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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

APR - 8 1992

Federal Communications Commission
Office of the Secretary

In re Application of)
)
SHELLEE F. DAVIS)
)
For a New FM Construction)
Permit for Channel 280A,)
Westerville, Ohio)

File No. BPH-911231MA

File

To: Chief, Audio Services Division

OPPOSITION OF PETITION TO DENY

Shellee F. Davis ("Davis"), by her attorneys, hereby submits her opposition to the "Petition to Deny and Dismiss the Application of Shellee F. Davis" ("Petition"), filed by Ohio Radio Associates ("ORA") on March 26, 1992. With respect thereto, the following is stated:

1. Davis filed her application on December 31, 1991, specifying a transmitter site 40° 14' 04" N, 82° 50' 20" W. Processing pursuant to Section 73.213 was specifically requested. Davis' Engineering Statement stated:

The site proposed for use by Shellee F. Davis (Davis) meets the separation requirements of Section 73.207 of the FCC Rules with respect to all stations except WTTF-FM (Channel 279B), Tiffin, Ohio. The reference point for the Westerville allotment presently contained in the FCC's FM Engineering Database (the former WBBY-FM site) was fully spaced to WTTF-FM as a 3 kilowatt facility, but did not meet the 6 kilowatt spacing requirements of Section 73.207 with respect to WTTF-FM. Because this allotment was proposed prior to October 2, 1989, it is grandfathered as a 3 kW facility under Section 73.213 of the FCC Rules. The specified Davis site (the former WBBY-FM site) meets the separation requirements of Section 73.213 with respect to WTTF-FM. (The appropriateness of the treatment of this proposal in this matter was confirmed through informal discussions held with the FCC staff.)

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FM EXAMINERS

Accordingly, a directional antenna is being propose is being specified for this application. It will be mounted at 100 meters above average terrain. An ERP of 6 kW is specified in all directions except those toward any point on the WTTF-FM 54 dBU contour. where the

3. ORA's Petition must be denied. As seen above, Davis has requested processing under Section 73.213 of the Commission's Rules. Under Section 73.207, maintaining minimum spacing separations is required "except for assignments made pursuant to §§ 73.213 or 73.215." 47 C.F.R. § 73.207. Therefore, with respect to ORA's citation of precedent concerning the necessity to establish the unavailability of other non-short-spaced transmitter sites, that precedent applies only to processing under Section 73.207 (as in certain circumstances under Section

5. Davis' application therefore qualifies for processing under this rule provision. The reference point for Channel Westerville, Ohio is $40^{\circ} 14' 04''$ N, $82^{\circ} 50' 20''$ W. Attachment 2. Moreover, Channel 280A was allotted on January 10, 1968, prior to October 1, 1989. Report and Order, 11 F.C.C.2d 571 (1968). Under the old rules, the reference point was fully spaced with WTTF-FM. Attachment 2. By operation of the new 6 kW spacing rules, the reference point has become short spaced. Id. Thus, pursuant to the provisions of Section 73.213(c), an application for the allotment may be authorized "in accordance with (c)(1) or (c)(2) of [the Rule] . . . with respect to such short-spacing." 47 C.F.R. § 73.213(c).

6. Moreover, Davis satisfies the provisions and policy for processing under Section (c)(1) of the Rule. Contrary to ORA, applicants seeking processing under Section 73.213(c)(1) are not required to maintain an "omnidirectional" operation. Cf. Petition at 4 n.4. ORA cites no authority for this unique proposition, and indeed, none exists. Rather, under the long standing policy underlying Section 73.213(c)(1), the Commission will allow applicants to propose utilization of short-spaced transmitter sites as long as the radiation in the short spaced direction is not increased. This policy was explicitly embodied in the Commission's Rules when it first adopted Section 73.213(c) (Revision of FM Rules, 3 R.R.2d 1571 (1964)), when the Commission first adopted its grandfathering rules. It thereby permitted

short-spacing stations to continue to operate at their existing locations, and to apply for changed facilities if they proposed operations with reduced effective radiated power in order to protect short-spaced stations. 47 C.F.R. § 72.213(c) (1964). Moreover, it specifically allowed for other-than omnidirectional operations to be used to effectuate this policy. As it stated in adopting the rule:

If a station wishes to operate with greater ERP than that would be permitted for its mileage bracket, it may do so (up to the maximum for its class) by directionalizing so as to reduce radiation in the critical direction to which would be permitted under the Table.

Revision of FM Rules, 3 R.R.2d at 1581. Similarly, as the Commission stated in Amendment to Part 73 of the Rules, 6 FCC Rcd 3417, 3423 (1991), it remains Commission policy to allow applicants to employ directional antennas to limit their effective radiated powers in the direction of short-spaced stations to 3 kW levels. In this way, the applicant continues to operate at parameters identical to a 3 kW Class A station in the direction of the short-spaced station, but it allows the applicant to propose operation to the full power levels otherwise permitted by the station's class in other directions. Id. at 3423 ¶ 40. This allows for a more full utilization of the allotment. "Consent" of the short-spaced station such as WTTF-FM is not required or needed, since 3 kW protected operations will be maintained in the direction of WTTF-FM. Cf. Petition at 4. Also, although the Commission's statement of policy speaks in

terms of "licensees," ORA states no reason why the same efficient use of the spectrum should not be available to the public by new permit applicants, and ORA states no precedent whereby the Commission has stated that it would in any way restrict use of its policy to existing stations. Cf. Petition at 3-4. In fact, the Commission specifically declined to adopt such a restrictive reading of its grandfathering rule in Northeast Broadcasting, Inc., 8 R.R.2d 1249 (1966).

7. The analysis that Davis is requesting be applied here is essentially identical to that applied by the Commission in Joseph Bahr, 52 R.R.2d 147 (1982). In Bahr, as here, applicants were applying for a newly-vacant allotment. The allotment reference point was grandfathered, insofar as under the then-existing spacing rules it was short-spaced to two existing stations. The short-spaced stations requested that the allotment be deleted. Id. at 148. The Commission denied the request, stating:

As to the future use of the channel is

Id. at 149. Accord, Northeast Broadcasting, Inc., 8 R.R.2d 1249 (1966) (the public interest considerations that led to the retention of a channel that had been vacated also provides justification for applying 73.213, thus permitting the applicant to render more effective service to the area). The same sort of analysis is being applied here, and the same result should be reached.

8. The situation being posed in this case involves a newly vacant allotment. Thus, although it is a grandfathered allotment (since the allotment was first requested prior to October 3, 1989, when the "old" spacing rules were in effect) with a grandfathered short-spaced reference point, it nevertheless is tantamount in many respects to a new allotment, since the allotment was only just recently reopened.^{1/} Report No. CF-22 (Nov. 25, 1991). Thus, application of the Rule is fully consistent even with restriction noted in Amendment of Part 73 of the Rules, 6 FCC Rcd at 3418 n.7. Davis' application thus is consistent with the Commission's policies, since it provides for maintaining use of an effective radiated power of only 3 kW in the direction of WTTF-FM, Tifton, Ohio (in compliance with Section 73.213(c)(1)), while proposing a more efficient use of the spectrum in all other directions by proposing full 6 kW

^{1/} As seen in Attachment 5, this allotment could not have made as a 6 kW allotment, since there are no fully-spaced sites at which 100% city-grade coverage could be provided. Attachment 5. This, this has to be considered as a "3 kW allotment" which is entitled to use Section 73.213(c)(1).

operations in those directions. Crediting this analysis allows several public benefits. First, unlike ORA's application, Davis will serve 100% of its community of license, while ORA is proposing service to only 94.5% of the community. Second, the 73.213(c)(1) analysis allows Davis to provide service to 630,160 persons, while ORA intends only to provide service to 582,530 persons. Finally, the 73.213(c)(1) analysis allows Davis to make use of an existing tower, which is environmentally and aeronautically preferred over the construction of a new tower.

9. Finally, ORA's claim that Davis' recent amendment was not timely filed is incorrect. Davis' amendment was timely filed on March 9, 1992, on the deadline date for amendments as a matter of right (Attachment 3), and the Commission's records recently were corrected to reflect that fact. Attachment 4. Therefore, Davis is fully entitled to the comparative benefits flowing from her amendment. Cf. Petition at 7.

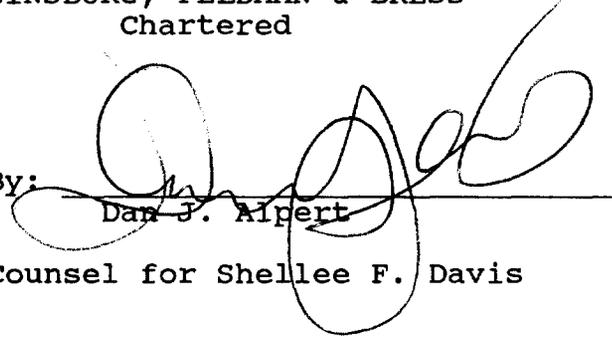
10. Davis' application remains fully in accord with the Commission's Rules. As noted in Davis' application, the analysis applied in this application was utilized after specific consultation with Commission staff to ensure compliance with the Commission rules and processing policies. Even if it were determined that the application could be not processed under Section 73.213 of the Rules due to a post hoc change in processing policy or interpretation of the rules, this should not require the dismissal of Davis' application. Under current

policy Davis should be permitted to file a curative amendment. See, e.g., Frank K. Spain, 6 FCC Rcd 6892 (Chief, Audio Services Div. 1991). Thus, in no event does ORA's Petition warrant the dismissal of Davis' application. It is noted that ORA has filed similar petitions against nearly all of the applicants in this proceeding. Also, ORA has submitted no integration proposal in this proceeding. ORA apparently recognizes that its only chance of prevailing in this proceeding is to seek the outright denial of each of the competing applicants. As seen above, however, based upon overwhelming Commission precedent and policy, and well as utilization of pure common sense, ORA's attempts to restrict applicants' ability to provide service to the public superior to that of the deleted WBBY-FM facility must be denied.

WHEREFORE, it is respectfully requested that the "Petition to Deny and Dismiss the Application of Shellee F. Davis" be denied.

Respectfully submitted

GINSBURG, FELDMAN & BRESS
Chartered

By: 

~~Dan J. Alpert~~

Counsel for Shellee F. Davis

Ginsburg, Feldman & Bress,
Chartered
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(202) 637-9158

April 8, 1992

ATTACHMENT 1

Statement B

ALLOCATION CONSIDERATIONS

prepared for
Shellee F. Davis
Westerville, Ohio

Ch 280A (103.9 MHz) 6.0 KW-DA (H&V) 100 m

The Westerville, Ohio Class A allocation was in existence prior to the revision of the domestic rules wherein 6 kW operation would be permitted for Class A assignments. This allotment was notified to Canada (as a B1 facility) and ultimately accepted.

The site proposed for use by Shellee F. Davis (Davis) meets the separation requirements of Section 73.207 of the FCC Rules with respect to all stations except WTTF-FM (Channel 279B), Tiffin, Ohio. The reference point for the Westerville allotment presently contained in the FCC's FM Engineering Database (the former WBBY-FM site) was fully spaced to WTTF-FM as a 3 kilowatt facility, but did not meet the 6 kilowatt spacing requirements of Section 73.207 with respect to WTTF-FM. Because this allotment was proposed prior to October 2, 1989, it is grandfathered as a 3 kW facility under Section 73.213 of the FCC Rules. The specified Davis site (the former WBBY-FM site) meets the separation requirements of Section 73.213 with respect to WTTF-FM. (The appropriateness of the treatment of this proposal in this manner was confirmed through informal discussions held with the FCC staff.)

Accordingly, a directional antenna is being propose is being specified for this application. It will be mounted at 100 meters above average terrain. An ERP of 6 kW is specified in all directions except those toward any point on the WTTF-FM 54 dBu contour, where the effective radiated power is limited to 3 kW. Specifically, for the proposed station, the directional antenna envelope pattern of Figure 2 was employed, using the bearings and radiation values shown in Table 1 of this application. All contours were computed using NGDC 30 second terrain data at 10° azimuths over the spans of interest, except where noted at finer (5°) intervals. All contours were computed using the F(50,50) propagation curves; Table 2 contains pertinent elevation and contour data.

ATTACHMENT 2

*** H 10 ***

12-MAR-92

FM Engineering Data Base -- Sorted by Country, State, City, Channel
Federal Communications Commission -- Mass Media Bureau

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*** Notice *** Unofficial Secondary Source -- See Warning and Disclaimer in Section 0.434 of FCC Rules *** Notice ***

US OH Westerville WOBN LIC 268D 101.5 MHz BLED901105KA
 Owner: Otterbein College ERP(kW) Max(kW) HAAT(m) RCAMSL(m)
 N 40 07 28 W 82 56 15 Horiz: .028 12 292 No Beam Tilt
 Non-DA Vert: Max HAAT: 52 m
 Int. Status: OPER Near Can border 73.215 does not apply Last Updated on 910919 at 11:53:34
 Gen. Comment: Commercial channel operating educational

US OH Westerville VACANT 280A 103.9 MHz Window Open: 911125
 Owner: ERP(kW) Max(kW) HAAT(m) RCAMSL(m)
 N 40 14 04 W 82 50 20 Window Close: 911230 Horiz: No Beam Tilt
 Non-DA Vert: Max HAAT: m
 Int. Status: VACANT Near Can border 73.215 does not apply Last Updated on 920220 at 14:57:49
 Int. Comment: Proposed to Canada as B1 on 900416
 Int. Comment: Accepted by Canada as B1 on 910305

US OH Westerville NEW APP 280A 103.9 MHz BPH911231MB
 Owner: Westerville Broadcasting Company Ltd Partnership ERP(kW) Max(kW) HAAT(m) RCAMSL(m)
 N 40 11 33 W 82 45 07 Cutoff: 920326 Horiz: 6.0 100 430 No Beam Tilt
 Non-DA Vert: 6.0 100 430 Max HAAT: 143 m
 Int. Status: PROPN Near Can border 73.215 does not apply Last Updated on 920304 at 11:33:59
 Int. Comment: Erp exceeds the maximum allowed under international agreements

US OH Westerville NEW APP 280A 103.9 MHz BPH911230ME
 Owner: John C. Landy ERP(kW) Max(kW) HAAT(m) RCAMSL(m)
 N 40 14 04 W 82 50 20 Cutoff: 920326 Horiz: 2.55 109 411 No Beam Tilt
 Non-DA Vert: 2.55 109 411 Max HAAT: 142 m
 Int. Status: PROPN Near Can border 73.215 does not apply Last Updated on 920304 at 11:31:40

US OH Westerville NEW APP 280A 103.9 MHz BPH911230MA
 Owner: David A. Ringer ERP(kW) Max(kW) HAAT(m) RCAMSL(m)
 N 40 14 04 W 82 50 20 Cutoff: 920326 Horiz: 4.3 118 430 No Beam Tilt
 DA Make: ODD Model: ODD911230MA Rotate: 0 Vert: 4.3 118 430 Max HAAT: 161 m
 Int. Status: PROPN Near Can border 73.215 applies Last Updated on 920304 at 11:28:35
 Int. Comment: Erp exceeds the maximum allowed under international agreements

Directional Antenna Tabulations for Make:ODD Model:ODD911230MA

Az.	Field														
0	0.706	10	0.790	20	0.994	30	1.000	40	1.000	50	1.000	60	1.000	70	1.000
90	1.000	100	1.000	110	1.000	120	1.000	130	1.000	140	1.000	150	1.000	160	1.000
180	1.000	190	1.000	200	1.000	210	1.000	220	1.000	230	1.000	240	1.000	250	1.000
270	1.000	280	1.000	290	1.000	300	0.889	310	0.706	320	0.706	330	0.706	340	0.706

Special Azimuths:

Az.	Field	Az.	Field	Az.	Field	Az.	Field	Az.	Field	Az.	Field	Az.	Field
5.0	0.706	295.0	0.997										

*** Notice *** Unofficial Secondary Source -- See Warning and Disclaimer in Section 0.434 of FCC Rules *** Notice ***

*** I 10 ***

279

12-MAR-92

US OK Beth
Owne
N 35
Non-
Int.
Gen

US OK Beth
Owne
N 35
Non-
Int.

US OK Bixb
Owne
N 35
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Rule

US OK Bixb
Owne
N 35
Non-
Int.
Gen

US OK Bris
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N 35
Non-
Int.
Ger

US OK Bris
Owne
N 35
Non-
Int.

US OK Bris
Owne
N 35
Non-
Int.

**

ATTACHMENT 3

LAW OFFICES
GINSBURG, FELDMAN AND BRESS
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1250 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
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CORRESPONDENT OFFICE
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DAN J. ALPERT
ASSOCIATE
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March 9, 1992

TELECOPIER (202) 637-9195
TELEX 4938614

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20036

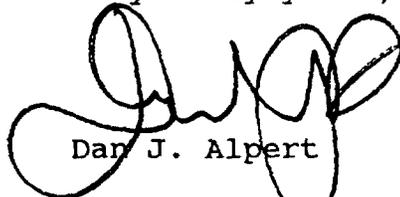
Re: File No. BPH-911231MA
Westerville, Ohio

Dear Ms. Searcy:

Transmitted herewith, on behalf of Shellee F. Davis is an amendment to the above-referenced application. This application was accepted for tender by Report No. 15189. Therefore, this amendment is being filed as of right pursuant to Section 73.3522(a)(6) of the Commission's Rules.

If there are any questions, please contact this office.

Very truly yours,



Dan J. Alpert

Counsel for Shellee F. Davis

da071.001

AMENDMENT

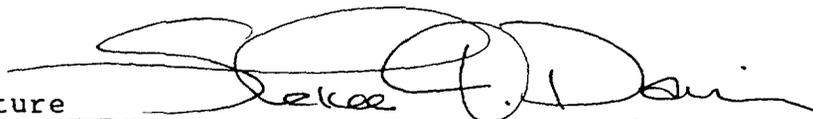
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Federal Communications Commission
Office of the Secretary

Please amend the application of Shellee F. Davis to include the following attached.

Signature



Date

March 7, 1992

INTEGRATION STATEMENT

When Shelle Davis' application is granted, Shelle Davis will serve full-time as General Manager of the station and will work full-time, a minimum of 40 hours per week in that capacity. She will terminate all other paid employment in order to effectuate that commitment.

As General Manager, Ms. Davis' duties will include overseeing and assuming ultimate responsibility for the day to day activities at the station, including sales, on-air, and general office departments. She will also be responsible for overseeing on-air logs and traffic, sales to agency and local accounts, hiring of sales and office staff, and managing the Public File and E.E.O. program, daily on-air newscasts, and commercial production undertaken by the station.

Ms. Davis will seek enhancement credit by virtue of her gender (female), her minority status (African-American decent), her past local area residency adjacent to the community of Westerville (1982-92), her proposed future residency in or adjacent to Westerville, and her past local area civic activities and involvement in the business community.

Shellee Davis' involvement in activities within the proposed service area of the station are as follows:

She has belonged to a national women's civic organization called The Columbus Chapter of Links, Inc. for the past four years. Last year the organization's Project Lead program enabled her to work closely with sixth and seventh graders to help

improve their self-esteem and offer alternatives to promote a more positive life-style. The organization adopted New Johnson Park Middle School and conducted various seminars for eight hours per week for a year. She was chairperson of the vocational education and career options module for a six week period. Also, for two years she is the chairperson of the Arts Committee. Her committee is responsible for the promotion of local artists and exposing the world of art to the minority community.

She had completed Project Diversity, a United Way program to prepare minority men and women to serve as board members. She is currently on the Columbus Speech and Hearing board and the New Salem Baptist Church Business Development Board.

Within the past two years she has become involved in mentoring with two established programs. She was assigned to two young women for one hour or more per month through the Columbus Minority Business Center. Also, through the Women's Network for Entrepreneurial Training she is assigned a protege on a scheduled basis. Informally, she is requested to speak with people interested in starting their own business or who need direction

minor bookkeeping and data entry on our computer. Ms. Davis' intention is to give the student hands on business experience in a business environment. They learn what makes the operation flow, learn the importance of detail which is essential in business, and to make a better judgement about their career direction.

Also, as a BBS project, all the employees donate personal goods and money to one or two needy groups of BBS' choice at Christmas.

Ms. Davis was a 1991 "Columbus Chamber of Commerce Small Business Person of the Year" Finalist; 1991 U.S. Chamber of Commerce Regional Retailer of the Year; 1991 NAACP Honorary Chairperson; 1991 National Urban League Conference Presenter; 1991 Winner of the Ernest and Young, Merrill Lynch & Inc. Magazine "Ohio Entrepreneur of the Year" Award; Winner of the Ohio State University Counsel of Black Students Administration "New Venture Award"; and 1990 Columbus Chamber of Commerce "Minority Business of the Year" award winner. She operated the Number One Xerox regional dealer in 1989, and her operation has been among the top five Xerox dealership nationally from 1988-91.

Some of her other community involvement is as follows:

- o Martin Luther King Campaign Chair for Black Owned Businesses 1991-92
- o News 4 at Sunrise Program Guest 1991
- o Center for New Directions Panelist 1991

- o Member of the United Way Business Development Committee 1991
- o Linden-McKinley High School Presenter 1991
- o Columbus Chamber of Commerce Project Future Mentor 1991
- o Columbus Government Workshop Panelist 1992
- o Ohio Department of Development's Women in

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. Yes No

2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$289,496.00

3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Shellee F. Davis 5518 Moccasin Drive Westerville, Ohio 43081	(614) 899-0350	Applicant	\$50,000.00
Huntington National Bank 41 South High Street Columbus, Ohio 43215	(614) 476-8300	Bank	\$300,000.00

ATTACHMENT 4

2186

FM BROADCAST STATION APPLICATIONS PLEADING

OH BMPH -9201021D WXMJ HOMETOWN BROAD/TING OF MCARTHUR, INC MOD OF CP (BPH-890112MH) TO MAKE CHANGES:
 98.7MHZ MCARTHUR, OH ERP: 6.0 KW (H8V), TL: NW 1/4 OF SW 1/4 OF SECTION 26; T9N;
 R18W; 5.3 MILES SW OF MCARTHUR, VINTON COUNTY OHIO
 INFORMAL OBJECTION FILED 3/11/92.

FM BROADCAST STATION APPLICATIONS PETITION FOR RECONSIDERATION FILED

CA BALH -920109GE KWCD WESTCOM COMMUNICATIONS, INC. VOL AL FROM WESTCOM COMMUNICATIONS, INC. TO R&L BROADCASTERS
 107.1MHZ GROVER CITY, CA INC. FORM 314
 ATTY(ASNR): DAVID TILLOTSON ATTY(ASNE): ROGER METZLER, ESQ
 ASNE ADDRESS: 2589 SUN REEF RD., LAS VEGAS, NV. 89128
 GRANTED WITH CONDITIONS: PETITION FOR RECONSIDERATION
 FILED 3/25/92.

FM BROADCAST STATION APPLICATIONS AMENDMENT RECEIVED

KY BPH -9002141C WMDJ-FM FLOYD COUNTY BROADCASTING CO., INC. LEGAL AMENDMENT (920320IA)
 100.1MHZ ALLEN, KY
 OH BPH -911231MA NEW SHEILLEE F. DAVIS LEGAL AMENDMENT (AMEND. FILE NO. 920309MH)
 103.9MHZ WESTERVILLE, OH

COMMERCIAL TV BROADCAST STATION APPLICATIONS ACCEPTED FOR FILING

FL BPCT -910815KE NEW BEACH TV PROPERTIES, INC. CONSTRUCTION PERMIT FOR A NEW TELEVISION STATION TO SERVE
 CHAN-46 PANAMA CITY BEACH, FL PANAMA CITY BEACH, FLORIDA; CHANNEL: 46; ERP(VIS): 1.268 KW;
 HAAT: 166.8 METERS (466 FEET); TL: 11830 LAUTHER LANE, WEST
 BAY, BAY COUNTY, FLORIDA 32413; ANT: BOGNER BU(O)24(BT)
 30-21-36/85-55-31 *AMENDED 03-20-92: TO CHANGE THE
 ERP(VIS): 2.380KW; HAAT: 359.5 METERS; TL: 1300 SCOTTS
 FERRY ROAD, YOUNGSTOWN, FLORIDA; ANT: ANDREW/ATW30H3-HSC1
 (DA)(BT) 30-21-09/85-23-26

9
 21871

ATTACHMENT 5