

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

**ORIGINAL
FILE**

original
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AUG 12 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Applications of)
)
ROBERT B. TAYLOR)
)
For Renewal of License for)
Station WTRU (FM))
Jupiter, Florida)
)
JUPITER BROADCASTING)
CORPORATION)
)
For Construction Permit for a)
New FM Station in Jupiter, Florida)
)
)
To: Honorable Walter C. Miller
Administrative Law Judge

MM Docket No. 92-114
File No. BRH-80926UJ
File No. BPH-890103MD

**TAYLOR OPPOSITION TO SECOND PETITION
TO ENLARGE ISSUES**

Robert B. Taylor, by counsel, hereby opposes the Second Petition to Enlarge Issues filed by Jupiter Broadcasting Corporation ("JBC") on July 24, 1992. In support of the opposition, it is stated as follows:

1. JBC requests addition of two misrepresentation issues on the grounds that Mr. Taylor made misrepresentations in response to JBC pleadings and discovery requests. It alleges that Mr. Taylor misrepresented his motivation for participating in a Melbourne, Florida rulemaking proceeding by virtue of his response to JBC's Motion For Partial Summary Decision and his response to

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Admission Request No. 57 , and misrepresented his motivation for filing a White City, Florida counterproposal in a Jupiter, Florida rulemaking by virtue of his response to JBC Admission request No. 154.

Melbourne Rulemaking

2. In its first petition to enlarge, JBC asserted (First Pet., p.20) that Mr. Taylor "was, himself, the proponent of the second WTRU frequency change." JBC further stated that "WTRU (FM) was a proponent of the Jupiter, Florida channel change advocated in the Melbourne FM rule making. This second WTRU (FM) channel change was an attempt to obtain a frequency that could be upgraded to a higher Class FM allotment." By stating that Taylor was "the proponent" of the second frequency change, JBC was alleging that Mr. Taylor was responsible for the Melbourne rulemaking petition. By stating that the second channel change "was an attempt to obtain a frequency that could be upgraded, JBC was asserting that Taylor was a proponent of the Melbourne channel change and that he was involved for the purpose of obtaining an upgrade of his Jupiter facility.

3. Mr. Taylor, in his opposition, denied the above allegations by JBC and maintained that he was not "the proponent" but had acquiesced in the rulemaking that had been filed by Silicon East Communications Corporation ("Silicon East") because he was faced with the choice of either agreeing to the proposed channel change or filing an opposition. He stated in his opposition that he agreed to support the channel change in order to avoid prolonged delay. JBC

bases its request for a misrepresentation issue on this denial.

4. In its First Request for Admissions, JBC listed the following admission: "The reason Robert B. Taylor consented to the proposal of Silicon East Communications Corporation to upgrade the channel of Station WAOA, was that he was seeking a channel on which Station WTRU (FM) could be upgraded to a higher class facility".

5. Thus, in Admission Request No. 57, JBC was asking Taylor to admit that he consented to the Silicon East proposal because he was "seeking a channel on which ... WTRU (FM) could be upgraded"; Taylor denied the admission. JBC alleges that Mr. Taylor's denial of Admission Request No. 57 constituted a misrepresentation.

6. Attached hereto as Attachment A is a declaration under penalty of perjury of Robert B. Taylor who states that he denied the JBC admissions request because he had nothing to do with the Silicon East filing and was not "seeking" any channel change when Silicon East filed its petition. Also attached hereto as Attachment B is a declaration under penalty of perjury of Gary Hess, one of the owners of Silicon East Communications Corporation, licensee of WVTI (FM), Melbourne, Florida. Silicon East filed the petition for rulemaking which requested the Jupiter channel change so that WVTI (then WAOA) could be upgraded to Class C1 on Channel 296A.

7. In his declaration, Mr. Hess states that there was no discussion with Mr. Taylor before the petition was filed and that it was filed without Mr. Taylor's prior knowledge or approval. He states that after the filing of the rulemaking

petition, he contacted Mr. Taylor by telephone and encouraged him not to oppose the petition because the filing of an opposition would delay final approval of the proposal. He states that Mr. Taylor was concerned with returning his station to the air but agreed that consenting to the proposed channel change would result in a speedier resolution of the rulemaking. Finally, he states that: "I pointed out to Mr. Taylor that one side benefit of accepting rather than fighting against the new channel was a possibility, of which he was unaware, that 99.5 Mhz could be upgraded."

