

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

MM Docket No. 87-131

In the Matter of

Unlimited Time Operation by Existing
AM Daytime-Only Radio Broadcast
Stations; Discontinuance of
Authorization of Additional
Daytime Only Stations; Minimum
Power of Class III Stations

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: January 18, 1989; Released: February 22, 1989

By the Commission: Commissioner Dennis concurring
and issuing a separate statement.

1. Before the Commission is a Petition for Reconsideration filed by Newsic, Inc. (Newsic), licensee of daytime-only station WRWH(AM), Cleveland, Georgia, seeking clarification of the *Report and Order* in this proceeding.¹ Specifically, Newsic requests explicit clarification that former regional channel daytime-only stations which, as a result of this proceeding, received nighttime authorizations at a power level below 250 watts will remain eligible, if they meet other established criteria, for the special comparative credit granted in Docket 84-231 to former AM daytimers competing in comparative hearings for new FM allotments. Newsic observes that, although the *Report and Order* makes passing reference to the daytimers' preference, it does not state that the preference is available to operators of former daytime-only stations who are presently operating on regional channels on a full-time basis with less than 250 watts nighttime power. Newsic submits that a clarification is needed to remove doubt about the eligibility of these operators for the preference and to enable them to assess correctly their comparative ranking vis-a-vis other applicants. Newsic contends that a clarification recognizing the eligibility for the preference of former regional channel daytimers now operating at night with less than 250 watts power would be consistent with the Commission's decision in Docket 84-231 to make the preference available to former daytimers operating on foreign clear channels at night with less than 250 watts power.²

BACKGROUND

2. To place Newsic's Petition in perspective, we review the rule making proceedings relevant to the issue which it raises. Our adoption in Docket 84-231 of the daytimers' preference³ was the culmination of a process initiated by the National Telecommunications and Information Administration which submitted in 1981 a Petition for Rule Making suggesting that we seek ways to aid daytime-only

licensees. In 1982, the Commission issued a *Notice of Inquiry and Notice of Proposed Rule Making* (NOI/NPRM) which considered a broad range of problems faced by daytime-only AM licensees and which included a proposal to grant a comparative preference to these licensees.⁴ Subsequently, in this proceeding, we issued a *Notice of Proposed Rule Making* (NPRM) which, inter alia, solicited proposals designed to aid daytime-only AM licensees in obtaining FM broadcast stations in their community of license.⁵ That NPRM expressed concern about the limitations of daytime-only operations, noted that many daytime-only licensees had long histories of outstanding service to their communities of license, and requested specific comments on the type of aid that could be provided to daytime-only licensees in the comparative process. Based on our own assessment of AM daytimers' problems and upon the broad range of comments received in response to the NPRM, we found substantial grounds for adopting the preference. Specifically, we recognized that AM daytimers had been burdened with the restriction of sunrise-to-sunset operation that deprived their audiences of night-time service and licensees of nighttime revenue. We found that the operation of a daytime-only station, despite technical limitations, provided a strong indication that, if given an opportunity, a daytimer licensee would operate an FM station in the same community in a manner that would further the public interest. We also determined that, by conferring a benefit upon daytimers in the form of the preference, we would thereby recognize their efforts as operators of limited facilities. We believed that such recognition would serve to encourage licensees operating in other services with technical limitations on the quality of their service to maximize provision of service to the public.⁶ Our action adopting the daytimer preference and eligibility criteria for the preference did not distinguish between daytimers based on the types of channels on which they operate.

3. Subsequently, in Docket No. 84-281,⁷ we recognized that new international agreements had eliminated restrictions on the nighttime use of certain foreign clear channels. Accordingly, we authorized nighttime operation for AM stations previously operating on a daytime-only basis on these channels. We determined that it would be appropriate to confer secondary status on the nighttime signal of any station with a newly authorized nighttime signal of less than 250 watts power.⁸

4. The question then arose, in petitions for reconsideration of our action in Docket 84-231, whether a station utilizing a nighttime authorization granted in Docket 84-281 would be ineligible for the daytimer preference because it was no longer a daytime-only station. We determined that because nighttime authorizations of less than 250 watts are given secondary status, licensees with such authorizations should be treated as daytime-only licensees. We concluded, therefore, that former daytime-only licensees operating on foreign clear channels who received nighttime authorizations of less than 250 watts as a result of Docket 84-281 should be treated as daytime-only stations for purposes of establishing eligibility for the daytimer preference.⁹

5. We next issued a Notice of Proposed Rule Making in this proceeding.¹⁰ The basic proposal was to permit eligible daytime-only AM stations to operate at night on regional channels with a power of up to 500 watts, reduced as necessary to avoid interference to existing do-

mestic stations, facilities for which applications for new or modified stations were filed before the effective date of the new rules, and foreign stations. In this connection, we continued to distinguish between classes of stations that were authorized to operate at night with 250 watts or more power and those whose nighttime authorizations limited them to less than 250 watts power. Accordingly, we established two Classes of regional stations, *i.e.* a Class III station which is required to operate with a minimum of 250 watts nighttime power and whose signal has primary-service status, and a Class III-S station which is required to operate with less than 250 watts nighttime power and whose nighttime signal is given secondary status. Finally, the Commission decided to discontinue authorization of new daytime-only AM stations. We made no proposals concerning the daytimers' preference. In the *Report and Order* in this proceeding, we authorized nighttime operations for daytimers operating on regional channels and on two clear channels, 940 kHz and 1550 kHz. Again, for technical reasons, we classified nighttime operations with less than 250 watts power on these channels as a secondary service.

DISCUSSION

6. Newsic's Petition will be dismissed as a petition for reconsideration. At the outset, we note that Newsic's Petition is directed at a matter—the applicability of the daytimer preference to licensees which operate at night at less than 250 watts on regional channels—which goes beyond the original scope of this proceeding, and that, ordinarily, we would not consider it in the context of this proceeding. However, we shall treat the petition for reconsideration as a request for a declaratory ruling in order to remove this uncertainty.¹¹

7. As indicated above, we adopted the daytimer preference in 1985 as part of our actions in Docket 84-231. In adopting this preference, however, we did not condition its availability on the type of channel on which a licensee operated. Our subsequent action in Docket 84-231 made clear that a former daytimer who received nighttime authorization to operate with less than 250 watts power on any of the foreign clear channels would still be considered to be a daytime-only licensee for purposes of determining eligibility for the daytimer preference. At the time when that decision was made, however, no daytimers had been authorized by the Commission to operate at night on any type of channel other than foreign clear channels. Thus the issue of other types of channels did not arise. We now take the opportunity to clarify our decision in Docket 84-231 to make the preference available to all former daytimers operating with secondary-service nighttime authorizations. We have consistently conferred secondary status upon Class II and Class III nighttime authorizations of less than 250 watts, *i.e.* upon Class II-S and Class III-S stations. Accordingly, former daytimers operating at night with an authorization of less than 250 watts power and which do not produce an effective field strength of 141 mV/m or greater at one kilometer will be considered daytime-only licensees for purposes of determining eligibility for the daytimer preference, regardless of the channel on which they operate.

8. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Newsic, Inc., IS GRANTED to the extent indicated as a Petition for Declaratory Ruling and is otherwise DENIED.

9. And, IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ 2 FCC Rcd 7113 (1987).

² See *Memorandum Opinion and Order* in MM Docket 84-231, 59 RR 2d 1221, n.27 (1986), *aff'd* 2 FCC Rcd 481 (1987). We note that the figure of 250 watts power utilized in Docket 84-231 assumed a station operating at minimum efficiency, prescribed in Section 73.189(b)(2)(ii) of the Commission's rules, such that the station produces an effective field strength of 141 mV/m at a distance of 1 kilometer from its transmitter site. Recognizing that stations operating with greater efficiency than that specified in the Rules can produce an effective field strength of 141 mV/m at one kilometer with less than 250 watts of power, such stations that received sufficient power to produce at least 141 mV/m at one kilometer were considered to be equivalent to a station operating with 250 watts or more. For ease of reference, we will utilize the figure of 250 watts power in this *Memorandum Opinion and Order* to denote 250 watts power at minimum efficiency or its effective field strength equivalent.

³ See *Second Report and Order* in MM Docket 84-231, 101 FCC 2d 638 (1985).

⁴ See BC Docket No. 82-538, 47 Fed. Reg. 38937 (September 3, 1982). While the NOI/NPRM was pending, the Commission began the first steps toward implementation of Docket 80-90. In that Docket, the Commission proposed that many of the new FM allotments be placed in communities presently served exclusively by daytime-only licensees.

⁵ See 49 Fed. Reg. 11214 (March 14, 1984).

⁶ 101 FCC 2d at 643.

⁷ See *Report and Order* in Docket 84-281, 101 FCC 2d 1 (1985), *modified on reconsideration, Memorandum Opinion and Order*, 103 FCC 2d 532 (1986).

⁸ *Id.* at 7.

⁹ *Memorandum Opinion and Order* in Docket 84-231, 59 RR 2d 1227, n.27 (1986). Because we conferred primary-service status on former daytime-only stations receiving nighttime authorizations of 250 watts or more power, we concluded that licensees operating with such authorizations would be ineligible for the preference.

¹⁰ See 3 FCC Rcd 3145 (1987).

¹¹ Section 1.2 of the Commission's Rules allows the Commission upon request or upon its own motion to "issue a declaratory ruling terminating a controversy or eliminating an uncertainty."

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In the Matter of: Unlimited Time Operation by Existing AM Daytime-Only Radio Broadcast Stations; Discontinuance of Authorization of Additional Daytime-Only Stations; Minimum Power of Class III Stations, MM Docket No. 87-131

I write separately to express my concerns regarding the daytimer preference. This Commission has generally sought to adopt policies that promote diversification of ownership and encourage new FM licensees. As we have repeatedly emphasized, "[d]iversification of control [of mass media] is a public good in a free society, and is . . . a primary objective in the licensing scheme."¹ The daytimer preference could create obstacles to entry by qualified newcomers into FM broadcasting, and could limit the diversity of voices among FM licensees. It could also undermine the policies that this Commission has adopted to encourage minority ownership of broadcast stations. It is too early to assess whether the daytimer preference is operating to discourage new entry, but I believe we must monitor the effect of this enhancement very carefully to ensure that it does not cause results inconsistent with fundamental Commission policies.

FOOTNOTE FOR STATEMENT

¹ See Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 394 (1965).