

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

MM Docket No. 93-37

In re Applications of

LEHIGH VALLEY COMMUNITY BROADCASTERS BOARD OF DIRECTORS  
(Hereafter "Lehigh")  
Allentown, Pennsylvania  
Req: 89.3 MHz; Channel 207A  
0.12 kW (H&V); 245 meters (H&V)

BEACON BROADCASTING CORPORATION  
(Hereafter "Beacon")  
Allentown, Pennsylvania  
Req: 89.3 MHz; Channel 207A  
0.150 kW (H&V); 244.8 meters (H&V)

NORTHAMPTON COMMUNITY COLLEGE  
(Hereafter "Northampton")  
Bethlehem Township, Pennsylvania  
Req: 89.5 MHz; Channel 208A  
0.004 kW (H) 0.100 kW (V)  
20 meters (H&V)

For Construction Permit for a  
New Noncommercial, Educational  
FM Station

**HEARING DESIGNATION ORDER**

Adopted: February 5, 1993; Released: March 9, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Preliminary Matters.* On November 13, 1990, the Chief, FM Branch returned Northampton's application because the protected contour (60dBu) of the Northampton proposal would overlap the interfering contour (54dBu) of first adjacent channel station WDVR(FM), Delaware Township, New Jersey in violation of 47 C.F.R. § 73.509. On December 12, 1990, Northampton filed a petition for reconsideration of this return. Specifically, Northampton's petition (1) admitted that it had made a typographical error in the preparation of its application, and did not contest the staff study of its application; (2) stated that it was not possible to file a curative amendment to eliminate or sub-

stantially mitigate the interference received; and (3) requested a waiver of 47 C.F.R. § 73.509. In support of its waiver request, Northampton stated that: (1) the frequency requested is the only usable frequency with which to construct a facility on the College's campus; (2) its proposal does not cause interference to other stations; rather, Northampton would only receive interference. This received interference is acceptable to the college and not detrimental to the goals of the broadcast program; (3) the proposed station will be an integral part of the College's communications curriculum which will be used for community outreach; and (4) the Commission has a special obligation under the terms of the Communications Act to ensure a fair and equitable distribution of available broadcast channels, and denial of the waiver request will preclude a local, educational broadcast service to the Bethlehem, Pennsylvania area.

3. We disagree with Northampton's assertions. An engineering study of Northampton's proposal reveals that the received prohibited contour overlap would encompass 58 percent of Northampton's proposed 60 dBu protected contour. As originally filed, Northampton's application thus failed to comply with the Commission's technical requirements as articulated in 47 C.F.R. § 73.509. Furthermore, Northampton did not request a waiver of this rule section at the time its application was filed. As such, the application was properly returned as unacceptable for filing pursuant to 47 C.F.R. § 73.3566(a). (Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing...) As the Commission has previously stated, all stations have a potential preclusionary effect as to the institution of other nearby facilities for new or increased FM broadcast service to the public. Proposed facilities which involve overlap received contribute toward less efficient channel usage because the overlap received decreases the normally protected 60 dBu service area, while continuing to cause the same preclusionary consequences as a fully efficient facility (i.e. one without the overlap received). Accordingly, to waive the prohibition against overlap received based on the reasons proffered by Northampton would effectively nullify the prohibition against overlap as a means of assuring efficient utilization of the FM broadcast spectrum.

4. In a recent decision involving waiver requests of contour overlap caused and received, the Commission distinguished first adjacent channel overlap from second or third adjacent channel contour overlap:

Overlap of co-channel or first adjacent channel signals is a more serious matter since the interference that may occur results in the loss of service over a wide area. Second or third adjacent channel overlap may result in the replacement of one signal by another (not the complete loss of service) and is confined to a very small area around the transmitter of the interfering station. In addition, the potential for such interference to occur depends to a great extent on the quality of the receivers used within the affected area.

See *Educational Information Corporation*, 6 FCC Rcd 2207, 2208 (1991), at Paragraph 9. Compelling circumstances must be advanced before waivers of 47 C.F.R. § 73.509 for first-adjacent stations can be considered. This has not been

done in the instant case. Consequently, Northampton's request for a waiver of 47 C.F.R. § 73.509, and its petition for reconsideration, will be denied.<sup>1</sup>

5. *Lehigh*. On May 11, 1990, Lehigh amended its application to indicate that it was financially dependent upon a Federal grant administered by the National Telecommunications and Information Administration. Commission records indicate that Lehigh has not received this grant. Accordingly, an appropriate financial issue will be specified.

6. Lehigh has amended Item 8, Section II of its application on May 11, 1990, February 25, 1991, and November 18, 1991 to reflect changes in its Board of Directors. However, the applicant failed to include amended responses to Section II, Items 6, 7, and 9 of FCC 340 in these three amendments. Accordingly, Lehigh will be required to file an amendment with respect to these Items with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. Lehigh proposes to mount its antenna on the existing tower of WFMZ-TV, Allentown, Pennsylvania. However, engineering analysis of Lehigh's application reveals a discrepancy between the information contained in the Commission's data base for this tower and that provided by the applicant. Specifically, Lehigh lists the overall height above ground level and overall height above mean sea level of its antenna's supporting structure (the WFMZ-TV tower) as 140 meters and 424 meters, respectively. However, the Commission's database for these parameters reflects 150.9 meters and 434.3 meters, respectively. Accordingly, Lehigh will be required to file an amendment with the presiding Administrative Law Judge which corrects this discrepancy within 30 days of the release of this Order.

8. *Beacon*. In a letter dated May 10, 1991, the Chief, FM Branch returned Beacon's application as unacceptable for filing due to prohibited contour overlap to station WRDV(FM), Warminster, Pennsylvania in violation of 47 C.F.R. § 73.509. In the letter, the Chief, FM Branch noted:

[P]ursuant to the Commission's *Public Notice* entitled "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications" [56 RR 2d 776 (1984)]... the Commission indicated that it would provide *one* opportunity to reinstate applications *nunc pro tunc* where the original application was returned and where a relatively minor curative amendment was filed within 30 days of the date of the return of the application. (emphasis in original)

Beacon's application was retendered on June 10, 1991 accompanied by an amendment which, Beacon claimed, corrected the engineering defect that resulted in the return of the original application. On October 1, 1991, Beacon's application, BPED-900905ML, was reinstated *nunc pro tunc* by Commission letter. On November 19, 1991, Lehigh filed a petition to deny against the Beacon application. Lehigh's petition alleges (1) that Beacon's retendered application would cause prohibited interference to WPVI(TV), televi-

sion Channel 6, Philadelphia, Pennsylvania, in violation of 47 C.F.R. § 73.525; (2) that Beacon's plotted transmitter site does not agree with the coordinates specified in Section VB, Item 2(b) of its application; and (3) that Beacon's Exhibit VB-2(b) (page 4), sets forth values which exceed the 0.135 kW directional antenna value proposed elsewhere in Beacon's application. Lehigh contends that Beacon has already been afforded an opportunity to correct its defective proposal and receive *nunc pro tunc* acceptance of its application. Consequently, Lehigh argues, resubmission at this time, to correct these additional defects, is expressly barred by the following policy respecting the processing of FM construction permits enunciated in the *Public Notice*, *supra*:

In the future, we will, however, expect such applicants to completely review *all* portions of a returned or dismissed application. Thereafter, if the same application is returned or dismissed a second time, it will *not* be afforded *nunc pro tunc* reconsideration rights. (emphasis original)

Therefore, Lehigh contends, Beacon's application, as amended on June 10, 1991, remains patently defective.

9. On December 20, 1991, Beacon filed an opposition to Lehigh's petition. Beacon included in its opposition an engineering statement specifying the method utilized to determine the potential interference area with WPVI(TV). Beacon concluded that the method of determining interference to WPVI(TV) is consistent with Section 73.525(e)(1) of the Commission's rules. With regard to the alleged misplotted transmitter site on the site map, Beacon acknowledges that the transmitter site was incorrectly plotted by a few feet. However, Beacon stated that the proposed antenna is to be mounted on an existing tower at an established antenna farm and due to the numerous towers in the area, confusion over the specific location of the proposed tower was inadvertently plotted in error. Beacon claimed that all other tower information provided within the application was correct. Accordingly, Beacon simultaneously filed an amendment to correct this minor discrepancy. As support for acceptance of the amendment, Beacon stated that the Commission has held in the past that the incorrect plotting of the proposed antenna site is not an issue when the proposed antenna will be located on an existing tower whose site location is a matter of record with the Commission. With regard to Lehigh's allegation that Beacon's Exhibit VB-2(b) contained incorrect information regarding the proposed directional antenna system, Beacon stated that this defect was a typographical error, but the correct information is clearly contained elsewhere in the application, specifically in Exhibit IV and Exhibit VB-2.