8. Mr. Taylor's letters to counsel referred to by JBC are consistent with Mr. Hess's declaration and Mr. Taylor's prior statements in his opposition. It is clear from Mr Hess's declaration that JBC's assertion in its first petition to enlarge that Mr. Taylor "was ,himself, the proponent of the second WTRU frequency change" is inaccurate which is what Mr. Taylor stated in his opposition. The fact is Silicon East proposal had been filed and the channel change was ultimately going to occur whether Mr. Taylor liked it or not. The fact that Mr. Taylor contacted counsel to follow up on Mr. Hess's suggestion that the channel proposed for his station by Silicon East (99.5 mHz) could be upgraded does not lead to the conclusion that "the reason" he supported the Silicon East proposal was that he was seeking a channel on which he could upgrade WTRU (FM).

9. In his January 25, 1988 letter, Mr. Taylor refers to filing a petition for rulemaking to implement the upgrade of which Mr. Hess informed him, but he also states that "[m]eanwhile, here in jupiter I will be working to put both radio

stations back on the air. The FM will go back on with the old existing class A facilities (3000 watts @ 300 feet HAAT) pending the FCC acting on our petition to upgrade to class C2." The fact is that when the station returned to the air it was with Class A facilities.

10. In view of the foregoing, it is clear that JBC was incorrect when it asserted that Mr. Taylor was "the proponent" of the rulemaking and Mr. Taylor properly denied that fact in his opposition. JBC has made an unsupported assumption that Mr. Taylor's statements in his opposition and in his responses to admission requests were misrepresentations based on his letters to counsel having mentioned filing for an upgrade on the new channel. The Hess and Taylor declarations make it clear that Mr. Taylor's primary reason for not opposing the SEC petition was to avoid delay in the determination of what channel he would finally get, and not to obtain an upgraded channel. The references cited by JBC simply show that Mr. Taylor was only following up on Mr. Hess's suggestion that the proposed channel could be upgraded.

11. It is clear that JBC has failed to meet its burden of establishing a prima facie case for addition of the requested Melbourne rulemaking misrepresentation issue.

White City, Florida Rulemaking

12. JBC bases its request for this misrepresentation issue on Mr. Taylor's denial of Admissions Request No. 154, and statements in his August 22,

1988 letter to counsel. Request No. 154 stated:

Exhibit No. 22 was filed in an attempt to prevent the creation of a new FM allotment for Jupiter, Florida.

Mr. Taylor denied this request. JBC points to the letter to counsel in which Mr. Taylor made reference to the fact that the proposal to move 105.5 MHz from Vero Beach to Jupiter would be a second FM for Jupiter and stated that "I feel that I must do all I can to stop this allotment".

13. Attached hereto as Attachment C is a declaration under penalty of perjury by James R. Bayes, Esquire. Mr. Bayes states that in his experience " it is not unusual to receive this kind of reaction to a rulemaking proposal from a licensee". He further states that after receiving Mr. Taylor's letter he had a telephone conversation with him in which he explained that a counterproposal to the Jupiter proposal could not be filed unless Mr. Taylor was genuinely interested in having the channel placed in another community and was willing to commit himself to the filing of an application if his requested channel was assigned. Mr. Bayes states that Mr. Taylor indicated that he understood these requirements after their conversation and was willing to proceed on that basis.

14. Also attached hereto as Attachment D is a declaration under penalty of perjury of Robert B. Taylor. Mr. Taylor states that when he first heard about the possible allocation of a second FM channel to Jupiter he was surprised that a second channel was being proposed for Jupiter and believed that it would make more sense to allot the channel to a growing community with no station. He

states that he personally researched White City which is located in the fast-growing "Treasure Coast" area. He states that he spent time in the community after talking to Mr. Bayes and came to the conclusion that the White City area deserved first service more than Jupiter needed a second FM station. He states that he felt that a White City station would be a desirable acquisition, and did not feel that it was improper to propose that the Vero Beach allotment be made somewhere else where it would provide a first service as long as he was willing to file for the proposed channel.

