

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

MM Docket No. 88-559

In re Applications of

A.P. WALTER, JR. File No. BPH-870824MS
(hereafter Walter)

LADIES III File No. BPH-870824MV
BROADCASTING, INC.
(hereafter Ladies)

VOICE OF THE GULF File No. BPH-870824MU
LIMITED PARTNERSHIP
(hereafter Voice)

Richard J. Bellairs and File No. BPH-870824MF
Vivian L. Bellairs d/b/a
BEACH BROADCASTING
(hereafter Beach)

SHELL ISLAND File No. BPH-870821MC
BROADCAST (PREVIOUSLY DISMISSED)
ASSOCIATES
(hereafter Shell)

C. C. BROADCASTING File No. BPH-870824MW
LTD. (DISMISSED HEREIN)
(hereafter CCB)

For Construction Permit for
a New FM Station on
Channel 286C2 (105.1 MHz)
in Panama City, Florida

HEARING DESIGNATION ORDER

Adopted: December 2, 1988; Released: January 17, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Shell Island Broadcast Associates (Shell) filed an application on August 21, 1987. (File No. BPH-890821MC)¹ That application specified a transmitter site separated from a vacant first adjacent FM channel in Chattahoochee, Florida, by 104.2 kilometers instead of the 105 kilometers as provided in Section 73.207 of the Commission's Rules. Accompanying the application was a request to waive the 0.8 kilometer short-spacing. On March 14, 1988, Shell's application was returned as unacceptable for filing and its waiver request denied by letter from the Chief, FM Branch. Shell was informed that inasmuch as

its waiver request was supported merely by a recitation of the *de minimis* extent of the short-spacing, there was insufficient justification for a waiver. The denial letter referenced Commission policy of not waiving the minimum distance separation standards unless no fully-spaced or lesser-spaced sites exist, citing, among other authority, *Donovan Burke*, 104 FCC 2d 843 (1986). The letter noted, in this regard, that other applicants had specified fully-spaced sites and that no issue had been raised as to their availability or feasibility. On April 21, 1988, Shell submitted a petition for reconsideration of the action denying its waiver request and returning its application.² On May 17, 1988, it submitted a supplement to its petition as well as a petition for leave to file.

3. In its petition, Shell argued that the short-spacing involved, 0.8 km, is *de minimis* under *Kenter v. FCC*, 62 RR 2d 1573, 1577 n.9 (1986), *aff'd per curiam*, 816 F.2d 8 (D.C. Cir. 1987), and that under *Kenter*, a threshold showing that fully spaced or lesser short-spaced sites are unavailable is required to support waiver requests only for short-spacings that are not *de minimis*.³ Shell contended that the staff erroneously determined that its waiver request was insufficient by ignoring this distinction, and requests reinstatement of its application on a *nunc pro tunc* basis.

4. Shell's reliance on *Kenter*, *supra*, is misplaced. In *Kenter*, the Commission reiterated its intent that the "*de minimis*" exception "describe[s] only those cases where we may grant a short-spacing waiver even though the applicant failed to make a threshold showing of no fully spaced site, *provided the applicant has demonstrated that the public interest will be served* despite the minor deviation from our spacing rule." 62 RR 2d 1577, at n.9. (Emphasis added). As noted above, Shell, in its original application, offered no justification as to why its waiver request was consistent with the public interest, but merely recited that "short spacing would occur between the proposed facility and an allocation to Chattahoochee, Florida." *Cf. Twin City Broadcasting, Inc.*, 2 FCC Rcd 7039, 7040 (1987)(HDO). Lacking adequate waiver justification, Shell's application was thus unacceptable for filing. Consequently, Shell has failed to demonstrate under 47 C.F.R. § 1.106 that the staff erred in returning its application, and its petition for reconsideration must therefore be denied.

5. *CCB.* In its application, CCB requested waiver of 47 C.F.R. § 73.207 concerning the non *de minimis* 4.19 km short-spacing of its proposed site to the existing facilities of WAAZ-FM, Channel 285A, Crestview, Florida. CCB asserted that the licensee of WAAZ-FM is prosecuting a notice of proposed Rule Making to upgrade its facilities from Channel 285A to 284C2 which, if granted, would eliminate any short-spacing to CCB's proposed site. *See* MM Docket No. 86-455; RM-5088 and RM-5337. CCB further argued that its choice of a suitable site in the community of license, Panama City, Florida, was "severely restricted" at the time of filing due to "a large portion of the fully spaced area [being] located on a top-secret government facility east of Panama City Beach. The remainder of the area is located in an exclusive, beach front, residential area, and on a golf course, where land of suitable size is not available."

6. On April 14, 1988, Ladies III timely filed a petition to dismiss or deny CCB's application as unacceptable for filing, correctly citing *Donovan Burke*, 104 FCC 2d 843, 844 (1986), for the proposition that it is contrary to

Commission policy to waive FM spacing rules where, as here, mutually exclusive applicants have specified fully spaced sites and no question has been raised regarding the technical feasibility or availability of those sites. CCB argued in opposition that in the present case no short-spacing will occur since "it is all but certain that Station WAAZ-FM will be operating on its new frequency long before commencement of operations by [CCB]." The cases on which CCB relies, however, are distinguishable. In *George Henry Clay*, 3 FCC Rcd 41, 42 (1988)(HDO) and *Orlando FM Group Limited Partnership*, 2 FCC Rcd 4691, 4693 (1987)(HDO), unlike the present case, waiver of 47 C.F.R. § 73.207 was found unnecessary because the staff was able to conclude affirmatively that short spacing would not occur.⁴ In contrast, granting CCB's waiver request would require us to accept an application contingent upon a proposed Rule Making seeking modification of an otherwise short-spaced existing facility -- WAAZ-FM on Channel 285A -- thus violating 47 C.F.R. § 73.3517 and conflicting with the policy established in *North Texas Media, Inc., supra*. See also *Ying Hua Bennis*, 3 FCC Rcd 2143 (1988)(HDO). In light of the foregoing, CCB's request for waiver of 47 C.F.R. § 73.207 must be denied, and its application returned as inadvertently accepted for filing. Accordingly, to the extent indicated herein, Ladies III's petition to dismiss CCB's application will be granted.

7. *Voice*. *Voice's* application consistently proposes construction of a 512 foot (156 meter) tower to support its antenna. However, the Commission's Antenna Survey Branch has indicated that, at the proposed coordinates, clearance has only been received for a tower 500 feet (152.4 meters) above ground level. This discrepancy does not affect the acceptability of the application, since the values specified therein are consistent and do not cause the application to violate any technical acceptance rule. However, *Voice* will be required to submit a clarifying amendment to resolve this discrepancy. In addition, an air hazard issue will be specified.

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Ladies III	April 22, 1988
Voice	June 2, 1988

9. Data submitted by the applicants indicate there would be significant differences in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and from the following applicant has been

unsuccessful. Accordingly, since no determination has been received that the tower proposed by the applicant below would not constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA will be made a party to the proceeding.

APPLICANTS: Beach.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the following applicants would constitute a hazard to air navigation: *Voice*; *Beach*.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 3-4 hereinabove, the petition for reconsideration filed by *Shell* IS DENIED.

14. IT IS FURTHER ORDERED That, for the reasons set forth in paragraphs 5-6 hereinabove, the petition to deny filed by *Ladies III* IS GRANTED, and the application filed by *CCB* IS HEREBY RETURNED.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: *Ladies III*; *Voice*.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the

time and in the manner therein prescribed and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

¹ Shell filed a minor amendment to its application on November 13, 1987.

² In order to better utilize the Bureau's limited processing staff resources, the Commission has approved staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation orders rather than in a separate action documents. *Teton Broadcasting*, 1 FCC Rcd 518 (1986). See also 47 C.F.R. 1.106(a)(1).

³ With respect to its assertion that the fully spaced sites specified by competing applicants were technically unfeasible, Shell has ignored that the burden of demonstrating such facts rests with the party seeking waiver, at the time the request is made. See *North Texas Media, Inc. v. FCC*, 778 F.2d 28, 34 (D.C. Cir. 1985).

⁴ In *Clay*, several applicants were short-spaced to the licensed facilities of WBIL-FM, Tuskegee, Alabama, but their requests for waiver of the minimum spacing requirements were dismissed as moot because the short-spaced station was operating at its new site in Montgomery, Alabama, prior to the opening of the Montgomery filing window. Similarly, a short-spacing waiver was unnecessary in *Orlando*, where 33 of the 48 applicants filed short-spaced to the 16 km buffer zone afforded WKTK-FM, Crystal River, Florida, because that station was operating at a new site, having abandoned its buffer zone protection at a time prior to the opening of the filing window for Orlando. See also *Henry R. Malloy, Jr. d/b/a Rem Malloy Broadcasting*, 3 Fcc Rcd _____ (1988) (HDO).