



Federal Communications Commission  
Washington, D.C. 20554

September 5, 2007

**DA 07-3835**

*In Reply Refer to:*

1800B3-KV

Released: September 5, 2007

Mr. Edward T. Czelada  
Superior Communications  
3302 N. Van Dyke Road  
Imlay City, MI 48444

In re: Superior Communications  
WHYT(FM), Goodland Township, Michigan  
Facility ID: 84187  
File No. BPED-20040812ABS

**Petition for Reconsideration**

Dear Mr. Czelada:

We have before us a Petition for Reconsideration ("Petition") filed on December 20, 2004, by Superior Communications ("Superior"), licensee of noncommercial educational ("NCE") Station WHYT(FM), Goodland Township, Michigan (the "Station"). The Petition seeks reconsideration of the November 16, 2004, staff dismissal of the captioned application (the "Application") to modify the facilities of the Station.<sup>1</sup> For the reasons discussed below, we deny the Petition.

**Background.** On August 12, 2004, Superior filed the Application proposing to increase the Station's effective radiated power from 0.4 kW to 12.5 kW. On October 1, 2004, Superior amended its Application to change the proposed directional pattern to increase effective radiated power towards Station WBFH(FM), Bloomfield Hills, Michigan. This amendment was filed on the same date on which the WBFH(FM) license had expired. Superior indicated in its amendment that it "assume[d] the automatic expiration of WBFH . . . [and] therefore is NOT mutually exclusive with WBFH."<sup>2</sup> Subsequently, on October 19, 2004, Bloomfield Hills School District, licensee of WBFH(FM), filed an untimely application for renewal of the Station WBFH(FM) license.<sup>3</sup>

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<sup>1</sup> Letter to Edward T. Czelda from George H. Gwinn, Supervisory Engineer, Audio Division, Media Bureau,, Reference 1800B3 (MB rel. Nov. 16, 2004). ("Staff Decision").

<sup>2</sup> See October 1, 2004, Amendment to the Application File No. BPED-20040812ABS, Attachment 15 at 1, (emphasis in original).

<sup>3</sup> Application File No. BRED-20041019AAV. On January 21, 2005, Superior filed a Petition to Deny the WBFH(FM) license renewal application. On June 1, 2005, the WBFH(FM) renewal was granted, but this grant was rescinded on February 12, 2007. On August 2, 2007, the Media Bureau granted the WBFH(FM) renewal application, and granted in part and denied in part Superior's Petition to Deny that application. See *Bloomfield Hills School District*, Memorandum Opinion and Order and Notice of Apparent Liability, DA 07-3515 (MB rel. Aug. 3, 2007) ("*Bloomfield Hills*").

In its review of the Application, as amended, the staff found that the Station's proposed 40 dBu interfering contour completely covered Station WBFH(FM)'s 60 dBu protected contour in violation of Section 73.509 of the Commission's Rules (the "Rules").<sup>4</sup> The staff noted that, while Station WBFH(FM)'s license had expired, it "was not forfeited, the call letters were not deleted, and [thus] the area covered by the license must remain protected by other application."<sup>5</sup> Subsequently, Superior timely filed the Petition.

**Discussion.** The Commission generally will reconsider a prior action only when a petitioner shows either a material error in the Commission's original order, identifies changed circumstances, or discloses unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.<sup>6</sup> The Commission will grant reconsideration and will reinstate a dismissed application *nunc pro tunc* where a relatively minor curative amendment is filed within 30 days of the date of the dismissal.<sup>7</sup>

Section 73.509 of the Rules sets forth the standards for overlap protection for NCE FM stations. Under this standard, as Superior acknowledges, the Application, as amended, is only grantable if it is not required to protect Station WBFH(FM). Superior contends that on October 1, 2004, when Station WBFH(FM)'s license expired, the obligation to protect Station WBFH(FM) ended. Superior argues, "if the staff's assumption is correct that the license is still valid, then what is the point of having an expiration date, if the licenses never really expire?"<sup>8</sup> Superior admits that "on several occasions the Commission has issued NAL's [Notices of Apparent Liability] to stations for unauthorized operation . . . [when] the licenses had expired."<sup>9</sup> However, Superior argues that the issuance of an NAL to a station with an expired license is inconsistent with Section 203 of the Telecommunications Act of 1996 (the "1996 Act"),<sup>10</sup> and Section 73.1020 of the Rules,<sup>11</sup> both of which limit license terms to eight years. Alternatively, Superior asserts, if the Commission accepts Station WBFH(FM)'s late filed renewal

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<sup>4</sup> 47 C.F.R. § 73.509. The staff also found that the Application as originally filed was unacceptable due to a proposed prohibited overlap with WLGH(FM), Leroy Township, Michigan, also licensed to Superior. *See* Staff Decision at 1. On December 20, 2004, Superior filed an amendment purportedly remedying the overlap with WLGH(FM). This amendment does not correct overlap with Station WBFH(FM).

<sup>5</sup> *Id.*

<sup>6</sup> *See* 47 C.F.R § 1.106, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Red 24414, 24415 (2003).

<sup>7</sup> *See Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776, 49 Fed. Reg. 47331 (rel. Aug. 2, 1984).

<sup>8</sup> Petition at 3.

<sup>9</sup> *Id.*

<sup>10</sup> Telecommunications Act of 1996, Pub.L. No. 104-104, Title II § 203, 110 Stat. 56, 112, (1996) (amending Section 307 of the Communications Act of 1934, as amended, (the "Act") and codified at Section 307(c)(1)).

<sup>11</sup> 47 C.F.R. § 73.1020.

application, then this application should be placed “in a ‘queue’ behind Superior’s amendment.”<sup>12</sup> We disagree.

Superior is correct that under Section 307(c)(1) of the Act, a license term may not exceed operating eight years. The Act, however, does not forbid the Commission from accepting a renewal application filed after the station’s license has expired. As Superior has acknowledged, there is longstanding Commission precedent for accepting renewal applications filed after the expiration of the license term, notwithstanding the fact that any station operations after license expiration are treated as unauthorized under Section 301 of the Act.<sup>13</sup>

In these circumstances, the Commission has generally issued a forfeiture for late-filing and unauthorized operation.<sup>14</sup> The same approach is warranted in the instant circumstances. Here, Station WBFH(FM) filed its application for renewal within 30 days of the expiration of its license, and thus the expiration of its license was not “final.” In the *Bloomfield Hills* decision, the staff granted the application for renewal of the WBFH(FM) license, issuing a Notice of Apparent Liability for, among other things, late filing and unauthorized operation. Accordingly, the amendment does not cure the Section 73.509 violation for which the Application was initially dismissed.

Finally, we reject Superior’s argument that WBFH(FM)’s license renewal application should be placed in a “queue” behind its modification application for WHYT(FM). Because the expiration of the WBFH(FM) license was not final, under Section 73.3573(e) of the Rules, the WBFH(FM) license renewal application, albeit untimely, is the “lead application” and is entitled to precedence over the WHYT(FM) modification application.<sup>15</sup>

**Conclusions/Actions.** Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Superior Communications IS DENIED, and that the Amendment filed on December 20, 2004, IS DISMISSED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>12</sup> Petition at 4.

<sup>13</sup> 47 U.S.C. § 301. See, e.g., *Discussion Radio Incorporated*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7437-38 (2004). (“*Discussion Radio*”), *Unlimited Service Organization*, Memorandum Opinion and Order, 20 FCC 2d (1969), *recon. denied*, 20 FCC 2d 1089 (1970); *Cumberland College of Tennessee*, Memorandum Opinion and Order, 87 FCC 2d 194, 195 (1981).

<sup>14</sup> See *Discussion Radio*, *supra*.

<sup>15</sup> See 47 C.F.R. § 73.3573(e). See also 47 U.S.C. § 309(k)(3) (only after license renewal application fails to meet standards set forth in subsection (k)(1) and been denied may the Commission accept application specifying the channel or facilities of the former licensee).