

Law Offices

HOLLAND & KNIGHT LLP

2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202

202-955-3000
FAX 202-955-5564
www.hklaw.com

Atlanta	Northern Virginia
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August 23, 1999

RANDALL W. SIFERS
202-828-1873

Internet Address:
rsifers@hklaw.com

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: MM Docket No. 99-153;
File Nos. BRCT-940407KF and BPCT-940630KG

Dear Madam Secretary:

Transmitted herewith, on behalf of Reading Broadcasting, Inc., is an original and six copies of its Reply to Mass Media Bureau's Comments on Adams Motion to Enlarge Issues in the above-referenced proceeding.

An extra copy of the Motion is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If should have any questions please contact Thomas J. Hutton at (202) 828-1892 or the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP

Randall W. Sifers

Randall W. Sifers

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of) MM Docket No. 99-153
)
READING BROADCASTING, INC.) File No. BRCT-940407KF
)
For Renewal of License of)
Station WTVE(TV), Channel 51)
Reading, Pennsylvania)
)
and)
)
ADAMS COMMUNICATIONS) File No. BPCT-940630KG
CORPORATION)
)
For Construction Permit)

To: Administrative Law Judge Richard L. Sippel

REPLY TO MASS MEDIA BUREAU'S COMMENTS ON
ADAMS' MOTION TO ENLARGE ISSUES

Thomas J. Hutton
Randall W. Sifers

HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Suite 400
Washington, DC 20037
(202) 828-1892

Counsel for
Reading Broadcasting, Inc.

August 23, 1999

SUMMARY

The Mass Media Bureau, in its *Comments to Adams' Motion to Enlarge Issues*, concludes that, with regard to Adams' first requested issue, Adams has failed to raise a material question of fact, and therefore, opposes its addition to this proceeding. Reading concurs with the Bureau.

The Bureau further comments that Adams' allegations appear to raise a question about Micheal Parker's candor, which, absent an adequate explanation by Reading, warrants addition of the second requested issue. Reading believes that the Bureau will find, in Reading's *Opposition*, the explanation it seeks. However, out of abundant caution, in this *Reply*, Reading augments the arguments set forth in its *Opposition* to demonstrate beyond any doubt that neither Adams nor the Bureau has presented a *prima facie* case for designating the second requested issue.

Section 1.229(d) of the Commission's Rules required Adams, as the proponent of a motion to enlarge issues, to set forth specific allegations of fact, supported by either affidavits of persons having personal knowledge or documents subject to official notice, demonstrating that substantial and material questions of fact exist.

Adams, in its *Motion*, failed to provide any sworn statement or affidavits of any person having personal knowledge of the facts it raises. Adams' key factual allegation for its second requested issue, that Micheal Parker intended to deceive the Commission by failing to provide full and candid information concerning the *Religious Broadcasting* and *Mt. Baker* decisions in multiple applications, is supported by nothing more than pure, unadulterated speculation, conjecture,

innuendo, and surmise. The Bureau's *Comments* fail to address the critical shortcomings in Adams' *Motion* or the line of cases cited by Reading that intent to deceive cannot be inferred when the information in question is a matter of public record, disclosed by the application.

Therefore, the Presiding Officer must deny Adams' request to add the second requested issue.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of)	MM Docket No. 99-153
)	
READING BROADCASTING, INC.)	File No. BRCT-940407KF
)	
For Renewal of License of)	
Station WTVE(TV), Channel 51)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS)	File No. BPCT-940630KG
CORPORATION)	
)	
For Construction Permit)	

To: Administrative Law Judge Richard L. Sippel

**REPLY TO MASS MEDIA BUREAU'S COMMENTS ON
ADAMS' MOTION TO ENLARGE ISSUES**

1. Reading Broadcasting, Inc. ("Reading"), by its attorneys, hereby submits its Reply to the *Mass Media Bureau's Comments on Motion to Enlarge Issues* ("Comments") filed on August 11, 1999 and served by mail.
2. Background. Adams Communications Corporation ("Adams") seeks to add two issues to this proceeding against Reading: (1) to determine whether, in light of the previously adjudicated misconduct of Micheal Parker, Reading is qualified to remain a Commission licensee; and (2) to determine whether Micheal Parker has engaged in a pattern of misrepresentation and/or lack of candor in failing to advise the Commission of the actual nature and scope of previously

adjudicated misconduct and, if so, the effect of such on Reading's qualifications to remain a licensee.

3. First Requested Issue. In its *Comments*, the Mass Media Bureau (the "Bureau") observes that the activities Adams relies on as the basis for its first requested issue occurred more than ten years ago and thus extend beyond the limitations period specified by the Commission.¹ *Comments* at ¶6. Accordingly, the Bureau concludes that Adams has failed to raise a material question of fact, and therefore, the first requested issue should not be added. *Id.* Reading concurs with the Bureau's conclusion. Additionally, Reading herein incorporates by reference the arguments set forth in its *Opposition to Motion to Enlarge Issues* ("*Opposition*") regarding Adams' first requested issue and respectfully requests the Presiding Officer to deny Adams' request.

3. Second Requested Issue. The Bureau comments that Adams' allegations appear to raise a question about Micheal Parker's candor, which, absent an adequate explanation by Reading, warrants addition of the second requested issue. *Comments* at ¶5.

4. Reading observes that its *Opposition* was filed on the same day as the Bureau's *Comments*. Accordingly, the Bureau's *Comments* were prepared without benefit of reviewing the arguments and explanations set forth in Reading's *Opposition*. Reading, therefore, cannot determine the extent to which its *Opposition*

¹ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1229 at ¶105 (1986), *modified*, 5 FCC Rcd 3252 (1990), 6 FCC Rcd 3448 (1991), 7 FCC Rcd 6564 (1992) ("*Character Policy Statement*").

provides an adequate explanation to the Bureau. Accordingly, Reading herein augments the arguments it set forth in its *Opposition* against Adams' second requested issue in order to demonstrate beyond any doubt that Adams has failed to make a *prima facie* case for designating its second requested issue.

Adams Has Failed To Make A *Prima Facie* Showing, In Accordance With Section 1.229(d) Of The Commission's Rules, That Parker Has Engaged In A Pattern Of Misrepresentation And/Or Lack Of Candor

5. The proponent of a misrepresentation and/or lack of candor issue has the burden of coming forward with a *prima facie* showing, in accordance with Section 1.229 of the Commission's Rules. *See, e.g., Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172 at ¶9 (Rev. Bd. 1981); *Alabama Citizens for Responsive Public Television*, 73 FCC 2d 615 at ¶19 (1979). Section 1.229(d) requires that motions to enlarge issues be supported by "affidavits of a person or persons having personal knowledge" of the facts alleged therein, or facts of which the Commission may take official notice. This is particularly applicable with respect to allegations of misrepresentation and/or lack of candor. Speculation and innuendo will not suffice. *See Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172 at ¶9 (Rev. Bd. 1981); *Alabama Citizens for Responsive Public Television, Inc.*, 73 FCC 2d 615, 620 (1979); *Itawamba County Broadcasting Co., Inc.*, 45 FCC 2d 871, 872 (Rev. Bd. 1974); *Eastern Broadcasting Corp.*, 29 FCC 2d 472, 474-75 (Rev. Bd. 1971).

6. Significantly, Adams, in its *Motion*, does not satisfy the requirements of Section 1.229(d). Adams has failed to provide any sworn statements or affidavits of any person having personal knowledge of the facts or attesting to the

truthfulness of the allegations it raises. As explained below, its conclusions, which the Bureau appears to adopt in its *Comments*, are based entirely on conjecture and speculation.

7. Further, the Bureau's *Comments* overlook the fact that Adams has failed in certain instances to present any facts of which the Commission can take official notice.² As support for its allegations, Adams provides as Attachment G what is purported to be an exhibit from an application that was dismissed in 1993 and is no longer available from the Commission's files.³ Not only is the relevance of this exhibit suspect, particularly in view of its isolation from the underlying application and without evidence that it constitutes the entire exhibit or any indication of whether any amendments were filed to the application, the application itself is no longer publicly available. Therefore, official notice cannot be taken.

² Official notice permits the Commission "to dispense with the conventional process of proof . . . when the matter in question is . . . some document or record that is in the agency's files (in which case it is an item that can be produced or identified)." *Newton Television Limited*, 4 FCC Rcd 2561 at ¶3 (1989), citing B. Schwartz, ADMINISTRATIVE LAW sec. 7.16 at 376 (2d ed. 1984). Additionally, Rule 201(b) of the Federal Rules of Evidence provides that a judicially noticed fact must be one that is not subject to reasonable dispute in that it is either generally known within the jurisdiction of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

³ In its *Motion*, Adams makes the unsupported claim that the application, which it "located in the Commission's files," is pending. *Motion* at n.11. As Reading discovered, the Commission's database shows that the application was dismissed in 1993. *Opposition* at ¶51. Additionally, the application is no longer available from the Commission's files. *Id.* Likewise, Adams' Attachment F is missing from the Commission's files.

Accordingly, Adams' showing for its second requested issue is insufficient to warrant further inquiry to the extent it is based on unavailable documents.

8. Adams' key factual allegation, for its second requested issue, that Micheal Parker intended to deceive the Commission by failing to provide full and candid information concerning the *Religious Broadcasting*⁴ and *Mt. Baker*⁵ decisions in multiple applications, *Motion* at ¶11-13, is supported by nothing more than pure, unadulterated speculation, conjecture, innuendo, and surmise. It is well settled that issues will not be added on this basis. See *Lutheran Church/Missouri Synod*, 10 FCC Rcd 9880 at ¶268 (ALJ 1995); *Heidi Damsky*, 8 FCC Rcd 6242 at ¶10 (Rev. Bd. 1993); *Barry Skidelsky*, 7 FCC Rcd 1 at ¶28 (Rev. Bd. 1992); *Folkways Broadcasting Co., Inc.*, 33 FCC 2d 806, 811 at ¶¶11-14 (Rev. Bd. 1972); *West Central Ohio Broadcasters, Inc.*, 1 FCC 2d 1178 (Rev. Bd. 1965).

9. Rather than providing sworn statements or affidavits in support of its allegation, as required by Section 1.229(d), Adams merely sets forth three theories that serve as surrogates for the required showing. The Bureau's *Comments* do not show why any of these three theories should satisfy the requirements of Section 1.229.

10. First, Adams alleged that each application contained "misleadingly innocent descriptions" of the *Religious Broadcasting* and *Mt. Baker* decisions.

⁴ *Religious Broadcasting Network*, 2 FCC Rcd 6561 (ALJ 1987), *modified*, 3 FCC Rcd 4085 (Rev. Bd. 1988).

⁵ *Mt. Baker Broadcasting Co., Inc.*, 3 FCC Rcd 4777 (1988).

Motion at ¶11. The Bureau agreed that the descriptions in question failed to “fairly disclose all relevant facts regarding Parker.” *Comments* at ¶8. Even though the applications contained an exhibit disclosing the underlying decisions (which Adams tacitly acknowledges, *Motion* at ¶21), Adams opines and the Bureau apparently concurs that mere disclosure is insufficient. This position is without merit. Section 73.3514(a) of the Commission’s Rules requires that “[e]ach application shall include all information called for by the particular form on which the application is required to be filed.” The Commission, at its discretion, after reviewing an application, can require an applicant to submit additional documents and written statements if it deems necessary. *See* 47 C.F.R. § 73.3514(b).

11. Rather than offering a legal basis for surmising that Micheal Parker intended to deceive the Commission by failing to advise the Commission of the nature and extent of the *Religious Broadcasting* and *Mt. Baker* decisions, Adams merely declares that “[a]ll applicants have an undeniable obligation to be fully forthcoming as to all facts and information that may be decisionally significant to their applications,” *Motion* at ¶26, and cites three cases, *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Silver Star Communications-Albany, Inc.*, 102 FCC 2d 1179, 1211(1986);⁶ and *Fox River*

⁶ Reading notes that Adams apparently has provided either the wrong citation or wrong case name in citing this decision. To the extent that Adams intended to rely on *Silver Star Communications – Albany, Inc.*, 6 FCC Rcd 6905 (1991), that case stands for the proposition that it is not sufficient to merely show that one could infer deception or concealment from the circumstantial evidence presented. Rather, the proponent must show that it is more likely than not that deceptive intent was present.

Broadcasting, Inc., 93 FCC 2d 127 (1983), to support its position. The Bureau likewise cites the *Swan Creek* and *Fox River* decisions. *Comments* at ¶7.

12. The holdings in these cases do not support designation of a misrepresentation/lack of candor issue in this case. For example, in *Swan Creek*, the Court found substantial evidence to support a finding of lack of candor based on sworn testimony coupled with the applicant's attempts to reconcile inconsistencies by retracting information from an application. The finding of lack of candor was not based on deceptive intent stemming from certifications made by the applicants in the applications. In fact, the Court stated, in relevant part, that although the applicants made an honest mistake when filing the applications, and were perhaps inept when completing the applications, "there is nothing in the record to suggest that [the applicants] were deceitful applicants engaged in some fraudulent enterprise designed to misuse the licensing process." *Swan Creek*, 39 F.3d 1217 at n.8.

13. Likewise, in *Fox River*, the Commission found that although the applicant's sole owner may have lacked care in making statements before the Commission, it did not support a finding of significant misconduct. *Fox River*, 93 FCC 2d 127 at ¶4. In fact, the Commission disavowed the Review Board's suggestion "that lack of candor may involve failure to provide information in the absence of any deceptive intent." *Fox River Broadcasting, Inc.*, 93 FCC 2d 127 at ¶6.

14. Reading agrees that applicants are obligated to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. However, because the Commission is responsible for granting applications, it must determine what information is decisionally significant and whether the information provided by the applicant is sufficient for it to render a decision. If the Commission determines that additional information is necessary, it is empowered to require the applicant to provide additional information. After-the-fact conjecture about what the Commission might have deemed relevant or useful does not support a lack of candor issue.

15. Unlike the matter here, the cases the Bureau cites relate to situations where the Commission found through substantial evidence that the applicant had intentionally deceived the Commission. None of those cases stand for the proposition that the failure of an applicant to discuss, at length, the details of Commission decisions in subsequent applications demonstrates an intent to deceive or otherwise warrant the addition of a misrepresentation and/or lack of candor issue.

16. Although the Bureau, in hindsight, may not be satisfied with the scope of information that Micheal Parker provided in the applications and may believe that certain information was omitted or could have been better described, it is an altogether different matter to conclude that there was deliberate deception. It is beyond dispute that the *Religious Broadcasting* and *Mt. Baker* decisions were disclosed on the applications. As the Court stated in *Swan Creek*, “[t]he

Commission will not disqualify an applicant . . . for a negligent omission.” *Swan Creek*, 39 F.3d 1217, 1222. *See also Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172 at ¶18 (Rev. Bd. 1981) (“The Commission will not infer deceptions or improper motives from an enumeration of alleged application errors, omissions, or inconsistencies, accompanied by speculation and surmise but lacking factual support”). The Bureau’s *Comments* completely fail to consider the line of cases holding that intent to deceive cannot be inferred when the information in question is a matter of public record, disclosed by the applicant. *See Opposition* at 32 n.15.

17. In the instant case, no substantial and material evidence has been presented that Micheal Parker attempted to deceive or mislead the Commission in its applications. As the Commission has stated in numerous proceedings, substantial evidence of an intent to deceive is the *sine qua non* of a misrepresentation or lack of candor showing. *See, e.g., Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Weyburn Broadcasting Ltd. Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *RKO General, Inc. v. FCC*, 670 F.2d 215, 225 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1974 (1982); *Armando Garcia*, 3 FCC Rcd 1065, 1066 (Rev. Bd. 1988) ; *Riverside Broadcasting Co., Inc.*, FCC 86-236 (released May 14, 1986); *Scott & Davis Enterprises*, 88 FCC 2d 1090, 1099 (Rev. Bd. 1982).

18. As Reading set forth in its *Opposition*, the disclosure of the *Religious Broadcasting* and *Mt. Baker* decisions in the exhibit to the applications, with

accurate FCC document numbers, undercuts any inference of an intent by Micheal Parker to deceive the Commission regarding whether any character issues had ever been added or requested against these applications. *Opposition* at ¶59. Because the underlying decisions were disclosed, it is not possible to conclude that Micheal Parker engaged in intentional concealment in failing to discuss at length the details of each decision.

19. Adams' second theory for concluding that Micheal Parker misled the Commission is based on the misplaced notion that it is too unreasonable to conclude that the Commission's staff would grant any of the applications in question had it been fully apprised of the nature and extent of Micheal Parker's alleged misconduct. Rather than accepting that information described in the exhibits to the applications was fully available to the Commission's staff when processing the applications, Adams resorts to speculation and surmise about how the staff members processed these particular applications. For example, Adams surmises: "[r]elying on the descriptions of the history of his earlier applications provided by Mr. Parker, the Commission's processing staff had no reason to believe that any serious questions had been raised in earlier proceedings" *Motion* at ¶21; "where the decisions . . . gave no hint of serious character qualifications questions . . . , the Commission would presumably not have bothered to have those decisions published in the official reporter" *Motion* at ¶24; and "[p]rovided with only Mr. Parker's self-serving redacted take on that history, the Commission's staff was willing to grant those applications." *Motion* at ¶25.

20. Likewise, the Bureau comments that the descriptions of Micheal Parker's prior history before the Commission in certain applications "erroneously characterize the Review Board's conclusion in *Religious Broadcasting* and, apparently, seek to discourage further inquiry into Parker's actions." *Comments* at ¶8. However, as Reading explained in its *Opposition*, even though the ALJ had earlier added a character issue in *Religious Broadcasting*, at the point of final disposition, that issue had been dealt with and there were no unresolved character issues pending. *Opposition* at ¶58. The conclusion that the description of the Review Board's decision was erroneous appears to be based on a misreading of that decision.

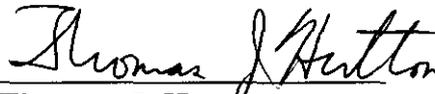
21. The Bureau's *Comments* also appear to overlook the requirements of Section 1.229. Rather than providing sworn statements or affidavits from parties with personal knowledge as to the review and processing of these applications, as required by Section 1.229(d), Adams' factual support is based entirely on unadulterated speculation, conjecture and surmise. However, the Bureau's actions in the Norwell, Massachusetts proceeding and the *HDO* for this case refute any inference that the Commission, if made aware of the nature and extent of Micheal Parker's past misconduct, would be unwilling to grant applications in which Micheal Parker is a party.

22. Adams' third theory to support its allegation is that even though the *Religious Broadcasting* and *Mt. Baker* decisions were disclosed in exhibits to the applications, Micheal Parker intended to deceive the Commission by failing to

provide the full official citation to the reported decisions. *Motion* at ¶23. The Bureau's *Comments* do not appear to support this theory of the case, which is based solely on unsupported conjecture.

23. In view of the foregoing, the Bureau has failed to show any facts presenting a *prima facie* case for a character issue to be designated against Reading. All of the allegations as to Micheal Parker's intent are supported by nothing more than pure, unadulterated speculation, conjecture and surmise. Where the underlying facts were a matter of public record cited by the applicant, it is impossible to infer an intent to deceive. Therefore, the Presiding Officer must deny Adams' *Motion*.

Respectfully submitted,
READING BROADCASTING, INC.

By: 
Thomas J. Hutton
Randall W. Sifers

Its Attorneys

HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Suite 400
Washington, DC 20037
(202) 828-1892

August 23, 1999

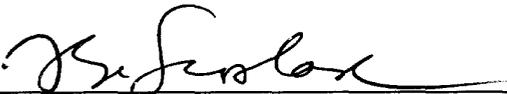
CERTIFICATE OF SERVICE

I, Ily Reis, a secretary in the law firm of Holland & Knight, LLP, do hereby certify that on August 23, 1999, a copy of the foregoing REPLY TO MASS MEDIA BUREAU'S COMMENTS ON ADAMS' MOTION TO ENLARGE ISSUES was delivered by hand to the following:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C864
Washington, DC 20554

James Shook, Esq.
Enforcement Division
Mass Media Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-A463
Washington, DC 20554

Gene A. Bechtel
Harry F. Cole
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, DC 20036
Counsel for Adams Communications Corporation



Ily Reis