

FCC MAIL SECTION

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

MAR 16 4 16 PM '93

MM Docket No. 93-51

DISPATCHED BY

In re Applications of

MARTHA J. HUBER File No. BPH-911114ME
(hereafter "Huber")

ADAMS RIB, INC. File No. BPH-911115MA
(hereafter "Adams Rib")

RITA REYNA BRENT File No. BPH-911115MC
(hereafter "Brent")

D.E.K.W. File No. BPH-911115MF
COMMUNICATIONS, INC.
(hereafter "D.E.K.W.")

MIDAMERICA File No. BPH-911115ML
ELECTRONICS
SERVICE, INC.
(hereafter "Midamerica")

STATON File No. BPH-911115MU
COMMUNICATIONS, INC.
(hereafter "Staton")

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

HEARING DESIGNATION ORDER

Adopted: March 3, 1993;

Released: March 15, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.¹

2. *Adams Rib*. An engineering review of Adams Rib's application reveals that a discrepancy exists between the antenna radiation center height above average terrain (HAAT) given in Section V-B, Item 7(b)(3) of FCC Form 301 (June 1989) and the average HAAT obtained from the radial values in Item 18. Item 7(b)(3) states that the HAAT is 138 meters while the average of the radials in Item 18 is 135 meters. The use of either value for the HAAT does not cause the application to violate any rule section. Consequently, this discrepancy is not an acceptability defect and may be corrected by an amendment. Accordingly,

Adams Rib must file an amendment which gives the correct HAAT with the presiding Administrative Law Judge after this Order is released.

3. Section V-B, Item 26 of FCC Form 301 (June 1989) requests whether a grant of the application would fall under Section 1.1307 of the FCC rules, such that it may have a significant environmental impact. Adams Rib responded in the affirmative while Exhibit EE-5 attached to the June 25, 1992 amendment indicates that there will be no significant environmental impact. Accordingly, Adams Rib must file an amendment that corrects this discrepancy with the presiding Administrative Law Judge after this Order is released.

4. *Brent*. Section II, Item 8(b) of FCC Form 301 (June 1989) requests whether any member of the applicant's immediate family has any interest in or connection with any other broadcast station, pending broadcast application or newspaper in the same area as the proposed station. Brent did not complete Item 8(b). Accordingly, Brent must file an amendment which responds to Section II, Item 8(b) and provides any necessary exhibit with the presiding Administrative Law Judge after this Order is released.

5. *D.E.K.W.* Dwayne E.K. Watkins, president and director of D.E.K.W., is also a senior account executive at station WGZB(FM), Corydon, Indiana. Additionally, David S. Greenberg, the sole non-voting shareholder of D.E.K.W., is vice president and director of Power Communications, Inc., the licensee of WGZB(FM). Mr. Watkins and Mr. Greenberg have indicated their intent to terminate their relationships with WGZB in the event of grant of the referenced application. Their employment may represent a potential violation of the Commission's cross-interest policy. See *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208 (1988). Accordingly, in the event of grant of D.E.K.W.'s application, Mr. Watkins and Mr. Greenberg will be required to sever all connections with station WGZB prior to the commencement of program test authority.

6. *Other Matters*. Adams Rib petitioned for leave to amend its application on June 25, 1992, after the last date for filing amendments as of right. This amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2) and, consequently is accepted for filing. Midamerica amended its application on the date shown below. This amendment was filed after the last date for filing amendments as of right and under Section 1.65 of the Commission's Rules, is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS

Adams Rib
Midamerica

AMENDMENTS FILED

June 25, 1992
January 29, 1993

7. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity,

¹ Mutually exclusive applicant Barbara Ruth Zarris, (BPH-911115MD), was dismissed on August 31, 1992, for failure to pay

a hearing fee.

together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. 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, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, in accordance with paragraphs 2 and 3 hereinabove, Adams Rib shall submit an amendment which (i) gives the correct HAAT, and (ii) corrects the discrepancy in Section V-B, Item 26. The amendment shall be submitted to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That, in accordance with paragraph 4 hereinabove, Brent shall submit an amendment which contains the information required by Section II, Item 8(b) of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That in the event of grant of D.E.K.W.'s application, Dwayne E.K. Watkins and David. S. Greenberg will be ordered to sever all connections with station WGZB(FM), Corydon, Indiana, prior to commencement of program test authority.

13. IT IS FURTHER ORDERED, That the June 25, 1992 petition for leave to amend filed by Adams Rib IS GRANTED, Adams Rib's corresponding amendment IS ACCEPTED to the extent indicated herein, and the January 29, 1993 amendment filed by Midamerica IS ACCEPTED to the extent indicated herein.

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, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 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

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau