



11/05/86 Greater Mansfield v. Federal Communications

1986.CDC.0000373 (1986) | Cited 0 times | D.C. Circuit | November 5, 1986

BEFORE: SILBERMAN and WILLIAMS, Circuit Judges, and JAMESON, Sr. District Judge.*

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Rules of the District of Columbia Circuit Court of Appeals may limit citation of unpublished opinions. Please refer to the Rules of the United States Court of Appeals for this Circuit.

ON APPEAL OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

APPELLATE PANEL:

This appeal from an August 1985 memorandum opinion and decision of the Federal Communications Commission was briefed and argued by counsel for appellant and appellees. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. See Local rule 13(c). On consideration thereof, and for the reasons set forth in the accompanying memorandum, it is

ORDERED AND ADJUDGED, by this Court, that the decision of the Federal Communications Commission appealed from herein is hereby affirmed. It is

FURTHER ORDERED, by the Court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for hearing. See Local Rule 14, as amended on November 30, 1981, and June 15, 1982.

MEMORANDUM

Appellant Greater Mansfield Broadcasting Co., owner of an AM and FM radio station, petitioned the FCC to deny an application by GSM Media for a proposed station that would compete with Greater Mansfield's stations for audiences and revenues. Greater Mansfield claimed that the proposed station would overlap with the signal of a third station. The Commission ultimately granted GSM's application, finding no prohibited overlap with the existing station. On appeal, Greater Mansfield challenges the Commission's decision on two grounds, arguing that the Commission employed a flawed methodology for calculating signal overlap and improperly denied Greater Mansfield a "full hearing."



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The Commission's rules require that a proposed station's .5 millivolt per meter contour not overlap any existing station's .025 millivolt per meter contour. 47 C.F.R. § 73.37(a). Measurements of a station's contours vary significantly depending on the conductivity of the soil in the locality. Soil conductivity in turn varies according to climatic and season conditions. See *United Broadcasting Co., Inc.*, 1 F.C.C.2d 555, 559 (1965). Consequently, the Commission averages together contour measurements taken under differing conditions in an effort to compensate for variations in soil conductivity. *Id.* In this case, the Commission was presented with five valid contour measurements, four taken during the Summer and one during the Winter. When the Commission first considered this case it averaged together the four measurements from the Summer to arrive at an average "Summer figure" and then averaged that figure with the Winter figure to arrive at a figure representative of variations in soil conductivity. Based on this average, the Commission found a small overlap between the proposed station and an existing station and denied GSM's application.

On reconsideration, the Commission modified its methodology in light of a study by the International Radio Consultation Committee, which indicated that soil conductivity was primarily influenced by the moisture content of the soil, rather than simply by season. When the Commission reaveraged the contour measurements to take into account the level of precipitation at the time of each measurement, it found no prohibited overlap and thus granted GSM's application. Greater Mansfield tries to portray the Commission's action as an "arithmetic error." Clearly that was not the basis of the Commission's decision. Rather, the Commission simply changed its views with respect to the issue of soil conductivity, something it is free to do, provided it supplies a reasoned analysis as it did here. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). Moreover, when it comes to a highly technical question like the one involved in this case, we necessarily must show considerable deference to an agency's expertise. See *MCI Cellular Telephone Co. v. FCC*, 738 F.2d 1322, 1333 (D.C. Cir. 1984). Based on the record before us, we cannot say that the Commission abused its discretion in modifying its methodology for calculating contour overlap.

Greater Mansfield also contends that it was denied its statutory right to a "full hearing." 47 U.S.C. § 309 (1982). But § 309 does not require a full hearing when "there are no substantial and material questions of fact." Here there was no dispute as to the facts, only as to how those facts should be analyzed. According, the Commission could properly proceed without a full hearing. Similarly, the Commission acted within its discretion, as provided by the note to 47 C.F.R. § 1.115(b) (1984), in not calling for briefs on GSM's application for review. The decision of the Commission is therefore.

Affirmed.

APPELLATE PANEL: FOOTNOTES

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d)

