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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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AUDIT SERVICES FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)
JAMES KILLINGER CORNICK)
For Construction Permit for a)
New FM Station on Channel 278A)
at Marion, Virginia)

File No. BPH-910311MA

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AUG 6 1991
FM EXAMINERS

To: The Chief, FM Branch

OPPOSITION TO "PETITION FOR LEAVE TO AMEND AND AMENDMENT"

Cope II Broadcasting Partners ("Cope II"), by its attorneys, hereby opposes the "Petition for Leave to Amend and Amendment" ("Petition") filed by James Killinger Cornick on August 6, 1991. As set forth herein, Cornick's Petition is inappropriate and his proffered amendment is impermissible. Accordingly, the Petition should be denied, and Cornick's above-captioned application should be dismissed as unacceptable for filing.

1. Cope II, a mutually exclusive applicant for Channel 278A at Marion, Virginia, filed a Petition to Dismiss or Deny Cornick's application on July 2, 1991 -- within the time period set by the Commission for the filing of such petitions.^{1/} In its Petition, Cope II demonstrated that, contrary to the engineering showing in Cornick's application (which invoked the "contour protection" provisions of Section 73.215 of the Commission's Rules), prohibited contour overlap would in fact

^{1/} See Public Notice, Report NA-148, Mimeo No. 13247 (released May 29, 1991).

occur between Cornick's proposed Marion facility and co-channel FM station WIMZ-FM, Channel 278C, Knoxville, Tennessee. As Cornick had failed to amend his application within the 30-day amendment following public notice of his application for tender, Cope II demonstrated that Cornick's application was inadvertently accepted for filing and must be returned or dismissed.

2. Cornick now concedes that, as the result of an "error" in the engineering, his application as filed violates Section 73.215. He therefore proffers an amendment correcting this defect, accompanied by the instant Petition for its acceptance.^{2/} The arguments Cornick presents in his Petition, however, are totally meritless and based on misperceptions of the Commission's procedural and processing rules.

3. Most fundamentally, Cornick's Petition mischaracterizes the processing standards relevant to his application. While Cornick purports to file his Petition pursuant to Section 73.3522(a)(2) of the Commission's Rules, that provision expressly excludes applications for non-reserved band FM stations such as Cornick's. Therefore, rather than being subject to the AM/TV processing standards, Cornick's application -- and his proffered amendment -- fall under the "hard look" processing standards applicable to FM applications.

4. As Cope II has demonstrated in its Petition to Dismiss or Deny Cornick's application, under the "hard look" processing

^{2/} Cornick contemporaneously filed an opposition to Cope II's Petition to Dismiss or Deny his application, citing his proffered corrective amendment and largely the same arguments he makes in his instant Petition. Cope II is this date filing a separate Reply to Cornick's Opposition.

standards, Cornick's amendment is impermissible, and his application must be dismissed. Cornick rests his Petition on the Commission's Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete Or Are Otherwise Defective, 65 R.R.2d 1664, 1666 (1988), to the extent it addresses treatment of applications which are "accepted for filing but . . . subsequently found not to be grantable." Thus, Cornick in essence argues that his application's violation of Section 73.215 constitutes a "grantability" defect, and he should therefore be allowed a curative amendment to correct the deficiency.

5. This contention is flatly wrong. Cornick's application, by his own admission, violates Section 73.215 of the Commission's Rules. As the very Statement cited by Cornick makes clear, "whether [the application] is in compliance with applicable Commission Rules" is an issue of the application's "acceptability for filing" (emphasis added), not its "grantability."^{3/} 65 R.R.2d at 1666. Indeed, the opening sentence of Section 73.215 states that "[t]he Commission will accept applications" (emphasis added) specifying short-spaced antenna locations, provided they meet the contour protection requirements specified therein. Moreover, the Commission has expressly held that applications failing to meet Section 73.215's

^{3/} Defects going to the grantability of an application would include, for instance, lack of site availability, lack of FAA clearance, and -- under the old Commission standards -- lack of a positive financial certification.

requirements are "technically unacceptable for filing." Lion's Share Broadcasting, DA 91-837 (released July 24, 1991).^{4/}

6. Cornick, therefore, cannot take solace in the Statement he cites. His is not an application which is acceptable for filing but ungrantable. Rather, it is an application which is unacceptable for filing, and which was accepted for filing inadvertently. Thus, the "policy" Cornick cites -- "that once an application is accepted for filing, errors subsequently found may be corrected by amendment" (Petition at 2) -- is inapposite as to his application. Since Cornick's application contained an acceptability defect, Cornick was required to submit any curative amendment within the 30-day "amendment-as-of-right" period following public notice of his application for tender. Cornick did not do so, and under the "hard look" standards, his amendment must be rejected, and his application dismissed.

7. As Cornick's application is subject to -- and fails to meet -- the Commission's "hard look" processing standards, his

^{4/} In Lion's Share Broadcasting and several other recent hearing designation orders, the Mass Media Bureau has allowed applicants whose Section 73.215 proposals would result in prohibited overlap to amend their applications on the ground that "the wording of Section 73.215(b)(ii) does not . . . afford applicants full and explicit notice of the prerequisites they must meet to avoid summary dismissal." Cornick, however, has not claimed that he had insufficient notice of Section 73.215's requirements. Rather, he simply concedes that his contour protection showing contained an error. Thus, unlike Lion's Share and similar cases, there is no basis for any result other than the dismissal of Cornick's application as inadvertently accepted for filing. As discussed infra, a consulting engineer's error is no excuse for allowing a late-filed amendment. Allowing Cornick to amend on this basis would, in effect, offer all Section 73.215 applicants a "second bite at the apple" which is not afford to fully spaced applicants.

attempted "good cause" showing for acceptance of his amendment is unavailing. The six-pronged "good cause" test elucidated in Erwin O'Connor Broadcasting Co., 22 F.C.C.2d 140 (Rev. Bd. 1970) is applicable only to post-designation amendments under Section 73.3522(b) of the Rules. Cornick's application has not been designated for hearing. To the contrary, his application is still in the staff review stage, and the "hard look" standards apply. Cf. George Henry Clay, 5 FCC Rcd 317, 318 (Rev. Bd. 1970) (distinguishing between "hard look" standards of staff review stage and post-hearing amendment standard under Section 73.3522(b)), recon. denied, 5 FCC Rcd 2997 (Rev. Bd. 1990).

8. Under the "hard look" standard, the Commission has many times made clear that curative amendments will not be accepted if filed beyond the 30-day post-tenderability notice period for filing amendments as of right. See, e.g., Julie J. Carey, 6 FCC Rcd 1366 (M.M. Bur. 1989) ("Since the adoption of the new ["hard look"] processing rules, the Commission has clearly stated that applicants . . . may not correct acceptability defects after the time for filing amendments as of right."); see also Kerrville Radio, 2 FCC Rcd 3441 (1987). Indeed, in Nan E. Carlisle & Jittendra R. Patel, 3 FCC Rcd 2530 (1988), the Commission expressly rejected "good cause" arguments similar to Cornick's in dismissing an FM applicant as unacceptable for filing, stating:

Applicants have 30 days after tenderability to correct acceptability defects, and they are expected to correct those defects during that amendment period. We specifically considered and rejected the concept of allowing curative amendments because permitting "curative amendments after that period poses to great a threat to the orderly functioning of our new processing

procedures." FM Application Processing, [58 R.R.2d 776, 785 (1985)].^{5/}

Id. at 2531.

9. The law, therefore, is clear. Cornick's late-filed curative amendment cannot be accepted. Rather, that amendment must be rejected, and Cornick's application must be dismissed as unacceptable for filing.^{6/}

5/ The Commission has also held that errors by an applicant's consulting engineer, such as the one contained in Cornick's application, are no justification for permitting a late-filed amendment. See R.A.D. Broadcasting Corp., 4 FCC Rcd 1772 (1989).

6/ Cope II notes in passing that even if accepted (which it clearly should not be), Cornick's amended proposal is in error as to the population to be served within his (now reduced) 1 mV/m coverage contour. Specifically, as demonstrated in Exhibit A, a Technical Statement by Cope II's consulting engineer, Cornick's amendment overstates by nearly 9,500 the number of persons to be served by his amended proposal. Rather than the population figure of 27,134 stated in Cornick's amendment, the attached Technical Statement calculates a predicted population of 17,647 based on 1980 U.S. Census data. By contrast, Cope II's proposed Marion facility will serve a population of 64,607 within the 1 mV/m contour -- nearly four times more than that of Cornick's amended proposal. Thus, even were Cornick's amendment accepted, it is clear that Cope II would be entitled to a significant preference over Cornick on the factor of comparative coverage.

CONCLUSION

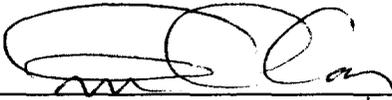
For the foregoing reasons, Cornick's Petition should be denied, his amendment rejected, and his defective application dismissed.

Respectfully submitted,

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Dated: August 15, 1991

EXHIBIT A

TECHNICAL STATEMENT
PREPARED FOR
COPE II BROADCASTING PARTNERS
MARION, VIRGINIA

This technical statement has been prepared on behalf of Cope II Broadcasting Partners, applicant for a new FM station on channel 278A at Marion, Virginia (File No. BPH-910312MF). This firm was requested to evaluate the amended application of James Killinger Cornick (File No. BPH-910311MA, amended July 1991) for this same allotment at Marion, Virginia.

In order to eliminate prohibited overlap with radio station WIMZ(FM), Knoxville, Tennessee, Mr. Cornick amended his application by reducing effective radiated power from 6.0 kilowatts to 1.0 kilowatt. Based on the 1980 U.S. Census and the coverage contour distances supplied with the amended application, it is believed that the population figure supplied in Item 17 of FCC Form 301, Section V-B of the amended application is in error. A value of 27,134 persons within the 1 mV/m coverage contour is stated; however, it appears that this figure is overstated by approximately 9,500 persons. By use of a computer program which adds the populations of 1980 census enumeration districts having centroids within the 1 mV/m contour, the predicted population within this contour is found to be 17,647. Mr. Cornick's amended application overstates this value by 9,487 persons or 53.8 percent.

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August 13, 1991

CERTIFICATE OF SERVICE

I, Julie K. Berringer, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "OPPOSITION TO 'PETITION FOR LEAVE TO AMEND AND AMENDMENT'" were sent this 15th day of August, 1991, by first class United States mail, postage prepaid, to the following:

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