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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	)	

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To: Administrative Law Judge Richard L. Sippel

REQUEST FOR PERMISSION TO FILE APPEAL

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SUMMARY

Reading Broadcasting, Inc. ("Reading") requests permission to appeal the ruling set forth in the *Memorandum Opinion and Order*, FCC 99M-61 (released October 15, 1999), in which the Presiding Officer modified, in part, his prior ruling, *Memorandum Opinion and Order*, FCC 99M-49 (released September 3, 1999).

In modifying the ruling, the Presiding Officer, without requiring adherence to the statutory standard for adding issues, added the second issue requested by Adams. By departing from the law, the Presiding Officer, in effect, has established a new law or novel Commission policy which warrants review. Reading is adversely affected as a result of the modified ruling because it will be required to defend itself against an improperly added issue.

TABLE OF CONTENTS

Summary ii

Background 1

Standard for Appealing Interlocutory Ruling 2

I. The Mass Media Bureau's Comments, In The Absence Of Affidavits From Persons With Personal Knowledge, Do Not Support Addition Of The Second Issue 4

II. The Cases Cited For Authority In The *Modified MO&O* Do Not Support The Addition Of The Second Issue 7

III. Adams' Second Requested Issue Was Addressed In The *Two If By Sea Broadcasting* Decision And Subsequently In The Norwell, Massachusetts Assignment Application 11

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To: Administrative Law Judge Richard L. Sippel

REQUEST FOR PERMISSION TO FILE APPEAL

1. Pursuant to Section 1.301(b)(3) of the Commission's Rules, Reading Broadcasting, Inc. ("Reading"), by its attorneys, hereby requests permission to appeal the ruling set forth in *Memorandum Opinion and Order*, FCC 99M-61 (released October 15, 1999) ("*Modified MO&O*"), in which the Presiding Officer modified, in part, his prior ruling, *Memorandum Opinion and Order*, FCC 99M-49 (released September 3, 1999) ("*First MO&O*").

2. Background. On July 15, 1999, Adams Communications Corporation ("*Adams*") filed a *Motion to Enlarge Issues* ("*Motion*") in which it sought to add two issues to this proceeding against Reading: (1) to determine whether Reading, in light of the previously adjudicated misconduct of Micheal Parker, Reading's president, director and substantial shareholder, 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 fully advise the Commission of the actual nature and scope of such previously adjudicated misconduct and, if so, the effect of such on Reading's qualifications to remain a licensee.

3. In the *First MO&O*, the Presiding Officer concluded that Adams' *Motion* did not contain specific allegations of fact necessary to support addition of the issues, and therefore, denied Adams' motion to add two character issues in this proceeding against Reading. Subsequent to that ruling, on September 13, 1999, Adams filed its *Request for Permission to File an Appeal* ("*Request*"). By *Memorandum Opinion and Order*, FCC 99M-61 (released October 15, 1999), the Presiding Officer denied Adams' *Request* and modified a portion of his ruling in the *First MO&O*.

4. Standard for Appealing Interlocutory Rulings. Section 1.301(b)(3) provides that any party adversely affected by a modified ruling may file a request with the presiding officer for permission to file appeal. Appeals of interlocutory rulings of presiding officers shall be filed only if allowed by the presiding officer. The request must "contain a showing that the appeal presents a new or novel question of law or policy and the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception." *See* 47 C.F.R. § 1.301(b). In considering the request for appeal, the presiding officer will either allow or disallow the appeal or modify the underlying ruling.

5. Because Reading will be required to defend itself against an improperly added issue, Reading is adversely affected by the modified ruling, and therefore, files the instant request. Adams, as the moving party, failed to meet the standards required for adding the second issue. By adding the second issue without requiring that the pleading standard be met, the Presiding Officer has committed egregious error. Further, by departing from the law, the Presiding Officer, in effect, has established a new law or novel Commission policy which warrants Commission review.

6. As a preliminary matter, Reading is thoroughly baffled over the Presiding Officer's decision to wholly change his legal analysis to arrive at the conclusion to add the second issue. No new facts have been presented. The law has not changed. Yet the extent of differences in legal reasoning employed together with the conclusions drawn from that reasoning between the two decisions is utterly striking. For example, in the *First MO&O*, the Presiding Officer concluded that "in view of Parker's basically accurate disclosures and the Bureau's actual knowledge in 1997 of prior adverse conclusions on Parker's character, there was no reasonable ability for Parker or Reading to deceive the Bureau." *First MO&O* at ¶21. However, in the absence of any new facts or error with regard to the second issue, the Presiding Officer concluded in his modified ruling "that the circumstances of Parker's incomplete disclosures on multiple occasions raise substantial questions that require further inquiry." *Modified MO&O* at ¶17.

I. The Mass Media Bureau's Comments, In the Absence Of Affidavits From Persons With Personal Knowledge, Do Not Support Addition Of The Second Issue.

7. The Presiding Officer stated that his decision to add the second issue was based in significant part on the Mass Media Bureau's comments. See *Mass Media Bureau's Comments on Request for Permission to File Appeal* ("*MMB Comments*"), filed September 27, 1999. *Modified MO&O* at ¶18 ("Of significance in adding the issue is the Bureau's stated belief that it was misled by Parker's nondisclosures and that as a result, the Bureau granted the assignment"). However, a review of the *MMB Comments* shows the Presiding Officer's reliance on the Bureau's comments is misplaced. Rather than affirmatively stating that it was actually misled by the alleged nondisclosures, the Bureau merely opined that "the key question is whether the descriptions as a whole fairly apprised the staff and any casual reader that they should read the referenced decisions and thereby gain a better appreciation of Parker's activities before making licensing decisions. In the Bureau's view, they did not." *MMB Comments* at ¶7.

8. In making its claim, the Bureau is merely speculating about whether, in its view, the disclosures provided sufficient information, and what might have occurred when the Commission's processing staff considered the applications in question.[1] Contrary to the Presiding Officer's determination, there is no affirmative

[1] The Bureau's implicit suggestion that the processing staff is in a similar position as a "casual reader" is difficult to accept, particularly considering that the federal courts and Congress deem the Commission to be an expert agency in the field of broadcast regulation.

statement by the Bureau that it or the Commission's processing staff was, in fact, misled. Further evidence that the Bureau itself was not misled about the alleged misconduct regarding Micheal Parker in *Religious Broadcasting*, *Mt. Baker*, or the alleged inadequate disclosures on the part of Micheal Parker and Reading[2] that comprise the second requested issue can be found in Reading's Opposition to Adams' Motion to Enlarge Issues ("*Reading's Opposition*"), filed August 11, 1999, wherein Reading disclosed that it filed a copy of the *By Direction Letter* in *Two If By Sea Broadcasting*, 12 FCC Rcd 2254 (1997), with the Commission, as required by Rule 1.65, and which therefore, became part of Reading's renewal application file. *See Reading's Opposition* at ¶10.

9. In view of Commission rules and precedent, it was not only improper but constitutes an egregious error for the Presiding Officer to rule that the Bureau's comments as to sufficiency of information or speculation about what might have occurred when the processing staff considered the applications rises to the level of an affirmation regarding what actually occurred for the purpose of finding that a substantial question of fact has been raised. To the extent that the Bureau's comments concern sufficiency of information, the Presiding Officer, relying on Commission precedent, correctly ruled in the *First MO&O* that, "[t]he Commission will not make adverse findings on misrepresentation or candor simply because there is a failure to provide sufficient information. There must be an accompanying intent to deceive." *First MO&O* at ¶21 *citing Fox River Broadcasting, Inc.*, 93 FCC

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2 *See* discussion at *infra* III.

2d 127 (1983); *Garret, Andrews & Letizia, Inc.*, 86 FCC 2d 1172 (Rev. Bd. 1981); *see also Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir 1994) *citing Weyburn Broadcasting*, 984 F.2d 1220, 1232 (1993); *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Fox River Broadcasting, Inc.*, 102 FCC 2d 1179, 1196 (1986); *RKO General, Inc. v. FCC*, 670 F.2d 215, 225 (D.C. Cir 1981).

10. More importantly, however, is that even if the Bureau's comment reasonably could be construed as an affirmation, the comment, without additional support, does not meet the standard for adding an issue that is required by the Commission's rules.

11. In order to add an issue, the Presiding Officer must find, pursuant to Section 1.229 of the Commission's rules, that the moving party has set forth specific allegations of fact, supported, where necessary, by affidavits from persons with personal knowledge, demonstrating that substantial and material questions of fact exist as to the party's basic qualifications to be a Commission licensee. In this case, neither Adams nor the Bureau submitted affidavits. Of significance with regard to the second requested issue is the implication of not submitting any affidavits. As the Presiding Officer explained in footnote 3 to the *First MO&O*:

> Since the issues depend on Commission documents on which Adams' arguments are based, there is no need for affidavits. The absence of any need for affidavits indicates that there is no direct evidence known to Adams of an intent to deceive. Therefore, such intent would need to be inferred solely from the lack of detail in the filed documents.

