

FCC MAIL SECTION

Before the
Federal Communications CommissionWashington, D.C. 20554
MAY 20 5 05 PM '92

MM Docket No. 92-114

DISPATCHED BY

In re Applications of

ROBERT B. TAYLOR File No. BRH-880926UJ

For Renewal of License for
Station WTRU(FM) Jupiter, FloridaJUPITER File No. BPH-890103MD
BROADCASTING
CORPORATIONFor Construction Permit for a new
FM Station in Jupiter, Florida

HEARING DESIGNATION ORDER

Adopted: May 11, 1992;

Released: May 20, 1992

By the Chief, Audio Services Division, Mass Media Bureau:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the above captioned application for renewal of license of WTRU(FM) (formerly WKSJ(FM)) Jupiter, Florida, filed September 26, 1988, by Robert B. Taylor (Taylor);^{1 2} (b) a petition to deny the WKSJ(FM) (now WTRU(FM)) license renewal application, filed January 3, 1989, by Jose Oaks (Oaks), as supplemented on January 9, 1989; (c) an opposition to petition to deny filed January 27, 1989, by Taylor; (d) a motion to strike the opposition to petition to deny filed March 22, 1989, by Oaks; (e) the above captioned mutually exclusive application for a construction permit for a new FM broadcast station on Channel 258A at Jupiter, Florida, filed January 3, 1989, by Jupiter Broadcasting Corporation (Jupiter); (f) a petition to deny the Jupiter application filed July 24, 1989, by Taylor; (g) an opposition to petition to deny filed August 25, 1989, by Jupiter;³ and (h) petitions for leave to amend filed by Jupiter.

¹ The renewal application was filed for call letters WKSJ(FM) by U.S. Three Broadcasting Corp. On December 27, 1988, the Chief, FM Branch, Audio Services Division, Mass Media Bureau, approved the assignment of the station from U.S. Three Broadcasting Corp. to Robert B. Taylor. All of the stock of U.S. Three was held by R & R Broadcasting Corporation of which Robert B. Taylor was the sole shareholder. For tax reasons, Mr. Taylor determined to dissolve both R & R Broadcasting and U.S. Three and to be the licensee as an individual. Subsequent to the assignment to Taylor, the call letters were changed from WKSJ(FM) to WTRU(FM).

Taylor's WTRU(FM) Application

a. Jose Oaks' Petition to Deny

2. On January 3, 1989, Jose Oaks filed a petition to deny Taylor's renewal application for Station WTRU(FM). To demonstrate standing, Oaks claims "to have a place of business" and to "seasonally resid[e]" in Boca Raton, Florida.⁴ However, Boca Raton, Florida, is not within the station's service area, nor has Oaks alleged that he listens to the station. Accordingly Oaks has failed to establish his standing as a party in interest as required by § 309(d)(1) of the Communications Act of 1934, as amended. See, *NAB Petition for Rulemaking*, 82 FCC 2d 89, 98 (1980). Thus, Oaks' pleading must be dismissed as a petition to deny.

3. However, having found Oaks' petition to be defective, we shall consider it as an informal objection, pursuant to § 73.3587 of the Commission's Rules. Nevertheless, even an informal objection must meet certain requirements. We conclude that Oaks' pleading lacks adequate specificity to warrant further Commission inquiry. Oaks alleges that the licensee violated § 73.1216 of the Commission's Rules, which states:

A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading or deceptive with respect to any material term.

