

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

In the Matter of)	
)	
Atlantic City Board of Education)	NAL/Acct. No. MB201541410031
)	FRN: 0020207858
Applications for Renewal of License and For)	Facility ID No. 3123
Minor Modification of Licensed Facilities of)	File Nos. BRED-20100921AAN, BRED-
WAJM(FM), Atlantic City, New Jersey)	20140128ABC and BPED-20120215AAW
)	
and)	
)	
Press Communications, LLC)	Facility ID No. 56233
)	File No. BPH-20100827ABW
Application for Minor Modification of Licensed)	
Facilities of WBHX(FM), Tuckerton, New Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 2016

Released: August 9, 2016

By the Commission: Commissioner Clyburn dissenting; Commissioner O’Rielly concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it the Application for Review (AFR) filed by Press Communications, LLC (Press) on November 9, 2015.¹ Press seeks review of a Media Bureau (Bureau) decision that (a) approved a Consent Decree providing for the short-term renewal of the license of WAJM(FM), Atlantic City, New Jersey (Station), which is licensed to the Board, (b) denied a Press Petition to Deny (Petition) WAJM’s 2010 license renewal application (2010 Application), (c) approved a minor modification of the license of that Station, and (d) dismissed Press’s conflicting application (Press Application) for minor modification of the license of WBHX(FM), Tuckerton, New Jersey, which was premised on Press’s argument that WAJM’s license had expired on June 1, 2006 and was accordingly not entitled to spacing protection from the Press modification proposal.² For the reasons stated below, we deny the AFR. Press’s contention that a broadcast licensee’s failure to timely file a license renewal application mandates the loss of its license if another licensee discovers its omission and files a conflicting application is contrary to the Communications Act of 1934, as amended (Act), the Commission’s rules (Rules), pertinent precedent and the public interest.

¹ We also have before us a Joint Opposition to Application for Review (Joint Opposition) filed by the Atlantic City Board of Education (Board) and Equity Communications LP (Equity) on November 24, 2015, a Reply to Joint Opposition to Application for Review (Reply) filed by Press on December 9, 2015, and a Statement for the Record filed by Press on February 1, 2016. Equity, the licensee of WZBZ(FM), Pleasantville, New Jersey, is involved in this proceeding because Press proposed an involuntary channel substitution for WZBZ in connection with Press’s proposed change in facilities for its station. That channel substitution would result in short-spacing between WAJM and WZBZ. See FCC File No. BPH-20100827ABW at Exh. 30.

² *Atlantic City Bd. Of Educ.*, Order and Consent Decree, 30 FCC Rcd 10583 (MB 2015) (*Order*). Any citations herein to the Consent Decree attached to the *Order* will refer to the Consent Decree rather than the *Order*.

II. BACKGROUND

2. *License Renewal Issue.* Under Section 73.3539 of the Rules (Application Deadline Rule), the Board was required to file a license renewal application for WAJM on or before February 1, 2006, which was four months prior to the license term's expiration on June 1, 2006.³ Although the Board continued to operate the Station, it did not file a license renewal application until it filed the 2010 Application on September 21, 2010. The Board's filing of the 2010 Application appears to have been precipitated by the Press Application, filed on August 27, 2010, wherein Press argued that a "theoretical" short-spacing of facilities proposed in the Press Application for Equity's WZBZ (on a new channel) *vis-a-vis* the Station was moot because no license renewal application had been filed for WAJM and therefore the Station license expired on June 1, 2006.⁴ Press repeated this argument in its Petition to Deny the 2010 Application.⁵

3. Simultaneously with its filing of the 2010 Application, the Board filed a request for special temporary authority (STA) to continue to operate the Station.⁶ The Bureau granted that STA request on September 29, 2010 and WAJM continued to operate pending action on the 2010 Application.⁷

4. In the *Order*, the Bureau rejected Press's argument that the WAJM license expired on June 1, 2006, at the end of the station's eight-year license term, pursuant to Section 307(c)(1) of the Act, and that the Press Application filed after that date merited cut-off protection from the subsequent, late-filed 2010 Application pursuant to Section 73.3573(f) of the Rules. The Bureau held that relevant Commission precedent supported the processing of the 2010 Application and the dismissal of the Press Application.⁸

5. *Spacing Waiver Issue.* The Bureau's *Order* also found that the Press Application was properly dismissed due to Press's failure to seek or justify a waiver of the proposed short-spacing between WJBR-FM, Wilmington, Delaware (on Channel 258A) and Equity's station, WZBZ(FM), Pleasantville, New Jersey, which the Press Application proposes to involuntarily modify from Channel 257A to Channel 259A. Press argued that the proposed short-spacing is identical to the existing grandfathered short-spacing between the stations, and that the proposed involuntary channel change for WZBZ would simply substitute one channel that is first-adjacent to WJBR-FM's channel to another first-adjacent channel, without any change in the location, power or antenna height of Equity's station. Under these circumstances, Press argued that no waiver of the spacing rules *vis-à-vis* WJBR-FM was necessary to process its application.⁹ The Bureau rejected this argument, finding that Press had failed to request a

³ See 47 CFR § 73.3539(a).

⁴ See Press Application, Exh. 30.

⁵ Petition to Deny at 3 (filed Dec. 22, 2010).

⁶ See FCC File No. BLSTA-20100921AAP, Ex. 38 (Board requesting "temporary relief" from 47 CFR § 73.3539 until the 2010 Application was granted). Upon expiration of that STA, the Board timely sought an extension of the STA. See FCC File No. BELSTA-20110317ACS), Att. 39.

⁷ See Consent Decree, 30 FCC Rcd at 10589 n.30. The Board subsequently filed a timely license renewal application in 2014 to be processed with the 2010 Application. See FCC File No. BRED-20140128ABC.

⁸ *Order*, 30 FCC Rcd at 10585-86, para. 6 (citing *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 7433, 7437-38, paras. 13-14 (2004) (*Discussion Radio*), and *Superior Commc'ns*, Letter, 22 FCC Rcd 16634, 16635-36 (MB 2007) (*Superior*)).

⁹ See Press's Response to June 20, 2014 Letter (Jul. 18, 2014), Letter from Kevin C. Boyle and David D. Burns, Latham & Watkins LLP, to Marlene H. Dortch, Secretary, FCC (filed Aug. 11, 2014), and Press's Reply (Aug. 21, 2014).

waiver of the applicable Rule, Section 73.213(c), or to show that, absent such a waiver, grant of the Press Application would have been consistent with any precedent interpreting or waiving that Rule.¹⁰

III. DISCUSSION

6. Press argues that the Order is inconsistent with Section 307 of the Act. Specifically, Press argues that Section 307(c)(1) provides that “[e]ach license granted for the operation of a broadcasting station shall be for a term not to exceed 8 years.”¹¹ Press argues that, in light of this limitation, the Commission “must give effect to the unambiguously expressed intent of Congress”¹² and hold that WAJM had no license or “licensed facilities” when Press filed the Press Application on August 27, 2010.¹³ In particular, Press notes that the *Order* and Consent Decree clearly hold that WAJM’s operation after June 1, 2006 was “unauthorized.”¹⁴ Press argues that, although there may be circumstances where an expired license can be resurrected, WAJM’s license cannot be resurrected because it would override the cut-off protection that Section 73.3573(f) of the Rules provided to the Press Application.¹⁵

7. Press contends that the precedents cited by the Bureau in the *Order* do not support the dismissal of the Press Application and the grant of the WAJM license renewal application.¹⁶ It argues that the Bureau implicitly waived the Application Deadline Rule, in contravention of applicable precedent for waiving filing deadlines.¹⁷

8. As an initial matter, Press ignores precedent recognizing the agency’s broad discretion to settle enforcement actions.¹⁸ Although a third party may prefer a different outcome than the terms the Bureau negotiated in its Consent Decree with the Board that would better serve the third party’s business purposes, the only relevant issue is whether the Bureau’s settlement terms are lawful. In this case, the renewal of WAJM’s license was consistent with established Commission procedures and precedent, notwithstanding the untimeliness of the 2010 Application. As explained in the *Order*, the Commission consistently has allowed broadcast station licenses to be renewed even though the license renewal

¹⁰ *Order*, 30 FCC Rcd at 10586, paras. 7-8.

¹¹ 47 U.S.C. § 307(c)(1). Press argues that Section 307(c)(3) is the only exception to the statutory eight-year license term limitation of Section 307(c)(1), as it provides, according to Press, “that, where a licensee has filed an application for renewal of its license, the license remains in effect until the Commission has acted on the application.” According to Press, because the Board failed to file its renewal application until after Press had filed its WBHX modification Application, that fact preempts Section 307(c)(3)’s requirement that the license remain in effect “[p]ending any administrative or judicial hearing and final decision and the disposition of any petition for rehearing” regarding the ultimately filed renewal application. AFR at 3-5.

¹² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

¹³ AFR at 4-6 (quoting the *Order*’s reference to protection of WAJM’s licensed facilities under Section 73.207 of the Rules).

¹⁴ *Id.* at 3 n.3 and 6-7.

¹⁵ *Id.* at 7 n.6.

¹⁶ *Id.* at 7-10.

¹⁷ *Id.* at 10-12; *see also* Press’s Statement for the Record (filed Feb. 1, 2016).

¹⁸ *See, e.g., University of San Francisco*, Memorandum Opinion and Order, 30 FCC Rcd 10530, 10535, para. 9 (2015); *U.S. Cellular Corp.*, Order, 24 FCC Rcd 8729, 8738, para. 26 (2009); *Viacom, Inc.*, Order on Reconsideration, 21 FCC Rcd 12223, 12226, para. 6 (2006).

application was filed after the license term expired.¹⁹ Adopting a contrary position in this case, without any prior notice to the Board, would violate the Board's due process rights.²⁰

9. Press fails to cite any case in which the Commission has denied a broadcast station's license renewal application due to its having been filed after the end of the license term, in the absence of any explicit license cancellation notice from the Bureau. Although Press criticizes the *Order* for limiting its illustrative cites to two cases (*Discussion Radio* and *Superior*), the Commission's consistent practice in this situation has been to process the untimely license renewal application rather than dismiss it, even if it was filed long after the license expired.²¹ The Bureau treats a broadcast license as having been cancelled only after it has issued a letter, public notice, or both, affirmatively stating that the license has been cancelled.²² Such Bureau action begins the period for filing a petition for reconsideration or an application for Commission review of the Bureau's order.²³ In such a situation, conflicting applications may not be filed until there is a final agency order cancelling the license.²⁴ Thus, Press's attempt to claim cut-off protection for the Press Application is unavailing.²⁵ The cut-off rule that Press has tried to invoke provides that minor modification applications "may be filed at any time, unless restricted by the FCC."²⁶

¹⁹ See *Order*, 30 FCC Rcd at 10585, para. 6 and n.16.

²⁰ We acknowledge that the Commission could apply another type of procedural system, such as that adopted for wireless licenses under the purview of the Wireless Telecommunications Bureau, but has not done so in the broadcast context. See *East Ky. Power Coop., Inc.*, Letter Order, 28 FCC Rcd 2071, 2072 (WTB 2013) (explaining Wireless Telecommunications Bureau's policy for late-filed license renewal applications, as adopted in *Biennial Regulatory Review (Wireless Telecommunications Services)*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 11476, 11485, para. 22 (1999)).

²¹ See, e.g., *Salmon River Commc'ns, Inc.*, Forfeiture Order, 28 FCC Rcd 9111 (MB 2013), resolved by Consent Decree, Order, 29 FCC Rcd 5724 (MB 2014) (renewal application filed over 5 years after filing deadline); *J. Thomas Development of NM, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 10859 (MB 2012) (over 5 years); *Hope Broad., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16370 (MB 2011) (over 7 years); *Hartford Bd. of Ed.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14476 (MB 2011) (over 4 years); *St. Mary's Coll. of Minn.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 13345 (MB 2011) (over 5 years); *Westport Bd. of Ed.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 3215 (MB 2010) (over 3 years) (collectively, *Late Renewal Cases*). The Application Deadline Rule requires broadcast licensees to file license renewal applications four months prior to the end of the current license term. The *Late Renewal Cases* and similar decisions treat violations of the Application Deadline Rule as a forfeiture matter under Section 1.80 of the Rules. See 47 CFR § 1.80, Note to Para. (b)(8) (base forfeiture amount for failure to file required form is \$3,000). If the license renewal application is filed after the license term has ended, continued operation that is not authorized by special temporary authority (STA) will be considered unauthorized operation under Section 301 of the Act. *Id.* (base forfeiture amount for unauthorized operation of station is \$10,000). See *Order*, 30 FCC Rcd at 10584-85, para. 3 (imposing a sanction for the Board's violation of Section 301 while providing a reduced forfeiture amount for the Board's violation of the Application Deadline Rule because WAJM was a student-run station); see also *Late Renewal Cases*.

²² See, e.g., *Christian Family Network, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 2459 (2016) (upholding dismissal of renewal application filed more than four years after license expiration and more than two and one-half years after Bureau issued cancellation notice to licensee and public notice of cancellation).

²³ See 47 U.S.C. §§ 155(c)(4) and 405, 47 CFR §§ 1.106 and 1.115.

²⁴ See e.g., *Superior*, 22 FCC Rcd at 16636.

²⁵ See AFR at 4 and 7 n.6.

²⁶ 47 CFR § 73.3573(f).

The protection of existing licenses until cancelled by a final order is a restriction consistently applied by the Commission.²⁷

10. As Press acknowledges, Section 307(c)(3) requires the Commission to “continue such license in effect” pending “any administrative or judicial hearing and final decision on [an] application [to renew that license].”²⁸ That is, this provision applies specifically to pending renewal applications.²⁹ Although it is silent on protections that apply when, as here, no renewal application has been filed, the Commission has broad discretion to fashion its renewal application processing policies, and nothing in our policy or practice violates the Act. In fact, they complement it. The Commission has developed and applied this interstitial processing policy to give fuller effect to the policies underlying Sections 307(c)(3) and 309(k), which promote continuity in broadcast station operations and protect existing licensees from conflicting applications pending final agency action on license renewal applications, for the benefit of the public.³⁰ The Commission’s policy and practices regarding the treatment of late-filed renewal applications provide stations with the opportunity to rectify their failure to timely seek renewal and afford them protection against competing applications, thus avoiding disruption in service to the public, while subjecting the licensee to appropriate enforcement action on account of its rule violations.³¹ Such a policy is fully consistent with the Act and with the public interest in the continuity of broadcast service. Nothing in the Act requires us to impose a “death sentence” on licensees and deprive audiences of

²⁷ See *Superior*, 22 FCC Rcd at 16636. Press attempts to distinguish *Superior* by claiming that the conflicting application there was only dismissed because the late-filed renewal application was filed within 30 days of the license expiration date. Press interprets *Superior* as holding that filing the renewal application within 30 days of the license expiration date prevented finality of license expiration. AFR at 8-10. We disagree with this interpretation, particularly Press’s incorrect claim that the Bureau’s reference to non-finality in *Superior* was a “contrivance . . . [that] cites no authority.” AFR at 10 n.7. In reality, *Superior* cited and relied upon Section 309(k)(3) of the Act, which allows conflicting applications only after a final determination that an existing station’s license renewal application is denied for failure to meet the standard for renewal in Section 309(k)(1) of the Act. See *Superior*, 22 FCC Rcd at 16636 n.15. Accordingly, the timing of the renewal application was a happenstance that Press has erroneously claimed to be decisional. Non-finality in *Superior* was due to the absence of an order either cancelling the existing station’s license for failure to file a renewal application or denying the renewal application pursuant to Section 309(k)(1). The same is true here, as there was no order cancelling the WAJM license.

²⁸ 47 U.S.C. § 307(c)(3).

²⁹ Section 309(k) also is specifically limited to situations in which a renewal application has been filed. “If the licensee of a broadcast station submits an application to the Commission for renewal of such license . . .” 47 U.S.C. § 309(k)(1) (emphasis added).

³⁰ By prohibiting the possibility of modifications to other stations that could compromise the ability of the station seeking renewal to continue its service to the public if the renewal application is granted unless renewal is denied, the Commission maintains such continuity. We note that the Bureau, in recent years, has required licensees that file their license renewal applications after the license term ended to file requests for STA to operate while their renewal applications are pending. Compare *Late Renewal Cases* with *Discussion Radio*, 19 FCC Rcd 7433, 7436, para. 11. The Commission has found that this practice is an appropriate way to enforce Section 301 of the Act. *Discussion Radio*, 19 FCC Rcd at 7437-38, para. 14. However, whether or not the station has received an STA, the Bureau still includes these stations in its database as requiring protection from conflicting applications until there is a final order cancelling the license. See *Superior*, 22 FCC Rcd at 16635. We also note that the Bureau, in recent years, has modified its processing policies to promptly notify stations that have failed to file their renewal applications, and to issue a notice of apparent liability if the renewal has not been filed within 30 days of the original due date.

³¹ In the rare case where an existing licensee did not file a license renewal application because it did not intend to continue station operations, any party seeking to file a conflicting application may do so (absent any other relevant filing restriction), but not until the Bureau has issued a cancellation notice that became a final order.

established broadcast service because the licensee files its renewal application late. We have other means to enforce our rules.³²

11. The Commission's practice of applying procedural protections comparable to those in Sections 307(c)(3) and 309(k) until the Bureau issues a cancellation notice that becomes a final order is not the same as extending a license term. If the eight-year license term has expired, continued station operation is unauthorized under Section 301 of the Act, unless and until the licensee requests and receives an STA to operate the station.³³ Such unauthorized operations, as well as violations of the Application Deadline Rule, are penalized.³⁴ If a late-filed renewal application is granted, the new license term begins as of the grant date; operation during the interim period after license expiration but prior to renewal is considered unauthorized operation to the extent not authorized by STA.³⁵ In seeking its next license renewal, the station must "run on [its] record" for that license term,³⁶ with an appropriate disclosure of all rule and statutory violations, including the violations of Section 301 and the Application Deadline Rule.³⁷ Accordingly, we reject Press's claim that the *Order* violated the "statutory mandate" of Section 307(c)(1).³⁸

12. Finally, we uphold the Bureau's determination with respect to Press's failure to seek or obtain a waiver of 47 CFR § 73.213(c) regarding short-spacing involving WJBR-FM and WZBZ-FM, for the reasons stated in the *Order*.³⁹

³² In *Discussion Radio*, the Commission dealt with the situation in which a licensee that had violated the Application Deadline Rule and the eight-year license period limitation contained in Section 73.1020 of the Rules by late-filing its renewal application and continuing to operate after the end of the license term. On review of the Bureau's grant of reconsideration of its earlier cancellation of the license, the Commission ultimately issued the licensee a notice of apparent liability for the violations, while stating that "waivers of [47 CFR §§ 73.1020 and 73.3539] are warranted in the instant circumstances for the limited purpose of accepting and acting on the station's license renewal application." 19 FCC Rcd at 7437, para. 14. Press cites this language to argue that a waiver is required here but is not warranted here in light of pertinent waiver precedent. AFR at 10-12 and Press's Statement for the Record. In this case, we are not waiving the rule violation, but have instead resolved the case by Consent Decree. Nevertheless, to the extent that the *Discussion* case suggested that a waiver is necessary for our consideration of a late-filed renewal application, we hereby overrule it.

³³ See *Order*, 30 FCC Rcd at 10584, para. 3; see also *Late Renewal Cases*.

³⁴ *Id.*

³⁵ See *Superior*, 22 FCC Rcd at 16636.

³⁶ *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966); see 47 U.S.C. § 309(k).

³⁷ 47 CFR § 73.3539(a); see FCC Form 303-S, Instructions at 7 ("an applicant is required to disclose only violations of the Communications Act of 1934, as amended, or the Rules of the Commission that occurred at the subject station during the license term, as preliminarily or finally determined by the Commission, staff, or a court of competent jurisdiction") and Section II, Question 4.

³⁸ AFR at 6.

³⁹ See para. 5 *supra*; 30 FCC Rcd at 10586, paras. 7-8.

IV. CONCLUSION

13. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Press Communications, LLC on November 9, 2015, IS DENIED pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the FCC's rules.⁴⁰

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁰ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(g).

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: Atlantic City Board of Education Applications for Renewal of License and For Minor Modifications of Licensed Facilities of WAJM(FM), Atlantic City, New Jersey and Press Communications, LLC Application for Minor Modification of Licensed Facilities of WBHX(FM), Tuckerton, New Jersey

I concur in the result reached by this order. While it achieves an acceptable conclusion consistent with past precedent, the item highlights a fairly major discrepancy in our treatment of late license renewal applications depending on whether they are filed with the Media Bureau or the Wireless Telecommunications Bureau. As the order acknowledges, the Commission consistently has allowed broadcast station licenses to be renewed even when the license term expired long before the renewal application was filed. This seems inappropriate and problematic: we ought not have different standards for deadlines based on the service being offered and we ought not allow late filings.

Given the importance of licenses for many services the Commission oversees, it would behoove all licensees to file their renewal applications either early or on time. In fact, the vast majority of broadcasters already do this. Thus, a deadline should mean just that.

In light of this, I suggest that the Commission should examine, with proper notice, whether the discrepancy in the treatment of the two types of renewal applications should be eliminated, and possibly take action to equalize the treatment of these licensees with emphasis given to timely filings.