

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

MM Docket No. 87-244

In re Applications of

REBECCA RADIO File No. BPH-8507110B
OF MARCO

EMERALD SEA File No. BPH-8507120F
BROADCASTING, INC.

AFFIRMATIVE File No. BPH-850712TX
BROADCASTING
CORPORATION

SHOWCASE File No. BPH-850712UB
COMMUNICATIONS,
INC.

MARCO MINORITY File No. BPH-850712UA
ASSOCIATES

SUSAN G. & File No. BPH-850712UE
WILLIAM R. GASTON

MARCO SKYWAVE, File No. BPH-850712UH
INC.

For Construction Permit for a
New FM Station on Channel 224A
in Marco, Florida

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1988; Released: January 19, 1989

By the Commission: Commissioner Quello dissenting
and issuing a statement.

I. BACKGROUND

1. By *Hearing Designation Order*, 2 FCC Rcd 4052 (1987), 17 mutually exclusive applications were designated for hearing. Only seven applicants remain. Before evidentiary hearings began, the remaining seven applicants filed a Joint Request for Approval of Settlement Agreements and Petition for Leave to Amend, which the Administrative Law Judge (ALJ) denied. *Rebecca Radio of Marco*, FCC 88M-1557 (May 24, 1988).

2. The proposed settlement agreements provide that Rowland Gulf Radio, Inc., which is not a party to this proceeding, will be substituted for Affirmative Broadcasting Corporation, that Rowland will pay Affirmative to amend its application to substitute Rowland as the applicant, that Rowland will pay each of the six competing

applicants to dismiss their applications, that Affirmative's amended application will be granted, and that Rowland (as the substituted applicant) will receive a construction permit for a new FM station on channel 224A in Marco, Florida. Under the settlement agreement, none of the above-captioned applicants will have an ownership interest in Rowland.

3. The ALJ initially refused to certify this matter to the Commission because he concluded that the settlement agreement could not be approved under Commission precedent. *Rebecca Radio*, FCC 88M-1557 at n.10. However, the Board subsequently "exhort[ed] the ALJ to certify to the full Commission the question of whether such settlements are lawful or serve the public interest." *Rebecca Radio*, FCC 88R-36 at ¶ 4 (June 28, 1988), 3 FCC Rcd. ¶ 4 (1988) (Board denied on procedural grounds Joint Petition for Extraordinary Relief and Joint Request for Stay).

4. In deference to the Review Board's suggestion, the ALJ granted the parties' Joint Request that they be permitted to appeal the ALJ's May 24, 1988 ruling denying the settlement agreements. *Rebecca Radio*, FCC 88M-2088 ¶ 3 (July 6, 1988). This permitted the Board to certify the settlement agreements and related pleadings¹ to the full Commission on July 13, 1988. *Rebecca Radio*, FCC 88R-42 (July 13, 1988), 3 FCC Rcd. ¶ 2 (1988). Thus, the question before us is whether we may approve a settlement agreement providing for the award of a construction permit to an entity wholly owned by non-parties. On November 23, 1988, Marco Minority Associates filed a Request for Expedited Action, which notes that the settlement agreements permit the parties to terminate the agreements in the absence of final Commission approval by December 24, 1988. In view of our action herein, the Request for Expedited Action is granted.

5. We will accept the amendment substituting Rowland for Affirmative Broadcasting as the applicant; approve the settlement agreements between Rowland and each of the seven other applicants; grant a construction permit to Affirmative (as amended to substitute Rowland); and dismiss the competing applications filed by Rebecca Radio, Emerald Sea Broadcasting, Showcase Communications, Marco Minority Associates, Susan & William Gaston, and Marco Skywave. For the reasons that follow, we find that approval of the settlement agreements will, consistent with the provisions of section 311(c) of the Communications Act, 47 U.S.C. § 311(c), and section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525, serve the public interest by expeditiously providing a new FM service to Marco, Florida, and by conserving the resources of the Commission and of the parties.

II. SETTLEMENT AGREEMENTS

6. This proceeding began in July 1985, when 17 mutually exclusive applications for a new FM station in Marco were filed. When the Commission designated these applications for hearing on the standard comparative issue, it specified air hazard issues against Emerald Sea, Minority, Gaston, and three other applicants that later dismissed their applications. *Hearing Designation Order*, 2 FCC Rcd at 4055 ¶ 16. The ALJ subsequently added site availability issues against Skywave and Showcase.² No character issues were ever specified against any of the seven applicants whose applications are pending before the Commission.

7. After a flurry of petitions to enlarge and other pre-hearing discovery motions, the parties tried to settle this case. Extensive settlement negotiations were conducted over the course of several months, but the parties were unable to reach a universal agreement. As a result of these efforts, it became clear that none of the parties had sufficient financial resources to compensate all of the competing applicants. The Mass Media Bureau participated in the settlement negotiations, and it fully supports the proposed resolution of this adjudicatory proceeding. Having failed to settle the proceeding in the usual manner, the parties believe that the proposed settlement, whereby Affirmative amends its application to substitute Rowland as the applicant, Rowland compensates the other applicants for the dismissal of their applications, and Rowland receives the construction permit, is the only way to resolve this proceeding without protracted litigation.

8. In order to approve the proposed settlement agreements under section 311(c)(3) of the Communications Act, we must be able to determine that the agreements are consistent with the public interest, convenience or necessity, and that none of the parties to the agreements filed its applications for the purpose of reaching or carrying out such an agreement. Pursuant to the requirements of section 311(c) of the Communications Act and section 73.3525 of the Commission's rules, the parties submit a copy of the agreement between Affirmative and Rowland. The agreement provides that Rowland will pay Affirmative \$230,000 and that Affirmative will file an amendment substituting Rowland as the applicant. The parties also submit copies of the settlement agreements providing that Rowland will pay various sums to Rebecca, Emerald Sea, Showcase, Minority, Gaston, and Skywave in exchange for their agreement to dismiss their applications with prejudice.

9. Each of the above-captioned applicants has filed statements under penalty of perjury certifying that its application was not filed for the purpose of reaching or carrying out a settlement agreement, as section 311(c) of the Act and section 73.3525(a) of the Rules require. The statements under penalty of perjury further explain that approval of the settlement agreements will serve the public interest by expediting broadcast service to Marco and conserving the resources of the Commission and of the parties.

A. The ALJ's Ruling

10. The ALJ refused to approve the settlement agreements because he found that the proposal is "contrary to the intent and purpose of Section 311(c) of the Act and of Section 73.3525(a) of the Rules and expressly precluded by *Scott & Davis*." *Rebecca Radio*, FCC 88M-1557 at ¶ 5. In doing so, the ALJ focused first on the fact that the proposed permittee is not a party to this comparative proceeding. The ALJ determined that the Rowland agreement could not be approved under section 311(c) of the Communications Act and section 73.3525 of the Commission's rules, because those provisions contemplate settlement agreements between or among competing applicants. *Rebecca Radio*, FCC 88M-1557 at ¶ 3. However, for the reasons stated below, we reach the opposite conclusion: the fact that the agreement provides that a non-party will be the permittee does not preclude the Commission from approving the agreements under the statute.

11. We conclude that section 311(c) does not prohibit settlement agreements where a third-party receives the construction permit. Section 311(c)(1) provides that "[i]f there are pending before the Commission two or more applications for a permit for construction of a broadcasting station . . . it shall be unlawful, without approval of the Commission, for the applicants . . . to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications." Section 73.3525(a), similarly provides only that the Commission must approve a settlement agreement "[w]henver applicants for a construction permit . . . enter into an agreement [procuring] the removal of a conflict between applications pending before the Commission. . . ." Thus, the plain language of the statute and the Commission's rules requires only that the Commission approve settlement agreements among competing applicants whereby one or more applicants withdraws its application. Neither section 311(c) of the Act nor section 73.3525(a) explicitly mentions or otherwise precludes third-party participation in such a settlement. The Commission and the court have never construed section 311(c) and section 73.3525 of the Commission's rules to preclude third-party participation in a settlement agreement among competing applicants. Rather, this is a question of first impression.

