

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

MM Docket No. 87-119

In re Applications of

BREEZE
BROADCASTING
COMPANY, LTD. File No. BPH-840503IC

MARANATHA
BROADCASTING
COMPANY, INC. File No. BPH-850712ME

J. MCCARTHY AND
JUNE J. MILLER File No. BPH-850712NT

GULF BREEZE
BROADCASTING CO. File No. BPH-850712OE

For Construction Permit
for a New FM Station in
Gulf Breeze, Florida

Appearances

Barry D. Wood and Ronald D. Maines on behalf of Breeze Broadcasting Company, Ltd; J. Geoffrey Bentley on behalf of Maranatha Broadcasting Company, Inc.; Donald J. Evans and Pamela Cooper on behalf of J. McCarthy and June J. Miller; A. Wray Fitch, III and James A. Gammon on behalf of Gulf Breeze Broadcasting, Co.; and Norman Goldstein on behalf of the Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE JOSEPH P. GONZALEZ**

Issued: December 20, 1989; Released: January 3, 1990

1. This is a multi-applicant proceeding for authority to construct a new FM radio station in Gulf Breeze, Florida. The present list of applicants is as follows: Breeze Broadcasting Company, Ltd. (Breeze); Maranatha Broadcasting Company, Inc. (Maranatha); J. McCarthy and June J. Miller (the Millers); and Gulf Breeze Broadcasting Co. (Gulf Breeze).¹ The applications were designated for hearing on the following issues:

- a. To determine whether the following applicants have proposed locations of their main studios in accordance with 47 C.F.R. 73.1125: Maranatha and Gulf Breeze Wireless Company (Wireless);²
- b. To determine whether there is a reasonable possibility that tower height and location proposed by the following applications would constitute a hazard

to air navigation: Delta Broadcasting Corporation (Delta)³ and Gulf Breeze FM Group Limited Partnership (GBFM);

- c. To determine which of the proposals would on a comparative basis, best serve the public interest; and
- d. To determine in light of the evidence addressed and pursuant to the foregoing issues which of the applications should be granted, if any.

2. With respect to the main studio issue set forth in one (1) above, Maranatha amended its application to make it clear that it intended to locate its main studio within the city limits of Gulf Breeze, Florida, and the issue is, therefore, resolved in Maranatha's favor. See Petition for Leave to Amend filed as a matter of right on June 1, 1987. The Wireless application was dismissed with prejudice, thereby eliminating the need to resolve that issue with respect to Wireless. See, Order FCC 88M-257, released February 3, 1988. Similarly, the Delta and GBFM applications were dismissed with prejudice, making further inquiry under the designated air hazard issue unnecessary. See Orders FCC 87M-2579 and FCC 87M-1611 released in this proceeding on October 16, 1987 and July 10, 1987, respectively. The sole issue awaiting resolution here is the so-called standard comparative issue.

3. Hearing sessions were held at the Commission from March 8 through March 17, 1988, after which the record was closed.

Preliminary Matter

4. The Millers filed a Petition for Leave to Amend on January 9, 1989, to report the death of Mrs. Miller on December 10, 1988, and that by operation of law, Mr. Miller was now owner of 100 percent of the equity of the applicant. Mr. Miller proposes to assume Mrs. Miller's 50 percent equity portion as well as her quantitative integration credit, and he posits that he is entitled to receive a 100 percent full-time quantitative integration credit for his proposal to work a minimum of 40 hours a week as the station's General Manager.

5. The amendment will be accepted for reporting purposes only. The Miller application will, however, be evaluated not as amended to reflect Mr. Miller's 100 percent ownership interest but as it stood as of the so-called B cut-off date. Whether or not the Millers are entitled to the claimed 100 percent quantitative integration credit will depend on whether or not Mrs. Miller's proposal is found to warrant a full-time integration credit.

BREEZE BROADCASTING COMPANY, LTD.

Findings of Fact

6. Breeze is a Florida limited partnership composed of two general partners, William H. and Patsy T. Phillips and two limited partners, Houston L. and Voncile R. Pearce. Each of the four principals holds 25 percent of the equity in the partnership (Breeze Exhibit #1, p. 1).

*Best Practicable Service**William H. Phillips*

7. William H. Phillips will work full-time at the proposed station, or a minimum of forty (40) hours a week, as General Manager (Breeze Exhibit #2, p. 1; Tr. 130). Mr. Phillips will direct and oversee the day-to-day operations and management of the station, and he will have ultimate authority and responsibility for sales, the sales staff, the station's finances, as well as the technical operations of the station (Breeze Exhibit # 2, p. 1).

8. Mr. Phillips has been a resident of Spanish Fort, Alabama since 1975. Spanish Fort is located approximately 45 miles from Gulf Breeze, Florida (Breeze Exhibit # 2, p. 1). He proposes to move to the town of Gulf Breeze in the event that Breeze is the successful applicant (Breeze Exhibit # 2, p. 1). From 1981 to 1984, Mr. Phillips was a member of the Board of Directors of the Gulf Coast Chapter of the Epilepsy Foundation which includes within its sphere of activity the town of Gulf Breeze, Florida (Breeze Exhibit # 2, p. 4; Tr. 54).

9. Mr. Phillips' began his career in broadcasting in 1962 as a staff announcer at WPRN, Butler, Alabama. He subsequently worked for station WBIS, Centerville, Alabama and in 1966, he returned to WPRN as General Manager (Breeze Exhibit # 2, p. 3; Tr. 63-64). Between 1972 and 1984, he served as General Manager and Sales Manager at station WJOY, Chickasaw, Alabama (Breeze Exhibit # 2, p. 2; Tr. 65, 69-71).

Patsy T. Phillips

10. Mrs. Phillips proposes to devote a minimum of 40 hours a week to her duties as Station Manager and Program Director of the new Gulf Breeze station (Breeze Exhibit # 3, p. 1; Tr. 158-159). According to her testimony, she will have complete authority and discretion over the programming of the station, including news and public affairs, music selection and the station's programming format. Mrs. Phillips will also be responsible for the entire administrative operation of the station, and she will supervise and oversee all full-time and part-time employees except for the sales staff (Breeze Exhibit # 3, p. 1; Tr. 158-160).

11. Mrs. Phillips has lived within the Mobile-Pensacola service area, which includes Gulf Breeze, most of her life. In the event that Breeze's application is granted, Mrs. Phillips has indicated that she will move to Gulf Breeze, Florida (Breeze Exhibit # 3, p. 1).

12. From October 1981 to December 1983, Patsy Phillips worked full-time at station WJOY (FM) Chickasaw, Alabama, as Program Director and Bookkeeper (Breeze Exhibit # 3, p. 2).

Diversification

13. Except for its application for the Gulf Breeze facility, Breeze has no other applications for broadcast stations pending before this Commission or any interest in any medium of mass communications (Breeze Exhibit # 1, p. 2).

14. William Phillips is President and 50 percent owner of Faulkner-Phillips Media, Inc., the licensee of WBCA and WLPR (FM) at Bay Minette, Alabama. Mr. Phillips has committed himself to divest this interest and sever all

connections with these stations in the event that Breeze is the successful applicant (Breeze Exhibit # 2, p. 2; Tr. 77-78).

15. Patsy Phillips has no interest of any kind in Faulkner-Phillips Media, Inc. or in any other medium of mass communications (Tr. 167).

16. Houston L. Pearce, a limited partner, is President, Director and a 50 percent stockholder of Radio South, Inc. (Breeze Exhibit # 1, p. 2). His wife, Voncile R. Pearce, also a limited partner in Breeze, is Vice President and also a Director of Radio South, Inc., the licensee of stations WARF, Jasper, Alabama and of WTSK and WTUG (FM) at Tuscaloosa, Alabama (Breeze Exhibit # 1, p. 2). Mr. Pearce is also Chairman of the Board of Directors in addition to holding 50 percent of the stock of Broadcasters and Publishers Inc. (Breeze Exhibit # 1; p. 2), the licensee of station WJDQ, Marion, Mississippi and WJDQ-FM, Meridian, Mississippi (Breeze Exhibit # 1, p. 2). He is also Chairman of the Board of Directors and a 40 percent stockholder of WGUD/Stereo, Inc. the licensee of WGUD at Moss Point, Mississippi and WGUD-FM at Pascagoula, Mississippi (Breeze Exhibit # 1, pp. 2-3). All of these stations are within 325 miles of Gulf Breeze but no closer than 200 miles (Tr. 107-109).

Conclusions of Law

17. The original Breeze partnership agreement was formed for the purpose of prosecuting an application for a new FM station in Mary Estes, Florida. The agreement pertinent to this proceeding is a revision of that original agreement.

18. Article III, Section I of the partnership agreement as filed with the State of Florida on May 10, 1984, mandates that "[t]he General Partners shall manage the partnership's business," and Section 3 of that Article provides that "[t]he Limited Partners shall not participate in the management or control of the partnership business, nor shall they transact any business for the partnership, or have the power to act for or bind the partnership, such powers being vested solely and exclusively in the General Partners." The Section goes on to state as follows: "the limited partner(s) shall not, affirmatively or negatively, act to exert "control" in any manner whatsoever, as the term "control" is defined or interpreted in the Communications Act of 1934, as amended. 47 U.S.C. Section 151 *et seq.*, the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. § 0.1 *et seq.*; and decisions of the Federal Communications Commission and courts of competent jurisdiction interpreting the provisions of the Communications Act of 1934 and the Rules and Regulations of the Federal Communications Commission" (Miller Exhibit # 6, 4).⁴

19. Article III, Section 2 of Breeze's limited partnership agreement confers upon the limited partners the right to consent to the salary paid the general partners if greater than that received at their last place of full-time employment, and the right under certain circumstances to convert the partnership to a corporation, see Article VI, Section 4, of the agreement, and to consent to the assignment of any partnership interest as well as the sale of all partnership assets. See Article VI and Article VII, (Miller Exhibit 6).

20. Breeze submits that it has always been its intention that the general partners would be in control of the enterprise and that the limited partners would be in-

sulated from both the management and control of the applicant. The partnership's agreement, as amended, supports this contention. Indeed, it states unequivocally that the limited partners shall not exert any control as that term is defined or interpreted by the Commission and courts of competent jurisdiction. Although opposing parties reference various sections of that agreement which, they contend, prove otherwise, the Presiding Judge is convinced that the agreement, even as it stood on the so-called B cut-off date provided the Commission with the necessary assurance that Breeze's limited partners would not be involved in the management and control of the entity and were, in fact, purely passive investors. This conclusion is supported by the testimony of Breeze's partners at the hearing, which clearly indicates that it has always been their intention that the limited partners not be involved in the prosecution of the application or in the management of the station.

21. The Pearces testified that they wanted nothing to do with managing the station and that they do not have the time to be involved in the operation of the station (Tr. 181, 190, 204). They currently live 300 miles from Gulf Breeze (Tr. 114) and they are involved in other businesses and broadcast ventures. In addition, Mrs. Pearce is a teacher at Walker Junior College in Northern Alabama (Tr. 181). The limited partners stated lack of interest in being actively involved in the prosecution of the Breeze application is further supported by the fact that the record lacks any evidence that they have had any input on the normal everyday decisions relating to the prosecution of the application. Furthermore, there is nothing in the record to indicate that they will be involved in the actual business of the partnership, including the day-to-day operations of the Gulf Breeze station. The recent amendments to the partnership agreement underscore this intent and effectively bar them from doing so.

22. In this regard, the Presiding Judge does not consider the Pearces' participation in settlement negotiations to contradict in any way this conclusion. The settlement negotiations which contemplated a merger would clearly have impacted on the interests of the limited partners (Tr. 118, 143-144). The limited partners, the Pearces, were contacted regarding this matter only after Mr. Phillips believed that he had a settlement in hand (Tr. 118). Apart from this one instance, the evidence of record indicates that the Pearces and the Phillips have had very limited contact since the filing of this application. According to Mr. and Mrs. Phillips, they have spoken to the Pearces less than 10 times since 1985, and Mr. Phillips saw Mr. Pearce in person for only the second time since 1985 on the occasion of their visit to Washington, D.C. for the Gulf Breeze hearing (Tr. 114-115). The mere fact that the Phillips and the Pearces have been in business together in the past does not, in the Presiding Judge's opinion, draw into question their stated intention that the Pearces will be merely passive investors in this enterprise.

23. The rights provided the limited partners, namely to consent to any increase in salary for the general partners, to the addition of any person to the partnership, to the assignment of any partnership interest, and to the sale of all of the partnerships' assets as well as the limited partners' right, under certain circumstances to require the conversion of the partnership into a corporation (Miller Exhibit 6), do not demonstrate that the limited partners will be materially involved in the operation or management of the partnership's business. The provisions set

forth above are designed to ensure that the original equity interests remain the same except by mutual agreement of all of the partners.

24. Mr. Phillips testified that only he and Mrs. Phillips have the right to make capital calls (Tr. 93). A Memorandum of Agreement signed by the parties on March 1, 1984, indicates that financial contributions will be made in equal increments by each of the partners upon the call of the general partners (Breeze Exhibit 9). All parties to the agreement must agree on the amount of such additional contributions, Article II, Section 4 (Miller Exhibit 6). It appears reasonable to give the limited partners veto power with respect to the amount of such a call as well as to the addition of partners or assignment of any interest in the partnership, when they have entrusted their investment and tendered management rights to the general partners. The limited partners' right to convert the partnership to a corporation, if the business of the partnership is unprofitable on a cash flow basis for any three consecutive calendar quarters after the first two years after the initiation of broadcasting by any station(s) does not lead to the conclusion that the limited partners will be in a position to convert their limited partnership interests to that of voting shareholders in the new corporation. The agreement itself does not provide for the issuance of voting stock to the limited partners, if such an event should occur. It must be assumed, therefore, that the limited partners would under such a circumstance become non-voting shareholders, since such a status is consistent with the intentions of all of the parties when they created the initial business entity.

25. The Presiding Judge concludes, therefore, that the Breeze partnership agreement places both management and control of the enterprise in the hands of the general partners and specifically excludes the limited partners from any role in the management and control of the station. Accordingly, the Presiding Judge finds that the Pearces, Breeze's limited partners, are properly insulated for purposes of awarding integration credit, and Breeze is entitled to a 100 percent quantitative integration credit for its proposal to integrate on a full-time basis its general partners into management positions at the station. The 100 percent quantitative integration credit is qualitatively enhanced by the decision of the Phillips to move to Gulf Breeze, Florida in the event that Breeze is the successful applicant, by Mr. Phillips very limited participation in the civic affairs of the Gulf Breeze area, Mrs. Phillips' gender, and the Phillips' past broadcast experience.

Diversification

26. The Phillips have made a timely commitment to divest themselves of any and all media interests. The interests held by Breeze's limited partners are not chargeable to Breeze in view of the finding reached above that the Pearces are insulated from any management and/or control over the enterprise.

MARANATHA BROADCASTING, INC.

Findings of Fact

27. Maranatha is a Pennsylvania corporation with the following officers and directors: Richard C. Dean, President, David G. Hinson, Secretary-Treasurer and Barry N. Fisher and Joanna M. Dean, who along with the Messrs. Dean and Hinson are Directors of the corporation (Mara-

natha Exhibit # 1, p. 1). Maranatha is authorized to issue 750 shares of common voting stock, of which 60 are issued and outstanding. Mr. Dean holds 57 percent of the stock and Mr. Hinson and Mr. Fisher, 5 percent each (Maranatha Exhibit # 1, p. 1). The remainder of Maranatha's stock is officially in Richard C. Dean's name but it is intended that the stock be given to his four children (Tr. 300).

Best Practicable Service

28. Maranatha does not propose any integration of ownership into management.

Diversification

29. Maranatha is the licensee of stations WFMZ (FM) and WFMZ-TV in Allentown, Pennsylvania (Maranatha Exhibit # 3, p. 1). It is also the permittee for a new FM station at Grand Junction, Colorado and the permittee of WELQ (FM), Hertford, North Carolina (Maranatha Exhibit # 3, p. 1, Tr. 310-311). An affiliated company MBC Communications Southwest, Inc. is the licensee of KKJY-FM, Albuquerque, New Mexico (Maranatha Exhibit # 3, p. 1).

30. Richard Dean is an Officer and Director of United Educational Broadcasting, Inc., the permittee of non-commercial educational station WBMR-FM, Telford, Pennsylvania (Maranatha Exhibit # 3, p. 2). He is also President and sole shareholder of Lehigh Valley Mobile Telephone Company, the tentative selectee for the construction permit for a new multi-channel multipoint distribution service station at Atlantic City, New Jersey.

31. Neither Maranatha nor its shareholders have proposed to divest themselves of any interests in the aforementioned media of mass communications in the event that Maranatha's application for the Gulf Breeze facility is granted.

Conclusions of Law

Best Practicable Service

32. Maranatha has made no commitment to any integration of ownership into management for the proposed Gulf Breeze, Florida station. Accordingly, it is entitled to no integration credit.

Diversification

33. Maranatha owns five media interests in the United States, namely WFMZ (FM) in Allentown, Pennsylvania, KKJY (FM) in Albuquerque, New Mexico and one television station WFMZ-TV, Allentown, Pennsylvania. In addition, it holds construction permits for an unbuilt FM station in Hertford, North Carolina and Grand Junction, Colorado. These media interests are located at distances from Gulf Breeze, Florida of 910 to 1600 miles.

34. Neither Maranatha nor its shareholders have proposed to divest themselves of any interests in the aforementioned media of mass communications. These interests warrant the imposition of a diversification demerit against the Maranatha application. As noted above, however, the various media interests are located at a substantial distance from Gulf Breeze. Accordingly, they do not merit more than a moderate diversification demerit.

