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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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May 14, 1993

93-88

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

Dear Ms. Searcy:

Transmitted herewith, on behalf of EZ Communications, Inc., the applicant for renewal of the license of WBZZ(FM), in Pittsburgh, Pennsylvania (MM Docket Number 93-88) is its Opposition to the Motion of Allegheny Communications Group, Inc. for Leave to File an Application for Review of the Hearing Designation Order.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,

Herbert D. Miller, Jr.

enc.

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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re Application of **EZ Communications, Inc.** For Renewal of the License of FM Radio Station WBZZ (FM) on Channel 229B at Pittsburgh, Pennsylvania **Allegheny Communications Group, Inc.** For a Construction Permit for a New FM Broadcast Station on Channel 229B at Pittsburgh, Pennsylvania	MM Docket Number 93-88

To: The Commission

OPPOSITION TO MOTION FOR LEAVE TO FILE

released on May 3, 1993 (FCC 93M-218). One week later, on May 10, 1993, Allegheny filed its present motion arguing (despite the plain language of Section 1.115) that the Presiding Administrative Law Judge erred in denying certification (Allegheny Motion for Leave to File, p. 2).

Allegheny's motion should be denied, and its accompanying Application for Review should be dismissed without substantive consideration. The matters Allegheny seeks to have the Commission review were thoroughly and correctly dealt with by the Chief, Audio Services Division, Mass Media Bureau, in the *Hearing Designation Order* and by the Presiding Administrative Law Judge in his *Order* refusing to certify. The Presiding Administrative Law Judge's refusal to certify plainly is not appealable in its own right (Section 1.115(e)(3), and without such certification review of the *Hearing Designation Order* must be deferred "until applications for review of the final Review Board Decision in the case are filed." (Section 1.115(e)(3)).

It is true that the Commission will, in extraordinary circumstances, entertain unauthorized interlocutory appeals. However, they

> "are generally disruptive and serve to delay the completion of the hearing process. It is only where an order to be appealed is patently defective and will delay the completion of the hearing process, and the grant of review will demonstrably serve to expedite the resolution of the hearing, that we will waive Section 115(e)." (*Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4333, n. 9)(1991).

Allegheny would stand this sound precept on its head, by having the Commission review Hearing Designation Orders on request (and regardless of a refusal to certify), any time a strained interpretation of the facts "could <u>possibly</u> be read to support" the legal position of the entity seeking premature review (Allegheny Motion, p. 9) (emphasis in original) instead of the legal position set forth in the Hearing Designation Order. That is not the law, and if it were the Commission would have little time for other business.

The two step process articulated by the D.C. Circuit in *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987), elaborated on in *Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988), and inexplicably relied upon by Allegheny (Motion, p. 9) does not require the Commission to entertain uncertified and otherwise unauthorized interlocutory appeals of Hearing Designation Orders whenever the petitioner's construction of the alleged facts could "possibly" lend support to the petitioner's legal position. Neither case has anything to do with interlocutory appeals. Nor does either case articulate the standard relied upon by Allegheny, even as the standard for initial staff action on a procedurally proper petition for deny, or for timely Commission review of such action. Even there, the Commission need only determine whether "the record as a whole presents a substantial and material question of fact warranting a hearing" (*Astroline Communications Company Limited Partnership v. FCC, supra* at 1563), consonant with Congressional intent to vest in the "FCC a large discretion to avoid time-consuming hearings . . . whenever possible" (*Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965) and with the thesis that "the Commission must look into the possible existence of fire only when it is shown a good deal of smoke." (*Citizens for jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. 1985). Here, there is no smoke at all; there is only the fog which Allegheny has created and attempted to pass off as smoke.

We are unaware of any case[1] in which the Commission has granted review of a Hearing Designation Order in the face of an administrative law judge's refusal to certify the matter. The Commission should not do so here.

Under the procedures established by Section 1.115(e(3), EZ could not properly respond on the merits to an **authorized** Application for Review actually

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[1] Allegheny has cited none.

certified to the Commission by the Presiding Administrative Law Judge until five days after release of the certification order. EZ should not, in these circumstances, be put to the burden of responding to Allegheny's **unauthorized** Application for Review unless and until the Commission grants Allegheny's present motion. Accordingly, in the event that the Commission grants that motion, EZ asks that it be allowed to respond to the Allegheny application for review within five days of the release of such a Commission order.

Respectfully submitted,

EZ Communications, Inc.

By /s/ Rainer K. Kraus
Rainer K. Kraus

By /s/ Herbert D. Miller, Jr.
Herbert D. Miller, Jr.

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May 14, 1993

Certificate of Service

I, Richard Massie, a secretary in the law firm of Koteen & Naftalin, hereby certify that I have this date sent copies of the foregoing to the following by First Class United States Mail, postage prepaid:

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* By hand

/s/ Richard Massie
Richard Massie

May 14, 1993