12. In denying the Joint Request for Approval of Settlement Agreements, the ALJ also relied on *Scott & Davis Enterprises, Inc.*, 54 RR 2d 868 (1983). There, the Commission was faced with a settlement agreement, whereby a construction permit would be awarded to Scott (one of the original applicants), who would immediately assign the construction permit to an entity 10 percent owned by Scott and 90 percent owned by a third-party. Because Scott intended in effect to assign the permit to a third-party, the Commission denied the settlement request as contrary to long-standing Commission precedent that "construction permits are granted only to qualified applicants who have . . . [a] bona fide intention to construct their proposed facilities and render a broadcast service." *Scott & Davis*, 54 RR 2d at 869 ¶ 4 & n.7 (quoting *Northeast TV Cablevision*, 21 FCC 2d 442, 443 (1970)).

13. In the ALJ's view, the settlement agreements in this case were even more questionable than the arrangement rejected by the Commission in *Scott & Davis* because none of the original applicants for Marco will have an ownership interest in the permittee. *Rebecca Radio*, FCC 88M-1557 at ¶ 4. Accordingly, the ALJ held that the Commission's denial of the proposed settlement in *Scott & Davis* compelled denial of the proposed settlements in this case. *Rebecca Radio*, FCC 88M-1557 at ¶ 4.

14. We do not agree with the ALJ that *Scott & Davis* governs whether we reject the settlement agreements in this case. In *Scott & Davis*, we rejected the settlement agreement because of Scott's stated intent to immediately assign the construction permit to a third-party. Our sole concern in that case was that we not grant a construction permit to an applicant that had expressly stated that it did not intend to construct and operate a station in the public interest. To grant that request would have been contrary to a long line of Commission precedent that construction permits are awarded only to applicants that actually intend to construct a broadcast facility and operate in the public interest.

15. Here, however, we are not asked to grant a construction permit to an applicant who will immediately assign the permit to a third-party. Rather, the proposal

requests that we substitute Rowland for Affirmative and then grant the construction permit to Rowland. Rowland, unlike Scott, does intend to construct and operate the proposed station to serve the public, and does not propose to assign the construction permit to a third party. Because the agreements in this case present a different situation than the one raised in *Scott & Davis*, that case does not support the ALJ's determination to reject the proposed settlement.

B. Public Interest Considerations

16. We conclude that approval of the proposed settlement agreements in this case serves the public interest. As the Commission has previously indicated, the law generally favors settlements as a way of reducing the time, cost, and uncertainty of protracted litigation. See *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd at ¶ 12 (1988), and the cases cited therein. See also *Spanish International Communications Corp.*, 2 FCC Rcd 3336, 3340 ¶ 27 (1987); *ASD Answer Service, Inc.*, 1 FCC Rcd 753, 754 (1986).

17. Providing new broadcast service to the public in an expeditious manner is an important public interest objective. Resolving initial licensing proceedings by settlement provides even greater public interest benefits than the settlement of a comparative renewal proceeding because it results in the immediate initiation of a new service to the public. *NBC, Inc.*, 25 RR 67, 73 ¶ 11 (1963). Avoiding the delay associated with lengthy comparative hearings more than offsets the public interest detriment of not having an array of applicants from which to choose. *Id.* Contested comparative proceedings often are quite time-consuming and expensive to resolve, particularly where, as in this case, numerous applicants are involved. Such proceedings, with the opportunity for administrative and judicial appeals, can delay for years the initiation of new broadcast service to the public. This delay is contrary to the public interest. Therefore, the benefits to the public from settlement are especially large where, as in this case, an agreement is reached before evidentiary hearings have begun.

18. We have received no objection to these agreements, and, as discussed below, the proposed permittee is qualified to be a Commission licensee. Thus, as petitioners urge in the Joint Request, approval of the settlement agreements will expedite the initiation of new service to listeners in and around Marco. By awarding the permit to a qualified applicant ready to begin serving Marco immediately, we can terminate a multi-party comparative proceeding that could prove to be very time consuming and costly for the private parties and the Commission to resolve through litigation. Our decision will conserve the resources of the parties and of the Commission. Because evidentiary hearings have not yet begun, the Commission stands to realize very substantial administrative and financial savings if the proposed agreement is consummated.

