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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM DOCKET NO. 92-111
	)	
DEAS COMMUNICATIONS, INC.	)	File No. BPH-910208MB
	)	
HEALDSBURG BROADCASTING, INC.	)	File No. BPH-910211MB
	)	
HEALDSBURG EMPIRE CORPORATION	)	File No. BPH-910212MM
	)	
For Construction Permit for a	)	
New FM Station on Channel 240A	)	
in Healdsburg, California	)	

To: The Review Board

**ORIGINAL  
FILE**

**MASS MEDIA BUREAU'S OPPOSITION TO  
APPEAL FROM DISMISSAL OF APPLICATION**

1. On August 20, 1992, Healdsburg Broadcasting, Inc. ("HBI"), filed an appeal from the Memorandum Opinion and Order, FCC 92M-874, released August 13, 1992 ("MO&O"), which dismissed HBI's application. The Mass Media Bureau submits the following opposition.

2. As noted in the Hearing Designation Order, 7 FCC Rcd 3135 (1992) ("HDO"), HBI's application for a new FM station at Healdsburg, California, filed on February 11, 1991, had several engineering problems. Paragraph 8 of the HDO noted discrepancies in the height above average terrain and predicted distance contours listed in the application. These errors did not render HBI's application unacceptable for filing. Paragraph 9 of the HDO noted that HBI proposed operation which would be in violation of the prohibited contour overlap provisions of §73.215 of the Commission's Rules with respect to the license for KKHI-FM, San Francisco, California. While such a rule violation would

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normally make HBI's application unacceptable for filing, the Bureau determined that the rule was somewhat unclear and gave HBI one chance to amend.<sup>1</sup>

3. On June 19, 1992, HBI filed its amendment seeking to cure the height above average terrain discrepancies and the violation of the contour overlap rule. However, in reviewing HBI's amendment, the Bureau discovered that the directional antenna proposed by HBI would have a radiation pattern which would violate §73.316(b)(2) of the Commission's Rules which prohibits a variation of more than 2 dB per 10° of azimuth. The information provided by HBI in its "Horizontal Plane Relative Field Tabulation for Proposed Directional Antenna" (Exhibit - 3, page 2), clearly indicated that the radiation pattern which HBI proposed would vary by 2.145 dB between 180° and 190° azimuth. Accordingly, at the Bureau's request, the Presiding Judge issued his MO&O in which he rejected HBI's amendment and dismissed its application. In doing so, he noted that HBI's application violated the "hard look" policy<sup>2</sup> and HBI failed to establish good cause for its amendment.

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<sup>1</sup> The Bureau also rejected a September 25, 1991, amendment filed by HBI because discrepancies therein precluded the determination that the contour overlap problem had been resolved. Moreover, at footnote 5 of the HDO, HBI was put on notice that there were problems with the tabulation of its directional antenna pattern in the September 25 amendment.

<sup>2</sup> See Processing of FM and TV Broadcast Applications, 50 Fed. Reg. 19936, 58 RR 2d 776 (1985) (subsequent history omitted). Appendix D to the "hard look" order, which contains the tenderability criteria, i.e., items which must be deemed substantially complete and therefore sufficient for tender, is reprinted at 58 RR 2d 166 (1985).

4. HBI argues that the violation of §73.316(b)(2) of the Commission's Rules, for which its June 19, 1992, curative amendment was rejected, was not an acceptability defect under the Commission's "hard look" policy. Moreover, HBI contends that it has shown good cause for submitting yet another amendment on July 16, 1992, in which it sought to cure the rule violation contained in its earlier amendment.

5. In the Bureau's opinion, HBI's June 19 amendment, filed in response to the HDO, was unacceptable for filing because it clearly violated §73.316(b)(2) of the Commission's Rules. See Mass Media Bureau's June 30, 1992, Opposition to Petition for Leave to Amend. Had a defect of this nature been discovered by the Bureau prior to designation for hearing, HBI's application would have been returned as unacceptable for filing.<sup>3</sup> While HBI's amendment was sufficient for tender, because it contained all the required information, it was not acceptable for filing because it was not in compliance with an applicable Commission rule, i.e., §73.316(b)(2). See Appendix D to the "hard look"

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<sup>3</sup> HBI's original application contained relative field tabulation values for the directional antenna which were different from the June 19, 1992, amendment. HBI's rule violation only became readily apparent on the filing of HBI's September 25, 1991, amendment. This amendment clearly contained the Section 73.316(b)(2) rule violation. However, the staff rejected this amendment after determining that it did not resolve the contour overlap problem previously noted. The staff did not review HBI's September 25 amendment to determine if there were other defects. The staff is not required to continue processing an application or amendment, looking for additional defects, once it has determined that the application or amendment is not acceptable. Indeed, such a requirement would be a waste of the Commission's limited resources.

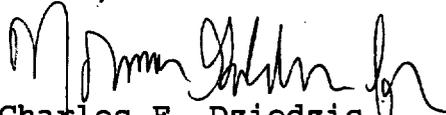
order, 58 RR 2d at 171. Moreover, HBI could not avoid dismissal of its application and amendment even had the staff inadvertently failed to detect the rule violation before designation for hearing. Pueblo Radio Broadcasting Service, 5 FCC Rcd 6278, 6279 (1990) and American Indian Broadcast Group, Inc., FCC 92-390, released August 28, 1992. Consistent with the Commission's "hard look" processing procedures, it was the responsibility of HBI, not the processing staff, to review its application and amendment to ensure that they were acceptable for filing. Pueblo Radio Broadcasting Service, 5 FCC Rcd at 6278; Kerrville Radio, 2 FCC Rcd 3441 (1987); R.A.D. Broadcasting Corporation, 4 FCC Rcd 4772, 4773 (1989).

6. HBI also failed to establish good cause for the acceptance of its July 16 amendment. As the Presiding Judge stated, HBI lacked due diligence in reviewing its application and submitting a corrective amendment. In addition, HBI has not shown that the need to amend its application was unforeseeable. See §73.3522(b)(1)(i) of the Commission's Rules. Any post-designation attempt to cure either a tenderability or acceptability defect must be analyzed in light of both pertinent "hard look" requirements and ordinary good cause considerations in order to avoid undermining the benefits of the "hard look" policy. SBM Communications, Inc., 7 FCC Rcd 3436, 3438 note 5 (1992) and Pueblo Radio Broadcasting Service, 5 FCC Rcd at 6279. The need to comply with the Commission's rules is always foreseeable. Moreover, HBI cannot avoid dismissal of its

proposal by assigning the responsibility for compliance with the acceptability criteria to the antenna manufacturer or its consulting engineers. Pueblo Radio Broadcasting Service, 5 FCC Rcd at 6279 and R.A.D. Broadcasting Corporation, 4 FCC Rcd at 4773. HBI's reliance on Magdalene Gunden Partnership, 2 FCC Rcd 5513, 5515 ¶¶ 7-8 (Rev. Bd. 1987), is misplaced because the facts are so dissimilar. In Gunden, the application complied with the Commission's rules, and thus, was found to be acceptable for filing. Here, HBI's amendment was clearly unacceptable for filing.

7. In view of the foregoing, HBI's appeal from the dismissal of its application should be denied.

Respectfully submitted,  
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September 1, 1992

**CERTIFICATE OF SERVICE**

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 1st day of September 1992, sent by regular United States mail; U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Opposition to Appeal from Dismissal of Application**" to:

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