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Federal Communications Commission
Washington, DC

1995 FEB 8

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. <u>93-107</u>
)	
DAVID A. RINGER)	File No. BPH-911230MA
)	
ASF BROADCASTING CORP.)	File No. BPH-911230MB
)	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
)	
KYONG JA MATCHAK)	File No. BPH-911230MF
)	
SHELLEE F. DAVIS)	File No. BPH-911231MA
)	
WESTERVILLE BROADCASTING COMPANY)	File No. BPH-911231MB
LIMITED PARTNERSHIP)	
)	
OHIO RADIO ASSOCIATES)	File No. BPH-911231MC

For Construction Permit for an
FM Station on Channel 280A in
Westerville, OH

To: Administrative Law Judge
Walter C. Miller

OPPOSITION TO MOTION TO ENLARGE ISSUES AGAINST SHELLEE F. DAVIS

Shellee F. Davis ("Davis"), by her attorney, hereby submits her opposition to the "Motion to Enlarge Issues Against Davis" filed by Ohio Radio Associates, Inc. ("ORA") in this proceeding. With respect thereto, the following is stated:

ORA again has filed a pleading requesting the consideration of matters that are not in accord with Commission policy. Significantly, ORA cites no cases adopting its interpretation of the Commission's Rules, and in fact, ORA's pleading blatantly ignores existing policy. For this reason, ORA's Motion must be denied.

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Requested Section 73.316 Issue

ORA argues that Davis "flagrantly violates" Section 73.316 of the Commission's rules, claiming that because she has not provided a complete description of her proposed directional antenna system, an issue as to the adequacy of Davis' application must be included in this proceeding.

ORA is wrong. In an informal objection filed with respect to an application for Station KDJK(FM), Oakdale, California, File No. BPH-8910311C, a petitioner argued that an application for a minor change in facilities must be denied because the application did not provide the directional antenna data required in Section 73.316 of the Commission's Rules.

The Mass Media Bureau specifically rejected that argument, stating:

all of this data is not required at the construction permit stage. [An applicant] is required to provide only a composite directional antenna pattern and a tabulation of relative field values at this time. It has done so. The remaining items are required to be submitted along with the application for license. Consequently, the [petitioner's] objection along this line will be denied.

Attachment 1 at 3. Moreover, Davis already has complied with Section 73.316(c). As seen in Attachment 1, the Davis application was based upon a use of a two-bay, full-wave spaced Shively Model 6810-2 antenna system (which complies with Section 73.316(c)(1) of the Commission's Rules). As also seen in Attachment 2, the Davis application includes already a relative field plane pattern (Section 73.316(c)(2)), a tabulation of the relative field pattern (Section 73.316(c)(3)), sufficient vertical patterns to include the radiation characteristics of the antenna above and below the horizontal plane (Section 73.316(c)(4)), a statement that the directional antenna will be mounted in accordance with manufacturer's instruction (Section 73.316(c)(5)), a statement that the tower does not have a top mounted platform that exceeds the

nominal cross sectional area of the tower itself (Section 73.316(c)(6)), and a statement that no other antenna will be mounted within the FM antenna aperture (Section 73.316(c)(7)). See also Attachment 3 (excerpt from Davis' application). Therefore, Davis' application is in accord with present Commission policy as well as the Commission's Rules, and ORA's request for this issue must be denied.

Requested Section 73.215 Issue

Davis has requested processing and her application was accepted pursuant to Section 73.213(c)(1) of the Commission's Rules -- pointedly, her application is not being processed under Section 73.207 (the FCC's traditional spacing rules) or Section 73.215 (contour protection rules). Nevertheless, ORA seeks the addition of a Section 73.215 of the Rules, and states that 73.215(b)(2)(ii) requires that an applicant, such as Davis, which desires to take advantage of directionalization, "even though not requesting Section 73.215 processing," must protect an affected short-spaced station's contours based on the station's maximum effective radiated power and not on its actual contours. Motion at 2. ORA is wrong. Section 73.213(b)(2)(ii) of the Rules specifically applies only to "applicants requesting short-spaced assignments pursuant to this section." 47 C.F.R. § 73.215(b). See also, Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignment Using Directional Antennas, 4 FCC Rcd 1681 (1989), which states:

if the applicant proposed a new short-spacing or an aggravation of an existing short-spacing not covered under Section 73.213, then the applicant must comply with the contour protection requirements with respect to that facility.

Id. at 1686 ¶ 34 (emphasis added). Insofar as Davis has not requested processing under Section 73.215 of the Commission's Rules and her proposal is fully-spaced under Section 73.213(c)(1),

and does not create a new short-spacing or aggravate an existing short-spacing not covered under Section 73.213, Davis is already in compliance with the Commission's Rules, and ORA's contentions again must be rejected.

Requested Short-Spacing Issue

During the pre-designation stages of this proceeding, ORA specifically requested the dismissal of Davis' application, claiming that the application is short-spaced with Station WTTF-FM, Tiffin, Ohio, and Davis had not made a requisite showing of the unavailability of non-short-spaced sites. The Commission specifically rejected those contentions, stating that "[ORA]'s contention that [Davis'] application should be dismissed because there are other applicants in the proceeding proposing fully-spaced sites is without merit." HDO at ¶ 8.

Section 73.207, by its own terms, is not applicable in those instances where an "assignment [is being] made pursuant to § 73.213 or § 73.215..." 47 C.F.R. § 73.207(a). Davis' application for assignment of a construction permit for Channel 280A, Westerville, Ohio, is, indeed, being processed under Section 73.213(c)(1), and Davis' application is fully-spaced under that provision. The North Texas policy to which ORA cites is applicable to determine whether waivers of the spacing rules is appropriate. No "waiver" of any spacing rule is being sought by Davis. Therefore, the North Texas policy is not applicable. Moreover, ORA's claim that Section 73.213 and 73.215 are "standardized procedures" to obtain a waiver of Section 73.207 also is incorrect. The Commission stopped granted "waivers" of its spacing rules in its Report and Order in Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd 1681, 1685 ¶ 33 (1989), aff'd, 6 FCC Rcd 5356, 5360 ¶ 27 (1991).

Davis' application already has been found to be eligible for processing under Section 73.213(c)(1). Her site is grandfathered, fully-spaced under Section 73.213(c)(1), her proposed operation will cause no interference to any other application, and in fact, her proposal will result in the provision of superior service that provided from ORA's fully-spaced application that is being processed under Section 73.207. Under Clearlake Broadcasting Co., 47 Fed. Reg. 47931 (1982) (which established the "Clearlake policy"), and the other cases cited by ORA in its Motion, as a well as a host of other cases, even where true "short-spacings" exist (which they

Requested Ex Parte Issue

As ORA concedes, the alleged improper "ex parte contacts" of which it complains were raised earlier in this proceeding by ORA, and are dealt with in the HDO released in this proceeding. As the Commission stated:

ORA also contends that Davis engaged in ex parte communications with the Commission's staff regarding [the filing date of their amendments as a matter of right]. However, we have determined that the communications by Davis and Matchak were not ex parte violations. Rather, they were status inquiries regarding the amendments, which had been erroneously date-stamped by the staff. Similarly, ORA contends that Davis' conversations with the Commission staff which occurred prior to December 27, 1991 (the date of Davis' engineering exhibit which references the conversations with the staff) regarding the filing of her applications were ex parte communications. We have determined that the conversations were not ex parte violations because they were made prior to the filing of an applications by any of the applicants in this proceeding. See Report and Order in MM Docket No. 86-225, 2 FCC Rcd 3011, 3023 (1987).

HDO at n.8.¹ Under well-established Commission precedent, an ALJ is bound by the ruling contained in a hearing designation order and is not free, even if he desired, to substitute his own judgement with that of the Commission. Atlantic Broadcasting Co., 8 R.R.2d 991, 995-96 (1966). The Commission already has correctly ruled that Davis has engaged in no improper ex parte behavior. The Presiding Judge already has denied ORA's request to have that determination certified to the Commission for review. Memorandum Opinion and Order, FCC

¹ Moreover, Section 1.1208(b)(1) of the Commission's Rules is not implicated since, as the Commission points out in the HDO, Davis' communications concerning the correct interpretation of Commission policy with regard to Section 73.213(c)(1) all occurred prior to the time any other application was filed. Therefore Davis' application was not itself "a mutually exclusive application that would cause the proceeding to become restricted." 47 C.F.R. § 1.1208(b)(1). See Susan Turgetto, 5 FCC Rcd 341, ¶ 13 (MMB 1989) (consultation with Commission staff prior to filing of application permitted).

93M-224 (May 4, 1993). For both of those reasons, this request for the addition of this issue must also be denied.

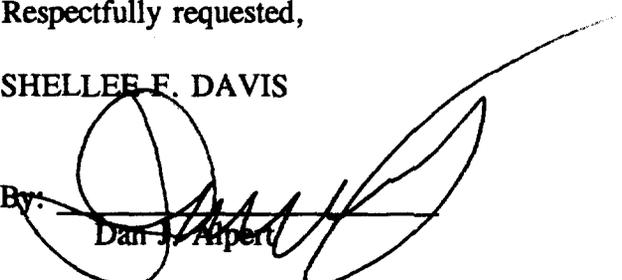
ORA's Motion is wholly unsupported by Commission policy and precedent and border on the frivolous. ORA has failed totally to raise a prima facie case warranting the addition of issues. Therefore, ORA's Motion must be denied.

WHEREFORE, it is respectfully requested that the "Motion to Enlarge Issues Against Davis" be denied.

Respectfully requested,

SHELLEE F. DAVIS

By:


Dan J. Alpert

Her Attorney

1250 Connecticut Ave.
7th Floor
Washington, DC 20036
(202) 637-9158

May 28, 1993

ATTACHMENT 1

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

20 SEP 1991

IN REPLY REFER TO:

Mr. Joe L. Gross
Goldrush Broadcasting, Inc.
Radio Station KDJK (FM)
570 Armstrong Way
Oakdale, California 95361

8920-DEB

Quick Broadcasting, Inc.
Radio Station KUIC (FM)
600 East Main
Vacaville, California 95688

In re: KDJK; Oakdale, CA
Goldrush Broadcasting, Inc.
BPH-891003IC

Gentlemen:

This letter is in reference to the above-captioned petition for reconsideration filed August 10, 1990 by Goldrush Broadcasting, Inc. ("Goldrush") in response to the Commission's letter of June 29, 1990 dismissing KDJK's application BPH-891003IC as unacceptable for filing. This request for reconsideration is opposed by Quick Broadcasting, Inc., licensee of KUIC, Vacaville, CA.

By way of background, Goldrush filed application BPH-891003IC on October 3, 1989 to request authority to relocate KDJK, Oakdale, CA to a site on Rushing Mountain, 5.8 km from KDJK's presently licensed transmitter site. As the site proposed was not fully spaced under 47 CFR § 73.207 with respect to station KSAN, San Francisco, CA (being short-spaced by 3.6 km), Goldrush requested processing of the application under the contour overlap provisions of 47 CFR § 73.215. This site also conflicted with the proposed reference coordinates for a proposed Class B1 allotment for Quick's station KUIC, Vacaville, CA. Notice of Proposed Rulemaking, Docket 88-491, 3 FCC Rcd 6128 (1988). Quick filed an informal objection against application BPH-891003IC claiming that Goldrush's § 73.215 study was conducted in error and that the proposal was in violation of the directional antenna requirements of 47 CFR § 73.316. Quick also requested denial of the application due to the conflict with its reference coordinates in Docket 88-491. In response, Goldrush on February 22, 1990 filed an untimely amendment to "make minor changes" to its proposal to eliminate some of the issues raised by Quick. However, on review the staff determined that the KDJK application was unacceptable for filing and dismissed application BPH-891003IC by letter dated June 29, 1990. Quick's informal objection was dismissed as moot.

The staff's June 29, 1990 letter stated that Goldrich has erroneously

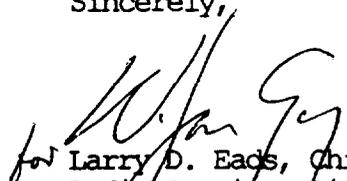
Since Goldrush has requested processing under the contour overlap rule, it is not seeking waiver of 47 CFR § 73.207 and therefore does not need a threshold showing justifying waiver. Therefore, Quick's objection in this regard will be denied.

Similarly, Quick seeks to require Goldrush to provide all of the directional antenna data required in 47 CFR § 73.316. However, all of this data is not required at the construction permit stage. Goldrush is required to provide only a composite directional antenna pattern and a tabulation of relative field values at this time. It has done so. The remaining items are required to be submitted with the application for license. Consequently, Quick's objection along this line also will be denied.

Nevertheless, Goldrush's application BPH-891003IC remains unacceptable for filing. This application is spaced only 141.7 km from the reference coordinates of the Class B1 allocation for Quick's station KUIC, whereas 47 CFR § 73.207 requires a spacing of 145 km.¹ This allocation was adopted by the First Report and Order in Docket 88-491, 4 FCC Rcd 8315 (1989) and affirmed in the Memorandum Opinion and Order in Docket 88-491, 6 FCC Rcd 143, released January 11, 1991. Pursuant to Commission policy, applications may be filed in conflict with a rulemaking proceeding, but are subject to the outcome of that proceeding. In the present instance, that rulemaking has led to the creation

Vacaville, CA (KUIC). A copy of this amendment shall be served on Quick Broadcasting, Inc. Failure to provide this amendment or otherwise respond within this time period will result in application BPH-891003IC being dismissed for failure to prosecute pursuant to 47 CFR § 73.3568(b).

Sincerely,


for Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Fletcher, Heald & Hildreth
: Ginsman, Feldman & Bress, Chartered

ATTACHMENT 2

Engineering Statement
**IN SUPPORT OF AN OPPOSITION TO A
MOTION TO ENLARGE ISSUES
AGAINST SHELEE F. DAVIS**

prepared on behalf of
Shellee F. Davis

This statement has been prepared on behalf of the Shellee F. Davis (Davis) in support of her Opposition the "Motion to Enlarge Issues Against Davis" filed by Ohio Radio Associates, Inc. in MM Docket No. 93-107 (Applications for Construction Permit for a New FM Station to Serve Westerville, Ohio).

The Davis application was based and premised upon the use of a two-bay, full-wave spaced, Shively Model 6810-2 antenna system, which is to be adapted by the antenna manufacturer to approximate, but not exceed, the bounds of the horizontal plane "envelope pattern" provided in the Davis application. All other information required in Section 73.316(c)(2-7) is addressed in the Davis application.

The application includes a relative field horizontal plane pattern of the proposed directional antenna (using a single pattern representing both the horizontal and vertical polarization). a tabulation of the relative field pattern, a vertical pattern.

ATTACHMENT 3

Statement A

PROPOSED DIRECTIONAL ANTENNA

prepared for
Shellee F. Davis
Westerville, Ohio

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

Figure 2 is a directional antenna horizontal plane envelope pattern which shows the permissible radiation from the proposed facility along all azimuths. This is a composite envelope, within which both the horizontally and vertically polarized radiation patterns will be contained. Upon grant of this application, an antenna will be designed to match this pattern as closely as possible without exceeding the pattern limits shown herein.

The proposed envelope pattern does not change by more than 2 dB per 10 degrees of azimuth. The ratio of maximum to minimum radiation is 3.01 dB, well below the 15 dB limit contained in Section 73.316 of the FCC Rules. Shellee F. Davis is proposing use of an 2 bay antenna, which will be directionalized to accommodate the pattern requirements. While a specific antenna model is indicated in the vertical (elevation) pattern plot of Figure 3, a substitute supplier, manufacturer or antenna type may be specified following grant of this application. The antenna make, model and actual measured antenna pattern will be submitted with the Application for License to cover this construction.

The antenna will be side mounted on an existing (former WBBY-FM) tower in accordance with the installation instructions to be supplied by the manufacturer. This tower does not have a top mounted platform that exceeds the nominal cross sectional area of the tower itself. No other antennas will be mounted within the FM antenna aperture, nor will any other antenna be installed on the tower within the minimum vertical or horizontal distance specified by the FM antenna manufacturer as being necessary for proper directional operation. The pattern measurements performed by the manufacturer will duplicate as closely as possible the existing tower, including all pertinent structural members, to ensure proper operation.

Statement A (con't)

Table 1 presents a tabulation of the horizontal plane pattern envelope, including minima and maxima. Table 2 supplies radial heights above average terrain, effective radiated power in pertinent directions based on this pattern, and the resultant contour distance data for this proposal. Table 2 supplements the information provided in response to elevation/contour distance table of Page 5 of Section V-B of FCC Form 301.

The tabulation of Figure 1 includes radials at 5° increments at certain azimuths; these are to be considered "special radials" and are included in the pattern computations used to determine the location of the coverage contours, and hence the shape of the coverage "footprint". Section 73.316(c)(3) requires radiation values at least every 10 degrees, which has been adhered to in this proposal.

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that foregoing document was served on May 27, 1993 upon the following parties by First Class Mail, postage prepaid:

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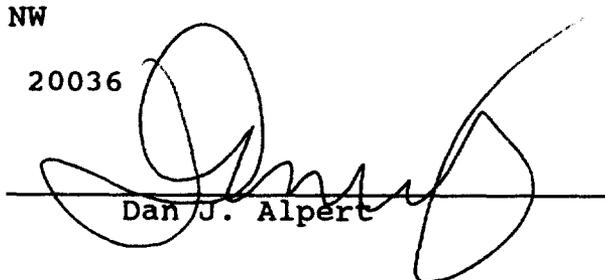
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