

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1424

September Term, 1999

Orion Communications Limited
Petitioner

Filed On: June 13, 2000 [522895]

v.

Federal Communications Commission and
United States of America,
Respondents

Liberty Productions, A Limited Partnership, et al.,
Intervenors

Consolidated with 98-1434, 98-1444, 98-1445, 98-1523, 99-1188, 99-1212, 99-1249,
99-1260, 99-1423

On Petitions for Review of Orders of the
Federal Communications Commission

Before: GINSBURG, TATEL and GARLAND, *Circuit Judges*.

J U D G M E N T

These petitions for review were considered on the record from the Federal Communications Commission and the briefs and arguments of the parties. The court has determined that the issues presented by all of the petitions for review except No. 99-1188 occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED and **ADJUDGED** by this Court that all of the petitions for review of the Federal Communication Commission's *First Report and Order*, 13 FCC Rcd. 15920 (1998) and

Memorandum Opinion and Order, 14 FCC Rcd. 8724 (1999), except No. 99-1188, be denied. No. 99-1188 is resolved in a published opinion issued herewith.

Because precedent in this circuit clearly establishes that the filing of an application does not create a vested right, *see, e.g., Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 241 (D.C. Cir. 1997), there is no impermissible retroactivity. The only issue therefore is whether the FCC's decision to hold auctions in place of comparative hearings was arbitrary or capricious. Based on the perceived difficulty of developing new criteria and the inevitable litigation about that new criteria, the FCC concluded that "auctions will result in a more expeditious resolution of each particular case, thereby expediting the initiation of new broadcast service to the public." *First Report and Order*, 13 FCC Rcd. at 15933 ¶ 34. We find nothing either arbitrary or capricious in this judgment.

We also find nothing arbitrary or capricious in the FCC's decision to decline to pursue unresolved claims that applicants had not met the filing requirements in place at the time they filed their application, as well as its decision to evaluate the qualifications of only the winning bidder. Petitioners have offered us no persuasive reason to question the FCC's conclusion that both decisions were justified by its desire to avoid unnecessary litigation. We similarly find no merit in petitioners' argument that the FCC acted arbitrarily and capriciously by declining to adopt some mechanism to mitigate the perceived advantage that interim operators would have in an auction. We find reasonable the Commission's judgment that an interim operator's operation of a station "in no way contravenes the rights of the competing applicants to a fair and impartial selection process." *Memorandum Opinion and Order*, 14 FCC Rcd. at 8738 ¶ 26.

In an order published in the Federal Register on August 21, 1996, the FCC announced that all applications for new analog stations had to be filed by September 20, 1996, but stated that applications competing with those filed by September 20 would be accepted at a later date. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 11 FCC Rcd. 10968 (1996). Despite this explicit promise, petitioners claim that the FCC is barred from accepting applications for new analog stations that compete with a singleton application filed by September 20. We find that the FCC reasonably concluded that the period ending September 20 did not constitute a "filing window." As the FCC explained, this period differed from a normal filing window in two respects: (1) prospective applicants were told that they could file competing applications at a later date and (2) the FCC could not have published a list of applications already on file, as was its practice with respect to filing windows, because none had been filed at the time of the Federal Register notice.

We have considered all of petitioners' remaining arguments and find them without merit.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely motion for rehearing en banc. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: Deputy Clerk