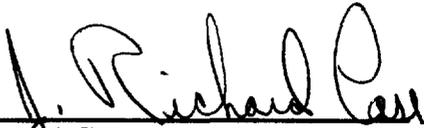
15. After discussing the matter with Mr. Bayes, Mr Taylor states that Mr. Bayes made him aware that if he filed a counterproposal it had to be based on a willingness to apply for the requested channel, and he states that "I told the Commission and I meant it, that I would apply for channel 288A if it was allotted to White City", and, it was for this reason that he could not agree with Request No. 154. He points out that he supported the White City allotment in another rulemaking proceeding in which Channel 267A was proposed for Port St. Lucie, a counterproposal was filed by Treasure Coast Media, Inc. urging the allotment of Channel 288A to Port St. Lucie which would have precluded its use in either Jupiter or White City. Taylor filed comments in the Port St. Lucie proceeding urging denial of the Treasure Coast Media proposal pointing out that allotment of Channel 267A as originally proposed would allow first local service to both Port St. Lucie and White City. Finally, he states that he did not file for White City after the channel was allotted because, by that time, circumstances had changed

in that the renewal challenge had been filed by JBC, and, because the Commission allotted a different channel than he had requested. The Presiding Judge is aware by reason of presiding in the White City proceeding that numerous applications were filed by applicants who also believed that White City was a desirable community for an FM station.

16. JBC 's entire argument on the White City rulemaking is based solely on the words about stopping the allotment in the single letter. JBC had no knowledge of the subsequent discussions with counsel. In view of the facts set forth in the attached declarations concerning the actual circumstances of the White City rulemaking proposal, it is clear that Mr. Taylor properly denied Admissions Request No. 154. The requested White City rulemaking misrepresentation issue should not be added.

Respectfully submitted,

ROBERT B. TAYLOR

By: 
J. Richard Carr
His Attorney

August 12, 1992

P.O. Box 70725
Chevy Chase, MD 20813-0725

ATTACHMENT A

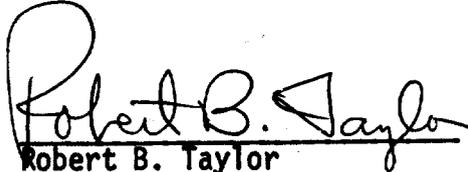
DECLARATION OF ROBERT B. TAYLOR

In its First Request for Admissions, JBC listed the following admission request No. 57 to Mr. Taylor: "The reason Robert B. Taylor consented to the proposal of Silicon East Communications Corporation to upgrade the channel of Station WAOA, was that he was seeking a channel on which Station WTRU (FM) could be upgraded to a higher class facility." I denied this admission request because it alleged that I was "seeking a channel on which...WTRU (FM) could be upgraded." I deny that I ever was "seeking" any channel change at all for any reason.

At that time, U.S. Three Broadcasting Corp. was faced with a Petition for Rulemaking filed by Silicon East Communications Corp. which U.S. Three did not initiate or authorize Silicon East to file. After a discussion with the president of Silicon East, Gary Hess, I decided that the fastest way to get WTRU (FM) back on the air was to support the Silicon East petition instead of opposing it because by opposing it WTRU would have been forced to remain dark during the long opposition process at the FCC. That was the immediate reason why I "consented to the proposal of Silicon East."

It is true that Gary Hess, who also is an RF engineer, told me that the frequency chosen by Silicon East, 99.5 MHz, might be upgradable (in fact it was not). Based on Hess's assertions, I asked my counsel at the time, James Bayes, to file at the Commission to attempt to upgrade the 99.5 MHz frequency. WTRU was being forced to use 99.5 MHz instead of 107.1 MHz as a result of the Silicon East Petition for Rulemaking. I was not "seeking" a channel change as JBC alleges, and for this reason could not admit to an inaccurate JBC allegation. The only way to answer JBC's admission No. 57 was to deny it.

I declare, under penalty of perjury, that the foregoing statements are true and correct.


Robert B. Taylor

ATTACHMENT B



DECLARATION OF GARY HESS

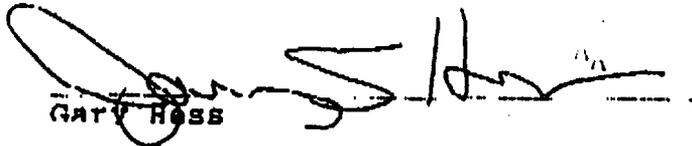
My name is Gary Hess and I am one of the three owners of Silicon East Communications Partnership ("SEC"), licensee of WAOA-FM (formerly WVTI), Melbourne, Florida.

SEC submitted a petition for rulemaking on February 27, 1987 to amend Section 73.202 (b) of the Commission's Rules to substitute Channel 258A (99.5 Mhz) for Channel 296A (107.1 Mhz) at Jupiter, Florida. The purpose of the petition was to permit WAOA (FM) to upgrade its facilities to Class C1 on Channel 296A.

I was aware that the Jupiter station was authorized to operate on Channel 296A as the result of an earlier rulemaking petition, but had not yet begun operation on that channel. There was no discussion with Robert Taylor, owner of the Jupiter station, prior to the filing of the SEC petition. The petition was filed without his prior knowledge or approval.

After the filing of the petition, I contacted Mr. Taylor by telephone. I encouraged him not to oppose the petition. He as concerned with returning his station to the air but did not want to resume operation on 107.1 MHz only to have to move channels again as a result of the SEC petition. We discussed the potential for delay that an opposition by him would create, and we agreed that his willingness to accept 99.5 MHz would result in a speedier resolution of the rulemaking. I have an engineering background, and in order to encourage him to cooperate, I pointed out to Mr. Taylor that one side benefit of accepting rather than fighting against the new channel was a possibility, of which he was unaware, that 99.5 MHz could be upgraded. Unfortunately, the upgrade was later prevented by an assignment to Vero Beach.

I declare, under penalty of perjury, that the foregoing is true and correct.


GARY HESS

8/5/78
Date

WAOA FM Executive Offices:

1775 W. Hibiscus Blvd., Suite 300 • Melbourne, FL 32901 • (407) 984-1000 • FAX (407) 724-1565

DECLARATION OF JAMES R. BAYES

I am a partner in the law firm, Wiley, Rein & Fielding, specializing in the practice of communications law.

My firm represented Robert B. Taylor and certain corporations owned by him which were the licensees of the Jupiter, Florida radio stations in matters before the Federal Communications Commission from 1985 until approximately January 20, 1989. During the course of our representation, I received a letter from Mr. Taylor dated August 22, 1988 regarding the Notice of Proposed Rulemaking in MM Docket No. 88-366, which proposed allotment of Channel 288A to Jupiter, Florida as that community's second FM service. In his letter, Mr. Taylor stated that he was not interested in having a new FM competitor in his city of license and indicated that he wished to stop the proposed allotment. He indicated that he was interested in filing comments in the proceeding to ask the Commission to allot the channel instead to a community without an existing aural service and suggested White City, Florida, a community north of Jupiter.

In my experience, it is not unusual to receive this kind of reaction to a rulemaking proposal from a licensee. I spoke with Mr. Taylor by telephone on at least one occasion shortly after receipt of his letter and informed him that it was not permissible to file a counterproposal suggesting another community based solely on a desire to keep the channel out of Jupiter. I explained that the Commission required that the proponent of a counterproposal state an

intention to file an application for the new channel if the proposal were to be granted. I also told Mr. Taylor that he should not file a counterproposal unless he had a genuine interest in having the new channel placed in the proposed community and in operating a station there.

In this or another telephone conversation prior to the filing of the counterproposal, Mr. Taylor indicated to me that he understood the FCC's requirements, believed that a White City station would be an attractive proposition for him, and was willing to proceed on that basis. Accordingly, I filed the comments and counterproposal in MM Docket No. 88-366 on Mr. Taylor's behalf on September 23, 1988. The filing included information on White City, some of which was provided to me by Mr. Taylor, and urged allotment of the new channel to White City instead of Jupiter.

I declare, under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge and belief.


