

Before the
Federal Communications Commission
Washington, DC

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In re Applications of)	MM Docket No. 93-107
)	
DAVID A. RINGER)	File No. BPH-911230MA
)	
ASF BROADCASTING CORP.)	File No. BPH-911230MB
)	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
)	
SHELLEE F. DAVIS)	File No. BPH-911231MA
)	
OHIO RADIO ASSOCIATES)	File No. BPH-911231MC

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

DOCKET FILE COPY ORIGINAL

To: The Review Board

OPPOSITION TO PETITION TO INTERVENE

Shellee F. Davis ("Davis"), by her attorney, hereby submits her opposition to the "Petition to Intervene" ("Petition") filed by WPAY/WPFB, Inc., licensee of Station WPAY-FM ("WPAY"). With respect thereto, the following is stated:

1. WPAY's Petition is premised on the filing of three petitions for leave to amend, whereby Davis, David A. Ringer ("Ringer"), and ASF Broadcasting Corp. ("ASF"), applicants in this proceeding, proposed to utilize the existing transmitter site of Station WOSU-TV, Columbus, Ohio in conjunction with their applications for Channel 280A/Westerville, Ohio in this proceeding. In all three instances, the applicants submitted their amendments pursuant, in relevant part, to the requirements and provisions of Section 73.215, whereby applicants are permitted to utilize "contour protection" to protect the

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operations of existing stations in instances where their chosen transmitter sites would otherwise be considered as "short-spaced" under what formerly was the Commission's "minimum spacing" rules (47 C.F.R. § 73.207). Station WPAY has been assigned a full Class C allotment. It currently is operating at 100 kW at 304.8 meters HAAT. As required under Section 73.215 of the Commission Rules, Davis (as well as all other applicants proposing the site) protected both WPAY's present facilities, as well as the maximum facilities to which it is entitled to operate as a full Class C facility (100 kW/600 meters HAAT or equivalent). The Mass Media Bureau already has examined each of the proposals, and has already stated that each of the proposals filed in this proceeding for the WOSU-TV site are in full accord with the Commission's Rules. See "Mass Media Bureau's Comments on Petition for Leave to Amend" dated July 28, 1994, "Mass Media Bureau's Comments on Petition for Leave to Amend and Amendment" dated May 18, 1994; "Mass Media Bureau's Comments on Petition for Leave to Amend" dated August 24, 1994.

2. WPAY's Petition must be denied. Pursuant to Section 1.223 of the Commission's Rules governing "petitions to intervene":

Any person desiring to file a petition for leave to intervene later than 30 days after the publication in the FEDERAL REGISTER of the full text or a summary of the order designating an application for hearing or any substantial amendment thereto shall set forth the interest in the proceeding, show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (a) and (b) of this section. Such petition shall be accompanied by the affidavit of a person with knowledge of the facts set forth in the petition, and where petitioner claims that a grant of the application would cause objectionable interference under

applicable provisions of this chapter, the petition to intervene must be accompanied by the affidavit of a qualified radio engineer showing the extent of such alleged interference according to the methods described in paragraph (a) of this section.

47 C.F.R. § 1.223(c) (emphasis added). WPAY has not satisfied a number of these requirements.

3. First, WPAY has not shown how its participation will assist the Commission in its resolution of the matters at issue in this proceeding. Another applicant (ORA) already a party in this proceeding, already has opposed the amendments in question under the same reasoning adopted by WPAY (reasoning which, as seen below, is erroneous, and misconstrues the Commission's Rules), and additionally, the Mass Media Bureau already is a party in this proceeding, and specifically is charged with the duty, as a neutral party, to protect the public interest and to prevent the acceptance of any application amendments which are violative of the Commission's Rules. Thus, WPAY's interests already are "protected" in this case.

4. Second, WPAY fails to include any affidavit of a person with personal knowledge of the facts alleged in his Petition. 47 C.F.R. § 1.223(c).

5. Finally, although WPAY alleges that the amendments are defective from an engineering standpoint and are violative of the Commission's technical rules, WPAY fails even to include an affidavit or statement of a qualified radio engineer which in any way confirms the allegation contained in the Petition (e.g., that acceptance of the amendments "may well preclude[] [WPAY] from changing its own site, antenna height, or other operating parameters"). For all three of these reasons, WPAY does not come even close to complying

with the provisions of Section 1.223 of the Commission's Rules.

6. Possibly more importantly, WPAY completely either misunderstands or misconstrues the Commission's current Rules with regard to contour protection and permissible short spacing. In its opposition to Davis' amendment, WPAY alleged that Davis is "short-spaced" under the Commission's Rules, and that in order for her amendment to be accepted, must establish that no "non-short-spaced sites" exist at which she could apply. WPAY "Opposition to Petitions for Leave to Amend" dated August 30, 1994 ("WPAY Opposition") at 2. This claim is made despite the fact that Davis applied not under the provisions under Section 73.207 of the Commission's Rules, but rather, pursuant to Section 73.215. The only cases cited in support of this proposition are cases involving applicants seeking waivers of Section 73.207, all of which are cases involving applications processed under an old version of Section 73.207 and for which the provisions of Section 73.215 are not available.¹

7. WPAY (and ORA) have claimed that the Commission's contour protection rules are applicable only in those instances where no lesser short-spaced site is available. WPAY Opposition at 2-3; ORA "Opposition to Davis Petition for Leave to Amend" dated August 24, 1994 ("ORA Opposition") at 3. Those assertions are not accurate. As the Commission

¹ In adopting the new contour protection rule, the Commission specifically stated:

Applications submitted prior to the effective date of the rules that we adopt today that include a request for waiver of Section 73.207 will be processed under the current minimum spacing rules only and not under the new contour protection rules.

Amendment of Part 73 of the Commission's rules to Permit Short-Spaced FM Station Assignment by Using Directional Antennas, 4 FCC Rcd 1681, 1688 ¶ 50 (1989).

stated in the Notice of Inquiry in 1987 which prompted the Commission proceeding which led to the adoption of the Rule:

Our objective in considering the issues herein is to give licensees greater flexibility in selecting transmitter locations.

Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station

Assignments by Using Directional Antennas, 2 FCC Rcd 3141 (1987). In actually adopting the Rule, the Commission adopted "[c]ontour protection as an alternative to distant separation requirements" (Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd 1681, 1684 (1987) (emphasis added)), and (since all such applicants will now have the ability to comply with the Commission's (by applying under Section 73.215 of the Rules) rather than violating and needing a waiver of the Commission's Rule 73.207), specifically eliminated the ability of applicants to successfully seek "waivers" of Section 73.207 of the sort pursued by applicants in the cases cited by WPAY. In adopting the Rule, the Commission noted the dual purposes of the Rule:

Our intention in this proceeding is simply to afford FM applicants and licensees some flexibility in the selection of transmitter site by permitting a limited amount of short-spacing to other co-channel and adjacent channel stations, by taking account of the effect of such factors as height above average terrain (along the pertinent radials), directional antennas and reduced operating facilities to afford requisite protection to existing and allotted coverage areas.

* * *

We believe the limited amount of short-spacing we are permitting will afford applicants with a genuinely helpful amount of flexibility in antenna site selection....Moreover, these rule changes enable us to discontinue granting waivers of Section 73.207 for co-channel and adjacent channel short-spacing,

Id. at 1684, 1685 ¶¶ 22, 33.² Simply stated, if WPAY (or ORA) were correct that applicants "remain" limited to utilizing nominally short-spaced sites only in instances where no "non-short-spaced sites" are available, what "greater flexibility" referred to by the Commission has been established?³

8. As a result of the foregoing, WPAY has misstated to the Board the Commission current limitations on "short-spacing." While under the "old" (pre-1989) rules applicants were required to seek "waivers" of the Commission's short-spacing rules (and only could successfully prosecute such a request if the short-spacing were de minimis⁴ or if no non- or

² This proposition was affirmed on reconsideration. Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 6 FCC Rcd 5356, 5359-60 ¶¶ 24-27 (1991). The language cited by ORA (ORA Opposition at 3) was lifted from that section of the Commission's Order on Reconsideration discussing this proposition. ORA misconstrues the language. All the Commission there stated was that a purpose in adopting the rule was to eliminate the need to grant waivers in those "extraordinary circumstances" where no fully spaced sites are available. Id. at 5360 ¶ 27. It did not state that was the only reason -- and, as seen above, there was, indeed, more than one policy objective underlying the adoption of the rule.

³ WPAY is especially disingenuous in its claim. WPAY selectively quotes the Commission's statement of the "need and purpose" of its action, implying that the sole purpose of the rule is to "permit the installation of facilities that would not be possible due to the lack of available sites at fully spaced locations." WPAY Opposition at n.4. The full quotation, however, is as follows:

This action will provide applicants for facilities in the FM Broadcast Service with greater flexibility in the selection of transmitter/antenna sites, thereby permitting them to more precisely locate their signal coverage over areas of greater demographic interest. In some cases, it will permit for installation of facilities that would not be possible due to the lack of available sites at fully spaced locations.

Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd at 1688.

⁴ See, e.g., Kenter Broadcasting, Inc., 62 R.R.2d 1573, 1577 n.9 (1987).

lesser short-spaced site were available⁵), under the current rules the spacing restrictions are applicable "[e]xcept for assignments made pursuant to § 73.213 or 73.215." 47 C.F.R. § 73.207(a). As the Commission noted on reconsideration:

The Report adopted rules that permit[] routine authorization of FM stations at nominally short-spaced transmitter locations as long as other stations are protected from interference.

Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 6 FCC Rcd 5356 (1991). While there are limitations to use of the rule adopted by the Commission, they do not involve situations where no "non-short-spaced" sites are available. Rather, the Commission stated:

we have decided that, in general, station should not be authorized at locations that do not meet, as a minimum, the required co-channel and adjacent channel spacings applicable to the next lower class of station. In other words, short-spaced stations will be allowed, but only to the extent that would be feasible if the stations were to operate with the approximate minimum facilities permitted their class.

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 ¶ 32 (1989).

9. As to WPAY's concern that the amendment may limit its station's ability to change locations in the future, that "harm" is, at best, speculative, undocumented, and in light of the Commission's previous considerations in adopting its Rules, irrelevant. In addressing the precise concern expressed by WPAY, the Commission stated:

under the short-spacing rules adopted herein, all existing fully spaced stations will continue to be afforded protection based on the presumed use of the maximum ERP and reference HAAT for their station class. Consequently, the upgrade potential for

⁵ See, e.g., Stoner Broadcasting System, Inc., 49 F.C.C.2d 1011 (1974).

the vast majority of station will be unchanged.⁷

⁷ We would further note that the ability to upgrade probably becomes less important as the FM service matures. Many stations able to upgrade already have done so in response to various marketplace and regulatory incentives.

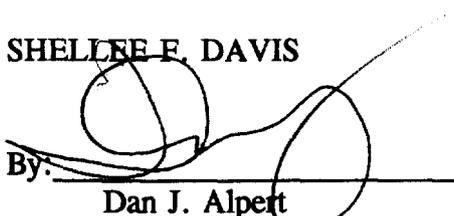
Id. at 1684 ¶ 26 and n.7. Station WPAY did not seek reconsideration of the Rule -- thus, it is bound by its provisions. JEM Broadcasting Co., Inc. v. FCC, 75 R.R.2d 273, 275-77 (D.C. Cir. 1994).

10. In short, no useful purpose would be served by WPAY's participation in this proceeding. Its Petition fails procedurally to meet the minimum requirements established by the Commission's Rules, and substantively, WPAY is not entitled to protection it claims it deserves. WPAY has no right to participate in this proceeding.

WHEREFORE, it is respectfully requested that the "Petition to Intervene" filed by WPAY/WPFB, Inc. be denied.

Respectfully submitted,

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By: 

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September 29, 1994

CERTIFICATE OF SERVICE

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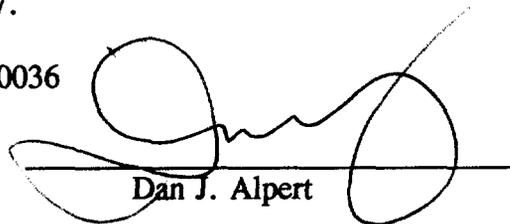
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