

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

In re Application of

CRAIN File No. BPH-870302MQ
BROADCASTING, INC.

For a Construction Permit
to modify the facilities of FM
Station WWUS, Big Pine Key, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1993;

Released: July 2, 1993

By the Commission:

1. The Commission has before it an Application for Review ("Application") filed by Crain Broadcasting, Inc. ("Crain") on July 17, 1989. Crain seeks review of action by the Mass Media Bureau ("Bureau") which denied its request for a waiver of 47 C.F.R. §73.211(b). See *Letter to James Franklin from the Chief, FM Branch, Audio Services Division, Mass Media Bureau* (reference 8920-SBS). June 14, 1989. We deny the Application for the reasons set forth below.

2. *Background.* Crain is the licensee of FM Station WWUS, Big Pine Key, Florida. It seeks to avoid mandatory downgrading, pursuant to BC Docket 80-90, from Class C to Class C1 status.¹ Federal Aviation Administration restrictions and other governmental regulations, as well as the scarcity of land in the Florida Keys, combine to eliminate any practical opportunity in the Keys to construct a tower structure sufficient for a minimum (300 meter) Class C antenna height above average terrain ("HAAT"). Thus, Crain filed the captioned application requesting authorization to operate from a proposed tower with 620 kW effective radiated power ("ERP") at 135 meters. Alternatively, Crain asked for retention of full Class C protection with its existing facilities. Since the proposed power level exceeds the 100 kW Class C maximum, Crain requested the §73.211(b) waiver.²

3. Crain argued before the Bureau that maintaining Class C service is in the public interest, indicating that its station is the primary source for emergency information in the Keys, that its "deficient" signal in the upper Keys requires improvement, and that a downgrade to Class C1 status and the resultant reduced separations would lead to a service deterioration as new stations are established and existing ones modified. Crain further argued that there is precedent for a grant of its waiver request, citing the "Denver cases"

and *Bayshore, New York* ("Bayshore"), 50 Fed. Reg. 10,768, 57 RR 2d 1275 (1985), *recon. denied*, 57 RR 2d 1652 (1986), an allotment rulemaking proceeding.

4. The Bureau held that the "Denver cases" and *Bayshore* were inapplicable to Crain's situation. The Bureau agreed with Crain that the Class C 100 kW power limit is predicated on the concept that increasing the ERP to achieve an increase in coverage will extend an interfering contour further than achieving the same coverage by increasing the HAAT. However, it determined that the fact that Crain's projected interfering contour would not exceed that of a Class C station operating at the 100 kW/600 meter HAAT maxima did not justify a grant of the requested waiver. According to the Bureau, a 100 kW facility generating an interfering contour equivalent to that proposed by Crain would provide a greater service area, and, thus, Crain's proposal would result in a less efficient utilization of the broadcast spectrum. Further, the Bureau noted that the Commission has denied requests to waive the power limit, even where actual coverage by a superpower station would be less than that which could be achieved utilizing the permitted ERP/HAAT combination, citing, for example, *Rock City Broadcasting, Inc.* ("Rock City"), 19 FCC 2d 558 (1969). Finally, the Bureau ruled that the lack of a suitable Class C site was not sufficient reason to forestall downgrading the station to Class C1 status.

5. *Application for Review.* Crain argues first that the Bureau failed to evaluate its waiver request in accordance with *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Citing *World's Fair-1982*, 89 FCC 2d 1374, 1379 (1982), and *Ponce TV Corp.*, 1 FCC Rcd 1167, 1176 (1986). Crain asserts that the applicable criteria are whether the policy underlying a rule would be circumvented by a waiver and whether the public would benefit.

6. Crain contends that grant of a waiver here would not undermine the policy underlying §73.211(b). According to Crain, the denial letter acknowledges this, since the resulting interfering contour will extend no further than that produced by a Class C station operating with maximum Class C facilities (100 kW ERP at 600 meters HAAT). Crain maintains that *Rock City*, and subsequent precedent actually supports its waiver request. The applicant asserts that, while the Commission declined to waive the power limit in *Rock City* because the same result could have been achieved by way of a directional antenna or height, there is no other means of improving WWUS' coverage and use of additional power is therefore appropriate. Crain cites *Golden West Broadcasters* ("Golden West"), 4 FCC Rcd. 2097, 2099 (1989), as a situation where the Commission authorized a superpower operation, because existing city coverage was inadequate, and this was the best means of addressing the problem. It cites *Tri-Valley Broadcasting Co.* (WYRY-FM), ("Tri-Valley"), 4 FCC Rcd 4711 (1989), as a situation where, with no fully spaced site available, the need for emergency information justified a short spaced facility, even though the resultant interfering contour extended beyond what the Commission's Rules contemplated. Additionally, it asserts that all of this precedent involves waivers of rules forming an "integrated system" of rules

¹ See *Memorandum Opinion and Order*, 49 Fed. Reg. 10,264 (1984), *modifying the Report and Order* in Docket 80-90, 48 Fed. Reg. 29,486 (1983) (Class C stations required to construct facili-

ties with 100 kW effective radiated power at an antenna height above average terrain of 300 meters or greater or be automatically downgraded to lower status).

² Pursuant to 73.211(b), the maximum power and height levels for Class C stations are 100 kW and 600 meters, respectively.

designed to ensure the integrity of the Commission's allocations system. In this regard, Crain argues that waiving the maximum power limit to improve coverage as in *Golden West* has the effect of extending service and interfering contours beyond a station's "allocations envelope" and that a similar result occurs where the spacing provisions are waived.

7. Crain's next argument is that its public interest showing was ignored by the Bureau. According to Crain, it cited authority for the proposition that mandatory reclassification to Class C1 status is inappropriate in situations where terrain anomalies render the Commission's propagation curves unreliable. Crain asserts that the "Denver cases" involved a recognition that disruption to existing service is a sufficient basis to avoid reclassification, even where sites are available from which full compliance with the Rules can be achieved. Crain maintains that the Bureau failed to follow the Commission's holding in *Bayshore*, that a power limitation waiver is appropriate where no site is available for a full height antenna and where a similar terrain anomaly would result in coverage beyond predictions. Crain also asserts that it demonstrated below that a grant of its proposal would not preclude any new allocation. Finally, Crain maintains that implicit in its proposal is the possibility of authorizing some lesser amount of power in combination with a directional antenna, something which was not addressed below. In this regard, Crain asserts that since WWUS' existing service contours extend "significantly" beyond what the Commission's propagation curves suggest, it requested that consideration be given to retaining the station's Class C status if the instant proposal could not be approved. According to Crain, retention would insure that existing WWUS service is not lost due to reduction in mileage separations based on a downgrading.

8. *Discussion.* Crain's reliance on the *Rock City* case is misplaced.³ In *Rock City*, the applicant stressed the public interest benefits of ameliorating shadowing and multiple distortion problems by way of a waiver of the power limitations of 47 C.F.R. § 73.213. 19 FCC 2d 558. As Crain observes, the Commission therein declined to waive the rule, in part because the same result could be achieved by means of a directional antenna or HAAT increase. Crain would have us hold here that, because there is no other means for it to achieve full Class C coverage, it should be permitted to use an ERP in excess of that prescribed in the rules. However, the Commission historically has refused to authorize excessive power levels in order to compensate for insufficient antenna heights. See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5456, 5361 (1991). See also *First Report and Order* in Docket No. 14185, 33 FCC 309, 337 (1962). Our recent decision in *Murray Hill Broadcasting Company*, 8 FCC Rcd _____ n.2 (1993), also reaffirms this principle.

9. The other cases cited by Crain are inapposite. In *Golden West*, which involved a grandfathered super-powered station, the Commission waived Section 73.211(b)'s power limit in order to permit the applicant to provide adequate city grade service to its community. Unlike *Golden West*, Crain does not claim that adherence to the rule will limit or disrupt WWUS' ability to adequately serve Big Pine Key. In *Tri-Valley*, the Commission waived the distance separation requirements of 47 C.F.R. § 73.207 in a situation where no fully or lesser short spaced site was available, where only a minimum degree of interference would result, where the applicant was the only party capable of providing adequate emergency information about a nearby nuclear power facility, and where to require full spacing would result in deletion of a first local service. 4 FCC Rcd at 4713. The only similarity to Crain's situation is the alleged need for WWUS to provide emergency information. However, examination of Crain's proposal and Application reveals that, contrary to Crain's assertion, WWUS would not be the only station capable of providing emergency information to all Keys residents as well as a substantial number of tourists, even operating with 620 kW. FM stations WMCU, Miami, WCTH, Plantation Key, and WEOW, Atlantic Beach, Florida, in combination are capable of providing such information to all the Keys. In addition, FM Stations WLVE, Miami Beach, WKLK, Rock Harbor, WAVK, Marathon, and WAIL, Key West, Florida, in combination are able to provide service to most populated areas of the Keys, and all of the Keys are served by daytime AM stations.

10. The "Denver cases"⁴ involved Bureau waivers of § 73.313, the Commission's rule involving prediction of coverage. In that context, applicants sought to avoid the automatic downgrading provided for in BC Docket 80-90. Although the rule was waived in both cases for the purpose of computing antenna height above average terrain, the basis for waiver was that the portions of the terrain radials extending over the Rocky Mountains would improperly skew the calculated value of the stations' HAAT. The Bureau specifically noted in both decisions that all radials were to be utilized in computing the stations' predicted service contours.⁵ The "Denver" applicants received no changes either in facilities or in allowable coverage, and these cases do not imply that the Commission will waive its maximum power limitation simply in order to allow a station to increase coverage to avoid a downgrade. Finally, in *Bayshore*, an allotment rulemaking proceeding, a channel was allotted despite predictions that city grade coverage would be unlikely in the face of environmental restrictions. It was recognized that the community of license might, in fact, receive an adequate signal because of a signal path over water near the transmitter site. However, no waiver was granted in that rulemaking proceeding, and it was merely suggested that waivers of 47 C.F.R. §§ 73.211 and 73.315 might be sought in the applications context. Moreover, no waiver of Section 73.211 was ultimately granted.

