

FCC MAIL SECTION

APR 27 11 53 AM '93

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

ORIGINAL

FCC 93M-190
31362

In re Applications of
DISPATCHED BY

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 on Channel 288A
in Bowdon, Georgia

MEMORANDUM OPINION AND ORDER

Issued: April 23, 1993; Released: April 27, 1993

Background

1. This is a ruling on a Motion To Modify Issues filed on March 26, 1993, by Steven L. Gradick ("Gradick"). Gradick also filed a Supplement To Motion To Modify Issues on April 2, 1993. An Opposition To Motion To Modify Issues was filed on April 7, 1993, by Terry C. Jenks ("Jenks"). The Mass Media Bureau ("Bureau") filed an Opposition on April 8, 1993. Gradick filed a Reply on April 15, 1993.

Facts And Discussion

2. Jenks, in conjunction with others who are not parties to this case, petitioned the Commission to allot Channel 288A to Bowdon, Georgia. There is presently before the Commission a petition to reconsider the allocation on the asserted grounds that Jenks had unlawfully fronted for others in seeking the allocation in order to prevent an upgrade by a competitor and to thereby induce a sale of an existing station at a price lower than its market value. Also, based on that same alleged conduct, another non-party to this case, Design Media, Inc. ("Design"), requested a formal Commission Inquiry to investigate for abuse of process.¹ Gradick seeks a modification of the comparative issue to provide that any grant to Jenks would be conditioned on the outcome of the pending reconsideration.

3. Gradick recognizes that the reconsideration issue described above is merely a pending matter. There has been no determination on the substance of the matters alleged. And Gradick does not seek to introduce the

¹ In the Supplement filed on April 2, 1993, Gradick discloses that he has learned that the Commission has sent out official letters of inquiry and that by letter dated February 10, 1993, the Commission announced that it will not pursue the inquiry any further. Thus, only the petition for reconsideration remains as an asserted viable basis on which to condition a grant.

substantive charges of those matters into this case for their resolution. Gradick seeks only to modify any grant to Jenks in this case on the outcome of the reconsideration, citing as authority the case of Wometco Enterprises, Inc., 55 Radio Reg.2d (P&F) 1545, 1552 (MMB 1984). But, as the bureau notes, that case is not applicable to the relief sought by Gradick. In Wometco, an assignment case determined by the Bureau pursuant to delegated authority, there was pending court litigation relating to non-FCC matters which could effect basic qualifications of an applicant. There the Commission conditioned any grant through assignment on the outcome of the litigation.² Here there is no pending proceeding outside of the Commission in which the alleged wrongful acts can be litigated, finally determined, and applied in this proceeding under principles of res judicata or collateral estoppel. Cf. RKO General, Inc., 82 F.C.C. 2d 291 (Comm'n 1980) (collateral estoppel is triggered when question or fact in dispute has been finally determined.) Therefore, there is no basis to apply here the holding in Wometco.

4. The motion was filed within thirty days of release of the hearing designation order. 47 C.F.R. §1.1299 (b) (1). Any motion to modify issues must contain specific allegations of fact which shall be supported by affidavit of a person having personal knowledge. 47 C.F.R. §1.229(d). Rather than proceed by affidavit, Gradick makes a general request for judicial notice of the documents on file with the Commission which are germane to the reconsideration. Id. Gradick has presented one pleading which was filed by a non-party, Design, and which is under consideration by the Commission for reconsideration. Based only on the Petition For Reconsideration filed by Design on September 19, 1991 (there are no opposing papers which relate to reconsideration submitted) he asks the Presiding Judge to determine that the one-sided adversarial pleading shows there to be a substantial and material question as to whether the Commission was deceived by Jenks. Astroline Communications Ltd. P'ship v. F.C.C., 857 F.2d 1556,1561-62 (D.C. Cir. 1988), cited by the Commission in Frank Digesu, Jr., 7 F.C.C. Rcd 5459, 5460 (Comm'n 1992). It is recognized that Gradick does not seek to litigate the modified issue in this forum. However, that does not justify non-compliance with the Commission's rule for modifying issues which makes no such distinction. The Presiding Judge cannot make a determination under Section 1.229 without reviewing all of the pleadings that are presently before the Commission on reconsideration. It is only on the contingency that the reconsideration allegations are accepted by another administrative forum that the remedy sought could raise a substantial and material question and it is not appropriate to add or modify issues based on a contingency.³ And, as an

² It is noted that the Commission has discretion to condition the grant of any application on the outcome of proceedings involving non-FCC misconduct. Policy Regarding Character Qualifications In Broadcast Licensing, 102 FCC 2d 1179, 1206 n.66 (1986). See also Amendment Of Part 1 - Broadcast Licensing, 5 F.C.C. Rcd 3252, 3253 (1990).

³ Jenks properly notes in his opposition that the Presiding Judge had counseled the parties that petitions to add new issues must comply "strictly" with the standards and quality of proof required under the Commission's rule. See Prehearing Conference Order, FCC 93M-88, March 3, 1993 at 3, Para.10.

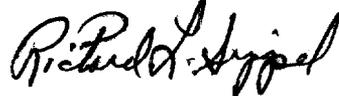
additional consideration, if contingent modification issues were considered as a matter of course, the burden on the hearing process could become substantial.

5. Gradick admits that the matters raised in the petition for reconsideration were incorporated in the request of Design for an inquiry. Gradick also acknowledges that the Commission has concluded its inquiry and has found no wrongdoing. Jenks alleges that the Bureau has conducted a year long investigation and has found no wrongdoing on the part of Jenks. Gradick persists in a reply pleading that notwithstanding the admitted fact that the Commission has refused to initiate a requested formal inquiry, the modification still should be made to condition any grant to Jenks on the outcome of the disposition of the reconsideration. It is concluded under the circumstances that the modification will not be granted and that Gradick's motion will be denied.

Ruling

Accordingly, IT IS ORDERED that the Motion To Modify Issues filed by Steven L. Gradick on March 26, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

Gradick apparently was not mindful of that instruction when he filed his motion to modify the issues.