

FCC MAIL SECTION

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

FCC 92M-474
02558

APR 20 11 10 AM '92

In re Applications of)	MM Docket No. 92-50
)	
GOLDEN CORNERS BROADCASTING, INC.)	File No. BPH-901218MH
)	
FISHER COMMUNICATIONS OF CLEMSON, INC.)	File No. BPH-901219MB
)	
CLEMSON BROADCASTING, INC.)	File No. BPH-901219MD
)	
For Construction Permit for New FM)	
Station on Channel 285A in)	
Clemson, South Carolina)	

PREHEARING ORDER

Issued: April 16, 1992;

Released: April 17, 1992

1. We will hold the Prehearing Conference on August 11, 1992, and the hearing will begin on August 26, 1992.¹ Both will begin at 8:30 a.m. and will be held in the Commission's offices in Washington. The applicants will exchange their direct case exhibits at the August 11th prehearing.

2. Appearance and Publication. On or before May 4, 1992, each applicant must show that they have complied with 47 CFR 1.221(c). See DA 92-263 released April 13, 1992 at para. 20. On or before May 14, 1992 each must show that they have complied with 47 CFR 73.3594(g)'s publication requirements. See DA 92-263 supra at para. 21.

3. Clarification of Issues. The Chief Audio Services Division has designated the standard comparative issue for hearing. On that point he has called for the filing of the standardized Integration Statement on or before May 11, 1992. See DA 92-263 supra at para. 20.

4. The Chief also wants comparative coverage adduced. See DA 92-263 supra at para. 9. The parties should consider a joint areas and populations showing exhibit if only for reasons of economy. If you can't agree on a joint coverage exhibit, each applicant must not only portray their own areas and population, but each of their opponents as well. That will not only be a substantial added expense but could also give rise to evidentiary conflicts. But you are alerted now. If you take the joint exhibit route you will be bound by th agreed-upon showing. At any rate get your approach to comparative coverage ironed out early on.

1 The Trial Judge has blocked off four days for hearing: August 26-28, 1992, and August 31, 1992. A courtroom has been reserved for those days.

5. All preliminary coverage engineering will be exchanged on or before July 13, 1992. The final engineering will be exchanged at the prehearing conference.

6. The Chief has designated an air hazard issue against all three applicants. See DA 92-223 supra, Issue 2. If each hasn't resolved that issue before the prehearing conference, they will exchange their air hazard direct case then. This will include both their engineering and nonengineering data as well as all correspondence and documents relating to their efforts to obtain FAA clearance.

7. Finally, the Chief has set down a contingent basic qualifying environmental impact issue against Fisher. See DA 92-223 supra at para. 4, and Issue 1. So they must file their Environmental Assessment on or before May 13, 1992. And if they haven't satisfied the Mass Media Bureau by the time of the August 11th Prehearing Conference, they must exchange their Issue 1 direct case evidence on that day.

8. All counsel should be prepared to discuss any questions about clarification of the existing issues.

9. Perfecting Amendments. The Chief has called on Fisher to submit perfecting amendments. See DA 92-223 supra at paras. 4 and 5. They are due May 13, 1992. Any amendments designed to meet basic qualifying issues must be filed pursuant to 47 CFR 73.3522(b)(2). All amendments, even those that may be filed as a matter of right, must be accompanied by a Petition For Leave to Amend.² See The New Continental Broadcasting Company, FCC 80M-102, released January 3, 1980 at Footnote 1.

10. This post-designation period (para. 9 supra) will be the last chance each applicant will have to firm up their application for hearing. This perfecting time period is designed to implement the Commission's post-designation amendment philosophy; i.e., to give all applicants a fair post-designation opportunity to firm up their applications, and at the same time secure a stable hearing environment as soon as possible, so we can proceed with the hearing on the necessary and remaining issues.

11. Interlocutory Pleadings. In the interest of uniformity and proper processing, each applicant should direct their interlocutory requests toward one and only one of their opponents. For example, if GCBI seeks enlargement against both Fisher and CBI, they should file separate requests.

² The parties are reminded to serve their amendments pursuant to the HDO. See DA 92-223 supra. at paras. 19. Both Fisher and GCBI are reminded that they cannot obtain comparative advantage from the post cut-off amendments they have filed. In addition, they will be charged with any comparative deterioration resulting from that amendment. See WTAR Radio-TV Corporation et al., 48 FCC 2d 1147.

The same thing holds true for oppositions, replies and other interlocutory requests, including discovery notices and motions.³

12. Discovery. All discovery must be completed by July 13, 1992; Automatic Document Production will take place on May 11, 1992. See DA 92-263 supra, para. 20; and any In Camera Inspection Request must also be filed on or before May 11, 1992.^{4 5}

13. No 47 CFR 1.315 and 1.323 written interrogatories will be employed, and any depositions of opposing principals will be taken in Clemson, South Carolina (unless otherwise agreed upon). Please don't notice a witness for any other place unless your opponent agrees in advance to the location change.

