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

In re Applications of

JAMES U. STEELE St. Simons Island, Georgia	**BC DOCKET NO. 81-307** File No. BPH-800930AE
DALE BELL St. Simons Island, Georgia	**BC DOCKET NO. 81-309** File No. BPH-801003AF

For Construction Permit for a New FM Station

Dale Bell
Assignor

and File No. BAPH-880728GQ

WBA Partnership
Assignee

For Consent to Assignment of Construction Permit

ORDER

Adopted: June 13, 1990; Released: July 3, 1990

By the Commission: Commissioner Quello concurring and issuing a separate statement.

1. Steele and Bell are competing applicants for a new FM station in St. Simons Island, Georgia. By its Memorandum Opinion and Order of May 9, 1989, the Commission conditionally approved a settlement agreement among Dale Bell, James U. Steele, and WBA Corporation and the assignment of Bell's construction permit to WBA Partnership. *James U. Steele*, 4 FCC Rcd 4700 (1989). Under the settlement agreement, Steele would dismiss its application, the grant of Bell's application would become final, and Bell would assign her construction permit to WBA Partnership, to be 49 percent owned by Bell and 51 percent owned by third-party WBA Corporation. Now before the Commission is a Joint Motion For Partial Vacation Of Commission Order, filed on August 4, 1989, by Dale Bell, James U. Steele, WBA Corporation, and Donia Hames and the Office Of Communication Of The United Church Of Christ.[1] The Joint Motion requests that the Commission vacate "that portion of the [Commission's] Order which places precedential reliance on *Rebecca Radio*." Joint Motion at 3.

2. In approving the settlement agreement, the Commission found that the agreement contravened neither the Communications Act, the Commission's rules, nor any Commission policy, and that approval of the agreement would serve the public interest by expediting the inauguration of FM service in St. Simons Island, and by conserving the resources of the parties and of the Commission. 4 FCC Rcd at 4703-04 ¶ 38. In doing so, the Commission also noted that, although the Steele settlement agreement was structured somewhat differently from the agreement that the Commission approved in *Rebecca Radio*, the rationale set forth in *Rebecca Radio* supported approval of the agreement in this case. 4 FCC Rcd at ¶¶ 39-41. Given the Commission's holding in paragraph 38 that the settlement agreement complies fully with the Act, the Rules, and Commission precedent, the reference to the *Rebecca Radio* rationale in the May 9, 1989 decision is dicta.

3. By our recent Order, 5 FCC Rcd 937 (Feb. 20, 1990), recon. denied, FCC 90-177 (May 10, 1990), appeal pending sub nom. *Rowland Gulf Radio, Inc. v. FCC*, No. 90-1308 (D.C. Cir. June 11, 1990), we have modified *Rebecca Radio*. Having concluded that approving the Marco agreement would disserve the public interest by creating an economic incentive for filing sham applications in the future, we returned that proceeding to active hearing status. *Rebecca Radio*, 5 FCC Rcd at 937 ¶ 3. In view of our action in *Rebecca Radio*, we grant the Joint Motion for Partial Vacation and delete all references to that case in the May 9, 1989 decision in this case. We reaffirm, however, that, as set forth in paragraph 38 of the May 9, 1989 decision, the *Steele* agreement comports fully with section 311(c) of the Act, sections 73.3525 and 73.3597 of the Rules, and Commission precedent requiring that construction permits be granted only to *bona fide* applicants with a real interest in building and operating a broadcast station in the public interest.

4. We also reaffirm that approval of the *Steele* agreement serves the public interest. In our view, the circumstances of this case do not create the same potential for future abuse that precluded us from finding that approval of the agreement in *Rebecca Radio* would serve the public interest. Bell is obligated to pay her proportionate share of the permittee's expenses for a period extending through at least one year after program test authority has begun. More importantly, the applicants in this proceeding filed their applications more than ten years ago. Both Bell and Steele have vigorously prosecuted their applications through the ALJ, the Review Board and the Commission, and they continued to litigate their claims in the court of appeals. We, like Commissioner James H. Quello, "doubt very much that most applicants would be willing to wait a decade or more simply to find a third party willing to purchase their applications or unbuilt construction permits." Concurring Statement Of James H. Quello, 4 FCC Rcd 4705 (1989). Under these circumstances, we find that approval of the *Steele* agreement will not encourage the filing of sham applications in future cases by individuals with no real interest in building and operating a broadcast station.

