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April 20, 1992

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Federal Communications Commission
Office of the Secretary

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EXAMINERS

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

RE: Shellee F. Davis
BPH-911231MA
Channel 280A
Westerville, Ohio

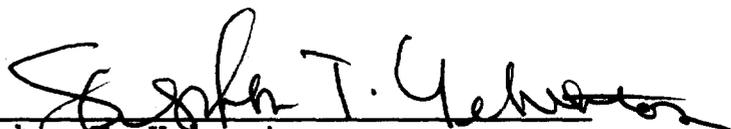
Dear Ms. Searcy:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and four (4) copies of its "Reply to Opposition of Shellee F. Davis."

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

Respectfully submitted,

MAUPIN TAYLOR ELLIS & ADAMS, P.C.

BY: 
Stephen T. Yelverton
Attorneys for Ohio Radio Associates, Inc.

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APR 20 1992

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

Federal Communications Commission
Office of the Secretary

In Re Application of:)
)
 SHELLEE F. DAVIS) File No. BPH-911231MA
)
)
 Application for Construction)
 Permit for a new FM station,)
 Channel 280A, Westerville,)
 Ohio)

TO: Chief, Audio Services
 Division

REPLY TO OPPOSITION OF SHELLEE F. DAVIS

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 73.3584(b) of the Commission's Rules, hereby submits this "Reply to Opposition of Shellee F. Davis" ("Davis"). On March 26, 1992, ORA filed a petition to deny and dismiss the application of Davis. On April 8, 1992, she filed an opposition thereto. In reply to the opposition, ORA submits the following comments.

Davis, in her opposition, concedes that she is short-spaced to Station WTTT-FM, Channel 279B, Tiffin, Ohio. Davis further concedes that Commission policy mandates the dismissal of short-spaced applications in a comparative hearing if another applicant proposes a fully-spaced tower site which is available and technically suitable. 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 FCC2d 843 (1986). See also, Megamedia, 67 FCC2d 1527 (1978); Clearlake

Broadcasting Co., 47 Fed. Reg. 47931 (1982); North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (D.C. Cir. 1985).

Davis nevertheless contends that this policy of dismissal would not apply if a short-spaced applicant requests processing under Section 73.213. However, she offers no support for this novel proposition. Moreover, no public interest rationale would support such a special exception to Commission policy. Even if one of several competing applicants in a comparative hearing could invoke Section 73.213, why should that applicant be considered if other applicants propose a fully-spaced tower site which would eliminate a "grandfathered" short-spacing? Commission policy strongly disfavors short-spacing. Why should a short-spaced location be perpetuated if it can be eliminated?

Davis ignores MM Docket No. 88-375, 4 FCC Rcd. 6375

(1202)

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 WTTF-FM. These stations were fully-spaced to each other under the rules existing at the time of allotment. Accordingly, even if qualifying under Section 73.213, Davis must nevertheless meet the minimum spacing requirements of Section 73.207 with respect to Station WTTF-FM.

Even if Section 73.213 could be invoked by Davis, she failed to comply with the explicit provisions of Section 73.213(c)(2). This provision requires an applicant, which proposes operations greater than 3,000 watts at 100 meters, to obtain the consent of the station which is short-spaced. Davis proposes directional operations at up to 6,000 watts. She failed to obtain the consent of Station WTTF-FM.

Davis contends that she need not comply with Section 73.213(c)(2) because, although she will be operating at 6,000 watts, her operations will be directional at 3,000 watts towards Station WTTF-FM. Thus, she contends that her proposal comes under the provisions of Section 73.213(c)(1). However, Davis' clever attempt to evade the clear requirements of Section 73.213(c)(2) must be rejected. Section 73.213(c)(1), by its own terms, applies only to stations which proposed to operate "at no more than 3,000 watts." Davis will operate directionally at

6,000 watts. The provision which she seeks to invoke does not state "at no more than 3,000 watts in the direction of the short-spaced station," as suggested by Davis. Therefore, Section 73.213(c)(1) applies only to stations which will operate at no more than 3,000 watts.

Davis contends that, because there would be no signal contour overlap with Station WTTT-FM, the consent of that station is not required. However, this contention must be rejected. The purpose of the minimum spacing requirements of Section 73.207 is not solely to prevent contour overlap, but to also provide a sufficient buffer zone to allow a station the opportunity to modify and improve its facilities. North Texas Media, Inc. v. FCC, supra, at 33-34, n. 27. Thus, the consent of Station WTTT-FM is required for Davis to intrude into that station's buffer zone, regardless that there would not be a signal contour overlap because of use of a directional antenna. Indeed, Davis' proposed use of a directional antenna would require processing under Section 73.215. Her explicit rejection of Section 73.215 processing alone requires denial and dismissal of her application.

Davis' reliance on Revision of FM Rules, 3 RR2d 1571 (1964) and Northeast Broadcasting, Inc., 8 RR2d 1249 (1966) is misplaced. These decisions relate to Section 73.213 before it was substantially revised in MM Docket No. 88-375, 4 FCC Rcd. 6375 (1989).

Davis' reliance on Joseph Bahr, 52 RR2d 147 (1982) is also misplaced. This decision is in regard to a request to

delete a short-spaced allocation. ORA is not requesting deletion of the Westerville allocation. Rather, it is contending that the applicants in this proceeding should have specified a fully-spaced tower site, which is available and technically suitable,¹ in order to avoid a short-spacing to Station WTTF-FM.

Davis notes that she relied on the advice of the Commission's staff as to filing under Section 73.213(c)(1). However, it is well-established policy that an applicant cannot rely on the informal advice of the Commission's staff. This disclosure by Davis is troublesome because it raises the specter of a possible ex parte issue. See, Sections 1.1202 and 1.1208(b)(1). The Commission's staff should not be advising one of many competing applicants in a comparative proceeding on how to evade the Commission's strict prohibition on short-spacing.²

Commission policy is clear that in a comparative hearing any short-spaced applicant will be immediately dismissed with prejudice if another applicant proposes a fully-spaced tower site which is available and technically suitable. North Texas Media, Inc. v. FCC, supra. This well-established policy has never been overruled by the Commission. When Section 73.213 was adopted and later revised, the Commission did not modify its existing policy as to short-spaced applications in comparative

¹Although the fully-spaced tower site will provide only about 96% city-grade coverage to Westerville, this is substantial compliance and well-above the 80% threshold for waiver of Section 73.215.

²It is not known if Davis accurately or fully informed the staff of the facts as to the matters in which she was seeking legal advice.

hearings, or create a special exception under Section 72.213 for applications with "grandfathered" tower sites. The staff does not have delegated authority to ignore or reject Commission policy. If the staff disagrees with Commission policy, it should certify the matter to the Commission for their review.

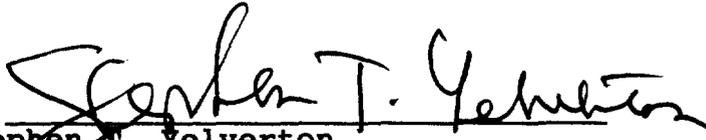
Davis claims that an amendment to her application was timely filed on March 9, 1992. However, the amendment was initially stamped March 10, 1992, and the public notice initially stated that it was filed on March 10, 1992. See, Attachments 1 & 2. It appears that Davis convinced a member of the Commission's staff to change the date stamp to March 9, 1992. Davis should have fully explained the circumstances of how this occurred. Again, the specter of a possible ex parte issue is raised. Date stamps on time critical comparative application filings should

proceeding and the circumstances of how a time critical date stamp on an amendment was changed by the Commission's staff.

Respectfully submitted,

MAUPIN TAYLOR ELLIS & ADAMS, P.C.

BY:


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Telephone: (202) 429-8910

April 20, 1992
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FM BROADCAST STATION APPLICATIONS AMENDMENT RECEIVED

OH BPH	-911230MF	NEW 103.9MHZ	WESTERVILLE RADIO PARTNERS WESTERVILLE , OH	LEGAL AND ENGINEERING AMENDMENT (AMENDMENT # 920310ME)
OH BPH	-911231MA	NEW 103.9MHZ	SHELLEE F. DAVIS WESTERVILLE , OH	LEGAL AMENDMENT (AMENDMENT # 920310MC)
OH BPH	-911231MC	NEW 103.9MHZ	OHIO RADIO ASSOCIATES, INC. WESTERVILLE , OH	LEGAL & ENGINEERING AMENDMENT (FILE NO. 920309MF)
TN BPH	-920109MA	NEW 103.1MHZ	DARRELL BRYAN TUSCULUM , TN	FAA AMENDMENT (FILE NO. 920309ME)
TX BPH	-901221IA	KNNC 107.7MHZ	REES-SLAYMAKER RADIO P/SHIP I, L.P. GEORGETOWN , TX	LEGAL AMENDMENT (FILE NO. 920305IE)
UT BPH	-911002IF	KCDH 92.7MHZ	CHARLES D. HALL NEPHI , UT	ENGINEERING AMENDMENT (FILE NO. 920306IA)

COMMERCIAL TV BROADCAST STATION APPLICATIONS ACCEPTED FOR FILING

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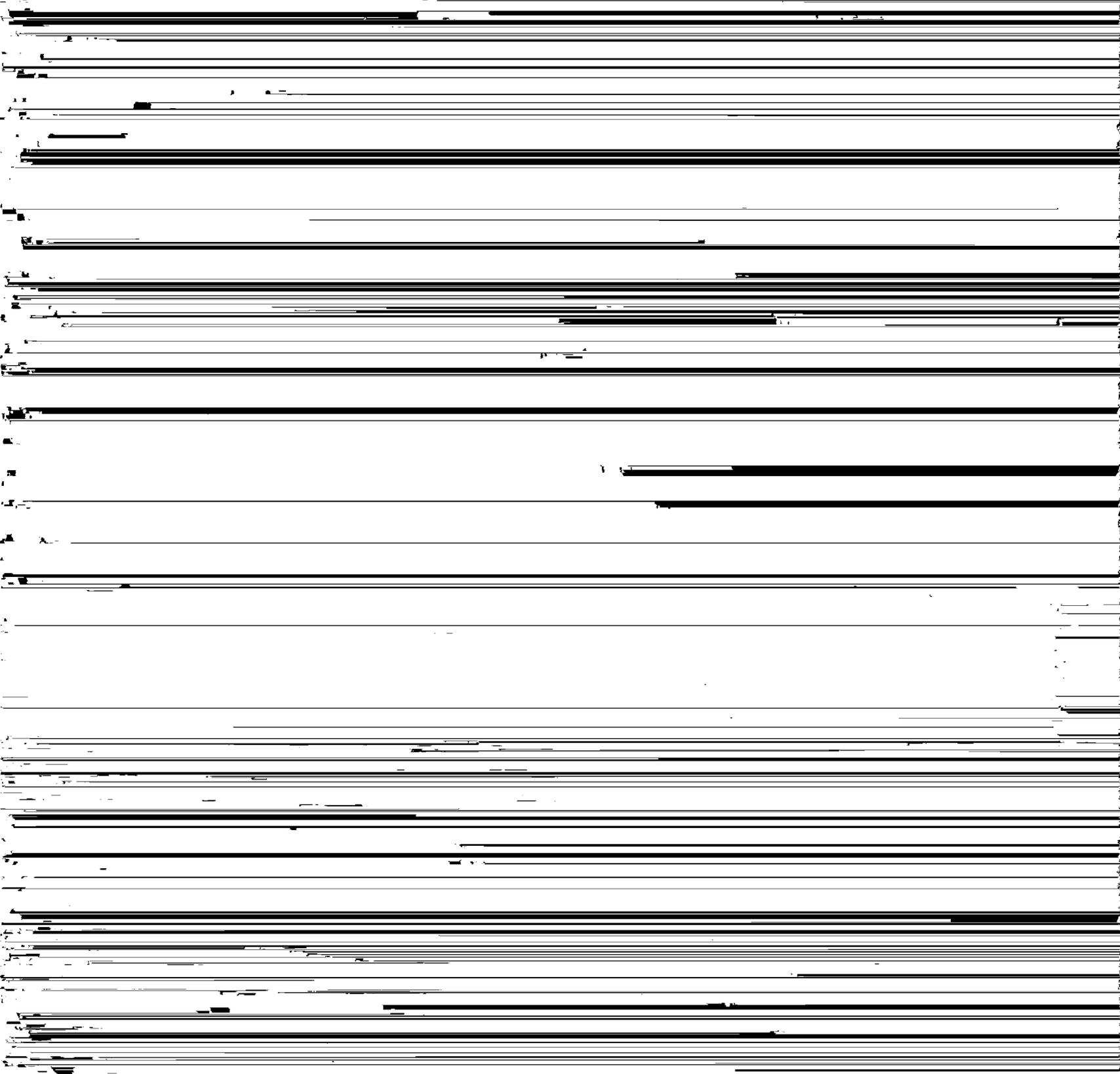
Federal Communications Commission
Office of the Secretary

WTC
THIS DATE
CANCELLED
F.C.C.
Office of the Secretary
OFFICE OF THE SECRETARY

Attachment 2

AMENDMENT

of Shelley F. Davis to



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 20th day of April, 1992, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of Shellee F. Davis" to the following:

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

Dan J. Alpert, Esq.
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Shellee F. Davis



Kate D. Shawcross

Hand Delivery*

pmh/sty1/sty21