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

MM Docket No. 87-567

In re Applications of

GEORGE HENRY CLAY	File No. BPH-870327KB
G. DEAN PEARCE	File No. BPH-870330MY
ALABAMA RADIO MOVEMENT, INC.	File No. BPH-870331ML
JOHNNIE F. KNIGHT	File No. BPH-870414KG
MONTGOMERY BROADCAST PROPERTIES, LTD.	File No. BPH-870415KO
JCT BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870415MB
Linda Breland Valeska d/b/a BRELAND BROADCASTING	File No. BPH-870415MI
JUNE N. PHELPS	File No. BPH-870415MM
DOUBLE LS BROADCASTING, INC.	File No. BPH-870415MN
WHITE BROADCASTING NETWORK, INC.	File No. BPH-870415MR

For Construction Permit for a New FM Station on Channel 241A in Montgomery, Alabama

Appearances

M. Fred Friedman and *DeWitt C. Conklin*, on behalf of Alabama Radio Movement; *Martin J. Gaynes*, *Robert M. Gurss*, and *Lonna M. Thompson*, on behalf of Johnnie F. Knight; *Eric S. Kravetz*, on behalf of Montgomery Broadcast Properties, Ltd.; *David D. Oxenford* and *John K. Hane*, on behalf of JCT Broadcasting Limited Partnership; *Stephen T. Yelverton*, on behalf of Breland Broadcasting; *Dennis F. Begley* and *Matthew H. McCormick*, on behalf of June N. Phelps; *Hilton L. Larkin*, *pro se*, on behalf of Double LS Broadcasting, Inc.; and *David L. Hill* and *Audrey P. Rasmussen*, on behalf of White Broadcasting Network, Inc.

DECISION

Adopted: December 19, 1989; Released: January 22, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. This comparative broadcast proceeding involves eight mutually exclusive applications for authority to construct and operate a new commercial FM broadcast station on Channel 241A at Montgomery, Alabama. They are: Alabama Radio Movement, Inc. (Movement); Johnnie F. Knight (Knight); Montgomery Broadcast Properties, Ltd. (MBP); JCT Broadcasting Limited Partnership (JCT); Breland Broadcasting (Breland); June N. Phelps (Phelps); Double LS Broadcasting, Inc. (Double LS); and White Broadcasting Network, Inc. (White).[1] These applications (along with eleven others subsequently dismissed, *see* note 1) were designated for consolidated hearing on "air hazard" and "city coverage" issues, as well as on the customary standard comparative issue. *Hearing Designation Order*, 3 FCC Rcd 41 (1988). The air hazard issues were resolved in favor of the applicants by a series of summary decisions prior to hearing. In an *Initial Decision*, 4 FCC Rcd 4654 (1989) (*I. D.*), presiding Administrative Law Judge Edward J. Kuhlmann (ALJ) found each of the applicants entitled to a waiver of the city coverage requirements prescribed by 47 CFR § 73.315, and granted Knight's application after concluding that its fulltime quantitative "integration" proposal, as qualitatively enhanced, made it the preferred applicant. The proceeding is now before the Review Board on exceptions filed by the parties.

2. As would be expected, the bulk of the exceptions are directed against Knight, the winner below, who was awarded the highest comparative credit for its 100% quantitative fulltime ownership/management integration proposal, qualitatively enhanced by long-term local residence, a history of participation in local community activities, past broadcast managerial experience, and an auxiliary power source, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (" *Policy Statement* "), as well as by a minority enhancement, *see West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). Unless the Board were to reduce the comparative credit awarded to Knight by the ALJ, none of the other competing applicants (save perhaps JCT) could prevail, regardless of the merits of the others' exceptions directed to their own respective applications.[2] Because we reject the exceptions directed at Knight, and we also reject JCT's exceptions as to its own application, the exceptions relating to Phelps, Breland, MBP, Movement, Double LS, and White are wholly non-decisional. *See* 47 CFR § 1.282(b).

EXCEPTIONS

3. Breland contends that the ALJ erred in denying its petition, filed March 16, 1988, which sought dismissal of Knight's application based on Knight's specification of erroneous geographic coordinates for his transmitter site. *See Memorandum Opinion and Order*, FCC 88M-1313, released May 3, 1988 (ALJ). The erroneous coordinates placed the transmitter site approximately 798 feet from the intended location. Relying on recent *Hearing Designation Orders*, *see, e.g., Nicholasville Broadcasting Corp.*, 4

FCC Rcd 2574, 2575 (1989), and cases cited therein, Breland argues that the Commission's "hard look" processing policy mandates at every stage of the proceeding the dismissal of FM broadcast applications that specify incorrect tower site coordinates, including applications, like Knight's, already in hearing.[3]

4. In its *Report and Order on FM Application Processing*, 58 RR 2d 776, 782 (1985), the Commission adopted new procedures designed to expedite authorization of new or expanded broadcast service to the public. Applicants for commercial FM stations were strictly cautioned that, under the new "hard look" policy, "carelessly prepared, unprocessable applications" would not be permitted to burden the processing system; *see also FM Applications*, 58 RR 2d 166, 169 (1985) (Public Notice). It is legally immaterial, though, at this late stage of the proceeding, whether Knight's application might have been rejected under the staff's "hard look" processing guidelines. It is clear that these new processing guidelines were and are intended to be applied at the *initial* staff review stage, and nothing in the Commission's discussion of its "hard look" policy suggests that it is to be again utilized once the hearing process has begun. Insofar as we are aware, the singular standard for application amendments, once a hearing has been designated, remains as set forth in Section 73.3522(b) of the rules, 47 CFR § 73.3522(b); under that standard, minor ministerial mistakes that do not disrupt the hearing proceeding are rather freely permitted. *See Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988) (subsequent history omitted); *see also Family Broadcasting Group*, 93 FCC 2d 771, 774-775 (Rev. Bd. 1983), *review denied*, FCC 83-559, released November 29, 1983. We shall not unilaterally extend, or apply retroactively by our own ukase, the processing standard established expressly for *initial* staff review of a broadcast application.

5. Breland, MBP, and Phelps next contend that the ALJ erred in denying enlargement petitions, filed February 18, 1988 by MBP, and May 18 and September 30, 1988 by Breland, respectively, seeking site availability, financial, and related candor issues against Knight. *See Memorandum Opinion and Order*, FCC 88M-831, released March 25, 1988 (ALJ); *Memorandum Opinion and Order*, FCC 88M-2478, released August 1, 1988 (ALJ); and *Memorandum Opinion and Order*, FCC 88M-4149, released December 6, 1988 (ALJ).[4] Breland and MBP argue that, based on a declaration by Edward L. Davis, agent for the tower site (owned by his children and) specified by Knight, the requisite "meeting of the minds" between Knight and Davis did not occur, and that Knight thus had no "reasonable assurance" that his proposed transmitter site was available. The Davis declaration claimed that Davis and Knight never discussed potential terms or arrangements for a lease. Additionally, adverting to Knight's amendment to correct his erroneous site coordinates, Breland argues that the failure of either Davis or Knight to mention that Knight now proposed to mount his antenna atop a grain elevator on the Davis property demonstrates further that Knight never had an agreement to use the Davis property. For its part, MBP contends that in light of the alleged absence of the "meeting of minds" as to specific lease terms, a financial issue is required, because Knight could not reasonably and reliably estimate future costs. Finally, Phelps argues that a financial issue is warranted, because Knight testified that he had no written budget estimates other than for equipment.

