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Federal Communications Commission

FCC 96D-13

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

In the Matter of	)	MM DOCKET NO. 96-192
	)	
BLUESTONE BROADCASTERS, INC.	)	File No. BR-950531ZF
	)	
For Renewal of License	)	
for Station WMTD(AM)	)	
in Hinton, West Virginia	)	

**Appearances**

*John B. Kenkel, Esq.* on behalf of Bluestone Broadcasters, Inc.; *Jacqueline Ellington, Esq.* on behalf of the Mass Media Bureau.

**SUMMARY DECISION  
OF  
ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

**Issued: December 19, 1996**

**Released: December 23, 1996**

**PRELIMINARY STATEMENT**

1. This hearing was instituted under Hearing Designation Order ("HDO") (DA 96-1509) released September 10, 1996. A Prehearing Conference was held on October 17, 1996, in accordance with the assignment Order (FCC 96M-215). See Prehearing Conference Order FCC 96M-220, released September 17, 1996. It was determined that summary decision would be appropriate and a round of pleadings was established.<sup>1</sup> Order FCC 96M-236, released October 21, 1996.

2. On November 8, 1996, Bluestone Broadcasters, Inc. ("Bluestone"), the renewal licensee, filed a Motion For Order On Local Notice Completion. There was no opposition filed by the Mass Media Bureau ("Bureau") and the motion was granted. Order FCC 96M-260, released November 25, 1996.

<sup>1</sup> The parties stated in a prehearing status report dated October 16, 1996, that they were prepared to stipulate to the filing of the licensee's renewal application and to the facts set forth in the HDO. That stipulation is accepted.

**FINDINGS OF FACTS**

3. Bluestone is the licensee of AM Station WMTD, Hinton, West Virginia. Station WMTD(AM) suspended its operations on January 27, 1993, as a result of the expiration of a long term lease on the Station's transmitter/antenna site. The lease would not be renewed by the new owner of the property. On February 10, 1993, Bluestone gave timely notice to the Commission of its cessation of broadcasting. Contemporaneously, Bluestone requested temporary authority to remain silent. That request was granted by the Bureau for a period of three months. Thereafter, commencing on February 10, 1993, Bluestone made successive requests for three month STAs which were granted. On May 26, 1995, Bluestone filed the Station's scheduled renewal application. Bluestone disclosed in that application the Station's silent status due to the fact that the lease for the Station's site had expired and the licensee was ordered to vacate the premises. The most recent STA which permitted the Station to remain silent expired on February 21, 1996. Bluestone's last STA request, filed on February 24, 1996, was denied by the Bureau.

4. The unopposed declaration of Lonnie R. Mullins, Bluestone's President, establishes that the license for Station WMTD(AM) has been held by Bluestone since 1964. Station WMTD(AM) was broadcasting from the same site for 33 years until the property was acquired by new owners. As the requests were filed seriatim for STA relief, the licensee worked with an engineer to locate a new site. The availability of antenna sites is described as limited in and around Hinton because the terrain is rugged and hilly. The operation of the Station's AM antenna requires a relatively flat and clear site of no less than 3 acres. Mr. Mullins appears to have been acting reasonably and diligently in his efforts to locate another suitable site, particularly in view of the back and forth nature of negotiations. As a result of Mr. Mullins' continuing efforts to locate a site, Bluestone now has a written, signed and notarized option with Wyatt and Virginia Hinton for a 20 year lease on suitable property. The option agreement, executed on November 11, 1996, provides Bluestone an option to lease a 3 acre lot. The option must be exercised by March 17, 1997, which is sufficient time to meet the statutory deadline. On December 4, 1996, the Bureau expeditiously approved the engineering of Bluestone's proposal and Bluestone was authorized to proceed with its modifications.

5. On November 12, 1996, Bluestone submitted to the Mass Media Audio Services-AM Side a Request For Special Temporary Authority ("STA") to operate with a temporary antenna installation at a site less than 0.5 miles from its licensed site. Bluestone also filed an FCC Form 301 in which it sought approval of a minor change to move to a new transmitter site. On November 13, 1996, Bluestone submitted copies of the applications for STA and the minor amendment directly to the Audio Service Division's Processing Support Group and requested expedited action on the items. See Procedures Announced For Expedited Processing Of Applications Filed By Silent Broadcast Stations, DA 96-818, released May 22, 1996 (expediting procedures contemplated where silent stations seek to return to the air). See also Deadline Approaching For Silent Broadcast Stations: AM And FM Stations Urged To File Related Applications By November 1, DA 96-1718, released October 17, 1996 (Bureau reminds silent broadcast stations of expedited processing procedures) (collectively the "Expediting Process

Notices"). There was no notification after tender that the Amendment was considered a major Amendment [47 C.F.R. §73.3578(a)] and the Bureau has acted favorably on Bluestone's request for expedited approval of its engineering.

6. On November 14, 1996, in order to meet its burden of showing diligence under the issues in this case and to report a significant change to its renewal application, Bluestone filed a Petition For Leave To Amend and Amendment. The Amendment would disclose in Bluestone's renewal application that an amendment for a new site was filed with the Bureau; that Bluestone had the capability and the intent to expeditiously resume broadcast operations; and that expedited processing had been requested. On November 20, 1996, the Mass Media Bureau ("Bureau") filed Comments On Petition For Leave To Amend And Amendment. The Bureau noted that the Amendment sought by Bluestone contains the same engineering matter that is being sought by Bluestone at the Bureau's Audio Services Division. The Bureau requested that the Presiding Judge take no action on Bluestone's Petition until the Audio Services Division's engineering staff had an opportunity to review and pass on Bluestone's minor change application. The Presiding Judge took no further action and on December 4, 1996, the Bureau's Audio Services Division approved Bluestone's engineering. On December 17, 1996, the Bureau filed its Comments On Motion For Leave To File Supplement and Supplement in which the Bureau acknowledges Bluestone's compliance and withdraws its earlier opposition.

7. On December 11, 1996, Bluestone filed a Motion For Leave To File Supplement in which Bluestone described a notarized option agreement for lease of a new site that was executed on November 18, 1996. Bluestone's Supplement also includes a Construction Permit dated December 4, 1996, for the new site and a letter from the Audio Services Division dated December 5, 1996, which advises Bluestone that it may proceed with construction and that its request for an STA is now moot.<sup>2</sup>

### CONCLUSIONS OF LAW

8. On November 15, 1996, Bluestone filed a Motion For Summary Decision in accordance with the pleading schedule. See Order FCC 96M-236, supra. On December 2, 1996, the Bureau filed Comments On Motion For Summary Decision. The Bureau acknowledged that it was processing Bluestone's Amendment for minor change and argued that the Motion For Summary Decision was premature until the Amendment was processed and Bluestone resumes broadcasting. The Amendment was processed on December 14, 1996, and the Bureau concludes that Bluestone now complies with all of the Commission's rules and regulations.

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<sup>2</sup> Bluestone was also advised that it would be necessary to submit an Application For License (FCC Form 302) for the new site upon completion of construction. It is noted that the same approved engineering was presented in the November 14 Amendment to Bluestone's Renewal Application which is the subject of this proceeding.

9. The HDO states that:

The station has been silent for a protracted period of time and the licensee has failed to demonstrate that causes beyond its control warrant the station's silence. Bluestone's request does not provide good cause for the continued extension of its special temporary authority.

HDO at Para. 2.

10. The Bureau does not affirmatively contest any of the facts as alleged by Bluestone in its Motion as supplemented. The Bureau asserts that:

The Motion for Summary Decision filed by Bluestone is predicated upon the Bureau's acting favorably on an Application for Minor Change filed by Bluestone on November 12, 1996 and Bluestone returning the station to the air. In light of the decision rendered by the Commission in Southwestern Broadcasting Corporation, FCC 96-443, released November 15, 1996, the Bureau is currently processing Bluestone's Application for Minor Change.

Bluestone's minor Amendment was accepted by the Division of Audio Services and Bluestone has been advised by the Bureau that it may commence construction. The Bureau also continues to contend that the Motion For Summary Decision is still premature until Bluestone resumes broadcasting. But the case is now ripe for a decision on the issues of Bluestone's diligence, capability and intent to expeditiously resume broadcasting and a conditional grant on the merits would be appropriate relief under recent precedent and the Commission's policy to expedite silent station cases.

11. The HDO set the following issues:

- (1) To determine whether Bluestone Broadcasters, Inc. has the capability and intent to expeditiously resume the broadcast operations of WMTD(AM), consistent with the Commission's Rules.
- (2) To determine whether Bluestone Broadcaster's, 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.

12. The HDO orders that if the renewal application is granted, the grant will be conditioned on the "expeditious resumption of operations" and the precise period for resumption will be established in the hearing. HDO at Para. 4. The Station has been silent for more than one year. Section 403(1) of the Telecommunications Act of 1996, as incorporated in Section

312(g) of the Communications Act of 1934, as amended (47 U.S.C. §312(g)), provides for the automatic expiration of a broadcast license if a station fails to transmit signals for any consecutive 12 month period. Since, under the statute, Bluestone's license will automatically terminate on February 9, 1997 (unless it returns to the air before that date), the date for resumption of broadcasting can readily be established in the hearing as on or before February 8, 1997.

13. The Commission's Rules provide that the moving party has the burden of establishing that summary decision would be appropriate based on the papers submitted. 47 C.F.R. §1.251. See Summary Decision Procedures, 34 F.C.C. 2d 485, 487-88 (1972). The unopposed documentary evidence in this case as presented by the movant establishes that Bluestone clearly has the intent and the capability to resume broadcasting on or before February 8, 1997. The Bureau has acted expeditiously in granting the minor site amendment and construction can be completed before the Act's deadline. Under the circumstances, there is no need for delaying a summary decision which is conditional on the resumption of broadcasting by the statutory deadline. An established date of February 8, 1997, constitutes a "precise period of time." HDO at Para. 4. In the Commission's recent silent station decision, Southwestern Broadcasting, supra, approval was given under similar circumstances and a grant was conditionally made, citing Keyboard Broadcasting Communication, 10 F.C.C. Rcd 4489 (M.M.Bur. 1995) (matter resolved favorably despite station's silence for over three years where licensee took steps after designation for hearing to overcome equipment and other problems to return to the air); Cavan Communications, 10 F.C.C. Rcd 2873 (Admin. L. J. 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 F.C.C. Rcd 1656 (Admin. L. J. 1994) (license renewed with support of the Bureau where licensee entered into time brokerage agreement and resumed operations).

14. Section 73.1740(a)(4) provides<sup>3</sup>:

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.

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<sup>3</sup> The HDO also cites Section 73.1750 of the rules which requires notification to the Commission of a station's silent status and the surrender of a license to the Commission after discontinuance of operation. However, the license will cancel automatically if broadcasting is not resumed by February 8, 1997, and if the Station is silent on that date the license automatically terminates without formal surrender.

If the causes beyond the control of the licensee make it impossible to comply with 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.

During the period February 8, 1993 to February 21, 1996, Bluestone was diligent in seeking STA authority to remain silent while it sought a new site. The required vacating of the transmitter/antenna site in January 1993, had made it impossible to continue operating and the events of lease termination, eviction and delays in searching for a new site were beyond the control of Bluestone. There are no specific allegations in the HDO or in the Bureau's pleadings of any dilatoriness in Bluestone's efforts to restore service.

15. Expedited approval by the Bureau of the engineering Amendment was based on the same information reported by Bluestone in its Petition For Leave To Amend and Amendment filed on November 14, 1996. Section 1.65 requires disclosure in the course of a hearing where an application is no longer substantially accurate or complete or where there is a substantial change as to any matter which would be of decisional significance. 47 C.F.R. §1.65 (a)(b). Bluestone's renewal application was filed in March 1995, and now contains outdated engineering information. Since November 12, 1996, the Commission has had on file in conjunction with the issues in this hearing Bluestone's application for a minor Amendment. Therefore, the proposed Amendment under 47 C.F.R. §1.65 also may be accepted for reporting purposes in Bluestone's pending renewal application as a decisionally significant matter relating to engineering.<sup>4</sup> Since the engineering has been approved, the Amendment will also be accepted as evidence of Bluestone's capability to expeditiously resume broadcasting on Station WMTD(AM).

16. On November 12, 1996, Bluestone applied for an STA. In the interest of expediting a return to broadcasting, Bluestone proposed the construction of a temporary antenna and placement of a portable building from which operations and broadcasting could take place before more permanent construction is completed. See FCC Form 301 at Attachment 2B(3). A copy of the STA request was also made a part of the Petition To Amend that was filed on November 14, 1996 pursuant to Section 1.65. Bluestone argued that if engineering approval for the new site is obtained, it would still be facing a statutory deadline for completion of construction. Bluestone's engineering for an STA was also submitted to the Bureau for expedited review and approval. However, the STA request has been rendered moot by grant of the Construction

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<sup>4</sup> This is not a comparative case and therefore there can be no "advantage" in permitting the Section 1.65 amendment.

Permit and the related approval of Bluestone's engineering by the Audio Services Division.<sup>5</sup> The chances for Bluestone to timely return Station WMTD(AM) to the air have improved substantially.<sup>6</sup>

17. The record shows that Mr. Mullins has been negotiating with landowners since Bluestone's lease was terminated. In the process of those negotiations, he kept the Commission informed. See Motion For Summary Decision at Attachment 2 (22 items of correspondence between Bureau and Bluestone). As a result of Mr. Mullins' efforts, Bluestone now has reasonable assurance of having a site for at least 20 years. Bluestone also received Commission authority to construct an antenna system. It appears that Bluestone has shown both the intention and the ability to return Station WMTD(AM) to the air by February 8, 1997. Recently, in Hometown Media, Inc., - F.C.C. Rcd - (FCC 96-461), released November 27, 1996, the Commission affirmed a summary decision granting a renewal application of a silent station on condition that the station resume broadcast operations before January 15, 1996. The same result should pertain with respect to the merits of a summary decision in favor of Bluestone.

#### RULINGS

Accordingly, IT IS ORDERED that the Petition For Leave To Amend and Amendment filed on November 14, 1996, by Bluestone Broadcasters, Inc. IS GRANTED and the Amendment IS ACCEPTED in this proceeding for all purposes incident to this Summary Decision.

IT IS FURTHER ORDERED that the Motion For Leave To File Supplement and Supplement that was submitted by Bluestone Broadcasters, Inc. on December 11, 1996, IS GRANTED and the Supplement IS ACCEPTED.

IT IS FURTHER ORDERED that the Motion For Summary Decision filed by Bluestone Broadcasters, Inc. on November 15, 1996, IS GRANTED.

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<sup>5</sup> Even if an STA were authorized it would not toll the statutory deadline. See Silent Station Authorization, supra (STAs will not toll or extend the 12-month period, notwithstanding any provision in any authorization to the contrary). Thus, there is no authority for Bluestone to remain silent beyond February 8, 1997.

<sup>6</sup> Bluestone need only complete construction and return to the air. Thereafter, so long as broadcasting has been resumed by February 8, 1997, Bluestone would apply for a license to operate at the new site.

IT IS FURTHER ORDERED that the above captioned application of Bluestone Broadcasters, Inc. for renewal of license for Station WMTD(AM), Hinton, West Virginia (File No. BR-950531ZF) IS GRANTED subject to the condition that the station SHALL RESUME broadcast operations no later than February 8, 1997.<sup>7</sup>

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel  
Administrative Law Judge

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<sup>7</sup> In the event that 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 will become effective 50 days after its public release pursuant to Section 1.276(d) of the Commission's Rules [47 C.F.R. §1.276(d)].