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OCT 18 1991

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of )  
Healdsburg Broadcasting, Inc. )  
For a Construction Permit )  
For a New FM Station on )  
Channel 240A )  
Healdsburg, California )

File No. BPH-910211MB

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COMMUNICATIONS DIVISION

To: Chief, Mass Media Bureau

**OPPOSITION TO PETITION FOR LEAVE TO AMEND  
AND MOTION TO DISMISS**

Beckwith Communications, Inc., by counsel and pursuant to Commission Rule Section 1.45, 47 C.F.R. §1.45, opposes the Petition for Leave to Amend ("Amendment") filed by Healdsburg Broadcasting, Inc. ("Healdsburg") and hereby moves for the dismissal of Healdsburg's application as defective. In support, the following is respectfully submitted:

I. **Introduction**

1. The above captioned application appeared on Public Notice as accepted for tender on May 2, 1991. On September 27, 1991, Healdsburg filed its Amendment, ostensibly pursuant to Rule Section 1.65.<sup>1</sup> This Amendment "report[ed] a calculation error in the Section V-B engineering portion of the application."

2. Section V-B of Healdsburg's application incorrectly calculated the 60 and 70 dBu contours because it assumed an incorrect Height Above Average Terrain ("HAAT"). This error resulted in a violation of Rule Sections 73.207 (requiring minimum

<sup>1</sup> The Amendment appeared on Public Notice October 7, 1991. See Public Notice Report No. 15101.

distance separation between stations) and 73.215 (contour separation for short-spaced stations), as it was short-spaced to Radio Station KKHI-FM, San Francisco. The proffered amendment would not only eliminate the short-spacing defect, but would also increase the coverage of the technical proposal, as is detailed in the attached affidavit of Thomas G. Adcock, P.E.

## II. Argument

- A. **Healdsburg's Amendment is not a Rule 1.65 reporting amendment. It is instead an improper attempt to correct a fatal engineering defect in its application.**

3. There can be no doubt that as originally filed, Healdsburg's application was not acceptable for filing. The rules regarding FM distance separation were adopted in 1962 and have remained fundamental to orderly processing of FM applications and maintenance of a workable system for allocation of FM service. The rules operate in a "go/no go" fashion, and violation of them is a defect which is fatal to any application, unless an appropriate request for waiver is made and granted.

4. Healdsburg's attempt to disguise its curative amendment as a §1.65 amendment is thus unavailing.<sup>2</sup> Section 1.65 requires applicants to maintain the continuing accuracy of the information contained in their applications. This rule does not, however, require the acceptance of such amendments when, as in the instant case, they cure an acceptability defect in the underlying application and the period for filing curative amendments as of

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<sup>2</sup> See Primemedia Broadcasting, Inc., 65 Rad. Reg. (P&F) 29 (1988).

right has already lapsed.<sup>3</sup> Section 1.65 and §73.3522 are complementary, not conflicting, rules and should not allow applicants, under the guise of a §1.65 reporting amendment, to circumvent deadlines established for the filing of curative amendments per §73.3522. Accordingly, Healdsburg's Amendment cannot be accepted as a §1.65 reporting amendment.

**B. Healdsburg has not shown good cause for filing its curative amendment late.**

5. On May 2, 1991, the Commission issued a public notice of the tenderability of Healdsburg's application. The public notice triggered a 30-day period during which Healdsburg could file a curative amendment for its application. Healdsburg failed to correct its defective Section V-B engineering showing during that period. The "hard look" procedures only allow for acceptance of a late amendment if an application initially found nontenderable is reinstated and then placed on Public Notice, or if a mutually exclusive applicant is granted leave to file a similar late amendment.<sup>4</sup> Applicants are expected to correct defects during the initial amendment period after public notice of acceptance for tender. Otherwise they face dismissal.

6. In the Report and Order in MM Docket No. 84-750, 50 FR 19936 (1985), 58 Rad. Reg. 2d (P&F) 776, recon. denied, 50 FR 43157 (1985), ("hard look" processing procedures) the Commission adopted

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<sup>3</sup> See Primemedia Broadcasting, Inc., 65 Rad. Reg. (P&F) at 29, See also Donovan Burke, 60 Rad. Reg. 2d (P&F) 110, 112-13 (1986).

<sup>4</sup> See Richard P. Bott, II, 65 Rad. Reg. 2d (P&F) 646, 648 (1988).

strict rules governing acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by release of the Public Notice announcing that application has been accepted for tender.<sup>5</sup> Once this period expires, predesignation amendments "will be considered only upon a showing of good cause for late filing or pursuant to §1.65 or §73.3514" of the rules.<sup>6</sup> Neither of those rule sections provide a basis to accept Healdsburg's Amendment here.

