

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

MM Docket No. 89-9

In re Applications of

JACK A. TUCEY File No. BPH-860521ME
(hereafter "Tucey")

BAY BROADCASTING File No. BPH-860529MC
SYSTEMS
(hereafter "Systems")

THOMAS QUINN File No. BPH-860529MD
TURNER, III
(hereafter "Turner")

CRESCENT RADIO File No. BPH-860530MG
LIMITED PARTNERSHIP
(hereafter "Crescent")

VLM ENTERPRISES, File No. BPH-860530MI
INC.
(hereafter "VLM")

For Construction Permit
for a New FM Station on Channel 224A
in Avalon, California

HEARING DESIGNATION ORDER

Adopted: January 23, 1989; Released: February 6, 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. *Tucey*. On June 8, 1988, *Systems* filed a petition to deny the *Tucey* application, as amended July 14, 1986, to change the proposed transmitter site and its ownership from "individual" to general partnership, alleging that: (i) "the selection and acquisition of a transmitter site is an indispensable tenderability requirement" and "an applicant who does not have reasonable assurance of site availability by the close of the pertinent filing window must be dismissed as unacceptable for filing" (Petition, pp. 3-4); and (ii) the organizational change constituted a major change amendment.

3. *System's* petition evidences a misunderstanding of the Commission's tenderability requirements, as set forth in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (1985). To be acceptable for tender, the application must contain certification of site availability which *Tucey* provided. The certification indicated that applicant had contacted A. Douglas Probst, President of Catalina Island Conservancy (Conservancy). The certifica-

tion was accompanied by a May 2, 1986 letter to the Commission from Donald P. Baker, Esq., on behalf of Conservancy, indicating the terms and conditions under which the site specified by *Tucey* would be made available to any prospective licensee. Subsequently, on July 14, 1986, *Tucey* filed the amendment as a matter of right to specify a new transmitter site.

4. *Tucey* has complied with the tenderability requirements of the *Report and Order* and *Systems* has not identified a violation of those requirements. Moreover, *Tucey* amended as of right within the time frame allowed to specify a new site meeting our separation standards. No independent showing of good cause was required.

5. Turning next to *Systems'* ownership assertion, in his initial application, as an "individual" applicant, *Tucey* was the sole principal. In Section II, Table 1 of his amendment, *Tucey* indicated that he was retaining a 60% general partnership ownership interest while assigning a 40% general partnership interest to his son, *Tony Tucey*. Due to *Tucey's* change to a general partnership, it is *System's* position that in assigning an interest to a "newcomer", *Jack Tucey* effectively lost "positive control", thus resulting in a major change, citing *In re Application of Tequesta Television, Inc.*, (Tequesta) 60 RR 2d 137 (Rev. Bd. 1986).

6. Although *Tucey's* amendment did not delineate the extent of actual control each partner exerted over the partnership affairs, Table 1 of Section II clearly provided all necessary information and does not support *Systems'* claim that *Jack Tucey* lost "positive control." Moreover, an affidavit executed by *Tony Tucey* confirms that *Jack Tucey* would maintain positive control over the partnership affairs. (See Opposition, "Declaration of *Tony Tucey*"). This is sufficient to demonstrate that the amendment did not effect a major ownership change. In *Tequesta*, cited by *Systems*, one of two general partners of a limited partnership was replaced by a new *equal* general partner. Here a sole owner has retained a majority general partnership interest. *Tucey's* amendment was timely filed as a matter of right. Notwithstanding, *Tucey* shall file as an amendment a copy of its partnership agreement, as filed with the state of organization, in order to clarify the actual control each partner exerts over the affairs of the partnership. Accordingly, the *System* petition to deny will be denied.

7. *VLM*. Further review of *VLM's* application indicates a discrepancy between applicant's "No" response to Item 7, Section V-G, FCC Form 301 and the contour map in Exhibit "Figure 6". In its response to Item 7, applicant indicates that it does not propose to use a directional antenna while its contour map suggests directionality of the proposed antenna. This discrepancy does not render the application unacceptable for filing since neither antenna would violate our technical acceptance rules. However, *VLM* will be required to file an amendment eliminating the discrepancy.

8. *Turner, VLM and Crescent*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. *Turner* has not completed Item 4 correctly. *Turner's* application gives a post office box number as the residence address for applicant. In its December 15, 1987 amendment, *VLM* indicates that *Robert Lane* has become a secretary of the applicant; however, applicant has not provided the information required by Item 4. *Crescent* gives a post office

box number as the residence address of Charles Hom, a general partner in applicant. Accordingly, Turner, VLM and Crescent must submit amendments to the presiding Administrative Law Judge which give all the information required by Section II, Item 4.

9. *Environmental.* An engineering study indicates that the Crescent and VLM proposals would exceed the radiofrequency radiation guidelines under 47 C.F.R. §1.1307(b). Accordingly, both applicants will be required to amend their applications within 30 days of the release of this Order to demonstrate compliance with the radiofrequency radiation guidelines. The applicants must submit a detailed study based upon OST Bulletin No. 65, (October 1985) entitled "Evaluating Compliance with FCC Specified Guidelines for Human Exposure to Radiofrequency Radiation." This study must include the cumulative effects of the proposed operation and all nearby RF sources. If a fence is to be built, the applicant must give the distance from the base of the tower to the fence. Since the proposals of applicants may have a significant environmental impact as defined by 47 C.F.R. §1.1307, the applicants are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Crescent and VLM will be required to file within 30 days of the release of this Order environmental assessments with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), recon. denied sub nom *Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

10. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after July 14, 1986, 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.

APPLICANTS	AMENDMENTS FILED
VLM	3/31/87, 9/4/87, 12/15/87
Systems	3/29/88 ¹

11. 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. 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.

13. 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. If a final environmental impact statement is issued with respect to VLM and Crescent in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
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.

14. IT IS FURTHER ORDERED, That Tucey shall file a copy of its partnership agreement, as specified in paragraph 6 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That the Systems petition to deny IS DENIED.

16. IT IS FURTHER ORDERED, That VLM shall submit an amendment, as specified in Paragraph 7 above, with the presiding Administrative Law Judge within 30 days after the release of this Order.

17. IT IS FURTHER ORDERED, That Turner, VLM and Crescent 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 in accordance with paragraph 9 hereinabove, VLM and Crescent shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

19. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by VLM ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

20. IT IS FURTHER ORDERED, That the petition for leave to amend filed March 29, 1988 by Systems IS GRANTED; that corresponding amendment IS ACCEPTED and any comparative credit IS DISALLOWED.

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

FOOTNOTE

¹ System's 3/29/88 amendment, proposing to change to a fully-spaced transmitter site, was filed in response to the Commission's action of 2/29/88 denying its request for waiver of the spacing rules. The new site is the same as the Turner, Crescent and Tukey sites. While there will be no improvement in coverage, there will be an improvement over System's original proposal; therefore, no comparative credit will be allowed.