19. By entering into settlement agreements with Rowland, the original applicants in this proceeding have, as the Board observed, effectively declared that they are no longer interested in litigating the right to serve Marco. *Rebecca Radio*, 3 FCC Rcd 2256, 2256 ¶ 3 (Rev. Bd. 1988). To proceed with comparative hearings, in the face of an agreement contemplating a grant to a qualified applicant, would be a significant waste of time and resources and would needlessly delay the institution of new service to Marco. Clearly, that would disserve the public interest.³ See *Allegan County Broadcasting, Inc.*, 83 FCC 2d at 373 ¶ 5; *Western Connecticut Broadcasting Co.*, 88

FCC 2d 1492, 1496-97 ¶ 9 (1981); *Son Broadcasting Inc.*, 92 FCC 2d 450, 451-52 ¶ 2 (Rev. Bd. 1982). By contrast, Rowland has indicated a clear willingness and desire to own and operate this station and to serve the needs and interests of Marco. Under these circumstances, the public interest is best served by putting the station in the hands of the person who has indicated the greatest willingness to serve this community.

C. Compliance with Anti - trafficking Rules

20. The settlement agreements are consistent with our anti-trafficking rules. Section 73.3597 of the Commission rules prohibits licensees from profiting on the sale of a construction permit for an unbuilt station, or a license for a station that has been on the air less than a year. 47 C.F.R. § 73.3597. In the case of the assignment of a construction permit, the permittee may not get more than its legitimate and prudent expenses in prosecuting its application for a construction permit and in placing the station on the air. See 47 C.F.R. § 73.3597(c)(2); *Amendment of Section 73.3597 of the Commission's Rules*, 52 RR 2d 1081, 1086 ¶ 21 (1982), modified, 99 FCC 2d 971 (1985). When an applicant gets a construction permit pursuant to a settlement agreement (rather than pursuant to a comparative grant), the one-year rule set forth in section 73.3597(a) does not apply. *NEWSystems of Pennsylvania*, 2 FCC Rcd 73, 74-75 ¶ 12 (1987). However, even where a construction permit is awarded pursuant to a settlement agreement, the permittee of an unbuilt station is subject to section 73.3597(c)(2), which precludes the permittee from receiving more than its legitimate and prudent expenses.

21. Under the proposed agreements, Rowland will pay \$230,000 to Affirmative; \$70,000 to Rebecca; \$250,000 to Emerald Sea; \$200,000 to Showcase; \$70,000 to Minority; \$200,000 to Gaston; and \$35,000 to Skywave. Regardless of whether these amounts represent the legitimate and prudent costs of prosecuting each application, section 73.3597 of our rules does not apply. It has long been Commission policy to permit competing applicants to dismiss their applications for compensation not limited to recovering only legitimate and prudent expenses. See *Agreements in Broadcast Proceedings*, 53 RR 2d 823, 825 ¶ 5 (1983).⁴

22. To date, we have not granted a construction permit for a new FM station on channel 224A in Marco, Florida. Indeed, we have not even begun evidentiary hearings to determine which of the above-captioned applicants would best serve the public interest. Because we have thus not issued a construction permit for channel 224A to any of the applicants in this proceeding, none of the applicants has anything that it can transfer or assign to Rowland. Thus, the applicants clearly are not being compensated for the assignment of a construction permit, within the meaning of section 73.3597(c)(2) of the rules. Rather, Rowland is paying Affirmative to file an amendment substituting Rowland as the applicant, and it is paying the other six applicants to dismiss their applications.

23. Approval of these agreements also does not violate the intent of section 73.3597(c)(2), which the Commission retained "in order to maintain the integrity of the Commission's licensing processes and effectuate the intent of sections 301 and 304 of the [Communications] Act." *Amendment of Section 73.3597*, 52 RR 2d at 1089 ¶ 30. As the hearings have not begun, neither the parties nor the Commission has invested substantial time or expense

in resolving this proceeding, that would be forfeited by approving the agreements prior to the conclusion of those proceedings. Moreover, the Commission has not granted a construction permit to any of the applicants in this proceeding, based upon promises that will go unfulfilled if the proposed settlement agreement is approved. Thus, the settlement agreements do not compromise the integrity of the Commission's adjudicatory processes.

24. Moreover, before settlement negotiations began, the competing applicants vigorously prosecuted their applications by filing various discovery and pre-hearing motions. These efforts, along with the section 73.3525(a) statements certifying that these applications were not filed for the purposes of entering into a settlement agreement, persuade us that these applicants actually intended to construct and operate on channel 224A when they filed their applications in July 1985. Cf. *NEWSystems*, 2 FCC Rcd at 74 ¶ 10 (Commission relied on affidavits in rejecting the contention that an assignee must have misrepresented its original intentions to the Commission because it could not have developed an intent to reassign station within a space of only two months).

25. Indeed, the original applicants entered into the agreements with Rowland only after several months of negotiations that failed to produce a universal settlement agreement, whereby one applicant would agree to pay all of the competing applicants for withdrawing their applications. Thus, it appears that the third-party agreement with Rowland may be the only way to avoid lengthy comparative hearings that could delay service to the public for years. Approval of the settlement agreements will therefore expedite, rather than delay or disrupt, service to the public. Under these circumstances, we find that the settlement more than adequately preserves the integrity of our licensing processes.

26. The Commission's second reason for retaining the rule against assigning or transferring a construction permit was to effectuate sections 301 and 304 of the Communications Act, which essentially specify that the grant of a construction permit or a license confers no ownership rights in the frequency. However, approval of the settlement agreements does not undermine those statutory provisions, inasmuch as Rowland is not paying any of the original applicants for the assignment of a construction permit. Thus, denial of the settlement agreement is not necessary to effectuate these statutory prohibitions.

27. From a public interest standpoint, we discern no meaningful distinction between this settlement and ordinary settlement agreements among competing applicants, which are routinely granted, where one applicant gets a construction permit after paying competing applicants to dismiss their applications. Thus, we find that, as long as the ultimate permittee is qualified, a settlement agreement that expedites the initiation of new broadcast service serves the public interest, regardless of whether the entity compensating the dismissing applicants is a party to the comparative proceeding. To this end, we find that permitting Rowland to compensate the dismissing applicants without regard to whether the amounts paid exceed their legitimate and prudent expenses is consistent with the public interest.

III. ROWLAND'S BASIC QUALIFICATIONS

28. We find that Rowland is fully qualified to be a Commission licensee. Attached to the Joint Request is a revised FCC Form 301 setting forth Rowland's qualifications to be a Commission licensee. There, Rowland adopts Affirmative's technical proposal in order to facilitate its substitution as the applicant for channel 224A in Marco. There is no question as to whether Affirmative has the basic qualifications to be a Commission licensee. When the Commission designated Affirmative's application for consolidated hearing with the mutually exclusive applications, it found that Affirmative had the basic qualifications to be a Commission licensee. Thus, it specified the standard comparative issue, but no basic qualifying issue, against Affirmative. *Hearing Designation Order*, 3 FCC Rcd at 4055 ¶¶ 15-16 ([e]xcept as may be indicated by issues specified below, the applicants are qualified to construct and operate as proposed).

29. The Bureau has reviewed the revised FCC Form 301, and, at its suggestion, the parties published local notice of Rowland's substitution in the *Naples Daily Times* on March 28, 29 and April 4, 5. The local notice advised that Rowland is the proposed permittee of channel 224A in Marco, and that it has adopted Affirmative's technical proposal. Moreover, to the extent that Rowland already controls the licensees of four broadcast stations (and its applications have been challenged only on technical grounds), its previous fitness to be a Commission licensee is a matter of Commission record.