In support, Oaks furnishes uncertified copies of three complaints filed against the licensee in March and April, 1987, in the Circuit Court of Palm Beach County. Through their attorney, the three complainants allege breach of contract, fraud and violation of Florida State law with respect to the licensee's conduct of contests during October and November, 1986. However, Oaks has failed to provide any sworn statements or affidavits of the complainants or any other person having personal knowledge of the facts, or attesting to the truthfulness of the charges raised in the complaints. Thus, the only information which has been furnished are the hearsay representations of the attorney, which, standing alone, are insufficient to raise a substantial and material question of fact. Cf. *Itawamba County Broadcasting Co. Inc.*, 45 FCC 2d 871, 872 (Rev. Bd. 1974); *Eastern Broadcasting Corp.*, 29 FCC 2d 472, 474-75 (Rev. Bd. 1971); *Martin Lake Broadcasting Co.*, 28 FCC 2d 457, 459 (Rev. Bd. 1971). Moreover, Oaks acknowledges that the cases may have been settled. Accordingly, even when considered as an informal objection, Oaks' request must be denied.⁵

² By letter dated April 15, 1992, the Managing Director denied Jupiter Broadcasting Corporation's petition to dismiss the renewal application of WTRU(FM) and granted Taylor's request for waiver of the hearing fee deadline.

³ On July 28, 1989, Jupiter filed a motion for extension of time, requesting until August 25, 1989, to respond to Taylor's petition to deny.

⁴ Oaks' "Statement," filed January 9, 1989.

⁵ In light of this action, the licensee's January 27, 1989, opposition to petition to deny and Oaks' March 22, 1989, motion to strike are dismissed as moot.

b. WTRU(FM)'s Silence

4. On April 1, 1987, WTRU(FM) suspended operations. Commission authority to remain silent was extended through April 1, 1989. The station then went back on the air until it again suspended operations with authority on November 20, 1989, pursuant to § 73.1740(a)(4) of the Commission's Rules. It then resumed operations on December 20, 1989. WTRU(FM)'s silence may be considered under the licensee's "renewal expectancy."

Taylor's Petition to Deny Jupiter's Application

5. On July 24, 1989, Taylor, licensee of WTRU(FM), filed an uncertified petition to deny Jupiter's application. Jupiter filed an opposition on August 25, 1989. The petition is, in essence, a predesignation petition to specify issues, which is no longer permitted. Accordingly, the petition and opposition thereto will be dismissed. *Revised Processing of Broadcast Applications*, 72 FCC 2d 202, 214-5 (1979). These issues can be raised before the presiding Administrative Law Judge as may be appropriate.

Areas and Populations

6. The area and population data in the existing files for Station WTRU(FM) are not current. Therefore, there may be a significant difference in the size of the area and population proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

Late-filed Amendments/§ 1.65

7. Jupiter petitioned for leave to amend its application on July 28, 1989, September 1, 1989, May 2, 1990, May 1, 1991, and June 13, 1991, all after the amendment of right cut off dates. Under § 1.65 of the Commission's Rules, the amendments are accepted for filing. However, Jupiter may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience and necessity. Therefore, the mutually exclusive applications must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, that pursuant to § 309(e) of the Communications Act of 1934, as amended, and § 1.227 of the Commission's Rules, the applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

(1) To determine which of the above captioned applications for an FM authorization in Jupiter, Florida would, on a comparative basis, best serve the public interest;

(2) To determine, in light of the evidence adduced pursuant to the specified issues, which, if either, of the applications should be granted.

10. IT IS FURTHER ORDERED, That the Petition to Deny filed by Jose Oaks on January 3, 1989, IS DISMISSED, and when treated as an Informal Objection, IS DENIED.

11. IT IS FURTHER ORDERED, That Taylor's January 27, 1989, Opposition to Petition to Deny and Oaks' March 22, 1989, Motion to Strike, ARE DISMISSED AS MOOT.

12. IT IS FURTHER ORDERED, That Taylor's July 24, 1989, Petition to Deny Jupiter's FM application and Jupiter's August 25, 1989, Opposition, ARE DISMISSED.

13. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by Jupiter on July 28, 1989, September 1, 1989, May 2, 1990, May 1, 1991, and June 13, 1991, ARE GRANTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants shall, pursuant to § 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to § 311(a)(2) of the Communications Act of 1934, as amended, and § 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by § 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau