



**Federal Communications Commission
Washington, D.C. 20554**

June 4, 2008

DA 08-1313

In Reply Refer To:

1800B3-RDH

Released: June 4, 2008

WIOO Radio, Inc.
180 York Road
Carlisle, PA 17013

In Re: WIOO(AM), Carlisle, PA
Facility ID Number: 72985
File No.: BP-20040809AAO

Petition for Reconsideration

Dear Applicant:

This letter is in reference to the Petition for Reconsideration ("Petition") filed by WIOO Radio, Inc. (the "Licensee") on April 20, 2007, seeking reconsideration of the staff's March 19, 2007, action dismissing the referenced application for the modification of facilities for station WIOO(AM), Carlisle, Pennsylvania (the "Station"). Also before Media Bureau staff are an Opposition to Petition for Reconsideration ("Opposition") filed May 2, 2007, by Radio One Licenses, LLC ("Radio One"), and a Reply to Opposition to Petition for Reconsideration ("Reply") filed by Licensee on May 14, 2007.

Background. On August 9, 2004, Licensee filed an application seeking to change the Station's frequency and operating power. On March 19, 2007, the application was returned¹ because it failed to provide daytime protection to co-channel stations WCST(AM), Berkeley Springs, West Virginia, and WOLB(AM), Baltimore, Maryland, in violation of Section 73.37 of the Commission's Rules (the "Rules").²

In its Petition, Licensee asserts that Radio One has abandoned WOLB(AM)'s licensed site and sold it to a developer who has constructed various buildings on it. Radio One, it continues, has pending an application for license to cover its WOLB(AM) construction permit and, in fact, is currently operating WOLB(AM) from that site. Licensee contends that its proposal now meets all Commission protection requirements with respect to WOLB(AM)'s new site and, therefore, the Commission should reconsider its prior action. Additionally, Licensee submits WCST(AM) signal strength measurements. It contends that these measurements establish that Licensee's proposal fully meets the Commission's Rules with respect to WCST(AM) and that no waiver with respect to that station is necessary.

¹ See *Letter to Jerrold Miller, Esq. and Richard J. Bodorff, Esq.*, Ref. No. 1800B3 (Asst. Chief, Audio Division, March 19, 2007) ("Dismissal Letter").

² 47 C.F.R. § 73.37. The dismissed application had requested a waiver of this rule with respect to WCST(AM) but not with regard to WOLB(AM). WCST(AM) did not oppose the waiver request.

In its Opposition, Radio One argues that the Petition should be dismissed because it relies on facts not previously presented that do not involve circumstances that have changed since Licensee's last opportunity to present such matters. Nor, it continues, does it rely on facts that were unknown earlier in the proceeding and could not reasonably have been learned by Licensee through the exercise of ordinary diligence.³ Finally, it argues that consideration of the facts relied on is not required by the public interest. Accordingly, Radio One asserts that the Petition contravenes Section 1.106 of the Rules⁴ and should be dismissed.

Moreover, Radio One contends that the Petition merely reargues issues already decided and that WIOO(AM) must protect licensed facilities regardless of the existence of a construction permit to operate different facilities until a license to cover has been granted. This, it continues, was already decided in this proceeding with respect to WCST(AM) and there should be no different result with respect to WOLB(AM). Finally, Radio One asserts that the Licensee's application should be summarily dismissed as it would result in the construction of a facility that would receive significant prohibited interference from and cause interference to WOLB(AM)'s "currently" licensed facility⁵. It concludes that the Licensee has failed to demonstrate good cause for a waiver of the Commission's interference protection rules.

Discussion. Pursuant to Section 1.106 of the Rules, as interpreted by established case law, "reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."⁶ Consideration of new facts not previously presented, however, is also appropriate when such consideration is required in the public interest.⁷ Given the following, we believe that consideration of the Licensee's Petition on its merits is required in the public interest.

Radio One is correct that Commission case law requires applications to continue to protect the formerly licensed facilities of a station until the grant of the covering license application for the modified facility.⁸ In the instant case, however, we take note *sua sponte* that, subsequent to the filing of the pleadings herein, Commission staff, on May 14, 2008, granted Radio One's application⁹ for a license to

³ Indeed, Radio One asserts that the signal measurements of WCST(AM) relied on by Licensee in its Petition were taken prior to the Commission's previous decision in this matter. Opposition at 3-4.

⁴ 47 C.F.R. § 1.106.

⁵ Radio One claims that Licensee has attempted to convert this issue into a factual dispute over whether WOLB(AM) is operating from its "currently" licensed site. Opposition at 8.

⁶ *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub. nom Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966) ("*WWIZ, Inc.*"); *see also National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003). *See also* 47 C.F.R. § 1.106(c).

⁷ 47 C.F.R. § 1.106(c)(2).

⁸ Radio One cites *Application of the State of Oregon*, Memorandum Opinion and Order, 15 FCC Rcd 15456, 15457 (2000) (quoting *Southern Oregon University*, FCC 99-315 (rel. Oct. 28, 1999)) and *Applications for Station WKVE*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411, 23423 (2003).

⁹ BL-22070220ADT

cover its modified WOLB(AM) facility.¹⁰ Accordingly, the Rules no longer protect the formerly licensed WOLB(AM) facility and Radio One's objection to the Licensee's Petition on this basis is now moot. An engineering review of the amended WIOO(AM) application reveals that the proposed station's daytime operation would afford full protection to Stations WOLB(AM), as now licensed, and WCST(AM), and satisfies all other Commission's Rules.

The staff may reinstate applications *nunc pro tunc* where the original application was dismissed and where a minor curative amendment was filed within 30 days of the date of the dismissal.¹¹ The Petition was timely filed and contains an amended application which, together with the grant of the Radio One application, corrects the deficiency noted in the *Dismissal* Letter. Accordingly, reinstatement is warranted.

Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by WIOO Radio, Inc., IS GRANTED. IT IS FURTHER ORDERED, that the WIOO Radio, Inc., modification application, File No. BP-20040809AAO, IS REINSTATED *nunc pro tunc* and IS HEREBY GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Jerrold Miller, Esq.
Richard J. Bodorff, Esq.
R. Morgan Burrow, Jr. PE
Timothy Z. Sawyer

¹⁰ See Public Notice, *Broadcast Actions*, Report No. 46739 (May 19, 2008).

¹¹ See *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, FCC 84-366 (rel. Aug. 2, 1984).