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Ray Jeter Brass

In re) MM DOCKET No.: 98-66
HICKS BROADCASTING OF INDIANA, LLC)
Order to Show Cause Why the)
License for FM Radio Station)
WRBR(FM), South Bend, Indiana,)
Should Not Be Revoked;)
AND)
PATHFINDER COMMUNICATIONS CORP.)
Order to Show Cause Why the)
License for FM Radio Station)
WBYT(FM), Elkhart, Indiana)
Should Not Be Revoked;)
AND)
Application of)
MICHIANA TELECASTING CORP.)
(ASSIGNOR))
AND) File Nos. BAL-960809GQ,
BALH-960809GR
PATHFINDER COMMUNICATIONS CORP.)
(ASSIGNEE))
For assignment of the licenses)
of:)
WNDU-AM-FM, South Bend, Indiana)

PAGES; 1 through 22
PLACE: Washington, D.C.
DATE: July 23, 1998

HERITAGE REPORTING CORPORATION

Official Reporters
1220 L Street, NW, Suite 600
Washington, D.C.
(202) 628-4888

FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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 For assignment of the licenses)
 of:)
)
 WNDU-AM-FM, South Bend, Indiana)

Courtroom 1, Room 227
 FCC Building
 2000 L Street, N.W.
 Washington, D.C.

Thursday,
 July 23, 1998

The parties met, pursuant to the notice of the
 Judge, at 9:00 a.m.

Heritage Reporting Corporation
 (202) 628-4888

BEFORE: HON. JOSEPH CHACHKIN
Administrative Law Judge

APPEARANCES:

On behalf of the Mass Media Bureau:

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On Behalf of Pathfinder:

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APPEARANCES: (Continued)

On Behalf of Niles Broadcasting:

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P R O C E E D I N G S

JUDGE CHACHKIN: Let's go on the record.

This proceeding concerns orders to show cause directed against Hicks Broadcasting of Indiana, LLC, and Pathfinder Communications Corp. The first order to show cause seeks a determination whether the license for FM Radio Station WRBR(FM), South Bend, Indiana, should not be revoked. The second one concerning Pathfinder seeks an order to show cause why the license for FM Radio Station WBYT(FM), Elkhart Indiana, should not be revoked.

In addition, there was also concern concerning applications for assignment of Michiana Telecasting Corp. to Pathfinder Communications Corp. However, in light of the dismissal of the assignment application, I assume litigation of that issue is now moot. We'll go into that further during the conference.

May I have the appearance of the parties? On behalf of Hicks Broadcasting of Indiana?

MR. WERNER: Eric Werner and Erwin Krasnow on behalf of Hicks Broadcasting, Your Honor.

JUDGE CHACHKIN: On behalf of Pathfinder Communications Corp.?

MR. BERNTHAL: Eric Bernthal, Everett Johnson and Allen Gardner, Latham & Watkins, Your Honor.

JUDGE CHACHKIN: On behalf of Michiana Telecasting

1 Corp.?

2 Let the record reflect there is no response.

3 On behalf of the Mass Media Bureau?

4 MR. SHOOK: James Shook, Roy Boyce and Kathryn
5 Berthot.

6 JUDGE CHACHKIN: And on behalf of Niles
7 Broadcasting Company?

8 MR. BRENNER: Dean Brenner and William Crispin,
9 Your Honor.

10 JUDGE CHACHKIN: All right.

11 The first matter I'd like to take up is as I
12 mentioned. Apparently Mr. Reynolds initially filed a Notice
13 of Appearance and then he subsequently dismissed the
14 application of assignment; is that correct?

15 MR. BERNTHAL: Yes, Your Honor.

16 JUDGE CHACHKIN: So that moots consideration of
17 issue nine listed in paragraph 58 of the designation order.

18 I was waiting for someone to file a motion to
19 dismiss. However, does the Bureau plan on doing anything?

20 MR. SHOOK: No, Your Honor. We had assumed that
21 on the basis of Michiana's submission that at some point you
22 would simply issue an order dismissing the designation.

23 MR. BERNTHAL: Well, Your Honor, we had intended
24 to request you to dismiss it as moot this morning, and to
25 ask you whether you wanted a formal motion or whether it

1 could simply be done by consensus here today and save you
2 the trouble of ruling on papers.

3 JUDGE CHACHKIN: Well, it can be done by
4 consensus, and I'll just confirm it in my order after the
5 prehearing conference the fact that it has been dismissed.

6 In my prehearing order, Order Prior to Prehearing
7 Conference, I set forth the procedures for discovery and for
8 the trial of the issues in this case, and I directed that by
9 June 25, the counsel are directed to meet for the purpose of
10 exploring proposed stipulations and discovery, as well as
11 any other prehearing procedures.

12 Did that meeting take place? And if so, what
13 happened?

14 MR. BERNTHAL: Yes, Your Honor, the meeting has
15 taken place, and while other counsel can speak to this, I
16 think that things are going very cooperatively and smoothly.
17 We've met. We're working out deposition schedules. We've
18 had fairly extensive document production already, which is,
19 I think, not yet complete, but well underway. I think all
20 counsel are cooperating fully, and as far as I know, famous
21 last words, there are no problems.

22 But I think that the reason for that is that we
23 all are of a common view that in the end most of the facts
24 in this case can end up being stipulated. The case is not
25 going to be about -- so much about fact determination as it

1 is about intent and motivation. And I think we're working
2 hard toward getting as much factual stipulation as possible.
3 The Bureau has already given us a fairly extensive request
4 for admissions. We've responded to it. We're admitting
5 most of what's been asked of us, and I think -- we're
6 hopeful that we'll have a completely smooth process here
7 pretrial.

8 JUDGE CHACHKIN: Mr. Shook, you have any comments?

9 MR. SHOOK: Well, by and large, I would agree with
10 that assessment. We may want to explore at hearing a bit
11 more than, you know, Mr. Bernthal suggests right now, but I
12 do see that there will be a fair number of stipulations, and
13 that given the material that we have in the admissions
14 response and I assume we're going to get an admissions
15 response shortly from Hicks, that there will be, you know,
16 much of the outlines of the case will have been established
17 at that point, and then we would use testimony to fill in
18 the blanks.

19 JUDGE CHACHKIN: Am I correct that the time for
20 filing any objections to the admissions is now past?

21 MR. SHOOK: Well, we've been working on this, I
22 guess you would say, rather informally in the sense that
23 from the time we submitted our request to both Pathfinder
24 and Hicks, you know, more than 10 days had passed, but we
25 were -- we understood that they were in the process of

1 preparing responses. And as Mr. Bernthal said, we did
2 receive Pathfinder's response yesterday, and we expect to
3 receive Hicks's shortly.

4 There were some, you know, general objections
5 stated in Pathfinder's responses, but nothing that I think
6 really affects, you know, what it is that we sought, so
7 we're not -- I don't see that litigation will ensue as a
8 result of that. Of course, it remains to be seen what Hicks
9 will actually tell us, but I have not heard from them that,
10 you know, there was anything that we submitted to them that
11 was objectionable, so I would presume at this point we would
12 have no serious problems with that.

13 As Mr. Bernthal said, we have been working out
14 deposition schedule. We are hopeful that a certain number
15 of depositions will be taken in the month of August. We
16 hope right now that it really doesn't involve Your Honor at
17 all.

18 JUDGE CHACHKIN: Well, that's my hope.

19 As far as production of documents, I assume that's
20 also moving smoothly?

21 MR. SHOOK: Well, from our perspective, it's
22 moving slowly, but at least it's moving. I mean, we have
23 received documents with respect to both -- or from both
24 Hicks and Pathfinder. We believe that, you know, there are
25 a fair number more documents to be looked at, but we don't

1 know yet until, you know, they are actually produced.

2 It's our understanding that additional documents
3 are going to be produced, you know, or made available to us
4 either late today or sometime tomorrow, and then we would
5 assume that there will be additional documents that will be
6 produced thereafter.

7 We have an understanding with both parties that
8 as, you know, documents are located and sent from the client
9 to the attorneys, that we will be notified so that documents
10 are being produced and reviewed on a rolling basis, if you
11 will.

12 JUDGE CHACHKIN: All right.

13 So apparently there is no interlocutory matter for
14 me to rule on at this time?

15 MR. SHOOK: Your Honor, desperately we tried to
16 find something, but --

17 (Laughter.)

18 JUDGE CHACHKIN: Well, I just congratulate the
19 parties on the extent of cooperation they're extending to
20 each other and the fact that this case is moving smoothly
21 without my having to rule on anything.

22 Well, is there anything particularly that the
23 parties want to discuss this morning?

24 MR. BERNTHAL: I think one thing that I'd like to
25 see if we can get a clarification from you, Your Honor,

1 would be on the issue of -- I think you issued an order
2 talking about written direct cases, which, I think, may
3 prove to be a less desirable way to proceed.

4 JUDGE CHACHKIN: I don't think -- I don't think --
5 excuse me.

6 MR. BERNTHAL: Yes.

7 JUDGE CHACHKIN: I didn't say that. I said
8 exchange of direct cases.

9 MR. BERNTHAL: Isn't there some reference to a
10 written case in an order? I think there --

11 JUDGE CHACHKIN: No, I said -- no, I didn't say
12 that. I didn't require you to bring the written case.

13 MR. BERNTHAL: Somewhere there was something about
14 a written case.

15 Well, if there is no desire on your part to have a
16 written case, then my concern is alleviated. It just seemed
17 to me that this was not a case that would likely be well
18 served by putting in a written direct case. The issue
19 really, again, I believe, is going to turn to intent,
20 motivation, credibility of people, and you have to look at
21 them and see them, and they have to tell you why they did
22 what they did and what they thought was right and wrong and
23 so on. And I don't think anybody is going to from either
24 side be particularly well served by a written direct case.

25 JUDGE CHACHKIN: Well, I didn't, I didn't require

1 it.

2 MR. BERNTHAL: And if you didn't ask for it, then
3 okay, that makes it easier.

4 JUDGE CHACHKIN: Well, if you look at my
5 prehearing order, it specifically says "exchange of direct
6 cases."

7 MR. BERNTHAL: Yes, I see that.

8 MR. JOHNSON: Judge Crachkin, I'm a little
9 confused by that. Can a witness testify at trial on direct
10 who has not offered an affidavit and hadn't exchanged that
11 affidavit in September?

12 JUDGE CHACHKIN: Yes, absolutely.

13 It's just this -- what I was talking about here,
14 if the parties do want to put in part of their case in
15 writing, I guess, then they --

16 MR. JOHNSON: It's not preclusive.

17 JUDGE CHACHKIN: That's right. It's certainly
18 not exclusive, no.

19 MR. JOHNSON: Thank you.

20 JUDGE CHACHKIN: So if you want to put in your
21 entire case orally, you can do so. All you have to -- your
22 responsibility is to notify the parties as to who your
23 witnesses are, and provide a brief summary of their expected
24 testimony, but that's the extent of your obligation.

25 MR. BERNTHAL: Fine. Well, we tried to get you

1 something to rule on, but you're not going to let us.

2 MR. WERNER: There is one additional item, Your
3 Honor, that we wanted to bring to your attention today in
4 connection with discovery.

5 Among the materials that we'll be producing, both
6 on behalf of Hicks Broadcasting and on behalf of Pathfinder,
7 are materials from some of the attorneys' files that worked
8 on the relevant transactions that are at issue in the case.

9 We've spoken with the Bureau staff and have
10 reached an agreement that, with respect to production of
11 those materials, that we're prepared to produce the
12 materials freely and without assertion of any
13 attorney/client privilege over the materials up to the point
14 at which the informal objection filed by Niles Broadcasting
15 was filed in this case, deeming that date to be the date at
16 which the issues that are now before this Court are now --
17 began to be litigated in earnest. And, therefore, all the
18 work product and communications from that point forward are
19 really communications in preparation and in anticipation of
20 litigation.

21 Mr. Shook has agreed that he would not use the
22 waiver of privilege with respect to the materials predating
23 the filing of the Niles informal objection to assert that a
24 waiver of privilege has been made with respect to the
25 materials that post-date that filing. And with that

1 understanding, we're prepared to move forward, and we should
2 be able to provide a good bit of those documents to the
3 Bureau either, as Mr. Shook said, later today or probably
4 tomorrow.

5 MR. SHOOK: And we concur with that, Your Honor.

6 JUDGE CHACHKIN: All right.

7 What is the role of Niles going to be in this
8 case? They were named as a party.

9 MR. BRENNER: We were named as a party. We have
10 provided the Commission in our written pleadings with all of
11 the information that we have, and I think our pleadings, if
12 anything, are certainly pretty complete. And, you know,
13 we're here but we don't have any particular role in mind
14 other than to see what happens.

15 JUDGE CHACHKIN: All right. I just thought the
16 parties should be aware of what exactly you're going to do
17 in this case, and I think you told us.

18 So you don't intend to present any witnesses as I
19 understand?

20 MR. BRENNER: No, not at this -- I mean, we have
21 no present intention of, you know, presenting any witnesses
22 or any other evidence of any kind.

23 JUDGE CHACHKIN: Any other matters the parties
24 want to take up at this time?

25 MR. BERNTHAL: Your Honor, there is one thing that

1 perhaps we could explore briefly. There is one factual
2 issue in the case which I think we're all -- I think is a
3 significant fact as the case has developed, and that is what
4 was actually asked -- I don't know how familiar you are so
5 far with the record, but the -- the Commission staff, in
6 processing the application, called counsel for Hicks and
7 requested that an amendment be filed, and an amendment was
8 filed and that amendment is a fairly significant event as
9 the case has developed.

10 What we do not know is what was asked to be
11 submitted in that amendment, what was asked by Commission
12 staff to be submitted in the amendment because the request
13 was in a telephone conversation between counsel and the
14 Commission processing attorney. There was no written
15 request for an amendment.

16 The only evidence that exists so far is the
17 amendment itself which was intended to be responsive, and a
18 letter, both of which will -- a letter from Hicks' counsel
19 to Hicks which addresses the subject. There is nothing that
20 we know of that indicates what -- from the Commission's
21 perspective, any evidence of what question was actually
22 asked, and it has some significance.

23 What I thought perhaps we could address briefly
24 here is how we might best get whatever information there may
25 be or determine that there is no information at the

1 Commission that sheds lights on this question.

2 We're mindful of the fact that you have
3 limitations in Commission rules about bringing Commission
4 personnel in as witnesses and taking their depositions. And
5 we are certainly open to any other sensible expeditious way
6 to get at either whatever does exist or the determination
7 that nothing exists that would shed light on this matter.
8 And in that vein, we filed a FOIA request yesterday to find
9 out what is in the Commission's file.

10 What I'm hoping is that -- although I'm not an
11 expert on FOIA, I know it takes a hell of a long time
12 sometimes, and what I'm hoping is that perhaps Mr. Shook can
13 help us just get at whatever is there or is not there so
14 that we have that piece of information and it's shared by
15 everybody in the case. It may well be that there is just
16 nothing there. But if that's the case, we'd like to know
17 that as well, and I think we're entitled to know it, and we
18 can know it by either being provided with a copy of the
19 file, the processing file and the assignment application,
20 which may or may not contain a notation of that
21 conversation. We would accept a representation from the
22 Bureau as to what is or is not there. Anything that works
23 that gets that information to the parties in an expeditious
24 manner would be acceptable to us.

25 JUDGE CHACHKIN: Mr. Shook?

1 MR. SHOOK: Your Honor, this is something that I
2 would have to, you know, consult with my superiors about.
3 I'm learning about the FOIA request now. I don't see it as
4 a large issue from our end. I think that it would be
5 possible for us to, you know, work out some kind of
6 stipulation as to what it was the Bureau asked Hicks to
7 produce by way of an amendment.

8 Likewise, we do right now intend to depose Mr.
9 Campbell, who was representing Hicks at the time, and one of
10 the things that we were going to inquire of him was what was
11 he asked to do. So there will be probably two ways of
12 answering the question that Mr. Bernthal raised; one from
13 Mr. Campbell and one ultimately from the Bureau.

14 But I'm not at all certain at this point, you
15 know, how the Bureau would do it. I'm hopeful that there is
16 some way that we can do it fairly quickly and cooperatively,
17 but I cannot say at this time exactly how that would be.

18 MR. BERNTHAL: Well, I have -- Your Honor,
19 obviously Mr. Campbell is not a Commission employee, and so
20 there are conventional means to get at his recollection of
21 that conversation, and I trust the Bureau will pursue those,
22 and that's why -- the reason I'm raising it here is that the
23 conversation was initiated by a person who worked at the
24 Commission at the time whose identity we don't know, and
25 there may or may not be some kind of a notation in the file

1 that would help shed light on the issue.

2 There are going to be recollections -- this
3 conversation occurred five years ago and -- four years ago,
4 excuse me, and the best evidence obviously would be if the
5 other party, the party who had initiated the call had asked
6 the question -- we're here and we're on a witness stand and
7 said, "This is what I asked." But I suspect that that may
8 be problematic because that person -- again, I don't even
9 know if it's a current or former Commission employee. We
10 don't even know who it is -- that person may not be
11 available because he or she is a Commission employee.

12 So we'd be happy to work it out in any way, a
13 stipulation as to what the Commission's file shows or to
14 what the Commission's processor would say or something, you
15 know. But I think it has some significance in the case.

16 JUDGE CHACHKIN: Well, I assume, since the Bureau
17 has the burden of proof in this case, that if they want to
18 pursue the question of whether or not there was a
19 misrepresentation with regard to what was said in this
20 conversation with this Commission employee, that they're
21 going to have this -- put this individual on the stand to
22 testify.

23 Am I wrong, Mr. Shook? How are you going to prove
24 it unless you put him on the stand and testify if his
25 recollection differs with the recollection of outside

1 counsel?

2 MR. SHOOK: Well, I guess that's something that
3 we'll have to assess as the day approaches. As things stand
4 right now, we don't even know whether there is a
5 disagreement between that person, whoever it is because,
6 frankly, I don't know either right now.

7 JUDGE CHACHKIN: You don't know the Commission
8 employee we're talking about here?

9 MR. SHOOK: No, Your Honor. I'm not -- I'm not
10 certain. There are a number of people who it could have
11 been, but I do not know personally right now who it was.
12 It's just not something I focused on yet.

13 But whatever it is that person asked, if it turns
14 out that he and Mr. Campbell or she and Mr. Campbell have
15 the same recollection as to what it was that was requested,
16 then from that standpoint there is no need to have that
17 person, you know, say anything.

18 JUDGE CHACHKIN: But doesn't the designation order
19 indicate that there is disagreement, what was asked, or am I
20 wrong? Doesn't it in a discussion here, the designation
21 order, maybe someone could point me to it.

22 MR. SHOOK: Your Honor, what I understood to be
23 the possible misrepresentation was, you know, what it was
24 that Hicks was asked to produce and then, in turn, what it
25 was that Hicks asked Mr. Dille to do. And so from a

1 misrepresentation standpoint, we've got a couple of states
2 of mind involved.

3 And as far as -- you know, I mean, what's going to
4 be important are the states of mind of Mr. Dille, and to the
5 extent he was involved at all, Mr. Hicks, and that , in
6 turn, would have been probably a product of whatever it was
7 that Mr. Campbell said to them.

8 MR. BERNTHAL: Well, Your Honor, that's only part
9 of the story though. Obviously --

10 MR. SHOOK: That's just focusing on that --

11 MR. BERNTHAL: Yes.

12 MR. SHOOK: -- submission though. That's not
13 focusing on the rest of it.

14 MR. BERNTHAL: I understand. But to the extent
15 we're looking at that submission, which is clearly an issue
16 in this case, I suspect that the recollections of people may
17 vary. But, in any event, we're entitled to know what the
18 Commission records show, if anything, or what the
19 Commission's processing attorney recalls, if anything, about
20 the question that was asked.

21 I mean, when an application is processed, there
22 are two ways that the Commission elicits information. One
23 is in writing, there is a request for an amendment in
24 writing, and sometimes it's handled less formally. And
25 those of us who practice in the field know we get calls all

1 the time saying, "Look, give us this or give us that, and
2 we'll grant your application." And it was the latter sort,
3 apparently, in this case. There was no writing.

4 Now, there was a conversation between a Commission
5 processing attorney and Mr. Campbell, who represented Hicks,
6 but I think it's not clear what was asked of Mr. Campbell,
7 and in all events, we're entitled to know whatever evidence
8 there exists within the Commission's records and from the
9 party who initiated the call as to what they recall was
10 asked, if you know.

11 I mean, the answer may come back that there is
12 nothing in the file and the person has no recollection, and
13 then we're left with that, and we go from there.

14 But on the other hand, if there is something in
15 there that sheds light on it, we're entitled to know it, and
16 more importantly, we're entitled to know it early in the
17 game, not walking into the hearing room and hearing it then.

18 JUDGE CHACKIN: I agree. First of all, you're
19 entitled to know who this employee is. Then when you find
20 out who this employee is, then you could go ahead with
21 written interrogatories if you want to proceed in that
22 fashion. And if you feel there is a need to depose this
23 individual, the Commission has in some cases, and perhaps
24 this case will be applicable, permitted depositions to be
25 taken.

1 But first, Mr. Shook, you've got to determine who
2 this individual is and provide that name to counsel, so
3 counsel could then proceed with discovery or how he wants
4 to proceed with discovery if you want to pursue this matter.

5 MR. SHOOK: Well, Your Honor, as I said, it was
6 brought to my attention today that the FOIA request was
7 made, and we can start to talk and work things out, as we
8 have with other things.

9 JUDGE CHACHKIN: All right. Well, over and above
10 whether there is a FOIA request, they have a right to know
11 who this individual is, and as I say, they can proceed with
12 interrogatories or depositions, if they feel that's
13 unsatisfactory. But a credibility question exists here
14 between the outside counsel and what his recollection was
15 and what the Bureau counsel, or staff counsel believes
16 occurred.

17 Well, that's something I assume that you will
18 proceed with forthwith, Mr. Shook, and endeavor to find out
19 who this individual is and to provide that name to Mr.
20 Bernthal, and then we can move on from there, but that
21 should be the first order of business.

22 Anything further?

23 MR. BERNTHAL: We have nothing further, Your
24 Honor.

25 JUDGE CHACHKIN: Anyone else have anything else

1 they want to bring up at this time?

2 (No response.)

3 JUDGE CHACHKIN: All right, if not, we are in
4 recess until the date of the hearing, October 6, 1998. If
5 something happens that requires me to rule, I'll be happy to
6 hold a further conference and take up the matter.

7 MR. BERNTHAL: Thank you, Your Honor.

8 JUDGE CHACHKIN: All right.

9 MR. SHOOK: Thank you.

10 (Whereupon, at 9:25 a.m., the prehearing
11 conference was concluded.)

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REPORTER'S CERTIFICATE

FCC DOCKET NO.: 98-66
CASE TITLE: In Re: Hicks, Pathfinder et al
HEARING DATE: July 23, 1998
LOCATION: Washington, DC

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

Date:

7/23/98

Scott David Britt

Official Reporter
Heritage Reporting Corporation
1220 "L" Street, N.W.
Washington, D.C. 20005

TRANSCRIBER'S CERTIFICATE

I hereby certify that the proceedings and evidence were fully and accurately transcribed from the tapes and notes provided by the above named reporter in the above case before the Federal Communications Commission.

Date:

7/27

Joyce Lee

Official Transcriber
Heritage Reporting Corporation

PROOFREADER'S CERTIFICATE

I hereby certify that the transcript of the proceedings and evidence in the above referenced case that was held before the Federal Communications Commission was proofread on the date specified below.

Date:

7/27

Bob Moser

Official Proofreader
Heritage Reporting Corporation