

Before the
Federal Communications Commission

Washington, D.C. 20554

**ORIGINAL
FILE**

RECEIVED

AUG - 1 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)	MM Docket No. <u>91-10</u>
(Charley Cecil &)	
Dianna Mae White)	File No. BPH-891214MM
d/b/a WHITE BROADCASTING)	
PARTNERSHIP)	
PEACHES BROADCASTING, LTD.)	File No. BPH-891214MN
SAGE BROADCASTING CORPORATION)	File No. BPH-891214MR
OF JUPITER, FLORIDA)	
FIRST COAST BROADCASTING)	File No. BPH-891214MU
COMPANY)	
DOUGLAS JOHNSON)	File No. BPH-891214MZ
NORTHEAST FLORIDA)	File No. BPH-891214NA
BROADCASTING CORP.)	
JEM PRODUCTIONS, LIMITED)	File No. BPH-891214ND
PARTNERSHIP C/O JOYCE)	
MORGAN)	
For Construction Permit)	
for a New FM Station on)	
Channel 289A in)	
Baldwin, Florida)	

TO: The Honorable Edward J. Luton
Administrative Law Judge

OPPOSITION TO WITNESS NOTIFICATION

Douglas Johnson ("Johnson") individual applicant, pursuant to the Presiding Officer's Order setting dates, released April 26, 1991 (FCC 91M-1455), hereby respectfully submits his opposition to the witness notification submitted in the above-captioned proceeding by Peaches Broadcasting, Ltd. ("Peaches") requiring that Johnson appear and be subject to cross-examination at the hearing in the above-captioned proceeding schedule to commence August 20, 1991.

In opposition thereto it is stated as follows.

It would appear from a reading of footnote 2 to Peaches witness notification filing that Peaches' purpose for having Johnson appear to testify is based on Peaches' curiosity as to why an applicant who proposes no integration and has other broadcast interests is participating in this proceeding. Johnson's motive is obviously simply one of pursuing his right to prove under the standard comparative criteria that his application should be granted.

In support of its witness notification calling for the presence of Mr. Johnson, Peaches relies on Lorraine Walker Arms, 5 FCC Rcd 3426 (Rev. Bd. 1990) ("Arms"). That case is inapposite for two reasons. First, Arms involved a two tiered corporation in which the requested witness held ninety-nine percent of the equity. In that proceeding, the Presiding Officer was presented with a question as to the ownership of the applicant. Here, Johnson is an individual applicant. No such convoluted structure as appeared in Arms is present and Peaches states that it seeks to examine Johnson on the diversification criteria not as to integration.

Second, the entire Commission hearing process has been changed since Arms by the Commission's issuance of its Order in Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157 (1990) ("Comparative Process Reform"). Therein, in order to expedite the hearing process, the Commission stressed the importance of

the ALJs being able to adjudicate a comparative hearing based on the written exhibits alone and concomitantly, limited the discretion of the ALJ in permitting any testimony. Therein the Commission noted:

Although our experience indicates that the use of strictly written procedures can expedite the hearing process, we did not propose to preclude ALJ's from taking oral testimony. For some types of issues, it may be necessary to observe the demeanor of the witnesses to assess their credibility, and, in other instances, cross examinations may be required. Section 1248 of our rules empowers ALJs to limit oral testimony, 47 C.F.R. §1.248, and, in the exercise of the discretion granted ALJs by that rule, we will make it clear that ALJs should permit oral testimony and cross examination only where material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings. Witnesses should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony, as reflected in exhibits, is subject to a question of substantial decisional significance.¹

In Great Lakes Broadcasting, Inc., FCC 91-198, ¶ 9, released July 16, 1991, ("Great Lakes") the Commission stated:

A showing' of probable decisional significance' requires that [the moving party] establish that the 'likelihood of proving the respective allegations therein is so substantial as to outweigh the public interest benefits inherent in the orderly and fair administration of the Commission's business.'

