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

MM Docket No. 93-155

In re Application of

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

and

WESTERN COMMUNICATIONS, INC. (Assignee)

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

Appearances

James P. Riley, Esquire, Anne G. Crump, Esquire, and *Kathleen Victory, Esquire,* on behalf of Richard Bott, II; *Lester W. Spillane, Esquire,* and *David D. Oxenford, Esquire,* on behalf of Western Communications, Inc.; and *Norman Goldstein, Esquire,* and *Y. Paulette Laden, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: January 19, 1994; Released: January 28, 1994

PRELIMINARY STATEMENT

1. By *Hearing Designation Order and Notice of Opportunity for Hearing,* 8 FCC Rcd 4074 (1993) ("*HDO*"), the Commission designated for hearing the above-captioned application of Richard Bott, II ("Bott") and Western Communications, Inc. ("Western"), for assignment of the construction permit of Station KCVI(FM), Blackfoot, Idaho. The following issues were specified:

(a) To determine whether Richard P. Bott II has misrepresented facts to or lacked candor with the Commission, either in connection with his integration pledge presented in the course of the Blackfoot, Idaho comparative hearing proceeding, or in his opposition to the petition to deny filed in the instant proceeding.

(b) To determine, in light of the evidence adduced pursuant to issue (a), whether Richard P. Bott II is qualified to remain a Commission permittee.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned application should be granted.

(*HDO* at para. 14.) In accordance with Section 309(e) of the Communications Act of 1934, as amended ("Act"), the burden of proceeding with the initial presentation of the evidence and the burden of proof with respect to all of the issues were placed on Bott. (*Id.* at para. 17.)

2. The *HDO* further stated 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 Act 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 of the Commission's Rules (submitting truthful written statements and responses to the Commission). (*Id.* at para. 15.)

3. A prehearing conference in this proceeding was held on July 20, 1993. A hearing was held in Washington, D.C., on October 26, 1993. The record was initially closed at the end of the hearing. (Tr. 193; *Order,* FCC 93M-683, released October 28, 1993.) However, by *Order,* FCC 93M-700, released November 10, 1993, the record was reopened for the receipt of an additional exhibit, and was then reclosed.

4. By *Order,* FCC 93M-686, released October 29, 1993, Bott was given permission to file a post-hearing motion for summary decision. Bott filed his Motion for Summary Decision on December 6, 1993. The Mass Media Bureau filed comments in support of Bott's motion on December 9, 1993. For the reasons which follow, Bott's motion will be granted. Issues (a) through (c) will be resolved in Bott's favor, and the assignment application will be granted. In addition, since the record reflects no violation of Section 73.1015 of the Rules, no order of forfeiture will be issued.

FINDINGS OF FACT

Background

5. On July 11, 1985, Bott filed an application for a construction permit ("CP") for a new FM station in Blackfoot, Idaho. (Tr. 89.) Competing applications were filed by six other applicants, including Radio Representatives, Inc. ("RRI"). By *Hearing Designation Order,* 2 FCC Rcd 3897, released July 1, 1987, the applications of Bott, RRI, and three of the other applicants were designated for comparative hearing. The hearing was held on December 7, 1987. (MMB Ex. 2.) During the hearing, Bott claimed, and received, an integration preference based on his commitment to move to Blackfoot and serve as the full-time general manager of his proposed station. (MMB Ex. 1; MMB Ex. 3, pp. 21, 28; Bott Ex. 3, pp. 20, 22.) Bott's CP application was granted and that of RRI and one other applicant were denied on the basis of Bott's integration preference. *Initial Decision,* 3 FCC Rcd 7094, 7099 (ALJ 1988). Although RRI appealed to the Review Board and the Commission, the determination reached in the *Initial Decision* was upheld. *Richard P. Bott, II,* 4 FCC Rcd 4924 (Rev. Bd. 1989), *rev. denied* 5 FCC Rcd 2508 (1990). RRI's subsequent appeal to the U.S. Court of Appeals was also denied. *Radio Representatives, Inc. v. FCC,* 926 F.2d 1215 (D.C. Cir. 1991) (*aff'd by judgment*).

6. Bott was issued the CP for his proposed Blackfoot facility on December 18, 1991. (Joint Ex. 1, p. 2.) On September 17, 1992, Bott filed the above-captioned application to assign that permit to Western. (Official notice taken.) A Petition to Deny the assignment application was filed by RRI on October 26, 1992. (MMB Ex. 3.) Bott filed an Opposition to Petition to Deny on November 10, 1992 (MMB Ex. 4), to which RRI filed a Reply to Opposition to

Petition to Deny on November 23, 1992 (MMB Ex. 5). On December 8, 1992, Bott filed a Request for Leave to Respond and Response. (MMB Ex. 6.) RRI filed a Supplement to Petition to Deny on May 14, 1993 (MMB Ex. 7), and by letter dated May 19, 1993, then counsel for Bott notified the Commission that no response to the Supplement would be filed (MMB Ex. 8). The *HDO* in this proceeding followed from this series of pleadings.

Bott's Integration Commitment and Preparation for Construction

7. Bott filed his Blackfoot application on July 11, 1985. (Tr. 89.) On the same date, Bott also filed an application for a new FM station in Central Valley, California. (*Hearing Designation Order*, 2 FCC Rcd 2826, released May 15, 1987; official notice taken of filing date.) Bott selected Blackfoot and Central Valley from the list of communities in the FM universal filing window notice after considering the coverage of the proposed facilities, the populations, the number of stations, and the competitive situation in these markets. Based upon these considerations, Bott felt that these communities provided viable economic markets for a successful radio business venture. (MMB Ex. 2, pp. 85-86.) Bott specifically selected Blackfoot because it was a Class C facility, offering a significant business opportunity, located in an underserved market, in an area of the country in which he would enjoy living and working. (Tr. 144.) Bott did not conduct a formal study of the Blackfoot market. (Tr. 144-45.)

8. At the time he filed the Blackfoot application, Bott had not decided whether he would move to Blackfoot and be integrated full-time into the operation of the station. (MMB Ex. 2, p. 19.) Bott elected to propose full-time integration in the Blackfoot proposal in the summer of 1987 when both the Blackfoot and Central Valley applications were designated for hearing. (MMB Ex. 2, p. 19; Bott Ex. 3, p. 14; MMB Ex. 4, p. 9; Tr. 151-52.) Bott made this decision based upon his assessment that the proposed Class C Blackfoot facility would be a more complicated operation with a substantially broader coverage area and would have a better "long-term profit potential" than the proposed Central Valley Class A station. According to Bott, the Blackfoot station would essentially cover two market areas, Idaho Falls and Pocatello, Idaho, rather than merely the city of license. Bott also felt Blackfoot would be a nice place to live. (MMB Ex. 2, p. 19; Tr. 84-85, 149-50.)

9. At the time he made the commitment to move to Blackfoot, Bott had never been to that community. However, he had vacationed in, was familiar with, and enjoyed the Rocky Mountain area. (Tr. 85-86, 152.) Bott had no family or friends in Blackfoot. (MMB Ex. 2, p. 72.) He did not intend to maintain a residence anywhere other than in Blackfoot. (MMB Ex. 2, pp. 72-73.)[1] Bott viewed the Blackfoot proposal as an opportunity to break away from the family broadcasting business,[2] to start and run his own business, to do his own programming, and to operate his own stations. (MMB Ex. 2, pp. 51, 68-69; Bott Ex. 3, p. 14; MMB Ex. 4, p. 9.) Bott was following in his parents' footsteps in this regard. His parents had previously worked for a station and elected to go out on their own by purchasing another station. (Tr. 130-31.)

10. On September 11, 1987, subsequent to the designation for hearing of the Blackfoot applications, Bott filed an Integration Statement in that proceeding. He represented that he would work full-time, 40 or more hours per week, as general manager of his proposed station. He further represented that he planned to establish his full-time residence in Blackfoot. (MMB Ex. 1.)

11. Bott visited Blackfoot in September 1987 to acquaint himself with the community and area in which he planned to live. While in Blackfoot he looked into housing and studio opportunities with a real estate agent, visited his then designated tower site, and met with the site manager. (MMB Ex. 2, p. 86-87; Tr. 91-94.) Bott also met with the mayor of Blackfoot, as well as representatives from the job service, a potato packaging plant (one of the main employers in the area), and the Bureau of Indian Affairs. Bott obtained literature on the city, its attributes and activities, and familiarized himself with types of community needs. He told the people with whom he met that he was planning to build a radio station in Blackfoot, and he discussed with them community service and public affairs and areas in which the radio station could help the community. He did not discuss formats. (Tr. 152-55.) Bott did not make a commitment to rent or purchase a particular house or studio space at that time but visited potential housing and studios to determine general availability. (Tr. 93.) He learned that obtaining office and studio space for the station, and a residence for himself, was not going to be a problem. (Tr. 99.) Bott did not return to Blackfoot during the course of the comparative hearing and the appeals. (Tr. 94.) He intended to return there, to work on his living and other arrangements, after finalizing his transmitter plans with the owner of his site. (Tr. 174-75.)

12. On December 7, 1987, a hearing was held to consider the proposals of the competing applicants in the Blackfoot proceeding. During the hearing, Bott testified that if he obtained the CP he intended to move to the community of license and be integrated full-time into the management and operation of the station. He also testified that he had no intention of selling the Blackfoot station, but intended to own and operate the station for an indefinite period of time. (MMB Ex. 1; MMB Ex. 2, pp. 72-73.)

13. As noted above, Bott's application for the Blackfoot facility was ultimately granted. Although the grant became final in the spring of 1991, the Blackfoot CP was not issued to Bott until December 18, 1991. (Joint Ex. 1, p. 2; Tr. 88.) Bott did not take steps toward commencing construction of the Blackfoot station until after the CP was issued because, as a result of his experience with the comparative hearing and all of the appeals, he was wary of taking any action until he had the CP in hand. (Tr. 103-04, 170-71.) In addition, after he was advised by his then counsel in March 1991 that the appeals of the CP grant had ended, the FCC

[1] During the pendency of the Blackfoot application, and until the summer of 1993, Bott lived in a rental apartment in Kansas City. During the summer of 1993, he purchased and moved into a new home in a suburb of Kansas City. Bott has never been married. (Tr. 78, 142-43.)

[2] Bott and both of his parents, through Bott Broadcasting Company ("BBC") and Bott Communications, Inc. ("BCI"), own a number of radio stations. BBC is jointly owned by Bott's parents. BBC owns 80 percent of BCI and Bott owns 20 percent of BCI. Bott is an officer and director of both BBC and BCI, and is an employee of BBC. All of the stations owned by BBC and BCI operate with a commercial religious format. (Tr. 126-28, 143; MMB Ex. 9, p. 2.)

staff required the submission by Bott of a radiofrequency radiation hazard statement before the CP would be issued. Bott submitted that statement, prepared at his request by a consulting engineer, in October 1991. (Joint Ex. 1.)

14. After the final grant, Bott did not lease or purchase studio space or a home in Blackfoot because he was more concerned with taking care of the antenna site arrangements. He believed that all other elements of the construction would follow from there. (Tr. 99, 174-75.)

15. In January 1992, Bott contacted the site agent, the Bureau of Land Management, to obtain an updated site management plan in order to assure himself that his tower plans were in compliance with the management plan. He also had discussions with the president of the users group at the transmitter site to determine whether a more advantageous tower site was available. He attempted to determine whether to side mount the antenna or to use a combiner and broadcast his signal and the signal of the other station operating from the tower through one antenna. In so doing, he conferred with his consulting engineer and an equipment supplier. Ultimately, Bott contacted Kent Frandsen, the tower owner, to make arrangements for his antenna installation. In January 1992, Bott also sought and received from the FCC authorization to use the call sign "KCVI" for the Blackfoot facility. (Tr. 95-96, 108-09; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.)

16. At the October 26, 1993, hearing in the instant proceeding, Bott affirmed that it was his intention at all times after 1987, during the pendency of the Blackfoot application, to move to Blackfoot and be fully integrated into the management of the station. It remained his intention to move to Blackfoot and be fully integrated until he decided to sell the CP in 1992. (Tr. 180.)

The Format Decision and the Decision to Sell the CP

17. Bott testified during the Blackfoot comparative hearing that he had not yet made a format decision for the Blackfoot station. (MMB Ex. 2, pp. 56, 89-90.) He stated that he would adopt a format "tailored to [the Blackfoot] market and the needs of that community." (*Id.* at 56.) In the instant hearing, Bott recalled and confirmed this testimony. (Tr. 86-87.) He explained that in considering Blackfoot, he reviewed the Broadcasting Yearbook listings for existing stations and formats in the market. However, format was not an overriding concern for him since formats change over time. When he filed for Blackfoot he had no particular or general idea how he would format the station. His hope was to build a facility which, through the sale of radio time, would be a profitable business enterprise. He expected to make the station profitable by finding an audience which was unserved, caring for and developing loyalty in that audience, and then marketing it to advertisers and others. (Tr. 145-49.)

18. Bott also testified in the comparative hearing that he would consider satellite-fed programming for his station, including some of the programs which were then being broadcast by BBC and BCI, in the event that such programming was compatible with whatever format he subsequently chose. However, Bott stated that he had not as yet chosen the exact format for his station. (MMB Ex. 2, pp. 62-63, 89-90.) Bott further stated that any programming he carried on the Blackfoot station would be selected for his own benefit and the benefit of the Blackfoot listenership, and not for the benefit of BBC or BCI. (*Id.* at p. 64.)

19. As of the time of the Blackfoot comparative hearing, Bott had had no specific discussions with his father relating to how Bott would program his station. (MMB Ex. 2, pp. 66-69.) His father, an experienced broadcaster, was a tremendous source of information for him. His father was concerned that Bott consider all the new formats that were available, including the newly developing satellite formats, and Bott and his father had conversations along those lines. (Tr. 131-32.) Bott intended to make his station independent of BBC. (Tr. 129.)

20. Realizing that a substantial period of time would elapse before the station would go on the air, Bott did not want to make a format decision prematurely, preferring instead to keep his format options open. (Tr. 87-88; Bott Ex. 3, p. 1.) All of Bott's broadcast experience, except for his experience with a college campus carrier station, had been with Bott family-owned broadcasting companies and their stations. (MMB Ex. 9, p. 2.) All of those stations operated commercially with a format of religious programs, news, and information. (Tr. 128.) However, Bott's knowledge of radio formats and their economics was broader. (Tr. 159-63.) This knowledge and experience, and his contacts in non-religious commercial broadcasting, provided the basis for Bott's belief that he could operate with any commercial format he chose, under the right circumstances. (Tr. 138-40.) According to Bott, the right circumstances included the number of stations in the market, their existing formats, community service attributes, and economic factors. Bott felt that economic considerations were foundational, that is, if the station could not operate at a profit it would not remain in existence. (Tr. 139-40.) Bott knew several individuals who operated commercial religious stations while also operating successfully other stations with different commercial formats. (Tr. 180-81.)

21. After the Court of Appeals decision became final in March 1991, Bott began the decision-making process to determine what format to use on his station. He considered this decision through the summer of 1991. (Tr. 90-91, 109, 156-57.) In making his decision he considered the market generally, the number and formats of stations in the market, and what viable format openings existed in the market. In addition to matters related to the market specifically, Bott considered the state of the national economy and the radio broadcast industry overall. Through reading newspapers, magazines and various trade publications, he became aware that the national and regional economies, as well as the national and Rocky Mountain regional radio business, were in a depressed state. (Tr. 90-91, 157; Bott Ex. 3, pp. 2, 8-13.)

22. Bott decided to adopt a commercial religious format. He did so largely because of the depressed state of the economy and the downturn in the radio industry. (Tr. 109-10, 158-59; MMB Ex. 4, p. 10.) Some of the other formats that he considered were Satellite Music Network, Unistar, country, soft adult contemporary, adult contemporary, Z-rock, contemporary hit radio, talk radio, and business radio. (Tr. 109, 159-60.) While he was aware of many of these formats in 1985 when he applied for Blackfoot, the thing that was different in 1991 when he made his format decision was the depressed state of the economy and the indications that it would get worse rather than better. (Tr. 163-64.)

23. The other formats which Bott considered relied substantially upon spot advertising. Based upon his experience, he knew that a commercial religious format relied primarily upon the sale of blocks of time rather than spot ad-

vertising sales. Bott felt that, although a commercial religious format did not maximize the profit potential of a station, such a format stood a greater chance of being economically viable in a depressed economy. (Tr. 109-10, 111-12, 162-63.) He knew that no other station operating in the market that the Blackfoot station would serve had a commercial religious format in the summer of 1991. (Tr. 166; Bott Ex. 3, p. 2.) Bott believed that he could make a success of operating the Blackfoot station with a commercial religious format. (Tr. 112; Bott Ex. 3, pp. 2-3.)

24. While in California for the purpose of attending a regional religious broadcasters convention in late September 1991, Bott learned from a time buyer, Teresa Rivera, that the Calvary Chapel Church had recently purchased FM station KRSS, Chubbock, Idaho, and was planning to go on the air with a commercial religious format and an increase in power. (Tr. 112-13, 164-68; Bott Ex. 3, p. 3; MMB Ex. 4, p. 10.) Bott was immediately concerned and called Lou Phelps, a former assistant to Rivera, who had moved to Pocatello to operate the station. (Tr. 113-14.) Bott discussed with Phelps KRSS's plans to increase power from a mountaintop site, its prospective coverage from that site, and its format. (Tr. 114, 167-68.) Based upon these conversations, his knowledge of broadcast engineering concepts generally, and his prior experience with a mountaintop site, Bott believed that KRSS's signal would serve substantially the same market that his Blackfoot station would try to serve, that is, the area from Idaho Falls in the north to Pocatello in the south. (Tr. 113-17, 119; Bott Ex. 3, pp. 3-4.)[3]

25. Bott was very distressed. (Tr. 117, 168.) He believed that two commercial religious stations would not be viable in the Idaho Falls-Pocatello market considering its size and demographic make up. (Tr. 168-70.) In addition, KRSS was in a position to be on the air before Bott's Blackfoot station. (Tr. 118; Bott Ex. 3, p. 15; MMB Ex. 4, p. 10.) Further, KRSS planned to broadcast many of the same programs Bott had intended to use, and there were only a finite number of such programs available. Even if Bott had sold time to competitive programs, the audience would have been split. Consequently, Bott believed he could not sustain a financially viable operation. (Tr. 167-70.)

26. Bott considered format alternatives but, faced with a start-up operation in a very depressed economy, he believed that he would be financially unsuccessful operating a new radio station with a format relying heavily upon spot advertising. (Tr. 117-18.) Nevertheless, Bott continued with his plans to build the station in the hope that either the economy would turn around and an alternative format would become viable, or that KRSS might not be able to effectuate its power increase proposal. (Tr. 118-19, 175-76; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.)[4]

27. In the spring of 1992, Kent Frandsen, the tower owner, suggested to Bott that if the FCC were to change its duopoly rules he would be interested in purchasing Bott's Blackfoot CP. (Bott Ex. 3, p. 16; MMB Ex. 4, p. 11; Tr. 110-11, 120-21.) Bott advised Frandsen that his CP was not for sale and that he intended to move to Blackfoot and construct and operate the station. (Tr. 111, 121; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.) Bott had not considered selling the CP at any time prior to this discussion with Frandsen. (Tr. 111, 121.)

28. In a subsequent conversation, Frandsen again indicated his interest in purchasing Bott's CP. Bott realized that a duopoly operation of his Blackfoot station, with all of its inherent efficiencies and economies, might be the best way of successfully operating the station. (Tr. 121, 176-77; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.) As a result, Bott discussed with his then FCC counsel whether he could sell the permit. Counsel advised him that he could sell the permit for his expenses. (Tr. 121-22, 180; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.)

29. Having concluded that his proposed Blackfoot station was no longer an economically viable business venture, and with his attorney's advice that he could sell the permit for his expenses, Bott agreed to sell the CP to Western, Frandsen's company. (Bott Ex. 3, p. 16; MMB Ex. 4, p. 11; Tr. 180.) The assignment application was filed with the Commission on September 17, 1992. (Official notice taken.)

The Pre-Designation Pleadings and the *HDO*

30. As noted above, RRI filed a Petition to Deny the assignment application. RRI contended that the assignment application must be designated for hearing pursuant to Section 73.3597(a) of the Commission's Rules because Bott proposed to assign his construction permit within one year of its grant, and Bott would, therefore, be abandoning the commitment he made in the comparative hearing to relocate to Blackfoot and integrate ownership and management. (MMB Ex. 3.) RRI further argued that a grant of the assignment application "would undermine the very foundation of the Commission's comparative hearing process." (*Id.* at p. 7.)

31. In his Opposition to Petition to Deny, Bott stated in a declaration under penalty of perjury that throughout the comparative hearing process "it remained [his] intention and plan to build the station in Blackfoot, move there and personally run the station full time if and when [he] received the C.P." (MMB Ex. 4, p. 9.) Bott's declaration also stated that *after* the CP grant was affirmed by the Court of Appeals in February 1991, he "proceeded with more detailed planning for the station [and] . . . decided that [he] would operate the station with a religious format." (*Id.* at pp. 9-10.) Bott's declaration further outlined the impact of the information he received in late September 1991 about the plans for station KRSS, and stated that throughout the remainder of 1991 and into 1992 he proceeded with planning for construction of his station, ultimately contacting Frandsen "to proceed with my plans to install my antenna on his tower." (*Id.* at p. 11.) In addition, Bott's declaration stated that Frandsen inquired about purchasing the CP and, after first telling him it was not for sale, Bott elected to sell the CP after his then attorney advised him that the FCC allowed him to do so provided that he receive as compensation only his expenses. (*Id.*) Bott stated in his declaration that he thought that in the poor economy a duopoly operation, as Frandsen would operate the Blackfoot station, represented the best hope for a successful operation. (*Id.*)

[3] Bott's belief that the signal of KRSS would reach this area was ultimately shown to be correct. (Bott Ex. 2.)

[4] KRSS was authorized to operate with increased power, and went on the air from its new facilities on April 6, 1992. (MMB Ex. 6, pp. 2, 4-10.)

32. RRI filed a Reply to Opposition to Petition to Deny. In the "Summary" section of the Reply RRI stated: "For the first time, Bott has revealed that his integration pledge has always been contingent on his ability to establish a profitable, religious station, which itself is inconsistent with the integration pledge made in this proceeding." (MMB Ex. 5, p. 2.) Similarly, in the "Background" portion of the Reply, RRI further stated that: "Bott claim[ed] that he pursued the permit in order to construct a commercial religious station, . . ." (*Id.* at p. 7.) It is noted, however, that the statements attributed to Bott by RRI were not contained in Bott's Opposition or in his declaration. (MMB Ex. 4.)

33. The *HDO* in this proceeding designated a misrepresentation/lack of candor issue against Bott. In its rationale for the specification of this issue, the *HDO* asserted that, in opposing RRI's Petition to Deny, "Bott state[d] 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.* " (*HDO* at para. 3; emphasis added.) The *HDO* further maintained that "Bott ha[d] represented in the instant proceeding that, throughout the comparative proceeding, *he always intended to operate with a commercial religious format* . . ." (*Id.* at para. 9; emphasis added.) However, as indicated above, neither the Opposition nor Bott's declaration contained these, or similar, statements. (MMB Ex. 4.) In this regard, the Mass Media Bureau acknowledged that it:

> does not possess a copy of a written statement or transcript of an oral representation by Bott to the Commission in which Bott asserts that throughout the six-year effort to obtain his permit he maintained a good faith intention to operate KCVI as a commercial facility with a religious format or that throughout the comparative proceeding, he always intended to operate with a commercial religious format.

(Bott Ex. 1, pp. 4-5.)

CONCLUSIONS OF LAW

34. This proceeding was designated for hearing to determine whether Richard Bott, II misrepresented facts to or lacked candor with the Commission either in connection with the integration pledge he made during the course of the Blackfoot, Idaho, comparative proceeding, or in an Opposition to Petition to Deny he filed in this proceeding. The findings of fact establish, and it is concluded, that Bott did not misrepresent facts to or lack candor with the Commission. It is further concluded that Bott is qualified to remain a Commission permittee, and that the public interest would be served by a grant of the above-captioned assignment application.

35. Turning first to the statements Bott is alleged to have made in his Opposition to Petition to Deny, the record establishes that those statements were not made by Bott. Specifically, the *HDO* attributed to Bott the statement 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.*" (Emphasis added.) The *HDO* also attributed to Bott the representation that "throughout the comparative proceeding, *he always intended to operate with a commercial religious format* . . ." (Emphasis added.) However, the italicized statements were not made by Bott in his Opposition, or anywhere else. On the contrary, the statements in question appear to have been derived from the "Summary" and "Background" portions of RRI's Reply to Opposition to Petition to Deny, which contained grossly inaccurate characterizations of Bott's actual statements.

36. Turning next to Bott's integration pledge in the Blackfoot comparative hearing, the findings establish that such pledge was made in good faith, that Bott intended to fulfill his pledge, that he took concrete and significant steps to do so, and that he did not misrepresent facts or lack candor with respect to his pledge. Bott originally proposed to be integrated in the Blackfoot facility, instead of another facility for which he applied, for several reasons. He believed that Blackfoot would present a better long-term profit potential than the other facility. He thought Blackfoot would be a more complicated station to run, and would have a broader coverage area. He also felt Blackfoot would be a nice place to live.

37. The record further demonstrates that Bott took numerous steps to prepare to move to Blackfoot and to construct and operate the station. Beginning as early as September 1987, Bott visited Blackfoot to acquaint himself with the community. He looked into housing and studio space, visited his tower site, met with community leaders, met with the site manager, obtained literature on the city, and familiarized himself with the community's needs. After his award of the Blackfoot CP became final in March 1991, Bott determined the format ' § of his proposed station, a process which lasted through the summer of 1991. In this regard, there is no record evidence that the format decision was made prior to the summer of 1991, or that Bott's testimony in the Blackfoot comparative proceeding was untruthful.

38. Next, Bott retained a consulting engineer to prepare a radiofrequency radiation hazard statement which was submitted to the Commission in October 1991. In January 1992, after the Commission issued the CP, Bott took additional action. He sought and received FCC authorization to use the call sign "KCVI." He contacted the site agent to obtain a site management plan in order to assure himself that his tower plans were consistent with the management plan. He had discussions with the president of the transmitter site users group to see if a more advantageous site was available. He conferred with his engineer and an equipment supplier to determine whether to side mount his antenna or use a combiner. He contacted Kent Frandsen, the tower owner, to make arrangements for the installation of his antenna.

39. It is highly significant, and an indication of his good faith, that the steps outlined in the preceding paragraph were taken by Bott *after* he became aware in September 1991 of KRSS's plans to go on the air with the same format he had decided to use and an increase in power from a mountaintop site. Bott was very distressed by this knowledge. He did not believe that two similarly formatted stations would be viable in the market both stations would serve. He also did not believe that he would be financially successful using an alternative format. Nevertheless, Bott continued with his plans to build the station, as described above, hoping that the economy would improve so as to make an alternative format viable, or that the KRSS power increase proposal would not be implemented. Indeed, Bott initially rejected the suggestion that he sell his CP. It was only after Bott became convinced that his proposed

Blackfoot station was no longer an economically viable business venture, and after securing his counsel's advice, that he agreed to the sale.

40. The *HDO*, at paragraph 10, posed the question of why, if Bott intended to proceed without having chosen a particular format, the format issue became so critical later. Bott has satisfactorily answered that question. Specifically, Bott chose the commercial religious format largely because of the depressed state of the economy and the downturn in the radio industry. This format relied primarily upon the sale of blocks of time and, for that reason, stood a greater chance of being economically viable in a depressed economy. The alternative formats he considered relied substantially upon spot advertising. In addition, after Bott became aware of KRSS's plans, he considered format alternatives but, faced with a start-up operation in a very depressed economy, he believed that he would not be financially successful operating a new radio station with a format relying heavily upon spot advertising.

41. The *HDO*, at paragraph 11, also questioned Bott's conclusion that he could not compete with KRSS when Bott's proposed coverage area was greater than that of KRSS. Bott has credibly answered this question as well. Thus, Bott knew, from the time he first learned about KRSS in September 1991, that the station was planning to increase power from a mountaintop site. Based upon his knowledge of broadcast engineering concepts generally, and his prior experience with a mountaintop site, Bott believed that KRSS's signal would serve substantially the same market that he was targeting. (Bott's belief was ultimately shown to be correct.) Moreover, KRSS was in a position to be on the air before Bott's Blackfoot station, and planned to broadcast many of the same programs Bott had intended to use, rendering them unavailable to his station. Even if Bott had sold time to competitive programs, the audience would have been split. Consequently, given the size and demographics of the market, Bott did not believe he could sustain a financially viable operation even with greater coverage.

ULTIMATE CONCLUSION

42. In view of the foregoing, it is ultimately concluded that Richard Bott, II did not misrepresent facts to or lack candor with the Commission, that Richard Bott, II is qualified to remain a Commission permittee, and that the above-captioned assignment application should be granted. In addition, since the record reflects no misrepresentation or lack of candor, it is ultimately concluded that Bott did not willfully or repeatedly violate Section 73.1015 of the Commission's Rules, and the issuance of an order of forfeiture is not warranted.

43. One final matter remains for consideration, namely, the amount of remuneration Bott may receive for the sale of his permit. Section 73.3597(c)(2) of the Rules limits such payment to the legitimate and prudent expenses incurred by Bott in preparing, filing, and advocating the grant of his CP, and for other steps reasonably necessary toward placing the station in operation. In amendments to the assignment application filed on October 14, 1992, and July 23, 1993, Bott has documented legitimate and prudent expenses totalling $91,582.40. Therefore, the payment of that amount to Bott will be authorized. *Eagle 22, Ltd.*, 7 FCC Rcd 5295, 5297 (1992).

Accordingly, IT IS ORDERED that the Motion for Summary decision filed by Bott on December 6, 1993, IS GRANTED, and that Issues (a), (b), and (c) ARE RESOLVED in Bott's favor.

IT IS FURTHER ORDERED that, unless an appeal from this Summary Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Sections 1.251(e) and 1.276 of the Rules, the above-captioned application of Richard Bott, II (assignor) and Western Communications, Inc. (assignee), for assignment of construction permit of Station KCVI(FM), Blackfoot, Idaho, IS GRANTED, and that reimbursement to Bott in the amount of $91,582.40 IS AUTHORIZED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

[5] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Sections. 1.251(e) and 1.276(d) of the Rules.