J. MCCARTHY AND JUNE J. MILLER

Findings of Fact

35. When the application was filed, the applicant was a general partnership with each individual Miller holding a 50 percent general partnership interest in the entity (Tr. 331-332). It was an oral partnership without any notes, papers or agreements memorializing the general partnership (Tr. 335, 380). On October 22, 1985, the Millers filed an amendment to their application advising the Commission that the applicant had been transformed into a tenancy by the entirety (Tr. 333). According to the Millers, the change in the nature of the applicant was made for estate planning purposes and that both of them owned 100 percent of the entity (Tr. 334, 341) and that it has always been their intention to share equally in the profits and losses of the station and to have equal rights in the management and conduct of the station's operations (Miller Exhibit # 1, p. 1). Exhibit # 1 of the Millers' direct case indicates that they, the Millers, each own a 50 percent interest as tenants by the entirety.

Best Practicable Service

J. McCarthy Miller

36. Mr. Miller proposes to serve full-time, not less than 40 hours a week, as the station's General Manager, Sales Director, and Editor (Miller Exhibit # 2, p. 4). He will oversee all aspects of the station's operations, including sales, programming, personnel, engineering, and administration (Miller Exhibit # 2, p. 4). All hiring and firing responsibilities will rest with Mr. Miller and all department heads will report directly to him (Miller Exhibit # 2, p. 4). As General Manager, Mr. Miller will also monitor the station's compliance with all FCC regulations and requirements (Miller Exhibit # 2, p. 4).

37. J. McCarthy Miller has been a resident of the Gulf Breeze service area for 18 years and plans to continue to reside there (Miller Exhibit # 2, 6). Mr. Miller has been a member of the Rotary Club of Pensacola since 1962 (Miller Exhibit # 2, p. 5). He also presently serves as a Board Member of the State Board Arthritis Foundation. Mr. Miller has been past President and Board Member of the following organizations: Pensacola Symphony Orchestra Society; Pensacola Little Theater; and the Pensacola Art Association. Mr. Miller is also a member of St. Johns Episcopal Church in Pensacola, Florida (Miller Exhibit # 2, p. 6). Since 1960, Mr. Miller and/or his companies have been members of the Junior Chamber of Commerce and the Chamber of Commerce of Pensacola, Florida. Mr. Miller is also a former Director of the National Marine Corps Reserve Officer Association; the Navy League of the United States; the Gulf Coast Council Boy Scouts; Junior Achievers; the Pensacola Junior College Foundation; the Fiesta of Five Flags; and the Florida Judicial Council (Miller Exhibit # 2, pp. 5-6). He has also participated in the YMCA, United Fund, Pensacola Catholic High School Foundation and the Baptist Hospital Building Fund drives. All of these organizations, as well as Mr. Miller's aforementioned directorships, are within the 1 mV/m contour of the Miller's proposed station (Miller Exhibit # 2, p. 6).

38. J. McCarthy Miller has been involved in broadcasting since 1947 when he became the Commercial Manager for station WBJ at Brewton, Alabama (Miller Exhibit # 2, p. 1). From 1951 to 1955, he was a Commercial

Manager of radio station WSPB at Sarasota, Florida (Miller Exhibit # 2, p. 1), and from 1955 to 1959 he was Sales Manager and News Director at station WDCL in Tarpon Springs, Florida. Mr. Miller then served as President and General Manager of station WCOA licensed to Pensacola, Florida while serving as Vice President of WKIS (AM and FM), Orlando, Florida (Miller # 2, p. 3), and as Vice President of radio station WIBB at Macon, Georgia (Miller Exhibit # 2, p. 3). Mr. Miller also served as President of WBIA at Augusta, Georgia and WTRL at Bradenton, Florida during the late 1970's (Miller Exhibit # 2, p. 3; Tr. 408-409).

June J. Miller

39. Mrs. Miller proposed to serve full-time, a minimum of 40 hours a week, as the station's Business Manager and Music Director (Miller Exhibit # 3, 1).⁵ In these capacities, Mrs. Miller would have overseen, directly, the administration of the overall business of the station, including the clerical and bookkeeping staffs, accounts receivable and payable, commercial continuity, station promotions, and public relations. Mrs. Miller also proposed to handle women's and social news (Miller Exhibit # 3, p. 1; Tr. 466-468), and she would have reported directly to Mr. Miller, working closely with him in the development of the station's programming (Miller Exhibit # 3, 2).

40. Mrs. Miller was a long term resident within the Gulf Breeze station's grade B contour. As part of her direct testimony, she indicated that she intended to continue to reside within that area in the future (Miller Exhibit # 3, p. 2). As of the date of her testimony, Mrs. Miller served on the Baptist Hospital Foundation Board and was a member of "Les Harlequins," a woman's organization in Pensacola, Florida (Miller Exhibit # 3, p. 2). She was also a former member of the Society of Debutante Cotillion, a local charitable organization, and she was also a former member of the St. Christopher Episcopal Church choir (Miller Exhibit # 3, p. 2). Mrs. Miller also served on several committees for the annual Christmas Caravan Tour of Homes, a local charitable fund drive which conducts tours of homes in the Pensacola and Gulf Coast areas (Miller Exhibit # 3, p. 2, Tr. 471). All of these activities occurred within the 1 mV/m contour of the Millers' proposed station.

41. Mrs. Miller does not have any broadcast experience which would entitle any quantitative integration credit awarded Mrs. Miller to qualitative enhancement for past broadcast experience.

Diversification

42. The Millers jointly own, as tenants by the entireties, 51 percent of M&M Communications, Inc. (M&M) (Miller Exhibit # 4, p. 1; Tr. 351). M&M holds Low-Power Television (LPTV) construction permits for Little Rock, Arkansas, and Nashville, Tennessee. It is also the permittee for LPTV stations in San Antonio, Texas, Fresno, California, Jacksonville, Florida, Savannah, Georgia, and Louisville, Kentucky. By an amendment filed June 3, 1987, the Millers indicated that they will divest themselves of their interests in all the LPTV permits, and on July 29, 1987 their MDS licenses (Joint Stipulation # 1).

43. The Millers are also joint owners of 100% of MDS of Monroe, Inc., the licensee of single-channel MDS station in Monroe, Louisiana and of 50 percent of Hartford

MDS Company, the licensee of the Hartford, Connecticut MDS system (Miller Exhibit # 4, p. 1). In addition, the Millers jointly own 51 percent of Multi-Communications Services, Inc. which is the licensee of a single-channel MDS station in Erie, Pennsylvania, and a minority venturer in the Channel 2 MDS licensee in Miami, Florida and Atlanta, Georgia (Miller Exhibit # 4, p. 1). Individually and through Multi-Communications Services, Inc., the Millers own less than a 10 percent interest in Contemporary Communications Corp. which is the licensee and permittee of a number of MDS stations (Miller Exhibit # 4, p. 1; Tr. 440). Mr. and Mrs. Miller are also 100 percent owners of *TV Facts*, a weekly publication published in Pensacola, Florida that lists television programs (Tr. 368).

44. As stated above, the Millers own their LPTV interests through M&M. All of these interests were acquired after the so-called "B" cut-off date. The Millers reported the grants of San Antonio, Texas, Fresno, California, Jacksonville, Florida, Savannah, Georgia and Louisville, Kentucky LPTV applications on June 3, 1987 (see *Order*, FCC 87M-2582). Their application was further amended pursuant to a Petition for Leave to amend filed on February 9, 1988 to further reflect the grant of a construction permit for an LPTV station in Albany, Georgia on September 28, 1987 and one for Winston-Salem, North Carolina on September 22, 1987 (see *Order*, FCC 88M-560). The Millers subsequently amended their application on May 11, 1988 to reflect that M&M no longer owned the LPTV station in Nashville, Tennessee, and that it had allowed the LPTV construction permit for Louisville, Kentucky to lapse (see *Order*, FCC 88M-1983).

Conclusions of Law

45. The Millers applied for the Gulf Breeze, Florida license initially as an oral general partnership to which they both had equal shares. There is no written documentation setting forth the rights and obligations of either Mr. Miller or Mrs. Miller. Although they subsequently changed the nature of the entity to two individuals with the right of survivorship, for our purpose here, the entity will remain an oral general partnership with each partner holding a 50 percent interest in the enterprise. The conversion to a tenancy by the entireties, assuming that it is legally binding, was reportedly done for estate planning purposes and has no effect on the comparative standing or evaluation of the Miller applicant. To permit Mr. Miller to claim a 100 percent ownership on the basis of this right of survivorship would constitute an impermissible comparative upgrade.

46. Mr. Miller was 73 years old at the time of the hearing, (Tr. 343). He indicated that he sold station WCOA, Pensacola, Florida to explore the notion of being semi-retired (Tr. 402) and that he was in semi-retirement for approximately 13 years (Tr. 402). Although he presently manages, administers and supervises the construction of his cellular telephone systems in Green Bay, Wisconsin and Binghamton, New Jersey, as well as low power television and MDS interests along with other business interests, together they do not constitute a full-time activity. After many years of semi-retirement, Mr. Miller proposes to be integrated full-time, working more than 40 hours a week, as the proposed station's General Manager.

47. The Presiding Judge concludes that it is simply not credible to believe that a man of Mr. Miller's age, after so many years of semi-retirement, would assume the responsibilities of working at the station on a full-time basis. It is

far more likely that Mr. Miller will devote only a limited amount of time to sales and that he will entrust actual management of the station to a paid employee. The Presiding Judge concludes, therefore, that Mr. Miller is entitled to a part-time integration credit for his proposal to work as Sales Director, which is qualitatively enhanced by his long term residence within the service area with some civic involvement and by his prior broadcast experience.

48. Mrs. Miller testified that as joint owner of the proposed station she will participate with her husband in its management. She indicated, however, that she would defer to her husband in matters of policy and that Mr. Miller would make the decisions affecting the station (Tr. 457). In the past, Mrs. Miller has not been involved to a significant degree in the Millers' enterprises. She did not, for example, take any active role in the Miller low power-TV projects (Tr. 487-488) or the cellular radio and multipoint distribution service companies (Tr. 488). With respect to radio station WCOA which she owned jointly with her husband, her only task was to monitor certain stations and inform her husband when the stations strayed from their proscribed format (Tr. 457-58). She had, however, the responsibility of keeping the books for the various Miller enterprises, and preparing the income tax records on an "on-going basis" which she testified required two full days a week (Tr. 458-459).

49. According to her testimony, her duties as business manager and music director will include the hiring of bookkeeping and clerical help (Tr. 466), overseeing the bookkeeping (Tr. 484), as well as assisting or helping to oversee a secretary-receptionist (Tr. 467) and a production person who would produce sports or have something to do with music (Tr. 467). She would also choose the station's format (Tr. 468), but there would be a program director (Tr. 492) who, along with some of the announcers, would select the music (Tr. 491). Although Mr. Miller testified that it would be his intention to consult with Mrs. Miller in areas that applied to her, and that she would be in charge when he was away (Tr. 405), Mrs. Miller indicated that Mr. Miller would make all the decisions on matters of policy at the station (Tr. 457) and that she would report to the program director (Tr. 492) but at the same time, apparently, supervise the activities of the program director (Tr. 491).

50. Mrs. Miller's description of her duties at the station was so vague as to draw into question whether or not she had a definite idea of what they would involve. She appeared to assign to herself a hands-off role which contradicts her claim for integration credit. The Presiding Judge found the proposal to be not only nebulous, but also very unlikely to be effectuated. Therefore, Mrs. Miller's integration pledge is found not to be credible, and the Millers are not entitled to any integration credit for Mrs. Miller.

