

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Application of:)	
)	
Max Frequency LLC)	File No. 0000158989
)	Facility ID No. 762416
For Original Construction for New FM)	
Station at Milano, Texas)	

To: Office of the Secretary
Attention: Chief, Audio Division, Media Bureau

PETITION TO DENY

Bryan Broadcasting License Corporation (“Bryan”), by its attorneys, and pursuant to Sections 73.5006 of the Commission’s rules, hereby submits this Petition to Deny the above-captioned application (“Application”) for a construction permit for a new FM broadcast station at Milano, Texas, to operate on Channel 274A (102.7 MHz) (“Station”).¹ The Application was filed by Max Frequency LLC (“Max”).² As shown herein, the Application should not be granted because of apparent collusion with another bidder in Auction 109 and an apparent material misrepresentation in its long-form application.

Standing

Bryan has standing to file this Petition to Deny. There are three elements to establish constitutional standing: (a) injury in fact, (b) causation and (c) redressability.³ Bryan would

¹ This Petition to Deny is timely filed under Section 73.5006(b) of the Commission’s rules. The Application appeared on Public Notice (Report No. PN-1-210914-01) on September 14, 2021.

² See LMS File No. 0000158989.

³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). “To establish standing under Article III, a complainant must allege (1) a personal injury in fact that is (2) ‘fairly traceable’ to

suffer listener and advertising losses that would harm it economically if this application is granted and the station constructed. The Application proposes operation on Channel 274 (102.7 MHz), which is co-channel with Bryan's FM translator K274CM, College Station, Texas (Facility ID No. 149347) (the "Translator"). From a review completed by Bryan's consulting engineer, the grant of the Application and construction of the Milano station would result in the translator causing destructive interference to the proposed Milano station. As FM translators are a secondary service, the Translator would have to relocate channels or cease operating due to this destructive interference. Relocation of the Translator or cessation of its operation will cause harm to the Translator's listeners and financial harm to Bryan.

This injury would stem directly from a Commission grant of the Application. The Commission can prevent this injury by denying the Application. Therefore, Bryan has shown with the required "substantial probability" that it will be injured and that the FCC can redress the injury, and thus has standing to pursue this Petition.⁴

Basis for this Petition

Max discloses in the Application that it filed with the Commission a Prohibited Communications Report ("Report")⁵ outlining conversations between principals of Max and Upbeat Frequency LLC, another Auction 109 participant.⁶ The Report indicates that the

the defendant's conduct and (3) redressable by the relief requested." *Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998) (quoting *SunCom Mobile & Data, Inc. v. FCC*, 87 F.3d 1386, 1387-88 (D.C. Cir. 1996) (quoting *Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))), cert. denied, 511 U.S. 1052 (1994)).

⁴ *American Petroleum Inst. v. EPA*, 216 F. 3d 50, 63 (D.C. Cir. 1999); *see also*, *National Broadcasting Co. v. FCC*, 132 F.2d 545, 548 (D.C. Circ. 1942), *aff'd* 319 U.S. 239, 247 (1943).

⁵ The Report was submitted pursuant to 47 C.F.R. §1.2105(c) (the Prohibited Communications Rule).

⁶ Upbeat Frequency LLC submitted a short-form application and was deemed a qualified bidder but did not submit a provisionally winning bid for a construction permit.

principals “met at a social gathering and discussed, in part, their plans that they had in place for several months to merge the two companies.”⁷ The Report claims that the principals did not discuss either party’s bids or bidding strategies with respect to Auction 109.⁸ However, the Report was considered by the Auctions Division and, on July 26, 2021, the Chief of that Division issued a letter (the “Letter”) stating that “applicants Max Frequency and Upbeat Frequency appear to have communicated with regard to each other’s bids and bidding strategies in apparent violation of section 1.2105(c) of the Commission’s rules.”⁹ The Letter further stated that “[d]espite the assertion in [Max’s] Prohibited Communications Report that the applicants’ principals, Messrs. Girdhar and Modi, did not discuss either party’s bids or bidding strategies for Auction 109, communication between applicants concerning the potential for pooling of their upfront payments to modify either applicant’s bidding eligibility—a result that is not provided for within the Commission’s competitive bidding rules or procedures—necessarily implicates the applicants’ bidding strategies.”¹⁰ Curiously, despite the Letter stating that there had been an “apparent violation of section 1.2105(c) of the Commission’s rules”,¹¹ the Application’s disclosure of this communication states instead just the opposite – claiming that the Letter “confirmed that there was no violation of Section 1.2105(c) of the Commission’s rules.”¹²

This disclosure totally misrepresents the Auction Division’s conclusion in the Letter.¹³ Even affording Max the benefit of the doubt that it did not intend to misrepresent the

⁷ See Application Exhibit titled “Auction Certification Exhibit for New CP Application.”

⁸ *Id.*

⁹ See Letter from Jonathan M. Campbell, Chief, Auctions Division, Office of Economics and Analytics, DA 21-913 (July 26, 2021).

¹⁰ Letter at para. 2.

¹¹ Letter at para. 1.

¹² See Application Exhibit titled “Auction Certification Exhibit for New CP Application.”

