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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

FEB 4 - 1992

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) RM- \_\_\_\_\_  
Table of Allotments, )  
FM Broadcast Stations )  
(Cadiz, Kentucky) )

Federal Communications Commission  
Office of the Secretary

To: Chief, FM Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

REPLY OF HAM BROADCASTING CO., INC.

1. On November 1, 1991, Ham Broadcasting, Inc. ("Ham") petitioned the Commission to initiate a rule making proceeding to amend the FM Broadcast Table of Allotments to upgrade Station WKDZ-FM, Cadiz, Kentucky, from Channel 292A to Channel 293C3. On January 22, 1992, WMOK, Inc. ("WMOK") filed a Motion To Dismiss and Opposition to Petition for Rulemaking ("Opposition"). This is Ham's Reply to WMOK's Opposition.

2. While WMOK attacks Ham's Petition with vigor, its Opposition skirts around the basic legal underpinning of Ham's petition and thus ends up with no wind in its sails.<sup>1/</sup> The basic point of Ham's Petition, which was well supported with legal citations, is very simple. Ham's proposed reference point for WKDZ-FM is short-spaced to the presently authorized

<sup>1/</sup> It should also be noted, as discussed further *infra*, that WMOK is only an applicant before the Commission seeking to purchase the station on behalf of which it opposes Ham's Petition. The purchase has not yet been approved or consummated. Thus WMOK may not have standing to oppose the Petition. The Commission generally does not normally grant standing to mere applicants. *Columbia Cellular Telephone Co.*, 6 FCC Rcd. 1408 (CC Bur. 1991).

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transmitter site for Station WSEQ(FM), Reidland, Kentucky, under File No. BPH-890117ML. However, WSEQ is an unbuilt station, and the permittee has no investment in the site specified in the construction permit. Moreover, the record shows that the permittee, Ladon Broadcasting Company ("Ladon"), has proposed not to build at the authorized site and in fact has proposed not to build at all. First, Ladon has actually filed an application to move the site, File No. BMPH-910913IC. Second, Ladon has applied to assign its construction permit to WMOK, File No. BAPH-910913GO. WMOK, the proposed assignee, has said it will not build at the currently authorized site either, because it cannot do so without causing prohibited overlap of 70 dBu contour with commonly owned station WREZ(FM), Metropolis, Illinois, in contravention of Section 73.3555(a)(2) of the Commission's Rules. Opposition at p. 4. The record is clear that there are no plans by anyone to build at the site. Nothing in WMOK's Opposition changes that fact. Therefore, it makes no sense to take the site into account in evaluating Ham's Petition.

3. In its Opposition, WMOK first claims that Ham has not made a showing that its proposal is an "extraordinary situation" or that there is "special justification" for it. Opposition at pp. 2-3. Ham does not know whether the terms quoted by WMOK constitute definitive legal standards or, if so, how they would be defined in this case; but it certainly cannot be concluded that Ham has "not even attempted to make a showing." *Id.* Ham has made a clear showing that the WSEQ site has been abandoned.

4. Ham's showing of abandonment stands unrebutted by WMOK. WMOK claims that Ladon has not "renounced its intention" to build at its presently authorized site if the assignment to WMOK is not consummated. Opposition at p. 5. However, WMOK's claim rings hollow in the face of resounding silence by Ladon.<sup>2/</sup> Ladon has spoken only in BMPH-910913IC, in which it has in its own name proposed to move. Even if the move is an accommodation to WMOK, it is the only statement Ladon has made on the record to Ham's knowledge. WMOK's counsel cannot speak for Ladon or put words in Ladon's mouth.<sup>3/</sup> As of now, Ladon has said it is moving and selling. There is nothing wrong with that. Ladon should not be faulted for what it has applied to do, and Ham is entitled to rely on the applications Ladon has filed.

5. WMOK next argues that since there is no site from which it (but *not* Ladon) can operate WSEQ that would not be short-spaced to the proposed Cadiz reference point and would also avoid prohibited 70 dBu contour overlap with WREZ, Ham is somehow trying to "require divestiture of an existing station." Opposition at p. 5. Ham is attempting no such thing. WMOK is not the licensee of WSEQ and has no legal right to become the licensee of WSEQ if the result will be prohibited 70 dBu contour

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<sup>2/</sup> Ladon was served with a copy of both Ham's Petition and WMOK's Opposition.

<sup>3/</sup> If Ladon has something further to say, it must speak unequivocally and under penalty of perjury pursuant to Section 1.16 of the Commission's Rules.

overlap with a co-owned station.<sup>4/</sup> WMOK's attempt to acquire WSEQ depends on moving WSEQ to a location that Ham demonstrated in its Petition is only a "mere site preference" that is not entitled to protection against a channel upgrade that is otherwise in the public interest.<sup>5/</sup>

6. Finally, WMOK argues that Ham cannot build a tower at its proposed reference point because the reference point is inside the Campbell 1 MOA Military Operating Area where aircraft may fly as low as 500 feet above ground. Opposition at p. 7. Here, WMOK is improperly attempting to shift the burden of proof to Ham. Ham is not obligated to prove the availability of the land at its exact proposed reference point<sup>6/</sup> or to construct facilities at that reference point if the proposed allotment is made.<sup>7/</sup> Ham need only show that there is a theoretical reference point that meets spacing requirements and is not in a

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<sup>4/</sup> As discussed at footnote 1, *supra*, WMOK is a mere applicant and may not have standing in this proceeding.

<sup>5/</sup> WMOK's charge at page 6 of its Opposition that Ham's motivation is to rid itself of a "vigorous competitor" is gratuitous. Upgrading WKDZ-FM has obvious benefits to Ham and provides a clear and legitimate motive for Ham's Petition.

<sup>6/</sup> *West Palm Beach, Florida*, 3 FCC Rcd. 5810 (MM Bur. 1988), *aff'd*, 6 FCC Rcd. 6975 (MM Bur. 1991).

<sup>7/</sup> *Melbourne, Florida*, 5 FCC Rcd. 1031 (MM Bur. 1990).

totally unacceptable area such as offshore in ocean waters.<sup>8/</sup>

Ham has met its burden.

7. For WMOK to refute Ham's showing, it must demonstrate that there is no land at all available anywhere that a station on the new allotment could be built. WMOK has fallen far short of meeting that burden. The fact that aircraft fly in the area does not mean that FAA authorization could not be obtained. Even under WMOK's own allegations, it appears that Ham could build a tower less than 500 feet above ground without intruding on the 500-10,000-foot airspace mentioned by WMOK; and that is perfectly acceptable for a Class C3 station, for which there is no required minimum antenna height.<sup>9/</sup> It should further be noted that WMOK's own aeronautical chart shows an 800-foot tall existing tower on the border of the *restricted* portion of the Campbell 1 MOA (Ham's coordinates are not in the restricted portion), and two 1,035-foot stacks at the edge of the MOA;<sup>10/</sup> so it is obvious that towers are not barred in the MOA. Finally, Ham could build

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<sup>8/</sup> Cf. *Wilmington, North Carolina et al.*, 6 FCC Rcd. 6969 (MM Bur. 1991) (TV allotment denied where the only available site was in environmentally sensitive wetlands with restrictions on development, but only *after* a formal rule making proceeding had been initiated); *Cusseta, Georgia*, MM Docket No. 90-373, DA 91-1545 (MM Bur. released Dec. 19, 1991) (FM allotment denied where, unlike here, the only theoretical reference point was actually on military property rather than only in an area where military aircraft fly).

<sup>9/</sup> See Section 73.211(a)(2) of the Commission's Rules.

<sup>10/</sup> A copy of WMOK's chart is attached hereto with the tower locations highlighted.

at slightly different coordinates from those specified in its Petition; and since the proposed reference point is very close to the edge of the Campbell 1 MOA, Ham might well be able to build outside the MOA, even if that approach required the use of a directional antenna pursuant to Section 73.215 of the Rules. In other words, there are ample possibilities for Ham, Ham has made the showing required to support a rule making, and WMOK's claimed rebuttal of Ham's showing is insufficient.

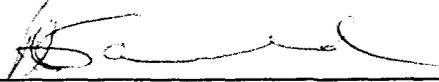
8. In sum, the record as it now stands is in Ham's favor.<sup>11/</sup> The WSEQ site to which the proposed Cadiz site has short-spaced has been abandoned. The site specified in BMPH-910913IC is a mere site preference that cannot prevail over Ham's proposed upgrade. There are other sites at which WSEQ may be built, unless the station is sold to WMOK; and WMOK has no legal right to acquire WSEQ that takes priority over the benefits to the public of upgrading WKDZ-FM to Class C3 status. Therefore,

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<sup>11/</sup> WMOK's conclusion, Opposition at p. 8, that Ham's proposal is "self-defeating," because if Ham prevails, WMOK will not acquire WSEQ, and WSEQ will remain at a site short-spaced to Ham's proposed reference point, is backwards. It is WMOK that is in a self-defeating position by virtue of its attempt to buy a station that it cannot own unless it moves the transmitter to a place where it cannot go without depriving the public of the additional service that would be gained by a grant of Ham's upgrade proposal.

the initiation of a formal rule making to invite comments on Ham's proposal is fully appropriate.

Respectfully submitted,



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February 4, 1991

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**CERTIFICATE OF SERVICE**

I, Lucy S. Colebaugh, do hereby certify that I have, this 4th day of February, 1991, caused to be sent by first class United States mail, postage prepaid, copies of the foregoing "Reply of Ham Broadcasting, Inc." to the following:

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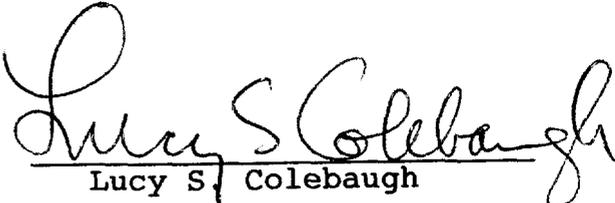
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