

BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1439

MINNESOTA CHRISTIAN BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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TABLE OF CONTENTS

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUE PRESENTED	2
STATUTES AND REGULATIONS	2
COUNTERSTATEMENT	3
I. STATUTORY AND REGULATORY BACKGROUND	3
II. THIS PROCEEDING	8
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. STANDARD OF REVIEW	14
II. THE COMMISSION REASONABLY INTERPRETED AND APPLIED ITS NEBC ELIGIBILITY RULES WHEN IT DISALLOWED THE BIDDING CREDIT MCBI HAD CLAIMED IN THE AUCTION FOR THE PEQUOT LAKES, MINNESOTA CONSTRUCTION PERMIT	15
A. MCBI’s Interests in Noncommercial Educational FM Broadcast Stations Are “Attributable Interests in Media of Mass Communications” Within the Meaning of the NEBC Eligibility Rules.	15
B. The Commission Lawfully Applied Its Interpretation of Its Rules To Require MCBI To Pay the Full Amount of Its Winning Auction Bid.	18
CONCLUSION	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Associated Builders & Contractors, Inc. v. Herman</i> , 166 F.3d 1248 (D.C. Cir. 1999)	14
<i>Bechtel v. FCC</i> , 10 F.3d 875 (D.C. Cir. 1993)	3
<i>Carol De La Hunt v. FCC</i> , No. 03-1029 (D.C. Cir.)	11
<i>Damsky v. FCC</i> , 199 F.3d 527, 533 (D.C. Cir. 2000).....	14
* <i>San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm.</i> , 789 F.2d 26 (D.C. Cir.), <i>cert denied</i> , 479 U.S. 923 (1986)	14, 19
* <i>Verizon Tele. Cos. v. FCC</i> , 269 F.3d 1098 (D.C. Cir. 2001).....	18
* <i>Vernal Enterprises, Inc. v. FCC</i> , 355 F.3d 650 (D.C. Cir. 2004).....	1, 19
 <u>Administrative Decisions</u>	
<i>In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses</i> , 13 FCC Rcd 15920 (1998)	3, 4
<i>In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses</i> , 14 FCC Rcd 8724 (1999)	5, 6, 7, 16
<i>Reexamination of the Comparative Standards for Noncommercial Educational Applicants</i> , 15 FCC Rcd 7386 (2000), <i>order clarified on reconsideration</i> , 16 FCC Rcd 5074 (2001), <i>reconsideration denied</i> , 17 FCC Rcd 13132 (2002).....	17
 <u>Statutes and Regulations</u>	
47 U.S.C. § 309(1)	3
47 U.S.C. § 309(j)(3)(B).....	18
47 U.S.C. § 309(j)(4)(D).....	4
47 U.S.C. § 402(a)	1, 2
47 U.S.C. § 402(b)	1, 2
47 U.S.C. §§ 151 <i>et seq.</i>	3

	<u>Page</u>
47 C.F.R. § 73.3555(f) (1999)	9, 11, 16
47 C.F.R. § 73.3555(f) (2000)	11, 12, 17
47 C.F.R. § 73.5007 (1999)	6
47 C.F.R. § 73.5007(a) (1998)	4
47 C.F.R. § 73.5007(a) (1999)	7, 17
47 C.F.R. § 73.5007(b) (1998)	4
47 C.F.R. § 73.5008(b) (1999)	7, 17, 18
47 C.F.R. § 73.5008(c) (1999)	6
47 C.F.R. § 73.5008(b) (1998)	4
Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997)	3

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

<i>Broadcast Auctions Order</i>	<i>In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses</i> , 13 FCC Rcd 15920 (1998)
<i>Broadcast Auctions Reconsideration Order</i>	<i>In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses</i> , 14 FCC Rcd 8724 (1999)
Bureau	Media Bureau (formerly, Mass Media Bureau)
Communications Act	Communications Act of 1934, as amended, 47 U.S.C. §§ 151 <i>et seq.</i>
<i>February 28, 2000 Letter Ruling</i>	February 28, 2000 Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, to Carol De La Hunt and Minnesota Christian Broadcasters, Inc. (JA 105)
Long-form application	FCC Form 301–Application for Construction Permit for Commercial Broadcast Station
MCBI	Minnesota Christian Broadcasters, Inc.
NCE	noncommercial educational
NEBC	new entrant bidding credit
<i>Order on Review</i>	<i>In re Application of Minnesota Christian Broadcasters, Inc.</i> 18 FCC Rcd 614 (2003) (JA 162)
<i>Reconsideration Order on Review</i>	<i>In re Application of Minnesota Christian Broadcasters, Inc.</i> , 18 FCC Rcd 24421 (2003) (JA 194)
<i>September 27, 2000 Reconsideration Letter</i>	September 27, 2000 Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, to Carol De La Hunt and Minnesota Christian Broadcasters, Inc. (JA 110)
Short-form application	FCC Form 175–Application To Participate in an FCC Auction

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BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION

JURISDICTIONAL STATEMENT

Minnesota Christian Broadcasters, Inc. (“MCBI”) filed an appeal of orders of the Federal Communications Commission reversing its staff’s award of a bidding credit to MCBI in an auction for a broadcast construction permit. MCBI asserts that the Court has jurisdiction pursuant to 47 U.S.C. § 402(b), but acknowledges that the Court may conclude that its jurisdiction must be invoked under 47 U.S.C. § 402(a), and therefore requests that the Court assume jurisdiction under § 402(a), if necessary. In the Commission’s view, *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650 (D.C. Cir. 2004), suggests that the Court’s jurisdiction arises under § 402(a). The Commission believes, however, that it is not necessary for the Court to resolve this

jurisdictional issue because MCBI's filing was timely under § 402(b), and thus timely under § 402(a), and this Court has jurisdiction under either provision.

STATEMENT OF ISSUE PRESENTED

MCBI and Carol De La Hunt were the only bidders in an auction for a construction permit for a new commercial FM station in Pequot Lakes, Minnesota. Notwithstanding its ownership of three noncommercial educational FM stations, including one licensed to Pequot Lakes, Minnesota, MCBI claimed as part of its application to participate in the auction that it was eligible to receive a 35 percent new entrant bidding credit. Both before and after the auction, De La Hunt challenged MCBI's claimed bidding credit on the grounds that MCBI was not a "new entrant" within the meaning of the Commission's rules. At the time of De La Hunt's initial challenges, the Commission had not specifically addressed the issue whether the noncommercial educational status of a broadcast station should be taken into account when determining eligibility for the new entrant bidding credit. When it did address this issue, however, the Commission concluded that MCBI's ownership of a noncommercial educational FM station in the same area as the proposed station disqualified MCBI from receiving a new entrant bidding credit. As such, the Commission disallowed the claimed credit and required MCBI to pay the full amount of its winning auction bid.

The question presented is whether the Commission reasonably interpreted and applied its bidding credit rules when it concluded that MCBI did not qualify for the new entrant bidding credit because MCBI owned an existing noncommercial educational FM station in the same service area as the proposed station.

STATUTES AND REGULATIONS

The pertinent regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

MCBI and De La Hunt filed their mutually exclusive applications for the Pequot Lakes, Minnesota construction permit in 1995. Their applications, however, were held in abeyance while the Commission undertook development of a new licensing structure in the aftermath of this Court's decision in *Bechtel*, which struck down the comparative structure that had been the mechanism for choosing among competing broadcast applications.¹ Then, on July 1, 1997, Congress enacted the Balanced Budget Act, which among other things, modified Section 309(j) of the Communications Act² to require that the Commission resolve future mutually exclusive licensing proceedings through auctions, and to give the Commission the discretion to use auctions to resolve pending proceedings like the Pequot Lakes, Minnesota licensing.³ The Commission thereafter adopted general broadcast licensing rules to implement its newly expanded auction authority, including rules in which the Commission exercised its discretion to resolve mutually exclusive applications filed before July 1, 1997, through auctions.⁴

In furtherance of its statutory duty to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the

¹ *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (Holding that the Commission's consideration of “integration of ownership with management,” a key comparative criterion, was arbitrary and capricious).

² 47 U.S.C. §§ 151 *et seq.*

³ Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

⁴ See 47 U.S.C. § 309(1); see also *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920, 15933 (¶ 34) (1998) (“*Broadcast Auctions Order*”).

opportunity to participate in the provision of spectrum-based services,”⁵ in the *Broadcast Auctions Order*, the Commission adopted rules to assist auction applicants “holding no or few mass media licenses.”⁶ Specifically, the Commission announced that it was making available a two-tiered bidding credit for qualifying “new entrants” that could be used to lower the cost of the new entrant’s winning bid on a broadcast construction permit.⁷

Under the new entrant bidding credit (“NEBC”) rules as originally adopted, a winning bidder qualified as a “new entrant” and thus could claim a 35 percent bidding credit if it did not have a cognizable interest, meaning more than 50 percent ownership or *de facto* control, in any disqualifying medium of mass communications; and a winning bidder with a cognizable interest in no more than three mass media facilities, could claim a 25 percent NEBC.⁸ No bidding credit, however, was available to an applicant with a cognizable interest in more than three media facilities or an applicant with an existing media facility in the same service area as the proposed broadcast station.⁹ Disqualifying mass media facilities included a daily newspaper; a cable television system; a license or construction permit for a television station, a low power television or television translator station, an AM, FM or FM translator broadcast station, a direct broadcast satellite transponder, or a Multipoint Distribution Service station.¹⁰

⁵ 47 U.S.C. § 309(j)(4)(D); *see also Broadcast Auctions Order*, 13 FCC Rcd at 15993 (¶ 186).

