

Original

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MAR 26 1992

Federal Communications Commission  
Office of the Secretary

March 26, 1992

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

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

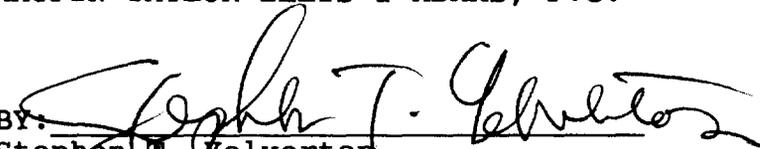
Dear Ms. Searcy:

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

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MAR 26 1992

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

Federal Communications Commission  
Office of the Secretary

In Re Application of: )  
 )  
SHELLEE F. DAVIS )  
 )  
Application for Construction )  
Permit for a new FM station, )  
Channel 280A, Westerville, )  
Ohio )

File No. BPH-911231MA

TO: Chief, Audio Services  
Division

PETITION TO DENY AND DISMISS THE APPLICATION 5  
OF SHELLEE F. DAVIS

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 Shellee F. Davis ("Davis"). 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 Davis be denied and dismissed because her 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.

Davis, at Section V-B, p. 3, item 13(a), concedes that her application is short-spaced to Station WTTT-FM, Channel 279B, Tiffin, Ohio. Under Section 73.207, a minimum spacing of 113 km.

is required. Davis proposes use of the former Station WBBY-FM tower site which is located 106.16 km. from Station WTTF-FM. Thus, the short-spacing is 6.84 km.

ORA and another applicant in this proceeding, Westerville Broadcasting Company, Limited Partnership, are fully-spaced to all stations and pending applications,<sup>1</sup> including Station WTTF-FM. 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 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, n. 32 (D.C. Cir. 1985). Accordingly, the application of Davis must be denied and dismissed.

In her application, Davis does not request a waiver of Section 73.207. Rather, she contends that the Channel 280A allocation is "grandfathered" under Section 73.213 and thus meets

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<sup>1</sup>The 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.

the spacing requirements of that section. However, Davis fundamentally misreads Section 73.213. That provision by its own terms applies only to existing stations and not to new ones.

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.

Even if Davis, as an applicant for a construction permit for a new station, did qualify as a "grandfathered" existing station under Section 73.213, she would still fail to justify her proposed power of 6.0 kw. ERP at 100 meters HAAT. Under Section 73.213(a)(2) applications for authorization of

With a patently inadequate showing under the requirements of Section 73.213(c)(2), Davis' short-spacing could otherwise only be justified under Section 73.215, which provides for contour protection to the affected station. However, she failed to request processing of her application under this provision. As the Commission stated in MM Docket No. 87-121, 4 FCC Rcd. 1681, 1688, para. 50 (1989), it would not presume that an applicant desired processing under the contour protection rules, Section 73.215, unless an explicit election was made. If there is no election, the Commission would presume that the applicant only intended to have its application processed under the minimum spacing rules.

If Davis' application is processed under the minimum spacing rules, Section 73.207, a waiver request would be required. However, Davis requested no waiver of Section 73.207. If a waiver was requested, Davis would have been required to plead with particularity the facts and circumstances warranting a waiver. Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 644 (D.C. Cir. 1968). Davis could not justify a waiver of the short-spacing rules as in the public interest, if there are

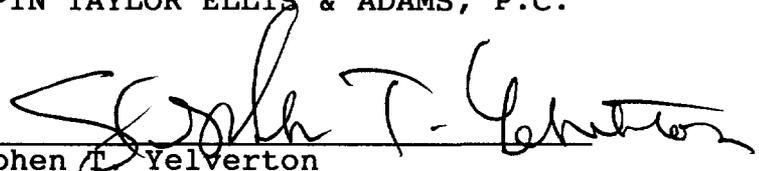
only be utilized where fully-spaced tower sites are unavailable

is not a public interest justification, only a private economic interest of Davis. Accordingly, the application of Davis must be

~~denied and dismissed~~

Respectfully submitted,

MAUPIN TAYLOR ELLIS & ADAMS, P.C.

BY: 

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March 26, 1992

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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 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  
Kate D. Shawcross  
hs S-T-4

Hand Delivery\*

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