

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN
ROBERT N. FELGAR*
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING*
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
GEORGE PETRUTSAS
RAYMOND J. QUIANZON
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS

* NOT ADMITTED IN VIRGINIA

FLETCHER HEALD & HILDRETH, P.L.C.
ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET
ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

January 19, 1999

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)

EDWARD F. KENEHAN
(1960-1978)

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS*
EDWARD S. O'NEILL*
JOHN JOSEPH SMITH

WRITER'S DIRECT

703-812-0450

riley@fhh-telcomlaw.com

RECEIVED

JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HAND DELIVERED

Magalie Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW, Room TWB204
Washington, D.C. 20554

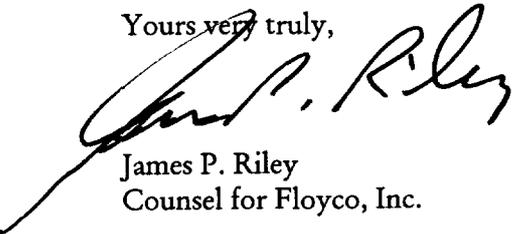
Re: MM Docket No. 98-43 and MM Docket No. 94-149

Dear Ms. Salas:

Transmitted herewith in triplicate on behalf of Floyco, Inc., permittee of Station WORL (AM), Altamonte Springs, Florida, is and original and four copies of its Petition for Reconsideration in the above-captioned proceeding.

Should further information be necessary, please communicate with the undersigned.

Yours very truly,


James P. Riley
Counsel for Floyco, Inc.

JPR:deb

Enclosures

No. of Copies rec'd 014
List ABCDE

ORIGINAL

Before the
Federal Communications Commission
Washington DC 20554

RECEIVED

JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
1998 Biennial Regulatory Review --)	MM Docket No. 98-43
Streamlining of Mass Media Applications,)	
Rules and Processes)	
)	
Policies and Rules Regarding)	MM Docket No. 94-149
Minority and Female Ownership)	
Mass Media Facilities)	

To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 405 of the Communications Act, 47 U.S.C. § 405, Floyco, Inc. ("Floyco"), by counsel, hereby petitions for reconsideration of the Report and Order in the above proceeding¹ to the extent and for the reasons set forth herein.

AMENDED SECTIONS 73.3534 and 73.3598

1. Floyco is the permittee of new, unbuilt AM station WORL, Altamonte Springs, Florida. The existing construction permit for WORL would expire April 1, 1999. On January 15, 1999, Floyco filed an application on Form 307 for a further extension of its permit. If granted under the terms of existing Section 73.3534 prior to the effective date of amended

¹Report and Order in MM98-43, MM94-149, 63 FR 70039, December 18, 1998.

Sections 73.3534 and 73.3598, the WORL permit would be extended to an expiration date in early August 1999.

2. As Floyco understands the amendment of Section 73.3598, the "original construction permit" for what is now authorized as Altamonte Springs's first radio station, WORL, would be deemed to have been granted December 5, 1984, over fourteen years ago. If Floyco's understanding is correct, its permit for WORL would automatically be forfeited at the end of either its existing permit's term or the end of the term of its pending extension application, no matter the state of construction of WORL or, if construction has been prevented, the reasons for prevention of WORL's construction.

3. In its NPRM in this proceeding, 13 FCC Rcd 11349 (1998) (herein "NPRM"), the Commission proposed that rules adopted regarding extension of construction permits be applied, insofar as the new rules would apply to outstanding permits, only to a permit in its initial construction period (*i.e.*, in the first 18 months for an AM station like WORL). NPRM, p. 11374. The Commission said it believed that:

it would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction permit (whether through extension, assignment, transfer of control, or modification). Because many of these permits have already been afforded a construction permit close to (or, in many instances, in excess of) the three-year term proposed in this Notice, we propose to continue to apply the rules as they exist today to permits outside their initial periods.

Id.

4. Floyco submits that the Commission was right in its proposed treatment of outstanding permits. However, in the Report and Order the Commission stated that it is adopting a different rule than proposed for reasons of fairness:

Although we proposed in the Notice that these rules apply to any construction permit that is within its initial construction period at the time these rules are adopted, we conclude that the fairer approach is to allow all permittees to take advantage of the extended construction period in the manner set forth below.

Report and Order, par. 84. (Citations omitted, emphasis supplied.) While the Commission's desire to achieve fairness is laudable, Floyco submits that in the "many instances" (NPRM, p. 11374) where permits have already been outstanding for nearly, or in excess of, three years, the approach adopted in the Report and Order will not achieve a fair result. Instead, permittees who have persisted in their efforts to construct new stations and have invested substantial sums in doing so will, without warning prior to the adoption of the Report and Order that this might be so, find their efforts of many years wasted and their investments wiped out.

5. The Report and Order does not contain reference to any substantial record support for the Commission's change of position, nor does the text of the Report and Order contain an analysis, beyond that quoted above, supporting the change of position. The Report and Order does say that "two commenters argued that we should apply the lengthened construction period to all outstanding authorizations that have provided a permittee with less than three years to construct." *Id.*, par 82, citation omitted. These two comments would not support applying the amended rule to permits like Floyco's which are beyond the three-year period. In note 138 of the Report and Order, the Commission cites the comments of Independent Broadcast Consultants, Inc., which proposed a one-year, one-time grace period for permittees near the expiration of their permit or extension. On the other hand, in note 147 of the Report and Order, the Commission cites comments of Michael Birdsill in direct support of the proposal made by the Commission in the NPRM. Thus, unless the Commission's conclusion -- that the rule adopted is more fair than

the rule proposed -- is demonstrably accurate, the application of the new three-year rule to permits already past the initial construction period, and certainly the application of the rule to permits already past the three-year mark from initial grant, has no support and should be reconsidered and reversed.

6. As stated above, Floyco understands that under amended Section 73.3598, its permit would be considered as having a December 1984 "date of issuance of the original construction permit." Floyco, adhering to the applicable Commission rules and precedent, sought to modify its permit. It ultimately filed, in 1987, a major modification application to change frequency and city of license to Altamonte Springs. That application, amended on February 18, 1988, was accepted by the Commission. A petition to deny was filed against the application, and responsive pleadings and technical amendments were filed. All pertinent pleadings and amendments were filed with the Commission before the end of 1990. Nevertheless, Floyco's application was not acted on by the Commission until it was granted by letter order on May 15, 1998, eight years after the application became ripe for action.² If new Section 73.3598 were applied to Floyco's permit, it would be automatically forfeited at the end of the latest extension granted prior to the effective date of the new rule -- no later than August 1999. Floyco submits that, far from fair, this would be an extraordinarily harsh result.

7. While Floyco has very real hope that construction of WORL will be completed prior to August 1999, it has encountered a completely unexpected -- but it believes resolvable --

²A copy of the Commission's grant letter of May 15, 1998, is attached. On July 30, 1998, Floyco filed a literally minor modification application solely to alter very slightly the layout of its towers on its site. That application was given "fast track" processing and granted October 1, 1998 (BMP-980730AB).

hurdle in obtaining its local building permits for its towers. This hurdle arises from enactment in 1997 of an ordinance applicable to Floyco's tower construction. These towers, first proposed by Floyco in an amendment filed with the Commission January 11, 1990, were not authorized by the Commission until May 15, 1998, although Floyco's permit application had by 1998 been ripe for action for eight years, seven of those years prior to adoption of the local ordinance which is now delaying commencement of the erection of Floyco's towers.

8. Extending the new three-year construction period to all permits, no matter when granted, as the Report and Order does contra to the NPRM's clear proposal to do otherwise, does not, despite the Commission's intention, provide greater fairness to those permittees who, like Floyco, are holders of permits with an initial grant date more than, or nearly, three years past. In Floyco's case, the Commission's May 15, 1998, letter order granted not only its permit modification but also a co-pending extension application which, the Commission held, satisfied the requirements of Section 73.3534. For any permittee now beyond, or approaching, the third anniversary of its initial grant, this must also have been the case on its last previous extension (or, in other cases, the Commission may have found the requirements of Section 73.3535 to have been satisfied).

9. These permittees, like Floyco, have never had notice, prior to the Report and Order, that their permits would automatically be forfeit at the end of three years. Had they had such notice, they might have surrendered hope of overcoming obstacles to construction and surrendered their permits rather than invest years of effort and substantial funds in their efforts to construct their stations. Now that these permittees are, as is Floyco, within reach of completing construction of their new stations, it would not be fair to subject them to a blanket three-year

limit on permits. Moreover, such a blanket application of the three-year rule in most such cases, and clearly in Floyco's case, will not satisfy Section 319(b) of the Communications Act. Floyco could not complete construction before the adoption of the Report and Order and the blanket three-year rule because the Commission deferred action, from 1990 to 1998, on Floyco's pending major change application. This delay at the Commission was beyond Floyco's control, but would not, by the terms of the Report and Order and amended Section 73.3598, extend Floyco's permit.

10. The Commission, on reconsideration, should revisit the amendment of Sections 73.3534 and 73.3598 and provide suitable relief to permittees like Floyco who are beyond, or approaching, the third anniversary of the initial grant of their construction permits. The proposal made by the Commission in the NPRM would do so.³ The proposal advanced in the comments of Independent Broadcast Consultants, Inc., for a one-year, one-time "grace period" for older permits, like Floyco's WORL permit, may also do so. The record and the Report and Order do not support the rule amendments adopted as they would apply to permits like Floyco's WORL permit.

CONCLUSION

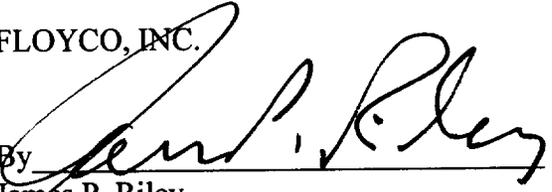
For the foregoing reasons, and to the extent indicated herein, the Commission should reconsider and set aside its action amending Sections 73.3534 and 73.3598 and should adopt rule

³Floyco's permit, like many of those at or approaching a third anniversary, is for a directional AM station. New construction of a directional AM station inherently involves more complex problems of land availability and local zoning and building permit issues than many FM and TV single tower projects. Under Section 73.3534, these complex problems can be considered by the Commission.

amendments which are generally consistent with the proposal in the NPRM, which recognized the need for different treatment of older (*i.e.*, beyond initial permit periods) construction permits.

Respectfully submitted,

FLOYCO, INC.

By 
James P. Riley

of

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0400

Its Attorney

January 19, 1999

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET NW
WASHINGTON DC 20554

MASS MEDIA BUREAU
AUDIO SERVICES DIVISION
TECHNICAL PROCESSING GROUP
APPLICATION STATUS: (202) 418-2795
HOME PAGE: www.fcc.gov/mmb/asd/

MAY 15 1996

PROCESSING ENGINEER: Edward A Lubetzky
TELEPHONE: (202) 418-2660
FACSIMILE: (202) 418-1410
MAIL STOP: 1800B2-EAL
INTERNET ADDRESS: elubetzky@fcc.gov

Nathaniel F. Emmons, Esquire
Wiley Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

In re: WORL(AM), Christmas, Florida
Floyco, Inc.
File No. BMP-870127AI (ext.)
File No. BMP-880218AE (mod.)

Dear Mr. Emmons:

This is in reference to the applications of Floyco, Inc. ("Floyco") for extension (File No. BMP-870127AI) and major modification (File No. BMP-880218AE) of its construction permit (BP-850314AG) for new station WORL(AM), Christmas, Florida.¹ This application proposes changes in frequency, power, hours of operation and transmitter location. It also proposes a change in city of license from Christmas, Florida to Altamonte Springs, Florida. On June 28, 1988, you filed a petition to deny the above application on behalf of TODAMERICA, Inc., licensee of WWFE(AM), Miami, Florida ("TODAMERICA").² Subsequent responsive pleadings and amendments followed.³ For the reasons set forth below,

¹ Floyco has filed an application (BMP-870127AI) for an extension of its outstanding construction permit. Floyco updated its extension request by letters dated March 10, 1997 and January 11, 1990. Floyco's uncontested extension application comports with the standards set forth in 47 C.F.R. §73.3534(b) and will be granted below.

² In view of TODAMERICA's allegation that grant of the instant application may create objectionable interference to its authorized facilities, we find that TODAMERICA has standing to file a timely petition to deny. See Orange Park Florida T.V., Inc. v. FCC, 811 F.2d 664 (D.C. Cir. 1987).

³ These included Floyco's July 13, 1988 opposition, and TODAMERICA's July 25, 1988 reply. As to the additional pleadings filed in this case, 47 C.F.R. §1.45(c) provides that "[a]dditional pleadings may be filed only if specifically requested or authorized by the Commission." The Commission neither requested nor authorized additional pleadings in the instant case. In our discretion, however, we have considered Floyco's August 29, 1988 motion to strike as well as TODAMERICA's September 2, 1988 opposition thereto to the extent that those pleadings address issues relevant to our disposition of the instant application. Additionally, we

we deny the TODAMERICA petition to deny and grant Floyco's extension and modification applications.

Petition to Deny. In its petition to deny, TODAMERICA alleges that the WORL(AM) application should be denied because certain of the field intensity measurements taken by Floyco on station WQBA(AM), Miami, Florida were suspect. Floyco responded that even were the WQBA(AM) measurements ignored, measurements from a special field test conducted by Floyco from its proposed transmitter site demonstrated that there existed no prohibited overlap of 0.5 mV/m contours of WORL(AM) and WWFE(AM); Floyco states that the measured radial data had previously been rejected by the Commission⁴ and did not form the basis for Floyco's claim that the application complied with the Commission's AM allotment standards. TODAMERICA's reply alleged that Floyco's special test measurements were invalid because they failed to comply with the Commission's rules for taking field intensity measurements and that, properly measured, the WORL(AM) application would create prohibited 0.5 mV/m overlap with WWFE(AM), Miami, Florida. Both Floyco and TODAMERICA further addressed this point in the subsequent motion to strike and opposition.

Discussion. On March 8, 1989, we received an amendment to the instant application from Floyco that reduced the proposed daytime power from 5 kW to 1 kW without otherwise changing the daytime technical design. This amendment fully protects WWFE(AM) on the basis of Figure M-3 conductivity without reliance on any measured conductivities. This amendment therefore renders TODAMERICA'S arguments regarding prohibited overlap moot.

January 25, 1989 Supplement. TODAMERICA also seeks to raise a misrepresentation issue against Floyco. In its January 25, 1989 supplement to petition to deny, TODAMERICA cites an August 17, 1988 letter from Gary E. Shader, who identifies himself as attorney for Mr. and Mrs. Henry Hardy, the owners of the property specified by Floyco as its original transmitter site for the instant proposal (the "Hardy site"). The letter states that "no towers were ever erected and no contracts have ever been entered into, permanent or temporary, and all applications for any radio towers should have been terminated some time ago." TODAMERICA asserts that Mr. Shader's letter casts doubt on Floyco's credibility, since it suggests that no tower was ever erected on the Hardy site for the purpose of conducting test measurements, and that Floyco therefore fabricated the measurements it claims to have conducted on May 30, 1987. TODAMERICA further asserts that the letter suggests that Floyco lacked reasonable assurance that the Hardy site remained available as its proposed

have treated TODAMERICA's January 25, 1989 further objection as a supplement to its petition to deny proffering pertinent information and have considered it as well.

⁴ See Letter to Central Florida Broadcasters, reference 8910-EL (Chief, AM Branch, Audio Services Division, Mass Media Bureau, May 4, 1997).

transmitter site.⁵

In the transmittal letter sent with its March 8, 1989 amendment, Floyco submits that "the allegations in TODAMERICA's [supplement] go far beyond any inferences which might reasonably be drawn from, much less compelled by, the August 17, 1988 letter." Floyco also notes that the letter is not an affidavit or declaration under penalty of perjury, provides no basis for assuming that the letter's author would have personal knowledge of the matters mentioned in the letter, and suggests that its author had no idea of the use to which the letter would be put. Floyco maintains the validity of its certification of reasonable assurance of site availability as well as its representations, also made in its March 8, 1989 amendment to the instant application, that its consulting engineer installed (and later removed) test equipment and conducted a special field test from the Hardy site on May 30, 1987, as reported to the Commission.

Discussion. As noted by Floyco, Mr. Shader's letter does not purport to be an affidavit of one with personal knowledge of the facts alleged; significantly, neither the letter nor TODAMERICA's pleading contain any statement whatever from the actual site owners, Mr. and/or Mrs. Hardy. Furthermore, the letter, standing alone, fails to establish that Floyco lacked reasonable assurance of site availability at the time the application was filed. Mr. Shader's letter, which was sent to a party who apparently also expressed an interest in the Hardy site, might be read to suggest that Floyco lacked a binding agreement that the site would be available to Floyco for use as its proposed transmitter site. Even if Floyco lacked such an agreement, it could still possess reasonable assurance of site availability, since reasonable assurance need not be a binding agreement or absolute assurance, but may consist of, inter alia, an uncontradicted oral promise of a land owner to lease the proposed site to an applicant, or informal discussions with a land owner or authorized agent that culminate in a meeting of the minds as to the key terms upon which the land will be made available. See Alden Communications Corp., 102 FCC 2d 518, 519 (1985); Houston Family Television, Ltd., 101 FCC 2d 661 (Rev. Bd. 1985); William F. Wallace, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974); Eastside Broadcasting Co., 45 FCC 1202, 1203 (Rev. Bd. 1963).

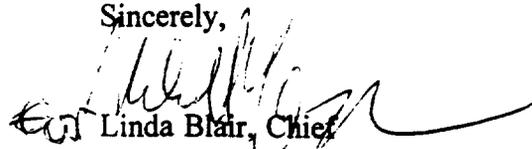
In the instant case, Mr. Shader concedes that "the property is listed for sale" and that "there were some initial discussions with a gentleman who was interested in implementing radio towers...." Although the letter states that no tower was ever erected on the Hardy site, it fails to establish that no test tower was erected and thereafter removed, nor does it establish that assurances were not given Floyco that the Hardy site would be available to it if required. In this regard, we note that an uncontradicted statement submitted in support of Floyco's pending extension request states that Mr. Hardy proceeded to negotiate a lease for the site with one of the permittee's principals in November 1987, without the participation or involvement of Mr. Hardy's attorney. See March 3, 1987 amendment, at p. 2. Accordingly,

⁵ On January 11, 1990, Floyco submitted an amendment to its application to request a minor site change. It appears that a condemnation action rendered the Hardy site unusable, since the action resulted in the loss of a portion of the property necessary for construction of Floyco's three-tower array. The loss of the Hardy site appears unrelated to any events described in Mr. Shader's letter.

we find that no substantial or material question of fact requiring further inquiry has been raised regarding Floyco's original specification of the Hardy site.⁶

Based on the above discussion, Floyco's application for extension of time (File No. BMP-870127AI) within which to construct station WORL(AM) IS HEREBY GRANTED and permit no. BP-850314AG IS EXTENDED for a period of six months from the date of this letter. Furthermore, TODAMERICA's June 28, 1988 petition to deny IS HEREBY DENIED, and Floyco's application for modification of its construction permit for WORL(AM), Christmas, Florida (File No. BMP-880218AE) IS HEREBY GRANTED. The authorization will follow under separate cover.

Sincerely,


Linda Blair, Chief
Audio Services Division
Mass Media Bureau

cc: James P. Riley, Esq.

⁶ TODAMERICA's original petition in this matter questioning the validity of certain measurements submitted by Floyco may also be thought to raise a misrepresentation issue with regard to Floyco. TODAMERICA expressed its disbelief that Floyco's engineer made one of the measurements submitted, given the time and distance between two of the locations. In response, Floyco's consulting engineer stated that he took all readings and, further, that he recorded the time either before or after taking the measurements. Thus, the time between measurements at each of the two locations cited by TODAMERICA may have been greater than actually recorded, but only by a matter of minutes. In light of this explanation, which we find to be credible, we conclude that TODAMERICA has failed to raise a substantial or material question of fact warranting further inquiry.