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JCE Licenses, LLC
660 North Andrews Avenue, Suite 160
Ft. Lauderdale, FL 33309

In re: JCE Licenses, LLC
WFTL(AM), West Palm Beach, FL
Facility ID No. 29490
File No. BMP-20031024AAV

Application for Construction Permit

Dear Applicant:

We have before us the captioned application filed by JCE Licenses, LLC ("JCE") for minor modification of the facilities of Station WFTL(AM), West Palm Beach, Florida (the "Station"). For the reasons set forth below, we dismiss the application.

Background. On October 24, 2003, JCE filed a minor change application to modify the daytime antenna pattern authorized in the Station's construction permit, File No. BP-19990521AI. The application included an exhibit describing an interference reduction agreement ("IRA") that JCE had negotiated with Aguadilla Radio and TV Corp, Inc. ("Aguadilla"), the licensee of Station WABA(AM), Aguadilla, Puerto Rico. On February 14, 2005, JCE amended the application to also change the Station's nighttime pattern. On May 4, 2005, the staff notified JCE that the IRA was unacceptable because the proposed modification to the WFTL(AM) facilities and IRA would not reduce, but would in fact increase, existing interference to WABA(AM), and identified several other deficiencies in the application's technical proposal.¹ JCE filed a responsive amendment and a "Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*" ("Petition")² on June 3, 2005. JCE's June 3, 2005, amendment primarily

¹ Letter to John Wells King, Esq., Reference 1800B3 (Audio Division, Media Bureau, May 4, 2005) ("May 4 Letter"). The May 4 Letter observed that the original WFTL(AM) proposal would not reduce overall interference in the AM band because WFTL(AM)'s proposed nighttime facility would cause new interference to WABA(AM) by increasing the 25% Root Sum Square ("RSS") limit to WABA(AM) in violation of Section 73.182 of the Commission's Rules (the "Rules"). This would decrease WABA(AM)'s existing nighttime interference-free ("NIF") service by some 13,000 listeners. The May 4 Letter also stated that: (1) WFTL(AM)'s proposed 0.025 mV/m -10% skywave contour would overlap the 50 kW nighttime 0.5 mV/m – 50% skywave contour of co-channel Mexican stations XETQ and XETQ1, Orizaba, VC, in violation of the US/Mexico Treaty; (2) WFTL(AM)'s proposed 0.025 mV/m contour would overlap the protected 0.5 mV/m daytime groundwave contour of co-channel Cuban stations CMGB, Trinidad, and CMJB, Mayari Arrib; and (3) the tower registration for the seventh nighttime tower in WFTL(AM)'s proposed directional array was not submitted. Because we deny JCE's application due to its increase in interference caused to WABA(AM), we do not address the other issues presented by the application.

² This pleading erroneously seeks reconsideration of the May 4 Letter, which it claims dismissed the captioned application. The May 4 Letter did not dismiss the WFTL(AM) application, but rather identified the deficiencies

disputes the Commission's findings that the IRA with Aguadilla was unacceptable because of the proposed increase in nighttime interference to WABA(AM). JCE also submits a new IRA showing that concedes that implementation of the amended WFTL(AM) proposal would result in the loss of service to nearly 15,000 WABA(AM) listeners.³

Discussion. As stated in the May 4 Letter, the Commission has undertaken significant initiatives to improve and revitalize the AM service.⁴ One such initiative permits licensees to reach agreements to reduce power or cancel their licenses in order to allow other licensees to improve service, and to reduce overall interference.⁵ In order to encourage such agreements, the Commission amended Section 73.3517 of the Rules⁶ to provide for the acceptance of contingent applications that would facilitate a reduction in overall AM interference.⁷ In amending the rule to permit the filing of contingent applications that would "reduce interference to one or more AM stations or . . . otherwise increase the area of interference-free service," the Commission removed regulatory barriers that prevent or discourage individual AM stations from entering into private agreements that would ultimately decrease interstation interference and improve the quality of AM service.⁸

Contingent application arrangements that propose the deletion or modification of an AM station require a case-by-case public interest determination, and the parties must demonstrate that a sufficient "local service floor" will be maintained in the community losing a local transmission service. The Commission chose not to "establish a quantifiable service floor that can uniformly be applied with respect to the replacement of deleted facilities," opting instead for a case-by-case approach. However, the Commission did determine that, at a minimum, an agreement that resulted in the deletion of a station could not create a "white" or "gray" area.⁹

When undertaking the case-by-case analysis, we generally consider four factors: (1) the amount of AM interference that will be eliminated in relation to the number of AM and FM services remaining available to areas that will lose service; (2) the areas and populations that will gain service as a result of

listed in Note 1, above, and provided JCE 30 days to address those deficiencies. For this reason, the Petition will be dismissed without further consideration.

