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

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In re Applications of)	MM DOCKET NO. 92-310
)	
ROBERT M. RICHMOND)	File No. BPH-910703MD
)	
BARBARA BRINDISI)	File No. BPH-910703MI
)	
LAURYN BROADCASTING CORPORATION)	File No. BPH-910703MJ
)	
For Construction Permit for a New)	
FM Station on Channel 265A)	
in Beaumont, California)	
)	
and)	
)	
KAY SADLIER-GILL)	File No. BPH-910611IF
)	
For Modification of Facilities For)	
Station KATY-FM, Idyllwild, California)	

PREHEARING ORDER

Issued: January 26, 1993 ; Released: January 28, 1993

1. We will hold the Prehearing Conference on May 19, 1993, and the hearing will begin on June 14, 1993.¹ Both will start at 8:30 a.m. and will be held in the Commission's offices in Washington, D.C. The applicants will exchange their direct case exhibits at the May 19th Prehearing.

2. Appearances and Publication. On or before February 10, 1993, each applicant must show that they have complied with 47 CFR 1.221(cc). See DA 92-1733 released January 21, 1993 at para.12. On or before February 23, 1993, each must demonstrate that they have complied with 47 CFR 73.3594(g)'s publication requirements. See DA 92-1733 supra. at para.13.

3. Clarification of Issues. We have two separate communities involved in this proceeding, Beaumont and Idyllwild. So, and although there is no 47 USC 307(b) issue in this proceeding at this time, we may need such an issue. At any rate the applicants should plan on adducing and begin preparing both 307(b) engineering and 307(b) demographic evidence.²

¹ The Trial Judge has blocked off 5 days for hearing: June 14 through June 18, 1993. A courtroom has been reserved for those days.

² Based on the facts in the HDO the following 307(b) question appears appropriate: Does Beaumont need a first local transmission outlet before Idyllwild needs the modified operation that Kay Sadlier-Gill proposes?

4. The Chief, Audio Services Division has also set down a standard comparative issue for hearing. See DA 92-1733 supra., Issue 2. So, on February 16, 1993, each applicant will serve a standardized integration/diversification statement on each of their opponents, on Mass Media Bureau counsel, and on the Trial Judge.

5. The Chief has also called for comparative coverage. See DA 92-1733 supra. at para.6. The parties should consider a joint areas and populations showing if only for reasons of economy. If you can't agree on a joint coverage exhibit, each applicant must not only portray their own areas and population, but each of their opponents as well.³ That will not only be a substantial added expense but could also give rise to evidentiary conflicts. But you are alerted now. If you take the joint exhibit route you will be bound by the agreed-upon showing. At any rate get your approach to comparative coverage ironed out early on.

6. All preliminary engineering (including the 307(b) engineering) will be exchanged on or before April 1, 1993. The final engineering will be exchanged at the Prehearing conference.

7. Finally, the Chief has set down a contingent environmental impact issue against Sadlier-Gill. See DA 92-1733 supra. Issue 1, and Para.2. So they must file their Environmental Assessment amendment on or before February 17, 1993. And if they haven't satisfied the Mass Media Bureau by the time of the May 19, 1993 Prehearing Conference, they must exchange their Issue 1 direct case evidence on that day.

8. All counsel should be prepared to discuss any questions about clarification of existing issues.

9. Perfecting Amendment. In addition to Sadlier-Gill's Environmental Assessment amendment, the HDO has called on each of the three Beaumont applicants to submit engineering amendments on or before February 23, 1993. Any amendment must be accompanied by an appropriate Petition for Leave to Amend.⁴ See The New Continental Broadcasting Company, FCC 80M-102, released January 3, 1980 at Footnote 1.

10. This post-designation period (from January 21, 1993 to February 23, 1993) will be the last chance each applicant will have to firm up their application for hearing. This perfecting time is designed to implement the Commission's post-designation amendment philosophy; i.e., to give all applicants a fair post-designation chance to firm up their applications, and

³ Kay Sadlier-Gill's showing must be twofold. They must show the areas and populations from their present operation and from their modified proposal. We must be able to determine the areas and populations gained or lost as a result of the modification proposed.

⁴ The parties are reminded to serve their amendments pursuant to Para.11 of the HDO.

at the same time secure a stable environment as soon as possible, so we can proceed with the hearing on the necessary and remaining issues.

11. Interlocutory Pleadings. In the interest of uniformity and efficient processing, each applicant should direct their interlocutory requests toward one and only one of their opponents. For example, if Richmond seeks enlargement against both Brindisi and Lauryn, he should file separate requests. The same thing holds true for oppositions, replies and other interlocutory pleadings, including discovery notices and motions.⁵

12. Discovery. Automatic Document Production will take place on February 16, 1993. See DA 92-1733 supra at para 12. Any In Camera inspection request must also be filed on February 16, 1993.^{6 7}

13. No 47 CFR 1.315 or 1.323 written interrogatories will be employed, and any depositions of opposing principals will be taken in Beaumont, California (unless otherwise agreed upon). Please don't notice a witness for any other place unless your opponent agrees to the location change.

14. Since this is a four-party proceeding the possibility exists that there will be more than one notice to depose certain principals. So, on February 16, 1993, at 2:00 p.m. at an agreed-upon location a discovery conference will be held. There all applicants who propose taking depositions will get together and set-up an agreed-upon deposition schedule. They will so coordinate that schedule so that each person eligible to be deposed will be deposed only once. The agreed-upon deposition schedule shouldn't impact on our other procedural dates. Any additional discovery will be initiated on February 22, 1993.

⁵ "Supplements" will not be accepted unless requested or authorized. Oh, you can supplement an original signature affidavit for a faxed one. But lets keep substantive supplements to a minimum. They can cause timing problems, and we'll generate more than enough paper without delaying the proceeding via "Supplements." See In re Filing of Supplemental Pleadings Before the Board, 40 FCC 2d 1026 (1972).

⁶ It's no defense to an otherwise legitimate discovery motion for the objecting party to assert that they intend to either file a Petition for Leave to Amend or a Motion for Summary Decision that will moot the discovery requests. Nor should the objecting party seek to defer a response to discovery on that ground.

⁷ Before they file an in camera motion, an applicant should carefully consider that he is voluntarily seeking a construction permit in a contested proceeding. Privilege claims hinder and even prevent the search for the whole truth. So you are alerted now. If the Trial Judge cannot make critical public interest findings because of claimed privilege documents he intends to draw adverse inferences against the applicant who has claimed the privilege.

15. Discovery isn't to be used as a vehicle for obtaining data on which to base a motion to enlarge the issues. If the issues are enlarged later on any discovery needed on the enlarged issues will be provided for in the enlargement order.

16. Settlement. This case could prove to be long, and costly. Because of lawyer and engineering fees, all four applicants will lose. At best three of you will have squandered substantial amounts of time and money prosecuting this case. Moreover, there is a direct relationship between the length of the trial and the costs involved. The general rule is the longer the trial, the greater the cost. So from your clients' viewpoint this prospective litigation is a mistake. Being merely another form of warfare it should be avoided. So engage in settlement dialogue now. The meter is running. Don't wait to argue before the Commission four and one-half years from today. Keep your settlement channels open and use them.

17. To this end, a negotiating principal from each applicant along with their attorney (if they're not pro se) are directed to attend a deposition conference on April 30, 1993, at 2:00 p.m.⁸ This face-to-face conference will be held at a prearranged agreed-upon location. There the applicants should determine whether this case can be settled.

18. On or before May 7, 1993, the settlement conferees should submit a Joint Memorandum to the Trial Judge. There they should outline the results of the April 30th conference. The Memorandum should contain, but not necessarily be limited to, answers to the following questions:

- (a) Has this case been settled? If so, do the settlement's terms pose any public interest questions?
- (b) If the case hasn't been settled, were any offers made at the conference? If so, are they still open? For how long?
- (c) If the case has been settled, how soon can the Settlement package; i.e., the joint request for approval and accompanying papers, be submitted for approval?

19. Marshalling and Exchanging Exhibits. It will contribute significantly to the disposition of this proceeding for the parties to submit and exchange their direct affirmative cases in writing. This will include the sworn written testimony and the exhibits to be offered in support of their

⁸ The parties needn't wait until April 30, 1993 to talk settlement. Nor should the mandatory face-to-face conference be the only effort at settlement. The mandatory April 30, 1993 date has been set because of its proximity to the May 19, 1993 Prehearing Conference.

direct cases. Such an exhibit exchange will take place at the May 19th Prehearing Conference.⁹

20. If a party intends to request that official notice be taken of any materials in the Commission's files, that material should be assembled in written form, properly identified by source, given a tentative exhibit number and exchanged on the date set.

21. Each party will assemble its exhibits in a binder. Each exhibit will bear a number, preferably by means of a tab on each document. Please number the exhibits serially starting with the number 1. Each exhibit will also contain the sponsoring witnesses' affidavit - if such an affidavit is required (See e.g. para. 20 supra.). Use a prefix to indicate who is sponsoring the exhibits; e.g. Richmond Ex.1, Brindisi Ex.1, Lauryn ex.1, etc.

20. Evidentiary Admission Session. An Evidentiary Admission Session will be held on June 1, 1993, at 8:30 a.m. There each applicant (in Docket Order) will formally identify and offer the direct case exhibits he exchanged on May 19, 1993. The Trial Judge will rule on any objections to those exhibits. Immediately after the conclusion of the Evidentiary Admission Session, each party will notify his opponents of those witnesses they need to cross-examine and the exhibits or areas to be covered by that cross-examination.

21. The June 14-18, 1993 hearing dates are firm dates. A thorough but speedy trial is contemplated. The hearing dates will not be extended merely because counsel have agreed to a settlement.¹⁰

FEDERAL COMMUNICATIONS COMMISSION


Walter C. Miller
Administrative Law Judge

⁹ Before he or she exchanges his written exhibits, counsel would be wise to review them - especially the comparative exhibits - and delete all unnecessary adjectives and comparative puffing. Let's save everybody time and money.

¹⁰ Daily hearing sessions will begin at 8:30 a.m. and end at 5:30 p.m. with an hour for lunch.