⁶ *Broadcast Auctions Order*, 13 FCC Rcd at 15995 (¶ 189).

⁷ *Id.*, 13 FCC Rcd at 15995-96 (¶ 190); *codified at* 47 C.F.R. § 73.5007 (1998).

⁸ 47 C.F.R. § 73.5007(a) (1998).

⁹ 47 C.F.R. § 73.5007(b) (1998).

¹⁰ *Broadcast Auctions Order*, 13 FCC Rcd at 15996 n.230 (¶ 190), *codified at* 47 C.F.R. 73.5008(b) (1998).

On reconsideration of the *Broadcast Auctions Order*, the Commission amended the eligibility standards for the NEBC “to be consistent with our general broadcast attribution standards, by which we define what constitutes a ‘cognizable interest’ in applying the broadcast multiple ownership rules.”¹¹ Utilizing the “well-established broadcast attribution rules to determine eligibility for the new entrant bidding credit in broadcast service auctions,” the Commission explained, “will best promote the goals of the bidding credit.”¹² Noting that “the interests defined as attributable under our general multiple ownership attribution rules have already been judged to give their holders ‘a realistic potential’ to affect the programming or other core functions of broadcast licensees,” the Commission concluded that “such interests should also be cognizable in determining whether a winning bidder in a broadcast auction should be given a bidding credit as a true ‘new entrant.’”¹³ In addition, because “the multiple ownership rules are designed to promote diversity in programming sources and viewpoints for the broadcast services, which is one of the purposes of the new entrant bidding credit,” the Commission found “that the same attribution rules should be applied in both contexts.”¹⁴ Accordingly, the Commission decided that a winning bidder’s interests in other media of mass communications “will be attributable for purposes of the new entrant bidding credit to the same extent that such

¹¹ *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 14 FCC Rcd 8724, 8762 (¶ 71) (1999) (“*Broadcast Auctions Reconsideration Order*”).

¹² *Id.*, 14 FCC Rcd at 8763 (¶ 72) (citation and internal quotation marks omitted).

¹³ *Broadcast Auctions Reconsideration Order*, 14 FCC Rcd at 8763 (¶ 72).

¹⁴ *Id.*

other media interests are considered attributable for purposes of the broadcast multiple ownership rules.”¹⁵ The Commission thus amended Sections 73.5007 and 73.5008 of its rules.¹⁶

The decision to utilize the general broadcast attribution rules to determine when there is a cognizable interest in other media of mass communications makes it more difficult to qualify for the new entrant bidding credit.¹⁷ The Commission therefore found it “appropriate to reconsider the types of media of mass communications that are relevant in this regard.”¹⁸ Specifically, the

¹⁵ *Broadcast Auctions Reconsideration Order*, 14 FCC Rcd at 8762 (¶ 71) (footnote omitted).

¹⁶ Section 73.5007 was amended to read, in part:

A winning bidder that qualifies as a “new entrant” may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. Any winning bidder claiming new entrant status must have *de facto*, as well as *de jure*, control of the entity utilizing the bidding credit.

(a) A thirty-five (35) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have no attributable interest in any other media of mass communications, as defined in § 73.5008. A twenty-five (25) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have an attributable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast station, or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, have attributable interests in more than three mass media facilities. . . .

(b) The new entrant bidding credit is not available to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have an attributable interest in any existing media of mass communications in the same area as the proposed broadcast or secondary broadcast facility.

47 C.F.R. § 73.5007 (1999). And, Section 73.5008 was revised to read: “An attributable interest in a winning bidder or in a medium of mass communications shall be determined in accordance with § 73.3555 and Note 2.” 47 C.F.R. § 73.5008(c) (1999).

¹⁷ An owner of as little as 5% of the voting stock of a broadcast station has an attributable interest in that station under the modified rules, while under the original NEBC eligibility standards, in the absence of *de facto* control, the interest would have to rise to more than 50% in order for it to be attributable. *See* p. 4 *supra*.

¹⁸ *Broadcast Auctions Reconsideration Order*, 14 FCC Rcd at 8764 (¶ 75).

Commission found that “attributable interests held by a winning bidder in existing LPTV [low power television] and television and FM translator stations should not be counted among the bidder’s other mass media interests in determining its eligibility for a new entrant bidding credit in any broadcast or secondary broadcast service auction.”¹⁹ The Commission, therefore, also amended Sections 73.5007 and 73.5008 of its rules to exempt those interests held in existing low power television and translator stations from counting toward a winning bidder’s other mass media interests in determining eligibility for the new entrant bidding credit, but did not exclude interests held in existing noncommercial educational stations.²⁰

The Commission was aware that questions concerning the types of media outlets whose ownership is relevant under the NEBC rules were only some of those that could arise in implementation of these rules. Questions could also rise as to whether an interest in a relevant media outlet could be characterized as an “ownership” interest within the meaning of these rules. These questions also arise under the multiple ownership rules and the Commission addressed them in a series of Notes to Section 73.3555, where the various multiple ownership rules are

¹⁹ *Broadcast Auctions Reconsideration Order*, 14 FCC Rcd at 8764 (¶ 75).

²⁰ *Id.*, codified at 47 C.F.R. § 73.5007(a) (1999). The following sentence was added to Section 73.5007(a): “Attributable interests held by a winning bidder in existing low power television, television translator or FM translator facilities will not be counted among the bidder’s other mass media interests in determining eligibility for a bidding credit.” 47 C.F. R. § 73.5007(a) (1999). And, Section 73.5008 was revised to read: “A medium of mass communications means a daily newspaper; a cable television system; or a license or construction permit for a television broadcast station, an AM or FM broadcast station, a direct broadcast satellite transponder, or a Multipoint Distribution Service station.” 47 C.F.R. § 73.5008(b) (1999). The Commission also noted that it had recently issued a notice of proposed rulemaking concerning the creation of a low power radio service, including one class of low power FM that would be a primary service. It thus advised that if the Commission ultimately were to approve such a primary service, the “stations in this service should be counted in determining eligibility for a new entrant bidding credit in any broadcast or secondary broadcast service auction.” *Id.*, 14 FCC Rcd at 8764-65 (¶ 76).

contained. The Commission made clear in Section 73.5008(c) that the guidance provided in Note 2 to Section 73.3555 also governed when the “ownership” issue arose under the NEBC rules.²¹

II. THIS PROCEEDING

Pursuant to the rules adopted in the *Broadcast Auctions Order*, and as modified by the *Broadcast Auctions Reconsideration Order*, MCBI filed a short-form application²² to compete in an auction with De La Hunt for the Pequot Lakes, Minnesota construction permit (JA 9). In its application, MCBI certified that it was eligible for the 35 percent bidding credit because “neither it nor any of its attributable interest holders have any attributable interest in any other media of mass communications as defined in 47 C.F.R. Section 73.5008” (JA 13). MCBI added that its “only other interests, as outlined in Exhibit A, are non-attributable pursuant to Section 73.3555(f)” (JA 13). Exhibit A to MCBI’s short-form application stated that:

Minnesota Christian Broadcasters, Inc. is the licensee of non-commercial educational FM Broadcast Stations KTIG, Pequot Lakes, Minnesota, KCFB, St. Cloud, Minnesota and KBHW, International Falls, Minnesota. It is also the permittee of non-commercial educational FM Station KBOG, International Falls, Minnesota. Pursuant to provisions of Section 73.3555(f) these interests are not attributable under the Commission’s multiple ownership rules.

(JA 12).

Upon the filing of MCBI’s short-form application, and prior to commencement of the auction, De La Hunt disputed MCBI’s position on the relevance, or lack thereof, of the noncommercial educational status of MCBI’s FM stations, and sought a declaration from the

²¹ The central question in this case, however, is whether a noncommercial educational FM station is a relevant media outlet under the NEBC rules; it is undisputed that MCBI, which owns 100% of the NCE FM stations at issue, has an “ownership” interest in those stations.

²² FCC Form 175—Application To Participate in an FCC Auction.

Commission's Media Bureau (formerly, the Mass Media Bureau) that MCBI was “not entitled to a 35% ‘new entrant’ bidding credit.” *Petition for Declaratory Ruling* (JA 17). The auction commenced and concluded before the Bureau took any action on De La Hunt’s petition. At the close of the auction, the Bureau announced that MCBI was the winning bidder for the Pequot Lakes, Minnesota construction permit, having submitted a high gross bid of \$213,000 (JA 33). In view of MCBI’s claimed bidding credit, the amount due on MCBI’s winning auction bid was reduced by 35 percent to \$138,000 (JA 41). MCBI remitted the required down payment on its net winning bid and submitted a long-form application²³ for the Pequot Lakes, Minnesota construction permit.

De La Hunt filed a petition to deny MCBI’s long-form application in which she renewed her argument before the Bureau that MCBI was not eligible for the NEBC and further argued that MCBI’s application for the Pequot Lakes construction permit should be denied or designated for hearing because MCBI was not financially qualified to be a Commission licensee. *Petition To Deny* (JA 47). Concluding that MCBI qualified for the NEBC, the Bureau noted that Section 73.5008(c) provided that issues concerning the existence of an attributable interest were to be resolved in accordance with Section 73.3555 and Note 2. Turning to Section 73.3555, the Bureau observed that subsection (f) thereof stated that 73.3555 “is not applicable to noncommercial educational FM and noncommercial educational TV stations.” *February 28, 2000 Letter Ruling* at 3 (JA 107). The Bureau thus determined that the Commission must not have intended for it to be possible for any bidder to have an attributable interest in a noncommercial educational FM or TV station for the purposes of the NEBC provisions in

²³ FCC Form 301—Application for Construction Permit for Commercial Broadcast Station.

Sections 73.5007 and 73.5008, and therefore denied De La Hunt's petition and dismissed her *Petition for Declaratory Ruling* as moot. *February 28, 2000 Letter Ruling* at 5 (JA 109).

On March 29, 2000, De La Hunt filed a *Petition for Reconsideration* of the *February 28, 2000 Letter Ruling* (JA 196). On reconsideration, the Bureau was not persuaded by De La Hunt's argument that Section 73.3555(f) provided only that the multiple ownership rules set forth in subsections (a) through (e) of Section 73.3555 were not applicable to limit the ownership of noncommercial educational FM and TV stations, and that the attribution guidance set forth in Note 2 to Section 73.3555, did apply for the purposes of determining whether an interest in an FM station, commercial or NCE, rose to the level of an "attributable interest" for purposes of the NEBC under Sections 73.5007 and 73.5008. Affirming its previous finding that "MCBI was qualified for the 35% new entrant bidding credit because the noncommercial educational ("NCE") FM stations it owns are not counted for purposes of determining eligibility for the credit," the Bureau denied reconsideration. *September 27, 2000 Reconsideration Letter* at 2 (JA 110-11).

On March 13, 2002, MCBI remitted the balance of its net winning bid, and on March 21, 2002, the Commission granted the Pequot Lakes, Minnesota construction permit to MCBI subject to the outcome of any further Commission or judicial proceedings (JA 161). De La Hunt sought review from the Commission of the Bureau's denials of her petitions and grant of the construction permit to MCBI. *Application for Review* (JA 117). The Commission granted in part, and denied in part, the *Application for Review*. *In re Application of Minnesota Christian Broadcasters, Inc.*, 18 FCC Rcd 614 (2003) ("*Order on Review*") (JA 162). The Commission upheld the Bureau's rejection of De La Hunt's arguments regarding MCBI's basic financial

qualifications, but reversed the Bureau's conclusion that MCBI was eligible for the NEBC benefit it had claimed in the auction.²⁴

The Commission looked to Sections 73.5007 and 73.5008 as the governing provisions for determining the types of media outlets where ownership is relevant for purposes of the NEBC. It noted that FM broadcast stations were included in the listing of relevant outlets in Section 73.5008(b) without any indication that the reference there was limited to commercial FM stations. The Commission also observed that, although Section 73.5007(a) specifically provided that "existing low power television, television translator or FM translator facilities" will not be counted "among the winning bidder's other media interests in determining eligibility for a bidding credit," the rule did not include an exemption for noncommercial educational facilities. *Order on Review* ¶ 6 (JA 165). Turning to Section 73.3555, the Commission found nothing there to alter its conclusion that "the rules are more properly read to mean that MCBI's 100% interests in stations KCFB(FM) and KTIG(FM) are cognizable for purposes of the bidding credit." *Id.* ¶ 4 (JA 164). The Commission essentially agreed with De La Hunt's assertions below (see p. 10 *supra*) that when applying Section 73.3555 in the context of NEBC eligibility, Section 73.3555(f), upon which the Bureau had relied, provided only that the multiple ownership limits in 73.3555 did not apply to limit the ownership of noncommercial educational stations. The Commission added that its intent to distinguish "between what constitutes an attributable interest and the multiple ownership limits," had been made "even clearer" by intervening amendments to Section 73.3555(f), which clarify that "[t]he ownership limits of this section are not applicable

²⁴ De La Hunt's appeal of the part of the *Order on Review* regarding MCBI's basic financial qualifications was the subject of *Carol De La Hunt v. FCC*, No. 03-1029 (D.C. Cir.). The Court affirmed the portion of the *Order on Review* relating to MCBI's financial qualifications in an unpublished judgment dated February 4, 2004.

to noncommercial educational FM and noncommercial educational TV stations.”” *Order on Review* ¶ 6 (JA 165).

The Commission thus concluded that full-service NCE stations are included among “media of mass communications” as defined in Section 73.5008(b). *Id.* ¶ 8 (JA 166). The Commission determined that its clarifying interpretation of the agency rules should be applied to MCBI’s application because there was no prior contrary interpretation on which MCBI could have relied and MCBI was on notice prior to the auction that its competitor, De La Hunt, was challenging MCBI’s claim that its NCE stations should not be counted in applying the NEBC provisions of the Commission’s rules. *Id.* ¶ 9 (JA 166-67). Applying its clarification of the NEBC eligibility rules to MCBI, the Commission disallowed the bidding credit and required MCBI to pay the full amount of its winning auction bid.²⁵ MCBI filed a *Petition for Partial Reconsideration* requesting that the Commission reverse its decision regarding MCBI’s new entrant bidding credit eligibility (JA 170). The Commission denied the petition after determining that it raised no new facts or arguments. *In Re Application of Minnesota Christian Broadcasters, Inc.*, 18 FCC Rcd 24421 ¶ 2 (2003) (“*Reconsideration Order on Review*”) (JA 194). This appeal followed.

SUMMARY OF ARGUMENT

This case involves the Commission’s interpretation of its own rules. The Commission interpreted its rules to mean that the ownership of noncommercial educational (“NCE”) FM stations is relevant for purposes of determining an applicant’s eligibility for the new entrant

²⁵ The Commission also noted that MCBI’s “erroneous claim of a thirty-five percent bidding credit, based on an erroneous reading of section 73.3555(f), does not affect MCBI’s basic qualifications.” *Order on Review* ¶ 9 (JA 167).

bidding credit (“NEBC”). That interpretation is reasonable and thus entitled to the Court’s deference.

Here, MCBI does not dispute that it was the sole owner of an existing NCE FM broadcast station licensed to Pequot Lakes, Minnesota at the time it filed its auction application to compete with De La Hunt for the Pequot Lakes, Minnesota construction permit. MCBI also does not dispute that it was the sole owner of two additional NCE FM stations at the time of the auction. Further, MCBI does not dispute that but for applying the exemption contained in Section 73.3555(f), the FM broadcast stations it owns fall within the definition of “media of mass communications” and its ownership of these stations is an “attributable interest in a medium of mass communications,” under the NEBC eligibility rules. Rather, MCBI complains that the Commission was required to treat MCBI as a “new entrant holding no other media interests,” because it only had attributable media interests in noncommercial educational stations, which are not considered for purposes of the multiple ownership rules, and therefore – according to MCBI – may not be considered under the NEBC eligibility rules.

While MCBI is correct that attributable interests held in NCE stations are not considered when applying the broadcast multiple ownership limit, *i.e.*, Section 73.3555 does not limit the number of NCE stations an entity may own, MCBI is wrong that such interests are disregarded when determining eligibility for the new entrant bidding credit. As the Commission held in the *Order on Review*, full-service NCE stations “are included among ‘media of mass communications’ as defined in Section 73.5008(b)” and interests held in full-service NCE stations may “constitute attributable interests within the meaning of Section 73.5008(c) for purposes of determining eligibility under Section 73.5007(a) for a new entrant bidding credit in any broadcast or secondary broadcast service auction.” *Id.* ¶ 8 (JA 166). MCBI therefore was

not qualified to claim the 35 percent bidding credit, and could not claim the 25 percent bidding credit because it had an attributable interest in an existing FM station in the same area as the proposed station, notwithstanding the existing station's noncommercial educational status. Accordingly, the Commission correctly disallowed the bidding credit that had been awarded to MCBI and required MCBI to pay the full amount of its winning auction bid.

ARGUMENT

I. STANDARD OF REVIEW

The Court must affirm the *Order on Review* unless MCBI demonstrates that the challenged agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”²⁶ Under this deferential review standard, the Court looks “to see whether the [Commission's] decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.”²⁷

MCBI faces a particularly heavy burden here because MCBI challenges the Commission's interpretation of its own rules. The Court must give the Commission's interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”²⁸ Further, in order to uphold the Commission's interpretation, the Court “need not find that the agency's construction is the only possible one, or even the one that the court would have adopted in the first instance.”²⁹

²⁶ 5 U.S.C. § 706(2)(A).