30. Based upon its review of the revised FCC Form 301 setting forth Rowland's basic qualifications to operate a new FM station on channel 224A, the Bureau states that Rowland has the basic and financial qualifications to be a Commission licensee, and that, pending expiration of the public comment period, it supports the proposed settlement. See Mass Media Bureau's Consolidated Comments, filed on April 11, 1988, at 4-5 ¶ 5. Having received no comment questioning Rowland's basic qualifications or otherwise objecting to the substitution of Rowland for Affirmative during the 30-day period for public comment that ended on May 5, 1988, we conclude that Rowland is qualified to be a Commission licensee.

IV. PETITION FOR LEAVE TO AMEND

31. Affirmative seeks permission to amend its application to substitute Rowland as the applicant for a new FM station on channel 224A in Marco, Florida. We find that the amendment is supported by good cause, and that its acceptance will serve the public interest by expediting service to Marco.

32. *New File Number*: Notwithstanding the ALJ's suggestion (*Rebecca Radio*, FCC 88M-1557 at n.9), the amendment substituting Rowland for Affirmative does not require that a new file number be assigned to Affirmative's amended application under 47 C.F.R. § 73.3573(b). Although it is true that section 73.3573(b) of the Commission's rules requires the assignment of a new file number where the original parties to the application do not retain more than 50 percent ownership interest in the application as originally filed, that rule applies only to amendments filed before (not after) a proceeding is designated for hearing. Under Commission precedent, 47 C.F.R. § 73.3522(b) governs post-designation amendments. *Great River Broadcasting, Inc.*, 12 FCC 2d 561, 562-63 ¶ 5 (Rev. Bd. 1968). See also *Chudy Broadcasting Corp.*, 58

RR 2d 133, 134-35 ¶¶ 5-7 (1985); *Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 468 ¶ 56 & n.63 (1982); *California Broadcasting Corp.*, 90 FCC 2d 800, 808 ¶ 17 (1982). In our view, both *Grace Missionary Baptist Church*, 80 FCC 2d 330 (1980), and *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), which were cited by the ALJ, are inapposite. See *Rebecca Radio*, FCC 88M-1557 at n.9. *Grace* involved an amendment filed before, not after, designation. In *Anax*, which did involve a post-designation amendment, the Commission found that the post-designation amendment was supported by good cause, as section 73.3522(b), which governs post-designation amendments, requires.

34. *Good Cause*: Section 73.3522(b) of the Commission's rules provides that post-designation amendments must be supported by good cause. We find that, under the circumstances of this case, the post-designation amendment substituting Rowland for Affirmative is supported by good cause, as section 73.3522(b) requires. In order to establish good cause for a post-designation amendment, the moving party generally must demonstrate that it acted with due diligence, that the amendment was not required by a voluntary act of the applicant, that the amendment will not require the addition of parties or issues, that the amendment will not disrupt the hearing, that the other parties will not be unfairly prejudiced, and that petitioner will not gain a competitive advantage as a result of the amendment. *California Broadcasting Corp.*, 90 FCC 2d at 808 ¶ 17 & n.28 (citing *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970)).

35. These factors are not rigidly applied, however. Rather, we must look to the primary purpose of the good cause requirement of section 73.3522(b), which is to prevent undue disruption of our administrative processes rather than to rigidly stultify our proceedings. *Gross Broadcasting Co.*, 46 RR 2d 1091, 1097-98 ¶ 38 (1979). Accordingly, we have held that the *Erwin O'Conner* test "should be interpreted in light of the equities of the case, especially where . . . a proffered amendment is intended to cure a disqualifying defect." *Anax Broadcasting Inc.*, 87 FCC 2d 483, 488-89 ¶¶ 16-17 (1981). Indeed, the Court of Appeals has admonished that we should not reject a post-designation amendment based solely on our procedural rules, particularly where the amendment cures a defect that would preclude the grant of an application, and there are no competing applicants that will be prejudiced by acceptance of the amendment. *Crosthwait v. FCC*, 584 F.2d 550, 555-56 (D.C. Cir. 1978). In this case, there is no defect precluding grant of any of the pending applications, but accepting the amendment substituting Rowland for Affirmative will permit the immediate grant of a construction permit to Rowland. Furthermore, as in *Crosthwait*, there are no remaining applicants, who could be prejudiced by such action.

