

ORIGINAL

MC CABE & ALLEN

**ORIGINAL
FILE**

2000 L STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 452-7872
Telex 373-0708
FACS (202) 833-3843

Direct Correspondence to
office.

THE CONNER CENTER
9105 OWENS DRIVE
POST OFFICE BOX 2126
MANASSAS PARK, VIRGINIA 22111
(703) 361-2278
FACS (703) 361-0694

Thomas J. McCabe
Robert G. Allen
Denise B. Moline

Douglas W. Harold, Jr.
Lloyd D. Young
Of Counsel

Virginia

RECEIVED

JUN 27 1991

June 27, 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: MM Docket 91-10
Baldwin, Florida
M&A #15111

Dear Ms. Searcy:

On behalf of Charley Cecil and Dianna Mae White, d/b/a White Broadcasting Partnership, there is transmitted herewith an original plus six (6) copies of a Reply to Opposition to Motion to Enlarge Issues in the above-referenced Docket proceeding for a new FM Station at Baldwin, Florida.

Should there be any question regarding the attached Motion, please contact the undersigned.

Very truly yours,


Denise B. Moline

DBM:wp
Attachment

ORIGINAL

RECEIVED

JUN 27 1991

**BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
)
Charley Cecil & Dianna)
Mae White, d/b/a)
WHITE BROADCASTING PARTNERSHIP)
)
et al.)
)
For Construction Permit)
for a new FM Station, Channel 289A)
Baldwin, Florida)
)
To: Honorable Edward Luton)
Administrative Law Judge)

**MM DOCKET NO. 91-10
FILE NO. BPH-891214MM**

**REPLY TO OPPOSITION TO MOTION TO ENLARGE ISSUES
AGAINST JEM PRODUCTIONS LIMITED PARTNERSHIP**

Charley Cecil & Dianna Mae White, d/b/a WHITE BROADCASTING PARTNERSHIP ("White") by Counsel, hereby respectfully submits its Reply to the Opposition to Motion to Enlarge Issues Against JEM Productions Limited Partnership ("JEM"). In support whereof, the following is respectfully shown.

INTRODUCTION

1. On May 24, 1991, White filed a Motion to Enlarge Issues ("Motion") Against JEM which sought the addition of the following issues:

1. Whether JEM has violated Section 1.65 of the Commission's Rules in failing to timely report changes in the status of the formation of the limited partnership, and changes in the status of its limited partners from individuals to corporations, and the impact of such violation on JEM's basic qualifications to be a Commission licensee;

2. Whether JEM misrepresented the status of its own formation as a limited partnership in its application to the Commission, such as to render it a sham limited partnership, and the impact of such misrepresentation on JEM's basic qualifications to be a Commission licensee;

3. Whether JEM misrepresented the ownership interests of Mr. Peter Knobel and/or Beylen Communications, Inc. in its application to the Commission, and the impact of such misrepresentation on JEM's basic qualifications to be a Commission licensee.

2. White's Motion was based on JEM's Petition for Leave to Amend and Amendment, filed May 9, 1991. Therein, JEM admitted that its Certificate of Limited Partnership was not filed with the State of Delaware until April 9, 1991, some 16 months subsequent to the filing of its application wherein it represented that the Certificate of Limited Partnership was filed on December 14, 1989. JEM's excuse for its dereliction was that its general partner, Joyce Morgan, had not discovered JEM's failure to act as represented "until recently". JEM's Amendment failed to explain how and when the failure to file had been discovered or the basis for its prior representation that the Certificate of Limited Partnership had been filed on December 14, 1989. White cited JEM's production of a second Limited Partnership Agreement dated February 26, 1991 as suggestive of JEM's awareness of its transgression months before it filed its Amendment. Viewed most charitably to JEM, its filing of its Certificate of Limited Partnership on April 9, 1991 meant that it necessarily had discovered its failure to file the Certificate prior to that date, thereby rendering untimely its Amendment of May 9, 1991 pursuant to Section 1.65 of the Rules.¹

¹ 47 C.F.R. §1.65 (1990). Section 1.65 requires the updating of all information provided in an application "as promptly as possible and in any event within 30 days...whenever the information furnished in that application is no longer substantially accurate and complete in all significant respects..."

White therefore requested the addition of a Section 1.65 issue.

3. White further requested the addition of a Section 1.65 issue on the basis of JEM's dual failure to report the assignment of ownership interests from its two limited partners individually to corporations owned by each of those limited partners and the further assignment of one of the limited partner's interest to the remaining limited partner and to the general partner. These assignments were reported for the first time in JEM's May 9, 1991 amendment. Notwithstanding JEM's representation that the latter assignments occurred on May 3, 1991, it failed to reveal the date on which the assignment of ownership interests from the limited partners individually to their wholly owned corporations occurred. Indeed, until JEM's May 9, 1991 amendment, the existence of neither assignee corporation had been divulged.

4. White further argued that JEM misrepresented its partnership status in having stipulated that its Certificate of Limited Partnership was filed with the State of Delaware on December 14, 1989 whereas the Certificate was not filed until April 9, 1991. Following the apparent execution of its initial Limited Partnership Agreement on November 4, 1989, JEM executed two additional Limited Partnership Agreements dated February 26, 1991 and May 2, 1991, respectively. Each of these Agreements involved different parties.² These discrepancies were unexplained by JEM. Its motive to misrepresent itself as a limited partnership was clear since as a limited partnership, JEM claimed 100% quantitative

² The parties to the Limited Partnership Agreement dated November 4, 1989 were Joyce Morgan, Robin Rothschild and Peter Knobel. The parties to the February 16, 1991 Limited Partnership Agreement were Joyce Morgan, Beylen Communications, Inc. and Atlantic-Pacific Broadcasting, Inc. The parties to the May 2, 1991 Limited Partnership Agreement were Joyce Morgan and Beylen Communications, Inc.

integration credit while as a general partnership, JEM could only claim 20% quantitative integration credit for Ms. Morgan's partnership equity interest. White argued that pursuant to the Commission's Report and Order, Revision of FCC Form 301, JEM's failure to perfect its limited partnership prior to the filing of its application meant that its claim to limited partnership status was a misrepresentative sham and that it should be treated as a general partnership.³

5. JEM further misrepresented the media interests of Peter Knobel, its original limited partner and the owner of Beylen Communications, Inc. ("Beylen"). Not only was Beylen Communications, Inc.'s existence unrevealed prior to JEM's May 9, 1991 amendment, but JEM failed to report Mr. Knobel's/Beylen's equity interest as a limited Partner in an application for new FM Facilities at Fernandina Beach, Florida. This interest existed prior to the filing of JEM's application. Since JEM's partners' media interests are significant for comparative purposes if JEM is treated as a general partnership, its failure to report Mr. Knobel's media interests further raises the possibility that JEM engaged in misrepresentations to the Commission.

6. On June 17, 1991, JEM filed its Opposition to White's Motion. JEM attempted to downplay the significance of its failure to timely provide information to the Commission and of its having engaged in misrepresentations. Its effort is unavailing both from a procedural and substantive perspective.

JEM'S OPPOSITION IS PROCEDURALLY FLAWED

7. Section 1.229 of the Commission Rules which governs Motions to Enlarge

³ 4 FCC Rcd 3853, 3857 (1989).

Issues, requires that all allegations of fact "... shall be supported by affidavits of a person or persons having personal knowledge thereof."⁴ JEM's Opposition is based upon the actions, the state of mind and the knowledge or lack thereof of its general partner, Joyce Morgan, at various crucial times prior to and subsequent to the filing of JEM's application. JEM had the opportunity to provide the statement of the one person who could clarify its transgressions of Section 1.65 of the Commission's Rules as well as its misrepresentations but has failed to do so. Thus, JEM's Opposition can be given no credence.

JEM'S OPPOSITION IS SUBSTANTIVELY NON-RESPONSIVE

8. Beyond its procedural defects, JEM has failed to address the gravamen of White's Motion. First, JEM has failed to shed any light as to the date on which Joyce Morgan discovered that JEM's Certificate of Limited Partnership had not been filed with the State of Delaware on December 14, 1989. JEM's representation that Ms. Morgan "recently" discovered this failure provides no information concerning the date of her discovery. Thus, no judgment can be made concerning JEM's diligence in reporting its failure to file the Certificate of Limited Partnership. It matters not, contrary to JEM's contention, whether its Section 1.65 violation was an isolated incident or part of a pattern of carelessness or inattentiveness. Section 1.65 requires the continuous updating of all information.

9. The fact of the matter is that JEM has manifested a continuing pattern of carelessness. It has yet to explain why it neglected to report that its individual limited partners transferred their interests to corporations. Whether each limited partner was the

⁴ 47 C.F.R. §1.229(d) (1990).

sole owner of the respective corporations is irrelevant. Without reporting the corporations' existence and ownership structure, the Commission and all competing applicants were ignorant of JEM's real ownership. Section 1.65 is designed solely for this purpose: to keep all parties apprised of significant data concerning each applicant.

10. The recent advent of the requirement that information be provided for limited partners also fails to exculpate JEM. Simply stated, FCC Form 301 requires the provision and updating of the information which JEM omitted from its application.

11. Also unconvincing is JEM's explanation for its failure to report Peter Knobel's pre-existing media interests in its original application.⁵ Ms. Morgan, who certified as to the completeness and accuracy of the information contained in JEM's application, was obligated to inquire as to the media interests of her partners. JEM's suggestion that there was something improper in Ms. Morgan asking Mr. Beylen for this information is preposterous.⁶ Nothing enjoins limited partners and general parties from communicating. How otherwise could the limited partnership have been constituted? JEM would be hard-pressed to maintain that its ownership structure materialized out of thin air. In fact, Mr. Beylen's confidence in and knowledge of Ms. Morgan, which only could have been engendered by personal contact, is reflected by his willingness to entrust \$250,000.00 to Ms. Morgan's discretion to construct and operate the proposed FM facility. JEM simply can not hide behind its ownership structure as an excuse for having belatedly provided

⁵ JEM has not even bothered to discuss its failure to report the existence of Atlantic-Pacific Broadcasting, Inc. prior to the filing of its Amendment.

