

FCC MAIL SECTION

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

FCC 00M-13
90926

DISSENTING

In re Applications of)	MM Docket No. 99-153
)	
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: February 7, 2000 Released: February 8, 2000

1. This is a ruling on Adams' Motion for Leave to Present Rebuttal Testimony that was filed by Adams Communications Corp. ("Adams") on January 21, 2000. An Opposition was filed by Reading Broadcasting, Inc. ("Reading") on January 31, 2000. The Enforcement Bureau has not filed a pleading relating to requests for rebuttal.¹

Daniel Bendetti "(Bendetti")

2. Mr. Bendetti was deposed by Adams in discovery. He is a former Reading employee holding a "top management" position during the license term who was "central to program operations" during the renewal period. Adams seeks to have Mr. Bendetti testify to rebut: (1) Mattmiller's assertion that the station met its role as public trustee; (2) use of canned programs produced for State legislators; (3) testimony on production and broadcasting of public service programming which exceeded five minutes; (4) Kase's testimony to justify failures to telecast live programming (e.g. station's inability to insert

¹ On February 4, 2000, Adams filed Adams Reply to Opposition to Its Motion To Present Rebuttal Testimony ("Adams Reply"), an unauthorized pleading under the Commission's rules. See 47 C.F.R. §1.294(b). The ruling herein was essentially completed before Adams Reply pleading was received and read. Reading need not respond to Adams' Reply.

live “advisories” in taped weather programs); (5) Kase’s testimony about station outages and reductions in power and related complaints; (6) complaints about station programming and any inference from an absence of evidence of complaints.

Frank D. McCracken (“McCracken”)

3. Mr. McCracken was deposed by Adams in discovery. He is an officer and a director of Reading. Adams submits that the deposition testimony of Mr. McCracken will rebut testimony of Mr. Parker concerning Mr. McCracken’s programming. There are no specifics provided in the proffer. Adams intends to offer the deposition of Mr. McCracken cold, as rebuttal evidence without calling the witness to the stand.

Jack A. Linton (“Linton”)

4. Mr. Linton was deposed by Adams in discovery. Adams represents that Mr. Linton, a director of Reading, has evidence that will rebut certain of Mr. Parker’s testimony regarding an alleged “proxy contest.” Adams asserts that Mr. Linton’s deposition contains evidence that relates to a shareholder’s meeting of October 31, 1991, which is a crucial event according to Adams’ theory of a transfer of control. Adams intends to offer the deposition of Mr. Linton as direct evidence without calling him to the stand.

Discussion

5. The object of rebuttal is to rebut and not to present a different flavor of testimony that already has been presented in open court and subjected to cross-examination. In other words, “where substantial and material facts are not in dispute – [with] only inferences to be drawn therefrom—further evidentiary sessions are superfluous.” Meredith Corporation, 4 F.C.C. Rcd 266, 2673 (1989, citing Gencom, Inc. v. F.C.C., 832 F. 2d 171, 180 – 183 (D.C. Cir. 1987)). See also Meredith Corporation, supra at 2675.

6. Under the Meredith - Gencom standard, there must be a specific showing by the party seeking to rebut those particular facts that are in dispute and that will be rebutted. Adams’ fails to meet that standard in certain respects. Therefore, under conditions that are set forth below, only Mr. Bendetti and Mr. Linton may be called as live witnesses. Adams has failed to provide sufficiently specific facts with respect to Mr. McCracken’s deposition and with respect to facts that McCracken would rebut. Also, the preferred method for rebuttal of a deponent-witness is to have the deponent on the stand to be cross examined and/or to affirm, explain or qualify deposition testimony that is relied on for rebuttal. See Bennett Gilbert Gaines, Interlocutory Receiver, 9 F.C.C.

Rcd 533 n. 4 (1994) (presiding judge rejected a principal's deposition as an exhibit during rebuttal phase). Adams concedes that the attempt there to use the Mangione deposition for rebuttal was an "unorthodox maneuver." For the same reason, Mr. Linton's deposition may not be introduced as an exhibit in rebuttal.² But if Mr. Linton is called to testify live, his deposition may be used to refresh recollection or to show any contradiction. See 47 C.F.R. §1.321(d)(1).

7. The Presiding Judge is aware that the rules provide for the use of depositions of officers and directors of parties "for any purpose." See 47 C.F.R. §1.321(d)(2). The discovery depositions of Messrs. McCracken and Linton fall into that category. However, even party deposition evidence must be shown to relate to evidence which it is intended to rebut. Otherwise, it would be confusing, wasteful and possibly prejudicial. See FRE 403. The Presiding Judge has the authority to regulate the course of the hearing. 47 C.F.R. §1.243(f), and here it is deemed necessary to assess the candor/credibility of Bendetti and Linton as live rebuttal witnesses. Cf. In re TeleSTAR, 2 F.C.C. Rcd 7352, 7353, Para. 11 (1987) (difficulty on review to resolve conflicts in hearing testimony based on cold record required a remand).

8. Adams does proffer specific deposition testimony of Mr. McCracken and eventually states a reason for its use in rebuttal in the unauthorized Reply pleading. But it cannot be determined that Mr. McCracken's volunteered comment in his deposition on what the station might do or should do would rebut a particular renewal fact that is now in the record. To make sense of the deposition testimony cited by Adams, Mr. McCracken would need to be brought in as a live witness. Adams has not shown a basis or an inclination for hearing live McCracken testimony at this stage of the proceeding. Therefore, Mr. McCracken's deposition will not be received as rebuttal evidence, a ruling that is clearly within the discretion of the Presiding Judge. Cf. Kimler Broadcasting, Inc., ___ F.C.C. Rcd ___ (FCC 99-221) released August 17, 1999 (presiding judge's refusal to reopen hearing for additional testimony that would contradict [rebut] material hearing testimony was within judge's discretion), citing Hillebrand Broadcasting, Inc., 1 F.C.C. Rcd 419 (1986); and Communi – Centre Broadcasting, Inc. v. F.C.C., 856 F.2d 1551 (D.C. Cir. 1988).

9. It is only where there is shown to be a direct conflict on a significant fact that the opportunity for rebuttal is required. See WCVQ, Inc., 67 Radio Reg. 2d (P&F) 1663, 1664 (1990) (pivotal testimony from former employee negating 40 hour integration work week of a principal was required as rebuttal.) Therefore, Adams may offer live rebuttal testimony of Mr. Bendetti to meet prior testimony on exceeding five minute public service programming; ability or inability to offer live commentary on weather; outages

² See Bennett Gilbert Gaines, supra. Adams uses the term "witness" without indicating (as does the Commission) that Mr. Mangione was a "principal" of WCBM Maryland, Inc., a characteristic which places him in the same category as Mr. McCracken and Mr. Linton.

and power reductions; and complaints about only public service programming. There will be no broad testimony on the station's role as a trustee. However, Mr. Bendetti may testify to specific statements made by Parker and others that qualify for a hearsay exception and that directly contradict Mr. Mattmiller's assertions regarding a commitment to a "trusteeship" or station policy. But there must be a specific line of testimony that is already in the record identified by Adams that Bendetti can rebut as a fact.

10. There will be no rebuttal testimony received on content or practice of non-public service programming of State political figures, unless the rebuttal is first proffered as a direct contradiction as to what was testified to by a witness on the particular subject (i.e., that "canned programs" were or were not in fact put on the air). In other words, Bendetti can rebut any false testimony on specific facts but first Adams must make a specific proffer.

11. Mr. Linton's rebuttal testimony will be limited to his recollection of shareholders' meetings of September 14, 1991, and October 31 1991, as well as any related meeting of directors and any contemporaneous conversations that he had with other directors or officers. The so-called "proxy contest" is the only factual matter that was the subject of Parker testimony that was cited by Adams in its Motion for Rebuttal. That sets the limit and there will be no open-ended examination permitted of Mr. Linton into matters which cannot be shown to be identified as significant facts relating to Parker's denial of a "proxy contest" that qualify for rebuttal.³

12. With respect to further procedures, Adams will exchange a specific outline of facts and testimony (identified by transcript page and line) of Mr. Mattmiller, Mr. Kase, and Mr. Parker that will be rebutted. There will also be exchanged a listing of any documents that Adams intends to use in the rebuttal phase in conjunction with rebuttal testimony. Each such document must be shown to relate to a fact already in evidence (whether testimony or documents). There is a prehearing conference scheduled for February 16, 2000, at which such an exchange may be discussed.

³ There is an additional reason for permitting Adams to call Mr. Linton in rebuttal. Recall that the decision to permit questions on control of Mr. Parker was made just prior to Parker's testimony affording Adams sufficient but shortened time to prepare. Mr. Linton's testimony would also relate to the same issue of control albeit in a rebuttal context and Adams and the Bureau should be given the opportunity to examine Mr. Linton on the subject.

Order

IT IS ORDERED, subject to the above conditions, that Adams' Motion for Leave to Present Rebuttal Testimony filed on January 31, 1999, IS GRANTED in part and IS DENIED in part.

FEDERAL COMMUNICATIONS COMMISSION⁴

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel
Administrative Law Judge

⁴ Copies of this ruling were e-mailed to counsel on date of issuance.