



Federal Communications Commission
Washington, D.C. 20554

May 7, 2009

DA 09-1033

In Reply Refer to:

1800B3-SS

Released: May 7, 2009

The School Board of Broward County
c/o Dr. Phyllis Schiffer-Simon
666 SW Nova Drive
Ft. Lauderdale, FL 33317

In re: **The School Board of Broward County**
WKPX(FM), Sunrise, FL
Facility ID No. 66342
File No. BPED-20070907AEF

Petition for Reconsideration

Dear Dr. Schiffer-Simon:

We have before us a Petition for Reconsideration ("Petition") filed May 7, 2008, by The School Board of Broward County, Florida ("SBBC"), applicant for a minor change (the "Application") to its noncommercial educational ("NCE") station WKPX(FM), at Sunrise, Florida (the "Station"). SBBC seeks reconsideration of the April 3, 2008, letter¹ dismissing the Application as unacceptable for filing.² For the reasons set forth below, we deny the Petition.

Background. The Application was filed several weeks prior to the October 2007 window for new NCE FM applications.³ A staff engineering review of the Application revealed that it failed to comply with Section 73.525 of the Commission's Rules (the "Rules")⁴ with respect to Channel 6 station WTVJ(TV), Miami, Florida. The Application requested a waiver of Section 73.525 regarding protection of TV Channel 6 stations, or in the alternative, a grant of the Application conditioned on the Station not operating with the proposed facilities until WTVJ(TV) had commenced digital operations and was no longer operating on Channel 6. In the *Staff Decision*, the staff found that neither Section 73.525 of the Rules nor established precedent provided a basis for finding that such an arrangement complied with TV Channel 6 protection requirements, that waiver of this rule was justified, or that a conditional grant of the Application was warranted. In particular, the *Staff Decision* noted that acceptance of the Application would be unfair to those window applicants that filed rule-compliant proposals. The staff also found that: (1) the proposal constituted a "contingent application" under Section 73.3517 of the Rules;⁵ (2) a waiver

¹ Letter to The School Board of Broward County, Florida, (MB rel. Apr. 3, 2008) ("*Staff Decision*").

² See *Staff Decision* at 2.

³ The NCE FM filing window opened on Friday, October 12, 2007. See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 2726 (MB 2007); *Media Bureau to Extend Window for NCE FM New Station and Major Change Applications; Window Will Close on October 22, 2007*, Public Notice, 22 FCC Rcd 18680 (MB 2007).

⁴ 47 C.F.R. § 73.525.

⁵ See 47 C.F.R. § 73.3517.

of the contingent application rule would be necessary to grant the Application; and (3) a waiver of the rule in this case would be contrary to the public interest. Accordingly, the staff dismissed the Application.

In its Petition, SBBC argues that the *Staff Decision's* denial of its requests for a waiver of Section 73.525 and/or a conditional grant was incorrect both as a matter of fact and as a matter of law. It argues that even if the Commission were to conclude that SBBC's filing was unfair with respect to applicants that filed in the October 2007 window and that chose to comply with Section 73.525 requirements, it is simply too late to accept new window applications.⁶ SBBC contends that a grant of its proposal would result in the Station being able to reach nearly the entire population of Broward County for the first time, including much of the seaboard region, for an overall increase of more than 50 percent of its current population reach. SBBC states that the public interest would be served by this extension of service.

Moreover, SBBC argues that the staff erred in finding that a waiver of the contingent application rule was necessary in this case. Specifically, SBBC argues that the staff based its decision on the ground that the "proposed facility cannot become operational unless WTVJ(TV) implements certain changes in its technical operation based on certain future events."⁷ Noting that the purpose of the contingent application rule is "to avoid the work of reviewing an application only to discover that it was ungrantable because the contingency was not resolved,"⁸ SBBC contends that Section 73.3517 is not applicable here because "there is no doubt whatsoever that the only event upon which the Application is contingent – WTVJ's abandonment of its analog operations on Channel 6 – will occur."⁹ According to SBBC, "... analog broadcasting by full-power stations is to cease – no later than February 17, 2009. This is a certainty."¹⁰ Thus, SBBC argues, the event upon which implementation of the Application depends is readily distinguishable from the traditional type of contingency – such as whether another applicant will elect to build after being granted a construction permit – that the rule was designed to protect.¹¹

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of petitioner's last opportunity to present such matters.¹² Petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the

⁶ Petition at 5.

⁷ *Id.* at 3, citing *Staff Decision* at 1.

⁸ Petition at 3, citing *Amendment of Sections 1.517 and 1.520 of the Commission's Rules*, Report and Order, 61 FCC 2d 238 (1976).

⁹ Petition at 3.

¹⁰ *Id.*

¹¹ *Id.* We note that although the transition to digital television ("DTV") is a certainty, the February 17, 2009, transition date was not. Congress and the Commission have moved the DTV transition date to June 12, 2009. See *Implementation of the DTV Delay Act, et al.*, Second Report and Order and Notice of Proposed Rulemaking, FCC 09-11 (rel. Feb. 20, 2009); see also DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

¹² See 47 C.F.R. § 1.106(c) and (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sum nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966) ("*WWIZ, Inc.*").

