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Washington, D.C. 20554

July 31, 2006

DA 06-1550

In Reply Refer to:

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Clear Channel Broadcasting Licenses, Inc.
2625 S. Memorial Drive, Suite A
Tulsa, OK 74129

In re: Clear Channel Broadcasting
Licenses, Inc.
WRKH(FM), Mobile, Alabama
Facility ID No. 53142
File No. BLH-20050615ACP

Dear Applicant:

We have before us the captioned application of Clear Channel Broadcasting Licenses, Inc. ("CCBL") for a license to cover a construction permit for modification of the licensed facilities of WRKH(FM), Mobile, Alabama. We also have before us a Petition to Dismiss ("Petition") the captioned application as untimely submitted, filed June 24, 2005, by Blakeney Communications, Inc. ("BCI").¹ For the reasons set forth below, we grant the Petition to the extent indicated and deny it in all other respects, admonish CCBL for its late-filed application, and grant the subject license application.

Background. Section 73.3598(a) of the Commission's Rules (the "Rules"),² promulgated pursuant to Section 319(b) of the Communications Act of 1934, as amended (the "Act"),³ states that construction permits for new stations or modifications to existing stations "shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed."⁴ In addition, Section 73.3598(e) of the Rules provides that "[a]ny construction permit for which construction has not been completed and for which an application

¹ CCBL filed an Opposition to the Petition on July 7, 2005, to which BCI replied on July 19, 2005. CCBL filed a "Motion for Leave to File a Surreply" and "Surreply" on August 8, 2005. Because petitions to deny do not lie against covering license applications, *see* 47 U.S.C. § 309(c) and 47 C.F.R. §§ 73.3580 and 73.3594(a), we will treat Blakeney's Petition as an informal objection under 47 C.F.R. § 73.3587. Further, because there is no formal pleading cycle established by the Commission's rules in the context of an informal objection, we are free to consider CCBL's "Surreply" and will do so here.

² 47 C.F.R. § 73.3598(a).

³ 47 U.S.C. § 319(b).

⁴ *See* 47 C.F.R. § 73.3598(a), revised in 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, 13 FCC Rcd 23056, 23089-94 (1998) ("1998 Streamlining Order"), *recon. granted in part and denied in part*, 14 FCC Rcd 17525 (1999).

for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”⁵

On February 26, 2002, CCBL filed an application to modify the facilities of its Mobile, Alabama, Station WRKH(FM).⁶ The staff granted the application on June 13, 2002, and the permit specified an expiration date of June 13, 2005. CCBL filed a covering license application two days after that date, on June 15, 2005, indicating that the WRKH(FM) modified facilities had been timely constructed and that the station was operating pursuant to automatic program test authority under Section 73.1620(a)(1) of the Rules.⁷

BCI⁸ asserts that CCBL filed its application for license after the expiration of its construction permit in violation of the Rules. Specifically, BCI provides evidence using the Commission’s database records which clearly indicates that CCBL filed its license application on June 15, 2005, two days after the expiration of CCBL’s construction permit.⁹ BCI argues that, pursuant to the Rules, CCBL’s construction permit was automatically forfeited at 3:01 a.m. local time on June 13, 2005, in accordance with the terms of the permit. BCI also alleges that there is no evidence that CCBL completed construction of the new physical facilities prior to the permit’s expiration.¹⁰ Accordingly, in light of this violation, BCI urges the Bureau to dismiss the subject application as unacceptable for filing.¹¹

CCBL argues that Section 73.3536(a) of the Rules¹² requires that an application for a license to cover a construction permit shall be filed pursuant to the requirements of Section 73.1620. CCBL argues that it completed construction on June 12, 2005, in accordance with the terms of its construction permit and immediately initiated program tests.¹³ CCBL also contends that it completed measurements to demonstrate compliance with the spurious emissions requirements of the Rules prior to the construction

⁵ 47 C.F.R. § 73.3598(e).

⁶ File No. BPH-20020226ACL.

⁷ 47 C.F.R. § 73.1620(a)(1).

⁸ BCI is licensee of WBBN(FM), Taylorsville, Mississippi. On December 28, 2001, BCI submitted an application (File No. BPH-20011228AAO) for a one-step upgrade of its facilities from Channel 240C2 to Channel 240C1. Due to spacing constraints with WRKH(FM) and the fact that WRKH(FM) operates at less than minimum Class C HAAT requirements, BCI’s application also requested reclassification of WRKH(FM) from a Class C to a Class C0 station. Pursuant to Section 73.3573, CCBL, on February 26, 2002, duly filed a modification application (File No. BPH-20020226ACL) which specified Class C facilities. CCBL’s application was granted, and a construction permit was issued on June 13, 2002. Accordingly, BCI’s upgrade application was dismissed on June 14, 2001.

⁹ *See id*; *see also* File No. BLH-20050615ACP.

¹⁰ *See* Opposition at 3.

¹¹ BCI notes that in the public interest and in reliance upon the automatic forfeiture of the WRKH(FM) construction permit, BCI has filed a new application for construction permit to specify improved facilities for its WBBN(FM); *see also* File No. BPH-20050613ADQ.

¹² 47 C.F.R. § 73.13536(a).

¹³ *See* Opposition Attachment A, Declaration of Randall L. Mullinax.

deadline.¹⁴ CCBL acknowledges that it filed the license application on June 15, 2005, two days after the expiration of the construction permit. CCBL argues, however, that pursuant to Section 73.1620(a)(1) of the Rules, a permittee has 10 days after it has begun program tests within which to file an application for license,¹⁵ and thus, CCBL states, its filing was in accordance with the Rules. CCBL asserts that no express time limit is imposed by Section 73.3598, the Act, or the Commission's 1998 *Streamlining Order* on the filing of license applications.¹⁶ CCBL argues that it has been the Commission's practice "to routinely grant license to cover applications that are filed following the construction deadline when construction was completed on time"¹⁷ The Commission cannot now treat CCBL differently than other similarly situated permittees¹⁸ Finally, CCBL states that, because (1) it was operating WKRH(FM) pursuant to its construction permit prior to the permit expiration date, (2) it had expended over \$40,000 to modify the station's facilities, and (3) the facility improvements will enhance WKRH(FM)'s ability to serve the public, waiver of Section 73.3598 is warranted, to the extent one is required.¹⁹

In reply, BCI argues that "the Commission is not obliged to repeat previous mistakes" and that there is an express time limit for filing a license application under the "plain meaning" of Section 73.3598.²⁰ BCI also contends that Section 73.3598 is not inconsistent with Section 73.1620.²¹ BCI notes that Section 73.1620 establishes a filing deadline only when a permittee completes physical construction of its facilities within the first two years, 11 months, and 20 days of the construction period.²² Because CCBL alleges that it completed construction less than one day before its permit expired, BCI argues that Section 73.1620 is inapplicable. The proper approach, BCI argues, would have been for CCBL to have requested "tolling" or "a waiver of Section 73.3598 for a brief period" as have other permittees facing the construction and filing deadline imposed by this rule. BCI concludes that in CCBL's case "the equities do not favor a waiver"²³

¹⁴ *Id.* See also 47 C.F.R. § 73.317(b)-(d).

¹⁵ See 47 C.F.R. § 73.1620(a)(1).

¹⁶ See Opposition at 5.

¹⁷ CCBL cites the following examples: Station WJUN(AM), Mexico, Pennsylvania (Construction Permit No. BP-19990727AC expired January 23, 2005; License Application File No. BL-20050125ALN filed on January 25, 2005, granted on May 18, 2005); KVLH(AM), Pauls Valley, Oklahoma (Construction Permit No. BP-20010202AD expired February 13, 2005; License Application File No. BL-20050228ADS filed on February 28, 2005, granted on June 1, 2005); WJEH(AM), Gallipolis, Ohio (Construction Permit File No. BP-20010525ABL expired September 10, 2004; License Application File No. BL-20041012AKQ filed on October 12, 2004, granted on March 7, 2005).

¹⁸ See *id.* at 7.

¹⁹ See *id.* at n.14.

²⁰ See Reply at 2, 4.

²¹ See *id.* at 2-4.

²² See *id.* at 3.

²³ See *id.* at 5.

In its “Surreply,” CCBL contends that the facts of this case are more favorable than those in which the staff has waived the Rules to permit consideration of late-filed license applications.²⁴ It emphasizes that it had completed all construction and measurements before expiration of its permit.²⁵ Furthermore, CCBL claims that BCI has made no attempt to distinguish other cases in which the Commission has granted late-filed license applications, other than to characterize those actions as “mistakes.”²⁶

Discussion. Initially, we disagree with CCBL’s reliance on Section 73.1620(a) to calculate the deadline for filing an application for license. Section 73.3598(a) clearly states that “[e]ach original construction permit . . . shall specify a period of three years from the date of issuance . . . within which construction shall be completed *and* application for license filed.” (emphasis added). The use of the conjunctive “and” in the rule section’s wording makes clear that the Commission requires the filing of a license application within the three-year construction period as a necessary element of being “ready for operation” pursuant to Section 319(b) of the Act.²⁷ Furthermore, the plain language of Section 73.1620 specifically concerns the maximum time which may elapse between the commencement of program tests and the filing of a license application, a wholly distinct filing issue.

CCBL also misinterprets the Commission’s *1998 Streamlining Order*, which affords permittees “an unencumbered three-year construction period.”²⁸ CCBL asserts that the time it requires to prepare the license application form (FCC Form 302-FM) is an encumbrance on the three-year construction period. Section 73.3598, however, clearly states the steps that must be completed within the three-year construction period and specifically lists those “encumbrances” that the Commission recognizes as legitimate impediments to completion of construction.²⁹ The form-filing requirement does not encumber the construction period. Rather, it is simply one step required for completing construction.³⁰

Nevertheless, as observed by CCBL, there have been several instances in which the Bureau has granted license applications filed after the permit expiration date, provided that the permittee has

²⁴ See “Surreply” at 3.

