

## MEMORANDUM OPINION AND ORDER

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

Adopted: July 3, 1990;

Released: July 18, 1990

By the Commission:

## MM Docket No. 89-337

In re Applications of

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION File No. BPED-870727MA

LOWELL MAZE JACKSON File No. BPH-870727MD

IVAN M. MILES File No. BPH-870727ME

JOHNSON BROADCASTING, INC. File No. BPH-870727MF

PAUL UHRY MAZO d/b/a MAZO RADIO CO. File No. BPH-870727MJ

ROBERT W. ROUNSAVILLE File No. BPH-870727MK

SOUTHERN RADIO SERVICES, INC. File No. BPH-870727ML

ROSWELL BROADCAST COMMUNICATIONS, LTD. File No. BPH-870727MM

NEW GEORGIA BROADCASTING, LTD. File No. BPH-870727MO

EATHEL HOLLEY File No. BPH-870727MQ

For Construction Permit for a New  
FM Station on Channel 298A in  
Roswell, Georgia

1. Before the Commission for consideration are a Review Board Memorandum Opinion and Order, *Georgia Public Telecommunications Commission*, FCC 80R-28 (Rev. Bd. Apr. 20, 1990); and an Application for Review filed April 27, 1990 by Johnson Broadcasting, Inc. (JBI).<sup>1</sup>

2. In Orders, *Georgia Public Telecommunications Commission*, FCC 89M-2546 (ALJ Oct. 26, 1989) and FCC 90M-238 (ALJ Feb. 8, 1990), the ALJ ordered JBI to produce for discovery a letter dated July 10, 1989 from JBI to its attorney concerning amendments to its application. In *Georgia Public Telecommunications Commission*, FCC 90R-28, *supra*, the Board denied JBI's appeal of the production requirement.<sup>2</sup>

3. In its Application for Review JBI argues that the ALJ has arbitrarily subjected it to different discovery procedures than those required of the other parties in this proceeding, that the July 10, 1989 letter is protected by the attorney-client privilege, and that, while the letter was disclosed to Sonrise Management, the disclosure did not constitute a waiver of the privilege.

4. Based on our review of the letter and the pleadings before us, we need not reach the question concerning alleged disparate treatment because we find that JBI has waived its right to claim the attorney-client privilege by virtue of its having sent a copy of the letter to Dr. Eugene Savage of Sonrise Management.<sup>3</sup> Absent a right to claim the privilege, the July 10, 1989 letter is subject to the same discovery procedures as any other non-privileged document.

5. The attorney-client privilege protects confidential communications by a client to his lawyer for the purpose of obtaining legal advice. Because the privilege protects only communications that are made in confidence, disclosure of an otherwise privileged communication to a third person who lacks a commonality of interest with either the client or his attorney generally rebuts the intent for confidentiality on which the privilege rests. *Hodges, Grant & Kaufmann v. U. S. Government*, 768 F.2d 719, 720-21 (5th Cir. 1985). In this regard, it is generally recognized that any voluntary disclosure of information constitutes a waiver of the right to claim that the information is protected by the privilege. *Weil v. Investment / Indications Research Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981); *United States v. American Tel. and Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).<sup>4</sup> In light of the disclosure of the letter to Sonrise Management, the burden is on JBI to establish a relationship with Sonrise consistent with its claim of privilege. *United States v. Kovel*, 296 F.2d 918, 923 (2nd Cir. 1961).

6. JBI asserts that "Sonrise originally formed the group and still had the money of JBI's principals." JBI Application for Review, filed April 27, 1990 p. 10. Thus, it contends that a disclosure to Sonrise would no more constitute a waiver of the privilege than would a letter between a client and an accountant in a litigated matter, citing *United States v. Kovel, supra*. Citing *Hodges, Grant & Kaufmann, supra* at 721, it argues that the privilege was not waived because the letter was "shared with a third person who has a common legal interest."

7. The authorities cited by JBI do not support its contention that the disclosure to Sonrise was not a waiver. In *United States v. Kovel, supra*, the court found that disclosure to an accountant was not a waiver when the accountant worked in the client's attorney's office, his function was to help the attorney prepare for litigation before the Internal Revenue Service, and the communication to the accountant was essential to the preparation for the client's litigation. In the instant proceeding there is no indication that sending a copy of the letter to Sonrise was essential to the provision of legal services to JBI. Moreover, when a communication serves an independent business purpose, and advice to be given by the third party is not essential to the attorney's legal analysis, disclosure of the communication constitutes a waiver. *In Re Breuto*, 231 F. Supp 529 (D. Minn. 1964) (communications to a banker who was providing estate planning services for client's attorney was not protected because the advice provided by the banker did not involve legal analysis).

8. In relying on *Hodge, Grant & Kaufmann, supra*, JBI does not identify a "common interest" that would exempt the disclosure of the letter from a waiver of the attorney-client privilege. In that case, the court held that a communication could be protected if it was divulged to a joint client of the attorney, or the client's agent or alter ego. 768 F.2d at 721 (citing *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977)).<sup>5</sup> JBI has not shown a commonality of interest with Sonrise by virtue of Sonrise's status as a joint client, its agent or its alter ego. Nor is there any showing otherwise that Sonrise had a relationship with JBI that would require it to hold communications from JBI in confidence. Thus, JBI's disclosure of the letter to Sonrise constituted a waiver of its right to claim that the contents of the letter are protected by the attorney-client privilege.

9. ACCORDINGLY IT IS ORDERED, That the Application for Review filed April 27, 1990 by Johnson Broadcasting, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That the Stay imposed by *Georgia Public Telecommunications Commission*, FCC 90I-39, released May 14, 1990 IS RESCINDED and the presiding Administrative Law Judge in this proceeding IS DIRECTED to take such steps as are necessary to compile a full record with respect to the July 10, 1989 letter.

11. IT IS FURTHER ORDERED, That the informal request for expedition, filed May 10, 1990 by Robert W. Rounsaville, IS GRANTED to the extent indicated herein, and in all other respect IS DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

#### FOOTNOTES

<sup>1</sup> Also before the Commission is an Opposition to Application for Review, filed May 10, 1990 by Robert W. Rounsaville and Ivan M. Miles. In a covering letter, which we will treat as an informal request, Rounsaville seeks expedited consideration of

the Application for Review. Consistent with the requirements of the Commission's business we have given expedited consideration to JBI's Application for Review.

<sup>2</sup> The Board's order denied JBI's appeal on the ground that JBI had not followed the procedures established for the protection of documents subject to the attorney-client privilege. However, we do not believe that this circumstance is dispositive in light of its submission of the letter to the ALJ for *in camera* inspection and the fact that the letter on its face was from JBI to its attorney. Thus, we shall address the merits of JBI's arguments as reflected below.

<sup>3</sup> On May 11, 1990 JBI provided a copy of the letter in question to the Office of General Counsel for *in camera* inspection.

<sup>4</sup> The attorney-client privilege is strictly construed because it impedes the full and free discovery of the truth. *Weil v. Investment Indications, supra* at 24.

<sup>5</sup> Wilson, moreover, dealt with an exception for co-defendants who were preparing a joint defense. Here there is no indication that JBI and Sonrise were preparing a joint defense or that the letter was part of the preparation for a joint defense.