

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

MM Docket No. 88-615

In re Applications of

C. RAY HELTON File No. BPH-871022MH
(hereafter: Helton)

ABUNDANT LIFE File No. BPH-871022MK
MINISTRIES
(hereafter: ALM/Martin)

CRYSTAL SETS, INC. File No. BPH-871022MD
(hereafter: Crystal) (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station
on Channel 246A in
Green Valley, Arizona

HEARING DESIGNATION ORDER

Adopted: December 23, 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. Also before us is a petition for reconsideration of the return of Crystal's application as unacceptable for filing, and a motion to dismiss ALM/Martin's application and a petition to deny Helton's application, both filed by Crystal, and related pleadings.

PRELIMINARY MATTERS

2. On May 13, 1988, the FM Branch Chief returned Crystal's application declaring it unacceptable for filing due to its violation of the United States-Mexican Agreement of 1972 (Mexican Agreement), 24 U.S.T. 1815 (1973). Subsequently, on June 24, 1988, Crystal filed a petition for reconsideration of the return of its application and requested that it be reinstated *nunc pro tunc*. On June 27, 1988, Crystal filed a petition for leave to amend and an amendment changing transmitter site, claiming that its option to use the original site had been terminated.

3. *The Crystal Petition for Reconsideration and Reinstatement.* Crystal, while conceding that its application violates the Mexican Agreement, contends that its application should be reinstated and that it should be allowed to cure the defect because: (i) the Commission has previously allowed the amendment of applications in violation of "technical rules and/or international agreements"; (ii) the Commission has accepted for filing and granted applications which violate the same agreement, and provisions thereof, which Crystal's application violates and which resulted in the return of its application; and (iii) the cases

which illustrate the foregoing situations are factually similar to its own and therefore the Commission is obligated to treat Crystal similarly and reinstate its application.

4. Crystal notes that the Commission policy statement on the processing of FM applications states that applications which are not "substantially complete" are to be returned, and that inconsistent data will be treated as missing data, citing *Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete or Are Otherwise Defective*, Mimeo No. 4580, released May 16, 1985. Crystal goes on to enumerate situations which are seemingly inconsistent with the "substantially complete" test where "the Commission has permitted applicants, whose applications were in clear violation of the Commission's technical rules and/or international agreements . . . to amend their applications to correct technical discrepancies." *Pet. For Recon.* at p.3, citing *Catskill Broadcasting Company*, 3 FCC Rcd 3024 (released May 25, 1988), and *Anita A. Levine et al.*, 2 FCC Rcd 1480 (1987). Crystal further asserts that the Commission has allowed applications in violation of the treaty to compete for new frequency allocations by designating them for hearing with other non-violative mutually exclusive applications, and has even granted a construction permit (CP) that is in conflict with the Mexican Agreement, citing (a) the application of Classic Media, Inc. (file no. BPH-861002TF), accepted for filing and designated for hearing in MM Docket 88-137, *Roy E. Henderson*, 3 FCC Rcd 2010 (released April 8, 1988), and (b) the CP granted to KFFX(FM), Green Valley, Arizona. Crystal states the similarity between *Catskill* and its own situation is "striking", and "that the only difference is that the application [in *Catskill*] violated an FCC rule and the Crystal application violated an international agreement." *Pet. for Recon.*, p.7 fn.2. Crystal submits that the common factual situations but disparate treatment of the applicants in *Catskill* and the other cases magnifies the arbitrary and capricious behavior of the Commission in treating similarly situated applicants differently. Therefore, the petitioner contends that the Commission is obligated to reinstate its application because it is required to treat similar cases consistently, citing *Melody Music, Inc. v. F. C. C.*, 345 F.2d 730 (D.C. Cir. 1965), and *Green Country Mobilephone, Inc. v. F. C. C.*, 765 F.2d 235 (D.C. Cir. 1985).

5. We reject Crystal's contention. In essence, Crystal equates FCC rules with international agreements, a position that is unsound and completely without foundation. The Mexican Agreement is a part of the United States' governing law "and cannot be waived, altered or canceled except by replacement with a new agreement or notice of termination served through diplomatic channels. The Commission itself has no authority to waive the terms of an international treaty, and certainly no member of the Commission's staff may do so in processing an application." *Kerrville Radio, a Limited Partnership*, 2 FCC Rcd 3441 (1987). Therefore, Crystal's analogy to *Catskill* is without merit. Moreover, the return of Crystal's application is consistent with the staff's treatment of other applicants who violated the same provisions of the Mexican Agreement. See *Spanish Aural Services Company, et al.*, 3 FCC Rcd 2739 (released May 12, 1988), and *Susan Lundborg*, 3 FCC Rcd 1 (released January 6, 1988). Additionally, there was an express finding in *Catskill* that the defect involved there was not a tenderability or acceptability defect because it was "attributable to the imprecision inherent in manually ascertaining from the Commission's

propagation curves the exact radiation value corresponding to the maximum permitted under the rules." *Catskill, supra*, at p.1. Conversely, Crystal's application was expressly found unacceptable for filing, and there was no question of inherent imprecision due to manually deriving the exact power, rather Crystal apparently did not consult the Annex 4 curves of the Mexican Agreement at all, which resulted in a clear violation of the treaty. Crystal's reliance on *Anita A. Levine, supra*, is also inapplicable because the application in that case was for an AM station and was therefore not subject to the "hardlook" FM processing rules adopted in the *Report and Order* in MM Docket 84-750, 50 Fed Reg 19936 (May 13, 1985).

