

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

97-128
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APR 28 1997

In re Application of)
)
SHURBERG BROADCASTING OF HARTFORD, INC.)
Hartford, Connecticut)
)
For authority to construct and)
and operate a new commercial)
television station on Channel 18,)
Hartford, Connecticut)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

File No. ARN-831202KF

OFFICE OF CHIEF

FEB 11 9 47 AM '95

MASS MEDIA BUREAU

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APR 28 1997

TO: James C. McKinney, Chief
Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OPPOSITION TO MOTION TO DISMISS

1. Shurberg Broadcasting of Hartford, Inc. ("SBH") hereby opposes the Motion to Dismiss filed by Astroline Communications Company Limited Partnership ("Astroline") with respect to SBH's above-captioned application for a construction permit for a new television station to operate on Channel 18 in Hartford, Connecticut. At present Station WHCT-TV is authorized to operate on that channel in Hartford. As set forth in detail below, Astroline's Motion suffers from fatal factual and legal flaws which reflect a substantial lack of familiarity not only with the facts of this case, but also with the Commission's own rules and policies.

Introduction

2. In marked contrast to other matters relating to SBH and Astroline ^{1/}, the instant Opposition and the Motion to which it is responsive involve a relatively limited matter. Astroline is simply attempting to convince the Bureau that SBH's application should be dismissed because, according to Astroline, SBH is not financially qualified and has failed to comply with Section 1.65 of the Commission's Rules. The sole basis for these claims is an affidavit executed by SBH's sole principal, Alan Shurberg, and submitted to the Court of Appeals in connection with the Emergency Motion for Stay in Case No. 84-1600 referenced in Footnote 1. A copy of Mr. Shurberg's affidavit appears as Exhibit A to Astroline's Motion. However, even a cursory examination of the underlying facts -- as distinct from

1/ The SBH/Astroline/Faith Center, Inc. proceeding has been the subject of extensive pleadings before the Commission, the United States Court of Appeals for the District of Columbia Circuit ("the Court of Appeals") and the United States District Court for the District of Columbia ("the District Court"). See, e.g., SBH's Consolidated Comments and Reply Comments filed with the Commission in Docket No. 80-730 on July 23, 1984 and August 2, 1984, respectively; In re Shurberg Broadcasting of Hartford, Inc., Case No. 84-5363 (D.C. Cir., filed June 12, 1984); Shurberg Broadcasting of Hartford, Inc. v. FCC, Case No. 84-3406 (D.D.C., filed November 9, 1984); Shurberg Broadcasting of Hartford, Inc. v. FCC, Case No. 84-1600 (D.C. Cir., filed December 10, 1984). While these various proceedings include matters not directly related to Astroline's most recent Motion, consideration of that Motion should be undertaken with at least some familiarity of the facts and circumstances which have led the parties to their present positions. To that end, SBH's Consolidated Comments and Reply Comments, cited above, are hereby incorporated by reference, as is SBH's Emergency Motion for Stay, filed with the Court of Appeals in Case No. 84-1600.

Astroline's distorted and self-serving misreading of those facts -- demonstrates the total invalidity of Astroline's claims.

I. No violation of Section 1.65 has occurred.

3. The primary thrust of Astroline's Motion is that Mr. Shurberg's affidavit somehow proves that SBH is not financially qualified and that that "fact" should have been reported to the Commission pursuant to Section 1.65 of the Commission's Rules. Section 1.65, of course, requires an applicant to notify the Commission either when information contained in its application is no longer substantially accurate or when there has been a substantial change as to any matter which may be of decisional significance. According to Astroline, Mr. Shurberg's affidavit is inconsistent with SBH's application in which, in the words of Astroline,

SBH stated in Section III . . . that it was financially qualified to construct and operate Channel 18 for three months without commercial revenue if it was awarded the license. Specifically, Mr. Shurberg certified that SBH has "sufficient net liquid assets . . . on hand or . . . available from committed sources to construct and operate the requested facilities." (SBH's FCC Form 301 at 5).

Astroline Motion at 3.

4. In purporting to characterize and quote from SBH's application, however, Astroline is absolutely and shockingly incorrect with respect to the content of that application; in fact, the "quoted" language is nothing more than an invention by Astroline, a figment of its own imagination. Contrary to Astroline's purported quotation, SBH's application specifically

did not include a certification of financial qualification. Instead, without responding either "yes" or "no" to the two questions comprising Section III of the application, SBH stated in response to that section as follows: "Financial certification to be supplied." A copy of the relevant page of SBH's application is included herewith as Attachment A. ^{2/} Thus, even if Mr. Shurberg's affidavit did reflect some material change in SBH's financial qualifications, it would not alter the accuracy of the information contained in SBH's application and would not, therefore, trigger any obligation under Section 1.65.

^{2/} SBH is completely at a loss to understand how Astroline could possibly explain, much less justify, the purported "quotation" of materials which do not exist. After all, this is not an instance of misreading or misquoting; in the absence of anything to misread or misquote, Astroline has fabricated a "quotation". In this case the gravity of Astroline's error is worsened by the fact that the "quotation" is not merely an incidental aspect of its pleading; rather, the "quotation" is in large measure the lynchpin, the sine qua non of its Section 1.65 argument.

Inadvertent errors borne of carelessness and negligence may be unfortunately unavoidable from time to time, and SBH does not believe that Astroline -- or any other party, for that matter -- should be held to the unattainable standard of perfection. However, SBH believes that, at a bare minimum, Astroline should be expected not to invent "facts" out of whole cloth in an effort to create its arguments. Astroline's resort to precisely that tactic in this instance raises serious questions about the reliability of any past, present or future assertions by Astroline: if -- as has been demonstrated here -- it is willing to make up information in order to support its case, Astroline's credibility is virtually nil. Ironically, this is not the first instance, or the first proceeding, in which such questions have been raised relative to Astroline or its associates. See Minority Broadcasters of East St. Louis, Inc., 56 R.R.2d 275, 283-284 (Rev. Bd. 1984) ("disturbing pattern of carelessness" found with respect to an applicant whose principals include principals of Astroline as well as its counsel, Thomas Hart, who prepared the Motion in question here).

Astroline's argument in this regard is, as a result, wholly without merit.

II. SBH's application is not subject to dismissal for failure to provide financial certification.

5. As indicated above, SBH acknowledges that it has not to date certified its financial qualifications to the Commission. Neither that fact nor Mr. Shurberg's affidavit submitted to the Court of Appeals, however, warrants dismissal of SBH's application. As an initial matter, it is important to recognize precisely what SBH's application states with respect to its financial qualifications. SBH has not stated that it is financially qualified, and it has not stated that it is not financially qualified. Instead, SBH has represented to the Commission that its "[f]inancial certification [is] to be supplied." See Attachment A hereto. Thus, there is absolutely no basis whatsoever in SBH's application from which to conclude that SBH is not financially qualified.

6. Mr. Shurberg's affidavit, when read in its totality and against the backdrop of the relevant facts and circumstances, similarly affords no basis for Astroline's conclusion. As set forth in Mr. Shurberg's affidavit, his source of financing had notified Mr. Shurberg that he had seen a newspaper article in which SBH's efforts to prosecute its application had been described by counsel for Astroline as "frivolous". Further, concern was expressed about the likelihood of SBH's ability successfully to prosecute its appeal. In particular, it was

noted that denial of SBH's then-pending Emergency Motion for Stay could be interpreted as an indication of SBH could not claim that success of the merits of its appeal was likely. SBH's financial source informed Mr. Shurberg that "funding would continue to be available to the extent that the effectiveness of the Commission's grant remains stayed, since such a stay would indicate the likelihood of SBH's ultimate success on the merits, and also since such a stay would preclude Astroline from operating the station in the meantime." See Exhibit A to Astroline's Motion (emphases added). From this Mr. Shurberg concluded that, absent the stay, SBH would not be able to "proceed with the full course of appellate procedure in an effort to secure reversal of the Commission's decision." Id.

7. As Astroline correctly notes, the Court of Appeals ultimately denied SBH's Emergency Motion for Stay. In so doing, however, the Court specifically and repeatedly indicated that its decision was not based on any failure by SBH to demonstrate the likelihood that it would succeed on the merits of its appeal. To the contrary, the Court described the issues raised by SBH as being "serious, substantial, difficult and doubtful." See Attachment B hereto. Thus, concern about any likelihood of failure on the merits was substantially eliminated by the Court of Appeals in its denial of SBH's stay request. This, in turn, led to the continued availability of funding to SBH. And since this occurred after and as a result of the Court's decision, Astroline's charge that SBH has "arguably committed perjury

before the Court of Appeals" (Astroline Motion at 12) is clearly without merit: Mr. Shurberg's affidavit was true and accurate when it was executed and submitted to the Court, and it remained so until the Court of Appeals issued its Order. To the extent that any change may have occurred after, and as a result of, the issuance of the Order, SBH was under no obligation to notify the Court of that change. This is especially so in light of the fact that, in denying SBH's Emergency Motion for Stay, the Court of Appeals had specifically declined to attribute decisional significance to the matter of SBH's financial qualifications -- if the Court denied SBH's stay request despite SBH's claim of likely financial inability, the Court would most certainly not be interested to learn, subsequent to that denial, SBH's situation had changed for the better.

8. But the more fundamental flaw in Astroline's Motion is its assumption that the Commission will dismiss an application in which the applicant fails to establish its financial qualifications. In fact, both the Communications Act of 1934, as amended, and the Commission's own longstanding processing policies require that, in such instances, the applicant be given an additional opportunity to demonstrate its financial qualifications. For example, the Communications Act requires that the Commission designate for hearing applications in which a substantial and material question of fact is presented with respect to, inter alia, the applicant's qualifications. See 47 U.S.C. §307(e). Thus, even if SBH were to certify that it is

not financially qualified, the result would not be the dismissal of its application. Instead, the Commission would normally afford SBH an opportunity, even after adoption of a hearing designation order, to certify its financial qualifications. Even in the worst case, the Commission (or the Presiding Administrative Law Judge) would simply add an issue to permit consideration of the financial qualifications matter in hearing.

9. This is precisely the routine course taken by the Commission and the Mass Media Bureau. A review of hearing designation orders released since January, 1984, reveals that many broadcast hearing proceedings commenced during the pendency of SBH's application have included applicants about whose financial qualifications questions remained at the time of designation. Included herewith as Attachment C is a sample listing of 24 such proceedings. In none of these cases was any application dismissed because of questions concerning its financial qualifications. By contrast, in several of the cases where such questions existed, no financial qualifications issue was added, and the applicant was permitted to tender a certification of financial qualifications to the Presiding Judge. And at least one proceeding -- Essential Communications Co., MM Docket Nos. 84-389 et al., 49 Fed. Reg. 19115 (Mass Media Bureau 1984) -- included an applicant who had, instead of answering "yes" or "no" to the questions in Section III of FCC Form 301, simply stated that financial certification would be supplied at a later date. In all of these instances the

applications had been fully processed by the Bureau's staff, had been accepted for filing ^{3/}, and were duly designated for hearing despite the fact that questions remained with respect to the applicants' financial qualifications.

10. It is clear that Astroline's position is based on a lack of understanding relative to the difference between standards for acceptance of an application, on the one hand, and standards for grant of an application, on the other. See, e.g., KALE, Inc., 35 R.R.2d 357 (1975) (where apparent deficiencies involve financial qualifications, acceptability is not in issue: "That an application may be acceptable for filing and yet not demonstrate the requisite qualifications to justify a grant is well established."). SBH's application was, and continues to be, complete and in compliance with the Commission's technical rules. It can, therefore, be accepted for filing and given a "B" cut-off date notwithstanding that the application may not presently be "grantable". Following acceptance of its application, SBH will have ample opportunity to establish its financial qualifications.

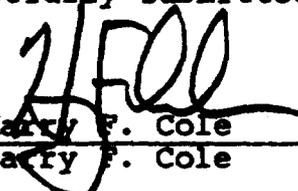
^{3/} In its Motion Astroline suggests that SBH's application has been accepted for filing by the Commission. This suggestion is apparent in the fact that Astroline refers, both in the caption and the text of its Motion, to SBH's file number as "BPCT-831202KF". Of course, only applications which have been formally accepted are accorded a "BPCT-" prefix. See Public Notice ("Broadcast Bureau Implements New File Numbering System"), Mimeo No. 2784, released July 7, 1978, a copy of which is included as Attachment D hereto. SBH's application has not, however, been accepted for filing, and the correct prefix of its file number is therefore "ARN-" (i.e., application reference number).

Conclusion

11. By confusing the distinct concepts of "acceptance" and "grant" and the separate standards underlying each, Astroline is seeking relief which the Commission does not as a routine matter -- and cannot, as a statutory matter -- provide. Even if SBH were found to be not financially qualified -- and there is no basis for such a finding before the Commission -- the Commission cannot, consistent with the Communications Act and the Commission's own routine processing standards, dismiss SBH's application. Thus, even if Astroline's plainly incorrect factual assertions had any validity at all, its Motion would still have to be denied.

WHEREFORE, for the reasons stated, Shurberg Broadcasting of Hartford, Inc. submits that the Motion to Dismiss filed by Astroline Communications Company Limited Partnership should be denied.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

Bechtel & Cole
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(202) 833-4190

Counsel for Shurberg Broadcasting
of Hartford, Inc.

February 7, 1985

ATTACHMENT A

9. Are there any documents, instruments, contracts or understandings relating to ownership or future ownership rights (including, but not limited to, non-voting stock interests, beneficial stock ownership interests, options, warrants, debentures)?

If Yes, provide particulars as Exhibit No. _____.

10. Do documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provide that (a) voting rights will remain with the applicant, even in the event of default on the obligation; (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission (pursuant to 47 U.S.C. 310 (d)) will be obtained?

No such documents exist.

If No, attach as Exhibit No. _____, a full explanation.

Section III

Financial Qualifications

NOTE: If this application is for a change in an operating facility do not fill out this section.

1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.

2. The applicant certifies that:

(a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit;

(b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment;

(c) it has determined that a reasonable assurance exists that all such sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments.

Financial certification to be supplied.

ATTACHMENT B

No. 84-1600

September Term, 19 84

Shurberg Broadcasting of Hartford, Inc.,
Appellant,

v.

Federal Communications Commission,
Appellee

Astroline Communications Company
Limited Partnership,

Intervenor

Before: Wright, Bork and Mikva,* Circuit Judges

United States Court of Appeals
For the District of Columbia Circuit
FILED DEC 21 1984
GEORGE A. FISHER
CLERK

ORDER

Upon consideration of Shurberg Broadcasting of Hartford, Inc.'s ("appellant" or "Shurberg") Emergency Motion for Stay and the oppositions and reply thereto, and the Federal Communication Commission's ("Commission") Motion to Dismiss and the opposition thereto, it is

ORDERED by the court that the Emergency Motion for Stay is denied.

In order to obtain a stay a party must 1) make a strong showing that it is likely to prevail on the merits of its appeal, 2) demonstrate that it will be irreparably injured if a stay is denied, 3) show that other parties will not be substantially harmed by the issuance of the stay, and 4) demonstrate that a stay is in the public interest. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977), citing Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). Although appellant "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation," Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), appellant has failed to demonstrate that it would be irreparably injured in the absence of a stay, or that other parties and the public interest would not be harmed by the issuance of a stay.

No. 84-1600

September Term, 1984

Two scenarios are possible under the Commission's December 7, 1984 order. Either the distress sale between Faith Center, Inc. ("Faith Center") and Astroline Communications Company ("Astroline") will be consummated or a comparative hearing will be held between Faith Center, Shurberg, and any other applicants who file during the new ninety day "window". In either event, if Shurberg is ultimately successful on its appeal, the Commission could provide complete relief to Shurberg because the successful licensee would take the license subject to judicial review. See Teleprompter Corp., 50 Rad. Reg. 2d (P&F) 125, 127 (CATC Bur. 1981); 47 U.S.C. § 402(h)(1982). See also Grand Broadcasting Company, 4 Rad. Reg. 2d (P&F) 205, 206 (F.C.C. 1964) (at conclusion of administrative proceedings unsuccessful applicant for new television station license denied stay because "possible commencement or the pendency of a judicial review proceeding has not been considered a sufficient reason for staying the Commission's decision in these circumstances"). Appellant's claim that it might be unable to meet the costs of pursuing the litigation simply does not amount to irreparable injury. See Renegotiation Bd. v. Bannerkraft Clothing Co., Inc., 415 U.S. 1, 24 (1974) ("mere litigation expense, even substantial unrecoupable costs, does not constitute irreparable injury"). Further, both Astroline's interest in consummating the transaction and the public's interest in ridding the Hartford area of a broadcaster of Faith Center's questionable reputation would likely be harmed by the issuance of the stay. Thus, although appellant may ultimately prevail on the merits of its appeal -- a question which the court need not and does not reach at this stage -- it has failed to satisfy the requirements for the issuance of a stay. It is

FURTHER ORDERED by the court that the Interim Stay issued on December 11, 1984 is vacated. It is

FURTHER ORDERED by the court that the Commission's Motion to Dismiss, filed December 14, 1984, is held in abeyance pending the response from appellant.

The Clerk is directed to transmit a certified copy of this order to the Federal Communications Commission.

Per Curiam

*Circuit Judge Mikva did not participate in this order.

ATTACHMENT C

Broadcast proceedings designated for hearing since 1984
which include applicants whose financial qualifications
had not been established prior to designation

<u>Case Name</u>	<u>Mass Media Docket Number (Lead Case Only)</u>	<u>Federal Register Page Number</u>
Calhoun County Broadcasting Co.	84-903	50 Fed. Reg. 1935
RKO General, Inc.	84-1148	49 Fed. Reg. 50543
RKO General, Inc.	84-1184	49 Fed. Reg. 50449
RKO General, Inc.	84-1122	49 Fed. Reg. 48991
RKO General, Inc.	84-1057	49 Fed. Reg. 48222
RKO General, Inc.	84-1085	49 Fed. Reg. 47568
Laughlin Roughrider	84-1226	49 Fed. Reg. 47560
Central Bucks Broadcasting Co.	84-850	49 Fed. Reg. 36155
Gold Coast Broadcasting Corp.	84-692	49 Fed. Reg. 30364
Morro Rock Resources, Inc.	84-677	49 Fed. Reg. 29454
Midway Broadcasting Co.	84-416	49 Fed. Reg. 19732
Payne Communications, Inc.	84-392	49 Fed. Reg. 19117
Essential Communications Co.	84-389	49 Fed. Reg. 19115
Coursolle Broadcasting of Minnesota, Inc.	84-362	49 Fed. Reg. 15616
Tri-County Broadcasting	84-315	49 Fed. Reg. 15133
Concho Communications, Inc.	84-319	49 Fed. Reg. 15130

Retherford Publications, Inc.	84-274	49 Fed. Reg. 11710
Marcell's, Inc.	84-244	49 Fed. Reg. 10578
People Broadcasting	84-202	49 Fed. Reg. 10157
Arby R. Beardslee	84-155	49 Fed. Reg. 9262
Nixon-Bray Communications Co.	84-112	49 Fed. Reg. 6994
Ideal Licensee, Ltd.	84-75	49 Fed. Reg. 6164
Harley G. Hunter	84-20	49 Fed. Reg. 5675
Retherford Publications, Inc.	84-40	49 Fed. Reg. 4556

ATTACHMENT D

PUBLIC NOTICE

Federal Communications Commission - 1919 M Street, NW. - Washington, D.C. 20554



For recorded listing of releases and texts call 632-0002

For general information
call 632-7260

July 7, 1978 - BC

BROADCAST BUREAU IMPLEMENTS NEW FILE NUMBERING SYSTEM

2784

Effective Monday, July 10, 1978 (780710), the Broadcast Bureau will implement a computerized Broadcast Application Processing System (BAPS). BAPS will discontinue the file numbers currently in use and begin a new numbering system called the Application Reference Number (ARN). ARN will become the official number and will be used to identify and refer to applications and certain amendments filed on and after July 10, 1978.

The ARN will be eight digits in length, i.e., 780710AA. The first six digits format the year 78, month 07, and day 10, the application is tendered (received) at the Commission. The last two digits AA will be alphabetical and are assigned daily by the License Division beginning with AA, AB, AC, etc. continuing through ZZ, if necessary, and depending on workload. The alphabetical sequences are repeated each day and in the unlikely event that they are exhausted for one day, the last two characters, either one or both, may be numeric.

The tendered date will be the date the application is stamped in "RECEIVED" at the Office of the Secretary or the Mail Branch. The first six digits will reflect that date, although the application may not appear on a Public Notice until several days later. Unique identification of an application for a specific day will be determined by the last two digits in alphabetical sequence. The eight digits comprising the ARN will appear on a Public Notice along with the usual identifiers. The applicant will also be notified by postal card confirming receipt of the application and informing them of the ARN. Thereafter, the ARN is to be used in identifying and referring to the application in correspondence and related documents.

Applications accepted for filing will have a complete file number which includes, in addition to the ARN, the prefixes currently used by the Broadcast Bureau, i.e., BP, ERCT, BALH, etc. For example, an application for a new AM station received in the Secretary's Office on July 10, 1978, will have an ARN of 780710AA when it is tendered. When it is accepted, the prefix BP will be added to the ARN, i.e., BP-780710AA. It will appear on a Public Notice as accepted for filing with the new file number BP-780710AA.

-over-

Applicants will also be advised by postal card of the acceptance of the application and the file number. Amendments that currently receive new file numbers will also receive ARN's and new file numbers in the same manner.

All applications and amendments filed prior to July 10, 1978, will be processed under the old file numbers.

CERTIFICATE OF SERVICE

I, Beverly A. Abosch, a secretary in the law firm of Bechtel & Cole, do hereby certify that I caused copies of the foregoing Opposition to Motion to Dismiss to be placed in the U.S. mail, first class, postage prepaid, to the individuals on the attached service list, on this 7th day of February, 1985.

The Honorable Mark S. Fowler
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
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ATTN: Legal Ass't. Thomas Herwitz

The Honorable James H. Quello
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CERTIFICATION

I hereby certify that a copy of the foregoing was sent by first class mail, postage prepaid, this 20th day of April, 1993 to the following:

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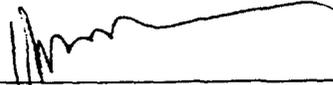
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