⁶ Notably, JEM reported the media interests of its other limited partner, Robin Rothschild.

information which was required by the FCC's application form. The bottom line is that JEM's May 9, 1991 amendment is devoid of a good cause rationale which excuses its untimely filing.

12. Finally, JEM has not even addressed the misrepresentation arguments levelled against it by White. Unless JEM can demonstrate that it was a subsisting limited partnership as of the December 14, 1989 filing date of its application, it must be treated as a general partnership and its representations seeking consideration as a limited partnership must be considered to be misrepresentative.⁷ Its motive to so misrepresent, the potential enhancement of its comparative posture concerning quantitative integration credit, hardly could be clearer.

13. To date, no less than three JEM Limited Partnership Agreements have been tendered in connection with this applicant.⁸ In addition to the technical problem concerning the registration date for JEM, the existence of three separate agreements raises questions regarding the validity of the first two limited partnership agreements and the mutual understanding among JEM's principals. If JEM's principals had failed to arrive at mutual agreement among themselves prior to May 2, 1991, JEM would have had no substantive existence. White's conclusion regarding JEM's misrepresentative intent

⁷ Report and Order, Revision of FCC Form 301, 4 FCC Rcd at 3857.

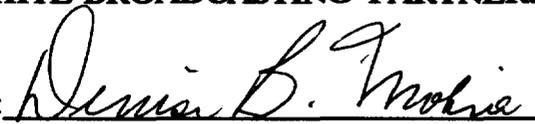
⁸ Supra, Paragraph 4. Although the May 2, 1991 Limited Partnership Agreement has been styled by JEM as an amendment to a prior Limited Partnership Agreement, this fact is nowhere apparent from an examination of that agreement.

therefore remains unrefuted.⁹

14. WHEREFORE, the foregoing considered, White respectfully requests that the Presiding Judge GRANT White's Motion to Enlarge Issues and add the requested issues against JEM in this proceeding.

Respectfully submitted,

Charley Cecil & Dianna Mae White
d/b/a
WHITE BROADCASTING PARTNERSHIP

By: 

Denise B. Moline
Its Attorney

McCabe & Allen
9105B Owens Drive
P.O. Box 2126
Manassas Park, VA 22111
(703) 361-2278
June 27, 1991

⁹ Although JEM's Opposition fails to cite any precedent for its argument that its limited partnership was timely constituted, its Amendment attempts to cobble together an argument to that effect. Its contention fails for several reasons. First, the Report and Order, Revision of FCC Form 301, id., required parties to finalize their status prior to representing that status on FCC applications. Formalization of the status of a limited partnership involves the filing of a Certificate of Limited Partnership with the state where the limited partnership has been organized. JEM incontrovertibly failed to perfect its status prior to representing it in its application. Therefore, the date on which JEM's original Limited Partnership Agreement was executed is not determinative of its status as a limited partnership. Mark L. Wodlinger, 3 FCC Rcd 3139 (Review Board 1988), cited by JEM as supportive of the notion that the date of execution of a Limited Partnership Agreement is controlling as to the partnership's existence, therefore has been effectively overruled by the Report and Order, Revisions of FCC Form 301, id. Alternatively, even if the original Limited Partnership Agreement dated November 4, 1989 actually was executed prior to the April 20, 1990 "B" cut-off date, given the fact that it is one of three JEM Limited Partnership Agreements now before the Commission, all involving non-identical parties, no determination can be made based on the current record that the signatories to the first Limited Partnership Agreement actually were the original parties to the application. Thus, to the extent that Mark L. Wodlinger, supra, maintains any vitality, it is unclear whether any valid Limited Partnership Agreement existed as of the "B" cut-off date.

CERTIFICATE OF SERVICE

I, Kelly A. O'Donnell of the Law Firm of McCabe & Allen, do hereby certify that I have caused to be served, this 27th day of June, 1991, by First-class mail, postage prepaid, a copy of the foregoing "Reply to Opposition to Motion to Enlarge Issues" on the following:

- * Honorable Edward Luton
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 225
Washington, D.C. 20554
- * Paulette Laden, Esq.
Hearing Branch
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, D.C. 20554
Counsel for the Mass Media Bureau

David Honig, Esq.
1800 N.W. 187th Street
Miami, FL 33056
Counsel for Peaches Broadcasting, Ltd.

Arthur Belendiuk, Esq.
Smithwick & Belendiuk, P.C.
2033 M Street, N.W., Suite 207
Washington, D.C. 20036
Counsel for Douglas Johnson

James L. Winston, Esq.
Rubin, Winston & Diercks
1730 M Street, N.W., Suite 412
Washington, D.C. 20036
Counsel for Northeast Florida Broadcasting Corp.

Avelino G. Halagao, Esq
7799 Leesburg Pike, Suite 900
Falls Church, VA 22043
Counsel for Jem Productions, Ltd. Partnership

Chief, Data Management Staff
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 350
Washington, D.C. 20554



Kelly A. O'Donnell

*Courtesy Copy, Hand-delivered