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April 7, 1993

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APR - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: MM Docket No. 93-26
Bowdon, Georgia

Dear Ms. Searcy:

Transmitted herewith on behalf of Terry C. Jenks are an original and six (6) copies of his Opposition to Motion to Modify Issues in the above-referenced proceeding.

Should any question arise concerning this matter, please communicate with this office.

Very truly yours,

FLETCHER, HEALD & HILDRETH

Patricia A. Mahoney

Patricia A. Mahoney
Counsel for Terry C. Jenks

PAM/dlr
Enclosure
cc: The Honorable Richard L. Sippel*
James Shook, Esquire*
Audrey P. Rasmussen, Esquire
*By Hand

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APR - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of	)	MM Docket No. 93-26
	)	
STEVEN L. GRADICK	)	File No. BPH-911031MD
	)	
TERRY C. JENKS	)	File No. BPH-911031MF

For Construction Permit for a
New FM Station in Bowdon, Georgia

Directed to: The Honorable Richard L. Sippel
Administrative Law Judge

OPPOSITION TO MOTION TO MODIFY ISSUES

Terry C. Jenks, by his attorneys, hereby respectfully submits his Opposition to the Motion to Modify Issues (Motion) filed by Steven L. Gradick on March 26, 1993, in this proceeding:

I. INTRODUCTION

In the Prehearing Conference Order, FCC 93M-88 (released March 3, 1993) (PCO), in this proceeding, the Presiding Judge reminded the parties that "[p]etitions to add new issues must comply strictly with the standards and quality of proof required under the Commission's rule." PCO at 3, ¶ 10. Notwithstanding this reminder, on March 26, 1993, Gradick filed the above-referenced Motion, which did not meet any of the requirements of Section 1.229 of the rules (except that it was timely filed),[1] which contained false and misleading statements unsupported by

[1]While styled as a motion to modify the issues, the Gradick Motion is in reality an unauthorized petition for reconsideration of the Hearing Designation Order in this proceeding. No issues were requested in the Motion, and no suggested modifications of the existing issues were offered therein.

any documentation, which withheld relevant information, and which misrepresented the status of matters pending at the Commission.

In his Motion, Gradick made statements either knowing them to be false or with a reckless disregard for truth in this proceeding. Gradick submitted as his sole support for the relief requested one pleading, a Petition for Reconsideration, from a docket (MM 90-309) that includes 45 entries.[2] Contrary to the allegations in Gradick's Motion, the Commission's Mass Media Bureau has already fully investigated the allegations of misconduct that were raised by Design Media, Inc. (Design) in its September 19, 1991 Petition for Reconsideration that Gradick has submitted as the sole attachment to and authority for its Motion. See Attachments 3-5 hereto and pages 6-8 infra. Contrary to the allegations in Gradick's Motion, the Mass Media Bureau, after an investigation that lasted over a year, did not find any evidence of any wrongdoing by Terry Jenks. Id. Gradick's Motion does not contain any new evidence or information. It is based solely upon the Design Petition for Reconsideration.

It is apparent that Gradick filed his Motion, not with any good faith belief in the merits thereof but in an effort to require Jenks to spend time and resources defending himself and

---

[2] Gradick did not submit any of the responses to the Petition for Reconsideration or even acknowledge that responses were filed. That in itself is misleading. Terry Jenks has no desire to burden this proceeding with all of the pleadings that were filed in MM 90-309 but is willing to do so if the Presiding Judge requests. Jenks believes that it was incumbent upon Gradick to submit all relevant documents in order to establish its prima facie case.

to raise suspicions about Jenks in this proceeding. It is

bitter attack against Jenks and others, beginning with its Petition for Reconsideration, filed on September 19, 1991.

