

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

September 5, 1995

IN REPLY REFER TO:
1800B3-BJB

3-D Communications Corporation
310 E. De Young Street
Marion, IL 62959

Withers Broadcasting Company of Illinois
PO Box 1238
Mount Vernon, IL 62864

Re: WVZA(FM), Herrin, IL
3-D Communications Corporation
BPH-931230IB
Petition to Deny

Dear Licensees:

The staff has under consideration a minor change construction permit application filed by Wayne E. Tate ("Tate"), the former licensee of WVZA(FM), proposing a "one-step" upgrade from Channel 224A to Channel 224B1 for WVZA.¹ On February 17, 1994 Withers Broadcasting Company of Illinois ("Withers") the licensee of WMIX-FM, Mount Vernon, IL filed a pleading styled as a petition to deny against the application.² Since the Communications Act of 1934, as amended, does not authorize the filing of petitions to deny against a minor change construction permit application, Withers' pleading will be considered as an informal objection. See 47 C.F.R. § 73.3587. For the reasons stated below, we grant the informal objection in part and dismiss the application.

WAIVER OF § 73.215(a)

Background

The instant application proposes a "two-site" upgrade for WVZA. That is, 3-D has specified a Channel 224B1 allotment site for Herrin that is fully spaced under 47 C.F.R. § 73.207, as well as a transmitter site which meets the minimum distance separation requirements of 47 C.F.R. § 73.215(e).³ The transmitter site proposed in the instant application is short-spaced under § 73.207 to first-adjacent channel Class C station WBKR(FM), Owensboro, KY. Accordingly,

¹ Pursuant to assignment of construction permit BAPH-940323GF, which was granted on May 16, 1994 and consummated May 31, 1994, 3-D Communications Corporation ("3-D") is the successor-in-interest of WVZA.

² On March 2, 1994, Tate submitted a pleading captioned as an "Opposition to Petition to Deny."

³ The proposed Channel 224B1 allotment coordinates are 37° 45' 51" N.L. and 89° 13' 42" W.L.

the application requests processing under the contour protection rule (§ 73.215) toward WBKR.⁴ However, the proposal would receive contour overlap in violation § 73.215(a). This deficiency is recognized in the application and waiver of § 73.215(a) is requested. Withers informal objection asserts that 3-D has not sufficiently established that such a waiver would be in the public interest.

Waiver Request

Under § 73.215, the proposed 57 dBu protected contour would receive prohibited contour overlap from the 51dBu interfering contour of WBKR.⁵ In support of the request for waiver, the application states that:

[t]his overlap is due entirely to the fact that the protected contour of WVZA becomes 57 dBu instead of 60 dBu. The Class B1 facilities proposed herein would not exceed the authorized Class A facilities, which causes no overlap with WBKR, in the direction of WBKR. Therefore, the "creation" of overlap as a result of this proposal is due entirely to the different contour level used for Class B1 than for Class A, when in fact, no overlap will be created beyond where it had existed previously... The proposed 57 dBu contour does not extend past the 57 dBu contour of the present Class A facility where there is existing overlap.

The engineering statement and subsequent "Opposition" conclude that the waiver would be in the public interest because: (1) the economic savings of allowing WVZA to utilize its current multi-station site for the upgrade facility will enable the station to better serve the public; (2) the WVZA signal would not be increased towards WBKR beyond that currently authorized and no overlap would be caused to WBKR; (3) waiver would allow WVZA to retain all of its presently authorized coverage area; and (4) waiver would allow WVZA to achieve maximum Class B1 facilities in the main antenna lobe without violating the 15 dB maximum to minimum ratio for a directional antenna.

Discussion

Change in protected contours. 3-D is correct in that the prohibited contour overlap created by its proposal for WVZA is the result of the change in the value of the protected contour from 60 dBu for a Class A station to 57 dBu for a Class B1 station. However, this fact does not justify waiver of the rule, as will be explained.

In 1962, station classes and the corresponding maximum facilities were originally selected to serve a specified service radius, not a particular service contour. When Class B stations, and

⁴ The transmitter site proposed in the instant application is also short-spaced under § 73.207 to first-adjacent Class B station WSEI(FM), Olney, IL. However, as stated in the application, the proposal complies with the spacing and contour protection requirements of § 73.215 with respect to WSEI.

⁵ This overlap occurs when WBKR is considered to be operating at maximum Class C facilities (i.e., 100 kW ERP at 600 m HAAT) as required by § 73.215(a)(2)(ii).

later Class B1 stations, were established, it was recognized that these classes of stations would provide a weaker field strength at their protected service contours when compared to other classes of FM stations. This difference was necessary to allow Class B and B1 stations to provide adequate service to the larger urban areas generally found in Zones I and I-A. With this in mind, the Commission adopted spacing rules (and later contour protection rules) designed to prevent interference within the weaker signal strength at the protected service contour. In this regard, Class B1 and B stations are administratively different than the remaining classes of commercial FM stations.⁶

The present application would not provide protection from interference out to WVZA's proposed Class B1 protected contour. If the application were granted as proposed, it would create a new area of prohibited contour overlap (and hence interference), as 3-D has recognized. Thus, WVZA's actual Class B1 protected service would be diminished from that which would normally be expected of a Class B1 station without contour overlap. To prevent this situation from occurring, the creation of new prohibited contour overlap is specifically prohibited by § 73.215. Consequently, 3-D has requested waiver of § 73.215.

While 3-D's application does not specifically reference Paragraph 54 of the Memorandum Opinion and Order in Docket 87-121, 6 FCC Rcd 5356 (1991), Paragraph 54 is central to its waiver request. Paragraph 54 addresses those stations which were governed solely by the § 73.207 spacing rules prior to the 1989 effective date of the contour protection rule (§ 73.215), but which would have existing contour overlap under § 73.215 standards. Paragraph 54 permits those stations to maintain (but not increase) any existing contour overlap in order that existing service not be lost. This policy also serves to prevent any existing interference in the FM band from becoming worse.

Paragraph 54 does not apply to an applicant seeking to increase or create new interference, as defined by § 73.215. Therefore, this policy cannot be applied to WVZA, since no prohibited contour overlap presently occurs between WVZA's 60 dBu protected contour and the 54 dBu interfering contour of WBKR. 3-D apparently bases its waiver request on "maintain[ing] existing service," the rationale being that the location of the 60 dBu coverage contour will not change. Therefore, the proposal will continue to provide service to persons currently served. However, this fact alone does not justify waiver of the rule because, as a Class B1 station, WVZA's service obligation is greater in that interference free service must be provided within the 57 dBu contour not simply within the 60 dBu contour as for a Class A station. If WVZA wishes to upgrade to a Class B1 facility, it must do so in a manner consistent with the Commission's rules as they pertain to B1 stations.

Preservation of existing service. In support of its waiver request, WVZA has quoted Triangle Publications, Inc., 37 FCC 307, 313 (1964), which stated that

⁶ See First Report and Order in MM Docket 14185, 23 RR 1801 (1962) at 1825; Report and Order in MM Docket 80-90, 94 FCC 2d 152 (1983) at Paragraph 87; Report and Order in Docket 87-121, 4 FCC Rcd 1681 (1989) at Paragraphs 43-45.

[o]nce in operation, a station assumes an obligation to maintain service to its ... audience and the withdrawal or downgrading of existing service is justifiable only if offsetting factors are shown which establish that the public interest generally will be benefited. Hall v. FCC, 237 F.2d 567, 99 U.S. App. DC 86 [(1956)].

This precept is only one factor in determining whether the grant of a proposal is in the public interest. In Triangle Publications, Inc., an application to change site was denied because the area gained by the site change did not offset the loss of the only existing service to another area. When considering proposals to upgrade allotments, the Commission has long recognized that, due to increased service contours and the resultant more restrictive spacing requirements, upgraded facilities often result in shifting of service areas.⁷ Accordingly, the desire to upgrade and, at the same time, continue service to the area in question is not sufficient justification for waiver.⁸

Moreover, the additional factors cited by WVZA in its application also do not justify grant of the requested waiver. Specifically, 3-D states that grant of the requested waiver would allow the station to operate with upgraded facilities from its existing site and thereby better employ the financial resources saved by doing not changing transmitter site. However, it has long been a Commission policy not to waive a core technical rule for a non-technical reason.⁹ Bobby Duffy, 7 FCC Rcd 1734, 1736 (1992); Broadcasters, Inc., 23 FCC 2d 155 (1970).

"Hard Look" has been afforded. When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action. Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F2d 664 (D.C. Cir. 1968). As set forth above, we have afforded Noble's waiver request the "hard look" called for under the WAIT doctrine, WAIT Radio v. FCC, 418 F2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in the application are insufficient to establish that grant of the requested waiver would be in the public interest. Consequently, 3-D's request for waiver of § 73.215(a) will be denied and, to the extent that it involves the requested waiver, Withers' objection will be granted.

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⁷ In the instant case, the construction of full Class ~~C3~~ facilities at the proposed fully spaced "one-step" allotment would result in the loss of some existing WVZA service to the east. However, since the area would continue to be served by at least five other existing aural services, the Commission would likely act favorably on such an upgrade proposal were it received as a petition for rulemaking. (See, for example, Bay City, 10 FCC Rcd 3337 (1995).)

⁸ If one were to assume that preservation of this existing service were the sole concern of 3-D, an argument could be made that the public interest is best served by retaining WVZA as a Class A station since (1) the currently licensed Class A 3.16 mV/m contour appears to provide more than adequate coverage to the community of Herrin as required by § 73.315 and (2) no prohibited contour overlap is created.

⁹ In addition, 3-D states that waiver would allow WVZA to comply with the 15 dB maximum-to-minimum limit rule imposed on FM directional operations by 47 CFR § 73.316(a)(1), thereby minimizing "picket-fencing" interference in the areas toward WBKR. However, we would require WVZA to comply with this criteria regardless of whether or not the requested waiver were granted.

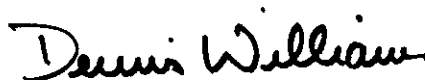
Matters Regarding § 73.3517

The proposed allotment site was 12 kilometers short-spaced under § 73.207 to the licensed facility of KYLS(FM), Channel 224A, Ironton, MO. However, on the same day the instant application was filed, KYLS filed a one-step application (BPH-931230IE) to change from Channel 224A to Channel 225A. The proposed Herrin Channel 224B1 one-step allotment was fully-spaced with respect to the KYLS application.¹⁰ Withers objects that, because the proposed one-step upgrade requires KYLS to file an application to change Channels from Channel 224A to Channel 225A, 3-D's application violates the contingent application rule, 47 C.F.R § 73.3517, and the "one-step" proceeding, MM Docket 92-159. However, Withers' objections on this point became moot when the KYLS permit was granted on May 17, 1995 for operation on the new channel.

CONCLUSION

Accordingly, in light of the above, 3-D's request for waiver of § 73.215(a) IS HEREBY DENIED. In addition, Withers' February 17, 1994 Petition to Deny IS HEREBY DISMISSED. However, when considered as an informal objection, Withers' February 17, 1994 pleading IS HEREBY GRANTED to the extent indicated above. Because of the staff's denial of a waiver request, 3-D is not entitled to file a corrective amendment to the application. See Paragraph 22, Report & Order, MM Docket 91-347, 57 Fed. Reg. 34872, 7 FCC Rcd 5074, released July 27, 1992. Therefore, application BPH-931230IB IS DISMISSED. These actions are taken pursuant to § 0.283.

Sincerely,



Dennis Williams
Assistant Chief
Audio Services Division
Mass Media Bureau

cc: David D. Oxenford, Esq.
Robert L. Olender, Esq.

¹⁰ At the time the instant application was filed, the Herrin and Ironton allotments were the subject of a counterproposal (RM-8325) in MM Docket 93-224. That counterproposal proposed to substitute Channel 258C3 for Channel 224A at Ironton and Channel 224B1 for Channel 224A at Herrin. On May 1, 1995, RM-8325 was dismissed. See Report & Order, MM Docket 93-224 (10 FCC Rcd 5041 (1995)).