



Federal Communications Commission
Washington, D.C. 20554

June 13, 2008

DA 08-1416

In Reply Refer To:

1800B3-RDH/PHD

Released: June 13, 2008

Jerrold Miller, Esq.
Miller and Neely PC
6900 Wisconsin Avenue
Suite 704
Bethesda, Maryland 20815

Mark Lipp, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

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

Petition for Reconsideration

Dear Counsel:

On June 4, 2008, the staff released a letter decision regarding the captioned Petition for Reconsideration filed by WIOO Radio, Inc., (the "Licensee").¹ At the time of this action, the staff was unaware that Radio One Licenses, LLC ("Radio One") had filed on May 29, 2008, a Supplement to Opposition to Petition for Reconsideration (the "Supplement"). Accordingly, pursuant to Section 1.113(a) of the Commission's Rules (the "Rules"),² the Chief, Audio Division, Media Bureau, on his own motion, SETS ASIDE the *Reconsideration Decision* to permit consideration of the Supplement.

We have before us an April 20, 2007, Petition for Reconsideration ("Petition") filed by Licensee, seeking reconsideration of the staff's March 19, 2007, action dismissing the referenced application (the "Application") for the modification of facilities for station WIOO(AM), Carlisle, Pennsylvania (the "Station"). Also before the staff are an Opposition to Petition for Reconsideration ("Opposition") filed May 2, 2007, by Radio One, a Reply to Opposition to Petition for Reconsideration ("Reply") filed on May 14, 2007, by Licensee, and the Radio One Supplement.

¹ See *Letter to WIOO Radio, Inc., from Peter H. Doyle, Chief, Audio Division, Media Bureau*, DA 08-1313, (rel. June 4, 2008) (the "*Reconsideration Decision*").

² 47 C.F.R. § 1.113(a).

Background. On August 9, 2004, Licensee filed the Application seeking to change the Station's frequency and operating power. On March 19, 2007, the Application was returned³ 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").⁴

In its Petition, Licensee asserts that Radio One has abandoned WOLB(AM)'s then-licensed site and sold it to a developer who has constructed various buildings on it. Licensee also notes that Radio One had recently filed an application for license to cover its WOLB(AM) construction permit⁵ to operate from a new site and, in fact, had commenced operations 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.

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.⁶ 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 Rules⁷ and should be dismissed.

Moreover, Radio One contends that the Petition merely reargues issues already decided and that WIOO(AM) must continue to protect the then-licensed WOLB(AM) 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). It concludes that the Licensee has failed to demonstrate good cause for a waiver of the Commission's interference protection rules. In the Supplement, Radio One contends that Commission should uphold the dismissal of the Application notwithstanding the grant of the WOLB(AM) License Application. Radio One contends that it would be improper for the Commission to reinstate and grant an application that had been dismissed as defective three years previously. It contends that "[i]f the Commission were to reinstate the WIOO(AM) Application due to the grant of a new license application for WOLB(AM), it would be setting a dangerous precedent that would essentially

³ See *Letter to Jerrold Miller, Esq. and Richard J. Bodorff, Esq.*, Ref. No. 1800B3 (Asst. Chief, Audio Division, March 19, 2007) ("*Dismissal Letter*").

⁴ 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.

⁵ File No. BL-20070220ADT (the "WOLB(AM) License Application").

⁶ 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.

⁷ 47 C.F.R. § 1.106.

permit a queue behind license applications once a new construction permit is granted.”⁸ Permitting Licensee to keep the Application “alive” by the filing of a petition for reconsideration, argues Radio One, would encourage a party filing a defective application to file a petition for reconsideration in the hope that circumstances would change while the reconsideration petition remains pending.⁹

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.”¹⁰ Consideration of new facts not previously presented, however, is also appropriate when such consideration is required in the public interest.¹¹ 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.¹² In the instant case, however, we take note, *sua sponte*, of the fact that the Media Bureau granted the WOLB(AM) License Application on May 14, 2008.¹³ Accordingly, the Rules no longer protect the formerly licensed WOLB(AM) facility and Radio One’s objection to the Petition on this basis is now moot. An engineering review of the Application, as amended, reveals that the proposed station’s daytime operation would fully protect 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 is filed within 30 days of the date of the dismissal.¹⁴ The Petition was timely filed. Accordingly, reinstatement is warranted.

The Radio One Supplement. Radio One’s Supplement is an unauthorized pleading¹⁵ and is subject to dismissal without consideration.¹⁶ However, in the interest of developing a full record in this proceeding, we will consider it here. The potential for manipulation of our licensing processes is always

⁸ Supplement at 3.

⁹ *Id.* at 4.

¹⁰ *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).

¹¹ 47 C.F.R. § 1.106(c)(2).

¹² 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).

¹³ *See Broadcast Actions*, Public Notice, Report No. 46739 (May 19, 2008).

¹⁴ *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)(the “*Processing Policy Public Notice*”).

¹⁵ *See* 47 C.F.R. § 1.45.

¹⁶ *See Letter to John Garziglia et al.*, 20 FCC Rcd 12105, 12107 (MB 2005).

a serious concern. As Radio One notes, the staff has the ability to deter the filing of premature and speculative applications by issuing summary dismissals of those applications and summary denials of petitions for reconsideration of such dismissals. If the staff notes an increase in impermissible contingent filings,¹⁷ it is prepared to take these and other measures to discourage these filings.

However, this case involves a properly filed petition for reconsideration which unquestionably satisfies the pleading requirements of Section 1.106(d) of the Rules. As noted above, the Commission has established a processing policy which specifically permits the reinstatement *nunc pro tunc* of a dismissed application found initially to be unacceptable for filing where the petition for reconsideration is, as here, accompanied by a minor curative amendment.¹⁸ Radio One fails to cite any Commission precedent that would support a departure from this processing rule or show that this processing policy was erroneously applied in this case.

The decision to reinstate and grant the Application should not be construed as a departure from our policy of permitting contingent filings only in certain narrowly defined circumstances described in Section 73.3517 of the Rules. In this regard, the initial dismissal of the Application was proper. While we recognize that our current processing rules leave open the potential for abuse,¹⁹ we find that it would be inherently unfair and unlawful to adopt a new policy designed to prevent future potential abuses here. To the extent that Radio One believes that a different processing rule would better serve the public interest, it should file a petition for rulemaking.²⁰

For these reasons, we find unpersuasive the arguments set forth in the Supplement. We conclude that the staff properly accepted Licensee's May 23, 2008, amendment and properly considered changed circumstances in acting on the Petition.²¹

¹⁷ See 47 C.F.R. § 73.3517. The Application is contingent upon grant to the WOLB(AM) License Application.

¹⁸ See *Processing Policy Public Notice*, *infra* at n.14.

¹⁹ It appears that Radio One has engaged in precisely the gamesmanship it complains of by requesting that the Commission defer the processing of the WOLB License Application until action is taken on a pending Radio One construction permit application to further modify WOLB. In so doing, Radio One sought to establish protection for three different facilities – one more than contemplated by the Rules - to the detriment of the Licensee. See WOLB License Application, transmittal letter at 1.

²⁰ See *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (new interpretation of an agency rule in conflict with prior definitive interpretation requires notice and comment).

²¹ See *Sells, Willcox, and Davis-Monahan AFB, Arizona*, Memorandum Opinion and Order, 23 FCC Rcd 1242, 1245 (2008); see also *Greenup, Kentucky, and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493, 1494 (1991).

Conclusions/Actions. Accordingly, pursuant to Section 1.113(a) of the Commission's Rules, IT IS ORDERED that the June 4, 2008, *Reconsideration Decision* in this proceeding, DA 08-1313, IS HEREBY SET ASIDE. IT IS FURTHER 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: WIOO Radio, Inc.