

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

MM Docket No. 88-577

In re applications:

OWEN-DUMEYER File No. BPH-870828MC
PARTNERSHIP
(hereafter Owen-Dumeyer)

NATIONAL File No. BPH-870831MF
COMMUNICATIONS
INDUSTRIES
(hereafter National)

RAKEL File No. BPH-870831MG
COMMUNICATIONS,
INC.
(hereafter raKel)

ERNEST J. PHILLIPS, III File No. BPH-870831MH
(hereafter Phillips)

LIBERTY PRODUCTIONS, File No. BPH-870831MI
A LIMITED PARTNERSHIP
(hereafter Liberty)

WILLSYR File No. BPH-870831MJ
COMMUNICATIONS
LIMITED PARTNERSHIP
(hereafter Willsyr)

BILTMORE FOREST File No. BPH-870831MK
BROADCASTING FM, INC.
(hereafter BFBFM)

SKYLAND File No. BPH-870831ML
BROADCASTING
COMPANY
(hereafter Skyland)

BILTMORE File No. BPH-870831MM
BROADCASTING INC.
(hereafter BBI)

UNITED BROADCASTING File No. BPH-870831MN
ENTERPRISES, INC.
(hereafter United)

SHAMROCK File No. BPH-870901MB
COMMUNICATIONS, INC.
(hereafter Shamrock)

ORION File No. BPH-870901ME
COMMUNICATIONS
LIMITED
(hereafter Orion)

HARBINGER File No. BPH-870901MF
BROADCASTING
COMPANY
(hereafter Harbinger)

For a Construction Permit
For a New FM Station
in Biltmore Forest, North Carolina
on Channel 243A

HEARING DESIGNATION ORDER

Adopted: December 9, 1988; Released: January 19, 1989

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On May 9, 1988, Willsyr filed a Petition to Deny against BFBFM. Willsyr alleges that BFBFM, by its November 16, 1987 amendment, altered its proposed site coordinates by 3 seconds latitude and 1 second longitude, but included no new site certification. Willsyr concludes, therefore, that BFBFM's application is untenderable as it does not have an acceptable site assurance certification.

3. The Commission does not agree with Willsyr's conclusion. By way of its *timely* November 16, 1987 amendment, BFBFM states that it is only correcting the coordinates submitted in the original application. Consequently, in its amendment, BFBFM has submitted new exhibits for all information pertaining to the correction in coordinates (e.g., Section V-B of FCC Form 301, antenna sketch, spacing study and contour map). On page 2 of the Engineering Statement of the November 16, 1987 amendment it is stated that "[t]he proposed transmitter site requested by this application is available for said use." The amendment, and thus the above statement, was signed as accurate and truthful by both the president of BFBFM and its broadcasting consultant.

4. Furthermore, BFBFM had filed a site certification in Section VII of its original application. Since BFBFM had a signed site certification within its originally submitted application, which on its face was valid, the Commission cannot now dismiss BFBFM's application as untenderable. By means of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission imposed a requirement on broadcast applicants to include as part of their applications certifications of reasonable assurance of site availability. See Paragraph 22 of the *Report and Order, supra*. Also, by means of the same document (See Paragraph 23 and Appendix D), the Commission established that site-availability certification was one element of tenderability or substantial completeness. However, the *Report and Order* is silent as to the applicability of this specific tenderability requirement with respect to amendments submitted pursuant to 47 C.F.R. § 73.3522. Consequently, the Commission will not return as unacceptable an amendment missing this information. Finding that BFBFM's application, and specifi-

cally its site certification, fully complies with the tender requirements advanced in Appendix D of the *Report and Order, supra*, the Commission will deny Willsyr's Petition to Deny herein. However, in light of the fact that the November 16, 1987 amendment did not contain a certification, a site availability issue will be added.

5. On May 9, 1988, Willsyr filed a Petition to Deny against Skyland. Willsyr's petition is essentially an attempt to specify issues. Since the Commission directed the deletion of all pleadings in pending cases, the matters sought to be raised in this petition will not be considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229 of the Commission's Rules. See *Report and Order in re Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, (1979) (*Paglin Report and Order*) Therefore, the Petition to Deny filed by Willsyr against Skyland will herein be dismissed.

6. *Section II, Item 4.* Section II, Item 4 of FCC Form 301 requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. raKel and Willsyr have not completed Item 4 correctly. Willsyr's application gives a post office box number as the address of its general partner and raKel only lists the city and state for its principals. Accordingly, Willsyr and raKel must submit amendments containing all information required by Section II, Item 4 to the presiding Administrative Law Judge.

7. *raKel.* raKel was also an applicant for a construction permit for a new FM facility in Upper Arlington, Ohio (File No. BPH-860507PE). By its June 7, 1988 amendment, raKel informed the Commission that the presiding Judge specified the following issues against it in the Upper Arlington proceeding:

(a) To determine whether raKel Communications, Inc. ever possessed "reasonable assurance" that its currently designated transmitter/antenna location would be available to it, and if not, the effect thereof on its basic qualifications to be a Commission licensee.

(b) To determine whether raKel engaged in misrepresentations to the Commission, and if so, the effect thereof on its basic qualifications to be a Commission licensee.

Memorandum Opinion and Order in MM Docket 87-370, FCC 87M-3143, released December 3, 1987.

8. The Upper Arlington proceeding concluded without the above issues being resolved. Therefore, these unresolved questions continue to cast uncertainty upon whether raKel is qualified to be a Commission licensee. Accordingly, appropriate issues will be specified below.

9. *BBI.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by BBI would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. *Shamrock.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301,

and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Although Shamrock has filed such a statement, it is deficient. Shamrock has not listed any specific minority or women's organizations as sources for recruitment. Accordingly, Shamrock will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

11. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

| AMENDMENTS | AMENDMENTS FILED |
|--------------|-------------------|
| Owen-Dumeyer | August 30, 1988 |
| raKel | June 7, 1988 |
| BFBFM | December 23, 1987 |
| | February 25, 1988 |
| | May 11, 1988 |
| BBI | November 13, 1988 |
| | November 23, 1988 |
| Shamrock | May 11, 1988 |

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether BFBFM has reasonable assurance that the transmitter site specified will be available to it.

2. To determine whether raKel ever possessed "reasonable assurance" that its transmitter/antenna location designated at the time of hearing in the Upper Arlington, Ohio proceeding would be available to it, and if not, the effect thereof on its basic qualifications to be a Commission licensee.

3. To determine whether raKel engaged in misrepresentations to the Commission, and if so, the effect thereof on its basic qualifications to be a Commission licensee.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by BBI would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the Petition to Deny BFBFM's application filed by Willsyr IS HEREBY DENIED.

16. IT IS FURTHER ORDERED, That the Petition to Deny Skyland's application filed by Willsyr IS HEREBY DISMISSED.

17. IT IS FURTHER ORDERED, That Willsyr and raKel shall submit amendments which contain the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That Shamrock file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order specifying minority and women's organizations which will be used for the purposes of recruitment.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Owen-Dumeyer, raKel, BFBFM, BBI, and Shamrock ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau