

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

For Construction Permit for a
New FM Station, Channel 255A, 98.9 MHz
Salisbury, Maryland

HEARING DESIGNATION ORDER

MM Docket No. 89-1

Adopted: January 3, 1989; Released: February 6, 1989

In re Applications of

IMPULSE, INC. File No. BPH-860507ML
(hereafter Impulse)

THOMPSON'S File No. BPH-860507MN
RADIO LIMITED
PARTNERSHIP
(hereafter Thompson's)

SALISBURY FM File No. BPH-860507MP
BROADCASTING
COMPANY
(hereafter Salisbury)

FIRST MINORITY File No. BPH-860507MR
BROADCASTERS OF
SALISBURY,
INCORPORATED
(hereafter First Minority)

WILLIAM H. File No. BPH-860507MT
MALLERY d/b/a
SALISBURY
BROADCASTING
(hereafter Mallery)

BRUCE D. File No. BPH-860507NK
BLANCHARD
(hereafter Blanchard)

CONNOR File No. BPH-860507QE
BROADCASTING
CORP.
(hereafter Connor)

MARLENE POWELL File No. BPH-860507MM
LEVERING Tr / as [Dismissed Previously]
SALISBURY
BROADCASTING
COMPANY
(hereafter Levering)

GALLUS RADIO File No. BPH-860507MS
BROADCASTING, [Dismissed Previously]
INC.
(hereafter Gallus)

By the Chief, Audio Services Division:

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

2. *Preliminary Matters.* The applications of Levering and Gallus, as originally filed, were returned by the Chief, FM Branch on April 16, 1987, as unacceptable for filing, because the proposed combination of effective radiated power (ERP) and antenna height above average terrain would exceed maximum Class A facilities pursuant to 47 C.F.R. § 73.211. In returning these applications, the Chief, FM Branch also noted that the height of the elevation of the site as shown in Sections V-B, V-G, and the antenna sketch of both applications was 12 feet, while the site elevation shown on the USGS 7.5 minute transmitter site map was approximately 39 feet.

3. On May 15, 1987, Levering filed a petition for reconsideration of the return. Levering concedes that the originally filed application contained "a minor clerical error, to wit: the ground elevation set forth in Exhibit 4, the antenna sketch, should have been 12 meters as opposed to 12 feet" (emphasis in original). Levering states that the Commission staff correctly noted this discrepancy when reviewing the USGS 7.5 minute map submitted with the application, but believes that the staff erred "in concluding that using 39 feet as the site elevation, the combination of ERP and HAAT exceeded the maximum for a Class A facility." The petition includes a curative amendment correcting the errant numbers contained in Sections V-B, V-G and the antenna sketch from feet to meters, and further argues these defects should not have resulted in the return of the application, as the necessary information could confidently be determined by the staff from the application as a whole. Finally, the petition contains a statement by the applicant's consulting engineer which attempts to explain that the use of the average of "2-10 mile terrain data" by the applicant substantiates that the Commission staff erred in returning Levering's application.

4. Discrepancies in site elevation data provided throughout the application would not result in the return of an application if no technical acceptance rule were violated by use of any of the conflicting values. However, such is not the case here. In Levering's situation, the application was returned because use of the site elevation data the staff obtained from the 7.5 minute map resulted in a violation of a Commission Rule, specifically, 47 C.F.R. § 73.211. Finally, the consulting engineer's reference to the 2-10 mile terrain data was not contained in the application, as originally filed.

5. On May 13, 1988, Gallus also filed a petition for reconsideration of the return of its application. Gallus acknowledges that it erred by indicating the incorrect site elevation in Sections V-B, V-G, and the tower sketch, but contends that "the correct information was available to the Commission simply by subtraction of the difference

between the site elevation read in meters and the elevation read in feet." Gallus would also have the staff, in analyzing its application, disregard the acknowledged discrepancy and extract the accurate data from the erroneous. Finally, Gallus has submitted an untimely amendment reflecting the correct site elevation for Sections V-B, V-G and the tower sketch.

6. "The Commission staff must process annually thousands of applications. It cannot be expected to do research for applicants or to probe the underlying engineering . . . If the Commission staff were required to assume such a burden, little or nothing would be accomplished." See *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968). In another context, but equally relevant here, the Commission has stated, "it must be recognized that there have been instances in the past where such deficiencies have not been deemed sufficient to warrant outright dismissal of an application and that applicants' temporizing activities have been indulged on occasion. Having said this, we wish to make it clear that times have changed and so has Commission policy." *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). The analysis of their applications that Gallus and Levering would have the Commission perform is outside the scope of the staff's function in processing applications. Accordingly, Gallus' and Levering's petitions will be denied and Gallus' late-filed amendment will be returned as unacceptable for filing.²

7. *Impulse*. The applicant has indicated in Section VI of FCC Form 301 that it will employ 5 or more employees and has included a Model EEO Program (FCC 396A) with its application. However, Impulse has failed to indicate the name or title of the individual responsible for the implementation of its EEO Program (Section II of FCC 396A). Accordingly, Impulse will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Thompson's*. Thompson's application was returned by the Chief, FM Branch, on April 16, 1987. On May 14, 1987, Thompson's filed a petition for reconsideration of this return. First Minority has filed an opposition to Thompson's petition, to which Thompson's has filed a reply. On June 27, 1988, the Chief, FM Branch granted Thompson's petition and reinstated its application *nunc pro tunc*. In light of this action, First Minority's opposition to Thompson's petition for reconsideration will be denied for the reasons stated in our June 27, 1988 letter.

9. *Salisbury*. The applicant has indicated that Maria Hull-Bynum, a principal of the applicant, serves as an on air personality with WBOC-TV, Salisbury, Maryland and that Samuel S. Carey, a principal of the applicant, is employed as a consultant to the University of Maryland - Eastern Shore, the licensee of a noncommercial, educational FM station at Princess Anne, Maryland. Both parties have indicated that they will terminate their current employment in the event that a construction permit is awarded to Salisbury as a result of this proceeding. Accordingly, an appropriate divestiture condition will be ordered.

10. *First Minority*. The applicant has indicated that Stevie Michaels, a principal of the applicant, is employed as the sales manager for WKHI(FM), Ocean City, Maryland. Stevie Michaels has stated her intention to sever all connection with WKHI(FM) in the event a construction

permit is awarded to First Minority as a result of this proceeding. Accordingly, an appropriate divestiture condition will be ordered.

11. *Mallery*. The applicant has not submitted Section IV of FCC Form 301 and the requisite description in narrative form of proposed programming relating to the issues of public concern facing its service area. Accordingly, Mallery will be required to file this information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

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

13. The following applicants have petitioned for leave to amend their applications on the dates indicated. The accompanying amendments were filed after the last date for filing minor 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 filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE OF AMENDMENT
Salisbury	October 9, 1987; June 13, 1988
First Minority	April 29, 1987; November 5, 1987
Connor	September 30, 1986; October 30, 1986 (engineering)

14. 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.

15. 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.

16. 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 there is a reasonable possibility that the tower height and location proposed by First Minority would constitute a hazard to air navigation.
2. To determine which of the proposals 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.

17. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 2 - 6, above, the petitions for reconsideration filed by Levering and Gallus ARE DENIED.

18. IT IS FURTHER ORDERED, That Impulse file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which indicates the title or individual responsible for implementing its EEO Program.

19. IT IS FURTHER ORDERED, That, in light of the discussion in paragraph 8, above, First Minority's petition for reconsideration of the action of the Chief, FM Branch which reinstated Thompson's application IS DENIED.

20. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Salisbury as a result of this proceeding, Maria Hull-Bynum will sever all connection with station WBOC-TV, Salisbury, Maryland and that Samuel S. Carey, will terminate his position as a consultant to the educational FM station at Princess Anne, Maryland licensed to the University of Maryland - Eastern Shore, prior to the commencement of program test authority.

21. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to First Minority as a result of this proceeding, Stevie Michaels will sever all connection with station WKHI(FM), Ocean City, Maryland, prior to the commencement of program test authority.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Mallery shall submit an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area.

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

24. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Salisbury, First Minority, and Connor ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

25. 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.

26. 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.

27. 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 An application by Salisbury Broadcasting, Inc., BPH-860507MQ, was dismissed on October 25, 1988 pursuant to its request. In addition, an application by American Radio Broadcasting Network, Inc., BPH-860507QF, was dismissed on November 10, 1988 for failure to prosecute in accordance with 47 C.F.R. § 73.3568(b).

² The *Memorandum Opinion and Order* in MM Docket 84-750, 50 Fed. Reg. 43157 (1985) requires that amendments curing acceptability defects must be filed within 30 days of an application appearing on a Notice of Tenderability released by the Commission. Since the last Notice of Tenderability in this proceeding was released on May 30, 1986, the amendment is untimely.