

FCC 67-256

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

<p>In re Applications of KITTYHAWK BROADCASTING CORP., KETTERING, OHIO Requests: 1140 kc, 1 kw, DA-Day THE GEM CITY BROADCASTING Co., KETTER- ING, OHIO Requests: 1140 kc, 5 kw, 1 kw (CH), DA-2, Day WESTERN OHIO BROADCASTING SERVICE, INC., EATON, OHIO Requests: 1130 kc, 250 w, DA, Day TREATY CITY RADIO, INC., GREENVILLE, OHIO Requests: 1130 kc, 250 w, DA, Day JAMES L. SCHMALZ, PHYLISS ANN SCHMALZ, JAMES I. TOY, JR., AND THOMAS A. GALL- MEYER, D.B.A. BLOOMINGTON BROADCASTING Co., BLOOMINGTON, IND. Requests: 1130 kc, 1 kw, Day VOICE OF THE OHIO VALLEY, INC., LOUISVILLE, KY. Requests: 1130 kc, 10 kw, DA-Day W. V. RAMSEY AND LEWIS YOUNG, D.B.A. SHIVELY BROADCASTING Co., SHIVELY, KY. Requests: 1130 kc, 500 w, Day ALBERT S. TEDESCO (WWCM), BRAZIL, IND. Has: 1380 kc, 500 w, DA-Day Requests: 1130 kc, 500 w, Day COOK, INC., ELLETTSVILLE, IND. Requests: 1110 kc, 250 w, Day For Construction Permits</p>	<p>Docket No. 17243 File No. BP-16603</p> <p>Docket No. 17244 File No. BP-16877</p> <p>Docket No. 17245 File No. BP-16816</p> <p>Docket No. 17246 File No. BP-16881</p> <p>Docket No. 17247 File No. BP-16876</p> <p>Docket No. 17248 File No. BP-16878</p> <p>Docket No. 17249 File No. BP-16738</p> <p>Docket No. 17250 File No. BP-16669</p>
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MEMORANDUM OPINION AND ORDER

(Adopted March 1, 1967)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration (a) the above-captioned applications; (b) a motion to dismiss the application of Cook, Inc., filed by Bloomington Broadcasting Co. (BP-16876) on October 4, 1965; and (c) pleadings in opposition and reply thereto.

2. In its motion to dismiss, Bloomington Broadcasting Co. requests dismissal of the proposal of Cook, Inc., on the grounds that its application was not timely filed pursuant to section 1.571(c) of the Commis-

sion's rules (the cutoff rule) and is thus not entitled to consolidation with the applications in this group. Bloomington points out that the lead application (Kittyhawk Broadcasting Corp., BP-16603) was listed on the Commission's public notice of July 8, 1965 (FCC 65-610). The notice stated that, in order to be considered with any listed application or with any other application conflicting with one on the list, an application had to be filed by the close of business on August 17, 1965. Prior to that date, there were no applications on file which would have conflicted, directly or indirectly, with the Cook proposal. However, on August 17, 1965, Bloomington filed its application and, because of an interlinking chain of interference, became joined in engineering conflict with Kittyhawk. For that reason, under the terms of the public notice of July 8, 1965, Bloomington's effective cutoff date became August 17, 1965, and no applications conflicting with Bloomington could be timely tendered after that date. On September 9, 1965, Cook tendered its application for filing. This proposal and that of Bloomington involve mutually destructive interference.

3. Cook, in opposing the motion to dismiss, states that preparation of its application began during the first week in August of 1965; that it was physically impossible to complete the application by August 17; that, until Bloomington filed, it had no reason to believe that it (Cook) would be bound by the August 17 cutoff date; and that, since Bloomington did not file until August 17, it (Cook) did not receive adequate notice of the cutoff date. Cook cites *Ridge Radio Corporation v. F.C.C.*, 110 U.S. App. D.C. 277 (1961), in support of its position. Alternatively, in the event of an adverse finding as to timeliness, Cook asserts that the above sequence constitutes good grounds for a waiver of the rule.

4. The Commission finds that Cook's reliance on *Ridge Radio*, supra, is misplaced. In that case the court found that the Commission's public notice "as phrased * * * was not fair warning * * * ." [Emphasis added.] Following *Ridge Radio*, however, the Commission reworded its notice in such a fashion as to afford specific warning to prospective applicants that they could be cutoff by the filing of unlisted applications which involve conflict with listed proposals.¹ However, even prior to *Ridge Radio*, supra, the Commission refused consolidation to late-filed applications which involved, through unlisted applications, indirect interlinking conflict with proposals appearing on cutoff lists.² The Commission's interpretation of the cutoff rule has remained constant since its inception. The only thing that has changed has been the wording of the public notices. For these reasons we believe that Cook knew or should have known that an intervening proposal filed on the last possible day could act to deny him consolidation. To illustrate: If proposals A and B conflict and A has a published cutoff date, a prospective applicant, D, knows or should know that he must be ready to file by A's cutoff date even though his proposal does not involve direct conflict with A or B be-

¹ The words added were " * * * or with any other application on file by the close of business on [a given date] which involves a conflict necessitating a hearing with an application on this list * * * ."

² *Fredericksburg Broadcasting Corp.*, 19 R.R. 900 (1960); *Mid-American Broadcasting System, Inc.*, 19 R.R. 920 (1960).

cause an unlisted applicant, C, might file—perhaps for tactical reasons—on the last day allowed. D knows that if C should file in this fashion and conflicts with either A or B that he, D, will not be entitled to file an application in conflict with C. Any other interpretation of the rule would result in its destruction because if D were accepted for filing, any applications filed subsequent thereto and in conflict with D would be entitled to consolidation in the ABCD group. In theory, at least, the chain might never end, and any attempt to establish cut-off dates would be nugatory. In the case at hand, the fact that no later-filed application conflicts with the Cook proposal is purely fortuitous and that fact cannot be relied upon by Cook as grounds for waiver. Since Cook has not set forth any compelling reasons to warrant extraordinary action³ by the Commission, its request for waiver will be denied and the application returned as untimely, pursuant to section 1.227(b).

5. The Commission, after examination of the above-captioned applications, finds that the following deficiencies exist:

(a) In re application of Kittyhawk Broadcasting Corp.:

(1) The proposed 5-mv/m contour would penetrate the geographic boundaries of Dayton, Ohio. Since the population of Dayton (262,332) exceeds 50,000, and is more than twice that of Kettering, Ohio (54,462), a rebuttable presumption that the applicant realistically proposes to serve the larger community arises under the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 R.R. 2d 1901, adopted December 22, 1965. By amendment of November 21, 1966, the applicant submitted data in attempting to rebut the presumption that it realistically proposes to serve Dayton. However, after examination of this material, the Commission finds that the applicant has failed to rebut the presumption and that an evidentiary hearing must be held to explore that matter further.

(2) The proposed towers have not yet obtained clearance from the Federal Aviation Agency. Thus, an air menace issue will be specified.

(b) In re application of the Gem City Broadcasting Co.:

(1) The proposed 5-mv/m contour would penetrate the geographic boundaries of Dayton, Ohio (population 262,332). Since the population of Dayton exceeds 50,000 and is more than twice that of Kettering, Ohio (54,462), a rebuttable presumption that the applicant realistically proposes to serve the larger community arises under the Commission's December 22, 1965, *Policy Statement Involving Suburban Communities*, supra. By amendment of November 28, 1966, the applicant submitted data in an attempt to rebut the aforementioned presumption. However, after examination of this material, the Commission finds that the applicant has failed to rebut the presumption and an issue with respect thereto will be included.

(c) In re application of Western Ohio Broadcasting Service, Inc.:

(1) It appears, from the applicant's data, that the antenna parameters specified in the application do not accurately depict the proposed radiation pattern. Accordingly, an issue will be designated to determine whether the proposed antenna parameters accurately depict the proposed directional antenna radiation pattern.

(d) In re application of Treaty City Radio, Inc.:

(1) Based on applicant's data it appears that cash in the amount of approximately \$75,000 (construction cost, \$25,000; working capital, \$50,000) will be required for the construction and operation of the

³ *Mid-America Broadcasting System, Inc.*, supra.

proposed station for 1 year. To meet these requirements, the applicant relies upon \$10,000 cash in a bank account, a bank loan of \$25,000, new capital of \$5,000, and \$60,000 in projected revenues for the first year. However, the applicant has failed to submit data in support of his predicted revenue. Furthermore, no balance sheets have been submitted purporting to establish the ability of the potential stockholders to meet their financial obligations. In addition, the letter submitted pledging the bank loan is more than a year old and as such is unacceptable. Assuming, arguendo, the aforesaid bank letter is acceptable, the applicant would still require \$40,000 to meet its capital requirements. Accordingly, a financial issue will be included.

(2) The site photographs do not show sufficient detail within the immediate vicinity of the proposed antenna site. Accordingly, an issue will be designated to determine if the antenna site is suitable for the proposed operation.

(e) In re application of Bloomington Broadcasting Co.:

(1) It appears from the applicant's data that \$169,386 (downpayment on equipment, \$6,386; land, \$30,000; building, \$30,000; miscellaneous, \$19,000; operation expenses for first year, \$34,000) will be required to construct and operate the proposal for 1 year. To meet this expense the applicant has available a \$150,000 loan from James I. Toy, a minority partner, and \$6,000 in capital contributed by Toy and Thomas A. Gallmeyer (the remaining minority partner). In addition, James and Phyllis Schmalz (majority partners—76 percent ownership) are committed to contribute \$19,000 to capital; however, their balance sheet indicates that they lack sufficient liquid assets to meet this obligation. Furthermore, Bloomington relies on predicted revenue of \$90,000 to help defray its initial expenses, but the applicant has failed to establish that this revenue is available.

(2) In view of the Schmalz' inability to meet their commitment and the lack of evidence showing the availability of revenue, the Commission finds that the applicant requires \$13,386, in addition to the \$156,000 available, to meet their first-year expenses. Accordingly, a financial issue will be included.

(3) Since the applicant has not obtained clearance from the Federal Aviation Agency, an issue will be included to determine whether the proposed antenna would constitute a menace to air navigation.

(f) In re application of Voice of the Ohio Valley, Inc.:

(1) Based on the applicant's data, \$113,697 (downpayment on equipment, \$20,505; first-year payments on equipment, with interest, \$24,192; building, \$10,000; miscellaneous, \$4,000; working capital for 1 year, \$55,000) will be required to meet the cost of construction and operation for the first year. To defray these expenditures the applicant relies on stock subscriptions of \$110,000 by John O. Bland, Jr. (\$99,000), and Jack Gibson (\$11,000) and predicted revenue of \$20,000. Examination of the subscribers' balance sheets indicates that neither has sufficient liquid assets to meet his stock-purchase commitments. In addition, the applicant has failed to submit data which would indicate the availability of the predicted revenue. Accordingly, a financial issue will be specified.

(2) It further appears that the applicant proposes to operate daytime with 10 kw of power utilizing a six-element directional antenna system to suppress that radiation over a wide arc; that the theoretical calculated radiation pattern exhibits essentially zero radiation in the null areas, and maximum expected operating values (MEOV's) as low as 16 mv/m are proposed; that the site photographs submitted are inadequate and, in fact, it appears that the proposed site is located in an area where manmade structures may exist, and, as a result, problems of reradiation may occur; and in view of these considerations an issue will be included to determine whether the applicant will be able to adjust and maintain the proposed directional antenna system within the maximum expected operating values of radiation, as proposed.

(g) In re application of Shively Broadcasting Co.:

(1) Applicant's data indicate that \$63,242 will be required to construct (\$23,370) and operate (\$39,872) the proposed station for 1 year. The partnership agreement provides that the partners will contribute sufficient funds to meet the cost of construction and operation. The applicant has not submitted an acceptable manufacturer's letter of credit and, furthermore, it has submitted no evidence to support its prediction of revenue.

(2) It appears from the partner's individual balance sheets that neither has sufficient liquid assets to meet his commitment. Thus, a financial issue will be specified.

(3) The proposed 5-mv/m contour would penetrate the geographic boundaries of Louisville, Ky. Since the population of Louisville (390,639) exceeds 50,000, and is more than twice that of Shively, Ky. (15,155), a rebuttable presumption that the applicant realistically proposes to serve the larger community arises under the Commission's aforementioned policy statement of December 22, 1963, on suburban communities. By amendment the applicant submitted data in an attempt to rebut the presumption that it is realistically proposing to serve Louisville. However, after examination of this material, the Commission finds that the applicant has failed to effectively rebut the aforesaid presumption, and an issue will be designated with respect thereto.

6. Except as indicated by the issues specified below, each of the applicants is qualified to construct, own, and operate as proposed, but, since the applications are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above applications, with the exception of Cook, Inc., *Are designated for hearing in a consolidated proceeding*, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine the areas and populations which would receive primary service from the above-captioned applications, with the exception of the WWCM application, and the availability of other primary service to such areas and populations.

2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station WWCM, and the availability of other primary service to such areas and populations.

3. To determine whether the proposal of Kittyhawk Broadcasting Corp. will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(b) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(c) The extent to which the applicant's program proposal will meet the specific unsatisfied programing needs of its specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

4. To determine, in the event that it is concluded, pursuant to the foregoing issue (a), that the proposal will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely, Dayton, Ohio.

5. To determine whether the proposal of the Gem City Broadcasting Co. will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(b) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(c) The extent to which the applicant's program proposal will meet the specific unsatisfied programing needs of its specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

6. To determine, in the event that it is concluded, pursuant to the foregoing issue (a), that the proposal will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely, Dayton, Ohio.

7. To determine whether the antenna parameters proposed by Western Ohio Broadcasting Service, Inc., accurately depict the proposed directional antenna radiation pattern.

8. To determine with respect to the application of Treaty City Radio, Inc.:

(a) The availability to the applicant of a \$25,000 bank loan from the Citizens State Bank of Greenville, Ohio.

(b) To determine the financial ability of Clarence E., Anna Lou, and Craig E. Plessinger to meet their commitments to purchase stock of the Treaty City Radio, Inc.

(c) To determine the basis for the applicant's estimate of revenue in its first year of operation, whether such estimate is reasonable, and the extent to which revenues may be relied upon to yield necessary funds for the operation of the proposed station for the first year.

(d) In light of the evidence adduced pursuant to the above issues whether Treaty City Radio, Inc., is financially qualified to construct and operate its proposed station.

9. To determine whether the transmitter site proposed by Treaty City Radio, Inc., is satisfactory with particular regard to any conditions that may exist in the vicinity of the antenna system which would preclude adjustment and maintenance of the proposed directional antenna system.

10. To determine, with respect to the application of Bloomington Broadcasting Co.:

(a) The ability of James and Phyliss Schmalz to meet their commitments to contribute \$19,000 in capital to the partnership.

(b) The basis for the applicant's basis of revenue in its first year of operation, whether such estimate is reasonable, and the extent to which such revenues may be relied upon to yield necessary funds for the operation of the proposed station for the first year.

(c) Whether, in light of the evidence adduced pursuant to the above issues, the applicant is financially qualified to construct and operate its proposed station.

11. To determine whether there is a reasonable possibility that the tower height and location proposed by Bloomington would constitute a menace to air navigation.

12. To determine whether there is a reasonable possibility that the tower height and location proposed by Kittyhawk Broadcasting Corp. would constitute a menace to air navigation.

13. To determine, with respect to the application of Voice of the Ohio Valley, Inc.:

(a) The ability of Jack L. Gibson and John O. Bland, Jr., to meet their commitments to purchase stock in the Voice of Ohio Valley, Inc.

(b) The basis for the applicant's estimate of revenue in its first year of operation, whether such estimate is reasonable, and the extent to which revenues may be relied upon to yield necessary funds for the operation of the proposed station for the first year.

(c) To determine, in the light of the evidence adduced pursuant to the aforesaid issue, whether the applicant is financially qualified to construct and operate its proposed station.

14. To determine whether Voice of the Ohio Valley, Inc., will be able to adjust and maintain the proposed directional antenna system within the maximum expected operating values of radiation, as proposed.

15. To determine, with respect to the application of Shively Broadcasting Co.:

(a) The ability of W. V. Ramsey and Louis Young to meet their financial commitments to contribute sufficient capital which would enable them to construct and operate a standard station, as proposed.

(b) The basis for the applicant's estimate of revenue in its first year of operation, whether such estimate is reasonable, and the extent to which revenues may be relied upon to yield necessary funds for the operation of the proposed station for the first year.

(c) Whether the deferred credit of Collins Radio Co. is available.

(d) Whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant is financially qualified to construct and operate its proposed station.

16. Whether the proposal of Shively Broadcasting Co. will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all relevant evidence, including, but not necessarily limited to, the showing with respect to:

(a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(b) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(c) The extent to which the applicant's program proposal will meet the specific unsatisfied programing needs of its specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

17. To determine, in the event that it is concluded, pursuant to the foregoing issue (a), that the proposal will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the rules, for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely, Louisville, Ky.

18. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.

19. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest.

20. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

It is further ordered. That, in view of the engineering showings contained in BP-16878, BP-16877, BP-16876, BP-16881, and BP-16816, the provisions of section 1.569(b)(2) *Are waived* with respect to these applications.

It is further ordered, That Bloomington Broadcasting Co.'s motion to dismiss the application of Cook, Inc., *Is granted*, and the Cook application *Is returned* as unacceptable for filing.

It is further ordered, That the Federal Aviation Agency is made a party to this proceeding.

It is further ordered, That, in the event of a grant of any of the above-captioned applications, the construction permit shall contain the following condition:

Pending a final decision in docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission's rules are not extended to this authorization, and such operation is precluded.

It is further ordered, That, in the event of a grant of the application of Voice of the Ohio Valley, Inc., the permittee shall assume responsibility for the elimination of interference due to external cross-modulation and for the installation and adjustment of filter circuits or other equipment in the antenna system of the proposed operation and of station WXVW, or any other stations, which may be necessary to prevent adverse effects due to reradiation. In addition, field observations shall be made to determine whether spurious emissions exist, and any objectionable interference problems resulting therefrom shall be eliminated.

It is further ordered, That, in the event of a grant of the application of Albert S. Tedesco, the construction permit shall contain a condition that, prior to program tests being authorized, the permittee shall dismantle the unused antenna towers located on the WWCM antenna site or, in the alternative, submit satisfactory evidence that they have been detuned in a manner which would eliminate any problems of reradiation.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicants and party respondent herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

It is further ordered, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.