

DOCKET FILE COPY
ORIGINAL

FCC MAIL SECTION

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

JUN 15 4 20 PM '93

MM Docket No. 93-155

DISPATCHED BY
In re Application of

RICHARD BOTT II File No. BAPH-920917GO
(Assignor)

and

WESTERN COMMUNICATIONS, INC.
(Assignee)

For Assignment of Construction
Permit of Station KCVI(FM),
Blackfoot, Idaho

**HEARING DESIGNATION ORDER
AND
NOTICE OF OPPORTUNITY FOR HEARING**

Adopted: June 1, 1993;

Released: June 10, 1993

By the Commission:

1. The Commission has before it: (1) the captioned application to assign the construction permit for unbuilt Station KCVI(FM), Blackfoot, Idaho, from Richard Bott II ("Bott") to Western Communications, Inc. ("Western"); and (2) a Petition to Deny the application filed October 26, 1992 by Radio Representatives, Inc. ("RRI"). Bott submitted an Opposition to the petition, to which RRI, in turn, filed a Reply. Bott subsequently filed a "Request For Leave to Respond And Response."¹

2. *Background.* The mutually exclusive applications of Bott, RRI, and another applicant were designated for comparative hearing on July 1, 1987. *Richard P. Bott, II*, 2 FCC Rcd 3897 (M.M. Bur. 1987). During the hearing, Bott received an integration preference based on his assertions that he would move to Blackfoot and serve as full-time general manager. Bott's construction permit application

was granted and that of RRI denied on the basis of the integration preference.² Although RRI appealed to the Review Board and the Commission, the Administrative Law Judge's determination was upheld. *Richard P. Bott, II*, 4 FCC Rcd 4924 (Rev. Bd. 1989); *Richard P. Bott, II*, 5 FCC Rcd 2508 (1990). RRI's subsequent appeal to the United States Court of Appeals, District of Columbia Circuit, was also denied. *Radio Representatives, Inc. v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991) (*aff'd by judgment*).³ Bott was issued a permit on December 18, 1991. Bott now seeks to assign the permit.

3. *Pleadings.* RRI contends in its petition to deny that the assignment application must be designated for hearing pursuant to 47 C.F.R. §73.3597(a)⁴ because Bott proposes to assign his construction permit within one year of its grant, thus abandoning his commitment made at hearing to relocate to Blackfoot and integrate ownership and management. In response, Bott states that throughout the six-year effort to obtain his permit he maintained a good faith intention to both move to Blackfoot and operate KCVI as a commercial facility with a religious format. He states that it was only "several months" subsequent to the Court of Appeals affirmation of action granting his application, while he was arranging to manage KCVI, that circumstances changed. Specifically, Bott says that only then did he learn that Station KRSS in nearby Chubbuck, Idaho had adopted an identical format. According to Bott, this development "dramatically" changed the market situation, as two such similar operations could not be supported. In light of this "significant" change in circumstances, states Bott, he decided to accept an assignment offer from Western.

4. Procedurally, Bott also argues that RRI's status as a former competing applicant is insufficient to confer RRI standing to file a petition to deny. In reply, RRI maintains that since it had filed a "Petition to Reopen the Record" with the Commission on October 26, 1992 and a "Petition for Recall of the Mandate of the Court and for Remand to Open the Record" with the Court of Appeals on October 28, 1992, it remained a competitor with Bott and thus has standing pursuant to §309(d) of the Communications Act of 1934, as amended. RRI next argues that its "Petition" can in any event be considered as an informal objection.

5. RRI also alleges that, in light of Bott's abandonment of his integration pledge and promise to relocate to Blackfoot, a grant of the assignment request without hearing would undermine the Commission's licensing process. In this regard, RRI indicates that in a recent review of its comparative hearing processes, the *Report and Order in re Reform of the Commission's Comparative Hearing Process to*

¹ According to Bott, this pleading is tendered "to correct certain factual misstatements" in the Reply and to assist the Commission. While this pleading is unauthorized, we will consider the information contained therein.

² The application of Claire Marie Ferguson was also denied, and no request for review of that action was taken. *Initial Decision*, 3 FCC Rcd 7094 (ALJ 1988).