¹³ The Commission has a long precedential history of denying applications due to a licensee’s or prospective licensee’s misrepresentation or lack of candor before the Commission. See *FCC v.*

Commission's position (though the nature of the disclosure appears to be a clear and unambiguous misstatement of the facts), "a false statement, even absent an intent to deceive, may constitute an actionable violation of Section 1.17 of the [Commission's] Rules."¹⁴ In direct contradiction to how Max characterizes the Commission's position, the Letter says that "[w]e are unable to fully investigate the facts underlying your report prior to the start of bidding, and will refer this **apparent violation** to the Commission's Enforcement Bureau for further investigation, which may result in sanctions"(emphasis added).¹⁵

As the Commission knows, the Prohibited Communications Rule is intended to ensure a level playing field for all auction participants. Violations of the rule are serious offenses and carry penalties commensurate with the seriousness of the offense, including monetary fines and prohibitions from participating in any future Commission auctions.¹⁶ Further, Max was warned that its continued participation in the auction "could exacerbate this violation and may increase the likelihood and severity of possible sanctions, including denial of your post-auction long-form application should you be a winning bidder in Auction 109" and it still chose to participate in bidding in the auction.¹⁷ And, despite these clear statements that there had been prohibited communications, Max still chose to characterize the Letter as finding that there had been no such communications. This statement alone appears to be an attempt to mislead the processor of the

WOKO, Inc., 329 U.S. 223 (1946) and *Radio Carrollton, Carrollton, GA. For Construction Permit; Faulkner Radio, Inc. (WLBB), Carrollton, GA. For Renewal of License*, Memorandum Opinion and Order, FCC 78-357 (rel. May 31, 1978); *RKO General, Inc.*, Decision, 78 F.C.C.2d 1 (1980), *aff'd*, 670 F.2d 215 (D.C. Cir. 1981).

¹⁴ See *Southern Skies Corporation*, Memorandum Opinion and Order, 11 FCC Rcd 19176, 19182 (rel. Oct. 10, 1996).

¹⁵ Letter at para. 3.

¹⁶ See *Cherokee Broadcasting Company*, Order and Consent Decree, DA 14-220 (rel. Feb. 28, 2014); *Star Wireless, LLC & Ne. Commc'ns of Wis., Inc.*, Order on Review, 22 FCC Rcd 8943 (2007), review denied, *Star Wireless, LLC v. FCC*, 522 F.3d 469 (D.C. Cir. 2008).

¹⁷ Letter at para. 3.

Application as to the true state of affairs and constitutes a material misrepresentation of the facts, itself warranting the denial of the Application.¹⁸

Moreover, the prohibited communication itself appears to be disqualifying, as the Auctions Division found in the Letter. As noted above, the rule against such communications is intended to ensure a fair auction, and there are serious consequences for its violation. Here, according to the Letter, Max had discussed combining companies and bids with applicant Upbeat Frequency.¹⁹ It appears Upbeat Frequency was not the winning bidder for any construction permit, and never bid on any of the channels on which Max was the winning bidder despite being qualified to do so after listing these channels as ones in which it was interested in its short-form application.²⁰ That in and of itself is curious – the applicants admittedly talked about combining their companies and auction bidding and only one succeeds in the auction by acquiring channels in which the other had expressed interest but did not bid, suggesting that a signal of how the parties would bid was delivered and received.²¹ The Application cannot be granted in light of these apparent material violations of the rule against prohibited communications. While it appears that, on its face, there was a violation of the rules that warrants disqualification of Max, at a minimum the Application cannot be granted while these communications are investigated.

In light of its serious and flagrant violations of the Commission's anti-collusion and misrepresentation rules, the Commission must either deny the Application outright, or allow the

¹⁸ See *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) and *Radio Carrollton, Carrollton, GA. For Construction Permit; Faulkner Radio, Inc. (WLBB), Carrollton, GA. For Renewal of License*, Memorandum Opinion and Order, FCC 78-357 (rel. May 31, 1978); *RKO General, Inc.*, Decision, 78 F.C.C.2d 1 (1980), aff'd, 670 F.2d 215 (D.C. Cir. 1981).

¹⁹ See Letter at para. 1.

²⁰ See Upbeat Frequency LLC Auction 109 Short-Form Application (File Number: 0009545135).

²¹ While Upbeat Frequency was not the winner of any channel in the auction, Max was the winning bidder on three channels (247A, Bogata, TX, 237C3, Teague, TX, and 274A, Milano, TX).

Enforcement Bureau's investigation to play out and follow the conclusion of that investigation. Given the clear misrepresentation and apparent violation of the rule against prohibited communications, the Application cannot be granted.

Conclusion

In light of the foregoing, Licensee respectfully requests that the Application be denied or, at a minimum, that its processing be delayed while the Enforcement Bureau investigates the prohibited communications in this case.

Respectfully submitted,

BRYAN BROADCASTING LICENSE
CORPORATION

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September 24, 2021

CERTIFICATE OF SERVICE

I, Karla Huffstickler, a paralegal with the law firm of Wilkinson Barker Knauer LLP, hereby certify that on this 24th day of September 2021, I served copies of the foregoing “**Petition to Deny**” on the following via first-class United States mail, postage prepaid:

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By e-mail: audiodivisionpleadings@fcc.gov

/s/
Karla Huffstickler