²⁷ *Damsky v. FCC*, 199 F.3d 527, 533 (D.C. Cir. 2000) (citation and internal quotations omitted).

²⁸ *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1253 (D.C. Cir. 1999) (citation and internal quotations omitted).

²⁹ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm.*, 789 F.2d 26, 30 (D.C. Cir.), *cert denied*, 479 U.S. 923 (1986).

II. THE COMMISSION REASONABLY INTERPRETED AND APPLIED ITS NEBC ELIGIBILITY RULES WHEN IT DISALLOWED THE BIDDING CREDIT MCBI HAD CLAIMED IN THE AUCTION FOR THE PEQUOT LAKES, MINNESOTA CONSTRUCTION PERMIT.

A. MCBI's Interests in Noncommercial Educational FM Broadcast Stations Are "Attributable Interests in Media of Mass Communications" Within the Meaning of the NEBC Eligibility Rules.

The initial issue in this case is whether the Commission reasonably interpreted its rules when it concluded that MCBI's undisputed 100% ownership of noncommercial educational FM stations rendered MCBI ineligible for a NEBC. In determining whether the Commission's interpretation is reasonable, it is useful to distinguish two separate questions: (1) whether possession of an attributable interest in a particular media outlet counts against NEBC eligibility and (2) whether a particular interest in a certain media outlet constitutes a cognizable and attributable ownership interest. The Commission concluded that the first question is governed by Sections 73.5007(a) and Section 73.5008(b) of its rules, whereas the second question is governed by Section 73.5555 and Note 2 thereof.

Looking to Sections 73.5007 and 73.5008, the Commission concluded that a full-service NCE station is a relevant media outlet for the purposes of NEBC eligibility because the plain language of the rules includes "an AM or FM broadcast station without any indication that noncommercial educational stations are excluded." *Order on Review* ¶ 6 (JA 165). Moreover, as the Commission noted, the NEBC eligibility rules exclude only "[a]ttributable interests held by a winning bidder in low power television, television translator or FM translator facilities," from what "counts among the winning bidder's other media interests in determining eligibility for a bidding credit." *Id.* By incorporating into Section 73.5008(c) of the NEBC rules the attribution standards set forth in Section 73.3555 and Note 2 thereof, the Commission did not exclude NCE

stations from consideration in determining NEBC eligibility, but determined that “the interests of the winning bidder (and of any individuals or entities with an attributable interest in the winning bidder) will be attributable for the purposes of the new entrant bidding credit *to the same extent that such other media interests are considered attributable for the purposes of the broadcast multiple ownership rules.*” *Order on Review* ¶ 5 (JA 165) (emphasis in original; footnote and internal quotations omitted).³⁰

This case involves only the question of whether NCE stations are relevant media outlets for the purposes of determining NEBC eligibility because MCBI does not dispute that it is the sole owner of the NCE stations at issue, and there is no dispute that sole ownership is an attributable ownership interest. Yet, even if MCBI’s interest in the NCE stations had not been as direct and strong as it was, thus presenting a need to resort to Note 2 in Section 73.3555 in order to determine whether the interest rose to the level that it was attributable, the Commission held that it was appropriate to apply the attribution aspects of Section 73.3555 to NCE stations, notwithstanding the version of 73.3555(f) in effect at the time MCBI filed its short-form application. The Commission found that “[n]either Section 73.3555(f) nor Note 2 specifies that an otherwise attributable interest in a medium of mass communications is disregarded under all circumstances because the facility in question is a noncommercial educational station.” *Order on Review* ¶ 6 (JA 165). Moreover, the Commission specifically construed the language of Section 73.3555(f) as it read at the time of the auction, as simply meaning that the “various ownership limits, such as the local radio ownership rule or the radio-television ownership rule, do not apply to NCE stations.” *Id.* The “distinction between what constitutes an attributable

³⁰ *Quoting Broadcast Auctions Reconsideration Order*, 14 FCC Rcd at 8762 (¶ 71).

interest and the multiple ownership limits” the Commission added, “is even clearer under current Section 73.3555(f), providing that “[t]he ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations.” *Order on Review* ¶ 6 (JA 165).³¹

MCBI does not dispute that an FM station is listed in Section 73.5008(b) as a relevant medium of mass communications for purposes of the NEBC, nor does MCBI dispute that when the Commission specified in Section 73.5007(a) that certain media outlets, which might otherwise have been regarded as relevant media outlets for purposes of the NEBC, were not to be considered for that purpose, the Commission did not include an exemption for noncommercial educational outlets. MCBI instead relies on (i) the Commission’s statement in Section 73.5008(c) that “an attributable interest in a . . . medium of mass communications shall be determined in accordance with § 73.3555 and Note 2” and (ii) MCBI’s reading of Section 73.3555 as prohibiting any application of its provisions to a noncommercial educational station. Confusing the two distinct issues of a cognizable media outlet (*i.e.*, Sections 73.5007(a) and 73.5008(b)) and a cognizable interest in such an outlet (*i.e.*, Section 73.3555), MCBI argues Section 73.3555(f) means that a noncommercial educational station cannot be regarded as a relevant media outlet for purposes of NEBC eligibility in the first place.

As discussed above, the Commission, however, looked to Section 73.5007(a) and 73.5008(b) as the governing provisions for determining what media outlets are relevant and rejected the attempt to construe Section 73.3555(f) as overriding the import of 73.5007(a) and

³¹ *Citing Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *order clarified on reconsideration*, 16 FCC Rcd 5074 (2001), *reconsideration denied*, 17 FCC Rcd 13132 (2002) (the proceeding in which the then-current language of Section 73.3555(f) [47 C.F.R. § 73.3555(f) (2000)] was adopted).

73.5008(b) that noncommercial educational stations are relevant outlets for NEBC purposes. The Commission’s interpretation of its rules is reasonable and entitled to the Court’s deference. Further, as a policy matter, it would not make sense to disregard attributable interests in NCE stations in determining NEBC eligibility because to do so would not “promote the NEBC goal of fostering entry into broadcasting by new participants.” *Order on Review* ¶ 7 (JA 165). In addition, as the Commission recognized, “a number of NCE licensees own dozens of full-power primary service stations,” and it therefore, “makes little sense to treat such licensees as ‘new entrants.’” *Id.* Moreover, because licensees may hold both noncommercial and commercial broadcast authorizations and can convert a station via routine application from commercial to noncommercial status, the Commission found that “drawing a distinction between stations based on their NCE or commercial status would undermine Congress’s intent to ‘disseminat[e] licenses among a wide variety of applicants.’” *Id.*³²

B. The Commission Lawfully Applied Its Interpretation of Its Rules To Require MCBI To Pay the Full Amount of Its Winning Auction Bid.

Once the Commission determined that attributable interests in NCE stations are pertinent to determining NEBC eligibility under the agency’s rules, the Commission next decided whether to apply that clarification to MCBI. Starting with a presumption in favor of applying the clarification, the Commission said that it would apply the clarification of the NEBC rules to MCBI “unless to do so would work a ‘manifest injustice.’” *Order on Review* ¶ 9 (JA 166).³³

³² *Quoting* 47 U.S.C. § 309(j)(3)(B).

³³ *Citing Verizon Tele. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (“In cases in which there are ‘new applications of existing law, clarifications, and additions,’ the courts start with a presumption in favor of retroactivity,” but will deny retroactive application if it would “work a ‘manifest injustice’.” (internal citations omitted)).

As the Commission had “not had an opportunity to address this issue previously,” the Commission found that it could not “be said that MCBI relied on settled Commission policy in this area.” *Order on Review* ¶ 9 (JA 167). Furthermore, the “position of the agency’s staff, taken before the agency itself decided the point, does not invalidate the agency’s subsequent application and interpretation of its own regulation.”³⁴ In addition, the Commission found that De La Hunt’s efforts to seek clarification of the NEBC eligibility rules, “plainly put[] MCBI on notice that its claimed NEBC likely would be challenged.” *Id.* See also Brief for Appellant at 11 (The Bureau twice confirmed that interests in NCE stations are not attributable interests “notwithstanding the vociferous and lengthy arguments of De La Hunt.”). Moreover, as the Commission noted, grant of the construction permit to MCBI “was expressly conditioned upon timely payment of the balance of MCBI’s gross winning auction bid should we find, as we have, that MCBI is ineligible for the claimed NEBC.” *Id.* Thus, the Commission reasonably concluded that under the circumstances, a “manifest injustice” would not result from application of the rule clarification to MCBI. The Commission thus ordered MCBI to pay to the Commission “the sum of \$74,550, representing the difference between MCBI’s gross winning auction bid and its bid net of the claimed thirty-five percent NEBC.” *Id.* MCBI has paid the balance of its winning auction bid and there is no basis for requiring the Commission to refund this payment.

³⁴ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm.*, 789 F.2d at 33. See also *Vernal Enterprise, Inc. v. FCC*, 355 F.3d 650, 659 (D.C. Cir. 2004) (“We recently reaffirmed our well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions.”).

CONCLUSION

For the reasons above, the *Order on Review* should be affirmed.

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