

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

In re Application of

BEASLEY RADIO File No. BMPH-860818IC
COMPANY

For Modification of a Construction
Permit for WDMT(FM)
Cleveland, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 16, 1989

By the Commission:

1. The Commission has under consideration: (i) an Application for Review, filed March 3, 1987, by Elyria Lorain Broadcasting Company ("Elyria"), licensee of WBEA(FM), Elyria, Ohio, of an action by the Chief, FM Branch, dismissing Elyria's Informal Objection to the subject application for modification of a construction permit filed by Beasley Radio Company ("Beasley"), former licensee of WDMT(FM), Cleveland, Ohio¹; (ii) a request for an extension of time to file an opposition to the Application for Review, filed by Beasley March 16, 1987; (iii) Beasley's Opposition to the Application for Review, filed on March 23, 1987; (iv) a Petition for Stay of the grant of the subject application and an Application for Review of that staff action, filed by Elyria on July 30, 1987; (v) an Opposition to the Motion for Stay, filed by Beasley, August 7, 1987; (vi) an Opposition to Elyria's second Application for Review, filed by Beasley, August 19, 1987; and (vii) various related pleadings.

2. *Background.* WDMT was licensed as a superpower Class B station, authorized to operate with an effective radiated power ("ERP") of 70 kW with an antenna height above average terrain ("HAAT") of 119 meters. Such a station is known as a superpower Class B facility because it is authorized to operate at a power greater than that generally allowed Class B stations under Commission rules. WDMT's licensed facility is also short-spaced to WBEA but this spacing is "grandfathered" pursuant 47 C.F.R. § 73.213 since both stations were authorized prior to adoption of the minimum distance separation requirements.

3. On February 22, 1982, the Commission granted Beasley's application (File no. BPH-810522AJ) for a construction permit ("1982 CP") to change WDMT's transmitter site, decrease its ERP to 12.3 kW, and increase its HAAT to 232 meters. The changes authorized by the 1982 CP, particularly the increased HAAT, were designed to overcome shadowing problems the station encountered due to terrain in the area. The transmitter site specified in the 1982 CP was fully-spaced when it was authorized, but became short-spaced to WBEA by approximately 10 km when the Commission adopted new metric separation standards and HAAT/ERP restrictions for the various classes of stations. *See Report and Order* in BC Docket

80-90, 94 FCC 2d 152 (1983), *recon. granted in part*, 97 FCC 2d 279 (1984). The ERP and HAAT specified in the 1982 CP are below the maximum allowed for Class B stations. While constructing the facilities authorized by the 1982 CP, Beasley was advised by its engineer that WDMT'S signal would better cover its community of license if it utilized a directional antenna and increased its power to the maximum allowed for Class B stations under 47 C.F.R. § 73.211. Consequently, on August 18, 1986, Beasley filed a minor modification application (File no. BMPH-860818IC)("1986 modification application") to modify the 1982 CP to increase power and operate with a directional antenna.

4. On September 25, 1986, Elyria filed a petition to dismiss or deny the 1986 modification application asserting that the proposed facility: (i) would violate § 73.211(c), which prohibits stations operating with facilities in excess of those specified in § 73.211(b) from increasing their ERP or extending their 1 mV/m field strength contour beyond the location permitted under their authorizations; and (ii) would violate § 73.316(b) because the proposed directional antenna was employed as a means of reducing minimum mileage separation requirements. Because a petition to deny does not lie against an application for minor change in the facilities of an authorized station (*see* 47 U.S.C. §309 (c)(2)(A)), Elyria's petition was treated as an informal objection and, on February 6, 1987, was dismissed by the Chief, FM Branch, as meritless because: (i) Beasley's proposal was clearly within the power/height limits specified in § 73.211(b); (ii) the directional antenna was not employed for the purpose of reducing the mileage separation requirement and thus did not violate the rules.² On March 3, 1987, Elyria filed an Application for Review of the dismissal of its informal objection. On July 16, 1987, Beasley's 1986 modification application was granted ("1986 CP"), and Elyria filed an Application for Review of that grant on July 30, 1987.

5. *The Applications for Review.* Elyria requests that its second Application for Review be consolidated with its first Application for Review and treated as a single request for relief. Because the legal issues and discussion presented are the same in both of Elyria's Applications for Review, Elyria's request will be granted and the two pleadings will be consolidated.

6. Elyria requests review of the following four questions by the Commission: (i) whether the staff erred in concluding that the 1986 modification application was in compliance with Section 73.211(c) and, if so, whether the staff's refusal to dismiss or deny Beasley's application would constitute prejudicial error; (ii) whether, in the event Beasley's 1986 CP complies with Section 73.211(c), the staff acted arbitrarily and capriciously in refusing to impose conditions upon the construction of the requested facilities that would safeguard the signal of Elyria's station; (iii) whether, in light of the data from the field measurements taken as a cooperative venture between Beasley and Elyria, the staff's action should be set aside, and the construction permit rescinded; and (iv) whether Beasley's 1986 CP should be rescinded because Beasley failed to disclose in its application for license to cover the 1982 CP (File no. BLH-870220KG) that it had installed as an omnidirectional antenna the same antenna it proposes to use as a directional antenna.

7. *Section 73.211 (c).* Elyria contends that Beasley's 1986 CP is in direct conflict with Section 73.211(c) of the Commission's Rules because the proposal would extend

Beasley's 1 mV/m contour toward WBEA. The dispute at issue arose when Beasley filed the 1986 modification application, proposing an increase in WDMT's power and use of a directional antenna. While Elyria does not dispute the Bureau's position that § 73.211(c) does not apply to stations operating within the maximum facilities specified for their class in § 73.211(b), Elyria maintains that this position necessarily assumes that the station complies with the minimum distance separation requirements adopted in BC Docket 80-90 and specified in § 73.207. Since, however, WDMT's site does not meet the minimum distance separation requirements of § 73.207, Elyria asserts that the FM Branch incorrectly ruled that Beasley's 1986 modification application met the requirements of § 73.211(b) and therefore was not subject to the restrictions set forth in § 73.211(c). In essence, Elyria argues that the power and height restrictions set forth in § 73.211(b) apply only to those stations that satisfy the minimum distance separation requirements specified in § 73.207 and that any power and antenna height increases for short-spaced stations are governed by 73.211(c).

8. Elyria's argument is unsupported by case law, Commission rule or policy. Neither the express nor implied terms of § 73.211 suggest that stations operating at less than the minimum distances specified in § 73.207 are prohibited from extending their 1 mV/m contours beyond the location permitted by their present authorization. Section 73.211(c) restricts the extension of a station's 1 mV/m contour only if the station is operating with facilities in excess of the power and height limitations set forth in § 73.211(b). Since Beasley's 1986 modification does not specify facilities in excess of those permitted in § 73.211(b), this application is not subject to the restrictions of § 73.211(c). Furthermore, we note that even if Beasley were subject to the restrictions of § 73.211(c), the 1986 modification application would still be acceptable because WDMT's 1 mV/m contour would not be extended beyond the 1 mV/m contour authorized by the station's license. Finally, our ruling in this case is not altered by the fact that WDMT's transmitter site (originally authorized in the 1982 CP) is now short-spaced to WBEA's transmitter site because Beasley was authorized to operate from the site specified in the 1982 CP and 1986 CP prior to adoption of the new distance separation requirements in BC Docket 80-90, and has been "grandfathered" at this site without any restrictions on its ERP or HAAT beyond those specified in 73.211(b). See 97 FCC 2d at 287.

9. Further, we are not persuaded by Elyria's contention that the staff's refusal to impose the specific conditions requested by Elyria on the 1986 CP was arbitrary and capricious. Elyria's purpose in seeking these conditions on any construction permit issued Beasley for directional operation is to ensure proper installation of the antenna in order to protect WBEA. The staff imposed conditions on the 1986 CP which are routinely imposed on any facility which proposes to operate with a directional antenna and that are designed to ensure proper installation of the antenna. See Construction Permit Authorization (File no. BPH-860818IC) (July 16, 1987) at 6. Before program tests are authorized for any directional facility the permittee must submit the results of a complete proof-of-performance to establish that the radiation characteristics of the antenna are within the limits proposed in the construction permit. This condition ensures that the signals of other stations will remain protected to the extent that they are protected by the Commission's tech-

nical rules. Thus, we believe that WBEA's signal will be adequately protected by the conditions imposed on Beasley's modification proposal.

10. *Signal Contour and Antenna Issues.* The two remaining issues posed by Elyria involve the operation of Beasley's station under the 1982 CP and not the 1986 modification application. Elyria submits an engineering study that purports to establish discrepancies between the predicted field strength of Beasley's signal as reported in its application for the 1982 CP and recent actual measurements of Beasley's station signal, and contends that Beasley's 1986 modification application should be rejected based on its findings. Finally, Elyria alleges misconduct on Beasley's part for utilizing as an omnidirectional antenna the same antenna it intends to modify and use as a directional antenna in the event its modification application is granted. 47 C.F.R. § 1.115(c) provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Since the circumstances giving rise to Elyria's final two arguments did not occur until after denial of Elyria's informal objection, the proper course for Elyria to have taken in this instance was the filing of a petition for reconsideration with the Mass Media Bureau. See note to 47 C.F.R. § 1.115(c). Nevertheless, in spite of this procedural deficiency, in the interest of clearly resolving the issues in this proceeding we will consider Elyria's final two arguments rather than dismiss them.

11. Elyria claims that the actual field strength measurements it submits demonstrate that the 1982 CP results in a 1 mV/m contour which slightly exceeds the predicted 1 mV/m contour specified in the application for that CP and therefore WDMT should be restricted from further increasing its radiation toward WBEA. Elyria also claims that because the actual field strength measurements taken with WDMT operating pursuant to the 1982 CP demonstrate that the station's 1 mV/m contour will extend 52.4 kilometers, the 1986 CP proposes facilities which will result in a 1 mV/m contour which slightly exceeds the maximum contour distance permitted by § 73.211(b)(52 kilometers). But Elyria concedes that under the Commission's rules, measurements are not acceptable as a means of defining the location of the service contour. Further, § 73.211(b)(2) provides that where a station's HAAT exceeds the maximum for its class, the station's ERP must be reduced so that the *predicted* distance to the 1 mV/m contour does not exceed the maximum class contour distance. Under the 1986 CP, the predicted contour for WDMT with the facilities specified in the 1986 modification application does not exceed the maximum class contour distance. Therefore, that proposal does not violate § 73.211(b) of the rules and Elyria's claim therefore is without merit.

12. Elyria's final argument is that inconsistencies exist between information contained in the license application to cover the 1982 CP and the 1986 modification application. Elyria states that the license application to cover the 1982 CP failed to disclose that the antenna employed for omnidirectional operation is the same antenna specified in the 1986 modification application for directional operation, and asserts that this fact is significant because the cover letter to the 1986 modification application suggested that different antennas would be used for the two operations. Elyria concludes that Beasley has been improperly using a directional antenna under its non-directional au-

thorization and that such conduct is, at best, "desingenuous" and, at worst, a "deliberate misrepresentation." Beasley responds that it did not make any misrepresentation to the Commission because at the time the 1986 modification application was filed Beasley had not yet decided whether it would use an antenna for its directional operation different from the antenna it had already tested for its non-directional operation (which could be modified to obtain a directional pattern). Because Beasley wished to avoid the installation of an antenna which might be replaced in the near future if the 1986 modification application were granted, Beasley's cover letter to that application requested expedited consideration to minimize any delays in construction which might result by the substitution of antennas. Upon the filing of Elyria's objection to the 1986 modification application, Beasley decided to use the same antenna for either directional or non-directional operation with the necessary modifications. Beasley further maintains that it has not engaged in any misconduct or violated any Commission rules in its operation under the 1982 CP. The license application filed on February 20, 1987, to cover the 1982 CP reflects that Beasley's operation is consistent with its non-directional authorization. That the cover letter to Beasley's 1986 modification application indicated that a different antenna would be utilized if that application were granted does not raise a substantial and material question of misrepresentation. There is no evidence of intent (or even possible motive) to deceive the Commission; it appears that Beasley simply changed its mind. Moreover, there was no improper operation because use of the one antenna would comply with the terms of both the directional and non-directional authorizations and the Commission's rules.

13. Thus, we conclude that the staff correctly ruled that Beasley's modification application complied with Section 73.211(c) and that Elyria's signal is safeguarded by the conditions imposed in Beasley's 1986 CP. Therefore, we believe that no material question of fact exists as to Beasley's compliance with Section 73.211(c), and we find that consequently the public interest would be best served by granting Beasley's application.

14. Accordingly, IT IS ORDERED, That the Applications for Review filed by Elyria ARE DENIED. In view of our action herein, IT IS FURTHER ORDERED, That Elyria's Petition to Stay the grant of the subject application and all other related pleadings ARE HEREBY DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ WDMT changed its call sign to WPHR, effective April 9, 1987. Subsequently, on November 6, 1987, the Mass Media Bureau granted an application to assign the license of WPHR to Ardman Broadcasting Corporation of Ohio (File No. BALH-870923HL). WBEA's call sign was changed to WCZR, effective January 1, 1989. For the sake of continuity and the purpose of

this order, the parties and the call signs of the respective stations will be referred to as they existed at the time Beasley filed its original application.

² Elyria's Application for Review does not challenge the determination that WDMT's use of a directional antenna would not violate § 73.316(b). Therefore, this finding is not subject to review.