



Federal Communications Commission
Washington, D.C. 20554

October 31, 2008

DA 08-2446

In Reply Refer to:

180083-KK

Released: October 31, 2008

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**Re: Oconee River Broadcasting, LLC
WBIC(AM), Royston, Georgia
Facility ID No. 3079
Application for Minor Change to a
Licensed Facility
File No. BP-20070205AAA**

**Petition for Reconsideration of Dismissal of
Minor Change Application**

Dear Mr. Kendrick and Counsel:

We have before us a Petition for Reconsideration ("Petition") filed July 26, 2007 by Diane E. Hawkins ("Hawkins"), former owner of Station WBIC(AM) in Royston, Georgia ("Station").¹ Petitioner seeks reconsideration of the June 22, 2007, staff decision ("Bureau Decision")² dismissing Petitioner's

¹ Since Hawkins' last filing, the Station has changed ownership. The Station's sale was consummated on March 17, 2008, and it is now owned by Oconee River Broadcasting, LLC ("Oconee"). See File No. BAL-20080122AAW, granted Mar. 14, 2008. Oconee has substituted itself as the party in interest in place of Hawkins. *Letter from Kris "KJ" Kendrick, Managing Member, Oconee River Broadcasting, LLC to FCC* (Sep. 25, 2008). For purposes of considering this Petition, the actions of Hawkins will be attributed to Oconee, and Hawkins and Oconee will be referenced collectively as "Petitioner."

² *Letter from Son Nguyen, Supervisory Engineer, Audio Division, Media Bureau, to John Trent, Counsel for Diane Hawkins* (MB Jun. 22, 2007).

application for a minor change to the Station's technical facilities (the "Application").³ For the reasons discussed below, we deny the Petition.

Background. On July 26, 2007, Petitioner filed the Application to modify WBIC(AM). Petitioner sought Commission approval to: (1) change its operating frequency from 810 kHz to 830 kHz; (2) change its transmitter site; (3) increase its daytime power; and (4) install a directional antenna system to begin nighttime operations. The Application stated that, "No prohibited overlap is predicted to any stations."⁴

In performing an engineering review of the Application, however, the Bureau discovered that the Station's proposed daytime .5 mV/m and 0.025 mV/m groundwave contours would overlap, respectively, with the 0.025mV/m and .5 mV/m groundwave contours of the unbuilt construction permit for co-channel Class B station WFGM(AM), Sandy Springs, Georgia ("WFGM(AM) Permit"), in violation of Section 73.37(a) of the Commission's rules ("Rules").⁵ Although the WFGM(AM) Permit was initially set to expire on February 3, 2007, the permit was tolled for a period and is now set to expire on January 13, 2009.⁶ Thus, the Bureau dismissed Petitioner's Application based on the prohibited groundwave contour overlap with the WFGM(AM) Permit.⁷

In response to the Bureau Decision, Petitioner argues that, although Sandy Springs holds a construction permit for WFGM(AM), that station will never be constructed for lack of a suitable site.⁸ Petitioner also argues that the Commission should revise its procedures for tolling construction permits, which it claims have been "contorted, abused, and manipulated" by Sandy Springs.⁹

³ In response to the Petition, Sandy Springs Radio, LLC ("Sandy Springs"), permittee of co-channel WFGM(AM), Sandy Springs, Georgia, filed an Opposition to Petition for Reconsideration ("Opposition") on August 6, 2007. Petitioner filed a Reply to Opposition to Petition for Reconsideration ("Reply") on August 16, 2007.

⁴ WBIC(AM) Application, Attach. 11, Technical Narrative at 2.

⁵ Bureau Decision at 1. Section 73.37(a) of the Rules states:

No application will be accepted for a new station if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph; and no application will be accepted for a change of the facilities of an existing station if the proposed change would involve such overlap where there is not already such overlap between the stations involved . . .

47 C.F.R. § 73.37(a) (chart omitted).

⁶ In accordance with Section 73.3598(b) of the Rules and pursuant to its request, Sandy Springs' permit was tolled following the initiation of zoning litigation over its station site. *Letter to Marlene H. Dortch, Secretary, FCC, from Mark N. Lipp* (Jul. 19, 2005); *Letter to Mark Lipp from Peter H. Doyle, Chief, Audio Division, Media Bureau* (MB Sep. 16, 2005). On receiving notification that the appellate decision in that case was final, *Letter to Marlene H. Dortch, Secretary, FCC, from Mark N. Lipp* (Jul. 3, 2007), Commission staff calculated the new expiration date as January 13, 2009.

⁷ Sandy Springs filed an Application for Minor Modification to a Construction Permit (BMP-20080207ABK) for WFGM(AM), which was accepted for filing and placed on public notice on February 12, 2008. *See Broadcast Applications*, Public Notice, Report No. 26671 (MB, rel. Feb. 12, 2008). Petitioner in this case did not file an objection. The Bureau granted Sandy Springs' minor modification application, and provided public notice of that action on June 11, 2008. *See Broadcast Actions*, Public Notice, Report No. 46755 (MB, rel. Jun. 11, 2008). The modification has not altered the fact that Petitioner's proposal would result in prohibited groundwave contour overlap with WFGM(AM).

⁸ Petition at 3.

⁹ Petition at 10-11.

Discussion. Petitioner first argues that the WFGM(AM) permit should not be protected because it can never be built. Although Sandy Springs continues to hold the WFGM(AM) Permit until January 13, 2009, Petitioner states that WFGM(AM) “will never, and can never be constructed” for lack of a suitable site. Petitioner points to evidence that there has been a final decision against Sandy Springs in the zoning litigation in Fulton County, Georgia, denying suitable zoning for one of the two tracts of land intended to comprise the WFGM(AM) site.¹⁰ Petitioner also cites to an affidavit submitted by Sandy Springs in the course of its zoning litigation, in which Sandy Springs stated that “there are no other sites in North Fulton County which could meet the setback criteria, and the array requirements of the FCC.” Without a prospective site for its station, Petitioner argues, WFGM(AM) is merely “a ‘lame duck’ permit.”¹¹

In its Opposition, Sandy Springs argues that its own WFGM(AM) Permit is valid and will remain so until January 13, 2009. Sandy Springs contends that to hold applications like Petitioner’s in “abeyance,” *i.e.* in a queue behind valid, issued construction permits such as that of WFGM(AM), would violate Section 73.37(a) of the Rules.¹²

In its Reply, Petitioner reiterates many of the arguments addressed in the Petition. Petitioner also contends that the WFGM(AM) Permit should expire on November 12, 2008. Petitioner argues that the tolling period should terminate when judgment is issued in the relevant litigation, rather than when such a judgment becomes final and may no longer be appealed.¹³ Sandy Springs chose not to appeal its loss in the Court of Appeals for the State of Georgia,¹⁴ thus, under Petitioner’s test, the WFGM(AM) Permit expiration date would move to the earlier date of November 12, 2008.¹⁵

We agree with Sandy Springs that the dismissal of Petitioner’s Application was appropriate. Sandy Springs’ WFGM(AM) Permit remains in effect with an expiration date of January 13, 2009. Petitioner’s station modifications would result in prohibited overlap with WFGM(AM); thus, the Bureau properly dismissed Petitioner’s Application. Although Petitioner urges that its Application should be held in “abeyance” pending the final dismissal of Sandy Springs’ WFGM(AM) Permit, the Rules do not contemplate such an action. The Rules state, for instance, that any queue of competing applications for minor modification to an AM broadcast station dissolves once a minor modification permit has been granted.¹⁶ Petitioner cannot, in the hopes that Sandy Springs is unable to construct its station, ask the staff to create a new queue of minor modification applications with its own application at the front of the line. In addition to having no basis in the Rules, we agree with Sandy Springs that such an approach

¹⁰ Petitioner cites to a letter from the Senior Fulton County Attorney which states, “There have been no further appeals, and the time for seeking an appeal has now expired. The County and the Court’s decisions in this case therefore are now final.” Petition at 3.

¹¹ Petition at 10.

¹² See 47 C.F.R. § 73.37(a).

¹³ The latter methodology, applied by the Commission, resulted in the existing expiration date of January 13, 2009 for the WFGM(AM) Permit.

¹⁴ *Letter to Marlene H. Dortch, Secretary, FCC, from Mark N. Lipp* (Jul. 3, 2007).

¹⁵ Petitioner calculates the proposed expiration date of November 12, 2008 by adding the permit’s remaining one year, seven months, and fifteen days from the date the Court of Appeals of the State of Georgia handed down its decision in the matter, March 28, 2007. WBIC(AM) Reply at 2.

¹⁶ 47 C.F.R. § 73.3571(f).

would, if applied, provide Petitioner with an unfair advantage over others interested in filing competing minor modification applications should Sandy Springs not complete construction.¹⁷

Petitioner next states that Sandy Springs should be ordered to show cause why its permit should not have expired on the original expiration date of February 3, 2007. Petitioner argues that it was not appropriate for Sandy Springs to receive additional time to construct its station, as Sandy Springs did not timely give notice to the Commission when it commenced the qualifying zoning litigation.¹⁸ Sandy Springs replies that it acted in compliance with the Rules, and its permit was properly tolled.¹⁹

We reject Petitioner's argument that a show cause order should issue. First, Sandy Springs' WFGM(AM) Permit was properly tolled. Pursuant to the Rules,²⁰ Sandy Springs received the remaining time on its WFGM(AM) Permit – one year, seven months, and fifteen days – after the unfavorable judgment in the Court of Appeals for the State of Georgia became final on May 29, 2007. Petitioner is correct in stating that Sandy Springs' initial tolling notification to the Commission was untimely, as it occurred more than thirty days after Sandy Springs filed suit challenging the unfavorable local zoning decision for its site.²¹ The Commission has noted, however, that late notification to the Commission does not require that tolling be denied in its entirety.²² Rather, tolling in such circumstances is properly calculated to begin thirty days prior to the date the late notification was received, so long as the station would be eligible for tolling on that date.²³ Sandy Springs' tolling period was properly calculated under this formula, and its WFGM(AM) Permit remains active with an expiration date of January 13, 2009. Further, the tolling decision was not contested²⁴ or appealed, and it is now a final determination that cannot be collaterally challenged in this proceeding. Petitioner therefore has failed to demonstrate grounds for issuance of a show cause order to Sandy Springs.

Petitioner has also failed to support its claim that Sandy Springs engaged in intentional “foot dragging” and “gamesmanship” with regard to its WFGM(AM) Permit. Petitioner is correct in stating that the Commission encourages construction permit applicants to begin addressing zoning issues even

¹⁷ See, e.g., *Robert E. Combs*, Memorandum Opinion and Order, 19 FCC Rcd 13421, 13426, ¶ 10 (2004) (holding that, “[I]t is fundamentally unfair selectively to allow an applicant to obtain a construction permit outside the auction process, while requiring all other similarly situated applicants to comply with our competitive bidding rules.”); *Amendments of Parts 1 and 90 of the Commission's Rules concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations*, PR Docket No. 90-481, Report and Order, 6 FCC Rcd 7297, 7302 ¶ 26 (1991) (holding that, “To permit coordinators to entertain applications for frequencies before they become unencumbered (i.e., available to others) would be unfair to applicants who await changes in the database before submitting applications.”).

¹⁸ Petitioner's other argument in favor of a show cause order to Sandy Springs would require the Commission to adopt a policy change proposed by Petitioner: that the Commission rescind additional, tolled construction time when an applicant is unsuccessful in the zoning appeals process. This policy argument is addressed separately. See *infra*.

¹⁹ Sandy Springs Opposition at 4.

²⁰ See 47 C.F.R. § 73.3598(b).

²¹ See 47 C.F.R. § 73.3598(c).

²² See *Pamplin Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 649, 656, ¶¶ 16-17 (2008).

²³ *Id.*

²⁴ Petitioner expresses concern that a tolling request “cannot be anything *but* uncontested.” Petition at 5 (emphasis in original). While the Commission does not issue public notice of a tolling request or decision, these developments can be contested or appealed. Tolling requests are on file and publicly available from the Office of the Secretary.

prior to the issuance of a construction permit.²⁵ As the grounds for tolling do not include an applicant's failure to timely complete the zoning process or an adverse determination by a local zoning board, an applicant who does not start the zoning process early runs the risk that it will lose its permit for failure to complete construction. The Commission does not, however, require that an applicant begin the zoning approval process early, nor does it necessarily consider an applicant who waits until later in the process to have engaged in "gamesmanship." Sandy Springs was not the initial permittee of WFGM(AM), but acquired the WFGM(AM) Permit by assignment in 2005.²⁶ Sandy Springs states in the Reply that it has diligently pursued development of its station;²⁷ indeed, the Bureau granted an uncontested minor modification application for WFGM(AM) on June 6, 2008.²⁸ In the event that WFGM(AM) is not complete and operational with a license to cover application on file by January 13, 2009, unless further tolled, Petitioner may refile its application to modify the WBIC(AM) facilities at that time.

Petitioner also argues for changes to the Commission's tolling policy, decrying the "wholesale unfairness" of the tolling process. Petitioner's concerns center on the fact that, pursuant to the Rules,²⁹ Sandy Springs received additional time to construct WFGM(AM) due to litigation regarding its station site. In summary, Petitioner claims that: (1) the Commission should provide public notice of tolling requests;³⁰ (2) additional time for construction should only be granted if the appeals process is successful; and (3) presumably in the alternative, applications like Petitioner's should be held in "abeyance" until the opposing, unconsummated construction permit can be dismissed. These issues are not properly addressed in an adjudicatory construction permit proceeding. As the Commission has repeatedly stated, and as Sandy Springs correctly observes, "[U]nlike a rulemaking proceeding, [it] is not the proper forum" for requesting a change in Commission policies and procedures.³¹ Accordingly, we will not further address these policy issues.

Conclusion. For the foregoing reasons, the Petition for Reconsideration filed by Diane E. Hawkins on July 26, 2007, IS DENIED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

²⁵ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540, ¶ 38 (1999).

²⁶ See File No. BAP-20050308AAX.

²⁷ Sandy Springs Opposition at 3.

²⁸ See note 8, *supra*.

²⁹ 47 C.F.R. § 73.3598(b).

³⁰ See note 25, *supra*.

³¹ See, e.g., *Tri State Broadcasting Co., Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3466, 3468, ¶ 6 (1997) (citations omitted).