

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

In re Applications of

NELSON	File Nos. BPFTB-890619TA
BROADCASTING	and
CORPORATION	BLFTB-891004TA
(WIOI-FM)	
Brunswick,	
Georgia	

For Authority to Construct An
FM Booster In Jacksonville, FL
And for a License to Cover
Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1991; Released: March 29, 1991

By the Commission:

1. Under consideration before the Commission are an application for review, filed by Nelson Broadcasting Corporation ("Nelson") licensee of WIOI-FM, Brunswick, Georgia,¹ of the Mass Media Bureau's ("Bureau") March 6, 1990, action (Letter from Larry D. Eads, Chief, Audio Services Division, reference 8930-CFD) rescinding the staff's August 30, 1989 grant of a construction permit for FM booster station WIOI-FM1, and all related pleadings.² For the reasons set forth below, we grant the application for review.

2. The Bureau's March 6 letter held, *inter alia*, that a grant of the booster construction permit is precluded by Section 73.207 of our FM Rules because the booster station would be less than the intermediate frequency ("IF") separation requirement of 24 kilometers from WJCT-FM, Jacksonville, Florida, a station which operates on channel 210 and is 54 channels away from Nelson's channel 264. As support for its action, the Bureau relied upon a statement in the *Report and Order* in MM Docket No. 87-13, *Amendment of Part 74 of the Commission's Rules Concerning FM Booster Stations and Television Stations*, 2 FCC Rcd 4625 (1987) ("R & O"), indicating that the geographic separation between a booster station and a station 54 channels away will be that provided in Section 73.207. *Id.* at 4630. In its application for review, Nelson contends that this spacing requirement cannot be applied to its booster because, contrary to Section 552(a) of the Administrative Procedure Act, the requirement was never published in the Federal Register and Nelson never received actual notice of it.

3. Section 552(a)(1)(C) of the Administrative Procedure Act, 5 U.S.C. § 552 (a)(1)(C), requires that the Commission "separately state and publish in the Federal Register...substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applicability formulated and adopted by the agency." Section 552(a) also provides:

"Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to or be adversely affected by, a matter required to be published in the Federal Register and not so published." *See also Appalachian Power Co. v. Train*, 556 F.2d 451, 455 (4th Cir. 1977) (an agency "regulation imposing specific obligations upon outside interests in mandatory terms. . . is required to be published in the Federal Register in its entirety, or in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register.").

4. Although the Commission amended the part 74 booster station rules in other respects in the *R&O*, we did not include any rule provision requiring a specific mileage separation between stations operating 54 channels apart, nor did we add to the booster rules any cross-reference to Section 73.207. A summary of the *R&O* was printed in the Federal Register, but it did not contain specific reference to the IF spacing requirements of Section 73.207 of the Rules. The summary refers to contour-related protection to first, second and third adjacent channels, but does not discuss either contour protection or mileage separation to stations 54 channels away. 52 Fed. Reg. 31398 (August 20, 1987).³ There is no suggestion that Nelson had actual notice of this requirement. Because the Commission failed to comply with the publication requirements of Section 552(a) the Administrative Procedure Act, under the circumstances of this case, its IF spacing requirements for booster stations are presently ineffective to impose obligations upon, or to adversely affect, Nelson, and the Bureau's action must be reversed.⁴

5. Accordingly, IT IS ORDERED that the application for review filed by Nelson Broadcasting Corporation on March 13, 1990 IS GRANTED and the captioned applications (BPFTB-890619TA and BLFTB-891004TA) ARE GRANTED.

6. IT IS FURTHER ORDERED: (a) that the motion for stay filed by Nelson Broadcasting Corporation on March 13, 1990 IS DISMISSED as moot; (b) that the contingent request for waiver of Section 73.207 of the Rules filed by Nelson Broadcasting Corporation as part of its application for review IS DISMISSED as moot (c) that the motion to strike the March 27, 1990 supplement of Nelson Broadcasting Corporation to its application for review, filed by Metroplex Communications, Inc. on April 5, 1990, IS DENIED; and (d) that the request to expedite filed by Metroplex Communications, Inc. on March 28, 1990 IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ On April 2, 1990, the WIOI call sign was changed to WAZO. However, for purposes of convenience and consistency with the pleadings filed, we will continue to refer to this station and the subject booster station by the call signs WIOI-FM and WIOI-FM1, respectively.

that it did apply a 0.5 kilometer rounding increment, petitioner states that this is permitted by the Commission's Rules. Second, petitioner questions Bach and Mirkwood's assertions that the fully spaced area for the substitute channel at Brandon entirely disappears when one considers the Marlboro applicant. Petitioner recognizes that the Marlboro site is short-spaced to the Brandon reference point, but petitioner asserts that this does not mean that the Marlboro applicant must be protected to the detriment of the Commission's discretion in this rule making proceeding. This is because, according to petitioner, the site specified by the Marlboro applicant represents a mere preference for a site and is outweighed by the public interest benefits flowing from the upgrade of the Randolph station. Third, petitioner contends that there is ample fully spaced area to accommodate the Brandon applicants because the fully spaced area is at least 1.5 square miles (or 960 acres) whereas a 500-foot guyed broadcast tower requires no more than 12 acres of land.

8. Petitioner also addresses Bach's concerns about the Brandon allotment being relegated to a second-class status. Citing *Vero Beach, Florida*, 4 FCC Rcd 2184 (1989), petitioner contends that Channels 268A and 270A at Brandon are equivalent for allotment purposes because they are of the same class and have a fully spaced reference point close enough to the community to allow city-grade service. It further notes that the greater portion of the fully spaced area is not densely populated and the station's blanketing contour would not include many people. Moreover, with respect to zoning, petitioner argues that Bach has proffered mere hearsay to indicate that local zoning officials might not approve a tall tower. Petitioner contends that even in an application context, this is insufficient to rebut the presumption that local approval will be forthcoming and that in rule makings, the Commission has consistently rejected arguments going to zoning matters.

9. However, even if the Commission were to consider the effect of the upgrade of Station WCVR-FM at Randolph on the Brandon service area, petitioner contends that the public interest is best served by upgrading the Randolph station. In support of this argument, petitioner submitted an engineering study showing that grant of the upgrade at Randolph would increase Station WCVR's service population by 62,000 persons within its 1 mV/m contour. It then compared the population that could be served within the 1 mV/m contour by the facilities proposed in Bach's application for Channel 270A at Brandon (i.e., 69,000 persons) with "assumed" facilities for Channel 268A at Brandon -- 5.8 kW effective radiated power and a 30-meter HAAT -- which could serve 29,000 persons, resulting in a potential loss of 40,000 persons. However, petitioner asserts that, overall, its proposal will result in a net gain in 1 mV/m coverage of 22,000 persons, which makes grant of its proposal in the public interest. Finally, petitioner contends that it is not obligated to reimburse affected applicants as compared to displaced permittees or licensees, citing *Circleville, Ohio*, 8 FCC 2d 159 (1979) and *Casa Grande, Claypool and Kearney, Arizona*, 5 FCC Rcd 157 (1990).

DISCUSSION

10. After consideration of the comments and reply comments filed in this proceeding, we believe that the public interest would be served by substituting Channel 271C3 for Channel 272A at Randolph, Vermont, and modifying the license for Station WCVR-FM to specify the higher class channel because this will result in an expanded area FM service for Randolph. To accommodate this upgrade, we will substitute Channel 268A for Channel 270A at Brandon, Vermont, and permit the applicants for Channel 270A at Brandon to amend their applications and retain cut-off protection. As will be explained below, we believe that Bach and Mirkwood have not demonstrated sufficient reasons why Channel 268A should not be substituted for Channel 270A at Brandon.

11. To begin with, we believe that there is theoretical site availability to allot Channel 268A at Brandon.⁴ Although the site for Channel 268A proposed in the *Notice*⁵ has a modest site restriction of 2.5 kilometers (1.5 miles) east of Brandon, it is not short-spaced to the sites of authorized stations or to the reference coordinates for any vacant allotments.⁶ Furthermore, a staff analysis of terrain profile reveals that this site would provide city-grade coverage to Brandon in compliance with Section 73.315 of the Commission's Rules. We do recognize, however, that when the required spacing of 41.5 kilometers between Channel 268A at Brandon and Channel 271C3 at Randolph is taken into account, the area available to locate a transmitter for Channel 268A at Brandon is reduced to a rectangular area of approximately 1.5 square miles (960 acres). While this appears to be a relatively small area, we believe that it is sufficient for purposes of locating a transmitter because, as stated by petitioner, a 500-foot guyed broadcast tower requires no more than 12 acres of land. Therefore, we believe that the record in this proceeding establishes that there is a theoretical site which is appropriate for allotment purposes.

12. We note, however, that Bach has challenged the suitability of this theoretical site. While such matters are generally considered at the application, as opposed to the allotment, stage,⁷ we have examined the nature of the land available in the fully spaced area because it has been alleged that the area in question is small and contains a swamp. In this regard, we agree with Bach that the reference coordinates proposed by the petitioner and used in the *Notice* are in a swamp. Although petitioner's engineering exhibit states that "there is no technical reason that the swamp area could not be employed for the transmitter site," we do not have a factual record to support this proposition. On the contrary, we have, consistent with our approach in similar situations,⁸ confirmed that another site 0.6 kilometers (0.4 miles) south of Brandon is available on dry land that meets the spacing requirements.⁹ We have also performed a terrain profile study and confirmed that this site would provide city-grade coverage to Brandon.¹⁰ While Bach contends that it may not be able to obtain zoning approval for an FM tower within the fully spaced area, we believe that this argument is speculative. There is no documentation from zoning officials to support this assertion. Moreover, "[a]bsent a sufficiently compelling showing demonstrating that no sites complying with the Commission's minimum distance separation and other technical requirements exist, the Commission's concerns at the rule making stage do not generally require detailed showings concerning the