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March 26, 1992

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MAR 26 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

RE: Westerville Radio Partners
BPH-911230MF
Channel 280A
Westerville, Ohio

RECEIVED
MAR 27 1992
FM EXAMINERS

MAR 27 11 21 AM '92

Dear Ms. Searcy:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and four (4) copies of its petition to deny and dismiss the application of Westerville Radio Partners.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

MAUPIN TAYLOR ELLIS & ADAMS, P.C.

RECEIVED

MAR 26 1992

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

Federal Communications Commission
Office of the Secretary

In Re Application of:)
WESTERVILLE RADIO PARTNERS)
Application for Construction)
Permit for a new FM station,)
Channel 280A, Westerville,)
Ohio)

File No. BPH-911230MF

TO: Chief, Audio Services
Division

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PETITION TO DENY AND DISMISS THE APPLICATION
OF WESTERVILLE RADIO PARTNERS

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 73.3584(a) of the Commission's Rules, hereby submits this petition to deny and dismiss the application of Westerville Radio Partners ("WRP"). This petition is timely filed pursuant to Public Notice, Report No. NA-156, released February 21, 1992, establishing a deadline of March 26, 1992, to file petitions to deny in this proceeding. ORA requests that the application of WRP be denied and dismissed because its proposed tower site is short-spaced to an existing station and because there are other qualified applicants in this proceeding with fully-spaced and technically suitable tower sites. In support of its petition, ORA submits the following comments.

WRP, in its application as initially filed, at Section V-B, p. 3, item 13(a), claims to be in compliance with the minimum spacing requirements of Section 73.207. It proposes to

use the tower site of former Station WBBY-FM. This tower is located 106.16 km. from Station WTTT-FM, Channel 279B, Tiffin, Ohio. Under Section 73.207, a spacing of 113 km. is required. Thus, WRP is short-spaced by 6.84 km.

Not only does WRP fail to seek a waiver of Section 73.207 in its application as initially filed, but also fails to invoke the provisions of Section 73.213. This failure to request a waiver requires denial and dismissal of its application. Black Hills Christian Communications, Inc., 6 FCC Rcd. 500, 501, n. 3 (MMB 1991).

ORA and another applicant in this proceeding, Westerville Broadcasting Company, Limited Partnership, are fully spaced to all stations and pending applications.¹ Under long-established Commission policy in comparative hearings, when an applicant is short-spaced and at least one other applicant in the proceeding is fully-spaced and no question is raised as to the availability or technical suitability of the fully-spaced site, the short-spaced applicant must be denied. That applicant will not be designated for hearing and will be immediately dismissed from the proceeding. Madalina Broadcasting, Inc., 6 FCC Rcd. 2508, 2509, paras. 3-5 (MMB 1991); Valley Radio, 5 FCC Rcd. 4875, 4876, para. 5 (MMB 1990); Donavan Burke, 104 FCC 2d 843 (1986). See also, Megamedia, 67 FCC2d 1527 (1978); Clearlake

¹The proposed tower site for ORA and Westerville Broadcasting Company is located 164.7 km from Station WPAY-FM, Portsmouth, Ohio. A spacing of 165 km. is required. However, under Section 73.208(c)(8), this distance rounds to 165 km. Thus, under Commission policy, there is no short-spacing.

Broadcasting Co., 47 Fed. Reg. 47931 (1982); North Texas Media, Inc. v. FCC, 778 F.2d 28, 34, n. 32 (D.C. Cir. 1985). Accordingly, the application of WRP must be denied and dismissed.

On March 10, 1992, WRP filed an amendment to make certain changes and to correct various deficiencies in its application as initially filed. However, that amendment was late-filed and cannot be accepted for comparative purposes, or to correct any acceptability defects under the Commission's "hard look" policy. Black Hills Christian Communications, Inc., supra. Pursuant to Section 73.3522(a)(6), FM broadcast applications may be amended as a matter of right only for a period of thirty (30) days following the Commission's issuance of a public notice announcing the acceptance of the application for tender. That public notice was on February 6, 1992. See, Report No. 15189. Thus, the 30th day and deadline for filing any amendments was Monday, March 9, 1992. See, Section 1.4(b).

Because the March 10, 1992, amendment is late-filed and cannot be considered, WRP's application if not dismissed could only be evaluated as initially filed. Therein, it proposed omnidirectional operations with 2.7 kw. Although such operations would not cause interference to Station WTTT-FM, this would not justify the proposed short-spacing. Lack of interference is not the sole rationale for the minimum spacing requirements of Section 73.207. North Texas Media, Inc. v. FCC, supra, at 33-34, n. 27. These rules are designed to allow licensees flexibility

and lee-way to subsequently improve their facilities. Supra, at 31.

Applicants, such as WRP, must meet the minimum spacing requirements of Section 73.207 with respect to all facilities and allotments at the time of filing their application. In MM Docket No. 88-375, 6 FCC Rcd. 3417, 3418, n. 7 (1991), the Commission stated as follows:

"...we wish to clarify our policy regarding applications for construction permit filed to implement allotments resulting from petitions for rulemaking to amend the Table of FM Allotments filed prior to October 2, 1989. Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment."

Thus, the only exception to this Commission policy are applications for facilities which were short-spaced at the time the allotment in question was made. At the time that the Channel 280A allotment was made to Westerville, there was no short-spacing to Station WTTT-FM. These stations were fully-spaced to each other under the rules existing at the time of allotment.

Even if WRP's March 10, 1992, amendment was accepted, its proposed use of a directional antenna under Section 73.215

would not justify the short-spacing of Channel 280A to WTTT-FM.

limited suitability. To hold otherwise, would effectively repeal Section 73.207 and would allow tower sites to be placed anywhere so long as no actual interference is caused.

Section 73.215 does not eliminate short-spacing, or render it legally irrelevant. This provision only allows short-

--- sites in limited situations and only if consistent

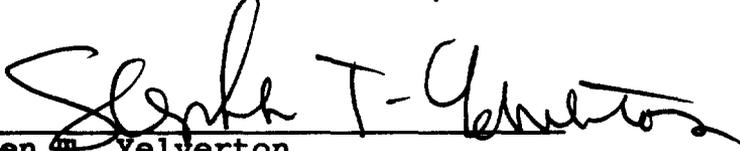
A review of WRP's application indicates that the maps contain no such delineation of the legal boundaries of Westerville. A map showing the proposed 70 dBu contour indicates that this contour may not cover all of Westerville, which is a large sprawling community and not a mere hamlet. Accordingly, dismissal of WRP's application is required on this basis alone. Karen S. Klehamer, 5 FCC Rcd. 2554, para. 5 (MMB 1990); Susan Beauchamp, 6 FCC Rcd. 490, para. 5 (MMB 1991), application dismissed where only the name of the community of license appeared on the map and the legal boundaries were not shown. Although WRP submitted the required map in its amendment filed on March 10, 1992, it cannot be considered because of the late-filing. Black Hills Christian Communications, Inc., supra.

If the WRP application is not denied and dismissed, a diversification demerit must be assessed against it. In the application, as initially filed, WRP's 60% principal did not propose to divest her broadcast interests. Although such divestiture was proposed in the March 10, 1992, amendment, it cannot be credited because of the late-filing. Black Hills Christian Communications, Inc., supra.

WHEREFORE, in view of the foregoing, ORA requests that the Commission deny and dismiss the application of WRP.

Respectfully submitted,

MAUPIN TAYLOR ELLIS & ADAMS, P.C.

BY: 

Stephen F. Yelverton

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Associates, Inc.

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March 26, 1992

12269.002

CERTIFICATE OF SERVICE

I, Kate D. Shawcross, a secretary in the law offices of Maupin Taylor Ellis & Adams, P.C., do hereby certify that on this 26th day of March, 1992, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Petition to Deny and Dismiss the Application of Westerville Radio Partners" to the following:

Dennis Williams, Chief*
FM Branch
Room 332
Federal Communications Commission
Washington, D.C. 20554

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Kate D. Shawcross
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Hand Delivery*
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