

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

In re Application of

MURRAY HILL  
BROADCASTING COMPANY

File No. BPH-8702251P

For a Construction Permit for  
Minor Changes in Station WQMG-FM,  
Greensboro, North Carolina

#### MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1992; Released: January 11, 1993

By The Commission:

1. The Commission has before it for consideration (a) an Application for Review, filed August 8, 1988, by Murray Hill Broadcasting Company ("Murray"), licensee of Station WQMG-FM, Greensboro, North Carolina; (b) an Opposition thereto, filed August 23, 1988, by Wilkes Broadcasting Company ("Wilkes"), licensee of Station WKBC-FM, North Wilkesboro, North Carolina; and (c) related pleadings.

2. Murray requests that the Commission review and reverse the staff action of June 29, 1988, which rejected Murray's application, as originally filed, but granted Murray's application, as amended. For the reasons that follow, we affirm the staff action.

<sup>1</sup> In relevant part, then-existing § 73.213, which applies to this case, provided:

(a) Stations authorized prior to November 16, 1964, at locations that do not meet the minimum distances specified in § 73.207 may apply for changes in facilities if the requested facilities conform to those listed in the following table:

Class	Separation First Adjacent	Facilities Power	Authorized Height
C to C	121 - 152 km	20 kW	600 m
C to C	less than 121 km	10 kW	600 m

(e) The powers listed in the table are the maximums the FCC will authorize. . . .

(f) The following provisions will govern applications for move of transmitter site:

#### BACKGROUND

3. Station WQMG-FM is a Class C station, which, at the time Murray filed the captioned application, was licensed to operate on Channel 246 with 100 kW effective radiated power ("ERP") at 157 meters height above average terrain ("HAAT"). Station WKBC-FM, also a Class C facility, is licensed to operate on first adjacent Channel 247. The stations were, at the time the captioned application was filed, located 123.2 km apart and considered "grandfathered" short-spaced stations under former § 73.213 of the Commission's Rules.<sup>1</sup>

4. Murray filed the captioned application on February 25, 1987, to preserve WQMG-FM's Class C status, in accordance with *FM Broadcast Stations*, 94 FCC 2d 152 (1983). The application proposed to move WQMG-FM's transmitting antenna 8.1 kilometers closer to WKBC-FM (thus, reducing the short separation to 115.1 km), and to operate WQMG-FM with 22.9 kW ERP (in the direction of WKBC-FM) at 315 meters HAAT.

5. Murray maintained that its proposal satisfied the requirements of then-existing § 73.213. Wilkes argued otherwise in an informal objection to the application, filed on August 4, 1987. In the first of two decisions, the staff, on January 7, 1988, dismissed Murray's application because it proposed an ERP for WQMG-FM which, in the direction of WKBC-FM, exceeded the 10 kW maximum set forth in § 73.213(a) for first adjacent Class C stations located less than 121 km apart.

6. Subsequently, on February 8, 1988, Murray filed a Petition for Reconsideration of the staff action. Therein, Murray argued that the staff had erred in concluding that Murray's proposal violated § 73.213, and, in any event, a waiver of § 73.213 was justified. In the alternative, Murray proffered a contingent amendment to its application which reduced power to comply with the staff's interpretation of § 73.213, as expressed in its January 7, 1988, decision. It was Murray's intention that the amendment be considered only in the event the staff again rejected the original proposal.

(2) Stations short-spaced with respect to other stations under § 73.207 may apply to move transmitter site, even though by the move the separation would be further shortened, under the following conditions and with the following facilities:

(ii) When a station does not meet the minimum separations to co-channel or adjacent channel stations, it may apply for up to the maximum facilities for the separations that would exist at the new transmitter site. (See paragraph (f)(2)(iii) of this section for further restrictions on very short-spaced stations.)

(iii) . . . If the [transmitter] move would decrease the short distance by [greater than 5 km], a station will be permitted no more than the facilities that would give it, in the critical direction, a 1 mV/m contour located no further out than that which would result from using the former location and the maximum facilities specified for the distance bracket.

7. By letter, dated June 29, 1988, the staff granted reconsideration to the extent that it approved Murray's amended proposal. Although Murray filed the instant Application for Review seeking reversal of that action, Murray nonetheless made the authorized modifications to WQMG-FM, filed an application for a covering license for the amended facilities (File No. BLH-890425KA) which was granted August 15, 1989, and has been operating in accordance with its amended proposal.

### THE ARGUMENTS

8. Murray states that, had sufficient and suitable land been available, it could have applied to operate from its original site with 20 kW ERP at 600 meters HAAT. In support, Murray relies on § 73.213(a), which permits such facilities for first adjacent channel Class C stations separated by 121 km to 152 km.

9. Because Murray's original transmitter site could not accommodate the modifications that Murray desired, Murray proposed to change transmitter sites, thus invoking the provisions of § 73.213(f). According to Murray, then-existing § 73.213(f)(2)(iii) specified certain restricted facilities when the proposed separation between first-adjacent channel Class C stations was less than 121 km and the site change decreased the existing short separation by more than 5 km. In such situations, Murray argued, the applicant was limited to facilities which would produce a 1 mV/m contour that extends no further in the critical direction than the 1 mV/m contour that would be produced if the station was operating with maximum height and power, per the table in § 73.213(a), at its original site.

10. In the instant case, according to Murray, the predicted 1 mV/m contour that would be produced by WQMG-FM operating from the proposed site with 22.9 kW ERP at 315 meters HAAT would extend no further toward WKBC-FM than would the predicted 1 mV/m contour that would be produced if the station was operating from its original site with 20 kW ERP at 600 meters HAAT. Moreover, Murray contends that the proposed interfering and protected contours demonstrate that WQMG-FM would cause less interference to WKBC-FM than it would by operating with the maximum allowable facilities at its original site. Thus, Murray argues, its proposal would afford WKBC-FM greater protection from interference than the rule required and was, thus, consistent with the spirit of § 73.213.

11. Although § 73.213(e) states that the powers specified in § 73.213(a) are the maximums that the Commission will authorize, Murray argues that § 73.213(e) is not applicable because § 73.213(e) applies to facilities changes, not site changes. The site change proposed in the instant case is, according to Murray, governed by § 73.213(f)(2)(iii), which specifies a contour restriction, not a power restriction.

12. Murray further states that assuming, *arguendo*, its application, as originally filed, does not comply with § 73.213, a waiver of § 73.213 is warranted. In support, Murray relies on *Bristol Broadcasting Co., Inc.*, 61 FCC 2d 13 (1976), which it characterizes as "a dispositive Commission precedent." Murray also asserts that there are significant public interest benefits which support the grant of a waiver in this instance. Murray states that if its initial proposal were granted, WQMG-FM would serve 334,682 more people and 5,457 more sq. km than the station was

servicing when the application was filed. Additionally, Murray contends, WQMG-FM would provide new city-grade (3.16 mV/m) service to 324,984 people and 2,977 sq. km.

13. Wilkes argues in its Opposition to Murray's Application for Review that Murray has misinterpreted § 73.213. Wilkes maintains that, based on the explicit language in § 73.213(e), the powers specified in § 73.213(a) are absolute maximums, even for site changes. Thus, according to Wilkes, since the Table of Facilities states that first-adjacent channel Class C stations located less than 121 km apart may not operate with an ERP in excess of 10 kW in the critical direction, and Murray's initial proposal contemplated that WQMG-FM would operate from such a distance with 22.9 kW in the direction of WKBC-FM, Murray's initial proposal clearly violated § 73.213. In its two decisions, the staff rejected Murray's original proposal for precisely this reason.

14. Wilkes further argues that Murray is not entitled to a waiver of § 73.213 because Murray has failed to satisfy the "high hurdle" required by *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Specifically, Wilkes maintains that although *Bristol Broadcasting, supra*, involved the grant of a waiver, the decision is nonetheless inapposite because it did not involve a proposal to exceed the maximum power levels specified in § 73.213(a), the key issue here. Moreover, Wilkes argues that there is nothing unique or compelling about the service gains claimed by Murray because such claims could be made by any applicant which seeks to operate with excessive facilities.

### DISCUSSION

15. Sections 73.213(a) and (e), as they existed on February 25, 1987, when Murray filed its captioned application, were intended to establish maximum permissible powers, whether the applicant was proposing a change in facilities or a change in transmitter site. Indeed, § 73.213(e) states in plain, unambiguous language that only antenna heights, not powers, may exceed those listed in § 73.213(a)'s Table of Facilities. It is axiomatic that any reasonable and logical construction of a rule begins with its plain language. *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987).

16. The "further restrictions" embodied in § 73.213(f)(2)(iii) must be read in conjunction with the power limitation provisions of §§ 73.213(a) and (e). The last sentence of § 73.213(f)(2)(iii) was intended to remedy situations where the 1 mV/m contour of a short-spaced station (in this case, a Class C station located less than 121 km from a first-adjacent Class C station) extended prohibitively far despite the 10 km/600 m limitation in § 73.213(a). Pursuant to § 73.213(f)(2)(iii), in such a situation, the applicant was required to "pull back" its 1 mV/m contour to an appropriate distance; that is, to a distance which would not exceed that which would obtain if the station were operating with maximum facilities allowed by § 73.213(a) from its original site. It was contemplated that the applicant could "pull back" its 1 mV/m contour to an appropriate distance by reducing power and/or antenna height from the maximum levels specified in § 73.213(a). It is not consistent to argue that § 73.213(f)(2)(iii) would permit an applicant to exceed the maximum power levels contained in § 73.213(a) in an attempt to produce a 1

mV/m contour of appropriate distance.<sup>2</sup> Indeed, to do so would render § 73.213(e) superfluous, a result which is inconsistent with settled principles of statutory construction. See, *Weinberger v. Hyson, Westcott & Dunning*, 412 U.S. 609, 633 (1973) (a regulation should not be construed to render clauses superfluous, citing "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect.").

17. There is also no basis for granting a waiver of § 73.213 to Murray. In this regard, we agree with Wilkes that *Bristol Broadcasting, supra*, provides no justification for waiving our rules in this instance, and Murray's claim of significant service gains are claims that any applicant which proposes excessive facilities could proffer. We also note that although the Commission has carved out an exception to the general rule prohibiting applicants from proposing powers in excess of the maximums specified in § 73.213(a), the exception was intended to apply in situations where there is a mutual agreement between the short-spaced stations involved, and then only when the proposal involves a change in facilities. See, *FM Broadcast Rules*, 40 FCC 868 (1964). Indeed, in *Short-Spaced FM Stations*, 57 FCC 2d 1263 (1975), the Commission reiterated that it would not consider a request for excessive facilities despite the existence of a mutual agreement if the proposal in question involved a transmitter site change. Consequently, even if Murray and Wilkes were able to negotiate a mutual agreement allowing WQMG-FM to operate with an excessive power, the Commission would disapprove the requested modifications because the proposed changes involve a transmitter move.

18. There also is another independent basis for rejecting Murray's Application for Review. Section 1.110 of the Commission's Rules states in pertinent part:

Where the Commission without a hearing grants any application . . . with terms other than those requested . . . the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days . . . file with the Commission a written request rejecting the grant as made.

19. In the instant case, the staff, by delegated authority, granted Murray's application with terms to which Murray objects. That is, the staff granted Murray's amended proposal, rather than its initial proposal. However, Murray failed to challenge the terms of the grant according to the procedure prescribed in § 1.110. To the contrary, Murray effectively accepted the grant when it subsequently modified WQMG-FM as authorized, and sought and received a covering license for the changes. Indeed, since 1989, WQMG-FM has been operating from the site and with the facilities which Murray contests. In this regard, we note that an applicant may not, on the one hand, accept a Commission grant *and*, on the other hand, seek an administrative appeal of the authorization. See *Central Television, Inc. v. FCC*, 834 F.2d 186 (D.C. Cir. 1987) *Capital Telephone Company, Inc. v. FCC*, 498 F.2d 734, 739 (D.C. Cir. 1974). Consequently, having effectively accepted the grant

as made *and* having failed to challenge the staff action as required, Murray has foreclosed its opportunity to contest the terms of the construction permit.

20. Although the most recent staff decision may not have articulated a response to every contention raised by Murray in its Petition for Reconsideration, we have carefully considered all of the arguments advanced by Murray in its Application for Review. We conclude that Murray's original proposal violated then-existing § 73.213 and was, therefore, properly dismissed. We further conclude that a waiver of § 73.213 was not justified. Finally, we conclude that the staff action granting recon- sideration to the extent that it approved Murray's amended proposal was proper. Murray's subsequent actions embracing the grant further support our disposition of this case.

21. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed August 8, 1988, by Murray Hill Broadcasting Company, licensee of Station WQMG-FM, Greensboro, North Carolina, IS HEREBY DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy  
Secretary

<sup>2</sup> We note in this regard, that the Commission historically has refused to authorize excessive power levels in order to compensate for insufficient antenna heights. See, *Revision of FM Rules*, 23 RR 1801, 1831 (1962).