

ORIGINAL

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL
FILE

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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 Commission

REQUEST FOR EXPEDITED CONSIDERATION OF APPEAL
OR, ALTERNATIVELY, MOTION FOR STAY

On October 13, 1992, Deas Communications, Inc. ("Deas") filed an Application for Review or, Alternatively, Motion for Extraordinary Relief (hereafter, "Appeal") of the Review Board's Memorandum Opinion and Order, FCC 92R-82, adopted October 2, released October 21, 1992 (the "MO&O"). The MO&O reinstated the previously dismissed application of Healdsburg Broadcasting, Inc. ("HBI") On October 27, the Mass Media Bureau filed persuasive Comments in support of the Appeal, which is now pending before the Commission.¹

Now, by Memorandum Opinion and Order, FCC 92M-1040, released November 6, 1992 and attached hereto, the Presiding Judge, in response to the Board's action, has reopened the record and instituted another discovery and hearing schedule,

¹ HBI, not surprisingly, opposes the Appeal.

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on a very expedited basis (the "ALJ Order").² The Order mandates that depositions be completed within a month and that any hearing be convened before the end of the year. See Att. All to accommodate an applicant properly dismissed once and whose dismissal the Commission may shortly reaffirm.³

Because this would disserve the public interest, Deas, by its attorneys, respectfully requests that the Commission consider its Appeal on an expedited basis or, alternatively, stay the ALJ Order pending its ruling on the Appeal. Rule 1.115(h)(2); Black Television Workshop of Los Angeles, Inc., 4 FCC Rcd 2708, 2709 para. 3 (Rev. Bd. 1989) (subsequent history omitted). See also Rebecca Radio of Marco, 3 FCC Rcd 4016 para. 2 (Rev. Bd. 1988); Hanover Radio, Inc., 98 FCC 2d 849 (Rev. Bd. 1982), rev. denied sub nom. Ninety-Two Point Seven Broadcasting, Inc., 55 RR 2d 607 (1984).⁴

² The other parties have already submitted direct case exhibits and waived cross-examination of one another's principals. The record was closed and dates set for filing proposed and reply findings when the Board acted.

³ In no sense is this intended as a criticism of the Presiding Judge who, given the Board's improvident action, had no choice but to accord HBI participatory rights in a time frame commensurate with the Commission's expedition policies. Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157 (1990), clarified, 6 FCC Rcd 3403 (1991). As will be shown, if Deas' Appeal proves successful, this ruling will be counterproductive to the Commission's policies and impose on all the parties (including HBI) significant unnecessary expense and inconvenience.

⁴ This request is being filed on the same date that the ALJ Order is released.

In support whereof, the following is shown.

1. The showing required for a stay supports this request whichever relief the Commission elects to provide. The applicable criteria are as follows:

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

2. Likelihood of prevailing on the merits. Deas' Appeal and the Bureau's supporting Comments (both incorporated here by reference) provide all the necessary support on this ground. They point out: that the MO&O's reinstatement of HBI's application exceeded the Board's authority and abused its discretion; that the MO&O action is contrary to law, violates Section 73.3522 and contravenes the "hard look" policy; that the Commission has repeatedly found compliance with Section 73.316(b)(2) of its Rules to be a core technical requirement

for acceptance of FM applications;⁵ and that defective applications inadvertently accepted for filing are consistently dismissed when the defect is revealed, whether before or after hearing designation. These pleadings speak for themselves.

3. It should therefore be concluded that substantial likelihood of prevailing on the merits has been shown.

4. Irreparable injury. This case has moved along very swiftly. Now, absent immediate Commission action, the parties' counsel will be forced to travel across-country to Healdsburg on short notice for depositions⁶ and then prepare for a late December hearing, at considerable expense and inconvenience.⁷ If Deas' Appeal is granted and HBI's dismissal reaffirmed, this will be a complete waste and the well-intentioned effort to keep the case moving at full speed may prove ultimately counterproductive. The other parties will have spent time and resources better used for a new station upon an applicant once again dismissed. Contrariwise, a brief

⁵ This is the rule which HBI admits violating in its application, in a predesignation amendment and yet again in a postdesignation "do or die" amendment.

⁶ HBI counsel works in nearby San Francisco, so this applicant is far less inconvenienced than the other parties.

⁷ The ALJ Order makes clear that all applicants' Christmas and New Year plans are jeopardized through no fault of their own. Likewise, while no discovery dates have been set as of yet, the requirement that depositions be completed in 30 days threatens also to impinge on Thanksgiving schedules. Notwithstanding the FCC's expedition policies, given the pending and Bureau-supported Appeal, this may be a rare case of too much expedition.

delay under these unique circumstances will serve the interests of all parties -- including the Commission, which will not hold a wasted hearing -- without serious harm to the ultimate resolution of the proceeding.

5. It should therefore be concluded that irreparable injury has been shown.

6. Harm to other parties. Grant of the relief requested will benefit all parties, including HBI. If the Appeal is granted and HBI's dismissal reaffirmed, it, too, will have been saved the needless expenditure of time, effort and financial resources on discovery and hearing preparation. If the Appeal is denied, discovery and another potential hearing can take place in an orderly fashion with the status of all parties a certainty. The brief delay will cause no harm to anyone, especially when contrasted to the substantial waste of private and public resources which would absolutely result if the new schedule is followed and the Appeal subsequently granted.

7. It should therefore be concluded that this request will not harm any of the parties in this case. See Washington Metropolitan Area Transit Commn., 559 F.2d at 844.⁸

⁸ There the court held: "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order will inflict irreparable injury on the movant."

8. Public Interest Considerations. The major purpose of a stay is to preserve the public interest from injury or destruction while other remedies are being pursued. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); see also Harold A. Jahnke, 48 RR 2d 855, 857 (1980). That purpose is well attended in this case.

9. Again, Deas' Appeal and the Bureau's supporting Comments explain why the public interest will be served by favorable action on this request. Extended commentary would be superfluous. It should therefore be concluded that grant of the request will serve the public interest.

10. Conclusion. The criteria for a stay have been met. It therefore follows that expedited Commission action on the Appeal is warranted.⁹

11. The ALJ Order, necessitated by the Board's erroneous ruling, has impelled the parties into a new high-speed discovery and hearing schedule which is both burdensome and potentially counterproductive, given the status of the case. To date the parties have complied with the Commission's expedition policies. This request is made not for purposes of delay but to serve the ends of justice. The relief sought herein is minimal compared to the possible harm to all parties,

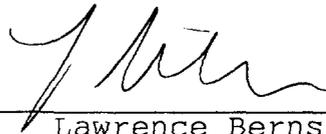
⁹ If the Commission grants expedited consideration of the Appeal, this action must, to be effective, be known prior to any scheduled depositions in Healdsburg. Deas therefore requests that the parties be orally advised of such an action.

HBI and the Commission included, if the new procedural schedule is followed and Deas' Appeal is subsequently granted. That would grossly disserve the public interest.

WHEREFORE, the Commission should expeditiously consider Deas' Appeal on the merits or, alternatively, stay the effectiveness of the ALJ Order pending its action on the pending Appeal.

Respectfully submitted,
DEAS COMMUNICATIONS, INC.

By:



Lawrence Bernstein
F. Joseph Brinig

Its Attorneys

BRINIG & BERNSTEIN
1818 N Street, NW
Suite 200
Washington, D.C. 20036

(202) 331-7050

Attachment

November 6, 1992

Edward J. Kuhlmann
331-7055

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

FCC 92M-1040

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For Construction Permit for a)	
New FM Station on Channel 240A)	
in Healdsburg, California)	

MEMORANDUM OPINION AND ORDER

Issued: November 5, 1992; Released: November 6, 1992

1. Under consideration is the Motion to Reopen the Record and Request for Discovery and Revised Procedural Dates, filed October 22, 1992 by Healdsburg Broadcasting, Inc.

2. HBI requests that the record be reopened and that it be given an opportunity to conduct discovery because its application was dismissed before it could depose the other applicants. Deas opposes the request on the grounds that HBI has not shown new evidence discovered after the close of the record. Deas also disputes HBI's claim that it had plans to depose the other applicants when its application was dismissed. Ordinarily, HBI would need to show good cause to reopen the record but the Review Board's order fulfilled that function. HBI's request will be granted. HBI and the other two applicants may conduct depositions within the next 30 days. All discovery must be completed by December 7, 1992. Following discovery, requests for examination of witnesses on exhibits that have been filed will be considered again. Any request must be justified with references to specific facts and should be filed by December 11, 1992. Objections should be filed by December 15, 1992. If it is determined that examination of witnesses is necessary, a hearing will be scheduled before the end of the year. Counsel should inform all principals that time may be required to testify at the end of December.

ACCORDINGLY, IT IS ORDERED that the motion to reopen the record and request for discovery and revised procedural dates, filed October 22, 1992 by Healdsburg Broadcasting, Inc. IS GRANTED to the extent indicated.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Edward J. Kuhlmann
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have, this 6th day of October, 1992, served copies of the foregoing "Request for Expedited Consideration of Appeal or, Alternatively, Motion for Stay" upon the following persons by first class United States Mail, postage prepaid:

Administrative Law Judge Edward J. Kuhlmann
Federal Communications Commission
2000 L Street, NW, Room 220
Washington, D.C. 20554

John I. Riffer, Esq.
Associate General Counsel - Adjudication
Federal Communications Commission
1919 M Street, NW, Room 610
Washington, D.C. 20554

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

Jerome S. Silber, Esquire
Rosenman & Colin
575 Madison Avenue
New York, New York 10022

Peter A. Casciato, Esq.
1500 Sansome Street
Suite 201
San Francisco, California 94111


Miriam Ervin