14. Since this is a three-party proceeding the possibility exists that there will be more than one notice to depose certain principals. So, on May 11, 1992, at 2:00 p.m. at agreed-upon location a discovery conference will be held. There all applicants who propose to take depositions will get together and set up an agreed-upon deposition schedule. They will so coordinate that schedule so that each individual eligible to be deposed will be deposed only once. Any non-voting stockholder who has an equity interest of 5% or more is eligible to be deposed. The party proposing to take the deposition of a non-voting stockholder holding less than a 5% equity interest must make a persuasive showing that that stockholder has relevant information essential to efficient pretrial preparation. The agreed-upon deposition schedule shouldn't interfere with our other procedural dates.

15. Settlement. This case could prove to be long and costly. Because of lawyers and engineering fees, all three applicants will lose. At best two of you will have squandered substantial amounts of time and money

3 "Supplements" will not be accepted unless requested or authorized. Oh, you can supplement an original signature affidavit for a faxed one. But let's keep substantive supplements to a minimum. They can cause timing problems, and we'll generate more than enough paper without delaying the proceeding via the "Supplement" route. See In re Filing of Supplemental Pleadings Before the Board, 40 FCC 2d 1026 (1972).

4 It's not defense to an otherwise legitimate discovery motion for the objecting party to claim that it intends to either file a Petition For Leave to Amend or a Motion For Summary Decision that will moot the discovery requests. Nor should the objecting party seek to defer a response to discovery on that ground.

5 Before he files an in camera motion, an applicant should carefully consider that he is voluntarily seeking a construction permit in a contested proceeding. Privilege claims hinder and even prevent the search for the truth. So you are alerted now. If the Trial Judge cannot make a public interest finding because of claimed privileged documents he intends to draw adverse inferences against the applicant who has claimed the privilege.

prosecuting this case. Moreover, there is a direct relationship between the length of the trial and the amount of costs involved. The general rule is the longer the trial, the greater the cost. So from your client's viewpoint this prospective litigation is a mistake. Being merely another form of warfare it should be avoided. So engage in settlement dialogue now. Don't wait to argue before the Commission four and one-half years from today. Keep your settlement channels open and use them.

16. To this end, a negotiating principal from each applicant along with his attorney (if he's not pro se) are directed to attend a disposition conference on July 20, 1992, at 2:00 p.m.⁶ This face-to-face conference will be held at a prearranged agreed-upon location. There the applicants should determine whether this case can be settled.

17. On or before July 27, 1992, the settlement conferees should submit a Joint Memorandum to the Trial Judge outlining the results of the July 20th disposition conference. The memorandum should include, but not necessarily be limited to, answers to the following questions:

- (a) Has this case been settled? If so, do the settlement's terms pose any public interest questions?
- (b) If the case hasn't been settled, were any offers made at the conference? If so, are they still open? For how long?
- (c) If the case has been settled, how soon can the settlement package, i.e., the joint request for approval and accompanying papers, be submitted for approval?

18. Marshalling and Exchanging Exhibits. It will contribute significantly to the disposition of this proceeding for the parties to submit and exchange their direct affirmative cases in writing. This will include the sworn written testimony and the exhibits to be offered in support of their direct cases. Such an exhibit exchange will take place at the August 11, 1992 Prehearing Conference.⁷

19. If any party intends to request that official notice be taken of any materials in the Commission's files, that material should be assembled in

6 The parties needn't wait until July 20, 1992 to talk settlement. Nor should the mandatory face-to-face conference be the only effort at settlement. In brief, don't be afraid to initiate settlement efforts.

7 Before he exchanges his written exhibits, counsel would be wise to go over them - especially his comparative exhibits - and delete the all unnecessary adjectives and comparative puffing. Let's save everybody time and money.

written form, properly identified by source, given a tentative exhibit number, and exchanged on the date set.

20. Each party will assemble its exhibits in a binder. Each exhibit will bear a number, preferably by means of a tab on each document. Please number the exhibits serially starting with the number 1. Each exhibit will also contain the sponsoring witnesses' affidavit - if such an affidavit is required (see para. 19 supra.). Use a prefix to indicate who is sponsoring the exhibits; e.g., GCBI Ex 1; Fisher Ex. 1; and CBI Ex. 1, etc.

21. Evidentiary Admission Session. An evidentiary admission session will be held on August 18, 1992 at 8:30 a.m. There each applicant (in docket order) will identify and offer the direct case exhibits he exchanged on August 11, 1992. The Trial Judge will rule on any objections to those exhibits. Immediately at the conclusion of the evidentiary admission session, each party will notify his opponents of those witnesses they need to cross-examine and the exhibits or areas to be covered by that cross-examination.

22. Extension of Time. The case has been placed on the Trial Judge's docket and courtroom space has been reserved so we cannot afford the luxury of procedural slippage. Otherwise, other dockets suffer. So any requests for extension of time must be made in writing and must be consent extensions. In addition, any request for extension for more than four working days must be signed by the client.⁸

23. The August 26-31, 1992 hearing dates are firm dates. A thorough but speedy trial is contemplated. The hearing dates will not be extended merely because counsel have agreed to recommend a settlement.⁹

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge

⁸ "Captive extension requests" will not be entertained. See New Jersey Exchange, Inc., 19 RR 737 (1960); Cosmopolitan Enterprises, Inc., FCC 66R-218 corrected (R. Bd. 1966); and Denari Broadcasting Company, Inc., FCC 80M-2652 released December 16, 1980.

⁹ Daily hearing sessions will begin at 8:30 a.m. and end at 5:30 p.m. with an hour for lunch.