

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

MM Docket No. 88-113

In re Applications of

ROBERT L. DEAN & File No. BPH-860312MR
CHARLES THOMAS, SR. d/b/a
DEAN-THOMAS
COMMUNICATIONS

ROBERT A. JONES File No. BPH-860317NG

COLLEGE TOWN File No. BPH-860317NH
RADIO
LIMITED PARTNERSHIP

For Construction Permit for a New
FM Station on Channel 286A
in Bridgewater, Virginia

Appearances

Dennis F. Begley and Cheryl A. Kenny on behalf of Robert L. Dean & Charles Thomas, Sr. d/b/a Dean-Thom-
as Communications; *Timothy E. Welch* on behalf of Rob-
ert A. Jones; *Henry Solomon* on behalf of College Town
Radio, Limited Partnership; and *Charles E. Dziedzic* and
Y. Paulette Laden on behalf of the Chief, Mass Media
Bureau, Federal Communications Commission.

**SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL**

Issued: January 11, 1989; Released: January 24, 1989

1. This is a ruling on a Motion For Summary Decision filed on November 8, 1988, by Robert L. Dean & Charles Thomas, Sr., d/b/a Dean-Thom-
as Communications (Dean-Thomas), related pleadings including two Petitions For Leave To Amend filed on November 8, 1988, by Dean-Thomas, and a Joint Request For Approval Of Agreement filed on November 1, 1988, by Dean-Thomas and the other applicants in this case, Robert A. Jones (Jones) and College Town Radio Limited Partnership (College Town). The Mass Media Bureau filed its Consolidated Comments On Joint Requests For Approval Of Agreement, Petition For Leave To Amend And Motion For Summary Decision.

2. The three applications were designated for a comparative hearing to select a permittee to construct and operate a new FM radio broadcast station at Bridgewater, Virginia. *Hearing Designation Order*, DA 88-321, released April 8, 1988 (3 F.C.C. Rcd 2030), published at 53 Fed. Reg. 12591 (April 15, 1988) (the "HDO"). The parties filed timely their Notices of Appearance and the required hearing fees are reflected as having been paid to the Commission's Fee Section. 47 C.F.R. §1.221 (1987). The

parties have agreed to a settlement which contemplates an award to Dean-Thomas' successor, WRDJ, Inc. The impediments to such an award are added disqualifying issues concerning alleged deficient financial qualifications and a related false certification. See *Memorandum Opinion and Order*, FCC 88M-2914, released September 6, 1988. The summary decision herein disposes of those issues in favor of Dean-Thomas.

3. Under the terms of the settlement, Dean-Thomas and College Town each will pay \$25,000 to Jones (\$50,000) in return for Jones' dismissal. Then, a newly formed consolidated entity organized by Dean-Thomas and College Town called WRDJ, Inc. will receive the grant.¹

FINDINGS OF FACT

4. On September 6, 1988, the Presiding Judge added the following issues:

A. To determine whether Dean-Thomas and/or its predecessor, Robert L. Dean, were financially qualified to receive a Commission construction permit at the time that an application was filed.

B. To determine whether Dean-Thomas and/or Robert L. Dean misrepresented or lacked candor in certifying to the Commission that Dean-Thomas and/or Robert L. Dean was financially qualified to construct and operate.

C. To determine whether Dean-Thomas and/or Robert L. Dean ever obtained the necessary reasonable assurance of financing for construction and operations as required by the Commission.

D. To determine under the evidence adduced on these added issues whether Dean-Thomas is qualified to receive a Commission permit.

Memorandum Opinion and Order, FCC 88M-2914, *supra*.

5. Robert L. Dean filed his application on March 12, 1986. On April 24, 1986, Mr. Dean joined with Charles Thomas, Sr. to form the general partnership, Dean-Thom-
as. On June 9, 1988, Dean-Thomas produced documents under established discovery procedures. These documents stated that certain individuals (not financial institutions) were ready to loan funds to Dean-Thomas. In some instances, the purpose of the loan is indicated but not in all cases. The individuals making these commitments appear to be related to Robert L. Dean. Two of the documents reflect the date June 8, 1988, and three of the documents are not dated. They are dated over two years after Dean-Thomas filed their application and the documents fail to state that the purpose for the loan was to construct and operate a broadcast station at Bridgewater. Dean-Thomas offers the following explanation in Dean's Declaration which is appended to the Motion For Summary Decision.

6. Dean asserts that he had prepared a budget in 1986 wherein he estimated \$116,000 for construction costs and three months' operations. Dean relied on his 15 years of personal experience as a broadcaster in making the estimates. Funding would come from his personal finances which are set forth in a Balance Sheet showing cash which exceeded his current liabilities by \$10,000. Documents furnished as exhibits to the Dean Declaration establish that in 1986, Dean's Balance Sheet revealed a net

worth of \$698,000 which is an amount well in excess of the \$116,000 needed to construct and operate. This was the state of the applicant's financial condition in March 1986, when Dean was the sole applicant.

7. In April 1986, the Dean-Thomas general partnership was organized. In the amendment, Mr. Dean certified that Dean-Thomas was financially qualified. The partnership relied on a \$30,000 loan from Luther F. Dean & Son and a \$32,700 loan from Dean-O'Connel, Inc., a closely held corporation controlled by Mr. Dean. A personal loan in the amount of \$57,300 will be made by Mr. Dean to the Dean-Thomas partnership.

8. More recently, in July 1988, Dean-Thomas obtained a bank loan commitment in the amount of \$125,000. This commitment is evidenced by a letter from the First American Bank of Virginia dated July 18, 1988 (Exh. L to MSD). A subsequent recomputation by Mr. Dean in October 1988 (updating 1986 costs and expenses) to reflect office equipment, legal fees and a proposed settlement payment to Jones of \$25,000, increased the estimate to \$121,768. Thereafter, the bank loan commitment was increased to \$150,000 (Exh. N to MSD).

9. The Consolidation Agreement between Dean-Thomas and College Town provides that College Town will acquire a 49% voting stock interest in WHBG, Inc., licensee of Standard Broadcast Station WHBG, Harrisonburg, Virginia. College Town also will acquire a 49% interest in a new corporation, WRDJ, Inc. The agreement contemplates that the new Bridgewater FM station and WHBG(AM) will be operated jointly. Robert L. Dean will control 51% of WRDJ, Inc.'s voting stock. The instant amendment also withdraws Robert L. Dean's pledge to divest his interest in WHBG upon grant of the Dean-Thomas application. *See Ruarch Associates*, 103 F.C.C. 2d 1178 (Comm'n 1986) (settlement removes case from adversarial comparative posture and parties are relieved of divestment pledges).

DISCUSSION

10. Dean-Thomas concedes in its motion papers that the contemporaneous documentation with respect to its 1986 certification is less than precise. But Dean-Thomas has assembled all relevant documentation and presented a narrative account which are sufficient to meet the issues. Before filing his application, Mr. Dean, an experienced broadcaster, made reasonable estimates of three months' operating costs at \$33,350 and construction costs in the range of \$72,900 to \$82,900. At that time Mr. Dean intended to self-finance with his calculated net worth at \$698,000 as of February 1986. He had current liabilities of only \$8,229. He had cash on hand totaling \$18,000 and notes receivable totaling \$545,300 which were paid monthly and which were current.² Mr. Dean was prepared to discount the notes and use the proceeds to cover the costs or rely on the monthly payments.

11. The Review Board has recently addressed the situation when a party has insufficient documentation to show all the elements of financial ability. *Northampton Media Associates*, 3 F.C.C. Rcd 5164 (Review Bd 1988). In that case, the applicant had based financial certification on a "belief" that two equity owners had sufficient assets but there was not contemporaneous documentation to support that conclusion. There the two equity principals had not submitted a financial statement or other documentation evidencing their financial commitment because

they viewed the commitment as one being made to themselves and not to some third party. *Id.* at 5166. A reconstructed net worth statement was received in evidence at the trial and it established a net worth of \$615,959. *Id.* The Review Board framed the issue to be whether the applicant had made "deliberate misrepresentations regarding its financial qualifications in executing its financial certification." *Id.* at 5167. The Review Board also noted:

[N]ot only were net liquid assets on hand - - -, their total net worth was such that it would be reasonable to conclude that the necessary funding could have been realized.

Id. Compare Kaye - Smith Enterprises, 98 F.C.C. 2d 670 (Review Bd 1984) (ownership of non-liquid assets several times value of cash needed provides a reasonable assurance).³ The Review Board and the Commission have declined to disqualify an applicant which lacks documentation when it certifies in Form 301 "if there was other reasonable and reliable evidence that funds would be available." *Id.* at 5167. Since Mr. Dean was a sole proprietor when he certified in March 1986, the evidence now establishes that he had a reasonable assurance to justify certification. The funding improved with the general partnership formed in April 1986 when Mr. Dean certified that Dean-Thomas was financially qualified. Current financial ability is clearly established by the 1988 bank commitment for \$150,000.

12. The Commission's rules provide that in considering a motion for summary decision:

The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, Dean-Thomas has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, Dean-Thomas is found to have sustained this burden.

13. In light of the conclusive evidence found in the Dean Declaration and allied exhibits there is no genuine issue of material fact that remains to be resolved. *See also* Bureau's Comments at 3-6 (Dean-Thomas is entitled to summary decision on the financial qualification and certification issues). Therefore, summary decision is appropriate here.

THE AMENDMENTS

14. On November 8, 1988, Dean-Thomas submitted two proposed amendments in furtherance of the settlement and in furtherance of resolving the issues. One of the amendments effects the merger between Dean-Thomas and College Town and discloses the formation of a new corporate entity to receive the grant, WRDJ, Inc. The other amendment would up-date the documentation con-

cerning Dean-Thomas' financial certification and the related reasonable assurance. In both instances, cause has been shown for their acceptance.

SETTLEMENT

15. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience or necessity, and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). See *Oak Television of Everett, Inc., et al.*, 93 F.C.C. 2d 926, 52 Radio Reg. 2d (P&F) 995 (Review Bd. 1983).

16. In this case, with the issues resolved in its favor, Dean-Thomas' successor is qualified at this time to construct and operate a FM station. The Joint Request was filed timely in accordance with §73.3525. The parties have represented that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Also, the Bureau has no objection to approving the settlement. Therefore, it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules.

17. There has been compliance with the local publication requirements of the Commission's rules. 47 C.F.R. §73.3594(g). Commission resources will be conserved by the termination of this case prior to hearing. In addition, the public interest will be served by approval of this agreement which will eliminate the need for protracted litigation and the corresponding utilization of resources, and its acceptance now ensures that a new FM service will be delivered to Bridgewater, Virginia at an earlier date. Accordingly, it is appropriate that the proposed settlement be accepted.

RULINGS

IT IS ORDERED that the Motion For Summary Decision filed on November 8, 1988, by Robert L. Dean & Charles Thomas, Sr. d/b/a Dean-Thomas Communications IS GRANTED and the designated issues regarding financial certification ARE RESOLVED in the applicant's favor.

IT IS FURTHER ORDERED that the Petitions For Leave To Amend filed on November 8, 1988, by Robert L. Dean & Charles Thomas, Sr. d/b/a Dean-Thomas Communications ARE GRANTED and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that the Joint Request For Approval Of Agreement IS GRANTED and the proposed settlement IS ACCEPTED.

IT IS FURTHER ORDERED that the application of Robert A. Jones (File No. BPH-860317NG) IS DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of the merged party, College Town Radio Limited Partnership (File No. BPH-860371NH), IS DISMISSED with prejudice.

IT IS FURTHER ORDERED that unless an appeal from this Summary Decision is taken to the Commission, or unless the Commission reviews this Summary Decision on its own motion in accordance with 47 C.F.R. §1.276 of the Commission's rules, the application of Robert L. Dean & Charles Thomas, Sr. d/b/a Dean-Thomas Communications (File No. BPH-860312MR) to construct and operate a new FM station on Channel 286A at Bridgewater, Virginia IS GRANTED to the successor applicant, WRDJ, Inc., and this proceeding IS TERMINATED.⁴

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

¹ Under the consolidation, College Town will have a 49% interest. Since there are no indicia that College Town will exercise *de facto* control, there is no need to address here the disqualifying issues added against College Town. 47 C.F.R. §73.3555 at Note 2(b). *Memorandum Opinion and Order*, FCC 88M-2926, released September 7, 1988. See *Allegan County Broadcasters, Inc.*, 83 F.C.C. 2d 371, 373 (1980).

² The notes were negotiated in connection with a sale of a radio station and they were secured with station assets. See letter from First American Bank stating that in 1986 Mr. Dean could have obtained a \$125,000 personal loan based on these notes (Exh. H to Dean Declaration).

³ Kaye-Smith was a closer call than this case. There the issue concerned real property valued at \$300,000 which was relied on to meet a \$200,000 cash need.

⁴ This Summary Decision disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).