

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
Aerco Broadcasting Corporation)	Facility ID No. 573
)	
For License to Cover)	File No. BL-19990406DC
WQBS(AM), San Juan, PR)	

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 2003

Released: November 19, 2003

By the Commission:

1. The Commission has before it an Application for Review, filed February 13, 2003 (“2003 Application for Review”), on behalf of Aerco Broadcasting Corporation (“Aerco”), licensee of station WQBS(AM), San Juan, Puerto Rico. Aerco seeks review of the Media Bureau’s (“Bureau”) January 16, 2003 action dismissing as moot a previous Application for Review filed by Aerco on November 29, 2000 (“2000 Application for Review”).¹ In that prior appeal, Aerco sought Commission review of an October 26, 2000 Bureau action which, *inter alia*, denied reconsideration of the staff’s dismissal of the captioned application for covering license for WQBS as “patently defective.”² At issue is whether the staff properly dismissed the captioned application as deficient without providing an opportunity for the applicant to correct the identified defects. We grant review to consider the arguments raised in Aerco’s 2000 Application for Review and conclude that the staff action dismissing the license application was proper.

2. *2003 Application for Review.* On January 16, 2003, Aerco’s 2000 Application for Review was dismissed as moot because, during its pendency, the staff granted a subsequent application³ (the “WQBS 5 kW Application”) for modification of the WQBS facilities. Aerco thereafter constructed the facilities authorized by that permit and filed a covering license application⁴ which the staff granted on August 8, 2002. The staff held that “these authorized and licensed facilities supersede those sought to be covered by the captioned license application and render moot any attempt to reinstate [that] application.”

3. In its 2003 Application for Review, Aerco argues that (1) the staff was without authority to dismiss the application for review, which must be acted upon by the full Commission; and (2) the 2000 Application for Review was not rendered moot by the grant of the WQBS 5 kW application. Aerco states that the WQBS 5 kW Application was filed to facilitate the grant of a special temporary authorization to permit the station to continue operations following the loss of its previously licensed site.⁵ It argues that the WQBS 5 kW application was not intended to supersede the subject license application.

¹ See Letter in re WQBS(AM), San Juan, Puerto Rico, reference 1800B3-MFW (Med. Bur. Jan. 16, 2003).

² See Letter in re WQBS(AM), San Juan, Puerto Rico, reference 1800B3-HM (M. M. Bur. Oct. 26, 2000).

³ File No. BP-19990930ABG, granted on July 13, 2000.

⁴ File No. BL-20020425ACB.

⁵ Aerco indicates that it was authorized in 1986 to modify the WQBS facilities by relocating to a new transmitter site and increasing daytime power from 5 kW to 9.6 kW. See File No. BP-19841219AB, granted November 24, 1986.

4. We grant Aerco's objection concerning the Bureau's exercise of delegated authority in dismissing its application for review. On review, we find that the staff erroneously determined that grant of the WQBS 5 kW Application mooted the matters at issue on review. We agree with Aerco that the WQBS 5 kW Application was not designed to supplant the facilities covered by the subject license application. Aerco indicates that it still seeks grant of its application authorizing WQBS' 9.6 kW operation.⁶ However, we also conclude that the captioned application is not entitled to reinstatement.

5. *The 2000 Application for Review.* As noted above, in the instant case, the staff issued to Aerco a construction permit to modify the licensed facilities of WQBS by relocating to a new transmitter site and increasing daytime power from 5 kW to 9.6 kW. Aerco completed certain modifications to the WQBS facilities and filed the captioned license application. The staff evaluated the application and identified seven deficiencies,⁷ stating that, "[b]ecause of the serious nature of the . . . deficiencies, we will dismiss the license application as patently defective."⁸ Aerco argues on review that: (1) the staff action dismissing the license application without according the applicant an opportunity to amend was unprecedented; (2) as such, the dismissal of the application was beyond the scope of the staff's delegated authority under then 47 C.F.R. Section 0.283.⁹ Aerco contends that the staff must accept a license application if it is filed on the proper

Installation of the tower, antenna, and ground system was completed in 1998 when the proof of performance measurements were completed. The station then operated under special temporary authorization from 1998 until August, 2002 as a result of the loss of its licensed site. Aerco indicates that the staff, as a condition to further extension of the STA, directed that Aerco file an application for a new construction permit. The staff did so because, as discussed below, it had dismissed Aerco's covering license application for the 9.6 kW facility and determined that the 1984 construction permit had expired. It then granted Aerco continued STA in order for WQBS to remain on the air, but required that Aerco file an application for a new construction permit that complied with current technical rules. Aerco did so, filing the WQBS 5 kW application.

⁶ Aerco claims that it cannot apply anew for 9.6 kW operation by WQBS because that operation is precluded by the more stringent interference rules adopted for the AM service since its application for 9.6 kW operation was approved in 1986. *See In re Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991), *recon. granted in part and denied in part*, 8 FCC Rcd 3250 (1993).

⁷ The license application defects consisted of the following: (1) the license application specified different operating facilities (5 kW daytime and nighttime, using the same directional pattern for both daytime and nighttime service) than those authorized by the amended permit (9.6 kW daytime, 5 kW nighttime, with different directional antenna for each service); (2) the required daytime proof of performance was not submitted with the application; (3) the nighttime proof of performance failed to include monitoring points required by the permit; (4) the daytime power employed for nondirectional field strength measurements was not supplied, so that the staff could not analyze the submitted nondirectional data; (5) the distribution of measurement points along several radials did not conform to the requirements of 47 C.F.R. §73.186; (6) no showing was made to demonstrate compliance with the conditions on the permit regarding exposure of humans to radio frequency ("RF") radiation; and (7) the geographic coordinates and site elevation data listed in the application did not match that in the requisite tower registration on file with the Commission.