5. ACCORDINGLY, IT IS ORDERED, That the Joint Motion for Partial Vacation of Commission Order, filed on August 4, 1989, by Donia Hames, United Church of Christ, James Steele, Dale Bell, and WBA Corporation IS GRANTED; and That the Commission's May 9, 1989 Memorandum Opinion and Order in *James U. Steele*, 4 FCC Rcd 4700 (1989) IS REAFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] On July 10, 1989, Donia Hames and the Office of Communication of the United Church of Christ (UCC) filed a Petition for Reconsideration of the Commission's action approving the settlement agreement in this case. In an Order, FCC 89I-48 (August 8, 1989), the General Counsel, acting under delegated authority, granted a Joint Motion To Dismiss Petition For Reconsideration, filed on August 4, 1989, by petitioners and joined by Steele, Bell, and WBA Corporation, without considering the request to vacate.

Concurring Statement of Commissioner James H. Quello

I concur in the judgment because I do not believe that approval of a third party agreement in the unique circumstances presented here will encourage the filing of sham applications. Nevertheless, I still disagree with the Commission's broad approach to approving third party settlements.

Today's decision is necessary to distinguish this case from *Rebecca Radio of Marco* 4 FCC Rcd. 830 (1989) (Quello, dissenting), a case that the Commission wisely chose to reconsider and reverse. *Memorandum Opinion and Order*, 5 FCC Rcd. 937 (1990). But merely to recast this case by deleting references to *Rebecca Radio* does not go nearly far enough. The Commission should recant its assertion, perpetuated by today's decision, that there is "no meaningful distinction between a nonparty paying Steele to dismiss his application and an ordinary settlement agreement among competing applicants." *James U. Steele*, 4 FCC Rcd. 4700, 4702 (1989). That erroneous conclusion was based on the concept that "[i]n an ordinary settlement among or between competing applicants, dismissing applicants are not limited to recovering only legitimate and prudent expenses." *id*, an idea that the Commission now questions. *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, FCC 90-193, (adopted May 10, 1990). *See also Amendment of Sections 1.420 and 73.3584 to Reduce Abuse of the Commission's Processes*, FCC 90-191 (adopted May 10, 1990); *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, FCC 90-190 (adopted May 10, 1990); *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, FCC 90-194 (adopted May 10, 1990). In effect, the Commission believed that it was permissible to auction a construction permit to a third party because it already allowed for-profit settlements among initial applicants. But as noted, we are now considering limiting settlement payments to "legitimate and prudent out-of-pocket expenses" and, in any event, the Communications Act never gave us the authority to conduct auctions.[1]

As I have pointed out before, the Commission errs when it reads our existing rules to encompass third party settlements. In particular, Section 73.3525 was intended to apply only to the dismissal by settlement of applications *already pending* before the Commission. *Amendment of Part 73 of the Commission's Rules to Conform § 73.3525 to Amendment of Section 311(c)(3) of the Communications Act of 1934, as Amended*, 53 R.R.2d 823 (1983). *See Amendment of Parts 0 and 1 Rules and Regulations*, 20 R.R.2d 1613, 1614 (1970); *Amendment of Sections 1.311, 1.312 and 1.363 of the Commission's Rules*, 20 R.R. 1669, 1671 (1961). The rule did not comtemplate a procedure whereby a new entity would prevail to the exclusion of those who filed applications initially. To allow such a result negates our rules governing the application process. *See, e.g.*, Sections 73.3564(d) (time deadlines for filing initial applications); 73.3568 (procedure for dismissal of applications). A liberal approach toward third party settlements also is inconsistent with our anti-trafficking policy. 47 C.F.R. §73.3597. Such a broad construction of our rules turns the comparative process into a private *de facto* auction.

To the extent certain exceptional cases - such as this one - present a clear public benefit to be gained from approving a third party settlement, the Commission has the option of waiving the requirements of Section 73.3597. Or, if the Commission believes that such arrangements should be approved in a broader set of circumstances, it could initiate a Rule Making. But to proceed as it has in this case undermines the integrity of our licensing process.

It is gratifying that the Commission has rescinded its approval of the third party settlement in *Rebecca Radio* and is now reconciling subsequent cases with this decision. It also is gratifying that today's majority opinion quotes my concurring statement issued with our initial approval of the Steele settlement. *See Order* at para. 4. It would be more gratifying, however, if the Commission would review its ill-considered reading of our rules regarding this procedure.

FOOTNOTE TO STATEMENT

[1] It is possible that the reform measures discussed herein will solve the problem of abusive third party settlements. But it is preferable to avoid the problem in the first place through sound interpretation of existing rules rather than to be forced to resort to subsequent reforms.