

Before the
Federal Communications Commission
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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 MOTION FOR LEAVE TO FILE COMMENTS

Shellee F. Davis ("Davis"), by her attorney, hereby opposes the "Motion for Leave to File Comments" filed by Ohio Radio Associates on February 13, 1995. With respect thereto, the following is stated:

1. As Davis has pointed out to ORA, and as the Mass Media Bureau agreed previously, under the Commission rules, there are two provisions governing grandfathered¹ facilities -- 73.213(c)(1) and 73.213(c)(2). Section 73.213(c)(1) deals with the situation where

¹ Section 73.213 specifically states:

New stations on channel allotments made by order granting petitions to amend the Table of Allotments which were filed prior to October 2, 1989 may be authorized in accordance with paragraphs (c)(1) or (c)(2) of this section.

47 C.F.R. § 73.213(c).

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an allotment was adopted under the old FCC-73.207 and is thus a grandfathered facility, and in which although a station would be "short-spaced" if analyzed under the current version of Section 73.207 of the Commission's Rules, it is fully-spaced under Section 73.213(c) and will not radiate more than the equivalent of a 3 kW/100 meter signal in the direction of the short-spaced facility. Section 73.213(c)(2) controls "grandfathered" stations that also would be viewed as "short-spaced" under the new version of 73.207, but involves those situation where the grandfathered facility desires to upgrade its facility in the direction of the short-spaced station beyond that of a 3 kW/100 meter or equivalent facility.

2. Section 73.213(c)(2) has a "prior consent" requirement, because a station would be increasing its radiations toward a station short-spaced under Section 73.207 beyond the previously-authorized 3 kW level.² In contrast, 73.213(c)(1) does not have a "prior consent" requirement, and logically so from a policy standpoint, since in such a situation, the station remains a fully-spaced/3 kW station in the direction of the other pertinent station, thus preventing any increased radiations in that direction that would "harm" (i.e. cause impermissible interference to) such a station.

3. The Livingston case (Livingston Radio Company, FCC 94-320 (Jan. 12, 1995)), cited to by ORA, involved a situation where a 3 kW station was fully-spaced under Section 73.213, and short-spaced under new Section 73.207, but unlike Davis (and ASF and Ringer)

² As the Commission stated:

Under this section, WHMI-FM is permitted to increase to 6 kW/100 meters provided that it submitted exhibits demonstrating that consent of the short-spaced stations to a grant and the increase is consistent with the public interest.

Livingston Broadcasting Co., FCC 94-320 ¶ 5 (1995) (emphasis added).

was attempting to increase power in the direction of the station with which it was short-spaced under new-73.207, beyond the 3 kW level. Livingston Radio Company, FCC 94-320 ¶ 2 ("Livingston filed a minor change application...to increase its ERP to 6.0 kW and its HAAT to 96 kilometers at its present site"). That proposal therefore threw the Livingston application into analysis under Section 73.213(c)(2). Since no consent had been obtained from the station with which Livingston would be "short-spaced" after commencing operation as a 6 kW station, the application failed to meet the requisites of Section 73.213(c)(2), and was denied. Id. at ¶ 5 ("since no exhibits [establishing consent] have been provided, WHMI-FM may not modify its facilities to operate above 3 kW ERP/100 meters HAAT standard").

4. What ORA fails to acknowledge in its analysis, however, is that Davis does not propose "to operate above 3 kW ERP/100 meters HAAT standard" in the direction of Station WTTF-FM. In this case, in the direction of Station WTTF-FM, Davis has applied under Section 73.213(c)(1) -- the allotment is grandfathered, and at the location she proposes, she is fully-spaced under Section 73.213(c), and she properly proposes radiating only a 3 kW signal in the direction of WTTF-FM. Therefore, Davis' application is properly analyzed under Section 73.213(c)(1) of the rules and further, and complies with the policies underlying the Commission's past treatment of applicants applying under the grandfathering rule. No "prior consent," therefore, was necessary³, and the Mass Media Bureau properly found

³ It also should be noted that the licensee of Station WTTF-FM properly has not filed objections to any of the latest proposals which continue to limit radiations to 3 kW in its direction.

Davis' application to be in compliance with the Commission's Rules and policies.⁴

5. In directions other than toward WTTF-FM, Davis' proposal proposes either a full 6 kW operation, or else properly reduces power as necessary to comply with Section 73.215 of the Commission's Rules.⁵ To the extent ORA makes a claim that "the FCC explicitly ruled that directional antennas could not be utilized to justify a short-spaced tower site where a fully-spaced tower site is available and suitable" (ORA Motion at 2), the fact of the matter is that the FCC has said precisely the opposite. In adopting Section 73.215, 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

⁴ 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.

⁵ In this way, Davis, ASF, and Ringer continue to operate at parameters identical to a 3 kW Class A station in the direction of the short-spaced station, but propose operation to the full power levels otherwise permitted by the allocation's class in other directions. Amendment to Part 73 of the Rules, 6 FCC Rcd at 3423 ¶ 40. This allows for a more full utilization of the allotment. This result has specifically been approved by the Mass Media Bureau in the past. For example, in the case of Vergennes, Vermont, an applicant (Lakeside Broadcasting Corp., File No. BPH-910822MB) specifically applied for the short-spaced allotment in the same manner as Davis -- applying at a site "short-spaced" under the 6 kW rules (but which a fully-spaced site under the 3 kW rules), proposing radiation equivalent to 3 kW/100 meters in the short-spaced direction and 6 kW/100 meters in all other directions, and invoking Section 73.213(c)(1) of the Rules. The application was routinely granted.

ORA has had the ability and resources to ascertain how the Commission is interpreting its rules. Obviously, it has chosen not to do so. Thus, the fact that the Commission must treat similarly situated applicants in a similar manner (Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965)) further confirms the propriety of the Mass Media Bureau's and the Commission's actions and rulings in this case.

added)) and, since all such applicants 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 case cited by ORA. In adopting the Rule, the Commission noted the dual purposes of the contour protection 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 (emphasis added). 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).⁶

⁶ In contrast, the language cited by ORA (ORA Motion at 2) was lifted from that section of the Commission's Order on Reconsideration discussing whether situations should exist where short-spaced stations should not have to file under the 73.215 contour protection rule if they would have been entitled to a waiver of the short-spacing rules prior to the adoption of the contour protection rule. ORA misconstrues the language. In rejecting that suggestion, the Commission stated that a purpose in adopting the rule was to eliminate the need to grant waivers even in those "extraordinary circumstances" where no fully spaced sites are available. Id. at 5360 ¶ 27. It did not state that was the only reason. The dual objectives of

6. ORA's pleading thus is substantively deficient. It fails to accurately analyze or recite Commission precedent. Moreover, to the extent the question of the proper legal interpretation of Section 73.213 is raised by ORA, that issue already has dealt with by the Commission in the Hearing Designation Order issued in this proceeding. David A. Ringer, 8 FCC Rcd 2651 (Chief, Audio Services Div. 1993). As such, that interpretation has become the law of this case, and since it was contained in a Hearing Designation Order, under the Commission's Rules further consideration of the matter must be deferred and can only be appealed to the full Commission. 47 C.F.R. § 1.115(e)(3). For all these reasons, ORA's Motion should be denied and its "comments" disregarded.

the contour protection Rule, the Commission stated, were 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.

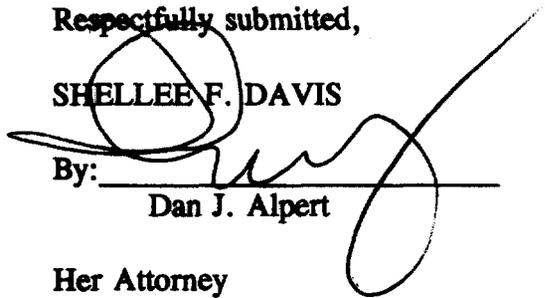
Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd at 1688 (emphasis added)

Thus, as seen above, there was, indeed, more than one policy objective underlying the adoption of the rule. If ORA were correct that applicants "remain" limited to utilizing nominally short-spaced sites only in instances where no "non-short-spaced sites" are available (as had been the case back when there was no contour protection rule (e.g., when North Texas Media, Inc. v. FCC, 778 F.2d 28 (D.C. Cir. 1985), cited by ORA, was decided), what "greater flexibility in the selection of transmitter/antenna sites" referred to by the Commission does ORA believe was established?

WHEREFORE, it is respectfully requested that the "Motion for Leave to File Comments" filed by Ohio Radio Associates be denied.

Respectfully submitted,

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By: 

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February 17, 1995

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that foregoing document was served on February 17, 1995 upon the following parties by First Class Mail, postage prepaid, or by Hand:

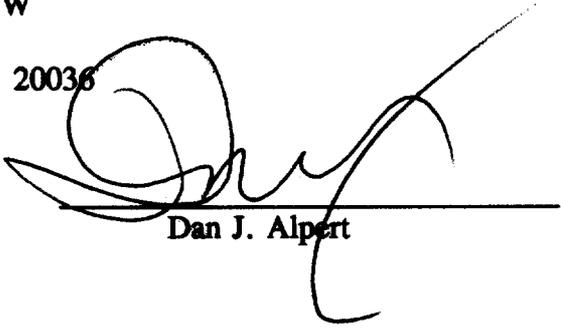
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