

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

In re Applications of

WEST WIND File No. BPH-930331IF
BROADCASTING, INC.

For Construction Permit to Modify
Facilities of Station WXCVM(FM),
Homosassa Springs, FL

WEST WIND File No. BLH-950801KB
BROADCASTING, INC.

For License to Cover Construction Permit
for Modification of Facilities of
Station WXCVM(FM), Homosassa Springs, FL

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1996;

Released: April 5, 1996

By the Commission:

1. The Commission has under consideration: (1) the Letter of the Chief, FM Branch, Audio Services Division, to West Wind Broadcasting, Inc. ("West"), dated March 24, 1995 (hereafter the "*Letter Decision*"), granting West's application for modification of the facilities of Station WXCVM(FM), Homosassa Springs, Florida; (2) an Application for Review filed May 3, 1995, by Alton Rainbow Corporation ("Alton"), licensee of Station WTLN(FM), Apopka, Florida; (3) an Opposition filed June 9, 1995, by West; (4) a Reply to Opposition filed August 2, 1995, by Alton; (5) an application filed August 1, 1995, by West on Form 302 for a license to cover the construction permit granted to West in the *Letter Decision*, File No. BLH-950801KB; (6) an Informal Objection and Petition for Extraordinary Relief filed September 20, 1995, by Alton with respect to the license application; and (7) an Opposition to Informal Objection filed October 2, 1995, by West.¹

2. *Background.* West is the licensee of Class A FM Station WXCVM, Homosassa Springs, Florida. Alton is the licensee of Class A FM Station WTLN(FM), Apopka, Florida. Both WXCVM and WTLN operate on FM Channel 237. In 1985, the stations became short-spaced, at their pre-existing transmitter sites, due to the Commission's slight change in minimum spacing requirements in connection with the conversion to the metric system as part of the *Report and Order* in BC Docket No. 80-90, 48 Fed. Reg. 29496 (1985). The stations became further short-spaced, to 10.8 kilometers, due to the revision of the minimum spacing requirements of Section 73.207 in the *Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989). Under the revised rules, the stations were

grandfathered at their existing short-spaced sites. The *Second Report and Order* in MM Docket No. 88-375 also increased the maximum effective radiated power (ERP) limitation for Class A FM stations from 3 kW to 6 kW. Section 73.213(c) permits grandfathered short-spaced Class A stations seeking to increase to 6 kW ERP to enter into agreements for mutual increase in facilities.

3. In another rule making proceeding, the Commission adopted Section 73.215 to allow an applicant for commercial FM facilities to request the authorization of a transmitter site that would be short-spaced to the facilities of other co-channel or adjacent channel stations, provided the services of those other stations, as well as its own service, are protected from new or increased interference through the contour protection procedures specified in that rule. *See Report and Order* in MM Docket No. 87-121, 4 FCC Rcd 1681 (1989), The *Report and Order* adopting Section 73.215 stated that an applicant proposing operation from a short-spaced site not covered under Section 73.213 must comply with the contour protection requirements of Section 73.215 with respect to that other station. 4 FCC Rcd at 1686.

4. Alton filed an application to increase its power to 6 kW on March 16, 1990. Because Alton did not have the agreement of co-channel short-spaced station WXCVM to allow for a mutual upgrade pursuant to Section 73.213(c)(2) of the Rules, Alton proposed directional facilities for WTLN to be authorized pursuant to Section 73.215 of the Rules, providing contour protection with respect to WXCVM. The WTLN 6 kW application was granted October 18, 1990; Alton constructed the improved facilities and received a license to cover the permit. Subsequently, on March 31, 1993, West filed the present application to increase WXCVM's ERP from 3 kW to 6 kW and to continue to utilize an omnidirectional antenna at its licensed transmitter site. On July 22, 1993, Alton filed an Informal Objection to WXCVM's modification application, contending that the proposal was defective because it failed to request processing under either the provisions of Section 73.213(c) or Section 73.215, and that the proposal worsens the current short-spacing between the two stations.

5. The Audio Services Division's *Letter Decision* denied Alton's Informal Objection. First, the *Letter Decision* noted that Alton had filed its own 1990 application to increase WTLN's ERP to 6 kW without the agreement of co-channel WXCVM for a mutual upgrade pursuant to Section 73.213(c) of the Rules. Lacking such an agreement for a mutual upgrade, Alton elected to file its application for directional facilities oriented away from WXCVM, pursuant to the contour protection requirements of Section 73.215 of the Rules. In order to obtain its Section 73.215 grant, Alton was required to demonstrate that the proposed upgraded WTLN would not result in any increase in contour overlap, both from WTLN to WXCVM and from WXCVM to WTLN, as if WXCVM were a maximum power (6 kW) Class A station, even though WXCVM was only 3 kW at the time. Under Section 73.215, existing stations were to be afforded protection from the encroaching short-spaced station based on the presumed use of an omnidirectional antenna at the maximum ERP by the encroached-upon station. The *Letter Decision* ruled that once WTLN was reclassified as a Section 73.215 station, West could now propose operation

¹ Also before the Commission are a Consent Motion for Extension of Time filed June 9, 1995, by West; a Consent Motion for Extension of Time filed June 27, 1995, by Alton; and a Motion

for Leave to File Untimely Pleading filed August 2, 1995, by Alton. For good cause shown, the extension requests and the motion for acceptance of a late filed pleading are granted.

from WXCV's licensed transmitter site with maximum 6 kW/100 meter facilities without consideration of the short-spacing with respect to WTLN because Alton had already been required to protect WXCV's contour and receive protection from WXCV's contour under Section 73.215 assuming WXCV was operating at maximum ERP. Alton in its own prior upgrade application expressly recognized that overlap would occur to its 60 dBu contour from WXCV's 40 dBu contour when WXCV is considered as a maximum Class A facility. According to the *Letter Decision*, Alton proposed "a directional antenna that would maintain existing overlap, assuming West to be operating with maximum Class A facilities at its licensed site." The *Letter Decision* found that Alton had therefore recognized the potential interference WTLN would face should WXCV later implement maximum Class A facilities. Finally, the *Letter Decision* rejected Alton's contention that West's proposal would worsen existing short-spacing, because West was not proposing a site change.

6. In its Application for Review, Alton contends that the *Letter Decision* is fundamentally flawed because it is based on a false factual premise, specifically, that when Alton's upgrade application was granted in 1990, Alton retained but did not increase the existing contour overlap from WXCV to WTLN. According to Alton, when it proposed the use of a directional antenna in 1990, it did not then create any actual overlap. Alton recognizes that its engineering statement accompanying the 1990 upgrade application did refer "to the possibility that there would be an overlap if West Wind sought to operate at maximum class A facilities," but Alton states that its own "engineering statement erroneously characterized the overlap identified if WXCV operated at its maximum facilities as not increasing the existing overlap between the stations." However, Alton now contends that there is actually no overlap between the contours of improved WTLN and existing 3 kW WXCV, and that it is the present WXCV upgrade to 6 kW that will improperly create a four kilometer overlap for the first time. Alton contends that although its consulting engineer "erroneously described the 1990 WTLN upgrade as maintaining existing overlap," Alton never consented to any new interference to its authorized signal by WXCV.

7. *Discussion.* We deny Alton's Application for Review. We find that Alton has misconstrued the observation set forth in the *Letter Decision* that the 1990 WTLN upgrade application "maintain[ed] existing overlap" between WTLN and WXCV. The "existing overlap" that was referred to was the overlap to the 60 dBu service contour of the old 3 kW WTLN facilities from the 40 dBu contour of the hypothetical maximum power 6 kW WXCV facilities. This existing overlap was compared with the overlap to the new WTLN 60 dBu contour from the 40 dBu contour of the same hypothetical maximum WXCV facilities, as required by the express language of the rule. Specifically, Section 73.215(b)(2)(ii) of the Rules requires that stations seeking a

grant of a directional proposal, such as WTLN in 1990, must employ contour protection with respect to short-spaced stations, "based on the presumed use of the maximum ERP for the applicable station class (as specified in §73.211) . . ." (Emphasis added.) Most critical to the present case, the express reason why the Commission required protection by the Section 73.215 station of the maximum facilities of the short-spaced station was to preserve the ability of that encroached-upon station to improve to such maximum facilities in the future:

For various reasons, not all FM stations use the maximum possible power or antenna height for their particular class of station. However, if interference protection is based on the maximum possible facilities, *sub-maximum stations may be free to upgrade at some time in the future.*

Notice of Proposed Rule Making in MM Docket No. 87-121, 3 FCC Rcd 1820, 1826 n.20 (1988) (emphasis added). Thus it is clear that the Commission fully contemplated that the station which is encroached by the Section 73.215 station would later be allowed to improve to maximum facilities, and that is the reason underlying the requirement that the Section 73.215 station provide protection for the hypothetical maximum facilities of the short-spaced station, not the actual facilities of that station.²

8. Consistent with the requirements of Section 73.215, Alton's 1990 upgrade application formally requested Section 73.215 treatment. Alton's application thus provided the required exhibit (Figure 3-a to its engineering statement) showing that there was already theoretical contour overlap to then-existing WTLN 60 dBu contour from the 40 dBu contour of the hypothetical maximum 6 kW WXCV facilities (not the 3 kW actual WXCV facilities). Alton's exhibit demonstrated that there would be no increase in contour overlap received by the upgraded WTLN from the same hypothetical maximum 6 kW WXCV facilities, due to the directionalization of WTLN's signal away from WXCV. Alton's engineering statement, and the *Letter Decision* as well, correctly referred to this showing of overlap as being related solely to maximum Class A WXCV facilities; thus both documents correctly stated that the 1990 WTLN upgrade, through contour protection, "maintain[ed] existing overlap." Because Section 73.215(b)(2)(ii) clearly states that contour protection is to be based on the "presumed use of maximum ERP," the degree of overlap with WXCV's actual, 3 kW contour was not relevant under the provisions of Section 73.215 by which WTLN obtained its upgrade. Thus the "existing overlap" was accurately described as being "maintained" in the *Letter Decision*, as well as properly acknowledged in Alton's own 1990 engineering statement. Alton's contention that the *Letter Decision* proceeded under a false factual premise is rejected. Moreover, as noted above, the Commission provided pro-

² Similarly, in processing Section 73.215 applications where the nominal short-spacing is with respect to an unapplied-for allocation, the applicant must provide protection to the allocation's reference point assuming full power and height facilities for the allocation, so that the Section 73.215 station does not by its application foreclose the community from receiving the full level of service contemplated in the rule making proceeding. See 47 C.F.R. §73.215(b)(2)(i). Further, an applicant for the allocation filing after the Section 73.215 station has constructed

may be authorized for full power as long as it proposes a site no nearer the Section 73.215 station than the protected reference point. There is no basis for placing an existing station, such as WXCV, that has been encroached upon by a Section 73.215 station, on a less protected footing than an applicant for an open allocation nominally short-spaced to a Section 73.215 station.

tection to short-spaced stations in WXCV's shoes specifically to prevent such a station from being foreclosed from a later upgrade to maximum facilities because of a Section 73.215 grant obtained by another station.

