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June 7, 1993

JUN - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Re: NM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Ms. Searcy:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Reply to Opposition of Davis."

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

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 
John W. Hunter

By: 
Stephen T. Yelverton

Enclosure

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REPLY TO OPPOSITION OF DAVIS

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.229 (d) and 1.294 (c) of the Commission's Rules, hereby submits this reply to the opposition of Shellee F. Davis ("Davis"). ORA filed a motion to enlarge the issues against Davis on May 17, 1993. Davis filed an opposition thereto on May 28, 1993. In support of its reply to the opposition of Davis, ORA submits the following comments.

Section 73.316 Violation

Shellee F. Davis, et al. filed on December 31, 1992, a motion to enlarge the issues against ORA.

other applications. It is binding only on the applications referenced in the letter.

In any event, the Bureau has no legal authority to ignore the Commission mandated requirements of Section 73.316 (c)(1). It is required to faithfully follow Commission Rules and policies. See, Section 0.283 (b); RKO General, Inc. v. FCC, 670 F.2d 215, 223-224 (D.C. Cir. 1981). The Bureau can not unilaterally and arbitrarily decide which Commission Rules will be followed and which will be ignored. Moreover, it is particularly inappropriate for the Bureau to ignore the mandate of Commission Rules and policies in the context of a comparative hearing ---whose purpose is to determine whether the competing applicants are in strict compliance with Commission Rules and policies before grant of the construction permit, not after grant!

Davis claims that she has already complied with Section 73.316 (c)(1). However, this is incorrect. She supplied the model number for her directional antenna for the first time in the May 28, 1993, opposition. It was not in the construction permit application as required by Section 73.316 (c)(1) and by FCC Form 301, Section V-B, page 3, Question 10. Davis must amend her application in order to supply this required information. Such an amendment must be accompanied by a petition for leave to amend with the requisite "good cause" showing under Section 73.3522 (b), including lack of foreseeability for engineering amendments.

Davis' failure to comply with the requirements of Section 73.316 requires the specification of a hearing issue. Sub-section (c)(1) requests information essential for the Commission staff to properly analyze and process a directional antenna application. This is critical data. The staff must know what type and model of antenna will be used in order to determine whether the applicant's proposed directional pattern will correspond with that specific antenna's predicted output and performance.

Section 73.215 Violation

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 that station's maximum effective radiated power and not on its actual contours. See, On the Beach Broadcasting, FCC 93-211, para. 10, released May 10, 1993. The application of Davis fails to state that it will provide this required protection to affected short-spaced stations and, in particular, to Station WTTF-FM, Tiffin, Ohio.

In opposition to ORA's motion to enlarge, Davis contends that she is not requesting processing under Section 73.215 and thus Section 73.215 (b)(2)(ii) is inapplicable. However, Section 73.215 (b)(2)(ii) refers to directional antenna applications not requesting authorization under Section 73.215. Davis is without question proposing the use of a directional antenna.

Even though Davis is attempting to use the "grandfathering" provisions of Section 73.213 to utilize a directional antenna, the previous licensee for the Westerville allotment did not employ a directional antenna. Thus, it appears that Davis is attempting to evade the directional antenna requirements of Section 73.215, which she knows that she can not meet.

The Bureau in its comments filed on June 2, 1993, at page 2, para. 3, acknowledges that Davis will have contour overlap with Station WTTF-FM. In "plain English," this means causing actual interference! The public interest would not be served by grant of an application which will cause actual interference to an existing station when other applications in this proceeding are in strict conformity with the mileage separation requirements of Section 73.207 and would cause no such interference. Accordingly, an appropriate issue must be specified against Davis.

Short-Spacing Issue

The application of Davis indicates that her proposed tower site is 6.84 km. short-spaced, under Section 73.207, to Station WTTF-FM. Under long-established Commission policy, when an applicant in a comparative hearing is short-spaced, a hearing issue must be specified as to that applicant's basic qualifications.

Jones Mountain Broadcasters, 7 FCC Rcd 4219, 4220, paras. 2 and 12 (1992); Payne Communications, Inc., 1 FCC Rcd 1052, 1053, paras. 6, 9-10 (Rev. Bd. 1986), aff'd, Evergreen Broadcasting Co., 6 FCC Rcd 5599, 5605, n. 3 (1991); Maquabo Broadcasting Co., 6 FCC Rcd 4879, para. 5 (1991); Madalina Broadcasting, Inc., 6 FCC Rcd 2508, 2509, paras. 3-5 (MMB 1991); Valley Radio, 5 FCC Rcd 4875, 4876.

existing station when other applications in this proceeding are in strict conformity with the mileage separation requirements of Section 73.207 and would cause no such interference. Accordingly, an appropriate issue must be specified against Davis.

Ex Parte Issue

Davis admitted in an opposition to a petition to deny her application, filed April 8, 1992, that prior to filing her application in December 1991 she contacted the Commission staff as to the merits of her short-spaced tower proposal and the use of a directional antenna. Section 1.1208 (b)(1) prohibits such contact if the applicant intends to file a mutually exclusive application which would cause the proceeding to become restricted. Accord, MM Docket No. 86-225, 2 FCC Rcd 3011, 3023, para. 88 (1987). It is readily apparent that at the time Davis knew that she would be filing a mutually exclusive application which would become part of a restricted proceeding.

The date for amendments of right in this proceeding was March 9, 1992. Davis filed an amendment which was initially date stamped March 10, 1992. After ORA raised this matter in a petition to deny, filed March 26, 1992, the Commission staff changed the stamp date to March 9, 1992. This was at the behest of Davis and could not have been the result of a mere status inquiry. Such a contact as to a contested matter in a proceeding with mutually exclusive applications violates Section 1.1208 (b)(1).

In opposition to ORA's motion to enlarge the issues as to these matters, Davis contends that, under Susan Turgetto, 5 FCC Rcd 341, para. 13 (MMB 1989), she is allowed to consult with the Bureau staff as to her application. However, Davis' reliance on that case is misplaced. It is a Bureau staff decision unreviewed by the Commission which is fundamentally in conflict with well-established Commission Rules and policies. See, Section 1.1208 (b)(1); MM Docket No. 86-225. The Bureau has no legal authority to ignore Commission Rules and policies, or to implement its own rules and policies. It is required to faithfully follow Commission precedent. See, Section 0.283 (b); RKO General,

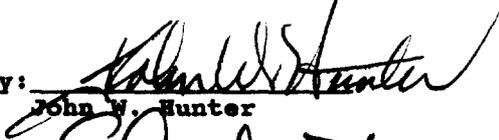
Inc. v. FCC. Moreover, it is particularly inappropriate for the Bureau to ignore the mandate of Commission Rules and policies when it is a party to the ex parte contacts.

As previously noted in its motion to enlarge the issues, ORA is filing this request for specification of an ex parte issue in order to protect and to perfect its appeal rights as to these matters. ORA does not want to take the risk that, on appeal of the designation order (when filing an application for review), the Commission will hold that the ex parte issue is moot because a motion to enlarge the issues was never timely filed.

WHEREFORE, in view of the foregoing, ORA requests that the foregoing issues be specified against Davis. She proposes the use of a directional antenna which will cause actual interference to an existing station.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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By: 

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June 7, 1993

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 7th day of June, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of Davis" to the following:

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