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

MM Docket No. 93-54

In re Applications of

GAF BROADCASTING COMPANY, INC. File No. BRH-910201WL

For Renewal of License
of Station WNCN(FM) (104.3 MHz),
New York, New York

CLASS ENTERTAINMENT AND COMMUNICATIONS, L.P. File No. BPH-910430ME

THE FIDELIO GROUP, INC. File No. BPH-910502MQ

For a Construction Permit
for a New FM Station on
104.3 MHz at New York, New York

HEARING DESIGNATION ORDER

Adopted: March 1, 1993; Released: March 15, 1993

By Chief, Audio Services Division:

1. The Commission has before it: (a) an application for renewal of license of Station WNCN(FM), New York, New York, filed February 1, 1991, by GAF Broadcasting Company, Inc. ("GAF"); (b) an application for a construction permit for a new FM broadcast station in New York, New York, filed April 30, 1991, by Class Entertainment and Communications, L.P. ("Class"); and (c) an application for a construction permit for a new FM station in New York, New York, filed May 2, 1991, by The Fidelio Group, Inc. ("Fidelio").[1] The applications are mutually exclusive because GAF operates WNCN(FM) on 104.3 MHz, the frequency sought by Class and Fidelio.

Class Amendment

2. On March 13, 1992, Class filed a Petition for Leave to Amend its application. Class is a limited partnership which originally had three general partners. The amendment reports that one of the general partners, Barbara J. Norris, who initially held a 12.43% ownership interest in Class, has withdrawn from the limited partnership, and her ownership interest has been transferred to one of the two remaining general partners. In comments filed March 26, 1992, GAF urges that acceptance of the Class amendment must be conditioned "to guard against an impermissible comparative upgrade."

3. The Class amendment will be accepted. However, pursuant to longstanding Commission policy, no comparative advantage from this amendment will be allowed. *See V.O.B., Inc.*, 5 FCC Rcd 5872 (Rev. Bd. 1990).

Request for Return of Fidelio Application

4. On May 30, 1991, GAF petitioned for the return of Fidelio's application as unacceptable for filing. GAF argues that, based on §§ 73.1020(a)(17) and 73.3516(e) of the

[1] There are also pending the following pleadings: (a) Petition for Leave to Amend, filed March 13, 1991, by Class; (b) Comments on Petition for Leave to Amend, filed March 26, 1991, by GAF; (c) Request for Return of Application as Unacceptable for Filing, filed May 30, 1991, by GAF; (d) Opposition to Request for Return of Application as Unacceptable for Filing, filed June 13, 1991, by Fidelio; (e) Reply to Opposition to Request for Return of Application as Unacceptable for Filing, filed June 24, 1991, by GAF; (f) Motion for Leave to File Response, filed June 28, 1991, by Fidelio; (g) Response to Reply to Opposition for Return of Application as Unacceptable for Filing, filed June 28, 1991, by Fidelio; (h) Motion to Strike Fidelio's Response and Opposition to Fidelio's Motion for Leave to File Response, filed July 11, 1991, by GAF; (i) Opposition to Motion to Strike, filed July 24, 1991, by Fidelio; (j) Petition to Deny, filed November 19, 1991, by GAF; (k) Opposition of The Fidelio Group, Inc. to Petition to Deny, filed January 17, 1992, by Fidelio; (l) Reply to Opposition to Petition to Deny, filed February 20, 1992, by GAF; (m) Petition for Leave to Amend, filed January 17, 1992, by Fidelio; (n) Opposition to Petition for Leave to Amend, filed February 20, 1992, by GAF; and (o) Reply by Fidelio to Opposition to Petition for Leave to Amend, filed March 10, 1992, by Fidelio; (p) Petition to Deny, filed April 30, 1991, by Class; (q) Petition to Deny, filed May 1, 1991, by Listeners' Guild, Inc. ("Guild"); (r) Petition to Deny, filed May 1, 1991, by the New York State Conference of Branches of the NAACP ("NAACP"); (s) Consolidated Opposition to Petitions to Deny, filed July 1, 1991, by GAF; (t) Reply to [Consolidated] Opposition to Petition[s] to Deny, filed August 21, 1991, by Guild; (u) Reply to Consolidated Opposition to Petitions to Deny, filed August 21, 1991, by Class; (v) Joint Request for Approval of Settlement Agreement, filed September 14, 1992, by GAF and NAACP; (w) Supplement to Joint Request for Approval of Settlement Agreement, filed September 22, 1992, by GAF; (x) Response of Listeners' Guild, Inc. to Joint Request for Approval of Settlement Agreement, filed September 29, 1992, by Guild; (y) Comments on Joint Request for Approval of Settlement Agreement, filed September 29, 1992, by Class; (z) Comments of the Fidelio Group, Inc. Concerning Joint Request for Approval of Settlement Agreement, filed October 5, 1992, by Fidelio; (aa) Consolidated Response and Motion to Strike, filed October 15, 1992, by GAF; (bb) Opposition to Motion to Strike, filed October 28, 1992, by Class.

NOTE: All pleadings, allegations, and agreements which relate to WNCN(FM)'s equal employment opportunity program and practices have been referred to the Mass Media Bureau's EEO

Commission's Rules,[2] Fidelio's deadline for filing an application mutually exclusive with the WNCN renewal application was the close of business on May 1, 1991. Because Fidelio's application was not filed until May 2, 1991, GAF argues that the application was untimely and should be dismissed.

5. In opposition, Fidelio argues that, based on the policy announced in *Fee Collection Program,* 5 FCC Rcd 3558 (1990), it was entitled to a one-day grace period within which to file its application. Thus, according to Fidelio, the deadline for filing its application was May 2, 1991. Because Fidelio tendered its application by the close of business on that date, Fidelio asserts that its application was timely filed and properly accepted for tender.

6. GAF replies that Fidelio's application does not qualify for the grace period referenced in *Fee Collection Program* because: (a) the Fidelio filing was not a time-critical application, and (b) Fidelio failed to timely file a back-up copy of its application with the Commission. According to GAF, a time critical application is a request for an authorization filed in response to a special "window" or "cut-off list" which establishes, with little advance warning, a brief and finite period within which to prepare and submit an application. However, Fidelio's application, according to GAF, was not filed in response to a special window or cut-off list. Rather, it was filed in response to a deadline established by operation of §§ 73.1020(a)(17) and 73.3516(e) of the Commission's Rules. Thus, GAF argues that Fidelio had notice for years in advance that WNCN's current license term would expire on June 1, 1991, and that an application mutually exclusive with the WNCN renewal application would be due no later than May 1, 1991. Consequently, GAF claims that Fidelio's filing is not the type of application for which the grace period was contemplated. GAF further asserts that Fidelio is not entitled to a grace period because it failed to file a back-up copy of its application with the Commission on May 1, 1991, along with proof that the application had been given to a courier service for next day delivery, as required by *Fee Collection Program.*[3]

7. In *Fee Collection Program* the Commission adopted a policy of requiring certain applications and accompanying fees to be submitted to a lockbox financial institution in Pittsburgh, Pennsylvania, rather than to the Commission's headquarters building in Washington, D.C. However, the Commission recognized that such a procedure might disrupt the normal filing habits of Washington-based entities. Specifically, the Commission acknowledged that a filer might lose control over its application when the application was delivered to an express carrier or courier for delivery to the bank, and, even if the application were sent in sufficient time to expect timely delivery, intervening events might result in loss or late delivery of the application to the bank.

8. Accordingly, the Commission created a one-day grace period for the filing of time critical applications. The Commission defined time critical applications as:

> requests for FCC authorizations that must be filed by a specific deadline or be dismissed as untimely. That is, applications filed in response to a "window" or a "cut-off" list established by the Commission.

5 FCC Rcd at 3564.

The Commission also stated that delivery of the application to the lockbox bank on the next business day after the deadline date "shall constitute a timely filing of the application in accordance with the deadline established by the Commission." 5 FCC Rcd at 3565.

