

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

MM Docket No. 93-155

In re Application of

RICHARD BOTT II File No. BAPH-920917GO
(Assignor)

and

WESTERN COMMUNICATIONS, INC.
(Assignee)

For Assignment of Construction Permit of Station
KCVI(FM), Blackfoot, Idaho

Appearances

James P. Riley, Esquire, and Anne G. Crump, Esquire, on behalf of Richard Bott, II; and Y. Paulette Loden, Esquire, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE ARTHUR I. STEINBERG**

Issued: July 25, 1994;

Released: August 4, 1994

PRELIMINARY STATEMENT

1. Richard Bott, II ("Bott"), one of the applicants in the above-captioned proceeding, by his counsel, pursuant to Section 1.1501 *et seq.* of the Commission's Rules, applies for an award of attorney's fees and other expenses in accordance with the Equal Access to Justice Act ("EAJA"), 5 U.S.C. 504. The Chief, Mass Media Bureau ("Bureau"), by his counsel, opposes grant of the relief sought under the EAJA.¹

FINDINGS OF FACT

The Blackfoot Comparative Proceeding

2. On July 11, 1985, Bott filed an application for a construction permit ("CP") for a new FM station in Blackfoot, Idaho. (Tr. 89.) Competing applications were filed by six other applicants, including Radio Representatives, Inc. ("RRI"). By *Hearing Designation Order*, 2 FCC Rcd 3897, released July 1, 1987, the applications of Bott, RRI, and three of the other applicants were designated for

comparative hearing. The hearing was held on December 7, 1987. (MMB Ex. 2.) During the hearing, Bott claimed an integration preference based on his commitment to move to Blackfoot and serve as the full-time general manager of his proposed station. (MMB Ex. 1; MMB Ex. 3, pp. 21, 28; Bott Ex. 3, pp. 20, 22.) Bott also testified at the comparative hearing that he had not as yet decided on the format of his proposed station. (MMB Ex. 2, pp. 55-56, 67-68, 89-90.)

3. The following are excerpts of Bott's testimony at the comparative hearing with respect to his commitment to move to Blackfoot and the format of his proposed station. The testimony was adduced on cross-examination by opposing counsel.

Q: Approximately when did that decision [to move to Blackfoot] come?

A: Last summer [1987] when both facilities became designated for hearing simultaneously for all practical purposes. I realized at that point I was going to have to make a decision where I was going to live and make my home. At that time then I decided that Blackfoot, Idaho would be where I would make my home due to a number of factors including the fact that this is a class C station with much broader coverage as opposed to the class A in Central Valley [California]. It was last summer [1987] that I made my decision to move and live in Blackfoot.

(MMB Ex. 2, p. 19.)

* * *

Q: Maybe this goes back to an earlier question, but do you intend to leave Bott Communications regardless [sic] of the grant of this [Blackfoot] application or [are] you only intending to leave Bott Communications --

A: Do you mean Bott Broadcasting?

Q: Yes, Bott Broadcasting.

A: If I could digress for a moment which will help clarify the question, I think, that you're asking. That is that the situation in Blackfoot represents an opportunity for me to get out into business on my own and to have my own radio station and build something for myself.

(*Id.* at p. 51.)

¹ Under consideration are an Application for Award Pursuant to the Equal Access to Justice Act, filed on April 18, 1994, by Bott; Mass Media Bureau's Answer to Application for Award

Pursuant to the Equal Access to Justice Act, filed on May 11, 1994; and Response to Answer of Mass Media Bureau, filed on May 26, 1994, by Bott.

* * *

Q: Okay. The format of the other stations that Bott Broadcasting currently owns is essentially what? How do you best describe it?

A: As you characterized it in the deposition, it is essentially a religious-oriented format although I like to think that it's different from the way most religious stations are characterized. It's a format that is designed to serve the needs and interests of families including their religious and spiritual needs but also a lot of information, news, talk, public affairs and so forth. So it's a blend of several different things including a good portion of religious programming.

Q: Isn't it true that you also intend to engage in a similar sort of format for the Blackfoot facility?

A: No, that's not necessarily true. I've not decided exactly the type of format, the type of music or whatever that I would use in that facility. It would be a format tailored to that particular market and the needs of that community.

(*Id.* at pp. 55-56.)

* * *

[In response to a series of questions as to whether there had been discussions between Bott and his father concerning the programming to be carried on Bott's Blackfoot station:]

A: . . . If I could just say that my programming decisions are going to be my own decisions and I'm going to look at the programming sources that are available to me in addition to the programming that we're going to produce locally and make my decisions at the appropriate time. . . .

(*Id.* at pp. 67-68.)

* * *

Q: Okay. Assuming you get this grant do you have any plans right now to only own this property for a finite period of time?

A: No, I have no plans to sell it if that's what you mean.

Q: That's what I meant. And in your [direct written] testimony you say that you intend to establish a domicile in Blackfoot. Is that correct?

A: Yes.

Q: Do you intend to maintain any other residences anywhere else in the country at the time that you have your domicile in Blackfoot?

A: No, I intend to live in Blackfoot.

Q: No other residences anywhere else?

A: No.

Q: And it's your intention to, for all intents and purposes, for the foreseeable future to live there forever?

Bott's Counsel: Objection, Your Honor. Forever is irrelevant.

RRI's Counsel: Your Honor, I disagree because the Commission's policy is that integration proposals should be on a permanent basis. Permanent is equated, I believe, to forever.

Presiding Judge: I think an indefinite period of time would be enough. I don't think he should commit himself to forever living in any one place. If you want to ask the witness whether he intends to stay in Blackfoot for an indefinite time, that's okay.

Q: Do you intend to live in Blackfoot for an indefinite period of time?

A: Yes.

(*Id.* at pp.72-73.)

* * *

Q: I believe your testimony is you resigned [*sic*] your position of employment with Bott Broadcasting Inc. Do you intend to resign as either a vice president or a director of Bott Broadcasting Inc.?

A: Well, my intention is to quit my job there so I can go move and live in Blackfoot. I don't have an intention specifically to cease being an officer or director; however, they may choose to elect somebody to replace me but that would be a decision of the Board of Directors. They haven't made a decision on that one way or the other.

(*Id.* at p. 87.)

* * *

Q: . . . Have you made arrangements for a home or apartment in Blackfoot as of [this] date?

A: Well, yes, to a certain extent. That's one of the reasons I went out to visit [Blackfoot in September 1987] because I wanted to see the homes that the real estate agent had been picking out for me. I saw two or three of them with him and he was supposed to get some more possibilities, but I'm working on that.

Q: To purchase a home there?

A: Yes, it would be premature to buy one before this case is settled but I have been investigating that.

Q: I was wondering whether the decision was to purchase a home or to lease an apartment.

A: Well, I haven't made a firm decision whether I'd buy or rent, but there's not much available in Blackfoot to rent so it appears that the best thing would be to buy something. The housing is fairly reasonable there.

(*Id.* at pp. 87-88.)

Q: Do each of the Bott stations, and again I use an umbrella term for Bott Broadcasting and Bott Communications, receive the same programming, that is the two talk shows and the news service?

A: Yes, they do. Those particular ones. There is some programming similarity. It's not identical but those particular shows they all get.

Q: You would consider contracting for these same shows at your Blackfoot facility should you receive it?

A: Should it be compatible with the format that I choose. Like I say I've not chosen the exact format and that would be one thing that I would certainly consider.

(*Id.* at pp. 89-90.)

4. Bott's CP application was granted and that of RRI and one other applicant were denied on the basis of Bott's integration preference. Thus, Bott was awarded 100 percent integration credit, which was enhanced by his commitment to move to Blackfoot, whereas RRI was awarded no integration credit and the third applicant was awarded 50 percent credit. *Initial Decision*, 3 FCC Rcd 7094 (ALJ 1988). Although RRI appealed to the Review Board and the Commission, the determination reached in the *Initial Decision* was upheld. *Richard P. Bott, II*, 4 FCC Rcd 4924 (Rev. Bd. 1989), *rev. denied* 5 FCC Rcd 2508 (1990). RRI's subsequent appeal to the U.S. Court of Appeals was also denied. *Radio Representatives, Inc. v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991) (*aff'd by judgment*). In this connection, RRI argued to the Court of Appeals that Bott would not carry through on the integration pledge he made to the Commission. Bott responded: "This claim is wide of the mark." (MMB Ex. 3, pp. 1-2.)

The Petition to Deny and Related Pleadings

5. Bott was issued the CP for his proposed Blackfoot facility on December 18, 1991. (Joint Ex. 1, p. 2.) Nine months later, on September 17, 1992, Bott filed the above-captioned application to assign that permit to Western Communications, Inc. ("Western"). (Official notice taken.) A Petition to Deny the assignment application was filed by RRI on October 26, 1992. (MMB Ex. 3.) Bott filed an Opposition to Petition to Deny on November 10, 1992 (MMB Ex. 4), to which RRI filed a Reply to Opposition to Petition to Deny on November 23, 1992 (MMB Ex. 5). On December 8, 1992, Bott filed a Request for Leave to Respond and Response. (MMB Ex. 6.) RRI filed a Supplement to Petition to Deny on May 14, 1993 (MMB Ex. 7), and by letter dated May 19, 1993, then counsel for Bott notified the Commission that no response to the Supplement would be filed (MMB Ex. 8).

6. In its Petition to Deny, RRI contended that the assignment application must be designated for hearing pursuant to Section 73.3597(a) of the Commission's Rules because Bott proposed to assign his CP within one year of its grant. (MMB Ex. 3, p. 3.) RRI further argued that the sole basis for the grant of Bott's application was his receipt of 100 percent integration credit (*id.* at pp. 2, 3-4); that Bott continually represented to the Commission, as well as to the Court of Appeals, that he would move to Blackfoot and

fulfill his integration pledge (*id.* at pp. 5-6); that Bott abandoned his integration pledge and his commitment to move to Blackfoot (*id.* at p. 6); that Bott's actions made a "mockery" of the comparative proceeding in which Bott was awarded the CP (*id.*); and that a grant of the assignment application "would undermine the very foundation of the Commission's comparative hearing process" (*id.* at p. 7).

7. In his Opposition to Petition to Deny, Bott argued that "significant changed circumstances affecting his proposed construction and operation of the Blackfoot station occurred *subsequent* to the acquisition of the permit" (MMB Ex. 4, p. 5; emphasis in original); that RRI's reliance on Section 73.3597(a) of the Rules was misplaced (*id.* at p. 6); that a grant of the assignment application would do no violence to the integrity of the Commission's licensing process (*id.* at pp. 6-7); and that Bott would not profit from the assignment (*id.*).

8. In a declaration under penalty of perjury appended to his Opposition, Bott stated that throughout the comparative hearing process "it remained [his] intention and plan to build the station in Blackfoot, move there and personally run the station full time if and when [he] received the C.P." (MMB Ex. 4, p. 9); that *after* the CP grant was affirmed by the Court of Appeals in February 1991, he "proceeded with more detailed planning for the station [and] . . . decided that [he] would operate the station with a religious format" (*id.* at pp. 9-10); that this decision was based upon his prior experience with religious format stations, the overall worsening of the economy, his knowledge that he "could still successfully operate the station and serve the community with a religious format," his contacts with potential clients, "and there was an opening in the market for that format" (*id.* at p. 10).

9. Bott's declaration further stated that in September 1991 he learned that the opening in the market for a religious format station had closed. At that time, Bott was informed that The Calvary Chapel Church had just purchased FM station KRSS, Chubbuck, Idaho, that KRSS would serve much the same market area Bott's station was proposing to serve, that KRSS was planning to increase power, and that it would use a format very similar to the one Bott was planning to use. (MMB Ex. 4, p. 10.) Bott stated that this "dramatically changed the competitive situation in the market" because the church had a "tremendous head start," and the market was too small and the economy too soft to support two commercial religious stations. (*Id.*) Nevertheless, Bott stated, throughout the remainder of 1991 and into 1992 he proceeded with planning for construction of his station, ultimately contacting Kent Frandsen, the owner of Bott's proposed tower, "to proceed with my plans to install my antenna on his tower." (*Id.* at p. 11.) Bott's declaration stated that, over the course of several conversations, Frandsen inquired about purchasing the CP. After first telling him it was not for sale, Bott elected to sell the CP after his then attorney advised him that the Commission allowed him to do so provided that he receive as compensation only his expenses. (*Id.*) Bott stated that he thought that in the poor economy a duopoly operation, as Frandsen would operate the Blackfoot station, represented the best hope for a successful operation. (*Id.*)

10. As noted above, RRI filed a Reply to Opposition to Petition to Deny. In the "Summary" section of its Reply, RRI stated: "For the first time, Bott has revealed that his integration pledge has always been contingent on his ability to establish a profitable, religious station, which itself is

inconsistent with the integration pledge made in this proceeding." (MMB Ex. 5, p. 2.) Similarly, in the "Background" portion of its Reply, RRI further stated that: "Bott claim[ed] that he pursued the permit in order to construct a commercial religious station, . . ." (*Id.* at p. 7.) RRI also argued that Bott's failure to fully disclose the contingent nature of his integration promises constituted "fraud on the Commission's processes" (*id.* at p. 8), and that Bott had not alleged sufficient changed circumstances to warrant a grant of the assignment application (*id.* at pp. 13-16). In addition, RRI alleged that Bott's proposed station would serve a much larger area and population than would be served by station KRSS (*id.* at pp. 16-17), and that Bott's claims of competitive disadvantage and loss of a good market opportunity were, therefore, "false" (*id.* at pp. 17-18). In support of the latter assertions, RRI attached a lengthy engineering study to its Reply. (*Id.* at pp. 22-91.) This study concluded, *inter alia*, that Bott's proposed station would serve an area 3.1 times the size and a population 2.1 times greater than that of station KRSS's upgraded facility. (*Id.* at p. 22.) Bott did not challenge these figures. (MMB Ex. 6.)

The Hearing Designation Order in this Proceeding

11. As a consequence of the Petition to Deny and related pleadings, by *Hearing Designation Order and Notice of Opportunity for Hearing*, 8 FCC Rcd 4074, released June 15, 1993 ("HDO"), the Commission designated for hearing the above-captioned application of Bott and Western for assignment of the CP of Station KCVI(FM), Blackfoot, Idaho. The following issues were specified:

- (a) To determine whether Richard P. Bott II has misrepresented facts to or lacked candor with the Commission, either in connection with his integration pledge presented in the course of the Blackfoot, Idaho comparative hearing proceeding, or in his opposition to the petition to deny filed in the instant proceeding.
- (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Richard P. Bott II is qualified to remain a Commission permittee.
- (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned application should be granted.

(HDO at para. 14.)

12. In its rationale for the specification of the misrepresentation/lack of candor issue against Bott, the HDO noted that "the Commission has clearly indicated its basic concern with the integrity of its licensing process" (HDO at para. 8; citation omitted); that Bott prevailed in the comparative proceeding essentially on the basis of his integration proposal (*id.* at para. 9); that Bott, in prosecuting his CP application, "unambiguously, unconditionally, and repeatedly" pledged to relocate to Blackfoot and be fully integrated in his proposed station (*id.*); and that Bott's pledges were not contingent on the practicality of introducing a commercial religious or any other particular format

(*id.*). The HDO also asserted that, in opposing RRI's Petition to Deny, "Bott state[d] that throughout the six-year effort to obtain his permit he maintained a good faith intention to both move to Blackfoot and operate KCVI as a commercial facility with a religious format." (*Id.* at para. 3; emphasis added.) The HDO further maintained that "Bott ha[d] represented in the instant proceeding that, throughout the comparative proceeding, he always intended to operate with a commercial religious format. . ." (*Id.* at para. 9; emphasis added.)

13. The HDO determined that Bott's failure to qualify his integration pledge raised questions as to whether he had misrepresented facts or lacked candor either in his statements made during the course of the comparative hearing or in the assignment proceeding. Specifically, the HDO stated that "it is proper to inquire into why, if Bott previously represented that he intended to proceed without having chosen a particular format, the format issue became so critical later." (HDO at para. 10.) The HDO additionally questioned "the credibility of Bott's 'justification' for not proceeding with his announced plans for KCVI" in light of RRI's assertions in its Reply that KCVI would serve a substantially greater area and population than KRSS would serve. (*Id.* at para. 11.) The HDO found that this called into question Bott's rationale for assigning rather than constructing KCVI. (*Id.*) The HDO, therefore, concluded that substantial and material questions of fact were raised which required designation of the assignment application for hearing. (*Id.* at para. 13.)

14. In addition, the HDO stated that, irrespective of whether the hearing record warranted an order denying the assignment application, it shall be determined whether an order of forfeiture in an amount not to exceed \$250,000 shall be issued against Bott for willful and repeated violations of Section 73.1015 of the Commission's Rules (submitting truthful written statements and responses to the Commission). (HDO at para. 15.) Further, if certain circumstances occurred, the HDO made provision for the issuance of "an order to show cause why an order of revocation of [Bott's] construction permit . . . should not be issued." One such circumstance involved a final determination that Bott was not qualified to remain a permittee. (*Id.* at para. 18, footnote omitted; *modified, Order*, 8 FCC Rcd 7303, released October 8, 1993.)

Between Designation for Hearing and the Hearing

15. On June 25, 1993, ten days after the release of the HDO, Bott filed a Petition for Leave to File Petition for Reconsideration, and a Petition for Reconsideration. (Official notice taken.) Both pleadings were addressed to the Commission. In his Petition for Reconsideration, Bott requested the Commission to reconsider the HDO, delete the misrepresentation/lack of candor issue, which would moot the other two issues, and grant the assignment application. Bott argued that the HDO's specification of the misrepresentation/lack of candor issue was based on an erroneous reading of Bott's Opposition to Petition to Deny. Bott contended that critical facts cited in the HDO were inaccurate, and that certain allegedly conflicting statements the HDO attributed to Bott did not exist.² Bott further asserted

² The specific statements that Bott alleged as inaccurate were:

(a) "Bott states [in his Opposition to Petition to Deny] that throughout the six-year effort to obtain his permit he main-

tained [an] . . . intention to . . . operate KCVI as a commercial facility with a religious format" (HDO at para. 3); (b) "The hearing record does not reveal any qualification to Bott's

that the *HDO* was inconsistent with recent Commission precedent. The Bureau opposed Bott's Petition for Leave to File, Bott replied to the Bureau's opposition, and the Bureau moved to dismiss the reply. (Mass Media Bureau's Opposition to Petition for Leave to File Petition for Reconsideration, filed on July 8, 1993; Reply to Opposition to Petition for Leave to File Petition for Reconsideration, filed on July 20, 1993, by Bott; Mass Media Bureau's Motion to Dismiss, filed on July 23, 1993; official notice taken.)

16. On July 6, 1993, Bott filed a Motion to Delete Issues, which was addressed to the Presiding Judge. (Official notice taken.) Bott requested that the Presiding Judge delete the misrepresentation/lack of candor issue for substantially the same reasons he urged upon the Commission for the deletion of that issue. The Bureau opposed Bott's motion to delete and Bott filed a reply to the Bureau's opposition. (Mass Media Bureau's Opposition to Motion to Delete Issues, filed on July 21, 1993; Reply to Opposition to Motion to Delete Issues, filed on August 2, 1993, by Bott; official notice taken.)

17. On July 15, 1993, Bott filed a Petition for Certification to Commission, which was addressed to the Presiding Judge. (Official notice taken.) Bott requested the Presiding Judge to certify to the Commission the question of whether the hearing in this proceeding should be held. Bott argued, once again, that this case was designated for hearing on the basis of an error of fact, and that the *HDO* was inconsistent with precedent. Bott maintained that certification was appropriate in order to give the Commission the opportunity to review the *HDO* with a correct understanding of the critical facts and law. The Bureau opposed the petition for certification. (Mass Media Bureau's Opposition to Petition for Certification to Commission, filed on July 27, 1993; official notice taken.)

18. On July 16, 1993, Bott served on the Bureau a Request for Admission. (Official notice taken.) Bott asked the Bureau to admit the truth of the following statement:

Bott had not prior to designation for hearing in the instant proceeding made the statement or representation to the Commission that throughout the six-year effort to obtain his permit he maintained a good faith intention to operate KCVI as a commercial facility with a religious format (*see HDO* ¶ 3) or that throughout the comparative proceeding, he always intended to operate with a commercial religious format. (*see HDO* ¶ 9) [*sic*]

19. On July 20, 1993, the Bureau filed its response to the admission request. The Bureau submitted that portions of Bott's request were improper in that they asked the Bureau to admit to statements made or not made by Bott. Instead, the Bureau stated that it would admit to the truth of the following "revised" admission:

pledges, such as being contingent on the practicality of introducing a commercial religious or any other particular format" (*id.* at para. 9); and (c) "Bott has represented in the instant proceeding that, throughout the comparative proceeding, he always intended to operate with a commercial religious format . . ." (*id.*). With respect to (a) and (c), Bott claimed that

The Bureau does not possess a copy of a written statement or transcript of an oral representation by Bott to the Commission in which Bott asserts that throughout the six-year effort to obtain his permit he maintained a good faith intention to operate KCVI as a commercial facility with a religious format or that throughout the comparative proceeding, he always intended to operate with a commercial religious format.

(Mass Media Bureau's Response to Request for Admission, filed on July 20, 1993; official notice taken.)

20. On July 20, 1993, a prehearing conference was held in this proceeding. (Tr. 1.) Among the matters discussed were Bott's Petition for Reconsideration (Tr. 4), Bott's Motion to Delete Issues (Tr. 5), Bott's Request for Admission and the Bureau's response (Tr. 6, 8, 10), Bott's Petition for Certification to Commission (Tr. 6), discovery (Tr. 16), the burden of proceeding and proof (Tr. 22), and summary decision (Tr. 16, 26). With respect to the latter, Bureau counsel raised the possibility of the filing of a motion for summary decision by Bott after the completion of discovery (Tr. 16), or premised on the Bureau's response to the Request for Admission (Tr. 26), and counsel for Bott recognized that he had such an option (*id.*).

21. By *Order*, FCC 93M-533, released August 17, 1993, the Presiding Judge deferred rulings on Bott's Motion to Delete Issues and Petition for Certification to Commission, pending action by the Commission on Bott's Petition for Leave to File Petition for Reconsideration and Petition for Reconsideration. This action was taken because the pleadings addressed to the Presiding Judge (*i.e.*, the Motion to Delete and the Petition for Certification) requested essentially the same relief as those addressed to the Commission (*i.e.*, the Petition for Leave to File and the Petition for Reconsideration). (*See also* Tr. 7-10.)

22. On August 18, 1993, Bott filed a Request for Dismissal of "Petition for Leave to File Petition for Reconsideration" and "Petition for Reconsideration," which was addressed to the Commission. (Official notice taken.) Bott requested the "immediate dismissal" of those two pleadings. Bott stated that he took this action in response to the Presiding Judge's August 17 *Order* because of Bott's "desire to have the Presiding Judge act on those pleadings pending before him."

23. By *Order*, 8 FCC Rcd 7303, released October 8, 1993, the Commission, *inter alia*, granted Bott's Request for Dismissal, and dismissed the Petition for Leave to File Petition for Reconsideration and the Petition for Reconsideration.

24. By *Memorandum Opinion and Order*, FCC 93M-643, released October 8, 1993, the Presiding Judge denied Bott's Motion to Delete Issues and his Petition for Certification to Commission. With regard to the motion to delete, it was determined that Commission precedent precluded the Presiding Judge from substituting his judgment for that of the Commission, and that the Presiding Judge lacked the authority to review the propriety of the designation of a case for hearing or to issue a ruling which would have the

he did not make the statements attributed to him, and that his format decision was made after the CP grant was affirmed by the Court of Appeals in 1991. With respect to (b), Bott maintained that he testified during the comparative hearing that he had not made a format decision. (Petition for Reconsideration at pp. 2-5.)

effect of dismissing a hearing designation order as defective. In denying the petition for certification, the *Memorandum Opinion and Order* stated:

As a practical matter, Bott's petition for certification is an attempt, through the authority of the Presiding Judge, to have the Commission review and reconsider the *HDO* in this proceeding. However, Bott had pending before the Commission itself a Petition for Leave to File Petition for Reconsideration and an accompanying Petition for Reconsideration of the *HDO*. Those pleadings raised directly before the Commission the identical questions that Bott is now seeking to have the Presiding Judge certify to the Commission. Despite this, Bott voluntarily chose to dismiss his Petition for Leave to File and his Petition for Reconsideration without awaiting Commission action on the merits of his arguments. In other words, Bott willfully and purposely withdrew from the Commission the opportunity to review and reconsider the *HDO* in light of his contentions. Yet, at the same time, Bott is maintaining that the Presiding Judge should give the Commission the opportunity to do the same. These positions appear to be completely inconsistent and, given the circumstances, it would not be appropriate to allow Bott to accomplish through indirect means that which he no longer desires or is willing to attempt to do by direct means.

The Hearing in this Proceeding and the Summary Decision

25. The hearing in this proceeding was held in Washington, D.C., on October 26, 1993. (Tr. 37.) Richard Bott, II, was the only witness to appear and testify. (Tr. 38, 75 *et seq.*) The record was initially closed at the end of the hearing. (Tr. 193; *Order*, FCC 93M-683, released October 28, 1993.) However, by *Order*, FCC 93M-700, released November 10, 1993, the record was reopened for the receipt of an additional exhibit, and was then reclosed.

26. By *Order*, FCC 93M-686, released October 29, 1993, Bott was given permission to file a post-hearing motion for summary decision. Bott filed such a motion on December 6, 1993, and the Bureau filed comments in support thereof on December 9, 1993. (Motion for Summary Decision, filed on December 6, 1993, by Bott; Mass Media Bureau's Comments in Support of Motion for Summary Decision, filed on December 9, 1993; official notice taken.)

27. By *Summary Decision*, 9 FCC Rcd 514, released January 28, 1994, all of the issues in this proceeding were resolved in Bott's favor, and the application for assignment of the CP was granted. The *Summary Decision* concluded, *inter alia*, that Bott did not misrepresent facts or lack candor either in connection with the integration pledge he made during the course of the Blackfoot, Idaho, comparative proceeding, or in the Opposition to Petition to Deny he filed in this proceeding. With respect to the statements Bott was alleged to have made in his Opposition, the *Summary Decision* stated:

Turning first to the statements Bott is alleged to have made in his Opposition to Petition to Deny, the record establishes that those statements were not made by Bott. Specifically, the *HDO* attributed to Bott the statement that "throughout the six-year ef-

fort to obtain his permit he maintained a good faith intention to *both* move to Blackfoot *and* operate KCVI as a commercial facility with a religious format." (Emphasis added.) The *HDO* also attributed to Bott the representation that "throughout the comparative proceeding, *he always intended to operate with a commercial religious format . . .*" (Emphasis added.) However, the italicized statements were not made by Bott in his Opposition, or anywhere else. On the contrary, the statements in question appear to have been derived from the "Summary" and "Background" portions of RRI's Reply to Opposition to Petition to Deny, which contained grossly inaccurate characterizations of Bott's actual statements.

(*Summary Decision* at para. 35.) In connection with the format of the proposed station, it was concluded that "there is no record evidence that the format decision was made prior to the summer of 1991, or that Bott's testimony in the Blackfoot comparative proceeding was untruthful." (*Id.* at para. 37.)

28. With respect to the specific questions raised by the *HDO*, the *Summary Decision* stated:

The *HDO*, at paragraph 10, posed the question of why, if Bott intended to proceed without having chosen a particular format, the format issue became so critical later. Bott has satisfactorily answered that question. Specifically, Bott chose the commercial religious format largely because of the depressed state of the economy and the downturn in the radio industry. This format relied primarily upon the sale of blocks of time and, for that reason, stood a greater chance of being economically viable in a depressed economy. The alternative formats he considered relied substantially upon spot advertising. In addition, after Bott became aware of KRSS's plans, he considered format alternatives but, faced with a start-up operation in a very depressed economy, he believed that he would not be financially successful operating a new radio station with a format relying heavily upon spot advertising.

The *HDO*, at paragraph 11, also questioned Bott's conclusion that he could not compete with KRSS when Bott's proposed coverage area was greater than that of KRSS. Bott has credibly answered this question as well. Thus, Bott knew, from the time he first learned about KRSS in September 1991, that the station was planning to increase power from a mountaintop site. Based upon his knowledge of broadcast engineering concepts generally, and his prior experience with a mountaintop site, Bott believed that KRSS's signal would serve substantially the same market that he was targeting. (Bott's belief was ultimately shown to be correct.) Moreover, KRSS was in a position to be on the air before Bott's Blackfoot station, and planned to broadcast many of the same programs Bott had intended to use, rendering them unavailable to his station. Even if Bott had sold time to competitive programs, the audience would have been split. Consequently, given the size and demographics of the market, Bott did not believe he could sustain a financially viable operation even with greater coverage.

(Summary Decision at paras. 40-41.)

CONCLUSIONS OF LAW

29. This proceeding involves the application of Bott for an award of attorney's fees and expenses pursuant to the EAJA. For the reasons which follow, it is concluded that the EAJA does not apply to this proceeding. Moreover, even assuming the applicability of the EAJA, it is also concluded that Bott's application must be denied.

30. Section 1.1501 of the Commission's Rules, which implements the EAJA, provides for the award of attorney's fees and other expenses to an eligible party "when it prevails over the Commission, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust." Similarly, Section 1.1505(a) of the Rules, entitled "Standards for awards," states, in pertinent part:

A prevailing applicant may receive an award for fees and expenses incurred in connection either with a proceeding, or with a significant and discrete substantive portion of a proceeding, unless the Administrative Law Judge determines that the position of the Commission over which the applicant has prevailed was substantially justified. The position of the Commission includes . . . the action . . . by the agency upon which the adversary adjudication is based.

In addition, Section 1.1526(a) of the Rules provides, in part, that "[w]hether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which [was] made in the adversary adjudication for which fees and other expenses are sought."

31. As a preliminary matter, Bott argues that the EAJA is applicable to this case because it is an adversary adjudication within the meaning of the rules. (Application for Award at pp. 1-3.) The Bureau, on the other hand, claims that this is not the type of proceeding to which the EAJA applies because it involves an application for assignment of license, which does not fall within the definition of an adversary adjudication. (Answer at pp. 1-4.)

32. It must be concluded that the EAJA is not applicable to this proceeding. Section 1.1503(a) of the Rules defines "adversary adjudications" as those conducted under a certain section of the Administrative Procedure Act in which the position of the Commission, or any component thereof, is presented by an attorney who enters an appearance and participates in the proceeding. Proceedings to grant or renew licenses are expressly excluded from the definition of adversary adjudications, while proceedings to modify, suspend, or revoke licenses are expressly included. Clearly, the position of the Bureau, a component of the Commission, was presented by attorneys who appeared and participated in this case. However, this case did not involve the modification, suspension or revocation of Bott's CP, proceedings which are expressly included in the definition of adversary adjudications. Instead, this case concerned the

assignment of Bott's CP to Western, which is manifestly a licensing proceeding. Such proceedings are specifically excluded from the EAJA.

33. In this connection, Bott argues that he faced a large forfeiture and a possible judgment that he was not fit to be a Commission permittee. (Application for Award at p. 3.) However, identical questions and sanctions typically arise in comparative proceedings involving misrepresentation and lack of candor issues, but these are licensing proceedings excluded from the EAJA. Therefore, standing alone, the type of sanction which may be imposed is not determinative. Further, the HDO made specific provision for the transformation of this case into a revocation proceeding should certain circumstances take place.³ Since such circumstances did not come to pass, this case remained a licensing proceeding. In any event, even assuming, *arguendo*, that the EAJA is applicable to this proceeding, the findings of fact establish, and it is concluded, that the Commission's position was substantially justified and an award of attorney's fees and other expenses is not warranted.

34. The major premise underlying Bott's application for an award of fees and expenses is his contention that the Commission's actions in designating the assignment application for hearing and in going forward with the hearing were not substantially justified. This is so, Bott contends, because the Commission had no evidence that he ever contradicted the testimony he gave during the comparative proceeding. (Application for Award at pp. 4, 6.) In support, Bott relies on the portion of the *Summary Decision* which concluded that certain statements imputed to him in the HDO were derived from "grossly inaccurate characterizations" contained in RRI's Reply to Opposition to Petition to Deny. (*Id.* at pp. 4-5, 7; *see also* para. 27, *supra.*) Bott claims that the basis for the misrepresentation/lack of candor issue, and thus the designation of this case for hearing, "rested *entirely* upon the Commission's unquestioning acceptance of RRI's grossly inaccurate characterizations" of Bott's statements to the Commission." (*Id.* at pp. 5-6; *emphasis added.*) Bott also argues that even if the Commission made an innocent error in misreading RRI's allegations, "innocent error is not substantial justification." (Response to Answer at p. 7.) Bott further relies for support on the Bureau's admission that it did not possess a copy of a written statement or a transcript of any oral representation by Bott containing the statements attributed to him in the HDO. (Application for Award at pp. 5-6; *see also* paras. 18-19, *supra.*) Based upon these arguments, Bott maintains that the Commission's designation of this case for hearing "had no reasonable basis in law or fact" and that "a reasonable person making an independent reading of Bott's statements could not have concluded that there was any substantial reason to believe that Bott had made misrepresentations or had lacked candor." (*Id.* at p. 7.)

35. Bott's premise is misplaced. While there can be no question that Bott did not make the statements ascribed to him in the HDO, it cannot be concluded, as urged by Bott, that the inaccurate attribution constituted the *entire* basis for the designation of this case for hearing. On the contrary, the findings establish, and it is concluded, that there were ample other grounds for setting this case for hearing.

³ One of those circumstances involved a final determination that Bott was not qualified to remain a permittee. Had such a final determination been made, an order to show cause looking

towards the revocation of Bott's CP would have been issued. At that time, this case would have become a revocation proceeding, and the EAJA would have applied.

36. First, Bott obtained his CP in the comparative proceeding only because of his integration commitment, and Bott repeatedly, unambiguously, and unconditionally testified in that case that he would move to Blackfoot to fulfill that promise. Bott maintained this position through the Court of Appeals. Yet, a mere nine months after Bott was issued the CP, he filed an application to assign it to Western. Those circumstances, without more, served to place into question the candor of Bott's testimony with respect to his integration pledge in the comparative proceeding.

37. Second, Bott testified in the comparative proceeding that he had not selected the format for his proposed station. However, when the assignment application was challenged by RRI, Bott stated in his Opposition to Petition to Deny that he decided to assign his CP, in part, because another FM station in the market, KRSS, was planning to use a format very similar to the one Bott ultimately decided to use. This raised the question of why the format issue became so critical to Bott when his integration commitment was made without consideration of format. This also placed into question the candor of Bott's testimony with regard to format in the comparative hearing, and the representations he made in his Opposition.

38. Third, the Opposition also stated that KRSS would serve much the same market area as Bott's station was proposing to serve, and the market was too small to support two similarly formatted stations. But RRI, in its Reply to Opposition to Petition to Deny, argued that Bott's proposed station would serve a much larger area and population than would be served by station KRSS, supported that assertion with a lengthy engineering study which was not challenged by Bott, and alleged that Bott's claims of competitive disadvantage were false. This, too, placed into question the candor of Bott's Opposition, as well as the credibility of his rationale for assigning rather than constructing his station.

39. Bott also argues that even if the Commission had been justified in designating this case for hearing, such justification "terminated" when it became clear that the alleged basis for the hearing did not exist. Bott implies that this point came when the Bureau filed its Response to Request for Admission. In addition, citing *Eagle 22, Ltd.*, 7 FCC Rcd 5295 (1992), Bott maintains that the Bureau knew that the law permitted his sale of the unbuilt CP at no profit without the need for him to justify his decision to sell. (Response to Answer at pp. 6-7.)

40. Bott's arguments are without merit. Although *Eagle 22* may permit the sale of an unbuilt CP without the seller providing a justification, the findings establish that Bott, in his Opposition to Petition to Deny, voluntarily provided to the Commission the reasons for his decision to assign the CP to Western. As demonstrated above, it was those very reasons which raised the misrepresentation/lack of candor questions leading to the designation of this case for hearing, and the Commission could hardly be expected to overlook the substantial and material questions raised by Bott's explanation. Therefore, the state of the Bureau's knowledge of *Eagle 22* is completely irrelevant. Further, the Bureau's

Response to Request for Admission was not a concession that the alleged basis for the hearing did not exist. Rather, the Bureau only admitted that it did not have any documentation establishing that Bott made certain statements imputed to him in the *HDO*. There was no admission by the Bureau with respect to anything else and, as shown above, there were other grounds for setting this case for hearing.

ULTIMATE CONCLUSIONS

41. In sum, it must be concluded that the EAJA does not apply to this case because it is a licensing proceeding expressly excluded from the act. Moreover, even assuming the applicability of the EAJA, it must ultimately be concluded that the Commission's position in this proceeding was substantially justified. Thus, it is abundantly clear that there were, in fact, ample reasons for designating for hearing the Bott-Western assignment application and for specifying a misrepresentation/lack of candor issue against Bott. These reasons were completely independent of the "grossly inaccurate characterizations" contained in RRI's Reply and repeated in the *HDO*. Further, contrary to Bott's assertions, a reasonable person undertaking an independent analysis of Bott's statements could, indeed, have concluded that substantial and material questions of fact were raised as to whether Bott misrepresented facts or lacked candor either in his testimony in the comparative hearing or in his Opposition to Petition to Deny. Consequently, Bott's unidimensional, constricted, reading of the *HDO* is fatally flawed, and his application for an award of attorney's fees and other expenses must be denied.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Sections 1.276 and 1.1528 of the Rules, the Application for Award Pursuant to the Equal Access to Justice Act, filed by Bott on April 18, 1994, IS DENIED.⁴

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

⁴ 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 Sections 1.276(d) and 1.1528 of the Rules.