

dismissal of Hooten's application. As set forth below, the criteria for modification of an unbuilt construction permit should not apply to Hooten's application. Moreover, even if the Commission were to apply the criteria, Hooten demonstrates below that it has met one of the three criteria, warranting expeditious grant of its modification application.

**The Commission's Criteria For Modification
Of An Unbuilt Construction Permit
Should Not Apply To Hooten's Application**

Mazak erroneously claims in its Petition that the Commission's criteria for modifying authorizations for unbuilt broadcast facilities after the first nine months of the construction period apply to Hooten's application. Section 73.3535 of the Commission's rules provides that an application to modify an authorized but unbuilt broadcast facility filed after the initial nine months of the construction period must meet one of the following three criteria (the "one-in-three criteria"): (1) construction is complete and testing is underway looking toward prompt filing of a license application, (2) substantial progress has been made, i.e., equipment is on order or on hand, site acquired, site cleared, and construction proceeding toward completion, or (3) no progress has been made for reasons clearly beyond the control of the permittee, such as delays caused by zoning problems, but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. As shown below, the criteria do not apply to Hooten's application.

While KZAM is an authorized but unbuilt station,² the one-in-three criteria should not apply as Hooten diligently filed its modification application during the first nine months of the construction period. As set forth in the attached Declaration of Bill Hooten, President of Hooten (Exhibit 1 hereto), Hooten initially submitted the application on October 4, 1996 and it was received on October 7, 1996,³ before the initial nine month construction period expired on October 11, 1996. The application was accompanied by an application filing fee of \$650.00.⁴ On October 10, 1996, the Commission returned the application⁵ as it had not been accompanied by the newly increased filing fee of \$690.00 for minor modification applications, which had just gone into effect three and a half weeks before Hooten filed its application.⁶ Hooten was unaware that the filing fee had increased until the application was returned. Hooten received the returned application on October 15, 1996 and promptly resubmitted it the

²KZAM's construction permit was issued January 11, 1995 and will expire July 11, 1997.

³See Page 1 of the original application reflecting that it was received October 7, 1996, attached hereto as Exhibit 2.

⁴See Check for \$650.00 dated October 3, 1996 which accompanied the initial submission, attached hereto as Exhibit 3. Hooten did not retain the assistance of an attorney in submitting the application.

⁵See Commission's Unprocessable Application Return Form dated October 10, 1996 returning the application, attached hereto as Exhibit 4.

⁶See Amendment Of The Schedule Of Application Fees, Order in Gen Dkt. No. 86-285, 11 FCC Rcd. 10231 (1996), providing for increased application filing fees effective September 12, 1996.

same day via overnight courier, along with the increased filing fee.⁷ The application was received by the Commission the next day, October 16, 1996, a mere five days after the end of the initial nine month construction period. In light of Hooten's good faith effort to file its application during the initial nine month period and its prompt resubmission of the application after it was returned, the Commission should find that the one-in-three criteria do not apply to Hooten's application or, alternatively, grant Hooten a waiver of application of the criteria.

Hooten's good faith efforts to file its application during the initial nine month period and place its station on the air can readily be distinguished from the actions of the applicant in Deleted Station WPHR(FM), Ashtabula, Ohio, 11 FCC Rcd. 8513, 3 Communications Reg. (P&F) 1054 (1996), to which the Commission applied the one-in-three criteria. There the Commission declined to grant modification, extension, and assignment applications for an unbuilt construction permit, holding that the applicant failed to take every step possible to prosecute its application, thereby precluding the possibility of retaining a valid permit. For example, the Commission found that the applicant failed to submit a showing regarding the one-in-three criteria in response to

⁷See Hooten's letter dated October 15, 1996 resubmitting the application, attached hereto as Exhibit 5.

staff inquiries.⁸ Hooten, in contrast demonstrates herein that it meets one of the three criteria.

Additionally, in Ashtabula, the Commission based its ruling on the fact that the applicant had procrastinated for a period of years and ultimately failed to construct at its authorized site within the 18-month construction period (which it voluntarily abandoned). Here, more than six months remain in KZAM's 18-month construction period and Hooten intends to have the station on the air before the 18-month period ends, at its initially authorized site if necessary.⁹ Moreover, the applicant in Ashtabula apparently abdicated its responsibility for its station, attempting to sell an interest in the station to a local broadcaster and move the station's studio and technical facilities to property owned by the broadcaster. Hooten's principal, an experienced broadcaster, has no such intent, and will own and operate KZAM himself.

Accordingly, Hooten's good faith effort to file its application during the initial nine months of the construction period and its prompt resubmission of the application after it was returned warrant a finding that the one-in-three criteria do not apply to Hooten's application or a waiver of application of the criteria is justified. Prompt grant of Hooten's modification application is, therefore, requested.

⁸Mazak erroneously claims that the Commission in Ashtabula rejected a one-in-three showing filed after the modification application. To the contrary, in Ashtabula the Commission stated that it had itself requested a one-in-three showing from the applicant subsequent to the resubmission of its application and had only refused to accept such a showing when submitted some years later, after denial of the application, as part of a petition for reconsideration of the denial.

⁹See Declaration of Bill Hooten.

Hooten Has Met The One-In-Three Criteria

Even if the Commission were to apply the one-in-three criteria to Hooten, grant of Hooten's modification application would be required as Hooten has met one of the three criteria.¹⁰ Hooten made substantial progress towards constructing KZAM and placing it in operation during the initial nine months of the construction period.¹¹ Hooten has been working to place KZAM on the air since the application for the station was filed in 1994. At that time, it made arrangements for use of KZAM's currently authorized site. About that time, it also made arrangements to hire an office manager for the station. Hooten additionally began making business plans for the station.

In January 1996, immediately after issuance of the permit, bids were sought and obtained for all necessary equipment for the station, including broadcast, STL, EAS, and studio equipment. In early 1996, Hooten also began making arrangements for studio and office space for the station. In approximately June 1996, after obtaining bids, arrangements for construction of the tower were completed. The tower company can erect a tower at either the original or proposed site. The tower can be completed within 45 days after the modification application is granted or Hooten determines that it must construct at the original site in order to meet the 18-month construction deadline. This includes construction of the tower and transmitter building, installation of

¹⁰In adopting the one-in-three criteria, the Commission stated that the burden to meet one of the three criteria would increase as the second nine months of the construct period progressed. Broadcast Construction Periods, 59 RR2d 595,596 (1985). As Hooten's modification application was resubmitted a mere five days into the second nine months, it must meet only the most minimal burden.

¹¹See Declaration of Bill Hooten.

transmission line, and installation of the antenna. Electricity is available at both sites.

All equipment can be delivered within 30 days of a decision regarding the site.

Arrangements are in place for an installer, with an additional engineer assisting him, to install all of the studio and other equipment and place the station in operation upon delivery of the equipment.

Hooten has since 1994 been working on business, marketing, programming, and staffing plans for the station. In 1995, it prepared a five year business and marketing plan. In January 1996, it interviewed and hired a general manager for the station. All programming plans for the station have been finalized. All programming will be live and a music library was acquired in the Fall of 1996. In September 1996, Hooten began interviewing and has hired five on-air personalities.

Hooten, thus, made substantial progress towards placing KZAM in operation during the first nine months of the construction period. Moreover, Hooten continues to work diligently to place the station on the air as expeditiously as possible, and hopes to commence broadcasting by April 1997, several months before the end of the 18-month construction period.

As Hooten has met one of the three one-in-three criteria, grant of its modification is clearly warranted. Prompt grant of the application will permit Hooten to construct the station at its preferred site prior to the end of its initial 18-month construction period.

Conclusion

WHEREFORE, for the foregoing reasons, Hooten requests that the Commission dismiss or deny Mazak's Petition and expeditiously grant KZAM's modification application so that Hooten may promptly place KZAM on the air.

Respectfully submitted,

HOOTEN BROADCASTING, INC.

By: 
Ann Bavender
Its Attorney

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

January 6, 1997

DECLARATION

I, Bill Hooten, hereby declare as follows:

1. I am President, Secretary, sole Director, and 100% stockholder of Hooten Broadcasting, Inc., permittee of KZAM(FM), Ganado, Texas.

2. KZAM's modification application was originally submitted by overnight courier on Friday, October 4, 1996 and received by the FCC on Monday, October 7, 1996. I did not retain the assistance of an attorney in filing the application and was unaware that the FCC had just increased its application filing fees. I included with the application a check for \$650.00, which I believed to be the correct filing fee. On October 10, 1996, the FCC returned the application because it did not include the newly increased filing fee. The returned application was received on October 15, 1996. That same day the application was resubmitted via Federal Express with the correct filing fee of \$690.00 and received by the Commission on October 16, 1996.

3. KZAM's construction permit will expire on July 11, 1997 and I intend to have KZAM on the air prior to that date. While I would prefer to construct KZAM at the site specified in its modification application, I will, if necessary, construct KZAM at its currently authorized site in order to place it on the air prior to the expiration of the construction permit. Arrangements have been made so that a tower company can construct a tower at either of the two sites, as soon as a decision is made regarding the site.

4. I have been working to place KZAM on the air since the application for the station was filed in 1994. At that time, I made arrangements for use of KZAM's currently authorized site. Around that time, I also made arrangements to hire an office manager for the station. I additionally began making business plans for the station.

In January 1996, shortly after KZAM's construction permit was granted, I sought and obtained bids for all equipment necessary to operate the station, including the antenna, transmitter, transmission line, studio equipment, STL, and EAS equipment. In early 1996, I also began making arrangements for studio and office space for the station. In approximately June 1996, after obtaining bids, arrangements for construction of the tower were completed. The tower company can build at either the currently authorized site or the site requested in the modification application. Once a decision is made regarding the site, construction can begin within 30 days and be complete within 45 days. This includes construction of the tower and transmitter building, installation of transmission line, and installation of the antenna. Electricity is already available at both sites. All of the equipment can be delivered within 30 days of a decision regarding the site. Arrangements are in place for an installer, with an additional engineer assisting him, to install all of the studio and other equipment and place the station in operation upon delivery of the equipment.

I have since 1994 been working on business, marketing, programming, and staffing plans for the station. In 1995, I prepared a five year business and marketing plan. In January 1996, I interviewed and hired a general manager for the station. All programming plans for the station have been finalized. All programming to be live original programming. A music library was acquired in the Fall of 1996. In September 1996 I began interviewing and have hired five on-air personalities (DJs).

I am ready to proceed with construction as soon as a decision is made regarding the site and wish to have KZAM on the air by April 1997 if at all possible. In any event, I plan to have the station in operation, at either the currently authorized or proposed site, prior to the expiration of the construction permit on July 11, 1997.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Jan 6, 1996

Bill Hooten
Bill Hooten
President
Hooten Broadcasting, Inc.

Facsimile signature; original signature will be submitted upon receipt.

Federal Communications Commission
Washington, D. C. 20554

Approved by OMB
3060-0027
Expires 06/30/98

FOR
FCC
USE
ONLY

FCC(1996) OCT 07 1996

FCC 301

**APPLICATION FOR CONSTRUCTION PERMIT
FOR COMMERCIAL BROADCAST STATION**

FOR COMMISSION USE ONLY
FILE NO.

Section I - GENERAL INFORMATION

1. APPLICANT NAME (Last, First, Middle Initial)			
Hooten Broadcasting, Inc.			
MAILING ADDRESS (Line 1) (Maximum 35 characters)			
P.O. Box 11196			
MAILING ADDRESS (Line 2) (Maximum 35 characters)			
CITY		STATE OR COUNTRY (if foreign address)	ZIP CODE
College Station		TX	77842
TELEPHONE NUMBER (include area code)		CALL LETTERS	OTHER FCC IDENTIFIER (IF APPLICABLE)
409-268-9696		KZAM	
2. A. Is a fee submitted with this application? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
B. If No, indicate reason for fee exemption (see 47 C.F.R. Section 1.1113) and go to Question 3.			
<input type="checkbox"/> Governmental Entity <input type="checkbox"/> Noncommercial educational licensee <input type="checkbox"/> Other (Please explain):			
C. If Yes, provide the following information:			
Enter in Column (A) the correct Fee Type Code for the service you are applying for. Fee Type Codes may be found in the "Mass Media Services Fee Filing Guide." Column (B) lists the Fee Multiple applicable for this application. Enter in Column (C) the result obtained from multiplying the value of the Fee Type Code in Column (A) by the number listed in Column (B).			
(A)	(B)	(C)	FOR FCC USE ONLY
(1) FEE TYPE CODE	FEE MULTIPLE (if required)	FEE DUE FOR FEE TYPE CODE IN COLUMN (A)	
M P R	0 0 0 1	\$ 650.00	
To be used only when you are requesting concurrent actions which result in a requirement to list more than one Fee Type Code.			
(A)	(B)	(C)	FOR FCC USE ONLY
(2)		\$	
ADD ALL AMOUNTS SHOWN IN COLUMN C, LINES (1) THROUGH (2), AND ENTER THE TOTAL HERE. THIS AMOUNT SHOULD EQUAL YOUR ENCLOSED REMITTANCE.		TOTAL AMOUNT REMITTED WITH THIS APPLICATION	FOR FCC USE ONLY
		\$ 650.00	

BILL HOOTEN 3/92
 107 NORTH STAR 572-4794
 VICTORIA, TEXAS 77901

1227

88-861/1 (31)

PAY TO THE ORDER OF Federal Communication Commission \$ 650⁰⁰

six hundred fifty & 00/100 DOLLARS

Citizens National Bank
 (512) 575-3671
 4800 N. Navarro • P. O. Box 4927 • Victoria, Texas 77903

FOR Bill Hooten

⑆ 113108815⑆ 60 2460 2 1227

FEDERAL COMMUNICATIONS COMMISSION
UNPROCESSABLE APPLICATION RETURN FORM

DATE: 10-10-96

Hunter & Co. Inc.
P.O. Box 14196
College Station, TX 77842

Dear Sir:

This is to notify you that your application package is being returned for the following reason(s):

- No application/filing accompanied your submission.
- No remittance accompanied your submission.
- No Remittance Advice Form (FCC Form 159) accompanied your submission.
- The amount remitted and/or Payment Type Code is incorrect.
- The Remittance Advice Form is incomplete.
- Multiple transactions are not accepted for this Payment Type Code. Each transaction must be listed separately on the Remittance Advice Form.
- When filing for more than one applicant and paying with a single remittance, you must include them all on one Remittance Advice Form. Please use Advice (Continuation Sheet) (FCC Form 159-C) if additional entries are necessary.

or Other: *Underpayment due to a fee increase
Current amount due is \$690.00.*

Please refer to the enclosed fee filing guide for further instructions, and mail your corrected application, Remittance Advice Form, and payment to the appropriate P.O. Box in Pittsburgh, Pennsylvania.

If you have further questions, please contact the Billings & Collections Branch at (202) 418-1995.

Sincerely,

Regina W. Dorsey
Regina W. Dorsey, Chief
Billings & Collections Branch

Enclosure

Form 155
Form 301
C.R.#: 1227 - \$650.00

Hooten Broadcasting

October 15, 1996

VIA FEDERAL EXPRESS

FCC Mass Media Services Bureau
P.O. Box 358195
Pittsburgh, Pennsylvania 15251-5195

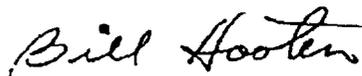
Re: Application for Modification of Construction Permit (BPH-940630MB)

Dear Sir/Madam:

Transmitted herewith is a resubmission of the Application for Modification of Construction Permit BPH-940630MB for Commercial Broadcast Station (FCC Form 301) for Channel 284C2 - KZAM(FM) - Ganado, Texas filed by Hooten Broadcasting, Inc. as licensee. Hooten erroneously included payment in the amount of \$650.00 per the recently outdated fee schedule in the first submission. Included here is the Application in triplicate along with a return copy with stamped self-addressed envelope, and a check payable to the Federal Communications Commission in the amount of \$690.00, the requisite filing fee, and FCC Form 155, the fee processing form.

Please contact me at (409) 268-9696 if there any questions regarding this information.

Sincerely,



Bill Hooten
President
Hooten Broadcasting, Inc.

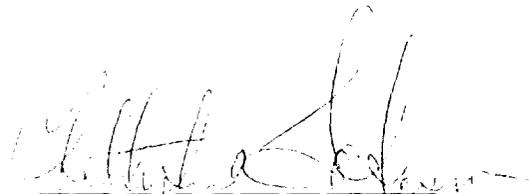
CERTIFICATE OF SERVICE

I, Chellestine E. Johnson, an employee of the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that a true and correct copy of the foregoing Opposition To Petition To Dismiss Or Deny was served via United States First Class Mail, postage paid, this 6th day of January, 1997, on the following persons:

Linda B. Blair, Chief*
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 302
Washington, DC 20054

Henry E. Crawford, Esq.
1150 Connecticut Ave., N.W., Suite 900
Washington, DC 20036

*Via hand delivery.



Chellestine E. Johnson

Mazak Broadcasting Company
Petition for Reconsideration
January 22, 1997

EXHIBIT 5

LAW OFFICES
HENRY E. CRAWFORD
SUITE 900
1150 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
202-862-4395

INTERNET: crawlw@wizard.net
Microsoft Network: crawlw@msn.com

TELECOPIER NUMBER
202-828-4130

January 16, 1997

BY HAND DELIVERY

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

RECEIVED

JAN 16 1997

Re:

In Re Application of Hooten Broadcasting, Inc. For Consent to Modify Existing Construction Permit of FM Station KZAM, Channel 284C2 Ganado, Texas
File No.: BMPH-961016IA

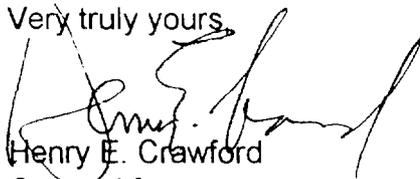
Federal Communications Commission
Office of Secretary

Dear Mr. Caton:

Transmitted herewith on behalf of MAZAK Broadcasting Company are an original and four (4) copies of a "Reply to Opposition to Petition to Dismiss or Deny" as directed to the Chief, Audio Services Division.

Should any additional information be required, please contact this office.

Very truly yours,


Henry E. Crawford
Counsel for
MAZAK Broadcasting Company

cc: Chief, Audio Services Division

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In re Application of

HOOTEN BROADCASTING, INC.

File No. BMPH-961016IA

For Consent to Modify Existing
Construction Permit of FM Station
KZAM, Channel 284C2
Ganado, Texas

To: Chief, Audio Services Division

REPLY TO OPPOSITION TO PETITION TO DISMISS OR DENY

MAZAK Broadcasting Company ("MAZK"), by counsel, pursuant to 47 CFR §73.3584(b) and 47 CFR §1.45(b), respectfully submits its *Reply to Opposition to Petition to Dismiss or Deny the Opposition to Petition to Dismiss or Deny* ("Opposition") filed on January 6, 1997, by Hooten Broadcasting, Inc. ("Hooten"). In support thereof, the following is stated:

I. THE HOOTEN MODIFICATION APPLICATION WAS NOT TIMELY FILED

1. In its Petition, MAZK established beyond question that Hooten filed its application beyond the initial nine month construction period. Hooten admits this fact, stating:

The application was received by the Commission [on] October 16, 1996, a mere five days after the end of the initial nine month construction period.

Opposition, p. 5. Consequently, the application was not timely filed with the Commission.

2. Since the application was received by the Commission beyond the initial nine month period, Hooten had to comply with the one-in-three showing contained in §73.3535(b) of the Commission's Rules. It did not. In fact, only now, nearly three months after the tardy document was filed with the Commission, Hooten attempts to make the required showing.¹ However, the Commission has solidly held that it cannot not consider a one-in-three showing when it is offered for the first time in a subsequent defense of a late modification application that failed to contain that showing. Deleted Station WPHR(FM), Ashtabula, Ohio, 11 FCC Rcd 8513 (1996) ¶¶ 16.

3. In the present case, the law and the facts could not be clearer. Both parties are in essential agreement. Hooten failed to timely file its application and that application failed to contain the required one-in-three showing. Therefore, the Hooten application must be dismissed.

II. HOOTEN'S APPLICATION REQUIRED A ONE-IN-THREE SHOWING

4. Hooten offers several excuses to avoid having to make a one-in-three showing. None of them, however, are legally sufficient to evade the Commission's requirements in this area.

5. Hooten's first excuse is that it did tender a timely application, albeit with an insufficient filing fee. It argues that the date of its defective filing should be the operative date and that no one-in-three showing should be required.² However, this argument flies in the face of both the Commission's Rules and case law.

¹ Opposition, pp. 7-8.

² Opposition, pp. 4-5.

6. Section 1.1116 of the Commission's Rules states the rules applicable to late or insufficient payments. It reads:

(2) For purposes of determining whether the filing is timely, the date of resubmission with the correct fee will be considered the date of filing. However, in cases where the fee payment fails due to error of the applicant's bank, as evidenced by an affidavit of an officer of the bank, the date of the original submission will be considered the date of filing.

47 CFR §1.1116(2).³ In the present case the date of resubmission is beyond the initial nine-month period. Consequently, a one-in-three showing was required.

7. Applicant error is not a mitigating factor. Hooten fails to cite any authority to support its contrary argument. Indeed, in Ashtabula, a case involving nearly identical circumstances, the Commission rejected the very argument offered by Hooten in the present case.

8. In Ashtabula, as in the present case, the applicant tendered its modification application within the initial nine-month period. Ashtabula, ¶ 4. The Ashtabula applicant also failed to file the appropriate fee, and, just as in the instant case, the Commission's returned the defective application. Both Hooten and the Ashtabula applicant resubmitted their applications within a very short period of time.⁴ However, both applications were resubmitted after the nine-

³ See also, In the Matter Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 65 RR 2d 513, 3 FCC Rcd 5987, ¶39 (1988) ("In any situation in which an applicant avails itself of the opportunity to correct an insufficient or failed fee payment, the filing date of the corrected, sufficient fee shall be considered the filing date of the application. Thus, in cases where an application must be submitted by a filing deadline, the "corrected" fee and resubmitted application must be received on or before the established deadline in order to be considered timely filed.").

⁴ Here it was five days; in Ashtabula it was two weeks.

month deadline had lapsed. Both applicants offered various excuses in arguing that the rule should be waived.

9. In rejecting the Ashtabula applicant's late filed modification application, the Commission stated:

Applicants are not entitled and should not expect, however, to file defective applications and then rely on the Commission to discover and notify the applicant of the deficiencies in time for the applicant to meet other Commission filing deadlines or to take advantage of time-dependent processing standards. Absent a persuasive showing that the filing requirements were indiscernible, a showing not made here, the applicant and the applicant alone, is responsible for filing a conforming application in the first instance and fails to do so at its own risk. Thus, the staff's failure to return [the applicant's] fee deficient application in time for her to refile it within the first 9 months of the construction period is not a basis for review.

Ashtabula, ¶12.

10. Hooten's own analysis of Ashtabula is confusing at best. Although Hooten points to staff inquiries and procrastination as distinguishing facts,⁵ the Commission's holding is squarely based on its refusal to permit *nunc pro tunc* treatment for a late filed modification application.⁶ While other factors may have been present in Ashtabula, the rejection of the modification application was based on the Ashtabula applicant's failure to make a timely filing.

11. Hooten suggests that its conduct should be excused because it "did not retain the assistance of an attorney in submitting the application."⁷

⁵ Opposition, pp. 5-6.

⁶ See, for example, Ashtabula, ¶7.

⁷ Opposition, p. 4.

However, the Commission has routinely held that an applicant's decision to proceed without counsel is a matter within the applicant's control and, therefore, the Commission will not excuse a failure to comply with the rules and orders of the Commission. HS Communications, Inc., 69 RR 2d 709, 6 FCC Rcd 3452 (Review Board 1991).

12. Hooten failed to file a timely appeal seeking nunc pro tunc treatment with the Office of the Managing Director. Instead, it waited until its actions were discovered by MAZK. Even then, it did not address the issue until January 6, 1997, long after the time had passed to seek review of the matter with the Managing Director. Did Hooten believe that it could just ignore the fact that it had failed to submit a timely application? Finally, Hooten offers no reason for failing to provide the one-in-three showing at the time it resubmitted its application. To offer it now, in response to a petition to deny is wholly contrary to Ashtabula and only serves to underscore the applicant's failure to prosecute its interests in a responsible manner.

13. In sum, the Commission's Rules and case law dictate that Hooten was required to have filed a one-in-three showing in the case of its untimely modification application. It failed to do so. Therefore, its application must be dismissed.

III. HOOTEN HAS NOT MADE A SUFFICIENT SHOWING

A. The Hooten Application Must Be Strictly Scrutinized

14. Perhaps realizing the precariousness of its legal position with regard to the untimely application, Hooten now attempts to show that it had taken substantial steps to put the station on the air. The showing itself is not very substantial. Nevertheless, Hooten argues that "it must meet only the most

minimal burden" because its application was filed five days after the deadline.⁸ According to Hooten, the burden of making the showing increases on a sliding scale with only a "minimal burden" being placed on tardy applications that are late by a short period of time.⁹

15. The Commission in Ashtabula interpreted Section 73.3535 as involving only two standards to be applied in each case. Leniency will be available for timely filed applications, while all the rest will be judge strictly:

Two possible standards can apply to applications seeking to modify or assign the permit of an unbuilt radio station, depending upon when the application is filed....For applications filed within the first 9 months of the original permit the standard is lenient -- the applicant need only certify that construction will begin immediately upon grant of the modification... After that first nine months, however, the standard becomes stricter. Specifically, the applicant must also make a "one-in-three" showing....

Ashtabula, ¶2. Hence, the Ashtabula Commission rejected a modification application that was resubmitted only two weeks after the deadline. That same strict standard must also be applied in the present case.

B. Hooten Has Not Made Substantial Progress Towards Constructing The Station

16. The substantial progress criteria will not be satisfied where the applicant has acquired little equipment, risked no funds, and generally failed to undertake efforts toward construction. Ashtabula, ¶14. The Commission

⁸ Opposition, p. 7.

⁹ Hooten cites Broadcast Construction Periods, 59 RR 2d 595 (1985). However, reading that item in context shows that the progressively increasing burden applies to assignments and extension of time requests where the applicant only begins to take action at the end of the construction period. It does not apply to applicants who miss the nine month modification deadline.

requires that at least some equipment be purchased and sums of money expended.¹⁰ In the instant case, Hooten has failed to meet its burden of showing either element.

17. Hooten offers the following items as evidence of the progress it has made in constructing the Ganado facility:¹¹

- 1) Hooten made arrangements to use the current site;
- 2) Hooten made arrangements to hire an office manager;
- 3) Hooten began making business plans for the station;
- 4) Hooten sought bids for station equipment;
- 5) Hooten began making arrangements for studio and office space for the station;
- 6) Hooten made arrangements for construction of the tower;
- 7) Hooten has worked on business, marketing, programming and staffing plans for the station;
- 8) Hooten made a five year business and marketing plan;
- 9) interviews were held and a general manager and five on-air personalities have been hired;
- 10) a music library has been acquired.

18. Hooten does not state that any money has been expended. Nor has any equipment been purchased. Out of the 10 items, seven¹² are mere "arrangements" or business plans.¹³ While it may sound impressive that Hooten sought bids on equipment, in fact, this takes very little effort at all since most equipment companies will be only too glad to quote prices over the telephone.

¹⁰ See, GOS B/casting Corp., 61 RR 2d 587 (M. Med. Bur., 1986); Texas Gulf Communications, Inc., 62 RR 2d 926 (M. Med. Bur., 1987) (no equipment purchased); L.E.O. B/casting, Inc., 62 RR 2d 996 (M. Med. Bur., 1987) (equipment not ordered); Benko B/casting Co., 65 RR 2d 1048 (M. Med. Bur., 1988) (substantial progress found where \$70,000.00 tower was constructed and \$500,000.00 worth of equipment delivered).

¹¹ Opposition, 7-8.

¹² Items: 1, 2, 3, 5, 6, 7 and 8.

¹³ It is interesting to note that in accordance with FCC Form 301, the business planing stage should have been completed at the time the budget was prepared and the construction permit application filed with the Commission.

No dollar figure was provided for the music library so it is impossible to say if anything of substance is meant by the word "acquired." Finally, Hooten asserts that it has hired various employees, but does not say if they have successfully negotiated employment contracts with them or if they have received a single paycheck. One only wonders what the five on-air personalities are doing down in Ganado without any broadcasting equipment, transmitter or studio.

19. The burden is on the applicant to show substantial progress. In this case, nothing of substance has been done to actually put the station on the air. Hooten has engaged in busywork, but no equipment has been purchased and no construction has been completed. Plans for construction do not amount to actual construction, just as arrangements for studio and office space do not amount to having a studio and office. Having failed to show actual expenditures or actual construction, Hooten has failed to meet its burden of showing substantial construction.

IV. EQUITABLE CONSIDERATIONS FAVOR DISMISSAL

20. Unlike *Ashtabula*, the Commission is not confronted with having to cancel Hooten's construction permit. The only result that would follow dismissal is that Hooten would be required to complete construction according to the facilities it originally requested from the Commission. Curiously, Hooten does not state his reason for seeking the modification. In fact, according to Hooten's own statement:

The tower company can build at either **the currently authorized site** or the site requested in the modification application.

Electricity is already available at **both** sites.

...I plan to have the station in operation, at either the **currently authorized** or proposed site, prior to the expiration of the construction permit on July 11, 1997.

Opposition, Exhibit 1.¶4. Therefore, no onus will befall Hooten in the event that the Commission upholds its rules and requires Hooten to construct the station in accordance with its original construction permit.

21. MAZK has invested considerable time and energy in seeking to have Channel 282A assigned to Victoria, Texas as a new commercial FM service. If the Commission allows Hooten to skirt the rules governing modification applications, MAZK will lose that investment. More significantly, the citizens of Victoria, Texas will be deprived of a new media voice for their community.¹⁴

22. The equities favor dismissal of the Hooten application. As Hooten readily admits, nothing will be lost if it is required build its station according to the specifications contained in its original construction permit. On the other hand, by permitting Hooten to dodge the Commission's Rules, both MAZK and the community of Victoria will forever lose the opportunity presented by Channel 282A.

V. CONCLUSION

23. There is no escaping the fact that Hooten's modification application was defective as filed and tardy as resubmitted. Case law and the Commission's Rules firmly hold that such applications are subject to dismissal. Hooten's

¹⁴ Regrettably, Hooten has chosen to attack MAZK's motives by claiming that MAZK is trying to "...block Hooten's efforts to place KZAM on the air as expeditiously as possible." Opposition, p. 1. There is absolutely no basis for that absurd notion and MAZK asks the Commission to strike that comment from the record as irrelevant nonsense.