

SUMMARY

The Bureau's Order of which review is hereby sought dismissed the application of Press Communications, LLC ("Press") for minor modification of the facilities of WBHX(FM). The basis offered by the Bureau for the dismissal: Press had supposedly failed to protect the "licensed facilities" of Station WAJM(FM).

But, under Section 73.3573(f) of the rules, such protection would have been necessary only if WAJM(FM) had any such "licensed facilities" at the time that Press's application was filed. As the Order itself makes abundantly clear, WAJM(FM) did *not* have *any* "licensed facilities" at that time. To the contrary, its license had expired in June, 2006 – more than four years before the filing of Press's application.

Section 307(c)(1) of the Communications Act expressly and unequivocally limits broadcast licenses to terms not to exceed eight years. (The only exception: if the licensee has pending an application for renewal of its license. In the instant case, no such renewal application was filed until approximately a month *after* Press's application was filed.) By claiming that WAJM(FM) retained facilities that were somehow still "licensed", the Bureau effectively extends WAJM(FM)'s license from 1998 (when it had last been renewed) to August, 2010, *i.e.*, more than 12 years. That is prohibited by the Act.

Curiously, the Bureau repeatedly acknowledges that WAJM(FM) had no license, *i.e.*, no authority to operate, between June 1, 2006 and September 29, 2010 (when it was granted special temporary authority ("STA") to operate). Indeed, in a Consent Decree accompanying the Order, the Bureau imposes a monetary penalty on WAJM(FM) for unauthorized operation. But if WAJM(FM) was not authorized to operate, it could not have "licensed facilities".

While the Bureau claims in its Order that the circumstances presented here have previously been addressed “many times” by the Commission and the Bureau, that is not true. The Bureau cites a total of two cases – one from the Commission, one from the Bureau – neither of which involves the facts and circumstances presented here. And review of the decisions on which the Bureau relies demonstrates that they do *not* support the Bureau’s conclusions.

Importantly, the precedent relied on by the Bureau clearly establishes that a late-filed renewal application does not extend the station’s license period retroactively: during the period between the license expiration and the eventual grant of authority (whether by grant of the late-filed renewal or STA), the station is *not* deemed to have had any authority to operate. Moreover, the precedent establishes that, where a late-filed renewal application is eventually filed, acceptance and consideration of that application necessitates waivers of otherwise applicable deadlines. But before it can waive filing deadlines, the Commission is required, under extensive administrative and judicial case law, to determine that timely filing was precluded by “unusual or compelling circumstances” involving “a calamity of a widespread nature”. No such circumstances were presented here. To the contrary, the sole reason offered by WAJM(FM) for its more-than-four-year lateness in filing its renewal application as “oversight”. That falls far short of the showing required by applicable D.C. Circuit precedent in such situations.

The Order also suggests, without explicitly holding, that Press should have requested a waiver relative to a short-spacing (between Stations WZBZ(FM) and WJBR-FM) that would supposedly be caused by Press’s proposal. But Press’s proposal would *not* create any such short-spacing. To the contrary, WZBZ and WJBR-FM are already authorized to operate at precisely the same spacing as proposed by Press. The Bureau’s suggestion that new approval need be requested for spacing has already been approved and is currently approved is arbitrary and capricious.

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Pursuant to Section 1.115 of the Commission's Rules, Press Communications, LLC ("Press") hereby seeks review, by the full Commission, of the Order, DA 15-880, released October 9, 2015, by the Chief, Media Bureau ("Bureau"). A copy of the Order is included as Attachment A hereto.

In the Order, the Bureau dismissed Press's above-captioned application for modification of Station WBHX because, according to the Bureau, that application failed to protect the "licensed facilities" of Station WAJM(FM). But the record plainly establishes – and the Order itself repeatedly confirms – that, at the time Press filed its application, WAJM(FM) had *no* licensed facilities at all. In fact, WAJM(FM)'s license had expired more than four years before Press's application was filed, and WAJM(FM) had taken no steps, either before or after the expiration, to renew its license.¹ In the absence of any WAJM(FM) license, WAJM(FM) cannot be said to have any "licensed facilities", and therefore no basis existed for the dismissal of Press's application. Accordingly, that dismissal should be reversed and Press's application should be reinstated and granted.²

¹ It is of no consequence that WAJM(FM) eventually did file a license renewal application. As discussed below, that application was filed long after Press's application and was, therefore, barred by the pendency of Press's application.

² The Order also suggests, without expressly holding, that Press should have requested a waiver of Section 73.207 to justify short-spacing between first adjacent Stations WJBR-FM and WZBZ(FM). Order at ¶7. The significance of that suggestion is not clear, but it is in any event immaterial here because, as discussed below, in its application Press did not propose any change in the already-authorized spacing between those two stations.

QUESTIONS PRESENTED

The Communications Act expressly and unequivocally caps the term of a broadcast license at eight years. The sole statutory exception to that cap provides that, pending final agency action on a license renewal application, a station's license will be "continue[d] ... in effect". 47 U.S.C. §307(c). WAJM(FM)'s license term that began in 1998 expired as of June 1, 2006. No license renewal application was filed prior to the August, 2010 filing of Press's application and, therefore, as of August, 2010 WAJM(FM) had no "licensed facilities". As a result, was not the Bureau's conclusion that Press had failed to protect WAJM(FM)'s "licensed facilities" precluded by the Act?

WAJM(FM)'s 2010 renewal application was barred by the pendency of Press's application under well-established Commission cut-off rules. 47 C.F.R. §73.3573(c). For WAJM(FM)'s 2010 to be considered at all, multiple rules – including those cut-off rules and the rule specifying the deadline for filing renewal applications – would have to have been waived. No waiver was requested and none was warranted; indeed, the only explanation offered by WAJM(FM) for the more-than-four-year tardiness in its renewal application was "oversight". In view of these factors, was not consideration of WAJM(FM)'s 2010 renewal application barred by the policies and precedents set out in, *e.g.*, *NetworkIP v. FCC*, 548 F.3d 116 (D.C. Cir. 2008)?

To the extent that the matter of the WZBZ/WJBR-FM spacing may be deemed, *arguendo*, material hereto – and the Order does not indicate that it is in fact material – was not the Bureau's suggestion that a waiver request was necessary mistaken in view of the fact that Press did not propose any material change in the already-authorized spacing between those two stations?

FACTORS WARRANTING COMMISSION CONSIDERATION

Commission consideration is warranted because the Bureau's Order conflicts with the Communications Act, the Commission's rules and well-established precedent of both the Commission and the U.S. Court of Appeals for the District of Columbia Circuit.

RESPECTS IN WHICH THE BUREAU'S ACTION SHOULD BE CHANGED

The Bureau's action should be reversed: the renewal of WAJM(FM)'s (supposed) license should be rescinded, the WAJM(FM) license renewal applications should be dismissed, and Press's application should be reinstated and granted.

BACKGROUND

This case involves two applications: Press's application (which proposes minor modifications to its own facilities and those of Station WHBX(FM)); and WAJM(FM)'s, which proposes, in effect, reinstatement and renewal of the expired WAJM(FM) license.

Press's application was filed on August 27, 2010. The Bureau claims that Press's application was barred because it failed to protect the "licensed facilities" of WAJM(FM). But that could not have been the case because as of August 27, 2010, WAJM(FM) had no licensed facilities.

WAJM(FM)'s license had, by its express terms, expired on June 1, 2006, more than four years earlier. An application for renewal of that license had been due no later than February 1, 2006, but no such application had been filed. As a result, as of August 27, 2010, WAJM(FM) had no authority of any kind to operate, a fact which the Order itself repeatedly and expressly confirms.³

WAJM(FM) did eventually file for renewal of its license, approximately one month *after* the filing of Press's application.⁴ By that time, however, Press's application had been filed and had secured "cut-off" protection under Section 73.3573(f). To the extent that, as the Order indicates, the WAJM(FM) renewal application was mutually exclusive with Press's application,

³ See Order at, e.g., ¶3 (WAJM(FM) "engag[ed] in unauthorized operation of the Station after its authorization had expired"); Consent Decree at n.29 (WAJM(FM)'s "license expired on June 1, 2006") and ¶3 (WAJM(FM) "continued to operate ... after the Station's license had expired in violation of Section 301 of the Act").

