

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
New Procedures To Streamline)
Radio and Television Applications;)
Require Electronic Filing; Institute)
Random Audit Enforcement; and)
Improve Ownership Data Collection)

MM Docket Nos. 98-43
and 94-149 ✓

To: The Commission - Mail Stop 1170



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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RECONSIDERATION

1. Brown Broadcasting Service, Inc. ("Brown") hereby petitions for reconsideration of that aspect of the Commission's decision in the above-captioned proceeding, FCC 98-281, released December 4, 1998, that precludes the grant of any extension of time of a construction permit ("CP") for changes in an existing broadcast station beyond three years from the grant of the original CP. The rationale underlying the absolute rule assumes that an existing station that loses a CP for failure to construct promptly can refile for a new CP when it is ready to construct. That is not true in some cases, particularly CPs that were granted under rules that were subsequently changed and the CPs are grandfathered. WBRU is in that situation. It holds a CP for changes that it had to struggle for five years to get the Commission to grant and is now threatened with loss of extremely important rights that it will not be able to regain, once again because of time require for the Commission to make a substantive evaluation of WBRU's situation.

2. Brown is a nonprofit corporation that is the licensee of Station WBRU(FM), Providence, Rhode Island. Brown has operated WBRU for more than 30 years. The station is managed at the top level and staffed principally by students enrolled at Brown University,

supplemented by a modest professional staff where necessary for the enterprise to function given the other demands on students' time. WBRU is a commercial, not a noncommercial, station, supported by the sale of advertising time rather than donations or contributions. It has served as a training ground for some of the nation's most prominent professional broadcasters.

3. WBRU was originally constructed prior to 1964, when the existing system of minimum mileage separation requirements for FM stations was put into effect. Under existing separation requirements, WBRU is short-spaced to six or seven other stations in New York and New England. As a result, WBRU has always been restricted to 20 kW ERP, even though it is a full Class B station and would normally be able to apply for 50 kW ERP.

4. Brown applied to increase ERP on November 6, 1987 (BPH-871106IU) on the last business day before a rule change went into effect that would preclude a grant of the increase. It took five years and a reconsideration petition before the application was granted. Unfortunately, during that period, local attitudes toward RF emissions changed considerably, resulting in WBRU's no longer being able to use the site that was available to it in 1987.

5. Brown diligently sought another site close enough to the approved site so that the spacing analysis underlying the grant of BPH-871106IU would not be undermined. It found such a site, on an existing tower; but another station occupying that tower as a tenant -- not the owner -- refused to waive a provision in its lease that it interpreted as giving it the right to keep other stations off, despite personal meetings and pleas by WBRU and the tower owner's support of WBRU. During these negotiations, the Commission granted extensions of time to construct.

6. Brown finally realized that the only way to obtain access to the tower would be to litigate with the other tenant; but the other tenant had far more resources than Brown, and the

tower owner was not willing to get involved in litigation because the company was being sold. Therefore, Brown gave up and filed an application to modify the CP to increase to 50 kW ERP at its present licensed site (BMPH-971114IC).

7. WBRU believes that its showing in BMPH-971114IC is a strong one. All the other stations to which WBRU is short-spaced have increased power in one way or another, leaving WBRU as the lone stepchild with seriously restricted facilities. However, the Commission's Staff is obviously troubled, because it has not granted the application and has informally indicated that changes in the Rules over time present an obstacle to grant. Likewise, no action has been taken on Brown's latest extension application (BMPH-981124JC). Brown is working on the issues and plans to pursue its position vigorously.

8. Brown has held BPH-871106IU in one form or another since 1992; so if an absolute three-year cut-off is applied, the CP will be lost. The only exception is that if BMPH-981124JC is granted, Brown will have six months or whatever period beyond that grant date the Commission authorizes, with no possibility of a further extension.

9. Brown is now in an untenable position. The underlying CP relies on rules that were changed on November 9, 1987. If the CP is lost, it can never be regained, and WBRU will remain only one of seven or eight short-spaced stations that cannot operate at the full facilities for its class.^{1/} Needless to say, Brown and its students are seriously alarmed, particularly since several generations of students have participated in the multi-year effort to bring a power increase

^{1/} Brown consented to modifications by some of the other stations with the specific *quid pro quo* that WBRU be allowed to increase power. The Commission is threatening to leave those bargains only half-way in place.

to fruition. The power increase is also of special importance to Brown because WBRU is a stand-alone station in a market dominated by large, national-group owners; so WBRU needs every bit of help it can to compete and survive to continue its more than 30-year history of training students.^{2/}

10. It is clear from the foregoing discussion that the basic premise of the absolute three-year limit for modification CPs for existing stations -- that if lost, a CP can be re-applied for -- does not work in some cases.^{3/} There needs to be some provision for those cases.

11. Brown could have done something to save itself under the new rules, had it known early enough what was coming. It could have initiated litigation over the local obstacles to use of its present site. It could also have initiated litigation over the new tower it found, that a competing station refused to share for obvious reasons of self-interest. It could have filed a complaint at the Commission or sued the competing station for anti-competitive conduct. With enough judicial litigation, Brown could have generated a tolling factor in the three-year period.

12. Litigation does not do a radio station any good. It costs money that college students do not have; and while it is in progress, nothing gets done to achieve the final objective of operating with increased power. It is wrong for the Commission to have a rule that encourages litigation. Brown acted in the most effective and efficient way possible by trying to find a solution

^{2/} In fact, WBRU has been training students since the late 1930's, some 60 years ago. In the early years, it was a carrier-current station serving only the University campus.

^{3/} The other rationale for cutting off CPs -- that they constitute spectrum warehousing -- does not apply here, as Brown has been providing service to the public with full 20 kW facilities during the entire period since 1987, except for short periods of time when its antenna was damaged and was being repaired.

to its problem rather than picking a fight. That is why it now seeks a power increase at its existing location.

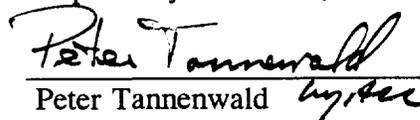
13. Brown is already operating at the location where it seeks a power increase and can implement the increase in very short order. An upgraded transmitter may be needed, but there is no need for tower construction or a new antenna. Brown's tower lease provides for WBRU to increase power, and the recently installed antenna at that location should have the capacity to handle a full 50 kW horizontal and 50 kW vertical ERP. But Brown needs to be able to work out the complex, and truly unique, engineering problems associated with a power increase. The Commission must not solve -- or rather eliminate -- those problems by cutting off WBRU's head with a procedural rule.

14. The amount of time Brown needs depends on how long the Commission needs to resolve the engineering problems. The Commission's Staff has many demands on its time other than dealing with WBRU. Therefore, the only fair procedure is to amend the rule to provide for tolling while a modification application is pending. A restriction in the number of permitted different modifications might be appropriate; but at a minimum, time must be allowed for resolving problems with any modification applications now pending, and no CP subject to a pending modification should be cancelled until at least six months after final disposition of the modification request.

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Respectfully submitted,


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