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Federal Communications Commission

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

In the Matter of)	MM DOCKET NO. 96-110
)	
WKZF-FM, INC.)	File No. BRH-950814UC
)	
For Renewal of License)	
for Station WKZF(FM))	
Bayboro, North Carolina)	

Appearances

Rick D. Rhodes, Esq., Elizabeth A. Sims, Esq. on behalf of WKZF-FM, Inc. and Alan E. Aronowitz, Esq. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK**

Issued: September 20, 1996

Released: September 24, 1996

Preliminary Statement

1. By Hearing Designation Order, DA 96-96-724, released May 9, 1996 ("HDO"), the Assistant Chief, Audio Services Division, Mass Media Bureau ("Bureau"), designated for hearing the application of WKZF-FM), Inc. ("WKZF") for renewal of license for FM Station WKZF, Bayboro, North Carolina. The following issues were specified:

- (1) To determine whether WKZF-FM, Inc. has the capability and intent to expeditiously resume the broadcast operations of WKZF-FM, consistent with the Commission's Rules;
- (2) To determine whether WKZF-FM, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules; and
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

The HDO further provided that, in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation. HDO at para. 6. The HDO placed upon the Licensee, WKZF, both the

burden of proceeding with the introduction of evidence and the burden of proof. Id. at para. 9. A prehearing conference was held on June 19, 1996 and on June 28, 1996. A telephone conference was held on September 6, 1996 at which time procedural dates were suspended pending ruling on the WKZF's Motion for Summary Decision filed August 28, 1996. Mass Media Bureau's Opposition to Motion for Summary Decision and Countermotion for Summary Decision was filed September 5, 1996 and Reply thereto by WKZF on September 13, 1996.¹ Mass Media Bureau's Motion to Dismiss WKZF's Reply was filed September 17, 1996.

Findings of Fact

2. The HDO recited the following facts as the basis for the specification of the issues in this proceeding. WKZF has been off the air since July 24, 1993 when the previous licensee, Carolina Community Broadcasting, Inc. ("Carolina") suspended operations for financial reasons. On November 17, 1993, the Commission approved the application (File No. BALH-930907GE) for the voluntary assignment of WKZF's license from Carolina to Sunbelt Media, Incorporated ("Sunbelt"). Carolina and Sunbelt consummated this transaction on December 13, 1993. Sunbelt, however, did not return to station to broadcast operations, filing instead on August 26, 1994 an application (File No. BALH-940826GN) to assign the station's license to WKZF-FM, Inc. The Commission approved this assignment on December 23, 1994, requiring the assignee to resume operations within sixty days of consummation of the approved assignment. HDO at para. 2. WKZF-FM, Inc. filed on March 20, 1995 both its notification that the assignment was consummated February 20, 1995 and its request to modify the conditioned assignment, stating that it was in the process of "engineering a facility upgrade as allocated by the Federal Communications Commission." The Bureau approved the new licensee's request, modifying the conditioned assignment to require operations within 240 days from the date of consummation, i.e., November 20, 1995. Letter to WKZF-FM, Inc. (Ref. 1800B3-GDG), dated July 25, 1995. On August 14, 1995, WKZF-FM, Inc. filed its renewal application, reporting in Section III, Item 3 of its application that the station was still off-air and reiterating in Exhibit 2 to the application that it was "currently developing the engineering for the station to apply for the C3 allocation." HDO at para. 3. The Commission approved the upgrade of the Bayboro, North Carolina allocation from Channel 250A to Channel 250C3 on August 31, 1992. Report and Order in MM Docket No. 91-237, 7 FCC Rcd 6305 (1992). The upgrade was effective November 12, 1992, and the Commission's action required that the licensee submit the appropriate application (FCC Form 301) implementing the upgrade by February 12, 1993. No application implementing the C3 upgrade has been filed by any of the approved licensees since the Commission's action in August 1992. Further, WKZF-FM has neither notified the Commission that it resumed broadcast operations nor has it indicated that it has made any progress in implementing the C3 allocation. Thus, WKZF-FM has been off-air for over two years, is not presently authorized to remain silent, and has not demonstrated that broadcast operations can be resumed expeditiously. Consequently, WKZF-FM, Inc. is in apparent violation of Sections 73.1740 and 73.1750 of the Commission Rules. HDO at para. 4.

¹ WKZF's Reply is an unauthorized pleading, and as such IS DISMISSED. See Section 1.251 and Section 1.45(c) of the Commission's Rules.

3. Pursuant to Section 1.251 of the Commission's Rules, in order to warrant summary decision, a party must show that there is no genuine issue of fact for determination at the hearing. To sustain a motion for summary decision, it must be established that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975). The Bureau and WKZF assert that the facts of this case are not in dispute.

4. In addition to the facts related in the HDO, WKZF asserts that subsequent to its request of March 20, 1995 to the Commission for permission to upgrade the facilities, it engaged in June 1995 the services of professional engineering consultant Timothy Warner to assist in the preparation of the upgraded application.

5. WKZF filed the subject renewal application on August 14, 1995. Therein, it noted that the station remained off the air, but that it was developing the engineering to apply for the facilities upgrade.

6. Mr. Warner first reviewed the station's upgrade options on September 26, 1995 and proposed an engineering study to determine whether the use of a directional antenna on an existing tower near Arapahoe, North Carolina, which would save time and money and would allow service to a larger area, would be consistent with the Commission's Rules Section 73.315. WKZF avers that the former licensee's tower site was considered unsafe due to the extensive deterioration of the tower and that even after it became the station licensee, WKZF was not permitted to inspect the station's tower site to determine whether repair was feasible. WKZF estimated at the time that it would take almost as much time, if not more, to return the station to the air using the former authorized site, as it would to obtain authorization from the Commission in implement an upgrade to the station's facilities at the currently proposed site.

7. WKZF states that as the engineering work was being processed and analyzed, it was still ascertaining whether to invest its resources to reconstruct the former, dismantled site, or alternatively, to start anew from a different site. As a result, the work proposed by Mr. Warner and other consulting engineers was temporarily postponed. WKZF avers that prior to the designation of the renewal application for hearing, however, it and its consulting engineers completed the technical work and analysis of the proposed new site. WKZF filed an application for authority to make the proposed changes with the Commission on August 27, 1996. WKZF alleges that, according to delivery and installation time estimates given by technical consultants and equipment manufacturers selected by it to provide equipment and substantially implement the upgrade and necessary site construction activity, it is prepared to have the station back on the air within 60-90 days of the Commission's pending modification application.

Conclusions of Law

8. WKZF argues that it has always been and continues to be its intention to return the station to air and that it presently has the requisite financing and technical capability to put the station back on the air. WKZF pleads that it cannot do anything further until the Commission acts to renew its authorization and

grant its pending modification application authorizing it to go forward with the upgrade facilities construction.

9. WKZF notes that Section 312(g) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, directs that the license of a broadcast station that has been silent for twelve consecutive months will automatically terminate at the end of that period without any discretion for the Commission to authorize additional time. It also notes that the Bureau's position that it will not expedite the processing of applications involving silent stations whose renewal applications have been designated for hearing. In its case, WKZF states that if its station is not back on the air by February 9, 1997, the station's license will automatically expire. WKZF contends that forcing the parties and the Commission to go through a renewal hearing is frustrating because there will be no time under the statute to get authority to return the station to the air at its proposed site even if its license is renewed.

10. WKZF recognizes the Commission's obligation to reclaim licenses for stations that are off the air for a prolonged period of time and are thus not serving the communities they are licensed to serve but contends that, in light of its willingness and ability to return the station to the air within 60-90 days of the Commission's grant of its renewal application and grant of authority to construct modified facilities, it would be contrary to the public interest to take away WKZF's license at this point thereby postponing further service to Bayboro.

11. WKZF also contends that it has held the license only for 16 months while diligently making efforts to return to the air and that it should not be held responsible for the failures of the previous licensees of the station, and that to do so would penalize WKZF's innocent creditors causing them to lose their entire investment. Citing Second Thursday Corp., et al. Memorandum Opinion and Order, 19 RR 2d 1199, 1200 (1970), WKZF notes that the Commission has held that a potential indirect benefit received by a possible wrongdoer who is a licensee of a station is substantially outweighed by the substantial equities in favor of innocent creditors and the public interest in resumption of service.

12. WKZF acknowledges its mistake in not separately notifying the Commission that the station was not going to return to the air in time for the November 20, 1995 deadline but in its defense states that it was not represented by an attorney and was mistakenly under the impression that its explicit admission on its renewal application that the station was not on the air and that it intended to file a facilities change application with the Commission in order to resume broadcast operation was sufficient notice under the Commission's Rules.

13. WKZF's Motion for Summary Decision may not be granted. As noted above, Issue (2) questions whether WKZF has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules. WKZF has not met its burden of proof under this issue.

14. Section 73.1740(a)(4) provides that:

In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue

operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30-day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

15. Section 73.1750 provides:

The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

Issue (3) seeks to determine whether, in light of the evidence adduced, grant of the subject renewal of license application would serve the public interest, convenience and necessity.

16. As the Bureau notes in opposition to WKZF's Motion, it is WKZF's burden to demonstrate that its own predesignation conduct was not dilatory. To meet this issue WKZF's asserts that it was not represented by an attorney, that it never intended to remain permanently silent and that it believed that stating in its renewal application that it was silent but will be filing a facilities change application was adequate notice. These assertions are not sufficiently probative to meet its burden of proof. Nor is WKZF's post designation filing of the modification proposal dispositive of the issue. It is in light of WKZF's actions or lack thereof and not that of prior licensees that the issue of public interest, convenience and necessity hinges. Since the adequate proof is lacking, WKZF's Motion for Summary Decision in its favor must be denied.

The Bureau's Countermotion

17. From all the above, it is clear that, absent a modification of facilities, WKZF cannot return the station to the air and that it is the Bureau's policy not to process modification applications of silent stations that have been designated for hearing. In light of this, it is clear that WKZF cannot return the station to the air and cannot meet its burdens under the designated issues.

Bureau's Countermotion for Summary Decision to Deny WKZF's renewal application must be granted.

Accordingly, IT IS ORDERED that the Motion for Summary Decision, filed August 28, 1996, by WKZF-FM, Inc. IS DENIED.

IT IS FURTHER ORDERED that the Countermotion for Summary Decision, filed September 13, 1996, by the Mass Media Bureau IS GRANTED.

IT IS FURTHER ORDERED that the renewal application of WKZF-FM, Inc. (File No. BRH-950814UC) for renewal of license for Station WKZF-FM Bayboro, North Carolina IS DENIED and the station's license IS CANCELLED.²

IT IS FURTHER ORDERED that the hearing scheduled for October 1, 1996 IS CANCELLED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

² In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).