

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

In the Matter of)	
)	
Application of)	
)	
Gray Television Licensee, Inc.)	
For Modification of Construction Permit of)	File No. BMPCT-20031219AAK
Station WCAV(TV))	Facility Id No. 363
Charlottesville, Virginia)	
)	
and)	
)	
Application of)	
)	
Charlottesville Broadcasting Corporation)	
(Assignor))	
)	
and)	
)	
Gray Television Licensee, Inc.)	
(Assignee))	
)	
For Consent to Assignment of)	
Construction Permit of)	File No. BAPCT-20040316AJT
Station WCAV(TV))	Facility Id No. 363
Charlottesville, Virginia)	

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2008

Released: January 17, 2008

By the Commission:

I. INTRODUCTION

1. The Commission has before it two Applications for Review filed by Sidney E. Shumate ("Shumate") on June 28, 2004.¹ Shumate seeks review of the Media Bureau's grant of two applications: an application to modify a construction permit for WCAV(TV), Charlottesville, Virginia (Channel 19), filed by Gray Television Licensee, Inc. ("Gray"), and an application for consent to the assignment of the WCAV construction permit filed by Charlottesville Broadcasting Corporation ("CBC") and Gray. Because we conclude below that Shumate's arguments lack merit, we deny both applications for review.

¹ Charlottesville Broadcasting Corporation and Gray Television Licensee, Inc. filed an opposition on July 9, 2004 and Shumate filed a reply on July 26, 2004.

II. BACKGROUND

2. By letter dated May 28, 2004, the Media Bureau granted the above-captioned modification and assignment applications and denied Shumate's informal objections to both applications, among others. In his first informal objection, Shumate argued that the modification application violates Commission guidelines with respect to human exposure to radiofrequency ("RF") electromagnetic fields.² With respect to the assignment application, Shumate argued that a grant would not be advisable because of likely construction delays.

3. In denying Shumate's informal objections, the Media Bureau concluded that Shumate's technical allegations were moot because they were based on an earlier technical proposal subsequently abandoned by the licensee of WCAV. It further found that grant of the assignment application, as well as the modification application, was in the public interest.

4. **Modification Application for Review.** In his application for review of the grant of the application to modify the construction permit, Shumate states that, on May 27, 2004, one day before the grant of WCAV's modification application, the Commission granted another modification application to allow WVIR-DT, licensed to Virginia Broadcasting Corporation, to build a new tower 140 feet from WCAV's tower. Shumate argues that the WCAV antenna will cause the allowable radio frequency level to be exceeded at a point on WVIR-DT's tower approximately 50 meters above ground, thereby creating a hazard to tower workers on the WVIR-DT tower. Shumate maintains that preparation of an environmental assessment is therefore required.

5. In opposition, CBC and Gray argue that Shumate lacks standing to file the applications for review and that they should be dismissed. Specifically, CBC and Gray state that Shumate has not shown that he is aggrieved by the Media Bureau's decision. Shumate replies that Givens & Bell, Inc., a corporation in which he was a principal, filed a competing application for the construction permit at issue here in 1996 which was dismissed by the Commission in 2001. If the above-captioned applications had not been granted, Shumate maintains, the construction permit would have expired and he would have sought reinstatement of his application.³

6. In any event, citing Section 1.115(c) of the Commission's Rules, CBC and Gray urge that the modification application for review be dismissed because it improperly raises issues regarding compliance with RF guidelines that were not raised before the Media Bureau.⁴ Specifically, CBC and Gray maintain that, in the modification application for review, Shumate relies on a new engineering fact concerning a nearby tower for WVIR-DT. According to CBC and Gray, because none of the informal objections or responsive pleadings in the underlying proceeding addressed this particular fact or argument, the Media Bureau never had an opportunity to consider this issue. In his reply, Shumate counters that the issue could not be raised before the Media Bureau because the WVIR-DT modification was approved one day before the grant of WCAV's modification application.

7. CBC and Gray maintain that, even on the merits, Shumate's concern regarding RF exposure is groundless. CBC and Gray state that, because the location identified by Shumate is 150 feet above the

² See *Office of Engineering and Technology, Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields (OET Bulletin 65) (1997) ("OET 65")*.

³ Indeed, Shumate has asked for reinstatement in a pleading filed in connection with WCAV's license application. That matter remains pending before the Media Bureau.

⁴ 47 C.F.R. § 1.115(c).

ground, it is not accessible to the public. Moreover, CBC and Gray point out that both affected stations, in their modification applications, committed to adopt measures to protect people working on the tower.

8. **Assignment Application for Review.** In his application for review of the grant of the application for consent to assignment of the construction permit ("assignment application for review"), Shumate maintains that the Media Bureau's treatment of the assignment application is significantly different from the treatment afforded another similarly situated party. Shumate maintains that, in order for the Media Bureau to effect such a change in policy, it must provide a rational basis, which Shumate claims it has not done.

9. Shumate points out that the application for assignment of the construction permit for WIJR(AM) was similar to the instant one because WIJR's construction permit was scheduled to expire about two months after the application was accepted for filing.⁵ According to Shumate, by the time the application was granted, WIJR had only eight days to construct and the WIJR construction permit expired before the station could be built. By contrast, Shumate complains, the WCAV assignment application was granted only nine weeks after it was accepted for filing and only three days after it was amended, leaving more time to construct before expiration of the construction permit.⁶

10. In their opposition, CBC and Gray state that the WIJR application was granted 70 days after it was filed, but only eight days before the construction permit expired. The Media Bureau granted WCAV's assignment application 73 days after it was filed and over two and a half months before the construction permit was scheduled to expire.⁷ CBC and Gray maintain that Shumate's argument is wrong as a matter of fact, because it actually took longer to grant WCAV's application. Unlike the WIJR application, WCAV's was filed well before expiration of the construction permit. Moreover, CBC and Gray argue, Shumate is wrong as a matter of law, because the Media Bureau's prompt action on the assignment application served the public interest.

III. DISCUSSION

11. **Standing.** Section 1.115(a) of the Commission's Rules permits any person aggrieved by any action taken under delegated authority to file an application for review.⁸ However, to be aggrieved, a party must establish a direct economic or other connection between its interest and the complained of grant of the applications.⁹ Shumate's claim that if the above-captioned applications had not been granted

⁵ See *Public Notice*, Report No. 44935, released March 6, 2001, announcing the grant of WIJR's assignment application, File No. BAP-20001221AAG.

⁶ The amendment to which Shumate refers was filed for the sole purpose of changing the contact information for the assignee.

⁷ The WCAV construction permit was scheduled to expire on August 15, 2004. The discrepancy between Shumate's timeline and CBC and Gray's can perhaps be explained by the fact that Shumate counts from the day the applications were accepted for filing and CBC and Gray count from the filing date. This distinction is immaterial to the resolution of the issue of disparate treatment that Shumate raises in his application for review of the assignment in this case; namely, the difference in the length of time between the grant of the two applications and the expiration of the respective construction permits.

⁸ 47 C.F.R. § 1.115(a). Also, 47 C.F.R. § 1.115(f) requires a party, such as Shumate, to sign, state his address, and verify the information set forth in the application for review. Shumate has not fully complied with this requirement. See n.14, *infra*.

⁹ See *Hanford FM Radio*, Memorandum Opinion and Order, 11 FCC Rcd 8509, 8511 (1996).

he would have sought reinstatement of the entity's application does not point to an injury in fact. It is conjecture to suppose that Shumate's claimed injury would have been redressed by the relief he requests. Shumate cannot show that denial of the applications at issue would likely result in reinstatement of an application dismissed in 2001, followed by grant of that application.¹⁰ In addition, in 2000 the Commission found that the filing of the Givens & Bell application with which Shumate was associated was unauthorized and stated that "even if we were to rescind CBC's construction permit for any reason, we would not permit Givens & Bell to resubmit that application or to take advantage of the procedures established for pending applications for new analog television stations on channels 60-69."¹¹ In any event, we need not decide whether Shumate is an aggrieved person under Section 1.115(a) of the Commission's Rules because we believe it is in the public interest, and in the interest of finality, to address the merits of Shumate's applications for review on our own motion.¹²

12. **Modification Application for Review.** The allegations regarding WCAV's compliance with RF guidelines contained in Shumate's original informal objection were properly dismissed as moot because they were based on an abandoned proposal. The allegations regarding RF compliance that Shumate makes in his modification application for review are based on the tower relocation by an unrelated station, WVIR-DT, which was approved just one day before the modification application at issue here was granted. Because of the short time frame involved, we will not penalize Shumate for failing to raise the issue earlier. Nevertheless, these facts have not been previously considered by the Media Bureau. On our own motion, we will consider the allegations on their merit now.

13. Based upon our review of the modification applications for both WCAV and WVIR-DT, we conclude that the two proposals comply with the Commission's RF guidelines. Both stations have agreed to cooperate to adopt whatever procedures are necessary to protect people working on the towers.¹³

14. **Assignment Application for Review.** The gravamen of Shumate's argument regarding the Media Bureau's grant of the assignment application is that the staff acted too quickly on the assignment application, thus permitting the licensee to complete construction before the construction permit expired. While such a result may have been disappointing to Shumate, it does not constitute a policy change and does not implicate the public interest. Moreover, there was no disparate treatment here because there was more time before expiration of the construction permit after WCAV filed its application than after the WIJR application was filed.

¹⁰ See, e.g., *A-C Broadcasters*, Memorandum Opinion and Order, 10 FCC 2d 256 (1967) ("since there was no way of knowing whether" an applicant for a station "would ever obtain a permit, its claim of injury rested on pure conjecture.").

¹¹ Footnote omitted. See *Achernar Broadcasting Company*, Order, 15 FCC Rcd 20458, 20459 (2000).

¹² Cf., *American Radio-Telephone Service, Inc.*, Memorandum Opinion and Order, 93 FCC 2d 1138 (1983).

¹³ See *OET 65* at p. 56. Although Shumate does not claim a threat to members of the public, we note that the location identified by Shumate is high enough above the ground that the area at the base of the tower will not be affected. Moreover, the WCAV application states that the location of the tower is not readily accessible to the public because it is fenced.

IV. CONCLUSION

15. Having considered, on our own motion, the merits of the arguments raised by Shumate in both applications for review, we conclude that the Media Bureau's decision was correct. We see no reason to disturb it.

V. ORDERING CLAUSES

16. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 1.115 of the Commission's Rules,¹⁴ Sidney E. Shumate's Applications for Review **ARE BOTH DENIED**.

17. **IT IS FURTHER ORDERED** that a copy of this *Memorandum Opinion and Order* shall be sent by certified mail, return receipt requested, to Sidney E. Shumate, 1897 Ridge Road, Haymarket, VA 20169,¹⁵ and to counsel for Gray Television Licensee, Inc., Robert A. Beizer, Esq., 1750 K Street, N.W., Suite 1200, Washington, DC 20006 and Charlottesville Broadcasting Corporation, Margot Polivy, Esq., 1532 16th Street, N.W., Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁴ 47 C.F.R. § 1.115

¹⁵ This is the address given in the Certificate of Service accompanying an Opposition filed by CBC and Gray. The pleadings filed by Shumate that are the subject of this *Memorandum Opinion and Order* do not include an address.