⁴ Confirming the fact that the station was, at that time, without authority to operate, simultaneously with its late-filed renewal application WAJM(FM) requested special temporary authority ("STA") to operate. See File No. BLSTA-20100921AAP. Further confirming that such STA was necessary to permit continued operation of the station – and, therefore, that the station otherwise had no authority to operate at that time – the Bureau granted WAJM(FM)'s request.

the pendency of Press’s application barred acceptance and consideration of the WAJM(FM) application, not vice versa.

ARGUMENT

I. Introduction

The Commission’s longstanding “cut-off” rules provide that an FM station proposing minor modifications of its facilities is entitled to protection against later-file mutually exclusive applications. Section 73.3573(f). Press’s application proposed such modifications and was, therefore, entitled to such “cut-off” protection as of the day it was filed. The Bureau’s Order effectively vitiates that protection by according WAJM(FM)’s later-filed application preclusive priority over Press’s application. This the Bureau may not do.

Presumably recognizing the impermissibility of granting such priority to a later-filed mutually exclusive application, the Bureau attempts to justify its action with the following confounding verbiage:

the Commission has ... found that, in the case of late-filed license renewal applications, waivers of these rules⁵] are warranted in the instant circumstances for the limited purpose of accepting and acting on the station’s license renewal application. Because longstanding and clear Commission precedent dictates that we are to process [WAJM(FM)’s] 2010 and 2014 Renewal Applications, the technical proposal in the Press Application was required to protect the Station’s licensed facilities under Section 73.207 of the Rules.

Order at ¶6 (footnotes omitted). This series of not-entirely-accurate *non sequiturs* reflects the totality of the Bureau’s rationale for dismissing Press’s application. While that rationale is far from clear, it appears to reduce to the mind-bending notion that, because WAJM(FM) eventually

⁵ The term “these rules” is not defined or otherwise explained in the Order, but it presumably refers to, *inter alia*, the deadline for filing renewal applications and the cut-off provision of Section 73.3573(f).

filed a renewal application, until that application finally walked in the door, WAJM(FM) retained “licensed facilities” that precluded Press’s application and thus opened the door for consideration of WAJM(FM)’s later-filed renewal application.

This “reasoning”, such as it is, is fatally flawed on multiple levels.

II. The notion that WAJM(FM) had “licensed facilities” as of August 27, 2010 is strictly prohibited by the Communications Act.

In exceptionally clear, *mandatory*, language, Congress has expressly directed that [e]ach license granted for the operation of a broadcasting station *shall be* for a term of *not to exceed 8 years*.

47 U.S.C. §307(c)(1) (emphasis added). The Act specifies only one circumstance in which a license might extend for more than eight years: Section 307(c)(3) provides that, where a licensee has filed an application for renewal of its license, the license remains in effect until the Commission has acted on the application.

In the instant case, it is undisputed that: (a) the license of Station WAJM(FM) expired in June, 2006 after an eight-year term (having last been renewed in 1998); and (b) no application to renew that license was filed until September, 2010, more than four years later. As a result, Section 307(c)(1) flatly bars any claim that WAJM(FM)’s license remained viable in any sense between June 1, 2006 and August 27, 2010, because that would entail a license term exceeding eight years.

The Order does not expressly address this statutory impediment. Instead, it cites a total of two cases in which, according to the Bureau, “the Commission and the Bureau have considered and addressed this issue many times”. Order at ¶6. As discussed below, that assertion is far from accurate. But even if the Commission had somehow “considered and addressed” these

circumstances, that would in any event be immaterial to the extent that the result was a license term exceeding eight years.

When Congress has given an agency express direction, the agency may not veer from that direction: an “agency must give effect to the unambiguously expressed intent of Congress”. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In other words, regardless of whether or not the Commission may have “considered” or “addressed” such questions in the past, the statutory mandate remains clear and unequivocal, and the Commission is bound to comply with that mandate.

Section 307(c)(1) reflects Congress’s unambiguous intent – stated in mandatory terms – that broadcast licenses “shall” not exceed eight years. As a result, the Commission cannot take any action that would effectively extend the WAJM(FM) license beyond eight years absent a pending renewal application. Once WAJM(FM)’s eight-year term expired as of June 1, 2006, it did not – and could not, consistently with the statute – exist. And without a license, there can be no “licensed facilities”.

The Order attempts no explanation as to how, in view of Section 307(c)(1), WAJM(FM) might permissibly be deemed to have had any “licensed facilities” as of August 27, 2010.

III. The Order itself confirms that WAJM(FM) had no license as of August 27, 2010.

Oddly, while the Bureau insists that WAJM(FM) had “licensed facilities” which Press was obligated to protect in its application, the Bureau glaringly contradicts itself on that point.

Both the Order and the accompanying Consent Decree make abundantly clear that WAJM(FM)’s operation between June 1, 2006 and September 29, 2010 was “unauthorized”. See Footnote 3,

supra.

The difficulty of the Bureau's position is obvious. Having determined that WAJM(FM)'s operation was "unauthorized" – and having fined WAJM(FM) for engaging in "unauthorized operation" – the Bureau cannot legitimately claim that WAJM(FM) had any "licensed facilities". After all, the notion of "licensed facilities" connotes that the station was not merely authorized, but formally licensed.

Needless to say, the Bureau does not even acknowledge, much less attempt any explanation of, its self-contradiction.

The Bureau's position here is further aggravated by the fact that, by letter dated September 29, 2010, the Bureau granted WAJM(FM) an STA to operate "with the facilities *for which the license expired on June 1, 2006.*" Letter to Ms. Angela Brown from Peter H. Doyle, dated September 29, 2010 (emphasis added). Again, the Bureau has demonstrated its own recognition of the undeniable fact that WAJM(FM)'s license had expired in June, 2006, and that, between then and September 29, 2010, the station had no authorization at all.

Again to state the obvious, without a license, there can be no "licensed facilities".

IV. The two cases on which the Bureau Order relies do not support the Bureau's position.

In the Order the Bureau alludes repeatedly to the supposed notion that the Commission and the Bureau have – "many times" in "longstanding and clear" precedent – addressed the issue supposedly⁶ posed by Press. Order, ¶6. In support of that claim the Bureau cites a total of two

⁶ According to the Order, Press's position is that WAJM(FM)'s "license cannot be renewed because it expired before the 2010 Renewal Application was filed." Order, ¶6. That plainly misstates Press's position. Press has not argued and is not arguing that a license which has been allowed to expire may never be resurrected (although any attempt at such resurrection is necessarily subject to, *inter alia*, the statutory and judicial limitations described herein). Rather, Press is arguing that such resurrection may not occur under the circumstances presented here,

cases: *Discussion Radio Incorporated*, 19 FCC Rcd 7433 (2004) and *Superior Communications*, 22 FCC Rcd 16634 (Media Bureau 2007). Neither of those decisions supports the Bureau’s action here. Indeed, in significant respects they contradict it.

In *Discussion Radio*, a licensee had failed to file a timely license renewal application and its license had expired. The licensee eventually filed a renewal application, which the Bureau accepted and granted. On review, the full Commission acknowledged that the Bureau’s actions necessarily entailed waiver of Section 73.3539 (*i.e.*, the deadline for renewal applications), and it affirmed that waiver “for the limited purpose of accepting and acting on” the late-filed license application. *Discussion Radio*, ¶14. The case includes no discussion whatsoever of the eight-year statutory limit on licenses. Rather, the Commission clarified that, while it would renew the licensee going forward, that action was *not* retroactive: that is, the Commission pointedly emphasized that the licensee should and would be penalized for unauthorized operation. In other words, the licensee could not be deemed to have held a license continually for longer than eight years, notwithstanding the waiver. Thus, the Commission tacitly acknowledged the statutory bar against more-than-eight-year licenses.

Importantly, *Discussion Radio* does *not* address how a late-filed renewal application should be processed vis-à-vis an earlier-filed application for facilities mutually exclusive with the expired license. So *Discussion Radio* doesn’t even come close to addressing the issues here. *Superior* is similarly unsupportive of the Order. In *Superior*, the Bureau acknowledged the eight-year limit on licenses, but then offered the *non sequitur* observation that the statute “does not forbid the Commission from accepting a renewal application filed after the station’s

i.e., where such resurrection would override the “cut-off” protection to which an intervening modification application is entitled.

license has expired.” While that observation may be true, it does not address the status of the station’s license between expiration and the acceptance of a post-expiration renewal application.

Closer review of *Superior* reveals that it actually supports Press here.

In *Superior*, a licensee (“Bloomfield”) had failed to file a timely renewal application. On the date of Bloomfield’s license expiration, another licensee (“Superior”) proposed a modification of its own license that was mutually exclusive with Bloomfield’s previously licensed facilities. Less than three weeks later, Bloomfield filed a renewal application. Superior argued that, because the Superior modification proposal had been filed after Bloomfield’s license had expired, Superior’s application was entitled to processing priority over Bloomfield’s later-filed renewal application.

The Bureau disagreed because Bloomfield had “filed its application for renewal within 30 days of the expiration of its license, and thus the expiration of its license was not ‘final’.” “*Because the expiration of the [Bloomfield] license was not final*”, the Bureau explained, Bloomfield’s renewal application was entitled to priority over Superior’s mutually exclusive application. *Superior*, p.3 (emphasis added).

The plain meaning of the Bureau’s *Superior* holding is that, had Bloomfield’s renewal application been filed more than 30 days after license expiration, then the expiration would have been “final” and Superior’s application would have been entitled to priority. In the instant case, of course, the WAJM(FM) renewal application was filed well beyond 30 days after the expiration of its license – in fact, it was filed *more than four years* after expiration. So under the apparent holding in *Superior*, the expiration of the WAJM(FM) license had become “final” long

before Press filed its application and, accordingly, Press’s application was entitled to cut-off protection.⁷

And, as in *Discussion Radio*, the Bureau in *Superior* held that the licensee would in any event be sanctioned for “unauthorized operation”, confirming again that, even if a late-filed renewal application were to be accepted, the station would still have been without a license between its expiration date and the eventual filing and/or grant of the application.

In sum, nothing in either *Superior* or *Discussion Radio* affords the Commission any justification for ignoring, or any discretion to ignore, the eight-year limit on broadcast licenses imposed by Congress. WAJM(FM) simply did not exist when Press’s above-captioned application was filed, and the later-filed WAJM(FM) renewal application cannot be deemed an impediment to grant of Press’s application.

V. **Waiver of applicable filing deadline would be inconsistent with well-established Commission and judicial precedent.**

An essential, albeit unarticulated, element of the Bureau’s action is that WAJM(FM) was entitled to a waiver of, *inter alia*, the deadline imposed by Section 73.3539 for filing its renewal

⁷ It should be noted that the notion of a license expiration becoming “final” only after the passage of 30 days following the actual expiration date appears to be a contrivance developed by the Bureau solely for the purpose of resolving the *Superior* matter. The Bureau’s decision there cites no authority – in the Act, the rules or the caselaw – in support of that notion, and it does not appear that the Bureau (or the Commission, or anyone else, for that matter) has seen fit to rely on *Superior* in any other reported decisions, according to a search on Lexis. Logically, of course, a license expires when its expiration date passes and no renewal application is pending; no 30-day waiting period – or *any* extension of a license term beyond the statutorily-mandated eight-year limit – would appear called for, or permissible under Section 307(c)(1) of the Act.

But even if we accept the Bureau’s generous assertion that a license somehow remains alive for another 30 days post-expiration, that does not help WAJM(FM) here: even with that 30-day period grace period, its license had been dead for more than four years when Press filed its application.

application. Having missed that deadline (by more than four years), WAJM(FM) could not expect its 2010 renewal application even to get in the door, much less get processed, without such a waiver. *See, e.g., Discussion Radio* at ¶14. The prior filing of the Press application aggravates WAJM(FM)'s situation in this regard considerably, because any waiver of the renewal deadline would perforce have to be made on a *nunc pro tunc* basis in order to create the fiction that the late-filed renewal application was entitled to priority over Press's earlier-filed application.

But the Commission is significantly constrained when waivers of filing deadlines are concerned. The U.S. Court of Appeals for the District of Columbia Circuit – quoting a standard announced by the Commission itself – has held that Commission-imposed filing deadlines may be waived only under “unusual or compelling circumstances” involving “a calamity of a widespread nature that even the best of planning could not have avoided, such as an earthquake or a citywide power outage which brings transportation to a halt.” *Meredith/New Heritage Strategic Partners, L.P.*, 9 FCC Rcd 6841, 6842 ¶6 (1994), *cited in NetworkIP v. FCC*, 548 F.3d 116, 126 (D.C. Cir. 2008). The Court has repeatedly “discourag[e] the Commission from entertaining late-filed pleadings ‘in the absence of extremely unusual circumstances.’” *BDPCC, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (*quoting 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 200 (D.C. Cir. 2003)). *See generally Network IP, supra*.⁸

Here, the sole reason offered by WAJM(FM) for its failure to file a timely renewal application was some unspecified “administrative oversight”. *See* File No. BRED-

⁸ “Ad hoc departures from [an agency’s established filing deadlines], even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.” 548 F.3d at 127 (*quoting Reuters Ltd. v. FCC*, 781 F.2d 946, 950–51 (D.C. Cir. 1986)).

20100921AAN, Exhibit 6. Under no stretch of the imagination could that justify a waiver of the filing deadline for WAJM(FM)'s renewal application in light of the governing D.C. Circuit precedent. In its pleadings to the Bureau, Press cited *NetworkLP* and other, similar, cases to demonstrate that, under the circumstances presented here, no basis exists for acceptance of the late-filed WAJM(FM) renewal application. The fact that such acceptance would (in the Bureau's view) result in the dismissal of Press's application underscored the impermissibility of such acceptance. Perhaps because it had no adequate response to that argument, the Bureau has chosen simply to ignore it in the Order: neither *NetworkLP* nor any of its related cases are even mentioned, much less substantively addressed, in the Order. Regardless of that regrettably struthious approach, the fact remains that the waiver of Section 73.3539 implicit in the Bureau's action cannot be sustained under *NetworkLP*.

VI. No short-spacing waiver was required with respect to WZBZ/WJBR.

The Order also alludes to the supposed need to request a waiver with respect to the short-spacing between the proposed operation of Station WZBZ(FM) on Channel 259A and the existing operation of Station WJBR-FM on first-adjacent Channel 258A. See Order at ¶7. But any waiver that might be required was granted long ago.

It is essential to recognize that Press's proposal would *not create any new short-spacing at all*. Station WZBZ(FM) is *already* short-spaced to Station WJBR-FM to precisely the same degree as would be the case if Press's proposal were adopted. The two stations are authorized to operate on channels first adjacent to one another, and under Press's proposal they would continue to operate on first adjacent channels. Since Press's proposal does *not* call for *any* change to Station WZBZ(FM)'s location, power or antenna height, the nature and extent of

short-spacing – and potential interference resulting therefrom – would be identical to the short-spacing and potential interference which *the Commission has already authorized*.

The Bureau’s seeming reluctance to approve now that which it has already approved – and that which is currently approved – is, on its face, arbitrary and capricious.

For decades the Commission has waived the strict application of Section 73.207’s minimum spacing provisions in situations involving stations subject to grandfathered short-spacings. *See, e.g., Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama, 6 FCC Rcd 6580 (Media Bur. 1991); Newman and Peachtree City, Georgia, 7 FCC Rcd 6307 (Allocations Branch 1992)*. That’s because, for the limited universe of grandfathered, short-spaced stations, proper spacing is determined *not* necessarily according to Section 73.207, but rather in the particular context of the grandfathered station’s authorization and related circumstances. *See, e.g., Grants, New Mexico et al., 16 FCC Rcd 20323 (Allocations Branch 2001)* (with respect to a proposed reallocation that (a) would be short-spaced under Section 73.207 but (b) was nonetheless consistent with the proponent’s grandfathered short-spaced authorization, “[w]e therefore agree . . . that the proposal is fully spaced . . .”).

Essentially, the concept of “fully spaced” for grandfathered short-spaced stations does not demand compliance with Section 73.207 spacings. Rather, proposed changes involving such stations are “fully spaced” as long as the proposal would not aggravate authorized short-spacings to which the affected stations are already subject. As a result, reallocations that would otherwise have run afoul of Section 73.207 have been routinely approved where no new short-spacings are created, no existing short-spacings are exacerbated, and the potential for interference between the currently short spaced stations is not increased. *See, e.g., Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama, supra; Newman and Peachtree City, Georgia, supra.*

All of those factors are present here: no new short-spacings would be created, no existing short-spacings would be increased, there would be no increase in potential interference.

To be sure, under Press's proposal Station WZBZ(FM) would end up operating on Channel 259A rather than Channel 257A, but that difference is immaterial because the other grandfathered short-spaced station at issue here, Station WJBR-FM, operates on Channel 258A. The currently authorized grandfathered short-spacing determines the "full spacing" between Stations WZBZ(FM) and WJBR-FM. Channel 257A and Channel 259A are both first adjacent to Channel 258A and, therefore, subject to identical minimum separations under Section 73.207. As a result, if Station WZBZ(FM)'s current short-spaced separation from Station WJBR-FM has been deemed fully-spaced – as WZBZ(FM)'s existing authorization establishes it has – then the identically-spaced operation of WZBZ(FM) on Channel 259A would necessarily be fully spaced as well. In each case, the distance between WZBZ(FM) and WJBR-FM would be the same.

The fact that a channel change for WZBZ(FM) is involved here is immaterial because, as the Commission has repeatedly held, FM channels are equivalent (and, therefore, interchangeable for allotment purposes) "if they are of the same class, would comply with the minimum distance separation requirements, and would enable a station to provide city-grade coverage to the community where the allotment would be made." *Randolph and Brandon, Vermont*, 7 FCC Rcd 1760, 1762 (Media Bur. 1991). Here, Channels 257A and 259A are both the same class, are identically separated from Station WJBR-FM (on first adjacent Channel 258), and enable Station WZBZ(FM) to provide city-grade coverage to its community of license.

In view of these considerations, no waiver request was necessary and, in any event, Press demonstrated in its presentations to the Bureau, below, that the circumstances here plainly support grant of the proposal consistently with established Commission standards.⁹

CONCLUSION

While perhaps noble, the Bureau's strained effort to save WAJM(FM) from the mandatory consequences of its own wholesale, years-long lack of attention to basic regulatory concerns is unavailing. That effort cannot succeed because it requires that the WAJM(FM) license be deemed to have been in effect for more than 12 years – from June, 1998 to August 27, 2010 (at least), and the Communications Act expressly and unequivocally prohibits that. Moreover, in order to accord the late-filed WAJM(FM) renewal application priority over Press's application, the Bureau would have to waive one or more rule-specified deadlines, and no basis for such a waiver exists.

Press presented these arguments to the Bureau. In its Order the Bureau has failed to address them in any meaningful way, and has instead simply clung to the patently bogus notion that there existed, as of August 27, 2010, some WAJM(FM) "licensed facilities" to which Press was supposed to accord protection. As the Order itself otherwise makes clear, there were no such "licensed facilities". The decision below should be reversed, and Press's application should be promptly reinstated and granted.

⁹ In that regard, it should also be noted that Press's proposal would *eliminate* an existing short-spacing – between Stations WZBZ(FM) and WBHX(FM) – a factor that further establishes that grant of the proposal would be in the public interest.

RELIEF REQUESTED

For the reasons discussed above, the Commission should: reverse the Bureau's Order; rescind the grant of the WAJM(FM) renewal applications; and reinstate and grant Press's application.

Respectfully submitted,

/s/ Harry F. Cole 
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ATTACHMENT A

2. In a 2013 *Policy Statement*,³ the Bureau announced that certain student-run NCE radio stations that committed first-time violations of certain documentation requirements of the Rules would be afforded the opportunity to negotiate a consent decree with a reduced payment amount.⁴ The *Policy Statement* limited the policy to “violations of rules that require the submission of reports and other materials or public notice of information”⁵ Additionally, it stated that all other violations of Rules were not included and would be processed under current procedures applicable to all licensees.⁶

3. In this Order, we adopt the attached Consent Decree and Compliance Plan entered into by the Bureau and Licensee. The Consent Decree and Compliance Plan resolve issues relating to the tardily filed 2010 Renewal Application and the Petition filed against that application. For this reason, and as discussed below, we also deny the Petition.⁷ The Consent Decree also requires that the Board adhere to a Compliance Plan as set forth in the Appendix to the Consent Decree and pay a specified civil penalty. The Consent Decree stipulates that Licensee violated Section 73.3539 of the Commission’s Rules (“Rules”) by failing to file a timely renewal application for the Station; Section 301 of the Communications Act of 1934, as amended (“Act”), by engaging in unauthorized operation of the Station after its authorization had expired;⁸ Section 73.3527 of the Rules by failing to retain all required documentation in the Station’s public inspection file;⁹ and Section 73.1350(a) of the Rules by operating

³ See *William Penn University*, Policy Statement and Order, 28 FCC Rod 6932 (MB 2013) (“*Policy Statement*”).

⁴ *Id.*, 28 FCC Rod at 6932 ¶ 2 (in cases of “first-time violations of certain documentation requirements of our Rules by student-run NCE radio stations,” instead of issuing a Notice of Apparent Liability (NAL), the Bureau will first afford the licensee an opportunity to negotiate a consent decree in which the licensee will pay a reduced civil penalty and agree to a compliance plan. In negotiating the amount, the Bureau will consider “the totality of circumstances, including giving appropriate consideration to the station’s finances with respect to reducing the base forfeiture amount significantly.”).

⁵ *Id.*, 28 FCC Rod at 6936 - 6937 ¶11. Covered violations include the failure to “(a) file the required materials with the Commission, such as the Ownership Reporting Rule, (b) place the required materials in a file, such as in the station’s public inspection file pursuant to the Public File Rule, or (c) publish a notice in a local newspaper or broadcast as an announcement on the station pursuant to Section 73.3580 of the Rules.”

⁶ *Id.*, 28 FCC Rod at 6937 ¶ 11. Specifically, the *Policy Statement* noted “that substantive operational violations, e.g. broadcast of indecent/obscene/profane material, commercial announcements, illegal contests, underwriting, news distortion and other programming-related violations, violations of the Commission’s technical, public safety, tower/transmitter site construction and maintenance rules, etc., as well as recurring or subsequent violations of any kind will continue to be handled under current procedures, with no reduction or relief for student-run stations, apart from those potentially available to all licensees under current procedures in appropriate circumstances.”

⁷ The Petition also references the Enforcement Bureau’s Official Notice of Violation, Ref. EB-01-PA-115 (rel. EB May 11, 2001) (“NOV”). See *id.* at 6. The NOV found that the Board had violated Sections 73.1870(c)(3)(logging requirements); 73.3527(e)(3)-(4)-(7)-(8) (contour map; ownership report; “The Public and Broadcasting” manual; and quarterly issues/programs lists requirements, respectively); 11.52(d); 11.61(a)(1)(v) (EAS requirements); 11.35 (operational readiness testing); 73.267(c)(3) (transmitter efficiency factor); 73.1225(a) and (e) (transmitter inspection availability and provision of local phone number, respectively); 73.1840(a) (retention of station logs); 73.1590(d) (equipment performance measurements); and 73.1350(c)(2) (calibration of monitoring equipment) of the Rules. On June 25, 2001, the Board filed a response addressing its progress in correcting each of the rule violations cited in the NOV. See *Letter to John E. Rahles, District Director, FCC Enforcement Bureau, from Cary Tepper, Esq.*, filed June 25, 2001 (“*Licensee Response*”) at Attachment (“*Declaration of Al Horner, Engineer for WAJM(FM)*”). Upon receipt of the *Licensee Response*, the Enforcement Bureau closed its investigation.

⁸ See 47 C.F.R. § 73.3539 and 47 U.S.C. § 301.

⁹ 47 C.F.R. § 73.3527.

the Station with an antenna at variance with its licensed parameters.¹⁰ With respect to the late-filing and Public File Rule violation, the Board has shown that, at the time of the violations, the Station was a student-run NCE FM station and that the violations at the Station are first-time documentation violations within the parameters of our policy concerning violations of documentation requirements of Rules by student-run NCE radio stations. For these violations, the Board will pay a civil penalty to the United States Treasury in the amount of one thousand five hundred dollars (\$1,500). Regarding the unauthorized operation and operation at variance from the Station's authorization, these are substantive violations that are not covered by special processing as set forth in the *Policy Statement*. For these violations, the Board has agreed to pay a civil penalty to the United States Treasury in the amount of four thousand seven hundred and fifty dollars (\$4,750). Thus, The Board has agreed to pay a total civil penalty of six thousand two hundred fifty dollars (\$6,250). A copy of the Consent Decree is attached hereto and incorporated by reference.

4. Based upon our review of the record before us, we conclude that the 2010 and 2014 Renewal Applications should be granted, subject to satisfaction of certain conditions set forth in the Consent Decree, but only for a term of two (2) years from the grant of the latter application.¹¹

5. *Press Application*. On August 27, 2010, Press filed its application to move to a new frequency¹² and new location for its Station WBHX(FM), Tuckerton, New Jersey. The Press Application's proposed involuntary channel substitution of Station WZBZ(FM), licensed to Equity, from Channel 257A to Channel 259A was not fully spaced to the allegedly expired Station license. Press argues in its Petition that there is no rule violation because "the WAIM license to broadcast . . . had already expired," and the Board failed to timely file the 2010 Renewal Application.¹³ The staff evaluated the Press Application and, on June 20, 2014, sent Press a letter providing it with 30 days to cure several listed defects.¹⁴ Press responded to the *Staff Letter* on July 18, 2014, but did not correct the identified defects.¹⁵

6. We reject Press' primary contention that the Station's license cannot be renewed because it expired before the 2010 Renewal Application was filed. The Commission and the Bureau have considered and addressed this issue many times.¹⁶ Accordingly, we find that we may process the late-filed 2010 Renewal Application and timely 2014 Renewal Application. To the extent Press argues that

¹⁰ 47 C.F.R. § 73.1350(a).

¹¹ See 47 U.S.C. § 309(k) (permitting the Commission to grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted").

¹² WBHX(FM) currently operates on Channel 259A (99.7 MHz). It proposes to "swap" frequencies with Station WZBZ(FM), Pleasantville, New Jersey, which currently operates on Channel 257A (99.3 MHz).

¹³ See Petition at 3; Press Application at Exhibit 29.

¹⁴ See *Letter to Press Communications, LLC*, Ref. 1800B3 (MIB rel. Jun. 20, 2014) ("*Staff Letter*").

¹⁵ See Press "Response to June 20, 2014, Letter," filed on July 18, 2014, to which the Board and Equity jointly responded by letter on August 11, 2014. Press responded to the joint Board and Equity August 11, 2014, letter on August 21, 2014.

¹⁶ See, e.g., *Discussion Radio Incorporated*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 7433, 7438 (2004) (licensee sanctioned for untimely renewal filing and unauthorized operation, renewal application granted) ("*Discussion Radio*"); *Superior Communications*, Letter, 22 FCC Rcd 16634, 16635-6 (MB 2007) (rejecting argument that late-filed renewal application should be put in a queue behind objector's application and finding that, although a license term may not exceed eight years, the Act does not forbid the Commission from accepting a renewal application filed after the station's license has expired).

acceptance of the 2010 Renewal Application would constitute an unjustified waiver of the filing deadline, again, the Commission has addressed that issue and found that, in the case of late-filed license renewal applications, waivers of these rules are warranted in the instant circumstances for the limited purpose of accepting and acting on the station's license renewal application.¹⁷ Because longstanding and clear Commission precedent dictates that we are to process the 2010 and 2014 Renewal Applications, the technical proposal in the Press Application was required to protect the Station's licensed facilities under Section 73.207 of the Rules.¹⁸ As discussed above, the Press Application does not do so with respect to the Station. The fact that Press alleges that it must relocate WBHX(FM) is not material to our application of these well-settled licensing policies. Press states that it is moving because the city of Beach Haven, New Jersey, where WBHX(FM)'s transmission facilities are located on a leased tower, requested that Press move from its existing site.¹⁹ Press also claims that Beach Haven will not allow Press to construct a broadcast tower, and that distance separation requirements substantially limit siting alternatives.²⁰ Press observes that moving its Station WBHX(FM) to Tuckerton, New Jersey, is its "only viable option" for relocating that station.²¹

7. Although the short-spacing to the Station renders the Press Application unacceptable, we briefly address the short-spacing to Station WJBR-FM. The *Staff Letter* indicated that, although WZBZ(FM) has a grandfathered short-spacing to WJBR-FM on its currently licensed Channel 257 and would remain equally short-spaced on the proposed Channel 259 A,²² Press had failed to cite any precedent for permitting the processing of an involuntary channel substitution under the grandfathering provisions of Section 73.213(c).²³ In its Response to the *Staff Letter*, Press cites three allocation cases which differ significantly from the proposed situation.²⁴ In each case, the rule making proponent proposed a short-spaced allocation and, unlike Press, requested a waiver of Section 73.207 of the Rules at that time, and provided an adequate justification for the waiver. In this instance, Press fails even to request a waiver of the spacing rules. Thus, Press has failed to cite any precedent for *involuntarily* changing one station's short-spaced channel to another short-spaced channel absent a waiver of the Commission's spacing rules.

8. The *Staff Letter* indicated that, pursuant to Section 73.3522 of the Rules, "... an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staffs deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff."²⁵ Additionally, Section

¹⁷ See *Discussion Radio, supra*, 19 FCC Rcd at 7437.

¹⁸ 47 C.F.R. § 73.207.

¹⁹ Petition at 1-2.

²⁰ *Id.*

²¹ Press Reply 2,8.

²² See *Staff Letter* at n.3. The required spacing between WZBZ(FM) and first-adjacent channel Station WJBR-FM is 113 kilometers, while the actual spacing proposed in the Press Application is 105 kilometers. *Staff Letter* at 1.

²³ See *Staff Letter* at n.3.

²⁴ Press cites *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, Report and Order, 6 FCC Rcd 6580 (MMB 1991); *Newman and Peachree City, Georgia*, Report and Order, 7 FCC Rcd 6307 (MMB 1992), and *Grants, New Mexico et al.*, Report and Order, 16 FCC Rcd 20323(MMB 2001)

²⁵ *Staff Letter* at 2, citing 47 C.F.R. § 73.3522

73.3564 of the Rules states that, "[a]pplications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment."²⁶ In accordance with these provisions, because the Press Application was not amended to correct all deficiencies, we will dismiss it.

9. *Conclusion/actions.* Based on the record before us, we conclude that nothing in that record creates a substantial or material question of fact whether Licensee possesses the basic qualifications to be a Commission licensee. After reviewing the terms of the Consent Decree, we find that the public interest will be served by its approval and by terminating the Bureau's investigation of potential violations of the Rules in connection with the 2010 Renewal Application and granting the 2010 and 2014 Renewal Applications, subject to the terms of the Consent Decree.

11. ACCORDINGLY, IT IS ORDERED, that the December 22, 2010, Petition to Deny filed by Press Communications, LLC, IS DENIED.

12. IT IS FURTHER ORDERED that the Application of the Atlantic City Board of Education for minor modification of the facilities of Station WAJM(FM), Atlantic City, New Jersey, (File No. BPEd-20100215AAW) IS GRANTED.

13. IT IS FURTHER ORDERED that the Application of Press Communications, LLC, for minor modification of the facilities of Station WBHX(FM), Tuckerton, New Jersey (File No. BPH-20100827ABW) IS DISMISSED. IT IS FURTHER ORDERED that the September 29, 2010, Petition to Deny filed by William Hawkes, Jr., the October 5, 2010, Informal Objection filed by the Atlantic City Board of Education; and the October 12, 2010, Informal Objection filed by Equity Communications, L.P., ARE DISMISSED as moot.

14. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended,²⁷ and by the authority delegated by Sections 0.61 and 0.283 of the Rules,²⁸ the Consent Decree attached hereto IS ADOPTED.

15. IT IS FURTHER ORDERED that the investigation by the Media Bureau of the matters noted above IS TERMINATED.

²⁶ *Staff Letter at 2*, citing 47 C.F.R. § 73.3564; see also Appendix B in the *Report and Order* in MM Docket No. 91-347, 57 FR 34872 (Aug. 7, 1992).

²⁷ 47 U.S.C. § 154(i).

²⁸ 47 C.F.R. §§ 0.61, 0.283.

16. IT IS FURTHER ORDERED, that copies of this Order shall be sent, by First Class and Certified Mail, Return Receipt Requested, to the Atlantic City Board of Education, 1300 Atlantic Ave., Fifth Floor, Atlantic City, NJ 08401, and to its counsel, Matthew Murchison, Esq., Latham & Watkins, LLP, 555 11th St., N.W., Suite 1000, Washington, DC 20004, and to Press Communications, LLC, 1329 Campus Parkway, Neptune, NJ 07753, and to its counsel, Michelle A. McClure, Esq., Fletcher, Heald & Hildreth, PLC, 1300 N. 17th St., 11th Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION



William T. Lake
Chief, Media Bureau

CONSENT DECREE

I. Introduction

1. This Consent Decree is entered into by and between the Media Bureau of the Federal Communications Commission and the Atlantic City Board of Education, by their respective authorized representatives, for the purpose of resolving certain issues regarding an inspection of the Station by the Commission's Enforcement Bureau staff as well as compliance with the Filing Date Rule, Public File Rule, Ownership Report Rule, Transmission System Operation Rule, and Unauthorized Operation Rule, as defined below, with regard to noncommercial educational station WAJM(FM), Atlantic City, New Jersey.

II. Definitions

2. For purposes of this Consent Decree, the following definitions shall apply:

- (a) "2010 Application" and "2014 Application" mean the pending applications for the renewal of the license for Station WAJM(FM), Atlantic City, New Jersey (File Nos. BREDD-20100921AAN and BREDD-20140128ABC, respectively);
- (b) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. §151 *et. seq.*;
- (c) "Bureau" means the Media Bureau of the Federal Communications Commission;
- (d) "Commission" or "FCC" means the Federal Communications Commission;
- (e) "Compliance Plan" means the processes and procedures developed by the Licensee in an effort to ensure compliance with the Filing Date Rule, Public File Rule, Ownership Report Rule, Transmission System Operation Rule, and Unauthorized Operation Rule at the Station, as summarized in the Appendix hereto;
- (f) "Effective Date" means the date on which the Bureau releases the Order;
- (g) "Execution Date" means the date on which this Consent Decree is executed by the last of the Parties to do so;
- (h) "Filing Date Rule" means Section 73.3539 of the Commission's Rules, 47 C.F.R. § 73.3539;
- (i) "Licensee" or "Board" means the Atlantic City Board of Education;
- (j) "Modification Application" is the application, File No. BPH-20100827ABW, filed by the Board to correct the Station's authorized operating parameters;
- (k) "*NOV*" means the Enforcement Bureau's Official Notice of Violation citing the Board's violation of Sections 73.1870(c)(3)(logging requirements); 73.3527(e)(3)-(4)-(7)-(8) (contour map; ownership report; "The Public and Broadcasting" manual; and quarterly issues/programs lists requirements, respectively); 11.52(d); 11.61(a)(1)(v) (EAS requirements); 11.35 (operational readiness testing); 73.267(c)(3) (transmitter efficiency factor); 73.1225(a) and (e) (transmitter inspection availability and provision of local phone number,

respectively); 73.1840(a) (retention of station logs); 73.1590(d) (equipment performance measurements); and 73.1350(c)(2) (calibration of monitoring equipment) of the Rules. See Official Notice of Violation, Ref. EB-01-PA-115 (EB rel. May 11, 2001);

- (l) “Order” means the Order of the Bureau adopting this Consent Decree;
- (m) “Ownership Report Rule” means Section 73.3615 of the Commission’s Rules, 47 C.F.R. Section 73.3615;
- (n) “Parties” means the Bureau and the Licensee;“
- (o) “Petition” means the Petition to Deny Filed by Press Communications, LLC, on December 22, 2010, alleging one or more violations of the Act and/or the Rules by the Board;
- (p) “Public File Rule” means Section 73.3527 of the Commission’s Rules, 47 C.F.R. § 73.3527;
- (q) “Rules” means the Commission’s Rules, found in Title 47 of the Code of Federal Regulations;
- (r) “STA” is the request for Special Temporary Authorization to continue Station operations pending consideration of the untimely WAJM(FM) 2010 Renewal Application, File No. BLSTA-20100921AAP, granted by the staff on September 29, 2010;
- (s) “Station” means Station WAJM(FM), Atlantic City, New Jersey (Facility ID No. 3123);
- (t) “Transmission System Operation Rule” means Section 73.1350(a) of the Commission’s Rules, 47 C.F.R. § 73.1350(a);
- (u) “Unauthorized Operation Rule” means Section 301 of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. § 301; and
- (v) “Violations” means the violations of the Filing Date Rule, Public File Rule, Ownership Report Rule, Transmission System Operation Rule, and Unauthorized Operation Rule.

III. Background

3. On September 21, 2010, Licensee filed the 2010 Renewal Application for the Station, more than four years after the filing deadline, in violation of the Filing Date Rule.¹ In addition, Licensee

¹ The Station’s application for renewal was due on or before February 1, 2006. No such application was filed, and the Station’s license expired on June 1, 2006.

continued to operate the Station after the Station's license had expired in violation of Section 301 of the Act.² Moreover, in the 2010 Renewal Application, Licensee disclosed violations of the Public File Rule and the Ownership Report Rule. The 2010 Renewal Application also disclosed: (1) that issues/programs lists during the eight-year period from the grant of the previous renewal application in September 1998 until the filing of the 2010 Renewal Application were missing from the Station's local public file, in violation of the Public File Rule;³ and (2) Licensee also indicates that it failed to file any biennial ownership reports with the Commission since the Station's last license renewal on September 23, 1998,⁴ in violation of the Ownership Report Rule.

4. Finally, in connection with a Petition to Deny the 2010 Renewal Application filed by Press Communications, LLC: (1) the Board disclosed that it had discovered that not all of the violations identified in the *NOR* were corrected; and (2) the Board acknowledged that the Station's antenna may have been mounted as much as 5 meters lower than authorized and may have been rotated as much as 3.5 degrees in azimuth, in violation of the Transmission System Operation Rule.⁵ It subsequently filed the Modification Application to Application to correct the height of its transmitting antenna by 2.3 meters.⁶

5. In light of the compliance issues raised in the 2010 Renewal Application, the *NOR*, and various pleadings in this proceeding regarding the late filing of the license renewal application, the unauthorized Station operations, and deficiencies in the public file related to issues/programs lists and ownership reports, the Parties have agreed to enter into this Consent Decree by which both Licensee and the Bureau intend to be legally bound.

IV. Agreement

6. The Parties acknowledge that any proceeding that might result from the Enforcement Bureau's Official Notice of Violation as well as the Licensee's compliance with the Ownership Report Rule, the Filing Date Rule, Section 301 of the Act, the Public File Rule, and the Transmission System Operation Rule could be time-consuming and require substantial expenditure of public and private resources. In order to conserve such resources, to resolve the matter, and to promote the Licensee's compliance with all pertinent Commission Rules, the Parties are entering into this Consent Decree, in consideration of the mutual commitments made herein.

7. The Parties agree to be legally bound by the terms and conditions of this Consent Decree. Both Licensee and the Bureau each represent and warrant that its signatory is duly authorized to enter into this Consent Decree on its behalf. Licensee agrees that the Bureau has jurisdiction over the matters contained in this Consent Decree.

² After its license had expired, the Station operated for more than four years. On the same day it filed the 2010 Renewal Application, Licensee filed the STA (Sept. 21, 2010). The staff granted the STA on September 29, 2010. The STA expired on March 29, 2011. Licensee timely sought an extension of the STA on March 17, 2011, which remains pending. See File No. BELSTA-20110317ACS.

³ 2010 Renewal Application, Exhibit 11.

⁴ *Id.*; see also *id.* at Exhibit 6.

⁵ See the Board's January 28, 2011, Opposition to Petition to Deny at 12 and Attachment 8 (Larry H. Will, P.E., Engineering Exhibit in Support of Opposition to Petition to Deny).

⁶ See Modification Application at Exhibit 18, Attachment 18. In the *Order* adopting this Consent Decree, the Bureau grants the Modification Application.

8. The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Licensee and the Bureau concerning the Licensee's Violations at the Station, as discussed herein.
9. In express reliance on the covenants and representations in this Consent Decree, the Bureau agrees that it will not use the Violations in any action against the Licensee, provided that the Licensee satisfies all of its obligations under this Consent Decree. In the event that the Licensee fails to satisfy any of its obligations under this Consent Decree, the Bureau may take any enforcement action available pursuant to the Act and the Rules with respect to each Violation, and/or the violation of this Consent Decree.
10. Licensee acknowledges that, since at least 2001, it has failed to operate the station with the diligence and attention required of Commission licensees. Licensee further acknowledges that it has both committed serious, and in some cases, repeated, violations at the Station and failed to correct those violations upon their discovery, even when admonished to do so by the Commission's Enforcement Bureau. Licensee further acknowledges that during this period it has demonstrated a reckless disregard of its responsibilities as a Commission licensee by failing to ensure that Station operations complied with Commission Rules, failing to correct known violations and failing to timely file required forms, lists and reports.
11. Specifically, Licensee hereby stipulates that, at least as of January 2011, the Board had not corrected all of the violations identified in the *NOI*.
12. Licensee also hereby stipulates that it violated the Filing Date Rule by failing to file a license renewal application for the Station on or before February 1, 2006, and that it violated Section 301 of the Act by continuing Station operations after the Station's license had expired.
13. Licensee also hereby stipulates that the Station violated the Public File and Ownership Report Rules in the maintenance of the Station's public file during the entire 1998-2006 license term.
14. Licensee also hereby stipulates that the Station violated the Transmission System Operation Rule by operating the Station with an antenna at variance with its licensed parameters, necessitating Licensee's filing, on February 15, 2012, of an application for minor modification of licensed facilities to correct the problem.
15. As part of the Order, the Bureau shall terminate its investigation of the Violations and grant the Petition in part and deny it in all other respects.
16. In light of its significant Rule violations during the subject license term, Licensee agrees to pay a civil penalty to the United States Treasury in the amount of Six Thousand Two Hundred and Fifty Dollars (\$6,250). Such contribution will be made, without further protest or recourse to a *trial de novo*, by a check or similar instrument, wire transfer or money order payable to the order of the Federal Communications Commission. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank -- Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Licensee will also send electronic notification on the date said payment is made to Stephen.Svab@fcc.gov.

17. Because the Violations continued over the entire license term, the Bureau agrees to grant the 2010 and 2014 Renewal Applications, after the Effective Date, provided that the following conditions have been met: (1) the Licensee has fully and timely satisfied its obligation to pay the civil penalty referenced in paragraph 15 of this Decree; and (2) there are no issues other than the Violations that would preclude grant of the renewal application. The forthcoming license term granted by such action will expire two (2) years after the grant of the 2014 Renewal Application.

18. The Licensee represents that, in addition to its existing policies and procedures, it has adopted, is currently in the process of implementing, and agrees to abide by the Compliance Plan for the purpose of ensuring compliance with the Commission's Rules. The Licensee agrees, to the extent that it has not already done so, to implement this Compliance Plan at the Station no later than thirty (30) days after the Effective Date and to keep such Compliance Plan in effect for two (2) years after the Effective Date.

19. The Licensee represents that, as of the Execution Date of this Consent Decree, the Station's public file fully complies with the Public File Rule and Ownership Report Rule and that, with the grant of the Modification Application, the Station also fully complies with the Transmission System Operation Rule. Licensee also represents that it is in full compliance with the Commission's EAS requirements.

20. The Licensee agrees that it is required to comply with each individual condition of this Consent Decree. Each specific condition is a separate condition of the Consent Decree as approved. To the extent that the Licensee fails to satisfy any condition or Commission Rule, in the absence of Commission alteration of the condition or Rule, it will be deemed noncompliant and may be subject to possible enforcement action, including, but not limited to, revocation of this Consent Decree, designation of the matter for hearing, letters of admonishment and/or forfeitures.

21. The Consent Decree will be binding on the Licensee's successors-in-interest and assigns. The Licensee agrees that any future application to assign or transfer control of the Station will include a statement executed by an authorized representative of the proposed assignee or transferee consenting to assumption of the responsibilities and duties set forth in this Consent Decree with regard to the Station.

22. The Licensee waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge the validity of this Consent Decree and the *Order*, provided the *Order* adopts the Consent Decree without change, addition or modification.

23. The Licensee agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. Section 504 and 47 C.F.R. Section 1.1501 *et seq.*, relating to the matters discussed in this Consent Decree.

24. The Licensee and the Bureau agree that the effectiveness of this Consent Decree is expressly contingent upon issuance of the *Order*, provided the *Order* adopts the Consent Decree without change, addition or modification.

25. The Licensee and the Bureau agree that if the Licensee, the Commission or the United States on behalf of the Commission, brings a judicial action to enforce the terms of the *Order* adopting this Consent Decree, neither the Licensee nor the Commission will contest the validity of the Consent Decree or *Order*; and the Licensee and the Commission will waive any statutory right to a trial de novo with respect to any matter upon which the *Order* is based (provided in each case that the *Order* is limited

to adopting the Consent Decree without change, addition, or modification), and will consent to a judgment incorporating the terms of this Consent Decree.

26. The Licensee and the Bureau agree that in the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, it will become null and void and may not be used in any manner in any legal proceeding.

27. This Consent Decree may be signed in counterparts and/or by telecopy and, when so executed, the counterparts, taken together, will constitute a legally binding and enforceable instrument whether executed by telecopy or by original signatures.

MEDIA BUREAU
FEDERAL COMMUNICATIONS COMMISSION

By: William T. Lake, Chief

Date: _____

ATLANTIC CITY BOARD OF EDUCATION

By: *Dennis L. M. Dennerly*
Dennis L. M. Dennerly, Superintendent

Date: 9/17/15

ATLANTIC CITY BOARD OF EDUCATION
Office of the Secretary

CityCenter Building
1300 Atlantic Avenue -- 5th Floor
Atlantic City, NJ 08401

Angela Brown
Board Secretary
(609) 343-7200 ext. 5020 - Fax (609) 347-1549

October 5, 2015

At the regular meeting of the Atlantic City Board of Education held on September 28, 2015, the following resolution was approved:

Goods & Services Resolution #9

On a motion made by Mr. Steele and seconded by Mr. Cooper, the Atlantic City Board of Education voted unanimously by roll call vote to approve the Consent Decree entered into by and between the Media Bureau of the Federal Communications Commission and the Atlantic City Board of Education, by their respective authorized representatives, for the purpose of resolving certain issues regarding an inspection of the Station by the Commission's Enforcement Bureau staff as well as compliance with the Filing Date Rule, Public File Rule, Ownership Report Rule, Transmission System Operation Rule, and the Unauthorized Operation Rule, as defined, with regard to noncommercial educational station WATM (FM), Atlantic City, NJ, (FCC DA 15-880). Penalty to be paid to the United State Treasury in the amount of \$6,250, charged to account 11-190-100-800-00-001-800, per Exhibit K.

Respectfully,



Angela Brown
Board Secretary

to adopting the Consent Decree without change, addition, or modification), and will consent to a judgment incorporating the terms of this Consent Decree.

26. The Licensee and the Bureau agree that, in the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, it will become null and void and may not be used in any manner in any legal proceeding.

27. This Consent Decree may be signed in counterparts and/or by telecopy and, when so executed, the counterparts, taken together, will constitute a legally binding and enforceable instrument whether executed by telecopy or by original signatures.

MEDIA BUREAU
FEDERAL COMMUNICATIONS COMMISSION

By: 
William T. Lake, Chief

Date: 10-8-2015

ATLANTIC CITY BOARD OF EDUCATION

By: Donna Haye, Superintendent

Date: _____

APPENDIXCOMPLIANCE PLAN FOR STATION WJMJ(FM)

The Atlantic City Board of Education, or its successor-in-interest, as appropriate will institute the following procedures to ensure compliance with the Commission's Rules. Unless otherwise provided, all terms defined in the Consent Decree apply to this Compliance Plan.

- I. The Board agrees to correct all violations identified in the *NOY* that can be retroactively corrected (Sections 73.3527(e)(3)-(4)-(7)-(8) (contour map; ownership report; "The Public and Broadcasting" manual; and quarterly issues/programs lists requirements, respectively); 11.52(d); 11.61(a)(1)(v) (EAS requirements); 1.35 (operational readiness testing); 73.267(c)(3) (transmitter efficiency factor); 73.1225(a) and (e) (transmitter inspection availability and provision of local phone number, respectively); 73.1840(a) (retention of station logs); and 73.1350(c)(2) (calibration of monitoring equipment) immediately and in any event prior to the submission of the first quarterly report under Item IV, below.
- II.
 - A. The Board will conduct in-house training for all Station employees and management on compliance with FCC Rules applicable to station operations, particularly those related to the Station's public inspection file, operation and maintenance of the Station's Emergency Alert System, and monitoring that the Station is operating with its authorized facilities. This training will be completed within 30 days of the Effective Date. Licensee will designate a management-level employee as Compliance Officer responsible for responding to Station employees' questions and to consult with outside counsel familiar with Communications Law regarding compliance matters. To augment this training, outside counsel, or other comparable professionals, will conduct a live workshop for all Station employees and management, also within 30 days of the Effective Date. The Board will repeat this workshop and use it as refresher training for staff and management at least every twelve (12) months. The Board also will videotape this workshop and use it to train any new Station employee within five (5) days of commencement of his or her duties at the Station.
 - B. The Board shall engage FCC counsel on an ongoing basis to provide guidance to the Board on FCC compliance issues, to provide regular updates and notices on developments in communications law applicable to the Board, and to review all of Licensee's applications and reports prior to filing with the FCC. In regard to the last matter, Licensee recognizes and acknowledges that any and all information provided to the FCC must completely and candidly set forth all relevant facts and circumstances, regardless of whether such a submission may disclose a violation of the Act or the Rules.
 - C. The Station Manager and other appropriate staff of the Station will compile a daily log of all public affairs and public service programming broadcast by the Station. These daily logs of public affairs and other public service programming will be retained until the Station's next license renewal application has been granted, compiled into quarterly issues/programs lists and will be timely placed in the public file of the Station.
 - D. All requisite quarterly issues/programs lists will be signed and dated by their preparer and by the Station Manager before they are placed in the public file.

- E. Late-filed public file documents will be reviewed and signed by the Station Manager and accompanied in the Station's public file with a statement indicating the nature of the document, the date placed in the public file, and the reason for the late filing.
 - F. The Station's management will train all employees, within five (5) days of commencement of his or her duties at the Station, concerning the absolute requirement to follow all Commission rules, regulations, and policies, specifically, fully explaining the obligations imposed by the Public File Rule to each employee charged with maintenance of the Station's public file. Should the Licensee or the Station's management learn that the Public File Rule has been violated, any employee responsible will be subject to appropriate disciplinary action, which may include suspension without pay or termination.
- III. For a period of two years from the Effective Date, the Licensee and/or any successor licensee, as appropriate, will conduct audits of the Station's public files as detailed below. The two-year period will terminate on the successful completion of the second annual public file audit pursuant to Item II(C). The second audit pursuant to Item II(C) will be due on the anniversary of the first audit. The audits of the public files shall be performed as follows:
- A. quarterly audits of the Station's public file, by telephone or facsimile, will be conducted by Licensee's FCC counsel or an authorized representative of the New Jersey Association of Broadcasters under the Alternative Broadcast Inspection Program;
 - B. a semi-annual review of the Station's public file will be conducted by the Station's management; and
 - C. annual, in-person or video conference, audits of the Station's public files will be conducted by an authorized representative of the New Jersey Association of Broadcasters under the Alternative Broadcast Inspection Program. The first such audit shall be completed not less than six (6) months following the Effective Date.
- IV. The Licensee shall submit reports to the FCC on a quarterly basis during the two-year term of this Compliance Plan. The reports shall include an affidavit or declaration to the Bureau certifying that since the commencement of the Compliance Plan or the filing of the last such report, the Station is in compliance with the Rules and is in compliance with the Consent Decree. The reports shall specifically address the Station's compliance with the Public File Rule and whether Licensee is operating with authorized facilities and is in full compliance with the Commission's record-keeping requirements for its technical facilities. The reports shall also include a summary of all actions related to operation and maintenance of the Station's Emergency Alert System.
- A. The reports shall be signed by: (1) the person supervising the Licensee's execution of the Compliance Plan (see VI, below); (2) the Station's Chief Engineer; and (3) the Station's FCC counsel, and shall contain the certification of each signatory that the representations in the Report are true.
- B. If the Licensee cannot truthfully make any of these certifications, it shall set forth in detail any public file deficiencies and describe any corrective measures taken. In regard to this last matter, Licensee recognizes and acknowledges that any and all information provided to the FCC must completely and candidly set forth all relevant facts and circumstances, regardless of whether such submission may disclose a violation of the Rules. A copy of these reports shall be served on Peter H. Doyle, Chief, Audio Division,

Media Bureau, Federal Communications Commission and e-mailed to him at peter.doyle@fcc.gov.

- V. Licensee agrees to submit to a full inspection by the Enforcement Bureau field staff subsequent to the filing of its next license renewal application.
- VI. The Compliance Plan, set forth above, will be under the direct supervision of the Atlantic City Board of Education's Superintendent Donna Haye, or by any member of the Atlantic City Board of Education designated by Ms. Haye, or in the event Ms. Haye is no longer with the Atlantic City Board of Education or if the license has been assigned, by her successor or her successor's designee at the Atlantic City Board of Education or successor Licensee's Board.

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that, on this 9th day of November, 2015, I caused copies of the foregoing "Application for Review" to be placed in the U.S. mail, first class postage prepaid, or transmitted electronically (as indicated below) to the following:

Peter Doyle, Chief (by email – peter.doyle@fcc.gov)
Audio Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Rodolfo F. Bonacci, Assistant Chief (by email – rodolfo.bonacci@fcc.gov)
Audio Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kevin C. Boyle, Esq.
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555 11th Street, NW
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Washington, DC 20004-1304

William Hawkes, Jr.
3028 Fire Road
Egg Harbor Township, New Jersey 08234

/s/ Harry F. Cole
Harry F. Cole

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Audio Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Rodolfo F. Bonacci, Assistant Chief (by email – rodolfo.bonacci@fcc.gov)
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3028 Fire Road
Egg Harbor Township, New Jersey 08234

/s/ Harry F. Cole *Harry F. Cole*
Harry F. Cole *by me*