Diversification

51. By an amendment filed June 3, 1987, the Millers reported the grant of five LPTV stations: Channel 67, San Antonio, Texas, granted June 9, 1986; Channel 2, Fresno, California, granted July 13, 1987; Channel 38, Jacksonville, Florida, granted March 31, 1986; Channel 34, Savannah, Georgia, granted February 27, 1987; and Channel 60, Louisville, Kentucky, granted August 7, 1986. The divestiture commitment was 11 months late for the San Antonio, Texas facility; 13 months late for the Jacksonville, Florida station; 3 months late for the Savannah,

Georgia LPTV facility; and 9 months late for the Louisville, Kentucky facility. The Millers' divestiture commitment for all of their MDS interests was made for the first time on July 29, 1987, more than 4 years after the grant of the Monroe MDS' application, more than 5 years after the grant of the Hartford MDS Company's application, and more than 4 years after the grant of the Multi-Communications Services applications. The Millers failed to make a timely commitment to divest their magazine *TV Facts*.

52. In order not to be charged with a diversification demerit, a commitment to divest must be made by the "B" cut-off date. As noted above, the Millers did not make a timely commitment to divest themselves of any one of these interests, and they are, therefore, chargeable to their application. The representations set forth in their direct exhibits that they will divest themselves of their LPTV and MDS interests is insufficient to eliminate these interests from an evaluation of their comparative standing.

53. From the evidence of record, it does not appear that *TV Facts* is a significant media interest since it has little editorial content. The Millers' ownership of this publication is, therefore, of minor significance. Similarly, the broadcast facilities in which the Millers hold an interest are located at a considerable distance from Gulf Breeze, Florida and are also of only very minor comparative significance.

GULF BREEZE BROADCASTING COMPANY

Findings of Fact

54. Gulf Breeze is a general partnership comprised of Galen D. Castlebury, a 40 percent partner; Helen L. Castlebury, also a 40 percent general partner; and Nadine L. Meade, a 20 percent general partner (Gulf Breeze Exhibit # 1, p. 1).

Galen D. Castlebury

55. Mr. Castlebury will serve as the station's General Manager working full-time or 40 hours a week (Gulf Breeze Exhibit # 2, p. 1). As General Manager, he will be responsible for the overall operation of the station. All management personnel will report directly to him, and he, along with Nadine Meade and Helen Castlebury, will establish station policy (Gulf Breeze Exhibit # 2, p. 1).

56. Mr. Castlebury resided in Gulf Breeze, Florida from May 1985 until May 1988 when he moved to New Jersey. He has indicated that he intends to return to Gulf Breeze within 18 months or earlier if Gulf Breeze is awarded the construction permit. See Amendment filed on June 6, 1988, received by *Order* (FCC 88M-2025) released June 29, 1988 (Gulf Breeze Exhibit # 2, p. 2). Since 1985, Mr. Castlebury has been a member of the following organizations: the Gulf Breeze United Methodist Church; the Gulf Breeze Masonic Lodge 347; the Pensacola Scottish Rite; the Pensacola Veterans of Foreign Wars Post 706; the American Legion Post 240, Pensacola, Florida; the Pensacola Elks 0497; and the Radio Amateur Emergency Radio Club, Escambia and Santa Rosa, Florida. From 1987 to the present, he has also been a member of Gulf Breeze-Tiger Point Kiwanis Club, as well as, serving as its President since 1987 (Gulf Breeze Exhibit # 2, p. 3). By an Amendment received by *Order* released on October 17,

1988, Gulf Breeze reports that Mr. Castlebury is no longer President of the Gulf Breeze-Tiger Point Kiwanis Club (see *Order* FCC 88M-3427).

57. Mr. Castlebury has been involved in radio broadcasting for more than 30 years. He began as a full-time announcer and engineer for station WKBI, St. Mary, Pennsylvania, and between 1956 and 1984, he served as a General Manager as well as Chief Engineer at WMPT, and WMPT (FM), South Williamsport, Pennsylvania, and as General Manager for WKAD-FM, Canton, Pennsylvania between 1979 and 1983 (Gulf Breeze Exhibit # 2, p. 2).

Helen L. Castlebury

58. Mrs. Castlebury will be employed as the station's full-time Station Manager, working at least 40 hours a week supervising and managing station operations. She will also have primary responsibility for programming and production. Mrs. Castlebury will meet regularly with Nadine Meade and Galen Castlebury to discuss and establish station policy (Gulf Breeze Exhibit # 4, 1).

59. Mrs. Castlebury has been a resident of Gulf Breeze, Florida from May 1985 until May 1988, when she moved to New Jersey with her husband. She has also indicated her intention to return to Gulf Breeze in 18 months or earlier if Gulf Breeze is awarded the construction permit (see Petition for Leave to Amend filed June 14, 1988, received by *Order* released on June 29, 1988, FCC 88M-2025). Mrs. Castlebury has been a member of the Gulf Breeze United Methodist Church since 1985, and from 1987 to the present of the Gulf Breeze Kiwanis Club. During the year 1987, she briefly performed volunteer work for the Salvation Army (Gulf Breeze Exhibit # 4, p. 1).

60. Mrs. Castlebury has no prior broadcast experience which would qualify her integration proposal for qualitative enhancement.

Nadine Meade

61. Mrs. Meade will be employed full-time, a minimum of 40 hours a week, as the station's Director of Sales. She will be responsible for managing the station's local and national sales and she will directly supervise a staff of sales people. Mrs. Meade will meet regularly with Helen and Galen Castlebury to discuss and establish station policy (Gulf Breeze Exhibit # 3, p. 2).

62. Mrs. Meade has been a resident of Gulf Breeze, Florida since 1977 (Gulf Breeze Exhibit # 3, p. 2). She has been a member of St. Sylvester Catholic Church of Gulf Breeze, Florida since 1981 and the Santa Rosa Shores Homeowners Association since 1983. Mrs. Meade has also been a member of the Homeowners Association Smugglers Cove, Gulf Breeze since 1985. Between 1978 and 1981, Mrs. Meade was a member of the Seville Square Merchants Association, Pensacola, Florida, and as a Gulf Breeze Century 21 employee, Mrs. Meade participated in an annual Lend-A-Hand Program (Gulf Breeze, Exhibit # 3, p. 2).

63. Mrs. Meade has no prior broadcast experience.

Diversification

64. Neither Gulf Breeze Broadcasting Company nor its principals, Mr. Castlebury, Mrs. Castlebury and Mrs. Meade, have any attributable interest in any medium of mass communications (GBBL Exhibit # 2, p. 2; Exhibit # 3, p. 2; and Exhibit # 4, p. 2).

Conclusions of Law

65. As noted above, Gulf Breeze is a general partnership with the Castleburys owning 40 percent each of the entity and Mrs. Meade the remaining 20 percent. The partnership agreement sets forth the parties' intention to form a corporation at a later date, sometime before the construction of the station (Gulf Breeze Exhibit # 1). The agreement further indicates that the corporation will be formed "with the above points in mind" (Gulf Breeze Exhibit # 1). An amendment signed by all of the partners and effective as of June 27, 1985, makes it clear that in the event that the partnership is converted to a corporation, "the ownership interests and voting rights will remain as stated in the partnership's agreement" (Gulf Breeze Exhibit # 1, 627, 741-742). The partnership agreement, as amended, provides the necessary assurance that the ownership interests of all partners will remain the same in the event that the entity is converted to a corporation. Any award of quantitative integration credit to Gulf Breeze will be based on the percentages of ownership set forth above.

66. Mr. Castlebury is an experienced broadcaster. With respect to the proposed station in Gulf Breeze, Mr. Castlebury will serve both as General Manager and Chief Engineer. Initially, he will devote 100 percent of his time to his duties as Chief Engineer and then gradually reduce that amount to 10 percent with 90 percent of his time committed to his role as General Manager (Tr. 645).

67. Mr. Castlebury moved to Gulf Breeze in May, 1985. He was not regularly employed until July 1987. By an amendment filed on June 13, 1988, Mr. Castlebury informed the Commission that he had moved back to Pennsylvania. Although he promises to return to Gulf Breeze in the event that his application is successful, for comparative purposes he can no longer be considered a local resident. The record demonstrates some involvement in the past in the civic affairs of the Gulf Breeze area. However, Mr. Castlebury's activities with these groups occurred for the most part after the B-cut-off date. Specifically, he did not become a member of the Gulf Breeze United Methodist Church's Central Committee until after September 13, 1985, the deadline for comparative improvement in this proceeding (Gulf Breeze Exhibit # 2, p. 3; Tr. 514). Furthermore, he was not a member or president of the Gulf Breeze-Tiger Point Kiwanis until the Fall of 1987 (Tr. 515) and he held no leadership position with the Gulf Breeze Masonic Lodge (Tr. 519-520) or the Scottish Rite (Tr. 520). Mr. Castlebury was unsure whether his membership in the Pensacola Elks Club was transferred before September 1985 (Tr. 520-521). However, he did join the Radio Amateurs Emergency Radio Club, Escambia and Santa Rosa, Florida sometime in the Spring of 1985 (Tr. 521). Accordingly, Mr. Castlebury's civic activities in the Gulf Breeze area, for comparative purposes, are considered to be of only very slight significance.

68. The Gulf Breeze partnership agreement originally set forth Mrs. Castlebury's position as Office Manager. The amendment to the agreement which became effective

on June 27, 1985, but was executed on or about June 28, 1987, (Tr. 582) changed her job description to Station Manager. Mrs. Castlebury described her duties as mostly paperwork and other office functions (Tr. 715) further indicating that she will be in charge of personnel and will fire employees if they are not doing their job (Tr. 728). Although she intends to differ to her husband on matters of policy, she testified that along with Mr. Castlebury and Mrs. Meade, she will help in establishing station policy (Gulf Breeze Exhibit # 2, p. 1).

69. The Presiding Judge did not find Mrs. Castlebury's claim of a management role at the station to be credible. She described her duties in very vague terms. Although she indicated that she will hire, fire and supervise employees, her testimony lacked conviction, and it is clear, from a reading of her entire testimony, that she will perform mostly office functions and differ on a regular basis to her husband on all matters of substance. Her role at the proposed station, as she described it, bears a strong resemblance to the position that she held at station WMPT, South Williamsport, Pennsylvania, where she, for the most part, answered the phone and performed other desk duties. The change in her job description from Office Manager to Station Manager was a clear attempt to reinforce a claim for a management role for Mrs. Castlebury at the Gulf Breeze facility by exaggerating her past broadcast experience. Mr. Castlebury's testimony that he introduced her at station WMPT as the Station Manager when, by Mrs. Castlebury's own admission, she did little else than answer the phone, is an obvious attempt to inflate Mrs. Castlebury's position at that station in order to make her proposal of a management role at the Gulf Breeze facility more credible. The conclusion is inescapable that there has been a concerted effort on the part of the applicant to claim a more significant role for Mrs. Castlebury than she will actually fill. Accordingly, Gulf Breeze will not receive an integration credit for Mrs. Castlebury since the record fails to disclose that she will be integrated into a management position at the station.

70. Mrs. Meade proposes to serve as the station's sales manager. At present, she is a real estate broker in the Gulf Breeze area. She indicated that she will stop selling real estate but will not give up her brokerage license in the event that Gulf Breeze is the successful applicant. Her license will be placed in inactive status (Tr. 676), but she will remain officially with her real estate company and continue to meet the educational requirements of her brokerage license (Tr. 676). Mrs. Meade did not rule out the possibility of returning to her real estate practice if she is not paid a salary for her work at the station (Tr. 658). However, she has already informed her employers that she plans to work full-time at the station (Tr. 681) and she has no intention to sell real estate on the side (Tr. 679-680). The Presiding Judge concludes that there is absolutely no basis on the record to dispute Mrs. Meade's claim that she will work full-time at the Gulf Breeze station. Her refusal to rule out returning to her real estate practice in the event that she is not paid a salary does not negate her integration commitment since sales could be made part-time while still working 40 hours a week at the station. On the basis of the evidence of record, the Presiding Judge finds that Mrs. Meade's commitment to work at the station on a full-time basis is credible, and that her duties, as described on the record, warrant a credit for integration of ownership into management. Her quantitative integration credit of 20 percent is qualitatively en-

hanced by her residence within the service area of the proposed station and by her gender. Mrs. Meade's involvement in civic affairs has been extremely limited and she has no prior broadcast experience. Her integration credit is not, therefore, entitled to any further enhancement except for the credits noted above.

71. The inconsistencies between Mr. Castlebury's testimony and that of his wife as to her role at station WMPT, South Williamsport, Pennsylvania and her title, if any, and their reason for moving to Florida; Mr. Castlebury testified that it was to acquire another broadcast facility whereas Mrs. Castlebury's indicated that they intended to retire (Tr. 619, 739); and Mr. Castlebury's testimony as to the date an amendment was prepared (Tr. 570) are troublesome since they draw into question the Castleburys' forthrightness. However, they are not sufficiently egregious to warrant either further inquiry as the Castleburys' candor and truthfulness or to merit Gulf Breeze's disqualification.

Diversification

72. Gulf Breeze and its principals have no cognizable interest in any medium of mass communications.

COMPARATIVE COVERAGE

73. The four applicants have stipulated that there is no area within the 60 dBu contour proposed by any one of the applicants which does not receive at least five (5) full-time aural commercial services, not including the services proposed herein (Joint Exhibit # 1, p. 5). Accordingly, none of the applicants is entitled to any preference for service to underserved areas and populations. Breeze will serve 23,602 (14.02%) more people than Miller, 9,914 (5.45%) more than Maranatha and 10,314 (5.68%) more than Gulf Breeze. Accordingly, Breeze is entitled to a very slight preference over the other applicants under this issue (see Susan E. Mulkey, 3 FCC Rcd. 590, 593 (1988)).

Auxiliary Power

74. Each applicant proposes auxiliary power at both their proposed studio and transmitter site (Gulf Breeze Exhibit # 2, p. 4; Breeze Exhibit # 1, 3; Miller Exhibit # 5, p. 1; Maranatha Exhibit # 2, p. 1). No applicant is, therefore, entitled to an auxiliary power preference.

ULTIMATE CONCLUSIONS

75. Breeze is the only applicant whose integration proposal is found to be totally credible. It has been awarded a 100 percent quantitative integration credit which is qualitatively enhanced by the Phillips' intention to move to Gulf Breeze, Florida, by Mrs. Phillips gender and by their past broadcast experience. Its nearest competitor is Gulf Breeze with a 60 percent part-time quantitative integration credit followed by the Millers with a 50 percent part-time quantitative integration credit. Maranatha does not propose any integration. The Breeze proposal is not subject to a diversification demerit of any degree and it is further entitled to a very slight preference over the other applicants for superior coverage. Accordingly, the Presiding Judge finds that Breeze's proposal is superior to that of the other applicants and that a grant of its application would best serve the public interest.

RULINGS

76. IT IS ORDERED that the Petition for Leave to Amend filed on December 10, 1988 IS GRANTED, and the amendment IS ACCEPTED for reporting proposes only.

77. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Breeze Broadcasting Company, Ltd. (File No. BPH-840503IC) for authority to construct a new FM station or Channel 237A in Gulf Breeze, Florida IS GRANTED; and that the applications of Maranatha Broadcasting Company, Inc. (File No. BPH-850712ME), J. McCarthy and June J. Miller (File No. BPH-850712NT) and Gulf Breeze Broadcasting Co. (File No. BPH-850712OE) ARE DENIED.⁶

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

¹ The application of Gulf Breeze Wireless Company was dismissed with prejudice for failure to prosecute by *Order* FCC 88M-257, released February 3, 1988; the application of Delta Broadcasting Corporation was dismissed voluntarily, by *Order* FCC 87M-2579, released October 16, 1987; the application of Stacey Pepper-Wrenn and David Wrenn, a partnership, was dismissed, voluntarily by *Order* FCC 87M-2578, released October 16, 1987; the application of Timothy Paul Woodward was dismissed voluntarily, by *Order* FCC 87M-2577, released October 16, 1987; and the application of Harold S. Schwartz was dismissed voluntarily, by *Order* FCC 87M-2576, released October 16, 1987. The applications of Gail Rose Schroeder, Sherry Ann Scott, Gulf Breeze FM Group Limited Partnership, Dee Wetmore, J-4 Broadcasting, Ltd. and Gulf Radio, Ltd. were dismissed, by *Order* FCC 87M-1611 released July 10, 1987. The application of Timothy L. Chisholm and Lisa Chisholm was dismissed for failure to prosecute, by *Order* FCC 88M-585, released March 2, 1988.

² *Id.*

³ *Id.*

⁴ By an amendment to the partnership agreement dated March 7, 1988, Breeze amended its partnership agreement by indicating specifically with respect to Article II, pp. 3 that ". . . neither limited partner may act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the partnership;" serve "in any material capacity, as an independent contractor or agent with respect to Breeze's media enterprises, nor communicate with the general partners on matters pertaining to the day-to-day operations of the proposed station; . . . to the extent the limited partnership agreement permits any limited partner to vote on the admission of a new general partner, the general partners are empowered to veto any such admissions; . . . the limited partners are prohibited from voting on the removal of a general partner; . . . the limited partners are barred from performing any services to the limited partnership materially relating to its media activities; . . .

the limited partners are expressly prohibited from becoming actively involved in the management or operation of the media businesses of the partnership" (Breeze Exhibit 8, p.1-2).

⁵ The Presiding Judge was advised by an amendment filed on January 9, 1989 that Mrs. Miller died on December 10, 1988.

⁶ In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).