

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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IN REPLY REFER TO:
8920-JR

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In re: Brown Broadcasting Service, Inc.
Station WBRU (FM), Providence, RI
File No. BPH-871106IU
"Petition for Reconsideration And
For Waiver"

Dear Mr. Tannenwald:

This concerns the captioned "Petition For Reconsideration and For Waiver" ("Petition for Reconsideration") filed January 17, 1989 by your client, Brown Broadcasting Service, Inc. ("Brown").¹ Brown, licensee of Station WBRU (FM), Providence, Rhode Island, seeks reconsideration of an action dismissing its captioned minor change application (File No. BPH-871106IU). See Letter to Brown Broadcasting Service, Inc. from the Chief, FM Branch, Audio Services Division, Mass Media Bureau, December 12, 1988 (reference 8920-CMJ). Brown proposed increases in WBRU's effective radiated power, antenna height above average terrain, and antenna supporting structure height as well as a change in transmitter site. In addition to the reconsideration, Brown now seeks a waiver of the spacing requirements of 47 C.F.R. §73.207. For the reasons set forth herein, Brown's application and the associated waiver request will be granted.

Brown's application was rejected because its proposal was short-spaced to third adjacent channel Station WSRS (FM), Channel 241B, Worcester, Massachusetts. The proposal would have reduced the separation from 69.4 to 66.3 kilometers, short of the required 74 kilometer spacing. Brown's claim that 47 C.F.R. §73.213(f)(2)(i)² permitted the spacing reduction was rejected by the FM Branch, which cited paragraph 19 of the Memorandum Opinion and Order in BC Docket No. 80-90, Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, 50 Fed. Reg. 43,157

¹ Brown also filed a supplement to its Petition on October 24, 1989. That supplement was withdrawn in the context of a second supplement filed October 11, 1991. The second supplement is considered herein. Another supplement, filed January 18, 1989, dealt with technical matters relating to the Station WBRU (FM) tower and is not discussed herein. An associated request for waiver of 47 C.F.R. §73.3555 was previously granted. See Letter to John R. Feore, 5 FCC Rcd 4795 (1990).

² Section 73.213 was amended pursuant to action in MM Docket No. 86-144. See Second Report and Order, Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations, 2 FCC Rcd 5,693 (1987).

(October 24, 1985). The Commission determined therein that the grandfathered short-spacing provisions of §73.213 were limited to stations short-spaced prior to November 16, 1984 and that other short-spaced stations not meeting the increased second and third adjacent channel spacings established in the context of Docket 80-90 would be grandfathered at their existing sites.³ The Commission also ruled, however, that, for a three-year period from March 1984 to March 1987 those other stations (such as WBRU) were eligible for §73.207 waivers when proposing new sites which met the "old," lesser, spacing requirements. Referencing paragraph 19, the FM Branch noted that WBRU was not short-spaced prior to November 16, 1964, that its application was filed subsequent to the three-year period, and that Brown's proposal to reduce the already short spacing to WSRS lacked a waiver request. It therefore dismissed Brown's application.

Brown initially argues in its petition that reliance on language in paragraph 19 of the 1984 Memorandum Opinion and Order cited by the Branch was erroneous, because even though that paragraph mentions a three-year period ending March 1987, Section 73.213 was not actually amended until November 9, 1987 pursuant to action reflected in the Second Report and Order in Docket 86-144, released September 25, 1987, referencing Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations, 2 FCC Rcd 5,693 (1987). According to Brown, it was entitled to rely on the rule as it appeared in the Code of Federal Regulations at the time it submitted its application. In this regard, Brown urges that even if this argument is rejected, the discrepancy between the versions of Section 73.213 is a circumstance warranting consideration of its waiver request. Further, Brown urges consideration of its request in conjunction with consideration of its Petition, because retention of its application file number is necessary to avoid having to meet more stringent waiver requirements, thereby further reducing its chances of operating with the authorized full Class B facilities.

Brown's next argument is premised on WBRU's "unique" situation. Although operating on a nonreserved channel, the station is managed primarily by Brown University students and as a nonprofit entity. Brown notes that WBRU moved to its current site which it leases from the licensee of FM Station WHJY, Providence. WBRU also shares an antenna with WHJY, a consequence of which is that it cannot operate directionally to protect Station WHRB-FM, Cambridge, Massachusetts, to which it is also short-spaced, because, Brown claims, the existing shared tower cannot support a second antenna. Brown states that its efforts to resume 50 kW operations⁴ have been "extremely complicated," noting terrain and zoning factors. According to Brown, its best hope of erecting its own tower is the proposed site on donated land. Brown points out that in light of Commission action in Docket 86-144, it had to act prior to November 9, 1987

³ As of November 16, 1964, WBRU and WSRS were 66.4 kilometers apart, exceeding the separation requirement then in effect.

⁴ According to Brown, when WBRU moved to a campus building and began 50 kW operations in 1972, it discovered that its operations adversely affected university laboratory experiments. Thus, it was forced to shut down that operation and resume transmitting from its previous site with 20 kW.

lest the new Rule 73.213 effectively prohibit extension of its 60 dBu signal towards any of several stations to which WBRU is short-spaced.⁵ According to Brown, it would have to cut back power to below its present 20 kW if it changed sites, and a directional antenna is impractical.

Brown notes that it alerted the Commission to its "predicament" in the context of a petition for reconsideration in Docket 86-144, asking that it be allowed to extend its 60 dBu contour toward other stations to the extent it could have under the old rules or, alternatively, to the extent its contour would reach were it fully spaced and operating with maximum Class B facilities. As Brown asserts, the Commission denied its reconsideration request but stated that Brown's status was unique and encouraged a request for relief via a waiver. See Memorandum Opinion and Order in MM Docket No. 86-144, 3 FCC Rcd 2477 (1988). Brown maintains that the uniqueness of WBRU's situation means that a grant of its application would neither establish an undesirable precedent nor lead to an avalanche of similar requests.

Brown also argues that no fully spaced site is available. Besides the stations to which WBRU is short-spaced, Brown claims that it is "hemmed in" by FM Stations WPLJ, Channel 238B, New York, New York, and WVBI, Channel 240A, Block Island, Rhode Island. In addition, Brown notes that even its present rented site may soon become unavailable upon expiration of its lease in 1992. On the other hand, Brown asserts that its proposed site is "highly desirable" because, among other reasons, it would eliminate an existing six kilometer short-spacing to second adjacent channel Station WATD, Marshfield, Massachusetts, while increasing the short-spacing to third adjacent channel WSRS by less than three kilometers.⁶ Further, the petitioner claims that utilization of the proposed site will ease by 5.3 kilometers the existing short-spacing to first adjacent channel Station WHRB-FM, Cambridge, Massachusetts, which will facilitate a solution to the problem that WHRB has in enhancing its own substandard Class A operation. Brown states that the proposed site will involve minimal or no zoning, environmental, or air hazard problems. Next, it asserts that continued operations at 20 kW disserves the public interest by limiting population and area coverage. Noting recent enhancements to the facilities of WSRS, the station cited in the December 12, 1988 dismissal letter, Brown claims that WSRS is now better off vis-a-vis WBRU than it was in 1964 and, thus, a WBRU move would not lead to a net audience loss for WSRS. Finally, Brown asserts that it has little alternative but to remain at 20 kW if its proposal is denied. According to Brown, the combination of actions in Dockets 80-90 and 86-144 effectively neutralized its ability to utilize its frequency, and there is no possibility of using a directional antenna or of relocating to a fully

⁵ WBRU is short-spaced to the following stations: WHRB-FM, Channel 237A, Cambridge, Massachusetts; WATD (FM), Channel 240A, Marshfield, Massachusetts; WKSS (FM), Channel 239B, Hartford, Connecticut; WROW-FM, Channel 238B, Albany, New York; WSRS; and WZID (FM), Channel 239B, Manchester, New Hampshire.

⁶ As reflected herein, infra, the Commission engineering staff finds that the "six" and "less than three" kilometer designations are actually 5.5 and 3.1 kilometers, respectively.

spaced site. Brown asserts that if, in reducing its spacing to WSRS by less than three kilometers it has to permanently reduce power to approximately 36 kW or antenna height by approximately 21 meters, a significant audience loss would result in order to protect a third adjacent channel facility, resulting in "equivalent protection" contrary to Commission policy.

Discussion. It is a unique conversion of factors and events here, not likely to be seen again, which provides the backdrop justifying a grant of Brown's waiver request and application. First, the overall situation resulted from a combination of the establishment of many stations in the New England area prior to the 1964 adoption of the FM Table of Allotments, the spacing requirements set forth in Section 73.207(b) of the Commission's Rules, and the Commission's action in Docket 80-90 increasing the mileage separations for second and third adjacent channel situations. Second, Brown's particular situation is also unique. Specifically, barring future Commission rule making action in the nature of those taken in Dockets 80-90 and 86-144, it is virtually impossible to have another applicant-licensee in Brown's situation. There are no other pending applications filed prior to November 9, 1987, the effective date of the rule making action in Docket 86-144, which became short-spaced as a result of the separation requirements adopted in Docket 80-90. Most importantly, the uniqueness of Brown's situation means that no precedent undermining the integrity of the Commission's Rules or policies will be established.

The action by the Commission in Docket 86-144 in response to Brown's reconsideration petition in that proceeding presents, perhaps, the most compelling reason to approve the instant proposal and to consider the waiver request on its merits. Seeking reconsideration, Brown expressed concern that the recent amendments to §73.213 would prevent it from moving to the proposed site and from what it considered to be its temporary site with 20 kW operations. As a remedy, Brown proposed that the new rule section be modified to permit grandfathered short-spaced stations, such as WBRU, to apply for predicted coverages equivalent either to (1) the maximum predicted coverages possible under the old rule or (2) the maximum predicted coverage from fully spaced sites. Denying Brown's reconsideration petition, the Commission expressed concern that tailoring the new rule affecting all grandfathered short-spaced stations in order to fit circumstances "peculiar to one particular...station would not be good public policy." Noting its recognition of Brown's "individual problem," the Commission suggested relief would be more appropriately considered in the context of a waiver request.⁷ In sum, the Commission invited Brown to file the waiver request at issue here.

Brown's waiver request conforms to Commission standards for short-spaced sites. First, Brown makes a case that its present site may not be available much longer. See John Lamar Hill, 70 FCC 2d 153 (Rev. Bd. 1978). Although Brown has not stated that it will definitely lose its leased antenna site on the WHJY tower, it has asserted that it has no assurance that its lease will be extended beyond 1992. Even if extended, WBRU's lease would still not enable it to

⁷ See paragraph 8 of the Memorandum Opinion and Order, 3 FCC Rcd at 2477-8.

operate at full Class B power or allow for directional operation to protect first adjacent channel WHRB. Also, the WHJY tower apparently cannot support a separate antenna for WBRU. Second, Brown's engineering showing that no fully spaced sites are available is convincing. See Carrol Harrison Broadcasting, Inc., 62 FCC 2d 45, 46 (1976); Townsend Broadcasting Corp., 62 FCC 2d 511, 512 (1976). Third, the proposed site appears to be the least short-spaced available option. See Megamedia, 67 FCC 2d 1527 1528 (1978). In addition, it appears that Brown has made a sufficient showing that a grant of its waiver request will benefit the public interest by eliminating a 5.5 kilometer short-spacing to second adjacent channel Station WATD while increasing to 3.1 kilometers the short-spacing to third adjacent channel Station WSRS. Further, the separation to WHRB would be increased, thereby also enhancing that station's ability to improve its substandard Class A operations. In this regard, Brown indicates a willingness to work with the WHRB licensee. Finally, no objection to WBRU's proposal is on record, even from the licensee of Station WSRS.

Accordingly, in light of the above and pursuant to 47 C.F.R. §0.283, IT IS ORDERED, That the Petition for Reconsideration submitted January 17, 1989 by Brown Broadcasting Service, Inc. IS GRANTED. IT IS FURTHER ORDERED, That the request for waiver of 47 C.F.R. §73.207 filed by Brown Broadcasting Service, Inc. IS GRANTED and that its application (File No. BPH-871106IU) IS REINSTATED AND GRANTED.

Sincerely,


Harry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Brown Broadcasting Service, Inc.