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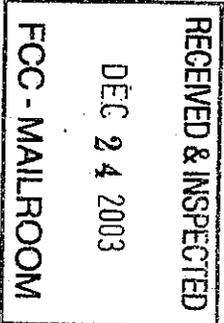
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December 23, 2003

Mr. David D. Oxenford
Shaw Pittman
2300 N Street NW
Washington, DC 20037

In re: WRLT (FM), Franklin, TN
Tuned-In Broadcasting, Inc. ("TIB")
Facility ID No. 24427
Petition for reconsideration of June 30, 1997
dismissal of BPH-19960306ID



Dear Mr. Oxenford:

By letter dated June 30, 1997 the staff denied waiver of various rules and dismissed construction permit application BPH-19960306ID for WRLT (FM), Franklin, TN.¹ On August 4, 1997, TIB filed a timely petition for reconsideration.

Petition for reconsideration. The petition for reconsideration faults the staff's analysis, stating the decision "ignored Commission precedent, misinterpreted the facts, and was otherwise inconsistent with the public interest." TIB faults the staff's application of the provision of 47 CFR Section 73.213 for grandfathered stations to WWTN, allowing WWTN to increase power to 100 kW despite being located only 20.7 KM from WRLT.² That improper increase, according to TIB, caused significant new interference to reception of WRLT.³ TIB takes issue with the staff's remark that it had not demonstrated that interference had not been shown to occur in its community of license (Franklin, TN). TIB contends that WRLT "is entitled to serve its entire service area without undue interference [caused by] subsequent modifications to the signal of another station."

The staff letter indicated that WRLT could substantially improve coverage to its community of license if the station were to operate with maximum Class A facilities (equivalent of 6 kW ERP / 100 meters HAAT). The staff further concluded that a Class C3 facility was not necessary to provide adequate coverage to the community of license. TIB avers that such a course would itself require waiver of Section 73.213 since that rule did not allow operation of grandfathered short-spaced Class A facilities with more than 3.0 kW ERP / 100 meters HAAT (or the equivalent). TIB argues that Section 73.315 requires an FM station to place a 70 dBu signal over the entire community of license. The proposed Class C3 operation would cover all of Franklin, as opposed to a Class A facility that could only cover 90%, "merits a conclusion that the upgrade provides a public interest benefit."

The petition points out that the proposed Class C3 operation would serve an additional 249,117 persons with only a small increase in interference caused to WWTN. The new interference area, including the changed location and

¹ The WRLT application sought a "one step" upgrade from Class A to Class C3, despite existing grandfathered short-spacings with respect to second-adjacent channel station WWTN, Manchester, TN and first-adjacent channel station WVVR, Hopkinsville, TN. The application also proposed a transmitter site change of 17.5 km southeast of WRLT's present licensed facilities.

² 47 CFR Section 73.207 requires a fully spaced Class A station to be at least 96 km from a second-adjacent channel Class C station.

³ TIB's application for review against the grant of the WWTN application was dismissed on October 26, 1999 on procedural grounds.

Consequently the staff did not err in concluding that the requests for waiver did not merit use of the one step upgrade process by WRLT. The staff considered TIB's arguments using proper procedures.⁷ TIB's application was simply unacceptable for filing and was accordingly denied.

Equivalent to 6 kW operation with existing licensed facility. The June 30, 1997 letter indicated that operation with Class A facilities equivalent to maximum Class A parameters (6.0 kW ERP/100 meters HAAT) could improve existing coverage over the community of license while reducing interference. At the time the letter was written, such operation would have necessitated waiver of Section 73.213(a). But later in 1997 the Commission modified its rules with respect to grandfathered short-spaced FM stations so as to allow WRLT to implement such operation without need of waiver.⁸ At the present time, TIB could file a minor change construction permit application on FCC Form 301 for 0.45 kW at the licensed HAAT of 360 meters (equivalent to 6 kW ERP at 100 meters HAAT), provided that the application supplied the information required in Section 73.213(a).⁹

70 dBu coverage over the community of license. WRLT's present licensed operation does not cover all of Franklin, TN, the station's community of license. But at 0.45 kW from the licensed facility (maximum Class A operation), the staff concluded (and TIB does not dispute) that 90% of the community of license (Franklin) would receive a 70 dBu signal.¹⁰ TIB contends that its Class C3 proposal – which would cover all of Franklin with a 70 dBu signal – “merits a conclusion that the upgrade provides a public interest benefit,” and satisfies the “requirement” in 47 CFR Section 73.315 that 70 dBu coverage be provided over the entire community of license.

Starting with *John R. Hughes*, 50 Fed Reg. 5679 (January 11, 1985), the Commission's rigid adherence to Section 73.315 was relaxed, deeming that FM proposals which cover 80% or more of the community of license are in substantial compliance with the rule. Thus, 90% coverage of the community of license, by itself, would not prevent grant of a construction permit application for maximum Class A operation.¹¹

Interference from WWTN. We do not dispute that listeners may receive interference from the upgraded facility of WWTN.¹² Grandfathered short-spaced FM stations are subject to such interference, and that situation has been recognized since the Commission adopted the spacing rules in 1964.¹³ Section 73.213 simply does not guarantee interference-free service within all of a station's 60 dBu service area. The Class C3 operation proposed by TIB would not eliminate such interference.

⁷ As stated in the staff's letter, the applicant seeking waiver of the rules must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v FCC*, 832 F.2d 189, 1992 (D.C. Cir. 1987), quoting *Rio Grande Family Radio Fellowship v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per curiam). The staff indicated it had afforded the waiver request the “hard look” called for under *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) but found the facts and circumstances were insufficient to waive Sections 73.203 and 73.3573.

⁸ *Grandfathered FM Stations, Report and Order*, MM Docket 96-120, FCC 97-276, 12 FCC Rcd 11940 (1997).

⁹ Specifically, WRLT can employ a directional antenna to maintain the ERP at 0.20 kW toward the existing area of overlap between the present 60 dBu contour of WRLT and the 54 dBu interfering contour of WVVR, while operating with 0.45 kW in other directions. Properly configured, this could allow WRLT to improve coverage of its community of license to 90%.

¹⁰ TIB calls the 90% coverage figure suspect in light of the interference from WWTN. However, it has provided no basis to support this remark.

¹¹ From the proposed transmitter site, with WRLT operating as a Class A facility operating with 1.30 kW at the proposed HAAT of 218 meters (maximum Class A facilities), WRLT's coverage over Franklin would exceed 80%. Nondirectional operation could be specified at this site.

¹² TIB previously filed appeals against WWTN's license application BLH-910606KG. TIB's application for review was dismissed by letter dated October 26, 1999.

¹³ *Fourth Report and Order* in Docket 14185, FCC 64-919, 40 FCC 868 (1964).

increase in size of the WRLT 100 dBu interfering contour, contains no population. Similarly, interference caused to WRLT's 60 dBu service from WWTN's 100 dBu interfering contour would occur in an area where no WRLT service presently exists. In support of its proposal, TIB contends that the staff should have considered the reduction in short-spacing to WVVR under the precedent in *Eatonton, AL*, DA 91-1342, 6 FCC Rcd 6580, 6583 (1991) (“[a]s a general matter [we] wish to encourage proposals that would eliminate or reduce short-spacings, and we believe that a refusal to consider a waiver under these circumstances could frustrate the underlying purpose of the rule [Section 73.207]”). TIB also faults the staff for not considering the reduced interference WRLT would receive from first-adjacent channel grandfathered station WVVR.

One step upgrade procedures do not apply. On review of the petition, staff letter, and original application, it is clear that TIB's proposal is not eligible for one step upgrade processing. The Commission adopted the one-step procedures as a simpler alternative for stations seeking upgrades. These one step procedures can be used only where strict allocation criteria are met in order to maintain the public interest considerations inherent in the present allotment standards.⁴ Specifically, in a one step upgrade proposal the Commission requires:

- 1) a fully spaced set of reference coordinates, which are fully spaced under Section 73.207 with respect to other stations and from which 70 dBu of the community of license can be attained, and
- 2) an application site that meets the spacing provisions of Section 73.207, or alternatively, facilities that comply with the minimum spacing requirements and contour protection requirements of 47 CFR Section 73.215.

TIB acknowledges that its proposed allotment site (which is at the same coordinates as the proposed application site) is grossly short-spaced under Section 73.207 with respect to WWTN and WVVR. It is equally worth noting that TIB's proposal falls far short of the minimum spacing required by Section 73.215(e) with respect to WWTN.⁵ The application clearly shows prohibited contour overlap with respect to WWTN and WVVR, contrary to the provisions of Section 73.215(a).

TIB's reliance on *Eatonton, supra* provides no support. *Eatonton* involved an allotment counterproposal for a community of license change and simultaneous *downgrade* from Class C to Class C1. In *Eatonton*, one existing short-spacing was eliminated while another was reduced. TIB's proposal is for a short-spaced station attempting to *upgrade* without elimination or amelioration of the short-spacing. The one-step upgrade process does not permit the use of short-spaced allotment reference sites; short-spaced allotments may only be considered in the context of a rulemaking proceeding. In general, the Commission has held that short-spaced allotments are not in the public interest. Recently in *Murrietta, Arcadia, Fallbrook, Yucca Valley, and Desert Hot Springs, CA, Report and Order*, MM Docket 01-11, DA 02-2514, 17 FCC Rcd 19458, released October 9, 2002 (application for review pending), the Audio Division denied a rulemaking request to upgrade an allotment, rejecting the petitioner's contention that Section 73.213(a)(4) of the Commission's rules exempted these 1964 grandfathered short-spaced FM stations from second- and third-adjacent channel spacings, including when a higher station class was sought. That decision considered several precedent cases involving allotment changes by 1964 grandfathered short-spaced FM stations covered under Section 73.213(a) and found that none of them sanctioned upgrade of a grandfathered short-spaced allotment unless the spacing deficiency was eliminated.⁶ Since the one step upgrade process is designed to mirror the allocations process insofar as the allotment site is concerned, the same concerns apply here. See also *Thunderbolt Broadcasting Company (WCDZ (FM))*, FCC 98-29, 13 FCC Rcd 6959 (1998) (appeal denied regarding denial of one step upgrade with short-spacing; Commission does not accord significant weight to improved service in well served areas).

⁴ *FM Channel and Class Modifications by Application*, MM Docket 92-159, 8 FCC Rcd 4735 (1993).

⁵ Section 73.215(e) requires a minimum of 89 km between WRLT and WWTN, whereas only 20.7 km would exist.

⁶ Reduction in short-spacings to two grandfathered short-spaced FM stations, well as population gains several times that proposed by TIB, did not provide sufficient public interest to warrant approval.

Conclusion. Accordingly, TIB's petition for reconsideration of the June 30, 1997 dismissal of application BPH-199702071A IS DENIED. This action is taken pursuant to delegated authority under 47 CFR Section 0.283.

Sincerely,

A handwritten signature in cursive script, reading "Edward P. De La Hunt". The signature is written in black ink and is positioned above the typed name.

Edward P. De La Hunt
Associate Chief, Audio Division
Office of Broadcast License Policy
Media Bureau

cc: duTreil, Lundin & Rackley