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Washington, D.C. 20554

February 28, 2014

DA 14-282

In Reply Refer to:

1800B3-CEG

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In re: **WZBH(FM), Georgetown, DE**
Facility ID No. 25003
File No. BMPH-20070511ACZ

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed by Great Scott Broadcasting ("Great Scott") on July 9, 2010. Great Scott seeks reconsideration of a June 4, 2010, letter decision by the Audio Division, Media Bureau ("Bureau") denying Great Scott's request for waiver of Section 73.215 of the Commission's rules ("Rules") ("Section 73.215") and dismissing the above-referenced minor modification application ("Application") to upgrade Station WZBH(FM) ("Station") from Channel 228B1 to Channel 228B as unacceptable for filing.¹ For the reasons stated below, we deny the Petition.

Background. The Application proposed to upgrade the Station from Class B1 to Class B at the existing licensed site, using a directional signal and increasing the antenna height. However, as a Class B station, the proposed facility would not meet the minimum distance separations set out in Section 73.207 of the Rules.² Specifically, it would be short-spaced to Stations WEZW(FM), Wildwood, New Jersey; WMMR(FM), Philadelphia, Pennsylvania; and WSTW(FM), Wilmington, Delaware. Therefore, Great Scott requested processing under Section 73.215 of the Rules, which allows short spacing provided that certain contour protection and minimum distance separation requirements are met. Under Section 73.215(a), a Class B station must be protected from received contour overlap to its 54 dB μ contour, whereas a Class B1 station is protected only to its 57 dB μ contour. The Station satisfied the minimum distance separation requirements of Section 73.215(e) of the Rules. However, the Application did not qualify for Section 73.215 processing because its proposed 54 dB μ protected contour would receive prohibited overlap from the 48 dB μ interfering contour of Station WSTW(FM).

¹ See *Great Scott Broadcasting*, Letter, Ref. No. 1800B3-RG (June 4, 2010) ("*Letter Decision*"); 47 C.F.R. § 73.215. Although the Application was originally filed as a modification to a construction permit (File No. BPH-199706201A), that permit was cancelled on June 28, 2007. Accordingly, in the *Letter Decision*, we treated the Application as a minor change to a licensed facility.

² 47 C.F.R. § 73.207.

Accordingly, Great Scott requested waiver of Section 73.215(a), arguing that it would have to reduce its existing signal in the direction of Station WSTW(FM) to avoid prohibited overlap under the Section 73.215(a) contour protection standards for Class B stations. Therefore, without grant of a waiver, the station upgrade would result in a “loss of existing service to listeners.”³ This situation was “anomalous,” Great Scott claimed, because the proposal: (1) used its existing licensed site; (2) sought Section 73.215 processing; (3) involved a change in station class; and (4) would receive, but not cause, interference.⁴

In the *Letter Decision*, the Bureau noted that the rationale behind the Class B and Class B1 protected service contours is to provide adequate signal coverage to the larger urban areas of the northeast and southern California. The Bureau rejected Great Scott’s request that we carve out an exception to these standards in cases where the existing signal coverage (at least in one direction) stays the same, but prohibited contour overlap is created “[as] the result of the change in the value of the protected contour from 57 dB μ for a Class B1 station to 54 dB μ for a Class B station.”⁵ We found that maintaining existing signal coverage does not justify a waiver, because “as a Class B station, WZBH(FM)’s service obligation is greater in that interference free service must be provided within the 54 dB μ contour not simply within the 57 dB μ contour as for a Class B1 station.”⁶ Therefore, we denied Great Scott’s waiver request and dismissed the Application.

In its Petition, Great Scott contends that, in the *Letter Decision*, the Bureau “failed to take into account” the fact that Great Scott’s proposed modification would preserve service to “a significant population.”⁷ The difference between the Class B1 and Class B contour protection requirements, Great Scott argues, is an “artificial construct of the FCC’s rules themselves” that “does not correlate to any actual change in the ability of the public to receive the station’s signal.”⁸ According to Great Scott, the policy underlying the Class B protection rules—to support adequate service to larger urban areas—is irrelevant in the rural area served by the Station, where the “paramount objective for WZBH is to aggregate and serve the largest potential audience from the many small communities in its listening area.”⁹ Finally, Great Scott questions the overall continued viability of using different protected contours for Class B1 and Class B stations. It suggests that, because the Commission has in the past considered a unitary 60 dB μ contour protection rule for Section 73.215, waiver of these requirements “should be a fairly low bar.”¹⁰

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

³ Application, Exhibit 1, Attachment 30, “Technical Exhibits 26 & 30: Interference and Separation Requirements,” at 4.

⁴ *Id.* at 5.

⁵ *Letter Decision* at 2.

⁶ *Letter Decision* at 3.

⁷ Petition at 2.

⁸ *Id.* at 6.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

existing at the time of the petitioner's last opportunity to present such matters.¹¹ Great Scott has failed to meet this burden.

In the Petition, Great Scott relies on the same facts and arguments that it advanced in the Application. These arguments were addressed and disposed of in the *Letter Decision*, which expressly rejected Great Scott's argument that waiver was appropriate to allow it to continue service to areas currently within its 57 dBμ protected contour. It is settled Commission policy that petitions for reconsideration are not to be used for the mere re-argument of points previously advanced and rejected.¹² Therefore, we deny the Petition on procedural grounds.

Even if we were to consider the Petition on the merits, Great Scott fails to show any material error in the *Letter Decision*. The Commission's Rules may be waived only for good cause shown.¹³ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"¹⁴ and must support its waiver request with a compelling showing.¹⁵ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.¹⁶

We disagree with Great Scott that there should be a "fairly low bar" for waiver of Section 73.215. Section 73.215 codifies a relief mechanism for applicants in lieu of "complex, time-consuming and litigable" Section 73.207 waiver requests.¹⁷ To this end, Section 73.215 allows applicants to specify sub-standard spacings *provided that certain criteria are met*.¹⁸ If an applicant cannot meet these standards, then Section 73.207 requirements control. Although the Commission has, in the past, expressed concern that the "noise level and multipath interference encountered in urban environments" might affect quality reception at the fringes of a Class B protected service contour, we have expressly declined to reduce the

¹¹ See 47 C.F.R. § 1.106(c),(d). See also *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*, 387 U.S. 967 (1966).

¹² See, e.g., *John F. Garziglia, Esq.*, Letter, 28 FCC Rcd 15738 (MB 2013).

¹³ 47 C.F.R. § 1.3.

¹⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

¹⁵ *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)).

¹⁶ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁷ *Mark N. Lipp, Esq.*, Letter, 28 FCC Rcd 1331, 1333 (MB 2013) (citing *Greater Media Radio Company, Inc.*, 15 FCC Rcd 7090, 7094-95 (1999)).

¹⁸ *1998 Biennial Regulatory Review—Streamlining of the Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Notice of Proposed Rulemaking and Order, 13 FCC Rcd 14849, 14860-61 (1998) (emphasis in original).

protected contour requirements¹⁹ and have specifically concluded that Section 73.215 waivers will only be granted in a “very small number of cases.”²⁰

More importantly, Great Scott fails to identify any special circumstances that would warrant waiver on the present facts. Its situation is not “anomalous.” Beyond its rural location, a circumstance that it shares with many other stations, Great Scott has alleged no facts that distinguish it from any other Class B1 station seeking Section 73.215 processing to upgrade to Class B status. Moreover, we do not find cogent Great Scott’s distinction between rural and urban areas in this context. While acknowledging that the rule was originally intended to maximize coverage of larger urbanized areas, we observe that Great Scott’s stated goal is functionally the same: to maximize coverage of the communities within its listening area. Great Scott’s fundamental objection is that a service contour that complies with the Class B1 standards may not meet Class B service standards, thus requiring the licensee to reduce its signal contour in the relevant direction in order to qualify for Section 73.215 processing. This is not a special circumstance: it is the normal operation of Section 73.215, which imposes different service obligations on Class B stations. If Great Scott wishes to petition for a change in the rule, the appropriate vehicle would be a petition for rulemaking, not a waiver request.

Conclusion/Actions. For the reasons stated above, IT IS ORDERED that the petition for reconsideration filed by Great Scott Broadcasting on July 9, 2010, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁹ *Amendment of Part 73 of the Commission’s Rules to Permit Short-Spaced FM Assignments by Using Directional Antennas*, Report and Order, 4 FCC Rcd 1681, 1687 (1989) (adopting the current levels of protection for Class B and B1 stations, noting that “altering the protected signal levels for Class B and B1 stations in the non-reserved band while maintaining their facilities at current levels could result in some loss of protected coverage area.”)

²⁰ *See, e.g., Mark N. Lipp, Esq.*, Letter, 28 FCC Rcd 1331, 1333 (MB 2013) (rejecting a Section 73.215 waiver request based on lack of population in the overlap area). We have waived Section 73.215 only in certain exceptional circumstances, which are not present here. *See, e.g., R&S Media*, Memorandum Opinion and Order, 19 FCC Rcd 6300 (MB 2004) (exceptional circumstances found where a directional antenna would not eliminate contour overlap and no alternative sites were available); *see also Amendment to Part 73 of the Commission’s Rules to Permit Short-Spaced Station Assignments by Using Directional Antennas*, Memorandum Opinion and Order, 6 FCC Rcd 5356, 5360 n.27 (1991) (waiver of the contour protection requirements under Section 73.215(a) may be appropriate in “a very small number of cases . . . to permit greater power in a short-spaced station’s direction where it is demonstrated that such a facility is necessary to allow use of a multiplexed transmitting antenna and that its authorization would otherwise serve the public interest, for example, by allowing retention of existing service to an underserved area.”).