

FEDERAL ROOM
Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 01M-12

2002 MAY 21 P 5:03

00445

In the Matter of)
)
Ronald Brasher)
Licensee of Private Land Mobile Stations)
WPLQ202, KCG967, WPLD495, WPKH771,)
WPKI739, WPKI733, WPKI707, WIL990,)
WPLQ475, WPLY658, WPKY903, WPKY901,)
WPLZ533, WPKI762, and WPDU262)
Dallas/Fort Worth, Texas)
)
Et al.)

EB DOCKET NO. 00-156

MEMORANDUM OPINION AND ORDER

Issued: May 9, 2001

;

Released: May 11, 2001

1. Under consideration are: (a) a Motion to Reopen the Record to Accept Additional Exhibit into Evidence, filed on April 17, 2001, by the Enforcement Bureau ("Bureau"); (b) an Opposition to Motion to Reopen the Record and Request for Sanctions, filed on April 24, 2001, by Ronald Brasher, Patricia Brasher, and DLB Enterprises, Inc. dba Metroplex Two-Way ("R. Brasher"); (c) an Opposition to Motion to Reopen Record to Accept Additional Exhibit into Evidence, filed on April 26, 2001, by David Brasher and Diane Brasher ("D. Brasher"); (d) an Opposition to Request for Sanctions and Response to Request for Opportunity to Cross Examine Witness, filed on April 30, 2001, by the Bureau; (e) a Motion to Strike, filed on May 3, 2001, by R. Brasher; and (f) an Opposition to Motion to Strike, filed on May 8, 2001, by the Bureau.¹

Motion to Reopen the Record

2. A hearing in this proceeding was held on February 26-28, March 1-2 and 5-9, 2001. At the conclusion of the hearing, the record was closed. (Tr. 2457-58; Order, FCC 01M-06, released March 15, 2001.) In its Motion, the Bureau requests that the record in this case be reopened, and that an additional exhibit be received into evidence as EB Exhibit 79. The exhibit consists of the April 10, 2001, "Affidavit" of Gale Bolsover (page 1); the April 10, 2001, "Forensic Laboratory Examination Report" of a "Handwriting Examination" conducted by Ms. Bolsover (page 2); and three attachments thereto (pages 3-5). Ms. Bolsover is a Forensic Document Analyst, employed by the United States Postal Inspection Service, who testified in this proceeding as an expert witness. In the proffered Report, Ms. Bolsover finds that a certain questioned "Norma Sumpter" signature "is not original to the document on which it appears, but has been cut and pasted or otherwise copied onto the [document] on which it is found." (Proposed EB Ex. 79, p. 2.)

¹ R. Brasher's Motion to Strike will be dismissed. It is, in actuality, a thinly veiled reply to the Bureau's Opposition to Request for Sanctions. As such, it is an unauthorized pleading and is entitled to no consideration. See Section 1.294 of the Commission's Rules; cf. *Guy S. Erway*, 40 FCC 2d 1071, 1074 (Rev. Bd. 1973). Given this ruling, the Bureau's Opposition to Motion to Strike will be dismissed as moot.

3. In support of its Motion, the Bureau argues that the exhibit in question could not have been offered during the course of the hearing despite the exercise of due diligence. The Bureau also claims that the exhibit will greatly aid in the determination of the credibility of the witnesses in this proceeding, and would be highly probative of the abuse of process issue.² Both R. Brasher and D. Brasher oppose the Bureau's Motion to Reopen.

4. The Motion to Reopen the Record will be denied. It is well established that, to justify a reopening of the record, a petitioner must show "unusual or compelling circumstances." *WEBR, Inc. v. FCC*, 420 F.2d 158 (D.C. Cir. 1969); *Kidd v. FCC*, 302 F.2d 873 (D.C. Cir. 1962); *Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72, 74 (1976). Specifically, a petition to reopen "must be supported by a showing that the petitioner could not, through the exercise of due diligence, have discovered the facts relied upon at an earlier date, and that the new evidence, if true, would affect the ultimate disposition of the proceeding." *Washoe Shoshone Broadcasting*, 5 FCC Rcd 5561 (1990), citing *Southeast Arkansas*. The Bureau has not met this stringent test.

5. Even assuming, *arguendo*, that the proffered evidence would affect the ultimate outcome of this case, the Bureau has failed to establish that it acted with due diligence. The record in this proceeding shows that the documents containing the two signatures which are the subject of Ms. Bolsover's April 10, 2001, Report were provided to the Commission's Wireless Telecommunications Bureau in early April 1999. (See EB Ex. 19, pp. 200 and 600; see also EB Ex. 45, p. 10.) Thus, the signatures in question have been in the possession of the Bureau since the release of the *HDO* in August 2000, and they could have been compared with each other long before the close of the record in this case. The fact that the similarities in the signatures were noticed by Ms. Bolsover, and pointed out to Bureau counsel, on the last day of the hearing, and that Ms. Bolsover's analysis of those signatures was promptly undertaken, does not establish that the Bureau acted with due diligence. Nor does it constitute such unusual or compelling circumstances as to warrant the reopening of the record.

6. Relying on the Presiding Judge's statement that any of the witnesses in this case may come forward with new information that they might remember which would aid in the proper resolution of the issues (Tr. 2246-47), the Bureau claims that the proffered exhibit is just such evidence and should, therefore, be accepted. The Bureau's argument is unpersuasive. Suffice it to say, it is clear from a reading of the cited portion of the record that the Presiding Judge's invitation was specifically directed to the Sumpters and the Brashers.

Request for Sanctions

7. R. Brasher avers that the Bureau's use of Ms. Bolsover in this proceeding "has been solely to unfairly prejudice [R. Brasher's] case," and that the Motion to Reopen "is an obvious example of prosecutorial excess" in that it allegedly attempts "premature[ly]" to place conclusions of fact and law before the Presiding Judge. R. Brasher's Opposition, at 10. In addition, R. Brasher contends that the Bureau's disclosure of Ms. Bolsover's March 5, 2001, Forensic Laboratory Examination Report (Judge's Ex. 3) on the date of her testimony was improper and prejudicial. *Id.* at 11-12. Further, R. Brasher maintains that the Motion to Reopen "arises out of a bad faith attempt to prejudice unfairly the trier of fact by asserting inflammatory evidence and unsupported conclusions," *id.* at 12, and "was wholly frivolous when conceived and filed" *id.* at 13 (footnote

² This issue reads as follows: "(c) To determine whether any of the captioned parties abused the Commission's processes in connection with the filing of applications on behalf of O.C. Brasher, Ruth I. Bearden, Jim Sumpter, Norma Sumpter, Melissa Sumpter or Jennifer Hill." *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing*, 15 FCC Rcd 16326, 16332 (¶ 11) (2000) ("*HDO*").

omitted). Consequently, R. Brasher requests that “all testimony and evidence given by [Ms. Bolsover] which goes beyond the contents of [EB Ex. 75] be stricken from the record and given no decisional weight.” *Id.* at 14. The Bureau opposes R. Brasher’s request.

8. The Request for Sanctions will be denied. First, the Request appears to contemplate a review and reconsideration of the ruling admitting into evidence Judge’s Ex. 3 and the testimony relating thereto. However, the Commission’s rules do not envisage the reconsideration of such interlocutory rulings. *See* Section 1.106(a)(1) of the Commission’s Rules. Next, contrary to R. Brasher’s assertions, there was nothing unusual or improper in the Bureau’s Motion to Reopen the Record. Such motions have long been a part of Commission practice and have been filed in all types of proceedings. *See, e.g.*, the cases cited in para. 4, above, and *Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1961); *Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988); *American International Development, Inc.*, 86 FCC 2d 808 (1981); *The News-Sun Broadcasting Co.*, 27 FCC 2d 61 (1971); and *West Central Ohio Broadcasters, Inc.*, 4 FCC 2d 934 (Rev. Bd. 1966). In addition, the filing of the Bureau’s Motion was neither frivolous nor an abuse of process. Rather, the Motion was a serious attempt to bring what the Bureau believed to be significant and important evidence to the Presiding Judge’s attention. Moreover, there was nothing inappropriate in the Bureau’s statement of the conclusions which might be reached if its proposed exhibit was received into evidence. Under the controlling case law, the Bureau was required to demonstrate that “the new evidence, if true, would affect the ultimate disposition of the proceeding,” *Washoe Shoshone*, 5 FCC Rcd at 5561, and its conclusory statements constituted an integral part of that showing.

9. One final matter requires brief comment. R. Brasher’s Opposition to Motion to Reopen the Record and Request for Sanctions (as well as its Motion to Strike) is filled with personal attacks on the motivation, good faith, trial tactics, legal abilities, character, and integrity of Bureau counsel. Such attacks have absolutely no bearing on the questions to be resolved and do nothing to advance R. Brasher’s cause. They are unprofessional and improper, and should immediately be discontinued. *Cf. City of New York Municipal Broadcasting System*, 39 RR 2d 102 (1976); *Valparaiso Broadcasting Co.*, 25 RR 530, 531 (Rev. Bd. 1963).

Ordering Clauses

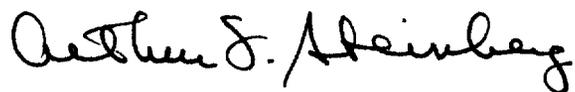
Accordingly, IT IS ORDERED that the Motion to Strike, filed by R. Brasher on May 3, 2001, IS DISMISSED as an unauthorized pleading.

IT IS FURTHER ORDERED that the Opposition to Motion to Strike, filed by the Bureau on May 8, 2001, IS DISMISSED as moot.

IT IS FURTHER ORDERED that the request for sanctions contained in the Opposition to Motion to Reopen the Record and Request for Sanctions, filed by R. Brasher on April 24, 2001, IS DENIED.

IT IS FURTHER ORDERED that the Motion to Reopen the Record to Accept Additional Exhibit into Evidence, filed by the Bureau on April 26, 2001, IS DENIED, and that EB Exhibit 79 (identified in para. 2, above) IS REJECTED.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg
Administrative Law Judge