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MAR 27 1991

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In re Applications of)
)
WHITE BROADCASTING PARTNERSHIP)
)
 et al.)
)
)
For a Construction Permit for)
A New FM Station)
Baldwin, Florida)

MM DOCKET NO. 91-10 ✓

To: Administrative Law Judge
Edward Luton

**MASS MEDIA BUREAU'S OPPOSITION TO
CONTINGENT MOTION FOR SUMMARY DECISION**

1. On March 13, 1991, Peaches Broadcasting, Ltd. ("Peaches"), filed a contingent motion for summary decision of the air hazard issues designated against it and against White Broadcasting Partnership ("White"), Douglas Johnson ("Johnson"), and Northwest Florida Broadcasting Corp. ("Northwest"). The Mass Media Bureau opposes Peaches' motion, and we submit the following comments.

2. Peaches seeks summary decision, contingent upon the acceptance of "an EMI condition" by White, Johnson and Northwest. Peaches itself manifests consent to such a condition, but it does not set forth the condition. Rather, it makes a vague characterization of the condition as "to the effect that FAA

concerns relating to EMI must be resolved to the FAA's satisfaction before a grant of program test authority may issue." While the Bureau has consented, in certain circumstances, to grant of a construction permit, notwithstanding allegations of electromagnetic interference ("EMI"), the condition that we have agreed to reads as follows:

Upon receipt of notification from the Federal Communications Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation.

See Mass Media Bureau's Comments in Support of Motion for Summary Judgment, filed March 25, 1991. The Bureau cannot support a motion for summary decision unless the applicant specifically consents to the condition set forth above. Compare Motion for Summary Judgment filed by Johnson on March 11, 1991.

3. Moreover, summary decision of an air hazard issue by imposition of the foregoing condition is only appropriate in cases where the Federal Aviation Administration ("FAA") has specifically found that the proposal is not a structural hazard. Again, compare Johnson's Motion, supra. Peaches' Motion is devoid of any finding of any kind by the FAA. It relies solely on its own analysis of the problem.

4. Finally, and most importantly, the Bureau's support of similar motions has been conditioned upon the absence of any objection by the FAA. Once an air hazard issue has been designated (or added), the FAA becomes a party. Peaches' motion has not even been served upon the FAA. Moreover, an omnibus motion which is contingent upon other applicants' agreement to an unspecified condition does not, in our view, provide the FAA with the required notice of the action which is contemplated.

5. Summary decision is an extraordinary procedure, to be undertaken only when the truth is clear and the basic facts are undisputed. Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975). The burden is on the moving party to demonstrate that no genuine issue as to any material fact remains. Section 1.251 of the Commission's Rules. This burden cannot be met by Peaches on behalf of other applicants, when their willingness to accept a condition has not been established. It is our opinion that each applicant must make its own showing. Even as to Peaches, the burden has not been sustained, for the reasons set forth in the foregoing comments.

6. Accordingly, we oppose summary decision of the air hazard issue designated against Peaches, White¹, and Northeast. We have supported Johnson's own motion for summary decision. See

¹ Our opposition is limited to the Motion at bar. Our comments on a separate Motion for Summary Decision filed by White on March 21, 1991, will be filed on April 4, 1991.

Mass Media Bureau's Comments in Support of Motion for Summary Judgment", filed March 25, 1991.

Respectfully submitted,
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Chief, Mass Media Bureau



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March 27, 1991

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch Mass Media Bureau, certifies that she has, on this 27th day of March, 1991, sent by regular United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Opposition to Contingent Motion for Summary Decision" to:

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