

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 11-1203  
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BLAKENEY COMMUNICATIONS, INC.,

APPELLANT,

V.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.  
\_\_\_\_\_

ON APPEAL OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
\_\_\_\_\_

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **1. Parties.**

All parties, intervenors, and amici in this case are listed in the Brief of Appellant.

### **2. Rulings under review.**

*Clear Channel Broadcasting Licenses, Inc. For License to Cover Application for Station WRKH(FM), Mobile, Alabama; Blakeney Communications, Inc. For Construction Permit for Modification of Licensed Facilities of Station WBBN(FM), Taylorsville, Mississippi, Memorandum Opinion and Order, 26 FCC Rcd 7153 (2011) (JA 191)*

### **3. Related cases.**

The order on appeal has not previously been before this Court or any other court, and counsel is not aware of any related case before this or any other court.

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
GLOSSARY .....	iv
JURISDICTION .....	1
QUESTION PRESENTED .....	2
STATUTES AND REGULATIONS .....	2
COUNTERSTATEMENT .....	2
I. STATUTORY AND REGULATORY BACKGROUND.....	2
II. FACTUAL BACKGROUND .....	7
A. The Division Decision.....	10
B. The Reconsideration Ruling.....	12
III. THE ORDER ON APPEAL .....	14
SUMMARY OF ARGUMENT .....	17
ARGUMENT .....	18
I. STANDARD OF REVIEW .....	18
II. THE COMMISSION REASONABLY WAIVED CLEAR CHANNEL’S FILING DEADLINE.....	19
A. The Waiver Was Not Arbitrary Or Capricious. ....	19
B. The Waiver Did Not Unlawfully Deprive BCI Of Its Rights.....	24
CONCLUSION .....	30

## TABLE OF AUTHORITIES

### CASES

<i>Ashbacker Radio Corp. v. FCC</i> , 326 U.S. 327 (1945) .....	13
<i>Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.</i> , 419 U.S. 281 (1974).....	18
<i>Florida Inst. of Tech. v. FCC</i> , 952 F.2d 549 (D.C. Cir. 1992).....	28
<i>Hispanic Info. &amp; Telecomm. Network, Inc. v. FCC</i> , 865 F.2d 1289 (D.C. Cir. 1989) .....	28
* <i>Keller Commc 'ns, Inc. v. FCC</i> , 130 F.3d 1073 (D.C. Cir. 1997).....	19, 22
* <i>Mass Communicators, Inc. v. FCC</i> , 266 F.2d 681 (D.C. Cir. 1959).....	27
<i>Maxcell Telecom Plus, Inc. v. FCC</i> , 815 F.2d 1551 (D.C. Cir. 1987).....	29
<i>NetworkIP, LLC v. FCC</i> , 548 F.3d 116 (D.C. Cir. 2008).....	19, 23
<i>Northeast Cellular Tel. Co. v. FCC</i> , 897 F.2d 1164 (D.C. Cir. 1990).....	19, 20, 23
* <i>Star Wireless LCC v. FCC</i> , 522 F.3d 469 (D.C. Cir. 2008).....	26
<i>WAIT Radio v. FCC</i> , 418 F.2d 1153 (D.C. Cir. 1969).....	3, 19, 22

### ADMINISTRATIVE DECISIONS

<i>1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Report and Order</i> , 13 FCC Rcd 23056 (1998) .....	21
---	----

<i>1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules, Second Report and Order, 15 FCC Rcd 21649 (2000) .....</i>	<i>4, 5</i>
<i>WKLC, Inc., 26 FCC Rcd 11001 (MB 2011).....</i>	<i>22</i>

## **STATUTES AND REGULATIONS**

47 C.F. R. § 73.3598(a) .....	3
* 47 C.F.R. § 1.3 .....	3, 19
47 C.F.R. § 73.1620(a)(1) .....	8
47 C.F.R. § 73.207 .....	4
47 C.F.R. § 73.211 .....	3
47 C.F.R. § 73.211(a)(2) .....	5
47 C.F.R. § 73.211(d).....	5
47 C.F.R. § 73.3573(f) .....	26
47 C.F.R. § 73.3573(f)(1).....	26
47 C.F.R. § 73.3573, Note 4.....	6, 15, 25
47 C.F.R. § 73.3598(e).....	3, 20
47 U.S.C. § 301 .....	2
47 U.S.C. § 307 .....	2
47 U.S.C. § 309 .....	2
47 U.S.C. § 319(a).....	2
47 U.S.C. § 319(b).....	3
47 U.S.C. § 402(b).....	1
5 U.S.C. § 706(2)(a) .....	18

*\* Cases and other authorities principally relied upon are marked with asterisks.*

## GLOSSARY

<i>Ashbacker</i>	<i>Ashbacker Radio Corp. v. FCC</i> , 326 U.S. 327 (1945)
BCI	Blakeney Communications, Inc.
Clear Channel	Clear Channel Broadcasting Licenses, Inc. and CCL Licenses, LLC, as licensee of station WRKH(FM), Mobile, Alabama
Commission or FCC	Federal Communications Commission
Division	Audio Services Division, Media Bureau, Federal Communications Commission
<i>Division Letter</i>	<i>Clear Channel Broadcasting Licenses, Inc.</i> , Letter, 21 FCC Rcd 8677 (2006) (JA 122)
<i>Order</i>	<i>Clear Channel Broadcasting Licenses, Inc. For License to Cover Application for WRKH(FM), Mobile, Alabama; Blakeney Communications, Inc. For Construction Permit for Modification of Licensed Facilities of Station WBBN(FM), Taylorsville, Mississippi</i> , Memorandum Opinion and Order, 26 FCC Rcd 7153 (2011) (JA 191)
<i>Reconsideration Ruling</i>	<i>WRKH(FM), Mobile, Alabama</i> , Letter, 23 FCC Rcd 4526 (2008) (JA 152)
<i>Streamlining Order</i>	<i>1998 Biennial Regulatory Review – Streamlining Technical Rules in Parts 73 and 74 of the Commission’s Rules</i> , Second Report and Order, 15 FCC Rcd 21649 (2000)

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BRIEF FOR APPELLEE

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**JURISDICTION**

The Federal Communications Commission order that is the subject of this appeal<sup>1</sup> was released on May 6, 2011. The notice of appeal was timely filed on June 3, 2011. The Court has jurisdiction under 47 U.S.C. § 402(b).

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<sup>1</sup> *Clear Channel Broadcasting Licenses, Inc. For License to Cover Application for Station WRKH(FM), Mobile, Alabama; Blakeney Communications, Inc. For Construction Permit for Modification of Licensed Facilities of Station WBBN(FM), Taylorsville, Mississippi, Memorandum Opinion and Order*, 26 FCC Rcd 7153 (2011) (“*Order*”) (JA 191).

## **QUESTION PRESENTED**

This appeal arises from the acceptance and grant of an application for a revised license to cover the authorized modification of an existing radio station's facilities. The question presented is:

Whether the Commission lawfully exercised its discretion to waive the filing deadline for an FM radio station that had completed construction of an upgrade, but had filed its license application two days late.

## **STATUTES AND REGULATIONS**

The pertinent statutory provisions and regulations are set forth in the addendum to this brief.

## **COUNTERSTATEMENT**

### **I. STATUTORY AND REGULATORY BACKGROUND**

The Federal Communications Commission ("FCC" or "Commission") is charged with licensing radio stations under the Communications Act of 1934. *See, e.g.*, 47 U.S.C. § 301. Station licenses and construction permits are granted on written application, if the Commission determines that "the public interest, convenience, and necessity will be served" thereby. 47 U.S.C. §§ 307-309.

