

FCC 67-1274

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
OPERATION DURING HOURS BEFORE LOCAL
SUNRISE BY UNLIMITED-TIME STANDARD
BROADCAST STATIONS

ORDER

(Approved November 16, 1967)

BY THE COMMISSION: COMMISSIONERS BARTLEY, LEE, AND JOHNSON
ABSENT.

1. By report and order, adopted June 28 and released July 13, 1967,¹ in the "presunrise" rulemaking proceeding (docket 14419), the Commission adopted new rules (principally new sec. 73.99) concerning use before local sunrise of facilities licensed for daytime-only (local sunrise to local sunset) or limited-time use. The new rules apply to class III (regional) daytime-only stations and unlimited-time stations operating differently day and night, and to certain daytime-only, limited-time, and unlimited-time class II stations. Briefly, such presunrise use of daytime facilities may take place only pursuant to specific Commission authorization (presunrise service authority, or PSA); it is limited in time to 6 a.m. local standard time and after and, for class II stations, to sunrise at the location of cochannel class I station(s) to the east and after;² and as far as regional and class I-B channels are concerned, it is limited to either 500-w power or whatever lesser power level is necessary to protect foreign unlimited-time stations under applicable international agreements, and U.S. I-B stations located west of the class II station under the conventional nighttime standards of our rules. The new rules became effective October 29, 1967, replacing an earlier "permissive" presunrise rule, section 73.87, which permitted all class III and some class II stations to use full daytime facilities starting at 4 a.m., unless and until such operation was ordered terminated because of undue interference to a licensed unlimited-time operation.

2. A number of parties filed petitions for reconsideration of this decision, including Association on Broadcasting Standards, Inc. (ABS), a group of unlimited-time class II and class III stations. In a memorandum opinion and order, adopted October 11 and released October 17, 1967 (FCC 67-1143, 11 R.R. 2d 1571), the Commission considered these petitions and, in general, denied them and affirmed

¹ 8 FCC 2d 698, 10 Pike & Fischer R.R. 2d 1580.

² This restriction, of course, does not apply during months when local sunrise is earlier than 6 a.m., since daytime facilities may be used as a matter of licensed right starting at local sunrise. This is not "presunrise operation."

the decision and new rules. A number of parties then appealed from the decision to various U.S. courts of appeals, ABS filing in the U.S. Court of Appeals for the District of Columbia and later having its appeal transferred to the U.S. Court of Appeals for the Second Circuit (New York City), where another appeal was pending.

3. On October 31, 1967, ABS petitioned the latter court for a stay of the Commission's decision and the new rules, and on November 13, 1967, that court granted a stay in part, the pertinent language of its order reading as follows:

* * * that the Federal Communications Commission be and it hereby is directed to authorize by appropriate means the operation of full-time class II and class III stations, during the pendency of the appeal herein, with daytime power and antenna as authorized in their respective licenses during presunrise hours, subject only to such limitations in power and hours of operation as may be necessary to conform to international requirements (including the requirement of a 6 a.m. sign-on time) and to court orders on the same subject matter. Such stay is conditioned on petitioner's filing its brief within the period fixed by the rules of this court.

The hearing on the appeal was ordered expedited, and it is anticipated that decision will come in the fairly near future.

4. The court's order in substance directs that, pending the decision on the merits, the Commission authorize "by appropriate means" full-time class II and class III stations to use their regular daytime facilities, from 6 a.m. on, subject to the protection requirements of pertinent international agreements. The Commission's construction of the order is that it means that presunrise operation under it shall take place only after and pursuant to authorization by us. Our review, before operation is permitted, is necessary in order to ascertain that foreign protection requirements are met. With respect to Canada, this means the provisions of the new "presunrise" agreement with that country (TIAS 6268, formalized June 12, 1967, and embodied in new sec. 73.99 and fig. 12 of sec. 73.190 of the rules); with respect to Mexico and other North American countries it means the provisions of the North American Regional Broadcasting Agreement (NARBA) and the U.S.-Mexican agreement concerning protection.

5. In carrying out the court's mandate, the following procedures will apply:

(a) A number of full-time class II and class III stations (approximately 200) have filed PSA requests for use of daytime facilities as contemplated by the June decision and new rules;³ most of these have been granted (as filed or as modified) and will remain in effect until further authorization by us. The few which are still pending will be processed and go into effect in normal course. These, of course, are limited to 500 w (where foreign considerations do not require a lower power level), and these stations may now seek greater power (if foreign considerations permit) and it will be granted on a temporary basis if an appropriate showing as to foreign cochannel stations is made. Such authority will, of course, apply only after 6 a.m.

³ The new rules, of course, leave full-time class II and class III stations a choice: using their regular nighttime facilities during presunrise hours, or applying for PSA and using daytime facilities, subject to the time and power limitations mentioned. Apparently, the majority have elected to do the former. Since the 500-w limitation, as such, will not apply to full-time stations pending the court's decision, such stations may now choose to apply for temporary authority with whatever power (up to regular daytime power) can be used consistent with foreign considerations. Such temporary operation is, of course, limited to 6 a.m. and after, as stated in the stay order and required by the Canadian agreement.

local standard time, and will be subject to the restrictions mentioned below as to class II stations and class III stations on 930 kc/s.

(b) Full-time class II and class III stations which have not applied for PSA's may apply for temporary authority to use their daytime modes of operation starting at 6 a.m. local standard time, with whatever power (up to their regularly licensed daytime power) is appropriate, taking into account pertinent foreign considerations. A showing in the latter respect must be made. As to class II stations and class III stations on 930 kc/s, the authorization will be subject to the restrictions mentioned below.

(c) Presunrise authority issued as provided in this paragraph is not a PSA, and it will be subject to automatic termination 15 days after the U.S. Court of Appeals for the Second Circuit issues its decision in the case of *Association on Broadcasting Standards, Inc. v. FCC*, except to the extent that continuance is required by that decision.

6. 930 kc/s.—WBEN, Inc., licensee of full-time station WBEN, Buffalo, N. Y., has also appealed our decision, in the same court, on the grounds of interference which presunrise use of daytime facilities would cause to it. The court in that case has ordered a stay of authorization of any presunrise operation which would cause that station additional interference under our conventional nighttime rules. The instant stay order in the ABS case states that authorizations by the Commission pursuant to it shall be subject to "court orders on the same subject matter." We assume this qualification includes the stay in the WBEN case. Therefore, full-time stations on 930 kc/s must show that the operation sought would not increase nighttime interference to WBEN, as well as making the foreign showing generally required.

7. Class II Stations.—Former section 73.87 of the rules, which was broader in terms of permitting presunrise operation than the new rule, precluded presunrise use of daytime facilities by class II stations in certain circumstances: (1) By any class II station on a foreign I-A clear channel; (2) by other class II stations unless they completely protected the 0.5-mv/m groundwave skywave service of cochannel class I stations, or (i) were located west of such stations, in which case they could begin at sunrise at the class I station, or (ii) had an agreement with the class I station.

8. It is our understanding that it was not the court's intention to permit presunrise operation which could not have taken place under the former rule. Therefore, with respect to full-time stations in the above situations, the following restrictions will apply in addition to those outlined in paragraph 5 (the pertinent facts must be shown in the application):

(a) Full-time stations on foreign I-A channels will not be permitted presunrise use of daytime facilities.⁴

(b) Other full-time class II stations will be permitted to use daytime modes of operation before local sunrise only to the extent that: (1) They protect groundwave and skywave service of all cochannel class I stations; or (2) with respect to class I stations located to the east, such operation takes place only after sunrise at the class I station.

(c) A number of full-time class II stations on clear channels are authorized different facilities (usually lesser power) during hours immediately after sunrise and before sunset ("critical hours") than the facilities licensed for

⁴In fact, this qualification has very little effect. Presunrise use of daytime facilities by stations on Canadian I-A channels is precluded by the new agreement, as is such operation on Mexican I-A channels by the U.S.-Mexican agreement. Thus, the only stations affected are a handful of full-time class II stations on 1540 kc/s, a Bahamian I-A clear channel, which could not use daytime facilities before local sunrise under earlier 73.87.

regular daytime use during other daytime hours. Former section 73.87 provided that the provision of section 73.187, the "critical-hours rule," applied to presunrise operation. New section 73.99 is to the same effect, providing that the presunrise power of class II stations shall be no more than "the authorized daytime or critical-hours power." As mentioned, we believe the court did not intend us to permit full-time stations to operate presunrise to a greater extent than they would have been permitted under former section 73.87 in the absence of complaint. Therefore, authority for class II stations will be limited to the critical-hours mode of operation (or whatever lesser power is required by foreign considerations), rather than the regular daytime mode where that is different (in many cases this result would also be required by our understanding with Canada concerning "daytime-skywave" protection).

9. *Daytime-Only and Limited-Time Stations.*—The court's stay order does not refer to daytime-only or limited-time stations; as to them, section 73.99 and the PSA arrangements prescribed therein remain in effect.

10. *Necessity for Specific Authority.*—As mentioned above, the court's stay mandate directs us to authorize full-time class II and class III stations to use daytime modes of operation "by appropriate means," and such operation is specifically made subject to meeting foreign protection requirements. In our judgment, this language means that we must review all proposals, before authorizing such operation, to make sure that they meet foreign protection requirements. Therefore, no presunrise use of daytime facilities will be permitted, by full-time stations or daytime stations, except subject to a PSA or temporary authority issued by the Commission. Such operation in the absence of such authority is a serious violation of our rules.

11. In view of the foregoing, *It is ordered*, That, notwithstanding the provisions of section 73.99 of the Commission's rules, unlimited-time class II and class III stations *May apply for* and, if a proper showing is made, *Will receive* temporary presunrise operating authority under the procedures and subject to the qualifications outlined hereinabove.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*