

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

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN      File No. BPH-870330NC  
(hereafter Bernstein)

BENJAMIN MACWAN      File No. BPH-870331MK  
(hereafter Macwan)

RADIO CENTER      File No. BPH-870331MV  
MORICHES,  
A GENERAL PARTNERSHIP  
(hereafter RCM)

ENRIQUE CARLOS      File No. BPH-870331NB  
GROSS  
(hereafter Gross)

NANETTE MARKUNAS      File No. BPH-870331NC  
(hereafter Markunas)

DAKK, INC.      File No. BPH-870331ND  
(hereafter Dakk)

CM BROADCASTING      File No. BPH-870331NT  
LIMITED PARTNERSHIP  
(hereafter CM)

CHARLES R. KENDALL,      File No. BPH-870331NU  
STEVEN LEEDS AND  
RICHARD SUMMER d/b/a  
SHINNECOCK BROADCASTING  
PARTNERSHIP  
(hereafter Shinnecock)

VERTICAL      File No. BPH-870331OQ  
BROADCASTING,  
INC.  
(hereafter Vertical)

MORICHES BAY      File No. BPH-870331PI  
BROADCASTING, INC.  
(hereafter MBBI)

KNIGHT      File No. BPH-870413KI  
COMMUNICATIONS,  
CORP.  
(hereafter Knight)

ROCKHIT      File No. BPH-870414KI  
COMMUNICATIONS  
USA  
(hereafter Rockhit)

GATEWAY      File No. BPH-870415KR  
BROADCASTING  
(hereafter Gateway)

FRIENDSHIP      File No. BPH-870415KS  
COMMUNICATIONS,  
LTD.  
(hereafter Friendship)

HAMPTON      File No. BPH-870415KY  
COMMUNICATIONS  
LIMITED PARTNERSHIP  
(Hampton)

LONG ISLAND      File No. BPED-870415MC  
UNIVERSITY  
RADIO, INC.  
(hereafter LIU)

THE LEFEBVRE      File No. BPH-870415MF  
GROUP  
(hereafter Lefebvre)

BAY MEDIA      File No. BPH-870415ML  
GROUP, INC.  
(hereafter Bay Media)

For a Construction Permit  
For a New FM Station  
on Channel 241A at  
Center Moriches, New York

**HEARING DESIGNATION ORDER**

Adopted: December 13, 1988; Released: January 26, 1989

By the Chief, Audio Services Division:

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

2. *Preliminary Matters.* Numerous parties have filed informal objections in this proceeding.<sup>1</sup> Although most of the pleadings are directed specifically against Rockhit, all speak in very general terms with objections applicable to all of the Center Moriches applicants. The objecting parties all assert that the Center Moriches allocation at Channel 241 will effectively block out reception of WQXR, New York City, New York, operating at first adjacent Channel 242, from Western Suffolk County, Long Island, New York. The parties claim this should be avoided since WQXR is one of only two classical music stations which may be heard from Suffolk County.

3. The arguments advanced in these objections are without merit. It is true that, WQXR, being an existing station, is entitled to some protection under the Commission's Rules. Section 73.207 of the Commission's Rules requires that all applicants for the Center Moriches Class A allocation give 105 kilometers of protection to WQXR, a Class B facility operating on a first adjacent channel. All of the Center Moriches applicants have proposed transmitter sites which fully honor the spacing entitled to WQXR. Therefore, operation of a new facility in Center Moriches will not result in interference to WQXR within WQXR's protected service contour. Despite the fact that those who reside outside of the protected contour of WQXR may receive interference, denying a grant of a construction permit to any of the Center Moriches applicants is not warranted. Specifically, the issue raised in these objections (*i.e.*, that reception of a station will be blocked) is not appropriate at this stage. The addition of Channel 241 to the Table of Allotments in 47 C.F.R. § 73.202 for Center Moriches was adopted in the *Report and Order* in MM Docket No. 84-231 on December 19, 1984, after full notice and comment Rule Making procedures. Interested parties were given an opportunity at that time to submit comments in favor of, or in opposition to, the allocation of said channel. The numerous objections raised herein would have been appropriate during the Rule Making comment period; as the issue of whether Channel 241 should be allocated to Center Moriches has already been decided, the objections are, in essence, untimely.

4. An additional concern of the objections is the loss of a classical music station. The Commission, however, does not take programming into account when making licensing decisions, but instead relies on market forces to promote diversity in entertainment programming and thus serve the public interest. This position has been upheld by the United States Supreme Court. *See FCC v. WNCN Listeners' Guild*, 450 U.S. 582 (1981). Finding that the objections offer no basis for the Commission to dismiss or deny the application of Rockhit or any other Center Moriches applicant, those objections will be denied herein.

5. *Directional Antenna*. Gross and Shinnecock state in Section V-B, Item 7, and in the associated engineering statement, that a directional antenna is *not* being proposed. However, a directional antenna pattern was submitted as Figure 1 in each application and the field strength contours depicted on the coverage map, Figure 6 of each application, were clearly plotted utilizing the directional antenna pattern. Accordingly, Gross and Shinnecock will be required to submit a clarifying amendment to correct this inconsistency. This amendment must either specify a directional operation or withdraw the radiation pattern and correct the coverage map accordingly.

6. *Height Above Average Terrain Computation*. Both Gross and Shinnecock omitted the 135, 180 and 225 degree radials from their calculation of the antenna height above average terrain (HAAT), Section V-B, Item 15. Section 73.313 of the Commission's Rules states, in part, "where the 3 to 16 kilometer portion of a radial extends in whole or in part over a large body of water . . . but the 50 uV/m contour encompasses land area within the United States beyond the 16 kilometer portion of the radial, *the entire* 3 to 16 kilometer portion of the radial must be included in the computation of the antenna HAAT."

(Emphasis Added) 47 C.F.R. § 73.313(d)(2). Both applicants' 225 degree radial crosses U.S. land approximately 3.5 kilometers from the transmitter site and again crosses land approximately 5.5 kilometers from the transmitter site after briefly crossing water. In addition, the 50 uV/m contour encompasses land area on Long Island, New York. Thus, *the entire* 3 to 16 kilometer portion of the 225 degree radial must be included in both the Gross and Shinnecock HAAT computations. Section 73.313 goes on to state, "[h]owever, where the 50 uV/m contour does not so encompass United States land area and . . . where a part of the 3 to 16 kilometers portion extends over large bodies of water . . . only that part of the radial extending from the 3 kilometers sector to the outermost portion of land area within the United States covered by the radial must be used in the computation of the antenna HAAT." Therefore, because both Gross' and Shinnecock's 135 degree radial crosses Westhampton Beach, New York, 5.2 kilometers from the transmitter site and the 50 uV/m contour does not so encompass land, the 135 degree radial must be included from the 3 kilometers sector to the outermost portion of Westhampton Beach in both HAAT computations. Similarly, the 180 degree radial must be included from the 3 kilometers sector to the outermost portion of the beach it crosses approximately 5 kilometers from the transmitter site. However, engineering analysis reveals that the inclusion of the 135, 180 and 225 degree radial does not increase the proposed HAAT beyond that of the maximum permitted for a Class A station pursuant to 47 C.F.R. § 73.211. Thus, both Gross and Shinnecock are in technical compliance with the Commission's Rules. Accordingly, we conclude that the HAAT discrepancy does not warrant the return of these applications. We will request, however, the submission of an appropriate amendment from both applicants which corrects any deficiency in the HAAT computations.

7. *Markunas*. Although Markunas has outlined the boundaries of Center Moriches in Exhibit B of its application, thereby complying with the tenderability requirements regarding city-grade coverage, it appears the boundaries outlined within Markunas' application are in error. Therefore, Markunas must submit a map which shows clearly, legibly and accurately, and with the original printed latitude and longitude markings, and a scale of distance in kilometers, the 3.16 mV/m predicted contour and the legal boundaries of the community or an appropriate issue will be specified.

8. *CM*. In response to Section II, Item 1, CM states it is a Limited Partnership. In Exhibit 2, CM states that the limited partnership agreement provides, among other things, that additional limited partners may be admitted. However, CM fails to provide the relevant details of the limited partnership agreement. In *Attribution of Ownership Interest*, 97 FCC 2d 997 (1984), *recon. granted in part*, 58 RR 2d 604 (1985) (*Attribution*), the Commission stated that the limited partnership interests were not attributable for the multiple ownership rules if the applicant certified that the limited partners will "not be involved in any material respect in the management of" the proposed station. *Attribution*, at 1023. In order for the limited partners to be exempt from attribution under the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, the applicant must certify that, by the terms of the partnership agreement, its limited partners will refrain from involvement in any material respect in the management or operation of the proposed station and, further, that no

limited partner has any interest in or connection of any nature with any broadcast station or other medium of mass communication operating within the service area of the proposed station area that is or might be inconsistent with the Commission's cross-interest policy. The Commission defined the requisite degree of non-involvement in paragraphs 48-50 of the reconsideration. Further, the Commission directed that Form 301, among others, be amended to conform to the new attribution standards. *Attribution*, at 1024. Accordingly, there is no need for CM to provide information as to the limited partners if it can submit the necessary certification and show that limited partnership interests will be sold only to individuals or entities that are sufficiently insulated. If the certifications and showings are not appropriate, the necessary information as to each limited partner will have to be filed as an amendment. Finally, since the Commission retained the cross-interest policy as to other attributable media interests in the same area, CM will be required to state whether the limited partners have or could have other media interests subject to the cross-interest policy and identify the limited partners with any such interest, identify the other local media, and state the nature or extent of the ownership interest.

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

10. *LIU*. In Exhibit 1 to Section II of FCC Form 301, LIU states that it is a not-for-profit corporation affiliated with Long Island University, implying that it may desire to operate as an educational facility. LIU, however, filed its application on an FCC Form 301 and paid the \$1,800.00 filing fee, implying that it may desire to operate as a commercial facility. Noncommercial Educational FM applicants may apply for channels in the non-reserved band; they must, however, still comply with the requirements for an educational applicant found on FCC Form 340. Since the majority of the relevant engineering data is called for on Form 301, a non-commercial educational applicant applying for a channel on the commercial band which applies on a Form 301, must only submit Sections II and IV of Form 340. LIU will be required to submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order clarifying whether it is applying as a commercial applicant or as a non-commercial educational applicant. If LIU is applying to operate as an educator, it must also submit Sections II and IV of FCC Form 340. Also, as an educator, LIU may be entitled to a return of its filing fee as educators are exempted from filing fees. Accordingly, if LIU intends to operate as a non-commercial educational entity, it should submit the appropriate forms to the Commission's Fee Section for the return of its previously submitted filing fee.

11. 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. LIU has not completed Item 4 correctly. LIU's application gives a post office box number as the residence address for director John Kanas. Accordingly,

LIU must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

12. *Lefebvre*. In response to Section II, Item 1, Lefebvre states it is a limited partnership. In response to Section II, Item 4, Lefebvre only lists Virginia Lefebvre as its sole general partner and names no limited partners. This is acceptable under the terms of *Attribution, supra*, as long as the requisite certifications are included. However, Lefebvre fails to state what ownership share its general partner will maintain. Accordingly, Lefebvre will be required to amend its application disclosing what portion of the partnership is held by the general partner.

13. *Equal Employment Opportunity Programs*. 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 for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Knight and Friendship have filed such statements, those statements are deficient. Neither Knight nor Friendship have listed women's organizations which will be used for recruitment as required by the instructions to Section VI. Accordingly, Knight and Friendship will be required to file an amended EEO programs with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

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

15. *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.

16. 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 minor amendments as of right. Under Section 1.65 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.

APPLICANT	AMENDMENTS FILED
Shinnecock	September 15, 1988
MBBI	August 1, 1988 (engineering)
Knight	July 21, 1988
	September 15, 1988 (engineering)
	November 21, 1988
Gateway	August 15, 1988 (engineering)
Bay Media	August 5, 1988 (engineering)

17. 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.

18. 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 Markunas and CM 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.

19. IT IS FURTHER ORDERED. That all of the numerous Informal Objections filed in this proceeding ARE HEREBY DENIED.

20. IT IS FURTHER ORDERED, That Gross and Shinnecock file an amendment indicating whether a directional antenna is being proposed to the presiding Administrative Law Judge within 30 days of the release of this Order.

21. IT IS FURTHER ORDERED, That Gross and Shinnecock file an amendment with the presiding Administrative Law Judge correcting any deficiency in the HAAT computations contained within their respective applications within 30 days of the release of this Order.

22. IT IS FURTHER ORDERED, That Markunas submit a map which shows the predicted 3.16 mV/m contour and the legal boundaries of Center Moriches with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED. That CM shall file, within 30 days of the release of this Order, an amendment with the presiding Administrative Law Judge which will provide, for all limited partners, an insulation statement wholly satisfying the multiple ownership and cross-interest policy requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604 (1985).

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Gateway 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.

25. IT IS FURTHER ORDERED, That LIU file an amendment clarifying its intention to operate either in a commercial or in a non-commercial educational capacity with the presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That LIU shall submit an amendment which contains 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.

27. IT IS FURTHER ORDERED. That Lefebvre file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order disclosing the portion of the limited partnership owned by the general partner.

28. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Knight and Friendship 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.

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

30. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by Shinnecock, MBBI, Knight, Gateway and Bay Media ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

31. 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.

32. 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.

33. 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

<sup>1</sup> The parties filing objections in this proceeding are: Gilda Scharf, Sylvia R. Raskin, Walter Raskin, Cecile Wagner, Leon and Harriet Kalvin, Carmen Riggs, John P. White, Dr. Michael Beck, Manus H. O'Donnell, Howard Pierson, Mr. and Mrs. Michael D. Winokur, Mrs. W. J. Altreuter, Frank Beyer, Nassua Music Educators Association, Eleanor Estrin, Jack Gandry, Dr. and Mrs. Philip Glaser, Thomas E. Gowan, Mr. and Mrs. Dean Gurinsky, Jacob Hertz, Douglas William Hitzig, Isabelle K. Hitzig, Islip Arts Council, Inc., Richard Marlborough, Sol and Sarah Migdal, John E. Clark, Robert Carlen, Margery F. Tipple, Michael Shawn May, Ann N. Rosen, Antonia Trapani, Audrey

Stefano, Terry R. Gross, Myron Leslie, Amorn Itinanpong, J. Robert Michele, Ariane Carozza, David A. Gross, Amy E. Taber, Gennifer E. Musson, Cristina Meefi, Karen Meefi, Stephen M. Marcott, Pamela Ann Meefi, Rose Ann Sobbeck, Geraldine Edmonds, Cecile Muller, John A. Linder, Jr., Barbara Gibbons, Michael A. Gross, Anita A. Cafferty, Willard L. Hogeboom, Catherine Figueras, Dr. Robert Berson, Lawrence and Virginia Ramsden, Philip Golden, Danielle Schneider, Dorothy A. Marchette, June J. Votava, Muriel Foy, B. Mike Pekar, Martha E. Camponile, Thomas L. Ramsey, Donald E. Wilson, Norman Malkin, Alex K. MacDonald, Marc Leopold, Mr. and Mrs. Sandford Gall, Mr. And Mrs. Bellamore, Dr. Arnold W. Golfman and Herbert C. Cohen.