

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

MM Docket No. 88-551

In re Applications of

SPANN FILE NO. BP-860922AF
COMMUNICATIONS
Surry, Virginia
Req: 670 kHz, 10kW (5kW-CH) DA-2, D

DAVID H. MORAN d/b/a FILE NO. BP-870601AB
KITTY HAWK RADIO
Kitty Hawk, North Carolina
Req: 670 kHz, 5kW, DA-D

ULTIMATE HIGH FILE NO. BP-870601AE
FIDELITY MEDIUM
Claremont, Virginia
Req: 670 kHz, 20kW, (5kW-CH), DA-D

David H. Moran d/b/a FILE NO. BP-870601AC
MIDLOTHIAN RADIO (DISMISSED HEREIN)
Midlothian, Virginia
Req: 670 kHz, 4kW, DA-D

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: November 28, 1988; Released: January 17, 1989

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the above-captioned mutually exclusive applications of Spann Communications' (Spann), David H. Moran d/b/a Kitty Hawk Radio (Kitty Hawk), Midlothian Radio (Midlothian) and Ultimate High Fidelity Medium (Ultimate) for new AM broadcast stations. Also before us is a request for waiver of Section 73.37 of the Commission's Rules filed by Ultimate. In addition, we are in receipt of a "Petition to Deny", filed by Durham Life Broadcasting, Inc. (Durham), licensee of AM station WPTF, Raleigh, North Carolina, and directed at the Kitty Hawk application.

2. *SPANN COMMUNICATIONS*. Spann's proposed 0.5 mV/m contour will overlap with the 0.5 mV/m contour of first adjacent station WCBM, Baltimore, Maryland. Unlike Ultimate, Spann did not request a waiver of Section 73.37 of the Commission's Rules. However, we have determined that the overlap exists because of a salt water path and does not involve the primary service area of either station. Accordingly, a waiver of Section 73.37 of our rules will be granted.

3. Spann has failed to provide in its application a narrative program service statement as required by Section IV of FCC Form 301. Also, the application does not include an EEO Program as required by Section VI of FCC Form 301. Consequently, Spann will be required to file the appropriate amendments with the presiding Administrative Law Judge within 30 days of the release of this Order.

4. Spann reports in its application character issues specified in other proceedings and left unresolved by dismissal of the applications in question. The proposals were those of Midway Broadcasting Company for a new AM station at Maywood-Chicago, Illinois (File No. BP-801105AC) and Minority Broadcasting Company of the Midwest, Inc., for a new AM station at Warrington, Pennsylvania (File No. BP-811124AA). Pervis Spann, Spann Communications' sole principal, was a principal in each applicant. The issues specified included inquiries into failures to report and misrepresentations as to the applicants' engineering showings.

5. In arguing that these issues need not be brought into this proceeding and litigated here, Spann Communications attributes its failure to report to a lack of knowledge on its principal's part. The alleged misrepresentations, it argues, were not in fact misrepresentations at all. Rather, Spann Communications claims, the applicants were using the technical showings of another - a practice which the Commission has specifically found not to raise substantial issues concerning qualifications - under circumstances where this use was apparent from an examination of the showings as a whole.

6. We find Spann Communications' explanation for the most part persuasive, and will require further litigation of only one of the issues. We note in this regard, as Spann Communications emphasizes, that Minority Broadcasting was not represented by counsel in the Warrington proceeding and did not respond to the motion to enlarge issues. Its explanation here satisfies us that no misrepresentation occurred. With respect to the Maywood-Chicago proceeding, the presiding Administrative Law Judge there specifically found that Midway Broadcasting had reported all interests elsewhere and that the applicant had not willfully violated U.S. copyright laws in connection with its application. At the same time, though, he acknowledged that Minority Broadcasting had been found by a U.S. District Court to have misrepresented the identity of its consulting engineer in an application filed with the Commission. This finding, he concluded, warranted specification of an issue. *Midway Broadcasting Co.*, FCC 84M-3152, Mimeo No. 6674, released July 18, 1984. Given the central role that truthfulness plays in our regulatory scheme, we too cannot dismiss the judicial findings of misrepresentation without further inquiry. Hence we will add the issue specified in the Maywood-Chicago proceeding to this proceeding.¹

7. We will also authorize an inquiry into Pervis Spann's conduct in matters relating to the application of Minority Broadcasting Company of the Midwest, Inc., for a new AM station at Memphis, Tennessee. An explanation follows, drawn from findings and conclusions set forth in a Memorandum Opinion and Order, *RKO General Inc. (WHBQ - TV)*, FCC 85M-4936, released December 18, 1985, and a Partial Initial Decision in that same proceeding, FCC 86D-32, released May 2, 1986.²

8. Minority Broadcasting's Memphis application was originally designated for a comparative hearing with the mutually exclusive application of Gilliam Communications, Inc., to modify the facilities of its station WLOK in Memphis. Minority Broadcasting then filed a petition to enlarge issues urging among other things that the Gilliam proposal was a strike application. Submitted in support of its request was the affidavit of one Daryl Williams, swearing to payola practices at station WLOK. Before the petition to enlarge issues was resolved by the presiding Administrative Law Judge, Gilliam withdrew its application and Minority Broadcasting, of which Pervis Spann is president, director and majority shareholder, was awarded the construction permit and later license for station WXSS in Memphis.

9. When Gilliam Communications' president and majority stockholder filed, through a subsidiary, an application for a television station in Memphis mutually exclusive with that of RKO General, Inc., for renewal of license for station WHBQ-TV, RKO sought and was able to bring the unresolved strike application issue into that proceeding. In connection with its litigation, the same Daryl Williams submitted a second affidavit disclaiming his first statement and swearing that Pervis Spann had paid him to sign the false affidavit. Upon advice of counsel, Mr. Williams subsequently refused to testify. The strike issue was tried without this evidence and resolved in Gilliam's favor.

10. We are left then with an unresolved allegation that Pervis Spann purchased and submitted a false statement to the Commission. That such conduct, if established, would call into question the probability of Spann Communications' performing truthfully and reliably as a licensee is a proposition too obvious to require elaboration. An appropriate issue will be specified.³

11. *KITTY HAWK RADIO*. A petition to deny has been filed by Durham alleging that Kitty Hawk's proposed antenna system, when varied 5 percent in current field ratio and 3 percent in phase system, would cause objectionable interference to the operations of Station WPFT. Durham requests that we deny Kitty Hawk's application or designate a critical array issue. It is our policy to consider as being generally stable directional arrays which do not exceed their radiation limits with 1.0 percent current ratio variation and 1.0 degree phase deviation. We consider those arrays which exceed their radiation limits with parameter variations of 0.1 percent and 0.1 degree highly unstable. Where arrays exceed their radiation limits within these parameter variations, we will condition a grant accordingly. Our computerized studies here indicate that Kitty Hawk's proposal would exceed specified standard radiation values with variations of 1.0 percent current ratio deviation and 1.0 degree phase deviation. Thus, the proposal falls into the category where stability conditions are called for. To this extent, we will grant Durham's pleading.⁴

12. *MIDLOTHIAN RADIO*. David H. Moran (Moran) the sole principal of this applicant is also the sole principal of Kitty Hawk Radio. Our studies indicate that Moran's proposals at Kitty Hawk, North Carolina and at Midlothian, Virginia are directly in conflict with each other. By filing two such applications, Moran is in violation of Sections 73.3518 of the Commission's Rules pertaining to inconsistent and conflicting applications.⁵ We will therefore dismiss the application of Midlothian Radio at Midlothian, Virginia, the later filed application deter-

mined by virtue of the suffix attached to Midlothian (BP-870601 AC) as opposed to the Kitty Hawk application (BP-870601 AB).

13. *ULTIMATE HIGH FIDELTY MEDIUM*. The applicant has requested a waiver of Section 73.37 of the Commission's Rules to allow its proposed 0.5 mV/M contour to overlap the 0.5 mV/M contour of the first adjacent station WCBM, Baltimore, Maryland. The waiver is justified because the contour overlap occurs due to a salt water path and is outside of the primary service area of both stations.

14. Ultimate did not provide in its EEO program a minority organization it will contact as required by Section VI of FCC form 301. Consequently, Ultimate will be required to file an appropriate amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

15. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding. As the proposals are for different communities, we will specify an issue to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal, or combination of proposals, would best provide a fair, efficient and equitable distribution of radio service. We will also specify a contingent comparative issue should such an evaluation of the proposals prove warranted.

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, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine whether Pervis Spann, as a principal of Midway Broadcasting Company, misrepresented in an application for a new broadcast station at Maywood-Chicago, Illinois, the identity of its consulting engineer, and, in light of the evidence adduced, whether Spann Communications possesses the basic qualifications to be a Commission licensee.
2. To determine whether Pervis Spann paid Daryl Williams to sign a false affidavit which Minority Broadcasting of the Midwest, Inc., filed with the Commission in a proceeding involving mutually exclusive proposals for a Memphis, Tennessee, broadcast station and, in light of the evidence adduced, whether Spann Communications possesses the basic qualifications to be a Commission licensee.
3. To determine: (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such areas and populations, and (b) in light hereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal, or combination of proposals, would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in the event it is concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

17. IT IS FURTHER ORDERED, That Section 73.37 of the Commission's Rules IS WAIVED as it applies to the overlap between the proposals of Ultimate and Spann and WCBM.

18. IT IS FURTHER ORDERED, That Spann Communications shall file the amendments specified in paragraph 3 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That should Kitty Hawk Radio's application be granted, the construction permit shall contain the following condition:

An antenna monitor of sufficient accuracy and repeatability, and having a minimum resolution of 0.1 degree phase deviation and 0.1 percent sample current ratio deviation, shall be installed and continuously available to indicate the relative phase and magnitude of the sample currents of each element in the array to insure maintenance of the radiated fields within the standard pattern values of radiation.

Upon the receipt of operating specifications and before issuance of license, the permittee shall submit the results of observations made daily of the base currents and their ratios, relative phase, sample currents and their ratios and sample current ratio deviations for each element of the array along with the final amplifier plate voltage and current, the common point current, and the field strengths at each monitoring point for both the nondirectional and directional nighttime operation for a period of at least thirty days, to demonstrate that the array can be maintained within the specified tolerances.

20. IT IS FURTHER ORDERED, That the application of Midlothian Radio filed by David H. Moran at Midlothian, Virginia IS DISMISSED.

21. IT IS FURTHER ORDERED, That Ultimate High Fidelity Medium file an amendment to provide an additional minority organization which it will contact as part of its EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

22. IT IS FURTHER ORDERED, That the petition filed by Durham Life Broadcasting, Inc., IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

23. 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 Street, N.W., Washington, D.C. 20554.

24. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard and pursuant to Section 1.22(c) of the Commission's Rules, the applicants shall, within 20 days of the mailing of this Order, in person or by attorney, file with the Commission, in triplicate, written appearances stating an intention to appear on the dates fixed for the hearing and to present evidence on the issues specified in this Order.

25. IT IS FURTHER ORDERED, That, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, the applicants shall give notice of the hearing as prescribed by the Rule, and shall advise the Commission of the publication of such 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 That issue read in pertinent part as follows: Whether Pervis Spann misrepresented to the FCC that E. Harold Munn, Jr. & Associates was the consulting engineer for Minority Broadcasting Company of the Midwest, Inc.

² Given that Pervis Spann was not technically a party to this proceeding, we will not specify an issue addressing his failure to report it here.

³ These same issues were added against Spann Communications in MM Docket No. 87-16 2 FCC Rcd 1200 (1987). However, a settlement in that hearing precluded that resolution of the issues against Spann.

⁴ Where other factors internal and/or external to the array warrant it, a hearing issue may be specified. Such circumstances, however, have not been established here.

⁵ Section 73.3518 of the Commission's Rules states in pertinent part while an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.