36. Nevertheless, we recognize that the proposed amendment substituting Rowland for Affirmative does not meet all of the requirements for good cause set forth in *Erwin O'Conner*. First, the decision to settle this proceeding, rather than litigate the right to operate on channel 224A, was voluntary. Strictly speaking, therefore, the proposed amendment did not result from Affirmative's involuntary act. Second, Rowland is not one of the original applicants in this adjudicatory proceeding. Thus, the amendment introduces a new party into the proceeding. Moreover, the substitution amendment specifies that Rowland adopts Affirmative's engineering proposal. Sections 73.3522(b)(i) and 73.3522(b)(ii) specify additional require-

ments for amendments to an engineering proposal. Such amendments must be required by unforeseen circumstances and must not require the addition of any new issues or parties. For the reasons discussed above, the settlement agreement does not meet these requirements. However, even in the case of an engineering amendment, the good cause determination is not inflexibly applied. See *California Broadcasting Corp.*, 90 FCC 2d at 810 ¶ 21 (Commission found that a post-designation engineering amendment was supported by good cause even though the amendment required the addition of a shadowing issue).

37. In accordance with *Erwin O'Conner*, the parties have acted diligently in filing the substitution amendment. Once the parties decided to settle this comparative proceeding, they diligently explored the possibility of a settlement that would not involve a third party. They turned to a third-party only after it became apparent that none of the mutually exclusive applicants had sufficient financial resources to compensate all of the competitors. Moreover, the amendment does not require further technical study or the addition of any new issues, because Rowland adopts Affirmative's engineering proposal, and it has the basic and financial qualifications to be a Commission licensee.

38. Thus, by virtue of the agreements between Rowland and each of the dismissing applicants, the amendment actually reduces the total number of parties involved in this proceeding, and eliminates the need for evidentiary hearings. By the same token, the amendment to Affirmative's application will not prejudice the other parties to this proceeding, disrupt the hearing, or give the amending party a comparative advantage. In view of the overall purpose of the good cause requirements, we conclude that the deficiencies set forth in paragraph 36 are not fatal to accepting the amendment. On balance, the equities clearly favor accepting the amendment substituting Rowland for Affirmative. Far from disrupting the Commission's processes, accepting the substitution of Rowland for Affirmative will lead to the speedy conclusion of this proceeding.

39. In view of the substantial public interest benefits of the settlement agreement, we conclude that the Joint Petition for Leave to Amend is supported by good cause, as section 73.3522(b) requires. Thus, we accept the amendment substituting Rowland for Affirmative, approve the settlement agreement, grant Affirmative's amended application for a new FM station on channel 224A in Marco, Florida, and dismiss the six mutually exclusive applications.

V. ORDERS

40. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreements and Petition for Leave to Amend, filed April 4, 1988, by Rebecca, Minority, Skywave, Showcase, Emerald Sea, Gaston, and Affirmative and the Request for Expedited Action, filed November 23, 1988, by Marco Minority Associates ARE GRANTED; that Affirmative's application IS AMENDED to substitute Rowland Gulf Radio, Inc. as the applicant therein; that the settlement agreements between Rowland and Rebecca, Minority, Skywave, Showcase, Emerald Sea, Gaston, and Affirmative ARE APPROVED; that the applications filed by Rebecca, Minority, Skywave, Showcase,

Emerald Sea, and Gaston ARE DISMISSED; and that Affirmative's amended application (File No. BPH-850712TX) IS GRANTED.

41. IT IS FURTHER ORDERED, That the proceeding in MM Docket No. 87-244 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ These include: (a) Joint Request for Approval of Settlement Agreements and Petition for Leave to Amend, filed April 4, 1988, by Rebecca Radio, Marco Minority Associates, Marco Skywave, Inc., Showcase Communications, Inc., Emerald Sea Broadcasting, William R. and Susan G. Gaston, and Affirmative Broadcasting Corporation; and (b) Consolidated Comments on Joint Request for Approval of Settlement Agreements and Petition for Leave to Amend, filed April 11, 1988, by the Mass Media Bureau.

