

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)
RAINBOW BROADCASTING COMPANY)
For an extension of time)
to construct)
and)
For an Assignment of its)
construction permit for)
Station WRBW(TV), Orlando, Florida)

GC Docket No. 95-172
File No. BMPCT-910625KP
File No. BMPCT-910125KE
File No. BTCCT-911129KT

DOCKET FILE COPY ORIGINAL

TO: The Honorable Joseph Chachkin
Administrative Law Judge

PRESS BROADCASTING COMPANY, INC.
HEARING EXHIBIT

NO. _____

Report and Order in MM Docket No. 89-68,
4 FCC Rcd 8320 (Chief, Allocations Branch 1989)

<u>Federal Communications Commission</u>	
Docket No. <u>GC 95-172</u>	Exhibit No. <u>2</u>
Presented by <u>Press Broadcasting</u>	
Disposition	Identified <u>X</u>
	Received _____
	Rejected <u>X</u>
Reporter <u>US</u>	
Date <u>6-27-96</u>	

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

MM Docket No. 89-68

In the Matter of

Amendment of Section 73.606(b). RM-6382
Table of Allotments.
Television Broadcast Stations.
(Clermont and Cocoa, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 20, 1989; Released: November 28, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 2515 (1989) ("*Notice*"), issued in response to a petition for rule making filed jointly by Brevard Community College ("BCC"), licensee of noncommercial educational TV Station WRES, Channel *18, Cocoa, Florida, and Press Television Corporation ("Press"), permittee of commercial TV Station WKCF (formerly WCLU), Channel 68, Clermont, Florida (jointly referred to as "petitioners"). The *Notice* proposed an exchange of the Clermont and Cocoa channels pursuant to Section 1.420(h) of the Commission's rules. Petitioners filed comments in response to the *Notice*. Meredith Corporation ("Meredith"), licensee of Station WOFL(TV), Channel 35, Orlando, Specialty Broadcasting Corporation ("SBC"), licensee of low power television station Channel 19, Kissimmee, Florida, Community Communications, Inc. ("CCI"), licensee of public television station WMFE-TV, Orlando, Rainbow Broadcasting Company ("Rainbow"), permittee of Channel 65, Orlando, and the National Association of Public Television Stations ("NAPTS") filed opposing comments. Press, BCC, Meredith, and Rainbow filed reply comments.

2. We requested in the *Notice* that petitioners specifically address four issues regarding their proposal. First, we requested that petitioners discuss any additional public interest benefits of their proposal, such as areas and populations that would receive first noncommercial educational television service. Second, we requested BCC's assurance that any proceeds of the exchange would be devoted exclusively to activities related to the operation of the noncommercial educational television station. Third, we proposed that we would consider Press' request for a specific transmitter site at the "*de facto*" Orlando "antenna farm" near Bithlo, Florida. We requested that petitioners address Press' commitment to use the designated site, whether the site will remain available, and whether other sites in the antenna farm may be available which could provide better service to Clermont. We also asked petitioners to address the possibility that we might defer approval of a particular site to the application stage and, were we to do so, whether the exchange would proceed.

Finally, relying upon petitioners' use of the terrain roughness correction factor as supported by field strength measurements, we proposed to accept petitioners' claim that city grade service would be provided to Clermont from the proposed transmitter site at the Bithlo antenna farm. We asked petitioners to provide additional details regarding their engineering statement, particularly regarding terrain roughness calculations. The comments are summarized below.

3. *Public Interest Benefits*. Petitioners claimed that the operation of WRES on Channel 68 would provide first noncommercial educational television service to 18,341 people, first or second such service to 99,441 people, and an increase in the population within WRES' Grade B contour from 165,181 people to 1,014,972 people. Petitioners also submitted approximately 300 letters from elected officials, business representatives, and area residents supporting their proposal.

4. Meredith, Rainbow, NAPTS and CCI claim that BCC can expand WRES' service on Channel 18. Meredith and Rainbow argue that the Glorious Church of God in Christ, Inc. ("Glorious Church"), the previous owner of WRES, filed a modification application that would have increased the population served by WRES to 1,060,264 people. NAPTS argues that the only benefit of the exchange is that BCC will be financially able to construct larger facilities. With respect to WKCF, Rainbow claims that Press could remain on its existing channel, move its transmitter to a site 7 kilometers (4.4 miles) from Clermont, and provide a better signal to Clermont and a Grade A signal to Orlando. In reply, Press argues that the supposed public interest benefits of alternative proposals advanced by third parties should not be considered in television channel exchange proceedings.¹ Press also claims that Glorious Church's previous modification proposals do not bind BCC. BCC argues that it is irrelevant if some or all of the public interest benefits could be achieved on its existing channel because, without Press' financial assistance, BCC would not be in a position to improve its facilities. In its reply, Meredith claims that Press and BCC are not qualified to judge the public interest benefits of the exchange because BCC was not the applicant for WRES, nor has it attempted to raise funds to keep the station operating and to improve facilities. Therefore, Meredith claims, the Commission should not defer to petitioners' determinations of the public interest.

5. NAPTS and CCI claim that Channel 18 is superior to Channel 68 because Channel 18 is much lower in the spectrum. NAPTS argues that Channel 18 is also superior because its transmitter can be located at the Bithlo antenna farm whereas there is less flexibility in locating a site for a Channel 68 transmitter in the Cocoa area. Furthermore, NAPTS claims that Channel 18 may have a superior channel position on cable television systems that carry broadcast stations on their over-the-air channel numbers. NAPTS also claims that the fact that Press is willing to pay more than one million dollars to obtain Channel 18 is evidence that it is a superior channel. CCI claims that viewers of WRES would be disadvantaged by tuner selection difficulties resulting from the wide separation of Channel 68 from other area UHF channels. NAPTS claims that this exchange would circumvent our policy of prohibiting commercial broadcasters from using noncommercial allotments to obtain a lower channel.² In reply, Press and BCC characterize NAPTS' comments as an untimely attack against the channel exchange proce-

ture. Press argues that even if one UHF channel is considered to be "inferior" to another, channel inferiority is not a sufficient grounds for rejection of an exchange proposal because almost any exchange would be subject to such a challenge.

6. CCI argues that approval of the exchange and implementation of the service proposed by petitioners would result in a substantial overlap of the signal contours of noncommercial educational TV Stations WMFE-TV and WRES. CCI claims that many of the new viewers of WRES would be former viewers of WMFE-TV. CCI estimates that if the exchange is approved WMFE-TV is likely to lose approximately 20,000 or more viewers per year, or 34% of its existing viewing audience by 1993, and experience a corresponding decrease in membership growth, which would result in an erosion of the quality and variety of programming. Furthermore, argues CCI, the stations would be forced to compete for funding from the same sources, and regional competition between the stations could cause a "bidding auction" for certain programming. In reply, Press argues that CCI's opposition is based on the fact that approval of the plan would result in competition between WMFE-TV and WRES. Press argues that CCI's claims of injury to its station arising from competition are speculative. Press and BCC claim that CCI is an affiliate of PBS, whereas BCC is not, and that BCC does not substantially duplicate CCI's programming and does not plan to do so. BCC submits television listings for each station to show the differences in programming. BCC also claims that it broadcasts a significant amount of instructional and community related programming.

7. Rainbow submits an engineering statement claiming that the presence of the proposed Channel 18 antenna on the same tower it is authorized to use at a height that is in the aperture of its proposed Channel 65 directional antenna is expected to cause distortion in the horizontal plane radiation pattern of the Channel 65 antenna. In reply, Press claims that Rainbow's engineering statement offers no technical basis for this conclusion, nor does Rainbow explain the type of distortion that could occur.

8. *Use of Proceeds.* BCC provides an assurance that it would devote the proceeds from the proposed exchange to insure the implementation of the proposals described in petitioners' petition for rule making, including the development of technical facilities. No commenter challenges BCC's assurance.

9. *Consideration of Specific Transmitter Site.* Petitioners argue that Press' proposed site should be expressly considered and approved in this proceeding because no other party can apply for the channel and therefore consideration of any other sites would be an unnecessary waste of Commission resources. Press states that it will not effectuate the channel exchange unless its site is approved in this proceeding. Press submits a copy of a letter offering assurance that space remains for its antenna on the proposed tower. Press also states that it is unaware of any equivalent sites in the area of the antenna farm which could provide significantly better service to Clermont. In reply comments, Meredith argues that even a tentative grant of authority to Press to operate from Bithlo is beyond the bounds of this proceeding, and that, if the Commission is inclined to approve the proposal, it should defer a final decision until Press submits all necessary information to ensure that approval of the site is technically possible.

10. *City Grade Service to Clermont from the Proposed Bithlo Transmitter Site.* Petitioners submit a terrain profile of a radial between the Bithlo site and Clermont and describe the methodology used to derive that profile. In opposition, Meredith, Rainbow, SBC and CCI claim that the Commission must waive its city grade contour requirement to permit the exchange. SBC submits an affidavit from an individual identified as a former engineer for Press who claims that an initial engineering study conducted by Press indicated that a city grade signal could not be provided to Clermont from the Bithlo site. In reply comments, Meredith references SBC's comments and argues that Press' failure to mention this preliminary study in its comments indicates that Press' engineering studies may have been outcome-driven and are therefore unreliable. Meredith also argues that Press' claim of city grade service may constitute a knowing misrepresentation or, at the very least, an extreme lack of candor. In reply, Press argues that Meredith offers no support for its claim that Press would be unable to provide a city grade signal to Clermont. Press argues that the allegations in the affidavit are immaterial, and questions the former employee's qualifications to render an engineering opinion. Press notes that although the affidavit refers to an engineering study, SBC offers neither the result of the study nor evidence that the study was conducted pursuant to the Commission's standards for field strength measurement studies. Press argues that the measurements submitted in petitioners' rule making petition are fully documented and reliable, and attributes any differences between the studies to the fact that field strength measurements are subject to variations attributable to various factors. Furthermore, Press notes that the Commission did not rely primarily on the field strength measurements in determining city grade coverage, instead relying upon the use of the terrain roughness correction factor.

11. *Other Matters.* Meredith and Rainbow argue that Clermont and Cocoa, which are approximately 100 kilometers (64 miles) apart, are not in "substantially the same market" as required for a channel exchange pursuant to Commission rule 1.420(h). Meredith claims that WKCF's current coverage barely extends to Cocoa, and WRES's Grade B contour is approximately 60 kilometers from Clermont. Meredith argues that the only commonality between the stations is the fact that they are both in the Orlando-Daytona Beach-Melbourne-Cocoa Area of Dominant Influence (ADI). Meredith argues that approval of this exchange will render meaningless the definition of "substantially the same market". In reply, Press claims that Meredith's assertion is inconsistent with petitioners' showing in its petition for rule making that the channels, when occupied by stations using more than minimal facilities, will substantially overlap. Press notes that the Commission has designated Orlando-Daytona Beach-Melbourne-Cocoa as a single television market in Section 76.51 of its rules.

12. Meredith questions whether Press intends to effectively change WKCF-TV's community of license after the exchange. SBC argues that Orlando is a well served market, and that the needs of Clermont would not be served by an additional Orlando station that delivers a signal of marginal quality to Clermont. CCI argues that the exchange proposal could constitute a possible *de facto* reallocation of the Clermont channel to Orlando.³ In

reply. Press states that it has no intention of abandoning service to Clermont and plans to continue to fully satisfy its obligations to its community of license.

13. Meredith suggests that Press may have acquired WRES from Glorious Church and assigned it to BCC without the Commission's knowledge. Meredith submits a copy of a newspaper article reporting that Press "recently bought Cocoa station WRES-TV Channel 18 from a Tampa church." Meredith claims that Press, a for-profit entity, would have been ineligible to hold a noncommercial license, and that no assignment application was filed to reflect an assignment from Press to BCC. Meredith argues that the newspaper article raises a material question as to whether Press actually acquired WRES, and suggests that Press' role in the transfer from Glorious Church to BCC should be fully examined in a hearing. Rainbow argues that the negotiation by Press of an exclusive right to propose a channel exchange with Glorious Church, and the transfer of that right to BCC, constitutes an improper grant of a property right in a license. Approval of the exchange, claims Rainbow, would constitute ratification of an improper contractual provision in violation of the holding of *FCC v. Sanders Brothers*, 309 U.S. 470 (1940). In reply, Press argues that it disclosed its involvement with WRES to the Commission and that its involvement was a matter of record prior to BCC's acquisition of WRES. Press argues that Rainbow mistakenly claims that Press improperly acquired a "property right" in WRES.

14. Meredith alleges that Press' funding of WRES raises questions as to whether Press has exercised *de facto* control of the station. Meredith states that Section 310(d) of the Communications Act prohibits the assignment or transfer of any station license, either directly or indirectly, without prior Commission consent, or the transfer of control of an entity holding a permit or license without Commission authority. Meredith argues that Press advanced funds to BCC, that BCC will use a transmitter site licensed to Press, that Press is responsible for preparing, filing and prosecuting the petition for the channel exchange, and that Press may have influenced Glorious Church to abandon its modification application to enlarge its coverage area. Meredith claims that these activities show that Press exercises a sufficient degree of control over WRES to warrant a hearing. In reply comments, Rainbow alleges that Press' control over the disposition of WRES raises serious questions of licensee propriety. In reply, Press argues that Meredith should have expressed its concerns when Press assigned WRES to BCC. Press notes that it made all of the assignment agreements available to the public and the Commission prior to the transfer. Furthermore, Press states that at no time did it exercise control over WRES' construction permit.

15. SBC claims that the exchange would result in the displacement of its LPTV channel because that facility would be within the Grade A contour of the proposed Channel 18 station. SBC claims that this would result in substantial economic harm to its station, and would disrupt or terminate its service. SBC claims that the availability of additional LPTV construction permits in the area is extremely limited or nonexistent and that it has been unable to purchase a construction permit on reasonable terms. While SBC states that it does not believe that the presence of LPTV stations should preclude the initiation of full power television service, it argues that we should consider the harm to its station when analyzing

the benefits of this proposal. In reply, Press claims that SBC should have been aware of the possibility that it could be forced to move its LPTV channel due to a conflict with a full-service station.

DISCUSSION

16. After careful consideration of the comments received in response to the *Notice*, we conclude that approval of the proposed channel exchange is in the public interest. As a result of this exchange, BCC will receive financial assistance from Press that will enable BCC to improve its facilities, thereby increasing the population within the WRES Grade B service area from 165,118 people to 1,014,972 people, and providing first noncommercial educational television service to 18,341 people. Furthermore, Press will be able to change the technical facilities for its station, thereby providing a WKCF Grade B service to 1,396,543 people.

17. Claims that BCC could expand its service on its existing channel are irrelevant to our analysis of the public interest benefits of the exchange in this proceeding. The *Channel Exchange Procedure Report and Order* does not limit approval of channel exchanges to instances in which technical constraints preclude noncommercial service improvements on an existing channel. Regardless of the extent of technical improvements that BCC could initiate on its existing channel, BCC has stated that it is unable to improve its facilities without Press' assistance, and Press will not provide that assistance unless the channel exchange is approved.² Therefore, this exchange will permit a vast expansion of BCC's noncommercial educational television service that might not otherwise be implemented.

18. Commission policy is to presume that UHF channels are equivalent for allotment purposes. We will not deny an exchange on the grounds that one UHF channel is "superior" to another. The *Channel Exchange Procedure Report and Order* contained no such prohibitions on exchanges. We note that, as a general policy, the Commission is reluctant to alter noncommercial educational channel allotments by deservicing lower UHF channels and substituting higher UHF channels if the allotment is presently unused and unapplied for. See *Report and Order (Houston, Texas)*, 50 RR 2d 1420 (1982). However, this policy is inapplicable in the context of a channel exchange procedure pursuant to Section 1.420(h) of the Commission's rules. Unlike a proposed exchange of a commercial UHF channel for a vacant noncommercial educational UHF allotment, a case in which there is generally no party available to protect the interest in commencement and expansion of noncommercial educational service on the allotment, under this procedure the permittee or licensee of the noncommercial educational channel is a party to the proceeding and can determine whether the exchange is in the best interest of its station. In this case, petitioners have shown that approval of the exchange will permit the expansion of WRES' service area and will provide first noncommercial educational television service to more than 18,000 people.

19. We believe it is proper to consider the specific transmitter site proposed by Press because, as we noted in the *Notice*, Press would be the only eligible applicant for the allotment. Furthermore, Press has provided us with an assurance that this site remains available.⁵ Press has demonstrated, through use of the terrain roughness cor-

rection factor supported by field strength measurements, that it can place a city grade signal over Clermont from this site.⁶ Press' alleged failure to discuss a previous engineering statement does not imply that Press' engineering studies are invalid, nor does it imply that Press' statements were made in bad faith. Our analysis of Press' engineering studies indicates that Press can place an acceptable signal level over Clermont from its specified site. As for Rainbow's contention that Press' transmitter site could cause interference with Rainbow's transmitter, we note that Rainbow provided no details of its allegations. Furthermore, this type of interaction is generally a concern of the parties involved and the owner of the tower on which the antennas are to be mounted and, in any event, is properly resolved during the planning and implementation of the antenna installation.

20. We will not deny the exchange on the grounds that, following approval, BCC's service area will substantially overlap with CCI's service area. While CCI offers statistics suggesting that it will suffer a significant loss of viewers, it does not describe the basis for this claim. Furthermore, even if CCI runs the risk of losing viewers, we cannot prevent a channel expansion solely to protect a broadcaster from competition. See *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon.* 4 FCC Rcd 2276 (1989).

21. We find that, for purpose of Section 1.420(h) of the Commission's rules, Clermont and Cocoa are in substantially the same market. According to petitioners' maps of the proposed coverage areas of noncommercial Channel 68 and commercial Channel 18, the predicted Grade B signal of Channel 68 will fall completely in the predicted Grade B signal of Channel 18. While there may currently be little overlap of the stations' signals, this appears to be due to the fact that neither station is operating at full power. Once the channel exchange is approved and expanded service is instituted, both channels will clearly serve substantially the same market.

22. Allegations that Press intends to effectively change the community of license of WKCF are meritless. WKCF is licensed to Clermont and owes its primary service obligation to that community regardless of its transmitter site. See 47 CFR 73.1120. Press has stated that it will continue to serve its community of license.

23. We need not explore the propriety of Press' alleged acquisition of WRES from Glorious Church and its subsequent assignment to BCC, Press' financial involvement with the station, or Press' negotiation of an exclusive right to propose a channel exchange with Glorious Church, and the transfer of that right to BCC. Press' involvement with WRES, BCC, and Glorious Church was fully disclosed to, and examined by, the Commission in connection with our consent to the assignment of WRES to BCC. Contentions of impropriety are, therefore, untimely. The sole piece of new evidence offered to support a claim of impropriety is a newspaper article stating that Press "recently bought Cocoa station WRES-TV." Even if the existence of this article had been timely raised, we do not believe that it would have constituted sufficient grounds for reexamining Press' actions. A newspaper article is not an acceptable substitute for the Section 309(d) requirement that allegations in a petition to deny must be supported by the affidavit of a person with personal knowledge of the facts alleged. See *Mississippi Authority for Educational Television*, 79 FCC 2d 577, 579 (1980).

Furthermore, after considering of the article in its entirety, as well as documents submitted by Press, BCC and Glorious Church before the assignment of WRES, we find that the use of the word "bought" reflects the reporter's mischaracterization of the legal form of the transaction. Therefore, we do not believe that a closer examination is warranted.

24. Finally, we will not weigh the existence of a LPTV station in the public interest calculus. We do not consider the effects of an allotment action on LPTV stations in television allotment proceedings because LPTV is considered to be a secondary service. See 47 CFR 74.702(b), 74.703(b).

25. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's rules, IT IS ORDERED, That effective **January 12, 1990**, the Television Table of Allotments, Section 73.606(b) of the Commission's rules, IS AMENDED, with respect to the community listed below, as follows:

Community	Channel No.
Clermont, Florida	18-
Cocoa, Florida	52, *68

26. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Brevard Community College, for Station WRES(TV), Cocoa, Florida, IS MODIFIED to specify operation on Channel *68, in lieu of Channel *18-, and the permit of Press Television Corporation for Station WKCF(TV), Clermont, Florida, IS MODIFIED to specify operation on Channel 18- in lieu of Channel 68, subject to the following conditions:

- (a) Within 90 days, the permittees shall file with the Commission minor change applications for construction permits (Form 301 or 340), specifying the new facilities;
- (b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620 of the Rules, however, coordination should occur so that both stations do not broadcast on the same channel simultaneously;
- (c) Each station may continue to operate on its authorized channel for up to one year from the effective date of this decision; and
- (d) Nothing contained herein shall be construed to avoid the necessity of filing an application to change the transmitter location or an environmental impact statement pursuant to Section 1.1301 of the Rules.

27. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to Brevard Community College, 4701 East Hanna Avenue, Tampa, Florida, 33610, and Press Television Corporation, 2000 W. Glades Road 206, Boca Raton, Florida, 33431.

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

29. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

¹ Press cites to *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations ("Channel Exchange Procedure Report and Order")*, 59 RR 2d 1455 at note 14 (1986), in support of its claim.

² Rainbow asserts that the exchange would deprive third parties of the right to compete for the newly unrestricted Channel 18, in contravention of *Ashbacker v. FCC*, 326 U.S. 327 (1945). We fully examined the *Ashbacker* aspects of Commission rule 1.420(h) in the *Channel Exchange Procedure Report and Order*. Because Rainbow offers no explanation as to why we should revisit our analysis, we decline to do so.

³ As Press notes in its reply, the Commission abandoned its *de facto* reallocation policy in *Suburban Community Policy, Berwick Doctrine and DeFacto Reallocation Policy*, 93 FCC 2d 436 (1983).

⁴ The *Channel Exchange Procedure Report and Order* expressly states that one of the benefits of this procedure is that noncommercial educational stations may receive consideration for exchanges that permit them to improve the quality of their facilities.

⁵ However, this does not mean that Press has been granted approval to operate from that site. Press must file a minor change application for a construction permit specifying the new facility, and the Commission must grant the permit. Our consideration of the site herein is limited to the question of compliance with Section 73.685 of the Commission's rules which requires city grade coverage of a station's community of license.

⁶ We base our determination on the exact site, height above average terrain, and ERP toward Clermont that Press proposed in its petition. We will construe any change at the application stage as a request for city grade coverage waiver, requiring full justification, including a specific showing that no other suitable sites are available that could provide a better signal to Clermont, as well as submission of at least three evenly spaced terrain profiles to Clermont, and the topographic maps from which they were derived.