



Federal Communications Commission
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DA 05-3206
In Reply Refer to:
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In re: WWZY(FM), Long Branch, NJ
Facility ID# 32983
Press Communications, LLC
BPH-20040609ABI

Dear Counsel:

This letter refers to the above-captioned application (the "Application") of Press Communications, LLC ("Press"), to modify the antenna height and effective radiated power of WWZY(FM), Long Branch, NJ. Press filed Application amendments on January 18, 2005, and September 26, 2005. For the reasons set forth below we dismiss the Application.

Background. On March 18, 1999, the Commission granted the WWZY license application for the station's currently licensed facilities. This license was issued pursuant to the contour overlap provisions of Section 73.215 to ensure adequate protection to short spaced station WKDN(FM), Camden, NJ.¹ On June 9, 2004, Press filed the Application which proposed to protect WKDN pursuant to Section 73.213(c)(2) of the Commission's rules. On January 3, 2005, the staff sent a deficiency letter to Press because the Application failed to provide Section 73.207 spacing protection to WKDN. Press filed responses to the deficiency letter on June 18, 2005, and September 26, 2005.²

In the January 18, 2005 amendment, Press attempts to distinguish *West Wind Broadcasting, Inc.*,³ in which the Commission stated that a station licensed under Section 73.215 may not seek to modify its facilities in accordance with Section 73.213(c)(2). In addition, the January 18, 2005, amendment cites an unpublished decision in which the staff allowed a station initially requesting processing pursuant to Section 73.215 to amend its construction permit application to propose processing pursuant to Section 73.213(c). In the September 26, 2005, Memorandum, the applicant provided several unpublished staff

¹ See File No. BLH-19980521KB.

² Although the June 18, 2005, and September 26, 2005, amendments were not electronically filed, we will consider these filings as Press's official response to the January 3, 2005, letter.

³ *West Wind Broadcasting, Inc.*, 11 FCC Rcd 4101 (1996).

letters which allowed non-Section 73.215 licensed stations with Section 73.215 construction permits to cancel these permits and revert back to their grandfathered licenses. Press also provides a number of staff decisions where existing Section 73.213 stations were notified by the Commission that their pending Section 73.215 applications could be processed (and eventually were processed) under Section 73.213. In conclusion, Press claims that WWZY's designation as a Section 73.215 facility was error and that the station is entitled to revert back to its status as a grandfathered Section 73.213(c) station.

Discussion. Press's argument is not persuasive. As a preliminary matter, its reliance on unpublished staff decisions is misplaced.⁴ Moreover, the cases relied on by Press are distinguishable. Specifically, Press has not identified a single decision reinstating the grandfathered status of a station licensed under the contour overlap provisions of Section 73.215. Its reliance on cases involving Section 73.215 permitted – but never licensed – facilities of otherwise grandfathered stations also is misplaced. The licensed facilities of such grandfathered stations remain fully protected under the Commission's rules during the construction permit term, a reflection of the fact that not all permitted facilities are constructed. Thus, when a Section 73.215 permit of a grandfathered Section 73.213(c) station is cancelled or expires, only the rights associated with the Section 73.215 permit terminate. The grandfathered rights of the station remain in effect during the construction period and remain in full force upon the permit's expiration.

Section 73.213(c) excludes stations which “became short spaced by grant of applications . . . filed pursuant to Section 73.215.”⁵ Press contends that WWZY “became short spaced” as a result of the 6 kW Class A rulemaking – rather than its Section 73.215 application – and therefore this exclusion is inapplicable to its modification application. We reject Press's crabbed reading of the rule. The Commission has spoken authoritatively on this issue.