9. Additionally, a directional station authorized pursuant to Section 73.215 is not entitled to protection of an "interference-free contour" as alleged by Alton. First, it must be recognized that, as explicitly stated in Section 73.209 of the Rules, licensees of broadcast stations generally "are not protected from any interference which may be caused by the grant of a new station, or of authority to modify the facilities of an existing one, in accordance with the provisions of this subpart [the FM engineering rules]." Rather, any such interference protection must be specifically provided for in the rules. And for a station which has elected to seek a Section 73.215 grant, such interference protection is particularly limited. On reconsideration of the directionalization rules, the Commission noted that Section 73.215(b)(2)(iv) "indicates that FM stations using directional antennas authorized pursuant to the new rules will be protected only to the contour defined by their current facilities." *Memorandum Opinion and Order* in MM Docket No. 87-121, 6 FCC Red 5356, 5360 (1991). Indeed, the Commission in adopting Section 73.215 warned applicants seeking to invoke such processing "to weigh the advantages and disadvantages associated with short-spacing under these new rules and to base their applications upon what they believe to be in their best interest." *Report and Order* in MM Docket No. 87-121, 4 FCC Red at 1684. In this case, the directional application filed by WTLN in 1990 showed that the facilities proposed for WTLN, and which then became its "current facilities" under Section 73.215, would be defined with a null in the direction of WXCV that would maintain predicted overlap to the upgraded WTLN from a *maximum power* 6 kW WXCV. As noted above, the WTLN "current facilities" were specifically designed pursuant to Section 73.215(b)(2)(ii) to protect, and maintain protection from, a 6 kW WXCV, for the stated purpose of preserving WXCV's ability to improve to 6 kW in the future. WXCV's present power increase therefore does not infringe the current facilities of WTLN as reflected in WTLN's own upgrade application. By filing its directional proposal under Section 73.215, WTLN necessarily accepted the disadvantage of facing an eventual power increase by WXCV to the maximum level that WTLN was required to protect under its own Section 73.215 proposal.

10. Additionally, contrary to Alton's contention, West was not required under Section 73.213(c)(2)³ to obtain the consent of Alton, for its present proposal to increase the power of WXCV from 3 to 6 kW at its existing site. By filing its 1990 upgrade application pursuant to Section 73.215, WTLN was no longer protected by the mutual agreement upgrade requirements for grandfathered short-spaced Class A stations. Section 73.213(c) of the Rules specifically states that the rule providing for upgrades only upon mutual agreement "does not apply to stations that became short spaced by grant of applications filed after October 1, 1989, or filed pursuant to § 73.215." By electing to be reclassified from a grandfathered short-spaced station under section 73.213(c) to a directional station under Sec-

tion 73.215, WTLN thus gave up what rights it may have had to withhold consent to a subsequent 6 kW upgrade by WXCV. In light of WTLN's change to Section 73.215 status, the mutual consent provisions of Section 73.213(c) are irrelevant to WXCV's application to upgrade to 6 kW at its existing site.

11. *Alton's Informal Objection and Petition for Extraordinary Relief.* After grant of the WXCV modification application, WXCV implemented the approved power increase and then filed a Form 302 license application to cover the granted permit. Alton then filed a further Informal Objection and Petition for Extraordinary Relief, contending that after the WXCV power increase was implemented, WTLN experienced increased interference in its service area, and WTLN listeners had complained to the station regarding the inability to receive the station. WTLN did not allege, however, that the power increase implemented by WXCV was inconsistent with the terms of WXCV's permit, nor that the interference allegedly experienced by WTLN differed from that predicted in connection with the Commission's consideration of either WTLN's earlier permit application or the present WXCV power increase proposal. Because we have here affirmed the grant of the construction permit to West, we see no basis for granting Alton's Informal Objection and Petition for Extraordinary Relief, which rests solely on the premise that the underlying grant of the permit was improper. We will therefore deny the Informal Objection and Petition for Extraordinary Relief. Since the staff of the Commission's Audio Services Division has determined that the WXCV license application is otherwise grantable, we will also by this order grant that application.

12. Accordingly, IT IS ORDERED that the Application for Review filed May 3, 1995, by Alton Rainbow Corporation IS DENIED; that the grant of the application for filed by West Wind Broadcasting, Inc., for modification of the facilities of Station WXCV(FM), Homosassa Springs, Florida, IS AFFIRMED. In addition, the Informal Objection and Petition for Extraordinary Relief filed September 20, 1995, by Alton Rainbow Corporation IS

DENIED, and the application filed by West Wind Broadcasting, Inc., for a license to cover the construction permits IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

³ Section 73.213(c)(2) provides, *inter alia*, that grandfathered short-spaced stations proposing to exceed 3 kW ERP must include with their applications, "an exhibit demonstrating the consent of each co-channel, first, second or third adjacent chan-

nel station (for which the requirements of Section 73.207 are not met) to a grant of that application." West did not include such an exhibit, and Alton obviously contends it would not consent.