7. Interpreting the good cause requirement, the Commission has noted that an applicant seeking to amend after the closing of the amendment as of right window must demonstrate:

that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; . . . that other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.<sup>7</sup>

Healdsburg states the errors in Section V-B of its application were discovered only when its consulting engineer was "in the process of certifying the beta version of a new computer program [he] recently developed for streamlining the design, specification, contour calculations, etc. of FM and TV transmitting facilities." That

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<sup>5</sup> 50 FR at 19941. See also 47 C.F.R. §73.3522(a)(6).

<sup>6</sup> See 47 C.F.R. §73.3522(a)(6).

<sup>7</sup> See Naguabo Broadcasting Co., 68 Rad. Reg. 2d (P&F) 1325, 1333 (Rev. Bd. 1991), quoting Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970).

Healdsburg was not aware that its application was defective does not justify acceptance of a late filed amendment designed to cure that defect, however. If this were so, any applicant could easily circumvent the amendment procedures set forth in the rules, by claiming, as Healdsburg does, that it was ignorant as to defects in its application.

8. Healdsburg admits that, as originally filed, its engineering proposal was short-spaced to KKHI-FM, San Francisco. Healdsburg asserts that this error was a "clerical error" and thus its amendment should be accepted. The error, however, was anything but "minor clerical" error. The error affected the entire engineering proposal and masked the violation of one of the more fundamental of FM technical rules, the minimum distance separation requirements of §73.207. Further, as is demonstrated in the attached Affidavit of Mr. Adcock, the amendment significantly increases the Healdsburg proposal's coverage and thus would result in an unfair comparative advantage accruing to Healdsburg. Thus, because Healdsburg failed to show good cause for acceptance of the Amendment, it must be rejected.

**C. Healdsburg's application must be dismissed as defective.**

9. There can be no doubt that, as originally filed, Healdsburg's application was not acceptable for tender. Healdsburg has attempted to amend its defective application through disguising it as a §1.65 reporting amendment. Yet, as shown above, a curative amendment cannot be accepted as a §1.65 amendment. Further, the Amendment cannot be accepted as a §73.3522 curative amendment, as

Healdsburg has not even attempted a credible showing of good cause for the late filing of the Amendment. The window for filing such an amendment closed over four months ago. Thus, Healdsburg cannot amend its defective application.

10. Stuck with a defective application, Healdsburg's application must now be dismissed because its defect is fatal.<sup>8</sup> The Commission has hewed mightily to the mileage separation system that protects the FM broadcast band (and the quality fidelity characteristics inherent therein).<sup>9</sup> The short-spacing rules are a "go/no-go" proposition. Violation of those rules results in dismissal of the offensive application. Without the amendment, which the Commission cannot accept, Healdsburg must be dismissed.

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<sup>8</sup> See Goodlettsville Broadcasting, Inc., 66 Rad. Reg. 2d (P&F) 146 (Rev. Bd. 1989); Saxton Steele Communications, 67 Rad. Reg. 2d (P&F) 355 (Rev. Bd. 1989). Further, Healdsburg did not request a waiver of §§ 73.207 and 73.215. Even if it had, it would not have been well taken, as fully spaced sites are available for the facility. See Naguabo Broadcasting Co., 68 Rad. Reg. 2d (P&F) 1325 (Rev. Bd. 1991).

<sup>9</sup> See Naguabo Broadcasting Co., 68 Rad. Reg. (P&F) 1325 (Rev. Bd. 1991).

In light of the foregoing, the proffered amendment cannot be accepted, and as a result, Healdsburg's application must be dismissed as unacceptable for tender, as it violates Rule Sections 73.207 and 73.215.

Respectfully submitted,  
BECKWITH COMMUNICATIONS, INC.

By: Marjorie K. Conner  
George L. Lyon, Jr.  
Marjorie K. Conner

Its Attorneys

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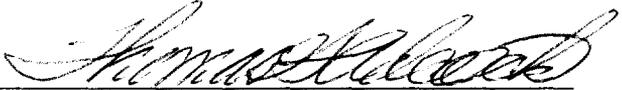
(202) 857-3500

October 18, 1991



HBI's proposed facilities except where the radiation pattern has been modified by HBI in its proposed amendment to greatly reduce the effective radiated power along selected radials, i.e. approximately those within the southeast quadrant.

6. The foregoing statements of fact are true and correct to the best of my own personal knowledge and belief, and are proffered in good faith.

  
THOMAS G. ADCOCK, P.E.

Subscribed to and sworn to before me  
this 18<sup>th</sup> day of October, 1991

  
Notary Public

My commission expires: ~~My Commission expires~~ June 14, 1993

CERTIFICATE OF SERVICE

I, Lydia H. Redfearn, Secretary in the law firm of Lukas, McGowan, Nace & Gutierrez, Chartered, certify that true copies of the foregoing document were sent this 18th day of September 1991, via first class mail, postage prepaid, to the following:

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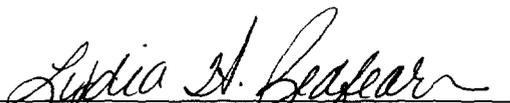
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