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

In re Application of

NEW LIFE ENTERPRISES, INC. File No. BPH-861231MC

For Construction Permit
for a New FM Station on Channel 257A
in Fresno, California

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1992; Released: January 27, 1992

By the Commission:

1. The Commission has before it a "Petition for Rehearing," filed by New Life Enterprises, Inc. ("New Life") on March 21, 1988, requesting that the Commission reconsider an action by the Mass Media Bureau which dismissed New Life's application and designated for comparative hearing fourteen other mutually exclusive applicants for the subject Fresno frequency. *Carta Corporation,* 3 FCC Rcd 798 (MM Bur. 1988).[1]

2. Prior to filing the instant application, New Life Principals Dan W. Jantz and N. James Patterson, Jr. filed an application for a new FM service on Channel 281A in Woodlake, California (File No. BPH-850503MA). The Woodlake application was designated for comparative hearing in MM Docket No. 87-430 on October 10, 1987. *SEB Broadcasting, Inc.,* 2 FCC Rcd 6401 (MM Bur. 1987). On December 31, 1986, during the pendency of the Woodlake application, New Life filed the instant Fresno proposal.[2]

3. The predicted 1.0 mV/m contours of New Life's Fresno and Woodlake applications overlapped in a manner then prohibited by Section 73.3555(a) of the Commission's multiple ownership rules.[3] Citing *Big Wyoming Broadcasting Corp.,* 2 FCC Rcd 3493, 3495 n. 10 (1987) (*"Big Wyoming"),* and the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (May 13, 1985) (*"Report and Order"),*[4] the Bureau on February 19, 1988 found that:

> New Life attempted simultaneously to prosecute two applications, both of which could not be granted. Since New Life's instant application was filed on December 31, 1986, during which time its Woodlake, California application was "pending and undecided," New Life's Fresno, California application was inconsistent and expressly prohibited under 47 C.F.R. § 73.3518 and must therefore be dismissed.

3 FCC Rcd at 799.

4. In its petition for rehearing, which will be treated here as a petition for reconsideration under 47 C.F.R. § 1.106(a)(1), New Life argues that: (i) the overlap between the predicted 1 mV/m contours of the Fresno and Woodlake proposals was *de minimis,* comprising but 22.29 square miles; (ii) New Life was therefore in "substantial compliance" with the duopoly rule; (iii) notwithstanding the *de minimis* overlap of New Life's Fresno and Woodlake predicted 1 mV/m contours, in actuality there would be no prohibited overlap between the two proposals; and (iv) the staff's allegedly retroactive application of *Big Wyoming* constituted an abuse of discretion, especially since New Life voluntarily dismissed its Woodlake application prior to dismissal of the Fresno application. Each of these arguments will be considered below.

5. We turn first to New Life's argument that the 1 mV/m overlap between its Fresno and Woodlake proposals was *de minimis* and that therefore New life was in substantial compliance with the duopoly rule. New Life claims that study of the two applications discloses an overlap area of 22.29 square miles. However, New Life states that re-analysis by its consulting engineer, taking account of upgraded terrain studies and the effect of side-mounting the proposed antenna, revealed that the degree of predicted overlap would be 15.97 square miles. Petition, at exhibit 6 of Appendix A. New Life states that, using the 22.29 square mile figure, this overlap would encompass an area with 7,440 people, or 1.78% of the population within the Fresno 1 mV/m contour. Using the 15.97 square mile figure, New Life concludes that the overlap would encompass an area with 2,135 people, or 0.51 of the population within the Fresno 1mV/m contour. Accordingly, claims New Life, "a threshold issue exists as to whether or not New Life's Fresno and Woodlake applications were inconsistent or whether they substantially complied with the Commission's duopoly rules without regard to the necessity of a waiver thereof." *Id.,* at p.8. New Life then analogizes the instant duopoly matter to Commission city coverage requirements,[5] for which it states the Commission has adopted a "substantial compliance" processing standard. New Life proposes that there is "no apparent reason why the Commission should invoke the substantial compliance doctrine in principal community coverage situations but ignore the substantial compliance doctrine in duopoly situations." *Id.,* at p.9. Petitioner then concludes that the failure to apply the "substantial compliance doctrine" in the present duopoly situation is arbitrary, capricious, and violative of the maxim that

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[1] Carta Corporation, an applicant in the Fresno proceeding, filed an Opposition to New Life's petition on April 15, 1988, and New Life filed a reply to the Opposition on May 3, 1988. Carta then filed a "Motion to Strike" New Life's reply on May 12, 1988, and New Life filed an opposition to the motion on May 25, 1988. Carta's Motion to Strike simply takes issue with arguments either raised or restated in New Life's Reply. New Life's opposition thereto attempts to counter those objections. Both pleadings are unauthorized under 47 C.F.R. § 1.45(c), and neither presents arguments relevant to the dispositive issues. Accordingly, they will not be further considered here.

[2] On November 19, 1987, eleven months later, New Life requested dismissal of its Woodlake application, which request was granted by the Presiding Administrative Law Judge.

[3] The multiple ownership rules were subsequently modified to prohibit overlap of the 3.16 mV/m (70 dBu) contours. *First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989).

[4] The *Report and Order* is reprinted at 58 RR 2d 776 (1985).

[5] *See* 47 C.F.R. § 73.315.

similarly situated parties may not be treated differently without explanation, citing *Melody Music., Inc. v. FCC,* 347 F.2d 730 (D.C. Cir. 1965), and *Garrett Broadcasting Service v. FCC,* 513 F.2d 1056 (D.C. Cir. 1975). Petition, at p. 9.

6. New Life's arguments regarding the *de minimis* nature of the overlap involved are unpersuasive. Even where the Commission finds overlap to be *de minimis,* the applicant must still request and obtain a waiver of the duopoly rule. *See, e.g., Storer Communications, Inc.,* 59 RR 2d 611 (1985). New Life requested no waiver here. As the United States Court of Appeals for the District of Columbia Circuit observed in *Columbia Communications Corp. v. FCC* [6]

> What this court said nearly twenty years ago applies with greater force in today's bureaucratic world:
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> > When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action. The Commission staff must process annually thousands of applications. It cannot be expected to do research for applicants or to probe the underlying... economic data.... If the Commission staff were required to assume such a burden, little or nothing would be accomplished.
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> *Rio Grande Radio Fellowship , Inc. v. FCC,* 406 F.2d 664, 666 (D.C. Cir. 1968) (per curiam).

New Life's application was in violation of the multiple ownership rules when filed, *see* 47 C.F.R. § 73.3555, and a waiver request was not filed. Therefore, we believe that it was properly dismissed. *See* 47 C.F.R. § 73.3566(a).

7. Furthermore, while New Life now makes the flat assertion that the subject overlap area is *de minimis,* it fails to make a sufficient showing to support such an assessment. The determination of whether or not an overlap is *de miminis* requires consideration of the totality of the circumstances, which includes the size of the overlap, the population within the overlap area, and the percentage of area and population within each station's 1 mV/m contour represented by the overlap. Generally, the cases in which we have considered overlap *de minimis* involved a percentage of both area and population within each station's 1 mV/m contour overlap area of less than 1%. *KSOO-TV , Inc.,* 43 FCC 2d 879 (1973); *Arcadian Television Corp.,* 51 RR 2d 743 (1982); *Radio Station WREN Co.,* 52 RR 2d 601 (1982).*Compare Farmville Broadcasting Co.,* 47 FCC 2d 463 (1974)[7] (overlap of 11% population/40% area of WFAG and 4% area of WPTF not *de minimis)* and *Piedmont-Crescent Broadcasting Co.,* 35 FCC 2d 640 (1972) (overlap of 2.7% of WRAL-FM contour and 4% of WMDE(FM) contour not *de minimis).* New Life has provided no showing as to the percentage of area and population served by the Woodlake proposal which would be in the overlap area, and only in its May 3 reply did it address the percentage of overlap of the Fresno application's service area.[8] While we will examine the totality of circumstances when making a determination that duopoly overlap area is *de minimis,* a positive finding requires more data than is presented here. We are unwilling to conclude, without more, that an overlap area involving from 15.97 to 22.29 square miles and from 2135 to 7440 persons is *de minimis.*

8. We also reject New Life's argument that it is in "substantial compliance" with the duoply rule. Petitioner is correct that the Commission has adopted a policy of "substantial compliance" with respect to the city coverage requirement. *See Richard Culpepper,* 5 FCC Rcd 2983, 2985 n. 2 (1990). However, New Life provides no authority for its novel proposition that there can be "substantial compliance" with the duopoly rule, and no such authority can be found. New Life merely asserts that "there is no palpable reason why the substantial compliance doctrine should be routinely applied in the resolution of principal community service issues and not applied in the resolution of duopoly issues." Petition, at 9. The rule in effect at the time New Life's Fresno application was filed prohibited *any* overlap of the 1 mV/m contours, and there is nothing in the regulatory history or subsequent case interpretations of the rule which suggest that adoption of a "substantial compliance" standard is appropriate. In fact, it has been consistent Commission policy to enforce the duopoly rule if the types of ownership and overlap that trigger its application are present. *United Community Service,* 37 FCC 2d 953, 960 (1972).[9] Thus, applicants with proposals violating the duopoly and inconsistent application rules are not "similarly situated" to applicants proposing substantial compliance with the Commission's city coverage rules.[10]

9. New Life's next argument is that, notwithstanding the apparent overlap between the Fresno and Woodlake 1 mV/m contours resulting from the staff's assumption of circular antenna radiation patterns, in actuality there was no prohibited overlap because (i) a side-mounted antenna such as that proposed by New Life in Woodlake "would result in a substantial reduction in all directions except that in the direction of the major lobe, toward Woodlake" (petition, at p. 10); a reduction of as little as 1.5 dB from either New Life proposal, or a combination thereof, would preclude any actual overlap; and (ii) as New Life's engineering consultant observes, based upon upgraded terrain studies coupled with the measured antenna pattern

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[6] 832 F.2d 189, 192 (D.C. Cir. 1987).:

[7] In one case, the Commission found that, where the area of overlap between two stations was 11.4 square miles and included a population of 267 persons, the overlap was *de minimis.* The area of overlap constituted 2.7% of one station's service area, but only, 7% of the other station's service area. *WREL, Inc.,* 45 RR 2d 319 (1979).

[8] New Life estimates its service area overlap to be in the two-to-three percent range. Reply, at p. 3.

[9] The Commission is not without flexibility and may, within its discretion, waive the fixed multiple ownership rules where an otherwise rigid application of the rules would run contrary to other public interest concerns. *See, e.g., Capital Cities Communications, Inc.,* 59 RR 2d 451 (1985). As indicated above, such circumstances have not been shown here.

[10] *Melody Music* and its progeny "appropriately recognize the importance of treating parties alike when they participate in the same event or when the agency vacillates without reason in the application of the statute or the interpreting regulations." *New Orleans Channel 20, Inc. v. FCC,* 830 F.2d 361, 366 (D.C. Cir. 1987). Here, New Life cites no precedent which the staff ignored, the transactions are not identical, and there are no circumstances which compel identical treatment.

for the Woodlake proposal, the actual contours had a clearance of over three miles. New Life also emphasizes that these conclusions do not result from any changes in the technical proposals for Fresno or Woodlake, but simply from more detailed examination of the existing proposals.

10. We reject New Life's argument concerning the antenna characteristics involved and its claims that the Commission's assumption that non-directional antennae generate perfectly circular radiation patterns is faulty. It has long been Commission policy to assume the circularity of non-directional antennae: "We recognize the fact that side-mounting results in some degree of distortion from circularity. Permittees should not conclude, however, that our recognition of this fact implies consent to any backdoor methodology whereby an applicant who was granted on the assumption that he would operate nondirectionally introduces parasitic elements and constructs in such a fashion that a directional pattern results." *Ettlinger Broadcasting Corp.*, 53 RR 2d 635, 637 n.4 (1983). This policy was restated by by the Commission in a *Public Notice* adopted September 13, 1984:

> In making allotments and in issuing construction permits and licenses the Commission assumes that FM non-directional antennas have perfectly circular horizontal radiation patterns. Actual antenna patterns shall conform to the ideal as closely as is practicable. The use of any technique or means (including side-mounting) which intentionally distorts the radiation pattern of what is nominally a non-directional antenna makes that antenna directional and it must be licensed as such.

"Public Notice, Criteria for Licensing of FM Broadcast Antenna Systems," FCC 84-437, released September 14, 1984. Thus, an applicant wishing to rely on the directional characteristics of a proposed antenna must so specify in its application. New Life did not do so. *See* response to Section V-B, Item 7 of application No. BPH-861231MC. It may not now claim the benefit of directional antenna characteristics.

11. New Life's final argument is that the Commission's allegedly retroactive application of *Big Wyoming* to its Fresno prposal was arbitrary and an abuse of discretion, especially since it voluntarily dismissed the Woodlake application prior to the dismissal of the Fresno application. The application of *Big Wyoming* to its Fresno proposal, alleges New Life, violates the edicts set forth in *Boston Edison Co. v. Federal Power Commission*, 557 F.2d 845 (D.C. Cir. 1977) and *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 401 (D.C. Cir. 1968), which New Life cites for the proposition that an agency must provide notice to affected parties when it changes its standards or precedents. New Life claims that the application of *Big Wyoming* to the circumstances presented here "is fundamentally inconsistent with elementary fairness and with New Life's right to a comparative hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)." Petition, at p. 15.

12. We affirm that New Life's Fresno application was properly dismissed for violation of the Commission's multiple ownership and inconsistent application rules, 47 C.F.R. §§ 73.3555(a) and 73.3518. *Big Wyoming,* far from being a case of first impression, merely restated what had been existing Commission policy with respect to inconsistent applications. As we observed in 1953, Section 73.3518 is designed to "prevent the abuse of our processes by the *filing* of two or more applications which are inconsistent with each other either on their face or in the context of any of our rules." *WSTV, Inc.*, 17 FCC 530, 531 (1953) (emphasis added). Additionally, in 1965, when as in the instant case a majority interest in both applicants was held by the same entity, we held that the appropriate action was the dismissal of the last-filed application. *D.H. Overmyer Communications Co. (Agnes J. Reeves Greer)*, 45 FCC 2d 2272 (1965). Each of these cases was cited in *Big Wyoming*. Here, applications which had impermissible duopoly overlap were filed by the same applicant, New Life. The filing of the Fresno application clearly violated Section 73.3518, which forbids the *"fil[ing]"* of subsequent inconsistent applications "by or on behalf of the same applicant, successor or assignee" (emphasis added), and the dismissal of that application was consistent with long standing Commission precedent. Notwithstanding New Life's assertion to the contrary, this violation occurred even though the Woodlake application had been voluntarily dismissed in hearing before the Fresno application was dismissed by the staff. The rule relates to inconsistent or conflicting applications *at the time of filing.*

13. Furthermore, the dismissal of New Life's Fresno application was compelled by the multiple ownership and inconsistent application rules as they have been applied under our current FM "hard look" processing procedures. Paragraph 24 of the *Report and Order* states that:

> As an additional component of our "hard look" approach, we reiterate our position with respect to multiple applications. Applicants will not be permitted to "flood the Commission's processing line and hearing docket with multiple applications, many of which could not be granted under our multiple ownership rules." *Storer Broadcasting Co.* 43 FCC 1254, 1256 (1953). Accordingly, we shall regard Section 73.3555 as establishing the maximum number of applications acceptable for filing by an applicant. Applications tendered in excess of this number shall be considered inconsistent with Section 73.3518 and returned as unacceptable for filing.

Id.[11]

14. Accordingly, for the reasons set forth above, IT IS ORDERED, that the petition for reconsideration filed by New Life on March 21, 1988 IS DENIED.

[11] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1991).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary