

FEDERAL COMMUNICATIONS COMMISSION

DOCKET FILE NO. 94-71

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

FCC 95M-174

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| In re Applications of |) | MM DOCKET NO. 94-71 |
| |) | |
| SANTA MONICA COMMUNITY COLLEGE |) | File No. BPED-920305ME |
| DISTRICT |) | |
| |) | |
| For Construction Permit for a |) | |
| New Noncommercial FM Station on |) | |
| Channel 204B in Mojave, California |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

Issued: July 26, 1995 ; Released: July 28, 1995

1. Under consideration are a "Petition for Leave to Amend" filed by Santa Monica Community College District (SMCCD) on September 1, 1994; a "Motion to Grant Pending Application" filed by SMCCD on May 3, 1995; "Mass Media Bureau's Comments on Motion to Grant Pending Application" filed by the Bureau on May 9, 1995; "Comments on Motion to Grant Pending Application" filed by California State University, Long Beach Foundation (CSU) on May 12, 1995; a "Motion to Strike" filed by SMCCD on May 24, 1995; "Opposition to Motion to Strike" filed by CSU on June 5, 1995; and an "Erratum" filed by SMCCD on June 13, 1995.

Background

2. Before considering the "Motion to Grant Pending Application," a brief history of this proceeding will place the request in proper context.

3. Originally, this case involved the mutually exclusive applications of SMCCD and Living Way Ministries (LWM). Pursuant to a settlement agreement filed on July 1, 1994, SMCCD agreed to remove the conflict with the LWM application by amending to specify Channel 201B instead of Channel 204B. A "Joint Petition for Approval of Settlement Agreement" was filed by the applicants on July 1, 1994, and an amendment proposing to operate on Channel 201B (in lieu of 204B) together with appropriate engineering exhibits was filed by SMCCD on July 5, 1994. On July 13, 1994, CSU filed an application to improve the facilities of its Channel 201 Long Beach station. On the following day, namely July 14, 1994, the Mass Media Bureau (Bureau) filed a pleading supporting the joint request and the request to amend the SMCCD application to specify Channel 201B.

4. On July 21, 1994, the Presiding Judge issued a Memorandum Opinion and Order (FCC 94M-453, released July 25, 1994) granting the joint request, accepting SMCCD's amendment, granting LWM's application, but retaining the SMCCD application in hearing status for the purpose of awaiting FAA clearance for the new frequency (201B).¹ Also on July 21, 1994, CSU's modification application appeared on Public Notice as "accepted for filing." At the time the Presiding Judge acted on the joint request and the petition to amend the SMCCD application, he was unaware of the filing of the CSU application, and it appears that counsel for the Bureau was similarly unaware of the CSU filing.² The Presiding Judge became aware of the filing of CSU's modification application when CSU filed a "Petition to Intervene" in this proceeding on September 7, 1994, contending that its modification application was mutually exclusive with the amended SMCCD application.

5. Because of the apparent conflict between the amended SMCCD application and the modification application filed by CSU, the Presiding Judge directed the parties, with the Bureau's participation, to explore the possibility of settlement. Progress reports regarding a possible settlement between SMCCD and CSU were submitted by the Bureau on November 24, 1994, December 22, 1994, January 23, 1995, and February 21, 1995. The last report reflects the fact that the "applicants have been unable to reach an agreement to modify their respective proposals in order to eliminate all mutual exclusivity."

6. The Presiding Judge had hoped, indeed expected, the applicants to arrive at a mutually agreeable arrangement whereby both applications could be granted. This does not now appear possible. A further prehearing conference was held on March 7, 1995, at which time the parties outlined their respective positions with respect to the case.

¹ SMCCD filed a "Petition for Leave to Amend" on September 1, 1994, providing the Commission with an "FAA No Hazard Determination" with respect to the amended proposal. This petition will be granted and the amendment will be accepted.

² Upon receipt of SMCCD's post-designation amendment, the Bureau conducted a full and complete engineering analysis, including a channel study. The analysis did not reveal any conflict with existing stations. Additionally, the analysis did not disclose any conflict with other proposals, including the previously-filed CSU application for modification of facilities of Station KLON-FM. It is now known that the analysis failed to reveal the CSU application because CSU's proposed new parameters had not yet been entered into the Commission's data base. In comments filed with the Presiding Judge on the same day that it conducted its engineering analysis, the Bureau recommended favorable action on the SMCCD application. The Bureau states that it has revised its review procedures in order to reduce the likelihood that a presiding judge will accept a post-designation amendment that is in potential conflict with another, previously-filed proposal. In addition to conducting a channel study on the Bureau's filing deadline, the Bureau now routinely requests presiding judges to provide advance notice of their intention to adopt an order accepting the amendment. The Bureau then conducts an additional "eleventh hour" channel study to ensure that the Presiding Judge's acceptance of the amendment will not create conflict with any other proposals.

7. In support of its "Motion to Grant Pending Application," SMCCD argues that the Presiding Judge's Memorandum Opinion and Order granting the joint request and accepting its amendment was deemed to have been placed on Public Notice on the date of release, July 25, 1994; 47 CFR Section 1.4(b)(2); that such Memorandum Opinion and Order became final on September 3, 1994, 47 CFR Section 1.4, 1.113, 1.117, 1.294; 47 USC Section 405(a); that CSU's modification application was placed on Public Notice on July 21, 1994, the day the Presiding Judge's Memorandum Opinion and Order was adopted; that CSU was given constructive notice of the parties' settlement agreement and SMCCD's amendment on July 25, 1994, when the Presiding Judge's Memorandum Opinion and Order was released and actual notice on August 22, 1994, when SMCCD served CSU with an Informal Objection to CSU's modification application; that CSU, despite such notice did not take timely action to prevent the Presiding Judge's action approving the settlement agreement and accepting SMCCD's amendment from becoming final; that CSU waited until September 7, 1994 (four days after the Presiding Judge's Memorandum Opinion and Order became final) to file a "Petition for Leave to Intervene"; that CSU did not appeal the denial of its request to intervene and therefor has no right to participate in the instant proceeding. Because the record in this proceeding only contains the SMCCD application, it is SMCCD's position that there is no need to reconcile its application with the CSU application which has not been processed by the Bureau. Finally, SMCCD argues that a grant of its application would be fully consistent with Commission rules and policies regarding post-hearing designation amendments, Section 73.3522(b), citing Las Americas Communications, Inc., 5 FCC Rcd 1634, 1637-1638 (1990) (subsequent history omitted).³

8. The Bureau opposes a grant of SMCCD's application. It argues that Section 73.3605(c)⁴ of the Commission's Rules governs the disposition of certain applications that have been designated for hearing, and, pursuant to such rule, it would appear that the SMCCD application should be "removed from hearing status." However, the Bureau recognizes that it has generally been the practice of presiding officers in adjudicatory proceedings involving mutually exclusive applications for new noncommercial educational stations to retain in hearing status amended applications which would otherwise be required to be returned to the processing line, and, upon favorable recommendation of the Bureau, to grant them. Because the prevailing practice appears inconsistent with Section 73.3605(c) and because the Bureau believes that, pursuant to Section 1.106(a)(2) of the Commission's Rules, substantial

³ In Las Americas, an applicant's proposed change in community of license was accepted in order to facilitate a settlement after issuance of the Designation Order, even though such change would have resulted in the applicant's return to the processing line if embodied within a pre-designation amendment.

⁴ The rule provides, in pertinent part, as follows:

An application for a broadcast facility which has been designated for hearing and which is amended so as to eliminate the need for hearing or further hearing on the issues specified . . . will be removed from hearing status. (Emphasis added.)

doubt exists on established policy and undisputed facts as to the disposition of SMCCD's application, the matter should be certified to the Commission.

9. The request to grant the SMCCD application will be denied. Until the question of whether CSU's application is mutually exclusive with the SMCCD application is resolved, the SMCCD application cannot be granted. In this connection, the Presiding Judge had suggested that the Bureau process the CSU application. If that application was found to be mutually exclusive with the amended SMCCD application, then the Bureau should designate the CSU application for hearing and consolidate the CSU application with the amended SMCCD application. Because the SMCCD and CSU applications specify different communities, a 307(b) issue should be included among the issues specified for hearing.⁵ In any event, the Bureau has not processed the CSU application. Under these circumstances, a public interest finding supporting a grant of the SMCCD application at this time cannot be made.

10. The Presiding Judge will follow the Bureau's recommendation and certify the question regarding the disposition of the SMCCD application to the Commission. As noted by the Bureau, there appears to be a conflict between Section 73.3605(c) and the practice of the Commission in retaining in hearing status amended applications for noncommercial educational stations. Such a situation was considered by the Review Board in Cabool Broadcasting Corp., 56 FCC 2d 573 (Review Board 1975). There, the Review Board determined that an amended application need not necessarily be taken out of hearing status despite the absence of further issues to be heard "if it can be determined that the rights of other interested applicants to comparative consideration for the new channel are not impaired." 56 FCC 2d 576. The Board in Cabool ultimately waived Section 1.605(c)⁶ after finding that no entity other than the amending applicant had sought to apply for the new channel. Also, in Christian Broadcasting Association, Inc., 22 FCC 2d 410 (1970), the Commission allowed an applicant in hearing to amend to a new channel without returning to the processing line. The Commission noted in Christian that the applicant had been through the processing line once; that there were still unresolved issues; that allowing the applicant to remain in hearing would avoid delay in implementing service; and that no other party expressed interest in the allocated channel. SMCCD argues that its situation is similar to the one in Christian and that CSU's eleventh hour effort comes too late.

11. The Presiding Judge is sympathetic to the situation SMCCD finds itself. It amended its application by specifying a new channel (201B) to settle a noncommercial educational proceeding. But, unknown to SMCCD, at the same time, CSU was in the process of preparing an application to modify its facilities which appears to conflict with SMCCD's amended application. The SMCCD joint request and amendment specifying Channel 201 was filed before the CSU application was filed. As noted by the Bureau, if Section 73.3605(c) were

⁵ It may well be that a comparison of the two applications will result in a decisive 307(b) preference in favor of one of the applicants, thereby eliminating the need for a comparative evaluation.

⁶ Section 1.605(c) was the predecessor to Section 73.3605(c).

strictly enforced, mutually exclusive applicants would be less inclined to settle through the filing of technical amendments because this would require a return to the processing line to face another possible mutually exclusive application and a new hearing. In any event, the requirements of Section 73.3605(c) have not been followed in these type of cases. Rather, the amended applications have been retained in hearing status and granted. Because it is quite possible that this situation may reoccur, the question regarding the disposition of SMCCD's amended application will be certified to the Commission.

Accordingly, IT IS ORDERED that the "Petition for Leave to Amend" filed by SMCCD on September 1, 1994, IS GRANTED, the amendment providing the "FAA No Hazard Determination" IS ACCEPTED, and the air hazard issue IS RESOLVED in favor of the applicant;

IT IS FURTHER ORDERED that the "Motion to Strike" filed by SMCCD on May 24, 1995, IS GRANTED and the "Comments on Motion to Grant Pending Application" filed by CSU on May 12, 1995, ARE STRICKEN because CSU is not a party to this proceeding and has no standing to file pleadings herein;

IT IS FURTHER ORDERED that the "Motion to Grant Pending Application" filed by SMCCD on May 3, 1995, IS GRANTED to the extent that the question regarding the disposition of the SMCCD amended application IS CERTIFIED TO THE COMMISSION.

FEDERAL COMMUNICATIONS COMMISSION


Joseph Stirmer
Chief Administrative Law Judge