Both Design and AMCC filed petitions for reconsideration of the Report and Order, and both petitions remain pending.[3] In addition to its Petition for Reconsideration, Design filed a Petition for Stay, on September 23, 1991, seeking a stay of the opening of the window for Bowdon, pending action on its Petition for Reconsideration. No stay was granted, which suggests that the Commission concluded that the requirements for a stay (including likelihood of success on the merits) were not present.

Design also filed a Request for Commission Inquiry, on September 26, 1991, which relied solely upon Design's Petition for Reconsideration. On the same day Design also filed an Application for Review of the approval of a settlement agreement in a proceeding unrelated to Bowdon, Georgia, or Terry Jenks but related to a member of Dallas Tarkenton's family. The Commission's Review Board dismissed Design's Application for Review by Memorandum Opinion and Order in MM Docket 91-184. See Stephen D. Tarkenton, 7 FCC Rcd 1357 (Rev. Bd. 1992). Review

> "A broadcaster represented by an experienced communications law firm has filed a pleading which fails to comply with the most basic procedural requirements....This spurious 'pleading' should have been summarily dismissed, and the serious allegations about the sins of the father and possibly his sons should have been referred to the appropriate Commission official... for a throrough investigation before they are repeated in a public document. See Justice Frankfurter. The Government Lawyer, 18 Fed. Bar J. 24, 30-31 (1958), on the importance of strict adherence to legal technicalities.

See 7 FCC Rcd at 1359.[4]

The Design Request for Commission Inquiry and Petition for Reconsideration were opposed by Dallas M. Tarkenton, Gleamer Lee Smith, and Terry C. Jenks, the three individuals attacked by Design in the Petition for Reconsideration. Gradick has not submitted copies of the responsive pleadings, which clearly and easily refuted Design's allegations.

In Jenks's Consolidated Opposition to Petitions for Reconsideration, Jenks demonstrated that Design's Petition for Reconsideration and Request for Commission Inquiry were themselves abusive of the Commission's processes, that in them Design was carrying out threats that were raised against Jenks when he declined to accept a pay-off to dismiss his counterproposal for Bowdon, and that Design had made false allegations and concealed important and relevant information from

---

[4]Thorough investigation has occurred, yet Gradick has recklessly raised the same allegations anew in this proceeding. Gradick's conduct is inexcusable.

the Commission. A copy of the Declaration of Terry C. Jenks submitted in response to Design's filings is Attachment 6 hereto.

As the Presiding Judge will easily recognize, the Design Petition for Reconsideration and Request for Commission Inquiry relate almost exclusively to the purported activities of parties other than Mr. Jenks and were directed against the alleged conduct of Dallas M. Tarkenton and his sons. Mr. Jenks has demonstrated that he had no knowledge of any of the conduct alleged against the Tarkentons and that he did not know, had never met, and had never even spoken with any of the Tarkentons. See Attachment 6 hereto.

B. THE MASS MEDIA BUREAU INVESTIGATION

On January 29, 1992, the Chief of the Enforcement Division of the Mass Media Bureau sent a letter addressed to counsel for Dallas M. Tarkenton. A copy of this letter is submitted as Attachment 7 hereto. The letter is in direct response to

and Tarkenton." (Emphasis added.) The Bureau found nothing to substantiate the allegations raised by Design against Jenks.

The Bureau did, however, have some unanswered questions of Dallas M. Tarkenton concerning conduct raised in the Design Petition for Reconsideration and Request for Commission Inquiry that had nothing whatsoever to do with Terry C. Jenks. The Bureau asked for additional information from Dallas Tarkenton. Dallas Tarkenton responded to the Bureau's letter on February 18, 1992.

On November 17, 1992, the Chief of Enforcement Division of the Mass Media Bureau sent another letter to counsel for Dallas M. Tarkenton seeking additional information. See Attachment 4 hereto. Again the information requested had nothing whatsoever to do with Terry Jenks. Indeed, Terry Jenks, Gleamer Lee Smith, and their respective counsel were not even served with copies of the further request. Dallas Tarkenton responded to the request with additional information on December 17, 1992.

