

FCC MAIL SECTION

Nov 9 10 56 AM '99  
Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 99M-73  
90780

In re Application 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 CORPORATION	)	File No. BPCT-940630KG
	)	
For Construction Permit for a New	)	
Television Station to Operate on	)	
Channel 51, Reading, Pennsylvania	)	

**MEMORANDUM OPINION AND ORDER**

Issued: November 8, 1999 ; Released: November 9, 1999

**Background**

1. Request for Permission to File Appeal was filed by Reading Broadcasting, Inc. ("Reading") on October 22, 1999. Reading requests an interlocutory appeal from a portion of Memorandum Opinion and Order, FCC 99M-61, released October 15, 1999 ("MO&O II"): That decision modified a prior ruling in Memorandum Opinion and Order FCC 99M-49, released September 3, 1999 (MO&O I) and added an issue. On November 3, 1999, Opposition pleadings were filed by the Mass Media Bureau ("Bureau") and by Adams Communications Corporation ("Adams"). See Order FCC 99M-66, released October 27, 1999 (responsive pleadings requested).

2. The Commission's rules provide that certain interlocutory rulings of Administrative Law Judges are appealable only if the appeal is allowed by the Presiding Judge. 47 C.F.R. §1.301(b). The request for such an appeal must be filed within five (5) days of the release of the ruling and the request must contain:

a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception.

Id. Reading's request was filed timely.

3. There is no new or novel question of law or policy contained in MO&O II. The Presiding Judge rejected an appeal from his decision not to set an issue that was barred by the passage of time. A second issue that was supported by the Bureau was added. The issue was added after an appeal request from an initial denial of the same issue. MO&O I. The Commission's rule authorizes adding an issue in such a situation 47 C.F.R. §1.301(b)(3) (in considering a request for appeal, presiding judge must either "allow or disallow the appeal or modify the ruling.") (Emphasis added.) 47 C.F.R. §1.301(b). Such an authorized modification of an earlier ruling is exactly what Reading is seeking in its appeal request here.

4. The Presiding Judge initially had decided that the issue should not be added. But after considering the further analyses in the appeal briefs, a modification of the earlier ruling was found to be appropriate and in accord with the Commission rule which specifically grants the discretion of modification in deciding interlocutory appeal requests. 47 C.F.R. §1.301(b). Because of the overt nature of the disclosure claimed to be inadequate, the burdens of proceeding and proof were assigned to the moving parties which was believed to be a justifiable concession to Reading. And even if Reading ultimately defeats the issue on the evidence and the law, whether in the initial decision, in a Commission decision on Reading's exceptions, or on appeal to the United States Circuit Court of Appeals, the procedure followed by the Presiding Judge in adding the issue is in accord with and does not violate or detract from Commission policy. However, Reading argues that the addition of the issue was erroneous as a matter of law and that any unlawful adding of issues is a departure from Commission policy that authorizes an appeal.

### **Reading's Arguments**

5. The issue that was added is as follows:

To determine whether Micheal L. Parker engaged in a pattern of misrepresentation and/or lack of candor in failing to advise the Commission of the actual nature and scope of his previously adjudicated misconduct and, if so, the effect of such misrepresentation and/or lack of candor on Reading's qualifications to remain a licensee.

The burdens of proceeding and of proof were assigned to Adams and the Bureau. MO&O II at 8-9.

6. Recall that the allegedly inadequate disclosures that resulted in favorable action on assignment requests involved adjudications in Mt. Baker<sup>1</sup> and Religious Broadcasting<sup>2</sup> finding that Parker: (1) had misled the Bureau/Commission on a commitment to construct a tower and aggravated the situation to such a degree that the Commission rescinded the construction permit; and (2) had been found after fully adjudicated findings of an administrative law judge, approved by the Review Board, to be an undisclosed real party-in-interest under a scheme that

---

<sup>1</sup> Mt. Baker Broadcasting, Inc., 3 F.C.C. Rcd 4777 (1988).

<sup>2</sup> Religious Broadcasting Network, et al., 3 F.C.C. Rcd 4085 (Review Bd. 1988).

the Board termed a "travesty and a hoax". The allegedly inadequate disclosures of those adjudications were in connection with a series of assignment applications. The facts were again analyzed in MO&O II where it was determined that under the prevailing legal standards established by this Circuit Court, there were substantial and material questions raised about certain of Reading's disclosures to the Commission that were acted upon favorably. See MO&O II at Par. 18, citing Citizens for Jazz v. F.C.C., 775 F.2d 392, 395 (D.C. Cir. 1985). Cf. Weyburn Broadcasting v. F.C.C., 984 F.2d 1220 (D.C. Cir. 1993).

### **Unvacated Adjudications**

7. In MO&O I, the wrong emphasis had been assigned to the Review Board's acceptance of a settlement in Religious Broadcasting, the case in which Parker was found to have been part of a "hoax" as an undisclosed principal. It was convincingly shown in Adams' appeal request that mootness of adverse findings through settlement did not negate the adverse finding itself which was allowed to remain unvacated for possible application in the future. The primary reason that the adverse findings were not the subject of an issue here was due to the passage of time under the Commission's policy (applied in this case) that character findings were not to be considered in adjudicatory proceedings brought ten or more years after the fact. Policy on Character Qualifications, 102 F.C.C. 2d 1179, 1229 (1986). See MO&O I at Para. 12 and MO&O II at Para. 9 and n.4.

8. Reading asserts it was erroneously inferred that the Bureau had been misled by the disclosure. Reading argues that there is no categorical statement that the Bureau was misled. Reading also notes that there was no supporting declaration of the Bureau filed attesting to the Bureau staff being misled. Reading also relies on contemporaneous filings of copies of the adverse adjudication decisions filed by Reading under §1.65 [47 C.F.R. §1.65] as giving the Bureau actual notice of reported events. But according to the Bureau, "the descriptions [in assignment applications] as a whole [had not] fairly apprised the staff and any casual reader that they should read the referenced decisions --- ." See Bureau Comments at Para. 7. The Bureau should not have to follow patchwork disclosures and piece it all together. Neither should the interested public be put to the task of matching pieces here and there. The Presiding Judge has been convinced by the pleadings to date that disclosure of significant events should stand on its own<sup>3</sup> and that there remain substantial and material questions of the adequacy of Reading's disclosures which when examined with testimony may (or may not) amount to misrepresentation and/or lack of candor. Those substantial questions should be aired in the hearing after reasonable discovery.

### **Adequate Pleadings**

9. Reading's strongest assignment of error is the assertion that there has been a serious departure from Commission policy by considering inadequate pleadings. Section 1.229 requires "specific allegations of fact" which "shall be supported by affidavits" that are based on personal knowledge. 47 C.F.R §1.229(d). Reading reasons:

---

<sup>3</sup> It would seriously detract from the Bureau's regulatory oversight if in each instance of an assignment it became necessary to trace the significance of disclosure. Rather, the disclosure must be true, accurate and complete on its own.

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.

MO&O I at n. 3. That observation was not complete and requires modification. The observation was preceded by the statement. "Since the issues depend on Commission documents on which Adams' arguments are based, there is no need for affidavits." Id. Compare Citizen for Jazz, supra at 394 (pleadings filed or other matters officially noticed may be sufficient). It cannot be now gainsaid that unless there is an admission uncovered through speech, writing, or conduct, it is difficult to ascertain intent by a preponderance of evidence. It would be wasteful to require an affidavit based on the personal knowledge of Adams or the Bureau which would again recite the disclosures and point out arguable inadequacies when compared with the adjudicated findings in Mt. Baker and Religious Broadcasting. The evidentiary need for proof of intent would not be advanced with that type of affidavit. The only workable method of showing or inferring intent, or lack of intent, is through deposition testimony followed by the observed hearing testimony of the person(s) responsible for the disclosures. See California Public Broadcasting Forum v. F.C.C., 752 F.2d 670,679 (D.C. Cir. 1988) (questions of intent are factual and may need to be resolved from inferences drawn from other facts). The pleadings filed on the question in connection with the Adams and the Reading appeal requests have convinced the Presiding Judge that at this time there is such a good deal of smoke raised by contrasting Parker's disclosures with the language of the adjudications that it becomes necessary to look for the possible existence of a fire. Citizens for Jazz, supra, 775 F. 2d at 397.

### **Speculation**

10. The Commission will not add issues based on speculation. But the cases on speculative issues that Reading cites are not persuasive. In Folkways Broadcasting Co., Inc., 33 F.C.C. 2d 806 (Review Bd. 1972), the Review Board refused to add a misrepresentation issue when there was no showing that the licensee had knowledge before a specific date of the contents of tapes containing recordings of lotteries. The Bureau was opposed to the issue because the knowledge of the licensee was totally speculative. Also, as distinguished from this case, the determination not to add the issue was made after the witness was both deposed and cross-examined on whether or not he had the requisite knowledge. Id. at 810-811. In the case of West Central Ohio Broadcasters, 1 F.C.C. 2d 1178 (1965), the Commission did not add requested nondisclosure issues because they were based on an unverified assumption that an individual had not undertaken a financial obligation when it was disclosed that he had and the movant merely asked what consideration was given for the release of a mortgage. Id. at 1179. As distinguished from those cases, here the necessary ingredient of intent is what is to be determined in discovery and at the hearing. See California Public Broadcasting Forum v. F.C.C., supra. Certainly, Parker intended to make the disclosures in the form in which they were consistently being made. Also, it was known by Parker what was not being disclosed. Finally, there was a possible motive to be less than candid if that would help in getting approval for the assignments or if favorable assignment decisions were later used as precedent. Under the totality of circumstances, it would amount to greater speculation to omit the issue than to add it.

11. Reading further argues that the Presiding Judge erred in assuming that the Bureau felt that it had in fact been misled by Parker's disclosures and that it was in reliance upon that disclosure that the requested relief was granted to transfer licenses. Reading contends that such intermediate findings cannot be made without the Bureau's affidavit attesting to those facts and conclusions. But as the Bureau points out, it is only the issue of legally adequate disclosure that is relevant. Whether or not the Bureau was capable of jumping through the required hoops to figure out the disclosure is irrelevant.

### **Negligence**

12. Reading correctly argues that the Commission does not disqualify for a merely negligent omission and that intent to deceive is an essential element of a misrepresentation or lack of candor. Swan Creek Communications, 39 F.3d 1217, 1222 (D.C. Cir. 1994). Reading also recognizes another holding in that case that an applicant must be "fully forthcoming as to all facts and information relevant" to its application. Id. Reading argues that it had made disclosures of adjudications and therefore should not be considered to have been misrepresenting or lacking in candor. However, as noted above, there can be no reasoned determination of the sufficiency of disclosures, the presence or absence of intent, or a finding of mere negligence without discovery, testimony and proposed findings on the questions. Compare California Public Broadcasting Forum v. F.C.C., supra.

13. The case of Seven Hills Television Co., 2 F.C.C. Rcd 6867 at Para.74 (Review Bd. 1987) which is relied on by Reading, holds that there is no intent to deceive where agreements are disclosed in meeting requirements under §1.65. But in this case, there is more to consider than the mere reporting of the Mt. Baker and Religious Broadcasting cases, both of which are also officially reported in the FCC Record. The issue for resolution here is the manner and extent in which the cases were disclosed by Parker, possibly intending to leave the impression that the Mt. Baker permit had been voluntarily surrendered and that the Religious Broadcasting case was only concerned with a failure to meet an integration proposal without explaining the more significant element of an undisclosed real party-in-interest. Then, as argued by the Bureau, Parker could attempt to use the completed assignments as precedent from which to argue that the Commission had effectively excused Parker for his adjudicated misconduct. See Bureau's Opposition to Appeal at Para. 10 and n.4.

### **Knowledge**

14. Reading makes the further argument, "arguendo," that even if the disclosures were incomplete and misleading, there is no showing that Parker had knowledge of the falsity of the representations. Reading relies on Abacus Broadcasting Corp., 8 F.C.C. Rcd 5110 (Review Bd. 1993). In that case, the renewal applicant filed a threshold showing which included a bogus tower site. Upon learning of the matter, the judge added an issue on candor of the renewal applicant and heard evidence on the issue. Id. The judge only assessed a forfeiture and awarded a short term renewal which were discretionary lighter sanctions under the circumstances of that case. At the point when it was decided to add the issue, the motive to mislead was self-evident in that Abacus would gain a comparative advantage. Id. at Para. 3. We are at the same beginning stages here before any testimony has been taken on the point. It is further argued by the Bureau that "Parker's intent can be inferred from the self-evident motive, namely, securing grants through assignments that later serve as grounds for arguing

that the Commission has determined on multiple occasions that Parker is fully qualified to be a Commission licensee." See Bureau's Opposition to Appeal at 7 n.4. The Bureau is correct. While there are no intermediate conclusions reached at this time as to Parker's intent, there is sufficient motive shown to raise a substantial intermediate question about Parker's intent and to add the issue as was done in Abacus. See Citizens for Jazz, *supra* at 394-395 (fact pattern in pleadings can require a hearing on misrepresentation where there is substantial and material question of fact).

### **Inapposite Authorities Presented For Denying The Issue**

15. Reading argues on the quality of any wrongdoing in connection with Parker's disclosures that are alleged to be misrepresentations/lack of candor misconduct, citing Omaha Channel 54 Broadcasting Group, 3 F.C.C. Rcd 870 at Para.8 (Review Bd. 1987) (non-credibility or non-viability of integration proposal cannot be equated with disqualification). But that case goes further in its holding. It is where there has been a disqualifying issue added and intent has been proven at a hearing that the misconduct will disqualify. *Id.* In Omaha Channel 54, the judge found the applicant to be disqualified but had not set an issue. The Review Board did not act until the hearing was concluded and it was on review that the Board ruled that a disqualifying issue must first be added before there can be a disqualification finding. That significant procedural point on adding an issue is being addressed in this ruling in accord with the Review Board's holding which supports adding an issue at this stage of the proceeding.

16. Reading also relies on a case that was settled prior to receiving evidence, Telephone and Data Systems, Inc., 10 F.C.C. Rcd 10518 (Admin. L.J. 1995). That adjudication was completed in the context of an unopposed motion for summary decision in conjunction with a settlement. The disqualifying issue had been set in the designation order. The issue arose from previous litigation in which allegedly false and misleading testimony was given. In awarding summary decision, the judge acknowledged the principle that "[n]egligence, inadvertence, and imprecision without intent to deceive do not amount to misrepresentation or lack of candor." *Id.* at Para. 16. In this case it is too early to determine whether Parker was merely negligent in his disclosures and certainly summary decision would not be an appropriate procedure on this record. Parker could be disqualified even if the disclosures were so "wanton, gross and callous, and in total disregard of [Parker's] obligation to the Commission as to be equivalent to an affirmative and deliberate intent." Golden Broadcasting Systems, Inc., 68 F.C.C. 2d 1099, 1106 (1978). Thus, after this record is closed, "it may suffice to show nothing more than that the misrepresentations were made with disregard for their truth." Leflore Broadcasting Co., Inc. v. F.C.C., 636 F. 2d 454, 461 (D.C. Cir. 1980).

17. Reading contends that the merits of the conduct found in Mt. Baker and in Religious Broadcasting were implicitly determined in favor of Parker on three previous occasions. Reading is referring to the By Direction Letter concerning Two If By Sea ("TIBS") and the Bureau's letter concerning the Norwell assignment, both of which were issued in 1997.<sup>4</sup> See

---

<sup>4</sup> Two If By Sea (By Direction Letter), 12 F.C.C. Rcd 2254 (1997); Bureau letter dated May 22, 1997, to Alan C. Campbell, Esq. From Barbara A. Kreisman, Chief Video Services Division, regarding WHRC (TV), Norwell, MA.

MO&O I at Paras.7-9. These two letters stated pointed concerns of the Commission that with respect to Religious Broadcasting, Parker had "serious character questions" and that there were "substantial questions of material fact with respect to Parker's qualifications." For reasons unrelated to the merits of those concerns and apparently for administrative expedience, the TIBS and Norwell matters were processed without adjudicating the substance of the concerns. But those fortuitous events did not alter Parker's duty to make full and fair disclosure to the Commission, particularly when asking the Commission to act favorably on assignment requests.

18. The third opportunity to address Parker's conduct was in connection with the designation order in this case ("HDO") in which there were no character issues set. Arguably, the Bureau knew of the Parker misconduct but had made a deliberate decision not to include the issue in the HDO. The equally logical assumption at the time of designation would be that Adams probably would raise these questions after the case was designated. It is also plausible that the questions were not set in the HDO in order to leave room for possible settlement before the applicant parties dug in.<sup>5</sup> Which ever possible alternative, if any, actually occurred became irrelevant after the HDO was issued because Adams and the Bureau then would have rights under the Commission's rules to seek the addition of issues, which is exactly what happened. After considering all of the pleadings on the question for purposes of this ruling, it is concluded that there are substantial questions of material fact regarding Parkers' disclosures to the Commission. Reasons for the absence of an issue in the HDO are speculative and are not relevant to the business at hand. There is no showing that serious questions of adequate disclosure were in any way adjudicated or determined in Parker's favor in either or both of the TIBS and Norwell letters or in connection with the issuance of the HDO. To conclude the matter, as the Bureau notes, there is no operative language in either of the two letters or in the HDO to support an argument that the questions have been addressed on the merits and resolved by the Commission.

#### **No New or Novel Policy and No likely Remand**

19. The Parker disclosures speak for themselves in what was omitted. Substantial and material questions of fact are raised with respect to the intent of Parker to mislead or with respect to a disregard for a need for truth and accuracy in disclosures that were designed to obtain license assignments and possibly serve as precedent for future assignments. The standards for truth are appropriately high for renewal applicants:

[T]he Commission may refuse to renew a license where there has been willful and knowing misrepresentation or lack of candor in dealing with the Commission. Because effective regulation is premised upon the agency's ability to depend upon the representations made to it by its licensees, '[t]he fact of concealment [is] more significant than the facts concealed.

---

<sup>5</sup> See Implementation of Section 309(j) of the Communications Act, 13 F.C.C. Rcd 15920, 16006 (1998) (upon proper assurances against an abuse of process, limitations on settlement payments may be waived). Cf. Trinity Broadcasting of Florida, Inc., et al., \_\_\_ F.C.C. Rcd\_\_\_, Memorandum Opinion and Order, FCC 99-314, released November 4, 1999.

Leflore Broadcasting Co., Inc. v F.C.C., supra at 461. The Court of Appeals has held it to be imperative that renewal applicants not be cavalier in material disclosures designed to effect a Commission grant:

Indeed, the Commission would be derelict if it did not hold broadcasters to 'high standards of punctilio, --- .

Id., citing Sea Island Broadcasting v. F.C.C., 627 F.2d 240, 244 (D.C. Cir. 1980). Under such standards of high duty for truth and completeness, coupled with possible motives to use the type of disclosure that would neither detain nor restrain assignments and which could eventually serve as precedent to negate the effect of Mt. Baker and Religious Broadcasting, the standard for adding issues under Citizens for Jazz, supra is met.

### Conclusion

20. Reading has failed to show or convince that a new or novel law or policy in connection with the added issue on possible misrepresentation/lack of candor. Reading also has failed to show or convince that in light of the Commission's expressed concerns in the TIBS and Norwell letters, that there is any likelihood of a remand by the Commission if this case goes forward through hearing and initial decision with the added issue. Under Weyburn Broadcasting Ltd. Partnership, supra 984 F.2d 1220 at n.3, and Citizens for Jazz, 775 F.2d at 398, it would be more likely to expect a remand from the Circuit Court if the issue were not added. Id.

### Order

Accordingly, IT IS ORDERED that the Request for Permission to File Appeal that was filed by Reading Broadcasting, Inc. on October 22, 1999, IS DENIED.

IT IS FURTHER ORDERED that discovery SHALL COMMENCE as soon as practicable<sup>6</sup> and shall be expedited to conclude by **December 3, 1999**.<sup>7</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

---

<sup>6</sup> Because of the time sensitivity of commencing and completing discovery, this decision was e-mailed to counsel on issuance. The decision is not official until it is released by the Commission.

<sup>7</sup> While the burdens of proceeding and of proof have been assigned to Adams and the Bureau, it would facilitate matters to a great extent, and it may be in the best interests of Reading and Mr. Parker, to utilize Parker's sworn written testimony as the basis for cross-examination at hearing. That procedure would not limit the rights of Adams and the Bureau to depose Parker and possibly others on the added issue before the exchange date. But it would facilitate the hearing.