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Law Offices  
of

PETER A. CASCIATO  
A Professional Corporation

**ORIGINAL FILE**  
Roundhouse Plaza  
1500 Sansome Street, Suite 201  
San Francisco, CA 94111  
Telephone: (415) 291-8661  
Facsimile: (415) 291-8165

October 21, 1992

FEDERAL EXPRESS/BY HAND

Donna Searcy, Secretary  
Federal Communications Commission  
1919 M Street NW Room 222  
Washington, D.C. 20554

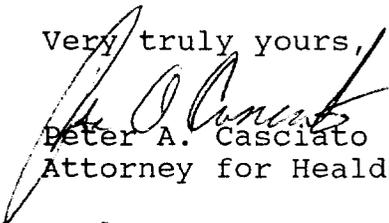
Re: MM Docket No. 92-111, Healdsburg, CA

Dear Ms. Searcy:

Enclosed for filing are an original and seven copies of Healdsburg Broadcasting, Inc.'s Motion to Reopen the Record & Request For Discovery & Revised Procedural Dates. Please return the extra copy to the undersigned, date-stamped, in the enclosed self-addressed stamped envelope.

Should you have any questions concerning Healdsburg Broadcasting, Inc., please contact the undersigned.

Very truly yours,

  
Peter A. Casciato  
Attorney for Healdsburg Broadcasting Inc.

enclosures

cc: Michale & Julia Akana  
w/encl.

PAC:sc

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

To: Hon. Edward J. Kuhlmann,  
Administrative Law Judge

MOTION TO REOPEN THE RECORD &  
REQUEST FOR DISCOVERY & REVISED PROCEDURAL DATES

Healdsburg Broadcasting, Inc. ("HBI"), by its attorney and pursuant to Sections 1.248, 1.291 and 1.315(e) of the Commission's rules, hereby requests that the presiding judge reopen the record to allow for a reasonable discovery period, whereby the active and passive principals of the applicants are made available for deposition in Healdsburg, CA. In addition, HBI requests that new dates be set for Filing of List of Witnesses Requested For Cross-Examination, Objections thereto and a hearing for cross-examination, as warranted.

Background

By Memorandum Opinion and Order, FCC 92M-874 released August 13, 1992, HBI's application was dismissed with prejudice from this proceeding. By Memorandum Opinion and Order, 92R-82 adopted October 2, 1992 released October 21, 1992, the Review Board granted HBI's appeal and reinstated its application.<sup>1</sup> On October 6, 1992, counsel to HBI was advised by the presiding

<sup>1</sup> A prepublication copy of 92R-82 was made available to undersigned counsel via facsimile and regular mail.

judge's litigation assistant that HBI would have one week from the date of release of 92R-82 to serve its direct case exhibits on the presiding judge and the parties to this proceeding. HBI will comply with those instructions as directed.<sup>2</sup>

Under Section 1.315(e), HBI was entitled to take the depositions of all of the principals of its competitors in this proceeding as a matter of right through and until August 20, 1992, or within 90 days of the date of release of the Hearing Designation Order, in this case May 20, 1992. In June, 1992, counsel for HBI requested those depositions in separate telephone conversations with counsel for Deas Communications, Inc. ("Deas") and Healdsburg Empire Corporation, and offered to make HBI's principals available for deposition. See Declaration of Peter A. Casciato, attached hereto. In addition as that Declaration further indicates, undersigned counsel also offered his offices as a place for deposition or, alternatively, agreed to find law offices in Santa Rosa, a community near Healdsburg or take the depositions in Healdsburg, itself, as Rule 1.315(e) provides.

On July 21, 1992, a prehearing conference was held in this proceeding in which the presiding judge set September 18, 1992 as a discovery cut off date for completion of discovery in this proceeding. See also Memorandum Opinion and Order FCC 92M-809, supra.

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<sup>2</sup> On October 8, 1992, undersigned counsel advised all other counsel to the proceeding of this telephone call.

### Argument

The presiding judge's Order 92M-784 dismissed HBI's application with prejudice. This occurred August 13, 1992, a week prior to the cut-off date established under Rule 1.315(e) for depositions as a matter of right and over a month prior to the discovery date set by the presiding judge in his discretion under Rule 1.248(b)(2). In its appeal of the dismissal of its application dated August 20, 1992, HBI specifically reserved its procedural rights to discovery in this proceeding, noting on the record that depositions had yet to be mutually scheduled. See HBI August 20, 1992 Appeal at p.3 at fn.5.

Through no fault of the presiding judge in attempting to apply confusing law and policy, as the Review Board's Order notes at para. 18, HBI was dismissed from this proceeding. Nonetheless, HBI's reinstatement must be accompanied with its full procedural and substantive due process rights to test the bonafides of the corporate structure and integration proposals of its competitors, in discovery, a continuing and ongoing seminal point of the comparative process. See e.g. Evergreen Broadcasting Company, 6 FCC Rcd 2d 5599 (1991) aff'd. FCC 92-449 released October 14, 1992.

In Evergreen, the Commission noted that in evaluating the bonafides and reliability of integration proposals of voting/nonvoting stock corporations, it looks at the totality of

the facts of both pre- and post-formation activities.<sup>3</sup> No such determination can be made in the absence of depositions followed by appropriate cross-examination. Indeed, the Commission's new discovery rules were specifically designed to allow the Commission to speed up the hearing process, by mandating

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<sup>3</sup> "We evaluate the reliability of such proposals on a case-by-case basis to determine whether the record mandates a conclusion that integration credit must be altogether withheld. For the reasons set forth in paragraphs 14-16 below, we generally rely on the post-formation record unless that record does not reliably establish that the nominally controlling owners will exercise exclusive control. In that event, we consider the entire record, that is the totality of the facts concerning the principals' pre- and post-formation activities, as well as the circumstances surrounding the applicant's formation. By way of illustration, we note that the following considerations are relevant under Royce ¶ 10 in evaluating the reliability of an applicant's ownership structure: (1) the extent to which the post-formation record reflects that, under which the nominally controlling owners are to have exclusive roles or defer completely to the purportedly passive owners who, in turn, continue to exercise managerial control; (2) the extent to which the nominally controlling owners did not formulate, or at the very least become familiar with, crucial aspects of the applicant's proposal; and (3) the extent to which the applicant was formed in a manner that is contrary to sound business judgment (i.e., whether the principals entered into a legally binding arrangement without meeting or knowing one another, without thoroughly investigating each others' financial, character, and business backgrounds, without carefully considering their respective duties and rights under that agreement, or without seeking to negotiate different or better terms). We note further that a determination to withhold all integration credit under Royce ¶ 10 may be further supported by fact patterns which, if standing alone, would only warrant attribution of all passive interests under Royce ¶ 9. These include, but are not limited to: (1) the extent to which the ownership documents insufficiently insulate the nominally controlling owner from undue influence by any of the purportedly passive owners, or otherwise accord them authority that belies their formal status as mere passive investors (i.e., non-voting stockholders or limited partners); and (2) the extent to which the principals have failed to adhere to the ownership documents, and therefore cannot be expected to follow those documents in the future." Evergreen Broadcasting, 6 FCC Rcd at para. 12.

obligatory discovery of active and passive owners prior to hearing at mutually convenient locations so that the hearing can then proceed with direct testimony and cross-examination based on an adequate showing to the presiding judge. See e.g. Proposals To Reform The Commission's Comparative Hearing Process 68 RR 2d 944, 953 (1990), recon granted in part 69 RR2d 168 (1991).<sup>4</sup>

HBI submits that its circumstances are unique and that, but for its improvident dismissal, it would have participated in the discovery process completing depositions according to the presiding judge's set schedule. Now that it has been reinstated, its is entitled to reinstatement of its procedural and substantive deposition rights nunc pro tunc.

Rule 1.248(b)(2) provides the presiding ALJ ample discretion to extend the discovery period for a reasonable period of time. Thus, in accordance with the schedule set by the presiding judge in his Memorandum Opinion and Order FCC 92M-809, HBI requests that

(a) the record be reopened, that precisely 36 days (the time corresponding from August 13, 1992, the date of notice of HBI's dismissal, and September 18, 1992, the discovery cut-off date) be set to complete depositions of all of the parties' active and passive principals;

(b) a new schedule be set for Filing of List of Witnesses

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<sup>4</sup> In its Reconsideration Order, the Commission stated that bringing all parties and attorneys together in one place for depositions may have a salutary effect on settlement. Id. at para. 11.

Requested For Cross Examination and objections thereto; and

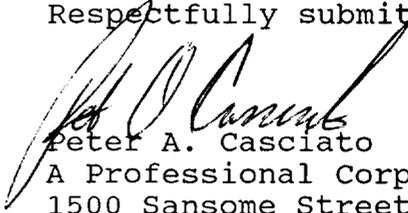
(c) a hearing date be set for appropriate cross-examination, as allowed under the Commission's rules.

HBI wishes to emphasize that it is not seeking favorable treatment for itself. Rather, it is proposing that all parties including HBI make their active and passive principals available for deposition.<sup>5</sup> In that regard, HEC and Deas may choose to take or forego taking depositions as they so choose.

Conclusion

Thus, for all the foregoing reasons HBI requests that the record be reopened and a new discovery and procedural schedule be set as set forth above.

Respectfully submitted,



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

October 21, 1992

Attorney for Healdsburg  
Broadcasting, Inc.

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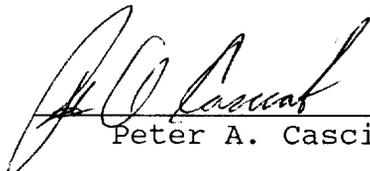
<sup>5</sup> It should be noted that since HEC is not a voting/nonvoting stock corporation, HBI would only require Joanne S. Kilmartin, its 21% shareholder and Robert S. Kieve, its 28% shareholder and the controlling shareholder (51.21%) of Empire Broadcasting Corporation for depositions.

DECLARATION

I, Peter A. Casciato hereby declare as follows:

1. I am the attorney for Healdsburg Broadcasting, Inc. ("HBI"), an applicant in this proceeding.
2. On or about June 12, 1992, to the best of my recollection, I had separate telephone conversations with Lawrence Bernstein, attorney for Deas Communications, Inc. ("Deas") and Jerome Silber, attorney for Healdsburg Empire Corporation ("HEC") concerning discovery and mandatory depositions of the principals of HBI, Deas and HEC. In each of those conversations, I offered my offices in San Francisco, CA for all of the depositions of the parties' principals. I also proposed other alternative locations, law offices belonging to attorneys I know in Santa Rosa, CA or in Healdsburg, CA.
3. In my conversation with Mr. Bernstein, he indicated that it might be preferable to hold the depositions in the Healdsburg area where his clients reside, that there might be a law office available there and that he would check with his client in that regard. Mr. Silber seemed favorably disposed to the use of my offices in San Francisco.
4. Later in June, 1992, to the best of my recollection, I believe on or about June 19, 1992, I had further discussions with Mr. Bernstein concerning discovery and depositions and noted that I had checked with the principals of my client and that the preferred dates for depositions were the last two weeks of August. Mr. Bernstein indicated that those dates might pose a scheduling conflict for he or his partner, but one of them would be available to cover the depositions. Likewise, later in June, 1992, I believe on or about June 24, 1992, I also provided the suggested dates to Mr. Silber who indicated that he would check availability with his client.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed at San Francisco, CA on October 21, 1992.

  
Peter A. Casciato

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 October 21, 1992, I caused the attached Motion to Reopen the Record & Request for Discovery & Revised Procedural Dates 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:

Hon. Edward J Kuhlmann  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, NW Room 220  
Washington, DC 20036 \*

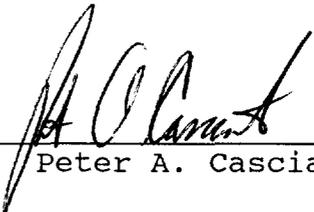
Larry Miller, Esq.  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street NW Room 7212  
Washington, D.C. 20554

Chief, Data Management Staff  
Audio Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street NW Room 350  
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 Federal Express

  
Peter A. Casciato