Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Clear Channel Broadcasting Licenses, Inc.	)	File No. BLH-20050615ACP
	)	Facility ID No. 53142
For License to Cover Application for	)	
Station WRKH(FM), Mobile, Alabama	)	
	)	
Blakeney Communications, Inc.	)	File No. BPH-20050613ADQ
	)	Facility ID No. 71207
For Construction Permit for Modification	)	
of Licensed Facilities of Station WBBN(FM),	)	
Taylorsville, Mississippi	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 2011 **Released: May 6, 2011**

By the Commission:

1. By this *Memorandum Opinion and Order*, we deny an April 17, 2008, Application for Review[1] filed by Blakeney Communications, Inc. ("BCI"), regarding a March 18, 2008, letter ruling[2] by the Chief, Audio Division, Media Bureau (the "Bureau"). The *Reconsideration Ruling* denied BCI's Petition for Reconsideration (the "Petition") of the July 31, 2006, grant of a Clear Channel Broadcasting Licenses, Inc. ("CCBL")[3] application for license to cover a construction permit for modification of licensed facilities (the "License Application") of WRKH(FM), Mobile, Alabama (the "Station").

I. BACKGROUND

2. The Station is a Class C facility. Prior to 2002, it was authorized to operate with less than full Class C facilities. On February 26, 2002, CCBL filed an application to modify the facilities of the Station, proposing full Class C facilities.[4] The staff granted the WRKH Upgrade Application and issued a construction permit (the "Construction Permit") on June 13, 2002. The Construction Permit was scheduled to expire at 3:00 a.m., on June 13, 2005. On Sunday, June 12, 2005 -- the day prior to the expiration of the Construction Permit -- CCBL commenced operation of the modified facilities under

[1] On May 2, 2008, CCBL filed an Opposition, to which BCI replied on May 15, 2008. On November 14, 2008, BCI filed a Supplement to its Application for Review. CCBL filed a Motion to Strike Supplement to Application for Review on November 25, 2008, to which BCI responded on December 9, 2008.

[2] *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau to Marissa G. Repp, Esq., and Frank R. Jazzo, Esq.*, 23 FCC Rcd 4526 (MB 2008) ("*Reconsideration Ruling*").

[3] CCBL assigned the Station to its indirect subsidiary CC Licenses, LLC. *See* File No. BALH-20050915AYA. The staff granted the assignment application on September 28, 2005; the parties consummated on September 30, 2005. For continuity purposes, we shall continue to use the caption CCBL – the licensee at the time of the filing of the License Application.

[4] File No. BPH-20020226ACL (the "WRKH Upgrade Application").

program test authority.[5] On June 13, 2005, BCI filed an application for modification of license to upgrade its station WBBN(FM), Taylorsville, Mississippi (the "BCI Application") from Channel 240C2 to Channel 240C1.[6] The BCI Application conflicts with the WRKH Upgrade Application. On June 15, 2005, CCBL filed the License Application.[7]

3. On June 24, 2005, BCI filed a Petition to Dismiss the License Application. It argued that under Section 73.3598(e) of the Commission's Rules (the "Rules"), CCBL forfeited the Construction Permit by failing to timely file the License Application. In Opposition, CCBL contended that the License Application was timely because Section 73.1620(a)(1)[8] allows permittees 10 days from the start of program tests to file a covering license application, and therefore, license application preparation was a Commission-recognized "encumbrance" that tolled expiration of the Construction Permit. CCBL also noted that the Bureau "routinely" accepts late-filed license applications.

4. On July 31, 2006, the Bureau denied BCI's Petition to Dismiss.[9] The *Division Letter*, however, rejected CCBL's arguments concerning the Section 73.1620(a)(1) "ten-day" filing provision[10] and pointed out that license preparation is not an encumbrance within the meaning of Section 73.3598(b).[11] Accordingly, the *Division Letter* concluded that the License Application was untimely filed. The Bureau, however, noted that it had previously accepted late-filed license applications if the facilities authorized in the construction permit were built before the permit expired.[12] The Bureau held that because: (1) the Station's modified facilities were fully constructed by the expiration date; and (2) the License Application was filed only two days late, it would *sua sponte* waive the automatic forfeiture provision of Section 73.3598(e) and accept the License Application. The Bureau admonished CCBL for its two-day late filing,[13] but declined to dismiss the License Application as BCI requested.

5. BCI then filed the Petition, arguing that: (1) there was "confusion" about the time of day the Station began operating pursuant to program test authority, suggesting that CCBL did not begin program tests before the expiration of the Construction Permit; (2) the License Application was unacceptable for filing because BCI's earlier-filed upgrade application "cut-off" all subsequent, conflicting, applications; (3)

[5] *See* 47 C.F.R. § 73.1620(a)(1) (providing for "automatic" program test authority).

[6] File No. BPH-20050613ADQ.

[7] File No. BLH-20050615ACP.

[8] 47 C.F.R. § 73.1620(a)(1).

[9] *Clear Channel Broadcast Licenses, Inc.,* Letter, 21 FCC Rcd 8677 (MB 2006) ("*Division Letter*").

[10] *Id.* at 8680.

[11] *Id.* at 8680-8681 ("The form-filing requirement does not encumber the construction period. Rather, it is simply one step required for completion of construction."). *See id.* at 8680 n.30 ("A station that is not constructed in accordance with its permit . . . cannot be declared 'ready for operation' in accordance with its authorization absent a waiver of [47 C.F.R. § 73.3598]). *Id.,* citing *KM Radio of St. John, L.L.C.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 5847, 5850-51 (2004) (Section 73.3598 waived when licensee mistakenly built facility at wrong site). The *Division Letter* also pointed out that CCBL could have asked for a waiver of Section 73.3598(e) and noted that its license application was delinquent by only two days. *Id.* at 8681.

[12] *Id.*

[13] *Id.* at 8681.

in the alternative, if the License Application was acceptable for filing, the "*Ashbacker*"[14] doctrine required the Commission to comparatively evaluate the License Application against the BCI Application; (4) the waiver of Section 73.3598(e) under delegated authority conflicts with the automatic downgrade procedure specified in the Commission's *Streamlining Order*;[15] and (5) the Station's allotment was automatically downgraded to Class C0 when the Construction Permit expired, and therefore, the staff erred in licensing the Station as a full Class C facility.

6. On March 18, 2008, the Bureau denied the Petition. In the *Reconsideration Ruling*, the Bureau rejected BCI's claim of "confusion" as to the timing of operations. It found that BCI's bare conjecture was outweighed by CCBL's sworn declarations that the Station's engineer initiated program tests in accordance with the Construction Permit at approximately 9:30 p.m. on June 12, 2005. The Bureau also found that its *sua sponte* waiver of Section 73.3598(e) was consistent with the *Streamlining Order* and long-standing Commission precedent. The Bureau also assumed without explanation that the staff action required an implicit waiver of Section 73.3573, Note 4,[16] and upheld this action as well. Accordingly the Bureau found that the BCI Application was unacceptable for filing pursuant to the Commission's cut-off rules and dismissed it.[17]

7. On April 17, 2008, BCI filed its Application for Review. BCI argues that the Bureau's *sua sponte* waiver of the automatic expiration provision of Section 73.3598(e) of the Rules changes a Commission rule without required notice and comment.[18] BCI also argues that the *sua sponte* waiver of Section 73.3598(e) was ineffective because it did not also expressly waive Note 4 of Section 73.3573 of the Rules,[19] "which by its terms specifies that failure to file a timely license application would result in the automatic reclassification of a target station . . . to Class C0 status."[20] Therefore, BCI contends, the Station became a Class C0 station by operation of the Rules on June 13, 2005.[21] Further, BCI argues that the *Reconsideration Ruling*'*s* acknowledgment that a waiver of Section 73.3573, Note 4 was "implicit in the [*Division Letter*]," is "a blatant attempt to spackle over a gaping hole in its earlier decision . . . ."[22]

8. In addition, BCI argues on review that, pursuant to *Ashbacker*, the BCI Application is timely and entitled to comparative consideration. BCI further argues that under the Commission's well-established cut-off rules, the BCI Application was protected from any later-filed mutually-exclusive applications, including the License Application. Finally, BCI argues that the "equities" favor it over

[14] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945) ("*Ashbacker*").

[15] *See 1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes*, Second Report and Order, 15 FCC Rcd 21649, 21662-63 (2000) ("*Streamlining Order*").

[16] 47 C.F.R. § 73.3573, Note 4. This section provides, in pertinent part: "If the construction is not completed as authorized, the subject Class C station will be reclassified automatically as a Class C0 station."

[17] *See Reconsideration Ruling* at 6.

[18] Application for Review at 7.

[19] *Id.* at 5.

[20] *Id.*

[21] *Id.* at 6.

[22] *Id*.

CCBL.[23] Specifically, BCI asserts that the CCBL Construction Permit was only for a modification of licensed facilities, and therefore, CCBL is not significantly harmed by the forfeiture of the Construction Permit; CCBL would suffer no loss of its investment in constructing the Station's modified facilities because the antenna and other new equipment installed could simply be used at a reduced (Class C0) power level; and BCI is more deserving than CCBL because it has been seeking to improve its facilities since 2001.[24] For the reasons set forth below, we affirm the *Reconsideration Ruling* and deny the Application for Review.

II. DISCUSSION

9. *Sua Sponte Waiver.* This case presents the narrow issue of how the staff should process a late-filed covering license application for facilities fully completed by the construction deadline. The staff practice has been to waive relatively minor filing deadline violations, so long as the applicant can demonstrate that construction was, in fact, completed in a timely manner. BCI argues, however, that the staff's *sua sponte* waiver of the automatic expiration provision of Section 73.3598(e) of the Rules changes a Commission rule without notice and comment. We disagree. Section 1.3 of the Rules[25] expressly provides that "any provision of the [R]ules may be waived by the Commission on its own motion . . . ,"[26] in whole or in part, for good cause shown; such waivers also are well within the staff's delegated authority established in Section 0.283 of the Rules.[27] The staff has exercised its waiver authority in many licensing contexts.[28] Additionally, the Commission has recognized that following similar staff-developed practices has enabled the Bureau to carry out its day-to-day functions, efficiently process applications in circumstances where good cause exists for limited recurring waivers, and where there is little, if any, threat that the staff's flexible enforcement of a rule will frustrate its purposes or cause prejudice to third parties.[29]

[23] Application for Review at 9.

[24] *Id.* at 9-11.

[25] 47 C.F.R. § 1.3.

[26] 47 C.F.R. § 1.3. *See Intel Corporation, Motorola, Inc., Tivo, Inc.,* Memorandum Opinion and Order, 25 FCC Rcd 7539, 7340 (MB 2010) ("[W]e consider established legal standards for waiver pursuant to Section 1.3 of the Commission's rules. We have authority to waive our rules if there is "good cause" to do so. We may exercise our discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.") (footnotes omitted).

[27] 47 C.F.R. §§ 1.201, 1.283.

[28] *See, e.g., Pamplin Broadcasting, Inc.,* Memorandum Opinion and Order, 23 FCC Rcd 649, 651-52 n.15 (2008) (staff routinely waives 100 percent coverage of principal community requirement of Section 73.24(j) of the Rules for applicants showing at least 80 per cent coverage); *State of Oregon,* Memorandum Opinion and Order, 16 FCC Rcd 4344, 4345 (2001) (staff routinely waives Section 74.1204(a) for applicants who show that an overlap area is unpopulated).

[29] *See, e.g., The Last Bastion Station Trust, LLC, as Trustee, c/o Media Venture Partners, LLC, Georgia Eagle Broadcasting, Inc.,* Letter, 23 FCC Rcd 4941, 4944 (MB 2008) (waiver of "same day filing" requirement facilitated efficient processing of applications in a manner which did not prejudice filing rights of any other potential applicant).

10. Section 73.3598 of the Rules provides permittees sufficient time to construct while conserving staff resources by sharply limiting opportunities to seek extensions.[30] The Station's modified facilities were constructed and operating at the time the Construction Permit expired. Therefore, CCBL's conduct satisfied the Commission's policy of requiring construction and commencement of operation within three years. In these circumstances, where CCBL's License Application was filed only several days after the pertinent filing deadline, we find that a waiver does not undermine Section 73.3598's purpose.

11. In these circumstances, we believe that the Bureau's action was proper. Specifically, we affirm the staff's practice of waiving Section 73.3598(e) of the Rules in situations where the applicant conclusively demonstrates that it completed construction prior to the expiration of the construction period, notwithstanding the tardy filing of the license to cover application. We note that the staff may also issue Notices of Apparent Liability for "failure to file a required form" as authorized by Section 503(b)(1)(B) of the Communications Act of 1934, as amended (the "Act") and Section 1.80 of the Rules, for such violations of covering license application filing deadlines[31] or take other enforcement action. The Bureau action admonishing CCBL for its two-day tardiness in filing the License Application recognizes the "strict completion" policy which underlies Section 73.3598(e) and we uphold this sanction on this basis.

12. *Automatic Downgrade.* Note 4 to Section 73.3573 of the Rules does not state, as BCI argues, that "*failure to timely file a license application* would result in the reclassification of the target station . . . to Class C0 status."[32] Rather, as noted above, the text of Note 4 states, in part: "If construction is not completed as authorized, the subject Class C station will be reclassified automatically as a Class C0 station."[33] BCI has proffered no credible evidence that the Station's modified facilities were not "completed" as authorized, and conversely, CCBL has proffered its sworn declarations that the Station's engineer initiated program tests in accordance with the Construction Permit prior to the construction deadline. Therefore, Note 4 is not applicable to the facts of this case, and a waiver of Note 4 is unnecessary.[34]

13. *Ashbacker Rights and Cut-Off Rules*. The United States Supreme Court held in *Ashbacker* that, where two parties' applications are mutually exclusive, the grant of one application without first considering the second application violated the due process rights of the second.[35] The D.C. Circuit, however, has upheld the Commission's cut-off application processing policy under which a prior-filed

[30] *See 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes,* 13 FCC Rcd 23056, 23089-94 (1998), *recon. granted in part and denied in part,* 14 FCC Rcd 17525, 17533 (1999).

[31] 47 U.S.C. § 503(b) and 47 C.F.R. § 1.80, note to paragraph (b)(4).

[32] Application for Review at 5 (emphasis added); *see also* 47 C.F.R. § 73.3573, Note 4, promulgated in *Streamlining Order*, 15 FCC Rcd 21649, 21662-63 (2000).

[33] *See* n.16, *supra*.

[34] We acknowledge that in the *Reconsideration Ruling* the Bureau stated that the staff had implicitly waived Section 73.3573, Note 4 of the Rules when it waived Section 73.3598(e) under the theory that the "automatic downgrade" provision of the rule may have been triggered due to the delay of the filing of the License Application. In this action, we find the Bureau's grant of a waiver of Note 4 to be unnecessary because construction was, in fact, "completed as authorized," as specified in Note 4. *Id.*

[35] *See Ashbacker,* 326 U.S. at 332-33.

application may "cut-off" the right of a subsequently-filed application to comparative consideration.[36] Moreover, *Ashbacker* has never been held to prevent the Commission from establishing threshold criteria that determine whether an application is entitled to comparative consideration.[37] In this case, the filing of the WRKH Upgrade Application established CCBL's cut-off rights. Thus, the BCI Application, filed three years after the WRKH Upgrade Application, has no right to comparative consideration to the License Application.

14. We also note that the *Ashbacker* doctrine has never been applied to a Section 319(b) application.[38] Thus, for example, a Form 301 application for a construction permit has never been allowed a comparative hearing with a Form 701 application for an extension of time to complete construction.[39] We find that the same principle applies to license applications filed pursuant to Section 319(c) of the Act. We therefore reject, as contrary to the Rules and well established staff practice, BCI's claim of *Ashbacker* rights based on the fact that it filed the BCI Application prior to the filing of the License Application. In particular, we note that pursuant to Section 73.3573(f) of the Rules, only acceptable minor modification applications, filed under a "first come/first served" processing rule, can cut-off the filing rights of other minor modification applications.[40] The BCI Application was not acceptable under Section 73.3573(f) of the Rules because it conflicts with the prior-filed WRKH Upgrade Application.

15. *Equitable Considerations.* We find unpersuasive BCI's equitable arguments. CCBL has expended considerable funds to effectuate its own facility improvement. Moreover, as explained above, acceptance of its late-filed License Application conforms with long-standing application processing and waiver policies. CCBL's Class C facilities were completed as authorized. The *de minimis* nature of the late-filed License Application filing creates equities in favor of CCBL, especially because a waiver in these circumstances is consistent with the policies underlying the rule.

III. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED, that the April 17, 2008, Application for Review filed by Blakeney Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[36] *See Florida Institute of Technology v. FCC,* 952 F.2d 549 (D.C. Cir. 1992) (characterizing the Commission's "hard nosed" cut-off rules as being legally sound).

[37] *See U.S. v. Storer Broadcasting*, 351 US 192 (1956) (Commission, by rulemaking, may adopt threshold eligibility criteria that affect pending applications if it determines that such rules serve the public interest).

[38] *See, e.g., Mass Communicators, Inc. v. FCC,* 266 F.2d 681, 684-85 (D.C. Cir. 1959).

[39] *See id.*

[40] *See* 47 C.F.R. § 73.3573(f)(1) provides that only the "first *acceptable* [minor modification] application cuts off the rights of subsequent applicants" (emphasis added). *See also 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules,* First Report and Order, 14 FCC Rcd 5272 (1999) ("Under the first come/first served processing system now used for *minor change applications* for commercial FM broadcast stations, the filing of a first acceptable application "cuts off" the filing rights of subsequent, conflicting applicants.") (emphasis added).