

APPLICABILITY OF SECTION 73.213(A)

This Exhibit 1 is filed in support of two applications being filed simultaneously by Press Communications, LLC, licensee of Station WHTG-FM, Eatontown, New Jersey: a minor amendment to a pending application for the main transmitter (BMPH-20010806AAA), and an application for a minor change in the licensed facilities of the station's auxiliary antenna facilities. As noted in the engineering portion of the applications, WHTG-FM is short spaced to a second adjacent channel, 294B, in New York City. Under Section 73.213(a), this short spacing can be ignored. However, since the FCC order changing WHTG-FM's channel to 292A was effective September 7, 1965, a brief discussion is warranted. *Amendment of FM Table of Assignments, Docket No. 15969*, 1 FCC 2d 739, 5 RR2d 1762 (1965) (the "Eatontown Order").

The Allocation of Channel 292A to Eatontown. The allocation of channel 292A in place of channel 288A as WHTG-FM's operating frequency involves five FCC decisions, beginning on June 28, 1963, that have their genesis in the severe short spacing between WHTG-FM on channel 288A and Station WDHA-FM also on channel 288A at Dover, New Jersey.

In *Drexel Hill Associates, Inc.*, 1 RR2d 566 (rel. June 28, 1963) ("*Drexel Hill 1*"), the licensee of WDHA-FM was seeking a license for facility changes, including a new transmitter site, that had been approved and constructed. The WDHA-FM permit was granted on August 22, 1961, and the station began program test operation with the new facilities on October 30, 1962. The licensee of WHTG-FM protested the WDHA-FM license application on the ground that the station's modified facilities caused objectional interference within the WHTG-FM 1.0 mV/m contour.¹ Station WHTG-FM asked that the WDHA-FM license application be set for hearing or, in the alternative, that the Commission find a new channel for either WDHA-FM or WHTG-FM. *Id.* Note 2. Station WHTG-FM supported its objection with comments that WDHA-FM had filed in the omnibus FM rule making proceeding in Docket No. 14185 (hereafter, the "*Docket 14185 Proceeding*"), which WHTG-FM characterized as conceding the existence of interference. The Commission completed its own technical analysis and concluded that the WDHA-FM interfering contour was "just tangent" to the WHTG-FM 1.0 mV/m protected contour, and that no objectional interference was being caused. Insofar as the assignment of a new channel for either station was concerned, the Commission stated that the issue would be "considered by the Commission prior to final action in Docket No. 14185." *Id.*, at Par. 8.²

¹ The Commission noted that the WDHA-FM application was grantable even though it involved a separation to co-channel WHTG-FM of only 46.5 miles (65 miles was the required separation) if there was not interference to WHTG-FM within its 1.0 mV/m protected contour. *Id.*, at Par. 6.

² Both parties request that the Commission take steps to find a new channel for either of the

Station WHTG-FM sought reconsideration of the Commission's decision in *Drexel Hill 1*, arguing that the WDHA-FM grant was premised on an incorrect sit elevation and that WHTG-FM was, in fact, receiving objectional interference. *Drexel Hill Associates Inc.*, 1 RR2d 563 (rel. October 28, 1963) ("*Drexel Hill 2*"). On reconsideration, the Commission concluded that the WDHA-FM grant was made in error, and that the WDHA-FM interfering contour extended five miles into WHTG-FM's 1.0 mV/m contour. *Id.* at Par. 6. However, because WDHA-FM was the only station licensed to Dover, New Jersey, the Commission authorized WDHA-FM to continue to operate with reduced facilities. Finally, the Commission withheld further action on WDHA-FM's pending license application: "to enable either or both parties to petition for amendment of the Table of FM Assignments (47 CFR ' 3.202) or to file any desired application or amendment looking toward a technical improvement in the existing situation." *Id.* at 566.

Again, WHTG-FM sought reconsideration of *Drexel Hill 2*, arguing that objectional interference was still being caused to it by WDHA-FM, and that the WDHA-FM grant was in violation of the FM separation rules just adopted in the Docket 14185 Proceeding. *Drexel Hill Associates, Inc.*, 1 RR2d 977 (rel. Feb. 24, 1964 ("*Drexel Hill 3*"). This caused the FCC to recalculate the WDHA-FM facilities and confirm its decision in *Drexel Hill 2*, although it did reduce the operating parameters for the WDHA-FM auxiliary antenna. *Drexel Hill* also countered, apparently in response to the Commission's invitation in *Drexel Hill 2*, with a petition to change WHTG-FM's channel. The Commission concluded that:

[F]urther action on *Drexel Hill's* "Petition to Change Frequency of WHTG-FM", which in effect proposes amendment of the Table of FM Assignments (47 CFR ' 73.202), will be withheld pending final action on the proposals contained in our Third Further Notice in Docket NO. 14185.

Id. at 981.

As noted, at the same time frame that the Commission was contending with the WDHA-FM/WHTG-FM dispute, the agency was also resolving broader issues affecting FM stations in the Docket 14185 Proceeding. In the Third Report and Order in the Docket 14185 Proceeding, the Commission adopted a mileage separation table to govern future FM channel assignments and applications. *Third Report and Order in Docket No. 14185*, 23 RR 1859 (Aug. 1 1963), but postponed a decision on the more difficult issue of what to do with existing FM stations that had already been authorized and were now short spaced under the new separation rules. The resolution of how these grandfathered short spaced stations could modify their facilities by the issuance of a *Third Further Notice of Proposed Rule Making in Docket No. 14185*, __ FR __ (rel.

two stations to resolve the present problem. A preliminary study indicates that no Class A channel can be assigned to either station without creating short-spacing under the present FM rules with respect to other stations. However, this matter is not properly before us in connection with the above-captioned applications, but will be considered by the Commission prior to final action in Docket No. 14185.

