

FCC 78R-25

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of

HAROLD A. JAHNKE Radio Station KQHJ-  
FM Hampton, Iowa

Docket No. 21420  
File No. BMPH-  
15051

For Extension of Construction Permit

*Appearances*

*Harold A. Jahnke*, on his own behalf, and *Aaron P. Shanis*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted: March 27, 1978; Released: April 5, 1978)

BY THE REVIEW BOARD: KESSLER, ZIAS AND OHLBAUM. BOARD  
MEMBER OHLBAUM DISSENTING WITH STATEMENT.

1. In a Memorandum Opinion and Order, FCC 77-729, released November 11, 1977, the Commission designated for oral argument before the Review Board the application of Harold J. Jahnke for additional time to construct Station KQHJ-FM. The application was designated on the following issue:<sup>1</sup>

To determine whether sufficient reasons exist in connection with the application for extension of completion date, which constitute a showing that failure to complete construction was due to causes not under the control of the permittee, or constitute a showing of other matters sufficient to warrant a further extension within the meaning of Section 319(b) of the Communications Act of 1934, as amended, and Section 1.534(a) of the Commission's Rules.

Although oral argument was scheduled for February 2, 1978,<sup>2</sup> Jahnke

<sup>1</sup> By Memorandum Opinion and Order, FCC 78-65, released February 2, 1978, the Commission dismissed a motion filed by Jahnke for reconsideration of the designation order.

<sup>2</sup> Oral argument was originally scheduled for January 12, 1978, by Order, FCC 77R-114, released November 23, 1977. However, by Order, FCC 78R-4, released January 11, 1978, the Board postponed the argument at the request of Jahnke. A further request to postpone the argument, contained in a motion to strike the Bureau's opposition to Jahnke's initial request for postponement, filed by Jahnke on January 30, 1978, was denied by the Board by Order, FCC 784-8, released February 1, 1978. Jahnke was personally notified by telephone of the denial. His motion to strike will be

did not appear and the argument was cancelled. Nevertheless, the Board has reviewed Jahnke's application in light of his brief,<sup>3</sup> the Bureau's reply and our examination of the record,<sup>4</sup> and, for the reasons set forth hereafter, is of the opinion that an extension of time to complete construction is not warranted.

2. This proceeding is an outgrowth of the Commission's rulemaking proceeding in Docket No. 19401, assigning Channels 285 and 277 to Hampton and Pella, Iowa, respectively. In its Second Report and Order in Docket No. 19401, 39 FCC 2d 452, 26 RR 2d 977 (1973), the Commission found that these assignments would be in the public interest, even though Station KCHA-FM, Charles City, Iowa, would be required to change from Channel 285 to Channel 240 in order to accommodate the other assignments. The Commission held, however, that since KCHA-FM, licensed to Radio, Incorporated, was being required to change frequencies, the station should be reimbursed by the benefitting parties, *i.e.*, the permittees for Hampton Channel 285 and for Pella Channel 277, for the reasonable expenses of the channel changes. The Commission stated that it had previously delineated the guidelines setting forth the items which may be the subject of reimbursement, and that it was leaving the matter of determining the appropriate costs to the interested parties, subject to Commission approval in case of dispute. Thereafter, Tulip City Broadcasting Co. was granted a permit to construct a station on Channel 277 in Pella (FCC 75D-47, 56 FCC 2d 524), and by Memorandum Opinion and Order, 58 FCC 2d 560, 36 RR 2d 911 (1976), Jahnke was granted a permit to construct a station on Channel 285 in Hampton. Jahnke was issued a construction permit on March 9, 1976; completion of construction was required by March 9, 1977. In accordance with the Commission's stipulation concerning reimbursement in the rulemaking proceeding, the grant to Jahnke was made subject to the condition that program test authority would be withheld until an agreement was

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dismissed as moot since it was filed long after the Board acted on Jahnke's initial request for postponement.

<sup>3</sup> At the argument the Bureau orally moved to default Jahnke because of his failure to appear. The Board is of the view that, although Jahnke's failure to appear constitutes grounds for default, he has made his position clear in his pleadings and dismissal of his application is not warranted. The Bureau's motion will therefore be denied. *Cf. Andrew J. Crevolin*, 37 FCC 2d 309, 25 RR 2d 308 (Rev. Bd. 1972).

<sup>4</sup> On February 6, 1978, the Board received a "motion to participate in oral argument" from Jahnke requesting that the record in this proceeding "remain open" for the purpose of receiving additional information to be forthcoming from interrogatories and that an attached statement be entered into the record in lieu of his appearance at the oral argument. The Broadcast Bureau filed an opposition to the motion on February 15, 1978, and Jahnke filed a reply on February 27, 1978. The Board has received no further information regarding the interrogatories and we will not delay resolution of this proceeding since an evidentiary hearing has not been ordered. However, we will consider the facts alleged in Jahnke's attached statement in our resolution of this matter.

reached for the reasonable reimbursement of the cost of the KCHA-FM channel change.<sup>5</sup> On December 14, 1976, Jahnke filed a petition to amend the condition on the construction permit by deleting Radio, Incorporated as a party to the reimbursement agreement. This petition is currently pending before the Commission and the Commission stated in its designation order (n. 1) that it "will be dealt with separately."

3. On February 17, 1977, Jahnke filed the subject application for additional time to construct Station KQHJ. In his application, Jahnke set forth several reasons why construction could not be completed by the specified date. The first reason listed by Jahnke was the "litigation" over reimbursement with Radio, Incorporated.<sup>6</sup> Jahnke stated that unless and until the Commission acted favorably on his petition seeking amendment of the condition on his permit, or the matter was resolved elsewhere, "no further money will be committed toward construction." Next, Jahnke claimed that the Commission failed to give him proper notice of a 45-day extension of time granted to Radio, Incorporated in April of 1976 to switch channels, and that this omission "aborted" the acquisition of Radio, Incorporated's used antenna at a favorable price. Jahnke also claimed that he had lost his transmitter site, that a Commission moratorium on applications involving major changes was in effect until December 31, 1976, and that "in view of the pending litigation no waiver was sought." Jahnke also stated, "application for modification of construction permit to specify new transmitter and studio sites and other contemplated engineering changes will be submitted when Commission rules on pending petition in the litigation, or upon disposition of any appeals, if necessary." On March 16, 1977, the Chief of the Broadcast Bureau's Broadcast Facilities Division wrote Jahnke requesting additional information and stating that the matter of reimbursement of Radio, Incorporated was clearly separate from his obligation to proceed with construction. Subsequently, on June 16, 1977, Jahnke's application was dismissed and his construction permit cancelled by letter of the Chief, Broadcast Bureau.

4. On June 23, 1977, the Commission received a letter from Jahnke requesting a hearing and alleging that he had filed an amendment on April 26, 1977, in response to the March 16 letter from the Chief of the Broadcast Facilities Division, and that the amendment was not considered prior to the dismissal of his application. A copy of that

<sup>5</sup> The construction permit contains the following condition (58 FCC 2d 560, 564):

Program test authority will be withheld pending agreement among this permittee, Joseph L. Stone and Earl W. Fessler, d/b as Tulip City Broadcasting Co. [the Pella, Iowa, permittee], and Radio, Incorporated, the licensee of station KCHA-FM, Charles City, Iowa, as to reimbursement of Radio, Incorporated for the reasonable expenses incident to the change of its operation from channel 285 to channel 240.

<sup>6</sup> Jahnke had agreed to negotiate with Radio, Incorporated in a letter to its counsel dated June 24, 1974, and allocated \$1,000 for "channel switch" in his proposed costs.

amendment was filed with the Commission on July 29, 1977. In his amendment, Jahnke stated that he had purchased an audio console in March of 1976, and that he had recently forwarded a deposit for an antenna and transmitter.<sup>7</sup> In addition, Jahnke attempted to explain how his failure to receive notice of the 45-day extension of time granted to Radio, Incorporated in April of 1976 interfered with his negotiations to purchase the used KCHA-FM antenna. In the original rulemaking proceeding in Docket No. 19401, KCHA-FM was required to make the channel shift by February 1, 1974, 39 FCC 2d 452 at 455. However, KCHA-FM requested a stay of the effect of that requirement. In its Memorandum Opinion and Order granting Jahnke's application, the Commission permitted Radio, Incorporated to continue to operate on Channel 285 until 45 days after the effective date of its action, or May 1, 1976. A subsequent 45-day extension of this date, objected to by Jahnke, was granted in April 1976. Jahnke says that he received no notice of this extension and claims that the Commission's failure to notify him prevented him from making an on-site inspection of the KCHA-FM antenna and that the antenna was shipped to the factory before acquisition could be completed. With regard to his proposed site, Jahnke alleged in his amendment that the two-story Hampton State Bank Building, where he originally proposed to locate his studio, tower and transmitter, was damaged by fire on some unspecified date, that construction of a replacement building commenced in April 1976, but as a one-story facility with space for bank needs only, and that he was advised on February 10, 1977 that the bank "would not consider even a temporary radio station use so that construction permit conditions could be met." Jahnke further stated that in August of 1976, a new zoning ordinance was approved by Franklin County which requires formal application for any changes not related to existing agriculture. He also said that he had "under consideration" three "city sites" and one "country site." The applicant again pointed out that there was a Commission moratorium on major changes from mid-1976 until the end of that year,<sup>8</sup> and contended that he made "several efforts" to ascertain whether a move to one of the three sites located in the City of Hampton would be regarded as a major or minor change, but did not receive a specific answer.

5. As noted above, on November 11, 1977, the Commission designated Jahnke's application for oral argument before the Review Board, finding that, after careful consideration of the application and amendment, it was unable to make the required statutory finding of diligence that would justify setting aside the Bureau's action of June

<sup>7</sup> In his statement attached to the motion to participate in oral argument, Jahnke alleges that he now has on hand an audio console, a transmitter and an antenna.

<sup>8</sup> By Public Notice dated April 29, 1976 (FCC 76-395) the Commission announced that new or major change AM and FM applications (with exceptions not relevant here) would not be accepted for filing from July 1, 1976 through December 31, 1976.

16, 1977. For the reasons which follow, we find that Jahnke did not proceed to construct his station with due diligence, that he was not prevented from constructing in timely fashion by causes beyond his control, and that there are not present "other matters" sufficient to warrant an extension of time to construct the station.

6. It is well established that an application for extension of time to complete construction of a broadcast station will be granted only where the permittee proceeded with diligence but was prevented from constructing by circumstances beyond its control, or where there are other public interest considerations sufficient to justify the extension. *Northeast TV Cablevision Corp. (WNEC)*, 21 FCC 2d 442, 18 RR 2d 333 (1970); *Radio Longview, Inc. (KHER)*, 19 FCC 2d 966, 16 RR 2d 1026 (1969). First of all, Jahnke has not, in our view, shown that the delay in construction was due to circumstances beyond his control. Thus, we fail to perceive how the length of time afforded by the Commission to Radio, Incorporated to vacate Channel 285 has any bearing on Jahnke's failure to construct.<sup>9</sup> The permission given KCHA-FM to remain on Channel 285 until Jahnke received his grant obviously is not pertinent to his subsequent failure to proceed with construction. And, assuming the accuracy of Jahnke's contention that he failed to receive notice of the subsequent 45-day extension granted to Radio, Incorporated, we are given no reason why this extension afforded to KCHA-FM caused a breakdown in his negotiations to purchase the used KCHA-FM antenna or otherwise impeded his efforts to proceed. His decision to purchase that antenna and, after negotiations broke down, his decision not to purchase another one within a reasonable period of time thereafter, were business judgments which clearly were within his control. Similarly, the Board perceives no significance in the fact, also relied upon by Jahnke in his brief before us, that his construction permit contained a specific condition relating to reimbursement while the permit of Tulip City for Pella did not. In this regard, we note that the presiding Judge, in granting Tulip City's application, stated that Tulip City was obligated to reimburse Radio, Incorporated, and it is not disputed that a settlement was reached by Tulip City and Radio, Incorporated prior to the time program test authority was issued.<sup>10</sup> Thus, we conclude that there was no disparity in treatment between the Hampton and Pella permittees by the Commission which contributed in any fashion to Jahnke's delay. Finally, we do not believe that

<sup>9</sup> In its Memorandum Opinion and Order granting Jahnke's application for construction permit, the Commission explained that, "it is apparent that the extended consideration necessitated by the pleadings in this proceeding has thus far relieved KCHA of any urgent need to effect the channel change." 58 FCC 2d at 564.

<sup>10</sup> Jahnke acknowledges in his brief that the Commission's staff advised the Pella permittee that program test authority would not be given until a settlement was reached with Radio, Incorporated. We note that the Pella permittee reimbursed Radio, Incorporated in an amount of \$6,300, and that Radio, Incorporated is seeking reimbursement in an amount of \$6,597.82 from Jahnke.

Jahnke has been prejudiced in any way by the alleged "loss" of his April 26, 1977 amendment at the Commission since the information contained in that amendment has been fully considered by the Board in reaching our decision herein.

7. In his petition for reconsideration of the Commission's designation order Jahnke also claims that he was aware of the unavailability of the bank building prior to February 10, 1977, the date on which the Commission's designation order stated he had first learned of it, and that he unsuccessfully attempted to gain *temporary* use of the bank building in February of 1977. We see no reason why this apparent error in the designation order has any effect on the issue of Jahnke's diligence. Nor do we believe that the moratorium on major changes in AM and FM facilities which was in effect between July and December of 1976 is an adequate justification for the delay. Although Jahnke allegedly inquired as to whether a move to another site would constitute a major change, he made no attempt either before or after the moratorium to amend to a different site, and he has indicated that he will not seek to amend to specify a new site until the reimbursement matter is settled.<sup>11</sup>

8. We have considered above Jahnke's grounds for the requested extension, as we understand them, and we cannot find that he has presented facts which, if substantiated, demonstrate that he proceeded with due diligence or that he was prevented from constructing his station by causes beyond his control. Turning to the question of whether there are present "other matters" which might warrant a grant of Jahnke's application we note that, although Jahnke has acquired certain items of equipment (note 7, *supra*), he has refused to give an unqualified commitment to proceed with construction until the matter of reimbursement is settled. Indeed, as indicated above, Jahnke states in his application for additional time to construct that an application for modification of construction permit to specify new transmitter and studio sites and other engineering changes will not be submitted until the reimbursement is settled.

9. The Commission made clear in its designation order that "the matter of reimbursement is ancillary and does not relieve the applicant of its obligations to go forward with the construction of authorized facilities." (See designation order, para. 7.) The Commission also stated in its designation order that, in view of the present uncertain status of the construction permit, resolution of the reimbursement matters in dispute would be inappropriate at this juncture. As indicated above (para. 2, *supra*), the Commission also made clear in its designation order (n. 1) that the currently pending pleading by Jahnke challenging the reimbursement requirement would be dealt with separately.

<sup>11</sup> Nor has Jahnke explained how the Franklin County zoning ordinance prevented him from proceeding with the specification of a new site once the Commission's moratorium expired.

Despite the foregoing, Jahnke, in the statement attached to his February 6, 1978 motion to participate in oral argument, reiterates that he will proceed with construction "if the reimbursement condition is removed from the construction permit and that matter is allowed to proceed to the Courts for resolution." Jahnke, in this and other statements,<sup>12</sup> has made it abundantly clear that he will not construct until the requirement of reimbursement is resolved. In these circumstances, it is apparent that Jahnke has not supplied a firm and unconditional commitment to construct the station. The Commission and the Review Board have consistently held that a showing of other matters sufficient to warrant a further extension must include a firm and unequivocal commitment to construct from the permittee or proposed assignee.<sup>13</sup> Thus, there is no basis on which we can conclude that a grant of an extension of time to construct would serve the public interest, and the application for additional time to construct must be denied.<sup>14</sup>

10. It is clear from the discussion contained in the Commission's designation order that the matter of reimbursement and the petition to amend the condition contained in the construction permit are not within the scope of the issue on which the application for additional time to construct was designated for oral argument before the Review Board, and that the Commission has reserved to itself the resolution of these matters. (See n. 1 and para. 7 of the designation order and para. 9, *supra*.) In light of the Commission's rulings on these matters, the Board cannot entertain Jahnke's argument that the matter of reimbursement should be resolved before he is required to commence construction, nor can it consider the amendment or deletion of the condition which the Commission attached to the construction permit. The Commission's designation order squarely rejected Jahnke's argument on the first point, holding that the matter of reimbursement is ancillary and does not relieve him of his obligation to go forward with construction. To the extent that Jahnke seeks modification of the condition, this can only be done by the Commission in any event, and

<sup>12</sup> In his February 27, 1978 reply to the Bureau's opposition to the motion, Jahnke proposes a time table for construction. However, this time table also reflects that no additional steps toward construction will be taken until the reimbursement matter is resolved.

<sup>13</sup> See, e.g., *Onondaga UHF-TV, Inc. (WONH)*, 21 FCC 2d 525, 18 RR 2d 270 (1970); *Carson City Broadcasting Corp. (KRWL-FM)*, 26 FCC 2d 694, 20 RR 2d 868 (Rev. Bd. 1970); and *Comet Television Corp. (KTOV-TV)*, 46 FCC 2d 1107, 30 RR 2d 393 (Rev. Bd. 1974).

<sup>14</sup> In reaching our conclusion that the application must be denied, we have been mindful of the fact that Jahnke's proposed station would provide Hampton with its first local transmission service; however, in the circumstances here where Jahnke has failed to justify a further extension of time by a firm and unconditional commitment to construct, this one factor relating to the establishment of a first transmission facility, standing alone, cannot be deemed of controlling significance. Cf. *Hymen Lake*, 56 FCC 2d 379, 35 RR 2d 648 (Rev. Bd. 1975).

the Commission has stated that the pending petition will be dealt with separately.

11. ACCORDINGLY, IT IS ORDERED, That the motion to strike, filed by Harold A. Jahnke on January 30, 1978, IS DISMISSED; that the motion to participate in oral argument, filed by Jahnke on February 6, 1978, IS GRANTED to the extent that the statement submitted in lieu of oral argument IS ACCEPTED, and, in all other respects the motion IS DENIED; and that the motion to default made orally by the Broadcast Bureau on February 2, 1978, IS DENIED; and

12. IT IS FURTHER ORDERED, That the application (File No. BMPH-15051) of Harold A. Jahnke for additional time to complete construction of Station KQHJ-FM, Hampton, Iowa, IS DENIED, that the construction permit for the station IS CANCELLED, and that the station's call sign IS DELETED.<sup>15</sup>

JOSEPH F. ZIAS  
MEMBER, REVIEW BOARD  
FEDERAL COMMUNICATIONS COMMISSION

DISSENTING OPINION OF BOARD MEMBER DANIEL R. OHLBAUM

Harold A. Jahnke was granted a construction permit for a new FM broadcast station at Hampton, Iowa, with the condition that, "Program test authority will be withheld pending agreement" between Jahnke and Radio, Incorporated, the licensee of KCHA-FM, as to the reimbursement of KCHA-FM by Jahnke for a portion of the reasonable expenses incident to the change of KCHA-FM's operations from Channel 285 to Channel 240 at Charles City, Iowa.<sup>1</sup> *Borgen, Obed S.*, 58 FCC 2d 560 (1976). The Commission also stated that if a dispute arose between the parties as to the amount of reimbursement, the matter would be determined by the Commission. A dispute between Jahnke and KCHA-FM has arisen as to the amount of reimbursement.

In this situation, it seems to me plainly unreasonable to require Jahnke to construct his station and prepare it for operation while, at the same time, refusing to determine the magnitude of a substantial

<sup>15</sup> The applicant is advised that within 30 days of the release date of this Decision he has the right to file a petition for reconsideration with the Review Board or a petition addressed to the Commission for Commission review of the Board's decision. Unless such a petition is filed by either party, or the Commission elects to review this Decision on its own motion, the Decision will become final automatically 40 days after its release, pursuant to Section 1.102 of the Commission's Rules, 47 CFR 1.102.

<sup>1</sup> See *FM Table of Assignments*, 39 FCC 2d 452 (1973), moving KCHA-FM from Channel 285A at Charles City, Iowa, to Channel 240A in order to make possible the assignments of Channel 285A at Hampton, Iowa, and Channel 277 at Pella, Iowa. The Commission also ruled that "the benefiting parties," i.e., the permittees of Channel 285A at Hampton, Iowa, and Channel 277 at Pella, Iowa, should reimburse KCHA-FM for the reasonable costs of KCHA-FM's channel change.

sum of money that the Commission is requiring him to pay to another party before he can commence operation.<sup>2</sup> So long as the Commission reserves to itself the power to determine one of the cost elements of Jahnke's station, this is a factor not within his business judgment, and it is only right that the Commission should tell Jahnke how large this payment will be before requiring Jahnke to build his station or forfeit his permit. Once the station is built, Jahnke will be in no position to make an uncoerced judgment as to whether it is worthwhile to proceed. He will have facilities he cannot use until he pays a sum satisfactory to KCHA-FM or to the Commission. The Court of Appeals has held that it is manifestly unfair to require a permittee to build when the Commission has not resolved policy affecting the future viability of the station. *Channel 16 of Rhode Island, Inc. v. Federal Communications Commission*, 142 U.S. App. D.C. 238, 440 F.2d 266 (1971). It is just as unfair to require Jahnke to build before the Commission determines how much it will require him to pay the previous occupant of the frequency.

It is true that Jahnke has not filed a formal petition requesting the Commission to resolve the dispute between him and KCHA-FM. However, in view of the Commission's express insistence that resolution of that dispute by the Commission is inappropriate at this time and that the reimbursement problem does not relieve Jahnke of his obligation to proceed with construction, it would be an empty formality to insist that he seek Commission resolution of the reimbursement dispute in order to obtain an extension.

I also recognize, of course, that the Commission has to date rejected the position I am taking. If this were a situation involving a motion to enlarge issues, a previous Commission decision resolving the merits of the request would be binding on the Review Board and would not permit a contrary holding by the Board or a dissent in conflict with the Commission's determination. Petitions to enlarge issues, once ruled upon by the Commission, are obviously not going to be subsequently re-examined. *Atlantic Broadcasting Company (WUST)*, 5 FCC 2d 717 (1966). This situation is different. The Commission, while expressing the view that determination of the amount of reimbursement was "ancillary," nevertheless designated the extension application for consideration by the Board without any limitation on the scope of the issues. Compare *Adolfo and Elias Liberman*, FCC 78R-13, released February 27, 1978. Accordingly, it seems permissible to construe the designation order as not constituting a final determination of any of the issues bearing on Jahnke's application, but rather as affording Jahnke a fresh opportunity to have all of his contentions considered.

<sup>2</sup> The Pella permittee agreed to pay KCHA-FM \$5000 as half the expenses of the channel change, plus half the cost of preventing second harmonic interference (a cost the Commission has held to be reimbursable). Jahnke has apparently offered KCHA-FM \$1000. Since the construction cost of Jahnke's proposed station is some \$20,000, a \$5000-plus payment to KCHA-FM would mean a 25% increase in costs to Jahnke.

My views on Jahnke's request for an extension of time are perhaps also affected by my doubts that it is consonant with the Communications Act to require an applicant for a channel which is publicly available to reimburse another private party for his expenses in shifting to another frequency.<sup>3</sup> The Commission has authority to require such frequency changes only when they will promote the public interest, not some private interest. Communications Act, Section 316, 47 U.S.C. 316. For the Communications Act is designed primarily to protect the public's interest in the channels of communications; it does not provide a new code for the adjustment of conflicting private rights. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Therefore, when the Commission required KCHA-FM to shift channels, that requirement was made to provide improved service for the benefit of the public and not for the benefit of any private party who might apply for the new channel made available at Hampton, Iowa. In that situation, the cost should be borne by the party upon whom it falls. If the cost to him is inordinate when measured against the public benefit, the move should not be required. There is no provision in the Communications Act clearly authorizing a transfer of this cost to another party unwilling to bear it. *Cf. Turner v. Federal Communications Commission*, 169 U.S.App.D.C. 113, 514 F.2d 1354 (1975). Fully conscious of the limitations of my position, I still believe it is worthwhile to bring these doubts to the attention of the Commission.

<sup>3</sup> *i.e.*, I doubt that the condition attached to Jahnke's construction permit is valid.