6. The Commission has stated that its requirements concerning transmitter sites are satisfied when an applicant has contacted the property owner or owner's agent and has obtained "reasonable assurance" in good faith that the proposed site will be available for the intended purpose. *See FM Application Processing*, 58 RR 2d at 782; *see also William F. and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). Here, Knight clearly has met the standard. Thus, a written Agreement submitted by Knight in response to MBP's enlargement petition, and signed by both Knight and Davis, reads as follows:

> **AGREEMENT**
>
> This document is intended to serve as written confirmation of an agreement entered into by and between Edward L. Davis and John F. Knight, Jr. on this 18th day of March, 1987.
>
> Mr. Davis has agreed to lease to Mr. Knight certain real property located at 1516 Mobile Road, Montgomery, Alabama. Mr. Knight has agreed to lease said property from Mr. Davis for the purpose of erecting a radio tower. It is fully understood and agreed to by Mr. Davis and Mr. Knight that the actual execution of said lease agreement is specifically contingent upon Mr. Knight's success in obtaining a FM Construction Permit.
>
> It is understood that the specific terms of the lease agreement are to be determined at the time of its execution and that the terms of said lease and the rental value of the property will be commensurate with other comparable commercial property similarly situated.

The ALJ properly concluded that, in light of the above agreement, Knight could in good faith assert that he had "reasonable assurance" for use of the Davis site. Moreover, a subsequent Davis declaration, referenced by Breland in its exceptions, claiming that he understood the agreement to mean only that he had spoken to Knight and agreed to discuss a lease if Knight wanted the property, is -- at minimum -- irrelevant to Knight's original good faith. Nor does it not undermine Knight's current "reasonable assurance," since Davis has never stated that the site is not available or, more importantly, that he intends to breach his written agreement with Knight. Davis' subsequent parole tergiversations do not nullify Knight's FCC claim to "reasonable assurance." Finally, Breland's reference to the absence of any reference in the pleadings to the grain elevator for Knight's site is insufficient for an issue. Davis himself has not suggested in his declarations that the grain elevator location was not within the scope of his agreement with Knight, and Breland's suggestions otherwise are wholly speculative. Breland has furnished no support to demonstrate that a dispute of fact exists between Knight and Davis over the use of the proposed site. Without such a factual dispute, no evidentiary hearing is summoned. *See Stone v. FCC*, 466 F.2d 316, 322-323 (D.C. Cir. 1972); *see generally also* 47 U.S.C. § 309(e). With respect to MBP's financial allegations regarding the leasing costs for the site, the ALJ found that Knight was familiar with current rents for similar uses, and that this knowledge entered into his assessment of his financial qualifications. *See Memorandum Opinion and Order*, FCC 88M-831, *supra*. MBP has

not shown otherwise. Last, Knight's failure to have prepared *written* budget estimates for himself is also not a basis, by itself, for a financial issue. *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6443-6444 (Rev. Bd. 1989) (lack of initial written cost estimates not grounds for financial issue). *See generally Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989). Here, the ALJ found that Knight had reasonably ascertained the estimated cost for the proposed station, *see Memorandum Opinion and Order*, FCC 88M-4149, *supra*, and that is sufficient under the FCC certification requirements obtaining at the time Knight filed.

Knight's Integration Proposal

7. Breland, MBP, Double LS, and White challenge the ALJ's grant of fulltime ownership/management integration credit to Knight. Essentially, they contend that Knight's political and civic activities will preclude him from devoting the requisite 40 hours per week to his proposed station and that, at best, he is entitled only to parttime "integration" credit. As to Knight's civic activities, the record shows that Knight devotes only a few hours per month attending monthly and annual meetings, *I. D.*, para. 26, and there has been no showing that these activities are so extensive as to preclude Knight from fulfilling his broadcast commitment. Indeed, by the very nature of a broadcast station, extensive local civic involvement by a broadcaster is neither unusual, *see, e.g., Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8152-8153 (Rev. Bd. 1989), nor discouraged. In fact, the opposite is true. *See Policy Statement, supra*, 1 FCC 2d at 396.

