

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

MM Docket No. 93-51

In re Applications of

MARTHA J. HUBER File No. BPH-911114ME

RITA REYNA BRENT File No. BPH-911115MC

MIDAMERICA File No. BPH-911115ML
ELECTRONICS
SERVICE, INC.

STATON File No. BPH-911115MU
COMMUNICATIONS, INC.

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

Appearances

Morton L. Berfield, *Esq.*, on behalf of Martha J. Huber;
Henry A. Solomon, *Esq.*, on behalf of Rita Reyna Brent;
Bradford D. Carey, *Esq.* and Marjorie R. Fisman, *Esq.*, on
behalf of Midamerica Electronics Service, Inc.; Donald J.
Evans, *Esq.* on behalf of Staton Communications, Inc.; and
Charles E. Dzedzic, *Esq.* and James W. Shook, *Esq.*, on
behalf of the Mass Media Bureau.

**SUMMARY DECISION OF ADMINISTRATIVE
LAW JUDGE RICHARD L. SIPPEL**

Issued: December 17, 1993; Released: December 28, 1993

PRELIMINARY STATEMENT

1. This is a ruling on a Motion For Summary Decision that was filed on November 23, 1993, by Martha J. Huber ("Huber"), Rita Reyna Brent ("Brent"), Midamerica Electronics Service, Inc. ("Midamerica"), and Staton Communications, Inc. ("Staton") (sometimes collectively referred to as the "applicants").

2. Also under consideration are related pleadings: Petition For Leave To Amend filed on November 23, 1993, by Midamerica to substitute a new entity for Midamerica

called New Albany Broadcasting Company, Inc. ("NABC"); a related Joint Request For Approval Of Agreements filed on November 23, 1993, by the applicants, with NABC substituted for Midamerica; and a Supplement To Joint Request For Approval Of Agreements that was filed on December 7, 1993.

3. On December 8, 1993, the Mass Media Bureau filed Consolidated Comments On Joint Request For Approval Of Agreements, Petition For Leave To Amend And Motion For Summary Decision. The Bureau supports all of the relief requested by the applicants.

FINDINGS OF FACT

4. This proceeding was commenced on March 3, 1993, by the adoption of *Hearing Designation Order* DA 93-253 ("HDO"), reported at 8 F.C.C. Rcd 1753 (MM Bur 1993) and released on March 15, 1993. Initially, there were six applicants in this case. But two were dismissed for failures to prosecute.¹ Issues were added by the Presiding Judge against each of the four remaining applicants in separate rulings to determine whether each was financially qualified at certification.² Issues were also added against Staton to determine whether Staton had an undisclosed real party-in-interest and whether Staton had misrepresented its proposal to the Commission.³

5. The proposed amendment discloses that NABC is a new entity that was formed on August 30, 1993, under the laws of the State of Indiana as a for profit corporation. The amendment would effect a merger of the applications of Huber and Midamerica. NABC would succeed to the application of Midamerica. The merger arrangement also contemplates the dismissal with prejudice of the applications of Brent and Staton in return for reimbursement of their costs.

6. The two principals of NABC are Martha Judith Huber, formerly the principal of the Huber application, and Peter C.L. Boyce, formerly the principal of the Midamerica application. Ms. Huber and Mr. Boyce are each owners of 50% of the outstanding shares of the voting stock of NABC. Ms. Huber is the company's president and one of its two directors. Mr. Boyce is the other director and its secretary-treasurer. Both Ms. Huber and Mr. Boyce ask to be relieved of their integration pledges. There is no objection interposed to that request. While each will continue to be involved in the business and development of NABC, a qualified manager will be hired to operate the station's day to day business.

7. A new antenna site is also contemplated for NABC which has not been proposed before in this case. The selection of the new antenna site and the dismissals of the competing applications are necessary steps taken incident to a contemplated universal settlement that would dispose of this case without further litigation. The bureau has reviewed the engineering, determined that the technical

¹ See *Memorandum Opinion and Order* FCC 93M-221, released May 4, 1993, dismissing the applications of former applicant parties Adams Rib, Inc. and D.E.K.W. Communications, Inc.

