

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

HEARING DESIGNATION ORDER

Adopted: January 23, 1989 Released: February 8, 1989

By the Chief, Audio Services Division:

MM Docket No. 89-10

In re Applications of

JOSEPH J. MATTA, JR. File No. BPH-870417MA
(hereafter Matta)

PASQUALE C. File No. BPH-870430NM
TOMINARO ET AL.
D/B/A SEAIRA
ASSOCIATES
(hereafter Seaira)

FREDRICK & NAOMI C. File No. BPH-870430NN
GERKON d/b/a
BARNEGAT
BROADCASTING
COMPANY
(hereafter Barnegat)

BAY File No. BPH-870430NO
COMMUNICATIONS,
L.P.
(hereafter Bay)

WORD ALIVE File No. BPH-870430NR
MINISTRIES
(hereafter Word)

FRANK CANALE File No. BPH-870430NS
(hereafter Canale)

HOWARD File No. BPH-870430OC
BURTENSKY AND
LOUIS GOTSIS
ASSOCIATES
(hereafter HBLG)

RICHARD LEE HARVEY File No. BPH-870430OM
(hereafter Harvey)

PRESS File No. BPH-870430NP
BROADCASTING
COMPANY
(Previously Dismissed)
(hereafter Press)

Construction Permit for a New
FM Station on Channel 253A in
Ocean Acres, New Jersey

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

2. *Press*. On January 20, 1988, the *Press* application was returned as inadvertently accepted for tender because the community to be served was not shown on the contour map. Specifically, the *Press* application failed to identify the actual community to be served by its predicted signal-strength contour as required by Item 10, Section V-B of the application,¹ and the legal boundaries of the community of license are not clearly and legibly defined on the contour map. This information is required pursuant to Paragraph 4g, Appendix D, *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985). The *Report and Order* indicates that the failure to provide this information will result in the application being returned as unacceptable for tender.

3. On February 12, 1988, *Press* filed a Petition for Reconsideration of the Commission action stating essentially that: (a) Ocean Acres is not an incorporated community and therefore legal boundaries do not exist which can be accurately described; (b) the Commission had previously accepted an application for Montecito, California (File No. BPH-851231MS) in which the applicant did not identify the boundaries of an unincorporated community; (c) the Commission had the requisite information in its files from other applicants who specified the same site coordinates; and (d) the Commission did not give sufficient notice of its policy (i.e., "lack of guidance" as to the appropriate procedures) in this situation.

4. The Commission, in the *Report and Order, supra*, adopted an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that the application is "substantially complete." In Appendix D to the *Report and Order*, the Commission stated that, henceforth, it would follow a new "substantially complete" standard for determining whether or not an application should be given a reference number and processed. The Commission did not initiate a so-called "letter perfect" standard for receiving applications for processing, as it did, for example, in adopting a "strict compliance" standard for low-power television applications. *See Low Power Television Service*, 51 RR 2d 476, 501, 502 (1982). It chose, instead, to carefully define, in Appendix D, what constitutes a substantially complete FM application under the new "window filing" procedures. Although administrative fairness requires full notice to parties whose rights may be affected by our policies, where such notice is afforded, the Commission may require strict compliance. *See Salzer v. FCC*, 778 F.2d 869, 877 (D.C. Cir. 1985). Both requisites are present here. *In re Application of Star Signal Corporation, Memorandum Opinion and Order*, 1 FCC Rcd 450 (1986).

5. In making these changes, we articulated the following justifications for taking a "hard look" approach in instituting the tender review of applications and for redefining "substantial completeness" under this new approach: Under our previous system, many errors in key portions of the applications remained undetected until considerable processing time and effort had already been

expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays both in disposing of the flawed applications and in processing problem-free but mutually exclusive applications as well as impeding the disposition of unrelated problem-free applications. Therefore, to prevent carelessly prepared, unprocessable applications from burdening the processing system, we now require applications to be substantially complete at tender or they will be returned, thereby losing their filing status. In order to assist applicants in satisfying our tender standards, we attached as Appendix "D" to the *Report and Order* a detailed list of the criteria utilized in evaluating the substantial completeness of applications. The Commission believes that important benefits can be obtained from this "hard look" approach. First, the reduction of frivolous and speculative applications will enable us to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Second, streamlining our processing procedures has minimized the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications. *Report and Order*, 50 Fed. Reg. at 19940.

6. We reject the arguments in support of the Petition for Reconsideration. First, Press's contour map (Figure 4) had no indication whatsoever of the location of Ocean Acres. Although the community is in fact unincorporated, Press made no effort to depict its understanding as to the community's location in relation to its 70 dbu contour to permit the staff to verify whether the Press application is in compliance with § 73.315 of the Commission's Rules. Second, Press's contention that the Commission accepted the Montecito, California, application under the same set of circumstances is erroneous. While the factual setting of the Montecito application did involve an unincorporated community, the Montecito application clearly indicated that the community of license was located within the 70 dbu contour. Third, Press contends the Commission could take Official Notice of the information contained in a competing application in this proceeding (which, it is alleged, proposes a transmitter site at the same coordinates as the proposed Press site). Contrary to Press's argument, the information contained in a competing application does not constitute information contained in the Commission files of which "Official Notice" may be taken to validate an incomplete application nor would such argument override the explicit provisions regarding application processing which are contained in the Commission's Rules. The Commission has adopted an FM application processing standard which requires that the application be substantially complete as to critical informational elements. Simply put, Press failed to provide requisite information and may not rely on another applicant's submissions as a substitute for that omitted information. Fourth, Press contends the Commission did not give sufficient notice of its policy in this regard and that both the FCC's Public Notice (58 R.R. 2d at 168) and Form 301, Section V-B, Question 16, both refer to the "legal boundaries" of the community of license and provide no guidance as to the appropriate procedures in cases where, as here, the community has no legal boundaries. We must also reject this argument. While Press is correct that this community is unincorporated and therefore has no "le-

gal" boundaries as such, it nevertheless does in fact have a "location" which can be identified with reasonable accuracy on a contour map which would reflect a good faith attempt to file a complete application. Press's contour map lacked *any* indication as to the location of Ocean Acres thereby making it impossible to verify compliance with Section 73.315 of the Commission Rules.

7. A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. §§ 1.106(c) and (d). In the absence of such a showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *affd. sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. den.* 383 U.S. 967 (1966); *Employment Practices of Charlotte, North Carolina Stations*, 77 FCC 2d 1 (1980). Furthermore, in accordance with the *Report and Order* in Docket 84-750, 50 FR 19936 (1985), the only basis for reversing an earlier finding of untenderability is demonstration that the Commission erred in its earlier determination. *See* Appendix D to the *Report and Order, supra*. We have examined Press's petition and have determined that the Commission did not make an error in returning the Press application as inadvertently accepted for tender. Accordingly, the Press petition will be denied.

8. 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. Seaira has not completed Item 4 correctly. Seaira's application gives a post office box number as the residence address for William White. Accordingly, Seaira 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.

9. Bay, Word and Canale have petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after July 22, 1987, 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
Bay	Aug. 31, 1987
Word	Sept. 21, 1988
Canale	July 22, 1988

10. 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.

11. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicant Word have been unsuccessful. Accordingly, since no de-

termination has been received as to whether the antenna proposed by Word would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

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. To determine whether there is a reasonable possibility that the tower height and location proposed by Word 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.

14. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Press Broadcasting Company IS DENIED.

15. IT IS FURTHER ORDERED, That Seaira 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.

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

17. 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.

18. 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.

19. 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 See requirements set forth in *Statement of New Policy Regarding Commercial FM Applications*, 58 R.R.2d 166 (1985):

A map or maps satisfying the requirements of Items 10, Section V-B and *clearly and legibly* showing the proposed 60 and 70 dBu contours and the legal boundaries of the community of license must be provided. Such maps permit ascertainment of compliance with city-grade requirements and permit verification of signal-strength contour predictions.