² Because the site availability issues do not involve character or candor questions, there is no need to inquire further into these matters in the context of any application that either Showcase or Skywave might file in the future. See *Allegan County Broadcasting*, 83 FCC 2d 371, 374 ¶ 7 (1980), where the Commission held that character issues against a withdrawing applicant need not be resolved precisely because such matters could be revisited in future proceedings involving that applicant. Thus, in view of our action herein approving the settlement agreements between Rowland and the remaining applicants, we grant the request of Skywave and Showcase and clarify that this issue need not be explored in future proceedings involving the principals of either applicant.

³ This case, which is an initial licensing proceeding, is distinguishable from *RKO General, Inc.*, 3 FCC Rcd (1988), where we approved a settlement agreement despite unresolved questions concerning the renewal applicant's basic qualifications. Under *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964), a licensee generally may not transfer its station to a third party until it has been found to be fully qualified. There is no allegation that any of the applicants in this proceeding lack the basic qualifications to be a Commission licensee. However, even a basic qualifications issue would not bar the settlement agreements in this case inasmuch as there is no impediment in an initial licensing proceeding to an applicant with unresolved character questions receiving compensation for the withdrawal of its application. See *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980). The rationale for the rule in *Jefferson Radio* is deterrence: an unqualified licensee may not profit from its misconduct. We approved the RKO settlement agreement because we found that, under the unusual circumstances of that proceeding, approving the agreement would be fully consistent with the deterrent aspects of the renewal process. 3 FCC Rcd at ¶ 14.

⁴ On June 23, 1988, the Commission adopted a Second Further Notice of Inquiry and Notice of Proposed Rule Making that proposes to limit a withdrawing applicant in a comparative renewal proceeding from receiving more than its legitimate expenses in return for withdrawing its application. *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, 3 FCC Rcd 5179, 5182 ¶ 19-20 (1988). However, in recognition of differences between comparative renewal proceedings and initial licensing proceedings, the proposed limitation would apply only to dismissing applicants in comparative renewal proceedings. *Id.*

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In re Applications of Rebecca Radio of Marco, *et al.*
(MM Docket No. 87-244)

As a general matter, I have always been in favor of settlements in the comparative process as a means of resolving disputes in an expeditious manner. In certain unique circumstances, allowing non parties to participate in the settlement will promote the public interest. See *RKO General, Inc.*, 3 FCC Rcd _____ (1988) (settlement with sale to third party promotes public interest by resolving litigation that is over two decades old). However, in our drive to promote settlements and expedite the process, we must be careful not to lose sight of our underlying statutory obligations. The settlement in this case crosses that line, creating dangerous precedent that establishes a *de facto* private auction for broadcast spectrum.

Sections 301 and 304 of the Communications Act make it abundantly clear that broadcast applicants do not have a vested right in the spectrum. Accordingly, it is settled law that the holder of a construction permit cannot profit from the sale of an unbuilt station because the permittee has no property right in the spectrum. *Central Television Inc.*, 60 R.R. 2d 1297 (1986); See 47 C.F.R. Sec. 73.3597. Given this time honored communications policy, I find it difficult to understand how the majority could allow an applicant for a new unbuilt broadcast station to sell its application to a third party for profit. Such a policy violates the fundamental principle that broadcast applicants do not have vested rights in the spectrum.

I agree with Administrative Law Judge Joseph Chachkins observation that the parties in this case "seek to utilize a settlement arrangement to circumvent the Commission's established processes for qualifying applicants and awarding construction permits" *Rebecca Radio of Marco*, FCC 88M-1557 (May 24, 1988) at 4. The potential adverse ramifications of this *de facto* private auction on the ability of the Commission to promote local integrated ownership and minority participation through the comparative process may be significant.

The majority's decision in this case is a radical departure from Commission precedent. Because it raised such fundamental issues, I believe it would have been more appropriate to address the implications of this new policy in the context of a rule making proceeding. Therefore, for the above stated reasons, I must dissent from the decision.