³ After the filing of the subject assignment application, on October 26, 1992, RRI filed a "Petition to Reopen the Record" with the Commission, and on October 28, 1992, RRI filed with the Court of Appeals a "Petition for Recall of the Mandate of the Court and for Remand to Reopen the Record." On December 23, 1992, the court denied this latter petition, but "without prejudice to refile, by either party, upon completion of the assignment proceeding before [the Commission]." *Radio Repre-*

sentatives, Inc. v. FCC, No. 90-1227 (D.C. Cir. December 23, 1992).

⁴ That section provides, in relevant part, that where a licensee or permittee seeks to assign a station "which has been operated on-air ... for less than one year," designation of the assignment application for hearing on appropriate issues is required unless the Commission finds that: (i) the permit was not issued through the Minority Ownership Policy or after a comparative hearing; (ii) the application involves an FM translator or booster station only; (iii) the application involves a *pro forma* assignment or transfer; (iv) the assignor demonstrates that, due to death, disability, or other "changed circumstances," grant of the assignment would serve the public interest; and (v) the application proposes assignment or transfer to a minority controlled entity.

Expedite the Resolution of Cases, 6 FCC Rcd 157, 160 (1990), the Commission specifically required that applicants commencing station operations provide information concerning fulfillment of representations made in the course of comparative hearings in order to insure at least a year's compliance. In addition, RRI notes that 47 C.F.R. §1.68 provides that failure to abide by obligations contained in a permit application requires designation for hearing of an application for a covering license. RRI asserts that the integration credit is only applicable where the proposed principal participation is "permanent," citing *Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 190 (1965), and several Review Board decisions. Indicating that but for Bott's integration credit its own application would have been preferred, RRI says that, unlike Bott, it stands ready to implement service in conformance with its proposal.

6. RRI further states that Bott's failure to reveal that his integration promises were "contingent" on the financial viability of the proposed KCVI format constitutes a "fraud" on the Commission. It argues that a permit obtained pursuant to a comparative hearing cannot be "casually" assigned just because no profit will accrue to the assignor, citing *Eagle, Limited*, 7 FCC Rcd 5295, 5297 (1987), and *TV-8*, 2 FCC Rcd 1218, 1220 (1987). In this regard, RRI argues that Bott's "changed circumstances" are insufficient and that to allow abandonment of an integration proposal where a specific format appears impracticable would be to subject the comparative process to abuse. According to RRI, changed financial circumstances do not warrant a transfer of Bott's permit. In this regard, RRI questions whether KCVI operating with the projected format would actually be at a competitive disadvantage *vis-a-vis* KRSS. Finally, RRI argues that a grant here will damage the integrity of the licensing processes. According to RRI, allowing the assignment of KCVI to a "white knight" is contrary to Commission policy, citing *Rebecca Radio of Marco*, 5 FCC Rcd 937 (1990), and "damaging" to the public interest.

7. In opposition, Bott maintains that RRI's reliance on Section 73.3597(a) is misplaced, as that rule applies only to "operational" stations and not to unbuilt facilities such as KCVI. According to Bott, subparagraph (4) does not mandate a hearing in the face of changed circumstances arising subsequent to a permit grant, and the new KRSS format qualifies as a changed circumstance affecting a permittee pursuant to that part of the rule. Bott also asserts that a grant of the captioned assignment application will conform to the public interest mandate of subparagraph (4). Bott asserts that he has perpetuated no fraud on the Commission and that RRI presents no evidence for its "unfounded" allegations, and further states that a grant of the proposed assignment will not adversely affect the integrity of the Commission's licensing processes. According to Bott, there is no motive to endure a comparative hearing simply to recoup expenses. Bott argues that the noted change in

market-format circumstances should not result in a penalty to him in the amount of his investment in KCVI. Finally, he argues that the public interest would be ill-served by denying the assignment and thereby delaying the introduction of a new service.

8. *Discussion*. Preliminarily, given that the adjudicatory proceeding in which RRI was a party is final, we find no basis to grant RRI standing to file a petition to deny. Accordingly, we will treat this as an informal objection. Contrary to RRI's assertion, Section 73.3597(a) of the Commission's Rules is inapplicable to the instant situation. RRI has cited *Urban Telecommunications Corp. ("Urban")*, 7 FCC Rcd 3867 (1992), and *TV-8, Inc. ("TV-8")*, 2 FCC Rcd 1218 (1987), arguing that the text of §73.3597(a) does not restrict application of that rule to "constructed" facilities and that there is no good policy reason for a "restrictive" reading. In *TV-8*, a losing applicant in a comparative hearing protested an application to transfer control of a television permittee. As here, the successful applicant prevailed due to a preference received in the course of the hearing and, as does RRI, the objector argued that the rule applies to an unbuilt facility. Faced with these circumstances, the Commission clearly determined that §73.3597(a) does not apply to an unbuilt station. 2 FCC Rcd at 1220. Nonetheless, the Commission has clearly indicated its basic concern with the integrity of its licensing process. See *Urban*, 7 FCC Rcd at 3870.⁵

9. Bott does not dispute, however, the contention that his application for a construction permit prevailed essentially on the basis of his integration proposal. An examination of the record in the hearing proceeding reveals that Bott, in the course of prosecuting his permit application, unambiguously, unconditionally, and repeatedly pledged to relocate to Blackfoot from his home in Kansas City, Missouri and to act as full-time (at least forty hours per week) general manager of the proposed facility.⁶ The hearing record does not reveal any qualification to Bott's pledges, such as being contingent on the practicality of introducing a commercial religious or any other particular format. Moreover, in his testimony at hearing, Bott made the following statements:

Q Isn't it true that you also intend to engage in a (religious-orientated) format for the Blackfoot facility?

A No, that's not necessarily true. I've not decided exactly the type of format, the type of music or whatever that I would use in that facility. It would be a format tailored to that particular market and the needs of that community.

(TR 61).

⁵ With respect to RRI's argument predicated on §1.68, that rule requires designation of an application for a *covering license* in situations where the permittee has not abided by the terms, conditions, and obligations in its permit application and grant. Thus, that provision clearly is inapplicable to the *assignment* application at issue here.

⁶ See, e.g., *Initial Decision* at 7094; Bott Exhibit 4 introduced at hearing December 7, 1987 (TR 19); Bott's testimony at hearing (TR 24, 92); Bott's September 11, 1987 *Integration Statement* filed with the presiding Administrative Law Judge; Bott's oral

testimony wherein Bott stated his intent to leave his father's broadcast business in order to operate his own station (TR 56) and stated that he had no plans to sell his proposed station and did intend to live in Blackfoot indefinitely (TR 77-78); Bott's February 8, 1988 *Proposed Findings of Fact and Conclusions of Law* at paragraphs 1, 11-12, 70-71; February 19, 1991 *Response To Motion to Remand To Reopen The Record* filed with the Court of Appeals; *Statement Of Richard P. Bott, II* attached to October 26, 1992 *Petition To Reopen The Record*.

AI've not chosen the exact format....

(TR 95). However, as previously noted in Paragraph 3, *supra*, Bott has represented in the instant proceeding that, throughout the comparative proceeding, he always intended to operate with a commercial religious format and that KRSS' adoption of an identical format dramatically changed the local market situation. Bott cannot have it both ways.

10. Insofar as Bott, by failing in any way to qualify his integration pledge, led the Commission to grant his permit application, there arises a question as to whether he has misrepresented facts or lacked candor, either in his statements made during the course of the hearing, or in the instant assignment proceeding. We believe that *any* authorization obtained under circumstances of misrepresentation or lack of candor undermines the integrity of the Commission's licensing processes, and thus it is proper to inquire into why, if Bott previously represented that he intended to proceed without having chosen a particular format, the format issue became so critical later. The Commission "must demand candor from those who come before it and must refuse to tolerate deliberate misrepresentations. *WOKO, Inc.*, 329 U.S. 223 (1946); *WMOZ, Inc.*, 36 FCC 202 (1964); *affirmed* 3 FCC 2d 637 (1966)." *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971). See also *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210-11 (1986), *recon. denied*, 1 FCC Rcd 421 (1986), and *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 940 (1990), *affirmed*, 5 FCC Rcd 4596 (1990). Therefore, we believe that designation of the captioned application for evidentiary hearing on pertinent issues is appropriate.

11. RRI's opposition pleading also raises an additional question. Although Bott attempts to justify his decision not to move to Blackfoot and operate KCVI on changed circumstances, *i.e.* the nonfeasability of his planned format in light of KRSS' prior introduction of such programming, the assertions of RRI in its Reply call into question Bott's rationale for assigning rather than constructing KCVI. Specifically, RRI notes that KCVI would serve an area 15.2 times that of KRSS and 2.55 times as many persons. Bott does not dispute the conclusion that KCVI will serve a substantially greater area and population than KRSS, although it does take issue with RRI's computation.⁷ In light of this, it appears that the credibility of Bott's "justification" for not proceeding with his announced plans for KCVI is further eroded.

12. Moreover, we believe that unanticipated competitive circumstances are not sufficient to justify abandonment of the integration proposal and approval of the assignment application. *Triangle Publications, Inc.*, 29 FCC 315, 318 (1960), *affirmed, sub nom. Triangle Publications, Inc. v. FCC*, 291 F.2d 342 (1961), *PZ Entertainment Partnership, L.P.*, 6 FCC Rcd 1240 (1991). Although RRI raised this point, Bott cites no contrary authority, and none is apparent. Further, it appears irrelevant whether the consideration Bott receives merely covers his expenses in

prosecuting his permit application to date. To allow Bott, in effect, to renege on his critical integration pledge solely on the basis that the station would not be as profitable as he once hoped would make a mockery of the comparative licensing process.

13. *Conclusion.* We have carefully reviewed the pleadings and related matters of which official notice may be taken involving grant of Bott's construction permit, and we believe that there are substantial and material questions of fact concerning whether Bott, in the course of the comparative licensing proceeding or the instant assignment proceeding, misled or lacked candor with the Commission about his intention to move to Blackfoot and act as full-time general manager of his proposed station.⁸ Since those questions cannot otherwise be resolved, and inasmuch as this precludes a finding pursuant to §309(a) of the Communications Act that the public interest, convenience, and necessity would be served by a grant of the captioned assignment application, that application must be designated for hearing pursuant to §309(e) of the Act.

14. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the captioned application IS DESIGNATED FOR HEARING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issue:

15. IT IS FURTHER ORDERED, that, irrespective of whether the hearing record warrants an Order denying the assignment application, it shall be determined pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE in an amount not to exceed \$250,000 shall be issued against Bott for willful and repeated violations of Section 73.1015 (submitting truthful written statements and responses to the Commission).

16. IT IS FURTHER ORDERED, that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

17. IT IS FURTHER ORDERED, that, in accordance with Section 309(e) of the Communications Act of 1934, as amended, Bott both proceed with the initial presentation of evidence and have the burden of proof with respect to all issues.

18. IT IS FURTHER ORDERED, that, in the event: (i) dismissal of the captioned application is requested; (ii) Bott fails to file a written appearance pursuant to paragraph 21, *infra*; or (iii) a finding adverse to Bott is made with respect to issue (b), above, the presiding Administrative Law Judge is hereby directed to issue an order to show cause why an order of revocation of the construction permit for unbuild station KCVI(FM) should not be issued.⁹

19. IT IS ORDERED, That the Informal Objection filed October 26, 1992 by Radio Representatives, Inc. IS GRANTED to the extent indicated herein.

⁷ Bott points out that KRSS has commenced operations with its authorized Class C2 facilities (BPH-900612IA, issued on May 8, 1992). KCVI, as a Class C facility, would serve an area 3.1 times the size and a population 2.1 times greater than that of KRSS' C2 operation, according to Bott.

⁸ Nothing in the record or pleadings presently appears to

indicate that Western, the proposed assignee, has acted in a manner warranting further inquiry.

⁹ The Commission reserves its right to refile with the D.C. Circuit Court of Appeals a petition for recall of mandate and for remand pursuant to the Court's December 23, 1992 order. See n.3, *supra*.

20. 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 BE SERVED on the Chief, Data Management Staff, Mass Media Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 350, Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, Bott and Western, pursuant to Section 1.221(c) of the Commission's Rules, in person or by their respective attorneys, within 20 days of the mailing of this Order, SHALL FILE in triplicate a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy 6/14/93

Donna R. Searcy
Secretary