

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

MM Docket No. 92-96

In re Applications of

JAMES KILLINGER File No. BPH-910311MA
CORNICK
(hereafter "Cornick")

COPE II File No. BPH-910312MF
BROADCASTING
PARTNERS
(hereafter "Partners")

For Construction Permit
for a New FM Station
on Channel 278A
in Marion, Virginia

HEARING DESIGNATION ORDER

Adopted: April 23, 1992;

Released: May 5, 1992

By the Chief, Audio Services Division:

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

2. *Petition to Deny*. Under the new spacing rules in 47 CFR § 73.207 for Class A stations adopted in the *Second Report and Order* in Docket 88-375, 4 FCC Rcd 6375, released August 18, 1989, the tower location submitted by Cornick must be separated from co-channel Class C station WIMZ-FM, Knoxville, TN by at least 226 kilometers (km). The actual proposed spacing is 219.9 km. Recognizing this, Cornick's application requests processing under the contour overlap provisions of 47 CFR § 73.215. Cornick's application indicates that no prohibited contour overlap will exist with WIMZ-FM, assuming WIMZ-FM is operating with 100 kilowatts (kW) effective radiated power (ERP) at 600 meters (m) height above average terrain (HAAT).

3. On July 2, 1991, a "petition to dismiss or deny" ("petition") was filed against the Cornick application by Partners. Partners argues that the location proposed by Cornick is short-spaced to WIMZ-FM and that Cornick's contour map (which shows no prohibited contour overlap) is in error. Specifically, Partners demonstrates that prohibited contour overlap will occur between Cornick's proposal and WIMZ-FM. Partners states that Cornick may not amend to rectify this deficiency since the thirty day amendment-of-right period following the release of the Notice of Tender has elapsed. Consequently, Partners urges dismissal of the application.

4. An analysis conducted by the staff using the provisions of 47 CFR § 73.215 (and considering WIMZ-FM as if it were operating with 100 kW ERP/600 m HAAT) in-

FCC MAIL SECTION

indicates that up to 9.14 km of prohibited contour overlap will be created between the azimuths of 227° T and 269° T between the 40 dBu interfering contour of WIMZ-FM and the protected 50 dBu contour of Cornick's proposal, as originally filed. As a result, Cornick's original proposal will receive interference. However, Commission policy permits those applicants applying under 47 CFR § 73.215 with deficiencies in their contour overlap studies to have one opportunity to rectify the errors. This policy was adopted due to confusion over the interpretation of the provisions of 47 CFR § 73.215, which caused some applicants reading this rule to fail to reach the proper conclusion (as was the case here). See generally *Rochelle C. Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985). Our records reveal that, on August 6, 1991, Cornick petitioned for leave to amend his application. Our engineering analysis of the application, as amended, reveals that it now complies with 47 C.F.R. § 73.215. In light of the above, we will, for good cause shown, grant Cornick's petition for leave to amend, accept the amendment, and dismiss Partners' petition as moot. Nevertheless, because the accompanying amendment was filed after June 10, 1991, the last date for filing minor amendments as of right, and applicants may not improve their comparative position after the time for filing amendments as of right has passed, we will disallow any comparative advantage resulting from the amendment.

5. *Environmental*. An engineering study based upon OST Bulletin No. 65, October, 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," reveals that Partners did not address how it would protect workers on its tower from RF radiation exposure. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Partners 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 Partners 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 applicant 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, Partners 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 Assessment, 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 proposal. See 47 C.F.R. § 1.1308(d).

6. *Financial.* In response to Item 3, Section III of FCC Form 301 ("Financial Qualifications"), Partners has not provided the name of the contact person of its source of funds. Partners shall submit an amendment to the presiding Administrative Law Judge.

7. *FAA.* Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Partners 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.

8. *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.

9. *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.

10. 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 Partners 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 National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1.1319.
2. To determine whether there is a reasonable possibility that the tower height and location proposed by Partners would constitute a hazard to air navigation.
3. To determine which of the proposals would, on a comparative basis, better 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.

11. IT IS FURTHER ORDERED, That the Partners "Petition to Dismiss or Deny" IS DENIED, and that the petition for leave to amend filed by Cornick IS GRANTED and the corresponding August 6, 1991 amendment IS ACCEPTED to the extent indicated in paragraph 4.

12. IT IS FURTHER ORDERED, That in accordance with paragraph 5 hereinabove, Partners shall submit the environmental assessment 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.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 6 hereinabove, Partners shall submit the amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

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

15. 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 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.

16. 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. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. See generally *Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

17. 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