

FEDERAL COMMUNICATIONS COMMISSION

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March 24, 2008

Mr. Paul Driscoll
WVUM, Inc.
P.O. Box 248127
School of Communications, University of Miami
Coral Gables, FL 33124

In re: WVUM (FM), Coral Gables, FL
Facility ID No. 74175
WVUM, Inc.
File No. BPED-20070615ACK

Dear Mr. Driscoll:

This letter is in reference to the above captioned minor change application to increase the effective radiated power of WVUM (FM) from 0.100 to 5.9 kW.

An engineering review of the application reveals that the application fails to comply with Section 73.525¹ of the Commission's Rules (the "Rules") with respect to Channel 6 TV station WTVJ (TV), Miami, FL. To address this issue, WVUM states that WTVJ (TV) has elected to remain on DTV Channel 31 and not return to Channel 6. Consequently, analog TV operations would be expected to cease on Channel 6 on February 17, 2009. As any construction permit issued to WVUM would not expire for three years, the FM station could easily wait until after February 2009 to implement its increased facilities. Accordingly, the applicant requests the grant of a conditional construction permit. However, we conclude that neither Section 73.525 nor established precedent provides a basis for the acceptance of such a contingent arrangement as sufficient to satisfy Channel 6 protection requirements. Accordingly, we will dismiss the referenced application.

A waiver of the Commission's contingent application rule would be necessary to grant the WVUM application. The proposed facility cannot become operational unless WTVJ (TV) implements certain changes in its technical operations based on certain future events. With the exception of certain narrowly defined filings, the Commission's rules prohibit generally the filing of contingent applications.² Such proposals can frustrate the introduction of new and improved services. Processing such applications also can result in the expenditure of limited staff resources on proposals that may never be implemented. WVUM has neither sought nor demonstrated that it has cleared the high hurdle for the required waiver.³ We conclude that a waiver in the instant circumstances would be contrary to the public interest.

¹ 47 C.F.R. § 73.525.

² See *id.* at § 73.3517.

³ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *aff'd* 459 F.2d 1103 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

In this case, WVUM has sought, albeit prematurely, to take advantage of the expected termination of WTVJ (TV) analog Channel 6 operations in order to improve its facilities and to gain cut-off protection from all applications filed several weeks later in the October 2007 NCE FM window. Accepting this application – or any application that relies on a similar contingent consent agreement from a potentially impacted Channel 6 station – could foreclose filing opportunities of other potential applicants and licensees that desire to file new station and modification applications based on the forthcoming vacation of analog Channel 6 allotments but have deferred such filings based on the recognition that it is not presently possible to file rule-compliant proposals. Accordingly, we find that acceptance of the WVUM application in these circumstances would be fundamentally unfair to those applicants that have filed applications that complied with Section 73.525⁴ and to those potential applicants that deferred their filings as a result of Channel 6 protection requirement issues. The public interest is better served by dismissing the WVUM application.

In light of the foregoing, Application BPED-20070615ACK is unacceptable for filing and is HEREBY DISMISSED pursuant to Section 73.3566(a)⁵ of the Rules. This action is taken pursuant to Section 0.283⁶ of the Rules.

Sincerely,



Dale E. Bickel
Senior Electronics Engineer
Audio Division
Media Bureau

cc: Carl T. Jones Corporation

⁴ For example, acceptance of an NCE new station application filed in the October 2007 window that includes a contingent agreement with a Channel 6 station could unfairly skew the “fair distribution” analysis to the detriment of mutually exclusive applications that filed rule-compliant proposals.

⁵ 47 C.F.R. § 73.3566(a).

⁶ *Id.* at § 0.283.