

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D.C.

In re  
MUSIC BROADCASTING COMPANY (WGRD),  
GRAND RAPIDS, MICHIGAN }  
For Authority to Operate Pre-Sunrise  
Hours. }

December 28, 1953

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION (COMMISSIONER DOERFER NOT PARTICIPATING):

1. The Commission has under consideration a pleading filed on November 16, 1953, by the Great Trails Broadcasting Company, licensee of Station WING, Dayton, Ohio, requesting the Commission to require Music Broadcasting Company, licensee of Station WGRD, Grand Rapids, Michigan, to terminate pre-sunrise operations during such hours as Station WING is operating before sunrise, and a pleading filed by Station WGRD on December 7, 1953.

2. Station WGRD, Grand Rapids, Michigan, is licensed to operate on 1410 kilocycles with one kilowatt power, daytime only (1410 kc, 1 kw, D). Station WING, Dayton, Ohio, is licensed to operate on 1410 kilocycles with five kilowatts power, unlimited time, employing a directional antenna at night (1410 kc, 5 kw, U, DA-N).

3. In its pleading dated November 16, 1953, Station WING states that it is "receiving serious and undue interference during the hours prior to sunrise from operation of daytime Station WGRD," and requests the Commission to require WGRD, pursuant to Section 3.87(b) of the Rules, to refrain from broadcasting during hours prior to sunrise when WING is operating. At the present time, WING signs on at 5:00 a.m. daily except on Sunday, and at 7:00 a.m. on Sunday. In response to this pleading, the Commission on November 17, 1953, directed WGRD to discontinue the operation in question. Thereafter, on November 27, 1953, this order was stayed pending further consideration by the Commission.

4. On June 10, 1940, the Commission adopted Order No. 74 to permit certain daytime only and limited time stations to operate between the hours of 4:00 a.m. local standard time and local sunrise. On October 14, 1941, the Commission cancelled Order No. 74 and in lieu thereof adopted Section 3.87.<sup>1</sup>

<sup>1</sup> Section 3.87 reads as follows:

§ 3.87 Program transmissions prior to local sunrise.

(a) The provisions of §§ 3.6, 3.8, 3.9, 3.10, 3.23, 3.79, and 3.84 shall not prevent the transmission of programs between 4 o'clock a.m. local standard time, and local sunrise, of standard broadcast stations with their authorized daytime facilities: *Provided*, That the provisions of this section shall not extend to:

(1) Stations regularly sharing time during daytime hours either under licenses pursuant to which time-sharing agreements have been entered into or licenses specifying

Except for a minor revision of Section 3.87(a)(2), not pertinent here, Section 3.87 has not been revised since its adoption. Subparagraph (a) of Section 3.87, after setting forth the general rule—permitting daytime only and limited time stations to operate between 4:00 a.m. and local sunrise—expressly excludes certain classes of daytime only and limited time stations from any operation before local sunrise. As to the stations permitted to operate before sunrise, Section 3.87(b) requires these stations to discontinue such pre-sunrise operation upon receiving notice from the Commission that undue interference is being caused to stations authorized to operate on an unlimited time basis. This subparagraph reads as follows:

3.87(b) Any station operating during such hours receiving notice from the Commission that undue interference is caused shall refrain from such operation during such hours pending further notice from the Commission.

It is this provision of the Rules upon which Station WING bases its instant claim for relief.

5. WGRD urges that it would be unlawful under Section 316(a) of the Communications Act and Section 9(b) of the Administrative Procedure Act to suspend without hearing its authority to operate during pre-sunrise hours. WGRD further urges that in any event no "undue interference" exists, and that no determination should be made in the matter without weighing the public interest and continuation of WGRD's pre-sunrise programs as against those of WING. WGRD especially stresses the extended period of time during which WING has not complained of interference from WGRD.

6. It is evident that WGRD totally misconceives the nature of the authority under which it has been operating. WGRD has been operating under a special rule which permits operation contrary to the Commission's basic rules only so long as undue interference is not caused by such operation. WGRD has been fully on notice at all times that this special operating authority was subject to being withdrawn at any time by the Commission. WGRD cannot be heard to claim operating privileges under Rule 3.87, and at the same time to reject the express condition upon which those privileges are afforded. Suspension or cancellation of WGRD's pre-sunrise operations is not a modification, revocation, suspension or annulment of its license within the meaning of Section 316(a) of

hours of operation, unless time-sharing agreements have been reached covering such operation prior to local sunrise. Sections 3.74, 3.77 and 3.78 shall be applicable to such agreements.

(2) Any Class II station causing interference (as determined by the Standards of Good Engineering Practice Concerning Standard Broadcast Stations and the North American Regional Broadcasting Agreement) by use of its daytime facilities within the 0.5 mv/m 50 percent skywave contour of any Class I station either of the United States of any country party to the North American Regional Broadcasting Agreement, except (i) where the Class I station is located east of the Class II stations in which case operation may begin at local sunrise at the Class I station; (ii) where an agreement has been reached with the Class I station to begin operation prior to local sunrise.

(3) Operation by use of its daytime facilities of any Class II station on any Class I-A channel not assigned to the United States under the North American Regional Broadcasting Agreement.

(b) Any station operating during such hours receiving notice from the Commission that undue interference caused shall refrain from such operation during such hours pending further notice from the Commission.

(c) Nothing contained in outstanding instruments of authorization for such stations shall prohibit such operation except as herein provided.

(d) The period 4 a.m. to 6 a.m., local standard time, shall not be included in determining compliance with § 3.71.

the Communications Act or Section 9(b) of the Administrative Procedure Act. WGRD's license permits daytime operation only. Its authority to operate additionally, beyond the terms of its license, is limited by the terms of Section 3.87 of the Rules.

7. WGRD's argument that it is not causing undue interference is equally unsound. By an ingenious but overly literal reading of the Rules, WGRD concludes that WING is not entitled to any protection from interference during the hours from midnight to sunrise. While it is true that the definition of "nighttime" in Section 3.7 refers to the period from sunset to midnight, that definition is designed merely to distinguish those hours during the night in which experimentation is not permitted, from the so-called "experimental" period. This is the period from midnight to sunrise (Section 3.10)—a time set aside for broadcast stations for experimental purposes in testing and monitoring station equipment. It has never been contemplated, and so far as we are aware, has never been contended, that unlimited time stations are not entitled to their regular nighttime protection from interference during the "experimental" period. Indeed, Section 3.10 which governs the experimentation to be permitted expressly limits such experimentation to that which *will not cause interference* to other stations maintaining a regular operating schedule.<sup>2</sup> This provision would be meaningless if such other stations were not entitled to protection from interference during the period in question.

8. It is clear that WING is receiving objectionable interference within its normally protected contours. The pre-sunrise operation of Station WGRD raises the nighttime limitation of Station WING from 2.47 mv/m to 8 mv/m. Station WING is a Class III-A station and pursuant to the provisions of the Standards of Good Engineering Practice is entitled to protection to its 2.5 mv/m ground wave contour during nighttime hours of operation. WGRD urges, however, that objectionable interference is not "undue interference" within the meaning of Section 3.87.

9. It is true that undue interference is not defined in the Rules. But the intention of the Commission in adopting Section 3.87, and its uniform construction over many years make clear its meaning. Section 3.87 was adopted to permit the more efficient utilization of the airwaves by permitting daytime only stations to operate during periods before sunrise in which unlimited time or dominant stations on the channel were not operating. The authority created by the rule, however, was made subject to immediate withdrawal by the Commission, so that if stations with which interference would be involved should start operating during pre-sunrise hours in accordance with their license, they could at any time demand the protection against interference to which their license and the Commission's rules entitle them.

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<sup>2</sup> Section 3.10 reads as follows:

3.10 Experimental period. The term "experimental period" means that time between 12 midnight and local sunrise. This period may be used for experimental purposes in testing and maintaining apparatus by the licensee of any standard broadcast station on its assigned frequency and with its authorized power, provided no interference is caused to other stations maintaining a regular operating schedule within such period. No station licensed for "daytime" or "specified hours" of operation may broadcast any regular or schedule program during this period.

10. Undue interference as referred to in Section 3.87 clearly means interference which is objectionable as determined on the basis of Commission Rules and Engineering Standards and which in addition (1) occurs during actual service of an unlimited time station and (2) has been complained of by that station. The Commission has uniformly followed this interpretation over a twelve year period. Upon proper complaint by an unlimited time station of objectionable interference caused by the pre-sunrise operation of a daytime only station, the Commission invariably has required the daytime only station to terminate its conflicting pre-sunrise operation. All the conditions for undue interference are met here. WING operates during the pre-sunrise period, and has formally asked that WGRD's interfering operation during that period be terminated.

11. There is likewise no basis for the contention that the services of WGRD and WING during the pre-sunrise period should be considered on a comparative basis. That question would only arise on proceedings for the modification of WING's license, and amendment of the Rules. Absent such proceedings, we see no alternative but to grant WING's request that its right to protection be respected by directing WGRD to operate only during the daytime period—the only period for which WGRD is licensed.

12. We are not unmindful of WGRD's claim of laches on the part of WING in asserting its rights. That claim, however, rests upon the unacceptable assumption that Section 3.87 is a trap for the unwary unlimited time station. Nothing in the rules suggests that the summarily revocable authority there provided will ripen in time into a vested "squatter's right" on the frequency. We believe that it would be wholly unjust to achieve such a result on the theory of laches.

In view of the foregoing, *It is ordered*, This 28th day of December, 1953, that in accordance with Section 3.87(b) of the Commission's Rules and Regulations, Music Broadcasting Company, licensee of Station WGRD, Grand Rapids, Michigan, *Refrain* from operating during hours prior to local sunrise at Grand Rapids in accordance with the terms of its license until further notice from this Commission; and

*It is further ordered*; That the petition filed hereinby Music Broadcasting Company and Great Trails Broadcasting Corporation respectively to the extent that they are not granted by the above action *Are dismissed*; and

*It is further ordered*, That this prohibition shall become permanent at the expiration of thirty days from the service of this order unless within the thirty day period Music Broadcasting Company shall request an evidentiary hearing on any issues of fact or an oral argument before the Commission on any issues of law or policy which bear upon the ultimate question whether this prohibition should be made permanent; and

*It is further ordered*, That in the event that a hearing or oral argument is designated, Music Broadcasting Company *Shall refrain* from operating during hours prior to local sunrise at Grand Rapids in accordance with the terms of its license until the Commission issues a final decision after said hearing or oral argument as to whether this prohibition shall or shall not become permanent.