

ORIGINAL

Joint Exhibit No. 1
MM Docket No. 93-155
Blackfoot, Idaho**STIPULATION RE: ISSUANCE OF
CONSTRUCTION PERMIT FOR BLACKFOOT, IDAHO**

Richard P. Bott, II and the Mass Media Bureau stipulate to the following statement of facts:

1. The U. S. Court of Appeals, D. C. Circuit, denied Radio Representatives, Inc.'s petition for review of the FCC's decision and order granting the application of Richard P. Bott, II to construct an FM radio station in Blackfoot, Idaho by an unpublished judgment filed February 22, 1991. A copy is attached.

2. By the terms of the court's judgment, its mandate was not to be issued until seven days after disposition of any timely petition for rehearing. The deadline for a petition for rehearing was April 8, 1991 (forty-five days after the judgment). No petition for rehearing was filed. The FCC's General Counsel's office advises that the mandate was issued April 17, 1991.

3. It is believed that sometime after the court's mandate was received by the FCC, Bott's application was assigned to the staff for a routine final technical examination. On October 7, 1991 Bott's then counsel, Barry Friedman, received a telephone call from an FM Branch staff member requesting that an RF radiation hazard prevention statement be submitted. Mr. Friedman relayed that request to Mr. Bott, who then contacted a consulting engineer to request preparation of the statement. The statement was filed under cover of an amendment signed by Bott on October 29, 1991 and received by the FCC on November 4, 1991. A copy is attached.

FEDERAL COMMUNICATIONS COMMISSION

Docket No. 93-155 Exhibit No. Exhibit #1
Presented by Counsel for RICHARD COITZ, II

Identified 11/8/93

Disposition: Received 11/8/93

Rejected MK FRESHMAN

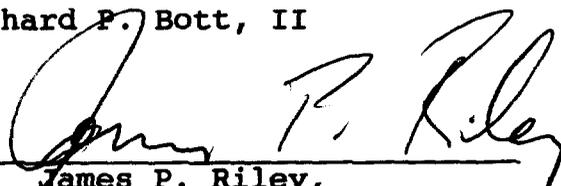
Date 11/8/93

4. On December 18, 1991 the construction permit for the Blackfoot FM station was issued to Mr. Bott.

SO STIPULATED:

Richard P. Bott, II

By



James P. Riley,
His Counsel

Chief, Mass Media Bureau

By

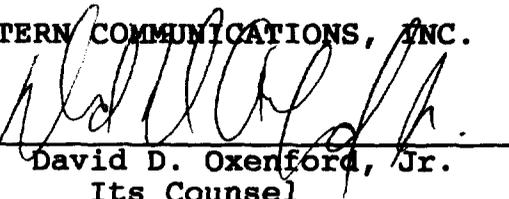


Norman Goldstein,
His Counsel

Western Communications, Inc.
has no objection to the receipt
of this Joint Exhibit No. 1 in
the record of MM Docket No. 93-
155.

WESTERN COMMUNICATIONS, INC.

By



David D. Oxenford, Jr.
Its Counsel

NOT TO BE PUBLISHED - SEE LOCAL RULE 1
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. No. 90-1227

September Term, 19 90

Radio Representatives, Inc.,
Petitioner,
v.

United States Court of Appeals
For the District of Columbia Circuit

FILED FEB 22 1991

Federal Communications Commission,
Respondent.

CONSTANCE L. DUPRÉ
CLERK

Before: WALD, BUCKLEY and SENTELLE, Circuit Judges.

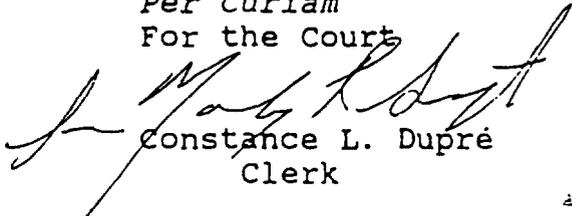
JUDGMENT

This case was considered on the record on petition for review of an order of the Federal Communications Commission and the briefs filed by the parties. See D.C. Cir. Rule 13(i). The issues have been accorded full consideration by the Court and occasion no need for a published opinion. See D.C. Cir. Rule 14(c). For the reasons stated in the accompanying memorandum, it is

ORDERED AND ADJUDGED that the petition for review is denied.

The Clerk is directed to withhold issuance of the mandate herein until seven (7) days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam
For the Court


Constance L. Dupré
Clerk

MEMORANDUM

Petitioner Radio Representatives, Inc. ("RRI") seeks review of a decision and order of the Federal Communications Commission ("FCC" or "Commission") granting the application of Richard P. Bott, II ("Bott") to construct an FM radio station in Blackfoot, Idaho. In particular, RRI contends that Bott did not demonstrate the requisite good cause and "unforeseeability" in amending his application to specify a new transmitter site and thus that the FCC erred in approving that amendment. Upon a thorough review of the record, we conclude that the FCC's decision was not arbitrary or capricious. Accordingly, we deny RRI's petition for review.

I. BACKGROUND

On July 11, 1985, Bott filed an application for a construction permit for a broadcast facility. In the application, Bott proposed to locate an antenna in an area known as "Lot 6" on Howard Mountain in Idaho. This area is administered by the U.S. Bureau of Land Management (BLM) and Bott, in preparing his application, had consulted with Delen T. Stears, the BLM's communications specialist. Stears had "recommended Lots 6 and 7 because they would be closer to electrical power" and "indicated that when [Bott] was ready to actually rent the space [he] should contact the" BLM's Pocatello office. This conversation was confirmed by letter.

In September 1985, a private group, the Howard Mountain Users Association ("Users Association") passed a resolution recommending to the BLM that Lot 6 be used for "low power communication sites"

and that Lots 11, 12, and 13 be used for high power sites (such as Bott's proposed antenna). This recommendation was discussed at a BLM meeting in March 1986. Although BLM officials believed that the "recommendation ha[d] merit," they were "not bound by this recommendation."

In August 1987, the BLM wrote to Bott reporting the Users Association's recommendation and suggesting that Bott reconsider his site selection. Again, the BLM noted that the Users Association's recommendation was "not binding on the Bureau." Three weeks later, Bott petitioned to amend his application so as to locate the antenna on Lot 12, instead of Lot 6.

An Administrative Law Judge ("ALJ") granted Bott's petition to amend, finding that, consistent with 47 C.F.R. § 73.3522 (b)(1), Bott had demonstrated good cause and that his amendment was necessitated by events that could not have been foreseen. On appeal, the FCC's Review Board found that the Users Association's recommendation was not binding on the BLM, that Bott did not become aware of the recommendation until August 1987, and that thereafter he acted promptly in locating a new site and petitioning to amend his application. Accordingly, the Board affirmed the ALJ's decision. The Commission denied RRI's application for review and this appeal followed.

II. ANALYSIS

Under the relevant regulations, Bott's application to amend could only be granted "upon a showing of good cause for late filing" and a demonstration that "the amendment [was] necessitated

by events which the applicant could not reasonably have foreseen." 47 C.F.R. § 73.3522 (b)(1). RRI contends that the FCC erred in finding good cause and "unforeseeability" and thus that the Commission's decision was arbitrary and capricious.¹ For the reasons stated below, we disagree.

The Commission has long employed a multi-factor analysis for assessing "good cause." See *Erwin O'Conner Broadcasting Co.*, 22 F.C.C.2d 140, 143 (Rev. Bd. 1970). RRI first contends that, contrary to the finding of the Review Board, Bott has failed to demonstrate one of these factors--namely, "due diligence." Both parties agree that due diligence is determined from "the time the applicant is, or should have been, apprised of the problem requiring amendment." *Horizon Broadcasting, Inc.*, 103 F.C.C.2d 656, 659 (Rev. Rd. 1986) (emphasis in original). RRI argues that Lot 6 became unavailable in March 1986 when the BLM met to discuss the Users Association's recommendation and thus that, in not amending his application until August 1987, Bott failed to exercise due diligence. The Review Board read the record differently. Emphasizing that the BLM did not consider itself bound by the Users Association's resolution, the Review Board found that there was no

¹In its application for a construction permit for a broadcast facility, an applicant must specify the site upon which it intends to place its transmitter. That specification must be based on a "reasonable assurance in good faith that [the transmitter] site will be available." *Mount Wilson FM Broadcasters v. FCC*, 884 F.2d 1462, 1463 (D.C. Cir. 1989) (citation omitted). The Review Board found that Bott's initial site application was founded upon such reasonable assurance. As RRI did not apply for Commission review of the Board's finding, the soundness of that finding is not an issue before this court.

"problem requiring amendment" (and thus no due diligence required) in March 1986. Even if the BLM had considered itself bound, the Board continued, RRI did not demonstrate that Bott "should have been [] apprised" of that information until he received the BLM's August 1987 letter. On these grounds, the Board affirmed the ALJ's finding of due diligence.

The Board's decision is well supported by the record. A BLM official clearly stated that as of March 1986 the Bureau did not consider itself bound by the Users Association's resolution. Indeed, as late as August 1987 the Bureau made clear that it did not consider the resolution binding. The only evidence to the contrary is an ambiguous declaration in which a paralegal retained by RRI reports a hearsay statement by a BLM official. This statement does not suggest that Bott had any reason to believe Lot 6 might not be available prior to August 1987. All told, the Board's reasoning and the administrative record clearly reflect that the Board's decision "was based on a consideration of the relevant factors" and was not "a clear error." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

RRI also contends that the Board erred in finding that the events necessitating the amendment were unforeseeable. To support this claim, RRI notes Bott's experience in licensing proceedings and suggests that Bott should have formally notified the BLM of his intention to build on Lot 6. The Board disagreed and found nothing in the record supporting a claim that Bott could have foreseen the BLM's apparent policy change. Moreover, as the Board

notes in its brief, it appears that "space on Howard Mountain could not be rented from the BLM until an FCC authorization had been obtained." Thus, there was no reason for Bott to contact the BLM before his FCC application was approved. Again, on this record, it seems beyond question that the Board's decision reflected reasoned decisionmaking and was not arbitrary and capricious.

For these reasons, we find that the FCC's order was not erroneous and deny the petition for review.

DUPLICATE

FCC MAIL SECTION

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911104MA

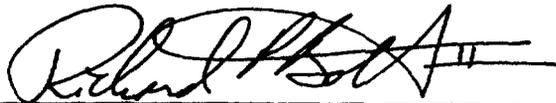
Nov 4 11 07 AM '91

File No. BPH-850711MM

RECEIVED BY

AMENDMENT

Richard P. Bott, II, an applicant for a new FM radio station at Blackfoot, Idaho, hereby amends his above-referenced application to submit the attached statement evidencing compliance by the proposed station with the Commission's rules concerning RF radiation.



Richard P. Bott, II
Sole Proprietor

Dated: 10/29/91

File -
Bott H.F. # 4 A,
Vol. I



Nov 4 11 07 AM '91

RF RADIATION EXPOSURE PREVENTION PROCEDURES

The applicant agrees to the following measures which will assure compliance with OST Bulletin No. 65 entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation". A restricted area will be established beginning at a point outside the area where the guidelines may be exceeded as determined by actual measurement, either at ground level or at an elevation above ground level.

MEASURES TAKEN TO PROTECT THE GENERAL PUBLIC:

Appropriate measures, including the posting of warning signs which describe the nature of the hazard, will be taken to preclude casual or inadvertent access to the supporting structure or to any portion of the restricted area.

MEASURES TAKEN TO PROTECT COMPANY EMPLOYEES AND CONTRACT LABOR:

For personnel whose duties require them to enter the restricted area, the following procedure will be instituted to ensure that exposure to RF radiation levels will not exceed the established guidelines:

The nonionizing RF levels at any particular work location will be determined through measurement to determine their exact value. The time-averaging methods described in the ANSI standard will be applied to limit exposure to working personnel, OR

If the levels are too high for such methods or if the time required to be spent inside the restricted area is larger than would be permissible by the averaging method, all emission of RF energy will cease during the work period to the extent that such RF energy would exceed the ANSI guidelines for any time period.

This policy will be posted at the access point to the restricted area. Anyone requiring access to the restricted area who feels the duties to be performed may place them at risk of exposure to unsafe levels of RF radiation should not enter the restricted area and are to immediately contact either the General Manager or the Chief Operator.