FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 93-301
	)	
CHARLES A. FARMER	)	File No. BPH-920518MA
	)	
RICHARD M. SCHAFBUCH	)	File No. BPH-920521MI
	)	
For Construction Permit for a	)	
New FM Station on Channel 280C3	)	
in Ilwaco, Washington	)	

DISPATCHED BY

ORDER PRIOR TO PREHEARING CONFERENCE

Issued: December 22, 1993; Released: December 23, 1993

The prehearing discovery in this proceeding will be governed by the Commission's new hearing procedures. See Proposals To Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (Gen. Doc. 90-264), 6 FCC Rcd 157 (1991). Counsel and parties appearing pro se are conclusively presumed to have full knowledge of the new procedures.

The prehearing conference set for January 26, 1994 shall address the possibility of a settlement of this matter without the necessity of a comparative hearing, and the Presiding Judge will rule on any matters dealing with discovery or trial preparation raised by any party. The hearing is set for April 20, 1994, to commence at 10:00 a.m. All conferences and hearings shall be conducted in a Commission courtroom in Washington, D.C.

Standardized Discovery

All parties who have timely filed their Notices of Appearance ("NOA") under 47 C.F.R. §1.221 shall, within five days of filing and service of the NOAs, shall effect the Standard Document Production ("SDP") under 47 C.F.R. §1.325(c)(1) and shall exchange Standard Integration Statements ("SIS") under 47 C.F.R. §1.325(c)(2). Service of SDP and SIS are to be made only on parties that have timely filed a NOA.

Initial supplemental requests for documents must be filed and served by the tenth day after the standardized document exchange. Further supplemental motions for documents must be filed and served ten days after receipt of information on which the further supplemental demand is made. There is no requirement for a showing of good cause and the parties are encouraged to stipulate to the scope and terms of all supplemental document requests which would avoid the need for a motion. See new 47 C.F.R. §1.325. Parties are to seek by motion only those documents that are refused to be produced, or that are contested as privileged. 47 C.F.R. §1.325(a)(2). Where documents that are responsive to a document request are on file with the Commission, such documents need only be identified by the responding party. Although copies of such documents need not be furnished, parties are encouraged to furnish copies if the request is reasonable.

Privileged Documents

Documents subject to the attorney-client privilege or the work-product exemption, commonly referred to as "privileged documents", need not be produced on discovery. However, as part of its document production, the party making such a claim must furnish, simultaneously, a list of any documents for which a claim of privilege is made. Documents on this list shall be described by date, sender, receiver, persons noted for copies ("cc"), and a brief description of the subject matter. The list shall be accompanied with a statement of the precise basis for the privilege(s) asserted. See Tri-State Community Development and Communications Corp., 4 FCC Rcd 2402 (Review Board 1989); and LNJ Communications, 3 FCC Rcd 2745 and 4411 (Review Board 1988). Opposing applicants have five (5) business days from receipt of the claims of privilege within which to file a motion to compel production of the documents. Oppositions shall be filed and served in 4 days. 47 C.F.R. §1.294(b). Documents containing materials which are claimed only in part to be privileged must be produced initially with only the claimed privileged matter masked.

Depositions

There is no longer a requirement for 21 days' notice for the deposition of a principal. Depositions of active and passive principals shall be noticed by the tenth day after the exchange of SDP documents. Unless otherwise agreed upon by the parties, depositions shall be held in the city of license or in Washington, D.C. If all parties are in agreement, limited partners and non-voting shareholders may be deposed initially via telephone. 47 C.F.R. §1.318(c). In person depositions of such witnesses may be sought subsequently by motion on a showing of good cause. Depositions of non-party witness still require 21 days' notice within the prescribed time for completing discovery.

Added Issues and Forfeitures

Petitions to add new issues must strictly comply with the standards and quality of proof required under the Commission's Rule 47 C.F.R. §1.229. Petitions for new issues must also include a request for relevant documents and except for non-party discovery, discovery relating to any added issues must be completed within 30 days of the Presiding Judge's rulings adding the issues and permitting discovery.[1] 47 C.F.R. §1.229(e).