Commission determines that consideration of the facts relied on is required in the public interest.¹³ As set forth below, SBBC has not met these standards.

First, we note that SBBC's proposal does not comply with Section 73.525 of the Rules. We remain unpersuaded by SBBC's arguments in favor of a waiver. As stated in the *Staff Decision*, in this case SBBC has sought, prematurely, to take advantage of the expected termination of WTVJ(TV) analog Channel 6 operations in order to improve its facilities and to gain cut-off protection from all applications filed several weeks later in the October 2007 NCE FM window.¹⁴ As stated in the *Staff Decision*, acceptance of the Application in these circumstances would be fundamentally unfair to those applicants that have filed applications that complied with Section 73.525 and to those potential applicants that deferred their filings as a result of TV Channel 6 protection requirement issues. SBBC's contention that it is too late to provide relief to October 2007 window filers simply ignores the fundamental fact that accepting the Application could foreclose filing opportunities for some, and be fundamentally unfair to other, potential applicants and licensees that chose to defer filings based on the recognition that it is not presently possible to file rule-compliant proposals.¹⁵ The public interest is best served by the fair and consistent application of our broadcast licensing Rules.

Recently, the Bureau released a Public Notice to provide guidance to NCE FM stations regarding TV Channel 6 requirements.¹⁶ The Public Notice states that these requirements now apply to and will continue to apply to all NCE FM reserved band applications until such time as the Commission expressly states otherwise, regardless of the date on which a potentially impacted television Channel 6 station terminates analog broadcast service.¹⁷ The purpose of this processing policy is to ensure fair and transparent procedures for the consideration of all – including potentially competing – proposals made possible by the termination of analog TV Channel 6 operations. In addition, the Public Notice also states that the Bureau will announce, by subsequent Public Notice, a future date at which it will begin accepting applications, premised on the termination of analog TV Channel 6 transmissions.¹⁸ Any minor change application premised on the termination of analog TV Channel 6 transmissions filed before the date established by Public Notice will be dismissed.¹⁹

In addition to the fairness and transparency issues noted above, recent developments subsequent to the filing of the Petition have shown that SBBC was in error regarding the “certainty” of future events. Those developments also have highlighted the importance of Section 73.3517. WTVJ(TV) has notified

¹³ See 47 C.F.R. § 1.106(c)(2). See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Scranton and Surfside Beach, South Carolina)*, Memorandum Opinion and Order, 4 FCC Rcd 2366 (MB 1989).

¹⁴ The filing window opened on Friday, October 12, 2007. See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 2726 (MB 2007); *Media Bureau to Extend Window for NCE FM New Station and Major Change Applications; Window Will Close on October 22, 2007*, Public Notice, 22 FCC Rcd 18680 (MB 2007).

¹⁵ See *Moore*, 23 FCC Rcd at 4780 (MB 2008).

¹⁶ See *Media Bureau Provides Guidance to NCE FM Stations Regarding Television Channel 6 Protection Requirements*, Public Notice, DA 09-744, 2009 WL 856368 (rel. Apr. 1, 2009) (“*Channel 6 Protection Notice*”).

¹⁷ See n.11, *supra*.

¹⁸ See *Channel 6 Protection Notice* at 2.

¹⁹ *Id.*

the Commission that it will continue to provide regular analog television broadcast programming to viewers until the end of the transition on June 12, 2009.²⁰ SBBC's proposed facility could not become operational until WTVJ(TV) implements certain changes in its technical operations based on certain future events, that is, the DTV transition date of June 12, 2009. Thus, the Application was, and remains, contingent on the "future event" of WTVJ(TV)'s conversion to fully digital operation.²¹ Accordingly, the facts and circumstances presented in this case are not sufficient to demonstrate that waiver, rather than strict application, of Sections 73.525 and 73.3517 of the Rules would further the public interest.²²

Conclusion/Action. SBBC has not corrected the defect for which the Application was initially dismissed, nor has it shown a material error or omission in the *Staff Decision*. Accordingly, IT IS ORDERED, that the May 7, 2008, Petition for Reconsideration filed by The School Board of Broward County, Florida, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Peter Gutmann, Esq.

²⁰ See *FCC Releases Dates on Which Stations Intend to Terminate Analog Television Service*, Public Notice, DA 09-598 at Appendix A (MB rel. Mar. 17, 2009).

²¹ Under Section 73.525 of the Rules, SBBC could have, but did not, submit a written consent agreement in which WTVJ(TV) concurs with the proposed minor change to the Station's facilities. However, see *Serendipity Broadcasting, Inc.*, Letter, DA 08-2360, 2008 WL 4722110 (MB rel. Oct. 28, 2008) (rejecting NCE-FM applicant's submission of agreement with Channel 6 station that allowed the NCE-FM applicant to operate daily from 12:30 am to 5:30 am for "signal testing" and could not begin regular operations until the Channel 6 station commenced DTV operations).

²² See *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 900-01 (D.C. Cir. 2004) ("The strict application of a rule by an agency, upon giving [a] requisite "hard look" to [a] request for waiver of [a] rule, is not *per se* an abuse of discretion, but may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases [A]s long as the agency has articulated a not 'insubstantial' reason for its strict application of a rule and applies the rule consistently, [the Court of Appeals] will not overturn it.").