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FCC 96-443

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

In the Matter of)	MM Docket No. 96-104
)	
Southwestern Broadcasting Corporation)	File No. BRH-900315UC
)	
For Renewal of License)	
for Station KLZK(FM))	
Brownfield, Texas)	

ORDER

Adopted: November 14, 1996 ; Released: November 15, 1996

By the Commission:

1. By this Order the Commission directs the Mass Media Bureau to reinstate nunc pro tunc and expeditiously process a minor modification application filed May 8, 1996 by Southwestern Broadcasting Corporation ("Southwestern"), licensee of Station KLZK(FM), Brownfield, Texas, to modify its facilities to operate on Channel 282C2. KLZK, which is licensed as a Class A FM station,¹ is currently off the air. By Hearing Designation Order ("HDO"), DA-96-657, released April 29, 1996, Southwestern's application for renewal of license of KLZK was set for hearing on issues to determine whether Southwestern has the capability and intent to expeditiously resume the broadcast operation of KLZK(FM), consistent with the Commission's rules, and whether Southwestern has violated 47 C.F.R. §§73.1740 and/or 73.1750 which provide, respectively, that a station may not discontinue operation for more than thirty days without Commission authorization, and that a licensee shall notify the Commission of permanent discontinuance of operation. The HDO further provided that any grant of renewal would be conditioned on the expeditious resumption of operation.

2. In a Summary Decision (S.D.), 11 FCC Rcd 9120 (ALJ 1996), Administrative Law Judge Richard L. Sippel (ALJ) denied Southwestern's renewal application and cancelled its station license. The ALJ recited that, at a June 6, 1996 prehearing conference, the parties indicated that they would attempt to negotiate a consent order to resolve the proceeding. The ALJ also indicated that, in view of Section 403(l) of the Telecommunications Act of 1996,² which added a new Section 312(g) to the Communications Act of 1934, 47 U.S.C. §312(g), under

¹The Bureau upgraded the allotment for KLZK from Channel 280A to Channel 282C2 in 1988. Report and Order, 3 FCC Rcd 6158 (M. M. Bur. 1988).

²Pub. L. No. 104-104, 110 Stat. 56 (1996).

which a broadcast station's license will automatically expire upon the station's failure to broadcast for a consecutive twelve-month period, an important element in a viable settlement would be the Mass Media Bureau's expeditious review of the application filed by Southwestern on May 8, 1996. At a further conference held June 27, 1996, however, the Bureau indicated that despite its extant policy of expeditiously processing applications to assist silent stations in danger of losing their authorizations as a result of the new legislation, see Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcasting Stations (Public Notice)("Expedited Processing"), DA 96-818, released May 22, 1996, the Bureau would not expedite the processing of Southwestern's application because it was filed after release of the HDO. In the circumstances, the ALJ authorized Southwestern to seek summary decision, which it did on July 5, 1996; the Bureau filed a countermotion for summary decision on July 19, 1996. The ALJ granted the Bureau's motion. The Bureau subsequently dismissed Southwestern's application. Southwestern has filed exceptions. In view of the fact that its license will be terminated automatically if it does not resume operation of KLZK before February 9, 1997, Southwestern urges the Commission, first, to issue an order directing the Bureau to process the KLZK modification application and, second, to hold the proceeding in abeyance until Southwestern returns KLZK to the air or the statutory deadline occurs. The Bureau opposes this relief.

3. In determining whether a licensee of a silent station has the requisite capability and intent to expeditiously restore broadcast operations, the Commission's current practice is to consider steps the licensee has taken during the course of the proceeding to return its station to the air. See Keyboard Broadcasting Communication, 10 FCC Rcd 4489 (M. M. Bur. 1995) (matter resolved favorably where, despite questions relating to station's silence for over three years, licensee took steps after designation for hearing to overcome equipment and other problems to return to the air); Cavan Communications, 10 FCC Rcd 2873 (ALJ 1995) (license renewed without objection by the Bureau where licensee acted promptly after designation to make necessary repairs and enter into a Local Marketing Agreement in order to return to the air); David Lee Communications, Inc., 9 FCC Rcd 1656 (ALJ 1994) (license renewed with support of the Bureau where, after designation, licensee entered into time brokerage agreement and resumed operations). Although the Bureau would distinguish these cases, noting that Southwestern failed to take any steps toward resumption of operations prior to the HDO, we believe the better reading of this precedent is that it is not fatal even if the steps taken by the licensee occur after the HDO, whether or not action is required by the Bureau. Furthermore, as noted, the Bureau, in Expedited Processing, announced its policy to assist stations facing the statutory deadline contained in 47 U.S.C. §312(g) by expeditiously acting on applications that are required to return a silent station to the air. The Bureau did not indicate in Expedited Processing an exception to this policy for actions taken after designation for hearing.

4. In this case, following issuance of the HDO on April 29, 1996, Southwestern promptly obtained a new transmitter site for KLZK to operate on Channel 282C2 and filed its application for the new facilities on May 8, 1996. In addition, it prepared a projection of expenses and

obtained a bank letter to cover the costs of construction and initial operation. Assuming favorable action on its application, we estimate it will take approximately sixty days following receipt of a permit for Southwestern to construct the proposed facilities and return KLZK to the air. Although the Bureau has declined to process the application for Channel 282C2 because it was filed post-designation, we are unable to discern a convincing basis for the Bureau's position in light of the aforementioned precedent, which gives decisional weight to efforts made by the licensee after designation to restore service, and the Bureau's own stated intention in Expedited Processing to come to the aid of silent stations in need of expedited application processing. Indeed, there is nothing in the language of Expedited Processing to indicate that the Bureau will not apply expedition to applications filed during the course of a hearing proceeding and the Bureau has offered no sufficient rationale for its refusal to do so here. Therefore, in view of the exigencies of this case, we direct the Bureau to reinstate nunc pro tunc and process Southwestern's May 8, 1996 application on an expedited basis and, if the application is technically complete and otherwise grantable, to issue a construction permit by December 6, 1996 so as to afford sufficient time for Southwestern to construct and resume operations prior to the statutory deadline.³ If the Bureau is unable to complete action on the application within the specified time frame, or, as a consequence of other extrinsic factors, the licensee cannot resume operations before February 9, 1997, the licensee may petition the Commission for such further relief as may be appropriate at that time. While these steps are in progress, we will hold this proceeding in abeyance.

5. ACCORDINGLY, IT IS ORDERED, That the Mass Media Bureau IS DIRECTED to reinstate nunc pro tunc and process Southwestern Broadcasting Corporation's May 8, 1996 modification application in accordance with this order.

6. IT IS FURTHER ORDERED That the August 28, 1996 Consolidated Brief and Exceptions and the application of Southwestern Broadcasting Corporation (File No. BRH-900315UC) for renewal of license of Station KLZK(FM), Brownfield, Texas, ARE HELD IN ABEYANCE pending further order of the Commission.⁴

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton

Acting Secretary

³As noted above, following release of the S.D., the Bureau dismissed Southwestern's modification application. Southwestern should be prepared to resubmit its application and provide any ancillary information needed by the Bureau to meet its December 6, 1996 deadline.

⁴If Southwestern is successful in returning KLZK to the air before the statutory deadline, the General Counsel is delegated authority to reverse the S.D. and grant renewal of license.