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[1] Depositions in connection with added issues must be noticed within 5 days after documents are produced. If subpoenas are needed and the 21 day notice provision applies, relief should be sought from the 30 day discovery cut-off as contemplated by the rule and the additional amount of time needed must be specified, including a cut-off date.

Where the new issues involve allegations that an applicant has made misrepresentations to the Commission or engaged in other misconduct during the pending application's process, the petition to enlarge issues must address, with particularity, the standards for forfeiture, specify the amount of forfeiture believed to be applicable, and state the reasons for the forfeiture and the recommended amount of the forfeiture. See 47 C.F.R. §1.229(f). See also 47 U.S.C. §503(b)(2)(A).[2] The parties are reminded that any forfeiture issue remains with the case even after settlement. 47 C.F.R. §1.80(g).

Procedural Dates

The following procedural dates are set to comply with the reformed time limitations and therefore these dates are firm:

March 3, 1994	-	Preliminary engineering data submitted to Bureau Counsel. If all parties come to the conclusion that there are no significant differences in areas and population to be served by the proposals, they should also entertain a joint stipulation that same date indicating that there is no significant difference.
March 23, 1994	-	Discovery closed. 47 C.F.R. §1.311(c)(1).
March 30, 1994	-	Exchange and receipt by 3:00 p.m. (D.C. time) of all documentary exhibits and frozen sworn testimony.
April 6, 1994	-	Exchange and receipt by 3:00 p.m. (D.C. time) of witnesses requested for cross-examination stating reasons and legal precedent for the requested cross-examination.
April 11, 1994	-	Exchange and receipt by 3:00 p.m. (D.C. time) of oppositions to witness requests which must state specific facts and case citations.

[2] A nexus must be shown between the alleged misrepresentation or misconduct and an applicable Commission rule.

April 6, 1994	-	Final Joint Engineering Exhibit or Stipulation accompanied with an engineer's affidavit which negates the comparative coverage issue shall be submitted to the Presiding Judge.
April 20, 1994	-	Commencement of hearing at 10:00 a.m. in a Commission courtroom in Washington, D.C.

Exhibit Assembly

Exhibits are to be assembled with each exhibit bearing a number and with a tab on each document. The exhibits are to be serially numbered, starting with the number 1. A prefix is to be used to indicate the party sponsoring the exhibits. Each exhibit should be separately and consecutively paginated. If stipulations are entered into, they are to be executed by counsel, prepared as joint exhibits, tabbed and paginated.

Commission Filings

Parties are to have sufficient copies of excerpts of any Commission filings which are expected to be used on cross-examination so that copies can be distributed immediately to opposing counsel and the Presiding Judge. While official notice may be relied on as a ground for the admission of Commission file records, official notice shall not be permitted as a substitute for the actual introduction of copies of the documents that are used for cross-examination which must be properly marked and received in evidence.

Use of Depositions

Excerpts of deposition transcripts to be used on cross-examination must be available for distribution to counsel and the Judge at the time the witness takes the stand to testify and only after proper marking of the excerpts and their identification as an exhibit. Alternatively, the witness or counsel may read into the record the relevant questions and answers that are relied on to refresh recollection or to show an inconsistency. Counsel are reminded that a proper foundation must be made for use of depositions on cross-examination and a copy of the transcript must be furnished to the Presiding Judge before the examination of the witness begins.

Extensions Of Time

Extensions of time with respect to discovery shall not be granted unless there is a clear showing of good cause and provided that the request is made in advance of the due date. See 47 C.F.R. §1.46(a) (it is the policy of the Commission that extensions of time shall not be routinely granted). See also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 172 n. 34 (1991) (requests for extensions of time in comparative cases to be closely examined for clear showing of good cause). Similarly, there will be no last minute motions for extensions of time granted with respect to pleadings.[3]

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

[3] The parties are on notice that failure to comply with procedural and discovery orders of the presiding trial judge may result in dismissal. See Hillebrand Broadcasting, Inc., 1 F.C.C. Rcd 419 (1986); Tri-State Communications, 4 FCC Rcd 8258 (Rev. Bd. 1989). See also Warren Price Communications, Inc., 4 FCC Rcd 1992 (1989).