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

In re Application of	)	
	)	
Thunderbolt Broadcasting Company	)	
	)	
For Modification of Facilities	)	File No. BPH-951120IE
WCDZ(FM), Dresden, Tennessee	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 1998 **Released:** April 1, 1998

By the Commission:

Introduction

1. The Commission has before it an October 28, 1996 application for review ("Application for Review") filed by Thunderbolt Broadcasting Company ("TBC"), licensee of WCDZ(FM), Dresden, Tennessee, seeking review of a September 27, 1996 letter order ("Order") by the Assistant Chief, Audio Services Division, Mass Media Bureau. The Order denied TBC's request for waivers of 47 C.F.R. §§ 73.203 and 73.3573 and dismissed the above-referenced TBC application to modify and upgrade Station WCDZ from Class A to Class C3 on Channel 236 in Dresden, Tennessee.[1] For the reasons set forth below, we deny the Application for Review.

Background

2. TBC filed its modification application on November 20, 1995 under the Commission's one-step processing rules. *See* 47 C.F.R. §§ 73.203(b) and 73.3573; *see also Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993). These processing rules eliminate the necessity for filing a rulemaking petition to modify a commercial FM allotment in certain circumstances and instead permit an applicant seeking a modification to do so through the filing of a single application. Under the one-step rules, an upgrade proponent must use or demonstrate the existence of a transmitter site which complies with the minimum spacing requirements set forth in § 73.207 of the Commission's rules. *Id.* at 4737. Thus, these procedures retain one of the key mechanisms

[1] Zimco, Inc. ("Zimco"), the licensee of WXLT(FM), Carterville, Illinois, filed an opposition to TBC's application for review on November 3, 1997 -- more than one year after TBC filed its application for review -- on the ground that it did not become an interested party in the proceeding until it filed, also on November 3, 1997, a one-step upgrade application that is mutually exclusive with the captioned TBC modification application. Zimco's opposition is untimely and will be dismissed. 47 C.F.R. § 1.45(a) ("Oppositions to any motion, petition, or request may be filed within 10 days after the original pleading is filed."); *see also* 47 C.F.R. § 1.45(c) ("Additional pleadings may be filed only if specifically requested or authorized by the Commission.").

that ensure the technical integrity of the FM service.[2] Notwithstanding this requirement, the site proposed by TBC in its modification application is 3.8 kilometers short-spaced to co-channel Class C Station WGGC(FM), Glasgow, Kentucky.[3] Furthermore, TBC has not submitted an exhibit establishing the "existence of a suitable allotment site . . . . " 47 C.F.R. § 73.203 (Note). Instead, it seeks a waiver of 47 C.F.R. §§ 73.203 and 73.3573.[4]

3. TBC concedes that it cannot show that there exists a fully spaced site for a Channel 236C3 station in Dresden, Tennessee. Its primary argument, however, is that it has no intention of using such a theoretical site and that both "logic" and the public interest justify rule waivers in this case. Application for Review at 6. Specifically, TBC maintains that it has "the ability to obtain the identical goal," -- constructing its desired Class C3 upgrade at its current site while preserving WGGC's actual Class C facilities -- through a much more burdensome series of one-step upgrade and downgrade applications, and related construction activities involving both WCDZ and WGGC. *Id.* The key component to this plan is the downgrade of WGGC to Class C1 or the relocation of WGGC's Class C facilities to a site that would be fully spaced to TBC's Class C3 proposal. TBC maintains that once WGGC is downgraded or relocated and WCDZ is subsequently upgraded, WGGC could file an application to resume Class C operations with its authorized facilities pursuant to the contour protection standards for short-spaced stations under § 73.215 of the Commission's rules. TBC argues that a waiver of §§ 73.203 and 73.3573 would avoid these "excessive and artificial measures to reach the same ends." *Id.* at 8 n.4. The public interest justification for the requested waiver is based on the fact that the upgraded WCDZ facilities would be well-situated to broadcast emergency evacuation, earthquake and flooding information to its listeners in the vicinity of the New Madrid Seismic Zone in the event of a natural disaster.

4. TBC raises two additional arguments. It asserts that the Mass Media Bureau staff exceeded its grant of delegated authority under § 0.283(b)(4) when it disposed of TBC's waiver request itself, rather than referring the request to the Commission. Citing the Order's statement that "[t]here is no precedent for waiver of the [§ 73.207] allotment requirements," TBC contends that its waiver request contains new or novel arguments that should have been considered by the full Commission. *Id.* at 8. In addition, TBC argues that its modification application presents a novel set of facts since upgraded Class C3 facilities would improve service to the New Madrid Seismic Zone. TBC contends that only the Commission is authorized to determine whether this "invaluable service" justifies its waiver request. *Id.* Finally, TBC

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[2] The Commission has consistently rejected rulemaking proposals to amend the table of allotments, 47 C.F.R. § 73.202(b), where the proponent could not show the existence of a suitable fully spaced site providing the requisite community coverage. *E.g.,Pinckneyville, Illinois,* 41 RR 2d 69, 72 (1977).

[3] TBC's proposal is also one kilometer short-spaced to first-adjacent Class A Station WTRB(FM), Ripley, Tennessee. In its Application for Review, TBC identifies a hypothetical allotment site fully spaced to WTRB at 36° 15' 56" N.L. and 88° 39 '43" W.L. According to TBC, its modification application did not include a showing as to the existence of this site due to an oversight on its part. TBC has not, however, amended the modification application to include the required exhibit.

[4] On September 16, 1997, TBC filed an amendment to the subject application. TBC claims that WGGC should be involuntarily downgraded because it does not operate with minimum Class C facilities. The requested downgrade would eliminate the short-spacing between WCDZ's proposed Class C3 facilities and WGGC. Although styled as an "amendment" to its application, the TBC filing is properly treated as a complaint regarding the allegedly unauthorized WGGC operations and as such, will be forwarded to the Mass Media Bureau's Enforcement Division for further investigation. In any event, TBC has failed to demonstrate good cause for the consideration of its "amendment." *See* 47 C.F.R. § 73.3522(a)(6). Moreover, the "amendment" seeks to introduce questions of fact or law that were not presented to the staff. *See* 47 C.F.R. § 1.115(c).

complains that it is one of a number of stations "locked into . . . underpowered facilities . . . " while the Commission's policies preserve for other stations, such as WGGC, the opportunity to move toward maximum facilities. It claims that this policy diminishes competition.

Discussion

5. TBC's claim that a waiver is appropriate since it could obtain the "identical" result through a multi-step application and construction scenario is fatally flawed in several respects. Plainly, TBC lacks the ability to unilaterally implement either of its hypothetical proposals which, in any event, would fundamentally change the interference protection which WGGC now receives from all other stations. Both plans require WGGC's full cooperation. Under 47 C.F.R. § 73.208, the licensing of WGGC as a Class C1 facility at its current site or as a Class C facility at a new, fully spaced site is a precondition for the filing of a WCDZ Class C3 application. However, nothing in the record suggests that WGGC has consented to either an allotment downgrade or the relocation of its transmission facilities. Nor does TBC, the only station that would benefit from this multi-step effort, pledge to finance the technical modifications which WGGC would be required to implement.

6. Even if we assume that TBC would absorb all expenses, it has no ability to ensure that it could achieve the results it desires through its hypothetical proposals. At a minimum, the Commission would be required to consider on a comparative basis any application mutually exclusive with and filed on the same day as the WCDZ one-step application. *See Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945). Similarly, WGGC's Class C upgrade or modification application to relocate to its currently authorized site also would be subject to competing applications. *Id.* Finally and importantly, WGGC could only be relicensed as a Class C station at its current site under the contour protection provisions of 47 C.F.R. § 73.215. Under this rule, WGGC would be protected to its actual, rather than maximum Class C facilities. *See Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Assignments by Using Directional Antennas,* 4 FCC Rcd 1681, 1684 (1989), *recon. denied in pertinent part,* 6 FCC Rcd 5356 (1991). Because WGGC currently operates at near class minima for power and height, the two scenarios which TBC proffers would leave WGGC in a materially different position *vis a vis* nearby co- and adjacent channel stations than is now the case. Thus, we reject TBC's theory that declining to grant the waiver it requests here would be merely an exercise in bureaucratic intransigence that would needlessly force TBC to engage in excessive paperwork and assume unnecessary expenses to achieve the "identical" result that a waiver would facilitate.

7. We find that the staff fully considered the public interest benefits which TBC contends support its waiver request. These include enhanced emergency service in the New Madrid Seismic Zone and greater service area coverage by WCDZ. As the staff noted in the Order, WCDZ's existing operation already serves part of the New Madrid Seismic Zone. The portion of the proposed new service area which lies within this seismic area is already served either fully or partially by 16 other FM stations, in addition to both AM radio and television service. The Commission does not accord significant weight to improved service in well-served areas. *See Bay City, Brenham, Cameron, etc., Texas,* 10 FCC Rcd 3337, 3337 (1995) (affirming policy that five receptive services is considered adequate). In these circumstances a waiver of the core § 73.207 allotment spacing requirement is unwarranted. *See, e.g., Bristol, Tennessee,* 46 RR 2d 650, 651 (1979) (compelling justification necessary to waive Commission's allotment separation requirements); *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama,* 6 FCC Rcd 6580, 6584 (1991) (spacing waivers generally denied absent showing of compelling need for requested allotment change); *Toms River, New Jersey,* 43 FCC 2d 414, 417 (1973) (same).

8. Moreover, the Mass Media Bureau staff acted within the authority delegated to it under § 0.283 when it ruled upon TBC's modification application and waiver request. The issues presented by the

modification application and waiver request are neither new nor novel. The Commission has previously considered and rejected substandard allotments based on the ability to provide emergency broadcast services to listeners. *See Chester and Wedgefield, South Carolina,* 4 FCC Rcd 4503, 4504-5 (1989), *recon. denied,* 5 FCC Rcd 5572(1990), *review denied sub nom. Chester County Broadcasting Co. v. FCC,* Case No. 90-1496 (D.C. Cir. June 6, 1991) (additional emergency broadcast capacity not sufficiently compelling to overcome Commission's traditional prohibition against the creation of short-spaced allotments). The Order properly applied controlling Commission precedent.

9. Lastly, we are unpersuaded that TBC is entitled to relief because it is limited to the "underpowered" Class A maximum of six kilowatts. Grant of the TBC application could have far-reaching impacts on FM band congestion and the distribution of aural services. First, we wish to emphasize, as noted at paragraph 2, *supra,* that it is incorrect to view TBC's proposal as a "simple" 3.8 kilometer short spacing waiver request. TBC does not propose a waiver of our *application* spacing rules which were waived in very narrow circumstances prior to the adoption of Section 73.215. *See, e.g., Megamedia,* 67 FCC 2d 1527 (1978) (applicant must show that alternative non-short-spaced sites are unavailable and that proposed site is the least short-spaced of all suitable sites). Rather, it seeks an unprecedented waiver of the *allotment* distance separation rule, in essence, asking that the Commission abandon the requirement that one-step upgrade proponents demonstrate the existence of a site which complies with allotment distance separation requirements. Maintaining our allotment separations is important to prevent overcrowding and to promote a more even distribution of stations. This system works to the benefit of all licensees including WCDZ.

10. Grant of the relief TBC requests could undermine this system by opening the way for other similarly situated stations to claim a right to waiver of allotment spacing requirements. The Mass Media Bureau staff has analyzed each of the 3712 commercial FM stations which can, potentially, seek upgraded allotments under the rules, i.e., all stations except those with full Class B or Class C allotments. The study identified 594 stations, including WCDZ, which currently meet Section 73.215(e) application separation requirements at their licensed sites for the next higher class, *e.g.,* Class A to Class C3, C2 to C1, B1 to B, etc., but which are short-spaced under the Section 73.207 allotment standards. Thus, the requested waiver could have implications far greater than the subject application. *See ECI License Company, Inc.,* 11 FCC Rcd 1797, 1799, *review denied sub nom. ECI License Company, L.P. v. FCC,* 106 F.3d 442 (D.C. Cir. 1996) (decision without published opinion) (each spacing waiver increases spectral crowding in FM band).

11. Secondly, TBC also challenges the Commission's policy of protecting to maximum facilities Class C stations which operate near height and power minima. As a general matter, the commercial FM spacing rules implicitly protect all stations, not just Class C's, to maximum facilities. This policy permits stations to improve technical facilities over time and provides a certain degree of flexibility for transmitter relocations. A change in separation standards, whether to create an intermediate class for "lesser" Class C stations[5] or, generally, to protect FM stations to their actual facilities, could have widespread impacts.

[5] Class C stations must operate with antenna heights above average terrain ("HAAT") of between 300 and 600 meters. 503 of the 853 licensed Class C stations currently operate with antennas at HAATs of less than 450 meters. Accordingly, the adoption of a rule which protects Class C stations to their actual facilities could create opportunities for a sizable number of stations to relocate or improve their facilities while potentially precluding any future enhancement of the impacted Class C stations.

We believe such proposals are most appropriately considered in the context of a rulemaking.[6]

12. The Commission's rules and policies provide a direct avenue for TBC to bargain for Class C3 facilities. To reach this result, TBC and WGGC must reach agreement on the downgrading of WGGC to Class C1 status at its current site. Unlike TBC's hypothetical proposals, the actual negotiations must be based on the understanding that there can be no certainty that WGGC would be able to upgrade its facilities. Moreover, both TBC and WGGC must recognize that any enhancement to the interference protection that WGGC receives after the downgrade would require significant expenditures -- either to construct a substantially taller tower at WGGC's current site or to relocate its transmission facilities to a site that would permit WGGC to operate as a fully spaced Class C facility. The WGGC downgrade could be readily achieved by WGGC reducing power by one kilowatt or lowering its antenna by two meters. Staff studies establish that either modification would reduce WGGC's coverage area by less than a virtually imperceptible one-half of one percent. The downgrade would have no impact on WGGC's ability to serve Glasgow or other major population centers within the station's current 60 dBu service contour. The staff also has determined that all areas which would lose service would continue to be served by five or more commercial aural services.

13. We believe that agreements between commercial FM broadcasters to undertake mutual facility modifications, so long as they are consistent with technical spacing and protection requirements, can serve the public interest. Indeed, our one-step upgrade and downgrade application procedures permit expedited staff review of the most complex proposals involving both allotment and application issues. Moreover, we wish to make clear that we would be favorably disposed to grant waivers of the contingent application rule, 47 C.F.R. § 73.3517, to facilitate mutual facility modifications otherwise in the public interest. *See Policies to Encourage Interference Reduction Between AM Broadcast Stations,* 5 FCC Rcd 4492 (1990) (excepting from contingent application rule applications filed pursuant to agreements to reduce interference in AM band). Thus, to implement the scenarios we describe here, the only question that remains is whether the value which TBC places on Class C3 facilities is sufficient to compensate WGGC for a Class C1 downgrade, a question which remains within the sole purview of these two stations.

Ordering Clause

14. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the October 28, 1996 Application for Review filed by Thunderbolt Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[6] We note that the Commission plans to consider shortly an FM technical streamlining *Notice of Proposed Rulemaking*. The proceeding will attempt to identify ways to speed the introduction of new and improved broadcast services, provide greater flexibility to broadcasters to improve existing services, and facilitate compliance with core technical requirements. Accordingly, TBC and other broadcasters will have an opportunity to comment on alternative interference protection models in this subsequent proceeding.