³ According to JCE the existing NIF service for WABA(AM) encompasses 196,544 persons. The proposed WABA(AM) NIF will encompass 181,722 persons, a reduction in service to 14,822 persons. June 3, 2005, Amendment, "Statement re: Commission Policy to Encourage Interference Reduction Between AM Broadcast Stations" ("June 3 IRA Statement") at 3.

⁴ *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273 (1991), *recon. granted in part and denied in part*, Memorandum Opinion and Order, 8 FCC Rcd 3250 (1993).

⁵ *Policies to Encourage Interference Reduction Between AM Broadcast Stations*, Report and Order, 5 FCC Rcd 4492 (1990) ("*Interference Reduction Order*").

⁶ 47 C.F.R. § 73.3517.

⁷ *Id.* at 4493.

⁸ *Interference Reduction Order*, 5 FCC Rcd at 4492.

⁹ *Id.* A "white" area is an area that does not receive interference free primary service from an authorized AM station or does not receive a signal strength of at least 1 mV/m from an authorized FM service. See 47 C.F.R. § 73.14. A "gray" area receives one full time service. See *Interference Reduction Order*, 5 FCC Rcd at 4496, n.14.

the proposed change; (3) whether the proposal will create any white or gray areas; and (4) the availability of AM and FM service in the area that will experience a reduction in service due to the proposed contingent facility changes.¹⁰ We thus examine the IRA between JCE and Aguadilla in light of these factors.

Interference Reduction. By its own admission, JCE's proposal for WFTL(AM) will decrease the NIF service from WABA(AM) by nearly 15,000 persons. The amended proposal exacerbates the extent of nighttime interference by approximately 2,000 listeners more than the original proposal which we previously found unacceptable in the May 4 Letter. JCE once again contends that the impact on the WABA(AM) nighttime signal will be minimal; the distance between the stations is mostly over water; and Aguadilla has consented to and desires a nighttime power increase for WFTL(AM).

Increased Service. JCE asserts that grant of the amended proposal will result in a gain of service to 119,644 persons in the Palm Beach County, Florida, area, and that WFTL(AM) will increase its NIF coverage of Palm Beach County, Florida, from 71.6% to 81.8%.¹¹ Taking into consideration the loss of service to 14,822 WABA(AM) listeners, JCE contends that there will be a net gain in interference-free service of 104,822 persons.

Local Service Floor. JCE's proposal demonstrates that no gray or white areas will be created by grant of the proposal. JCE also asserts that the entire WABA(AM) loss area is served by two stations licensed to Aguadilla, Puerto Rico, and 12 stations licensed to other communities.

We disagree with JCE's assertion that grant of the WFTL(AM) modification application would be consistent with the Commission's interference reduction policy. JCE's proposal would increase the overall interference in the AM broadcast band. This result is antithetical to the essential purpose of the *Interference Reduction Order*, namely, to provide for the acceptance of contingent applications that would facilitate a *reduction* in overall AM interference. The issue of permitting AM station licensees to increase interference by mutual agreement was specifically raised and rejected in the AM Interference Reduction rule making proceeding.¹² Moreover, the proposed increase in interference cannot be justified by comparing the overall gain in service to WFTL(AM) listeners with the smaller loss of service to WABA(AM)'s listeners. JCE makes no attempt to show that WFTL(AM)'s existing service is in any way inadequate and, when faced with a choice between increased coverage with increased interference

¹⁰ *Id.* at 4494.

¹¹ JCE states that WFTL(AM)'s existing NIF service covers 891,990 persons, while the proposed NIF includes 1,011,634 persons, a gain of 119,644 persons. June 3 IRA Statement at 3.

¹² There, the Commission wrote:

While the AM [Notice of Inquiry] originally suggested that the Commission might consider allowing licensees to increase interference by mutual agreement, the commenters have persuaded us to refrain from proposing rules that would permit any increased interference within the protected contours of AM stations. Rather, we limit this proposal to permitting those activities between licensees that would reduce interference to one or more stations. Further, we propose to amend certain AM processing rules to facilitate such efforts to achieve interference reduction between AM stations.

Interference Reduction Order, 4 FCC Rcd at 2432-33.

received on one hand, and lesser but adequate coverage without an increase in prohibited interference on the other, the Commission favors the latter.¹³ As stated in the May 4 Letter, JCE may not justify its proposal by simply comparing WFTL(AM)'s gains in nighttime interference-free coverage area to the loss of service area to any other station.

JCE argues that WABA(AM) has no feasible alternative to eliminate the interference that will be created by JCE's proposal.¹⁴ Aguadilla could not file a simultaneous minor change application, states JCE, because a power increase for WABA(AM) would cause impermissible interference to Station YVLC in Valencia, Venezuela.¹⁵ Moreover, other alternatives identified for WABA(AM) that would ostensibly comply with the *Interference Reduction Order* and allow WFTL(AM) to obtain its desired service improvement would decrease the overall level of service to the public. JCE concludes that "in order for the parties to achieve their service goals, the proposal as configured is the best, most efficient public interest alternative."¹⁶

JCE's arguments are without merit. The only options it presents are those consistent with its objective of increased nighttime service for WFTL(AM), not with the public interest in decreasing the overall amount of interference in the existing AM band. JCE's private interest in maximizing WFTL(AM)'s service, as stated above, cannot come at the expense of increasing interference to WABA(AM).

Finally, JCE argues that, because of the distance between the stations, the fact that much of that distance is over water, and that the impact on the WABA(AM) nighttime signal will be minimal, Aguadilla "has consented to, and has agreed with WFTL on the desirability of, a nighttime power increase for WFTL."¹⁷ The Commission has consistently prohibited applicants and licensees from negotiating among themselves which areas may receive interference.¹⁸ This prohibition is grounded in the requirements of Section 307(b) of the Communications Act of 1934, as amended (the "Act").¹⁹ Under that provision, the Commission must ensure the "fair, efficient, and equitable distribution of radio service" throughout the country. Approval of the IRA presented here would be inconsistent with that Commission statutory responsibility.

¹³ See, e.g., *In re Board of Education of the City of Atlanta*, Memorandum Opinion and Order, 82 FCC 2d 125, 126 (1980) (citing *Musicast of the South, Inc.*, Memorandum Opinion and Order, 45 RR 2d 1213 (1979) and *The Mountainside Corp.*, Memorandum Opinion and Order, 70 FCC 2d 678 (1979)).

¹⁴ JCE submits these arguments in response to the statement in the May 4 Letter that, "[p]ursuant to Section 73.3517(c) [of the Rules], WABA(AM) could have filed a simultaneous minor change application to remove the interference that it receives from the WFTL(AM) proposal." May 4 Letter at 3, n. 10.

¹⁵ JCE provides no support for this statement.

¹⁶ June 3 IRA Statement at 5.

¹⁷ *Id.* at 2.

¹⁸ See *Open Media Corporation*, Memorandum Opinion and Order, 8 FCC Rcd 4070 (1993).

¹⁹ 47 U.S.C. §307(b).

Conclusion/Actions. For the above stated reasons, and pursuant to Sections 0.61, 0.283 73.182(k) of the Rules, JCE Licenses, LLC's June 3, 2005, Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*, and its application (File No. BMP-20031024AAV) to modify the construction permit for Station WFTL(AM), West Palm Beach, Florida, ARE DISMISSED.²⁰

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: John Wells King, Esq.

²⁰ The Commission has indicated that it will reinstate applications *nunc pro tunc* where the application was returned and a minor curative amendment is filed in conjunction with a paper-filed petition for reconsideration within 30 days of the date of the dismissal. *See Public Notice*, "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications," FCC 84-366 (Aug. 2, 1984). Any electronic amendment filed later than 30 days will be returned as untimely. *See* 47 U.S.C. § 405, 47 C.F.R. § 1.106(f). The deficiencies noted in the May 5 Letter were discerned after a preliminary staff study of the application. The staff did not engage in a detailed review of the entire application to determine whether other deficiencies exist which would preclude acceptance for filing or result in a subsequent dismissal. Inasmuch as JCE will not be afforded a second opportunity to correct another deficiency, it should carefully review the entire application prior to submitting a curative amendment, should it choose to do so.