

ORIGINAL

ANN BAVENDER*
KAREN L. CASSER*
ANNE GOODWIN CRUMP*
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN*
ERIC FISHMAN*
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING*
KATHRYN A. KLEIMAN
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY*
HOWARD M. WEISS

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET
ROSSLYN, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

FLETCHERHEALD@man.com

March 29, 1996

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1958-1983)
PAUL D.P. SPEARMAN
(1938-1982)
FRANK ROBERSON
(1938-1981)
RUSSELL ROWELL
(1948-1977)

RETIRED
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS

SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*

WRITER'S NUMBER
(703) 812-

RECEIVED

MAR 29 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

0474

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: MM Docket No. 92-81; RM- 7875
Farmington and Gallup, New Mexico

Dear Mr. Caton:

Enclosed for filing on behalf of KOB-TV, Inc., are an original and four copies of a Petition for Reconsideration, filed in the above-referenced proceeding.

Should any question arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,



Andrew S. Kersting
Counsel for KOB-TV, Inc.

Enclosure

cc (w/ encl.): John A. Karousos (via hand delivery)
Erwin G. Krasnow, Esquire

No. of Copies rec'd
List ABCDE

044

ORIGINAL

RECEIVED

MAR 29 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

In the Matter of)
)
Amendment of Section 73.606(b),)
Table of Allotments,)
Television Broadcast Stations,)
(Farmington and Gallup, New Mexico))

MM Docket No. 92-81
RM-7875

To: Chief, Allocations Branch
Mass Media Bureau

PETITION FOR RECONSIDERATION

FRANK R. JAZZO
VINCENT J. CURTIS, JR.
ANDREW S. KERSTING
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street, 11th Floor
Rosslyn, Virginia 22209
(703) 812-0400

Counsel for
KOB-TV, INC.

March 29, 1996

TABLE OF CONTENTS

	<u>Page</u>
Summary	ii
I. Introduction	1
II. The Bureau Erred in Finding that the Reallotment of Channel 3 From Gallup to Farmington Would Result in a Preferential Arrangement of Allotments	3
A. The Bureau Erred in Applying the Definition of an "Existing Station" Set Forth in <u>Modification of License MO&O</u> in this Proceeding Because Pulitzer Never Intended to Construct Channel 3 at Gallup	3
1. Pulitzer's Seven Extension Applications	3
2. Pulitzer's Failure to Construct Resulted in Repeated Violations of Section 73.3534(b) of the Commission's Rules	6
3. Pulitzer Has Abused the Commission's Processes and Should Not Be Permitted to Benefit From Its Wrongful Conduct By Having Channel 3 Reallotted to Farmington	9
III. Conclusion	13

SUMMARY

The Mass Media Bureau ("Bureau") erred in granting Pulitzer's proposal to reallocate Channel 3 from Gallup to Farmington, New Mexico, because it failed to consider the circumstances concerning why Station KOAV-TV has not been constructed.

The facts in this proceeding establish that Pulitzer has abused the Commission's processes because it never intended to construct Station KOAV-TV at Gallup. Although Pulitzer claimed in each of its seven extension applications that its failure to construct was due to circumstances beyond its control, the only basis offered for this assertion is the pending rulemaking proceeding initiated by Pulitzer, which is based entirely on Pulitzer's unsupported allegation that the operation of KOAV-TV at Gallup will not be economically feasible. The Commission has repeatedly held, however, that a permittee's refusal to construct due to economic concerns is a private business decision that does not constitute "circumstances beyond the permittee's control." Therefore, the Commission erred in granting Pulitzer's extension applications because Pulitzer failed to comply with Section 73.3534(b) of the Commission's rules.

Pulitzer should not be permitted to benefit from its wrongful conduct by claiming that because it failed to construct Station KOAV-TV, the reallocation of Channel 3 from Gallup to Farmington will not result in the removal of an "existing service." Instead, because Pulitzer has abused the Commission's processes, Station KOAV-TV should be considered an existing service, and the proposed reallocation of Channel 3 regarded as the removal of Gallup's sole operating station. Therefore, on reconsideration, the Bureau should deny Pulitzer's proposal because the proposed reallocation of Channel 3 from Gallup to Farmington will not result in a preferential arrangement of allocations.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.606(b),)	MM Docket No. 92-81
Table of Allotments,)	RM-7875
Television Broadcast Stations,)	
(Farmington and Gallup, New Mexico))	

To: Chief, Allocations Branch
Mass Media Bureau

PETITION FOR RECONSIDERATION

KOB-TV, Inc. ("KOB"), licensee of Stations KOB-TV, Albuquerque, New Mexico, and KOB(TV), Farmington, New Mexico, by its attorneys and pursuant to Section 1.106 of the Commission's rules, hereby requests reconsideration of the Report and Order, DA 96-128 (released February 23, 1996) ("Report and Order"), issued in the above-captioned proceeding, which granted the request of Pulitzer Broadcasting Company ("Pulitzer"), permittee of Station KOAV-TV, Channel 3, Gallup, New Mexico, to reallocate Channel 3 from Gallup to Farmington, New Mexico.¹ In support of this petition, the following is stated:

**I.
Introduction**

At Pulitzer's request, the Mass Media Bureau ("Bureau") issued a Notice of Proposed Rule Making, 7 FCC Rcd 2382 (1992) ("NPRM"), proposing the reallocation of Channel 3 from Gallup to Farmington. In its Report and Order, the Bureau found that the public interest would be served

¹ The current call letters of the Channel 3 facility at Gallup are KOFT(TV). However, in order to be consistent with the Report and Order, the Gallup station will be referred to herein by its former call letters, KOAV-TV.

by reallocating Channel 3 from Gallup to Farmington because it would provide the larger community, Farmington, with its second local and first competitive television service. The Bureau also found the proposed reallocation would provide a first Grade B service to 3,366 persons within a 3,162 square kilometer area, and a second Grade B service to 67,444 persons within a 10,176 square kilometer area. Report and Order, ¶18.

In granting Pulitzer's proposal, the Bureau rejected KOB's argument that removal of Channel 3 from Gallup would result in the creation of a "white area" encompassing some 62,000 people. The Bureau noted that although the Commission is concerned with the removal of an existing service, it has defined an "existing service" as a constructed station. Id. at ¶19, citing Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990) ("Modification of License MO&O"). Thus, because Station KOAV-TV has not been built, the Bureau concluded that although the failure to activate the channel at Gallup may perpetuate an existing "white area," it would not create one. Id. The Bureau also noted that the potential loss of service was mitigated by the availability of Channel 10 at Gallup, for which KOB or any other interested party could apply. Id. at ¶20.

In addition, although KOB expressed an interest in applying for and operating the Channel 3 facility at Gallup, the Bureau found KOB's interest insufficient to warrant a denial of the proposed reallocation. Despite Pulitzer's refusal to construct the station unless Channel 3 is reallocated to Farmington, the Bureau concluded that the channel is not available for application by other parties: "Petitioner remains a valid permittee for Channel 3 at Gallup until such time as the permit is voluntarily relinquished by the petitioner or cancelled by the Commission." Report and Order, ¶21.

Nevertheless, as demonstrated herein, the Report and Order contains prejudicial errors of fact and substantive law, is arbitrary and capricious, and is inconsistent with Commission precedent because the Bureau failed, inexplicably, to consider the circumstances concerning why Station KOAV-TV has not been constructed.

II.

The Bureau Erred in Finding that the Reallocation of Channel 3 From Gallup to Farmington Would Result in a Preferential Arrangement of Allotments

A. The Bureau Erred in Applying the Definition of an "Existing Station" Set Forth in Modification of License MO&O in this Proceeding Because Pulitzer Never Intended to Construct Channel 3 at Gallup.

1. Pulitzer's Seven Extension Applications.

Pulitzer filed its application for the Channel 3 facility at Gallup on October 10, 1989 (File No. BPCT-891010KG).² The application was granted on February 23, 1990. Less than two months later, on April 17, 1990, Pulitzer filed a petition for rulemaking requesting the reallocation of Channel 3 from Gallup to Farmington. By letter dated April 12, 1991, the Chief of the FCC's Allocations Branch advised Pulitzer that its rulemaking petition was "unacceptable for consideration," and suggested that Pulitzer resubmit its petition with "a stronger public interest benefit showing." Pulitzer resubmitted its petition for rulemaking on November 21, 1991. See BMPCT-920129KJ (attached hereto as Exhibit A) Exhibit No. 1, p. 1.

² The actual applicant for Channel 3 at Gallup was KOAT Television, Inc. Pulitzer is the parent of the applicant, and a wholly-owned subsidiary of Pulitzer Publishing Company. See BPCT-891010KG. However, in order to be consistent with the Report and Order, the permittee of Station KOAV-TV will be referred to herein as "Pulitzer."

On January 29, 1992, Pulitzer filed an application to extend its construction permit (File No. BMPCT-920129KJ). In Exhibit No. 1 to that application, Pulitzer referenced its pending rulemaking petition and then stated:

Failure to construct is for reasons beyond the control of the permittee. There is no transmitter site which would be capable of providing a city-grade signal over the communities of Gallup and Farmington. Accordingly, if [Pulitzer] were to construct a television station at Gallup and the Commission were to reallocate Channel 3 to Farmington, it would be necessary to abandon the Gallup site.

See Exhibit A, p. 4 (emphasis in original). On this basis, Pulitzer requested that the deadline for constructing Station KOAV-TV at Gallup be extended until six months after the Commission's final action on its pending rulemaking petition. Id.

On July 22, 1992, Pulitzer filed a second extension application (File No. BMPCT-920722KK). In its accompanying exhibit, Pulitzer noted that on April 16, 1992, the Commission released the NPRM inviting comments on Pulitzer's proposal to reallocate Channel 3 from Gallup to Farmington, and attached Exhibit No. 1 from its previous extension application. Pulitzer again requested that the deadline date for construction of Station KOAV-TV be extended until six months after final Commission action in the rulemaking proceeding. See Exhibit B, p. 3.

Pulitzer filed two more extension applications on February 18, 1993, and September 8, 1993, respectively (File Nos. BMPCT-930218KE and BMPCT-930908KE). The accompanying exhibits to each of these applications were identical to that attached to Pulitzer's July 22, 1992, filing. See pp. 3-5 of Exhibits C & D.

On April 28, 1994, Pulitzer filed an application requesting the replacement of its expired construction permit for Station KOAV-TV and an extension of time to construct its proposed facility (File No. BPCT-940428KJ). In Exhibit No. 1 to that application, Pulitzer again claimed that its

failure to construct was for "reasons beyond the control of the permittee," citing the same grounds set forth in its initial extension application. See Exhibit E, p. 3. Pulitzer also noted that the reason it was seeking to replace its expired permit was because it had "simply missed the expiration date." Id. at 4.

Pulitzer filed another extension application on November 21, 1994, which contained the same accompanying exhibit as its previous extension request (File No. BMPCT-941126KI). The permittee noted, for the first time, that it had not ordered any equipment for its proposed facility. See Exhibit F, pp. 1, 3.

Finally, on September 1, 1995, Pulitzer filed another application seeking the reinstatement of its construction permit for Station KOAV-TV and an extension of time to complete construction (File No. BPCT-950901KF). In Exhibit No. 1 to that application, Pulitzer repeated its previous assertions concerning why its failure to construct the station was beyond its control. In addition, despite having filed six previous extension applications for Station KOAV-TV, including one of which also sought to replace an expired construction permit, Pulitzer proffered the following explanation for not filing a timely extension application:

[Pulitzer] also requests that the construction permit for Station [KOAV-TV be] reinstated; [the failure to file] a timely request for extension of time was due to an inadvertent error, namely, applicant was under the mistaken impression that the permit was automatically extended because of the pendency of the above-noted Petition for Rule Making.

See Exhibit G, p. 3.

2. Pulitzer's Failure to Construct Resulted in Repeated Violations of Section 73.3534(b) of the Commission's Rules.

In each of its seven extension applications, Pulitzer claimed its failure to construct was due to reasons beyond its control. However, the only explanation Pulitzer offered for its failure to construct Station KOAV-TV was the pending rulemaking proceeding.³ The reason Pulitzer filed its rulemaking petition seeking to reallocate Channel 3 from Gallup to Farmington is Pulitzer's claim that the operation of Channel 3 at Gallup would not be "economically feasible." See Report and Order, ¶9. Indeed, Pulitzer does not intend to construct Channel 3 unless the station is reallocated from Gallup to Farmington. Id. at 21. Therefore, the underlying reason for Pulitzer's failure to construct is not the pendency of the rulemaking proceeding itself, but, rather, the permittee's concern regarding the economic viability of operating Station KOAV-TV at Gallup.

In 1985, the Commission adopted strict criteria for applications to extend the time to construct broadcast facilities. See Community Service Telecasters, Inc., 6 FCC Rcd 6026, 6027, n.11 (1991), citing Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, 102 FCC 2d 1054 (1985) ("Construction of Broadcast Stations").⁴ Before an

³ As noted above, Pulitzer claimed there was no transmitter site which would enable it to provide a city-grade signal over both Gallup and Farmington. Thus, Pulitzer stated that if it were to construct the Gallup station and the Commission granted its rulemaking petition, it would have to abandon the Gallup site. See Exhibit A, p. 4.

⁴ In Construction of Broadcast Stations, the Commission expressed concern regarding the number of extension applications being granted which resulted in substantial delays in the activation of new broadcast service to the public. Accordingly, the Commission announced that it intended to "strictly review" extension applications:

Permittees should . . . be advised that we expect station construction to commence and be brought to fruition expeditiously. Moreover, applications for extension of time to construct broadcast stations will be carefully scrutinized. Thus,

(continued...)

extension application can be granted, a permittee must show either that substantial progress has been made in the construction of the station, or that reasons clearly beyond its control have prevented construction and that all possible steps have been taken to resolve the problem and to proceed with construction. 6 FCC Rcd at 6027, n.11, citing 47 CFR §73.3534(b).

In Community Service Telecasters, the permittee of a UHF station challenged the Bureau's denial of its application for extension of time to construct Station WGTJ, Greenville, North Carolina. The permittee argued that the Bureau improperly disregarded the adverse economic impact caused by a new VHF station in the market:

. . . [T]his unforeseen and uncontrollable change in the economic and competitive situation in the market was and still is the reason WGTJ cannot be built as a second stand-alone independent in the Greenville/New Berne/Washington market.

Id. at 6028.

The Commission found, however, that at the time the permittee obtained its permit, it had notice that another independent television station in a neighboring community would likely be serving much of the same market in competition with its proposed station. Moreover, the permittee had not acquired any equipment, erected no tower, and had expended no funds toward constructing its station during the initial construction period. Instead, the permittee had simply awaited the result of a court decision in the allotment proceeding concerning the new VHF station, and, in the meantime, sat idly

⁴(...continued)

unwarranted delays will be avoided and service to the public expedited. If stations are not constructed within the allowed time, permittees will lose their authorizations.

Id. at 1057.

by, refusing to commit any funds to construct due to its doubts about the economic viability of the station. Therefore, the Commission affirmed the Bureau's denial of the extension application. *Id.*

Similarly, in New Dawn Broadcasting, 2 FCC Rcd 4383 (Mass Med. Bur. 1987), the permittee of a VHF station sought reconsideration of the Bureau's denial of its extension application. The permittee alleged that the inherent uncertainty in a pending rulemaking proceeding proposing to allot a new VHF station in the area would frustrate the future development of the permittee's own station by restricting the availability of "prime" transmitter sites near the community of license. There was no indication, however, that the permittee's authorized site was either unavailable or unsuitable to serve the community. Therefore, the Bureau denied reconsideration, concluding that any move to a new site would be a business decision which would not constitute circumstances beyond the permittee's control. *Id.* at 4383-84.

Furthermore, in Cidra Broadcasters, Inc., 2 FCC Rcd 230 (Mass Med. Bur. 1987), a permittee sought reconsideration of the Bureau's denial of its application to replace an expired construction permit where the permittee's station, representing the community's only authorized television station, had remained unbuilt and the public remained without service for over three years. In denying reconsideration, the Bureau stated:

[T]he Commission cannot base grant of an extension application on the inability of the community of license or of the surrounding area to support a television station. We expect an applicant to weigh such conditions *before it applies for the channel* -- not 3½ years after its construction permit has been granted.

Id. at 231-32 (emphasis added). See also East Texas Television Network, Inc., 2 FCC Rcd 2931 (Mass Med. Bur. 1987); 2 FCC Rcd 2933 (Mass Med. Bur. 1987) (The Bureau rejected a permittee's contentions that the depressed local economy inhibited the timely construction of its two UHF

stations, noting that the Commission considers the refusal to build because of such economic concerns to be a private business decision, wholly within the permittee's control).

The precedent outlined above establishes that Pulitzer's refusal to construct Station KOAV-TV due to its concern that the station would not be economically viable at Gallup was a business decision, and does not constitute a circumstance "clearly beyond the permittee's control." Moreover, as in the cases cited above, nothing changed from the time Pulitzer filed for the Gallup facility and the Commission's grant. Thus, the Bureau ignored clear precedent and erred in granting Pulitzer's January 29, 1992, extension application and each of its succeeding six extension applications (including its April 28, 1994, and September 1, 1995, applications which also sought to replace its expired construction permit) because they all failed to meet the requirements of Section 73.3534(b) of the rules. Therefore, the construction permit for Station KOAV-TV should be cancelled and the call sign deleted. Community Service Telecasters, 6 FCC Rcd 6026; New Dawn Broadcasting, 2 FCC Rcd 4383; Cidra Broadcasters, 2 FCC Rcd 230. See also Press Broadcasting Co., Inc. v. FCC, 59 F.3d 1365, 1372 (D.C. Cir. 1995) (the court found that the FCC arbitrarily relieved the permittee of a new television station of its obligations under §73.3534, and remanded the case to the Commission for it to determine whether the permittee had made the required showing under §73.3534(b)).

3. Pulitzer Has Abused the Commission's Processes and Should Not Be Permitted to Benefit From Its Wrongful Conduct By Having Channel 3 Reallotted to Farmington.

The record in this proceeding establishes that Pulitzer never intended to construct Channel 3 at Gallup. Pulitzer filed its rulemaking petition less than two months after its application was granted, and only six months after filing its application for the Gallup facility. As noted above,

nothing changed from the time Pulitzer filed its application for Channel 3 and the Commission's grant of that application. Also, like the permittee in Community Service Telecasters, Pulitzer did not order any equipment for the Gallup station (see p. 2 of Exhibits F & G), has not erected a tower, and has refused to expend any funds toward construction since its application was granted over six years ago.

Although Pulitzer repeatedly claimed that its failure to construct is due to reasons beyond its control, the only basis offered for this assertion is the pendency of the instant rulemaking proceeding, which, in turn, is based entirely upon Pulitzer's wholly unsupported allegation that the operation of Station KOAV-TV at Gallup would not be economically viable. However, the Commission expects applicants to weigh the economic conditions of their proposed community *before* they file their application. See Cidra Broadcasters, 2 FCC Rcd at 231. Pulitzer failed to make any showing that there was a substantial decline in the economic condition in Gallup between the filing of its application and its rulemaking petition. Indeed, the fact there was little, if any, change in Gallup's economic condition between the filing of Pulitzer's application and its rulemaking petition is demonstrated by the petitioner's argument that Gallup's growth has been "almost stagnant over the last two decades." See Report and Order, ¶9; Comments of Pulitzer Broadcasting Company, filed June 8, 1992, p. 10.

The most demonstrative evidence of Pulitzer's bad faith in this proceeding is illustrated in its most recent application seeking to replace the expired KOAV-TV construction permit in which it claimed it was "*under the mistaken impression that the permit was automatically extended because of the pendency of the above-noted Petition for Rule Making.*" See Exhibit G, p. 3 (emphasis added). Pulitzer's explanation for the late filing of its September 1, 1995, extension application is in sharp contrast to its previous explanation (contained in its April 28, 1994, application to replace its expired

construction permit) in which it merely stated it had "missed the expiration date." See Exhibit E, p. 4. Indeed, Pulitzer's *six* previous extension applications establish, beyond peradventure, that Pulitzer was fully cognizant of the fact the mere pendency of the instant rulemaking proceeding did *not* automatically extend the time for constructing KOAV-TV. Thus, Pulitzer's explanation for the untimely filing of its September 1995 application to replace its expired permit lacks credibility.

The facts outlined above affirmatively establish that Pulitzer never intended to construct Station KOAV-TV at Gallup. As a result, through the initial filing of its application for Channel 3 at Gallup, its rulemaking petition, and its seven extension applications (all of which failed to comply with Section 73.3534(b) of the rules), Pulitzer has abused the Commission's processes by submitting an application under false pretenses, *i.e.*, for the purpose of seeking a construction permit for a new television station in Farmington, rather than Gallup, as Pulitzer represented to the Commission. Therefore, for this additional reason, the construction permit for Station KOAV-TV, Gallup, New Mexico, should be revoked and cancelled. See generally Inquiry Into Alleged Abuses of the Commission's Processes By Applicants for Broadcast Facilities, 3 FCC Rcd 4740 (1988) (FCC instituted Section 403 investigation concerning abuse of its processes where series of related applications were submitted under false pretenses); Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386 (D.C. Cir. 1993) (court affirmed the Commission's determination that a comparative renewal applicant had abused the FCC's processes by filing an application solely to obtain a settlement payment from the existing licensee).

In light of Pulitzer's efforts to abuse the Commission's processes, the permittee should not be entitled to benefit from its wrongful conduct by claiming that because it failed to construct Station KOAV-TV, the reallocation of Channel 3 from Gallup to Farmington will not result in the removal

of an existing service. The definition of "existing service" set forth in Modification of License MO&O (equating existing service with an operating station) reflects the Commission's general policy in allotment proceedings. However, the Bureau erred in applying that policy in this proceeding because, in doing so, it completely ignored the circumstances concerning why Station KOAV-TV has not been built, and effectively rewarded Pulitzer for its wrongful conduct. Because Pulitzer has abused the Commission's processes, Station KOAV-TV should be regarded as an "existing service," and the proposed reallocation of Channel 3 should be regarded as involving the removal of Gallup's sole local operating station. Thus, in accordance with paragraph 22 of the Report and Order, the Bureau, on reconsideration, should conclude that the proposed reallocation would create, rather than perpetuate, a substantial "white area" of over 62,000 persons. Therefore, Pulitzer's proposal should be denied because the proposed reallocation of Channel 3 from Gallup to Farmington will not result in a preferential arrangement of allotments.

Furthermore, this is not a proceeding where a party is merely seeking to have a vacant channel reallocated from one community to another. See, e.g., Report and Order in MM Docket No. 86-493 (Anchorage, Palmer, and Seward, Alaska), 5 FCC Rcd 7570 (1990) ("Anchorage"). In Anchorage, Channels 3 and 9 had been unapplied for at Seward for over 20 years. In response to a petitioner's request, the Commission reallocated Channel 9 from Seward to Anchorage and reserved it for noncommercial use as the community's second local noncommercial educational service. Because the petitioner properly sought to have Channel 9 reallocated from Seward to Anchorage, rather than apply for the Channel 9 facility at Seward with no intention of constructing the station, Anchorage is in sharp contrast to the instant proceeding where Pulitzer applied for a vacant channel with no intent to construct and then sought to have it reallocated. Indeed, this proceeding involves a

construction permit which was applied for under false pretenses and has been outstanding for over six years.

III. Conclusion

For the reasons stated herein, the Bureau erred in applying the Commission's general policy of equating "existing service" with an operating station because it failed to consider the circumstances concerning why Station KOAV-TV has not been constructed. Because Pulitzer has abused the Commission's processes, Station KOAV-TV should be regarded as an existing service, and, thus, Pulitzer's proposal should be regarded as involving the removal of Gallup's sole operating station. As a result, Pulitzer's proposal should be denied because the proposed reallocation of Channel 3 from Gallup to Farmington will not result in a preferential arrangement of allotments. Furthermore, because not one of Pulitzer's seven extension applications complied with Section 73.3534(b) of the Commission's rules, the Bureau should cancel the construction permit for Station KOAV-TV, Gallup, New Mexico, delete the call sign, and make the channel available for application by interested parties.

WHEREFORE, in light of the foregoing, KOB-TV, Inc., respectfully requests the Commission to RECONSIDER its Report and Order, released February 23, 1996, and DENY the request of Pulitzer Broadcasting Company to reallocate Channel 3 from Gallup, New Mexico, to Farmington, New Mexico.

Respectfully submitted,

KOB-TV, INC.

By: 

Frank R. Jazzo
Vincent J. Curtis, Jr.
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street, 11th Floor
Rosslyn, Virginia 22209
(703) 812-0400

By: 
Marvin Rosenberg

Of Counsel

Holland & Knight
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202
(202) 457-7147

March 29, 1996

EXHIBIT A

**Pulitzer's January 29, 1992, Application for Extension of Time
to Construct Station KOAV-TV, Gallup, New Mexico
(File No. BMPCT-920129K.I)**

LAW OFFICES

VERNER, LIIPFERT, BERNHARD, McPHERSON AND HAND

CHARTERED

SUITE 700
901-15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301

(202) 371-6000

TELEX: 1561792 VERLIP UT

TELECOPIER: (202) 371-6279

HOUSTON OFFICE

6901 TEXAS COMMERCE TOWER
601 MILAM

HOUSTON, TEXAS 77002

(713) 237-9034

TELECOPIER: (713) 237-1216

VIRGINIA OFFICES

8280 GREENSBORO DRIVE

MCLEAN, VIRGINIA 22102

(703) 749-6000

TELECOPIER: (703) 749-6027

10484-A ARMSTRONG STREET

FAIRFAX, VIRGINIA 22030

(703) 591-2883

TELECOPIER: (703) 385-7998

TERRENCE J. MCCARTIN
DEAN R. BRENNER
FRANCES C. DELAURENTIS
JOHN A. MENKE
LAWRENCE N. COOPER*
DON C. LEWIS*
LESLIE M. ALDEN*
LINDA E. COLLIER*
GENE R. SCHLEPPENBACH*
REBECCA M.J. GOULD*
JOHN S. HOOT
RICHARD A. GLICK
MARK R. LEWIS
THERESA I. ZOLET
JOHN J. ACKELL*
SCOTT K. DAINES*
DAVID P. HENDEL
LESLIE B. KRAMERICH*
E. JOHN KRUMHOLTZ
MICHAEL E. BELLER
RETA J. LEWIS
ANJALI G. CALHOUN

LISA J. GEFEN
MICHAEL H. TECKLENBURG*
RICHARD J. BIFFL*
SHARI B. GERSTEN*
PETER A. GOULD*
WILLIAM E. VINCENT*
JOHN S. BRITTON
STEPHEN L. GOODMAN
ANDREW D. ESKIN
MARRIE L. MILLER**
GUY A. MORLEY*
BRIAN A. MIZOGUCHI
JOHN R. NIETUS, JR.*
BONNIE M. DEUTSCH*
JACQUELINE R. KINNEY*
SUSAN C. FREEDMAN
KRISTA L. POOL*
CATHERINE G. VAN WAY*
JEANETTE M. PABLO
CATHERINE A. ELLIS**
SUSAN G. BLUMENTHAL*
HEDY L. NELSON

JAMES M. VERNER*
EUGENE T. LIIPFERT
EMERITUS
BERL BERNHARD
HARRY MCPHERSON
LLOYD N. HAND*
RONALD B. NATALIE
WILLIAM C. EVANS
MICHAEL J. ROBERTS
FRITZ R. KAHN
BERNHARDT K. WRUBLE
THOMAS J. KELLER
JOHN A. MERRIGAN
JOSEPH L. MANSON, III
WILLIAM H. CRISPIN*
CLINTON A. VINCE
GLEN L. ORTMAN
ERWIN G. KRASNOW
JAMES F. HIBBY
JULIA R. RICHARDSON
RUSSELL E. POMMER
GEORGE M. FOOTE, JR.*
BUEL WHITE*
WILLIAM F. ROEDER, JR.*
ROY G. BOWMAN

AMY L. BONOURANT
HOPEWELL H. DARNELLE, III
DOUGLAS OCHS ADLER
RILEY A. TEMPLE*
JOHN P. CAMPBELL*
MICHAEL J. BARTLETT*
DOUGLAS J. COLTON
JOHN M. ZENTAY
FRED W. DROGULA
ANDREA JILL GRANT
GARY J. KLEIN
J. CATHY FOGEL
JOHN B. CONNOR**
LAWRENCE R. SIDMAN
ALBERT HALPRIN
WILLIAM E. KENNARD
BENJAMIN H. FLOWE, JR.
FREDERICK J. TANSILL*
PAUL E. NORDSTROM
SHERRY A. QUIRK
J. RICHARD HAMMETT*
MICHAEL D. GOLDEN
JAMES O. TEMKIN
JAMES J. BLANCHARD*
WILLIAM A. ZEITLER*

LOUIS F. BESIO
VICE PRESIDENT FOR
FINANCE AND ADMINISTRATION
WRITER 5 DIRECT DIAL NUMBER

OF COUNSEL

NEIL T. PROTO
DOROTHEA SUMMERELL
MARY K. WILLIAMS**
JOSEPH E. BRENNAN*
MARTIN MENDELSON
STEPHEN W. VAN HOOSER

* NOT ADMITTED IN DC
* ADMITTED IN VIRGINIA
* ADMITTED IN TEXAS

202/371-6062

January 29, 1992

BY HAND DELIVERY

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: KOAV(TV), Gallup, New Mexico
File No. BPCT-891010KG

Dear Ms. Searcy:

On behalf of Pulitzer Broadcasting Company, permittee of television broadcast station KOAV, Gallup, New Mexico, there is submitted herewith, in triplicate on FCC Form 307, an application requesting an extension of time to complete construction of the facilities authorized by BPCT-891010KG.

There is also submitted herewith an FCC Fee Processing Form and a check in the amount of \$200.00 to cover the requisite filing fee.

Should any question arise concerning this matter, kindly advise the undersigned.

Respectfully submitted,

[Handwritten signature]

Erwin G. Krasnow

APPLICATION FOR EXTENSION OF BROADCAST CONSTRUCTION
PERMIT OR TO REPLACE EXPIRED CONSTRUCTION PERMIT
(CAREFULLY READ INSTRUCTIONS ON BACK BEFORE COMPLETING)

For Commission Use Only
File No. BPCT-920129KT

1. Legal Name of Applicant (See Instruction C) Pulitzer Broadcasting Company	3. PURPOSE OF APPLICATION: <input checked="" type="checkbox"/> a. Additional time to construct broadcast station <input type="checkbox"/> b. Construction permit to replace expired permit	
2. Mailing Address (Number, street, city, state, ZIP code) P.O. Box 25982 Albuquerque, NM 87125	4. IDENTIFICATION OF OUTSTANDING CONSTRUCTION PERMIT: File Number BPCT-891010KG Call Letters KOAV Frequency Channel No. Ch. 3	
Telephone No. (Include Area Code) (305) 884-7777	Station Location Gallup, New Mexico	

5. OTHER:
Submit as Exhibit No. DNA a list of the file numbers of pending applications concerning this station, e.g., major or minor modifications, assignments, etc.

6. EXTENT OF CONSTRUCTION: (a) Has equipment been delivered? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO If NO, answer the following:	(b) Has installation commenced? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
From Whom Ordered (If no order has been placed, so indicate) See Exhibit No. 1	If YES, submit as Exhibit No. <u>1</u> a description of the extent of installation and the date installation commenced.
Date Ordered	Date Delivery Promised (c) Estimated date by which construction can be completed.

7. (a) If application is for extension of construction permit, submit as Exhibit No. 1 reason(s) why construction has not been completed.
(b) If application is to replace an expired construction permit, submit as Exhibit No. _____ the reason for not submitting a timely extension application, together with the reason(s) why construction was not completed during the period specified in the construction permit or subsequent extension(s).

8. Are the representations contained in the application for construction permit still true and correct? YES NO
If NO, give particulars in Exhibit No. _____

The APPLICANT hereby waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)
The APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations and that all the exhibits are a material part hereof and are incorporated herein as set out in full in the application.

CERTIFICATION

I certify that the statements in this application are true and correct to the best of my knowledge and belief, and are made in good faith.

Legal Name of Applicant Pulitzer Broadcasting Company	Signature
Title Vice President/General Manager, KOAT-TV	Date 1/28/92

**REASONS WHY CONSTRUCTION OF
STATION KOAT, GALLUP, NEW MEXICO
HAVE NOT BEEN COMPLETED**

On February 23, 1990, the Mass Media Bureau granted an application filed by KOAT Television, Inc. (now Pulitzer Broadcasting Company) for a construction permit for a new television station operating on Channel 3 at Gallup, New Mexico (BPCT-891010KG). On April 17, 1990, shortly after the grant of the application, KOAT Television, Inc. filed a Petition for Rule Making requesting that the Commission amend the Television Table of Allotments, Section 73.606(b) of the Rules, to reallocate Channel 3 from Gallup to Farmington, New Mexico.

In a letter dated April 12, 1991, the Chief of the Commission's Allocations Branch advised Pulitzer Broadcasting Company that the aforementioned Petition for Rule Making was "unacceptable for consideration" and suggested that Pulitzer Broadcasting Company might consider "resubmitting the petition with a stronger public interest benefit showing." During the next several months, Will Mandich and Billy Lee Johnson, employees of Station KOAT-TV, Albuquerque, New Mexico (which is licensed to Pulitzer Broadcasting Company) conducted extensive television field strength measurements on Station KREZ-TV, Durango, Colorado. Several delays were encountered in the measurement project (which was conducted under the supervision of the consulting engineering firm of Jules Cohen and Associates, P.C.) On November 21, 1991, Pulitzer Broadcasting Company

resubmitted a Petition for Rule Making which requests the allocation of Channel 3 from Gallup to Farmington.

Failure to construct is for reasons beyond the control of the permittee. There is no transmitter site which would be capable of providing a city-grade signal over the communities of Gallup and Farmington. Accordingly, if Pulitzer Broadcasting Company were to construct a television station at Gallup and the Commission were to reallocate Channel 3 to Farmington, it would be necessary to abandon the Gallup site.

Pulitzer Broadcasting Company has taken all possible steps to prosecute the Petition for Rule Making before the Commission. Counsel for Pulitzer Broadcasting Company has been advised by the Acting Chief of the Allocations Branch that action on the pending Petition for Rule Making is expected to be taken in the next few weeks.

Accordingly, for the reasons stated above, Pulitzer Broadcasting Company hereby requests that the deadline date for constructing the facilities of Station KOAV be extended for a period of six months after final action by the Commission on the above-noted Petition for Rule Making.

EXHIBIT B

**Pulitzer's July 22, 1992, Application for Extension of Time
to Construct Station KOAV-TV, Gallup, New Mexico
(File No. BMPCT-920722KK)**

LAW OFFICES
VERNER, LIIPFERT, BERNHARD, McPHERSON AND HAND

CHARTERED

SUITE 700
901-15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301

(202) 371-6000

TELEX: 1561792 VERLIP UT
TELECOPIER: (202) 371-6279

HOUSTON OFFICE

6901 TEXAS COMMERCE TOWER
600 TRAVIS
HOUSTON, TEXAS 77002
(713) 237-9034
TELECOPIER: (713) 237-1216

VIRGINIA OFFICES

8280 GREENSBORO DRIVE MCLEAN, VIRGINIA 22102 (703) 749-6000 TELECOPIER: (703) 749-6027	10484-A ARMSTRONG STREET FAIRFAX, VIRGINIA 22030 (703) 591-2883 TELECOPIER: (703) 385-7998
---	---

TERRENCE J. MCCARTIN
DEAN R. BRENNER
FRANCES C. DELAURENTIS
LAWRENCE N. COOPER*
DON C. LEWIS*
LINDA E. COLLIER*
REBECCA M.J. GOULD*
JOHN S. MOOT
MARK R. LEWIS
SCOTT R. DANES*
LESLIE B. KRAMERICH*
E. JOHN KRUMHOLTZ
MICHAEL E. BELLER
LISA J. GEFEN
MICHAEL H. TECKLENBURG*
RICHARD J. BIFFL*
SHARI B. GERSTEN*
PETER A. GOULD
WILLIAM E. VINCENT
JOHN B. BRITTON
ANDREW D. ESKIN
MARIE L. MILLER*
GUY A. MORLEY*

PAUL C. SHEELINE
RICHARD H. SALTSMAN
CHARLENE A. STURBITTS
HOWELL E. BEGLE, JR.
BRUCE A. KIMBLE**
ROBERT W. BLANCHETTE
DOROTHEA SUMMERELL

OF COUNSEL

MARY K. WILLIAMS**
JOSEPH E. BRENNAN*
STEPHEN W. VAN HOOSER*
GENE R. SCHLEPPENBACH*
J. ROBERT KIRK
JAMES K. JACKSON

* NOT ADMITTED IN DC
* ADMITTED IN VIRGINIA
* ADMITTED IN TEXAS

JAMES M. VERNER*
EUGENE T. LIIPFERT
EMERITUS

BERL BERNHARD
HARRY McPHERSON
LLOYD N. HAND
RONALD B. NATALIE
WILLIAM C. EVANS
MICHAEL J. ROBERTS
FRITZ R. RAHN
BERNHARDT K. WRUBLE
THOMAS J. KELLER
JOHN A. MERRISAN
JOSEPH L. MANSON, III
WILLIAM H. CRISPIN*
CLINTON A. VINCE
GLEN L. ORTHMAN
ERWIN G. KRASNOW
JAMES F. HIBEY
RUSSELL E. POMMER
GERBIE M. FOOTE, JR.*
BUEL WHITE*
WILLIAM F. ROEDER, JR.*
ROY G. BOWMAN
AMY L. BONDURANT
HOWELL H. DARNELLE, III
DOUGLAS OCHS ADLER

RILEY K. TEMPLE*
JOHN P. CAMPBELL*
MICHAEL J. BARTLETT*
DOUGLAS J. COLTON
JOHN H. ZENTAY
FRED W. DROGULA
ANDREA JILL GRANT
GARY J. KLEIN
J. CATHY FOGEL
JOHN B. CONNOR**
LAWRENCE R. SIDMAN
WILLIAM E. KENNARD
BENJAMIN M. FLOWE, JR.
FREDERICK J. TANSILL*
PAUL E. NORDSTROM
SHERRY A. OUIRK
J. RICHARD HAMMETT*
MICHAEL D. GOLDEN
SUSAN G. TENKIN
JAMES J. BLANCHARD*
WILLIAM A. ZEITLER*
NEIL T. PROTO
LESLIE M. ALDEN*
LAWRENCE Z. LORBER
R. STUART BROOM
ROBERT G. WARNER, JR.
KENNETH S. BARR

LOUIS F. BESIO
PRESIDENT FOR
OFFICE AND ADMINISTRATION

WRITER'S DIRECT DIAL NUMBER
(202) 371-6062

July 22, 1992

BY HAND DELIVERY

Federal Communications Commission
Mass Media Services
Fee Code MKT
P.O. Box 358165
Pittsburgh, PA 15251-5165

Re: KOAV(TV), Gallup, New Mexico
File No. BPCT-891010KG

Dear Ms. Searcy:

On behalf of Pulitzer Broadcasting Company, permittee of television broadcast station KOAV, Gallup, New Mexico, there is submitted herewith, in triplicate on FCC Form 307, an application requesting an extension of time to complete construction of the facilities authorized by BPCT-891010KG as modified by BMPCT-920129NJ.

There is also submitted herewith an FCC Fee Processing Form and a check in the amount of \$200.00 to cover the requisite filing fee.

Should any question arise concerning this matter, kindly advise the undersigned.

Respectfully submitted,



Erwin G. Krasnow