FCC Received October 27, 1994 @ 2:00 p.m.
Donna R. Bradshaw

ORIGINAL

RECEIVED
NOV - 2 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

1
2 TRANSCRIPT OF PROCEEDINGS
3
Before the
4 FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
5
6
7 IN RE APPLICATIONS OF: MM DOCKET NO. 94-71
8 SANTA MONICA COMMUNITY
COLLEGE DISTRICT
9
For Construction Permit for a
10 New Noncommercial FM Station
on Channel 204B in
11 Mojave, California
12
13
14
15
16
17
18
19
20
21
22
23 DATE OF CONFERENCE: October 21, 1994 VOLUME: 1
24 PLACE OF CONFERENCE: Washington, D.C. PAGES: 1 - 46
25

FREE STATE REPORTING, INC.
Court Reporting Depositions
D.C. Area (301) 261-1902
Balt. & Annap. (410) 974-0947

RECEIVED

NOV - 2 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the matter of: SANTA MONICA COMMUNITY COLLEGE DISTRICT For Construction Permit for a New Noncommercial FM Station on Channel 204B in Mojave, California	MM Docket No. 94-71

The above-entitled matter came on for Prehearing Conference pursuant to Notice before Judge Joseph Stirmer, Chief Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., in Courtroom No. 1, on Friday, October 21, 1994, at 9:00 a.m.

APPEARANCES:

On behalf of Santa Monica Community College:

LEWIS J. PAPER
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

On behalf of Mass Media Bureau:

GARY SCHONMAN
Room 7212
2025 M Street, N.W.
Washington, D.C. 20554

1 I N D E X

2 Page:

3 Opening by Judge Stirmer 3

4 Statement by Mr. Paper 5

5 Statement by Mr. Schonman 19

6 Closing by Judge Stirmer 45

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25 Conference Began: 9:00 a.m. Conference Ended: 10:05 a.m.

1 P R O C E E D I N G S

2 JUDGE STIRMER: Good morning. On the record, please.
3 This is a prehearing conference in Docket Number 94-71,
4 involving the application of Santa Monica Community College
5 District for a construction permit for a new commercial FM
6 station on Channel 204B in Mojave, California. Originally,
7 when this case was designated for hearing, there were two
8 applications, the second being Living Way Ministries. By
9 order of the presiding judge released July 25th, 1994, a joint
10 request for approval of agreement was granted and the Living
11 Way Ministries application was granted, while, at the same
12 time, the Santa Monica Community College District application
13 was amended to a new channel and remained in hearing to
14 resolve an air hazard issue.

15 The case which originally was rather simple became
16 complicated as a result of developments which were unknown to
17 me and perhaps to other counsel in the case. I have specific
18 reference to the filing on July 13th, 1994, of an application
19 by California State University, Long Beach Foundation, to
20 improve its facilities on Channel 201 Long Beach, California.
21 And part of the agreement between Santa Monica Community
22 College District and Living Way Ministries involved the
23 amendment of the Santa Monica Community College District
24 application to 201.

25 I also have before me a petition to intervene in this

1 proceeding filed by California State University, Long Beach
2 Foundation. Let me first obtain the appearances for Santa
3 Monica Community College District.
4 MR. PAPER: Lew Paper for Santa Monica Community
5 College District.
6 JUDGE STIRMER: And for the Bureau?
7 MR. SCHONMAN: Good morning, Your Honor. Gary P.
8 Schonman on behalf of the Chief Mass Media Bureau.
9 JUDGE STIRMER: Let me tell you why I convened this
10 conference. I consider this matter rather unique, and the way
11 I have evaluated and analyzed the situation that's presently
12 pending, it involves a question of whether or not that
13 recently filed amendment -- recently filed application to
14 improve the facilities of the California State University,
15 Long Beach Foundation, station is mutually exclusive with the
16 amended application that's before me, that was filed by your
17 client, Mr. Paper.
18 As I evaluate the situation, if in fact those
19 applications are mutually exclusive, then that application to
20 improve the facilities of the Long Beach station should be
21 designated for hearing and consolidated in this proceeding.
22 If it is not mutually exclusive, if for some reason it's
23 determined that that application was not timely filed to be
24 mutually exclusive, then I can go ahead and grant your
25 application, because you've met now the air hazard issue which

1 has held up the final resolution of this case. Now, I
2 convened conference to hear further from you all on that
3 specific issue and how you think we should proceed in this
4 proceeding.
5 I personally feel, at least going into this
6 conference, that the issue is one that has to be resolved by
7 this staff. It's a processing issue. Whether or not this
8 mutual exclusivity exists, it's not something that I can
9 determine, but it's something that the staff has to determine
10 under the Commission's processing rules, whether or not we
11 have before the Commission pending two mutually exclusive
12 applications so as to require under Ashbacker a comparative
13 evaluation. Mr. Paper or Mr. Schonman, who wants to be heard
14 first on this?
15 MR. PAPER: Well, maybe I should go first. What
16 would you think of that, Gary?
17 MR. SCHONMAN: That would be fine.
18 MR. PAPER: Well, first of all, I appreciate
19 Your Honor postponing this prehearing conference from last
20 week. I do appreciate that. And let me tell you where I, I
21 see this. I agree with Your Honor that it is a processing
22 problem to some extent. Well, to an entire extent. Here's
23 the way I look at it. We have to look at this -- Let me take
24 a step backward. We're all so familiar with Ashbacker and the
25 notion of mutually exclusive applications that as soon as we

1 hear of two applications that are mutually exclusive on an
2 engineering basis, Ashbacker of course pops into our mind.
3 But I don't think it's quite that simple. Ashbacker
4 did not say any and every application, regardless of how it
5 complies with the Commission's rules or procedures, is
6 mutually exclusive. The Commission -- The court in Ashbacker
7 said that when the Commission has before it two eligible
8 applicants, and I underscore the word eligible applicants, who
9 the Commission has pending before it who had been processed,
10 it's at that juncture that the Commission cannot grant one
11 application without first having hearing on both applications
12 simultaneously.
13 And there have been many situations, for example,
14 involving waivers, where the court has upheld the Commission's
15 refusal to consider two applicants who are mutually exclusive
16 on an engineering basis because the Commission had adopted
17 rules which say that an applicant isn't eligible, even though
18 their engineering -- their proposals are current and
19 consistent. One of the more recent cases that I can point
20 Your Honor is the Hispanic case. It involved instructional
21 television where the Commission decided in this particular
22 case to give a, a -- I'm trying to think of the word -- a
23 dispositive preference to local entities.
24 And in that case, a nonlocal entity who had already
25 filed this application went to the court and said we're a

1 competing application, we're mutually exclusive. And the
2 court said well, you may be mutually exclusive in the sense
3 your proposals are inconsistent, but the fact is the
4 Commission had adopted a rule in the exercise of its
5 reasonable discretion which says that a, a local entity gets a
6 dispositive preference and, therefore, under the Commission
7 rules you are not, you are not deemed to be mutually
8 exclusive, even though from an engineering perspective
9 certainly --
10 JUDGE STIRMER: All right, let, let me stop you there
11 for a moment. Do we have a similar rule with respect to the
12 particular question that's before us?
13 MR. PAPER: Yes. And that's what I was leading up
14 to.
15 JUDGE STIRMER: All right. Which rule?
16 MR. PAPER: Well, there are several rules. The first
17 rule is, Your Honor, that we have rules, the Commission has
18 rules regarding -- In my view, the first rule is, is the
19 petition for intervening if you're being timely filed.
20 JUDGE STIRMER: Well, let me say this. I don't think
21 there's much merit to the petition to intervene because I
22 don't think a case has been made to permit intervention at
23 this time. The only way that that newly filed application
24 could be considered to have a standing to intervene would be
25 if, if it's considered mutually exclusive with your

1 application. And in that instance, then we'd have a
2 consolidated proceeding.
3 MR. PAPER: Right.
4 JUDGE STIRMER: But unless and until that happens,
5 there's no basis for intervention. At least that's my
6 thinking as of now.
7 MR. PAPER: Well, that, that -- But that thinking,
8 Your Honor, coincides with what I'm saying, which is that the
9 Commission has rules as to how applications are processed. We
10 have been sitting in line for over two years, as Your Honor
11 knows, before we, before we became designated. We worked out
12 a settlement agreement. The settlement agreement was proposed
13 to Your Honor consistent with the Commission rules. And the
14 Commission rules -- As Your Honor knows, the Commission's
15 processing rules distinguish, as Your Honor knows, between
16 what might be a -- considered a major amendment -- An
17 amendment that might be deemed to be a major amendment at a
18 predesignation stage, that same amendment in a post-
19 designation stage would not be deemed to be a major amendment.
20 And so, therefore, something that could not be
21 processed in predesignation stage can be processed in post-
22 designation stage. And specifically, I'm talking about a
23 change in channel for an educational station. If we had made
24 this proposal to change the channels at a predesignation
25 hearing, of course we would have been kicked out of line. It

1 would have affected the processing of our application. It
2 would have been deemed to be a major amendment. But under the
3 Commission's own rules, the rules distinctly do not provide
4 for a change in channel, it does not constitute a major
5 change.
6 It's something that can be accepted, as Your Honor
7 knows, at post-designation stage, which is why we did that.
8 And so it provides for a grant of the application if good
9 cause is shown. You made a finding that good cause was shown
10 for our amendment. Your finding that there is good cause is
11 now final. It's not subject to review by you, it's not
12 subject to review by the Commission, by a court, by anybody.
13 You've made that finding. So therefore, under the
14 Commission's processing rules, we -- our application -- our
15 amendment was granted and I think our application now has
16 satisfied every parameter the Commission has set for us to be
17 granted.
18 In terms of the processing of this application at
19 Santa Monica that Long Beach filed, there is, I will say to
20 Your Honor, no rule, none -- You can look up and down the
21 rules. There is no rule that entitles them to any
22 consideration with us because the Commission has
23 established -- As I was saying before, it's not the exact same
24 situation, and I know we can find some ways to try and
25 distinguish it, but it's analogous to the situation I

1 described before with respect to the instructional television
2 case where you had a dispositive preference. The Commission
3 has established rules as to how applications are to be
4 processed in deciding -- And so I'm saying that they have --
5 There is nothing that entitles them to consideration with us
6 and we have a settlement agreement and a decision by you that
7 has become final. It's no longer subject to review, and you
8 can't split the baby in half.
9 JUDGE STIRMER: Well, let me ask you this, Mr. Paper.
10 It would be no question whatsoever that had this other
11 application, the Long Beach application, been filed well after
12 you had been granted, there would be no question but that the
13 thing couldn't be set aside. Now, you originally applied for
14 204 and you were cut off from any competing applications for
15 204 once you were designated for hearing. I mean, once the
16 time passed for filing competing applications for 204, you
17 received protection against any subsequently filed application
18 for that channel. My question is what happened once you
19 amended to 201? Did you still retain the protection you had
20 for 204 with respect to your amended application for 201 so as
21 to preclude any other filing for 201?
22 MR. PAPER: Yes.
23 JUDGE STIRMER: You say yes.
24 MR. PAPER: And I'll tell you why.
25 JUDGE STIRMER: Okay, fine.

1 MR. PAPER: Your Honor just said that we were
2 protected because of the cut-off rule. The cut-off rule is a
3 Commission rule. It's not a court rule. And so, therefore,
4 under Ashbacker -- Let's just back up so you'll see where my
5 reasoning goes. Let's suppose that somebody filed a competing
6 application -- The Commission established a rule that said
7 anybody who wants to file a competing application must do so
8 by June 1, whatever date. And somebody came by and filed an
9 application on June 5, a competing application in the sense
10 that it was mutually exclusive, it was in conflict, just like
11 their application, Long Beach's application is in conflict
12 with ours.
13 If you took that to the court, I don't think anybody
14 should have any doubt what the court would say. The court
15 would say you're too late. The Commission has a rule for how
16 applications are processed. Your application, yes, on the
17 facts is inconsistent and the two -- both applications cannot
18 be granted. But the Commission has decided under its rules
19 that there's a cut-off rule. And I'm saying that the
20 Commission processing rules at Section 7335-22 provides a
21 similar cut-off rule, provides similar protection to us. And
22 that protection is the following.
23 I say that when you make a finding -- When we file an
24 amendment under Section -- under the post-designation -- I
25 forget, it's 7335-22(a)(6)?

1 JUDGE STIRMER: 3522(a) is the predesignation section
2 and subsection (b) is for post-designation amendments.
3 MR. PAPER: Okay. Okay. So we file a -- I could
4 read them all to Your Honor, but I'm sure that -- But the
5 rules says -- (a) says, as Your Honor, if there's a change in
6 channel to a major amendment, you go back to the processing
7 line. And that's what would govern a court decision.
8 Section (b), subsection (b) of Section 7335-22 does not
9 contain the same language. It says instead that a post-
10 designation amendment will be accepted if good cause is shown.
11 That's the processing rule. That, that's what gives us
12 protection. So, therefore, what gives us protection, in my
13 view, is that if Your Honor makes a good finding, a good
14 cause, as you did, that, that entitles us to have our
15 application processed.
16 There is nothing -- And therefore, once we satisfy
17 the parameters of the Commission's requirements for the air
18 hazard, you have made a good cause finding, you have approved
19 the settlement agreement which has become final under the
20 Commission's rules. The Commission's rules say when something
21 becomes final. You can't -- It's -- I've never heard of a
22 situation where a court or a judge in an FCC case or any case
23 approves a settlement agreement and then after it becomes
24 final and no longer subject to review by anybody, decides to
25 carve out a piece of the settlement agreement.

1 I've never seen anything like that and I don't think
2 that can happen here. We then became entitled under the
3 Commission's rules to finality. And the task that you have
4 now is really, with all due respect, and I don't mean to
5 demean the task that is before you, but now it's really a
6 ministerial task because it really comes down to did the FAA
7 approve, and the FAA approved and that's all that we have to
8 show. There's nothing more that you need to do. And at that
9 juncture, the settlement agreement is final and there is
10 nothing in the Commission rules which entitles any application
11 filed under -- As the Long Beach application was filed,
12 there's no rule, there's nothing in any rule or anything,
13 there's no case, no rule, no nothing -- I hate to sound -- use
14 bad English, but it's true. There's no nothing that entitles
15 Long Beach to consideration with us.
16 So I, I say we have a settlement agreement -- that's
17 final. We have a finding by you of good cause. We are
18 entitled to be processed under Section 7335-22. Now,
19 Mr. Schonman, I don't mean to steal his thunder, will tell you
20 that the Bureau is concerned about this. They're concerned
21 because they have a, a concern that maybe people aren't
22 getting the proper public notice of amendments that are filed
23 like ours. Maybe people should know, like Long Beach should
24 know beforehand that our amendment was filed and so that they
25 will know in advance. Maybe there should be some different

1 procedure. My response to that, and I'll let him speak to you
2 certainly, but my response to that, Your Honor, is simple. If
3 the Commission, if the Commission thinks that its current
4 rules do not adequately address the problem or if they think
5 there's a better way to go about it, you know, I can certainly
6 understand their desire to, review things, to make sure that
7 it's being done in a proper way.
8 But that's prospective. We have rules now that
9 cannot be changed and that do not give Long Beach any right
10 under the processing rules to be considered with us.
11 JUDGE STIRMER: The timing of these things raise
12 questions, and let me just go over that for a minute. The
13 settlement agreement and the petition for leave to amend was
14 filed on June 28th, 1994. The joint request was filed on
15 July 1. On July 13th, the Long Beach application was filed.
16 MR. PAPER: Right.
17 JUDGE STIRMER: I granted the amendment. I accepted
18 the amendment and I granted the joint request by order adopted
19 July 21, 1994.
20 MR. PAPER: Right.
21 JUDGE STIRMER: And at that time, I did not know, and
22 I don't think anybody knew, of the filing of the Long Beach
23 application.
24 MR. PAPER: That's true.
25 JUDGE STIRMER: Now, if I had known that on

1 July 13th, 1994, an application had been filed by Long Beach
2 specifying the same channel as your amended application, would
3 I have granted the amendment? Would I have accepted the
4 amendment? I don't know.
5 MR. PAPER: Well, I don't know either, Your Honor.
6 You're going to have to decide that. Now, let me take -- I, I
7 understand your point, but I think that you need not belabor
8 that point, and I'll tell you why. The fact of the matter is
9 none of us knew about it. I don't think in the application --
10 I don't know whether it went on public notice, but I certainly
11 did not know about it until our engineer told us about it,
12 because there would be no way for me to know just by looking
13 at it because it's from Long Beach and this is in Mojave and
14 I'm not an engineer.
15 So even if I saw the application in the public
16 notices, I would not have known enough to know it was
17 inconsistent. It wasn't until our engineer told us, I think
18 sometime in August. So I didn't know about it, either. But I
19 will tell this, Your Honor. The fact of the matter is you,
20 you went ahead and you acted in accordance with the Commission
21 rules. Long Beach, they knew about it. They knew about it
22 because we filed an informal objection to their application in
23 the processing log -- and we said hey, we're -- we said well,
24 what's going on here? We told them what's going on here and
25 we said we're about to be granted, and they got that -- and

1 they got our informal objection on August 22. Now, on July 25
2 your, your order did not become final for purposes of
3 Commission review until 40 days after July 25.
4 You had 30 days to reconsider it on your own motion,
5 and the Commission had another 10 days to reconsider on its
6 own motion. So for 40 days after July 25 your motion was
7 subject to reconsideration. Now, Long Beach -- The 30-day
8 period for reconsideration expired on August 24th. On
9 August 22, Long Beach knew about this situation. This is not
10 a complicated case, Your Honor. What could they have done?
11 They could have come immediately to you and they could have
12 asked for extraordinary immediate relief and told you about
13 the problem before your, your action became final.
14 They could have alerted you to the problem, and they
15 could have at least alerted it before the 40-day period
16 expired so at least maybe the Commission might do something.
17 But then didn't. They waited until September. I forget the
18 exact date, but it was September something. It was after the
19 40-day period expired. In fact, they slept on their rights,
20 so the period passed. So what I say to you, Your Honor, is
21 that you have to, like all of us, abide by the Commission
22 rules. The Commission rules say that a decision has become
23 final.
24 Sometimes the Commission makes decisions which maybe
25 in retrospect seem like bad decisions. Maybe they wish they

1 had done something different. But the Commission can't go
2 back and reconsider something after its rules say that time
3 has passed. And I'm saying to you that your time has passed
4 or the Commission's time has passed to reconsider this. This
5 set up your decision to accept back our amendment and to
6 approve the settlement agreement, for better or worse. Maybe
7 you would have done something differently if you had known
8 about it, if they -- if Long Beach had filed earlier.
9 I don't know what you would have done. We would have
10 argued about it for sure. I still think we're right. Don't
11 mind me. I think they're not entitled to consideration, but
12 I'm saying that we don't have to reach that substantive point
13 because there's a procedural issue here which in my mind bars
14 anything. It's like saying whatever you may think about this
15 issue, it's in my view beyond you now. The fact that you
16 have, you have a grantor obligation is, as I said, that's just
17 a ministerial task implementing a, an order, settlement
18 agreement, which you have already approved.
19 And that approval has become final and you don't
20 have, you do not have the discretion any more to go back and
21 say well, maybe I shouldn't have approved this settlement
22 agreement. You can't go back to that point. And I say to
23 Your Honor in this case justice is served if we look at -- And
24 the Federal Rules of Civil Procedure and the Commission's
25 rules are designed to do justice. If you want to look at the

1 equities of this situation, there's no doubt, no reasonable
2 person could doubt where the equities lie in this case. We
3 filed our application two years ago. More than that, almost
4 three now, two and a half years ago now.
5 We waited a long time. And, and the Bureau, in
6 fact -- We had a proposal about how to resolve this with the
7 Bureau. Not Mr. Schonman. But, of course, we've talked to
8 the Bureau about it and the Bureau said wait till, wait till
9 you're designated and then you can make your proposal and then
10 you'll be granted, and that way it'll resolve the case. So we
11 gave up our right to have a hearing with Living Way, and
12 they're, they're gone now because you can't bring them back.
13 We have already acted in reliance, to our detriment, on your
14 order and the Commission's rules.
15 So whatever Mr. Schonman thinks or whatever the
16 Bureau thinks about how the rules should be changed, that
17 should be prospective. We should not be made to suffer
18 because we relied on the rules.
19 JUDGE STIRMER: I recognize that there are a great
20 man equities in your favor. The only question I'm concerned
21 about is, is the legality of the matter and whether or not I
22 have a situation where I have an application pending on the
23 processing law that's mutually exclusive of an application
24 before me. That to me, I think, is, is the issue. I
25 recognize the equities in favor of your application and I

1 realize that you filed your application a long, long time ago.
2 But let me hear from the Bureau, counsel.
3 MR. SCHONMAN: Thank you, Your Honor. A lot has been
4 said in the past few minutes and I'm trying to sort through
5 all this. I think this is a complicated, complicated matter.
6 Let me start by, by trying to address your initial concerns,
7 Judge. I don't think there's any question that the two
8 applications, that is, the Long Beach minor modification
9 application which is pending before the staff and, and
10 Mr. Paper's amended application, those two applications are
11 technically MXed. There will be technical interference if
12 they're both granted.
13 I don't think there's any question, both parties
14 agree and the Bureau has done its own independent study and
15 has determined that they are technically MXed. The second
16 matter that Your Honor raised was whether the Long Beach minor
17 modification application was timely filed, and I think therein
18 lies the problem with this, this entire matter. What does
19 timely filed mean vis a vis a post-designation amendment that
20 Mr. Paper filed? And there are some anomalies, when one
21 compares the Communications Act and one compares the
22 Commission's rules, and let me explain that.
23 Mr. Paper accurately described Section 7335-22(a) and
24 (b), and I don't think I have to go into that any further than
25 to say that part (a) describes the procedures that the staff

1 will follow for predesignation amendments and subsection (b)
2 of that rule section describes the procedures that should be
3 followed for post-designation amendments. Section (a)
4 describes -- Section (a) makes a distinction between major and
5 minor amendments, predesignation amendments. Subsection (b)
6 does not make a distinction between major and minor amendments
7 that are filed after designation.
8 The Communications Act at Section 309 requires there
9 to be notice when there are substantial changes, and it uses
10 the word "substantial." It would appear that a channel change
11 is a substantial change. The Bureau thinks that there may
12 very well be a problem with notice in this matter. That is,
13 notice to the Long Beach licensee. It would appear that
14 Mr. Paper's client did not provide any notice of the filing of
15 the amendment to change channels. Therefore, when Long Beach
16 filed its minor mod application, it had no knowledge that its
17 application would be MXed with Mr. Paper's client.
18 Now, an argument has been made this morning about the
19 significance of your decision of July 25 granting the
20 settlement agreement, and I think it has been suggested that
21 that decision should operate as a benchmark as to when notice
22 was provided because that was a publicly released notice. And
23 I believe Mr. Paper, if he hasn't already made the argument,
24 would make the argument that that order constituted notice to
25 the world and that Long Beach did not come in within a

1 reasonable amount of time of the July 25 decision in order to
2 seek intervention in this case. I would submit that the
3 July 25 decision granting the settlement agreement did not
4 provide the type of notice contemplated by the Act.
5 Your decision granting the settlement agreement and
6 the notice that the order provided was notice after the fact.
7 The type of notice that the, that the Act contemplates is
8 notice to interested parties to come in and assist you in
9 making a decision. Your order granting the settlement
10 agreement can't constitute that type of notice because it was
11 notice of action already taken. That would not have assisted
12 anyone. So I don't believe that your July 25 order can
13 constitute the benchmark for when there should have been
14 notice.
15 Now, there is no requirement in the rules, as it
16 now -- as they now exist, that would have required Mr. Paper
17 to provide notice to the public that he was amending his
18 application to change channels, and therein lies the problem.
19 Long Beach had no notice. They could not have known. And, in
20 fact, they have represented in their motion to intervene that
21 they had no knowledge whatsoever that Mr. Paper had a
22 competing application until Mr. Paper filed his informal
23 objection on August 22. Now, August 22 is -- was only two and
24 a half or three weeks before they filed their motion to
25 intervene.

1 On that basis, I'm not sure that the motion to
2 intervene is late. They filed their motion to intervene
3 within two or three weeks after first learning that there was
4 an MX situation. I would also disagree with Mr. Paper further
5 about the significance of your, of your July 25 order. I
6 don't think that the granting of the settlement agreement
7 settled this case. Mr. Paper's application remains pending.
8 It is not a ministerial task merely to sign off on that
9 application simply because you've received FAA notice.
10 Your Honor has to make a determination as to the
11 qualifications of Mr. Paper's client and whether the public
12 interest would be served by granting that. Given the fact
13 that there is a competing application -- Well, let me state it
14 otherwise. Given the fact that there is an application that's
15 technically MXed, I don't think Your Honor is in a position to
16 make the determination yet as to whether Mr. Paper's
17 application can be granted. But the problem is a fundamental
18 one and it, and it's a problem of notice for Long Beach. They
19 simply had no notice that a competing application -- that
20 Mr. Paper had filed his amendment. And the rules don't
21 provide for notice, but the Act suggests that there should be
22 notice.
23 JUDGE STIRMER: Well, we're coming back to this rule
24 relating to amendments after a case has been designated for
25 hearing. My own personal view is I always thought that

1 whenever an applicant was designated for hearing and
2 thereafter changed frequencies he should go back through the
3 process. That has always been my view, but it's not the view
4 of the Commission. The Commission permits applicants to amend
5 their application to specify different frequencies and to
6 remain in hearing.
7 And the question is when they do so do they continue
8 to receive the protection that they had when they specified
9 their original channel? Namely, that they're precluded from
10 having anyone else file against them on their new channel.
11 MR. SCHONMAN: Your Honor, I don't know of any case
12 prior to this --
13 JUDGE STIRMER: Where it happened?
14 MR. SCHONMAN: -- where that's come up.
15 JUDGE STIRMER: I know.
16 MR. SCHONMAN: Because I don't know of a case where
17 someone has filed a competing application during this interim
18 period.
19 JUDGE STIRMER: I don't know of any either.
20 MR. SCHONMAN: And, and because this appears to be
21 the first case of this kind, where there has been a -- where
22 the lack of notice has become a material problem, we, we may
23 very well need guidance from the Commission on this.
24 MR. PAPER: May I comment, Your Honor?
25 JUDGE STIRMER: Certainly.

1 MR. PAPER: Thank you, Your Honor. Mr. Schonman
2 starts -- really his announcement starts with a notion.
3 There's nothing, as he says, in the rules that requires
4 notice, but he's concerned that there was no notice that
5 prejudiced that -- He's concerned that Long Beach did not have
6 notice to which it's entitled. Now, he says that there's
7 nothing under the FCC rules that entitles Long Beach to
8 notice. So he then says well, but there's something in the
9 Act, Section 309 I think it is, correct?
10 MR. SCHONMAN: Correct.
11 MR. PAPER: Which says that there would have to be
12 notice of substantial changes. That's the only thing --
13 That's the only legal authority he can cite to say that Long
14 Beach was entitled to some notice. And from that, he proceeds
15 to say that since they were entitled to notice all these bad
16 consequences flowed to us. The premise of his argument,
17 however, is flawed, and it's flawed for this reason. The
18 Commission interprets what those words "substantial change"
19 mean, just like the Commission implements a lot of the broad
20 language of the Communications Act where specific rules have
21 given meaning in particular circumstances.
22 The Commission has defined in its rules what
23 substantial changes are. The Commission has said that a
24 substantial change in the predesignation stage is different
25 than it is in the post-designation stage. And for better or