⁸ *Letter in re WQBS(AM), San Juan, Puerto Rico*, reference 1800B2 (M.M. Bur. June 3, 1999).

⁹ The version of Section 0.283 in effect at the time the 2000 Application for Review was filed read, in pertinent part:

The performance of functions and activities described in § 0.61 of this part is delegated to the Chief, Mass Media Bureau, provided, that the following matters shall be referred . . . to the Commission *en banc* for disposition:

- (a) Applications. Formal and informal applications for new or modified facilities, and for the renewal assignment, and transfer of construction permits and licenses involving such

form, properly signed by the applicant, includes an engineering report, and is accompanied by the appropriate filing fee. Aerco also argues that the dismissal of an application as defective without providing the applicant an opportunity to correct the deficiencies is in conflict with Section 73.3564 of the Commission's rules.¹⁰

6. Aerco's contentions are meritless. Section 73.3564 directs the staff to issue deficiency letters only in the case of "minor" application defects as to "completeness." In contrast, the submitted license application describes fundamentally different facilities constructed at a different site than those specified in the underlying construction permit. In these circumstances we reject as frivolous Aerco's contention that its application suffered from only minor defects that it should have been afforded an opportunity to correct. Aerco provides no precedential support for its expansive view of "minor" defects. Furthermore, the patent omissions in the technically critical proofs of performance and RF radiation compliance showing – which are essential for the staff to determine whether the terms and conditions of the construction permit have been satisfied and whether the constructed facilities will operate in conformance with the Commission's rules -- can only be characterized as major deficiencies.

7. Section 73.3566(a) *directs* the staff to dismiss nonconforming applications: "Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed."¹¹ Consistent with this directive, the staff

facilities, when such applications fail to satisfy the requirements of Commission rules or established Commission policy in the following areas of special concern:

...

(14) Miscellaneous applications and requests

(ii) Any other application, proposal, or request presenting novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines.

47 C.F.R. § 0.283 (2000). The rule has since been revised to reflect the Commission's reorganization and expand the authority delegated to the Chief, Media Bureau. The language requiring referral to the Commission of any "novel questions of fact, law, of policy which cannot be resolved under existing precedents and guidelines" was retained and is now found in Section 0.283(c).

¹⁰ Section 73.3564 reads, in pertinent part:

(a)(1): Applications tendered for filing are dated upon receipt and then forwarded to the Mass Media Bureau, where an administrative examination is made to ascertain whether the applications are complete In the case of minor defects as to completeness, a deficiency letter will be issued and the applicant will be required to supply the missing or corrective information. Applications that are not substantially complete will not be considered and will be returned to the applicant.

¹¹ Aerco cites *Metromedia Radio and Television, Inc.*, 102 FCC 2d 1196 (1985), for the proposition that "dismissal is not mandated before the applicant is afforded the opportunity to amend." In that decision, the Commission noted that the fact that the principal of assignee News America Television, Incorporated, Rupert Murdoch, was not an American citizen at the time the application was filed was a "patent defect." However, we also stated that "we consider News America's statements as to Murdoch's pending citizenship petition to be a request for waiver of the acceptance standards." *Id.*, at 1199. We also emphasized that the applicant informed the Commission of the defect in the application, stated that it was in the process of being corrected, and ultimately did correct the defect by filing an amendment upon the granting of citizenship to Mr. Murdoch. None of those factors are present here.

routinely dismisses defective applications,¹² and the Commission has affirmed this practice.¹³ This rule makes clear that an applicant may not – as attempted by Aerco in this case – file a grossly defective and incomplete application as a mere placeholder and shift to the staff the full burden of ensuring the technical integrity and safety of constructed facilities. The dismissal of the WQBS license application was consistent with both the Commission’s rules and staff practice; it was neither unprecedented nor outside the scope of the Bureau’s authority.

8. Accordingly, the January 16, 2003 Application for Review of Aerco Broadcasting Corporation IS GRANTED to the extent indicated herein and IS DENIED in all other respects, and the construction permit underlying the subject license application (BP-19841219AB) IS CANCELLED. These actions have no bearing on WQBS(AM)’s operations with its currently licensed facilities.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹² See, e.g., *KZTY(AM), Winchester, Nevada*, (M.M. Bur. Dec. 21, 2000); *WWRU(AM), Jersey City, New Jersey*, (M.M. Bur. Feb. 15, 2000); and *KAPM(AM), Bakersfield, California*, (M.M. Bur. Oct. 29, 1999). Each of these cases involved a staff dismissal of a defective AM license application without an opportunity to amend.

¹³ See, e.g., *Bobby Duffy*, 7 FCC Rcd 1734 (1992) (“the initial finding of acceptability is a provisional determination. When the Bureau later determined that Duffy’s application was not in compliance with Section 73.211 of the Commission’s Rules and was not supported by a grantable waiver request, the application could properly be dismissed.”) See also *Dasan Communications Corp.*, 7 FCC Rcd 7550, 7551 (1992) n.3; and *Special Markets Media, Inc.*, 4 FCC Rcd 5753, 5754 (1989) (Commission affirms dismissal of application, rejects applicant’s claim that it should have been given a chance to amend).