

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

MAR 21 1 30 PM '95

MM Docket No. 94-20

In re Application of

FAMILY File No. BPH-910924MB
BROADCASTING, INC.

For Construction Permit for a
New FM Station on Channel 229A in
Hague, New York

Appearances

Joseph E. Dunne, III, Esq. on behalf of Family Broadcast-
ing, Inc. and Robert A. Zauner, Esq. on behalf of the Mass
Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIK

Issued: March 14, 1995;

Released: March 21, 1995

PRELIMINARY STATEMENT

1. This proceeding involves the application of Family Broadcasting, Inc. ("Family") for a new FM station on channel 229A in Hague, New York which was filed on September 24, 1991. By *Hearing Designation Order* ("HDO"), DA 94-215 (released March 23, 1994), Family's application was designated for hearing on the following issues:

- a) Whether the applicant, at the time it so certified, had reasonable assurance that its proposed site would be available to it;
- b) Whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant misrepresented to the Commission the availability of its specified site; and
- c) If, b) above is resolved in the affirmative, the effect thereof on the applicant's qualifications to be a Commission licensee.

2. The HDO further specified that grant of a permit to Family shall be subject to the following condition:

The permittee/licensee, in coordination with other users of the site, must reduce power or cease operations as necessary to protect persons having access to the site, tower or antenna from radio frequency radiation in excess of FCC guidelines.

3. On November 1, 1994, Family filed a Petition for leave to Amend its application to specify a new antenna site. The proposed new antenna site is the same site Family specified in an amendment filed with the Commission on January 27, 1992. Family's 1992 amendment was rejected in the HDO because it was not accompanied by a "good cause" showing. At the hearing, because the good cause determination was contingent upon the resolution of the above-specified issues, the Presiding Judge directed that comments on Family's November 1, 1994, amendment be included in the Mass Media Bureau's ("Bureau") proposed findings of fact and conclusions of law (Tr. 12-13).

4. A prehearing conference in this proceeding was held on May 24, 1994. A hearing session was held on November 2, 1994. By *Order*, FCC 94M-612, released November 9, 1994, the record in this proceeding was closed. Proposed findings were filed on January 31, 1995 and Family's Reply was filed on February 15, 1995.

FINDINGS OF FACT

5. Family is the licensee of WGLY-FM, Waterbury, Vermont; WGLV-FM, Hartford, Vermont; and, low power television station W39AS, Burlington, Vermont (Family Ex. 1, p. 1). Family is also the permittee of WMNV-FM, Rupert, Vermont. Alex D. McEwing is the president and 39.8 percent shareholder of Family, and is also the president and a director of Christian Ministries, Inc., a nonprofit nonstock organization which is the permittee of a noncommercial FM station in Bolton, Vermont (BPED-931103MA)¹ and which has applied for a noncommercial FM station in Barre, Vermont (BPED-930311MA). Mr. McEwing has been the largest stockholder and the president of Family since February 12, 1986 (*Id.*).

6. McEwing was responsible for preparing and reviewing Family's application for Hague. Family wanted to utilize the Hague facility as a repeater station, repeating the programming on Family's FM station, WGLY. In looking for an antenna site for Family's proposed facility, McEwing determined that the best location would be an existing tower on Mt. Defiance. He felt that of the sites available, the Mt. Defiance site would provide the best coverage of Hague, and, as an existing site, would enable Family to expedite service to the public (*Id.*; Tr. 34-5; 57).

7. McEwing called David Gallety, the executive director of WAMC, an FM station which operates on the Mt. Defiance site, to ascertain who owned the tower. McEwing had met Gallety previously when both were involved in a proceeding for a new station in Voorheesville, New York. Gallety told him that the tower was owned by the Fort Ticonderoga Association and that McEwing should contact Nick Westbrook at the Association. Gallety provided McEwing with Westbrook's telephone number. During the conversation, McEwing asked Gallety if there was space on the tower for another antenna. Gallety told him space on the tower was tight, but he thought there could be space available (Tr. 35-8).

8. McEwing called Westbrook and introduced himself as a representative of Family (Family Ex. 1, Att. A, p. 2), and said that Dave Gallety had given him Westbrook's name (Tr. 40). McEwing also told Westbrook that he was under some pressure to get an application for Hague on file

¹ Since the closing of the record in this proceeding, Christian

Ministries, Inc.'s application for Bolton has been granted.

because the allocation was vacant and the application was being filed on a "first come-first served" basis (Family Ex. 1, Att. A, p. 2). McEwing told Westbrook that he wanted to check to see if the Mt. Defiance site was available for an FM application for Hague, New York. Westbrook responded that he needed a "formal proposal," including the applicant's tax status, which McEwing discussed with him (Family Ex. 1, Att. A, p. 2; Tr. 42). In addition, Westbrook noted that the proposal should include a reference to the amount of rent that Family proposed paying, the time frame during which the station would be built, how much room Family would require in the building, and approximately how much electricity the station would use. McEwing's notes of the conversation include a notation concerning "tenant 1 percent of gross" (Family Ex. 1, Att. A, p. 5), which referred to a comment made by Westbrook concerning the rent paid by one of the other users of the site (Family Ex. 1, Att. A, p. 4; Tr. 51). The notes also include the notation, "Okay," Family Ex. 1, Att. A, p. 5, which refers to McEwing's reaction to Westbrook's request for a written proposal (Tr. 43). McEwing told Westbrook that he would "make it worth his while." (Tr. 52).

9. McEwing then explained that the FCC process took a long time, and that Family would not likely need to use the site for many months, but that Family was under time constraints to file its application quickly (Family Ex. 1, Att. A, pp. 4-5). McEwing explained that the FCC required that an applicant have "reasonable assurance" of the availability of its antenna site, which meant that the site was available and that he (Westbrook) would rent the site to Family. McEwing told Westbrook that they did not need to agree on a specific monthly rental, that the specific details could be negotiated later if he were willing to rent the site to Family. McEwing knew what "reasonable assurance" meant because he had spoken to his communications counsel, Mr. Dunne, concerning the matter (Family Ex. 1, p. 2), prior to his conversation with Westbrook (Tr. 33). McEwing understood that Family didn't need to have negotiated the terms and conditions of a lease to have reasonable assurance of a site, but that Family, at least, had to have the permission of the site owner to specify the site in an application. In Mr. McEwing's mind "reasonable assurance" meant "one that the site was available and secondly that the site was available to rent for me." (Tr. 33, 34). McEwing's understanding of what "reasonable assurance" meant was confirmed in writing by counsel (Family Ex. 1, Att. B, p. 2). In that letter counsel stated:

Section VII, Q. 3. Please review the information on the site certification carefully to determine if it is completely accurate. Recall that the Commission requires no more (but no less) than that Family has reasonable assurance to use the site specified in the application. Reasonable assurance means, at a minimum, permission to use the site. The permission may be given orally--it need not be in writing--but it must be unambiguously given.

(Family Ex. 1, Tab B).

10. Because he was in a hurry to get the application on file, McEwing asked Westbrook if he (Westbrook) had any objections to Family filing an application on the Mt. Defiance site (Family Ex. 1, Att. A, p. 3; Tr. 41, 44, 47, 53). Westbrook replied that he had a board meeting coming up soon, and that Family would need to "send him a letter." (Family Ex. 1, Att. A, p. 2; Tr. 44, 46). McEwing agreed to

send the requested letter (Family Ex. 1, Att. A, p. 2). McEwing alleges that when the conversation with Westbrook ended, he believed that Westbrook would not object to Family specifying the Mt. Defiance site in its application and that he had to prepare a formal written proposal for Westbrook to commence the negotiating process.

11. On this point the transcript contained the following testimony:

MR. ZAUNER:

Q Did you directly ask Mr. Westbrook whether Family had permission to use the Mt. Defiance site?

A I asked Mr. Westbrook if he had any objections to us specifying the Mt. Defiance site in our application. And

Q what did he tell you?

A He said send me a letter.

Q So he didn't say yes or he didn't say no, he just said send you -- send me a letter.

A That's correct.

(Tr. 43-44).

12. After his conversation with Nicholas Westbrook on September 18, 1991, McEwing immediately called Gary Savoie, a consulting engineer, and asked him to prepare the application for channel 229A in Hague (Family Ex. 1, p. 2). McEwing's telephone records show that the call took place immediately after the conversation with Mr. Westbrook, and that the conversation took over 32 minutes (Family Ex. 1, Att. A, p. 7; Family Ex. 3, p. 1).

13. McEwing told Savoie that there was some urgency in the matter because the window for filing for the allocation had closed and the application would be a "first-come, first-served" application (Family Ex. 1, p. 2; Ex. 3, p. 1). McEwing instructed Savoie to specify the Mt. Defiance site of WANC-FM, and gave him some technical information about the site. Savoie specifically asked McEwing if Family had gotten permission to use the site (Family Ex. 1, p. 2; Ex. 3, p. 1). Savoie asked McEwing something like: "have you got the site?" McEwing told him "yes," that he had just spoken with Nicholas Westbrook and had asked him if we could use the site in Family's application, and that Westbrook had expressed no objection, but requested a formal proposal, in writing, to present to his board of directors. Savoie's notes of the conversation show that he noted Mr. Westbrook's name and telephone number as the person who gave Family permission to use the site (Family Ex. 3, p. 2).

14. In preparing the application Savoie became concerned about several technical issues, such as the electromagnetic radiation at the site and the spot, exactly, where Family's antenna could be located on the WANC tower (Family Ex. 3, p. 3). Savoie called the other occupant on the tower which Family was specifying, FM station WANC, and told the person at WANC that he (Savoie) was preparing an application on behalf of Family Broadcasting, Inc. for an FM frequency in Hague, New York, that Family was specifying the WANC tower as its site, and that he needed some technical information to prepare the FCC application (Family Ex. 3, p. 3). Savoie's notes of his conversation with one he referred to as the WANC engineer indicated that the WANC engineer told him that he

knew that McEwing had already called about the site, and that he had been instructed to be as accommodating as possible. He was, and following that conversation Savoie had no doubt that Family had permission to use the site (*Id.*).

15. McEwing never sent Westbrook the written proposal that Westbrook had requested. After speaking with Westbrook, McEwing became involved in other, unrelated matters. When McEwing focused attention again on Family's Hague application, it was time to publish the public notice of its filing. On Monday, November 11, 1991, Family ran the public notice in the *Times of Ti*. Family's notice stated, *inter alia*, that, "[t]he antenna and transmitter will be located at the top of Mount Defiance." (Tr. 48-49; MMB Ex. 1, Att. 1).

16. By letter dated November 14, 1991, Westbrook informed McEwing that he was "greatly disturbed to read the legal notice in the *Times of Ti* ... declaring your intention to seek approval from the FCC for an FM broadcast facility based on Mount Defiance." Westbrook further stated that, "[n]either you, nor Family broadcasting, nor Harvest Broadcasting, nor any other related entity have approval to do so from the property owners, the Fort Ticonderoga Association." In addition, Westbrook noted:

When you telephoned in early September to inquire about lease possibilities during this current FCC 'window,' I stated clearly that we would consider written proposals only, detailing technical and financial implications. I noted that we had an upcoming Board of Trustees meeting in early October. Your only subsequent communication was the legal notice referred to above.

(Family Ex. 7).

17. When McEwing received Westbrook's letter, he tried to call Westbrook but could not reach him. McEwing then wrote a letter, dated November 18, 1991, and faxed it to Westbrook. In his letter McEwing stated in pertinent part:

I specifically told you on the phone when I talked with you, that the FCC is a long process and that if you had no objections we would be filing an application for Hague, NY with a proposed transmitter on Mt. Defiant (sic) obviously pending your formal approval. We have a written option on another transmitter site to use for this proposed facility. But, it was my impression from you that your organization might have some interest in leasing space for the right price and terms - by legal definition of reasonable assurance' - that impression is all that is necessary to file an FCC application - it gets the long process rolling.

Our intention was to file the application based on our impression that there was tower rental opportunity available, and then formally submit the letter you requested.

(Family Ex. 1, Tab A, Att. C).

18. Immediately after receiving Westbrook's letter, McEwing called Peter Morton, another consulting engineer with whom he was acquainted, to ask his help in finding a new site and preparing the engineering portions of an amendment to the Hague application (Family Ex. 1, p. 3).

McEwing told Morton that Westbrook had originally indicated to McEwing that he (Westbrook) had no objections to specifying the site and that he "had pulled the rug out from under us." Morton told McEwing that he was puzzled that Westbrook had changed his mind, since Morton had asked him (Westbrook) if Mr. Morton could use the Mt. Defiance site during the summer and had been told exactly the same thing, and Morton believed that Westbrook had agreed for him to use the site too (Family Ex. 1, p. 4).

19. During the Summer of 1991, Morton worked as the manager of WIPS, an AM daytime station serving Ticonderoga, New York. The WIPS transmitter site is located on property owned by the Fort Ticonderoga Association. Morton became interested in the possible purchase of WIPS (Tr. 65). At that time Morton was aware that the FCC was in the midst of a rulemaking procedure to allocate a class A FM channel to Hague, New York, a town adjacent to Ticonderoga, and Morton did an allocation study which showed that the Mt. Defiance site owned by the Fort Ticonderoga Association would be by far the best site to provide service to Hague. Morton was interested in operating an AM-FM combination (Tr. 65). Morton approached Westbrook about the availability of the site for an additional transmitter and antenna for the proposed FM station (Family Ex. 2, p. 2). Westbrook told Morton his proposed lease terms. Morton neither agreed or disagreed with Westbrook's proposal (Family Ex. 2, p. 2), but he believed that he had reasonable assurance to use the Mt. Defiance site after that meeting (Tr. 78, 80). When the FCC subsequently set a date to accept applications Morton again contacted Westbrook and asked Westbrook about the availability of the Mt. Defiance site. Westbrook asked Morton if it were possible to use the AM tower site, which is located next to the lake in Ticonderoga, but Morton rejected the AM site as technically inadequate. Westbrook then agreed that the Mt. Defiance site was probably the best place, and told Morton something like "we can probably do something," or "it can be worked out" (Family Ex. 2, p. 2; Tr. 77), or, "if you have to use the FM, that's what we'll have to do. ..." (Tr. 73). Westbrook also asked Morton for a letter to take to his board of directors outlining possible programming for the new station and the technical requirements (size and shape) of the transmitter and antenna (Family Ex. 2, p. 2-3).

20. In his declaration (MMB Ex. 1) dated October 28, 1994, Westbrook states that he recalls meeting Morton in his office in the summer of 1991. At the time Morton was the new manager of WIPS-AM, Ticonderoga, New York. WIPS-AM uses a broadcast tower on property owned by the Association located near the shore of Lake Champlain about one mile from Mt. Defiance.

21. According to Westbrook during that discussion, Morton noted the troubled financial situation of WIPS-AM's owners, Empire State Radio. Morton informed him that he might have an opportunity to acquire WIPS-AM at a very favorable price. He inquired about the Association's potential interest in a transfer of the lease to him and his potential associates and asked about the general financial requirements (MMB Ex. 1, ¶16).

22. Westbrook stated that he emphasized the community's strong desire to keep the station from going silent, recognizing that the community would lose forever a tremendous asset. He discussed a potential rental fee framework, including both a fixed amount and a percentage of gross. Westbrook noted that the Association owned only

the tower by the lake and that Morton would have to negotiate separately from the studio building located in the village of Ticonderoga (MMB Ex. 1, ¶17, ¶18).

23. Westbrook avers that the conversation with Morton was hypothetical on both sides. He understood Morton to be seeking an opportunity to own his own station, but he needed a business plan and financial backers. Westbrook invited him to return when he had a firm written proposal. In his opinion, he never gave Morton "reasonable assurance" of anything during their conversation. He did not discuss with Morton the Association's completely separate broadcast facilities on Mt. Defiance (MMB Ex. 1, ¶19).

24. Westbrook does not recall McEwing at any point asking whether Family could specify Mt. Defiance as its antenna site. Westbrook avers that had McEwing done so, his answer would have been no. Westbrook states that without first obtaining the approval of the board of trustees and the other tenants, he could not unilaterally approve the specification by Family of the site. When no written proposal was received from McEwing by the date of the October board meeting, he presumed the matter was dead. In the absence of a written proposal by Family, the matter was not raised at the October meeting (MMB Ex. 1, ¶7).

25. In his opinion had Family submitted a formal written request for use of the Mt. Defiance tower the Board of Trustees would have been open to considering the proposition (MMB Ex. 1, ¶13).

CONCLUSIONS OF LAW

Site Availability

26. The Commission has long held that to claim "reasonable assurance" of the availability of its site, an applicant must have received an indication that the owner of the site or his agent will be favorably disposed toward entering into an arrangement with the applicant. See, *Elijah Broadcasting Corporation*, 5 FCC Rcd 5350, 5351 (1990). It is well established that, although a legally binding commitment to provide access to a site is not required, a "mere possibility" that a site will be available also does not suffice. See, *El Camino Broadcasting Corp.* 12 FCC 2d 25, 26 (Rev. Bd 1968). Even in circumstances where a landowner has agreed "to discuss" making his land available to an applicant, "reasonable assurance" of the availability has been found not to exist (*Id.*). Indeed, as the Review Board stated:

In our view, the mere fact that the property owner has indicated that he would discuss the possibility of [making land available] at some future date does not, absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance than an unrejected offer.

(*Id.*). See also, *William F. and Anne K. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974), statement by landowner that he sees "no problem" in applicant locating on his land does not constitute "reasonable assurance" of the availability of the proposed site. See, *Progressive Communications, Inc.*, 61 RR 2d 560 (Rev. Bd. 1986).

27. A careful review of the record discloses that Family did not possess the requisite reasonable assurance of the availability of its proposed antenna site at the time it filed its application. McEwing avers that he specifically asked Westbrook if he had any objection to Family specifying the

Mt. Defiance site in its application as its proposed antenna site. At this point the record shows that Westbrook was aware of Family's time restraints regarding the filing of the application and that there was a degree of urgency. McEwing did not answer in the affirmative. Rather, Westbrook replied that he needed a formal written proposal that would include Family's tax status, the rent Family would be willing to pay, the time frame involved, the amount of electricity required and the amount of space in the transmitter room that Family would need.

28. There was no ambiguity in Westbrook's response. Indeed the clear meaning of his response was underscored by Westbrook when he learned that Family had claimed in its application that it had available access to the Mt. Defiance site. Westbrook disabused Family of that idea by letter and also so informed the Commission.

29. Family argues that, Westbrook's response that Family should send a letter notwithstanding, McEwing was correct in understanding that Westbrook was amenable to grant Family access to the Mt. Defiance site. McEwing indicates that in following up on his conversation with Westbrook he engaged an engineer to do the technical makeup who in turn talked to the engineer of one of the occupants of the Mt. Defiance tower and was told that he had already known that McEwing called about the site and that he had been instructed to be as accommodating as possible. However, this information is of no weight. It is not probative of the assertion that Westbrook was amenable to grant Family access. It is speculative.

30. Family also argues that Westbrook reacted to his request in the same manner as he had to Peter Morton who also on a different occasion sought access to the Mt. Defiance site and that at that time Morton believed he had access available to the Mt. Defiance site and transmitter. But, Morton's claim of access is also speculative because Morton's attempt to gain access never came to a finality. Furthermore, Morton's claim is rebutted by Westbrook in his declaration (MMB Ex. 1). The record is barren of any evidence as to why Westbrook would not state the truth.

31. It is concluded that McEwing never obtained reasonable assurance that Family's proposed antenna site on Mt. Defiance would be available for Family's use. McEwing's belief to the contrary cannot be translated to an expressed willingness to grant access on Westbrook's part. At best all Family had was a mere possibility that the Mt. Defiance site would be available which by Commission precedent does not constitute "reasonable assurance."

MISREPRESENTATION

32. It is well established that misrepresentation requires a false statement of fact made with an intent to deceive. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

33. At the time McEwing spoke with Westbrook he was in a rush to obtain a site for Family's Hague application. He inferred from Westbrook's failure to enunciate an objection to his request for permission to specify Mt. Defiance that Family had Westbrook's permission to do so. Based on his understanding of reasonable assurance, McEwing believed that Family could specify the site because it was available and because Westbrook had approved of its specification. The fact that Westbrook wanted Family to submit a formal written proposal further established in McEwing's mind that Westbrook had authorized Family's use of the site. McEwing apparently considered the formal written proposal necessary only to determine the terms.

McEwing's failure to submit a proposal is consistent with this testimony that he believed he had obtained permission to specify the site from Westbrook during their telephone conversation.

34. Moreover, McEwing's claim that he believed that he had obtained reasonable assurance from Westbrook is supported by other record evidence. McEwing knew that Family would have to prepare and publish public notice of its selection of the Mt. Defiance site in a local newspaper and that Westbrook and the Fort Ticonderoga Association would then become aware of Family's site intentions. To deliberately specify an unavailable site, knowing that your deception would be made known to those who knew the true facts, would not make sense. Also, McEwing, before calling Westbrook, consulted with his attorney to ascertain what constituted reasonable assurance. This evidences an intent to comply with the Commission's requirements with regard to Family's site specification. Finally, McEwing's November 18, 1991, letter to Westbrook, written when he first learned of Westbrook's opposition to Family's specification of the Mt. Defiance site, is consistent with McEwing's testimony in this proceeding that he believed that he had reasonable assurance to specify the Mt. Defiance site based on the absence of an objection by Westbrook. The misrepresentation issue IS RESOLVED in Family's favor.

Family's November 1, 1994, Amendment

35. Currently, Family is without an antenna site. On November 1, 1994, Family filed a Petition for Leave to Amend its application to specify a new antenna site. The antenna site specified is the same antenna site Family specified in its January 22, 1992, amendment which was rejected in the *HDO* for failure to meet the good cause requirements of Section 73.3522(b)(1) of the Commission's Rules. The Bureau correctly states that there is no need to examine Family's good cause showing. Its amendment must be rejected in any case. The law is clear that "an applicant will not be permitted to amend [to a new transmitter site] where it did not have the requisite reasonable assurance to begin with. ..." *Rem Malloy Broadcasting*, 6 FCC Rcd 5843 (Rev. Bd. 1991), citing *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n.12 (Rev. Bd. 1984). Here, it has been concluded that Family never obtained reasonable assurance of the availability of its original antenna site. Consequently, Family cannot now be permitted to amend its application to specify a new site. Family's November 1, 1994 Petition for Leave to Amend IS DENIED.

ULTIMATE CONCLUSIONS

36. From the foregoing, it is concluded that Family never obtained reasonable assurance of the availability of the Mt. Defiance antenna site specified in its application. It is also concluded that in specifying the Mt. Defiance site, Family did not intend to deceive the Commission as to the site's availability. Finally, it is concluded that because Family never obtained reasonable assurance of the availability of the antenna site specified in its application, it cannot now be permitted to amend its application to specify a new site.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Family Broadcasting, Inc. (File No. BPH-910924MB) for a construction permit for a new FM station to serve Hague, New York, is deficient and IS DENIED.²

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

² In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall

become effective 50 days after its public release pursuant to Rule 1.276(d).