9. The Commission further established a back-up filing procedure allowing a filer to deliver an unofficial copy of its application on the official due date to the Commission's headquarters building in Washington, D.C. where it would be retained by the Office of the Secretary. The stated purpose of the back-up filing procedure was to provide the applicant with "evidence" of timely submission in the unlikely event its official filing was lost or delayed by the courier service entrusted to deliver the official filing to the lockbox bank in Pittsburgh.

10. The Commission subsequently clarified certain aspects of the new filing procedures in *Public Notice, Filing of Time Critical Feeable Applications,* 67 RR 2d 1127 (1990). Specifically, the Commission stated:

> For time critical, feeable broadcast . . . applications, heretofore filed in Washington, D.C., the Commission will accept as timely filed those applications stamped in by the lockbox bank (Mellon Bank in Pittsburgh) before 12 o' clock midnight the next business day following the *official* deadline or cut-off date established by the Commission.
>
> . . . .
>
> The Commission has not officially extended any deadline or cut-off dates it has established. It has, however, by applying a "mail box" rule, granted filers who are required to file in Pittsburgh one extra day for transportation.

Branch for Commission disposition. Any grant of GAF's renewal application will be conditioned on the Commission's resolution of the EEO allegations.

[2] Pursuant to § 73.1020(a)(17) of the Commission's Rules (1991 edition), the license term for radio stations authorized to serve communities in the State of New York expired on June 1, 1991. Section 73.3516(e) of the Commission's Rules states, in pertinent part:

> (e) An application for a construction permit for a new broadcast station . . . will not be accepted for filing if it is mutually exclusive with an application for renewal of an existing broadcast station unless it is tendered for filing by the end of the first day of the last full calendar month of the expiring license term.

[3] Fidelio further disputes GAF's allegations in a response to GAF's reply. However, the Commission's rules do not contemplate the filing of responses to replies, and Fidelio's Motion for Leave to File Response will be denied.

. . . .

> A back-up filing procedure has been established for *only* time critical, feeable broadcast . . . applications, previously filed in Washington, to provide "insurance" against loss or late filings.

67 RR 2d at 1127.

11. On reconsideration, the Commission further clarified that the back-up filing procedure is voluntary. *See Fee Collection Program,* 6 FCC Rcd 5919, 5921 (1991).

12. Turning to the instant case, since Fidelio was not required to comply with the back-up filing procedure because the procedure is permissive, Fidelio's decision not to submit an unofficial copy of its application to the Office of the Secretary on May 1, 1991, is a matter without consequence in this case. Therefore, GAF's arguments to the contrary will be rejected.

13. It also is clear that Fidelio's filing was a time critical application. It is irrelevant that the deadline for filing an application mutually exclusive with a renewal application was established by operation of law, rather than by a special filing window or cut-off list. Regardless of how long in advance Fidelio was aware of it, the deadline unquestionably constituted a date certain which, if breached, would have subjected Fidelio's application to dismissal. Because it is concluded that the Fidelio application was a time critical filing, Fidelio was entitled to avail itself of the grace period contemplated in *Fee Collection Program.* Moreover, given the Commission's unambiguous pronouncements that the grace period is an automatic entitlement and that receipt on the next business day after the official deadline "shall constitute" a timely filing, it is further concluded that Fidelio's application was timely filed and received at the Pittsburgh lockbox facility on May 2, 1992.

Petition to Deny Fidelio Application

14. On November 19, 1991, GAF petitioned to deny the Fidelio application. GAF contends that the Fidelio application should be rejected because Fidelio has failed to demonstrate that its proposal, if granted, would provide adequate coverage to the community of license. Additionally, GAF argues that the Fidelio application may not be granted without an environmental assessment.[4]

15. Specifically, GAF maintains that because Fidelio's antenna will be mounted on the Chrysler Building in midtown Manhattan in close proximity to windows and interior offices, individuals working inside the building may be exposed to radiofrequency ("RF") radiation in excess of American National Standards Institute ("ANSI") limits. Accordingly, GAF argues that before Fidelio may effectuate its proposal, protective measures must be taken to limit exposure to excessive RF radiation. However, if Fidelio takes appropriate measures to limit excessive RF radiation exposure, such corrective measures will create severe shadowing problems and impede Fidelio's ability to comply with § 73.315(a) of the Commission's Rules. Section 73.315(a) requires an FM broadcast station to place a minimum field strength of 3.16 mV/m over at least 80% of the residential area of the community of license. *See Naguabo Broadcasting Co.,* 68 RR 2d 1325, 1330 (Rev. Bd. 1991).

16. Fidelio counters that it is highly unlikely that any corrective measures will be necessary to limit RF radiation. However, assuming, *arguendo,* that such measures are required, Fidelio categorically denies GAF's claim that the resulting signal would be so distorted so as to reduce coverage below acceptable levels.

17. We believe that GAF's arguments have merit. Mounting an antenna on the face of a building is relatively unusual. In addition, the interactions between the building and the antenna configuration could have significant adverse effects on the station's radiation pattern and coverage of the community of license. However, it has been Commission policy not to require details of antenna construction or a measured radiation pattern prior to the filing of an application for covering license (e.g., for directional antennas), and we will not do so here. Nevertheless, we will require Fidelio to file an amendment containing a statement from an antenna manufacturer certifying that an omnidirectional antenna can be constructed that will provide omnidirectional service when mounted in the manner and under the circumstances proposed by Fidelio. The statement should, if possible, specify the likely form and size of the antenna. The amendment shall be filed with the Commission within 30 calendar days of the release of this *Order.* In addition, a city-coverage issue shall be specified against Fidelio.

18. GAF also argues in its Petition to Deny that Fidelio should be subject to environmental processing on two independent grounds. Specifically, GAF states that the Chrysler Building upon which Fidelio proposes to sidemount its antenna has been designated an historic landmark in the National Register of Historic Places, and, therefore, Fidelio's proposal may have a significant environmental impact under § 1.1307(a)(4) of the Commission's Rules.[5] In this regard, GAF maintains that Fidelio is not entitled to an exemption from environmental processing under the "antenna farm" provision of § 1.1306(b) (Note 3)[6] because: the only antennas presently mounted on

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[4] The GAF Petition to Deny also incorporates by reference GAF's Request for Return of [Fidelio's] Application as Unacceptable for Filing, discussed above.

[5] Section 1.1307(a)(4) requires the preparation of an Environmental Assessment for:

> Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places.

[6] Section 1.1306 (Note 3) states:

> The construction of an antenna tower or supporting structure in an established "antenna farm": (i.e., an area in which similar antenna towers are clustered, whether or not such area has been officially designated as an antenna farm), will be categorically excluded [from environmental processing] . . . .

the Chrysler Building are relatively small, "whip-type" private radio antennas that are not visible from street level; Fidelio's proposed antenna would constitute the only broadcast antenna mounted on the Chrysler Building; Fidelio does not propose to construct a supporting tower; the antenna would likely be visible to pedestrians; and the antenna would interfere with the architectural integrity of the Chrysler Building. GAF also argues that the Fidelio application should be subject to environmental processing because it will cause exposure of workers or the general public to levels of RF radiation in excess of ANSI levels.

19. Fidelio responds that although it is far from clear whether formal environmental processing is required, Fidelio's application nonetheless provides sufficient information to effectively constitute an Environmental Assessment. Additionally, Fidelio maintains that given the size of its proposed antenna (several feet wide) and the height at which it will be mounted (nearly the length of three football fields above street level), it is difficult to understand what significant adverse impact the antenna might have on the Chrysler Building. Moreover, while Fidelio concedes that there are presently no other broadcast stations using the Chrysler Building, Fidelio argues that the Chrysler Building has played host to multiple TV and radio antennas in the past, none of which had any apparent adverse impact on the historic structure. Fidelio also claims that its sole voting principal is an urban planner by training and profession who is sensitive to architectural design.

20. Fidelio also responds that the chances of exposing the occupants of the Chrysler Building to excessive RF radiation will be minimal because its proposed antenna will be located no closer than four floors from the nearest occupied office. Moreover, the exterior of the Chrysler Building is constructed of materials such that the structure itself will act as an RF shield, thereby preventing excessive amounts of radiation from penetrating. Additionally, Fidelio states that it is committed to making appropriate measurements upon installation of its equipment and taking any corrective steps necessary.

