

FCC MAIL SECTION
Before the
Federal Communications Commission
Washington, D.C. 20554
AUG 5 3 13 PM '92

MM Docket No. 92-170

DISPATCHED BY

In re Applications of

LIBERTY
UNIVERSITY, INC.
(hereafter "Liberty")
Channel 210A (89.9 MHz)
Lynchburg, Virginia

File No. BPED-911206MB

VISION
COMMUNICATIONS, INC.
(hereafter "Vision")
WRXT (FM)
Channel 212C2 (90.3 MHz)
Roanoke, Virginia

File No. BMPED-920414IF

For Construction Permits for New
and Modified Noncommercial
FM Facilities

HEARING DESIGNATION ORDER

Adopted: July 28, 1992;

Released: August 3, 1992

By the Chief, Audio Services Division:

1. The Commission has under consideration the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.¹

2. *Preliminary Matter.* Liberty proposes to construct a new, noncommercial educational FM station to serve Lynchburg, Virginia on Channel 210A (89.9 MHz); Vision proposes to modify its existing construction permit (BPH-880801ME) by changing its transmitting antenna location and height and by adding a directional antenna to its facility serving Roanoke on Channel 212C2 (90.3 MHz).² Section 73.509 of the Commission's rules states, in pertinent part, that applications for new or modified noncommercial FM facilities will not be accepted if the proposed operations of adjacent-channel facilities involve

overlap of the interfering (80 dBu) and protected (60 dBu) signal strength contours of the respective stations. According to our engineering analysis, it is clear that the proposals are involved in overlap situations. Therefore, the applications are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Co. v. FCC*, 326 US 327 (1948).

3. *Liberty.* Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Liberty 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.

4. Section II, Item 4 of FCC Form 340 (May, 1985) requires applicants to specify the residential address for each member of its governing board. Liberty has not completed this item correctly, providing a post office box number for three and apparent business addresses for twelve of its trustees.³ Accordingly, Liberty must submit an amendment giving all the information required by this item to the presiding Administrative Law Judge within thirty days of the release of this Order.

5. *Vision.* Vision proposes to construct a new tower on Taylors Mountain in Roanoke County, Virginia. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Vision 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 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Vision's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Specifically, Vision must amend its showing to address the issue of potential occupational hazards caused by the proposed facility. This amendment should explain what steps will be taken to limit the RF radiation exposure to persons authorized access to the tower.⁴ Accordingly, Vision will

¹ Vision's application proposes to change its area served by approximately 41%, and is therefore treated as a minor application pursuant to Section 73.3573(a)(1).

² Vision's construction permit (BPED-880801ME) was granted October 4, 1991. Since its instant application was filed within nine months of this date, Vision is required by Section 73.3535(a) of the Commission's rules to provide a statement that it will "immediately begin building after the modification is granted." See *Memorandum Opinion and Order*, 102 FCC 2d 1054 (1985). Vision will be required, therefore, to amend its application to provide this certification.

³ Exhibit 2 to Liberty's application includes the Liberty Uni-

versity Board of Trustees. The list provides only post office boxes for Trustees Pate, Dobson and Gage. In addition, the addresses listed for trustees Crain, Dinsbier, Fitzpatrick, Graham, Merritt, Rhodenhizer, Smith, Sweet, Thompson, Thorpe, Vines and Lovett are those of the various churches each serves. It is not clear from this exhibit whether these addresses are meant to connote residence as well.

⁴ Vision's engineering report states that workers will be instructed to limit their exposure to RF fields to six minutes "when visits to the site by authorized personnel require exposure to RF fields in excess of 1.0 mV/cm squared." OST Bulletin 65 states, however, that exposure must be *time-averaged*

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 Vision's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue will be deleted and the presiding judge shall therefore not consider the environmental effects of the proposal. See 47 C.F.R. § 1.1308(d).

6. *Other matters.* The applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, 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 (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 among themselves.

7. The respective applications are for different communities, but do not propose to serve substantial areas in common. Therefore, it will be necessary only to determine pursuant to Section 307(b), which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

8. Inasmuch as it appears that there would be a significant difference in the size of the 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.

9. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding.

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

2. If a final environmental impact statement is issued with respect to Vision 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. §§ 1.1301-1319.

3. To determine, where appropriate: (a) the number of other reserved channel noncommercial, educational FM services available in the proposed service area of each applicant, and the area and populations served thereby; (b) whether a share-time arrangement between the applicants would result in the most efficient 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.

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

11. IT IS FURTHER ORDERED, That Vision shall submit the certification noted in footnote 2 of this Order to the presiding Administrative Law Judge within thirty days of the release of this Order.

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

13. IT IS FURTHER ORDERED, That Liberty shall submit the appropriate amendment containing all information required by Section II, Item 4 of FCC Form 340 to the presiding Administrative Law Judge within 30 days of the release of this order.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Vision shall submit the environmental assessment required by § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

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 be served on the Chief,

over a six minute period. This means, for example, that if a worker is exposed to twice the ANSI levels for three consecutive minutes, he or she must not be exposed at all during the

subsequent three minute period. Given this fact, Vision will be required to amend its application to include a further explanation on this matter.

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.

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