



Federal Communications Commission
Washington, D.C. 20554

February 21, 2013

In Reply Refer To:
1800B3-MM
DA 13-249

Mark N. Lipp, Esq.
Wiley Rein L.L.P
1776 K Street, N.W.
Washington, DC 20006

In re: Tower Investment Trust, Inc.
WBNK(FM), Pine Knoll Shores, NC
Facility ID No. 170178

File No. BPH-20090626ACC

Petition for Reconsideration

Dear Mr. Lipp:

We have before us a Petition for Reconsideration, filed on June 21, 2010, by Tower Investment Trust, Inc. ("Tower"), licensee of WBNK(FM), Pine Knoll Shores, North Carolina ("Station"). The Petition seeks reconsideration of a May 17, 2010, letter decision ("Letter Decision")¹ by the Media Bureau ("Bureau") dismissing the captioned minor change application ("Application"). For the reasons set forth below, we deny the Petition.

Background. On June 26, 2009, Tower filed the Application. It proposed to modify the broadcast facilities of the Station by increasing authorized effective radiated power ("ERP") from 11.5 kilowatts to 21.9 kilowatts. Tower requested processing under Section 73.215 of the Commission's Rules ("Rules"). However, the proposed power increase would result in a small amount of prohibited overlap to third-adjacent channel station, WERO(FM), Washington, North Carolina. As required by Section 73.215, this overlap is calculated on the basis of WERO(FM)'s maximum class facilities rather than licensed facilities. Accordingly, Tower requested a waiver of Section 73.215(a) and grant of the Application.

In support of the waiver request, Tower stated that the waiver was warranted to remedy "seasonal" ducting interference from several first-adjacent channel stations. It claimed that this interference results in deficient service to Pine Knoll Shores, the Station's community of license, and to many communities within the Station's service contour. Tower did not provide signal strength measurements of the interfering stations or data on the seasonal periods during which ducting occurs. Rather, it emphasized that there is no population in the overlap area which consists of water and wetlands and submitted documents to support its claim that there is no likelihood of future construction or public

¹ Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Tower Investment Trust, Inc. (rel. May 17, 2010).

use of land in the overlap area. Finally, it added that no actual overlap would result from the power increase and that tower limitations likely preclude WERO(FM) from obtaining the maximum class facilities on which the contour overlap is predicted to occur.²

On May 17, 2010, the Commission issued the Letter Decision denying the waiver request and dismissing the Application. It stated that Tower's failure to demonstrate that a directional antenna could not be used to eliminate the prohibited overlap was "crucial" to the dismissal.³ Moreover, it added that the Commission will not entertain Section 73.215(a) waiver requests based on the theory that the short-spaced station cannot construct, or is highly unlikely to construct, maximum class facilities.⁴ The only way, noted the Letter Decision, that the Commission might entertain such a request is if WERO(FM)'s licensee elected to forego contour protections by filing an application to "request" Section 73.215 processing towards the Station.⁵

Tower filed the Petition on June 21, 2010. It argues, first, that the Letter Decision "ignored" Tower's primary basis for the waiver request, namely, that there is no population within the affected area, that the area is uninhabitable and that based on past case law, such a showing justifies an overlap waiver without any additional factors.⁶ It clarifies its position that the ducting interference prompted the waiver, but was not the justification for the waiver.⁷ Rather, Tower argues that, based on "well settled" case law,⁸ waiver is warranted because the overlap occurs in an uninhabitable area with no population.

Tower also questions the cost efficiency of the alternatives suggested in the Letter Decision. It argues that using a directional antenna is economically infeasible, given the costs of installing and testing such a system and the uncertainty of whether such a system would effectively ameliorate the effects of temperature inversion.⁹ It further claims that asking the licensee of WERO(FM) to forego contour protection is also economically infeasible because WERO(FM)'s licensee would likely require substantial

² See File No. BPH-20090626ACC, Attachment 34 (Exhibit 31), page 3.

³ Letter Decision at 2.

⁴ *Id.*

⁵ *Id.*

⁶ Petition at 4.

⁷ *Id.*

⁸ *Larson-Irwin Enterprises*, Memorandum Opinion and Order, 6 FCC 2d 613 (1967) (Sections 73.37 and 73.24(b) waivers granted because overlap over islands at great distance from location of station being interfered with and islands have less than 300 people); *Collier Broadcasting Co.*, Memorandum Opinion and Order, 25 FCC 2d 867 (1970) (Section 73.37 waiver granted where overlap over salt water except island with a maximum of fifteen people); *Widener College, Chester, Pennsylvania*, Memorandum Opinion and Order, 60 FCC 2d 924 (1976) (Section 1.573, note 1 waiver granted where all interference from contour overlap was on campus areas without people); *The Board of Trustees of the Leland Stanford Jr. University*, Memorandum Opinion and Order 67 FCC 2d 431, 432 (1978) (Section 73.509 waiver granted where contour overlap lies in extremely rugged mountainous terrain and restrictive zoning "prevents any substantial increase in the present population area"); *Board of Education of the City of Atlanta*, Memorandum Opinion and Order, 82 FCC 2d 125, n.4 (1980) (Section 73.509 waiver granted where contour overlap covered a negligible area that was mountainous or over salt water).

⁹ Petition at 4.

compensation in return for its reduced protection.¹⁰ In any event, Tower states, it was unable to discuss this option with WERO(FM)'s licensee because it "only recently emerged from bankruptcy status."¹¹

Discussion. Reconsideration is warranted only if the petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the prior action.¹² Tower has not met this burden.

The Commission may waive its policies or rules upon a showing of good cause.¹³ An applicant seeking a waiver has the burden to plead with particularity the facts and circumstances that warrant such action.¹⁴ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"¹⁵ and must support its waiver request with a compelling showing.¹⁶ The Commission may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.¹⁷ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁸ However, waiver of the Commission's policies or rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹⁹

Tower first argues that the Letter Decision "ignored" its primary basis for waiver, namely, that the contour overlap area was uninhabitable and had no population.²⁰ It argues that the Letter Decision ignored the "well settled" case law cited in support of a waiver grant on this basis.²¹ While we acknowledge that the Letter Decision did not specifically discuss the cases cited in Tower's waiver request, we find them to be inapposite. Each involves a contour overlap waiver that predates the enactment of Section 73.215. To find otherwise would defeat the principal purpose of Section 73.215(a), *i.e.*, to provide applicants with increased flexibility (relative to the Section 73.207 distance separation criteria) without burdening the Commission with complex, time-consuming and litigable waiver requests.²² Thus, as the Letter Decision correctly noted, when adopting the rule, the Commission specifically concluded that Section 73.215 waivers would only be granted in a "very small number of

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 6, n.8.

¹² See 47 C.F.R. § 1.106.

¹³ 47 C.F.R. § 1.3.

¹⁴ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987).

¹⁵ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd.*, 459 F.2d 1203 (1972), *cert. denied*, 93 S Ct. 461 (1972) ("*WAIT Radio*"). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

¹⁶ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

¹⁸ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁹ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

²⁰ Petition at 4.

²¹ *Id.* at 5.

²² See *Greater Media Radio Company, Inc.*, 15 FCC Rcd 7090, 7094-95 (1999).

cases.”²³ Notably, Tower cites to no case in which the Commission has granted a Section 73.215 waiver based on lack of population.

As for the alleged economic infeasibility of the alternatives to waiver suggested in the Letter Decision, it is well-settled that we do not consider cost efficiencies that simply benefit the broadcaster to be grounds for waiver.²⁴ Nor can we accept Tower’s speculation concerning demands that the licensee of WERO(FM) might or might not make in negotiations that have not taken place. Accordingly, we find that the Letter Decision correctly denied Tower’s waiver request.

Conclusion. We find that Tower has not set forth an error of fact or law, or presented new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the Letter Decision.

In light of the above discussion, and pursuant to Section 309(k) of the Act, and Sections 0.61 and 0.283 of the Rules,²⁵ the Petition for Reconsideration filed on June 21, 2010, by Tower Investment Trust, Inc., IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Tower Investment Trust, Inc.

²³ Letter Decision at 2, citing *Amendment to Part 73 of the Commission’s Rules to Permit Short-Spaced Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5360 n.27 (1991).

²⁴ See, e.g., *Chicago Newsweb Corporation/WNDZ, Inc.*, Letter, 24 FCC Rcd 10852 (MB 2009) (insofar as requested waiver will not enhance the public interest but is intended to principally benefit the licensee financially, there is no good cause showing for a waiver); *Radio Redentor, Inc.*, 14 FCC Rcd 17754, 17755 (1999); and *Maines Broadcasting, Inc.*, 8 FCC Rcd 5501, 5502 (1993) (same).

²⁵ 47 U.S.C. § 309(k) and 47 C.F.R. §§ 0.61, 0.283.