petition persuades us to reverse our determination in the *First Winstar Order*, 17 FCC Rcd at 6127, to uphold what the Division said in its letter decision, namely that the Division found "that Copeland has failed to establish a *prima facie* case or a substantial and material question of fact that Winstar underwent a transfer of control to Equity." Letter from Barbara A. Kreisman, Chief, Video Serv. Div., Mass Media Bur., to John M. Shoreman, Esq. (rel. June 18, 2001).

⁴⁸ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2376 ¶ 163; see also *Telesaurus Order*, 17 FCC Rcd at 19749 – 50 ¶ 7 (explaining the two-phase review process in detail).

⁴⁹ Mr. Steven R. Sixberry, *Letter*, 15 FCC Rcd 15958 (Auctions Div. 2000) (Nevada Wireless Letter) ("Absent substantiated evidence of wrongdoing, . . . it is more prudent to address allegations [of a failure to disclose information] after the winning bidders have submitted their long-form applications.").

⁵⁰ FCC Form 175.

determining that the applicant is ineligible for grant of a license. In reviewing the short-form applications, the information and certifications contained in the short-form applications are presumed to be true unless they are incomplete, internally inconsistent or contradicted by information in the Commission's records.⁵¹ If the short-form application is found acceptable for filing, and the applicant submits the required upfront payments, other qualified bidders must assume that the applicant is qualified to bid and proceed accordingly.⁵²

16. Following the close of the auction, winning bidders are required to submit a long-form application, and the second phase of the review commences.⁵³ If, either upon further examination, or through deficiencies brought to the Commission's attention through a petition to deny, the application is found to be defective or not in conformance with the Commission's rules, it will be denied or dismissed.⁵⁴ If, during review of the long-form applications, an applicant is discovered to have made a false certification or to be ineligible for the license on which it bid, the Commission has a number of sanctions it can impose against the applicant.⁵⁵

17. Thus, applicants to participate in the Commission's spectrum auctions do so with the knowledge that they are bidding against entities whose short-form applications have been subject to only an initial screening process rather than an in-depth review of the applicants' qualifications. Such was the case in Auction No. 25. In that auction, Winstar submitted a short-form application that contained the certifications and attachments required under Section 1.2105 of the Commission's rules to meet the minimum threshold requirement for participation in an auction.⁵⁶ Winstar's short-form application was accepted for filing, and Winstar timely submitted the required upfront payment. Thus, the Commission found it to be a qualified bidder.⁵⁷ Copeland, who also was qualified to bid on the Virginia Beach television station, submitted its bids with the understanding that it would be subject to all of the rules and procedures that govern the auction, including the two-phased approach to application review under which the qualifications of the winning bidders are determined after the close of the auction.

⁵¹ *Nevada Wireless Letter*, 15 FCC Rcd at 15958.

⁵² *Telesaurus Order*, 17 FCC Rcd at 19450 ¶ 7.

⁵³ *Id.*

⁵⁴ *See, e.g.*, Application of Baker Creek Communications, L.P., *Order*, 14 FCC Rcd 11529 (Pub. Saf. Div. 1999) (petition to deny filed against the winning bidder and granted to extent that the winning bidder was declared ineligible to receive the bidding credits claimed); Applications of Nextband Communications, L.L.C., *Order on Reconsideration*, 14 FCC Rcd 7647 (Pub. Saf. Div. 1999) (Commission concluding as a result of the petition to deny that a winning bidder did not violate the Commission's anti-collusion rules); *see* 47 C.F.R. §§ 1.934, 1.945 and 1.2108.

⁵⁵ We note that submission of a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution. Closed Broadcast Auction, Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999, Minimum Opening Bids and Other Procedural Issues, *Public Notice*, 14 FCC Rcd 10632, 10637 (1999); 47 C.F.R. § 21.15(a)(4) ("The submission of a false certification will subject the applicant to all remedies available to the Commission . . .").

⁵⁶ Copeland fails to point to any information on file in Commission records as of July 1, 1997 which contradicts any ownership information in Winstar's short-form application.

⁵⁷ Closed Public Auction, 224 Qualified Bidders, *Public Notice*, 14 FCC Rcd 15475, 15490 (1999); *see also Broadcast Competitive Bidding First Report and Order*, 13 FCC Rcd at 15951 ¶ 83 ("All pending applicants who file complete short-forms and submit appropriate upfront payments will be qualified to participate in the auction . . .").

18. As noted above, the Commission previously addressed Copeland's argument, raised in its petition to deny, that Winstar engaged in a transfer of control that rendered Winstar ineligible to participate in the auction. The Division had concluded based on the record before it that Copeland failed to make a *prima facie* case that Winstar engaged in an unauthorized transfer of control. Subsequently, the Commission found that Copeland's arguments were thoroughly considered and properly resolved by the Division. In that same order, the Commission found that Winstar had defaulted on its payment of the balance of the winning bid, and consequently, dismissed Winstar's long-form application. Because Winstar's long-form application was dismissed due to its failure to make its final payment, any issue raised with respect to Winstar's eligibility to hold the license it won in Auction No. 25 became moot.⁵⁸ Moreover, even if we were to find that Copeland's subsequent proffer of new evidence regarding Winstar's eligibility to hold the license was not untimely, as explained above, the Commission determined that it would not permit winning bidders to attempt to show that competing applicants were somehow unqualified to be licensees, because such a mechanism could encourage auction winners to make such claims so as to avoid their obligations to pay their winning bids. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's decision.⁵⁹ Thus, Copeland's reconsideration petition effectively seeking to unwind the auction based on a post-auction determination that one or more bidders should not have been qualified to bid, contravenes the specific decision of the Commission as upheld by the court.⁶⁰

19. In his reconsideration petition, Copeland argues that we should unwind an auction based on facts concerning a bidder that are discovered long after the auction. While our application process envisions the sort of post-auction test of qualifications that occurred in this case, it does not envision that the post-auction review will undo the auction. Such a result would undermine the integrity of all Commission auctions by indicating to bidders that, despite the rules, they may not be held to their bids and they may be able to remove a license from the auction process by contesting the qualifications of the bidders and arguing that the auction should not have occurred at all. The consideration of such claims by winning bidders would be time-consuming and administratively burdensome for the Commission, and would delay both the

⁵⁸ As mentioned above in paragraph 5, the Video Services Division had previously determined that Copeland failed to establish a substantial and material question of fact that Winstar underwent a transfer of control or that Winstar was financially unqualified. The decision of the Video Services Division was upheld by the Commission in the *First Winstar Order*. See *supra* ¶ 8.

⁵⁹ *Orion Communications Ltd. v. FCC*, 221 F.3d 196, No. 98-1424, slip op. (D.C. Cir. June 13, 2000) (unpublished opinion available at 2000 WL 816046 (D.C. Cir.).

⁶⁰ We note that the Commission's rules anticipate that review of applicants' qualifications at the long-form stage will occur in the context of petitions to deny, which allow the applicant whose qualifications are questioned to submit argument and evidence on its own behalf – something that has not occurred here with respect to Copeland's new assertions about the ineligibility of parties that are not applicants for the license at issue, which only support Copeland's own argument that it should not have to pay the amount of its last bid. With regard to Copeland's insistence that we must disqualify Soldinger at this stage, we note that Soldinger's application and qualifications have not been the subject of a petition to deny, with an opportunity for Soldinger to file an opposition to any such petition to deny. This conforms to our competitive bidding procedures in which petitions to deny are filed after competitive bidding and only against the winning bidder. 47 C.F.R. § 1.2108; *accord Broadcast First Reconsideration Order*, 14 FCC Rcd at 8752 ¶ 56 ("[W]e are unsure of the basis on which the alleged lack of qualifications of a losing bidder would be determined, as an unsuccessful bidder is not required to submit a long-form application, which is the usual basis for determining any broadcast applicant's qualifications to be a licensee."). We would not consider this evidence in any event because it has not been subject to cross examination in this proceeding, and therefore, should not be the basis, without further examination, for reversing our prior determinations.

ultimate grant of construction permits to auction winners and the commencement of service to the public. This is exactly the sort of process that auctions are meant to avoid.⁶¹

C. Copeland's Arguments Fail to Justify a Waiver of the Default Rule.

20. Copeland urges us to reconsider our decision to follow the procedures set out in Section 1.2109(c) of the Commission's rules under which we offered Copeland the opportunity to acquire the Virginia Beach construction permit at Copeland's last bid amount.⁶² Section 1.2109 established a process for offering licenses to other highest bidders in descending order at their final bids in the event of a default by the highest bidder, as has occurred here.⁶³ We are not persuaded that the interests of the public would be served by our grant of the waiver Copeland requests of Section 1.2109. Copeland participated in Auction No. 25 and through his bids expressed his value for the Virginia Beach construction permit pursuant to all of the auction rules and procedures. To ignore those rules and procedures after-the-fact increases the possibility that others will seek ways to attack the results of future auctions,⁶⁴ thereby undermining efficiency in auction procedures.⁶⁵ The Commission recognized this possibility in the Broadcast Competitive Bidding proceeding, and observed that post-auction "consideration of claims by winning bidders asserting that their competitors were unqualified would be time-consuming and administratively burdensome for the Commission, and would delay both the ultimate grant of construction permits to auction winners and the commencement of service to the public."⁶⁶ In addition, if we were to unwind this auction, as Copeland requests, other bidders in future auctions may perceive opportunities to engage in post-auction efforts to circumvent our rules that would undermine the integrity of the auction process.⁶⁷ Consistent application of the auction rules to all bidders is essential to a fair and