Id.

Feb. 3, 1964) (the "*Third Notice*"), and the Commission's general approach toward resolving existing short spacings is summarized as follows:

[A] limited number of existing stations may be able to resolve short-spacing problems by requesting individual frequency changes or interrelated frequency changes. In the "*Third Report*" and in several subsequent orders in this proceeding, we have already modified the licenses of a number of existing stations so as to eliminate short-spacing problems. We will continue to give further consideration to requests of this nature. Where a proposed change or series of changes would eliminate all short-spacing problems, would create no new problems, and would not require the deletion of any existing or proposed assignment, the requested change or changes will, in all uncontested cases, be granted. Similarly, where a proposed change or series of changes would substantially improve one or more short spacings - even if the shortages were not entirely eliminated - and no new problems would be created, it is most probable that we would be prepared to modify the table of assignments and the licenses involved. Finally, we do not preclude the possibility that a series of channel changes might be approved even if a slight worsening of the position of one or more stations would be involved. In such a case, however, it would be necessary for the parties requesting the changes to show that there would be a marked net improvement in the overall assignment picture. We will treat requests for site changes for existing short-spaced stations in a similar manner. We do not propose to modify existing or proposed assignments so as to create a short-spaced station or assignment where none existed before.

Id. at, Par. 5.

The Commission's resolution of how to deal with existing short spacings was reached in the *Fourth Report and Order in Docket No. 14185*, 40 FCC 868, 3 RR2d 1571 (rel. Oct. 9, 1964) (the "*Fourth Report*"). In order to provide some relief to these grandfathered short spaced stations, the Commission adopted a special separation table that would permit such stations to modify their facilities within specified mileage brackets. The Commission further decided to permit these existing short spaced stations that apply to move their transmitter site to ignore short spacings to second and third adjacent channels. However, the Commission did provide that under these relaxed procedures, it would not permit any new short spacings to be created, including new second or third adjacent channel short spacings. *Id.* at Par. 34.

This background is critical to the Commission's ultimate decision in the Eatontown Order to assign channel 292A to Eatontown, New Jersey and to modify the WHTG-FM license to specify operation on channel 292A in lieu of channel 288A. Although the Eatontown Order was made effective as of September 7, 1965, it is clear that the WHTG-FM was treated as a grandfathered short spaced station and, therefore, is entitled to the Section 73.213(a) relief adopted in the Fourth Report insofar as second adjacent channel 294B in New York City is concerned.³

³ The Commission observed in making its determination to permit existing short spaced stations to ignore second and third adjacent channels that most of these situations occur where the transmitter site of a Class A station is located within the 1.0 mV/m contour of a nearby big city Class B or C station. *Id.* at Par. 30. This is the very situation confronting WHTG-FM.

Following the issuance of the Fourth Report, the Commission released a Notice of Proposed Rule Making on April 22, 1965, proposing, among other things, to delete channel 292A from Red Bank, New Jersey (where the channel had become unused), and assign it to Eatontown for use by WHTG-FM. 30 FR 5860. In the Notice, the Commission noted the existence of the spacing problems involving WHTG-FM and WDHA-FM referenced above and observed that when a short spaced channel becomes vacant, the Commission will decide whether it should be deleted entirely or assigned to another community to relieve an existing problem.

In the fourth report and order in the overall FM allocation proceeding (Docket NO. 14185, FCC 64-919, released October 9, 1964, paragraph 37 we stated that, when a short-spaced channel previously occupied becomes vacant, we would give consideration to the question of whether or not it should be deleted from the community, taking into account the amount of the separation shortage(s), the need for assignments elsewhere, the other service available, and other relevant factors. In our view, use of Channel 292A as a solution to the serious Eatontown-Dover situation may well be in the public interest.

Id. at Par. 4.

Based on the ongoing short spacing dispute described in the Drexel Hill decisions and the history of the Docket 14185 Proceeding, the Commission applied the rules applicable to existing short spaced stations in deciding to assign channel 292A to Eatontown. Under the Commission's analysis, channel 292A was the grandfathered short spaced channel, whether it was assigned to Red Bank or Eatontown.

This is not a new assignment in contravention of our rules but rather a shift of an existing assignment not in use to a proposed and meritorious use nearby, to alleviate a serious existing situation...As to the impact of the additional two mile shortage from Eatontown, this would be much less than the Red Bank station would have been entitled to under Section 73.213 of our rules. Under these rules, which govern changes in facilities and sites for existing short spaced stations, such a Red Bank station could have moved an equal or greater amount closer to WQAL. This is the situation which results from the substitution of Channel 292A for 288A at Eatontown.

Eatontown Order, supra at Par. 15.

In sum, the instant application of WHTG-FM to modify facilities is entitled to treatment as a grandfathered short spaced station under Section 73.213(a) insofar as second adjacent channel 294B, New York City. Therefore the short spacing to channel 294B can be ignored.