³ An analysis of Crain's Application reveals much emphasis on the concept of a station's "allocations envelope." Crain, however, references no applicable precedent in which the concept of an "allocations envelope" is specifically or metaphorically discussed. Rather, in each noted case the focus is considerably more narrow.

⁴ *Letter to Ramsey L. Woodworth, Esq. and to John Wells King, Esq. from the Chief, Audio Services Division, Mass Media Bureau*, January 14, 1986 (reference 8920-MA), and *Letter to*

Malrite Radio & Television, Inc. from the Chief, Audio Services Division, Mass Media Bureau ("Malrite"), June 11, 1987 (reference 8920-AED).

⁵ Thus, Crain's argument that "terrain anomalies" in the Keys render the Commission's propagation curves unreliable carries no weight here.

Again, there is no indication that WWUS' coverage of Big Pine Key is inadequate, and Crain does not demonstrate that any such waiver grants were realized pursuant to any permit application.⁶

11. Crain's proposal would be extremely disruptive to the FM allotment scheme. It is true that in this case grant of Crain's proposal would not have a significant direct adverse preclusionary effect *vis-a-vis* new allotments or facilities changes.⁷ However, Crain did not address the indirect preclusionary effect on new allotments resulting from channel changes among existing stations. Additionally, while Crain points out that its 34 dBu "interfering" contour would extend no further than that of a Class C station operating with maximum facilities, its 60 dBu coverage contour will extend 17 km less than that of a full Class C station; its coverage contour thus will extend to only 81% of that of a Class C station operating with maximum power and height according to the Rules. We believe it to be an inefficient utilization of spectrum to permit Crain to create as much interference potential as a Class C station with a coverage contour which extends only 81% as far.⁸ We also note that Crain's proposal of extremely high power at a relatively low antenna height will greatly increase the risk of blanketing interference. See 47 C.F.R. § 73.318.

12. Finally, approval of the requested power level would treat WWUS differently than other similarly situated applicants. See, e.g., *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). In this regard, three former Class C stations, WEON, WOZN, Key West, Florida, and WCTH were recently downgraded to Class C1, as required by BC Docket 80-90, because they could not achieve minimum Class C facilities in compliance with the rules. Additionally, WCTH, along with two other Class C1 stations, WAIL and WWFT, Key West, Florida, meet the spacing requirements for Class C facilities. If Crain's proposal is granted, these stations could be expected to apply (after appropriate rulemaking) for Class C facilities, using Crain's grant as precedent to seek a similar exemption from the power limitation component of our FM allocation scheme. This would in effect vitiate that scheme in southern Florida and set a precedent for undercutting the allotment process in analogous circumstances throughout the United States. The possibility that some Class C stations such as WWUS would face difficulties in securing adequate sites was expressly recognized by the Commission in the context of BC Docket 80-90. Nevertheless, we specifically noted in providing for downgrading that such facilities would not lose service but

could continue to provide service to their existing areas. 49 Fed. Reg. 10,260, paragraphs 9 and 15. To permit WWUS to extend its authorized coverage contours or, alternatively, allow retention of Class C status⁹ despite the Commission's BC Docket 80-90 determination would amount to sanctioning the "warehousing" of spectrum. Such a result would, contrary to Crain's arguments, undermine Commission policy.

13. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed July 17, 1989 by Crain Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

⁶ In fact, no waivers of Section 73.211 were ultimately granted in that proceeding, but rather a blanket waiver of Section 73.315 was granted to those applicants proposing to locate their antennae on the Fire Island Lighthouse. *Warren Price Communications*, 2 FCC Rcd 4201, 4203 (M.M. Bur. 1987), *erratum*, 2 FCC Rcd 4452 (M.M. Bur. 1987).

⁷ The Florida keys are so well-served that there is no room for new "drop-in" FM allotments, and these stations are adequately spaced such that Crain's proposal would appear to have no preclusionary effect *vis-a-vis* facilities changes.

⁸ A Class C1 station operating with full facilities (100 kW at 300 meters) will have a predicted service contour at a distance of 72 km and a predicted co-channel interference contour at 172 km. Required spacings between such a C1 station and other stations are predicated, in part, on these distances. A Class C station operating with full facilities (100kW at 600 meters) will have a predicted service contour at a distance of 92 km and a predicted co-channel interference contour at 198 km. Conse-

quently, the required spacings between such a Class C station and other stations are significantly greater than is the case for the Class C1 station. Crain's proposal for facilities of 620 kW at 135 meters would have a predicted service contour of 74 km and a predicted co-channel interference contour at 197 km. Granting WWUS' proposal would, in effect, apply the large Class C inter-station spacings, which were adopted in order to protect Class C service contours extending to as much as 92 kilometers, in circumstances where such service would not be provided and has no reasonable prospect for being established.

⁹ Although Crain argues that an alternative to its specific proposal, such as a lesser power or a directional antenna, should have been considered below, Crain advanced no specific proposal, and to consider a proposal not advanced by an applicant would contravene Commission practice. Thus, the Bureau appropriately limited its consideration to the specific proposal before it. See *Palm Bay Public Radio, Inc.*, 6 FCC Rcd 1772, 1773 n.7 (1991).