8. The record also shows that Knight is, and proposes to remain, a Commissioner of Montgomery County, Alabama, an activity to which Knight claims to devote approximately two hours per week. *I. D.*, para. 26. Citing *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3955 (Rev. Bd. 1988), the exceptors claim that Knight's fulltime "integration" proposal should be rejected as conflicting with his official duties. However, it appears that Knight mainly intends to devote Mondays to his county duties, *see* Tr. 418, apart from answering occasional calls and letters from constituents, *id.*, at 368. He has pledged to devote Tuesdays through Saturdays to the new station. Knight aptly observes also, we believe, that he is *currently* the Alabama State University Director of Communications and Public Affairs (as well as general manager of public broadcast station WVAS-FM), a position he has pledged to relinquish entirely upon a grant of his instant application, and that he now devotes 40 to 50 hours per week to these duties, in addition to his ongoing civic and political activities. In *Washoe Shoshone*, by contrast, we rejected a fulltime "integration" proposal of a city councilman, whose political activities occupied 30 (or more) hours per week. But, nothing on this record undermines Knight's representation that he can and will work 40 hours per week managing his new commercial station, consistent with his local office. In sum, Knight is entitled to the fulltime "integration" credit awarded by the ALJ.[5]

JCT's Integration Proposal

9. The ALJ rejected JCT's critical "integration" credit, because he found that Janet May, JCT's sole "general" partner, will not control the applicant in light of her perceived inability to make the capital contributions on which her equity share is entirely dependent. *I. D.*, para. 84. The ALJ also held that JCT's limited partnership agreement was fatally flawed, and that one of its two putatively "passive" investors had exercised control over the application from the outset. *Id.* JCT's exceptions argue that there is no record support for concluding that May will not purchase her equity interest in the applicant, but that her retention of a full 50% equity interest is not relevant to the "integration" analysis since May will retain 100% "voting control" under the JCT partnership agreement, *whatever* her ultimate equity share. It cites *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3666 (Rev. Bd. 1988), for the proposition that a provision allocating equity interests according to capital contributions is not cause for reduction of an applicant's "integration" credit. JCT further contends that its limited partnership agreement complies with the Commission's guidelines for insulation of its limited partners' interests, citing *Ownership Attribution*, 58 RR 2d 604, 613-620 (1985), and that May has made all of the recent and pertinent partnership decisions.

10. It is the Commission's long-standing practice in comparative cases to award "integration" credit at a quantitative level that corresponds to the integrating principal's ownership percentage of the applicant. *See, e.g., Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 508, 516 (Rev. Bd. 1982) (70% ownership equity yields a 70% "integration" credit) (subsequent history omitted). Where there are *passive* equity owners (*i.e.*, "limited" partners or non-voting shareholders), only the equity interests of the *active* principals are calculated for comparative "integration" purposes and extrapolated to that applicant as a whole, a dynamic we recently discussed again in *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8149-8150 (Rev. Bd. 1989). Here, because May is proposed as the sole "general" partner of JCT, it seeks a 100% "integration" credit through May. *Ceteris paribus*, she would have it. *See Independent Masters, Ltd.*, 104 FCC 2d 178, 185-192 (Rev. Bd. 1986) (10% sole "general" partner garners 100% *effective* "integration" credit).

11. However, we here find that May's claim to a 50% equity share in JCT is entirely speculative at this point, because the JCT partnership agreement provides that the actual equity position of each of JCT's three principals shall ultimately depend upon their respective purchase of partnership shares. The JCT agreement expressly specifies that there shall be 200 partnership shares overall, at a cost of $2000 each. Should a partner fail to timely purchase his or her JCT shares, those shares must be offered to another JCT partner. In order to acquire her 50% equity interest, May must contribute her *pro rata* portion, which (according to JCT) might run from $30,000 to $50,000 just in application prosecution costs. *I.D.*, paras. 35-36.

12. But, the record here raises, at a minimum, critical doubt that May is in a position to purchase any of her partnership shares. Although she originally contributed $2,500 in capital from her personal funds, she subsequently withdrew that amount in the face of dire financial distress. For example, May has accumulated approximately $50,000 in personal debt, including an IRS tax lien against her for $7,405,[6] I.D., paras. 35-36, and has lost her business office (and perhaps her home as well). *Id.*, para. 36. Moreover:

> Thomas May & Associates, an advertising agency she owns . . . [has] been subjected to lawsuits and liens by lending institutions, a realty company, product and service suppliers and the state and federal gov-

ernments. She removed her office to her home and has settled claims which led to a scheduled sheriff's sale of her home.

Id. At the close of this hearing record, JCT's expenses had already reached $25,000, *id.*, para. 35, and her "limited" partner, Hunter White, testified that May might well be unable to purchase her anticipated shares. *Id.* As a matter of fact, May conceded that she might end up with as little as 1% of JCT's equity; but JCT nonetheless argues that even with only 1% of the total equity, May, as the sole "general" partner, would yet entitle JCT to an effective 100% "integration" credit.

13. Under the above circumstances, we shall not disturb the ALJ's refusal to award "integration" credit based upon May's *potential* ownership interest in JCT. As we view this record, it is unclear, if not now exceedingly doubtful, that May will be able to acquire any significant equity in JCT in the near future, let alone the 50% equity interest she initially proposed to purchase. Moreover, even if we started our analysis with the unlikely premise that May now "holds" a 50% equity interest in JCT, it is admitted that her share could drop to the infinitesimal level of 1% (or, conceivably, below). The Board has long held that it will not grant "integration" credit based on a specified equity percentage where there exists a substantial likelihood that percentage might drop dramatically, as by the exercise of options by another party. *Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1366 and n.9 (Rev. Bd. 1983); *see also Washoe Shoshone Broadcasting* 3 FCC Rcd 5631, 5635 (Rev. Bd. 1988) (no "integration" credit awarded where applicant's ownership structure is "in flux").[7] We agree that May's potential ownership interest, and the percentage of any such interest, is purely speculative at this point, and that JCT has not met its bedrock burden of proving out its "integration" entitlement. *See generally Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 687-689 (Rev. Bd. 1986) (each applicant bears burden of proving "integration" entitlement); *see also Ft. Collins Telecasters*, 103 FCC 2d 978, 986-988 (Rev. Bd. 1986). [8]

14. In light of our disposition that JCT's "integration" proposal is too uncertain to be credited, we will not consider the exceptions as to the ALJ's additional grounds for disapproving JCT's integration proposal.

15. ACCORDINGLY, IT IS ORDERED, That the application of Johnnie F. Knight (File No. BPH-870414KG) for a Construction Permit for a new FM broadcast station at Montgomery, Alabama IS GRANTED; that the applications of George Henry Clay (File No. BPH-870327KB) and G. Dean Pearce (File No. BPH-870330MY) ARE DISMISSED; and that the applications of Alabama Radio Movement, Inc. (File No. BPH-870331ML), Montgomery Broadcast Properties, Ltd. (File No. BPH-870415KO), JCT Broadcasting Limited Partnership (File No. BPH-870415MB), Breland Broadcasting (File No. BPH-870415MI), June N. Phelps (File No. BPH-870415MM), Double LS Broadcasting, Inc. (File No. BPH-870415MN) and White Broadcasting Network, Inc. (File No. BPH-870415MR) ARE DENIED; and

16. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by JCT Broadcasting Limited Partnership on July 14 as supplemented on July 21, 1989; October 12, 1989; and October 30 as supplemented on November 6, November 14, and November 22, 1989 ARE GRANTED, and the amendments ARE ACCEPTED; that the Petition for Leave to Amend filed by June N. Phelps on July 31, 1989 IS GRANTED, and the amendment IS ACCEPTED; that the motion to dismiss filed by JCT Broadcasting Limited Partnership on July 18, 1989 IS GRANTED; that the respective motions to dismiss filed by June N. Phelps on July 18, 1989 ARE DENIED; and that the motion to dismiss and the motion to strike, filed, respectively, by Johnnie F. Knight on July 24, 1989 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Two other applicants, George Henry Clay and G. Dean Pearce, have not filed exceptions to the denial of their applications by the *Initial Decision*. Consequently, their applications are dismissed pursuant to 47 CFR § 1.276(f). *See, e.g., Breaux Bridge Broadcasters, Limited Partnership,* 4 FCC Rcd 4995 (Rev. Bd. 1989).

[2] The ALJ positioned Phelps second in the comparative qualitative rankings by virtue of her long-term local residence, excellent civic participation and broadcast managerial experience. She also is entitled to a gender preference which Knight lacks. However, she lacks a minority preference (which Knight received); and as the ALJ correctly found, minority credit is deserving of greater weight than gender credit. *Horne Industries, Inc.*, 98 FCC 2d 601, 603 (1984). Breland and MBP similarly lack minority credit and are also inferior on civic participation and past broadcast managerial experience. Double LS trails Knight on local residence, civic participation, and past broadcast experience. And, Movement seeks no quantitative "integration" credit. Its argument that its minority operation, *per se*, is sufficient to allow it to prevail, has previously been rejected by the Commission in *Las Misiones De Bejar Television Co.*, 93 FCC 2d 191 (Rev. Bd. 1983), *review denied,* 56 RR 2d 1481 (1984). Finally, White has a lesser length of local residence and inferior breadth of civic activities, but in any event, did not challenge the ALJ's qualitative rankings. *See* 47 CFR § 1.277(a) ("any objection not saved by exception filed pursuant to this section is waived").

[3] By *Memorandum Opinion and Order,* FCC 88M-1313, *supra,* the ALJ accepted Knight's curative amendment, filed April 14, 1988, correcting the erroneous coordinates.

[4] MBP's petition there requested site availability, financial, and related candor issues. The petition filed by Breland also sought a site availability issue. Breland's later petition requested a financial issue.

[5] Breland would also have the Board overturn the ALJ's finding that Knight was entitled to a city-grade coverage waiver. It argues that, because Knight's tower is located nearer to the city of Montgomery than some of the other applicants, Knight's coverage beyond the city is relatively inferior. Knight, however, observes that there is no comparative coverage issue in the proceeding, or any evidence as to the difference in total coverage among the applicants. Moreover, Knight's proposal covers 83.6% of the population and 63.7% of the area of Montgomery,

whereas Breland's proposal covers only 78.6% of the population and 63.1% of the area. Knight Reply Br. at 14-15. We therefore affirm the ALJ's finding.

[6] May owns an advertising agency that is experiencing severe financial problems. *I.D.*, para. 36. The ALJ found that the tax lien occurred after May hired two people for the agency, withheld federal taxes from their paychecks to pay the government, and then used the money for other purposes. *Id.*, para. 35.

[7] *Vela Broadcasting Co., supra,* relied upon JCT, is inapposite. In *Vela,* which involved a general partnership where all of the principals proposed to be integrated into the station operation, an argument was raised that the applicant's "integration" proposal should be discounted as lacking in permanence because the partnership agreement did not explicitly include a provision guaranteeing each partner's share against disappearance or diminution. Rejecting that novel argument, we found that there was nothing in the agreement (or the facts) that would support any inference that the partnership was ephemeral. Here, by way of contrast, there is an explicit provision allowing for the disappearance of the "general" partner's equity interest, as well as a factual setting suggesting the substantial likelihood of a significant equity diminution.

[8] Insofar as JCT argues that it would be entitled to a 100% "integration" credit, even if May's equity share dropped to 1%, suffice it that no Board or Commission decision has ever awarded so great an "integration" credit on so minuscule an equity interest. Indeed, the Board has on several occasions questioned whether mere fragmentary ownership interests may (or should) be extrapolated to 100% comparative "integration" credit. *Metroplex, supra,* 4 FCC Rcd at 8160 (citing *Religious Broadcasting Network,* 3 FCC Rcd 4085, 4106 n. 37 (Rev. Bd. 1988)). Without some special showing as to likely management control, we question whether such fractional equity interests could generally translate into complete supervisory dominion over a licensee. (As in *Metroplex,* the Board Chairman does not join in this aspect of the opinion.)