

properly noted that, while the burden is on the licensee to show that it will return the silent station to the air in an expeditious manner, where the licensee has a facilities change application pending at the FCC, it needs cooperation from the Mass Media Bureau's processing staff to meet the statutory deadline.<sup>18</sup>

The Bureau's *Memorandum of Law and Policy* essentially states that a licensee in such a situation should take responsibility for "its alleged non-feasance" and not burden the Bureau's resources by forcing it to review and process such applications prior to a renewal grant showing that the licensee is deserving of such attention.<sup>19</sup> However, while the Bureau acknowledges that the nonfeasance is in fact only *alleged* until the hearing is concluded and any liability for the licensee's action or inaction is finally decided, it fails to address how the staff will possibly have time before the statutory deadline to consider the pending applications of licensees who ultimately have their licenses renewed. While WKZF-FM can sympathize with the Bureau's desire to avoid placing an extra burden on an already overburdened staff, there is little point in forcing the parties and the Commission to go through a renewal hearing if there will be no time under the statute to get authority to return the Station to the air even if the license is renewed.<sup>20</sup>

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<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Memorandum of Law and Policy* at 3.

<sup>20</sup> It is also important to note that only a handful of all renewal applications for stations which are currently off the air have been designated for hearing by the Mass Media Bureau. If the reason for designating these applications for hearing is in fact, as the Bureau states, to force the licensee to show that its "alleged non-feasance" is either nonexistent or excusable and that renewal of the license is warranted before any other Bureau action is taken, then all such renewal applications should be designated for hearing. It is grossly unfair to penalize some dark stations for such alleged non-feasance and not others. Moreover, the Bureau has not offered any reason, legitimate or otherwise, for this disparate treatment.

The situation created by the Mass Media Bureau's policy is a no-win situation for a licensee which finds itself in circumstances such as those in *Southwestern* and in the instant case, and consequently, a no-win situation for the public in the licensee's broadcast area who will likely be denied local broadcast service under the policy. The Mass Media Bureau has stated that it will not act on these pending modification applications while the renewal application is awaiting hearing, but a licensee cannot easily show its diligent and ongoing efforts to return the station to the air in a renewal proceeding if it does not have authority from the Mass Media Bureau to make the changes necessary to actually put the station back on the air. Regardless of what the policy is or is not, or should or should not be, the fact remains that while this circular reasoning is being debated between the Mass Media Bureau and the Commission, the statutory clock is ticking and the Commission has no authority or discretion to stop it. If the Commission does not issue a Summary Decision renewing WKZF's license immediately and direct the Mass Media Bureau to act on the licensee's facilities change application in an expeditious manner, the licensee will not have enough time before the statutory deadline of February 9, 1997 to implement the proposed changes and return the Station to the air.

D. **Because the Issues which Have Been Designated for Hearing Have Been Addressed Herein, Postponing a Decision in the Instant Proceeding Is Unnecessary.**

The issues which have been designated for hearing in October, as set forth in the Hearing Designation Order at paragraph 5, have been sufficiently addressed above. First, the Commission seeks to determine whether WKZF-FM has the capability and intent to expeditiously resume the broadcast operations of the Station. As described in detail above, WKZF-FM has made diligent efforts during the past year to return the Station to the air. It has

been financially and is now technically in the position to do just that, and is only waiting for the Commission to grant it the legal authority to do so. These actions show the licensee's willingness and capability to resume broadcast operations expeditiously.<sup>21</sup>

In *Southwestern*, the Commission ultimately decided that the licensee's choice to keep the station off the air for *over six years*, especially where there was little evidence of diligent efforts during that time, was sufficient to show that the licensee did not intend to expeditiously resume broadcast operations of the station.<sup>22</sup> In the instant case, however, the licensee has only held the license for sixteen months, during which time it has aggressively sought resumption of the Station's broadcast service to Bayboro. Furthermore, the Station has not resumed operation under the existing authorization because the former tower is no longer technically usable. Essentially, the licensee would have had to build a new tower to operate under the current authorization, only to have to build another one shortly thereafter in a different location, assuming that the currently pending upgrade application is eventually granted. WKZF was not in the financial position to simultaneously build a tower for temporary operation under the existing authorization and pursue a permanent upgrade of the Station's facilities at a different transmitter site. Moreover, WKZF concluded that potentially lengthy zoning proceedings and the added construction obligations that would result from building two towers, instead of one, would have prolonged the lack of service to Bayboro even further. Thus, using its best professional

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<sup>21</sup> Moreover, if the Commission is concerned that a renewal grant would somehow benefit an underserving licensee, the grant could be conditioned upon having the Station back on the air before February 9, 1997. If the condition is not satisfied, the renewal grant is revoked.

