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In re: WRKH(FM), Mobile, Alabama
Facility ID No. 53142
File No. BLH-20050615ACP
Petition for Reconsideration

Dear Applicant and Counsel:

We have before us a Petition for Reconsideration ("Petition")[1] filed by Blakeney Communications, Inc., ("BCI"), licensee of WBBN(FM), Taylorsville, Mississippi, seeking reconsideration of a July 31, 2006, letter order issued by the Audio Division ("Division") of the Media Bureau[2] ("*Division Letter*"). We also have before us an Opposition to Petition for Reconsideration, ("Opposition"),[3] a Motion for Leave to File Supplement to Record[4] and a Supplement to Record[5] ("Supplement") filed by CCBL Broadcasting Licenses, Inc. ("CCBL"),[6] licensee of WRKH(FM), Mobile, Alabama, and a Reply to Opposition to Petition for Reconsideration ("Reply") filed by BCI.[7]

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[1] BCI Petition for Reconsideration, Aug. 30, 2006.

[2] *Clear Channel Broadcast Licenses, Inc.,* Letter, 21 FCC Rcd 8677 (MB 2006).

[3] CCBL Opposition to Petition for Reconsideration, Sept. 13, 2006.

[4] CCBL Motion for Leave to File Supplement to Record, Oct. 11, 2006.

[5] CCBL Supplement to Record, Oct. 11, 2006.

[6] As noted in the Supplement, WRKH(FM) was assigned from CCBL to an indirect subsidiary, CCL, effective Sept. 30, 2005. In the interest of continuity, and consistent with the caption in this case, we refer to the WRKH(FM) licensee as "CCBL" herein. *See* Supplement at 1, n.1.

[7] BCI Reply to Opposition to Petition for Reconsideration, Sept. 29, 2006.

Background

On Sunday, June 12, 2005 - the day before its "upgrade"[8] construction permit[9] expired - CCBL activated WRKH(FM) under program test authority.[10] CCBL, however, did not file a license application before the WRKH(FM) construction permit expired at 3:00 a.m. the next day, June 13, 2005. Later, on that same day, BCI filed a conflicting application for modification of license to upgrade WBBN(FM).[11] On June 15, 2005, CCBL filed its license application for the WRKH(FM) upgrade.[12]

BCI's Petition to Dismiss. BCI petitioned for dismissal of the WRKH(FM) license application. It argued that, under Section 73.3598(e) ("Section 73.3598(e)") of the Commission's Rules ("Rules"), CCBL forfeited the WRKH(FM) construction permit by failing to file a timely license application.

In opposition, CCBL contended that its license application was timely because Section 73.1620(a)(1) of the Rules ("Section 73.1620(a)(1)") allows permittees ten days from the start of program tests to file a covering license application.[13] It also argued that license application preparation was a Commission-recognized "encumbrance" that tolled expiration of the WRKH(FM) construction permit.[14] It noted that the Division has "routinely" accepted late-filed license applications.[15]

The *Division Letter* rejected CCBL's arguments concerning the Section 73.1620(a)(1) "ten-day" provision[16] and pointed out that license preparation is not an encumbrance within the meaning of Section 73.3598(b).[17] Accordingly, the *Division Letter* concluded that the CCBL license application was untimely filed. The Division, however, agreed with CCBL that the staff previously had accepted late-filed license applications if the facilities authorized in the construction permit were built before the permit expired. [18] Accordingly, the Division admonished CCBL for its two-day late filing, waived Section 73.3598(e), *sua sponte,* and granted the license application.[19] It

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[8] For a discussion of "upgrading" in this context, *see 1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes*, Second Report and Order, 15 FCC Rcd 21649, 21665 (2000). *See also* 47 C.F.R. § 73.3573 Note 4.

[9] File No. BPH-20020026ACL.

[10] *See* 47 C.F.R. § 73.1620(a)(1) (providing for "automatic" program test authority).

[11] File No. BPH-20050613ADQ.

[12] File No. BLH-20050615ACP.

[13] *See Division Letter* at 8678-8679.

[14] *Id.* at 8679.

[15] *Id.* at 8680-8681.

[16] *Id.* at 8680. ("Section 73.1620 specifically concerns the maximum amount of time which may elapse between the commencement of program tests and the filing of a license application, a wholly distinct filing issue.")

[17] *Id.* at 8680-8681. ("The form-filing requirement does not encumber the construction period. Rather, it is simply one step required for completion of construction."). *See id.* at 8680 n.30. ("A station that is not constructed in accordance with its permit . . . cannot be declared 'ready for operation' in accordance with its authorization absent a waiver of [47 C.F.R. § 73.3598]). *Id. citing KM Radio of St. John, L.L.C.*, 19 FCC Rcd 5847, 5850-51 (2004). (Section 73.3598 waived when licensee mistakenly built facility at wrong site.) The *Division Letter* also pointed out that CCBL could have asked for a waiver of Section 73.3598(e) and noted that its license application was delinquent by only two days. *Id.* at 8681.

[18] *Id.*

[19] *Id.* at 8682.

found admonishment sufficient to deter future violations by CCBL[20] and, therefore, declined to dismiss the WRKH(FM) license application as BCI requested.

On reconsideration, BCI argues that there is "confusion" about the time of day WRKH(FM) began operating pursuant to program test authority, suggesting that that CCBL did not begin program tests before the permit expired.[21] It also contends that the WRKH(FM) license application was unacceptable for filing because BCI's earlier-filed upgrade application "cut-off" all subsequent, conflicting, applications.[22] In the alternative, BCI argues that, if the WRKH(FM) license application was acceptable for filing, the *Ashbacker* doctrine requires the Commission to comparatively evaluate the WRKH(FM) license application against the BCI upgrade application.[23] It also claims that the Division's waiver of Section 73.3598(e) of the Rules conflicts with the Commission's *Streamlining Order*.[24] Finally, BCI argues that, under the Rules, WRKH(FM)'s allotment was automatically downgraded to Class C0 when its construction permit expired. Therefore, the Division erred in licensing WRKH(FM) with as a full Class C facility[25]

Discussion

Timing of WRKH(FM)'s Program Tests. As an initial matter, we find that BCI's arguments regarding the commencement of WRKH(FM) program tests are procedurally defective. The arguments rest on an exhibit that was part of the WRKH(FM) license application. That exhibit was publicly available prior to BCI's filing. BCI did not, however, in its Petition to Dismiss, cite the exhibit or argue that WRKH(FM) may have begun program tests after its construction permit expired. Section 1.106 of the Rules[26] prohibits a party from raising new matter in a petition for reconsideration if it had the opportunity to do so earlier.[27] Accordingly, we are dismissing that portion of the Petition that relies on the exhibit from the WRKH(FM) license application.

In any event, BCI's arguments regarding the commencement of program tests are without merit. BCI, itself, concedes that the issue it raises is "not determinative of the outcome" of this proceeding, but, nevertheless, says the "confusion" respecting when program tests began may be an "equitable point favoring" BCI.[28] BCI's speculation has not convinced us that, as BCI claims, there

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[20] *Id.* at 8681.

[21] *See* Petition at 3-5.

[22] *See id.* at 8-9.

[23] See *id.* at 3, *citing Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945) ("*Ashbacker*").

[24] *See id.* at 6-7.

[25] *See id.* at 5. 47 C.F.R. § 73.3573, Note 4, provides, in pertinent part, "If the construction is not completed as authorized, the subject Class C station will be reclassified automatically as a Class C0 station." *See 1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes*, Report and Order, 13 FCC Rcd 23056, 23092 (1998) ("*Streamlining Order*") *recon. granted in part and denied in part*, 14 FCC Rcd 17525 (1999).

[26] 47 C.F.R. § 1.106.

[27] Under 47 C.F.R. § 1.106(c), as interpreted by established case law, "reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters." *WWIZ, Inc.,* Memorandum Opinion and Order, 37 FCC 685, 686 (1964)*, aff'd sub nom. Lorain Journal Co. v. FCC,* 351 F.2d 824 (D.C. Cir. 1965)*, cert. denied,* 387 U.S. 967 (1966). *See also, National Association of Broadcasters,* Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003); *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941). (A party may not "sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.")

[28] Reply at 13.

may be "substantial doubt" and "serious questions" concerning the sworn declarations of 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.[29] Those declarations significantly outweigh BCI's bare conjecture concerning alleged discrepancies between statements by the CCBL engineer and "time stamps" on the spectrum analyzer printouts.[30] We find that BCI has failed to raise a substantial and material question of fact regarding the initiation of WRKH(FM) program tests.

Waiver of Section 73.3573, Note 4. BCI questions "whether the staff has the authority to waive the automatic downgrade of a station and allow a late-filed license application" because the "full Commission specified this [downgrade] procedure" in the *Streamlining Order*.[31] Waivers for good cause, however, are well within the staff's delegated authority as established in Sections 0.201 and 0.283 of the Rules. BCI has not addressed those rules, much less shown that they are inapplicable here.[32] BCI also argues that the Division's waiver of Section 73.3598(e) was ineffective because the Division did not also waive Section 73.3573, Note 4. We find that waiver of Section 73.3573, Note 4,[33] is implicit in the *Division Letter*. To conclude otherwise - as BCI urges - is to indulge the unsupportable assumption that the Division intended to grant a waiver that could never be effectuated. We thus find no merit to BCI's argument.

Consistency With the Streamlining Order. We disagree with BCI's assertion that the waiver granted in the *Division Letter* is inconsistent with the Commission's intent in providing for automatic forfeiture of expired construction permits in the *Streamlining Order*.[34] The *Streamlining Order* clearly demonstrates that the automatic forfeiture provision was adopted for a singular and narrow purpose: conservation of Commission staff resources previously devoted to the unnecessary

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[29] Unsupported claims cannot establish a *prima facie* case of misrepresentation. *See, e.g., Renewal of License of Station WNYW-TV,* 10 FCC Rcd. 8452, 8478 (1995), *recon. denied,* 11 FCC Rcd. 7773 (1996). (Setting out "Standards for Misrepresentation and Lack of Candor.")

[30] *See* Petition at 3-5; Reply at 14-15. Each spectrum analyzer printout in the exhibit bears a "time stamp" which, in the usual case, shows the time a measurement was made. Although CCBL's engineer recalls that program tests began at 9:30 p.m. on June 12, 2005, the time stamps on the spectrum analyzer printouts furnished with the WRKH(FM) application read "00:50:28" (12:50 a.m.) and "01:02:19" (1:02 a.m.). (The spectrum analyzer displays "military time," *i.e*., it uses a timekeeping convention in which the day runs from midnight to midnight and is divided into 24 hours, numbered from 0 to 23.) The time discrepancy, BCI suggests, may indicate that WRKH(FM) was not activated under program test authority until after its construction permit expired. CCBL, however, has established that its engineer used the spectrum analyzer only for radio frequency measurements, not as a timepiece. Moreover, we note that BCI has not established that the spectrum analyzer clock was correctly set to local time. The extensive discussion, in the pleadings, of the spectrum analyzer time stamps is a teapot tempest. Whether program tests began at 1:00 a.m. or 9:30 p.m. is immaterial so long as the tests began prior to 3:00 a.m. on July 13, 2005 when the WRKH(FM) construction permit expired. BCI has offered nothing that would allow us to conclude that program tests began after the permit expired.

[31] Petition at 7. We note, but reject, BCI's tautology that the "automatic downgrade" procedure adopted in the *Streamlining Order*, and codified in 47 C.F.R. § 73.3573 Note 4, cannot be waived by the staff because the procedure was adopted by the "full Commission." *Id.* All Rules emanate from the "full Commission."

[32] *See* 47 C.F.R. §§ 0.201, 0.283. *See also,* 47 C.F.R. § 1.3.

[33] *See* 47 C.F.R. § 73.3573, Note 4. The Rule specifies, in pertinent part, that if a station does not implement Class C facilities before its upgrade construction permit expires, the station's allotment reverts to Class C0.

[34] *See* Reply at 5.

task of cancelling expired permits and so notifying the former permittees.[35] The Division's waiver of Section 73.3598(e) in the instant circumstances is thus unrelated to the Commission's intent in adopting the Rule.

Moreover, we find nothing in the *Streamlining Order*, which suggests that the Commission intended to apply Section 73.3598(e) to permittees already operating pursuant to program test authority.[36] The Division, in waiving Section 73.3598(e), *nunc pro tunc*, followed long-standing precedent which establishes that unintended consequences of a Rule are a significant factor favoring a Rule waiver.[37] In sum, we find nothing in the *Streamlining Order* which suggests that the Division erred in waiving Section 73.3598(e). The waiver is consistent with precedent and well within the Division's delegated authority.

BCI's Cut-off Claim. As a result of the waiver of Section 73.3598(c), WRKH(FM) was operating pursuant to program test authority. Although there are self-executing "automatic termination" Rules applicable to both construction permits (Section 73.3598(e)) and program test authority (Section 73.1620(c)), the two Rules have different triggering events. A construction permit terminates automatically - by virtue of forfeiture - on its expiration date. Program test authority, however, terminates automatically only after the Commission grants or denies a license application.[38] Program test authority may be terminated before such final disposition,[39] but the termination is not automatic. Because the Commission had neither acted affirmatively to terminate WRKH(FM)'s program test authority, nor finally disposed of the application for license, WRKH(FM)'s program test authority was still in effect when BCI filed its upgrade application.[40] Therefore, we are dismissing BCI's conflicting upgrade application as unacceptable for filing. Accordingly, we reject BCI's contention[41] that *Ashbacker* mandates comparative evaluation of its

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[35] *Streamlining Order*, 13 FCC Rcd at 23087. The automatic forfeiture provision eliminated "the Commission's long-standing practice . . . to declare a construction permit forfeited before considering it actually to have lapsed." *Id.* at 23088.

[36] We note that there is no reference to "program test authority," or its equivalent, in the *Streamlining Order*. We also note that the circumstance here - the filing of a conflicting application against a program test authorization - is unusual, if not unprecedented. Given our disposition of this case, parties are unlikely to file such conflicting applications in the future. Moreover, repetition of the circumstances here is unlikely because parties are now on notice that late-filed license applications may be met with enforcement action, termination of program test authority, or both.

[37] *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). ("The 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.") Automatic forfeiture of the authorization of an operating station is a severe penalty which the Commission has been reluctant to impose absent an egregious violation of its Rules. *See, e.g., Mt. Baker Broadcasting Co.,* 3 FCC Rcd 4777 (1988) ("*Mt. Baker*"). (Forfeiture, rather than enforcement action, deemed appropriate when a permittee implemented facilities at variance with its construction permit, willfully misrepresented material facts in connection with a request for extension of time within which to construct, and failed to comply with a direct Commission order to file a license application within ten days.)

[38] 47 C.F.R. § 73.1620(c). ("Unless sooner terminated, the program test authority remains valid during FCC consideration of the application for license, and, during this period, further extension of the construction permit is not required. Program test shall be automatically terminated by final determination upon the application for station license.")

[39] *See* 47 C.F.R. § 73.1620(b).

[40] In finding that that WRKH(FM)'s program test authority had not terminated automatically, we neither minimize the importance of timely filing of license applications nor suggest that the Commission will not terminate program test authority if a permittee does not file a license application before its construction permit expires.

[41] *See* Reply at 3-5.

upgrade application against the WRKH(FM) license application. BCI's application was unacceptable for filing[42] pursuant to the Commission's cut-off Rules and is subject to dismissal on that basis.[43]

Decision/Action

Accordingly**,** IT IS ORDERED, that the Petition for Reconsideration filed by Blakeney Communications, Inc. IS DISMISSED to the extent stated above, and DENIED in all other respects. IT IS FURTHER ORDERED, that the Motion for Leave to File Supplement to Record filed by CC Licenses, Inc. IS GRANTED. IT IS FURTHER ORDERED, that the Application for Minor Modification of License, File No. BPH-20050613ADQ, filed by Blakeney Communications, Inc., IS DISMISSED WITH PREJUDICE.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[42] 47 C.F.R. § 73.3573(f) provides that only the "first acceptable application cuts off the rights of subsequent applicants." (Emphasis supplied.) *See* Reply at 8. Both *Florida Institute of Technology v. FCC,* 952 F.2d 549 (D.C. Cir. 1992) ("*Florida Institute")* and *State of Oregon*, 11 FCC Rcd 1843 (1996) emphasize, as BCI says, "the importance of the cut-off rules"). *See* Reply at 8. That precedent compels dismissal of BCI's application because: (a) the application does not represent an "extreme case[] involving extraordinary circumstances." *Id. quoting Florida Institute,* 952 F.2d at 553, and (b) BCI's filing an application inconsistent with the cut-off rules was not "attributable to circumstances beyond its control." *Id.*

[43] *See Ashbacker,* 326 U.S. at 332. (Establishing that only "*bona fide"* applicants have a right to comparative consideration.) *See also, Rio Grande Family Radio Fellowship*, Memorandum Opinion and Order, 28 FCC 2d 326 (1971); *WMSJ, Inc*., Memorandum Opinion and Order, 8 FCC2d 533 (1967). ("The rule . . . speaks in terms of 'conflicting applications' and, before an application can acquire any rights as a conflicting application, it must be acceptable for filing. An opposite holding would abolish the real distinction between acceptable and unacceptable proposals by affording them equal status. This, in turn, would . . . create a legal absurdity."). *See also, Florida Institute,* 952 F.2d at 549. (Characterizing, as legally sound, the Commission's "hard nosed" cutoff rules.); *State of Oregon*, 11 FCC Rcd at 1845 (cut-off rules advance public's interest in receiving service without untoward delay); *Plaincom, Inc*., 15 FCC Rcd 8219, 8220 (2000) (limiting *Ashbacker* rights to cut-off applications).