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

In re Applications of)	MM DOCKET NO. 92-302 ✓
)	
JOHN M. GIANNETTINO)	File No. BPH-910719MA
)	
JOHN T. PRITCHARD)	File No. BPH-910722MI
)	
For Construction Permit for a)	
New FM Station on Channel 276C3)	
in Burlington, Iowa)	

MEMORANDUM OPINION AND ORDER

Background

Issued: February 16, 1993;

Released: February 18, 1993

1. This is a ruling on a Joint Petition For Approval Of Settlement Agreement And For Grant of Application ("Joint Request") that was filed on January 12, 1993, by John M. Giannettino ("Giannettino") and John T. Pritchard ("Pritchard"), and on a related Contingent Petition For Leave To Amend that was filed by Pritchard on that same date. Pritchard also filed on January 22, 1993, a Supplement To The Contingent Petition and a Declaration. The Mass Media Bureau ("Bureau") filed Consolidated Comments On Joint Request For Approval Of Settlement Agreement And Contingent Petition For Leave To Amend on January 28, 1993.

Facts

2. Giannettino and Pritchard are the only two mutually exclusive applicants for a construction permit for a new FM Station on Channel 276C3 at Burlington, Iowa. See Hearing Designation Order DA 92-1669, released December 23, 1992.

3. The Joint Petition contemplates that Giannettino's application will be voluntarily dismissed with prejudice in return for a payment of \$20,000.00 representing an amount less than his actual legitimate and prudent expenses, and that Pritchard will receive the grant. The proposed Contingent Amendment would permit Pritchard to withdraw his divestiture and integration commitments.

4. The Bureau's Comment of January 28, 1993, states that approval of the Joint Request should be withheld until the Audio Services Division had determined that Pritchard has adequately addressed the contingent environmental issue and until that issue has been resolved in Pritchard's favor. See Hearing Designation Order, supra at Paras. 3, 7(1). On February 12, 1993, the Assistant Chief, Audio Services Division, advised the Presiding Judge in writing:

Upon examination of the enclosed pleading [Supplement To Contingent Petition and Engineering Statement], the

Bureau finds that the information satisfies the requirement of 47 C.F.R. §1.1311.

Accordingly, the Bureau requests that the contingent environmental issue and the short spacing issue specified as to this applicant be eliminated from the Hearing Designation Order.

Based on the unqualified statement of the Bureau quoted above and the representations of Pritchard in his Petition For Leave To Amend, the environmental issue and the short spacing issue against Pritchard will be deleted.¹

5. Pritchard's application was filed on July 23, 1991, at which time he had pending an application to acquire control of the licensee of Station KKMI-FM at Burlington. Pritchard represented at that time, as was then required by law, that he intended to divest the KKMI interest in the event he was granted the CP in this case. However, since Pritchard's filing in 1991, the Commission has amended its multiple ownership rule [47 C.F.R. §3555] to allow common ownership of more than one station in a broadcast service that is located in the same area. See Revision of Radio Rules and Policies, 7 F.C.C. Rcd 2755 et seq (Comm'n 1992). Specifically, Pritchard qualifies under the new proviso that in radio markets having 14 or fewer commercial radio stations, a party may own up to 3 commercial radio stations, no more than 2 of which are in the same [FM] service and so long as the cumulative radio ownership is less than 50% of the stations in the market. 47 C.F.R. §3555(a)(i). It is established that under the facts here, Pritchard qualifies under the amended multiple ownership rule and he is therefore relieved of his commitment to divest any interest in the licensee of Station KKMI-FM.² Pritchard filed a Supplement on January 22, 1993, which contained an Engineering Statement to support that analysis of his compliance with the amended multiple ownership rule.

¹ There is no short spacing issue as such that was set against Pritchard in the HDO. However, there was a question raised and discussed about a possible signal interference with KBKB-FM due to the proximity of Pritchard's proposed tower. See HDO at Para. 2. KBKB-FM's objection was based on possible interference with air traffic signals. But the FAA set a condition, which will be included in the grant, which satisfied the FAA. Also, Pritchard has undertaken in his Engineering Statement to rectify any interference. Therefore, the Bureau ruled in the HDO that the "concern" of KBKB-FM was baseless. See HDO, supra at Para. 2.