6. In addition, the petitioner's allegation that the Commission has granted an application in violation of the Mexican Agreement is simply not accurate. Crystal alludes to a CP (file no. BPH-860910IA) granted to KFX(X)FM, Green Valley, Arizona, which at first blush appears to be in violation of the treaty. However, upon further scrutiny it is clear that no such violation exists. The CP referred to was issued for an auxiliary antenna with an effective radiated power (ERP) of 1.85 kilowatts, with a radiation center at height above average terrain (HAAT) of 124 meters, combining for a total power output that technically cannot feasibly exceed the coverage of its main antenna, which is in compliance with the Mexican Agreement.¹ Furthermore, because the power output of the auxiliary antenna cannot and will not extend beyond the coverage of the main antenna, it is also in compliance with the Commission's rules. See 47 C.F.R. § 73.1675. We therefore are not persuaded that the petitioner is "similarly situated" to the applicants in either *Catskill, Anita A. Levine*, or KFX(X)FM. Accordingly, *Melody Music, Inc.*, and *Green Country Mobilephone, Inc., supra*, are not applicable with respect to these cases. See *New Orleans Channel 20, Inc. v. F. C. C.*, 830 F.2d 361, 366 (D.C. Cir. 1987).

7. Finally, the petitioner is correct that the Commission did accept for filing and designate for hearing an application in violation of the Mexican Agreement. The application of Classic Media, Inc. (file no. BPH-861002TF) specified an ERP of 3 kilowatts, with an HAAT of 100 meters, the same height and power proposed by the petitioner. This application should have been returned as unacceptable for filing, see *Kerrville, supra*, and it was error for the staff to designate the Classic Media application for comparative hearing. (The Mass Media Bureau has since filed comments to that effect with the presiding Administrative Law Judge in that proceeding, seeking dismissal of the Classic Media application.) This staff error, however, is non-precedential and the petitioner's contention that the inadvertent designation of the Classic Media application now estops the Commission from upholding its FM processing policy and the Mexican Agreement with respect to its application is meritless. See, e.g., *M & C Broadcasting, Inc.*, FCC 85-217, released April 29, 1985; and *North Texas Media v. F. C. C.*, 778 F.2d 28, 32-33 (D.C. Cir. 1985). Accordingly, Crystal's petition for reconsideration and reinstatement *nunc pro tunc* will be denied.²

8. *Crystal's Petition to Deny the Helton Application*. The petitioner, licensee of KGVY(AM), Green Valley, Arizona, and whose principals reside within the contours of the proposed new FM station at Green Valley, oppose Helton's application based on an alleged misrepresentation in the application. Specifically, Crystal notes that

Helton's application states that no adverse finding has been made and no "adverse final action taken by any administrative body as to the applicant under the provisions of any law related to a felony." *Pet. to Deny*, at 2 (emphasis added by petitioner). The petitioner then offers evidence indicating that Helton, a doctor, was placed on probation in 1985 by the Arizona Board of Osteopathic Examiners for his prescribing practices relating to controlled substances, and that Helton was previously warned of the illegality and felony nature of such practices by the Arizona State Board of Pharmacy in 1980.³ Due to Helton's failure to report these matters in response to questions on the application, Crystal requests that Helton's application be denied. Although the petition does not demonstrate that the Helton application was unacceptable for filing, we find that it does raise a substantial and material question of fact regarding Helton's compliance with 47 C.F.R. § 73.3514, which requires complete responses to all questions on the application form. Accordingly, Crystal's petition will be granted to the extent that an appropriate issue will be specified.

9. *ALM / Martin*. On October 22, 1987, Abundant Life Ministries (ALM), a limited partnership, filed an application (file no. BPH-871022MK) in the instant proceeding. ALM filed an amendment to its application on December 18, 1987, indicating that Douglas Martin, a director of Grace Broadcasting Systems, Inc. (GBSI), the sole general partner of ALM, would instead be the applicant. This action by ALM/Martin reflected a substantial change in the structure of the applicant, which is not generally allowable by way of amendment following the close of the applicable filing window. The switch from ALM, a limited partnership, to Martin, an individual whose only connection with the original applicant was as director of its sole general partner, represents a major change, effectively an outright assignment of interest.⁴ Therefore, pursuant to 47 C.F.R. § 73.3573(b), the amendment is a "suicide" amendment since its acceptance would constitute a major change requiring the assignment of a new file number to the application and would result in the dismissal of the ALM application from the Green Valley proceeding. Consequently, the amendment will be returned and the applicant will be given 30 days from the release of this order to file an amendment with the presiding Administrative Law Judge that restores its ownership *status quo ante*, or the presiding Administrative Law Judge is authorized to dismiss the ALM/Martin application. See, e.g., *Redwood Television Ministries, Inc.*, 52 RR 2d 1365, 1369 (1982); See also *Tequesta Television, Inc.*, 2 FCC Rcd 41 (1987).

10. *Crystal's Motion to Dismiss the ALM / Martin Application*. In support of its motion, Crystal submits that ALM/Martin's application should be dismissed because Commission Rules state that "[a] new file number will be assigned to an application for a new station . . . where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed . . ." 47 C.F.R. § 73.3573. The petitioner points out that ALM/Martin's sole general partner at the time its application in the instant proceeding was originally filed was GBSI, a corporation whose 100% shareholder was Grace Full Gospel Church (GFGC), a membership organization with no officers or directors. Therefore, Crystal argues, it follows that Douglas Martin's only connection with ALM was as one of four directors of the corporate general partner in which Martin had no equity interest until nearly four months after ALM filed

its original application.⁵ Crystal submits that the ALM/Martin application fails to meet the Section 73.3573 test, and therefore it cannot retain its mutually exclusive status and must be dismissed. In light of the action taken in paragraph 9, above, Crystal's motion to dismiss the ALM/Martin application will be denied.

OTHER MATTERS

11. Where applicants for a new broadcast station propose to employ five or more full-time employees, 47 C.F.R. § 73.2080 requires those applicants to submit Equal Employment Opportunity (EEO) Programs with their applications. Section VI of FCC Form 301 specifies the use of a five-point format set out in FCC Form 396A. In their applications, Helton and Martin state that they will employ five or more full-time employees. However, while each has submitted an EEO program, neither has included in Part IV adequate examples of minority organizations which reflect the significant Hispanic population residing in Pima County, Arizona, where community of license Green Valley is located.⁶ Accordingly the applicants will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of the Order, or an appropriate issue will be specified by the Judge.

12. 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.

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.(a) To determine, in light of the facts and circumstances surrounding the adverse findings and final action against Helton by the Arizona Board of Osteopathic Examiners in Medicine and Surgery, whether Helton violated Section 73.3514 of the Commission's Rules by providing a negative response to question 10(a), Section II of FCC Form 301.

(b) To determine, in light of the facts adduced pursuant to issues in paragraph (a) above, whether Helton misrepresented facts to, or concealed information from, the Commission.

(c) To determine, in light of the facts adduced pursuant to issues in paragraphs (a) and (b) above, whether Helton possesses the basic qualifications to be a licensee of the facilities sought here.

2. To determine which proposal would, on a comparative basis, best serve the public interest.

3. 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 Crystal's petition for reconsideration and reinstatement *nunc pro tunc* IS DENIED.

16. IT IS FURTHER ORDERED, That Crystal's petition to deny the Helton application IS GRANTED to the extent indicated.

17. IT IS FURTHER ORDERED, That ALM's December 18, 1987 amendment indicating the applicant's structural change from a limited partnership to an individual, Martin, IS RETURNED.

18. IT IS FURTHER ORDERED, That ALM/Martin is granted leave to further amend its application pursuant to paragraph 9, above, within 30 days from the release of this order, but, if its does not do so, the presiding Administrative Law Judge is authorized to dismiss ALM/Martin's application.⁷

19. IT IS FURTHER ORDERED, That Crystal's petition to dismiss the ALM/Martin application IS DENIED.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Helton and ALM/Martin shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

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

FOOTNOTES

¹ KFXX(FM)'s main antenna is authorized to operate at 3 kilowatts ERP with an HAAT at 130 feet, and thus fully in compliance with the Mexican Agreement. See application file no. BMPH-820421AC.

² In light of our action here, Crystal's motion to dismiss Martin's application and petition to deny Helton's application will be considered here since Crystal is no longer a party to the proceeding and thus will not be able to raise such issues post-designation. See *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).

³ Attachments to the petition include: an Arizona Board of Osteopathic Examiners order of probation, dated April 24, 1985; an amendment to that order extending the time of probation, dated February 4, 1986; and a letter from the Arizona Board of Pharmacy to Helton advising him of federal regulations regarding the writing of prescriptions for controlled substances.

⁴ Douglas Martin is one of four directors of GBSI, ALM's sole general partner and 2.0% holder of equity in the limited partnership. The remaining holders of equity, including various individuals, trustees, a membership group and an investment fund, are limited partners. Martin personally did not obtain an equity interest in ALM until February of 1988.

⁵ The Commission, on January 15, 1988, granted ALM, licensee of KVOI(AM), Oro Valley, Arizona, a transfer of control from GFGC to Martin and three other individuals, with the transfer consummated February 29, 1988.

⁶ In the event that an applicant listed an organization in its EEO program as a recruitment source which is unfamiliar to the staff but which would satisfy the EEO requirements, the applicant may amend its EEO program to describe that organization.

⁷ In the interest of administrative efficiency, we are authorizing the ALJ to dismiss ALM/Martin's application in the event it does not comply with this order, rather than to require the application to be returned to the processing line for assignment of a new file number and other appropriate action in accordance with § 73.3573(b).