

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

In the Matter of)	
)	
V.I. Stereo Communications Corp.)	File Nos. BLH-19870114KB,
)	BPH-19970116IF, BPH-20010411AAD,
For Modified Construction Permit and)	and BSTA-20010413AAX
Special Temporary Authorization for)	
DWVIS(FM), Vieques, Puerto Rico)	Facility ID No. 69631

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 2006

Released: December 4, 2006

By the Commission:

1. The Commission has before it an Application for Review filed by V.I. Stereo Communications Corp. (“VISC”). VISC was the licensee of former station WVIS(FM), Vieques, Puerto Rico. In an initial determination, the staff deleted the station’s call sign, and found that VISC’s construction permit to relocate the station from Christiansted, U.S. Virgin Islands, to Vieques, Puerto Rico (the “Vieques Permit”),¹ as well as its application to modify or replace that permit (the “Modification Application”),² had become moot upon automatic forfeiture of the station’s license for failure to broadcast for 12 consecutive months pursuant to Section 312(g) of the Communications Act of 1934, as amended (the “Act”).³ VISC seeks review of an August 27, 2002, decision (“Staff Decision”),⁴ which affirmed the initial determination and rejected VISC’s request to reclassify the Modification Application as one for a permit to construct a new station. For the reasons detailed below, we find that the staff acted appropriately under the statute as it existed at that time, but that a different outcome is warranted under subsequent legislation modifying Section 312(g).

I. BACKGROUND

2. VISC was initially licensed for WVIS(FM) to serve Christiansted, U.S. Virgin Islands. On June 22, 1995, in a rulemaking proceeding, the staff modified the FM Table of Allotments at VISC’s request to specify Vieques, Puerto Rico, in lieu of Christiansted, U.S. Virgin Islands, as the community of license for the channel occupied by WVIS(FM).⁵ As required, VISC filed an application on January 16,

¹ File No. BPH-19970116IF.

² File No. BPH-20010411AAD.

³ See Letter to James L. Oyster, Esq. from Peter H. Doyle, Chief, Audio Services Division (Oct. 25, 2001) (“Forfeiture Letter”) (citing 47 U.S.C. § 312(g) and *Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16599 (1996) (“*Silent Station Implementation Order*”). See also 47 C.F.R. § 73.1740(c) (implementing Section 312(g) with respect to AM, FM, and television stations).

⁴ See Letter to James L. Oyster, Esq. from Peter H. Doyle, Chief, Audio Division (Aug. 27, 2002).

⁵ *Canovanas, Culebra, Las Piedras, Mayaguez, Quebradillas, San Juan, and Vieques, Puerto Rico, and Christiansted and Frederiksted, Virgin Islands*, 10 FCC Rcd 6673, 6678 (MMB 1995), *recon. denied*, 11 FCC Rcd 16392 (MMB 1996), *app. for rev. denied*, FCC 99-147, 1999 WL 409511 (rel. June 21, 1999) (history of related allotments omitted) (“*Vieques Rulemaking*”).

1997, for a permit to construct facilities conforming to the new allotment. On April 22, 1998, the staff granted the application and issued the Vieques Permit. The permit originally specified an 18-month construction period, expiring on October 22, 1999. Subsequently, the Commission changed the construction period for all initial broadcast permits to three years and also extended the deadline for certain existing permits, including the Vieques Permit, to three years from the date of initial grant.⁶ The expiration date of the Vieques Permit was thus changed to April 22, 2001.

3. During the three-year construction period, VISC reported no construction progress at Vieques but notified the staff that it was operating its Christiansted facilities intermittently, at reduced power and antenna height, pursuant to several special temporary authorizations (“STAs”). The STAs were necessitated, in part, by damage to the station caused by four hurricanes. On April 11, 2001, only 11 days prior to the stated expiration date of the Vieques Permit, VISC filed a Modification Application seeking to “replace” its expiring permit with a permit to construct transmission facilities at a different site in Vieques. VISC identified the application’s purpose as a “Minor Change in licensed facility.”⁷ Concurrently, VISC requested STA to remain silent, pending the staff’s action on the Modification Application.

4. On April 18, 2001, the staff approved VISC’s STA request for its licensed facilities to remain silent. On July 19, 2001, VISC requested that its STA to remain silent be extended. VISC had never identified the date on which WVIS(FM) had ceased operations. On September 5, 2001, the staff wrote to VISC asking it to provide the date. Two days later, Aurio Matos (as an individual) and Juan Carlos Matos Barreto, then permittee of WXZX(FM), Culebra, Puerto Rico, jointly filed an informal objection to VISC’s STA extension request (“Matos Objection”), alleging that, because WVIS(FM) had been silent continuously since 1995, the WVIS(FM) license had expired automatically as a matter of law under Section 312(g) of the Act.

5. On October 18, 2001, VISC responded to the staff’s inquiry and the informal objection. VISC reported that WVIS(FM) had been silent continuously only since December 22, 1999, not, as Matos and Barreto had alleged, since 1995. While conceding that WVIS had failed to operate for 12 consecutive months, that Section 312(g) was applicable, and that it no longer held any license to operate in Christiansted,⁸ VISC argued that the Vieques Permit should be reclassified as a permit for a new station and “preserved in full force and effect.”⁹ The staff rejected VISC’s claims, stating that all of WVIS(FM)’s authorizations and applications had been rendered moot upon forfeiture of the WVIS(FM) license as of December 23, 2000.¹⁰ On reconsideration, the staff explained that the *Vieques Rulemaking* had modified VISC’s existing license for WVIS(FM), and had not created a distinct new station

⁶ See *Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23092 (1998) (“*Streamlining R&O*”), recon. granted in part and denied in part, 14 FCC Rcd 17525, 17541 (1999) (“*Streamlining MO&O*”). VISC’s letter requested extension of the expiration date to April 22, 2001.

⁷ See File No. BPH-20010411AAD, Question I(4).

⁸ See *VISC Response to Request for Order Declaring License Forfeited and Opposition to Application for Modification and Further Grant of Authority to Remain Silent*, at Exhibit 1. It was therefore unnecessary for the staff to determine whether the station had been silent continuously for a longer period of time, as alleged in the Matos Objection.

⁹ *Id.* at 1. Had the staff treated the Vieques Permit as independent from the forfeited WVIS(FM) license, the Vieques Permit would have remained in effect through April 22, 2001.

¹⁰ The WVIS(FM) license expired 12 months from the conceded date of silence, and was automatically forfeited under Section 312(g) as of 12:01 a.m. on December 23, 2000. See Letter to James L. Oyster, Esq. from Peter H. Doyle, Chief, Audio Services Division (Oct. 25, 2001). The staff’s action also dismissed as moot VISC’s April 13, 2001, request for STA to operate with temporary facilities.

authorization.¹¹ The staff also rejected VISC's assertion that Section 312(g) mandated termination of the license alone, with no impact on the Vieques Permit or the Modification Application. The staff acknowledged that it had, on rare occasions, reclassified a pending application for modification of an existing facility as an application for a new facility, but stated that, unlike the facts in those cases, here, VISC filed its April 11, 2001, modification application after it no longer had any license to modify. The staff stated that VISC's license expired as a matter of law three and one-half months earlier, on December 23, 2000, upon 12 months of silence.¹²

6. In its Application for Review, VISC makes three related arguments: (1) that Section 312(g) does not apply to periods of silence after a rulemaking proceeding that establishes a new community of license;¹³ (2) that cancellation of the Vieques Permit was contrary to the Administrative Procedure Act ("APA")¹⁴ and principles of due process;¹⁵ and (3) that the staff erred in failing to reclassify the Modification Application as an application for a new station.¹⁶ After reviewing the pleadings and pertinent provisions of the Act, the Rules and Commission precedent, we conclude that VISC's arguments are without merit. Nevertheless, we reinstate VISC's authorizations for the reasons discussed below, and therefore need not address VISC's arguments in greater detail because they are mooted by the reinstatement.

¹¹ Staff Decision at 3-4.

¹² *Id.* at 3.

¹³ With respect to rulemaking proceedings, according to VISC, the change in community amounted to a finding that service to Christiansted is no longer desirable. VISC argues that it would make no sense to require it to operate in Christiansted, especially when the Christiansted facilities "had been destroyed by a hurricane [and would have] to be rebuilt in accordance with a license that had been modified and thus no longer existed." Application for Review at 14. VISC states that the Christiansted license "ceased to exist upon adoption of the rulemaking, having been replaced by the Vieques license, which is yet to be implemented." *Id.* at 5. VISC argues the staff erroneously relied on forfeiture of the Christiansted license as grounds for forfeiture of the Vieques Permit. According to VISC, "there was no 'Christiansted license' to be forfeited." *Id.* at 6. VISC argues that, after the *Vieques Rulemaking*, VISC "was 'permitted' to continue to operate in Christiansted pending its move to Vieques" but that "it makes no sense that it was 'required' to do so or face forfeiture" pursuant to Section 312(g). *Id.* at 2.

¹⁴ 5 U.S.C. § 551 *et seq.*

¹⁵ VISC argues that it was deprived of its permit without appropriate notice. Specifically, it observes that the text of Section 312(g) does not directly address whether construction permit applications become void concurrently with licenses that are forfeited. To the extent that the Commission discussed the impact of Section 312(g) on associated authorizations in the *Silent Station Implementation Order*, VISC notes that the *Order* was adopted without notice and comment pursuant to an APA exemption for actions which merely implement a statute. VISC argues that the staff thus had no discretion under Section 312(g), the Rules, or the APA to find that VISC's application became moot in light of the forfeiture of its license. *Id.* at 15. VISC also alleges that, contrary to due process requirements, the staff's action deprived VISC's principal, the late Joseph Bahr, "of his livelihood without a hearing and without justification." *Id.* at 17.

¹⁶ VISC explains that its intent was to establish a new station in Vieques "on a different frequency, in a different territory of the U.S., on a different island, serving a different audience, [and] speaking a different language" compared to the Christiansted facility. *Id.* at 11-12. Further, VISC asserts that "the Commission has held that a modification permit can be severed from the original license and treated as a permit for a new station," *id.* at 15, apparently referring to an unpublished 1998 staff action in which the staff reclassified a modification application that VISC's counsel filed on behalf of a station in Canandaigua, New York. *Id.* at Exhibit 1 (Letter to James L. Oyster, Esq. from Dennis Williams, Assistant Chief, Audio Services Division (May 5, 1998)).

II. DISCUSSION

7. Section 312(g) of the Act states that the license of a broadcasting station that fails to transmit broadcast signals for any consecutive 12-month period expires automatically at the end of that period. At the time of the Staff Decision, the Commission had no discretion under this statutory mandate to waive Section 312(g) for any reason, including based upon the circumstances that led to WVIS(FM)'s protracted silence or the station's prospects of returning to the air from another location.¹⁷ It is undisputed that WVIS(FM) failed to operate for 12 consecutive months.

8. On December 8, 2004, legislation was signed into law which, *inter alia*, revised Section 312(g). The new law retains all of the existing language of Section 312(g) but adds an exception: the Commission now has discretion in some circumstances to prevent license forfeiture or to reinstate a forfeited license, notwithstanding more than 12 months of station silence. Specifically, ". . . the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness."¹⁸ Broadcast licenses continue to expire and forfeit automatically at the end of 12 months of silence. The Commission now has the discretion, however, following the automatic forfeiture, to reinstate the license (and associated authorizations/applications) upon an appropriate showing. We find that VISC has demonstrated circumstances that merit reinstatement. Specifically, WVIS(FM)'s licensed facilities were located in an area frequently within the path of hurricanes. The record indicates that one hurricane completely destroyed the station's tower.¹⁹ VISC rebuilt the tower, but the station's facilities again sustained substantial damage in three more hurricanes, taking the station off the air. Under such circumstances, the station's extended silence is understandable. We therefore exercise the discretion now afforded by Section 312(g), as revised, to reinstate the previously forfeited license of WVIS(FM). Similarly, we reinstate the Vieques Permit, which had forfeited concurrently with the license, and reinstate and accept the Modification Application which was filed after the forfeiture.

9. In light of this reinstatement, there have been a number of developments since the deletion of the station's license that require VISC to take additional action before the Commission. First, Joseph Bahr, the principal of VISC, has passed away. Therefore, within 30 days of release of this *Order*, VISC must file an application (FCC Form 316) to obtain our consent to the involuntary transfer of control from Mr. Bahr to the Estate of Joseph Bahr. VISC must also, within this same 30-day timeframe: (1) file a new ownership report; and (2) maintain a staffed main studio at a location that complies with Section 73.1125 of the Rules.²⁰

10. Second, the licenses of all radio stations in Puerto Rico and the Virgin Islands expired on February 1, 2004.²¹ VISC did not file an application for license renewal because its WVIS(FM) license had been forfeited. VISC must electronically file a complete and acceptable license renewal application on FCC Form 303-S within 90 days of the release of this *Order*. Because of the late filing, it will not have been able to give timely notice to the public, as required.²² Therefore, it should add the number of

¹⁷ See *WYCQ, Inc.*, 18 FCC Rcd 16900, 16901 (2003) (citing *OCC Acquisitions, Inc.*, 17 FCC Rcd 6147, 6151 n.14 (2002), *aff'd per curiam*, *OCC Acquisitions, Inc. v. FCC*, 64 Fed. Appx. 790 (D.C. Cir. 2003)). See also *infra* ¶ 17.

¹⁸ 47 U.S.C. § 312(g)(1996), *amended by* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3431, Title IX, § 213(3) (2004) (Emphasis added). The new provision does not mandate any particular Commission action with respect to stations located outside Alaska, an exception not applicable here.

¹⁹ See Application for Review at 12.

²⁰ See 47 C.F.R. § 73.1125.

²¹ See 47 C.F.R. § 73.1020.

²² See 47 C.F.R. § 73.3580(4)(i) and (ii).

required pre-filing notices (four) to the number of required post-filing notices (eight), so that it will have completed the required total of twelve notices at intervals as close as possible to those identified in Section 73.3580, no later than 120 days from the release of this *Order*. In the event that WVIS(FM) is able to restore full service within that time, the remaining notices should be given by on-air announcements. Otherwise, VISC should publish the notices in an appropriate newspaper in accordance with the requirements in Section 73.3580, except that the publication should occur both in the community of Christiansted where the station last operated and in the community of Vieques, as specified in the current FM Table of Allotments and its reinstated construction permit. The notices should identify the authorizations that the station has held in both communities. Because VISC has asserted that the primary languages in Christiansted and Vieques are different, it should publish the notices in the respective languages appropriate for each community. A station's public inspection file plays a large role in the license renewal process.²³ VISC must secure a publicly accessible location, such as a public library, lawyer's office, or main studio, for the WVIS(FM) public inspection file in accordance with the Commission's rules.

11. Finally, the construction deadline for the Vieques Permit expired while this proceeding was pending. We set a new expiration date of one year after the release of this *Order* for construction of WVIS(FM) at the permitted coordinates. We direct the staff to give expedited consideration to the reinstated Modification Application.²⁴ We further grant special temporary authority for WVIS(FM) to remain silent and/or to operate pursuant to the terms of its reinstated, but expired, license for six months following release of this *Order*. That STA may be extended, upon a satisfactory showing, until a date no later than one year from release of this *Order*. WVIS(FM) must resume meaningful and ongoing service to Christiansted, or begin such service to Vieques no later than one year from release of this *Order*. We further direct the staff, consistent with longstanding policy, to keep in pending status the license renewal application to be filed for WVIS(FM) until the station has returned to the air and the staff can ascertain that the station has been providing meaningful and ongoing service to the public. To facilitate the staff and public's consideration of WVIS(FM)'s operation in the public interest, VISC must file written status reports with the Commission's Secretary and place copies in its public inspection file every 90 days following the filing of its license renewal application. In the reports, VISC must either certify that the station has complied with the minimum operating schedule in Section 73.1740 at all times since its last report or, if not, detail the extent of the station's operations within that period. The station's most recent issues/program list, prepared in accordance with Section 73.3526(e)(12), should be included with each report submitted to the Commission.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, That the Application for Review filed on September 24, 2002, by V.I. Stereo Communications Corp. IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

13. IT IS FURTHER ORDERED, That call sign DWVIS(FM) (which indicated the station's deletion) is changed to WVIS(FM).

14. IT IS FURTHER ORDERED, That the previously forfeited license for WVIS(FM) (File

²³ See 47 C.F.R. § 73.3526.

²⁴ We contemplate consideration of any request for additional construction time only for circumstances that meet the tolling requirements in 47 C.F.R. § 73.3598(b). VISC should be aware that an authorization to modify a construction permit bears the same completion deadline as the underlying construction permit; no additional time is provided by the modification. See *Streamlining R&O*, 13 FCC Rcd at 23090. Therefore, VISC should take all preliminary steps at the earliest date possible to ensure that all construction in Vieques can be completed one year from the release of this *Order*.

No. BLH-19870114KB) IS REINSTATED, CONDITIONED UPON action by V.I. Stereo Communications Corporation to comply with the requirements outlined in paragraphs 9, 10, and 11 of this *Order*.

15. IT IS FURTHER ORDERED, That the construction permit to modify WVIS(FM) (File No. BPH-19970116IF) IS REINSTATED with an expiration date one year from the release date of this *Order*.

16. IT IS FURTHER ORDERED, That special temporary authorization IS GRANTED for WVIS(FM) to remain silent and/or to operate pursuant to the terms of its reinstated, but expired, license (File No. BLH-19870114KB) for a period ending six months from the release date of this *Order*.

17. IT IS FURTHER ORDERED, That the application (File No. BPH-20010411AAD) to modify the WVIS(FM) construction permit IS REINSTATED WITH ITS ORIGINAL FILING NUMBER *nunc pro tunc* AND IS ACCEPTED FOR FILING. We direct the staff to consider this application on an expedited basis.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary