

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 by Section 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 Rcd 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.⁵ Accordingly, for the reasons set forth above, the application for review filed by Ocean Pines Broadcasting Associates on August 10, 1988 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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).