21. We believe that Fidelio's proposal may have a significant environmental effect, for which an Environmental Assessment ("EA") must be prepared, because it contemplates the sidemounting of a broadcast antenna on a building which has been designated as an historic landmark. Thus, the proposal falls squarely within § 1.1307(a)(4) of the Commission's Rules. The proposal is not categorically excluded from environmental processing under 1.1306(b)(Note 3) because the Chrysler Building is not an established "antenna farm" for broadcast antennas. In this regard, the broadcast antenna which Fidelio proposes to sidemount on the building differs from the private radio antennas presently located on the structure. Furthermore, Fidelio does not propose to construct a supporting tower for its antenna.

22. There also is another, independent ground for requiring environmental processing. Given the location of Fidelio's proposed antenna relative to occupied offices within the Chrysler Building, and the unique design of the skyscraper and indeterminate form of Fidelio's antenna configuration, we believe that Fidelio's proposal would expose members of the public to excessive RF radiation unless corrective measures are taken. Those corrective measures shall be specified in an EA.

23. Accordingly, a contingent environmental issue shall be specified below, and Fidelio shall prepare and submit an EA containing the information required in § 1.1311 of the Commission's Rules. The EA shall be directed to the Presiding Administrative Law Judge and filed with the Commission within 30 days of release of this *Order*. In addition, a copy shall be served on the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of § 1.1308. 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 review of the EA, that Fidelio's proposal will not have a significant impact on the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Administrative Law Judge shall thereafter not consider the environmental effects of the proposal. *See* § 1.1308(d).

Fidelio Amendment

24. On January 17, 1992, Fidelio petitioned for leave to amend its application to correct a discrepancy in the antenna height specified in its application. Fidelio states that the antenna height initially specified in its application did not accurately reflect the intended location of its proposed antenna on the Chrysler Building. Fidelio attributes the discrepancy to "miscommunication" of information between the Chrysler Building's engineer and Fidelio's consulting engineer. Fidelio notes that the amendment does not effect a change in the geographic coordinates or coverage specified in its application.

25. GAF opposes Fidelio's amendment. GAF argues that the amendment would, in part, raise the height of Fidelio's antenna by 128 feet, thereby placing it approximately 12 stories higher on the Chrysler Building than originally proposed. Consequently, GAF maintains that the amendment is far from a mere "housekeeping" matter; rather, it represents an impermissible attempt to cure an acceptability defect. GAF also argues that the amendment must be rejected because it was filed some six-months beyond the amendment-as-of-right date and, therefore, is grossly untimely. GAF further states that there is no good cause for acceptance of the amendment.

26. There is good cause to accept Fidelio's amendment. The amendment merely seeks to rectify a discrepancy in the height of Fidelio's antenna caused by miscommunication of information. The amendment specifies the position on the Chrysler Building which is actually available to Fidelio for Fidelio's proposed antenna. The higher elevation of Fidelio's proposed antenna is offset by a reduction in Fidelio's proposed effective radiated power. Although Fidelio's untimely amendment, filed January 17, 1992, will be accepted, no comparative advantage gained by this amendment will be allowed.

Petitions to Deny GAF Application

Class Petition

27. On April 30, 1991, Class filed a petition to deny the GAF renewal application. Class claims that GAF lacks the requisite character qualifications to remain a licensee because of misconduct which resulted in the criminal convic-

tions of GAF's parent company, GAF Corporation, and a principal thereof, James T. Sherwin ("Sherwin"), for violating federal securities and anti-fraud laws. Class further argues that the subsequent reversal of those convictions does not eliminate serious questions about GAF's fitness to continue operating Station WNCN(FM).

28. The Class petition is without merit. In *GAF Corporation,* 7 FCC Rcd 3225 (1992), the Commission definitively ruled that the reversal of the convictions of GAF Corporation and Sherwin eliminated questions about GAF's fitness to be a licensee. The Commission stated that the reversal:

> nullifies any earlier finding of criminal misconduct on their part. Therefore, we are not faced with an ultimate adjudication of relevant non-FCC misconduct by an appropriate trier of fact. Accordingly, consistent with [our policy statements on character qualifications], consideration of the alleged misconduct and its effect on the qualifications of the applicants in this proceeding is not warranted.

7 FCC Rcd at 3230 (footnote omitted).

29. Moreover, the Commission specifically stated that its decision in *GAF Corporation,* rejecting arguments that the criminal proceeding has an adverse effect on GAF's character, is dispositive of the matters raised in the instant Class petition to deny. 7 FCC Rcd at 3232, n.28. Accordingly, the Class petition will be denied.

Guild Petition

30. On May 1, 1991, Guild filed a petition to deny the GAF application on a number of grounds. Guild is a not-for-profit corporation organized and existing under the laws of the State of New York. According to an accompanying affidavit of the organization's President, David Malamud, Guild's members, as well as its directors and officers, are listeners of WNCN(FM) who reside in the New York City metropolitan area, the community served by WNCN(FM). Accordingly, Guild claims standing as a party-in-interest. Guild's allegations will be considered because the organization has adequately demonstrated that it has petitioner status. *See American Legal Foundation v. FCC,* 808 F.2d 84 (D.C. Cir. 1987).

31. Initially, Guild, like Class, argues that a hearing is warranted on GAF's basic character qualifications despite the reversal of the convictions of GAF Corporation and Sherwin. This argument will be rejected for the same reason that the Class petition is being denied. As the Commission stated in *GAF Corporation:*

> [i]n the absence of an ultimate conviction for unlawful criminal conduct, we believe it would be inappropriate for us to attempt to assess and resolve questions of federal law, and testimony and evidence presented in regard thereto, which are outside our principal area of jurisdiction.

7 FCC Rcd at 3231.

32. Guild also contends that "its rights have been violated, and the Commission's processes have been abused" because GAF's use of the name "WNCN Listeners' Club" for the station's promotional organization is confusingly similar to the Guild's own name. In its Consolidated Opposition, GAF asserts that the dispute over any purported similarity is a matter involving private commercial property rights and, as such, is of no consequence to the Commission.

33. The Commission does not adjudicate intangible property rights. *See e.g., Broadcast Call Sign Assignments,* 54 RR 2d 1492 (1983), *recon. denied,* 56 RR 2d 540 (1984) (Commission will not entertain disputes over station call signs because, in part, there are adequate judicial remedies). Additionally, Guild's accusation, that GAF has somehow abused the Commission's processes on the basis of the name that GAF has given to its listener organization, is totally unsupported and frivolous.

34. Guild also claims, based on its examination of Station WNCN(FM)'s issues/programs lists during the last license term, that GAF's purported compliance with the Commission's policies on public affairs programming is a sham. Specifically, Guild maintains that GAF has provided very little public affairs programming on WNCN(FM); it has confined what little public affairs programming it does provide to "graveyard" hours; and it has made only minimal efforts at ascertaining the needs and interests of the community.

35. GAF counters that licensees are afforded broad discretion to determine the nature and extent of their non-entertainment programs. GAF further argues that the Commission's rules require only that broadcasters place in their public files each quarter a list of programs reflecting the station's most significant treatment of community issues during the preceding three-month period. Thus, according to GAF, issues/programs lists are intended to be merely representative of a station's efforts to meet its public service obligations, not an exhaustive record of such efforts. In any event, GAF stresses that Guild has completely failed to meet the heavy burden it bears of showing that GAF has abused its discretion in meeting its public service obligations.

36. In 1981, the Commission determined that it would no longer dictate to licensees how to ascertain what issues warrant attention or the types of non-entertainment programs that licensees must broadcast in order to satisfy their public service programming obligations. *Deregulation of Radio,* 84 FCC 2d 968 (1981), *recon. granted in part,* 50 RR 2d 93 (1981), *aff'd in part and remanded in part sub nom. Office of Communications of United Church of Christ v. FCC,* 707 F.2d 1413 (D.C. Cir. 1983). Consequently, there are no mandatory issues that a station must address in its non-entertainment programming; there is no minimum amount of public service programming that a station must air; and there is no specific time period during which such programming must be broadcast. *Philadelphia Television Station,* 67 RR 2d 1567 (1990). Furthermore, § 73.3526(a)(9) of the Commission's Rules requires that a licensee place in its public file each calendar quarter an issues/programs list containing what is essentially a sampling -- not a comprehensive compilation -- of the station's public service programming during the preceding three-month period.

37. In order to make out a *prima facie* case of licensee abuse of its public service programming obligations, a petitioner must demonstrate that the licensee was unreasonable in its selection of issues or the licensee failed to provide issue-responsive public service programming. *See Silver King Broadcasting of Vineland, Inc.,* 5 FCC Rcd 7499 (1990). In the instant case, Guild has done neither. Although Guild argues that GAF's list of ascertained issues has been relatively static over the license term, Guild does

not allege that GAF acted unreasonably in its selection of those issues. Nor does Guild allege that WNCN(FM) has failed to provide issue responsive programming. Rather, Guild focuses almost exclusively on the quantity and scheduling of WNCN's non-entertainment programming, matters which are within GAF's discretion and, standing alone, do not raise a *prima facie* case for abuse of the licensee's public service programming obligations. *See Deregulation of Radio,* 84 FCC 2d 968 (1981). Accordingly, Guild's petition, to the extent that it seeks denial of the GAF renewal application based on claims of programming deficiencies, will be rejected.

Conclusion

38. 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.

39. ACCORDINGLY, IT IS ORDERED, That, pursuant to § 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. If a final Environmental Impact Statement is issued with respect to Fidelio in which it is concluded that the proposed facilities will 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.

2. To determine whether Fidelio's application complies with § 73.315(a) of the Commission's Rules, and, if not, whether a waiver is warranted.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

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

40. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed March 13, 1992, by Class IS GRANTED, and the amendment IS ACCEPTED to the extent indicated above.

41. IT IS FURTHER ORDERED, That the Request for Return of [Fidelio's] Application as Unacceptable for Filing, filed May 30, 1991, by GAF IS DENIED.

42. IT IS FURTHER ORDERED, That the Petition to Deny [Fidelio's application], filed November 19, 1991, by GAF, IS GRANTED TO THE EXTENT INDICATED ABOVE AND DENIED IN ALL OTHER RESPECTS.

43. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed January 17, 1992, by Fidelio IS GRANTED, and the amendment IS ACCEPTED to the extent indicated above.

44. IT IS FURTHER ORDERED, That the Petition to Deny [GAF's application], filed April 30, 1991, by Class, IS DENIED.

45. IT IS FURTHER ORDERED, That the Petition to Deny [GAF's application], filed May 1, 1991, by Guild IS DENIED TO THE EXTENT INDICATED ABOVE. *See* "Note" at footnote 1, above.

46. IT IS FURTHER ORDERED, That any grant of GAF's application for renewal of license of Station WNCN(FM) SHALL BE CONDITIONED on final Commission disposition of the staff inquiry into WNCN(FM)'s equal employment opportunity program and practices. *See* "Note" at footnote 1, above.

47. IT IS FURTHER ORDERED, That FIDELIO SHALL FILE, in accordance with ¶ 23, above, within 30 days of release of this *Order,* an Environmental Assessment containing the information required in § 1.1311 of the Commission's Rules.

48. IT IS FURTHER ORDERED, That FIDELIO SHALL FILE, in accordance with ¶ 17, above, within 30 days of the release of this *Order,* an amendment containing the referenced technical information about its proposed antenna.

49. 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, 1919 M Street, N.W., Suite 350, Washington, D.C. 20554.

50. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the APPLICANTS and any party respondent herein SHALL FILE with the Commission, pursuant to § 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this *Order,* 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.*

51. IT IS FURTHER ORDERED, That the APPLICANTS herein SHALL GIVE NOTICE of the hearing within the time and in the manner specified in § 311(a)(2) of the Communications Act of 1934, as amended, and § 73.3594 of the Commission's Rules, and SHALL ADVISE the Presiding Judge of the publication of such notice, as required by § 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau