
BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1290

PRESS COMMUNICATIONS, LLC,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ON APPEAL FROM AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties and intervenors appearing in this Court are listed in the Brief for Appellant.

2. Rulings under review.

The ruling at issue is *Atlantic City Board of Education*, Memorandum Opinion and Order, 31 FCC Rcd 9380 (2016) (“*Order*”) (JA ____ - ____).

3. Related cases.

The FCC is not aware of any related cases pending in this Court or any other court.

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GLOSSARY

Board of Education	Atlantic City Board of Education
Bureau	Media Bureau, a staff-level component of the FCC
Equity	Equity Communications LP
FCC	Federal Communications Commission
NCE	Noncommercial educational
Press	Press Communications, LLC
WAJM	A radio station licensed to the Atlantic City Board of Education
WBHX	A radio station licensed to Press Communications, LLC
WJBR-FM	WJBR, a radio station in Wilmington, Delaware
WZBZ	A radio station licensed to Equity Communications LP

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BRIEF FOR APPELLEE

JURISDICTION

The *Order* (JA __) was released on August 9, 2016. Appellant Press Communications, LLC (Press) timely filed an appeal of the *Order* on August 12, 2016, within the requisite thirty-day filing period. *See* 47 U.S.C. § 402(c) and 47 C.F.R. § 1.4(b). This Court's jurisdiction rests on 47 U.S.C. § 402(b)(2) and (c).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission (FCC or Commission) reasonably dismissed Press' application to modify its license when the modification would have resulted in two independent violations of

Commission rules regarding the minimum required separation between radio stations.

a. Whether the Commission reasonably determined that Press' proposal would result in an impermissible short-spacing between radio stations WZBZ and WJBR.

b. Whether the Commission reasonably determined that Press' proposal would result in an impermissible short-spacing between radio stations WZBZ and WAJM.

STATUTES AND REGULATIONS

An addendum to this brief sets forth the relevant statutes and rules.

COUNTERSTATEMENT

A. Noncommercial Educational Radio Stations

This case involves Press' attempt to take advantage of a tardy license renewal by a student-run noncommercial educational (NCE) radio station. NCE radio stations include traditional public broadcast stations as well as stations licensed to universities, high schools, churches, and municipalities. These not-for-profit facilities provide a rich and varied blend of educational, cultural, and informational programming specifically designed to serve the needs of their listeners. There are approximately 4100 licensed NCE radio stations in the country, nearly 500 of which are student-operated. Public Notice, *Broadcast Station Totals as of 2016* (Jan. 5, 2017) (JA __); William

Penn Univ., Policy Statement and Order, 28 FCC Rcd 6932 ¶ 3 (MB 2013)

(JA___) (“*NCE Policy Statement*”). Student-run NCE radio stations rely primarily on student volunteers for day-to-day management, operational, and programming functions of the station. *Id.* These stations provide students with invaluable training and experience in radio programing and production, and serve as a supplement to the educational curriculum of the school. *Id.*

Student-run NCE stations also face a variety of unique challenges. Student turnover is high, as students eventually graduate or assume other responsibilities that conflict with the time they can devote to station activities. *Id.* As a result, new student volunteers must be recruited and trained on an ongoing basis by the remaining students. *Id.* Student volunteers must also handle the considerable responsibility of operating such stations while simultaneously juggling their own academic course loads. *Id.* In addition, student-run NCE stations generally lack any professional oversight aside from that provided by faculty advisors, who typically have limited time to devote due to the demands of teaching and other responsibilities. *Id.* Finally, many student-run NCE stations have significant financial constraints, often operating on a shoestring budget. *Id.*

B. Background

1. WAJM

WAJM is one such student-run NCE radio station. For the last twenty years, the station has been located at Atlantic City High School in Atlantic City, New Jersey, and is licensed to intervenor Atlantic City Board of Education (Board of Education). Board of Education Opposition to Petition to Deny at 1 (Jan. 28, 2011) (JA ____). WAJM offers valuable, hands-on opportunities for students in grades 10 – 12 to learn the day-to-day responsibilities of operating a radio station. Board Renewal Application, Exhibit 6 (Sept. 27, 2010) (JA ____). The station's array of programming includes student-produced sports coverage, news focusing on local issues in Atlantic City, live broadcast of Board of Education meetings and school events, and cultural programming. *Id.* at 4-5 (JA ____). For example, WAJM has student-created programs such as Latin Rhythms and *Lo Mejor Musica Latina*, which offer Spanish music as well as news, weather, sports and entertainment in Spanish. *Id.* at 5 (JA ____). In addition, the program *Salaam Namaste* broadcasts Middle Eastern and Hindi music and segments discussing U.S. citizenship and the naturalization process. *Id.* Such diverse programming is a reflection of not only the surrounding multicultural Atlantic City community, but the high school student body itself—over 75% of whom

are African American, Latino, and Asian. Board of Education Letter Re: Application of Press Communications, LLC for Minor Modification of License for Station WBHX(FM) at 4 n.15 (Aug. 11, 2014) (Board of Education Letter) (JA ____).

2. The Board of Education's License Renewal Application

All persons operating a radio station must obtain a license from the FCC under 47 U.S.C. § 301. In addition, under Section 73.3539 of the Commission's Rules, all radio stations seeking to renew their license must do so four months prior to the license term's expiration. 47 C.F.R. § 73.3539(a). The Board of Education was granted its initial license on May 28, 1997 and timely filed a renewal application on January 27, 1998, which the Commission granted. *Broadcast Applications*, Public Notice, Report No. 24171, 1998 WL 40478 (MB Feb. 4, 1998) (JA ____). The Board of Education was next required to file for renewal on or before February 1, 2006, but it failed to do so until September 21, 2010. *Order* ¶ 2 (JA ____).

In its belated 2010 application, the Board of Education stated that it “deeply regret[ted]” the delay, which was the result of an “administrative oversight that the Board [of Education] is taking immediate steps to correct.” Board of Education Renewal Application, Exhibit 6 (JA ____) (Sept. 21, 2010). The Board of Education explained that “the station is operated by school

district staff and students for curricular, non-profit purposes” and that the failure to communicate about the need to renew the station’s license was due to the “annual turn-over in the Board [of Education] as well as the administrative staff and students overseeing the operation of the station.” *Id.*

The Board of Education further explained that it was taking measures to improve communication between itself and the high school staff “to ensure full, future compliance with the FCC’s rules.” *Id.* In particular, the Board of Education created an internal position to “maintain[] day-to-day oversight and authority over the station to ensure compliance with the Commission’s rules, prepare[] all documents required by the Commission and other agencies, and keep[] the Board [of Education] apprised of any compliance issues.” Board of Education Opposition to Petition to Deny at 9 (JA ____).

Simultaneously with its renewal application, the Board of Education filed a request for special temporary authority to continue to operate the station, which the Commission’s staff subsequently granted. *Order* ¶ 3 (JA ____). The Board of Education thereafter timely filed its next license renewal application on January 28, 2014. *Broadcast Applications*, Public Notice, Report No. 28167, 2014 WL 345114 (MB Jan. 31, 2014) (JA ____).

3. Press' Application

Appellant Press is a licensee of six commercial radio stations in New Jersey. On August 27, 2010—approximately three weeks before the Board of Education filed its belated renewal application—Press filed a minor modification application to move its radio station WBHX to a new frequency and location.¹ *Order* ¶ 2 (JA ____). Specifically, Press sought to move WBHX from 99.7 FM (Channel 259A) to 99.3 FM (Channel 257A). Press Application (Aug. 27, 2010) (JA ____). In so doing, Press proposed to displace involuntarily radio station WZBZ, which was then operating on 99.3 FM. Press Br. at 8, 38 (JA ____). WZBZ is licensed to Equity Communications LP (Equity). *Order* ¶ 2 (JA ____). Press proposed that WZBZ move to 99.7 FM (Channel 259A), the channel which Press planned to vacate. Press' Response to June 20, 2014 Letter at 1 (July 18, 2014) (JA ____). Press also proposed,

¹ The Commission's rules define a minor modification as a (1) "change in community of license"; (2) "change to a higher or lower class co-channel, first, second or third-adjacent channel, or intermediate frequency"; (3) "change to a same class first, second or third-adjacent channel or intermediate frequency"; or (4) "channel substitution . . ." 47 C.F.R. § 73.3573(a)(1). Here, Press' proposal to move from Channel 259 to Channel 257 fell within the third category as a "change to a same-class . . . second . . . adjacent channel."

among other things, to move its transmitter site from Beach Haven to Tuckerton, New Jersey. *Id.*

The Board of Education and Equity filed objections to Press' application, on the grounds that Press' proposal would violate the minimum distance separation requirements between WZBZ and WAJM, as well as between WZBZ and WJBR, a station in Wilmington, Delaware. Board of Education's Informal Objection to the Press Application (Oct. 5, 2010) (JA ___); Equity's Informal Objection to the Press Application (Oct. 12, 2010) (JA ___). The Commission's rules require radio station transmitters to be separated by a minimum distance to prevent interference. 47 C.F.R. § 73.207. Stations whose transmitter sites are separated by less than the required minimum mileage separations are said to be "short-spaced." 47 C.F.R. § 73.213.

C. Deficiency Letter

On June 20, 2014, the Commission's Media Bureau (Bureau) issued a letter to Press, explaining that Press' proposal presented two impermissible short-spacings: (1) between Equity's WZBZ and WJBR, a station in Wilmington, Delaware; and (2) between WZBZ and the Board of Education's WAJM. *Id.* at 1 (JA ___).

The Bureau pointed out that with respect to WJBR, the spacing required by Commission rules is 113 kilometers, but “the actual spacing [from WZBZ] proposed in the [Press] application is 105 kilometers.” *Id.* With respect to WAJM, “the required spacing pursuant to [the Commission’s Rules] is 10 kilometers while the actual spacing [from WZBZ] proposed in the application is 2 kilometers.” Deficiency Letter at 1 (JA ____). The Bureau concluded that these two short-spacings constituted “an acceptance defect” which Press must correct. *Id.* The letter informed Press that it had 30 days to cure the deficiencies and that “applications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for amendment.” *Id.* at 2 (JA ____); 47 C.F.R. § 73.3564.

Press did not avail itself of the opportunity to cure the defects in its application. Nor did it seek a waiver of the rules. Rather, Press responded to the letter on July 18, 2014, informing the Bureau that “[w]ith all due respect . . . the [Commission staff] is mistaken.” Press Response to June 20, 2014 Letter at 1 (July 18, 2014) (JA ____). First, Press argued that any short-spacing with respect to WAJM was irrelevant because the Board of Education’s license expired in June 2006. *Id.* at 3-4 (JA ____). Second, Press maintained that it was under no obligation to request a waiver relative to a short-spacing

between WZBZ and WJBR because its “proposal would not create any new short-spacing at all.” *Id.* at 7 (JA ____). Press pointed out that WZBZ is already authorized to be short-spaced to WJBR as part of a grandfathering in 1989, and Press’ proposal therefore “would be identical to the short-spacing and potential interference which the Commission has already authorized.”² *Id.* at 8 (JA ____).

D. Bureau Order

On October 9, 2015, the Bureau issued an order in which it dismissed Press’ application as defective for presenting two impermissible short-spacings.³ *Bureau Order*, 30 FCC Rcd 10583, 10584-85 ¶¶ 3, 5 (MB 2015) (JA ____).

² When the Commission allowed an increase in the maximum power level of Class A FM stations in 1989, it amended 47 C.F.R. § 73.213(c) to provide that Class A stations that were authorized at that time were “grandfathered” and were not required to meet the greater distance separations specified by section 73.207 as long as they remain continuously short-spaced after 1989. *See Amendment of Part 73 of the Rules to provide for an additional FM station class (Class C3) and to increase the maximum transmitting power for Class A FM stations*, Second Report and Order, 4 FCC Rcd 6375 ¶ 1 (1989) (“*Grandfathered Stations Order*”).

³ In the same order, the Bureau also (1) adopted a consent decree imposing, among other things, a compliance plan and a monetary forfeiture of \$6,250 on the Board of Education for not filing a timely renewal application for WAJM and for engaging in unauthorized operation of its station while its license had expired; and (2) granted the Board of Education’s 2010 and 2014 renewal applications.

The Bureau explained that Press’ application was defective because its proposed channel substitution “was not fully spaced” to WAJM. *Id.* at 10585 ¶ 5 (JA ____). In doing so, the Bureau rejected Press’ argument that WAJM’s license could not be renewed because it had expired before the Board of Education filed its renewal application in 2010. *Bureau Order*, 30 FCC Rcd at 10586 ¶ 8 (JA ____). The Bureau explained that “longstanding and clear Commission precedent” dictates that the Board of Education’s renewal application should be granted, pointing to cases in which the Commission penalized the licensee for untimely filing a license renewal, but nonetheless accepted and granted the renewal application. *Id.* at 10585-86, 10596 ¶ 6, n.16 (JA ____).

The Bureau also addressed the second short-spacing between WZBZ and WJBR. It rejected Press’ argument that no waiver was necessary because the proposed short-spacing was technically indistinguishable from the existing grandfathered short-spacing between WJBR and WZBZ, and that the proposed involuntary channel change for WZBZ would simply substitute one channel for another, without any other technical change. *Id.* at 10586 ¶ 7 (JA ____). The Bureau explained that although WZBZ has a grandfathered short-spacing to WJBR on Channel 257A and would remain equally short-spaced on the proposed Channel 259A, “Press has failed to cite any precedent for

involuntarily changing one station’s short-spaced channel to another short-spaced channel absent a waiver of the Commission’s spacing rules.” *Id.* (emphasis in original). Here, the Bureau noted that “Press fails even to request a waiver of the spacing rules” for either short-spacing violation. *Bureau Order*, 30 FCC Rcd at 10586 ¶ 7 (JA ____).

The Bureau therefore dismissed Press’ application, consistent with Commission rules providing that defective applications that are not cured within 30 days are “dismissed with no further opportunity for amendment.” 47 C.F.R. § 73.3564(a)(3).

E. Order on Review

Press subsequently filed an Application for Review (AFR) asking the full Commission to review the Bureau order. On August 9, 2016, the Commission denied the AFR in the *Order* under review.

First, the Commission explained that it “consistently has allowed broadcast station licenses to be renewed even though the license renewal application was filed after the license term expired.” *Order* ¶ 8 (JA ____). The Commission pointed out that Press had failed to cite *any* case in which the agency had “denied a broadcast station’s license renewal application due to its having been filed after the end of the license term, in the absence of any explicit license cancellation notice from the Bureau.” *Id.* ¶ 9 (JA ____).

The Commission further explained that its treatment of late-filed renewal applications is consistent with policies embedded in the Communications Act (Act) to “promote continuity in broadcast station operations and protect existing licensees from conflicting applications pending final agency action on license renewal applications, for the benefit of the public.” *Id.* ¶ 10 (JA ____). The Commission’s policy also allows stations to “rectify their failure to timely seek renewal and afford them protection against competing applications, thus avoiding disruption in service to the public, while subjecting the licensee to appropriate enforcement action on account of its rule violations.” *Id.* Nothing in the Act, the Commission determined, requires the agency to “impose a ‘death sentence’” on licensees and deprive listeners of established broadcast service for a paperwork violation, particularly when the agency has “other means to enforce our rules.” *Id.*

Next, the Commission found that “Press[] attempt to claim cut-off protection for the Press Application is unavailing.” *Id.* ¶ 9 (JA ____). Under 47 C.F.R. § 73.3573(f), “[a]pplications for minor modifications . . . may be filed at any time, *unless restricted by the FCC*, and, generally . . . will be on a ‘first come/first served’ basis with the first *acceptable* application cutting off the filing rights of subsequent applicants.” (emphases added). The Commission

explained that protecting licenses—unless affirmatively cancelled by a final order—is a “restriction consistently applied by the Commission.” *Order* ¶ 9 (JA ____). Accordingly, Press’ application did not cut-off, or supersede, the filing rights of the Board of Education’s subsequently filed renewal application.

Finally, “for the reasons stated in the [Bureau] Order,” the Commission upheld the Bureau’s determination that Press’ failure to cure the two short-spacing deficiencies in its application or request a waiver of the rules warranted dismissal of its application. *Id.* ¶ 12 (JA ____).

F. Subsequent Developments

As explained in the *Order*, the Bureau has since modified its policies to promptly notify stations that have not filed their license renewal applications. *Order* n.30 (JA ____). In addition, the Bureau issues a notice of apparent liability if the station has not submitted an application to renew its license within 30 days of the filing deadline. *Id.*

SUMMARY OF ARGUMENT

The Court should reject Press’ efforts to take advantage of an untimely filed license renewal application by WAJM, an NCE station operated and managed by high school students. The Commission reasonably dismissed Press’ patently defective application because it would result in two

impermissible short-spacings—between WZBZ and WJBR, and between WZBZ and WAJM—in violation of Commission rules. Press was given the opportunity to cure these deficiencies, or it could have sought a waiver of the short-spacing rule. Press exercised neither option.

a. The Commission appropriately rejected Press’ argument that the short-spacing between WZBZ and WJBR was permissible because it was no different than the grandfathered short-spacing that had existed between WZBZ and WJBR at WZBZ’s previous frequency. The Commission’s rules exclude certain types of modification applications from “grandfathering” treatment, and grandfathering rights do not apply where, as here, an applicant seeks a change in channel. 47 C.F.R. § 73.203, Note. Longstanding Commission precedent also makes clear that Press could not rely on WZBZ’s prior grandfathering rights to avoid obtaining a waiver of the Commission’s short-spacing rules.

Because it is undisputed that Press did not cure the WZBZ/WJBR short-spacing deficiency in its application or seek a waiver, the Commission would have been entirely appropriate in dismissing Press’ application on the basis of *this defect alone*. The Court’s inquiry can end here.

b. In all events, the Commission appropriately concluded that Press’ proposal would also result in a second impermissible short-spacing, between

WZBZ and WAJM. In so doing, the Commission reasonably rejected Press' assertion that there was no short-spacing issue because WAJM's license had expired in 2006. The Commission's decision to grant the Board of Education's untimely filed renewal application is faithful to its longstanding practice in such instances to penalize the licensee for operating the station on an expired license, but ultimately accept and grant the renewal application. The Commission's approach is also consistent with its more lenient posture toward student-run NCE stations like WAJM. The Commission reasonably determined that terminating the Board of Education's license altogether was far too drastic a remedy for a paperwork violation. As the Commission emphasized, imposing a "death sentence" in such circumstances, *Order* ¶ 10, would deny valuable educational programming to the surrounding Atlantic City community. Furthermore, the agency's decision is consistent with the statutory language. Nothing in Section 307(c) of the Act limits the Commission's authority to accept and grant an untimely filed license renewal application.

Finally, Press' defective application was not entitled to cut-off protection from the Board of Education's license renewal application. In order to supersede the Board of Education's filing rights, Press' application had to be "acceptable" and could not be "restricted by the FCC." 47 C.F.R. §

73.3573(f). Press’ application was not acceptable because it would result in two impermissible short-spacings. And as the *Order* explained, the Commission’s practice of accepting and granting untimely filed renewal applications is a longstanding restriction that trumped Press’ defective application. The Commission’s interpretation of its cut-off rule is reasonable, and easily satisfies the deferential standard of review set forth in *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

STANDARD OF REVIEW

The FCC’s interpretation of the Communications Act is reviewed under the standards set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In addition, Press bears a heavy burden to establish that the *Order* on review is “arbitrary, capricious [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). Under this “highly deferential” standard, the order is entitled to a presumption of validity. *E.g.*, *Cellco P’ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). A court is not to ask “whether a regulatory decision is the best one possible or even whether it is better than the alternatives.” *FERC v. Electric Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016). Instead, the Court must uphold a rule if the Commission “examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[.]

including a rational connection between the facts found and the choice made.” *Id.* The order must be affirmed unless the agency failed to consider relevant factors or made a clear error in judgment. *E.g., Consumer Elec. Ass’n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

Moreover, an agency’s interpretation of its own rules is “controlling unless plainly erroneous or inconsistent with the regulation.” *Auer*, 519 U.S. at 461 (internal quotation marks omitted); *see also Ill. Public Telecomm. Ass’n v. FCC*, 752 F.3d 1018, 1024 (D.C. Cir. 2014).

ARGUMENT

THE COMMISSION REASONABLY DISMISSED PRESS' APPLICATION BECAUSE IT WOULD RESULT IN TWO IMPERMISSIBLE SHORT-SPACINGS THAT PRESS FAILED TO CURE, AND PRESS DID NOT SEEK A WAIVER OF THE SHORT-SPACING RULE.

The Commission's rules explicitly prohibit short-spacings. *See* 47

C.F.R. § 73.207(a) (“The Commission will not accept applications . . . to change the channel or location of existing assignments unless transmitter sites meet the minimum distance separation requirements of this section . . .”).

As the Bureau correctly identified, Press' application to move to a new channel and frequency was unacceptable because it would result in two impermissible short-spacings: (1) between Equity's WZBZ and WJBR, a station in Wilmington; and (2) between WZBZ and the Board of Education's WAJM. Press was given the opportunity to cure these deficiencies or seek a waiver of the short-spacing rule. Press refused to do either. The Commission therefore reasonably dismissed its defective application.

A. Press' Proposal Would Result in an Impermissible Short-Spacing Between Equity's WZBZ and WJBR.

Press' application proposed moving from 99.7 FM (Channel 259A) to 99.3 FM (Channel 257A)—the channel on which Equity's WZBZ is currently authorized to operate. Press' Response to June 20, 2014 Letter at 1 (JA ____). For that move to take place, the WZBZ license would have to be modified to

specify another channel. Press proposed moving WZBZ involuntarily to Channel 259A (which Press proposed to vacate). In Press' view, although WZBZ would remain short-spaced to WJBR at its new channel, the short-spacing was permissible because it was no different than the short-spacing that had existed between WZBZ and WJBR at WZBZ's previous frequency. Thus, according to Press, its application "did not propose any change at all from the status quo that had been authorized by the FCC decades ago," Press Br. at 39, and is consistent with the Commission's policy of allowing grandfathered short-spaced stations to continue to operate as licensed.

The Commission's rules permit certain, limited modifications of grandfathered short-spaced stations. *E.g.*, 47 C.F.R. § 73.213(c). However, the rules also explicitly exclude certain types of modification applications from "grandfathering" treatment. Grandfathering rights do not apply when an applicant seeks a change in community, class, or as here, a change in channel. *See* 47 C.F.R. § 73.203, Note (applications proposing such changes "must meet either the minimum spacing requirements of § 73.207 at the site specified in the application . . . or demonstrate . . . the existence of a suitable allotment site that fully complies with § 73.207 . . ."). Thus, the fact that WZBZ is authorized to be short-spaced to WJBR on its existing channel due to grandfathering is irrelevant. Press needed to seek a waiver of the short-

spacing rules. *See* 47 C.F.R. § 73.3566(a) (an application that does not comply with Commission rules must be “accompanied by an appropriate request for a waiver”).

The Bureau has specifically addressed the requirement that a station with grandfathered short-spacing rights must seek a waiver in the context of a community of license change.⁴ *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (MB 1992), involved a pre-1964 grandfathered short-spaced station that did not meet the spacing requirements under Section 73.207(b) of the Commission’s rules. The licensee requested to move its station from Newnan to Peachtree City, Georgia, which would result in “no change in technical facilities.” *Id.* at 6308 ¶ 5. In granting the reallocation to the new location, the Bureau explained that “we will consider waiving strict application of Section 73.207 [short-spacing requirements] in limited circumstances, provided that no new short-spacings are created, no existing short-spacings are exacerbated, and the potential for interference between the currently short-spaced stations is not increased.” *Id.*; *see also Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876, 13877 ¶ 3 (MB 2001) (describing

⁴ A change in community license, like a change to a first-, second- or third adjacent channel (as in this case), is considered a minor modification under Commission rules. 47 C.F.R. § 73.3573(a)(1).

Newnan as an exception to the Commission’s policy “not to grant waivers of the spacing requirements in considering the allotment of an FM channel”).

In addition, the Bureau staff in a public notice explicitly noted that a proposal involving a community of license change would require a waiver showing. Public Notice, *Media Bureau Offers Examples to Clarify the Treatment of Applications and Rulemaking Petitions Proposing Community of License Changes, Channel Substitutions, and New FM Allotments*, 22 FCC Rcd 6852 (Apr. 10, 2007). In that public notice, the Bureau offered a number of examples to further explain the application of rules to community of license changes. Among the examples given was a “pre-1964 grandfathered short-spaced Station A proposes to change its community of license from Smalltown, VA to Othertown, VA. Station A does not propose any technical facility modifications.” *Id.* at 6855. The Bureau explained that while this change would violate a Commission rule regarding assignment reference site, “[t]he staff will consider waiver request in accordance with the policy set forth in *Newnan and Peachtree City, Georgia* [].” *Id.*

In sum, the Commission’s rules, orders and public statements all show that Press was not entitled to rely on WZBZ’s prior grandfathering rights to avoid the necessity of seeking a waiver of the Commission’s short-spacing rules.

B. Press' Proposal Would Result in an Impermissible Short-Spacing Between Equity's WZBZ and the Board of Education's WAJM.

The short-spacing between WZBZ and WJBR alone rendered Press' application defective. The Commission therefore would have been entirely reasonable in dismissing Press' application on this sole basis, and the Court's inquiry can end here.

In all events, the Bureau appropriately determined that Press' application presented a second deficiency, in that Press' proposal would also result in an impermissible short-spacing between WZBZ and WAJM.

1. The Board of Education's Untimely Renewal Application Does Not Excuse The Short-Spacing Deficiency With Respect To WAJM in Press' Application.

Press does not dispute that its proposal leaves WZBZ short-spaced with WAJM. Instead, it argues that when the Board of Education did not file for renewal of its license in 2006, "any hypothetical 'short-spacing' between WZBZ and WAJM's no-longer-licensed facilities did not present any problem because there was no WAJM license to protect," *see* Press Br. at 8, when Press filed an application to modify its license in 2010. Press further contends that the Commission "is statutorily barred from according a broadcast licensee any rights extending beyond the license's eight-year term,"

see Press Br. at 6, and therefore, it overreached its authority when it accepted and granted the Board of Education's untimely filed renewal application.

Press' argument is unavailing. As explained in the *Order*, the agency's decision to grant the Board of Education's 2010 and 2014 renewal applications was faithful to "the Commission's consistent practice . . . to process the untimely license renewal application rather than dismiss it, even if it was filed long after the license expired." *Order* ¶ 9 (JA ____). The Commission cited numerous decisions in which it imposed a monetary forfeiture on licensees for failing to file a timely renewal application, but ultimately accepted and granted the renewal application. *Id.* n.21 (JA ____); *see, e.g., Superior Commc'ns*, Letter, 22 FCC Rcd 16634, 16636 (MB 2007) (recognizing "longstanding Commission precedent for accepting renewal applications filed after the expiration of the license term . . . [i]n these circumstances, the Commission has generally issued a [monetary] forfeiture for late-filing and unauthorized operation"); *Discussion Radio Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 7433, 7441 (2004) (accepting untimely filed license renewal application and penalizing licensee with \$16,500 forfeiture for operating station on an expired license). The agency explained that this practice advanced the Act's goals of "promot[ing] continuity in broadcast

station operations . . . avoiding disruption in service to the public, while subjecting the licensee to appropriate enforcement action on account of its rule violations.” *Order* ¶ 10 (JA ____).

The Commission’s decision to grant the Board of Education’s renewal application—pursuant to a consent decree penalizing the Board of Education for violating the renewal application deadline rule and engaging in unauthorized operation—is also consistent with its more flexible approach toward student-run NCE stations, which rely on student volunteers for all management, operational, and programming functions. *See NCE Policy Statement*, 28 FCC Rcd at 6932 ¶ 2 (JA____) (reducing monetary forfeiture for student-run NCE stations that commit first time, non-substantive violations of Commission’s rules). This policy is in recognition of the fact that “[s]tudent volunteers at these stations are young”—in this case, as young as fifteen years old—“and unlikely to have had any work experience in regulatory compliance matters, particularly those involving the FCC requirements to which NCE stations are subject.” *NCE Policy Statement*, 28 FCC Rcd at 6933 ¶ 3 (JA ____). At the same time, these stations provide significant value to the students, who learn about the day-to-day responsibilities involved in operating a broadcast station, and especially to the larger community who benefit from a diverse range of educational programming. *Id.* The

Commission's more flexible approach toward student-run NCE stations appropriately balances all of these interests.

Press maintains that the Commission's practice of accepting late-filed license renewal applications is contrary to the language of 47 U.S.C. § 307(c), which provides that "[e]ach license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years." But as explained in the *Order*, nothing in the language of the Act requires the Commission to "impose a 'death sentence' on licensees and deprive audiences of established broadcast service," *see Order* ¶ 10 (JA __), for belatedly filing a renewal application—a paperwork violation. *See Discussion Radio*, 19 FCC Rcd at 7440 ¶ 22 (licensee violated a number of "technical" rules including the failure to file a timely license renewal, but Commission determined these actions did not amount to a "'serious violation' of the Communications Act or the Commission's Rules").

A comparison of the statutory text in other provisions of the Act is illustrative on this point. In the context of construction permits, for example, Congress has made clear that a permit is "automatically forfeited if the station is not ready for operation within the time specified." 47 U.S.C. § 319(b). Accordingly, this Court recently upheld the Commission's determination that a construction permit had automatically forfeited when the petitioner failed to

meet the construction deadline. *Walker Broad. v. FCC*, 2016 WL 7335630 (D.C. Cir. Dec. 5, 2016) (unpublished). Here, in contrast, 47 U.S.C. § 307(c) contains no such language. Nothing in the statutory text compels the conclusion that a license is automatically forfeited when the licensee does not file a timely renewal application. It is well settled that “when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *N.Y. v. EPA*, 413 F.3d 3, 39 (D.C. Cir. 2005) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)).

Press insists that the inclusion of the term “shall” in Section 301 makes clear that “Congress intended that the rights created by a broadcast license are to be narrowly circumscribed and in particular, are not to extend beyond the license’s stated term.” Press Br. at 21. But as the Supreme Court has recognized, while Congress’ insertion of the term “shall” in the statutory text makes the duty “mandatory,” “[i]n the absence of congressional guidance regarding a remedy . . . the sanction for breach is not loss of all later powers to act.” *State Farm Fire & Casualty Co. v. United States*, 137 S. Ct. 436, 442 (2016). In *State Farm*, the petitioner argued that the government’s failure to place under seal a complaint arising under the False Claims Act—consistent

with a statutory requirement that a complaint “shall” be kept under seal—necessitated dismissal of the complaint. *Id.* The Court acknowledged that “[t]rue, this language creates a mandatory rule the relator must follow,” *id.*, but held that dismissal was not warranted. In so doing, the Court explained that it adhered to the “general principle that Congress’ use of ‘explicit language’ in one provision ‘cautions against inferring’ the same limitation in another provision.” *Id.* Because the False Claims Act has a number of provisions that explicitly require the dismissal of the relator’s actions, the Court concluded that “it is proper to infer that, had Congress intended to require dismissal . . . it would have said so.” *Id.* at 443. Similarly in this case, nothing in the language of 47 U.S.C. § 307(c) requires the Commission to issue a “death sentence,” *see Order* ¶ 10, on a licensee or prohibits it from accepting late-filed license renewal applications, especially when compared

to other sections of the Communications Act that expressly provide for automatic expiration provisions.⁵

The Bureau appropriately penalized the Board of Education with a monetary forfeiture for filing a belated renewal application and operating its station with an expired license. *Bureau Order*, 30 FCC Rcd at 10584 ¶ 3 (JA ____). This was a “less drastic,” *Pierce*, 476 U.S. at 260, remedy than terminating the Board of Education’s license altogether, and is faithful to the statutory text, the Supreme Court’s statutory interpretation of similar provisions, and Commission precedent. Moreover, there are “important public rights are at stake.” *Id.* Student-run NCE stations like WAJM “play a unique role because they are incubators for talent as well as media outlets.” *NCE Policy Statement*, 28 FCC Rcd at 6932-33 ¶ 3 (JA ____). WAJM serves

⁵ In an analogous case, *Brock v. Pierce County*, 476 U.S. 253 (1986), the Supreme Court addressed a statute stating that the Secretary of Labor “shall” act within a certain time on information regarding misuse of federal funds. The respondent there maintained that the failure to act within the specified time divested the Secretary of authority to investigate the claim. *Id.* at 257. The Court rejected that argument, explaining that Congress’ “mere use of the word ‘shall’ [was] not enough to remove the Secretary’s power to act.” *Id.* at 262. The Court went on to explain that it “would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.” *Id.* at 260. The Court warned that “[w]hen, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.” *Id.*

the public interest by offering a range of educational programming, including bilingual and multicultural programs that appeal to a wide cross section of the Atlantic City community. Board of Education Opposition to Petition to Deny at 3-5 (JA ____). It would therefore be contrary to the public interest to deprive the Atlantic City community of an important source of programming by denying the Board of Education's license renewal application. *See Order* ¶ 10 (recognizing the important of “promot[ing] continuity in broadcast station operations . . . for the benefit of the public.”) (JA ____); *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990) (“The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocoting of a channel from one community to another.”).

Finally, Press argues that the Commission waived its rules by accepting the Board of Education's late-filed renewal application and thus, under this Court's decision in *Network IP v. FCC*, 548 F.3d 116 (D.C. Cir. 2008), was required to “explain why deviation [from the rule's requirement] better serves the public interest” and any “special circumstances” warranting the waiver. Press Br. at 25. But the Commission did not waive the date for filing a

license renewal application, *see Order* n. 32 (JA ___), and thus had no occasion to address *Network IP*. On the contrary, the Bureau adopted a consent decree terminating an enforcement proceeding in which it stated explicitly that the Board of Education “violated the Filing Date Rule by failing to file a license renewal application for the Station on or before February 1, 2006, and that it violated Section 301 of the Act by continuing Station operations after the Station’s license had expired.” *Consent Decree*, 30 FCC Rcd at 10591 ¶ 12 (JA ___). For these and other violations, the Board of Education was assessed a forfeiture of \$6,250, a significant penalty for a student-run NCE station to pay.⁶ *Bureau Order*, 30 FCC Rcd at 10585 ¶ 3 (JA ___); *see also NCE Policy Statement*, 28 FCC Rcd at 6933 ¶ 3 (recognizing that “student-run stations frequently operate with very limited annual operating budgets, in some cases less than the Commission’s base forfeiture amount for a single public inspection file violation”) (JA ___). In short, the FCC *applied* and *enforced* the rule, just not in the way Press would have preferred.

⁶ To the extent that Press challenges the Commission’s decision to enter into a consent decree in which the Board of Education agreed to pay a forfeiture, this Court has held in similar circumstances that a decision to terminate a pending enforcement proceeding via consent decree is an unreviewable exercise of the agency’s discretion. *New York State Dep’t of Law v. FCC*, 984 F.2d 1209, 1213 (D.C. Cir. 1993).

2. Press' Defective Application Did Not Entitle Press to Cut-Off Protection From the Board of Education's License Renewal Application.

The Commission's cut-off rule, 47 C.F.R. § 73.3573(f), provides that “applications for minor modifications for non-reserved channel FM broadcast stations . . . may be filed at any time, unless restricted by the FCC, and, generally, will be processed . . . on a ‘first come/first served’ basis, with the first acceptable application cutting off the filing rights of subsequent applicants.” 47 C.F.R. § 73.3573(f). The cut-off rule is intended to protect applicants that seek minor modifications of their licenses against any subsequently filed minor modification applications. Press contends that “[u]nder the FCC’s well established cut-off rules . . . the pendency of Press’s application barred the acceptance of the later filed mutually exclusive WAJM application.” Press Br. at 3. Applications are considered “mutually exclusive” if only one can be granted because they seek the same license or different licenses that would interfere with each other. *See Lakeshore Broad., Inc. v. FCC*, 199 F.3d 468, 470 (D.C. Cir. 1999) (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945)).

At the outset, Press’ application was not “acceptable,” 47 C.F.R. § 73.3573(f), because it proposed two impermissible short-spacings without a supporting waiver request. The Bureau offered Press the opportunity to cure

these deficiencies, but Press chose not to do so. Deficiency Letter at 1 (JA ____).

Minor modification applications may be accepted for filing unless “restricted by the FCC.” 47 C.F.R. § 73.3573(f). And, as the *Order* explains, the Commission’s long-standing practice of accepting late-filed renewal applications and protecting licenses unless cancelled by a final order “is a restriction consistently applied by the Commission.” *Order* ¶ 9 (JA ____). The *Order* cited numerous cases in which the Commission has penalized licensees for operating stations on an expired license while still accepting and granting their late-filed renewal application, *see id.* n.21, consistent with advancing the Act’s goals of “promot[ing] continuity in broadcast station operations . . . and avoiding disruption in service to the public.” *Id.* ¶ 10 (JA ____).

The Bureau previously examined this precise issue in *Superior Commcn’s*, Letter, 22 FCC Rcd 16634 (MB 2007), in which it determined that a minor modification application does not cut off the rights of a subsequent license renewal application that was untimely filed. In that case, radio station WHYT filed an amendment to a modification application that was mutually exclusive with the license for station WBFH. *Id.* WHYT argued that there was no mutual exclusivity because WBFH’s license had long expired and it had not filed a renewal application. *Id.* WBFH

subsequently filed an untimely renewal application, which WHYT contended was cut off by WHYT's previously filed modification application. *Id.*

The Bureau held that Section 307(c)(1) of the Act, which states that a license term “shall be for a term of not to exceed 8 years,” 47 U.S.C. § 307(c)(1), “does not forbid the Commission from accepting a renewal application filed after the station’s license has expired.” *Id.* at 16636. The Bureau explained that there “is longstanding Commission precedent for accepting renewal applications filed after the expiration of the license term” and that in these circumstances, the Commission has customarily issued a monetary forfeiture for late-filing and unauthorized operation. *Id.* In light of this well-established Commission precedent, the Bureau “reject[ed] Superior’s argument that WBFH[’s] license renewal application should be placed in a ‘queue’ behind its modification application for WHYT(FM).” *Id.* Consistent with *Superior*, the Commission here appropriately rejected Press’ assertion that its application cut off the rights of the Board of Education’s renewal application.

CONCLUSION

The Court should deny Press' appeal.

Respectfully submitted,

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January 12, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRESS COMMUNICATIONS, LLC,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

No. 16-1290

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Appellee in the captioned case contains 7,067 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

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47 U.S.C. § 301**§ 301. License for radio communication or transmission of energy**

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 307(c)**§ 307. Licenses**

* * * * *

(c) Terms of licenses**(1) Initial and renewal licenses**

Each license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years. Upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby. Consistent with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action.

(2) Materials in application

In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings.

(3) Continuation pending decision

Pending any administrative or judicial hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 or section 402 of this title, the Commission shall continue such license in effect.

47 U.S.C. § 309(k)**§ 309. Application for license**

* * * * *

(k) Broadcast station renewal procedures**(1) Standards for renewal**

If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--

(A) the station has served the public interest, convenience, and necessity;

(B) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and

(C) there have been no other violations by the licensee of this chapter or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.

(2) Consequence of failure to meet standard

If any licensee of a broadcast station fails to meet the requirements of this subsection, the Commission may deny the application for renewal in accordance with paragraph (3), or grant such application on terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted.

(3) Standards for denial

If the Commission determines, after notice and opportunity for a hearing as provided in subsection (e) of this section, that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall--

(A) issue an order denying the renewal application filed by such licensee under section 308 of this title; and

(B) only thereafter accept and consider such applications for a construction permit as may be filed under section 308 of this title specifying the channel or broadcasting facilities of the former licensee.

(4) Competitor consideration prohibited

In making the determinations specified in paragraph (1) or (2), the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.

47 U.S.C. § 319**§ 319. Construction permits****(a) Requirements**

No license shall be issued under the authority of this chapter for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(b) Time limitation; forfeiture

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.

(c) Licenses for operation

Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309(a)-

(g) of this title shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.

(d) Government, amateur, or mobile station; waiver

A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. A permit for construction shall not be required for public coast stations, privately owned fixed microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits for any such stations. With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations. With respect to any other station or class of stations, the Commission shall not waive the requirement for a construction permit unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver.

47 C.F.R. § 73.203**§ 73.203 Availability of channels.**

(a) Except as provided for in paragraph (b) of this section and § 1.401(d) of this chapter and 73.3573(a)(1), applications may be filed to construct new FM broadcast stations only at the communities and on the channels contained in the Table of Allotments (§ 73.202(b)).

(b) Applications filed on a first come, first served basis for the minor modification of an existing FM broadcast station may propose any change in channel and/or class and/or community not defined as major in § 73.3573(a). Applications for a change in community of license must comply with the requirements set forth in § 73.3573(g).

Note to § 73.203: This section is limited to non-reserved band changes in channel and/or class and/or community. Applications requesting such changes must meet either the minimum spacing requirements of § 73.207 at the site specified in the application, without resort to the provisions of the Commission's rules permitting short spaced stations as set forth in §§ 73.213 through 73.215, or demonstrate by a separate exhibit attached to the application the existence of a suitable allotment site that fully complies with §§ 73.207 and 73.315 without resort to §§ 73.213 through 73.215.

47 C.F.R. § 73.207**§ 73.207 Minimum distance separation between stations.**

(a) Except for assignments made pursuant to § 73.213 or 73.215, FM allotments and assignments must be separated from other allotments and assignments on the same channel (co-channel) and five pairs of adjacent channels by not less than the minimum distances specified in paragraphs (b) and (c) of this section. The Commission will not accept petitions to amend the Table of Allotments unless the reference points meet all of the minimum distance separation requirements of this section. The Commission will not accept applications for new stations, or applications to change the channel or location of existing assignments unless transmitter sites meet the minimum distance separation requirements of this section, or such applications conform to the requirements of § 73.213 or 73.215. However, applications to modify the facilities of stations with short-spaced antenna locations authorized pursuant to prior waivers of the distance separation requirements may be accepted, provided that such applications propose to maintain or improve that particular spacing deficiency. Class D (secondary) assignments are subject only to the distance separation requirements contained in paragraph (b)(3) of this section. (See § 73.512 for rules governing the channel and location of Class D (secondary) assignments.)

(b) The distances listed in Tables A, B, and C apply to allotments and assignments on the same channel and each of five pairs of adjacent channels. The five pairs of adjacent channels are the first (200 kHz above and 200 kHz below the channel under consideration), the second (400 kHz above and below), the third (600 kHz above and below), the fifty-third (10.6 MHz above and below), and the fifty-fourth (10.8 MHz above and below). The distances in the Tables apply regardless of whether the proposed station class appears first or second in the “Relation” column of the table.

(1) Domestic allotments and assignments must be separated from each other by not less than the distances in Table A which follows:

Table A—Minimum Distance Separation Requirements in Kilometers (miles)

Relation	Co-channel	200 kHz	400/600 kHz	10.6/10.8 MHz
A to A	115 (71)	72 (45)	31 (19)	10 (6)
A to B1	143 (89)	96 (60)	48 (30)	12 (7)
A to B	178 (111)	113 (70)	69 (43)	15 (9)
A to C3	142 (88)	89 (55)	42 (26)	12 (7)
A to C2	166 (103)	106 (66)	55 (34)	15 (9)
A to C1	200 (124)	133 (83)	75 (47)	22 (14)
A to C0	215 (134)	152 (94)	86 (53)	25 (16)
A to C	226 (140)	165 (103)	95 (59)	29 (18)
B1 to B1	175 (109)	114 (71)	50 (31)	14 (9)
B1 to B	211 (131)	145 (90)	71 (44)	17 (11)
B1 to C3	175 (109)	114 (71)	50 (31)	14 (9)
B1 to C2	200 (124)	134 (83)	56 (35)	17 (11)
B1 to C1	233 (145)	161 (100)	77 (48)	24 (15)
B1 to C0	248 (154)	180 (112)	87 (54)	27 (17)
B1 to C	259 (161)	193 (120)	105 (65)	31 (19)
B to B	241 (150)	169 (105)	74 (46)	20 (12)
B to C3	211 (131)	145 (90)	71 (44)	17 (11)
B to C2	241 (150)	169 (105)	74 (46)	20 (12)
B to C1	270 (168)	195 (121)	79 (49)	27 (17)
B to C0	272 (169)	214 (133)	89 (55)	31 (19)
B to C	274 (170)	217 (135)	105 (65)	35 (22)
C3 to C3	153 (95)	99 (62)	43 (27)	14 (9)
C3 to C2	177 (110)	117 (73)	56 (35)	17 (11)
C3 to C1	211 (131)	144 (90)	76 (47)	24 (15)
C3 to C0	226 (140)	163 (101)	87 (54)	27 (17)
C3 to C	237 (147)	176 (109)	96 (60)	31 (19)

C2 to C2	190 (118)	130 (81)	58 (36)	20 (12)
C2 to C1	224 (139)	158 (98)	79 (49)	27 (17)
C2 to C0	239 (148)	176 (109)	89 (55)	31 (19)
C2 to C	249 (155)	188 (117)	105 (65)	35 (22)
C1 to C1	245 (152)	177 (110)	82 (51)	34 (21)
C1 to C0	259 (161)	196 (122)	94 (58)	37 (23)
C1 to C	270 (168)	209 (130)	105 (65)	41 (25)
C0 to C0	270 (168)	207 (129)	96 (60)	41 (25)
C0 to C	281 (175)	220 (137)	105 (65)	45 (28)
C to C	290 (180)	241 (150)	105 (65)	48 (30)

(2) Under the Canada–United States FM Broadcasting Agreement, domestic U.S. allotments and assignments within 320 kilometers (199 miles) of the common border must be separated from Canadian allotments and assignments by not less than the distances given in Table B, which follows. When applying Table B, U.S. Class C2 allotments and assignments are considered to be Class B; also, U.S. Class C3 allotments and assignments and U.S. Class A assignments operating with more than 3 kW ERP and 100 meters antenna HAAT (or equivalent lower ERP and higher antenna HAAT based on a class contour distance of 24 km) are considered to be Class B1.

TABLE B—MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS

Relation	Co-Channel	Adjacent Channels				I.F.
	0 kHz	200 kHz	400 kHz	600 kHz	10.6/10.8 MHz	
A-A	132	85	45	37		8
A-B1	180	113	62	54		16
A-B	206	132	76	69		16
A-C1	239	164	98	90		32
A-C	242	177	108	100		32
B1-B1	197	131	70	57		24
B1-B	223	149	84	71		24
B1-C1	256	181	106	92		40
B1-C	259	195	116	103		40
B-B	237	164	94	74		24
B-C1	271	195	115	95		40
B-C	274	209	125	106		40
C1-C1	292	217	134	101		48
C1-C	302	230	144	111		48
C-C	306	241	153	113		48

(3) Under the 1992 Mexico–United States FM Broadcasting Agreement, domestic U.S. assignments or allotments within 320 kilometers (199 miles) of the common border must be separated from Mexican assignments or allotments by not less than the distances given in Table C in this paragraph (b)(3). When applying Table C—

(i) U.S. or Mexican assignments or allotments which have been notified internationally as Class A are limited to a maximum of 3.0 kW ERP at 100 meters HAAT, or the equivalent;

(ii) U.S. or Mexican assignments or allotments which have been notified internationally as Class AA are limited to a maximum of 6.0 kW ERP at 100 meters HAAT, or the equivalent;

(iii) U.S. Class C3 assignments or allotments are considered Class B1;

(iv) U.S. Class C2 assignments or allotments are considered Class B; and

(v) Class C1 assignments or allotments assume maximum facilities of 100 kW ERP at 300 meters HAAT. However, U.S. Class C1 stations may not, in any event,

exceed the domestic U.S. limit of 100 kW ERP at 299 meters HAAT, or the equivalent.

Table C—Minimum Distance Separation Requirements in Kilometers

Relation	Co-channel	200 kHz	400 kHz or 600 kHz	10.6 or 10.8 MHz (I.F.)
A to A	100	61	25	8
A to AA	111	68	31	9
A to B1	138	88	48	11
A to B	163	105	65	14
A to C1	196	129	74	21
A to C	210	161	94	28
AA to AA	115	72	31	10
AA to B1	143	96	48	12
AA to B	178	125	69	15
AA to C1	200	133	75	22
AA to C	226	165	95	29
B1 to B1	175	114	50	14
B1 to B	211	145	71	17
B1 to C1	233	161	77	24
B1 to C	259	193	96	31
B to B	237	164	65	20
B to C1	270	195	79	27
B to C	270	215	98	35
C1 to C1	245	177	82	34
C1 to C	270	209	102	41
C to C	290	228	105	48

(c) The distances listed below apply only to allotments and assignments on Channel 253 (98.5 MHz). The Commission will not accept petitions to amend the

Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments where the following minimum distances (between transmitter sites, in kilometers) from any TV Channel 6 allotment or assignment are not met:

MINIMUM DISTANCE SEPARATION FROM TV CHANNEL 6 (82-88 MHz)		
FM Class	TV Zone I	TV Zones II & III
A	17	22
B1	19	23
B	22	26
C3	19	23
C2	22	26
C1	29	33
C	36	41

47 C.F.R. § 73.213**§ 73.213 Grandfathered short-spaced stations.**

(a) Stations at locations authorized prior to November 16, 1964, that did not meet the separation distances required by § 73.207 and have remained continuously short-spaced since that time may be modified or relocated with respect to such short-spaced stations, provided that (i) any area predicted to receive interference lies completely within any area currently predicted to receive co-channel or first-adjacent channel interference as calculated in accordance with paragraph (a)(1) of this section, or that (ii) a showing is provided pursuant to paragraph (a)(2) of this section that demonstrates that the public interest would be served by the proposed changes.

(1) The F(50,50) curves in Figure 1 of § 73.333 are to be used in conjunction with the proposed effective radiated power and antenna height above average terrain, as calculated pursuant to § 73.313(c), (d)(2) and (d)(3), using data for as many radials as necessary, to determine the location of the desired (service) field strength. The F(50,10) curves in Figure 1a of § 73.333 are to be used in conjunction with the proposed effective radiated power and antenna height above average terrain, as calculated pursuant to § 73.313(c), (d)(2) and (d)(3), using data for as many radials as necessary, to determine the location of the undesired (interfering) field strength. Predicted interference is defined to exist only for locations where the desired (service) field strength exceeds 0.5 mV/m (54 dBu) for a Class B station, 0.7 mV/m (57 dBu) for a Class B1 station, and 1 mV/m (60 dBu) for any other class of station.

(i) Co-channel interference is predicted to exist, for the purpose of this section, at all locations where the undesired (interfering station) F(50,10) field strength exceeds a value 20 dB below the desired (service) F(50,50) field strength of the station being considered (e.g., where the protected field strength is 60 dBu, the interfering field strength must be 40 dBu or more for predicted interference to exist).

(ii) First-adjacent channel interference is predicted to exist, for the purpose of this section, at all locations where the undesired (interfering station) F(50,10) field strength exceeds a value 6 dB below the desired (service) F(50,50) field strength of the station being considered (e.g., where the protected field strength is 60 dBu, the interfering field strength must be 54 dBu or more for predicted interference to exist).

(2) For co-channel and first-adjacent channel stations, a showing that the public interest would be served by the changes proposed in an application must include exhibits demonstrating that the total area and population subject to co-channel or first-adjacent channel interference, caused and received, would be maintained or decreased. In addition, the showing must include exhibits demonstrating that the area and the population subject to co-channel or first-adjacent channel interference caused by the proposed facility to each short-spaced station individually is not increased. In all cases, the applicant must also show that any area predicted to lose service as a result of new co-channel or first-adjacent-channel interference has adequate aural service remaining. For the purpose of this section, adequate service is defined as 5 or more aural services (AM or FM).

(3) For co-channel and first-adjacent-channel stations, a copy of any application proposing interference caused in any areas where interference is not currently caused must be served upon the licensee(s) of the affected short-spaced station(s).

(4) For stations covered by this paragraph (a), there are no distance separation or interference protection requirements with respect to second-adjacent and third-adjacent channel short-spacings that have existed continuously since November 16, 1964.

(b) Stations at locations authorized prior to May 17, 1989, that did not meet the IF separation distances required by § 73.207 and have remained short-spaced since that time may be modified or relocated provided that the overlap area of the two stations' 36 mV/m field strength contours is not increased.

(c) Short spacings involving at least one Class A allotment or authorization. Stations that became short spaced on or after November 16, 1964 (including stations that do not meet the minimum distance separation requirements of paragraph (c)(1) of this section and that propose to maintain or increase their existing distance separations) may be modified or relocated in accordance with paragraph (c)(1) or (c)(2) of this section, except that this provision does not apply to stations that became short spaced by grant of applications filed after October 1, 1989, or filed pursuant to § 73.215. If the reference coordinates of an allotment are short spaced to an authorized facility or another allotment (as a result of the revision of § 73.207 in the Second Report and Order in MM Docket No. 88–375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this section only with respect to such short spacing. No other stations will be authorized pursuant to these paragraphs.

(1) Applications for authorization under requirements equivalent to those of prior rules. Each application for authority to operate a Class A station with no more than 3000 watts ERP and 100 meters antenna HAAT (or equivalent lower ERP and higher antenna HAAT based on a class contour distance of 24 km) must specify a transmitter site that meets the minimum distance separation requirements in this paragraph. Each application for authority to operate a Class A station with more than 3000 watts ERP (up to a maximum of 5800 watts), but with an antenna HAAT lower than 100 meters such that the distance to the predicted 0.05 mV/m (34 dBmV/m) F(50,10) field strength contour does not exceed 98 km must specify a transmitter site that meets the minimum distance separation requirements in this paragraph. Each application for authority to operate an FM station of any class other than Class A must specify a transmitter site that meets the minimum distance separation requirements in this paragraph with respect to Class A stations operating pursuant to this paragraph or paragraph (c)(2) of this section, and that meets the minimum distance separation requirements of § 73.207 with respect to all other stations.

MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)				
Relation	Co-channel	200 kHz	400/600 kHz	10.6/10.8 MHz
A to A	105 (65)	64 (40)	27 (17)	8 (5)
A to B1	138 (86)	88 (55)	48 (30)	11 (6)
A to B	163 (101)	105 (65)	69 (43)	14 (9)
A to C3	138 (86)	84 (52)	42 (26)	11 (6)
A to C2	163 (101)	105 (65)	55 (34)	14 (9)
A to C1	196 (122)	129 (80)	74 (46)	21 (13)
A to C	222 (138)	161 (100)	94 (58)	28 (17)

(2) Applications for authorization of Class A facilities greater than 3,000 watts ERP and 100 meters HAAT. Each application to operate a Class A station with an ERP and HAAT such that the reference distance would exceed 24 kilometers must contain an exhibit demonstrating the consent of the licensee of each co-channel, first, second or third adjacent channel station (for which the requirements of § 73.207 are not met) to a grant of that application. Each such application must

specify a transmitter site that meets the applicable IF-related channel distance separation requirements of § 73.207. Applications that specify a new transmitter site which is short-spaced to an FM station other than another Class A station which is seeking a mutual increase in facilities may be granted only if no alternative fully-spaced site or less short-spaced site is available. Licensees of Class A stations seeking mutual increases in facilities need not show that a fully spaced site or less short-spaced site is available. Applications submitted pursuant to the provisions of this paragraph may be granted only if such action is consistent with the public interest.

47 C.F.R. § 73.3539**§ 73.3539 Application for renewal of license.**

(a) Unless otherwise directed by the FCC, an application for renewal of license shall be filed not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed, except that applications for renewal of license of an experimental broadcast station shall be filed not later than the first day of the second full calendar month prior to the expiration date of the license sought to be renewed. If any deadline prescribed in this paragraph falls on a nonbusiness day, the cutoff shall be the close of business of the first full business day thereafter.

(b) No application for renewal of license of any broadcast station will be considered unless there is on file with the FCC the information currently required by §§ 73.3612 through 73.3615, inclusive, for the particular class of station.

(c) Whenever the FCC regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation, and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified. If the licensee fails to file such application within the prescribed time, the hearing or investigation shall proceed as if such renewal application had been received.

(d) Renewal application forms titles and numbers are listed in § 73.3500, Application and Report Forms.

47 C.F.R. § 73.3564

§ 73.3564 Acceptance of applications.

(a)(1) Applications tendered for filing are dated upon receipt and then forwarded to the Media Bureau, where an administrative examination is made to ascertain whether the applications are complete. Except for applications for minor modifications of facilities in the non-reserved FM band, as defined in § 73.3573(a)(2), long form applications subject to the provisions of § 73.5005 found to be complete or substantially complete are accepted for filing and are given file numbers. In the case of minor defects as to completeness, a deficiency letter will be issued and the applicant will be required to supply the missing or corrective information. Applications that are not substantially complete will not be considered and will be returned to the applicant.

(2) In the case of minor modifications of facilities in the non-reserved FM band, applications will be placed on public notice if they meet the following two-tiered minimum filing requirements as initially filed in first-come/first-serve proceedings:

(i) The application must include:

- (A) Applicant's name and address,
- (B) Applicant's signature,
- (C) Principal community,
- (D) Channel or frequency,
- (E) Class of station, and
- (F) Transmitter site coordinates; and

(ii) The application must not omit more than three of the following second-tier items:

- (A) A list of the other media interests of the applicant and its principals,
- (B) Certification of compliance with the alien ownership provisions contained in 47 U.S.C. 310(b),
- (C) Tower/antenna heights,
- (D) Effective radiated power,
- (E) Whether the antenna is directional or omnidirectional, and

(F) An exhibit demonstrating compliance with the contour protection requirements of 47 CFR 73.215, if applicable.

(3) Applications found not to meet minimum filing requirements will be returned to the applicant. Applications found to meet minimum filing requirements, but that contain deficiencies in tender and/or acceptance information, shall be given an opportunity for corrective amendment pursuant to 73.3522 of this part.

Applications found to be substantially complete and in accordance with the Commission's core legal and technical requirements will be accepted for filing. Applications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for amendment.

(b) Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the FCC's administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the FCC's rules.

(c) At regular intervals, the FCC will issue a Public Notice listing all long form applications which have been accepted for filing. Pursuant to §§ 73.3571(h), 73.3572, and 73.3573(f), such notice shall establish a cut-off date for the filing of petitions to deny. With respect to reserved band FM applications, the Public Notice shall also establish a cut-off date for the filing of mutually exclusive applications pursuant to § 73.3573(e). However, no application will be accepted for filing unless certification of compliance with the local notice requirements of § 73.3580(h) has been made in the tendered application.

(d) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing applications for new stations or for major modifications in the facilities of an existing station. Except for reserved band FM stations and TV stations on reserved noncommercial educational channels, applications for new and major modifications in facilities will be accepted only during these window filing periods specified by the Commission.

(e) Applications for minor modification of facilities may be tendered at any time, unless restricted by the FCC. These applications will be processed on a “first come/first served” basis and will be treated as simultaneously tendered if filed on the same day. Any applications received after the filing of a lead application will be grouped according to filing date, and placed in a queue behind the lead applicant. The FCC will periodically release a Public Notice listing those minor modification of facilities applications accepted for filing.

(f) If a non-reserved band FM channel allotment becomes vacant, after the grant of a construction permit becomes final, because of a lapsed construction permit or for any other reason, the FCC will, by Public Notice, announce a subsequent filing window for the acceptance of new applications for such channels.

(g) Applications for operation in the 1605–1705 kHz band will be accepted only if filed pursuant to the terms of § 73.30(b).

47 C.F.R. § 73.3566**§ 73.3566 Defective applications.**

(a) Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.

(b) If an applicant is requested by the FCC to file any additional documents or information not included in the prescribed application form, a failure to comply with such request will be deemed to render the application defective, and such application will be dismissed.

47 C.F.R. § 73.3573(a) & (f)**§ 73.3573 Processing FM broadcast station applications.**

(a) Applications for FM broadcast stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes of authorized stations. A major change in ownership is any change where the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed. In the case of a Class D or an NCE FM reserved band channel station, a major facility change is any change in antenna location which would not continue to provide a 1 mV/m service to some portion of its previously authorized 1 mV/m service area. In the case of a Class D station, a major facility change is any change in community of license or any change in frequency other than to a first-, second-, or third-adjacent channel. A major facility change for a commercial or a noncommercial educational full service FM station, a winning auction bidder, or a tentative selectee authorized or determined under this part is any change in frequency or community of license which is not in accord with its current assignment, except for the following:

(i) A change in community of license which complies with the requirements of paragraph (g) of this section;

(ii) A change to a higher or lower class co-channel, first-, second-, or third-adjacent channel, or intermediate frequency;

(iii) A change to a same-class first-, second-, or third-adjacent channel, or intermediate frequency;

(iv) A channel substitution, subject to the provisions of Section 316 of the Communications Act for involuntary channel substitutions.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

* * * * *

(f) Processing non-reserved FM broadcast station applications.

(1) Applications for minor modifications for non-reserved FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. Processing of these applications will be on a “first

come/first serve” basis with the first acceptable application cutting off the filing rights of subsequent applicants. All applications received on the same day will be treated as simultaneously tendered and, if they are found to be mutually exclusive, must be resolved through settlement or technical amendment. Applications received after the tender of a lead application will be grouped, according to filing date, behind the lead application in a queue. The priority rights of the lead applicant, as against all other applicants, are determined by the date of filing, but the filing date for subsequent applicants for that channel and community only reserves a place in the queue. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves.

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station. FM applications for new facilities or for major modifications, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be accepted only during the appropriate filing period or “window.” Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(ii) Such FM applicants will be subject to the provisions of §§ 1.2105 and 73.5002 regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. FM applicants may submit a set of preferred site coordinates as a supplement to the short-form application. Any specific site indicated by FM applicants will not be studied for technical acceptability, but will be protected from subsequently filed applications as a full-class facility as of the close of the window filing period. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

(iii) FM applicants will be subject to the provisions of §§ 1.2105 and 73.5002(c) regarding the modification and dismissal of their short-form applications.

(3) Subsequently, the FCC will release Public Notices:

(i) Identifying the short-form applications received during the window filing period which are found to be mutually exclusive, including any applications for

noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), as well as the procedures the FCC will use to resolve the mutually exclusive applications;

(ii) Establishing a date, time and place for an auction;

(iii) Providing information regarding the methodology of competitive bidding to be used in the upcoming auction, bid submission and payment procedures, upfront payment procedures, upfront payment deadlines, minimum opening bid requirements and applicable reserve prices in accordance with the provisions of § 73.5002;

(iv) Identifying applicants who have submitted timely upfront payments and, thus, are qualified to bid in the auction.

(4) If, after the close of the appropriate window filing period, a non-reserved FM allotment remains vacant, the window remains closed until the FCC, by Public Notice, specifies a subsequent period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station pursuant to paragraph (f)(2)(i) of this section. After the close of the filing window, the FCC will also release a Public Notice identifying the short-form applications which are found to be non-mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6). These non-mutually exclusive applicants will be required to submit the appropriate long-form application within 30 days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of § 73.5005(d). Non-mutually exclusive applications for commercial broadcast stations will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Non-mutually exclusive applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.7004 and 73.3584. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience, and necessity will be served by the granting of the non-mutually exclusive long-form application, it will be granted.

(5)(i) Pursuant to § 1.2107 of this chapter and § 73.5005, a winning bidder that meets its down payment obligations in a timely manner must, within 30 days of the

release of the public notice announcing the close of the auction, submit the appropriate long-form application for each construction permit for which it was the winning bidder. Long-form applications filed by winning bidders shall include the exhibits identified in § 73.5005(a).

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to § 1.2109(a) of this chapter. Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

(iii) All long-form applications will be cut-off as of the date of filing with the FCC and will be protected from subsequently filed long-form applications and rulemaking petitions. Applications will be required to protect all previously filed commercial and noncommercial applications. Winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application or the allotment, the long-form application will be returned pursuant to paragraph (f)(2)(i) of this section.

(6)(i) When a non-reserved channel FM allotment is added to the Table of FM Allotments using the Tribal Priority described in Note 5 to this section, the FCC will specify by Public Notice a window filing period during which only those applicants that satisfy all of the eligibility criteria listed in Note 5 to this section with regard to the specific Tribal Priority FM allotment(s) listed in the Public Notice may file a long-form application for the Tribal Priority FM allotment. Only applications from applicants meeting the “threshold qualifications” listed in Note 5 will be accepted during this window filing period.

(ii) If only one application for the Tribal Priority FM allotment is accepted for filing during the threshold qualifications window, the long-form application will be processed. If two or more applications for the Tribal Priority FM allotment are accepted for filing during the threshold qualifications window, the FCC will specify by Public Notice a period of time, after the close of the threshold qualifications window but before the next FM auction, during which the parties

may negotiate a settlement or bona fide merger, as a way of resolving the conflict between their applications. Parties to a settlement must comply with § 73.3525 of the Commission's rules. If a settlement or bona fide merger is reached, the surviving application will be processed. If no settlement or bona fide merger is reached among the threshold qualifications window applicants, the Tribal Priority FM allotment will be offered at auction as described in paragraphs (f)(2) through (f)(5) of this section, except that only those applicants whose applications were accepted for filing pursuant to paragraph (f)(6)(i) of this section may participate in the initial auction of the Tribal Priority FM allotment.

(iii) If no application is accepted for filing during the threshold qualifications window, and the party that initially proposed the Tribal Priority FM allotment requests by letter to the Audio Division, Media Bureau, that its pending long-form application not be immediately processed, the Tribal Priority FM allotment will be auctioned as described in paragraphs (f)(2) through (f)(5) of this section in the normal course for vacant FM allotments. When a Tribal Priority FM allotment is offered at auction for the first time, only those applicants meeting the threshold qualifications for that specific Tribal Priority FM allotment, as described in Note 5 to this section, may participate in the auction of that allotment.

(iv) Should no applicant meeting threshold qualifications, as described in Note 5 to this section, apply to bid on a Tribal Priority FM allotment in the first auction in which it is offered, or should no applicant meeting threshold qualifications qualify to bid in the first auction in which a Tribal Priority FM allotment is offered, then the Tribal Priority FM allotment will be offered in a subsequent auction. Any such subsequent auction of a Tribal Priority FM allotment shall proceed as described in paragraphs (f)(2) through (f)(5) of this section, and any qualified applicant may participate in the auction of the Tribal Priority FM allotment in such subsequent auction, regardless of whether it meets the threshold qualifications with regard to that specific Tribal Priority FM allotment.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PRESS COMMUNICATIONS LLC,)	
)	
Appellant,)	
v.)	No. 16-1290
FEDERAL COMMUNICATIONS COMMISSION,)	
)	
Appellee.)	

CERTIFICATE OF SERVICE

I, Thaila K. Sundaresan, hereby certify that on January 12, 2017, I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Courts of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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