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

In re Application of

Owen P. Mills &

File No. BPH-870330MP

John A. Borsari d/b/a OCEAN PINES BROADCASTING ASSOCIATES

For Construction Permit for a New FM Station Ocean Pines, Maryland Channel 246A

MEMORANDUM OPINION AND ORDER

Adopted: January 23, 1992; Released: February 3, 1992

By the Commission:

- 1. The Commission has before it an application for review filed by Ocean Pines Broadcasting Associates ("Pines") on August 10, 1988, seeking review of an action by the Mass Media Bureau ("Bureau") which dismissed the captioned application and designated for comparative hearing ten other mutually exclusive applications for the Ocean Pines allotment. Stegus Corporation, 3 FCC Rcd 4641 (1988).
- 2. Engineering study of Pines' application by the Commission staff revealed an error in one of its crucial engineering parameters. In dismissing Pines' application, the Bureau stated:

[a discrepancy exists] between the value for the antenna height above average terrain (HAAT) listed in Section V-B. Item 6, of [Pines'] FCC Form 301, and the average of the eight radials listed in Section V-B, Item 15. Specifically, a HAAT value of 102.6 meters is obtained when calculating the HAAT using the eight radials as opposed to the HAAT value of 100 meters listed in Section V-B, Item 6 of [the] application. The effective radiated power (ERP) value of 3.0 kilowatts in combination with the HAAT value of 102.6 meters exceeds the maximum permitted for a Class A facility pursuant to 47 C.F.R. § 73.211. Accordingly, [Pines'] application was inadvertently

accepted for filing and pursuant to 47 C.F.R. §§ 73.3564 and 0.283. [Pines'] application will be dismissed herein. *Cf. Kerrville Radio*, 2 FCC Rcd 3441, 3442 (1987).

Stegus, at 4641.

- 3. In its application for review, Pines first claims that its HAAT was computed accurately utilizing proper Commission methodology. Specifically, Pines argues that it employed computer-generated average terrain elevations and profile graphs, which are permitted by Section 73.312(d), and that it excluded from its HAAT calculations the 45, 90, and 135 degree radials, as required by Section 73.313(d)(2), because they are located entirely over water in the 3 to 16 kilometer range. Thus, Pines claims that by calculating its antenna HAAT using the five radials, its proposed facility was properly calculated as having an HAAT of 100 meters and therefore does not exceed the maximum permitted for a Class A facility. Pines also cites two Hearing Designation Orders1 released on the same day as that for Ocean Pines, in which the Bureau concluded that applicants had improperly computed their HAATs yet were given an opportunity to correct the defect rather than be dismissed. Pines concludes that the Bureau therefore "acted arbitrarily and capriciously in not affording [Pines] the opportunity to file a corrective amendment. Petition, at p. 8.
- 4. We reject Pines' claim that its antenna HAAT was computed in accordance with Commission procedures. We agree that use of the computer-generated terrain profile data was permissible under Section 73.312(d) of the Rules. However, we believe that its use here caused Pines erroneously to exclude three radials from its HAAT calculations. Exhibit E-3 of Pines' application does appear to indicate that the site elevations of the 45, 90, and 135 degree radials in the pertinent 3 to 16 kilometer segments is zero feet above mean sea level (AMSL).2 Pines engineering consultant then apparently assumed that the "sea level" reading along those three radials indicated that the radials extended entirely over sea water and thus excluded them from the HAAT computation. However, examination of the contour and topographic site maps. submitted with Pines' application as Exhibits E-2 and E-5, respectively, indicates that there is in fact land area within the 3 to 16 kilometer range and that the 50 uV/m contour does not encompass United States land area beyond the 16 kilometer portion of the radial. Therefore," that part of the radial extending from the 3 kilometers sector to the outermost portion of land area within the United States covered by the radial" should have been used in computing Pines HAAT. See 47 C.F.R. § 73.313(d)(2)(ii). Pines failed to do so, and thus computed the HAAT averaging five rather than eight radials.³ The resulting error caused

Naguabo Broadcasting Company, 3 FCC Rcd 4634 (1988)(Naguabo, Puerto Rico), and Ocean Waves Broadcasting, 3 FCC Rcd 4637 (1988)(Narragansett Pier, Rhode Island).

² Figure 1 of Pines' exhibit shows the radial data in summary form, Figure 2 in tabular form, and Figure 3 in graphic form.

³ HAAT is determined by subtracting antenna radiation center height above mean sea level (RCAMSL) from the average terrain elevation above mean sea level. The average terrain elevation is computed by adding the average elevation in the 3 to 16 kilometer range along each radial, then dividing by the number of radials used. The sum of average elevation figures submitted in Exhibit E-3, Figure 1 of Pines' application is 34.75 meters

⁽¹¹⁴ feet). When divided by 5 (the number of radials erroneously used by Pines), the average terrain computes to 6.95 meters (22.8 feet) AMSL; when subtracted from the listed RCAMSL of 107 meters (351 feet), the HAAT computes to 100 meters (328 feet). However, when divided by 8 (the number of radials which should have been used), the average elevation computes to 4.34 meters (14.25 feet) AMSL. Thus, when subtracted from the 123 meter RCAMSL, Pines' HAAT is, in fact, 102.6 meters (337 feet), which violates Section 73.211. This same figure, 102.6 meters, is reached by averaging the eight HAAT values listed in Table 1A of Pines' engineering report, its "Tabulation of TV/FM Contour Calculations on Channel 246."

its application to specify facilities greater than the maximum permitted for Class A stations, in violation of 47 C.F.R. § 73.211.

5. Pines cites two contemporaneous Hearing Designation Orders in which, it claims, applicants which had erroneously omitted certain radials from their HAAT computations were permitted to amend rather than be dismissed. However, we believe that both the rulings and the circumstances there are clearly distinguishable from those in the instant case. In Ocean Waves Broadcasting, 3 FCC Rcd 4637 (1988), the Bureau concluded that some applicants improperly excluded certain radials and others improperly included radials. That case, however, hinged on the interpretation of that portion of Section 73.313(d)(2) of the Rules which provides that applicants must include a radial when the 3 to 16 kilometer portion lies in whole or in part over water if land within the United States boundaries is encompassed within the proposed 50 uV/m contour beyond the 16 kilometers portion of the radial in question. The applicants in the Narragansett Pier proceeding were therefore given the opportunity to amend because the Bureau concluded that "\$ 73.313(d)[(2)] is ambiguous as to how to interpret whether the 50 uV/m contour 'encompasses' land area in the United States and, therefore, applicants reading this rule may have failed to come to the correct conclusion." 3 FCC Rcd at 4639. The ambiguity presented by that provision of Section 73.313(d)(2) does not arise under the facts of the instant case because Pines' 50 uV/m contour clearly falls beyond United States land. Thus, because Pines' 50 uV/m contour falls differently than those of the Ocean Waves applicants. Pines' reliance upon Ocean Waves is misplaced. While the computations in Ocean Waves are governed by Section 73.313(d)(2), Pines' are governed 73.313(d)(2)(ii), which is not ambiguous or unclear.

6. In the other case relied upon by Pines, the Naguabo. Puerto Rico proceeding, one applicant failed to include the 135 degree radial in its HAAT calculations. The predicted 50 uV/m contour of the applicant encompassed the American territory of Vieques Island, and thus the radial, though entirely over water, should have been included in the HAAT computation. In that proceeding, however, it was not necessary to conclude that the portion of the rule concerning land encompassment beyond the 16 kilometer distance was unclear, since the Bureau determined that the erroneous HAAT calculation did not result in a proposal which violated our technical acceptance rules.4 Naguabo Broadcasting Company, 3 FCC Rcd at 4635. Here, Pines' application violated Section 73.211 of the Rules as of the close of the amendment as of right period and, therefore, was unacceptable for filing. See Pike Family Broadcasting, 6 FCC Red 5552 (1991).

7. In sum. Pines has not demonstrated either that the staff erred in returning its application or that it was treated differently from similarly situated applicants. Accordingly, for the reasons set forth above, the application for review filed by Ocean Pines Broadcasting Associates on August 10, 1988 IS DENIED.

Donna R. Searcy Secretary

FEDERAL COMMUNICATIONS COMMISSION

⁴ Class A stations in Puerto Rico may operate with 3 kW ERP and HAAT of up to 335 meters (1100 feet). See former 47 C.F.R. § 73.211(b)(3)(ii).

⁵ See generally New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C. Cir. 1987) (Commission discretion in appraising factual differences).