

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

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 94-78
Table of Allotments,) RM-8472
FM Broadcast Stations.) RM-8525
(Cloverdale, Montgomery)
and Warrior, Alabama)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 12, 2000

Released: June 14, 2000

By the Commission:

1. The Commission has before it an Application for Review filed by William P. Rogers ("Rogers") directed to the staff Memorandum Opinion and Order in this proceeding. 12 FCC Rcd 2090 (1997). Deep South Broadcasting Company ("Deep South"), the licensee of Station WBAM-FM, Channel 255C1, Montgomery, Alabama, and North Jefferson Broadcasting Company, Inc., a 50 percent owner of WBHK, LLC, which was the former licensee of Station WBHK(FM),¹ Channel 254C1, Warrior, Alabama (jointly referred to as "WBHK/WBAM") filed an Opposition to Rogers' Application for Review. Rogers filed a Reply to WBHK/WBAM's Opposition and a Supplement to his Reply. For the reasons discussed below, we deny the Application for Review.

2. Background. At the request of Pulaski Broadcasting, Inc. ("Pulaski"), the Notice of Proposed Rule Making ("Notice") in this proceeding proposed the allotment of FM Channel 254A to Cloverdale, Alabama as its first local aural transmission service. 9 FCC Rcd 3311 (1994).² In response to the Notice, both WBHK/WBAM and Rogers filed counterproposals. In his counterproposal, Rogers requested the allotment of Channel 254A to Florence, Alabama, as its third local FM service. The Report and Order granted the joint counterproposal filed by WBHK/WBAM by upgrading Station WBHK (formerly, Station WLBI), Warrior, to specify operation on Channel 254C1, and downgrading Station WBAM-FM, Montgomery, to specify operation on Channel 255C1. 10 FCC Rcd 13630 (1995). In so doing, the Report and Order did not accept Rogers' counterproposal. There were three reasons for that action. First, the staff found that Rogers' counterproposal is short-spaced to the licensed site of Station WZLQ, Channel 253C1, Tupelo, Mississippi. Second, using the Commission's standard methodology for predicting signal coverage, Rogers' counterproposal did not provide a 70

¹ Cox Radio, Inc. is now the licensee of Station WBHK(FM).

² Pulaski's petition for rule making was dismissed for failure to submit comments in a timely fashion after the Notice was released.

dBu contour over the entire community of Florence, as required by Section 73.315(a) of the Commission's Rules. Third, the Report and Order found that Rogers' use of actual terrain factors to demonstrate coverage of Florence was unacceptable. The Memorandum Opinion and Order denied a Petition for Reconsideration filed by Rogers directed to the Report and Order.

3. Application for Review. In his Application for Review, Rogers sets forth two arguments. First, he contends that the short-spacing to the licensed site of Station WZLQ, Channel 253C1, Tupelo, Mississippi, should not preclude his proposed allotment of Channel 254A at Florence, Alabama. This claim is based upon the fact that at the time he filed his counterproposal, his proposal met the minimum separation requirements with respect to Station WZLQ's outstanding construction permit (File No. BPH-930812IB). In this regard, Rogers argues that the dismissal of his proposal was in contravention of "applicable precedent." Second, Rogers contends that the 70 dBu signal of his proposed Channel 254A allotment will encompass 88% of Florence, and consistent with prior actions, should not have been dismissed. We will consider each of these arguments below.

4. Discussion. At the time that Rogers submitted his counterproposal for Florence, Alabama, the staff had a policy of allotting a new channel to a community even if it was short spaced to an outstanding license, if there was an outstanding construction permit which would obviate the short-spacing with the licensed facilities. See, e.g., Linden, Texas, 10 FCC Rcd 5126 (1995). In those kinds of cases, the staff would defer the licensing of a proposed new channel until the facilities specified in the relevant construction permit were constructed and licensed. This procedure made the processing of rulemaking proposals contingent on the construction and licensing of authorized facilities by third parties in separate proceedings to effect compliance with the minimum separation requirements. The staff no longer adheres to this procedure. See Cut and Shoot, Texas, 11 FCC Rcd 16383 (Policy and Rules Div. 1996). In Cut and Shoot, it was determined that such a procedure was not conducive to the efficient transaction of Commission business and imposed unnecessary burdens on the administrative resources of the Commission. It was also determined that this procedure was unfair to parties who filed proposals in compliance with our separation requirements and delayed service to the public pending the licensing of an outstanding construction permit. We concur in the policy adopted by the staff in Cut and Shoot.

5. To the extent that Rogers has argued that he has been treated unfairly in that the more lenient policy preceding Cut and Shoot should have been but was not applied to his counterproposal, it is not necessary to resolve this issue. The staff's denial of Rogers' counterproposal on the grounds that it failed to comply with Section 73.315(a) of the Commission's Rules is valid and dispositive.

6. The Rogers proposal for a Channel 254A allotment will not provide the entire community of Florence with the requisite 70 dBu signal, in contravention of Section 73.315(a) of the Rules. In his Application for Review, Rogers refers to two examples in which, at the application stage, less than 100% coverage of the proposed city of license was determined to be "substantial compliance" or Section 73.315(a) was waived. See Virginia Beach, Virginia, 5 FCC Rcd 3949 (1990) and Barry Skidelsky, 70 RR 2d 722 (1992). These cases are not persuasive, however, because they do not address coverage issues in the context of allotment proceedings. We continue to believe that there is a

valid reason for considering Section 73.315(a) differently at the allotment stage as opposed to the application stage. At the allotment stage, we determine coverage by utilizing the maximum power for the class and the antenna height above average terrain ("HAAT"), the latter being determined by averaging the elevations along each of eight radials from 3 to 16 kilometers from a theoretical reference site. We cannot evaluate the actual transmitter site that will be specified in the successful application for the Channel 254A allotment at Florence, because no such site yet exists. Here, there is no assurance that Rogers will be the successful applicant nor is there a requirement that he actually specify this site in his application. Thus, consideration of a waiver request at the allotment stage would be inappropriate. It continues to be our view that in order to maintain the technical integrity of the FM broadcast service, we should adhere strictly to spacing and coverage requirements at the allotment stage, thereby maximizing the likelihood that the eventual authorization will comply with our technical requirements. See, e.g., Caldwell, College Station and Gause, Texas, 15 FCC Rcd 3322, 3327 (2000), recon. pending.

7. In the allotment context, we have waived our city grade coverage requirement only in Oak Beach and Bay Shore, New York ("Bay Shore"), 2 FCC Rcd 1293 (1987) and a situation involving six communities in the implementation of BC Docket No. 80-90. See Terrell and Daingerfield, Texas, 5 FCC Rcd 556 (1990) and Greenwood, South Carolina, 3 FCC Rcd 4108 (1988). None of the waiver cases is analogous to the circumstances of this case. In Bay Shore, we allotted Channel 276A to Bay Shore, New York, as a first local service even though it was predicted, according to our standard propagation methodology using average terrain, that a 70 dBu signal would cover only 45% of Bay Shore. We noted that, because the path from the transmitter site to Bay Shore consisted of water with no terrain obstructions, the 70 dBu signal contour would actually extend farther than predicted along that radial, and likely provide city-grade coverage of Bay Shore. Here, Rogers made no showing that the terrain along the path towards Florence would enhance the signal so that it would likely extend farther than predicted, and provide the requisite coverage of Florence. Moreover, Bay Shore was premised on the availability of only one site -- Fire Island -- that met our minimum separation requirements. The only available transmitter site on Fire Island was located atop an historic lighthouse that could accommodate an antenna tower, height-restricted by the National Park Service to 25 feet. At such an antenna height, the Commission's propagation methodology does not predict 70 dBu coverage of the entirety of Bay Shore using the then-maximum power of 3 kilowatts. Thus, under these unusual circumstances, it was appropriate to rely on the reasonable likelihood of city-grade coverage, despite the prediction, using our standard methodology, that 100 % coverage of the community of license would not be achieved. These unusual circumstances are not present here.

8. In Implementation of BC Docket No. 80-90, 59 RR 2d 679 (1985), we reconsidered sua sponte the principal city coverage requirement regarding six of the 689 allotments made possible by our action in BC Docket No. 80-90. In that action, we recognized the need to provide FM allotments to six larger communities where the demand for FM allotments was the greatest. Inasmuch as only Class A channels were available, we "for [that] proceeding only" allotted these Class A channels even though they could not provide the requisite principal city coverage to an entire community. We observe that no party to that proceeding was prejudiced by this action, whereas in the case now before us, waiving the coverage rule for Rogers would prejudice other parties to this proceeding.

9. Even if we were to accept the Rogers claim that his proposal would encompass 88% of Florence, we do not believe that waiver in this situation would be appropriate, because it would prejudice a competing proposal that fully complies with Section 73.315(a) of the Rules. See Caldwell, College Station and Gause, Texas, 13 FCC Rcd 13772, 13775-76 (1998), appeal pending.³

10. We also disagree with Rogers that his proposal encompasses 88% of Florence. Employing the Commission's F (50,50) curves and utilizing maximum Class A facilities (6 kW effective radiated power and 100 meters antenna HAAT) at the site specified for channel 254A at Florence, the city-grade or 70 dBu contour would extend 16.2 kilometers and cover only 57% of that community. See Section 73.333 Figure 1 of the Rules and the map included in Exhibit A of Rogers' "Supplement to Reply to Opposition to Application for Review." That exhibit is a copy of an engineering exhibit submitted by Rogers with his original counterproposal. That exhibit asserts that, using a United States Geological Survey Topographic Map and a Defense Mapping Industry terrain data base, the 70 dBu signal would extend approximately 18 kilometers and encompass 88% of Florence. Under Section 73.313 of the Rules, however, only average terrain calculations (as determined using the eight cardinal radials from a reference site) are used in determining whether the entire community is provided with the requisite 70 dBu signal coverage. The Commission has not departed from that requirement in allotment proceedings except in the limited situations described in paragraphs 7 and 8, supra, which are not present here,⁴ and in the circumstance known as the "Woodstock" exception.⁵

³ At the request of the Commission, the foregoing case was remanded from the U.S. Court of Appeals for the District of Columbia Circuit to the Commission for a supplemental decision. That decision, which affirmed the 1998 decision, is published at 15 FCC Rcd 3322 (2000), recon. pending.

⁴ However, there are situations, none of which are applicable here, where it may be appropriate to use a propagation methodology different from the Commission's standard F(50,50) curves. Rule §73.313(e) provides for use of an alternate propagation methodology such as Tech Note 101 (P.L. Rice, A.G. Longley, K.A. Norton, and A.P. Barsis, "Transmission Loss Predictions for Tropospheric Communications Circuits," NBS Technical Note 101, first published in 1965 by the National Bureau of Standards). It may be used to supplement but not supplant, the Commission's F(50,50) curves when the terrain along a radial from a specific site "departs widely" from average terrain and the "contour distances [are] different from what may be expected in practice." We note that Rogers states in his engineering statement that he used, along with the 3-second terrain data base, the "Computer Software Program CVR/VER110" to determine the claimed 88% coverage of Florence. Rogers does not specify

11. Rogers does not qualify for the Woodstock exception.⁶ That limited exception permits an existing licensee that wishes to upgrade its own facilities on a co- or adjacent channel to demonstrate that a 70 dBu contour would encompass the entire community of license by using the average elevations of terrain along one radial between a specific site and the community. Once an upgrade is granted, the Commission does not consider competing applications that could specify another site.⁷ Moreover, in Woodstock the proponent had taken steps to assure the continued availability of a transmitter site for the upgraded channel. Additionally, tower approval had been obtained from the Federal Aviation Administration (“FAA”). It was, therefore, appropriate to depart from the assumption of a circular city-grade contour over uniform terrain using a hypothetical reference site and determine the extent of the 70 dBu signal by examining the actual terrain profile along the radial from a specific site to the community. Along that radial, we found that 70 dBu coverage extended beyond the community of Woodstock. In Rogers’ situation, none of the special Woodstock facts exist; he is not proposing to upgrade existing facilities; he does not have reasonable assurance of the availability of a specific transmitter site or FAA approval of that site, and there was competition for the allocation from other parties.

12. Even if Rogers’ proposal had qualified for an exception under Woodstock, his exhibit claims that a 70 dBu signal would extend only 18 kilometers (greater than that predicted by our F(50,50) curves), and encompass 88% of Florence. Therefore, we would not have allotted Channel 254A to Florence because, as discussed above, his proposal does not meet the requirement of placing a 70 dBu signal over the entirety of Florence.

that this program uses the F(50,50) curves or that the program even uses an alternate propagation methodology. If he uses an alternate propagation methodology, however, he must 1) describe the procedures used in preparing the study, 2) the assumptions made, and 3) the methodology employed, as well as 4) provide sample calculations. Rogers’ engineering statement does none of this.

⁵ Rogers also argues that his showing of 88% coverage of Florence should be sufficient because it exceeds the 80% coverage requirement accepted at the applications stage. We disagree, noting that not only does this not meet the 100% coverage requirement of § 73.315(a), but that, when properly measured, his proposal would cover only 57% of the community.

⁶ Woodstock and Broadway, Virginia, 3 FCC Rcd 6398 (1988). It appears that Rogers has used the Woodstock exception in his foregoing engineering exhibit (Exhibit A of Rogers “Supplement to Reply to Opposition to Application for Review”) to demonstrate 88 percent coverage of Florence. Thus, it appears that he used the average elevations of terrain along only one radial to demonstrate his coverage of Florence. This technique is what the Report and Order referred to as “the use of terrain factors to enhance propagation of a 70 dBu signal in the direction of Florence,” 10 FCC Rcd 13630 at fn.4 (Allocations Br. 1995) and the staff Memorandum Opinion and Order referred to as “terrain enhancement,” 12 FCC Rcd 2090, 2092 (Policy and Rules Div. 1997).

⁷ In limiting the transmitter site to that for which the licensee has taken specific steps to assure its availability, we know the actual site location at the allotment stage, which permits the determination of the range of the signal along the radial path from that site to the community. If the average elevation of the terrain is less than that along the other pertinent radials, then the range of the signal will be greater than that predicted by the Commission’s standard propagation methodology.

13. In view of the above, IT IS ORDERED, That the Application for Review filed by William P. Rogers IS DENIED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary