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Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY
MM Docket No. 92-132

In re Applications of

CARNEGIE-MELLON File No. BPED-891108MA
STUDENT GOVERNMENT
CORPORATION

For Construction Permit for a Major
Change, Station WRCT(FM), Channel 202A
Pittsburgh, Pennsylvania
(hereafter "WRCT")

HE'S ALIVE, File No. BPED-900606MC
INCORPORATED

For Construction Permit for a New
Noncommercial Educational FM Station
Channel 201A
Murrysville, Pennsylvania
(hereafter "HAI")

HEARING DESIGNATION ORDER

Adopted: June 4, 1992; Released: June 22, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.¹

2. HAI. HAI filed its original proposal on June 6, 1990. Upon review, the staff determined that HAI's application failed to meet the prohibited contour overlap requirements of 47 CFR § 73.509, resulting in interference caused within the existing licensed service area of WRCT. Consequently, the staff returned the application by letter dated December 6, 1990. In response, HAI filed an amended proposal on December 20, 1990 which eliminated the prohibited contour overlap with WRCT's licensed facility and requested *nunc pro tunc* reinstatement of its application. The staff determined that the amended proposal resolved the conflict which resulted in the return of the original application and reinstated the application by letter dated February 25, 1991. That letter also required HAI to rectify errors in its 47 CFR § 73.525 Channel 6 interference study.

3. On April 10, 1991, WRCT petitioned to deny the amended application, citing the deficient Channel 6 interference study and claiming that HAI did not have reasonable assurance of its proposed site (the WPTT TV tower). Two days later, on April 12, 1991, WJAC, Inc., licensee of Station WJAC-TV (Channel 6), Johnstown, Pennsylvania, also filed a petition to deny HAI's application, referencing the deficient Channel 6 study. In response to these pleadings and the staff's February 25, 1991 letter, HAI on May 20, 1991 submitted a minor amendment specifying directional operation at a new transmitter site. This amendment also reduced the population receiving Channel 6 interference to 2318 people, in compliance with 47 CFR § 73.525, and thereby mooted WJAC, Inc.'s petition to deny, which will therefore be denied. However, the amendment was assailed by WRCT in its July 15, 1991 supplement to its petition to deny, which argued that 1) HAI has not provided reasonable assurance of the availability of its new transmitter site; 2) the added expense of a directional antenna and new tower requires HAI to execute a new financial qualifications statement; 3) the directional information provided fails to comply with the requirements of 47 CFR § 73.316; and 4) adequate service would not be provided to HAI's proposed community of license, Murrysville.

4. Unlike the commercial FM service, an educational applicant is not required to provide a site availability certification as a condition for grant of its application. Similarly, educational stations are not held to a minimum level of coverage over the community of license. Consequently, we deny WRCT's assertion that HAI must comply with these inapplicable standards. With respect to the financial qualifications issue raised by WRCT, HAI correctly argues that no specific recertification is required. Nonetheless, in connection with a minor engineering amendment filed on October 11, 1991, HAI recertified that it is financially qualified. Thus, even if WRCT had raised a *prima facie* question concerning HAI's financial qualifications, which it had not, there would be no substantial and material question remaining on this issue.

5. With respect to the directional antenna exhibits provided by HAI, WRCT argues that HAI should have provided a complete description including manufacturer and model number for the proposed directional antenna. However, this information is not required to be provided at the construction permit application stage. At this time, HAI is merely required to provide a composite directional antenna pattern and a relative field tabulation, as it has done. The remaining items are to be provided with the license application, assuming grant of the construction permit.

6. WRCT's pleadings also claim that the directional antenna pattern submitted in the May 20, 1991 amendment violates the 2 dB/10⁰ limit of 47 CFR § 73.316(b)(2) between the azimuths of 30⁰ to 40⁰, 140⁰ to 150⁰, 220⁰ and 230⁰, and 330⁰ to 340⁰. In addition, the pattern is said to exceed the 15⁰ dB maximum-to-minimum limit of 47 CFR § 73.316(b)(2). HAI does not dispute these findings; rather, it has amended its directional pattern on October 11,

¹ Although the applications are apparently for two different communities, the interfering contour of each application overlaps the protected contour of the other. Since the applications were timely filed and the grant of one would effectively pre-

clude the grant of the other, they are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

1991 to eliminate these violations, claiming a "drafting error". These changes moot WRCT's objections to the directional antenna.

7. Having addressed the pleadings of WRCT and finding no remaining issue of substance, WRCT's petition to deny against amended HAI proposal will be denied. Also, HAI's above-referenced amendments filed May 20 (and supplemented on May 23) and October 11, 1991 will be accepted for good cause shown. Nevertheless, because they were filed after the April 12, 1991 deadline for filing amendments as of right, any resulting comparative upgrading will be disallowed.

8. *Environmental.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled "Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that WRCT and HAI did not address the matter of how they would protect workers on their respective towers from RF radiation exposure. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Broadcasting and National may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since WRCT and HAI failed to indicate how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, the applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally OST Bulletin No. 65, *supra*, at 28. Accordingly, WRCT and HAI will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. See 47 C.F.R. § 1.1308(d).

9. *Share-time.* HAI has indicated that an attempt has been made to "explore settlement options with WRCT." In view of this vague statement, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560

(October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

10. *Section 307(b) & Contingent Comparative Issues.* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

11. *Comparative Coverage.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

12. *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.

13. 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 WRCT and HAI 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. §§ 1.1301-1.1319.
2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and

whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.²

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

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed on May 20 (as supplemented on May 23) and October 11, 1991 by HAI ARE GRANTED for good cause shown, and the corresponding amendments ARE ACCEPTED, but any resulting comparative upgrading will be disallowed.

15. IT IS FURTHER ORDERED, That the petitions to deny, filed on April 10 (supplemented on July 15), 1991 by WRCT, and filed on April 12, 1991 by WJAC, Inc. ARE DENIED.

16. 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.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 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.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 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 Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

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

² Recently, in a Notice of Proposed Rulemaking in GC Docket No. 92-52, the Commission tentatively concluded that this noncommercial educational comparative issue is vague and should be eliminated. *Reexamination of the Policy Statement on*

Comparative Broadcast Hearings, FCC 92-98, released April 10, 1992, at paras. 39-40. Nevertheless, any revised rules to be adopted in that proceeding will apply only to applicants not in hearing as of the effective date of the new rules. *Id.* at para. 41.