²⁵ *Id.*

²⁶ See *id.* at 2.

²⁷ Section 319(b) of the Act states:

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

²⁸ See *1998 Streamlining Order*, 13 FCC Rcd at 23091 (1998).

²⁹ See 47 C.F.R. § 73.3598(b).

³⁰ A station that is not constructed in accordance with its permit does not meet the requirements of Section 73.3598 and cannot be declared “ready for operation” in accordance with its authorization absent a waiver of that rule. See *KM Radio of St. John, L.L.C.*, 19 FCC Rcd 5847, 5850-51 (2004).

demonstrated timely construction in accordance with the terms of the permit.³¹ Here, CCBL has demonstrated that it completed physical construction of Station WRKH(FM)'s facilities prior to the permit's expiration, but it did not tender a license prior to the expiration of the permit. Thus, CCBL did not meet the express terms of Section 73.3598(a), and it should have requested a waiver of that rule and of Section 73.3598(e) in its license application. Nevertheless, taking into account all of the circumstances in this case, including the fact that the facility was fully constructed by the expiration date and that the delay in filing the license application amounted to only two days, we will waive the automatic forfeiture provision in Section 73.3598(e) on our own motion and accept the license application.³² We note that if waiver were not granted, CCBL would be required to repeat the Forms 301 and 302 filing process. We find that this would be an unnecessary burden on public and private resources, and it would delay the public service benefits associated with the modification of WRKH(FM)'s facilities.

In view of the foregoing, we find that CCBL's failure to file the WRKH(FM) license application prior to the expiration of the underlying construction permit, on the facts presented here, does not warrant dismissal of the license application. Instead, we conclude that waiver of Section 73.3598(e) is warranted and that an admonishment is sufficient to redress CCBL's failure to timely file the application. Finally, we urge CCBL to use care to ensure future compliance.

Conclusion. Based on the evidence presented in the record, we find that BCI has not raised a substantial and material question of fact warranting further inquiry or dismissal of the subject application. We further find that CCBL has demonstrated that the WRKH(FM) modifications have been constructed in accordance with all the terms and conditions of its authorization and that grant of the WRKH(FM) license application is consistent with the public interest, convenience, and necessity.

³¹ In addition to the four cases referenced in Note 17, *supra*, CCBL and BCI cite two unpublished staff decision letters to support their respective positions. See *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Harry C. Martin, Esq., KCAA(AM), Big Bear Lake, California* (rel. Apr. 23, 2003) ("KCAA") (Bureau granted waiver of Section 73.3598 in case where an AM permittee made "substantial progress" toward construction but was unable to conduct proof of performance tests to support a license application due to unusually heavy rains); see also *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to John C. Trent, Esq., WQBQ(AM), Leesburg, Florida* (rel. Sept. 13, 2004) ("WQBQ") (Bureau granted tolling of construction permit when permittee completed physical construction of station but could not file timely license application because Hurricane Charley had "wiped out many of the monitoring points necessary to complete the proof of performance [that was] to accompany" the license application). CCBL cites the *KCAA* case for the proposition that, if necessary here, waiver of Section 73.3598 is warranted when substantial construction is completed at significant cost and only a short period is needed to complete construction. BCI, on the other hand, cites *KCAA* and *WQBQ*, arguing that if CCBL's hypothesis is correct and if completion of physical construction was all that was necessary to meet the requirements of Section 73.3598, tolling or waiver would not have been necessary in the *KCAA* and *WQBQ* cases.

These decisions are unpublished and therefore not binding on the staff, see 47 C.F.R. § 0.445(e). Moreover, and of equal importance, they are inapposite here, as both are premised on circumstances beyond the permittee's control which prevented timely completion of construction and filing of a license application. There is no evidence in the record here of circumstances beyond CCBL's control; rather, CCBL simply did not submit a license application prior to the expiration of the WRKH(FM) permit.

³² See 47 C.F.R. § 1.3; *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("[W]aiver is appropriate . . . if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest"); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). See also *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, Memorandum Opinion and Order*, 14 FCC Rcd 17525, 17541 (1999) (matters not specifically listed may be considered upon request for waiver).

Accordingly, IT IS ORDERED, that the August 8, 2005 “Motion for Leave to File a Surreply” of Clear Channel Broadcasting Licenses, Inc. IS GRANTED and the June 24, 2005, Petition to Dismiss filed by Blakeney Communications, Inc., IS GRANTED to the extent indicated herein and IS DENIED in all other respects. IT IS FURTHER ORDERED, that Clear Channel Broadcasting Licenses, Inc., IS ADMONISHED for its late-filed license application in violation of Section 73.3598(a) of the Commission’s Rules and for its failure to have requested a waiver pursuant to Section 1.3 of the Commission’s Rules. Finally, IT IS ORDERED, that Section 73.3598(e) of the Commission’s Rules IS WAIVED to the extent indicated, and the WRKH(FM) license application (File No. BLH-20050615ACP) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Anne Goodwin Crump, Esq.
Marissa G. Repp, Esq.