

FCC MAIL SECTION

DUCKET ORIGINAL

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

FCC 93M-218
31421

MAY 3 12 30 PM '93

In re Applications of)	MM DOCKET NO. 93-88
EZ COMMUNICATIONS, INC.)	File No. BRH-910401C2
For Renewal of License FM Radio)	
Station WBZZ (FM) on Channel 229B)	
at Pittsburgh, Pennsylvania)	
ALLEGHENY COMMUNICATIONS GROUP, INC.)	File No. BPH-910628MC
For a Construction Permit for a New)	
FM Broadcast Station on Channel 229B)	
at Pittsburgh, Pennsylvania)	

MEMORANDUM OPINION AND ORDER

Issued: April 29, 1993; Released: May 3, 1993

1. Under consideration are 1) Motion to Certify Hearing Designation Order to the Commission, filed April 12, 1993 by Allegheny Communications Group, Inc.; 2) Opposition to Motion to Certify, filed April 14, 1993; and 3) Mass Media Bureau's Opposition to Motion to Certify Hearing Designation Order to the Commission, filed April 21, 1993.

2. Allegheny requests that the Presiding Judge certify to the Commission the Hearing Designation Order (HDO) "to the extent that the HDO denied Allegheny's June 28, 1991 'Petition to Deny' directed against the renewal application of EZ Communications, Inc. (EZ)." Section 1.115(e)(3) of the Commission's Rules provides:

"Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation."

3. Allegheny sought the specification of five issues relating to EZ's qualifications to be a Commission licensee. Allegheny argues that since the issues all "relate to" EZ's basic qualifications, they constitute "controlling questions of law" within the meaning of Section 1.115(e)(3). That superficially seductive argument notwithstanding, however, Allegheny has structured its motion in a way which makes it quite clear that its complaint is really with the views taken in the HDO of the factual allegations made by

Allegheny. Section 1.115(e) (3) requires that the "controlling question of law" be one about which there exists a "substantial ground for difference of opinion." Allegheny seeks to meet this requirement by purporting to "explain why a substantial ground for difference of opinion exists" with regard to each of the factual issues which it sought against EZ. That effort, however, cannot transform those factual issues into "controlling questions of law." What is involved here are merely differences of opinion about facts. Thus:

- a. it was determined in the HDO that any allegedly indecent segments in EZ programming amounted to no more than isolated instances. Allegheny argues that the facts can be read to support the conclusion that EZ repeatedly broadcast indecent programming.
- b. it was determined in the HDO that no discrimination in recruiting, hiring or promoting of employees had been demonstrated. Allegheny argues that "the HDO is just wrong on this point."
- c. it was determined in the HDO that Ms. Randolph did not threaten to file a petition to deny or informal objection and that EZ made no payment to induce her not to do those things. Allegheny argues that the HDO "is just plain wrong."
- d. it was determined in the HDO that "there is no evidence that the allegedly offensive remarks" about Ms. Randolph were "made in the context of a news broadcast or were intended to constitute news" and that "given the entertainment context of the statements, we do not believe that the listening public would construe the statement as news." Allegheny appears to claim that the broadcast matter in question was, in fact news.

Alleged factual errors in a hearing designation order do not constitute a valid basis for certification pursuant to Section 1.115(e) (3). The motion will be denied.

IT IS ORDERED THAT the Motion to Certify Hearing Designation Order to the Commission IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


Edward Luton
Administrative Law Judge