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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 93-107
	)	
DAVID A. RINGER	)	File No. BPH-911230MA
	)	
ASF BROADCASTING CORPORATION	)	File No. BPH-911230MB
	)	
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
	)	
SHELLEE F. DAVIS	)	File No. BPH-911231MA
	)	
OHIO RADIO ASSOCIATES, INC.	)	File No. BPH-911231MC
	)	
For a Construction Permit for a New FM Station on Channel 280A at Westerville, Ohio	)	

DOCKET FILE COPY ORIGINAL

To: The Review Board

OPPOSITION TO PETITION FOR LEAVE TO INTERVENE

David A. Ringer ("Ringer"), by and through counsel and pursuant to §1.294 of the Commission's rules, hereby submits his Opposition to the "Petition For Leave To Intervene" ("Petition") filed by Radio Stations WPAY/WPFB, Inc. ("WPAY") in the above-captioned proceeding.[1] WPAY's Petition is late, procedurally defective and the arguments raised in its accompanying "Opposition To Petition For Leave To Amend" have already been considered on three separate occasions and were rejected each time. In support whereof, the following is shown:

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[1] This Opposition is timely filed. WPAY submitted its Petition on September 23, 1994. Sections 1.4 and 1.294 of the rules permit an opposition to be filed within four days of the filing of a petition (including three additional days for mail time and excluding holidays) or, in this case, by October 4, 1994.

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BACKGROUND

1. On May 9, 1994, Mr. Ringer filed an amendment to specify a new tower site. As fully demonstrated in his "Petition For Leave To Amend and Amendment," Mr. Ringer lost his original tower site and diligently located a new tower site location - the existing tower of WOSU-TV, Columbus, Ohio. In the engineering portion of the amendment, Mr. Ringer's consulting engineer noted that "the facilities proposed herein would be short spaced to two other stations: WTTF-FM, Tiffin, OH, Channel 279B (and) WPAY-FM, Portsmouth, OH, Channel 281C." See "Petition For Leave To Amend and Amendment" at Exhibit 2. The engineer stated further: "These short spacings are permitted under Section 73.215 of the FCC Rules, provided that the necessary contour protection is provided to these short spaced stations." A full contour protection showing was included with the engineering portion of the amendment. This showing demonstrated that "the proposed operating facilities provide the required contour protection to WPAY-FM....."

2. On May 18, 1994, the Mass Media Bureau filed its Comments on the Mr. Ringer's tower relocation amendment. The Bureau specifically found that: "[T]he engineering staff of the Bureau has reviewed Ringer's technical proposal and has determined that it is in compliance with the Commission's Rules." See "Mass Media Bureau's Comments on Petition For Leave To Amend and Amendment," at p. 2.

THE SHORT-SPACING ISSUE HAS PREVIOUSLY BEEN RESOLVED

3. In its Petition, WPAY argues that "WPAY-FM will suffer irreparable injury if the aforenoted three applicants (including Mr. Ringer) are permitted to amend to specify short-spaced sites....." In its Opposition, WPAY cites cases in support of its position that Mr. Ringer's amendment should be denied for failure to comply with the Commission's spacing rules. It should be noted that the arguments raised by WPAY are curiously reminiscent to arguments previously raised on several occasions by another party in this proceeding - Ohio Radio Associates, Inc. ("ORA"). In Petitions To Deny filed against some of the applicants in this proceeding (including Mr. Ringer), ORA made the very same arguments that are contained in WPAY's pleadings; namely, that some of the Westerville proposals were short-spaced to WTTF-FM, Tiffin, Ohio, in violation of the Commission's spacing rules. ORA even cited the very same case precedent that is contained in WPAY's pleadings. The Audio Services Division ("ASD") reviewed ORA's arguments and rejected them in the Hearing Designation Order, 8 FCC Rcd 2651, 2651-2, (ASD 1993)("HDO"). The ASD found that the applicants were permitted to seek processing under Section 73.215 of the Rules, that these applicants were exempt from processing under the Commission's minimum spacing requirements and that the Commission does not favor applicants seeking processing under Section 73.207 (the

minimum spacing rule) over those seeking processing under Section 73.215 (contour protection rule). HDO, 8 FCC Rcd at 2652.

4. Nevertheless, unfazed by the ASD's rejection and probably hoping for a more sympathetic response from the Commission, ORA filed with the Presiding Judge a "Motion To Certify Questions to the Commission" which was essentially an unauthorized attempt to appeal the Bureau's decision. This Motion was properly rejected by the Presiding Judge. See, Memorandum Opinion and Order, FCC 93M-224, released May 4, 1994. Despite another rejection, ORA decided to raise this issue a third time by filing Motions To Enlarge Issues against each of the applicants in question, copying the exact same arguments it had raised in its Petitions To Deny and its Motion To Certify. The Mass Media Bureau opposed ORA's Motions To Enlarge Issues. In its Oppositions, the Bureau very bluntly stated that "ORA is wrong." See, e.g., "Mass Media Bureau's Opposition To Motion To Enlarge Issues Against Ringer," filed June 2, 1993. The Bureau recounted the fact that the applicants were permitted to rely on Sections 73.213 and 73.215 of the rules to remedy the proposed short-spacing to WTTF-FM and that "the cases cited by ORA, all of which dealt with applications seeking waivers of Section 73.207, are inapposite." Finding that ORA's Motions were nothing more than attempts to seek reconsideration of the HDO, the Presiding Judge later denied

each of them. See, e.g., Memorandum Opinion and Order, FCC 93M-366, released June 16, 1993. While not directly appealing the earlier decisions, ORA made passing references to these arguments one last time, in the Exceptions it filed to the Initial Decision in this proceeding.

5. Despite the fact that both the Bureau and Presiding Judge have completely reviewed the arguments raised by ORA in this proceeding and have flatly rejected them, WPAY would like the Board's permission to intervene in this proceeding to argue them one more time. The phrase "beating a dead horse" would appear to be an appropriate label for what WPAY is attempting to do at this time. The question of whether applicants in this proceeding can seek to have their applications processed pursuant to Section 73.215 to avoid potential short-spacings to other stations has been fully litigated and was resolved months ago. Furthermore, the Mass Media Bureau has consistently supported the various short-spaced proposals in this proceeding and has found them in compliance with all of the technical standards. WPAY would like the Review Board to substitute the Bureau's expertise for WPAY's. However, WPAY has not submitted a single piece of evidence to support its claim that Mr. Ringer's proposed Westerville operation will interfere with its station nor has it explained why Mr. Ringer should not be allowed to avail himself of the contour protection standards contained in Section 73.215. The Commission's

Rules, the Mass Media Bureau, the Presiding Judge and Commission precedent all weigh against WPAY's arguments. To permit WPAY to intervene in this proceeding for the sole reason of raising these arguments yet another time, would be a complete waste of Commission resources and time. WPAY's Petition should be summarily denied.

WPAY HAS FAILED TO DEMONSTRATE WHY IT SHOULD BE PERMITTED TO INTERVENE IN THIS PROCEEDING

6. WPAY has failed to demonstrate how its participation in this proceeding would assist the Review Board in the final resolution of this case. Such a showing must be made pursuant to Section 1.223 of the Commission's rules whenever a party, as is the case here, seeks to intervene in a proceeding after the deadline for intervention has passed.[2] Here, the Mass Media Bureau and Presiding Judge have already reviewed the merits of these arguments and have rejected them. Furthermore, WPAY's Opposition provides no further evidence or support for denying Ringer's amendment and merely recites the exact same flawed arguments made previously by ORA. WPAY's participation in this case would in no way assist the Board in its final decision. For this reason, WPAY's Petition does not comply with strict letter of Section 1.223 of the rules and must be denied.

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[2] Section 1.223 sets a deadline for intervention of 30 days after the publication in the Federal Register of the Hearing Designation Order in a proceeding. The deadline in this case, May 24, 1993, has long since passed.

WHEREFORE, the above-premises considered, David A. Ringer respectfully requests that the "Petition For Leave To Intervene" filed by Radio Stations WPAY/WPFB, Inc. be **DENIED**.

Respectfully submitted,

DAVID A. RINGER

By: _____
Arthur V. Belendiuk
Shaun A. Maher
His Attorneys

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October 4, 1994

CERTIFICATE OF SERVICE

I, Dale Harris, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 4th day of October, 1994, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

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