² See *Memorandum Opinion and Order* FCC 93M-276, released May 18, 1993 (Midamerica); *Memorandum Opinion and Order* FCC 93M-314, released June 1, 1993 (Huber); *Memorandum Opinion and Order* FCC 93M-318, released June 2, 1993 (Staton); and *Memorandum Opinion and Order* FCC 93M-374,

released June 17, 1993 (Brent).

³ See *Memorandum Opinion and Order*, FCC 93M-419, released June 28, 1993. Since Staton is being dismissed with prejudice and there is no principal of Staton who will be participating in NABC, the character issue against Staton need not be resolved here in order to effect a settlement. See *Allegan County Broadcasters, Inc.* 83 FCC 2d 371 (Comm'n 1980).

proposal conforms with Commission requirements, and notes that use of the new site is an integral part of the settlement.

8. Applicants Staton and Brent have entered into separate agreements with NABC whereby their applications will be voluntarily dismissed with prejudice in return for payments of the reasonable and prudent costs incurred in connection with the prosecution of their respective applications up to the date of settlement. Based on the Declarations of the parties, it is determined that the reasonable and prudent costs are \$25,000 for Staton and \$51,776 for Brent.

9. The dismissing parties, Staton and Brent, have affirmed that their applications were not filed with a view towards any settlement and that their proposed dismissals are in the public interest of providing a new broadcast service for New Albany, the community of license, without a need for further litigation.

10. The financing proposal of NABC is now relied on to provide a reasonable assurance of its ability to construct a station and to operate it for three months without revenue. However, to permit the amendment for the NABC financial proposal, it is first necessary:

To determine whether, at the time it filed its application, Midamerica was qualified to construct and operate its proposed FM station at New Albany, Indiana.

See Memorandum Opinion and Order, FCC 93M-276, supra at 4. In that ruling which set the issue, the Presiding Judge was concerned about the general manner in which costs were estimated by Midamerica and the lack of objective substantiation for the facially low estimate of \$85,000. *Id* at Paras 6-9. Midamerica and Mr. Boyce had relied on the circumstance that Midamerica had an inventory of equipment that could be used for the station's operation. Since there would not be a need to purchase equipment in the open market, Midamerica had estimated neither the costs of the items of equipment nor the cost of installation. Mr. Boyce was to fund the \$85,000 from his personal account.

11. Mr. Boyce goes into further detail in his Second Declaration dated November 17, 1993, that is submitted here in support of a summary decision. Midamerica and Mr. Boyce were and are in the business of building and remodelling broadcast facilities. Midamerica also is a dealer for manufacturers of certain items of equipment by which Mr. Boyce gained first-hand knowledge of equipment costs. Mr. Boyce has now recast the Midamerica budget based on information that was available to him from Midamerica's computer at the time of certification. Here he lists nine items for the studio, four items for the transmitter, a studio to transmitter link, fixing up expenses, and miscellaneous costs such as salaries, FCC filing fees, and legal fees. There now is substantial evidence on which to conclude that the cost estimate of \$85,000 was reasonable under the circumstances.⁴

12. Mr. Boyce has also provided details of his personal finances at the time of Midamerica's certification. His personal financial statement as of November 1, 1991, reflects a

net worth of \$1,051,803. The statement shows liquid assets of cash and readily marketable securities in the amount of \$75,000. Midamerica further relied on a commitment for a personal loan of \$25,000 from Mr. Larry Young, a long-time friend of Mr. Boyce and the corporate secretary of Midamerica. While there were no papers prepared to reflect the commitment of Mr. Young to make the loan, in the past Mr. Boyce had informally loaned substantial monies to Mr. Young for business purposes without requiring documentation. Thus there was a reasonable expectation that Mr. Young would loan Midamerica \$25,000 if it were needed. And Mr. Young had assets of over \$200,000 and he was known personally to Mr. Boyce as having the financial ability to make the loan.

13. The facts presented in the Second Declaration of Mr. Boyce and the Declaration of Mr. Young, as outlined above, provide substantial evidence that is sufficient to base a finding that at the time of certification on November 15, 1991, Midamerica had a reasonable assurance of its financial ability to construct and operate an FM broadcast station.

CONCLUSIONS OF LAW

14. The Commission's rules provide that in considering a motion for summary decision:

The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1,251(a)(1). As the moving party, Midamerica has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, it is concluded that Midamerica has met its burden.

Financial Issue

15. There is no issue with respect to the proposed financing of NABC. However, there remains for resolution the issue against Midamerica's financing. Also, NABC's financial proposal is a subject of the proposed amendment and the Commission has held that initial financial qualifications are a "critical ingredient" to a good cause showing in considering a post-designation amendment. *Aspen FM, Inc.*, 6 F.C.C. Rcd 1602, 1603 (Comm'n 1991). *See also Opal Chadwell*, 4 F.C.C. Rcd 1215, 1217 (Comm'n 1989)(validity of applicant's original financial proposal must be established before it could rely on a new financial proposal). Here, the financial proposal of Midamerica was implemented without documentation. But the Commission will not disqualify an applicant lacking documentation at certification provided that there is "other reasonable and reliable evidence" that funds would be available. *Northampton*

⁴ NABC has estimated its costs at \$197,000. The additional costs over and above Midamerica's \$85,000 estimate are attributed to the decision by Ms. Huber and Mr. Boyce to purchase better and therefore more expensive equipment than that which

is currently owned by Midamerica. Additional funds will also be used to cover the added costs of obtaining a new transmitter site and the necessary engineering study and report.

Media Associates, 3 F.C.C. Rcd 5164, 5167 (Review Bd 1988), *review denied*, 4 F.C.C. Rcd 5517 (Comm'n 1989), *aff'd*, 941 F.2d 1214 (D.C. Cir.1991).

16. Mr. Boyce was a principle of Midamerica. As such, he had an incentive to submit a viable financial proposal in expectation of a comparative contest. On May 26, 1993, he was deposed at length on the issue of Midamerica's financial qualifications. Boyce had a substantial net worth of over \$1,000,000 of which \$75,000 constituted liquid cash and securities. To further assure that the applicant had liquid assets of \$85,000, Mr. Boyce arranged for a commitment from another officer of Midamerica who was known to Mr. Boyce and who had borrowed a substantial sum of money from Mr. Boyce for business purposes. Thus, Mr. Boyce knew well the reliability of Mr. Young as a resource for \$25,000 in liquid assets. This situation is closely aligned on the facts with *Northampton, supra* wherein the Cuttings had orally agreed to make available the sum of \$40,000 to the applicant, a personal long-time friend.

17. Mr. Boyce has been engaged in broadcasting. At the time that Midamerica applied for the New Albany frequency he owned 50% of the licensee of an AM/FM combination in North Vernon, Indiana. Also, through Midamerica, he has been engaged in a related line of business for the maintenance of broadcast stations and equipment. Therefore, Mr. Boyce was familiar with and had first-hand knowledge of the costs associated with constructing, maintaining and operating an FM broadcast facility. Cf. *Northampton, supra*, 3 F.C.C. Rcd at 5165 (one principal of applicant dealt with a knowledgeable engineer who reviewed cost items in oral consultations). Mr. Boyce was similarly positioned to provide his expertise in making cost estimates for Midamerica at the time that the application was prepared, certified and filed by him. The Bureau supports a summary determination on the issue. It is concluded that summary decision in favor of Midamerica is warranted and it will be granted. See *Big Country Radio, Inc.*, 50 F.C.C.2d 967, 968 (Review Bd. 1975).

Engineering Amendment

18. Another condition to approving the settlement is the acceptance of NABC's new engineering proposal as set forth in the proposed amendment. There is a public interest for its acceptance. The engineering in the amendment provides for a facility with existing improvements that will be cost effective and that will shorten the construction period. The new site also has fewer zoning concerns than the Midamerica site. The Bureau has determined that the technical proposal conforms to the Commission's requirements. Thus, the amendment's acceptance will permit NABC to bring on line more quickly and at a lesser cost the allocated broadcast facility in New Albany.

19. The engineering amendment also meets the "good cause" test that is required of an engineering amendment that is sought 30 days or more after issuance of the *HDO*. 47 C.F.R. §73.3522(b)(1)(2). The proposed new site became available only after the original applications were filed. And because of the efficiencies identified above, its approval would be in the public interest. There is no opposi-

tion to the amendment and its acceptance will not result in the enlargement of the issues or in the addition of a new party. Thus, the Commission's standard for acceptance has been met. 47 C.F.R. §73.3522(b)(i) and (ii). Also, Midamerica has acted with diligence to effect the amendment, the proposed amendment would advance the resolution of this case rather than disrupt it, and no party gains a comparative advantage. See *Edwin O'Conner Broadcasting, Co.*, 22 F.C.C.2d 140, 143 (Review Bd 1970). See also *Eugene Walton*, 6 F.C.C. Rcd 6071, 6072 (Review Bd 1991). Thus, the amendment is accepted based on the public interest and the showing of good cause.

Settlement

20. The settlement also meets the Commission's standards for acceptance. The payments to the dismissing parties of up to \$25,000 (Staton) and \$51,000 (Brent) represent the respective parties' legitimate and prudent expenses. The payments are made incident to a merger which has been examined to determine that the merger agreement is *bona fide* and not entered into to evade the payment limitations applicable to non-merger settlement agreements. See *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements for Construction Permits*, 6 F.C.C. Rcd 2901 (1991). Before the settlement, both Ms. Huber and Mr. Boyce were proposed as full-time principals who would be integrated into the operations of the station if their applications were selected. With the creation of NABC, Boyce and Huber agreed to share equally in the control of the station.⁵ There is no additional compensation to be paid to either principal and thus there is no possibility of an illegal payment. Here, the merger of the Huber and Midamerica proposals will have the beneficial effect of combining the capitalization of two applicants and a combination of qualitative attributes of experience in local civic activities and broadcast experience. Cf. *Harrison County Broadcasting Company, Order FCC 921-072* (payment of \$148,000 for expenses and merger approved)(OGC 1992).

21. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). See *Oak Television of Everett, Inc.*, 93 F.C.C. 2d 926 (Review Bd. 1983).

22. In this case, the Joint Request and allied papers were timely filed. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Therefore, it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules. The

⁵ Huber and Boyce have requested to be relieved of their integration pledges. The Bureau interposes no objection and notes that where applicants have made equivalent commitments to merge, the commission has permitted withdrawal of those

commitments. See *WCVO, Inc.*, *Order FCC 921-087* (OGC 1992). The request will be granted and NABC will be relieved of its reporting requirement under §73.1620(g).

Bureau has no objection to approving the settlement and Commission resources will be conserved by the termination of this case prior to hearing. The public interest will be served by approval of the agreement which eliminates the need for litigation and the corresponding utilization of resources. And the settlement ensures that a new FM service will be delivered to New Albany at an earlier date.

RULINGS

Accordingly, IT IS ORDERED that the Motion For Summary Decision filed on November 23, 1993, by Midamerica Electronics Service, Inc. IS GRANTED and the financial qualification issue set by the Presiding Judge against Midamerica IS RESOLVED in favor of the applicant.

IT IS FURTHER ORDERED that the Petition For Leave To Amend filed on November 23, 1993, by Midamerica Electronics Service, Inc. IS GRANTED and the Amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the Joint Request For Approval Of Agreements filed on November 23, 1993 by the applicants IS GRANTED and the Settlements ARE ACCEPTED.

IT IS FURTHER ORDERED that the applications of Martha J. Huber (File No. BPH-911114ME), Rita Reyna Brent (File No. BPH 911115MC), and Staton Communications, Inc. (File No. BPH-911115MU) ARE DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that pursuant to the approved merger, New Albany Broadcasting Co., Inc. IS SUBSTITUTED for Midamerica Electronics Service, Inc. as the party applicant in application FILE NO. BPH-911115ML.

IT IS FURTHER ORDERED that Martha J. Huber and Peter C.L. Boyce ARE RELIEVED from their respective obligations to effectuate their integration pledges and New Albany Broadcasting Co., Inc. IS RELIEVED of its reporting obligations under 47 C.F.R. §73.1620(g).

IT IS FURTHER ORDERED that the application of New Albany Broadcasting Co., Inc. (File No. BPH-911115ML) for a new FM Station on Channel 234A at New Albany, Indiana IS GRANTED.⁶

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

⁶ This Summary Decision disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Com-

mission elects to review the case on its own motion.⁴⁷ C.F.R. §1.276(d).