James R. Bayes

August 11, 1992

ATTACHMENT D

DECLARATION OF ROBERT B. TAYLOR

When I first heard about the proposed allocation of a new FM channel to Jupiter for a new FM radio station, I was surprised that a second channel was being proposed for Jupiter when there were several growing communities to the north that had no radio station. It made more sense to me to allot the channel to one of those communities than to place it in Jupiter to compete with my two radio stations.

I had been aware of and had followed the growth that was taking place in the area north of Jupiter which had become known as the "Treasure Coast". When the Jupiter proposal was filed, I went to White City and personally researched the community to see if there was a sufficient base for a radio station. I spent some time in the area and was convinced that this was an area that deserved first service more than Jupiter needed a second FM.

When I wrote to my attorney, Jim Bayes, I expressed my desire to not see another station in Jupiter and pointed out that I had located White City as an alternative, and that I wanted to file a counterproposal. Mr. Bayes telephoned me and said that he had noted that I had used the phrase that I wanted to "stop" the Jupiter allotment. Mr. Bayes informed me that in order to file a counterproposal that would suggest another location for the channel, I had to be genuinely interested in filing an application for the alternative community and not just in keeping the community out of Jupiter, and, had to be prepared to file such application if the Commission assigned the channel to the community I proposed.

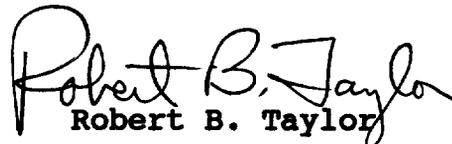
I proceeded with the counterproposal with the understanding that if my proposal were accepted and the allotment to White City was made, I would be obligated to go forward with an application for the channel so that the FCC would be assured that there would be at least one applicant for White City. I told the Commission and I meant it that I would apply for Channel 288A if it was allotted to White City. My counterproposal was filed on September 23, 1988 and proposed that Channel 288A be allotted to White City instead of Jupiter.

In another proceeding in which the allotment of Channel 267A was proposed for Port St. Lucie, a counterproposal was filed by Treasure Coast Media, Inc. proposing the allotment of Channel 288A which would have precluded the use of that channel in either Jupiter or White City. I filed comments urging denial of the Treasure Coast proposal pointing out that allotment of Channel 267A would allow first local service to both Port St. Lucie and White City.

The FCC acted on the White City rulemaking in mid-1989 and allotted Channel 288A to Jupiter as originally proposed, and also allotted Channel 284A to White City. However, by the time the FCC acted, my situation had drastically changed because I was facing the renewal challenge filed by JBC. I also believed that since my proposal to allot Channel 288A had not been adopted that I was not required to file an application.

JBC Admissions Request number 153 was asking me to agree that I never had any intention of applying for White City. This was not correct and I said so. Request number 154 was asking me to agree that my counterproposal "was filed in an attempt to prevent the creation of a new FM allotment for Jupiter". I did not agree with number 154 because, as stated above, I believed that my counterproposal was a more sensible use of the channel, but even more to the point, Mr. Bayes had explained the procedure to me and I intended to apply for White City when I filed my counterproposal. It was not filed to prevent the Jupiter allotment.

I declare, under penalty of perjury, that the foregoing statements are true and correct.


Robert B. Taylor

ATTACHMENT C

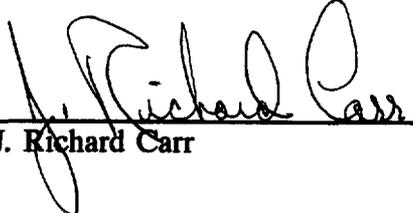
CERTIFICATE OF SERVICE

I, J. Richard Carr, hereby certify that copies of the foregoing Taylor Opposition to Second Petition to Enlarge Issues were sent via first class mail, postage prepaid, or as otherwise indicated, to each of the following on this 12th Day of August, 1992:

Hon. Walter Miller*
Administrative Law Judge
Federal Communications Commission
2000 L Street, NW
Washington, DC 20554

Norman Goldstein, Esq.*
Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, NW
Suite 7212
Washington, DC 20554

Joseph A. Belisle
Leibowitz & Spencer
One S.E. Third Avenue
Suite 1450
Miami, Florida 33131
Counsel for Jupiter Broadcasting Corp.



J. Richard Carr

* By hand delivery