In Great Lakes, the Commission went on to further note it expected strict enforcement of its procedural rules particularly where the party previously had ample opportunity to develop the evidence of record. Here the only evidence that Peaches proposes

¹ Comparative Process Reform at 162 (underscoring supplied).

to develop through cross-examination of Johnson relates to the diversification criteria. Peaches had ample opportunity in discovery to request that Johnson produce ownership reports, coverage contour maps, or other similar data which might be relevant to a diversification issue. Peaches did not do so. Peaches, having failed to do so, still can easily obtain that information between now and the hearing date from the Commission's records and request official notice of the documents.

Peaches knows, or should already have by now, known what other broadcast interests Johnson has. These interests were set forth in Johnson's exhibit number 1 exchanged on July 18, 1991. Since the reformed hearing process limits cross-examination only to material issues of decisional significance. Peaches ability to prove that Johnson has other broadcast interest has already been answered by Johnson's exhibit which is Johnson's direct case.

Since Peaches makes no attempt to show wherein Mr. Johnson's testimony is necessary under the diversification criteria it is respectfully submitted that Peaches has failed to make the, now mandatory, threshold showing required by Comparative Reform Process that either (1) "material issues of decisional significance cannot be adequately resolved without [Johnson's] oral evidentiary [testimony], or (2) the public interest otherwise requires oral evidentiary proceedings." Indeed, Johnson submits that Peaches has violated the Commission's

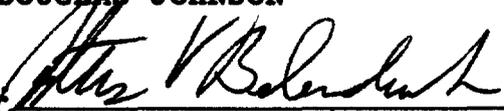
mandate in Comparative Reform Process that "witness should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony ... is subject to a question of substantial decisional significance." No such showing has been made by Peaches.

The requested testimony of Johnson on the diversification issue relates to date contained in the Commission's records, such as coverage contours, which may be introduced by requesting official notice. Such a showing does not require Mr. Johnson's presence, it merely requires that Peaches do its homework prior to the hearing in developing its case through discovery and not attempt to wait until the actual hearing process to prolong a proceeding in violation of both the letter and the spirit of Comparative Reform Process.

For the foregoing reasons, it is respectfully requested that the Presiding Officer issue an Order that Douglas Johnson need not appear to testify in the above-captioned proceeding in response to Peaches Broadcasting, Ltd. witness notification.

Respectfully submitted,

DOUGLAS JOHNSON

By: 
Arthur V. Belendiuk
Robert W. Healy
His Counsel

SMITHWICK & BELENDIUK, P.C.
2033 M Street, N.W.
Suite 207
Washington, DC 20036
(202) 785-2800
August 1, 1991

CERTIFICATE OF SERVICE

I, Lisa M. Volpe, a legal assistant in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 1st day of August, 1991, copies of the foregoing were mailed to the following:

Honorable Edward J. Luton*
FCC
Administrative Law Judge
2000 L Street, N.W.
Room 225
Washington, DC 20054

Paulette Laden, Esquire*
FCC
Mass Media Bureau
2025 M Street, N.W.
Room 7212
Washington, DC 20554

Denise B. Moline, Esquire
McCabe & Allen
10500 Battleview Parkway
Suite 200
Manassas, VA 22110
Counsel for Charley Cecil &
Dianna Mae White d/b/a White
Broadcasting Partnership

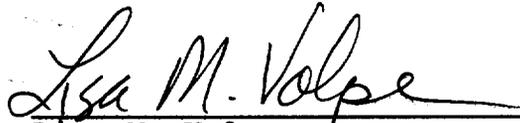
David Honig, Esquire
1800 N.W. 187th Street
Miami, Florida 33056
Counsel for Peaches
Broadcasting, Ltd.

Dennis J. Kelly, Esquire
Cordon and Kelly
1920 N St., N.W.
Second Floor
Washington, DC 20036
Counsel for First Coast
Broadcasting Company

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

Avelino G. Halagao, Esquire
7799 Leesburg Pike, Suite 900
Falls Church, VA 22043
Counsel for
JEM Productions, Limited
Partnership

*By Hand



Lisa M. Volpe