⁶¹ The Commission observed that establishment of the post-auction mechanism Copeland seeks would be contrary to the statutory objectives of section 309(j) of the Communications Act, which is intended, *inter alia*, to encourage the development and rapid deployment of new services for the public without administrative or judicial delays and to recover for the public a portion of the value of the public spectrum resource available for commercial use. See *Broadcast First Reconsideration Order*, 14 FCC Rcd at 8752 ¶ 56; see also 47 U.S.C. § 309(j)(3)(A) and (C).

⁶² *First Winstar Order*, 17 FCC Rcd at 6131; 47 C.F.R. § 1.2109(c).

⁶³ 47 C.F.R. § 1.2109(c).

⁶⁴ While Copeland argues that the exception he proposes to Section 1.2109 would apply only to Auction No. 25, we are unconvinced. Copeland posits a distinction without a difference. In each auction, there is a possibility that a highest bidder could default, just as Winstar defaulted here. In each auction, losing bidders may file post-auction petitions to deny challenging the highest bidder's qualifications. Even as to particular issues raised in Copeland's petition to deny, lack of financial qualifications can be raised in many instances and transfers of control or assignments are generally prohibited during the course of other auctions.

⁶⁵ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rulemaking*, 8 FCC Rcd 7635, 7654 ¶ 111 (1993).

⁶⁶ *Broadcast First Reconsideration Order*, 14 FCC Rcd at 8752 ¶ 56.

⁶⁷ We note also that one of the purposes of Section 1.2109(c) is to serve a statutory directive to "prevent unjust enrichment and produce revenues to compensate the public for the use of the public airwaves." See 47 U.S.C. § 309(j)(3)(C). Reducing the final bid amount by nearly \$4.4 million (from \$5,171,400 to \$806,000), as Copeland requests, would unjustly enrich him and diminish revenues paid to compensate the public for the use of the public airwaves. For these reasons, we refuse to waive the Section 1.2109 post-default provisions as requested by Copeland. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 93 S.Ct. 461 (1972) ("The court's insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.").

efficient licensing process, and is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not.⁶⁸

21. By having an announced procedure which applies uniformly, the Commission crafted in Section 1.2109 a predictable and fair procedure for all bidders, in the event any high bidder defaults. Significantly, the U.S. Court of Appeals for the District of Columbia Circuit warned this Commission to avoid "[a]d hoc departures from [Commission] rules . . . for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action."⁶⁹ The court explained that "[a] precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations."⁷⁰ According to the court, "considerations of fairness could not justify a departure from clear and applicable rules and regulations of the Commission."⁷¹ We find no basis to justify a departure from the post-default provisions of Section 1.2109 here.

IV. ORDERING CLAUSES

22. ACCORDINGLY, IT IS ORDERED that the Petition for Reconsideration filed by Robert O. Copeland IS HEREBY DENIED pursuant to 47 C.F.R. § 1.106.

23. IT IS FURTHER ORDERED that the reconsideration petition supplement filed by Robert O. Copeland IS HEREBY DISMISSED for failure to comply with the requirements of 47 C.F.R. § 1.106.

24. IT IS FURTHER ORDERED pursuant to 47 U.S.C. § 154(i) that Copeland must submit a statement accepting or rejecting the offer of this construction permit at his final bid amount no later than March 1, 2005.

25. IT IS FURTHER ORDERED pursuant to 47 U.S.C. § 154(i) that, if Copeland accepts the offer of this construction permit at his final bid amount, Copeland must make his final payment no later than April 1, 2005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁸ See The Application for Review of the Denial of Vista Communications, Inc.'s Request for Waiver of the Installment Payment Rules for the 218 – 219 MHz Service, *Memorandum Opinion and Order*, 18 FCC Rcd 16957, 16962 ¶ 12 (2003).

⁶⁹ *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 - 51 (D.C. Cir. 1986) (*Reuters*).

⁷⁰ *Id.*, 781 F.2d at 947.

⁷¹ *Id.*, 781 F.2d at 952 n. 6.