<sup>22</sup> *Southwestern Summary Decision* at 6.

judgment, it chose to pursue solely the upgrade in order to effectuate service more quickly and to a greater segment of the public in the Bayboro area.

Secondly, in the upcoming hearing, the Commission also intends to determine whether WKZF-FM has violated Sections 73.1740 and/or 73.1750 of the Commission's rules regarding Commission notification when a station is off the air for a certain period of time. As acknowledged above, WKZF-FM now realizes that it technically should have notified the Commission when it could not return the Station to the air as quickly as originally anticipated. However, it was not represented by an attorney at that time and was mistakenly under the impression that its detailed admission on its renewal application that the Station was still not on the air pending an upgrade to the Station's facilities was sufficient notification to the FCC. The people of Bayboro should not be punished for the inadvertent mistake of a licensee who was unable to obtain counsel at an earlier time due to temporary financial constraints.

Lastly, the Commission seeks to determine, in light of the evidence shown under the first two issues, whether a grant of the renewal application would serve the public interest, convenience and necessity. Never has the licensee acted in bad faith with regard to attempts to resume broadcast operations of the Station and the public interest will not be served if the licensee is, in effect, given the "death penalty" as a reward for diligent actions taken thus far. As noted above, the result of such a penalty for the licensee would actually be a much greater harm to the people of Bayboro, North Carolina, for whom service would not likely be restored for an inordinately long time to come.

Bayboro is a rural community in eastern coastal North Carolina. It is the principal community and county seat of Pamlico County. The main industries in the area are commercial

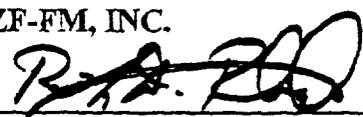
fishing and agriculture. Because the only other radio service licensed to the entire county is out of Oriental, North Carolina, which is approximately ten miles away, the people of Bayboro would greatly benefit from a full time radio broadcast station licensed to and operated from their community. For example, an area broadcast station that aired local weather reports would aid area farmers and fishermen in the pursuit of their businesses, especially those reports dealing with hurricane preparedness. Additionally, a new radio station would create jobs and support schools in the community. Thus, the public interest would clearly be best served by granting WKZF's renewal application at this time.

### III. CONCLUSION

For the reasons set forth above, WKZF-FM respectfully requests that the Presiding Officer issue a Summary Decision renewing the license for the Station and direct the Mass Media Bureau to process the licensee's pending modification application on an expedited basis. To do otherwise would be directly contrary to the public interest the Commission is obligated to preserve.

Respectfully submitted,

WKZF-FM, INC.

By: 

Rick D. Rhodes

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(202) 728-0354 (fax)  
August 28, 1996



Elizabeth A. Sims  
(Licensed in Georgia Only)

Its Attorneys

DECLARATION OF KEITH ECKHARDT

I, Keith Eckhardt, President of WKZF-FM, Inc., licensee of Station WKZF(FM), Bayboro, North Carolina, do hereby state, under pain or penalty of perjury, that I have read the foregoing "Motion for Summary Decision" and that the facts contained therein are true and correct to the best of my knowledge, information and belief.

WKZF-FM, INC.

By:   
Keith Eckhardt  
President

Date: August 23, 1996



convenience and necessity. See *Hearing Designation Order* in MIM Docket No.96-110, DA 96-724, released May 9, 1996 ("*HDO*").

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 asserts that the facts of this case are not in dispute, and that only the legal significance of those facts remains at issue.

4. To meet the specified issues, WKZF asserts that it assumed control of the station, then dark since mid-1993, by assignment consummated on February 2, 1995. On March 20, 1995, WKZF notified the Commission of the consummation of the assignment, and requested that a condition on the assignment be modified to permit it to file a facilities upgrade application. The Bureau approved the request and modified the previously conditioned license to require resumption of station operations within 240 days from the date of consummation, *i.e.*, November 20, 1995.<sup>1</sup>

5. WKZF states that in June 1995, it engaged the services of Mr. Timothy Warner, a professional engineering consultant, to assist it in the preparation of an upgrade application.

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<sup>1</sup> *HDO*, at 1-2.

It relates that Mr. Warner first reviewed the station's technical options on September 26, 1995,<sup>2</sup> and proposed an engineering study to determine whether the use of a directional antenna on an existing tower, which would save time and money and would allow service to a larger area, would be consistent with the Commission's rules. WKZF also contacted structural engineers to assess the strength of the existing tower and the costs of necessary replacement work. In addition to assessing this potential new site, WKZF was also determining whether it might instead utilize the authorized transmitter site, for which it had been denied access, rather than start anew from a different site. According to WKZF, the reconsideration of the original site caused the work proposed by Mr. Warner, the engineering consultant, to be postponed.

6. 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. WKZF states that prior to the designation of the renewal application for hearing, it and its consulting engineers completed the technical work and analysis of the proposed new site. It states that it filed an application to upgrade its facilities on August 27, 1996, is now prepared to move forward with construction, and estimates that it can return the station to the air within 60-90 days of the grant of the modification application.

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<sup>2</sup> WKZF states that the former licensee's tower site was considered unsafe due to the extensive deterioration of the tower. It further relates 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. Thus, it states, it estimated that it would take as much time, if not more, to utilize the authorized site to return the station to the air as it would to obtain FCC consent to and to implement an upgrade application.

7. WKZF contends that there are no genuine issues as to any material fact and that no useful purpose would be served by a hearing. It maintains that the facts indicate that it has made diligent efforts and is committed to return the station to the air and serve a larger area. WKZF further argues that in light of its efforts, it would be contrary to the public interest to deny renewal in this case because service to Bayboro would be further delayed or even jeopardized entirely. WKZF contends that it should not be held responsible for the failures of the previous licensees of the station, and that to do so would penalize its "innocent" creditors for the negligence of the previous licensees who were not aggressive enough in restoring service.<sup>3</sup> It states that any benefit to be derived from the denial of the renewal application is outweighed by the equities favoring both the resumption of service and protection of innocent creditors.

8. WKZF also 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 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 7, 1997, the station's

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<sup>3</sup> WKZF recognizes that it did not notify the Commission that it was not going to resume service by November 20, 1995, as required by Section 73.1740 of the Commission's Rules. However, it states that it never intended to permanently discontinue station operations, and thus is not in violation of section 73.1750 of the Rules. Nevertheless, WKZF maintains that even if the Commission finds some fault with regard to its actions, "its innocent creditors should not be forced to lose their entire investment in the station as a result."

license will automatically expire. Thus, it asserts that there is little point in forcing the parties and the Commission to go through a renewal hearing if 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. It maintains that this situation places the licensee and the public interest in a "no-win" situation that can be avoided by the issuance of a Summary Decision renewing the WKZF(FM) license immediately and the prompt processing of its modification application that will enable the station to expeditiously resume service. WKZF thus asserts that summary decision is warranted in this case because, despite its admitted rule violations, a grant of its renewal application conditioned upon the prompt restoration of service will serve the public interest.

#### The Motion for Summary Decision Cannot Be Granted

9. In an effort to meet its burden under Issue 1 in the *HDO*, WKZF sets forth and emphasizes its efforts to prepare a facilities modification application from February, 1995, through August, 1996, and disavows what it terms the past licensees' failures to return the station to the air. It also sets forth a plan to restore service based on the facilities modification application filed long after its November 20, 1995, extended deadline to resume broadcast operations and almost four months after its renewal application was designated for hearing. WKZF's proposal, however, ignores its own failure, as the licensee of WKZF, to expeditiously restore station operations and to seek continued authority for the station to remain silent. In this proceeding, it is WKZF's burden to demonstrate that *its own* pre-designation conduct was not dilatory in order to meet the specified issues and obtain grant of

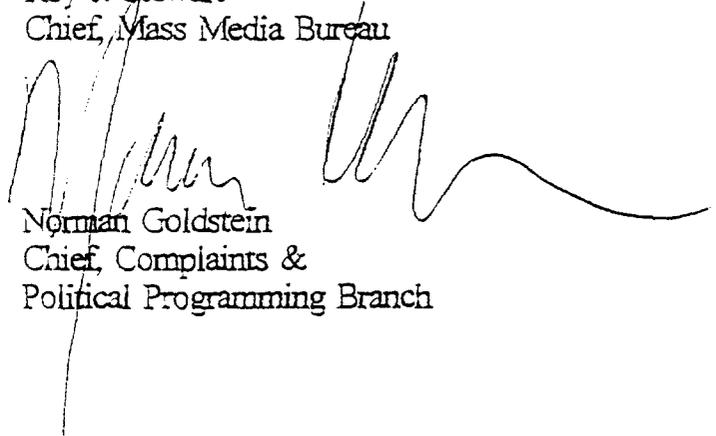
its renewal application. As is clear from the pleadings, WKZF has not and cannot make that showing. In sum, the only justification that WKZF provides for the grant of its renewal application is that it has now filed a modification application. Such a showing is not sufficient to meet its burdens with respect to the issues designated in the *HDO*. The critical issue in this proceeding is whether, in light of this licensee's conduct, grant of the renewal application serves the public interest. Before WKZF's renewal application can be granted, the Presiding Judge must resolve this outstanding issue in the licensee's favor which, as shown here, cannot be done. Consequently, WKZF's motion for summary decision in its favor must be denied.

#### The Bureau's Countermotion for Summary Decision

10. From the facts set forth in WKZF's pleadings, the appropriate legal inferences require that the Bureau's countermotion for summary decision be granted. Absent a modification of facilities, it is clear that WKZF can not return the station to the air and it is the Bureau's policy not to process modification applications of silent stations that have been designated for hearing. Thus, it is clear that WKZF cannot return the station to the air and cannot meet its burdens under the designated issues. Accordingly, the Presiding Judge must grant the Bureau's Countermotion for Summary Decision, deny WKZF's renewal application,

and terminate this proceeding.

Respectfully submitted,  
Roy J. Stewart  
Chief, Mass Media Bureau

A handwritten signature in black ink, appearing to read "Norman Goldstein", with a long horizontal flourish extending to the right.

Norman Goldstein  
Chief, Complaints &  
Political Programming Branch

Alan E. Aronowitz  
Attorney  
Mass Media Bureau

Federal Communications Commission  
2025 M Street, N.W.  
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(202) 418-1430

September 5, 1996

CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 5th day of September 1996, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Opposition to Motion for Summary Decision and Counter-motion for Summary Decision**" to:

WKZF-FM, Inc.  
c/o Rick D. Rhodes Esq.  
Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Avenue, N.W.  
Suite 200  
Washington, DC 20036-3101

  
Natalie A. Moses  
Natalie Moses

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SEP 13 1996

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

FILE COPY

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

To: The Honorable John M. Frysiak, Administrative Law Judge

**REPLY TO MASS MEDIA BUREAU'S OPPOSITION TO  
MOTION FOR SUMMARY DECISION AND  
COUNTERMOTION FOR SUMMARY DECISION**

Pursuant to Section 1.251 of the Commission's rules,<sup>1</sup> WKZF-FM, Inc. ("WKZF-FM"), licensee of Station WKZF(FM), Bayboro, North Carolina ("WKZF" or the "Station"), through its attorneys, hereby submits this Reply to Mass Media Bureau's Opposition to Motion for Summary Decision and Countermotion for Summary Decision ("Opposition and Countermotion") in the above-referenced proceeding regarding the renewal of the license for the Station. In support thereof, the following is shown:

**A. Mass Media Bureau's Opposition and Countermotion**

The Mass Media Bureau's (the "Bureau's") response to WKZF-FM's Motion for Summary Decision ("Motion") does not provide any logical or legal basis on which the Commission should rest a dismissal of WKZF-FM's Motion. In its Opposition and Countermotion, the Bureau spends four and a half out of six substantive pages merely restating

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<sup>1</sup> 47 C.F.R. § 1.251.

what WKZF-FM had argued in its own Motion. Thereafter, in a single paragraph, the Bureau argues that WKZF-FM's Motion cannot be granted as a matter of law because there is no way that the licensee can show that its efforts with regard to returning the Station to the air have been diligent in light of the fact that a modification application for the Station was only recently filed with the Bureau and the licensee failed to seek continued authority for the Station to remain silent.<sup>2</sup> The Bureau argues that, absent such a showing, the Commission can have no basis on which to find that it would be in the public interest to grant the renewal application in the instant proceeding.

The Bureau further contends that "the only justification that WKZF[-FM] provides for the grant of its renewal application is that it has now filed a modification application."<sup>3</sup> It claims that mere evidence of this filing is not a sufficient showing of diligent efforts to allow WKZF-FM to "meet its burdens with respect to the issues designated" in the *Hearing Designation Order* for this proceeding.<sup>4</sup>

The Bureau goes on to aver, in a seven line countermotion, that "the appropriate legal inferences require that the Bureau's countermotion be granted."<sup>5</sup> However, the Bureau fails to further state what these "appropriate legal inferences" are and exactly how they should justify the Commission's grant of the Bureau's countermotion. The countermotion consists of essentially one argument, which relies on circular reasoning. The Bureau states that "it is clear that WKZF[-

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<sup>2</sup> Opposition and Countermotion at 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

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

FM] cannot return the station to the air," specifically because the Bureau itself will not consider the very modification application that would allow the licensee to return the station to the air while the renewal application is designated for hearing, and thus, the Station's renewal application should be denied.

**B. The Bureau's Opposition and Countermotion Provide No Reasonable Basis for a Dismissal of WKZF-FM's Motion for Summary Decision or a Denial of the Station's Renewal Application.**

While the Bureau correctly recognizes that WKZF-FM cannot return the Station to the air without a grant of its pending modification application, it neglects to acknowledge that it is the Bureau's own decision to delay any consideration of the application until after the renewal application is granted that is essentially causing the Station to remain off the air at this point. Through the detailed facts set forth in its Motion, WKZF-FM has shown that it has acted diligently and in good faith to return the Station to the air since it acquired the license in the spring of 1995. When it acquired the license, the former tower site was inoperable and not in the condition to be repaired and the Station had been dark for some time. WKZF-FM has since arranged for operation of the Station from a new site and has obtained the technical and financial support necessary to return the Station to the air within 60-90 days. Yet it cannot do so without legal authorization from Commission that will enable it to move forward in this process.

In a recent Summary Decision of Administrative Law Judge Arthur I. Steinberg,<sup>6</sup> attached as Exhibit 1, Judge Steinberg found that the licensee of Station WPVG, Funkstown, Maryland, whose circumstances with regard to its renewal application were similar to that of the

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<sup>6</sup> *WPVG, Inc.*, MM Docket No. 96-117, FCC 96D-05 (released September 5, 1996).

instant case, had sufficiently demonstrated its diligent efforts to return the station to the air when it located a new tower site from which to broadcast and prosecuted a modification application to acquire authorization to implement that change. Judge Steinberg also found that the failure of the licensee to formally request continued authority to remain silent was not disqualifying, in light of the fact that it had noted in the cover letter to its modification application that the station was silent and would remain off the air until after the Commission issued the construction permit necessary to resume broadcast operation. Likewise, in the instant case, WKZF-FM has pursued similar diligent actions to relocate the inoperable former tower site and prosecute a modification application for authorization to broadcast from that site. WKZF-FM filed its application for modification promptly upon completion of the engineering studies required to finalize the application. Moreover, WKZF-FM notified the Commission in an exhibit to its renewal application that the Station was off the air and would remain so until grant of its modification application. Thus, WKZF-FM's renewal application should be granted at this time.

If the Presiding Officer is concerned that WKZF-FM will not in fact return the Station to the air upon grant of the renewal, it is important to recognize that WKZF-FM has no better impetus to promptly return the Station to the air than the February 8, 1996 statutory deadline imposed by the Telecommunications Act of 1996. Even if both the renewal application and the pending modification application are granted in the near future, should WKZF-FM not return the Station to the air by February 8, 1996, which is *less than six months from now*, the Station's license will automatically expire at that time and the licensee and its creditors will be left with nothing but a number of legal, technical and other costs to show for its efforts to return the Station to the air. Given that deadline and possible outcome, there is no logical reason why the

licensee would want anything other than to return the Station to the air as soon as possible. If the applications are granted, the Commission can rest assured that WKZF-FM has every intention to return the Station to the air by February 8, 1996, if not earlier. The alternative result is not appealing.<sup>7</sup>

The Bureau itself notes in its Opposition and Counter-motion that "the critical issue in this proceeding is whether...grant of the renewal application serves the public interest."<sup>8</sup> The public interest of the Bayboro, North Carolina community is surely not best served by a denial of the renewal application. Such denial would no doubt assure that the Bayboro community would lose much-needed local radio broadcast service for years to come, if not permanently. The alternative, to grant the renewal application, will allow the licensee the opportunity to return the Station to the air and effectively serve the Bayboro public. Thus, WKZF-FM urges the Presiding Officer to grant the renewal application in the interest of the public and the community of Bayboro.

(continued on next page)

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<sup>7</sup> In *WPVG, Inc.*, Judge Steinberg conditioned the grant of the renewal on the resumption of broadcast operations on or before February 8, 1997. WKZF-FM encourages the Presiding Officer in this case to do the same.

<sup>8</sup> *Id.*

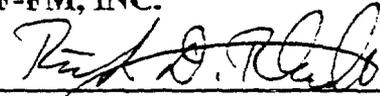
C. Conclusion

For the reasons set forth above, WKZF-FM respectfully requests that the Presiding Officer issue deny the Bureau's Counter-motion, grant WKZF-FM's Motion for Summary Decision, renew the license for the Station, and instruct the Bureau to promptly consider WKZF-FM's pending modification application on an expedited basis.

Respectfully submitted,

WKZF-FM, INC.

By:



Rick D. Rhodes

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Elizabeth A. Sims

(Licensed in Georgia Only)

Its Attorneys

September 13, 1996

**DECLARATION OF KEITH ECKHARDT**

I, Keith Eckhardt, President of WKZF-FM, Inc., licensee of Station WKZF(FM), Bayboro, North Carolina, do hereby state, under pain or penalty of perjury, that I have read the foregoing "Reply to Mass Media Bureau's Opposition to Motion for Summary Decision and Countermotion for Summary Decision" and that the facts contained therein are true and correct to the best of my knowledge, information and belief.

WKZF-FM, INC.

By:   
Keith Eckhardt  
President, Operations

Date: 9/13/96

**EXHIBIT 1**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	MM DOCKET NO. 96-117
	)	
WPVG, INC.	)	File No. BR-950601VH
	)	
For Renewal of License	)	
for Station WPVG(AM)	)	
Funkstown, Maryland	)	

Appearances

*Roy F. Perkins, Jr., Esquire*, on behalf of WPVG, Inc.; and *Alan E. Aronowitz, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF  
ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: September 3, 1996

Released: September 5, 1996

Preliminary Statement

1. By *Hearing Designation Order*, DA 96-814, adopted May 16, 1996, and released May 22, 1996 ("*HDO*"), the Assistant Chief, Audio Services Division, Mass Media Bureau, by delegated authority, designated for hearing the application of WPVG, Inc. ("WPVG" or "Licensee"), for renewal of license for Station WPVG(AM), Funkstown, Maryland. The following issues were specified:

- (1) To determine whether WPVG, Inc. has the capability and intent to expeditiously resume the broadcast operations of WPVG(AM), consistent with the Commission's Rules.
- (2) To determine whether WPVG, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (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 a grant of the renewal application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation. *HDO* at para. 4. The *HDO* placed upon the Licensee both the burden of proceeding with the introduction of evidence and

burden of proof. *Id.* at para. 7. A prehearing conference was held on July 9, 1996. (Tr. 4-16.)

2. Presently under consideration are a Motion for Summary Decision, filed on August 15, 1996, by WPVG, and comments in support thereof, filed on August 26, 1996, by the Mass Media Bureau.

### Findings of Fact

3. The *HDO* recited the following facts as the basis for the specification of the issues in this proceeding:

WPVG suspended operations on October 30, 1994 when the owner of the station's transmitting antenna site ordered the [L]icensee to remove its facilities from the property. WPVG reported that it was in the process of establishing a new tower site, and that it would file the appropriate application when zoning approval was received for the new location. In its June 1, 1995 renewal application WPVG reported that its search for a new site was complicated by the necessity to secure a site that would serve both WPVG's needs while protecting AM Stations WMET (Gaithersburg, Maryland) and WCCS (Eomer, Pennsylvania) from interference. On September 12, 1995, WPVG reported that it was negotiating for two possible sites, that it hoped to finalize an agreement for one of these sites by September 24, 1995, and that it expected to file the proper application (FCC Form 301) for this site when the site owner accepted its offer. The special temporary authority approving WPVG's September, 1995 request [to remain silent] expired March 27, 1996. A review of the record for this station does not indicate that an application to relocate the station's transmitting antenna has been filed. Further, the [L]icensee has neither notified the Commission that broadcast operations have resumed nor requested further extension of its special temporary authority. Therefore, WPVG is in apparent violation of Sections 73.1740 and 73.1750 of the Commission's Rules.

*HDO* at para. 2 (footnotes omitted).

4. In its Motion for Summary Decision, the Licensee does not dispute that portion of the *HDO* which summarizes the facts pertaining to the loss of its transmitter site. (Motion at 3.) Rather, WPVG challenges the accuracy of the *HDO*'s statement that no application to relocate the station's transmitter had been filed. In support, WPVG relies on the following additional facts.

5. On April 18, 1996, the Licensee filed an application (under FCC Form 301) for a construction permit for a new transmitter site. The cover letter to that application stated, *inter alia*, that "Station WPVG is presently off the air and will be until the station is built after the CP is granted." (Motion at 3 and Att. A.) Public notice of the receipt and acceptance of the

application for the new site was issued by the Commission on May 13, 1996. (*Public Notice*, "Broadcast Applications," Report No. 23736, dated May 13, 1996, at 6.)

6. On May 30, 1996, eight days after the release of the *HDO* in this proceeding, the Licensee's counsel, by letter, requested the Commission to extend for six months the authority for WPVG to remain silent. The letter stated as grounds for the extension request that WPVG was silent due to the loss of its leased antenna-transmitter site, and that the Licensee was forced by the lessor to remove its equipment, including the tower. The letter noted that a new site had been located, that an application to construct the WPVG transmitting facilities at the new site had been filed with the Commission, and that the application had been accepted for filing. (Letter from Roy F. Perkins, Jr., to William F. Caton, Acting Secretary of the Commission, dated May 30, 1996.)

7. On June 6, 1996, the Licensee's counsel, by letter to the Mass Media Bureau's Audio Services Division, requested that action be expedited on WPVG's pending application for a construction permit for a new transmitter site. The letter was filed pursuant to *Public Notice*, "Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcast Stations," DA 96-818, released May 22, 1996. Counsel's letter noted that the station was silent due to the eviction from its former site, and that a grant of the application for a new site was necessary for WPVG to resume broadcast operations. (Letter from Roy F. Perkins, Jr., to James Crutchfield, Audio Services Division, dated June 6, 1996.)

8. By letter dated June 27, 1996, from an engineer in the Audio Services Division, the Licensee was advised of technical deficiencies in its application for a new transmitter site. The letter afforded the Licensee 30 days within which to file a curative amendment. (Motion at 4 and Art. B.) The Licensee's curative amendment was filed with the Commission on July 24, 1996. (*Id.* at 4.)

9. By fax message dated July 30, 1996, from an engineer in the Audio Services Division, the Licensee was advised as follows:

Ready to grant WPVG app[lication] as soon as FAA approval received.  
Fax FAA approval to me as soon as you receive it.

Warning: Failure to resume broadcast operations by Feb[ruary] 9, 1997, or the 12 month silent period ending thereafter will result in the loss of the licensed WPVG facilities. Lack of FAA approval will not delay loss of licensed facility due to Telecom Act of 1996.

(Motion at 4 and Art. C.)