12. Clearly, the same analysis must be applied to the Bureau's submission under Section 1.229. Moreover, the intent inferred must be based on more than speculation. The Commission will not permit issues to be added which are based on speculation. *See, e.g., Folkways Broadcasting Co., Inc.*, 33 FCC 2d 806, 811 (Rev. Bd. 1972); *West Central Ohio Broadcasters, Inc.*, 1 FCC 2d 1178 (Rev. Bd. 1965).

13. Thus, Section 1.229 clearly requires that allegations of fact, such as the Bureau's comment with regard to the processing staff's conduct if it is to be taken as a fact, must be supported by affidavits from persons with personal knowledge. No such affidavit was provided with the Bureau's comments. Therefore, the Presiding Officer's reliance on (and apparent misreading of) the Bureau's comment about the sufficiency of information provided or what the processing staff may have considered when acting on the applications in question, without additional support, directly contravenes the Commission's rules regarding the requirement for adding an issue. By so doing, the Presiding Officer has committed an egregious error.

II. The Cases Cited For Authority In The *Modified MO&O* Do Not Support The Addition Of The Second Issue.

14. The Presiding Officer provides cites to several cases as authority in support of his decision. It appears, however, that the Presiding Officer neglected to consider the full case holdings in these cited cases when reaching his decision to add the second requested issue. Reading relies on the same decisions to show that the Presiding Officer improperly ruled that the second issue should be added.

15. For example, the Presiding Officer correctly cites *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) for the proposition that the Commission requires an applicant to be "fully forthcoming as to all facts and information relevant" to its application. *Modified MO&O* at ¶17. However, the Presiding Officer neglected to discuss the part of the case which states, in relevant part, that "[t]he Commission will not disqualify an applicant, however, for a negligent omission; 'intent to deceive [is] an essential element of a misrepresentation or lack of candor showing." *Swan Creek Communications*, 39 F.3d at 1222 (citations omitted). In this case, 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.[3]

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[3] *See, e.g., Seven Hills Television Co.*, 2 FCC Rcd 6867 at ¶74 (Rev. Bd. 1987) (subsequent history omitted) (failure to report material agreements is a serious violation of Section 1.65, but intent to deceive cannot be inferred where the Bureau was alerted to the existence of the agreements); *Telephone and Data Systems, Inc.*, 10 FCC Rcd 10518 at ¶16 and n.22 (ALJ 1995):

> [W]here a party already has disclosed the information which it is later charged with attempting to conceal, the Commission has found an absence of intent to make misrepresentations or lack of candor. *See, e.g., Calvary Educational Broadcasting Network*, 9 FCC Rcd 6412, 6429 (Rev. Bd. 1994); *Valley Broadcasting Co.*, 4 FCC Rcd 2611, 2614-15 (Rev. Bd. 1989); *International Radio, Inc.*, 98 FCC 2d 608, 639 (Rev. Bd. 1984); *Superior Broadcasting of California*, 94 FCC 2d 904, 909 (Rev. Bd. 1983). [footnote omitted].

16. The Presiding Officer also correctly cites *LeFlore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir 1980) for the proposition that "the fact of misrepresentation coupled with proof that the party had knowledge of its falsity would be enough to justify a conclusion that there was fraudulent intent." (emphasis added). In the instant case, there has been no "proof" shown that Parker had knowledge of the falsity of the statement. Indeed, the evidence on the record fully supports the inference that Parker's belief was that the information presented was true. Even the Bureau concedes in the final footnote of its comments that Micheal Parker was not disqualified in *Religious Broadcasting*.

17. Moreover, as the Presiding Officer determined in the *First MO&O* and apparently did not modify, "[i]n all instances of alleged misrepresentation or lack of candor cited by Adams, there were references to Commission documents which were not falsified or denied by Parker." *First MO&O* at ¶18. In this case, assuming *arguendo* that Micheal Parker's disclosures regarding the *Religious Broadcasting* and *Mt. Baker* decisions were incomplete, legally inaccurate and thus could be construed as misleading, there has been no showing that Micheal Parker had knowledge of the falsity of the representation, as required by *LeFlore*. *See also Abacus Broadcasting Corp.*, 8 FCC Rcd 5110 at ¶10 (Rev. Bd. 1993) (no lack of candor where filing was misleading, but made without intent to deceive). Micheal Parker's disclosure of the relevant decisions, which were a matter of public record, precludes the inference that he intended to deceive the Commission. As the Presiding Officer determined in the *First MO&O* and apparently did not modify,

"[t]here are no allegations and no showing is made that Parker failed to disclose in fact he was involved in those proceedings or that he lost on the ultimate issues that were adjudicated or determined." *First MO&O* at ¶16.

18. The Presiding Officer also apparently holds that even though the Review Board in *Religious Broadcasting* did nothing more than deny integration credit to the Parker-sponsored applicant (as confirmed by the Bureau in the final footnote of its comments), Micheal Parker was somehow obligated to disclose in applications before the Commission that he had been described in *Religious Broadcasting* as a "travesty and a hoax" and a "transpicious sham." *Modified MO&O* at ¶12. However, as stated in *Readings Opposition* (¶36), the Presiding Officer's apparent determination is contrary to a long line of Commission decisions holding that a denial of integration credit does not implicate that applicant's basic qualifications. *See, e.g., Evansville Skywave, Inc.*, 7 FCC Rcd 1699 (1992), 1700 at ¶14 (holding that an applicant's failure to meet its burden of showing that its integration proposal is reliable does not, standing alone, establish that the applicant has committed disqualifying misconduct) and at ¶¶15-16 (a finding that a "sham" proposal is unreliable does not necessarily raise an issue of basic qualification);[4] *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 at¶8 (1990) ("To the extent an applicants' conduct or intentions are demonstrably at odds with the described ownership structure," the proposal will be deemed unreliable); *Omaha*

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[4] The Commission has discouraged the use of the term "sham" because of the term's ambiguity and potential for confusion. *Evansville Skywave*, 7 FCC Rcd 1699, 1700 at¶16.

Channel 54 Broadcasting Group, 3 FCC Rcd 870 at ¶8 (Rev. Bd. 1988) (Review Board citing *Tequesta Television, Inc.*, 2 FCC Rcd 7324 at ¶6 (1987) "[t]he ineluctable conclusion must be drawn that, under current Commission precedent, even completely negativing the credibility or viability of an integration proposal cannot be equated with disqualifying the putative malfeasor").

III. Adams' Second Requested Issue Was Addressed In The *Two If By Sea Broadcasting* Decision And Subsequently In The Norwell, Massachusetts Assignment Application.

19. In both the *First MO&O* and the *Modified MO&O*, the Presiding Officer concluded that, with regard to the first issue, the evidence on record provides strong evidence that the Bureau affirmatively decided not set the "serious questions" concerning Michael Parker in *Two If By Sea Broadcasting*, the Norwell, Massachusetts assignment application, or in this proceeding. Importantly, the Presiding Officer concluded that the Hearing Designation Order ("*HDO*") in this proceeding states that "the applicants appear qualified."

20. It appears that the Presiding Officer has mistakenly concluded that the "serious questions" were limited to Micheal Parker's misconduct in the *Religious Broadcasting* and *Mt. Baker* cases. However, as Reading showed in Exhibit D to its opposition filed August 11, 1999, there was an opposition filed in the *Two If By Sea Broadcasting* proceeding by counsel that represents Adams here, wherein the opponent claimed, in part, that Micheal Parker was not qualified to be a Commission licensee because Micheal Parker had, in subsequent applications, failed to properly advise the Commission about the nature and extent of the

Religious Broadcasting and *Mt. Baker* decisions. *Reading's Opposition* at ¶46. Thus, it is beyond dispute that the substance of the second requested issue in this case has been in front of the Commission on three occasions. It necessarily follows that the "serious questions" regarding Micheal Parker include the same concerns covered by the second requested issue in this case.

21. Thus, to the extent that the Presiding Officer has determined, with respect to the first issue, that the Bureau's action in the Norwell matter coupled with the absence of an issue in the HDO for the instant proceeding suggests that the Bureau "specifically decided not to set the issues for formal adjudication," then it logically follows that the Bureau must have considered the second issue as well and similarly decided not to set the second issue for formal adjudication.

22. As the Presiding Officer explained in the *First MO&O*, the second issue sought is based on allegations that Micheal Parker did not go far enough in describing the contents of adjudicatory documents that were known to the Bureau staff to exist at a time when Parker was seeking a license or a transfer of a license to another party. In reaching his decision in the *First MO&O*, the Presiding Officer applied the standard required by the Commission's rules for adding an issue and denied Adams request because "[t]here must be something more found in the record other than a speculation that there might have been some deception." *First MO&O* at ¶21. Unfortunately, in modifying that ruling, the Presiding Officer has abandoned the statutory requirements for adding an issue. By deciding to add the second issue without requiring adherence to the pleading standard, the Presiding

Officer has departed from the law, and in effect, established a new law or novel Commission policy which warrants Commission review.

Respectfully submitted,

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October 22, 1999

CERTIFICATE OF SERVICE

I, Myra Powe, a secretary in the law firm of Holland & Knight LLP, do hereby certify that on October 22, 1999, a copy of the foregoing REQUEST FOR PERMISSION TO FILE APPEAL was delivered by hand to the following:

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