On February 10, 1993, the Chief of the Enforcement Division sent a final letter to Dallas M. Tarkenton. That letter, a copy of which is Attachment 5 hereto, states quite clearly that,

> "The Commission is in receipt of your responses to official letters of inquiry.... The letters of inquiry were precipitated by concerns that Mr. Tarkenton abused the Commission's processes, was or is an undisclosed real party-in-interest in applications for broadcast facilities filed by or on behalf of one or more of his sons, or otherwise engaged in Commission-related misconduct.

Based on the information currently before the Commission, we find there is no warrant at this time for further action. Accordingly

(Emphasis added.) This statement of Gradick's "discovery" does not correct the false assertions in the Motion. Significantly, Gradick did not supply copies of the January 29, 1992 or February 10, 1993, letters in its Supplement or explain that the Commission's Mass Media Bureau (before whom the Petition for Reconsideration is pending) had examined the allegations of misconduct against Terry Jenks and had concluded that they were unsubstantiated.

On the contrary, Gradick has in its Supplement deliberately

allegations and finding them to be unsubstantiated and no warrant-

ATTACHMENT 1

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

comments and counterproposals (RM-7488).[5] AMCC, Bowdon, and DMI filed reply comments. AMCC and DMI filed comments in response to the counterproposals. After the close of the record DMI filed a request for leave

4. In its reply comments to the counterproposals, AMCC argues that if both Design and AMCC are allowed to go Class C3 status, AMCC will provide service of 1.0 mV/m or greater intensity to a 137.64 square kilometer area encompassing 1,248 persons currently served by no other full time AM or FM service. AMCC contends that the boundaries of this "white area" are composed of the 0.5 mV/m contour of Station WSB(AM), Atlanta, Georgia, the present 1.0 mV/m contour of Station WSKS, Channel 249A, Sparta, Georgia, and the proposed 1.0 mV/m contour of Station WSKS(FM) on Channel 248C3. AMCC states that this white area or first full-time aural service takes precedence over Bowdon's proposal which proposes first local service. [9] However, in an attempt to resolve this conflict, AMCC conducted a channel search and suggested the use of Channel 223A at Bowdon as a 3 kilowatt station Class A facility. [10]

5. DMI, in its reply comments to the counterproposals, restates AMCC's argument that the upgrade of Station WQUL(FM) and Station WSKS(FM) will result in the provision of full-time aural service to a "white area" served by no other full-time AM or FM station. DMI contends that a white area first fulltime aural service is to be preferred over the conflicting Bowdon proposal. DMI

(1) first full-time aural service

(2) second full-time aural service

(3) first local service; and

(4) other public interest matters.

(Co-equal weight given to priorities (2) and (3).

In applying these priorities, we note, at the outset, that DMI and AMCC's claim that the grant of the upgrade for the Sparta station would result in a first full-time aural reception service to 1,743 people is incorrect. Our engineering analysis reveals that upgrading the Sparta station would not result in any full-time reception service because the claimed "white area" would be covered entirely by the 1.0 mV/m contour of Station WSAA(FM), Channel 226A, Warrenton, Georgia, currently authorized by a construction permit, and is covered substantially by the 1.0 mV/m contour of Station WHAN(FM), Channel 274A, Sparta. These two construction permits were ignored by DMI and AMCC's "white area" study. Moreover, when these two stations are considered, the claimed area of second full-time reception service (*i.e* ., "gray area") is reduced to a small portion of Warren County encompass-

In the few cases in which this conflict has arisen, we have compared the population that would receive second full-time aural service (*i.e.*, the gray area population) with the population of the community in which we would provide a first local aural transmission service. [14] Applying this procedure here, we note that the Sparta upgrade would provide a second full-time reception service to 113 people while the allotment of Channel 288A to Bowdon would result in a first local transmission service to a population of approximately 1,743. As a result, the Bowdon proposal is the preferred allotment under the *Revision of FM Assignment Policies.* [15]

8. Channel 288A can be allotted to Bowdon in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.1 kilometers (5.7 miles) southwest, in order to avoid a short-spacing to Station WCHK(FM), Channel 289C2, Canton, Georgia. [16]

9. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Bowdon, Georgia	288A

10. The window period for filing applications will open on **October 1, 1991,** and close on **October 31, 1991.**

11. IT IS FURTHER ORDERED, That the petitions for rule making filed by Alexander Mitchell Communications Corporation (RM-7310) and Design Media, Inc. (RM-7097) ARE DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[14] *See, e.g., Conway, Arkansas,* 2 FCC Rcd 6132 (1987). *See also Killington, Vermont,* MM Docket No. 83-357, Mimeo No. 6471, released August 21, 1985.

[15] Although DMI questions the legitimacy of Jenks' expression of interest in the allotment for Bowdon and his motives in filing his petition for rule making, we note DMI has not submitted any extrinsic evidence on this issue. On the contrary, Mr. Jenks has stated in his counterproposal that he will file an application, if the allotment is made to Bowdon. Likewise, DMI questions whether the counterproponent has shown that Bowdon has a need for a first local service. We believe that since Bowdon is an incorporated community of 1,743 people, such a need can be presumed.

[16] The coordinates for Channel 288A at Bowdon are North Latitude 33-28-54 and West Longitude 85-19-34.

ATTACHMENT 2

DUPLICATE FILE

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER H. FEINBERG
PETER GUTMANN
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SEP 19 1991
Federal Communications Commission
Office of the Secretary

September 19, 1991

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 90-309
Petition for Reconsideration

Dear Ms. Searcy:

Enclosed herewith on behalf of Alexander Mitchell Communications Corporation, is an original and six copies of a "Petition for Reconsideration". This material is directed to the attention of the Chief, Allocations Branch.

Should any questions arise in connection with this matter, kindly communicate directly with the undersigned.

Respectfully submitted,

Howard J. Barr

Enclosures
HJB/cr

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SEP 1 9 1991

Federal Communications Commission
Office of the Secretary

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

In the Matter of	)	MM Docket No. 90-309
	)	
Amendment of Section 73.202(b),	)	RM-7097
Table of Allotments,	)	RM-7310
FM Broadcast Stations	)	
(Griffin, Hogansville, and	)	
Sparta, Georgia)	)	

To: Chief, Allocations Branch

PETITION FOR RECONSIDERATION

Alexander Mitchell Communications Corporation ["WSKS(FM)"], licensee of WSKS(FM), Sparta, Georgia, by its attorneys and pursuant to Section 1.106 of the Commission's Rules, hereby submits its Petition for Reconsideration of the Report & Order, DA 91-987, released August 14, 1991, 56 Fed. Reg. 41076-02, published August 19, 1991.[1/] The following is shown in support thereof:

I. HISTORY OF THE PROCEEDING

1. WSKS(FM) has proposed to upgrade from Channel 249A to Channel 249C3. The adoption of this proposal is dependent upon the adoption of Design Media, Inc.'s ("Design") proposal to upgrade WQUL(FM) (formerly WKEU(FM)), Griffin, Georgia from Channel 249A to Channel 248C3. Adoption of these proposals requires the substitution of Channel 288A for Channel 248A at Hogansville, Georgia.

2. Bowdon Broadcasters ("Bowdon") has counterproposed to allot a first local service to Bowdon, Georgia on Channel 288A.

1/ This Petition is timely filed within thirty days of Federal Register publication.

Though Bowdon dismissed its request, Terry C. Jenks filed an expression of interest, thus Bowdon's proposal was considered in this proceeding. Since Channel 288A cannot be allotted to both Hogansville and Bowdon in compliance with the Commission's minimum distance separation requirements, adoption of Bowdon's proposal will preclude adoption of Design's and WSKS(FM)'s interdependent proposals.

3. In its Report & Order, the Bureau adopted the Bowdon counterproposal and allotted Channel 288A to Bowdon, while rejecting WSKS(FM)'s and Design's proposals. WSKS(FM) seeks reconsideration of that decision.

II. ADOPTION OF THE WSKS(FM) AND DESIGN PROPOSALS BETTER SERVES THE PUBLIC INTEREST

4. An upgrade by both WSKS(FM) and Design's WQUL(FM) and the provision of wide area service by both stations, will create a new competitive environment in the central Georgia area. This should be preferred over the proposal to provide a first local service to the much smaller community of Bowdon. See Bartow, Georgia, et al, 4 FCC Rcd 6876, 6878 (MMB 1989) ("provision of a competitive service to a larger community may overcome the presumptive need for a first local service to a smaller community, especially if the public service benefit arising from the allotment of a channel to a smaller community is limited to the provision of first local service to an extremely small population"). citing, Ruarch Associates, 101 FCC 2d 1358 (1985)

5. That is the case here. The enhanced service WSKS(FM) and WQUL(FM) will provide if allowed to upgrade as proposed, con-

stitutes the provision of a competitive service within the meaning of Bartow. Not only will large gains in service result from adoption of WSKS(FM)'s and Design Media's interrelated proposals -- gains that cannot be equalled by adoption of the Bowdon counterproposal[2/] -- adoption of the proposal will result in the provision of a second aural service by WSKS(FM). Bowdon, on the other hand, appears to be limited to the "provision of first local service to an extremely small population."

6. In light of the Commission's recognition that the entire country receives at least one radio service and the Commission's decision in Bartow, the provision of a second aural service must take precedence over the provision of first local service where the provision of that first local service will not also result in the provision of a second aural service. No showing has been made that the Bowdon counterproposal will also result in the provision of a second aural service. Accordingly, the interrelated WSKS(FM) and Design Media proposals should be preferred.

III. CHANNEL 223A MAY BE ALLOTTED TO BOWDON CONSISTENT WITH THE COMMISSION'S RULES

7. In its Reply Comments to the Counterproposals, WSKS(FM) urged that Channel 223A be allotted to Bowdon as a 3 kilowatt facility as a way of accommodating all proposals. WSKS(FM) demonstrated that the allotment could be made consistent with Section 73.213(c)(1) of the Commission's Rules. Reply Comments

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2/ See Exhibit 1 to WSKS(FM)'s Reply Comments.

at ¶9. See also Exhibit 1 thereto at p. 2-3. WSKS(FM) demonstrated that the spacing requirements set forth in Section 73.213(c)(1) could be utilized because the new allotment will be made by an order granting a petition to amend the FM Table of Allotments filed prior to October 2, 1989, i.e., Design Media, Inc.'s inceptive proposal filed on September 28, 1989. See Section 73.213(c) of the Commission's Rules.

8. The Bureau dismissed this potential resolution, citing nothing more than its disagreement with the proposition that Section 73.213(c) could be utilized.[3/] Nothing in the Commission's Second Report & Order, supra, prevents a grant of WSKS(FM)'s proposal to allot Channel 223A as a 3 kilowatt facility to Bowdon. If the Commission were to adopt the Channel 223A proposal along with WSKS(FM)'s and Design's proposals, it would be making the allotment pursuant to a petition for rule making filed prior to October 2, 1989. The allotment would therefore be made in full compliance with the Commission's Rules.

9. In fact, as set forth in WSKS(FM)'s Reply Comments, the 223A 3 kilowatt allotment is a better allotment than the Channel 288A allotment. See Reply Comments at ¶11. Adoption of this proposal will therefore serve the needs and interests of all parties, including the public interest.

[3/] The Bureau did refer to the Commission's Second Report and Order in MM Docket No. 88-275, 4 FCC Rcd 6375 (1989). The Bureau did not, however, refer to any particular page or section of that decision which addressed the issue of the applicability of Section 73.213(c) in these circumstances, and indeed, counsel for WSKS(FM) has been unable to find such a discussion.

CONCLUSION

Wherefore, the premises considered, the counterproposal of Bowdon Broadcasters should be rejected and the proposal contained in the Commission's Notice of Proposed Rule Making, DA 90-832, released June 22, 1990, as well the Channel 223A alternate at Bowdon, should be adopted.

Respectfully Submitted,

ALEXANDER MITCHELL COMMUNICATIONS CORPORATION

By: _____
John F. Garziglia
Howard J. Barr

Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20554
(202) 296-0600

September 19, 1991

CERTIFICATE OF SERVICE

I Claudia Roberts, do hereby certify that a true and correct copy of the foregoing Petition for Reconsideration has been served upon the following individuals by U.S. mail, postage prepaid, on this 19th day of September, 1991.

*Andrew J. Rhodes
Acting Chief, Allocations Branch
Federal Communications Commission
Mass Media Bureau
2025 M Street, N.W., Room 8322
Washington, D.C. 20554

*Ms. Nancy J. Walls
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8317
Washington, D.C. 20554

Alan Aronowitz, Esquire
Baraff, Koerner, Olender
& Hochberg, P.C.
2033 M Street, N.W., Suite 700
Washington, D.C. 20036
(Counsel for Design Media, Inc.)

Terry C. Jenks
12017 Running Creek Road
Louisville, KY 40243

Daniel F. Vann Horn, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
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(Counsel for Bowdon Broadcasters)

Robert G. Scott, Jr., Esq.
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1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(Counsel for Info-Air, Inc.)

*Hand Delivery

Claudia Roberts

ATTACHMENT 3

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C. 20554

January 29, 1992

IN REPLY REFER TO

GPS/7212

Certified Mail - Return Receipt Requested

John S. Neely, Esq.
Miller & Miller, P.C.
1990 M Street, N.W., Suite 760
Washington, D.C. 20036

Dear Mr. Neely:

The Commission is in receipt of a Request for Commission Inquiry, filed September 26, 1991, by Design Media, Inc. ("Design"), and three opposition pleadings, filed by Terry C. Jenks ("Jenks"), Gleamer Lee Smith ("Smith"), and Dallas M. Tarkenton ("Tarkenton"). Design requests that the Commission commence a formal investigatory proceeding, pursuant to § 403 of the Communications Act of 1934, as amended, to determine whether Jenks, Smith and Tarkenton engaged in an abuse of the Commission's processes, and whether Tarkenton committed a violation of § 73.3513 of the Commission's Rules.

Background

Design is the licensee of Station WQUL(FM) (Channel 249A), Griffin, Georgia. In Rulemaking Proceeding MM Docket No. 90-309, Design requested that the Commission substitute Channel 248C3 for 249A at Griffin, and modify WQUL(FM)'s license to specify operation on the higher powered channel. In order to accomplish the upgrade at Griffin, Design also proposed to substitute Channel 288A for 248A at Hogansville, Georgia. However, Jenks and another entity, Bowdon Broadcasters, Inc. ("BBI"), independently filed counterproposals requesting the allotment of Channel 288A to Bowdon, Georgia, as that community's first local service.

Although BBI eventually dismissed its counterproposal in consideration for the payment of money by Design, Jenks continued to prosecute his counterproposal for the allotment of a new FM channel at Bowdon. In Report and Order, 6 FCC Rcd 4863 (1991), the Chief, Allocations Branch, determined that Jenks' counterproposal would better serve the public interest. As a consequence, Design's plan to upgrade WQUL(FM)'s facilities was frustrated. Subsequently, on September 19, 1991, Design filed a Petition for Reconsideration of the Report and Order. The