

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

MM Docket No. 88-586

In re Applications of

MARILYN S. &
JAMES W. COBB
(hereafter "Cobb")

File No. BPH-871022MF

NAPPANEE
BROADCASTING
CORPORATION
(hereafter "NB")

File No. BPH-871022MG

ANDREW LAWRENCE
BANAS
(hereafter "Banas")

File No. BPH-871023MK

For Construction Permit for a
New FM Station, Channel 239A,
Nappanee, Indiana

HEARING DESIGNATION ORDER

Adopted: December 13, 1988; Released: January 31, 1989

By the Chief, Audio Services Division:

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

2. *Petitions to Dismiss / Deny.* On December 28, 1987, Cobb filed a "Motion to Dismiss" the Banas application, and on June 9, 1988, Cobb filed a "Petition to Dismiss or Deny" the Banas application, alleging that Banas has failed to secure reasonable assurance of transmitter site availability. The staff has determined that Cobb's petition is essentially a petition to specify issues. Since the Commission's *Report and Order in re: Revised Procedures for processing of Contested Broadcasting Applications: Amendments of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the petitions will be dismissed and an opportunity to raise any allegations contained therein will be afforded the parties post-designation.

3. The engineering data submitted by NB does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. See *John. R. Hughes et al.*, 50 Fed. Reg. 5679 (February 11, 1985). See also *Southwest Communications, Inc.*, released July 16, 1986 (letter from Dennis Williams, Acting Chief, FM Branch, reference 8920-HVT). Engineering study reveals that NB's contour

would cover approximately 97% of the community of license and 100% of its population. Accordingly, no waiver is required.

4. Banas has indicated his intent to terminate his relationship with WRQT-FM, Bear Lake, Michigan in the event of grant of the referenced application. Accordingly, in the event of grant of his application, Banas will be required to sever all connections with that station prior to the commencement of program test authority.

5. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after January 3, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT

Cobb

AMENDMENT FILED

May 19, 1988 (engineering)

6. 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 Banas has filed such statement, it is deficient in that Banas has not listed any female recruitment sources. Accordingly, Banas 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.

7. 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.

8. 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 which of the proposals would, on a comparative basis, best serve the public interest.

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

9. IT IS FURTHER ORDERED, That the December 28, 1987 Motion to Dismiss and the June 9, 1988 Petition to Dismiss or Deny filed by Cobb ARE DISMISSED.

10. IT IS FURTHER ORDERED, That in the event of grant of Banas' application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commis-

sion that it has divested itself of all interests in and severed all connections with station WRQT-FM, Bear Lake, Michigan.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Cobb IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Banas shall file Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules with the presiding Administrative Law Judge.

13. 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.

14. 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.

15. 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