10. On January 15, 1992, Lehigh filed both a reply to the opposition and an opposition to Beacon's December 20, 1991 amendment. Lehigh stated that Beacon's application appeared on a cutoff list (Report No. B-138, released October 15, 1991) establishing November 19, 1991 as the deadline for submission of amendments as of right. Beacon claimed that Lehigh has neither requested leave to file the

<sup>1</sup> On November 18, 1991, Northampton wrote to the Commission requesting that Lehigh be ordered to share its proposed frequency with Northampton, or in the alternative, that Northampton be afforded the opportunity to prepare and file an

application for the frequency specified by Lehigh and Beacon. In light of the action taken herein, this request will be dismissed as moot.

late-filed amendment nor proffered any justification for its acceptance by the Commission, and therefore, Beacon's amendment must be rejected. Lehigh reiterates its argument that Beacon's amendment must be rejected, in any event, because Beacon has already had one opportunity to correct its defective application, and any further attempt to shore up that proposal through an additional amendment is expressly barred by the Commission's policy statement respecting the processing of defective AM and FM construction permit applications.

11. Beacon proposes to co-locate its antenna on the television tower of WFMZ(TV), Allentown, Pennsylvania. It has been longstanding Commission policy that if an applicant has specified inconsistent data, but clearly proposes to locate its antenna on an existing tower to which specific reference is made in its application, the staff takes official notice of data specified in Commission records for the licensed facilities, and thus often can confidently and reliably resolve the inaccuracy or inconsistency in the data given for the proposed tower location or height. See *R. Donnie Goodale*, 7 FCC Rcd 1495 (1992); *David T. Murray*, 5 FCC Rcd 5770 (1990); and *Steven B. Courts*, 4 FCC Rcd 4764 (1989). Accordingly, for administrative convenience and good cause, we shall accept Beacon's December 20, 1991 amendment which corrects the discrepant coordinates.

12. We now turn to the allegations raised by Lehigh with respect to Beacon's compliance with the Commission's rules pertaining to interference to television channel six as set forth in 47 C.F.R. § 73.525. Lehigh contends that Beacon's application should be dismissed because of predicted interference to Channel 6 television station WPVI, Philadelphia, Pennsylvania. However, contrary to Lehigh's contention, noncompliance with Section 73.525 does not affect the acceptability of Beacon's application. Nevertheless, the Commission could not grant Beacon's application until this defect is corrected.

13. On May 28, 1992, Capital Cities/ABC, the licensee of WVPI-TV, Philadelphia, Pennsylvania filed an informal objection to Beacon's application. The objection asserted that Beacon's proposal would result in interference to the signal of its station. As a result of this objection, Beacon filed an amendment on July 27, 1992 which brings its application into compliance with Section 73.525 by a reduction in the number of people who will receive interference and by the installation of filters within the area predicted to receive interference. Lastly, Beacon's July 27, 1992 amendment corrected the directional antenna value discrepancy by reducing the proposed effective radiated power to 0.125 kilowatts vertically polarized and utilizing a more restrictive directional antenna pattern. Accordingly, in light of the above discussion, both Lehigh's petition and Capital Cities/ABC's informal objection will be denied.

14. Engineering analysis of Beacon's application reveals that the proposed maximum ERP of 0.15 kilowatts (V) as listed in Section V-B, Question 9(a), of Beacon's amendment, is not supported in the rest of Beacon's July 27, 1992 amendment. In Beacon's engineering statement, Beacon requests an ERP of 0.125 kilowatts (V) and the 0.125 kilowatts (V) ERP is listed as the maximum ERP everywhere else in the amendment. This discrepancy appears to be a typographical error. The Commission allows such typographical errors to be corrected by an amendment, if the correct information is contained elsewhere in the application. Furthermore, in Exhibit VB-7, titled "Directional Antenna Information" there is an error which appears

to be typographical. In this exhibit, the adjusted effective radiated power at an azimuth of 225° is listed as -23.98 dBk. However, using the relative field factor of 0.566 at the 225° azimuth, the adjusted effective radiated power is calculated to be -13.98 dBk. The Commission allows such typographical errors to be corrected by an amendment, if the correct information can be confidently obtained using other information contained elsewhere in the application.

15. In addition, an engineering review of Beacon's application also reveals a discrepancy in its listed overall height above ground level and overall height above mean sea level of its proposed antenna supporting structure. Beacon states that it is mounting on WFMZ(TV)'s existing tower at the coordinates 40° 33' 54" N.L., 75° 26' 26" W.L. In its application, Beacon lists the overall height above ground level and overall height above mean sea level of the antenna's supporting structure as 204 meters and 487 meters, respectively. However, the overall height above ground level and overall height above mean sea level of the antenna supporting structure are listed by the FAA as 150.9 meters and 434.3 meters, respectively. Furthermore, the Commission's database shows that there is another tower in the vicinity of Beacon's proposed coordinates; it is listed at 40° 33' 55" N.L., 75° 26' 26" W.L. with an overall height above ground level and an overall height above mean sea level of the antenna's supporting structure as 203.6 meters and 487.1 meters, respectively. Since these defects in Beacon's application pertain to its grantability, and not acceptability, Beacon's application is not in violation of the Commission's policy on the processing of patently defective AM and FM applications as set forth in the *Public Notice, supra*. Accordingly, Beacon shall be required to file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order to correct the above-listed discrepancies.

16. Lastly, an engineering study of Beacon's amended application reveals that its amended Channel 6 interference study was done in accordance with 47 C.F.R. § 73.525. The number of people calculated to be inside the Channel 6 interference area is 3,102. Therefore, the installation of 102 filters on television receivers would be necessary for Beacon's proposal to be in compliance with 47 C.F.R. § 73.525. Accordingly, if Beacon is awarded a construction permit as a result of this proceeding, its compliance with the following condition will be required:

In accordance with Section 73.525 of the Commission's Rules, Beacon shall effectively install 102 filters on television receivers located within the predicted interference area within ninety (90) days after commencing program tests and, no later than forty five (45) days thereafter, provide TV channel six Station WPVI(TV) with a certification containing sufficient information to permit verification of such installations. [The number of filters to be installed within the area predicted to receive new interference shall be 102.]

17. *Other Matters.* Both Lehigh and Beacon propose to locate their transmitting antennas on the existing tower of WFMZ, Allentown, Pennsylvania. Our engineering study indicates that the applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the

*Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also, *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since the applicants failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. In situations such as those of Lehigh and Beacon, where there are multiple contributors to radiofrequency radiation, it is necessary to submit a certification that an agreement will be in effect requiring all stations to reduce power or cease operations, as necessary, to assure worker safety with respect to radiofrequency radiation when construction or maintenance is to be performed at the site. See *Public Notice*, August 19, 1992, Mimeo 24479. Therefore Lehigh and Beacon will be required to file, within 30 days of the release of this Order an EA, containing the requisite certification of agreement, with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. See 47 C.F.R. § 1.1308(d).

18. Lehigh and Beacon both propose to co-locate their antennas above the directional antennas of translator stations W285DB, Allentown, Pennsylvania and W204AC, Emmaus, Pennsylvania. Since their transmission lines would pass by these translators' directional antennas, there is a possibility that their transmission lines could disrupt the translators' directional antenna patterns. Accordingly, Lehigh and Beacon must submit exhibits demonstrating that their proposed facilities would have no adverse effect on the translators' directional antenna patterns.

19. Beacon petitioned for leave to amend its application after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative position after

the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

20. Lehigh petitioned for leave to amend its application on March 28, 1991 and November 18, 1991 and October 23, 1992. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

21. *Share-time Arrangement*. An issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfallon Denver Educational Broadcasting, Inc.*, 43 Fed. reg. 49560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

22. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

23. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

24. 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, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Lehigh, whether the applicant is financially qualified.
2. If a final environmental impact statement is issued with respect to Lehigh or Beacon in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
3. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

25. IT IS FURTHER ORDERED, That Northampton's request for waiver of 47 C.F.R. § 73.509 and its petition for reconsideration ARE DENIED.

26. IT IS FURTHER ORDERED, That Lehigh shall, within 30 days of the release of this Order, file with the presiding Administrative Law Judge the amendments set forth in paragraphs 7 and 8, hereinabove.

27. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 10 through 15, above, Lehigh's petition to deny the application of Beacon and the Capital Cities/ABC informal objection ARE DENIED.

28. IT IS FURTHER ORDERED, That Beacon shall file the amendments set forth in paragraphs 16 and 17, hereinabove, with the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That if a construction permit is awarded to Beacon as a result of this proceeding, it will be conditioned upon the terms set forth in paragraph 18, hereinabove.

30. IT IS FURTHER ORDERED, That in accordance with paragraph 19, hereinabove, Lehigh and Beacon shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

31. IT IS FURTHER ORDERED, That Lehigh and Beacon shall, within 30 days of the release of this Order, file with the presiding Administrative Law Judge the amendment set forth in paragraph 20, above.

32. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Lehigh and Beacon ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

33. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, 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, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

34. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

35. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within

the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief  
Audio Services Division  
Mass Media Bureau