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FCC MAIL SECTION

FCC 92M-964

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In re Applications of	DISPATCHED BY	MM Docket No. 92-114
ROBERT B. TAYLOR)	File No. BRH-880926UJ
For Renewal of License for Station)	
WTRU(FM), Jupiter, Florida)	
JUPITER BROADCASTING CORPORATION)	File No. BPH-890103MD
For Construction Permit for New FM)	
Station in Jupiter, Florida)	

MEMORANDUM OPINION AND ORDER

Issued: September 16, 1992; Released: September 18, 1992

1. Jupiter Broadcasting Corp. (JBC) seeks a ruling on a "Second Petition to Enlarge Issues Against Robert B. Taylor." They filed their Petition on July 24, 1992 and want two character issues added against Taylor: (1) for alleged misrepresentations Taylor made in his June 16, 1992 opposition to JBC's May 22, 1992 Motion for Summary Decision; i.e. misrepresentations that had their genesis in the Melbourne, Florida rulemaking proceeding, MM Docket 87-233; and (2) for alleged abuse of process misrepresentations Taylor made about his (Taylor's) participation in MM Docket 88-366 (the Jupiter and White City, Florida rulemaking.).

2. The Mass Media Bureau commented on JBC's second Petition on August 12, 1992; Taylor opposed the Second Petition the same day; and JBC replied on August 21, 1992.

Preliminary Ruling

3. JBC's second petition is untimely filed.¹ Petitions to Enlarge were due on June 11, 1992.² See 57 F.R. 22239 published May 27, 1992, and 47 CFR 1.229(b). JBC's requests involve events that occurred as early as February 27, 1987 and August 22, 1988. Moreover, JBC makes no effort to even address its lack-of-timeliness. So JBC's second petition is ruled untimely in the extreme.

1 Second, third, and fourth petitions are invariably untimely.

2 JBC certainly can file timely Petitions to Enlarge. Their "First Petition to Enlarge . . ." was filed on May 22, 1992. See FCC 92M-765 released July 10, 1992.

4. This being so, JBC must meet the Commission's reassessed Edgefield-Saluda doctrine. See Adjudicatory Re-regulations Proposals, 58 FCC 2d 865 (1976).³ There, at 873-874, the Commission said this:

" . . . An untimely motion to enlarge will be considered ully on its merits if it raises a question of probable decisional significance and of such public interest importance as to warrant consideration in spite of its untimely filing. It is expected that this standard will be strictly construed."

Ruling

5. Giving JBC's allegations the strict construction they deserve, their motion will be granted in part and denied in part.

6. JBC's first set of allegations; i.e., those relating to the Melbourne, Florida rulemaking do not raise any questions of probable decisional significance. Nor can it be said that those allegations are of such public interest importance that they warrant consideration despite their untimeliness.

7. In fact, the Trial Judge agrees with the Bureau. He can discern no misrepresentation at all, let alone a decisionally significant one. So JBC's first request is denied.

8. However, JBC's second set of allegations are another matter completely. From March 1987 until the station was deleted on January 30, 1982, Taylor's WEXI(AM) operation in Jupiter, Florida was off-the-air, apparently for reasons within Taylor's control and without color of authority. Since March 1987, Taylor's WTRU(FM) operation in Jupiter, Florida has been silent on at least three occasions without Commission authority, and there is a serious question during those periods when he was on the air whether he abdicated control of the station.

9. During that time frame, on June 29, 1988, the FCC adopted a Notice of Proposed Rule Making in Docket MM 88-366. See 3 FCC Rcd. 4695 released August 3, 1988. There the Commission indicated their intention to allot FM Channel 288A to Jupiter, Florida. A short time later, Taylor wrote a letter to his then counsel, James R. Bayes of Wiley, Rein, and Fielding. There Taylor said in pertinent part:

" . . . Regarding the petition to the FCC proposing allotting channel 288A (105.5 mhz) to Jupiter, Florida as its second FM service, I feel I must do all I can to stop this allotment. (I am not at all interested in having a new FM competitor in my city of license) . . ."

³ This reassessment, sans the strict construction admonition, has been codified as 47 CFR 1.229(c).

Taylor then went on to suggest to Bayes that Bayes' (on Taylor's behalf) should counterpropose using 288A in nearby White City, Florida.

10. Bayes then telephoned Taylor. He informed Taylor ". . . that it was not possible to file a counterproposal suggesting another community based solely on a desire to keep the channel out of Jupiter." Bayes 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." Bayes ". . . also told Mr. Taylor that he should not file a counter proposal unless he had a genuine interest in having the new channel placed in the proposed community and in operating a station there."⁴

11. Taylor indicated to Bayes 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. So Bayes 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 ". . . by Mr. Taylor, and urged allotment of the new channel to White City instead of Jupiter . . ."

12. The Chief, Allocations Branch was impressed by Taylor's presentation. The Commission made a further engineering study and found that Channel 288A could be allotted to Jupiter, as proposed, and Channel 284A could be allotted to White City, as its first local FM service. Accordingly, the Commission allocated an FM channel (284A) to White City, Florida. See 4 FCC Rcd. 5295 released June 30, 1989. But Robert Taylor never applied for White City, as he represented he would.

13. This case was designated for hearing on May 20, 1992. See 57 F.R. 22239 published May 27, 1992. On June 22, 1992, JBC served its "First Request for Admissions" on Robert Taylor. Among other things, JBC asked Taylor to admit: (1) that he never had any intention of applying for a new station at White City, Florida (Request 153); and (2) that his Comment and Counterproposal in MM Docket 88-366 was filed in an attempt to prevent the creation of a new FM allotment for Jupiter, Florida (Request 154). Taylor denied both requests.

14. Based on the foregoing it is ruled that JBC's second set of allegations raises a question of probable decisional significance and of such public interest importance as to warrant consideration in spite of their untimely filing.

15. JBC's allegations call into question whether Taylor's counterproposal in MM Docket 88-366 is akin to what is commonly called a "block" or "strike" proposal. Such proposals are filed by an existing

4 The docket record reflects that Bayes was aware that Taylor's AM and FM in Jupiter were silent, and that Taylor would have a tough time explaining how he (Taylor) could construct and operate a new FM proposal while two of his other operations located in the same general area were not in operation.

licensee in an attempt to prevent or delay competition. And since the Commission's past and present broadcast allocation philosophy is pro-competitive, the Commission has historically been concerned with "block" or "strike" activities.⁵

16. Here we have a Commission licensee, Robert Taylor, who has, by his own admission, acted in a manner designed to impede, obstruct or delay the advent of competition to Jupiter, Florida, his city of license. The Mass Media Bureau is correct. That constitutes an abuse of process.

So the "Second Petition to Enlarge Issues Against Robert B. Taylor" that Jupiter Broadcasting Corp. filed on July 24, 1992, IS GRANTED in part, and IS DENIED in part; and the issues in this proceeding ARE ENLARGED as follows:

"Taylor-11⁶: To determine whether Robert B. Taylor abused the Commission's process in MM Docket 88-366 by engaging in anti-competitive (Strike) conduct, and, if so, whether Taylor is fit to remain a Commission licensee;

"Taylor-12: To determine whether Robert Taylor has abused the Commission's discovery processes by falsely answering either or both of two Requests for Admissions (Numbers 153 and 154) propounded to him by JBC on June 22, 1992, and if so what impact such abuse has on Taylor's fitness to remain a Commission licensee."

The burden of proceeding on Issues Taylor 11 and Taylor 12 is on Jupiter Broadcasting Corporation. But the burden of proof remains on Robert B. Taylor. Issues Taylor 11 and Taylor 12 WILL BE TRIED in Phase III of this proceeding. Except for Phase III discovery, the Phase III procedural dates will be set by subsequent Order.⁷

Any further discovery on Issues Taylor 11 and Taylor 12 will be initiated within 20 days of the release of this Order, and completed within 70 days of its release.

5 For example, see Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (1946); Capital Broadcasting Co., 29 FCC 677, rec. denied 30 FCC 1 (1961); Roger S. Underhill, 22 RR 801, 803-804 (1961); Southland, Inc., 37 FCC 2d 125, 130 (Rev. Bd. 1972); and Faulkner Radio, Inc. v. FCC, 181 U.S. App. D.C. 243, 250, 557 F.2d 866, 87f3 (1977).

6 For Issues Taylor-1 through Taylor-10 see FCC 92M-765 released July 10, 1992.

7 We still have 2 more petitions to enlarge outstanding. So the phase III procedural dates will be set by subsequent Order.

Within 10 days of the release of this MO&O Taylor will make the following documents available for inspection and copying at the offices of Jupiter Broadcasting Corporation's counsel:⁸

(1) All documents that Robert B. Taylor, or anyone under his direction and supervision prepared, drafted, revised, compiled or otherwise made on any aspect of his September 23, 1988 counterproposal in MM Docket No. 88-366; and

(2) All documents that Robert Taylor received that related to any aspect of his September 23, 1988 counterproposal in MM Docket No. 83-366.

In addition, JBC will depose: (1) Robert B. Taylor; (2) James R. Bayes; (3) Gary Minker; and (4) any former employee of WTRU(FM) or WEXI(AM) who has first-hand knowledge of Taylor's September 23, 1988 counterproposal in MM Docket No. 83-366.

Notice of Forfeiture

17. Robert B. Taylor IS NOW NOTIFIED, pursuant to 47 CFR §1.80(f)(1) that if it develops that he misrepresented or lacked candor in his response to Requests for Admission Numbers 153 and 154 that JBC served on him on June 22, 1992, or if he has misrepresented or lacked candor in Declarations filed with the Commission⁹ regarding his counterproposal in MM Docket No. 88-366, then he may have violated 47 CFR 1.17 (duty to submit truthful written statements and responses) and 47 CFR 73.1015 (applicants shall not submit to the Commission any written statement containing a misrepresentation or material omission bearing on any matter within the Commission's jurisdiction.

18. Specifically, substantial and material questions exist whether Robert B. Taylor misrepresented or lacked candor in his response to Request for Admission No. 153, Request for Admission No. 154, and in his Attachment D Declaration to his August 12, 1992 Opposition to Second Petition to Enlarge Issues.

19. Robert Taylor's apparent forfeiture liability in the above matters is as follows:¹⁰

⁸ If Bureau counsel wants to review any such documents, they should contact JBC's counsel and obtain a copy.

⁹ The Declaration (Attachment D) attached to his August 24, 1992 opposition is undated. But it appears that it was prepared within the past year.

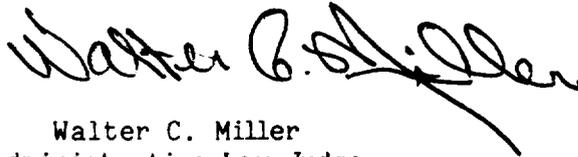
¹⁰ In addition, depending on the outcome of this proceeding, Taylor's renewal for Station WXKE, Fort Wayne, Indiana, may well end up in jeopardy.

(1) Misrepresentation in response to Request for Admission Number 153: \$20,000.

(2) Misrepresentation in response to Request for Admission Number 154: \$20,000.

(3) Misrepresentation in the Attachment D Declaration to Taylor's August 12, 1992 Opposition to JBC's Second Petition to Enlarge Issues: \$20,000.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script that reads "Walter C. Miller". The signature is written in black ink and is positioned above the typed name and title.

Walter C. Miller
Administrative Law Judge