

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No. 92-\_\_\_\_\_

In the Matter of: )  
 )  
Amendment of §73.202(b), ) RM - \_\_\_\_\_  
Table of Allotments, )  
FM Broadcast Stations. )  
(Germantown, Tennessee) )

To: Chief, Allocations Branch

**SUPPLEMENT TO PETITION FOR RULE MAKING  
AND REQUEST FOR ORDER TO SHOW CAUSE**

Omni Broadcasting Corp. ("Omni"), by its attorneys, herewith supplements its "Petition For Rule Making And Request For Order To Show Cause" ("Petition") tendered January 28, 1992. In support, the following is shown:

1. Omni petitioned the Commission to amend the FM Table of Allotments to substitute Channel 298C3 for Channel 298A at Germantown, Tennessee, and requested that its construction permit BPH-870908MV be modified to specify operation on Channel 298C3, conditioned on the final resolution of the proceeding in MM Docket No. 88-429.

2. Omni supplements its Petition to report that the full Commission has adopted and released its Memorandum Opinion and Order in MM Docket No. 88-429, Eugene Walton, FCC 92-218 (Released May 28, 1992), and affirmed the Review Board Decision, which granted Omni's applica-

tion. A copy of the Commission's order is attached hereto, for convenience.

WHEREFORE, Omni renews its request that the Commission issue as soon as possible a Notice of Proposed Rule Making proposing to amend the FM Table of Allotments as follows:

	<u>Channel No.</u>	
<u>City</u>	<u>Present</u>	<u>Proposed</u>
Germantown, Tennessee	231C2, 298A	231C2, 298C3

and to modify Omni's construction permit BPH-870908MV to specify operation on Channel 298C3.

Respectfully Submitted,  
OMNI BROADCASTING CORP.

by Harold K. McCombs  
Harold K. McCombs, Jr.

Its Attorney

May 29, 1992

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 88-429

In re Applications of

EUGENE WALTON	File No. BPH-870904MS
HENDERSON BROADCASTING OF MEMPHIS, INC.	File No. BPH-870908MJ
DAVID J. BOTT AND CARESE C. BOTT, JOINT TENANTS	File No. BPH-870908MN
PEDERSON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870908MS
OMNI BROADCASTING CORP.	File No. BPH-870908MV
GERMANTOWN BROADCASTING CORP.	File No. BPH-870908MY

For Construction Permit for a  
New FM Station on Channel 298A  
at Germantown, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1992;

Released: May 28, 1992

By the Commission:

1. By this action we affirm a Review Board Decision, *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), granting Omni Broadcasting Corporation's (Omni) application for a new FM Station at Germantown, Tennessee. Now before the Commission are Applications for Review filed by each of the parties.<sup>1</sup> We will grant Bott's Application for Review to the limited extent indicated herein. Further comment is also warranted with respect to Pederson's and Heart's Applications for Review. In all other respects the applications for review will be denied.

2. *Bott's Integration*: Bott filed applications for construction permits for new FM facilities at both Germantown and Mt. Juliet, Tennessee. Both applications were financed in part by Mrs. Bott's father. Mrs. Bott promised her father that she and Mr. Bott would be active in the management of both stations. The Botts claimed credit for 100 percent integration in this proceeding. They did not propose integration at the Mt. Juliet station and testified that they could fulfill their obligations at the Mt. Juliet facility on a secondary basis by visits on weekends and by tele-

phone. The ALJ and the Board gave Botts no integration credit, finding that the Botts had not shown how they could be fully integrated into the Germantown station and still honor their commitment to Mrs. Bott's father to be active at the Mt. Juliet facility.<sup>2</sup>

3. After reviewing the record with respect to this matter, we have concluded that the rulings below were in error and that it would be helpful to give guidance to subordinate authorities concerning the showing required to demonstrate that an integration proposal is reliable. The Botts never pledged to be integrated into the management of the Mt. Juliet station. There is no evidence that they ever intended to be involved in day-to-day on-site supervision of the facility. They testified during the 1989 hearing sessions that they intended to hire a manager and staff to operate the Mt. Juliet station and that they expected to provide the necessary oversight on weekends and by telephone. Tr. 1666-67, 1791-92. The actual construction of the facility would be supervised by the station's engineer. Tr. 1668.

4. The rulings below were based on Mrs. Bott's admission that she had promised her father that they would be "involved" in the management of the Mt. Juliet station. Tr. 1681. There is nothing in the record to suggest that this involvement contemplated the Botts' spending time in Mt. Juliet during the week or that they would be involved in activities otherwise detracting from their full-time integration at the Germantown facility. The fact that the Botts never intended to be integrated into the management of the Mt. Juliet station, and their testimony (see para. 3 *supra*) concerning their proposed role at the facility are not only consistent with their integration proposal here, but are also facially sufficient to satisfy the promise they said they made to Mrs. Bott's father that they would be "involved" in the management of the Mt. Juliet station.<sup>3</sup> Accordingly, we find no reason to conclude that the Botts' promised "involvement" in the Mt. Juliet station is inconsistent with the integration commitment for the Germantown station. We thus conclude that Bott has reliably shown that it will be able to carry out its integration proposal.<sup>4</sup>

5. *Pederson's Integration*: Pederson is a limited partnership. The general partner, Paula M. Pederson, has a 20 percent equity interest. The limited partner, B. Scott Reardon III, has an 80 percent equity interest. The Board attributed Reardon's 80 percent interest to Pederson for integration purposes, finding that Reardon was the driving force behind the application and that the partnership agreement failed to insulate Reardon from involvement in the applicant. The Board rejected an amendment to the limited partnership agreement proposing to provide the required insulation as an impermissible upgrading of Pederson's comparative qualifications. 6 FCC Rcd at 6076-77 ¶¶ 26-29. Pederson asserts that the Board's decision is in error. Specifically, it argues that it is a bona fide limited partnership and that the Board should have accepted its curative amendment. It asserts that Mrs. Pederson, its general partner, has made a pro rata capital contribution to the applicant, has acted independently of Reardon and has been the moving force in the applicant. It thus concludes that Mrs. Pederson will control the partnership. It also argues that there is good cause for the curative amendment because Reardon's rights under the original agreement "are not so extraordinary as to suggest that the limited partnership agreement was a sham or that it deprived the general partners of their exclusive control

over the applicant." *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5960 ¶ 8 (1991), citing *Doylan Forney*, 5 FCC Rcd 5423, 5425 ¶ 15 (1990).

6. Pederson's reliance on *Evergreen* is misplaced. In *Forney* we held that an applicant must show good cause for acceptance of a post-cut-off curative amendment as required by 47 C.F.R. § 73.3522(b) and *Erwin O'Conner*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). 5 FCC Rcd at 5425 ¶ 13. Pederson has made no such showing. Instead, Pederson waited until after these applications were designated for hearing to attempt to amend to provide the necessary insulation. Pederson made no effort to show why a timely curative amendment could not have been filed earlier. Thus, the amendment was properly rejected by the Board as a post cut-off upgrading of Pederson's comparative qualifications. See *Forney*, 5 FCC Rcd at 5425 ¶ 16.

7. Turning to the limited partnership agreement, as filed, we find that the agreement was fatally flawed from the time of its execution, because it did not prohibit Reardon from communicating with Pederson about the day-to-day business of the partnership and it authorized Reardon to make a determination concerning Pederson's competence and to replace her as general partner, instead of placing the responsibility for such a determination with a court of competent jurisdiction. Pederson Ex. 6, ¶ 17. Thus, Reardon's right to remove Mrs. Pederson as general partner was inconsistent with his alleged limited partnership interest. *Ownership Attribution*, 58 RR 2d 604, 619-20 ¶¶ 48-49 (1985). Without considering questions concerning the role of Reardon in the filing of the application, the failure of Pederson's limited partnership agreement to insulate Reardon from involvement in the applicant is sufficient to warrant the attribution of Reardon's 80 percent equity interest for integration purposes and Pederson is entitled to credit for the integration of only Mrs. Pederson's 20 percent equity interest. *Evergreen Broadcasting Company*, 6 FCC Rcd *supra* at 5600 ¶ 9; *Cotton Broadcasting*, 4 FCC Rcd 1781, 1783 ¶¶ 20-21 (1989).

8. *Heart's Application*: Heart's application was dismissed by the Mass Media Bureau prior to the designation of this proceeding for hearing. Its petition for reconsideration was denied in the *Hearing Designation Order*, 3 FCC Rcd 5591 (MMB 1988). Heart then filed a request to have the ALJ certify a question concerning the dismissal of its application to the Commission. The ALJ dismissed Heart's petition because it was not a party to the proceeding. The ALJ held that he lacked authority to act on any matters relating to Heart's application. *Eugene Walton*, FCC 89M-1971 (July 27, 1989). Heart now argues that its application was dismissed improperly by the Bureau; that all of the subsequent actions in this proceeding constitute prejudicial error because none of those determinations, including the ALJ's order dismissing its certification request, was served on Heart or its counsel; and that it was thus deprived of its right to participate in the hearing.<sup>5</sup>

9. The ALJ correctly concluded that he had no authority to consider the request for certification. Thus, his dismissal of Heart's request was appropriate. An ALJ's authority is limited to matters that could be raised by the parties in Commission proceedings pending before him. 47 C.F.R. §0.341. Heart was not a party to the proceeding designated for hearing. The appropriate procedure for Heart to challenge the Bureau's order dismissing its application would have been to file an application for review pursuant to 47 C.F.R. § 1.115(a). The Bureau, in a pleading filed October 7, 1988 and served on Heart, put Heart on specific notice

of the procedural deficiencies in the request for certification before the period for filing applications for review under Section 1.115 had expired. In view of Heart's failure to request timely review of the Hearing Designation Order, the Order dismissing Heart's application had become final and it has no right to further participation in this proceeding. See *Hughes-Moore Associates, Inc.*, 7 FCC Rcd 1454, 1455 ¶ 12 (1992). Under these circumstances, Heart was not prejudiced by the failure to serve it with the rulings issued in this proceeding, and its instant application for review will be dismissed without further consideration.<sup>6</sup>

10. *Comparative Evaluation*: Only three applicants, Omni, Bott and GBC, have been given credit for 100 percent integration, warranting decisive quantitative preferences over the other applicants. The qualitative comparative attributes of those three applicants are as follows:

	Omni	GBC	Bott
Local Residence <sup>8</sup>	100% Long term	100% Future	100% Shorter term
Civic Involvement	None	None	100% Slight credit <sup>9</sup>
Broadcast Experience <sup>10</sup>	100%	100%	100%

Omni and Bott are preferred over GBC because their past local residence is entitled to greater weight than GBC's mere promise that its principals will move to Germantown if their application is granted. GBC has no offsetting qualitative advantage.

11. In evaluating Omni's and Bott's comparative proposals, we will treat the applicants' local residence and civic activities as a unified comparative factor. *Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 ¶¶ 7-11 (1991), recon. dismissed, 7 FCC Rcd 674 (1992); *Ronald Sorenson*, 6 FCC Rcd 1952, 1952-53 ¶ 5 (1991), recon. denied 6 FCC Rcd 6901 (1991), appeals filed Nos. 91-1208, 91-1213 (D.C. Cir. May 8, 1991). Based on our review, Omni is the preferred applicant. Omni's principal, Wilbourn, has lived continuously within the proposed service area since 1968 and its other principal, Phillips, since 1957. In contrast, Mr. Bott moved into the service area, and Mrs. Bott returned to the service area less than one year before filing the application. Credit for Mrs. Bott's earlier residence is significantly discounted because of the hiatus between it and her return to the area as an adult. *Colonial Communications*, 7 FCC Rcd *supra* at 674 ¶ 6. Thus, Omni has the edge for local residence.

12. Turning to civic participation, the Botts' showing of civic activities that commenced prior to the filing of their application was modest in nature. While those activities continued after the filing of the application and other activities commenced after the filing of the application, these aspects of Bott's showing are entitled to only minor enhancement credit. *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 (1991); *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441 ¶¶ 18-19 (Rev. Bd. 1989), rev. denied 5 FCC Rcd 3712 (1990). Thus, we conclude that Omni's longer continuous local residence, even without significant civic participation, outweighs the credit awarded Bott for its shorter local residence and the slight credit awarded for civic activities.<sup>11</sup> Omni's advantage for local residence and its slight advantage for broadcast experience fully support the grant of Omni's application.

13. ACCORDINGLY, IT IS ORDERED, That the Motion to Dismiss filed November 26, 1991 by the Mass Media Bureau IS GRANTED; and that the Application for Review filed November 21, 1991 by Heart of America Broadcasting, Ltd. IS DISMISSED.

14. IT IS FURTHER ORDERED, That the Request for Official Notice filed February 21, 1992 by Eugene Walton IS DISMISSED as moot.

15. IT IS FURTHER ORDERED, That the Applications for Review filed November 27, 1991 by David J. Bott and Carese C. Bott, Joint Tenants, and November 29, 1991 by Pederson Communications Limited Partnership ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED.

16. IT IS FURTHER ORDERED, That the Applications for Review filed November 27, 1991 by Eugene Walton and Henderson Broadcasting of Memphis, Inc., and November 29, 1991 by Germantown Broadcasting Corporation ARE DENIED; and that the Application for Review filed November 27, 1991 by Omni Broadcasting Corporation IS DISMISSED as moot.

#### FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

#### FOOTNOTES

<sup>1</sup> Applications for Review were filed on November 21, 1991 by Heart of America Broadcasting, Ltd. (Heart), on November 27, 1991 by Eugene Walton (Walton), David J. Bott and Carese C. Bott (Bott), Henderson Broadcasting of Memphis, Inc., (Henderson), and Omni, and on November 29, 1991 by Pederson Communications Limited Partnership (Pederson) and Germantown Broadcasting Corporation (GBC). Oppositions were filed on December 16, 1991 by Walton, Henderson, Pederson, Omni, GBC and the Mass Media Bureau. On November 26, 1991 the Mass Media Bureau filed Motion to Dismiss Heart's Application for Review. Heart filed an Opposition on December 5, 1991, and Omni filed Comments in Support of the Motion to Dismiss on December 16, 1991. On February 21, 1992, Walton also filed a Request for Official Notice with respect to the decision in *Jerome Thomas Lamprecht v. FCC*, No. 88-1395 (February 19, 1992).

<sup>2</sup> On June 10, 1991 the Botts filed a motion to dismiss their Mt. Juliet application. That application has been dismissed. FCC 91M-1975 (ALJ June 21, 1991). Although that action does not moot the question concerning Bott's integration proposal in this case, for the reasons set forth below, we resolve that question in Bott's favor.

<sup>3</sup> In light of the evidence concerning the Botts' intention to supervise the Mt. Juliet facility by visits on weekends and by telephone, we believe that they set forth in sufficient detail their proposal to allocate their time between the two stations. Thus, the cases relied on by the Board to discredit their integration proposals, where applicants failed to make the requisite showing, are distinguishable.

<sup>4</sup> In this regard, we note that the ALJ also concluded that Mrs. Bott's role at the proposed Germantown station was not entitled to credit for integration of ownership and management. 6 FCC Rcd at 1216 ¶ 67. In light of the ultimate resolution of this

proceeding reflected below, we see no need to address the arguments raised by Bott concerning that determination at this time.

<sup>5</sup> When the dismissal of Heart's application was sustained in the Hearing Designation Order, Heart was deleted from the service list maintained by the Commission's Docket Division. The filing of the request for certification with the ALJ, a procedure generally reserved for parties to the proceeding, failed to put the Docket staff on notice that it would have to check the service list to make sure that Heart was still on it. Thus, the failure to serve Heart with the ALJ's order dismissing the certification request was the result of an administrative oversight. However, that oversight was of no consequence because the ALJ's order dismissing the certification request was not appealable under 47 C.F.R. § 1.115(e)(3). The failure to serve Heart with subsequent rulings is not relevant because Heart was not a party to the proceeding and it was not entitled to be served with those rulings.

<sup>6</sup> Heart's argument that the ALJ should have granted its request for certification to the Commission is without merit. There is no reason to require ALJs to review and make determinations with respect to the merits of unauthorized pleadings filed by non-parties to hearing proceedings.

<sup>7</sup> In accordance with the decision in *Jerome Thomas Lamprecht v. FCC*, No. 88-3995 (D.C. Cir. Feb. 19, 1995), we will not grant enhancement credit for female ownership to any applicant in this proceeding. Under these circumstances, Walton's Request for Official Notice concerning this question may be dismissed as moot.

<sup>8</sup> Omni's principals, Phillips and Wilbourn, have lived within the proposed service area continuously since 1957 and 1968, respectively. Phillips also owns a vacation home in Eastport, Mississippi. As found by the ALJ, the vacation home does not raise a question with respect to the genuineness of Omni's integration proposal. 6 FCC Rcd at 1302 ¶ 124. In contrast, Mr. Bott moved into the service area in December 1986, less than one year before the filing of Bott's application. Mrs. Bott lived in the Germantown area as a child from 1964 through 1980. She returned to the area in December 1986 with Mr. Bott. The credit for Mrs. Bott's childhood residence is discounted because of the hiatus between it and her more recent residence as an adult. *Colonial Communications, Inc.*, 7 FCC Rcd 674 (1992).

<sup>9</sup> Bott is entitled to only minor credit for civic activities initiated after the application was filed. *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441 ¶ 19 (Rev. Bd. 1990). Bott filed its application in September, 1987. Although Mr. Bott did not give specific dates for his involvement in civic activities, he has been affiliated with Memphians for Life, the Tennessee Home Education Association, the First Evangelical Church, and the Germantown Chamber of Commerce since 1987. Mrs. Bott has been a member of F.L.A.R.E. (a group concerned with public morality), a Board Member of Memphians for Life, a member of the Daughters of the American Revolution, and a docent for the Mallory-Neely House in Memphis since early 1987. Thus, Bott has a modest record of pre-filing civic activities, which together with its record of post-filing activities (6 FCC Rcd at 1295 ¶¶ 57 and 60) are entitled to only minor qualitative enhancement credit.

<sup>10</sup> Omni, GBC and Bott are each entitled to enhancement credit for 100% broadcast experience. The Botts have been involved in broadcasting only since 1986. GBC's principals, A. J. Hendrickson and William E. Taylor, have been involved in broadcasting since 1951 and 1959, respectively. Omni's principals, Wilbourn and Phillips, have been involved in broadcasting since 1965 and 1973, respectively. Thus, Omni and GBC are entitled to an advantage over Bott, because their principals have longer and

more diversified broadcast experience than Bott. Under the circumstances of this proceeding the differences in Omni's and GBC's principals long term broadcast experience are not decisionally significant. See 6 FCC Rcd at 6078 ¶ 35.

<sup>11</sup> Compare *Ronald Sorenson*, 6 FCC Rcd *supra* at 1953 ¶¶ 7-11, where the winning applicant's long term residence with an impressive record of civic activities was found sufficient to outweigh the longer residence of a mutually exclusive applicant. Here the Botts have neither the long term residence nor the outstanding record of civic activities attributed to the winning applicant in *Sorenson*.

**CERTIFICATE OF SERVICE**

I, Harold K. McCombs, Jr., do hereby certify that I have caused to be mailed, First Class postage prepaid, this 29th day of May, 1992, copies of the foregoing "Supplement To Petition For Rule Making And Request For Order To Show Cause" to the following:

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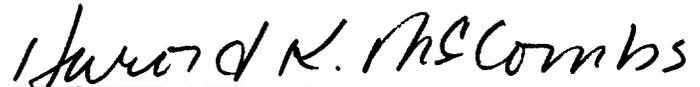
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