Section 319(a) of the Communications Act provides that "[n]o license shall be issued . . . for the operation of any station unless a permit for its construction has been granted by the Commission." 47 U.S.C. § 319(a).



Section 319(b) specifies that such construction permits “shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.” 47 U.S.C. § 319(b).

The Commission’s rules provide generally that construction permits to make changes in existing radio or TV stations “shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed.” 47 C.F.R. § 73.3598(a). Section 73.3598(e) of the Commission’s implementing rules makes clear that “[a]ny construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.” 47 C.F.R. § 73.3598(e).

Any provision of the Commission’s rules “may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” 47 C.F.R. § 1.3. *See generally WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

There are three general classes of commercial FM radio stations – Class A, Class B, and Class C. *See* 47 C.F.R. § 73.211. The Commission’s

licensing rules specify minimum and maximum antenna height and power for each class of station. The protection that each FM station receives and must provide to other stations operating on co- and adjacent channels is based on station class. The Commission's minimum distance separation requirements (which protect stations from interference caused by the signals of other stations) are greatest from Class C stations because such stations may be authorized to operate at the highest effective radiated power (100 kilowatts) and greatest antenna height above average terrain ("HAAT") (600 meters). *See* 47 C.F.R. § 73.207. Thus, Class C stations have the largest service areas of all FM stations and greatest potential to cause interference to other stations operating on the same and nearby frequencies.

In 2000, the Commission revised its rules to allow for more efficient utilization of the FM radio band by Class C commercial FM stations, because, at the time, approximately half of such stations operated antennas with HAATs of between only 300 and 450 meters. *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 21649, 21655 ¶ 15 (2000) ("*Streamlining Order*"). To avoid the imposition of unnecessary minimum distance requirements for Class C stations that are not operating at the maximum HAAT, the Commission "create[d] an intermediate Class C0

(C zero) between Classes C and C1 with a maximum antenna HAAT of 450 meters.” *Id.* at 21656 (¶ 15).<sup>2</sup>

The Commission also determined that existing Class C stations authorized to operate with facilities less than “the new Class C antenna HAAT minimum of 451 meters,” could continue to do so but their licenses would be subject to reclassification under the process set forth in Note 4 to Section 73.3573 of the Commission’s rules. *See ibid.*; *see also* 47 C.F.R. § 73.211(d) (“Class C stations authorized . . . that do not meet the minimum antenna HAAT . . . for Class C stations may continue to operate as authorized subject to the reclassification procedures set forth in Note 4 to § 73.3573.”). Significantly, the reclassification process is initiated only if “triggered” by a conflicting application – one the does not meet the minimum distance separation requirements for Class C stations but would if an affected station were reclassified as a Class C0 station. *Streamlining Order*, 15 FCC Rcd at 21662 (¶ 26).

Specifically, under the Commission’s rules, a Class C FM radio station operating with an antenna at a HAAT of less than 451 meters “is subject to reclassification as a Class C0 station upon the filing of a triggering

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<sup>2</sup> *See* 47 C.F.R. § 73.211(a)(2) (“Class C0 stations must have an antenna . . . (HAAT) of at least 300 meters (984 feet). Class C stations must have an antenna . . . (HAAT) of at least 451 meters (1480 feet).”).

application for [a] construction permit.” 47 C.F.R. § 73.3573, Note 4. If the triggering application is acceptable, then the licensee of the affected Class C station must timely seek authorization from the Commission to modify its facilities in order to maintain its full Class C status. *Ibid.* If the Class C station licensee files “an acceptable construction permit application to increase antenna height to at least 451 meters HAAT,” then upon “grant of such a construction permit application, the triggering application will be dismissed.” *Ibid.*

If, on the other hand, the affected Class C station fails to submit such an application and the triggering application is left unchallenged, “the subject station will be reclassified as a Class C0 station, and processing of the triggering application will be completed.” *Ibid.* (“If the construction is not completed as authorized, the subject Class C station will be reclassified automatically as a Class C0 station.”).

## II. FACTUAL BACKGROUND

WRKH(FM), Mobile, Alabama, is a Class C radio station operated by FCC licensee Clear Channel Broadcasting License, Inc. (“Clear Channel”).<sup>3</sup> Prior to 2002, WRKH(FM) was authorized to operate with less than full Class C facilities. *See Order* ¶ 2 (JA 191).

On December 28, 2001, Blakeney Communications, Inc. (“BCI”), the licensee of station WBBN(FM), Taylorsville, Mississippi, filed an application for a construction permit to upgrade its station from a Class C2 facility to a Class C1 facility and, due to otherwise applicable minimum spacing constraints, requested reclassification of Clear Channel’s WRKH(FM) station from Class C to Class C0. *Clear Channel Broadcasting Licenses, Inc.*, Letter, 21 FCC Rcd 8677, 8678 n.8 (2006) (“*Division Letter*”) (JA 123).

In response to BCI’s triggering application, Clear Channel filed an application on February 26, 2002 to upgrade WRKH(FM)’s facilities to maintain Class C status by increasing its antenna height to 535 meters. *Division Letter*, 21 FCC Rcd at 8678 (JA 123); Clear Channel Form 301

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<sup>3</sup> On September 28, 2005, the FCC consented to the assignment of the station WRKH(FM) from Clear Channel Broadcasting License, Inc. to its indirect subsidiary, CC Licenses, LLC, the intervenor in this appeal. The assignment was consummated on September 30, 2005. *Order* n.3 (JA 191). For convenience, we refer to Clear Channel Broadcasting License, Inc. and CC Licenses, LLC as “Clear Channel” throughout this brief.

Application for Construction Permit for Commercial Broadcast Station (JA 11). The FCC granted Clear Channel's application on June 13, 2002. *Order* ¶ 2 (JA 191).<sup>4</sup> The construction permit required Clear Channel to complete construction and to submit a license application for the modified station by June 13, 2005, 3:00 am local time. Clear Channel Construction Permit (JA 14).

Clear Channel completed construction of its facilities upgrade and, on June 12, 2005, it "commenced operation of the modified facilities under program test authority." *Order* ¶ 2 (JA 191-92); *see also* Opp'n to Pet. to Dismiss, Decl. of Randall L. Mullinax ("Mullinax Decl.") at ¶ 2 (JA 76).<sup>5</sup> Three days later, on June 15, Clear Channel filed an application for a license to cover the completed upgrade of WRKH(FM)'s facilities. *Order* ¶ 2 (JA 192); *see* Clear Channel Form 302 Application for FM Broadcast Station License (JA 48).

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<sup>4</sup> BCI's triggering application was dismissed on June 14, 2002. *Division Letter*, 21 FCC Rcd at 8678 n.8 (JA ).

<sup>5</sup> Commission rules provide that upon completion of construction, "[t]he permittee of a nondirectional . . . FM station . . . may begin program tests upon notification to the FCC in Washington, DC provided that within 10 days thereafter, an application for a license is filed with the FCC in Washington, DC." 47 C.F.R. § 73.1620(a)(1).

The day after Clear Channel commenced operation, on June 13, BCI filed an application for a construction permit to modify the facilities of station WBBN(FM) that conflicted with the operation of WRKH(FM) as a Class C station, and would have required WRKH(FM)'s reclassification as a Class C0 station. *Order* ¶ 2 (JA 192); *see* BCI Form 301 Application for Construction Permit for Commercial Broadcast Station License (JA 31).

On June 24, 2005, BCI petitioned the Audio Division of the FCC's Media Bureau ("Division") to dismiss Clear Channel's application for a revised license for station WRKH(FM). BCI argued that Clear Channel's application was "unacceptable for filing" because it was not submitted until two days after the underlying construction permit had expired pursuant to Section 73.3598(a) of the Commission's rules. *Pet. to Dismiss* at 4 (JA 64); *see Division Letter*, 21 FCC Rcd at 8678 (JA 123).

In opposition to the petition to dismiss, Clear Channel argued that its filing on June 15 was neither untimely nor violated the Commission's rules because, "pursuant to Section 73.1620(a)(1) . . . , a permittee has 10 days after it has begun program tests within which to file an application for license" – which, in Clear Channel's case, was within ten days of June 12. *Id.* at 8679 (JA 124). In addition, Clear Channel contended, BCI's interpretation of the Commission's timely-filing rules was "inconsistent with

the Commission's practice to routinely to grant license to cover applications that are filed following the construction permit deadline when construction was completed on time." Opp'n to Pet. to Dismiss at 7 (JA 73).<sup>6</sup> Clear Channel also explained that it had "incurred a substantial financial obligation" to upgrade its facilities, and that the operation of its upgraded facilities serves to "improve service to the public." *Ibid.* (JA 73). *See also* Mullinax Decl., ¶¶ 5, 6 (JA 76) (explaining that WRKH(FM)'s larger antenna would increase the population of listeners by over 120,000, and that Clear Channel had "incurred over \$40,000 in expenses" in upgrading its facility).

#### **A. The Division Decision.**

On July 31, 2006, the Division disposed of BCI's petition to dismiss Clear Channel's license. *Division Letter*, 21 FCC Rcd 8677 (JA 122).

At the outset, the Division disagreed with Clear Channel's reliance on the Commission's program test authority rules "to calculate the deadline for filing an application for license." *Division Letter*, 21 FCC Rcd at 8680 (JA

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<sup>6</sup> In doing so, Clear Channel cited the following Commission cases: Station WJUN(AM), Mexico, PA (construction permit expired Jan. 23, 2005; covering license filed Jan. 25, 2005; license granted May 18, 2005); KVLH(AM), Pauls Valley, OK (construction permit expired Feb. 13, 2005; covering license application filed Feb. 28, 2005; covering license granted June 1, 2005); WJEH-AM, Gallipolis, OH (construction permit expired Sept. 10, 2004, covering license application filed Oct. 12, 2004; covering license granted March 7, 2005). Opp'n to Pet. to Dismiss at 7 n.11 (JA 73).



125). As the Division explained, “Section 73.1620 specifically concerns the maximum time which may elapse between the commencement of program tests and the filing of a license application,” which is “a wholly distinct filing issue” from that under Section 73.3598(a) of the Commission’s rules, which “requires the filing of a license application within the three-year construction period.” *Ibid.* (JA 125).

The Division went on to note, however, that in “several instances” it had “granted license applications filed after the permit expiration date, provided that the permittee has demonstrated timely construction in accordance with the terms of the permit.” *Id.* at 8680-81 (JA 125-26). In this case, the Division found, even though Clear Channel “did not tender a license prior to the expiration” of its construction permit, it had “demonstrated that it completed physical construction of Station WRKH(FM)’s facilities prior to the permit’s expiration.” *Id.* at 8681 (JA 126). Thus, although Clear Channel did not file its license application within the three-year period for construction specified in Section 73.3598(a) of the Commission’s rules, the Division determined that it should “waive the automatic forfeiture provision in Section 73.3598(e) on our own motion and accept [Clear Channel]’s license application.” *Ibid.* (JA 126).

The Division's waiver decision "[took] into account all of the circumstances in this case, including the fact that the facility was fully constructed by the expiration date and that the delay in filing the license application amounted to only two days." *Ibid.* (JA 126). Moreover, the Division stated, "if waiver were not granted, [Clear Channel] would be required to repeat the . . . [application] filing process" which "would [place] an unnecessary burden on public and private resources" and "would delay the public service benefits associated with the modification of WRKH(FM)'s facilities." *Ibid.* (JA 126). Nonetheless, the Division "admonish[ed]" Clear Channel for its late filing, concluding that such a sanction was "sufficient to redress [Clear Channel]'s failure to timely file the application." *Ibid.* (JA 126).

**B. The Reconsideration Ruling.**

On August 30, 2006, BCI filed a petition for reconsideration of the Division's waiver of the filing deadline and subsequent grant of the covering license application. Among other things, BCI argued that reconsideration was warranted because there was "'confusion' about the time of day WRKH(FM) began operating pursuant to program test authority," and suggested that Clear Channel "did not begin program tests before the permit

expired.” *WRKH(FM), Mobile, Alabama*, Letter, 23 FCC Rcd 4526, 4528 (2008) (“*Reconsideration Ruling*”) (JA 154).

In a ruling issued on March 18, 2008, the Division found that BCI’s arguments were “procedurally defective” (because BCI had the opportunity to raise those arguments earlier but failed to do so), and in any event were “without merit.” *Ibid.* (JA 154). Specifically, the Division found that the sworn statements by WRKH(FM)’s engineer “that he activated WRKH(FM) pursuant to program tests at approximately 9:30 p.m. the day before its construction permit expired . . . significantly outweigh[ed] BCI’s bare conjecture” to the contrary. *Id.* at 4529 (JA 155).

The Division also rejected BCI’s arguments that it had erred in waiving its rules to accept Clear Channel’s license application, finding the waiver to be “consistent with precedent and well within the Division’s delegated authority.” *Id.* at 4530 (JA 156). Finally, the Division rejected BCI’s contention that the *Ashbacker* doctrine,<sup>7</sup> under which certain conflicting broadcast license applications are entitled to comparative hearing, “mandate[d] comparative evaluation of BCI’s upgrade application against the WRKH(FM) license application.” *Id.* at 4530-31 (JA 156-57).

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<sup>7</sup> See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

### III. THE ORDER ON APPEAL

On April 17, 2008, BCI filed an application for review by the Commission of the *Reconsideration Ruling*. In an order released on May 6, 2011, the Commission denied review and affirmed the *Reconsideration Ruling*. *Order* ¶ 8 (JA 194).

The Commission explained that the case presented “the narrow issue of how the staff should process a late-filed covering license application for facilities fully completed by the construction deadline.” *Id.* ¶ 9 (JA 194). The Commission noted that the “staff practice has been to waive relatively minor filing deadline violations, so long as the applicant can demonstrate that construction was, in fact, completed in a timely manner.” *Ibid.* (JA 194).

In this case, the Commission found, WRKH(FM)’s modified facilities already were “constructed and operating at the time the Construction Permit expired,” thus Clear Channel’s conduct satisfied the policy underlying Section 73.3598 that construction and commencement of operation be completed within three years of the grant of a construction permit. *Id.* ¶ 10 (JA 195). “In these circumstances,” the Commission concluded, where Clear Channel’s license application was filed only two days after the deadline, “we find that a waiver does not undermine Section 73.3598’s purpose.” *Id.* ¶¶ 10, 11 (JA 195). In determining that “the [Division]’s action was proper,” the

Commission reaffirmed “the staff’s practice of waiving Section 73.3598(e) of the Rules” only in those situations where “the applicant conclusively demonstrates that it completed construction prior to the expiration of the construction period, notwithstanding the tardy filing of the license to cover application.” *Id.* ¶ 11 (JA 195). The Commission also upheld the “[Division] action admonishing [Clear Channel] for its two-day tardiness in filing the License Application,” as consistent with the “‘strict completion’ policy which underlies Section 73.3598(e).” *Ibid.* (JA 195).