² Pritchard presents evidence showing that there are four broadcast stations licensed to Burlington, two of which are AM services and two of which are FM services. Four additional FM services which are outside of the Burlington city limits would also be counted, as well as one additional AM service in Fort Madison. When Pritchard receives the new Burlington FM service for Channel 276C3 he will own two of five FM services which constitute only 40% of the Burlington radio stations and only two of ten, or 20%, of the broadcast stations in the relevant "radio market."

6. Pritchard also had committed to fully integrate himself into the management of the new FM station if he is awarded the CP. However, since the case is now in settlement which, once approved, will result in dismissal of the only competing applicant, Pritchard may now be relieved of his integration commitment. Ruarch Associates, 103 F.C.C. 2d 1178 (Comm'n 1986). See also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 F.C.C. Rcd 157, 160 (Comm'n 1990), recon. granted in part, 6 F.C.C. Rcd 3403 (Comm'n 1991) (Comm'n permits applicant in a "global" settlement to withdraw divestiture and integration proposals where settlement is reached early in the hearing process).

7. John T. Pritchard now is basically qualified to receive the grant and there are no added issues to resolve or qualifying issues to consider.

Settlement

8. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, Section 311(c)(3). See Oak Television of Everett, Inc., et al., 93 F.C.C. 2d 926 (Review Bd. 1983).

9. In this case, the Joint Petition was filed timely in accordance with Section 73.3525. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Also, the Bureau has no objection to approving the settlement. Therefore, it is determined that the parties have complied with 47 C.F.R. §§73.3525(a)(1) and (a)(2) of the Commission's rules. In addition, a review of Giannettino's 32 line-item expenses totalling \$20,249.39 as of January 8, 1993, has been made by the Presiding Judge and those expenses are found to be legitimate and prudent in accordance with 47 C.F.R. §73.3575(a)(3) (1991).

10. There has been compliance with the local publication requirement of the Commission's rules. 47 C.F.R. §73.3594(g). The parties also have paid the required hearing fees. 47 C.F.R. §1.221(g). Pritchard has provided for the protection of persons from environmental hazard at and around his antenna site and has satisfied any concern for signal interference to the Bureau's satisfaction. Commission resources will be conserved by the termination of this case prior to hearing. In addition, the public interest will be served by approval of this agreement which will eliminate the need for protracted litigation and the corresponding utilization of resources, and which ensures that a new FM service will be delivered to Burlington, Iowa at an earlier date. Accordingly, it is appropriate that the proposed settlement be accepted.

ORDER

IT IS ORDERED that the Joint Petition For Approval Of Settlement Agreement And For Grant Of Application filed on January 12, 1993, by John M. Giannettino and John T. Pritchard IS GRANTED and the Settlement Agreement IS ACCEPTED.

IT IS FURTHER ORDERED that the Contingent Petition For Leave To Amend filed on January 12, 1993, by John T. Pritchard IS GRANTED and the amendment withdrawing his divestiture and integration commitments IS ACCEPTED.

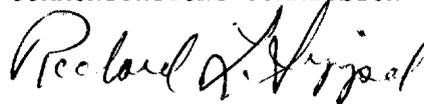
IT IS FURTHER ORDERED that the application of John M. Giannettino (File No. BPH-910719MA) IS DISMISSED with prejudice and the applicant's name and file number ARE STRICKEN from the case caption.

IT IS FURTHER ORDERED that the application of John T. Pritchard (File No. BPH-910722MI) for a Construction Permit for New FM Channel 276C3 at Burlington, Iowa, IS GRANTED, subject to the following condition:

Upon receipt of notification from the Federal Communications Commission that harmful interference is being caused by the permittee's transmitter, the permittee shall immediately reduce power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one(1) year of interference-free operation.

IT IS FURTHER ORDERED that the Prehearing Conference set for February 23, 1993 and the Hearings set for April 20, 1993, and May 4, 1993, ARE CANCELLED and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge