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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-308

In re Applications of

Caroline K. Powley d/b/a UNICORN SLIDE	File No. BPCT-900518KO
TRUDY M. MITCHELL	File No. BPCT-900726KG

For Construction Permit
Slidell, Louisiana

HEARING DESIGNATION ORDER

Adopted: December 15, 1992; Released: January 11, 1993

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (a) the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 54, Slidell, Louisiana; (b) a "Motion to Dismiss or Deny" the application of Trudy M. Mitchell (Mitchell),[1] filed by Unicorn Slide (Unicorn) on June 25, 1991[2] (c) and other pleadings.[3]

2. We note that the transmitter site proposed by Mitchell will be located 0.2 km from the AM non-directional tower of AM station WSLA, Slidell, Louisiana. In the event that Mitchell is the successful applicant in this proceeding, Mitchell's construction permit will be conditioned to ensure that WSLA's radiation pattern is not adversely affected by the construction of the proposed television station.

3. No determination has been reached regarding whether or not the height and location of the tower proposed by Unicorn would constitute a hazard to air navigation. Accordingly, an issue regarding the matter will be specified.

4. From our review of the proposals submitted by Unicorn, we cannot determine whether the applicant is in compliance with the environmental rules set forth in the *Report and Order* in General Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Under the rules, an applicant must determine whether the radiation hazard of its proposals would have a significant environmental effect under the criteria set out in Section 1.1307 of the Commission's Rules. If the application is subject to the environmental processing under the Section 1.1307 criteria, the applicants must then submit an environmental assessment (EA) containing the information delineated in Section 1.1311 of the Commission's Rules. Section 1.1307(b) states that EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. An examination of Unicorn's application suggests that it has not followed the procedures outlined above. While it is unlikely that an RF problem exists as a result of the height and power proposed by Unicorn, other factors must be evaluated by the applicants in making a final determination. The applicant will be required to file, within 30 days of the release of this Order, a statement or showing with respect to radiation hazards that might have an adverse effect on the quality of the environment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Television Branch, Mass Media Bureau, who will then proceed regarding this matter in accordance with the provisions of Section 1.1308. A copy of the statement must also be filed with the Chief, Hearing Branch, Mass Media Bureau. Accordingly, a contingent environmental issue will be specified, and the comparative phase of the case will be allowed to begin before the

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[1] Mitchell filed amendments on June 14, 1991 and October 11, 1991 specifying new transmitter sites and thus eliminated the need to specify a short-spacing issue. The amendments will be accepted for this purpose only, but Mitchell will not be allowed any comparative benefits as a result of these amendments.

[2] In essence, Unicorn's motion to dismiss or deny is a predesignation petition to specify issues. Since such petitions are no longer permitted, Unicorn's petition will be dismissed. *Revised Procedures for the Processing of Contested Broadcast Applications*, 72 FCC 2d 202 (1979). Although we will dismiss Unicorn's petition, we note that Unicorn attempts to raise acceptability issues regarding Mitchell's application. It states that Mitchell's application, as originally filed, proposed a short-spaced transmitter site and that Mitchell did not request a waiver of our rules. Thus, Unicorn concludes, the application was patently defective when filed and should therefore be dismissed. We disagree. First, it is settled Commission practice when considering mutually exclusive television applications containing short-spaced proposals, with or without waiver requests, to specify an appropriate issue in the hearing designation order. While Unicorn's application containing a short-spaced proposal without a waiver request may not have been grantable at acceptance, it was substantially complete, which is the requirement for acceptability. Moreover, on June 14, 1991, Mitchell amended her application to specify a fully spaced site and the staff properly accepted the amendment to eliminate a potential hearing issue. We note that under Section 73.3522(b)(2) of the Commission's Rules, amendments may be filed as a matter of right, within 30 days after the release of an Order designating mutually exclusive applications for hearing, to eliminate issues specified in the Order. Thus, it would be a waste of valuable Commission resources to reject Mitchell's amendment which eliminates the need to specify a hearing issue when such an amendment is permissible as set out above. Unicorn also raises questions regarding whether Mitchell tendered the appropriate filing and hearing fees for its application. We have examined this matter and are satisfied that all appropriate fees have been paid. The question of whether Mitchell's filing fee was timely submitted was resolved on February 7, 1991, when the Commission billed Mitchell for the fee. Unicorn did not seek reconsideration of that action.

[3] Unicorn filed amendments to its application on August 13, 1991, December 20, 1991 and February 18, 1992. The amendments reported the ownership interests of Ms. Powley and her immediate family, which is required by Section 1.65 of the Commission's Rules. Because the amendments were not timely filed by the March 13, 1991, "B" cut-off date, they will be accepted for Section 1.65 purposes only.

environmental phase is complete. See *Golden State Broadcasting,* 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. The effective radiated visual power antenna height above average terrain and other technical data submitted by the applicants indicate that there would be significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

6. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below:

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Caroline K. Powley, d/b/a Unicorn Slide:

(a) whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation;

(b) if a final environmental impact statement is issued in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

2. To determine, which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1(a).

9. IT IS FURTHER ORDERED, That the Motion to Dismiss or Deny filed by Caroline K. Powley, d/b/a Unicorn Slide IS DISMISSED.

10. IT IS FURTHER ORDERED, That the amendments filed by Caroline K. Powley, d/b/a Unicorn Slide on August 13, 1991, December 20, 1991 and February 18, 1992, respectively, ARE ACCEPTED for filing for 1.65 purposes only.

11. IT IS FURTHER ORDERED, That the amendments filed by Trudy M. Mitchell on June 7, 1991 and October 11, 1991, respectively, ARE ACCEPTED for filing in order to eliminate a short-spacing issue and no comparative benefit shall accrue to Mitchell as a result of the filing of the amendments.

12. IT IS FURTHER ORDERED, That, in the event that Trudy M. Mitchell is the successful applicant in this proceeding, the construction permit shall be conditioned as follows:

Prior to construction of the tower authorized herein, permittee shall notify AM station WSLA, Slidell, Louisiana, so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C., to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission.

13. IT IS FURTHER ORDERED, That Caroline K. Powley, d/b/a Unicorn Slide, submit an amendment containing an environmental statement as explained in paragraph 4, above, to the presiding Administrative Law Judge and a copy to the Chief, Television Branch and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, Room 700, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other

parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See Generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990). Erratum, 6 FCC Rcd 3472 (1991), *recon. granted in part,* 6 FCC Rcd 3403 (1991).

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau