

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

In re Application of

ECI License Company, L.P. File No. BPH-921231IE
Station WYUU(FM)
Safety Harbor, Florida

For Minor Change
(Transmitter Site)
in Licensed Facilities

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1996;

Released: March 21, 1996

By the Commission:

1. The Commission has under consideration an Application for Review filed on September 20, 1993 by ECI License Company, L.P., licensee of Station WYUU(FM) ("WYUU"). WYUU requests review of a staff action denying its request for waiver of the minimum spacing table in Section 73.215(e) of the Commission's Rules and dismissing its captioned application for a construction permit authorizing it to move its transmitter site. See *Letter from Chief, FM Branch to Entertainment Communications, Inc.*, Ref. 1800B3-DEB, dated August 10, 1993.¹ We deny the application for review for the reasons set forth below.

BACKGROUND

2. In September 1988, WYUU completed its authorized upgrade from Channel 221A to Channel 223C2.² On December 12, 1988, the Commission adopted the Report and Order in MM Docket No. 87-121 which promulgated Section 73.215 of the Rules. *Amendment of Part 73 -- Short-Spaced Criteria*, 4 FCC Rcd 1681 (1989) ("*Report and Order*"), recon. granted in part and denied in part, 6 FCC Rcd 5356 (1991) ("*Reconsideration Order*"). That rule became effective on June 26, 1989. See *Public Notice*, 56 Fed. Reg. 56,938, published November 7, 1991. Section 73.215 permits an applicant to specify a transmitter site which is short-spaced under the criteria set forth in Section 73.207 of the Rules, provided that it meets the technical requirements set forth in the new rule. See 47 C.F.R. § 73.215; see also 47 C.F.R. § 73.207. Because, after the upgrade, WYUU experienced interference to its service in Tampa as a result, it argued, of recurring atmospheric conditions, WYUU desired to modify its facilities again.

The modification proposed the use of a site closer to Tampa and required processing pursuant to Section 73.215. WYUU is licensed to Safety Harbor, Florida, but Tampa lies within WYUU's predicted 1 mV/m signal strength contour.

3. WYUU relates that by early April 1989 it had identified and desired to use the transmitter site ("Lodestar site") specified in its captioned application. The Lodestar site is located 170.9 kilometers ("km") from Station WWKA(FM), Orlando, Florida, operating on Channel 222C which is first-adjacent to WYUU's Channel 223C2. Section 73.207 requires a minimum distance separation of 188 km between first-adjacent Class C and Class C2 channels. Therefore, the Lodestar site is 17 km short-spaced to WWKA. Nonetheless, the Lodestar site met the 169 km minimum distance separation requirement set forth in the original version of Section 73.215(e) which became effective on June 26, 1989 until modified, effective December 19, 1991.

4. WYUU's modification application specifying the Lodestar site was not filed until December 31, 1992. This delay was largely due to the Commission's freeze on accepting applications filed pursuant to Section 73.215 in cases where the short-spacing distance as determined by Section 73.207 exceeded 8 km. Notice of the freeze was set forth in a Note to Section 73.215(e) as originally promulgated by the *Report and Order*, 4 FCC Rcd at 1690-91. The freeze would have prevented WYUU from filing, in 1989, an application specifying the Lodestar site because its 17 km short-spacing to WWKA clearly exceeded the 8 km short-spacing limit imposed by the Note.

5. During the pendency of the freeze, in 1991, the Commission ruled on petitions for reconsideration that were filed in the proceeding adopting Section 73.215. In the *Reconsideration Order*, the Commission modified the spacing table in Section 73.215(e), effective December 19, 1991. 6 FCC Rcd at 5359, 5365-5366; *Erratum*, 6 FCC Rcd 6537 (extending until December 19 the effective date of the amendments to the spacing table). In pertinent part, the modified rule requires an applicant filing pursuant to Section 73.215 for Class C2 facilities to specify a minimum distance separation of 176 km from any first-adjacent channel Class C station. The Lodestar site, situated 170.9 km from Class C WWKA, does not comply with this restriction. Effective November 9, 1992, the freeze was lifted and the Note to Section 73.215 was deleted. *Order*, 7 FCC Rcd 6473 (MM Bur.) (*Public Notice*, 57 Fed. Reg. 46,325, published October 8, 1992).

6. On December 31, 1992, WYUU filed its application specifying the Lodestar site and requesting processing pursuant to Section 73.215. In the application, WYUU requested waiver of the 176 km spacing requirement imposed by Section 73.215(e). In the August 10, 1993 letter, the staff denied the waiver request and dismissed the WYUU application.³

¹ Entertainment Communications, Inc. is the former name of the licensee.

² WYUU is currently licensed as a Class C2 facility, operating with 50 kilowatts ("kW") effective radiated power ("ERP") at 149 meters ("m") height above average terrain ("HAAT"). See File No. BLH-880922KB, granted August 24, 1989. Previously,

WYUU was licensed as a Class A facility, operating with 1.95 kW ERP at 122 m HAAT. See File No. BLH-851223KH, granted February 18, 1986.

³ The staff letter also found that the WYUU application did not comply with the prohibited contour overlap restriction imposed by Section 73.215(a). In an engineering statement attached to the Application for Review, however, WYUU has demonstrated

DISCUSSION

7. Prior to the contour protection rules in § 73.215 which became effective in 1989, all commercial FM stations since 1962 had been allotted and assigned on the basis of compliance with the minimum spacing requirements of 47 CFR § 73.207. These spacing rules themselves were adopted in part to promote a fair distribution of FM service across the country, as required by 307(b) of the Communications Act, avoiding undue concentrations of stations in urban areas (particularly major markets). *First Report and Order*, MM Docket 14185, 23 RR at 1817, 33 FCC 309, 322-23 (1962), Paragraph 37. In fulfillment of this goal during the 27 years between 1962 and 1989, the Commission rarely granted waivers of the minimum spacing rules in excess of 6 km absent compelling circumstances.⁴ See, e.g., *Musicast of the South, Inc.*, 45 RR 2d 1213 (1979); *Boone Biblical College*, 15 FCC 2d 861 (1969), *recon. denied*, 19 FCC 2d 155 (1969).

8. By 1989, however, a shortage of suitable transmitter sites caused by FAA objections, zoning restrictions, environmental concerns, and other restrictions was becoming a serious impediment to new or expanded FM service. The *Report and Order* in MM Docket 87-121, 4 FCC Rcd 1681 (1989) specifically acknowledged this problem, noting that non-short-spaced sites had become scarce for many stations. 4 FCC Rcd at 1681, paragraph 5. Thus, to afford FM applicants some additional flexibility in locating potential transmitter sites, a limited form of short-spacing was adopted which provided for contour protection. However, in part to respond to concerns of overcrowding (see Paragraph 9, *Report and Order* in Docket 87-121, 4 FCC Rcd at 1682), the Commission limited the amount of short-spacing which could be proposed by a contour protection station through the spacing table in § 73.215(e). One result of this spacing table is that the goal of a fair distribution of service is maintained by preventing applicants from "shoehorning" stations into larger communities which already receive sufficient service at the expense of service to smaller, more suburban or rural communities.

9. At no point in time has WYUU's proposal to move to the Lodestar site been grantable absent a waiver, and a waiver is not warranted. Prior to the implementation of Section 73.215, the proposal was barred by the spacing requirements of Section 73.207. The proposal could have been granted under the provisions of 73.215(e) as that rule was first adopted if we had not announced a freeze on the filing of applications proposing short-spacing in excess of 8

km simultaneously with adoption of the rule. In fact, however, we did, for sound administrative reasons, announce a freeze. By the time the freeze was lifted, the short-spacing requirements of Section 73.215(e) had been revised to address issues raised in petitions for reconsideration of the original provisions of the rule and to reflect the creation of Class C3 stations. WYUU's proposal did not meet the revised spacing requirements. The Commission has waived those requirements in only one instance, and the circumstances presented in that case are easily distinguished from the ones presented here. See para. 11 *infra*.

10. WYUU is incorrect in maintaining that it has a legal right to file under the original separation standards adopted in the *Report and Order*. WYUU did not seek reconsideration of the *Report and Order's* imposition of the 8 km freeze in 1988, nor did it seek reconsideration of the adoption of the new spacing rules in 1991. Any challenge to either action is at this point extremely untimely.

11. We are also unpersuaded by WYUU's claim that, because ECI "obeyed the Commission's instructions and waited patiently for more than three years [for the freeze to be lifted]," equities or administrative fairness weigh in favor of granting its request for waiver of the current rules. WYUU's situation is very different from the only case in which a waiver of the current provisions was granted. That case involved, among other distinguishing factors, a "grandfathered" short-spaced station whose proposed change of transmitter site would reduce the actual interference it was causing to the other station.⁵ See *Letter from Chief, Audio Services Division to Peterborough Broadcasting Co., Inc. (WNHQ(FM))*, Ref. 1800B3-BFM/ESR, dated February 12, 1993. Thus the public interest clearly warranted the waiver. We see no comparable public interest considerations here, where WYUU proposes to disregard our spacing rules for the sole purpose of improving service to a near-by larger community that is already well-served. See, e.g., *WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969) (subsequent history omitted) (grant of waiver must better serve public interest than application of the rule).⁶ Though, as WYUU points out, the 8 km freeze was itself waived in a few situations, those cases are inapposite here because they involved applications filed either by stations which clearly would not be affected by addition of the Class C3 separations, or that would clearly comply with the updated separations table. See para. 9, *supra*.⁷

that correction of an engineering calculation error through the filing of a minor amendment to the application would cure the defect in question.

⁴ We note that the 5.1 km short-spacing proposed here by WYUU from the applicable § 73.215(e) spacing (176 km) cannot be compared directly with the prior § 73.207 precedents, since the § 73.215(e) table already affords WYUU 12.0 km of relief from the § 73.207 minimum separation requirements. The appropriate comparison would be made against prior spacing waiver cases involving a 17.1 km short-spacing. However, for purposes of comparison, the staff has not been able to locate any case in which the Commission has granted a spacing waiver of this magnitude (all waiver requests found of this magnitude were denied).

⁵ The other distinguishing factors in *Peterborough Broadcasting* are: (1) WNHQ's reception problems, unlike WYUU's here, occurred within its community of license; (2) WNHQ's short-spacing increased by 73 m in contrast to WYUU's proposed creation of new short-spacing of 17 km (*i.e.*, 17,000 m); and (3)

WNHQ was short-spaced to a second-adjacent channel station whereas WYUU proposes short-spacing to a first-adjacent channel station. In addition, WNHQ proposed to use the highest peak in the area providing city-grade coverage to its community of license; WNHQ's proposed site was an existing communications site; WNHQ's construction of an alternative new tower in any direction from the mountain peak would place the tower in a scenic overlook; and WNHQ's proposed operations from the new site would improve the contour protection afforded to the short-spaced station.

⁶ Disturbances to FM reception caused by changing atmospheric conditions are not uncommon occurrences in the Gulf Coast region, as well as other areas of the country. See the *First Report and Order*, Docket 14185, 23 RR 1801, 1819 (1962). Thus, numerous FM broadcast stations in these areas face similar reception problems within their respective service areas.

⁷ Any reading of the staff's August 10, 1993 letter to imply that, if WYUU had filed a request for waiver of the 8 km freeze, it might have been granted, is therefore erroneous.

12. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on September 20, 1993 by ECI License Company, L.P. IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary