

ORIGINAL

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-940407KF

RECEIVED

JUL 14 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

POINTS AND AUTHORITIES
OF ADAMS COMMUNICATIONS CORPORATION
ON THE ISSUE OF PRIVILEGE

1. Pursuant to the Presiding Judge's Order, FCC 00M-47, released July 12, 2000, Adams Communications Corporation ("Adams") hereby submits its Points and Authorities on the Issue of Privilege relating to a memorandum ("the Resnik Memo"), apparently ^{1/} dated October 12, 1998, from Joshua Resnik to Howard Topel.

^{1/} Not having had access to the Resnik Memo, Adams must rely on descriptions of that document as provided by RBI.

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BACKGROUND

2. Phase II of the above-captioned proceeding entails an inquiry into whether Micheal Parker, the dominant principal of Reading Broadcasting, Inc. ("RBI"), engaged in misrepresentation or lack of candor in his descriptions, contained in a number of applications signed by Mr. Parker, of earlier proceedings in which Mr. Parker had been found to have engaged in serious misconduct. During cross examination in June, 2000, Mr. Parker was examined extensively about those descriptions. In his testimony, Mr. Parker relied to a great degree on claims of reliance upon counsel; he also provided two separate and seemingly inconsistent explanations for his descriptions of the earlier proceedings. *See, e.g.*, discussion at Tr. 2032-34.

3. After Mr. Parker's testimony, an additional document surfaced as a result of discovery which RBI was then undertaking of materials in the files of Dow, Lohnes & Albertson. That additional document was a letter ("the Parker-Gaulke Letter"), dated October 8, 1998, signed by Mr. Parker and addressed to an official of Telemundo. In that letter Mr. Parker provided an extended description of the earlier proceedings in which he had been found to have engaged in misconduct. The description in the Parker-Gaulke Letter varied in a number of significant respects from the descriptions which Mr. Parker had previously provided to the Commission, and they seemed also to vary from the explanations which Mr. Parker had offered during his June, 2000 testimony.

4. The Enforcement Bureau expressed concern that the Parker-Gaulke Letter appeared not to be consistent with Mr. Parker's testimony. Tr. 2125-36. As a result, Mr. Parker was called back to provide further testimony concerning the preparation of the Parker-Gaulke Letter and the extent to which the descriptions in the Parker-Gaulke Letter

could be said to be inconsistent with Mr. Parker's previous descriptions of the same subject matters both in the applications he had filed and in his testimony in this proceeding.

5. Counsel for RBI stated on the record that he understood that the Parker-Gaulke Letter "was prepared under the direction or by Mr. Topel, who is former counsel for Reading Broadcasting." Tr. 2335. This indicated that RBI intends to assert that the Parker-Gaulke Letter was based on advice of counsel.

6. In reviewing discovery responses in connection with Mr. Parker's upcoming testimony about the Parker-Gaulke Letter, counsel for Adams came across references to the Resnik Memo, which had been identified in RBI's earlier discovery responses but withheld from production on the basis of privilege claims. The Resnik Memo is apparently dated October 12, 1998 -- that is, it is contemporaneous with the Parker-Gaulke Letter. According to RBI, the Resnik Memo

presents a summary of the proceedings and allegations relating to the character allegations previously raised against Micheal Parker, and entities in which he holds an interest.

See Attachments A and B to Adams's Motion to Compel (filed July 10, 2000). Adams then sought production of the Resnik Memo based on the facts that: (a) the subject matter of the Resnik Memo appears to cover precisely the same subject matter as the portion of the Parker-Gaulke Letter about which Mr. Parker is to be examined; and (b) the Resnik Memo was prepared at the same time as the Parker-Gaulke Letter; and (c) RBI has asserted, through counsel, that the Parker-Gaulke Letter was in fact prepared by or under the direction of Howard Topel, to whom the Resnik Memo was addressed.

7. In its Points and Authorities filed on July 13, 2000, RBI states that Mr. Resnik, the apparent author of the Resnik Memo, was "a legal assistant with the firm of

Fleischman & Walsh, L.L.P. ("F&P"), at the specific request of Howard A. Topel, Esq., an attorney with that law firm". RBI Points and Authorities at 3. RBI thus seems to be saying that Mr. Resnik was not an attorney.^{2/} But according to the 1999 edition of Martindale-Hubbell, Mr. Resnik had been admitted to the bar in 1996 and was listed as an associate at F&P. See Attachment A hereto. Additionally, Mr. Resnik's name had appeared in the signature block of pleadings on behalf of at least one of Mr. Parker's corporations in 1997. See Attachment B hereto. It therefore appears that, contrary to RBI's assertion, Mr. Resnik was an attorney at F&P in October, 1998.

8. Mr. Resnik's actual status at F&P does not appear to Adams to be particularly significant. It is therefore surprising that RBI would misstate that status when, presumably, it would have been a simple matter for RBI either to verify exactly what Mr. Resnik's position with F&P was, or to avoid attempting to draw any distinction between the respective positions of Messr. Resnik and Topel. This is particularly true where RBI purported to describe Mr. Resnik's position with specificity (*i.e.*, "legal assistant"). This apparent misstatement raises questions about the reliability of RBI's factual assertions in general.

9. Similarly, RBI overstates the facts when it asserts that the Resnik Memo was prepared "in the actual course of litigation". RBI Points and Authorities at 4. In support of this claim, RBI points first to the fact that an application filed by Mr. Parker concerning his Dallas station had been the subject of a petition to deny. But that application was filed in September, 1997, the petition was filed in November, 1997, and the application had thereafter been dismissed at the request of the applicants in December, 1997, almost a year

^{2/} RBI refers to Mr. Resnik as a "legal assistant", while it describes Mr. Topel as "an attorney". Also, RBI accords Mr. Topel the honorific of "Esq." normally reserved for lawyers; no such honorific is accorded to Mr. Resnik.

before the Resnik Memo. Thus, there was no litigation pending there.

10. Next, RBI cites the Hartford case. While questions concerning Mr. Parker had indeed been raised in the Hartford proceeding, the Commission had declined to add any issues about Mr. Parker when it designated the Hartford proceeding for hearing in April, 1997, approximately 18 months *before* the Resnik Memo. *Martin W. Hoffman*, 12 FCC Rcd 5224 (1997). While it is possible that questions relating to Mr. Parker might someday have been litigated in the context of the Hartford case, the fact is that such questions were not in litigation in October, 1998 in that case and they have not since been in litigation in that case.

11. Finally, RBI cites the fact that undersigned counsel represented adversaries to Mr. Parker in both the Hartford and the instant cases. That is true, but it does not mean that, in October, 1998, any "actual" litigation was underway, or even on the immediate horizon.

DISCUSSION

12. In its Points and Authorities, RBI argues that the Resnik Memo is protected by the work product and attorney client privileges. RBI also argues that the Resnik Memo is not relevant to Mr. Parker's upcoming testimony.

13. As to the claim of relevance, RBI's argument is transparently without merit. Mr. Parker is going to be examined about statements made in a letter over his own signature concerning past proceedings in which he had been involved at the Commission. As the Enforcement Bureau has suggested, the statements in the Parker-Gaulke Letter may be inconsistent both with Mr. Parker's representations to the Commission and with Mr. Parker's testimony given in this very proceeding about those same representations. The Parker-Gaulke Letter is therefore clearly relevant to this proceeding.

14. The Resnik Memo is equally relevant hereto for several reasons. First, the Resnik Memo was prepared for and, presumably, under the direction of Mr. Topel. But according to counsel for RBI, it was Mr. Topel who was responsible for the language of the Parker-Gaulke Letter. Tr. 2335. Since the two documents were prepared at essentially the same time, the Resnik Memo may shed additional valuable light on the manner in which the Parker-Gaulke Letter came to be written.

15. Second, and more importantly, counsel for RBI has indicated that the Parker-Gaulke Letter does not necessarily "represent Mr. Parker's personal views". Tr. 2335. But according to RBI's Points and Authorities, the Resnik Memo contains notations made by Mr. Topel which reflect "information gleaned from Mr. Parker". RBI Points and Authorities at 7; *see also id.* at 3 ("A number of [Mr. Topel's] notes clearly reflect information received from Micheal Parker."). So Mr. Topel apparently had access to Mr. Parker's "personal views" either prior to or shortly after the preparation of the Parker-Gaulke Letter.

16. The information "gleaned from Mr. Parker" therefore has a clear and direct relevance to any claim that Mr. Parker might make to the effect that he did not really believe the statements to which he subscribed in the Parker-Gaulke Letter. This is true regardless of whether the Resnik Memo (and Mr. Topel's notations thereon) came before, after, or absolutely simultaneously with the Parker-Gaulke Letter.

17. RBI seems to argue that the two documents were so separated in time that the Resnik Memo must be deemed irrelevant. RBI Points and Authorities at 5. But the dates on the two documents indicate that they were both prepared within several days of one another. It is difficult to imagine that Mr. Topel would have prepared an extensive description of Mr. Parker's history at the Commission -- a description to be delivered to and relied upon by

a third party -- and, a day or two *after* that preparation, call for a memorandum on precisely the same topic. That would make no sense.

18. But let's say that that's what happened. Mr. Parker then signed off on the Parker-Gaulke Letter, even though he (according to RBI's counsel) may not have believed that that letter accurately reflected his personal views. But then Mr. Parker and Mr. Topel conferred and Mr. Parker provided Mr. Topel with "information". If Mr. Parker truly did not agree with Mr. Topel's descriptions as set forth in the Parker-Gaulke Letter, then it is logical to assume that Mr. Parker would have advised Mr. Topel of that disagreement and that that information would be reflected in Mr. Topel's notes on the Resnik Memo. Again, there can be no question but that the Resnik Memo is relevant hereto.

19. And if Mr. Topel's notes do *not* reflect any disagreement from Mr. Parker, then that, too, would be relevant, as it would tend to undermine the claim (already advanced by RBI's counsel) that Mr. Parker may somehow have disagreed with the descriptions in the Parker-Gaulke Letter.

20. The primary concern of Phase II is Mr. Parker's understanding and state of mind concerning the representations he made to the Commission. He has testified at some length about those matters, and the Parker-Gaulke Letter appears to be inconsistent with that testimony to some degree. The Parker-Gaulke Letter is thus clearly relevant hereto. The Resnik Memo apparently was generated in the same law firm at the same time about the same subject matter as the Parker-Gaulke Letter, and it contains notes reflecting information received from Mr. Parker. It, too, is clearly relevant hereto.

21. With respect to the claim of attorney-client privilege, it is well-established that that privilege is waived through any voluntary disclosure of otherwise privileged

communications concerning a particular matter.^{3/} According to Wigmore, as quoted by the D.C. Circuit,

The client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter.

8 J. Wigmore, *Evidence in Trials at Common Law*, §2327 at 638, quoted in *In re Sealed Case*, 676 F.2d 793, 809, n. 54 (D.C. Cir. 1982).^{4/}

22. In the instant case, it appears clear that Mr. Parker and Mr. Topel communicated about the matters addressed in the Parker-Gaulke Letter and the Resnik Memo. It is also clear that, at least according to RBI's counsel, the Parker-Gaulke Letter was authored by (or under the supervision of) Mr. Topel, and presumably thereafter communicated to Mr. Parker. To the extent that RBI apparently intends to rely on Mr. Topel's supposed authorship of the Parker-Gaulke Letter, RBI is in effect voluntarily disclosing attorney-client communications between Messrs. Parker and Topel concerning the subject matter addressed in the Parker-Gaulke Letter. That disclosure effects a waiver of the privilege with respect to other communications relating to the same matter. *See In re Sealed Case, supra.*

^{3/} Adams notes that, not having had access to the Resnik Memo, Adams has no way of knowing whether that memo is in fact subject to any legitimate attorney-client privilege claim -- for example, are the communications between Messrs. Parker and Topel supposedly reflected therein truly the sort to which such privilege is accorded? Without waiving any argument that the documents do not qualify for any privilege, Adams's arguments herein are based on the assumption that the documents would otherwise be privileged.

^{4/} *See also In re Sealed Case*, 676 F.2d at 818 ("Any disclosure [of communications assertedly subject to the attorney-client privilege] inconsistent with maintaining the confidential nature of attorney-client relationship waives the privilege. When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter . . .").

23. With respect to the claim of work-product privilege, it is well-established that that privilege is not absolute. *In re Sealed Case, supra*. The privilege can and is defeated when (a) there is a prima facie showing of fraudulent conduct by the party asserting the privilege and (b) the court finds some valid relationship between the assertedly privileged materials and the prima facie fraud. *Id.* at 814-15. In the instant case, it has already been established that, at a minimum, a substantial and material question exists as to whether Mr. Parker engaged in misrepresentation or lack of candor, *i.e.*, fraud on the Commission. The first element of the two-part standard is thus satisfied.

24. And the Resnik Memo is clearly and closely related to the prima facie fraud. Inasmuch as RBI has indicated that the Parker-Gaulke Letter was authored by Mr. Topel, RBI must be deemed to be relying on some form of an "advice of counsel" explanation for the Parker-Gaulke Letter's description of Mr. Parker's past history before the Commission. The Resnik Memo, created contemporaneously with the Parker-Gaulke Letter, at the same law firm, and containing notations reflecting information obtained from Mr. Parker himself is obviously closely related to the Parker-Gaulke Letter.

25. In its Points and Authorities, RBI suggests that Adams does not really need the Resnik Memo because Adams could simply ask Mr. Parker direct questions. RBI Points and Authorities at 6. But RBI misses the point. RBI's counsel has already previewed Mr. Parker's testimony, and has indicated that Mr. Parker is likely to say that Mr. Parker had little if anything to do with the language of the Parker-Gaulke Letter and that that language does not necessarily reflect Mr. Parker's personal views. That being the case, Adams is entitled to documents which might impeach this "official version" of the story, since such materials are necessary for any fair evaluation of Mr. Parker's latterday

testimony. *See In re Sealed Case*, 676 F.2d at 822 (when a party purports to fully disclose information, waiver of work product privilege may be implied with respect to any material necessary for a fair evaluation of the disclosures).

26. In view of the foregoing, Adams renews its motion for an order compelling production of the Resnik Memo.

Respectfully submitted,



/s/ Harry F. Cole

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July 14, 2000

ATTACHMENT A

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D.C. Co.

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Biography: Member: District of Columbia Bar; Maryland State Bar Association, Inc.

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Born: Santa Monica, California, June 12, 1970

Member: ABA

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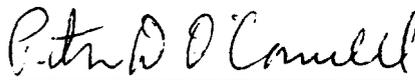
ATTACHMENT B

IV. Conclusion

Shurberg has proved himself to be a thoroughly bankrupt and untrustworthy applicant. He already has consumed far more than his share of Commission and judicial resources. For the reasons set forth in the Petition and above, Shurberg's application should now be dismissed.

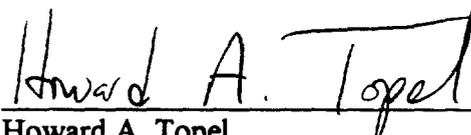
Respectfully submitted,

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October 1, 1997

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of July, 2000, I caused copies of the foregoing "Points and Authorities of Adams Communications Corporation on the Issue of Privilege" to be hand delivered (as indicated below), addressed to the following:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
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