

FCC MAIL SECTION

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

FCC 97M-33
70864

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MM DOCKET NO. 97-77

In re Applications of

GREATER WASHINGTON EDUCATION
TELECOMMUNICATIONS ASSOCIATION, INC.
Channel 219B
Leonardtown, Maryland

)
) File No. BPED-930617MD
) DIS

For Construction Permit for a New
Noncommercial Educational FM Station

COLUMBIA UNION COLLEGE BROADCASTING, INC.)
Channel 220B
Takoma Park, Maryland

) File No. BPED-930723MB
)
)

For Modification of Facilities of
Station WGTS-FM
Takoma Park, Maryland

)
)
)

PREHEARING CONFERENCE ORDER

Issued: February 27, 1997 ; Released: March 3, 1997

1. A prehearing conference is scheduled for April 8, 1997, commencing at 9:00 a.m. in a Commission courtroom. The parties' counsel who are to litigate this case shall appear to discuss designated and proposed issues, the evidentiary scope of this proceeding, the scope of discovery, and the estimated time required. Counsel also shall demonstrate compliance with the Commission's rules on local publication. 47 C.F.R. §73.3594.

Common Engineering

2. This is a comparative proceeding for new noncommercial frequencies. However, the mutually exclusive proposals are to be compared only on the basis of community needs under §307(b) of the Act. Hearing Designating Order, DA 97-378, Para. 1, released February 24, 1997.¹ Engineering evidence to be adduced to show a superior coverage will be limited to evidence of available noncommercial educational FM signals within the respective service areas. The parties are encouraged to use a common engineer and to stipulate to all relevant data with respect to coverage and with respect to the §307(b) issue.

¹ Comparative qualification standards are under review. In the Matter of Reexamination of the Comparative Standards for New Noncommercial Educational Applicants, 10 F.C.C. Rcd 2877 (1995).

Preconference Meeting Of Counsel

3. By April 1, 1997, counsel for the applicant parties are directed to meet and confer for the purpose of exploring settlement, an agreement on share-time arrangements, the scope of the issues to be tried in this case, a common engineer, and discovery. With respect to discovery, the applicants shall agree on a mutually convenient schedule for the taking of any depositions. Unless authorized by the Presiding Judge, interrogatories shall not be used by applicant parties.² The applicants shall agree on a Joint Document Production Request which would be applicable to all applicants. This will ensure a uniform and reciprocal disclosure of documents. In the event one or more of the applicants has a specific document request, a motion for the production of such documents shall be separately filed.

Preconference Report

4. By 12 noon on April 7, 1997, a Joint Report shall be submitted to the Presiding Judge reporting in full on the results of the meeting described in Para. 3 above. That report shall include a report on the prospects for a share time arrangement, a description of the documents to be exchanged voluntarily and the date for such exchange, a description of any known contested documents which will be sought by motion, subpoenas needed for witnesses, and a representation that a joint engineer has been or shall be retained.

Discovery

5. By April 14, 1997, the applicant parties shall file an agreed stipulated schedule for the exchange of identified documents. Any supplemental request for documents may be filed and served 10 days after receipt of the information on which the supplemental request is based, or the parties may elect to defer supplemental requests until ten days after depositions.

6. The parties are encouraged to stipulate to the scope and terms of all supplemental document requests which would avoid the need for a motion. Party applicants are to seek a motion to compel only those documents that are refused to be produced, or that are contested as privileged. See 47 C.F.R. §1.325(a)(2). Where documents that are responsive to a document request are on file with the Commission, such documents need only be identified by a responding party. Although copies of such documents need not be furnished, parties are encouraged to furnish copies if the request is reasonable.

² The Bureau may utilize a first set of interrogatories on any issue in which it participates as a litigant party without seeking prior authorization from the Presiding Judge.

Privileged Documents

7. Only documents need be produced on discovery which are not subject to the attorney-client privilege or the work-product exemption. Both types of documents are referred to as "privileged documents." Along with a party's document production there must be furnished a simultaneous list of any documents for which a privilege will be asserted.³ Documents in that list shall be described by date, sender, receiver, persons noted for copies ("cc"), and brief description of subject matter. The list shall be accompanied with a statement of the precise basis for the privileges asserted that relies upon cited and analyzed points and authorities. See Tri-State Community Development and Communications Com., 4 F.C.C. Rcd 2402 (Review Bd 1989); and LNJ Communications, 3 F.C.C. Rcd 2745 and 4411 (Review Bd 1988). Opposing applicants have five (5) business days from receipt of the privilege claims within which to file a motion to compel production of the documents. Oppositions shall be filed and served in 4 days. 47 C.F.R. §1.294(b). Uncontested privilege claims which are not facially defective will be accepted by the Presiding Judge without ruling. Documents containing materials which are claimed only in part to be privileged must be produced initially with only the claimed privileged matters masked. The assertion and contesting of privilege shall apply only to those excised portions of the document.

Depositions

8. Depositions of principals should be noticed by the tenth day after the exchange of documents. Unless otherwise agreed, the parties shall take depositions in the city of license or in Washington, D.C. The parties must seek diligently to agree on the places, dates and times for taking depositions, at the lowest cost and with the least inconvenience. If all parties concur, cooperative non-party witnesses may be deposed initially via telephone. 47 C.F.R. §1.318(c). Subsequent in person depositions of such witnesses may be sought by motion upon a showing of good cause. However, depositions of non-party witnesses still require 21 days' notice under the prescribed time for completing discovery within the authorized discovery. Therefore, parties seeking non-party deposition discovery within the authorized period should submit ex parte subpoena requests immediately on the passage of time for oppositions, or immediately following a ruling that denies any opposition. See 47 C.F.R. §§1.315 and 1.333.

³ Parties are urged to waive privileges to the maximum extent possible. It is common knowledge that communications counsel are generally actively involved at early stages of financing, site selection and application preparation. See Opal Chadwell, 103 F.C.C. 2d 840, 846 (Review Bd 1988) (Board takes note that the "regular business" of communications attorneys is the preparation and prosecution of Commission applications). Thus, parties are urged to engage in a free exchange of information about such matters without unnecessary delay. Cf. Raveesh K. Kumra, 5 F.C.C. Rcd 5607 (Review Bd 1990) (privilege to be confined strictly within the narrowest possible limits) and WWOR-TV Inc., 5 F.C.C. Rcd 6261, 6263 (1990) (Comm'n denied protection for documents on terms and conditions of employment or employment purposes).

Other Discovery

9. The parties may defer filing requests for admission of fact and genuineness of documents until up to 20 days after an opposing party's documents are produced and that party's deposition has been concluded. Requests for short extensions incident to consent motions for additional time to complete discovery will be considered.

Added Issues

10. Petitions to add new issues must comply strictly with the standards and quality of proof required under the Commissions's rules. 47 C.F.R. §1.229(d). See Great Lakes Broadcasting, Inc., 6 F.C.C. Rcd 4331 (Comm'n 1991) (strict adherence to standards of §1.229 required). Petitions for new issues must also include a request for relevant documents and, except for nonparty discovery, all party discovery relating to any added issues must be completed within 30 days of the Presiding Judge's ruling adding the issues and permitting discovery.⁴

Forfeitures

11. Where new issues involve allegations that an applicant has made misrepresentations to the Commission or engaged in other misconduct during the pending application's process, the petition to enlarge issues must address, with particularity, the standards for forfeiture, shall specify the amount of forfeiture believed to be applicable, and shall state reasons for the forfeiture remedy and the recommended amount. See 47 C.F.R. §1.229(f). See also 47 U.S.C. §503(b)(2)(A).⁵ The parties are reminded that an added forfeiture issue remains with the case even after settlement. 47 C.F.R. §1.80(g).

⁴ Depositions in connection with added issues must be noticed within 5 days after documents are produced. If subpoenas are needed and the 21 day notice provision applies, there should be relief sought from the discovery cut-off date and the additional time needed must be specified, including a new cut-off date. Any Request for an extension of time must be made by motion with a showing of good cause.

⁵ There must be a nexus shown between the alleged misrepresentation or misconduct and an applicable Commission rule. See, e.g., 47 C.F.R. §1.17 (duty to submit truthful written statements and responses to Commission inquiries and correspondence) and 47 C.F.R. §73.1015 (applicants shall not submit to the Commission any written statement containing a misrepresentation or material omission bearing on any matter within the Commission's jurisdiction).

Procedural Dates

12. The following procedural dates are set:

June 23, 1997	Preliminary engineering data submitted to Bureau Counsel.
July 1, 1997	Discovery is closed.
July 25, 1997	Exchange and receipt by 3:00 p.m. (D.C. time) of all documentary exhibits and <u>signed</u> frozen sworn testimony.
July 30, 1997	Exchange and receipt by 3:00 p.m. (D.C. time) of witnesses requested for cross-examination stating reasons and legal precedent for each witness.
August 01, 1997	Exchange and receipt by 3:00 p.m. (D.C. time) of oppositions to witness requests.
August 11, 1997	Final Joint Engineering Exhibit (or Stipulation accompanied with an engineer's affidavit which negates the comparative coverage issue) shall be submitted to the Presiding Judge.
August 13, 1997	Commencement of hearing at 10:00 a.m. in a Commission courtroom in Washington, D.C.

Exhibit Assembly

13. Exhibits are to be assembled with each exhibit bearing a number and with a tab on each document. The exhibits are to be serially numbered, starting with the Number 1. A prefix is to be used to indicate the party sponsoring the exhibits. Each exhibit should be separately and consecutively paginated. If stipulations are entered into, they are to be executed by counsel, prepared as joint exhibits, tabbed and paginated.

Commission Filings

14. Parties are to have sufficient copies of excerpts of Commission filings which are expected to be used on cross-examination so that copies can be distributed immediately to opposing counsel and to the Presiding Judge. While official notice may be relied on as a ground for the admission of Commission file records, official notice shall not be permitted as a substitute for the actual introduction of copies of documents that are used for cross-examination which must be properly marked and received in evidence.

Use of Depositions

15. Excerpts of deposition transcripts to be used on cross-examination must be available for distribution to counsel and the Judge at the time the witness takes the stand to testify and only after proper marking of the excerpts and their identification as an exhibit. Alternatively, the witness or counsel may read into the record the relevant "Qs" and "As" that are relied on to refresh recollection or to show an inconsistency. Counsel are reminded that a proper foundation must be made for use of depositions on cross-examination, and a copy of the transcript must be furnished to the Presiding Judge before the examination of the witness begins.

Extensions Of Time

16. Extensions of time with respect to discovery shall not be granted unless there is a clear showing of good cause and provided the request is made in advance of the due date. See C.F.R. §1.46(a) (it is the policy of the Commission that extensions of time shall not be routinely granted). Cf. Proposals to Reform the Commission Comparative Hearing Process to Expedite the Resolution of Cases, 6 F.C.C. Rcd 157, 172 n. 34 (1992) (requests for extensions of time in comparative cases to be closely examined for clear showing of cause).⁶

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁶ The parties are on notice that failures to comply with procedural and discovery orders of the Presiding Judge may result in dismissal. See Tri-State Communications, 4 F.C.C. Rcd 8258 (Review Bd 1989); Warren Price Communications, Inc., 4 F.C.C. Rcd 1992 (Comm'n 1989); and Hillebrand Broadcasting, Inc., 1 F.C.C. Rcd 419 (1986).