The Commission considered and rejected each of BCI’s arguments for review of the *Reconsideration Ruling*. The Commission found that Note 4 to Section 73.3573 of the Commission’s rules provides for reclassification of a Class C station to a Class C0 station only “[i]f construction is not completed as authorized.” *Id.* ¶ 12 (JA 195) (*quoting* 47 C.F.R. § 73.3573, Note 4). The Commission further found that BCI “has proffered no credible evidence” that station WRKH(FM)’s “modified facilities were not ‘completed’ as authorized.” *Ibid.* (JA 195). Conversely, the Commission explained, Clear Channel had submitted “sworn declarations that the Station’s engineer initiated program tests” of the modified facilities “prior to the construction deadline.” *Ibid.* (JA 195). Therefore, the Commission concluded, “Note 4 is not applicable to the facts of this case, and a waiver of Note 4 is

unnecessary,” *id.* ¶ 12 (JA 195), “because construction was, in fact, ‘completed as authorized.’” *Id.* ¶ 12 n.34 (JA 195).

The Commission also rejected BCI’s argument that, under *Ashbacker*, the Division could not properly have granted Clear Channel’s covering license application without first considering BCI’s application to upgrade station WBBN(FM). *See id.* ¶¶ 13-14 (JA 195-96). The agency explained that “*Ashbacker* has never been held to prevent the Commission from establishing threshold criteria that determine whether an application is entitled to comparative consideration.” *Id.* ¶ 13 (JA 196). In this case, the Commission found that Clear Channel’s filing of an application for a permit to upgrade station WRKH(FM) terminated the right of any subsequent applicant – including BCI – to seek a construction permit that did not meet the minimum spacing requirements that protect a Class C station from interference. *Ibid.* (JA 196). BCI’s upgrade application accordingly “was not acceptable under Section 73.3573(f) of the Rules,” which “provides that only that the ‘first *acceptable* [minor modification] application cuts off the rights of subsequent applicants.” *Id.* ¶ 14 & n.40 (JA 196) (emphasis added in original) (citation omitted).

In sum, the Commission concluded that (1) acceptance of Clear Channel’s late-filed license application “conforms with long-standing

application processing and waiver policies,” (2) the station’s upgraded facilities “were completed as authorized,” (3) the late filing was “*de minimis*,” and (4) and a waiver serves “the policies underlying” Section 73.3598 of the FCC’s rules. *Id.* ¶ 15 (JA 196). Thus, a waiver was consistent with the public interest.

### SUMMARY OF ARGUMENT

The Commission acted within its discretion in waiving Section 73.3598(e) of its rules for good cause shown. The waiver here served the policy underlying that rule – to promote construction and operation of FM stations within the applicable three-year period – because Clear Channel in fact had completed construction and had commenced operation under the Commission’s grant of program test authority within that period. The Commission reasonably concluded that Clear Channel’s failure to meet the deadline for *filing* the accompanying application form – a deadline it missed by only two days – should not be fatal under the circumstances. Having made a substantial investment in completing construction of facilities that would better serve the local community, grant of a waiver – in the face of a *de minimis* failure to meet a filing deadline – was in the public interest. And, in affirming the Division’s grant of a waiver, the Commission sufficiently explained the special circumstances justifying a departure from a strict

application of its rule, and why such an outcome would serve the public interest.

The Commission's waiver action had no impact on the application for a construction permit BCI filed two days before Clear Channel's filing of its application for a license to cover its modified station. BCI's construction permit application was unacceptable for filing under the Commission's licensing rules because it interfered with WRKH(FM)'s duly authorized – and currently operating – Class C facilities.

Because the Commission's waiver action was a reasonable exercise of its discretion, the *Order* should be affirmed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Under the Administrative Procedure Act, this Court must uphold federal agency action so long as it is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a). The scope of review “is a narrow one”; the Court “is not empowered to substitute its judgment for that of the agency” but instead may determine only whether the agency has “articulate[d] a rational connection between the facts found and the choice made.” *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (internal quotation marks and citations



omitted). Moreover, courts must afford “deference . . . to an agency’s decision whether to waive one of its own procedural rules.” *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

## **II. THE COMMISSION REASONABLY WAIVED CLEAR CHANNEL’S FILING DEADLINE.**

### **A. The Waiver Was Not Arbitrary Or Capricious.**

The FCC’s rules expressly provide that the Commission may “on its own motion” waive any provision of its rules “if good cause therefor is shown.” 47 C.F.R. § 1.3. And this Court has long recognized that “[t]he FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.” *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d at 1159). Indeed, an “agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.” *WAIT Radio*, 418 F.2d at 1157. *Accord Keller Commc’ns, Inc. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997). An agency’s waiver authority allows it to “take into account considerations of hardship, equity, or more effective implementation of overall policy.” *WAIT Radio*, 418 F.2d at 1159.

To be sure, in granting a waiver the Commission must explain its reasons – it must identify the “special circumstances” that warrant a deviation from the general rule, and explain why “such deviation will serve the public interest.” *Northeast Cellular*, 897 F.2d at 1166. The Commission did so here.

Section 73.3598(e) of the Commission’s rules provides that “[a]ny construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.” 47 C.F.R. § 73.3598(e). The Commission expressly found that Clear Channel had completed construction of WKRH’s facilities prior to the expiration of its construction permit – an outcome consistent with the fundamental policy underlying Section 73.3598. *See Order* ¶ 2 (JA 191-92) (“On Sunday, June 12, 2005 – the day prior to the expiration of the Construction Permit – [Clear Channel] commenced operation of the modified facilities under program test authority.”). BCI does not challenge that finding on appeal.<sup>8</sup>

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<sup>8</sup> BCI vaguely alludes to its claims below that there were “discrepancies in the documentation” that accompanied the statement of Clear Channel’s engineer (BCI Br. 28), but it does not dispute that the Commission’s factual findings were supported by substantial evidence.

As the Commission explained, because WRKH(FM)’s “modified facilities were constructed and operating at the time the Construction Permit expired,” Clear Channel satisfied the purpose of Rule 73.3598 to ensure that station construction and operation occur within the three-year term of the construction permit. *Order* ¶ 10 (JA 195).<sup>9</sup> In addition, as the Commission observed, because the required application form was filed only two days late, the nature of the filing-rule violation was “*de minimis*.” *Id.* ¶ 15 (JA 196).

The waiver in Clear Channel’s case also was consistent with the staff’s practice – which the Commission expressly affirmed – of accepting late-filed covering license applications only in those situations “where the applicant conclusively demonstrates that it *completed construction* prior to the

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<sup>9</sup> See also *Reconsideration Ruling*, 23 FCC Rcd at 4529-30 (Section 73.3598’s “automatic forfeiture provision was adopted for a singular and narrow purpose: conservation of Commission staff resources previously devoted to the unnecessary task of cancelling expired permits and so notifying the former permittees[;]. . . [there’s] nothing in the *Streamlining Order* [adopting the rule] which suggests that the Commission intended to apply Section 73.3598(e) to permittees already operating pursuant to program test authority”)(JA 155-56), citing *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Report and Order, 13 FCC Rcd 23056, 23087-88 (¶¶ 77-80) (1998).

expiration of the construction period, notwithstanding the tardy filing of the license to cover application.” *Id.* ¶ 11 (JA 195) (emphasis added).<sup>10</sup>

Finally, the Commission reasonably concluded that the equities and the public interest weigh in Clear Channel’s favor. *See WAIT Radio*, 418 F.2d at 1159. The record shows that Clear Channel incurred “over \$40,000 in expenses” in modifying its facilities to maintain its Class C status, and that those modifications increased the population to be served “from 619,185 to 731,224 persons” – an increase of “almost 20 percent.” Mullinax Decl., ¶¶ 5, 6 (JA 76). As the Division explained, the failure to grant Clear Channel a waiver “would delay the public service benefits associated with the modification of WRKH(FM)’s facilities.” *Division Letter*, 21 FCC Rcd at 8681 (JA 126); *see also Order* ¶ 11 (JA 195) (affirming the Division’s action). Such financial and public interest considerations support the Commission’s decision to waive Section 73.3598(e) under the circumstances of this case. *See Keller Commc’ns*, 130 F.3d at 1077 (affirming Commission

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<sup>10</sup> Thus, Commission staff granted, for example, the 2005 license application of Station WJUN(FM), Mexico, PA, even though the application was filed two days after its construction permit had expired. *See Division Letter*, 21 FCC Rcd at 8679 n.17 (JA 124). In contrast, in *WKLC, Inc.*, 26 FCC Rcd 11001, 11005 (¶ 6) (MB 2011) (cited at BCI Br. 22-23), the Commission denied a waiver when the station did not file its covering license application “until nearly four years after the construction permit’s expiration.”

rule waiver to uphold grant of radio license in view of public safety benefits and municipal licensee's expenditure of "thousands of dollars" in reliance).

*NetworkIP*, in which this Court reversed a Commission waiver of procedural rules applicable to the filing of a formal complaint under Section 415(b) of the Communications Act (*see* BCI Br. 22, 27), presented a very different situation from the one before the Commission here. Unlike this case, the Commission's waiver in *NetworkIP* was not justified by any special circumstances other than mere "procrastination plus the universal tendency for things to go wrong . . . at the worst possible moment." *Ibid.* 548 F.3d at 128. Nor was there any "indication" that "the FCC's practice" was to accept late-filed complaints. *Ibid.* Here, by contrast, the Commission explained that the waiver served the rule's overarching purpose to promote construction of upgraded FM station facilities, and was consistent with the staff's practice of waiving the filing deadline in like circumstances. *Order* ¶¶ 10-11 (JA 195).<sup>11</sup>

Finally, BCI is wrong that, through the waiver in Clear Channel's case, the Commission "has effectively written [the] obligation" to file a covering license application within the three-year construction period "out of [its]

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<sup>11</sup> The situation presented here is also very different from that in *Northeast Cellular* (cited BCI Br. at 16), where the Court found that the Commission had failed to "articulate any standard" by which it could "determine the policy underlying the waiver." 897 F.2d at 1166-67.

rules.” *See* BCI Br. 17. As the Commission held, a denial of a waiver to Clear Channel under the circumstances would not serve the public interest. *Order*, ¶¶ 9-15 (JA 194-96). Moreover, Clear Channel was admonished for the late filing and warned to use care to ensure future compliance. *See Order* ¶ 11 (JA 195). As the Commission and its staff found, the admonishment was “sufficient to redress CCBL’s failure to timely file the application” (*Division Letter*, 21 FCC Rcd at 8681 (JA 126)), and also properly “recognize[d] the ‘strict completion’ policy which underlies Section 73.3598(e).” *Order* ¶ 11 (JA 195).

BCI “does not dispute that agencies are entitled to a fair measure of deference in determining when and how to waive their rules and deadlines.” BCI Br. 38. The Commission’s waiver decision is entitled to deference here.

**B. The Waiver Did Not Unlawfully Deprive BCI Of Its Rights.**

BCI contends that the Commission’s waiver grant to Clear Channel nonetheless improperly deprived BCI of “procedural protections” that would have required the Commission to have considered BCI’s upgrade application for a construction permit. BCI Br. 30-37.

First, BCI contends that the waiver deprived it of rights under the Commission Class C radio station reclassification rules, because, according to BCI, Clear Channel’s untimely filing should have resulted “in the automatic

forfeiture of Clear Channel's permit and reclassification of its channel." BCI Br. 30-31. But as the Commission explained, its rules provide for reclassification of a Class C station to a Class C0 station only "[i]f construction is *not* completed as authorized." *Order* ¶ 12 (JA 195) (citing 47 C.F.R. 73.3573, Note 4) (emphasis added).<sup>12</sup> Here, as the Commission found, Clear Channel completed its station modification within the three year period provided by its construction permit, thus its construction was "completed as authorized," 47 C.F.R. 73.3573, Note 4. *See Order* ¶ 12 & n.34 (JA 195) (finding that a waiver of Note 4 was therefore unnecessary).

BCI argues that "even if Clear Channel did complete installation of its equipment" in a timely fashion, it did not complete construction "as authorized" within the meaning of Note 4 because it had failed to submit its covering license application prior to the construction permit's expiration. BCI Br. 31 n.13. BCI's reading ignores Note 4's specification that it is "construction" that must be authorized. Because Clear Channel completed modification of its facilities before its construction permit expired, the construction was "authorized," and Note 4 did not trigger reclassification simply because its covering license application was filed two days late.

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<sup>12</sup> Note 4 to Section 73.3573 provides in relevant part: "If the construction is not completed as authorized, the subject Class C station will be reclassified automatically as a Class C0 station."

*Order* ¶ 12 & n.34 (JA 195). Because, at a minimum, the Commission’s reading of its own rule is not “plainly erroneous or inconsistent with the regulation,” the Commission’s interpretation is “entitled to controlling weight.” *Star Wireless LCC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008) (internal quotation marks and citation omitted).

Second, relying on section 73.3573(f) of the Commission’s rules, 47 C.F.R. § 73.3573(f), BCI contends that, because it involved a minor modification, its June 13 application “should have been immune to” Clear Channel’s late-filed covering application, which was submitted on June 15. BCI Br. 32. But section 73.3573(f) provides only that the first “acceptable” minor modification application “cut[s] off the filing rights of subsequent applicants.” 47 C.F.R. § 73.3573(f)(1). Here, BCI’s application was not acceptable because it conflicted with WRKH(FM)’s upgrade application, filed three years earlier, and which established Clear Channel’s right to cut



off applications that conflicted with station WRKH's operation as a Class C station. *Order* ¶ 13 (JA 195-96).<sup>13</sup>

Third, and relatedly, BCI contends that its application was entitled to comparative consideration with "Clear Channel's mutually exclusive covering license application" (BCI Br. at 37(footnote omitted)) under the doctrine of *Ashbacker* (holding that where two parties' license applications are mutually exclusive, the grant of one application without first considering the second application violates the due process rights of the second applicant).

*Ashbacker* has no relevance in this case. As the Commission explained, "the *Ashbacker* doctrine has never been applied to a Section 319(b) application" because the frequency is not available to a competing applicant. *Order* ¶ 14 (JA 196), citing *Mass Communicators, Inc. v. FCC*, 266 F.2d 681, 684-85 (D.C. Cir. 1959); see also *id.* ("a Form 301 application

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<sup>13</sup> BCI contends that commencement of station WRKH(FM)'s operations pursuant to program test authority on June 12, 2005 was not "authorized" (BCI Br. 12 & n.7), because "program test operation is to be commenced 'upon notification to the FCC in Washington.'" BCI Br. 28-29. However, the Commission did not rely on Clear Channel's operation of the modified station pursuant to program test authority, but instead found that, under the Commission's first-come/first served processing rule, Clear Channel's minor modification application to upgrade station WRKH(FM) – filed in response to BCI's triggering application for a minor modification to station WBBN(FM) – was the "first acceptable" application. See *Order* ¶ 14 (JA 196).

for a construction permit has never been allowed a comparative hearing with a Form 701 application for an extension of time to complete construction”) (JA 196). The Commission found that “the same principle applies to [covering] license applications filed pursuant to Section 319(c) of the Act.” *Ibid.* (JA 196).

The Commission further explained that *Ashbacker* does not preclude the Commission from establishing a “cut-off application processing policy under which a prior-filed application may ‘cut-off’ the right of a subsequently filed application to comparative consideration.” *Order* ¶ 13 (JA 195-96). *See Florida Inst. of Tech. v. FCC*, 952 F.2d 549, 550 (D.C. Cir. 1992). Nor does the doctrine “prevent the Commission from establishing threshold criteria [to] determine whether an application is entitled to comparative consideration.” *Order* ¶ 13 (JA 196). *See Hispanic Info. & Telecomm. Network, Inc. v. FCC*, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (*Ashbacker* “does not preclude the FCC from establishing threshold standards to identify qualified applicants and excluding those applicants who plainly fail to meet the standards.”).

Regardless of the Commission’s waiver of Section 73.3598(e) to accept the late-filed covering license application, on the day the construction permit expired, Clear Channel retained all the rights of a Class C station—including the right to file an application for a construction permit for full

Class C facilities. *See Division Letter*, 21 FCC Rcd at 8681 (JA 126) (in the absence of a waiver of Section 73.3598(e), “[Clear Channel] would be required to repeat the Forms 301 and 302 filing process”). *Ashbacker* therefore “simply is irrelevant” where, as here, an applicant complains that its application was not considered due to otherwise valid Commission processing rules. *Cf. Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1561 (D.C. Cir. 1987).

\* \* \* \* \*

BCI, which galvanized Clear Channel to upgrade WRKH(FM)’s facilities by filing a triggering application, now seeks to capitalize on Clear Channel’s two-day delay in submitting a covering license application for its modified Class C facilities, and to compel the Commission to entertain BCI’s application for a construction permit that does not meet the minimum distance separation requirements for Class C stations. The public interest plainly did not require that result. Moreover, the Commission sufficiently explained the special circumstances and public interest considerations that underlay its determination that good cause was shown for a waiver of section 73.3598(e) of its rules. The waiver should be upheld.

## CONCLUSION

For the above reasons, the *Order* should be affirmed.

Respectfully submitted,

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November 21, 2011

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLAKENEY COMMUNICATIONS, INC.,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

No. 11-1203

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Appellee” in the captioned case contains 6,051 words.

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January 10, 2012

## STATUTORY APPENDIX

### Communications Act Provision:

47 U.S.C. § 319

### FCC Rules:

47 C.F.R. § 1.3

47 C.F.R. § 73.1620

47 C.F.R. § 73.3573 & NOTE 4

47 C.F.R. § 73.3598

## 47 U.S.C.

### § 319. Construction permits

#### (a) Requirements

No license shall be issued under the authority of this chapter for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

#### (b) Time limitation; forfeiture

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

#### (c) Licenses for operation

Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the

lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of [section 309\(a\)-\(g\)](#) of this title shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.

(d) Government, amateur, or mobile station; waiver

A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. A permit for construction shall not be required for public coast stations, privately owned fixed microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits for any such stations. With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations. With respect to any other station or class of stations, the Commission shall not waive the requirement for a construction permit unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver.



## **47 C.F.R.**

### **§ 1.3 Suspension, amendment, or waiver of rules.**

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

### **§ 73.1620 Program tests.**

(a) Upon completion of construction of an AM, FM, TV or Class A TV station in accordance with the terms of the construction permit, the technical provisions of the application, the rules and regulations and the applicable engineering standards, program tests may be conducted in accordance with the following:

(1) The permittee of a nondirectional AM or FM station, or a nondirectional or directional TV or Class A TV station, may begin program tests upon notification to the FCC in Washington, DC provided that within 10 days thereafter, an application for a license is filed with the FCC in Washington, DC.

(2) The permittee of an FM station with a directional antenna system must file an application for license on FCC Form 302-FM requesting authority to commence program test operations at full power with the FCC in Washington, D.C. This license application must be filed at least 10 days prior to the date on which full power operations are desired to commence. The application for license must contain any exhibits called for by conditions on the construction permit. The staff will review the license application and the request for program test authority and issue a letter notifying the applicant whether full power operation has been approved. Upon filing of the license application and related exhibits, and while awaiting approval of full power operation, the FM permittee may operate the directional antenna at one half (50%) of the authorized effective radiated power. Alternatively, the permittee may continue operation with its existing licensed facilities pending the issuance of program test authority at the full effective radiated power by the staff.

(3) FM licensees replacing a directional antenna pursuant to [§ 73.1690 \(c\)\(2\)](#) without changes which require a construction permit (see [§ 73.1690\(b\)](#)) may

immediately commence program test operations with the new antenna at one half (50%) of the authorized ERP upon installation. If the directional antenna replacement is an EXACT duplicate of the antenna being replaced (i.e., same manufacturer, antenna model number, and measured composite pattern), program tests may commence with the new antenna at the full authorized power upon installation. The licensee must file a modification of license application on FCC Form 302-FM within 10 days of commencing operations with the newly installed antenna, and the license application must contain all of the exhibits required by [§ 73.1690\(c\)\(2\)](#). After review of the modification-of-license application to cover the antenna change, the Commission will issue a letter notifying the applicant whether program test operation at the full authorized power has been approved for the replacement directional antenna.

(4) The permittee of an AM station with a directional antenna system must file an application for license on FCC Form 302-AM requesting program test authority with the FCC in Washington, DC at least ten (10) days prior to the date on which it desires to commence program test operations. The application must provide an AM directional antenna proof of performance, containing the exhibits required by [§ 73.186](#). After review of the application to cover the construction permit, the Commission will issue a letter notifying the applicant whether program test operations may commence. Program test operations may not commence prior to issuance of staff approval.

(5) Except for permits subject to successive license terms, the permittee of an LPFM station may begin program tests upon notification to the FCC in Washington, DC, provided that within 10 days thereafter, an application for license is filed. Program tests may be conducted by a licensee subject to mandatory license terms only during the term specified on such licensee's authorization.

(b) The Commission reserves the right to revoke, suspend, or modify program tests by any station without right of hearing for failure to comply adequately with all terms of the construction permit or the provisions of [§ 73.1690\(c\)](#) for a modification of license application, or in order to resolve instances of interference. The Commission may, at its discretion, also require the filing of a construction permit application to bring the station into compliance the Commission's rules and policies.

(c) Unless sooner suspended or revoked, the program test authority continues valid during FCC consideration of the application for license, and during this period

further extension of the construction permit is not required. Program test authority shall be automatically terminated by final determination upon the application for station license.

(d) All operation under program test authority shall be in strict compliance with the rules governing broadcast stations and in strict accordance with representations made in the application for license pursuant to which the tests were authorized.

(e) Acceptance by the FCC of notification of the station of program tests, or the granting of program test authority by the FCC, is not to be construed by the permittee as approval by the FCC of the application for station license.

(f) The licensee of a UHF TV station which is not in operation on, but assigned to, the same allocated channel which a 1000 watt UHF translator station is authorized to use (see [§ 73.3516](#), "Specification of facilities"), shall notify the licensee of the translator station, in writing, at least 10 days prior to commencing or resuming operation. The TV station licensee shall also certify to the FCC in Washington, DC that such advance notice has been given to the translator station licensee.

(g) Reports required. In their application for a license to cover a construction permit and on the first anniversary of the commencement of program tests, applicants for new broadcast facilities that were granted after designation for a comparative hearing as a result of a post designation settlement or a decision favoring them after comparative consideration must report.

(1) Any deviations from comparative proposals relating to integration of ownership and management and diversification of the media of mass communication contained in their application for a construction permit at the time such application was granted; and

(2) Any deviations from an active/passive ownership structure proposed in their application for a construction permit at the time such application was granted.

(3) The reports referred to in paragraphs (g)(1) and (2) of this section shall not be required in any case in which the order granting the application relieved the applicant of the obligation to adhere to such proposals.

**§ 73.3573 Processing FM broadcast station applications.**

(a) Applications for FM broadcast stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes of authorized stations. A major change in ownership is any change where the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed. In the case of a Class D or an NCE FM reserved band channel station, a major facility change is any change in antenna location which would not continue to provide a 1 mV/m service to some portion of its previously authorized 1 mV/m service area. In the case of a Class D station, a major facility change is any change in community of license or any change in frequency other than to a first-, second-, or third-adjacent channel. A major facility change for a commercial or a noncommercial educational full service FM station, a winning auction bidder, or a tentative selectee authorized or determined under this part is any change in frequency or community of license which is not in accord with its current assignment, except for the following:

(i) A change in community of license which complies with the requirements of paragraph (g) of this section;

(ii) A change to a higher or lower class co-channel, first-, second-, or third-adjacent channel, or intermediate frequency;

(iii) A change to a same-class first-, second-, or third-adjacent channel, or intermediate frequency;

(iv) A channel substitution, subject to the provisions of Section 316 of the Communications Act for involuntary channel substitutions.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(b)(1) The FCC may, after the acceptance of an application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of [§§ 73.3522](#), [73.3580](#) and [1.1111](#) of this chapter pertaining to major changes. Such major modification applications in the non-reserved band will be dismissed as set forth in paragraph (f)(2)(i) of this section.

(2) An amendment to a non-reserved band application which would effect a major change, as defined in paragraph (a)(1) of this section, will not be accepted, except as provided for in paragraph (f)(2)(i) of this section.

(3) A new file number will be assigned to a reserved band application for a new station or for major changes in the facilities of an authorized station, when it is amended so as to effect a major change, as defined in paragraph (a)(1) of this section. Where an amendment to a reserved band application would require a new file number, the applicant will have the opportunity to withdraw the amendment at any time prior to designation for hearing, if applicable; and may be afforded, subject to the discretion of the Administrative Law Judge, an opportunity to withdraw the amendment after designation for hearing.

(c) An application for changes in the facilities of any existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of such licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

(d) If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of an application for FM broadcast facilities, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure given in [§ 73.3593](#) will be followed. In the case of mutually exclusive applications for reserved channels, the procedures in subpart K of this part will be followed. In the case of mutually exclusive applications for unreserved channels, the procedures in subpart I of this part will be followed.

(e) Processing reserved channel FM broadcast station applications.

(1) Applications for minor modifications for reserved channel FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and will be processed on a “first come/first served” basis, with the first acceptable application cutting off the filing rights of subsequent, competing applicants. The FCC will periodically release a Public Notice listing those applications accepted for filing. Conflicting applications received on the same day will be treated as simultaneously filed and mutually exclusive. Conflicting applications received after the filing of the first acceptable application will be grouped, according to filing date, behind the lead

application in the queue. The priority rights of the lead applicant, against all other applicants, are determined by the date of filing, but the filing date for subsequent conflicting applicants only reserves a place in the queue. The right of an applicant in a queue ripens only upon a final determination that the lead applicant is unacceptable and that the queue member is reached and found acceptable. The queue will remain behind the lead applicant until the construction permit is finally granted, at which time the queue dissolves.

(2) The FCC will specify by Public Notice a period for filing reserved channel FM applications for a new station or for major modifications in the facilities of an authorized station. FM reserved channel applications for new facilities or for major modifications will be accepted only during the appropriate filing period or "window." Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(3) Concurrently with the filing of a new or major modification application for a reserved noncommercial educational channel, the applicant shall submit to the FCC's public reference room and to a local public inspection file consistent with [§ 73.3527\(e\)\(2\)](#), supporting documentation of points claimed, as described in the application form.

(4) Timely filed applications for new facilities or for major modifications for reserved FM channels will be processed pursuant to the procedures set forth in subpart K of this part ([§ 73.7000 et seq.](#)) Subsequently, the FCC will release Public Notices identifying: mutually exclusive groups of applications; applications selected pursuant to the fair distribution procedures set forth in [§ 73.7002](#); applications received during the window filing period which are found to be non-mutually exclusive; tentative selectees determined pursuant to the point system procedures set forth in [§ 73.7003](#); and acceptable applications. The Public Notices will also announce: additional procedures to be followed for certain groups of applications; deadlines for filing additional information; and dates by which petitions to deny must be filed in accordance with the provisions of [§ 73.3584](#). If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the application, it will be granted. If an application is determined unacceptable for filing, the application will be returned, and subject to the amendment requirements of [§ 73.3522](#).



(f) Processing non-reserved FM broadcast station applications.

(1) Applications for minor modifications for non-reserved FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. Processing of these applications will be on a “first come/first serve” basis with the first acceptable application cutting off the filing rights of subsequent applicants. All applications received on the same day will be treated as simultaneously tendered and, if they are found to be mutually exclusive, must be resolved through settlement or technical amendment. Applications received after the tender of a lead application will be grouped, according to filing date, behind the lead application in a queue. The priority rights of the lead applicant, as against all other applicants, are determined by the date of filing, but the filing date for subsequent applicants for that channel and community only reserves a place in the queue. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves.

(2)(i) The FCC will specify by Public Notice, pursuant to [§ 73.5002\(a\)](#), a period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station. FM applications for new facilities or for major modifications, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in [47 U.S.C. 397\(6\)](#), will be accepted only during the appropriate filing period or “window.” Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(ii) Such FM applicants will be subject to the provisions of [§§ 1.2105](#) and [73.5002](#) regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. FM applicants may submit a set of preferred site coordinates as a supplement to the short-form application. Any specific site indicated by FM applicants will not be studied for technical acceptability, but will be protected from subsequently filed applications as a full-class facility as of the close of the window filing period. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

(iii) FM applicants will be subject to the provisions of [§§ 1.2105](#) and [73.5002\(c\)](#) regarding the modification and dismissal of their short-form applications.

(3) Subsequently, the FCC will release Public Notices:

(i) Identifying the short-form applications received during the window filing period which are found to be mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in [47 U.S.C. 397\(6\)](#), as well as the procedures the FCC will use to resolve the mutually exclusive applications;

(ii) Establishing a date, time and place for an auction;

(iii) Providing information regarding the methodology of competitive bidding to be used in the upcoming auction, bid submission and payment procedures, upfront payment procedures, upfront payment deadlines, minimum opening bid requirements and applicable reserve prices in accordance with the provisions of [§ 73.5002](#);

(iv) Identifying applicants who have submitted timely upfront payments and, thus, are qualified to bid in the auction.

(4) If, after the close of the appropriate window filing period, a non-reserved FM allotment remains vacant, the window remains closed until the FCC, by Public Notice, specifies a subsequent period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station pursuant to paragraph (f)(2)(i) of this section. After the close of the filing window, the FCC will also release a Public Notice identifying the short-form applications which are found to be non-mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in [47 U.S.C. 397\(6\)](#). These non-mutually exclusive applicants will be required to submit the appropriate long-form application within 30 days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of [§ 73.5005\(d\)](#). Non-mutually exclusive applications for commercial broadcast stations will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of [§§ 73.5006](#) and [73.3584](#). Non-mutually exclusive applications for noncommercial educational



broadcast stations, as described in [47 U.S.C. 397\(6\)](#), will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of [§§ 73.7004](#) and [73.3584](#). If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience, and necessity will be served by the granting of the non-mutually exclusive long-form application, it will be granted.

(5)(i) Pursuant to [§ 1.2107](#) of this chapter and [§ 73.5005](#), a winning bidder that meets its down payment obligations in a timely manner must, within 30 days of the release of the public notice announcing the close of the auction, submit the appropriate long-form application for each construction permit for which it was the winning bidder. Long-form applications filed by winning bidders shall include the exhibits identified in [§ 73.5005\(a\)](#).

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to [§ 1.2109\(a\)](#) of this chapter. Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of [§§ 73.5006](#) and [73.3584](#). Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

(iii) All long-form applications will be cut-off as of the date of filing with the FCC and will be protected from subsequently filed long-form applications and rulemaking petitions. Applications will be required to protect all previously filed commercial and noncommercial applications. Winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application or the allotment, the long-form application will be returned pursuant to paragraph (f)(2)(i) of this section.

(g) Applications proposing to change the community of license of an FM station or assignment are considered to be minor modifications under paragraphs (a)(2),

(e)(1), and (f)(1) of this section, and are subject to the following requirements:

- (1) The applicant must attach an exhibit to its application containing information demonstrating that the proposed community of license change constitutes a preferential arrangement of allotments or assignments under Section 307(b) of the Communications Act of 1934, as amended ([47 U.S.C. 307\(b\)](#));
- (2) The facilities specified by the applicant at the proposed community of license must be mutually exclusive, as defined in [§ 73.207](#) or [73.509](#), with the applicant's current facilities or its current assignment, in the case of a winning auction bidder or tentative selectee; and
- (3) Notwithstanding the provisions of [§ 73.3580\(a\)](#), the applicant must comply with the local public notice provisions of [§§ 73.3580\(c\)\(3\)](#), [73.3580\(d\)\(3\)](#), and [73.3580\(f\)](#). The exception contained in [§ 73.3580\(e\)](#) shall not apply to an application proposing to change the community of license of an FM station.
- (4) Non-reserved band applications must demonstrate the existence of a suitable assignment or allotment site that fully complies with [§§ 73.207](#) and [73.315](#) without resort to [§ 73.213](#) or [73.215](#).

. . .

**Note 4 to § 73.3573:** A Class C station operating with antenna height above average terrain (“HAAT”) of less than 451 meters is subject to reclassification as a Class C0 station upon the filing of a triggering application for construction permit that is short-spaced to such a Class C station under § 73.207 but would be fully spaced to such a station considered as a Class C0 assignment. Triggering applications may utilize § 73.215. Triggering applications must certify that no alternative channel is available for the proposed service. Available alternative frequencies are limited to frequencies that the proposed service could use at the specified antenna location in full compliance with the distance separation requirements of § 73.207, without any other changes to the FM Table of Allotments. Copies of a triggering application and related pleadings must be served on the licensee of the affected Class C station. If the staff concludes that a triggering application is acceptable for filing, it will issue an order to show cause why the affected station should not be reclassified as a Class C0 station. The order to show cause will provide the licensee 30 days to express in writing an intention to seek authority to modify the subject station's technical facilities to minimum Class C HAAT or to otherwise challenge the triggering application. If no such

intention is expressed and the triggering application is not challenged, the subject station will be reclassified as a Class C0 station, and processing of the triggering application will be completed. If an intention to modify is expressed, an additional 180-day period will be provided during which the Class C station licensee must file an acceptable construction permit application to increase antenna height to at least 451 meters HAAT. Upon grant of such a construction permit application, the triggering application will be dismissed. Class C station licensees must serve on triggering applicants copies of any FAA submissions related to the application grant process. If the construction is not completed as authorized, the subject Class C station will be reclassified automatically as a Class C0 station. The reclassification procedure also may be initiated through the filing of an original petition for rule making to amend the FM Table of Allotments as set forth in Note 2 to § 1.420(g).

### **§ 73.3598 Period of construction.**

(a) Except as provided in the last two sentences of this paragraph, each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. Except as provided in the last two sentences of this paragraph, each original construction permit for the construction of a new LPFM station shall specify a period of eighteen months from the date of issuance of the construction permit within which construction shall be completed and application for license filed. A LPFM permittee unable to complete construction within the time frame specified in the original construction permit may apply for an eighteen month extension upon a showing of good cause. The LPFM permittee must file for an extension on or before the expiration of the construction deadline specified in the original construction permit. An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license. For purposes of the preceding sentence, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 CFR 121 through 201, at the time the transaction is approved by the FCC, and holds

(1) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit; or

(2) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or

(3) More than 50 percent of the voting power of the corporation that will hold the construction permit if such corporation is a publicly traded company.

(b) The period of construction for an original construction permit shall toll when construction is prevented by the following causes not under the control of the permittee:

(1) Construction is prevented due to an act of God, defined in terms of natural disasters (e.g., floods, tornados, hurricanes, or earthquakes);

(2) The grant of the permit is the subject of administrative or judicial review (i.e., petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission and any judicial appeal of any Commission action thereon), or construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement; or

(3) A request for international coordination, with respect to an original construction permit for a new DTV station, has been sent to Canada or Mexico on behalf of the station and no response from the country affected has been received, or the licensee or permittee is challenging the response from Canada or Mexico on the grounds that the facility as approved would not permit the station to serve the population that is both approved by the Commission and served by the station's TV (analog) facility to be vacated by June 12, 2009.

(c) A permittee must notify the Commission as promptly as possible and, in any event, within 30 days, of any pertinent event covered by paragraph (b) of this section, and provide supporting documentation. All notifications must be filed in triplicate with the Secretary and must be placed in the station's local public file.

(d) A permittee must notify the Commission promptly when a relevant administrative or judicial review is resolved. Tolling resulting from an act of God will automatically cease six months from the date of the notification described in paragraph (c) of this section, unless the permittee submits additional notifications at six month intervals detailing how the act of God continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments.

(e) Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.

**11-1203**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**Blakeney Communications, Inc., Appellant**

**v.**

**Federal Communications Commission, Appellee.**

**CERTIFICATE OF SERVICE**

I, Pamela L. Smith, hereby certify that on January 10, 2012, I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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