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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 92-64
)	
WIND 'N SEA FM LIMITED)	File No. BPH-901224ME
PARTNERSHIP)	
)	
J.H. COMMUNICATIONS)	File No. BPH-901226MB
)	
For Construction Permit for a)	
New FM Station on Channel 295A)	
in Ocean City, Maryland)	

TO: Honorable Edward Luton
Administrative Law Judge

**REPLY TO
MASS MEDIA BUREAU'S
OPPOSITION TO MOTION TO DISMISS**

P.M. Broadcast Engineering, Inc. ("P.M."), licensee of WQMR(FM), Federalsburg, Maryland, and pursuant to FCC Rule § 1.294(c)(3), hereby replies to the "Mass Media Bureau's Opposition to Motion to Dismiss" filed May 28, 1992.^{1/} None of the arguments set forth by the Bureau militate against dismissal of the captioned applications.

^{1/} P.M. notes that the Mass Media Bureau's Opposition was filed two days late. Under FCC Rule § 1.294(c)(3), any opposition would have been due ten days after the May 15 filing date of P.M.'s May 15 Motion to Dismiss. Since May 25 was a holiday, the Opposition was due May 26, 1992. The Bureau would not get an additional three days for mailing since P.M.'s Motion was hand delivered. Accordingly, this Reply is being filed within five days of the Bureau's Opposition pursuant to Sections 1.294(c)(3) and 1.4(g) and (h).

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First, the Bureau alleges that P.M. "is really seeking reconsideration of the Hearing Designation Order, 7 F.C.C. Rcd. 2293 (1992) (HDO).^{2/} This is not true. Under FCC Rule § 1.106(a)(1), "[a] petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." The Motion to Dismiss filed by P.M. is not based on "an adverse ruling with respect to [P.M.'s] participation in the proceeding," and thus, a petition for reconsideration of the HDO is inapplicable to the relief sought by P.M., i.e., dismissal of the captioned applications.

The Bureau next states that, "[t]he HDO acknowledged that the Commission's policy regarding grandfathered stations or allotments may have been unclear. Thus, the HDO determined that return of the Wind 'N Sea and J.H. applications with no opportunity to correct the short-spacing would be inappropriate." While the HDO acknowledged the lack of clarity regarding grandfathered allotments, that acknowledgement related only to the stations that are short-spaced to the Ocean City allotment.^{2/} However, the HDO explicitly acknowledged that "the Ocean City allotment is

^{2/} The Ocean City allotment is short-spaced to WKDN(FM), Camden, New Jersey; construction permit BPH-880727MC, North Cape May, New Jersey; and WAFX(FM), Suffolk, Virginia. HDO ¶4.

not short-spaced to WQMR(FM). Therefore, 47 C.F.R. § 73.213(c)(1) cannot be applied to the required separation distance to WQMR(FM)." HDO ¶4. Thus, insofar as WQMR is concerned, there is no arguably "grandfathered" station or allotment and thus, no ambiguity as to the contour protection required.

The Bureau next states that "an Administrative Law Judge does not have authority to dismiss a construction permit application on grounds already considered by an operating bureau pursuant to a delegation of authority," citing Anax Broadcasting, Inc., 87 F.C.C. 2d 483 (1981). It is clear, however, that the Audio Services Division ("Division") did not consider the short-spacing to WQMR in the HDO, because recognition of that short-spacing would have mandated dismissal of the applications as unacceptable for filing. See Patently Defective AM and FM Construction Permit Applications, 49 Fed. Reg. 47331 (Dec. 3, 1984) ("FM applications must comply with distance separation standards as well as the maximum power and height limitations. If an application does not comply with these requirements and does not contain an appropriate request for waiver, the application will be returned.") See, e.g., South Missouri Broadcasting Co., Inc., F.C.C. 92-200 (May 11, 1992) (Short-spacing of 0.7 km warrants return of application as unacceptable for filing).

Review of the HDO shows that the short-spacing to WQMR proposed by both J.H. Communications ("J.H.") and Wind 'N Sea FM

Limited Partnership ("Wind 'N Sea") were not fully considered by the Division and neither application contained "an appropriate request for waiver." In paragraph 3 of the HDO, the Division noted that J.H. "requested processing pursuant to 47 C.F.R. § 73.213(c)(1) with respect to WKDN(FM) and WQMR(FM)."^{3/} But in the very next paragraph, the Division notes that "the Ocean City allotment is not short-spaced to WQMR(FM). Therefore, 47 C.F.R. § 73.213(c)(1) cannot be applied to the required separation distance to WQMR(FM)." Thus, because Section 73.213(c)(1) is inapplicable to the short-spacing proposed by J.H., any reference to that section cannot be considered as an "appropriate" request for waiver.^{4/}

After noting that the application of Wind 'N Sea was also short-spaced to WQMR, the Division noted that Wind 'N Sea "failed to address this problem; however, its application meets the spacing requirements of 47 C.F.R. § 73.213(c)(1) with respect

^{3/} P.M. has been unable to locate J.H.'s request for processing pursuant to Section 73.213(c)(1) with respect to WQMR. However, since that section is inapplicable in any case, it is irrelevant whether such a request exists in J.H.'s application.

^{4/} In a footnote, the Division notes that J.H. had requested processing under FCC Rule § 73.215, and waiver of § 73.207, but only as to the construction permit (then, pending application) for North Cape May, New Jersey. In any case, waivers under § 73.207 have not been permitted since 1989, when FCC Rule § 73.215 was amended, permitting contour protection. Report and Order in MM Docket No. 87-121, 4 F.C.C. Rcd. 1681, 1685 (1989).

to all the stations." HDO ¶13. Again, since the Division notes in the very next paragraph that Section 73.213(c)(1) is inapplicable to WQMR, Wind 'N Sea's application cannot possibly comply with that section vis-a-vis WQMR. The only other recognition given by the Division to the WQMR short-spacings is in footnote 3, wherein the Division states that its "engineering study has revealed that processing pursuant to 47 C.F.R. § 73.215 with respect to WQMR may be a viable option for these applicants." While contour protection pursuant to Section 73.215 may well have been a viable option when the applications were initially filed (or by the amendment as of right date), it is clearly too late in the process to permit amendment of the applications in that fashion.

Under the Commission's "hard look" processing guidelines, a short-spacing which violates the Commission's rules and is not "grandfathered" by a short-spaced allotment requires dismissal of the offending applications. See Patently Defective AM and FM Construction Permit Applications, and South Missouri Broadcasting Co., Inc., supra. If the Division fails to dismiss those applications at its acceptability review stage, then the presiding Administrative Law Judge clearly has authority to dismiss the applications now as inadvertently designated for hearing. See Pueblo Radio Broadcasting Service, 5 F.C.C. Rcd. 6278 (1990) (Application dismissed by ALJ as inadvertently accepted for filing based on failure to comply with U.S.-Mexican

agreement); see also SBM Communications, Inc., F.C.C. 92-229 (June 3, 1992) (Commission affirms ALJ dismissal of application as inadvertently designated for hearing based on failure to contain original signature).

Thus, there is no question that the Presiding Officer has authority to dismiss the captioned applications as inadvertently accepted for filing and/or designated for hearing based on the Division's failure to properly consider the short-spacings to WQMR proposed in both applications. The short-spacings proposed by both applicants to other stations may well have been permissible (or at least ambiguous) under FCC Rule § 73.213(c)(1), since the Ocean City allotment is short-spaced to those other stations. However, there is simply no basis for permitting post-designation amendments to cure proposed short-spacings to WQMR, which is not short-spaced to the Ocean City allotment. These applications were not amended by the close of the amendment as of right period under FCC Rule § 73.3522(a)(6), and therefore, they must now be dismissed as patently defective applications that were inadvertently accepted for filing pursuant to FCC Rule § 73.3566.

Pueblo Radio Broadcasting Service, supra.^{5/}

^{5/} The Anax case cited by the Bureau was released in 1981, four years prior to initiation of the "hard look" processing procedures established by the Commission in 1985. See Report and Order in MM Docket 84-750, 58 R.R. 2d 776 (1985). Thus, even if the Division arguably considered the short-spacings to WQMR, the Bureau's reliance on this case is misplaced. In any case, even under Anax, the Presiding Officer would be free to certify this question to the Commission as explained infra.

Finally, the Bureau alleges that P.M. should have requested certification of this question to the Commission "within five days of designation for hearing," pursuant to FCC Rule § 1.115(e)(3), and failing that, must now wait "until applications for review of the final Review Board [Decision] are filed." As explained above, however, this is not true since the Presiding Officer has full authority to dismiss these applications as inadvertently accepted for filing and/or inadvertently designated for hearing based on the acceptability defects in both applications.

In any case, the Presiding Officer always has the authority to certify an issue to the Commission on his own motion. FCC Rules §§ 1.341(c) and 1.115(e)(3). The very rule cited by the Bureau, Section 1.115(e)(3), states that the ALJ may certify an application for review to the Commission on his own motion if he "determines that the matter involves a controlling question of law as to which there is a substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation." There is no question that immediate consideration of the dismissal of both captioned applications would "materially expedite the ultimate resolution of the litigation," since the hearing would be unnecessary if both applications are dismissed as inadvertently accepted for filing. The rationale for this

rule is obvious, since it would be a tremendous waste of Commission resources to go through an unnecessary hearing merely because a request to certify was not filed with the Presiding Officer within five days after the HDO was issued. Indeed, FCC Rule § 1.115(e)(3) was amended in 1983 specifically to permit the presiding ALJ "to certify an application for review of a designation order to the Commission if the Judge determines that the application for review involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation." Revision of Section 1.115(e)(3), 93 F.C.C. 2d 434 (1983).

Additionally, FCC Rule § 0.341(c), delineating the authority of Administrative Law Judges, states as follows:

Any question which would be acted upon by the Chief Administrative Law Judge, the Review Board or the Commission, if it were raised by the parties, may be certified by the administrative law judge, on his own motion, to the Chief Administrative Law Judge, the Review Board or the Commission, as the case may be.

This rule confirms that the ALJ has authority to certify a question to the appropriate authority on his own motion. In enacting this rule, the Commission stated that the ALJ (then Hearing Examiner) "should not be compelled to rely on the initiative of parties to the proceeding" in certifying a question to the Review Board or Commission. Revision of Delegations of

Authority in Hearing Proceedings, 2 R.R. 2d 1571, 1574 (1964).

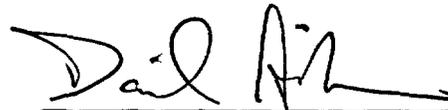
Thus, it is clear that the Presiding Officer has authority to certify to the Commission the issue of whether the captioned applications should be dismissed if he feels that it is a question within the Commission's jurisdiction. He is not bound to go through with an unnecessary hearing before the answer to that question can be determined.

Accordingly, for the foregoing reasons and those specified in P.M.'s Motion to Dismiss, the Presiding Officer should dismiss the captioned applications of J.H. Communications and Wind 'N Sea FM Limited Partnership pursuant to FCC Rule § 73.3566 as patently defective applications that were inadvertently accepted for filing. Alternatively, the Presiding Officer should certify this issue to the Commission for immediate resolution to avoid an unnecessary hearing pursuant to FCC Rule §§ 0.341(c) and 1.115(e)(3).

Respectfully submitted,

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June 5, 1992

CERTIFICATE OF SERVICE

I, Sharon K. Mathis, do hereby certify that copies of the foregoing were sent via first-class, postage prepaid, United States mail, this 5th day of June, 1992, to the following:

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