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RECEIVED

June 14, 1993

JUN 14 1993

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM 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 Wilburn."

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

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: 
Stephen F. Kelverton

Enclosure

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JUN 14 1993

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:)
)
DAVID A. RINGER)
)
 et al.,)
)
Applications for Construction)
Permit for a New FM Station,)
Channel 280A, Westerville,)
Ohio)

To: Administrative Law Judge
Walter C. Miller

MM Docket No. 93-107
File Nos. BPH-911230MA
through
BPH-911231MB

REPLY TO OPPOSITION OF WILBURN

Respectfully submitted,
MCNAIR & SANFORD. P.L.A.

REPLY TO OPPOSITION OF WILBURN

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 Wilburn Industries, Inc. ("Wilburn"). ORA filed a motion to enlarge the issues against Wilburn on May 17, 1993. Wilburn filed an opposition thereto on June 2, 1993. In support of its reply to the opposition of Wilburn, ORA submits the following comments.

Section 73.315 Issue

A map showing Wilburn's proposed 70 dBu coverage to Westerville does not indicate that at least 80% coverage would be provided to the community of license, as required by Section 73.315. In opposition to ORA's motion, Wilburn concedes that it does not have 100% city-grade coverage of Westerville. It claims, with no supporting analysis, that it will provide at least 80% coverage. Moreover, Wilburn refuses to state what its percentage of coverage will be. Will it actually be 79%, 80%, or 81%? Review of Wilburn's application shows that it contains no such specific showing.

By submitting in its application a statement from its engineer only generally concluding that at least 80% coverage will be obtained, without any supporting analysis and without any showing as to the percentage of coverage, Wilburn has itself raised a substantial and material question of fact as to its

specified. Port St. Lucie Broadcasting, 6 FCC Rcd 2063, 2065, para.10 (MMB 1991); Pearce Broadcasting Partnership, 6 FCC Rcd 5775, para. 2 (MMB 1991). Wilburn's efforts to distinguish these cases is unavailing. All cases have some differences in facts and circumstances.

Section 73.207 Issue

The application of Wilburn indicates that its proposed tower site is 6.84 km. short-spaced, under Section 73.207, to Station WTTT-FM, Tiffin, Ohio. Under long-established Commission policy, when an applicant in a comparative hearing is short-spaced under Section 73.207, a hearing issue must be specified as to that applicant's basic qualifications. Jemez 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); Naquabo 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, para. 5 (MMB 1990); Donavan Burke, 104 FCC2d 843 (1986); Megamedia, 67 FCC2d 1527 (1978); Clearlake Broadcasting Co., 47 Fed. Reg. 47931 (1982); and North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (D.C. Cir. 1985). On May 10, 1993, the Commission released On the Beach Broadcasting, FCC 93-211. Therein, at n. 1, it reaffirmed that North Texas Media, Inc. v. FCC, is still binding precedent.

In its opposition, Wilburn fails to acknowledge that the use of Section 73.213 is merely a standardized procedure to obtain, under certain special circumstances, a waiver of the spacing requirements of Section 73.207. Nothing in the adoption of Section 73.213 eviscerated the spacing requirements of Section 73.207. See, Docket No. 14185, 40 FCC 868, 3 RR2d 1571, 1589, para. 38 (1964).

In its opposition, Wilburn also fails to understand that the issue is not whether it is entitled to use the grandfathering provisions of Section 73.213. Rather, the issue is whether it is in the public interest to award the Westerville permit to an applicant with inferior short-spaced facilities operating at only 3.0 kw., or to an applicant operating at maximum 6.0 kw. power

with a fully-spaced tower site. Nothing in the adoption of Section 73.213, or in subsequent revisions, negated or overruled the "North Texas" policy of preferring on a basic qualifying basis a fully-spaced applicant over a short-spaced applicant, under Section 73.207, in a comparative hearing. This is more than simply a comparative areas and population issue.

The Mass Media Bureau, in its comments, with respect to the motion to enlarge issues against Ringer, filed June 2, 1993, at page 2, para. 3, acknowledges that Wilburn also will have contour overlap with Station WTTF-FM. In "plain English," this means causing actual interference! The public interest would not be served by the 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 Wilburn.

WHEREFORE, in view of the foregoing, ORA urges that the requested issues be specified against Wilburn. It will cause actual interference to an existing station.

Respectfully submitted,

McNAIR & SANFORD, P.A.

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June 14, 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 14th 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 Wilburn" to the following:

The Honorable Walter C. Miller*
Administrative Law Judge
Federal Communications Commission
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2000 L Street, N.W.
Washington, D.C. 20554

James Shook, Esquire
Hearing Branch
Federal Communications Commission
Room 7212
2025 M Street, N.W.
Washington, D.C. 20554

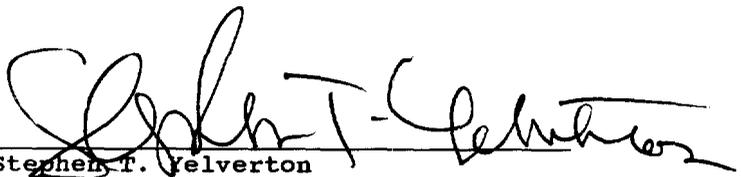
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*Hand Delivery