

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

FCC 86-77  
36478

In re Applications of )  
)  
CHRISTIAN BROADCASTING OF THE ) BC DOCKET NO. 81-178  
MIDLANDS, INC. ) File No. BFCT-790327LD  
Omaha, Nebraska )  
)  
HARRY J. PAPPAS ) BC DOCKET NO. 81-179  
Omaha, Nebraska ) File No. BFCT-791026LB  
)  
)  
For a Construction Permit for a New )  
UHF Commercial Television )  
Broadcast Station )

ORDER

Adopted: February 11, 1986 ; Released: February 14, 1986

By the Commission: Commissioner Quello concurring and issuing a statement;  
Commissioner Patrick concurring in the result.)

1. The Commission has before it: (a) an Application for Review of the Review Board Decision herein 1/ filed November 30, 1984 by Christian Broadcasting of the Midlands, Inc. (Christian); 2/ (b) an Opposition to (a)

1/ Christian Broadcasting of the Midlands, Inc., 99 F.C.C. 2d 578 (1984). The Review Board's Decision awarded Christian a slight diversification preference based upon the facts that Christian had no mass media interest, whereas Mr. Pappas was the licensee of two UHF television stations: Station KMPH at Visalia, California, and Station WHNS at Asheville, North Carolina. On September 25, 1985, the Commission granted an application (FCC File No. BTCC-840529KF) for transfer of control of Metro Communications South, Inc. (Metro) to Mr. Pappas. See Pete J. Stathakus, et al, FCC 85-526, released October 23, 1985. Metro holds a construction permit for new commercial television Station WCCG-TV, Channel 48, Greenwood, South Carolina. In granting the foregoing transfer of control application, the Commission authorized him to operate Station WCCG-TV as "primarily a satellite" of Station WHNS. Station WCCG-TV will be primarily a satellite station and will operate approximately 1500 miles from the proposed stations involved in this proceeding. Under these circumstances, Mr. Pappas' recent broadcast acquisition, even when combined with Mr. Pappas' other interests, provides no basis for an award of more than a slight diversification preference to Christian.

2/ In its Application for Review, Christian Broadcasting of the Midlands Inc. (Christian) argues, inter alia, that it should receive a moderate preference under the diversification of control of mass media criterion of our Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395 (1965), rather than the slight preference awarded by the Review Board. In this regard, Christian cites one case which warrants discussion: Resort  
(cont'd)

filed December 17, 1984, by Harry J. Pappas; (c) a Motion for Expedited Consideration of (a) filed May 6, 1985, by Mr. Pappas; (d) a Motion to Reopen Record for Enlargement of Issues filed August 26, 1985, by Christian; (e) an Opposition to (d) filed September 6, 1985, by Mr. Pappas; (f) a Reply to (e) filed September 18, 1985, by Christian; (g) a Petition to Reopen Record filed November 8, 1985, by Christian; 3/ and (h) an Opposition to (g) filed November 20, 1985, by Mr. Pappas.

2. In its Motion to Reopen Record for Enlargement of Issues filed August 26, 1985, Christian requests that the record herein be reopened to determine whether Mr. Pappas' application should be denied or, alternatively, whether Pappas should receive a substantial comparative demerit for engaging in what Christian views as prohibited premature construction of his proposed facilities. Mr. Pappas has admitted Christian's claims that he has begun construction of the broadcast antenna tower for his proposed station, including a tower base and anchors, and that a new power line to supply the transmitter/tower site is being installed. Mr. Pappas interprets Section 319(a) of the Communications Act of 1934, as amended (47 U.S.C. §319(a)), as permitting such construction so long as the station is not put on the air prior to the issuance of a construction permit, citing King Country Broadcasters, 55 R.R. 2d 1591, 1592 (1984).

3. We shall deny Christian's Motion to Reopen the Record. The Commission grants Motions to Reopen the Record only when the proffered evidence would affect the ultimate decision in this case. See, e.g., Southeast Arkansas Radio, Inc., 61 F.C.C. 2d 72, 74 (1976). In this case, the proffered evidence would not be of decisional significance. Mr. Pappas' construction activities did not constitute premature construction in violation

Broadcasting Co., Inc., 41 F.C.C. 2d 640 (Rev. Bd. 1973), review denied, FCC 74-139, released February 6, 1974, affirmed sub nom. Resort Broadcasting Co., Inc. v. FCC, 511 F.2d 448 (D.C. Cir. 1975). Resort was a comparative case in which one of two applicants for a Florida FM station received a "significant" (not "substantial" as Christian claims) diversification preference because it held no media interests, whereas its opponent's 50 percent shareholder was the principal stockholder of an AM/FM combination in New Jersey, as well as a six percent owner of a cable television firm which held several franchises in New Jersey. Although the Review Board in that case used the term "significant" to describe the diversification preference, the winner in Resort actually received a slight diversification preference which outweighed two very slight preferences for integration and efficient frequency use. In brief, Resort was a very close case where a slight diversification preference was "significant" because it was determinative, but it provides no basis for more than a slight diversification preference for Christian in this case.

3/ Christian requests that we consider the impact of Mr. Pappas' acquisition of the permittee of Station WCCG-TV, Greenwood, South Carolina, on our diversification analysis in this proceeding. To the extent that we have considered that impact in footnote 1, supra, we have granted Christian's petition.

of Section 319(a) of the Communications Act. We believe that our opinion in Patton Communications Corp. (Patton), 81 F.C.C. 2d 336 (1980), is applicable here. There, we issued a declaratory ruling that the pouring of concrete footings for a broadcast tower did not constitute premature construction in violation of Section 319(a) of the Communications Act. We observed that some outdoor construction is impossible during winter months in certain parts of the country and that it would be anomalous to interpret Section 319(a) in a manner that would hinder a permittee from complying with Section 319(b), which requires the prompt completion of construction. Here, it appears that the limited construction activity in which Mr. Pappas has engaged, i.e., installation of a tower base and anchors and of a new power line, would likewise be impossible to accomplish in winter months and that it involves only a relatively minor expenditure of funds. Thus, for essentially the same reasons set forth in Patton, we find no violations of Section 319(a) of the Communications Act.

5. However, we take this opportunity to clarify a matter in this regard; i.e., our opinion in King Country, supra. There, we observed that the language of Section 319(a) does not directly mandate a proscription on licensing facilities constructed prior to the issuance of a construction permit and that it merely states that the Commission must grant a construction permit for a station at some time prior to issuing a license for that station. After further study of the legislative history of that Section, we are persuaded that Congress did not intend for this agency to license an entire station which had been built prior to receiving a construction permit. 4/ Accordingly, we overrule King insofar as it is inconsistent with Patton, supra, and this case.

6. ACCORDINGLY, IT IS ORDERED, That the Application for Review of the Review Board's Decision herein filed November 30, 1984, and the Motion to Reopen Record for Enlargement of Issues filed August 26, 1985, by Christian Broadcasting of the Midlands, Inc. ARE DENIED; the Motion for Expedited Consideration of Application for Review filed May 6, 1985, by Harry J. Pappas IS DISMISSED as moot; and the Petition to Reopen Record filed November 8, 1985, by Christian Broadcasting of the Midlands, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

7. IS IS FURTHER ORDERED, That the application of Harry J. Pappas (File No. BPCT-791026LB) IS GRANTED and the application of Christian Broadcasting of the Midlands, Inc. (File No. BPCT-790327LD) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico  
Secretary

4/ See Hearings on H.R. 5589 before the Committee on Merchant Marine and Fisheries, House of Rep., 69th Cong. 1st Sess., pp. 12, 33-34 (1926).

**Concurring Statement of  
FCC Commissioner James H. Quello**

**In re: Applications of Christian Broadcasting of the Midlands, Inc. and Harry J. Pappas for a Construction Permit for a New UHF Commercial Television Broadcast Station; BC Docket Nos. 81-178, 81-179.**

I support affirming the Review Board's decision. In addition, I agree that to the extent the Commission's decision in King Country Broadcasters, 55 Rad.Reg.2d(P&F) 1591 (1984), could encourage construction of broadcast facilities without a construction permit, that decision should be overruled.

I wish to emphasize, however, that I do not believe that Section 319 of the Communication's Act, 47 U.S.C. § 319, precludes the Commission from behaving reasonably in light of all circumstances in dealing with the premature construction of broadcast facilities. Thus, I do not regard the Commission's decision in Patton Communications Corp., 81 F.C.C.2d 336 (1980), or the instant decision as setting any outer limit on Commission authority to license facilities when construction began prior to the obtaining of a construction permit.