ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

RECEIVED

AUG 20 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL FILE

In re Applications of	)	MM Docket No. 92-111
Deas Communications, Inc.,	)	
et al.	)	File Nos. BPH-910208MB
	)	et al.
For A Construction Permit	)	
For A New FM Radio Station	)	
on Channel 240A	)	
Healdsburg, California	)	

To: The Review Board

APPEAL FROM DISMISSAL OF APPLICATION

Peter A. Casciato, A Professional Corporation
1500 Sansome Street Suite 201
San Francisco, CA 94111
(415) 291-8661

August 19, 1992

Counsel for Healdsburg Broadcasting, Inc.

No. of Copies rec'd 0+11
List ABCDE

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, DC

In re Applications of Deas Communications, Inc., et al. For A Construction Permit For A New FM Radio Station on Channel 240A Healdsburg, California	))))))))	MM Docket No. 92-111 File Nos. BPH-910208MB et al.

RECEIVED

AUG 20 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Review Board

APPEAL FROM DISMISSAL OF APPLICATION

Healdsburg Broadcasting, Inc. ("HBI"), by its attorney and pursuant to Section 1.301(a)(1) of the Commission's rules, hereby appeals the Memorandum Opinion and Order ("Order") FCC 92M-874 released August 13, 1992, dismissing its application.

A. INTRODUCTION

The presiding judge dismissed HBI's application for two reasons (1) a misperceived failure by HBI to meet the good cause requirements of 47 CFR 73.3522(b)(1) and the Commissions "hard look" rules; and (2) the erroneous recitation of the Mass Media Bureau ("Bureau") position "that HBI's failure to comply with Section 73.316(b)(2) would have resulted in HBI's application being dismissed if it had been discovered before designation of this case hearing." See Order at p. 8. As discussed below, HBI's cure of a de minimis engineering error within 12 days of its discovery met the Commission's good cause requirements. Moreover, it is neither true that HBI's error would have resulted in dismissal if discovered pre-designation (Statement of New Policy Regarding Commercial FM Applications ("Hard Look Order") 50 FR 19445, 58 P&F 2d 166 (1985)) nor did the Bureau take this position below. As a result, HBI's corrected amendment should be accepted nunc pro tunc and its application should be immediately reinstated.

B. BACKGROUND

In the Hearing Designation Order ("HDO") of this proceeding, 7 FCC Rcd 3135 (1992), the Mass Media Bureau, by its Assistant Chief, Audio Services Division, noted that HBI's amended engineering proposal for a directional antenna contained a discrepancy between the tabulation for the proposed directional pattern and the sketched pattern. See fn. 5 thereof. Nonetheless, the Bureau concluded that HBI's application was acceptable for filing (Id. at para. 8) and that HBI would be given the opportunity to cure the defects by post designation minor curative amendment that did not conflict with any previously filed

application. Id. at para. 9.[1]

In conformance with the HDO, HBI submitted its curative amendment on June 19, 1992, which the Bureau found to meet the height and contour overlap deficiencies but which, for the first time, the Bureau found to be in non-compliance with Section 73.316(b)(2) of the Commission's Rules. See Bureau June 30, 1992 Opposition To Petition For Leave To Amend at pps. 1-2. Thereafter, on July 16, 1992, in response to Memorandum Opinion and Order FCC 92M-782 ("Show Cause Order") released that same date[2], requiring that HBI show cause as to why its application should not be dismissed in light of this engineering deficiency, HBI demonstrated that the de minimis error noted by the Bureau was the result of a typographical error contained in information provided Stephen C. Petersen P.E., its consulting engineer, by Jampro Antennas, Inc. ("Jampro"), the manufacturer of HBI's proposed directional antenna. See HBI's Show Cause Response at pps. 2-3. This error was easily and speedily corrected by HBI in a concurrently filed Corrected Amendment and Petition For Leave To File Corrected Amendment.

C. Facts and Circumstances Surrounding the Typographical Error

In Attachment 1 to HBI's Show Cause Response, Benjamin Dawson, one of HBI's consulting engineers, demonstrated that the August 13, 1991 engineering Pattern Envelope information (Attachment 2 at pages 2-3 of the HBI Show Cause Response) provided Mr. Petersen, by Jampro, contained typographical errors which directly conflicted with Jampro representations to Mr. Petersen in information it provided on August 7, 1991 -- that the slope of the Jampro antenna pattern "will comply with known FCC rules" so that "a protection null will not exceed 2 dB per 10 degrees azimuth." See Attachment 2 to the HBI Show Cause Response at p. 1, the August 7, 1991 Jampro Antenna Data.[3] As Mr. Dawson further indicated in his engineering statement, and as Mr. Dye confirmed in his declaration, although the antenna pattern was intended by Jampro to be symmetrical around the 150 degree bearing, Jampro's typing error resulted in a relative field of 0.64 rather than 0.62 in the relative field value for 190 degrees, resulting in incorrect

---

[1] The Bureau also added the admonition that if the amendment for any other reason was unacceptable for filing it would be dismissed. Id.

[2] Counsel for HBI was provided a pre-publication copy of the Order by the presiding administrative law judge's office on July 14, 1992.

[3] See also Mr. Petersen's July 10, 1992 Declaration (Attachment 3 thereto) and the Declaration of July 10, 1992 of Eric Dye, Jampro staff engineer (Attachment 4 thereto).

interpolated values for 185 and 175 degrees in the June 19, 1992 HBI amendment. See Attachments 1-3 of HBI Show Cause Response. Jampro provided the corrected data table and pattern plot, Attachment 5 to the HBI Show Cause Response, and HBI corrected the 0.02 relative field value error in a corrected amendment which was filed with a Petition For Leave To File Corrected Amendment concurrent with HBI's Show Cause Response.

D. HBI Submitted Good Cause for its Petition for Leave to Amend File Corrected Amendment

The presiding judge correctly held that he had the authority to rule on HBI's Corrected Amendment because it had not been previously dealt with by the Commission, itself. See FCC 92M-784 at p.4 and cases cited therein. However, the denial of HBI's Petition For Leave To File Corrected Amendment and Show Cause Response for failure of good cause was in error because HBI met all of the good cause criteria of Section 73.3522(b) of the Commission's Rules.[4]

HBI acted with diligence, within a twelve (12) day period after notice of the error as contained in the Bureau's Opposition. The corrected amendment did not result from a voluntary act by HBI. In fact, the amendment is two steps removed from the purview of HBI since it occurred as a result of a typographical error from the manufacturer of the proposed directional antenna upon which HBI's engineer reasonably relied and which, as the Jampro/Dye declaration (Attachment 3 to the Show Cause Response) and associated material indicates, was represented to comply with Commission rules and, in fact, would have but for Jampro's typographical error. HBI's amendment did not require modification or enlargement of the issues and did not disrupt the orderly processes of the hearing or necessitate additional hearings, because the hearing schedule and preliminary matters thereto have been set, with which HBI is and will comply.[5] Likewise, the amendment neither claimed to nor did it afford HBI any comparative advantage nor did it prejudice any other party to the proceeding, since the correction of the typographical error and associated

---

[4] The moving party must demonstrate that [1] it has acted with due diligence; [2] the proposed amendment was not required by the voluntary act of the applicant; [3] no modification or addition of issues or parties would be necessitated; [4] the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; [5] the other parties will not be prejudiced; [6] the applicant will not gain a competitive advantage; and [7] the amendment is necessitated by events which the applicant could not have reasonably foreseen.

[5] The hearing date is October 5, 1992. Document discovery is complete. Depositions have yet to be mutually scheduled. HBI reserves all of its procedural rights to participate pending favorable outcome of this Appeal.

engineering calculations is de minimis and had no impact on the other applications in this proceeding.[6]

Acceptance of the corrected Amendment, nunc pro tunc, does not require an enlargement of the issues or the addition of new parties to the proceeding. Finally, the acceptance of the Corrected Amendment was necessitated by extenuating circumstances which the applicant itself could not have foreseen as Commission precedent indicates. Magdalene Gunden Partnership ("Gunden"), 2 FCC Rcd 5513, 5515 paras. 7-8; 63 RR2d 1647 (Rev. Bd. 1987).[7] In Gunden, the Board held that good cause existed for the acceptance of an amendment after issuance of a designation order in a comparative hearing and after the specification of a city grade coverage issue against an applicant, North Bay, concluding that North Bay's actions to correct its major problem within seven weeks were prompt and duly diligent because the time for calculating diligence commenced on the date of notice of the problem -- in Gunden, the date of specification of a transmitter issue by the presiding judge. 63 RR2d at paras. 8-9. The Board also held that even though North Bay's engineer did not follow either his own normal or good engineering practices concerning North Bay's original site (the cause of North Bay's problem), North Bay was entitled to and did rely upon their engineer's recommendation on a highly technical matter. Thus, it would be unfair to saddle an applicant with the failure of its professional engineer with regard to "an issue of a highly technical and esoteric error," which when corrected, provided the required city grade coverage. Id. at paras. 6-9.[8]

HBI's facts are much less egregious than North Bay's. Here, the technical error is much more esoteric, yet much less significant than city grade coverage, a sine qua non of both acceptance and grant of an application. Moreover, unlike Gunden the error originates not with its expert consulting engineer but with typographical errors from the antenna manufacturer, itself. Neither the Bureau in its review of HBI's application nor its September 27, 1990 amendment discovered the de minimis error. Likewise, not even HBI's additional expert engineers, Hatfield & Dawson could recognize the errors in HBI's June 19, 1992

---

[6] No applicant has a vested right in any other applicant's dismissal or disqualification. Croswaith v. FCC, 44 RR2d 107 (D.C. Cir. 1978).

[7] Recon. denied 3 FCC Rcd 488; rev. denied on other grounds, 3 FCC Rcd 7186 (1988) pet. for recon. denied, 5 FCC Rcd 2509 (1990) aff'd in part and reversed and remanded in part 69 RR2d 613, 615-616, sub nom Marin TV Services Partners, Ltd. v. FCC (D.C. Cir. 1991).

[8] The D.C. Circuit, in turn, affirmed both the Board and later the Commission, stating that the expert could not have foreseen the technical issues and the necessity to amend its application and that North Bay was entitled to rely on its expert. Marin TV Services Partners, Ltd. v. FCC, supra.

Amendment which they reviewed prior to its filing (see HBI Show Cause Response, Attachment 1 at p.1.), because they, like Stephen C. Petersen, were not aware of the existence of those typographical errors. Moreover, the typographical errors, when corrected, permit the correct calculated values so that HBI is in compliance with the requirements of Section 73.316(b)(2) of the Commission's rules, but for an outside third party's minor errors. Gunden, supra.

E. The Correction of the Jampro Error Did Not Require Dismissal Even If It Had Been Discovered Prior To Designation

The Dismissal Order is flatly wrong (at para. 8) in asserting that discovery of HBI's minor engineering error would have resulted in dismissal of HBI's application even if discovered prior to hearing.[9] The Hard Look Processing Guidelines do not state that a minor violation of Section 73.316(b) renders an application either untenderable or unacceptable for filing. Rather, the Guidelines specifically state all the requirements of Section 73.316(d) must be met and HBI so complied. See Hard Look Order, supra at 168, para 4f. It likewise provides that, if an application is accepted for filing and designated for hearing on a mutually exclusive basis and then an error is discovered making the application not grantable, either an issue will be designated or a post-designation amendment will be required. Id. at 168. No such issue is warranted here since the typographical error and resulting calculations have been explained and immediately corrected. Rather, upon notice of the error a post-designation amendment -- the diligently provided HBI corrected amendment -- should have been accepted.[10]

CONCLUSION

HBI's application should be reinstated and its Petition For Leave To File Corrected Amendment be granted nunc pro tunc.

Respectfully submitted,

Peter A. Casciato, A Professional Corporation
Counsel for Healdsburg Broadcasting, Inc.

August 19, 1992

---

[9] The Bureau never stated this in either its Opposition to HBI's June 19, 1992 Petition For Leave To Amend or its Consolidated Opposition to HBI's Petition For Leave To File Corrected Amendment and Show Cause Response.

[10] The correction of the 0.02 field value is certainly more akin to the correction of geographic coordinates, which is allowed upon a showing of due diligence (Brownfield Broadcasting Corp., 88 FCC 2d 1054, 1058 (1988)), as opposed to the presiding judge's reliance on SBM Communications, Inc., 7 FCC Rcd 3436 (1992) wherein the Commission reiterated a long-standing policy against acceptance of applications without original signatures.

CERTIFICATE OF SERVICE

I, Peter A. Casciato, certify that the following is true and correct:

I am employed in the City and County of San Francisco, California, am over the age of eighteen years, and am not a party to the within entitled action:

My business address is: 1500 Sansome St., Suite 201, San Francisco, California 94111.

On August 19, 1992, I caused the attached Appeal from Dismissal of Application to be served by causing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, to be placed in the United States Post Office mail box at San Francisco, California, addressed to the following listed people:

Joseph A. Marino, Esq.*
Chairman, The Review Board
Federal Communications Commission
2000 L Street, N.W.
Room 211
Washington, D.C. 20036

Norman B. Blumenthal, Esq.*
The Review Board
Federal Communications Commission
2000 L Street, N.W.
Room 207
Washington, D.C 20036

Eric T. Esbensen, Esq.*
The Review Board
Federal Communications Commission
2000 L Street, N.W.
Room 206
Washington, D.C 20036

Marjorie R. Greene, Esq.*
The Review Board
Federal Communications Commission
2000 L Street, N.W.
Room 201
Washington, D.C 20036

Allan Sacks, Esq.*
Chief for Law
The Review Board
Federal Communications Commission
2000 L Street, N.W.
Room 205
Washington, D.C 20036

Leland J. Blair, Esq.*
The Review Board
Federal Communications Commission
2000 L Street, N.W.
Room 203
Washington, D.C 20036

Larry Miller, Esq.
Mass Media Bureau
Federal Communications Commission
2025 M Street NW Room 7212
Washington, D.C. 20554

Lawrence Bernstein
Brinig & Bernstein
1818 N Street, NW, Suite 200
Washington, DC 20036
Attorney for Deas Communications, Inc.

Jerome S. Silber
Rosenman & Colin
575 Madison Avenue
New York, NY 10022-2585
Attorney for Empire Broadcasting Corp.

*BY MESSENGER

Peter A. Casciato