

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

In re Application of

DOMEGA  
BROADCASTING  
CORPORATION  
Las Cruces, New Mexico

File No. BPH-860929ME

**MEMORANDUM OPINION AND ORDER**

Adopted: December 21, 1988; Released: February 10, 1989

By the Commission:

1. The Commission has before it an application for review filed July 19, 1987, by Domega Broadcasting Corporation (Domega), in which Domega seeks *nunc pro tunc* reinstatement of the above-referenced application for a new FM station to serve Las Cruces, New Mexico. Therein, Domega challenges the June 6, 1987 action of the Chief, FM Branch which returned its application as unacceptable for filing for violation of the Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation in the 88 to 108 MHz Band, ("U.S. - Mexican Agreement" or "Treaty") 24 U.S.T. 1815, T.I.A.S. No. 7697.

2. The background and procedural history of this matter is as follows: On September 29, 1986, Domega timely filed the subject application for a construction permit for a new FM station on channel 258C to serve Las Cruces. STL Broadcasting Corporation (STL) filed the only competing application for the Las Cruces channel; both applications were placed on a Public Notice of Tenderability on October 27, 1986. On March 31, 1987, STL filed a petition requesting dismissal of Domega's application on the grounds that it contravened the literal terms of the U.S. - Mexican Agreement in that the facilities proposed exceeded the power-height combination permitted by Annex IV thereunder. In response, a petition for leave to amend was filed by Domega on May 4, 1987, along with an amendment proposing a power decrease from 45.43 to 33.10 kilowatts at 831.2 meters above average terrain; an opposition thereto was filed by STL on May 28, 1987. By letter dated June 6, 1987, the Chief, FM Branch rejected Domega's amendment as untimely, and in view of the outstanding Treaty violation, returned its application as unacceptable for filing. Domega then filed the instant application for review. Shortly thereafter, Domega and STL entered into settlement negotiations. In anticipation of an agreement between the parties, STL requested additional time to file an opposition to Domega's application for review.<sup>1</sup> Following the apparent breakdown and cessation of these negotiations, Domega filed a petition for leave to supplement its application for review, along with a supplement on August 20, 1987. An opposition to Domega's application for review, as supplemented, was filed by STL on September 8, 1987.

3. Pursuant to the terms of the U.S. - Mexican Agreement, Class C facilities within 320 kilometers of the U.S.-Mexican border are restricted to a maximum 100 kilowatts effective radiated power (ERP) at 600 meters antenna height above average terrain (HAAT) or the equivalent. The instant Class C proposal is located approximately 89.1 kilometers from the U.S. Mexican border, and specifies a HAAT of 831.2 meters with an ERP of 45.43 kilowatts. However, the Chief, FM Branch found that under the Treaty, an antenna HAAT of 831 meters would only permit a maximum ERP of approximately 36 kilowatts.

4. In support of its request for *nunc pro tunc* reinstatement, Domega contends that by virtue of the manner in which ERP and HAAT are defined in the Treaty, the derating methodology of Annex IV thereto may be interpreted in a less restrictive manner than that employed by the Commission. Specifically, Domega claims that because ERP is defined in Part II, Article 3, § B-12 of the Treaty as "the power supplied to the antenna multiplied by the relative gain of the antenna in a *given* direction" (emphasis added), and because the definition of HAAT found in § B-13 of the treaty<sup>2</sup> does *not* require averaging of the resulting values of the eight standard radials, there exists no bar in the Treaty to consideration of ERP exclusively in the arc of radials extending towards Mexico. Further, Domega asserts that consideration of ERP/HAAT combinations along discrete radials as opposed to averaging the values for all eight radials, is consistent with Commission practice as it is employed by the FCC in calculating a domestic station's coverage contour pursuant to 47 C.F.R. § 73.313(d). Domega asserts that its application, as originally filed, fully complies with the U.S. - Mexican Agreement because its ERP meets the requirements of the Treaty if one considers terrain elevation only *in the direction of the Mexican border*.

5. Alternatively, Domega argues that the Staff erred in rejecting its late filed curative amendment because good cause had been established for acceptance of the amendment in compliance with 47 C.F.R. § 73.3522(a)(6).<sup>3</sup> In its good cause showing, Domega alleged that: (i) it first became aware of the deficiency through STL's March 3, 1987 petition to dismiss and acted with due diligence to correct this "inadvertent oversight" . . . "just one month after learning of the defect and before an acceptability determination had been made"; (ii) the amendment was not necessitated by Domega's voluntary act; (iii) acceptance of the amendment would not necessitate the addition of new issues or parties; (iv) acceptance of the amendment would not disrupt the hearing process or prejudice another party to the proceeding; and (v) acceptance of the amendment would not result in a comparative advantage for Domega. Finally, Domega's application for review charges that the Commission's decision in Reno, Nevada, *Hearing Designation Order*, MM Docket No. 87-316, DA 87-1090 (released August 12, 1987), wherein the staff directed an applicant who had proposed an ERP level which exceeded the maximum under 47 C.F.R. § 73.211(b)(2) to submit a postdesignation curative amendment, evinces inconsistency and inequity in the administration of the new FM processing rules. Citing *Melody Music Inc., v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965), Domega concludes that the subject application must be reinstated *nunc pro tunc* pursuant to principles of administrative fairness.

6. In opposition, STL repudiates Omega's assertion that the language of the Treaty supports its theory that antenna HAAT may be properly determined along eight non-standard azimuths without requiring averaging of the resulting values. STL emphatically stresses that, as set forth in Article 3, Paragraph B of the Treaty, antenna HAAT is calculated by subtracting, from the antenna radiation center height above mean sea level, the *average* of the elevations of data points along the eight 2 to 10 mile radials spaced 45 degrees apart around the compass, starting with true North.<sup>4</sup> Hence, STL maintains that Omega's method is totally at odds with the plain language of the Treaty, Commission application of that language and sound engineering practice and charges that acceptance thereof would undermine a key element of the allocations system governing both sides of the international border.

7. In accordance with the U.S. - Mexican Agreement the maximum ERP of a Class C station may not exceed 100 kW for a HAAT of 2000 feet (600 meters) or less. Contrary to Omega's assertion, the calculation of HAAT for purposes of discerning an applicant's ERP/HAAT combination requires averaging as well as consideration of the eight primary radials evenly spaced around the compass. As set forth in Part II, Article 3, § B-13 of the Treaty, HAAT is defined in relevant part as:

The height of the radiation center of the antenna above sea level minus the *average* of the terrain heights above sea level, from 2 to 10 miles (3 to 16 km) from the antenna for *the eight directions spaced evenly for each forty five degrees azimuth starting with true North.* (emphasis added).

When the HAAT exceeds the agreed limit (in this case, 600 meters), the ERP shall be reduced in accordance with a curve in Annex IV to the Agreement. The Agreement does not provide for excluding any of the eight standard radials or for substituting other radials. While Omega may find the procedure unduly rigid or restrictive it is nonetheless straightforward. We therefore reject Omega's method of calculating HAAT because it fails to comply with the U.S. - Mexican Agreement in that it does not rely on radials evenly spaced every 45 degrees around the compass. It is well settled that applications are unacceptable for filing if, *inter alia*, they fail to comply with international broadcasting agreements. *1010 Broadcasting*, 59 RR 2d 1124 (1986).

8. Omega also argues that the untimely amendment filed to bring its application into conformity with the Commission's interpretation of the Treaty should have been accepted in accordance with the 47 C.F.R. § 73.3522(a)(6). Section 73.3522(a)(6), in relevant part, provides that predesignation amendments going to the acceptability of an application are not permitted after expiration of a 30 day period triggered by the FCC's issuance of a Notice of Tenderability for the underlying application. Subsequent amendments will be considered only upon a showing of good cause. The Public Notice of Tenderability for the instant application was issued by the Commission on October 27, 1986; amendments as of right were due by November 28, 1986. The amendment to Omega's application was not filed until May 4, 1987, and is undisputably untimely.

9. As previously mentioned, in support of its contention that its corrective amendment should have been accepted, Omega argued that it first became aware of the deficiency in its application through the March 31, 1987 petition to dismiss filed by STL. The remainder of its arguments seek to minimize the effects of this error on the Commission's processing procedures, leaving the thrust of its argument at the doorstep of ignorance. Essentially, Omega's claims amount to an admission that it simply did not know about the Treaty's requirements, but "diligently" corrected the deficiency as soon as it was brought to its attention. This fact does not constitute good cause for late filing:

The fact that an applicant may not have been aware that its application was defective does not justify acceptance of a late filed amendment designed to cure that defect. If this were the case, any applicant could easily circumvent the amendment procedures set forth in our Rules by claiming that it was ignorant of the defects in its application.

*PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988). Moreover, the Commission's Rules and processing guidelines contain several references to the existence and operation of treaties, providing ample notice to applicants. For example, in discussing the engineering data necessary to perform an acceptability study under our revised FM application processing procedures, the Commission stated that "[i]nternational agreements also influence permissible ERP levels in border areas" and that "antenna height is also limited in certain cases by international treaty." *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19946 (1985) (Appendix D). Appendix D was also released as a separate *Public Notice*, Mimeo No. 4580 (May 16, 1985), to ensure that applicants were well advised of these procedures. In addition, 47 C.F.R. § 73.1650(b) states that "the U.S.A. is a signatory to separate, bilateral agreements covering FM broadcast stations with the government of . . . Mexico." 47 C.F.R. § 73.1650(d) states that copies of all such agreements are available for inspection at the office of the Chief, Mass Media Bureau, and can be purchased from the FCC duplication contractor through the Commission's Consumer Assistance Office. Additionally, the instructions to FCC Form 301 caution that applicants should "have on hand and be familiar with", *inter alia*, part 73 of the Rules. The fact that applicants may have had no actual knowledge of the detailed terms of a treaty or Commission rule does not excuse noncompliance. *See e.g., Starns County Broadcasting*, 104 FCC 2d 688, 696 (Rev. Bd., 1986); *Primemedia Broadcasting, Inc.*, 3 FCC Rcd 4293. It is incumbent upon all applicants to review the pertinent requirements of the Commission's rules and international treaties before filing to ensure compliance. *Kerrville Radio*, 2 FCC Rcd 3441. Accordingly, we find that Omega failed to establish good cause for acceptance of its May 4, 1987 amendment and that this amendment was justifiably dismissed by the Chief, FM Branch as untimely.

10. Inasmuch as there is little similarity between the defect in Omega's proposal and that of the applicant in the Reno, Nevada proceeding, we reject Omega's claim that the Commission engaged in disparate treatment of the two applicants. Initially, we note that the Reno, Nevada proceeding did not involve the application of a treaty. The applicant in Reno was in violation of 47

C.F.R. § 73.211(b)(2) which provides a method for derating the ERP of a station whose antenna height exceeds the maximum antenna HAAT permitted for that station's class. Due to the imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum permitted under § 73.211(b), applicants who slightly exceed the maximum ERP allowed per the rule are routinely permitted to correct the slight discrepancy between their specified ERP and the maximum allowed as calculated by the staff. Because the applicant in the Reno proceeding slightly exceeded the staff's calculation of maximum ERP allowed given the proposed antenna HAAT, and this discrepancy was attributable to the imprecision inherent in manually ascertaining the maximum ERP permitted from the Commission's propagation curves, an amendment was permitted to correct this discrepancy. In the instant case, the defect in Omega's proposal cannot be attributed to any imprecision inherent in ascertaining the maximum ERP permitted by the Mexican Treaty. Therefore, dismissal of Omega's application does not result in disparate treatment of similarly situated applicants.

11. Accordingly, for the reasons set forth herein, IT IS ORDERED THAT Omega's application for review IS HEREBY DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

#### FOOTNOTES

<sup>1</sup> Requests were made by STL on July 31, 1987 and August 10, 1987.

<sup>2</sup> The Treaty specifically refers to the radiation center of the antenna above average terrain which is synonymous with antenna HAAT.

<sup>3</sup> Omega also suggests that the Commission should not bar amendments which address acceptability defects when, as in the instant case, they are filed before an acceptability study has been performed on the underlying application. Such a policy, Omega maintains, would not be inconsistent with *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). We disagree. 47 C.F.R. §73.3522, as adopted in Appendix A to the *Report and Order* in MM 84-750, unequivocally restricts the filing of amendments to a period expiring 30 days after release of a public notice announcing acceptance of the underlying application for tender unless good cause for late filing is demonstrated. This procedure provides a date certain by which amendments as of right must be filed, eliminating unnecessary delay as to all pending applications caused by reprocessing those which are repeatedly amended. The procedure advocated by Omega whereby curative amendments would be allowed up until the time an acceptability study is performed on the underlying application is neither practical nor desirable because it would: (i) result in a tremendous administrative burden on the staff and uncertainty and confusion to applicants and other interested parties; and (ii) inordinately delay the processing of

all applications, thus unnecessarily delaying the initiation of new service. See *James C. Rogers, III*, 2 FCC Rcd 5536, 5537 (1987).

<sup>4</sup> The eight standard radials are: 0°; 45°; 90°; 135°; 180°; 225°; 270°; and 315°.