

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

In re Applications of)
READING BROADCASTING, INC.)
For Renewal of License of)
Station WTVE(TV), Channel 51)
Reading, Pennsylvania)
and)
ADAMS COMMUNICATIONS CORPORATION)
For Construction Permit for a New)
Television Station to Operate on)
Channel 51, Reading, Pennsylvania)

MM Docket No. 99-153

File No. BRCT-940630KG

RECEIVED

MAY 31 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

File No. BPCT-940630KG

To: Magalie Roman Salas, Secretary
for direction to
The Honorable Richard L. Sippel
Administrative Law Judge

OBJECTION TO WITNESS NOTIFICATION

1. Adams Communications Corporation ("Adams") hereby objects, to the extent indicated herein, to the witness notification reflected in a letter submitted by Reading Broadcasting, Inc. ("RBI") on May 24, 2000.

2. In its letter, RBI advised the Presiding Judge of RBI's intent to "cross-examine" the following eight witnesses: Howard N. Gilbert, Robert L. Haag, Wayne J. Fickinger, A. R. Umans, Elinor Woron, Garrison Cavell, M. Anne Swanson, and Paul Sherwood.

3. Adams has no objection to "cross-examination", by RBI, of Messrs. Gilbert, Fickinger or Cavell. Each of those three individuals was listed as a direct case witness by Adams, and

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Adams acknowledges that witnesses which a party presents for direct case testimony are subject to cross-examination by all other parties. But neither Adams nor the Enforcement Bureau has presented ANY of the other five individuals as the source of direct case testimony.

4. Cross-examination is generally limited to matters addressed during the witness's testimony under direct examination. E.g., Fed. R. Evid. Rule 611(b). Rule 611(b) provides that "cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." If there is no such direct examination, then perforce there can be no basis for cross-examination. As a preliminary matter, then, it is difficult to perceive how RBI contemplates cross-examining individuals who have offered no direct testimony and who will not otherwise be appearing as witnesses.

5. Rule 611(b) does provide the Court with discretion to permit additional examination of the witness by counsel who would otherwise be cross-examining the witness -- but some justification must be shown for this departure from the standard limitations on cross-examination. In this case, RBI has offered no such justification at all. Moreover, any discretion would be exercisable by the Court only if there were in fact a witness already available for cross-examination. Here, as noted above, RBI has named for cross-examination five individuals who have not been called by any other party and who would not have any reason

at all to appear at the hearing and, therefore, be subject to cross-examination herein.

6. RBI's sudden expression of interest in cross-examining three of these five witnesses, Mr. Sherwood, Ms. Swanson and Mrs. Woron, is particularly bizarre in view of the fact that RBI provided no indication whatsoever in its direct case exhibits or its trial brief that RBI felt any need to examine any of those three. None of those three is mentioned at all in RBI's trial brief, which was required to set forth the anticipated testimony on which RBI intended to rely. See Order, FCC 00M-28, released April 5, 2000, n. 5, which stated the "[p]rescribed contents of Trial Briefs are set forth in Order, FCC 99M-42, at fn. 8". The contents as set forth in that cited order are:

- (a) A concise proffer of what the party intends to prove.
- (b) A brief summary of what each witness is expected to testify to in support of the proffer of proof.
- (c) A list of the documents which will be moved into evidence, a brief description of each document, and a statement of relevance with respect to each document.
- (d) Points and Authorities for anticipated evidentiary, procedural and substantive issues, citing only key cases and authorities relied on.

Order, FCC 99M-42, released July 15, 1999, at n. 8. In other words, to the extent that RBI intended to offer any documents or call any witnesses in order to prove its case, RBI was obligated to identify those documents and/or witnesses in its Trial Brief.

7. RBI's Trial Brief contains no reference whatsoever to

Mr. Sherwood, Ms. Swanson or Mrs. Woron.^{1/} This is not surprising because RBI made no timely effort to depose any of those three, or indeed, any of the eight witnesses it now proposes to cross-examine.^{2/}

8. In light of these circumstances, RBI's witness notification is plainly dubious. What purpose can legitimately be served by allowing RBI to "cross-examine" individuals whom RBI has not identified as having information material to its case and whom no other party has called to testify? This is especially true because RBI appears not to have even spoken with several of those witnesses and therefore presumably does not have any clear idea of what they are likely to say. It would be wasteful of the resources of the Court and the other parties to permit RBI, in effect, to undertake discovery in the guise of conducting "cross-examination".

9. RBI cannot complain that rejection of its witness notification would be unfair. RBI has had ample opportunity to assemble whatever proofs it thought essential to its position

^{1/} None of these three individuals was mentioned in Adams's Trial Brief, either.

^{2/} RBI did depose several Adams principals during Phase I of this proceeding, but RBI made no timely effort to depose any Adams principals under Phase III. At the close of Phase III discovery, RBI did file notices of deposition addressed to, inter alia, Mr. Sherwood, Ms. Swanson, Mr. Gilbert, Mr. Haag and Mrs. Woron. While the Presiding Judge refused to allow deposition of the Adams principals (Messrs. Gilbert and Haag and Mrs. Woron) because of the untimeliness of RBI's efforts, he did permit the deposition of Mr. Sherwood and an interview of Ms. Swanson. RBI did depose Mr. Sherwood but declined the opportunity to depose Ms. Swanson.

vis-à-vis the Phase III issues. Those issues were added at RBI's request, and RBI has been on notice since at least January that the issues would likely be tried. And yet, the exhibits exchanged by RBI concerning the Phase III issues include only four deposition transcripts, one of them partial, prepared in connection with Phase I, not Phase III, and a self-serving statement of an RBI employee. And in its Trial Brief, RBI has given no indication that it has any plans to rely on any other new evidence -- documentary or testimonial -- with respect to Phase III.

10. Thus, of the eight witnesses whom RBI now says it wishes to "cross-examine", four -- Mr. Cavell, Mr. Sherwood, Ms. Swanson and Mrs. Woron -- have never been mentioned by RBI in any of the materials in which RBI was supposed to have set forth its case. This failure by RBI was not the result of any ignorance of the names of these individuals: RBI has known about Mr. Cavell and Mrs. Woron for six years, since both were identified in Adams's application; RBI has known about Ms. Swanson since at least January, 1999, when she was identified on the record of this proceeding; and RBI has known about Mr. Sherwood since April 19, 2000 when he was identified by Adams. It is therefore beyond argument that RBI could have listed some or all of these individuals in its Trial Brief, filed on May 18, or in its exhibits, exchanged on May 16.

11. RBI did not so much as mention any of these four. Accordingly, RBI's implicit suggestion now that these witnesses

may be important lacks credibility.

12. Adams submits that RBI should be entitled to cross-examine only Messrs. Gilbert, Fickinger and Cavell, i.e., the witnesses whom Adams properly and timely listed as its direct case witnesses in its Trial Brief.

13. Inasmuch as RBI did include the deposition transcript of Robert Haag and an excerpt of the deposition transcript of A. R. Umans among its direct case exhibits, Adams believes that those two individuals may be deemed to have been identified as RBI direct case witnesses, but only to the extent covered by the transcripts exchanged by RBI. That is, RBI may call Messrs. Haag and Umans for direct testimony concerning only the matters addressed in the transcripts which RBI has exchanged. Without such a limitation, the Presiding Judge would be giving RBI carte blanche to range well beyond the proofs which RBI has already advised the Court and the other parties it intends to present. Such an approach would be grossly unfair to the other parties and would completely eviscerate the Presiding Judge's efforts, through the exhibit exchange and trial brief processes, to narrow and sharpen the issues for trial and thereby avoid unnecessary and undesirable surprise, with its attendant disruption and delay.

14. And RBI's suggestion that it should be permitted to "cross-examine" Mr. Sherwood, Ms. Swanson and Mrs. Woron should be rejected. Since none of those three have been named by any party as direct case witnesses, none of them will be offering any

direct testimony. Consequently, there will be nothing about which to "cross-examine" them. Had RBI wanted to conduct direct examination of these witnesses, RBI was required to so advise the Court and the other parties in its Trial Brief. It did not do so.^{3/} RBI should not be permitted to expand its proposed direct case proofs through the illogical and disingenuous claim of "cross-examination" of witnesses who are not appearing for any direct examination.

15. Adams recognizes that the Presiding Judge has signed subpoenas for Ms. Swanson, and possibly Mr. Sherwood and Mrs. Woron as well. But Adams does not understand that the signing of subpoenas constitutes a formal resolution of the propriety of what RBI is proposing here. Indeed, the fact that RBI sought subpoenas establishes conclusively that RBI did NOT believe that any of these witnesses would be properly subject to cross-examination. In order to be subject to cross, the witness would have to have been subject to direct examination, that is, the witness would already have to have been present in the courtroom, whether voluntarily or under compulsion of a subpoena

^{3/} Further, during an informal telephone conference on May 19, the Presiding Judge specifically alerted RBI to the fact that, if RBI intended to call Adams principals other than the four (Fickinger, Gilbert, Haag, Umans, all of whom are Adams directors) whose deposition testimony was included in RBI's exhibits, RBI would be expected to explain how such additional witnesses could be expected to add anything beyond what Messrs. Gilbert, Haag, Fickinger and Umans might provide. In listing Mrs. Woron for "cross-examination", RBI has offered no such explanation. Since Mrs. Woron is a less than 1% shareholder in Adams, is not an officer or director of Adams, and has not heretofore been deposed, it is doubtful that such an explanation is available to RBI.

at the instance of one or another party. Were that the case, RBI would not have needed any subpoena to assure the presence of witnesses for "cross-examination".

16. Thus, the fact that RBI has sought subpoenas for any of these witnesses further illustrates the fact that RBI is not really seeking to "cross-examine" them, but is instead planning to use these witnesses in some way in RBI's own direct case. But again, RBI has not heretofore given any indication that RBI plans to rely on any of these three witnesses in its direct case. That being so, RBI's backdoor attempt to expand its case must be rejected. ^{4/}

17. This is especially so in view of the obvious unfairness inherent in RBI's approach. The trial procedures established by the Presiding Judge, including the exchange of exhibits and trial briefs, are obviously designed to provide all parties with a clear and detailed understanding of what the other parties plan to prove at trial. The goal is to afford all parties ample time to prepare for the trial, and particularly to prepare to address the other parties' direct case showings. Here the direct case

^{4/} Adams is aware that, even though all discovery on Phase III was supposed to have been concluded on May 5, RBI is, more than three weeks later, still seeking to obtain additional documents from Ms. Swanson and her client, Telemundo. Adams anticipates that RBI may present its on-going discovery efforts as a justification for allowing it to expand its direct case on the eve of the hearing. But any delay in obtaining documents from Ms. Swanson and/or Telemundo is RBI's own fault. RBI had ample time in which to seek those materials as early as April 3. RBI then failed even to initiate that process until May, less than a week before the scheduled close of discovery, even though RBI was well aware of the identities and whereabouts of both Ms. Swanson and Telemundo.

showing which RBI has described consists of nothing more than some Phase I deposition testimony of four Adams principals and some testimony from Mr. Mattmiller.

18. RBI's witness notification clearly suggests that RBI plans also to rely in some way on the testimony of Mr. Sherwood, Ms. Swanson and Mrs. Woron in its direct case. But RBI has offered no hint of what it expects to prove through any of these individuals. Indeed, while RBI did belatedly depose Mr. Sherwood, it declined the opportunity to depose Ms. Swanson, and it did not make any timely effort to depose Mrs. Woron. Under these circumstances, it is not clear that RBI has any idea of the testimony Ms. Swanson or Mrs. Woron would provide. Moreover, RBI has failed to provide any justification for its failure to mention any of these three witnesses in any of its proof outlines.

19. The Court and the parties should not be forced to engage in a guessing game on the eve of the hearing. That is precisely the circumstance which the trial procedures dictated by the Presiding Judge were intended to prevent. Unfortunately, it

is also precisely the circumstance in which Adams, the Bureau and the Court find themselves following RBI's witness notification. Accordingly, for the reasons and to the extent shown above, Adams objects to the RBI witness notification. ^{5/}

Respectfully submitted,


/s/ Harry F. Cole
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May 31, 2000

^{5/} Rejection of RBI's witness notification to the extent indicated herein would not absolutely preclude RBI from presenting the testimony of those witnesses. For example, if RBI believes that any witnesses who are not allowed to appear in the initial evidentiary phase have information which may be presented as rebuttal, RBI will presumably be permitted to seek to present such rebuttal testimony, just as Adams sought leave to present rebuttal testimony in connection with Phase I. So in the unlikely event that RBI's proposed witnesses really do have some information which RBI might elicit on "cross-examination", RBI may have the opportunity to introduce that information into the record, as long as RBI can make an appropriate threshold showing sufficient to justify the presentation of "rebuttal" evidence.

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of May, 2000, I caused copies of the foregoing "Objection to Witness Notification" to be hand delivered (as indicated below), addressed to the following:

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