

within 15 days after the facts are discovered by the moving party. Here, JBC does not state when it learned about Taylor's alleged misrepresentations and discovered additional facts regarding Taylor's filings in the Jupiter/White City rule making. However, it appears that the documents upon which the allegations are predicated were furnished to JBC on July 23, 1992, pursuant to its document production request. Accordingly, it appears that JBC meets the requirements of § 1.229(b)(3) of the Commission's Rules.

Misrepresentation (Melbourne)

4. JBC recites that in its first petition to enlarge the issues against Taylor, it alleged that Taylor's filings in the Melbourne, Florida rule making (MM Docket No. 87-233) were motivated by a desire to obtain a frequency which could be upgraded to a higher class FM allotment. JBC repeated that allegation in its May 22, 1992, Motion for Partial Summary Decision. JBC notes that in objecting to JBC's motion for summary decision and in a response to an admission request by JBC, Taylor denied that the reason he consented to moving to channel 258A was his desire to upgrade. JBC submits that Taylor's denials constitute misrepresentations, because in a letter to his then counsel, Taylor requested that action be taken to have the Commission allot channel 258C2 rather than 258A to Jupiter.

5. Misrepresentation involves false statements of fact while lack of candor involves concealment, evasion or other failures to be fully informative. Both represent deceit. The seriousness of either offense depends on the facts and circumstances of the particular case. Crucial to both is the existence of an intent to deceive. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983).

6. In the Bureau's view, no misrepresentation occurred. While JBC points to the apparent discrepancy between Taylor's explanations and denials on the one hand and the thoughts contained in Taylor's letter to his counsel on the other, JBC posits no motive for Taylor to misrepresent his actions or intentions in the Melbourne/Jupiter rule making. JBC has thus failed to raise a question about Taylor's intent to deceive. In any event, a close examination of Taylor's responses reveals no misrepresentation. The proposal to change the Jupiter frequency from channel 296A to channel 258A was not initiated by Taylor, but by the Melbourne licensee. Taylor was simply reacting. Taylor's station had just been moved to channel 296A and had not yet resumed broadcasting. Taylor could either acquiesce in the Melbourne licensee's proposal or fight it. Were he to fight and lose after having put his station back on the air at channel 296A, he would undergo the disruption attendant to a second change in channels. By acquiescing, Taylor could avoid the disruption and, perhaps, upgrade his own station to a C2. Taylor

admitted as much.¹ Thus, while it appears that one of the reasons Taylor acquiesced in the allocation of channel 258A to Jupiter was the possibility of upgrading that channel to C2 status, it does not follow that that was his sole reason. Accordingly, it does not appear that Taylor misrepresented facts regarding the Melbourne/Jupiter rule making either in his response to JBC's motion for partial summary decision or by denying JBC's admission request about the reason for his consent to the channel change.

Abuse of process/Misrepresentation

7. In its first petition to enlarge the issues against Taylor, JBC alleged, inter alia, that Taylor had abused the Commission's processes by filing a spurious counter proposal in MM Docket No. 88-366, which sought to add channel 288A to Jupiter. See Notice of Proposed Rule Making, 3 FCC Rcd 4695 (1988). In that proceeding, Taylor, through his solely owned U.S. Three Corporation, submitted a counter proposal that channel 288A be allotted to White City, Florida. In opposing JBC's petition and denying a companion admission request, JBC contends, Taylor made it appear that U.S. Three Corporation's counter proposal of channel 288A for White City was genuine and that it

¹ In Taylor's objection to JBC's motion for partial summary decision, Taylor states that he asked for an upgrade on 258, but was told it was precluded. See JBC's "Second Petition to Enlarge Issues Against Robert B. Taylor" at p. 2.

had intended to file an application for White City.² However, as JBC observes, an August 22, 1988, letter from Taylor to his then counsel, James R. Bayes, shows that Taylor felt he had to do all he could to stop channel 288A from being allocated to Jupiter in order to avoid additional competition. JBC argues that the Taylor letter demonstrates the falsity of his denial to JBC's admission request that his counter proposal was an attempt to prevent the creation of a new FM allotment for Jupiter.

8. "The term 'abuse of process' is a very broad concept but generally can be defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure, or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule." Comparative Renewal Process, 3 FCC Rcd 5179, 5199 at n. 2 (1988). Applying the above definition to the Jupiter rule making, the Bureau agrees that Taylor's counter proposal was abusive if the only reason it was filed was to avoid competition in Jupiter. The Bureau notes that it opposed JBC's first petition to enlarge the issues regarding this matter because JBC's allegations were speculative and did not take into account a significant circumstance which would have affected

² Ultimately, channel 288A was allotted to Jupiter while 284A was allotted to White City. Table of Allotments, FM, Jupiter and White City, FL, 4 FCC Rcd 5295 (1989). Neither Taylor nor U.S. Three Corporation filed an application for channel 284A in White City.

Taylor's subsequent failure to file an application for White City, namely, JBC's competing applications.³

9. Although JBC has not addressed the Bureau's concern regarding the change in circumstances that would have led Taylor not to file an application for White City, Taylor's letter leaves little doubt that his primary, if not sole, motivation for proposing channel 288A for White City was to avoid a second FM service for Jupiter. This is in stark contrast to his denial of JBC's request that he admit that his counter-proposal "was filed in an attempt to prevent the creation of a new FM allotment for Jupiter, Florida." Thus, unless Taylor can demonstrate that he actually intended to file for channel 288A in White City, the Bureau agrees with JBC that a substantial question is raised as to whether Taylor misrepresented facts when he denied JBC's admission request.

³ See "Mass Media Bureau's Comments on First Petition to Enlarge Issues against Robert B. Taylor," filed June 10, 1992, at p. 9.

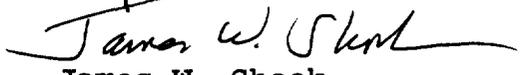
Conclusion

10. In sum, the Bureau submits that the misrepresentation issue requested by JBC with respect to the Melbourne rule making proceeding be denied but that, absent a satisfactory showing, the misrepresentation issue requested with respect to the Jupiter rule making proceeding be added.

Respectfully submitted,
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August 12, 1992

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 12th day of August, 1992, sent by regular mail, U.S. Government frank, copies of the foregoing "MASS MEDIA BUREAU'S COMMENTS ON SECOND PETITION TO ENLARGE ISSUES AGAINST ROBERT B. TAYLOR" to:

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