By filing its 1990 upgrade application pursuant to Section 73.215[,] WTLN was no longer protected by the mutual agreement upgrade requirements for grandfathered short-spaced Class A stations By electing to be reclassified from a grandfathered short-spaced station under Section 73.213(c) to a directional station under Section 73.215, WTLN thus gave up what rights it may have had to withhold consent to a subsequent 6 kW upgrade by WXCW.⁶

Press's attempt to distinguish *West Wind Broadcasting* is unavailing. At issue in both cases is whether the Section 73.215 exclusion applies to formerly grandfathered stations. The fact that Press, unlike the applicant in *West Wind Broadcasting*, has obtained the consent of the short spaced station or the fact that WKND(FM) operates with maximum class facilities are simply irrelevant to interpreting the scope of the Section 73.213(c) exclusion. Press provides no support for its novel contention. Moreover, Press's conflicting rule interpretation is untenable. Section 73.213(c) concerns *only* stations which became short spaced as a result of either the adoption of the FM Table of Allotments on November

⁴ See 47 C.F.R. § 0.445(e) (unpublished decisions may not be relied on or cited as precedent except against persons who have actual notice of the document in question or by such persons against the Commission).

⁵ 47 C.F.R. § 73.213(c).

⁶ *West Wind Broadcasting, Inc.*, 11 FCC Rcd at 4103.

16, 1964 and/or the 1989 adoption of the 6 kW Class A rules. Under Press's interpretation, the Section 73.215 exclusion would not exclude *any* formerly grandfathered station, currently licensed as a Section 73.215 station, from processing under Section 73.213. This is because any such station could claim that it first became short spaced as a result of certain distance separation rule changes, and not from the grant of a Section 73.215 license application.

Press's interpretation also would turn decades of established licensing policy on its head. Nothing in the rulemaking which led to the adoption of Section 73.215 suggests that the Commission intended to permit formerly grandfathered stations to move freely between licensing under the short spacing rule, Section 73.215, and a grandfathering rule which provides significantly less protection to other stations, Section 73.213. The absence of any such discussion is particularly probative because Press's interpretation would constitute a dramatic departure from the long-held prohibition against permitting formerly grandfathered stations to reestablish their grandfathering rights.

Section 73.213 permits certain technically sub-standard facility modifications which would otherwise not comply with licensing standards. It reflects the Commission's finding that it must provide some technical flexibility to this limited class of stations to relocate to new transmitter sites and to make other changes in order to preserve existing service. This need to balance our competing interests in technical integrity and service preservation is simply inapplicable when a station is licensed under our general commercial FM technical standards, *i.e.*, Sections 73.215 and 73.207. To permit the filing of Section 73.213 applications in this situation would needlessly undermine fundamental signal protection principles. We conclude that only stations which have continuously maintained their grandfathered status under Section 73.213 may seek application processing under this rule.

We also reject as meritless Press's contention that we should ignore the consequences of its licensing decisions because the currently licensed facilities could have been processed under Section 73.213. Press voluntarily requested Section 73.215 processing. The fact that the staff has, on occasion, identified processing options for other applicants in other circumstances does not impose any obligation here. Section 73.213 and Section 73.215 authorizations carry different benefits and limitations. The staff is not in a position to make this and similar types of assessments for each applicant with regard to the 1000+ modification applications it processes each year. As Press well knows, every licensing action has consequences. It remains solely the obligation of each applicant to assess these potential consequences and to choose its facility licensing strategy accordingly.

The January 3, 2005, staff letter to WWZY(FM) stated that "the application must be amended to demonstrate compliance with § 73.207 or § 73.215 with respect to WKDN's License BMLD-19980417KA." In addition, we stated that pursuant to Section 73.3522, ". . . an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff." Additionally, Section 73.3564 states that, "applications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendments."⁷ The

⁷ 47 C.F.R. § 73.3564.

January 3, 2005 letter provided Press 30 days to submit a corrective amendment pursuant to Section 73.3522(a)(6). Application BPH-20040609ABI remains in violation of Section 73.207, is unacceptable for filing after the one opportunity for corrective amendment, and will be dismissed.

Conclusion. In light of the above, application BPH-20040609ABI is unacceptable for filing and IS HEREBY DISMISSED. This action is taken pursuant to Section 0.283 of the Commission's rules.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Press Communications, LLC