

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

**PUBLIC NOTICE**

Released: June 8, 1992

**FEE DECISIONS OF THE MANAGING  
DIRECTOR AVAILABLE TO THE PUBLIC**

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

**Alexander, Lenora** - Request for refund of hearing fee for a radio station in Strasburg, Colorado - **Granted** (May 15, 1992).

**Lopez, Felix** - Request for reinstatement of an application for a LPTV station in Fort Myers, Florida - **Denied** (May 20, 1992).

**MAR-BOB-BEN** - Request for refund of hearing fee for a radio station in Waynesboro, Pennsylvania - **Granted** (May 20, 1992).

**Medley, Ms. Jerianne** - Request for refund of the transfer fee for transfer of the license to radio station WOKJ(AM), Jackson, Mississippi - **Granted** (May 27, 1992).

**New South Radio, Inc.** - Request for partial reconsideration of fee determination as to filing fees for New South Radio, Inc - **Granted** (May 13, 1992).

**Northwest Broadcasting Company** - Request for refund of a filing fee for a FM station in Lake Geneva, Wisconsin - **Denied** (May 28, 1992).

**P.M. Broadcast Engineering, Inc.** - Request for clarification - **Decision** (May 27, 1992).

**Pacific View Broadcasting** - Request for refund of hearing fee for a radio station in Hilo, Hawaii - **Granted** (May 15, 1992).

**Ruark, Robert H.** - Request for reinstatement of an application for a LPTV station in Albany, New York - **Denied** (May 5, 1992).

**U S WEST Communications, Inc.** - Request for fee determination, waiver and partial fee refund - **Denied** (May 5, 1992).

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

MAY 27 1992

OFFICE OF  
MANAGING DIRECTOR

David M. Silverman, Esquire  
Cole, Raywid & Braverman  
1919 Pennsylvania Avenue, N.W.  
Second Floor  
Washington, D.C. 20006-3458

86-285

Dear Mr. Silverman:

This is in response to your request made on behalf of P.M. Broadcast Engineering, Inc. (P.M.), licensee of station WQMR(FM), Federalsburg, Maryland for clarification of whether a hearing fee must be paid by an intervenor in a comparative hearing designated to select a broadcast licensee.

You state that P.M. Broadcasting (P.M.) intends to seek intervention in the comparative proceeding designated to select the licensee for a new FM station at Ocean City, Maryland. You further state that at least three of the applicants designated for hearing appear to be short-spaced with WQMR(FM) and, thus, could result in harmful interference to WQMR(FM) operations. See Hearing Designation Order in MM Docket No. 92-64, released April 13, 1992. You, therefore, contend that it would contravene the intent of Congress and that of the Commission to require P.M. to submit a hearing fee when its sole purpose in participating in the proceeding is to protect the quality of its signal.

In establishing its Fee Collection Program, the Commission generally imposed the fee requirement on those participants in a comparative proceeding requesting "a potentially valuable license", but excluded from the fee requirement those parties "where imposition of the fee would require a party to pay to defend itself." See Fee Collection Program, 2 FCC Rcd 947, 966 (1987), as modified, 3 FCC Rcd 5987 (1988). Consistent with this rationale, the Commission explicitly determined that intervenors, participating in a comparative proceeding pursuant to section 1.223 of the Commission's rules, would not be assessed a hearing fee. See 2 FCC Rcd at n. 134; see also 47 C.F.R. 1.223. Section 1.223 specifically recognizes that a licensee of an existing station, once it has met certain threshold requirements, may intervene in a hearing in order to protect its station from possible interference from a proposed station.

Accordingly, we conclude that P.M. may participate in the comparative proceeding designated to select the licensee at Ocean City, without payment of a hearing fee, subsequent to a successful

David M. Silverman, Esq.

2.

demonstration of compliance with section 1.223. Moreover, we conclude that any party, qualified as an intervenor under section 1.223, may participate in a comparative broadcast proceeding without payment of a hearing fee.

Sincerely,



Marilyn J. McDermott  
Associate Managing Director  
for Operations

*Jim*

# COLE, RAYWID & BRAVERMAN

ATTORNEYS AT LAW

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April 15, 1992

*Handwritten notes and scribbles, possibly including "WCF" and "4/16/92".*

\* ADMITTED IN PENNSYLVANIA ONLY

## VIA HAND DELIVERY

Andrew S. Fishel, Managing Director  
Federal Communications Commission  
1919 M Street, N.W., Rm. 852  
Washington, D.C. 20554

ATTN: Thomas Holleran  
Room 848

Re: Request for Clarification

Dear Mr. Fishel:

On behalf of P.M. Broadcast Engineering, Inc., licensee of WQMR(FM), Federalsburg, Maryland, we hereby request clarification that the Commission's hearing fee of \$6,760 specified in FCC Rule § 1.1104 does not apply to intervenors in broadcast hearings pursuant to FCC Rule § 1.223. Although there is nothing in the rules that would indicate whether or not the hearing fee applies to intervenors, the Commission's Hearing Fee Report and Order in Gen. Docket No. 86-285, 2 F.C.C. Rcd. 947 (1987) ("Report and Order"), makes it clear that the fee does not apply to intervenors.

Specifically, footnote 134 in that Report and Order states in relevant part, "[a]s we proposed in the NPRM, we will not assess a fee in the following situations: . . . intervenors (47 C.F.R. § 1.223) . . . ." This is consistent with the Commission's discussion of the types of situations in which the hearing fee would be levied. For example, in justifying the imposition of a hearing fee in the comparative renewal context, the Commission stated that "such a hearing is not, in legal contemplation, an enforcement action where the imposition of a fee would require a party to pay a fee to defend itself." 2 F.C.C. Rcd. at 966 (¶ 143).

NOTE: DOUG COOPER & I spoke briefly this week about this ~~with~~ 4/16/92

COLE, RAYWID & BRAVERMAN

Andrew S. Fishel, Managing Director  
April 15, 1992  
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By contrast, an intervenor in a broadcast hearing under FCC Rule § 1.223 is participating in the hearing for the sole purpose of defending itself and not for the purpose of obtaining a Commission authorization of any kind. In the instant case, P.M. Broadcast Engineering intends to intervene in MM Docket No. 92-64, in which at least three of the five applications designated for hearing are admittedly short-spaced to WQMR(FM). See HDO at ¶ 2 (copy enclosed). Accordingly, it would be both unfair and inconsistent with the intent of both the Commission and Congress to require P.M. Broadcast Engineering, Inc. to pay a hearing fee as an intervenor, when it is intervening for the sole purpose of protecting its protected contour and signal. See Report and Order at ¶ 138 ("The relevant legislative history indicates that this charge should be levied when an application is designated for hearing.") (Emphasis added)

Accordingly, for the foregoing reasons, we hereby request clarification that P.M. Broadcast Engineering, Inc. is not required to pay a hearing fee to participate as an intervenor in the hearing for a new FM station in Ocean City, Maryland, MM Docket No. 92-64. Should there be any questions concerning this matter, please communicate with undersigned counsel.

Very truly yours,



David M. Silverman

Enclosure

cc: Mr. Thomas Holleran (w/enc. - FCC)

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

MM Docket No. 92-64

In re Applications of

WIND 'N SEA FM LIMITED File No. BPH-901224ME  
PARTNERSHIP  
(hereafter "Partnership")

WEBB File No. BPH-901224MF  
BROADCASTING, INC.  
(hereafter "Webb")

ARIS MARDIROSSIAN File No. BPH-901224MI  
(hereafter "Mardirossian")

EQUAL TIME File No. BPH-901224MK  
BROADCASTING CORP.  
(hereafter "Broadcasting")

J.H. COMMUNICATIONS File No. BPH-901226MB  
(hereafter "Communications")

For Construction Permit  
for a New FM Station on Channel 295A  
in Ocean City, Maryland

#### HEARING DESIGNATION ORDER

Adopted: March 23, 1992;

Released: April 13, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.<sup>1</sup>

2. *Short Spacing.* An engineering review of the Webb, Partnership and Communications applications reveals the following:

(1) The Partnership proposal is 8.2 kilometers (km) short-spaced to WKDN(FM), Camden, NJ; 4.2 km short-spaced to construction permit BPH-880727MC, North Cape May, NJ; 6.4 km short-spaced to WQMR(FM), Federalsburg, MD; and 2.2 km short-spaced to WAFX(FM), Suffolk, VA.

(2) The Webb proposal is 7.6 km short-spaced to WKDN(FM), 3.6 km short-spaced to construction permit BPH-880727MC, 5.8 km short-spaced to WQMR(FM), and 2.7 km short-spaced to WAFX(FM).

(3) The Communications proposal is 12.7 km short-spaced to WKDN(FM), 9.5 km short-spaced to construction permit BPH-880727MC, and 6.2 km short-spaced to WQMR(FM).

3. These short-spacings are in violation of 47 C.F.R. § 73.207. In this regard, Webb requested processing under 47 C.F.R. § 73.213(c)(1) with respect to all of them. Communications requested processing pursuant to 47 C.F.R. § 73.213(c)(1) with respect to WKDN(FM) and WQMR(FM).<sup>2</sup> Partnership failed to address this problem; however, its application meets the spacing requirements of 47 C.F.R. § 73.213(c)(1) with respect to all the stations.

4. A review of the applications reveals that the instant allotment (for Channel 295A in Ocean City, MD) is itself in violation of 47 C.F.R. § 73.207. Specifically, this allotment is 3.1 km short-spaced to WKDN(FM), 1.1 km short-spaced to construction permit BPH-880727MC, and 1.4 km short-spaced to WAFX(FM). However, the Ocean City allotment is not short-spaced to WQMR(FM). Therefore, 47 C.F.R. § 73.213(c)(1) cannot be applied to the required separation distance to WQMR(FM).

5. In clarifying its existing policy regarding short-spaced Class A allotments, the Commission recently amended Section 73.213(c) of the Rules to provide explicitly that:

If the reference coordinates of an allotment are short-spaced to an authorized facility or another allotment (as a result of the revision of Section 73.207 in the *Second Report and Order* in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this Section *only with respect to such short spacing.*

*Memorandum Opinion and Order*, MM Docket 88-375, 6 FCC Rcd 3417, 3424-3425 (1991) (emphasis added). See *id.* at 3418 n.7.

6. We acknowledge, however, that prior to the release of that *Memorandum Opinion and Order*, the policy discussed above regarding "grandfathered" stations or allotments may have been somewhat unclear. In particular, we find that return of the applications with no opportunity to correct the defect would be inappropriate, because the applicants did not, for "hard look" processing purposes, have full and explicit notice of the prerequisites they must meet to avoid summary dismissal. *Compare Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (dismissal inappropriate where rules are unreasonably ambiguous) with *Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) (dismissal affirmed where rules are clear). Instead,

<sup>1</sup> A competing application (File No. BPH-901226MA), filed by Bruce D. Blanchard Limited Partnership, was dismissed for failure to pay a required fee. An appeal of the dismissal has been filed with, and is currently pending before, the Commission's Office of Managing Director.

<sup>2</sup> Communications also requested processing pursuant to 47

C.F.R. § 73.215, and waiver of 47 C.F.R. § 73.207, with respect to BPH-880727MC. Because its application satisfies the requirements of 47 C.F.R. § 73.215 with respect to BPH-880727MC, Communications' request for waiver of 47 C.F.R. § 73.207 is HEREBY DISMISSED as unnecessary.

However, Webb will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

12. *Attribution.* In response to Item 6, Section II of FCC Form 301, Webb states that Michael M. Reitman and Anthony Guida, employees of the National Broadcasting Company, and Franklyn Field, an employee of CBS, Inc., "are neither shareholders, officers nor directors" of those respective organizations (Exhibit 1). Webb shall provide the specific positions held by these individuals, who are also "non-voting" stockholders of Webb.

13. *Air Hazard Issue.* Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Webb and Broadcasting would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

14. *Late-Filed Amendments.* The applicants below have petitioned for leave to amend their applications. The accompanying amendments were filed after March 25, 1991, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the following amendments are accepted for filing:

| APPLICANT      | DATE(S) FILED          |
|----------------|------------------------|
| Webb           | 6/24, 12/11/91, 1/3/92 |
| Mardirossian   | 6/3/91                 |
| Broadcasting   | 5/16/91                |
| Communications | 4/5/91.                |

In addition, Partnership and Mardirossian petitioned for leave to amend their applications on July 15, 1991 (supplemented July 22, 1991) and November 29, 1991, respectively, after the last day for filing amendments as of right. These amendments, dealing mostly with engineering, were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, they are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from any of the above amendments will be disallowed.

15. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the 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 any of the applicants.

16. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. **ACCORDINGLY, IT IS ORDERED,** That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications **ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING,** at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Partnership, Broadcasting and Communications in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301- 1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Webb and Broadcasting would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

18. **IT IS FURTHER ORDERED,** That Partnership, Webb and Communications shall file the amendments, specified in Paragraph 6 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

19. **IT IS FURTHER ORDERED,** That in accordance with paragraph 7 hereinabove, Partnership, Broadcasting and Communications shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

20. **IT IS FURTHER ORDERED,** That the Purcell Petition to Deny IS **HEREBY DENIED.**

21. **IT IS FURTHER ORDERED,** That within 30 days of the release of this Order, Webb shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

22. **IT IS FURTHER ORDERED,** That Webb shall file the amendment, specified in Paragraph 12 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. **IT IS FURTHER ORDERED,** That the Federal Aviation Administration IS **MADE A PARTY** to this proceeding with respect to the air hazard issue only.

24. **IT IS FURTHER ORDERED,** That the petitions for leave to amend filed by Partnership (7/15 supplemented 7/22/91), Webb (6/24, 12/11/91, 1/3/92), Mardirossian (6/3, 11/29/91), Broadcasting (5/16/91) and Communications (4/5/91) **ARE GRANTED** and the corresponding amendments **ARE ACCEPTED** to the extent indicated in paragraph 14 above.

25. **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 also be served on