

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

In re Application of)
)
JCE LICENSES, LLC) FCC File No. BMP-20031024AAV
)
Station WFTL(AM)) Facility ID #29490
West Palm Beach FL)
)
For Modification of Construction Permit)
For Minor Modification of Facilities)

To: Chief, Audio Division
Media Bureau

**Petition For Reconsideration
And Reinstatement *Nunc Pro Tunc***

JCE Licenses, LLC (“JCE”), by its attorney and pursuant to Section 1.106 of the Commission’s Rules, hereby respectfully petitions the Commission for reconsideration of the staff letter dated May 4, 2005,¹ dismissing the above-captioned application, and for reinstatement of the application *nunc pro tunc*. In support of its petition, JCE submits the following:

The subject application, as amended, proposed minor changes in the facilities of Station WFTL, West Palm Beach, Florida, specifically, (1) to modify the daytime directional antenna pattern, and (2) to increase power and modify the

¹ Letter of Susan N. Crawford, Assistant Chief, Audio Division, to John Wells King, Esq., May 4, 2005 (the “Letter”), a copy of which is attached hereto for convenient reference.

nighttime directional antenna pattern. These were submitted as modifications to construction permit File No. BP-19990521AI.²

Daytime Facilities. The Letter finds that the proposed 0.025mV/m contour will overlap the protected 0.5 mV/m daytime groundwave contour of co-channel Cuban stations CMGB, Trinidad, and CMJB, Mayari, Arrib. The application as re-tendered proposes such facilities. The applicant respectfully requests, as the Letter advises, that the International Bureau staff notify the daytime proposal to the ITU.³

Nighttime Facilities. The Letter finds that the proposed 0.025 mV/m 10% skywave contour would overlap the 50 kW nighttime 0.5 mV/m 50% skywave contour of co-channel Mexican stations XETQ and XETQ1, Orizaba VC, in violation of the US/Mexican Agreement. The application as re-tendered modifies the WFTL nighttime proposal in order to overcome this deficiency.

Interference Reduction. The Letter takes issue with JCE's showing under the Commission's AM Interference Reduction Policy with respect to the impact of the proposed nighttime facilities on co-channel Station WABA, Aguadilla, Puerto

² That construction permit expired December 21, 2004. JCE tendered a covering license application on December 20, 2004, re-tendered January 4, 2005, File No. BL-20050104ABJ. The license application was accepted for filing January 25, 2005, and is pending. On December 22, 2004, an amendment to the subject construction permit application was filed, for augmentation of the WFTL nighttime directional antenna pattern.

³ Insofar as the proposed daytime modification may implicate facilities proposed by WACC, 830 kHz, Hialeah FL, in FCC File No. BP-19890109AB, kindly note that that application was dismissed January 27, 2005, per *Public Notice*, "Media Bureau Announces Dismissal of Unamended Form 301, 314, and 315 AM and FM Applications," DA 05-178. A petition for reconsideration of the dismissal of the unamended application was filed February 28, 2005.

Rico. The application, as re-tendered modifies and supplements the showing. JCE respectfully requests that the Commission find that the proposal is consistent with the Policy, as it has so found in similar cases.

The resubmission of the captioned application and this petition conform to Commission policy on reinstatement of dismissed applications *nunc pro tunc* – i.e., the filing of a minor curative amendment in conjunction with a petition for reconsideration within thirty days of the dismissal of the application. *Public Notice*, “Commission Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications,” FCC 84-366, released August 2, 1984, 56 Rad.Reg.2d (P&F) 776 (1984). Because the minor amendment filed concurrently herewith cures the defects found to exist in the application, and because the minor amendment is tendered within 30 days after dismissal of the application, in connection with this petition for reconsideration, it is submitted that (1) this petition should be granted under the Commission’s policy on incomplete and patently defective AM and FM construction permit applications, *supra*, (2) the

amendment should be accepted, and (3) the application should be reinstated *nunc pro tunc* and granted.

It is so requested.

Respectfully submitted,

JCE LICENSES, LLC

By: /s/ John Wells King
Its Attorney

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June 3, 2005

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MAY 4 2005

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In re: James Crystal Enterprises II, LLC
WFTL(AM), West Palm Beach, FL
Facility ID No. 29490
BMP-20031024AAV

Dear Mr. King:

This letter is in reference to the above-captioned minor change application filed by James Crystal Enterprises II, LLC (JCE) to modify construction permit BP-19990521AI by changing the daytime pattern, and the February 14, 2005, amendment to change the nighttime pattern. We note that a request for waiver of 47 C.F.R Section 73.37(a) and Section 73.3571 with respect to daytime overlap to WACC, and an interference reduction agreement (IRA) with WABA were included in the application. We will not address the 73.37 waiver request due to the problems noted below.

Interference Reduction:

The Commission has undertaken significant initiatives to improve and revitalize the AM service.¹ One such initiative permits licensees to reach agreements to reduce power or cancel their licenses in order to permit other licensees to improve service, and to reduce overall interference.² In order to encourage such agreements, the Commission amended its rules to provide for the acceptance of contingent applications that would facilitate a reduction in overall AM interference.³ The amended contingent application rule, 47 C.F.R. § 73.3517, applies to both deletions and modifications of existing AM stations. In amending the rule to permit the filing of contingent applications that would "reduce interference to one or more AM stations or ...otherwise increase the area of interference-free service," the Commission removed regulatory

¹ *Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991), *recon. granted in part and denied in part*, 8 FCC Rcd 3250 (1993).

² *Policies to Encourage Interference Reduction Between AM Broadcast Stations*, 5 FCC Rcd 4492 (1990) ("Interference Reduction Proceeding").

³ *Id.* at 4493.

barriers that prevent or discourage individual AM stations from entering into private agreements that would ultimately decrease interstation interference and improve the quality of AM service.⁴

Contingent application arrangements that propose the deletion or modification of an AM station require a case-by-case public interest determination, and the parties must demonstrate that a sufficient "local service floor" will be maintained in the community losing a local transmission service. The Commission chose not to "establish a quantifiable service floor that can uniformly be applied with respect to the replacement of deleted facilities," opting instead for a case-by-case approach. However, the Commission did determine that, at a minimum, an agreement that resulted in the deletion of a station could not create a "white" or "gray" area.⁵

When undertaking the case-by-case analysis, we generally consider four factors: (1) the amount of AM interference that will be eliminated, in relation to the number of AM and FM services remaining available to areas that will lose service; (2) the areas and populations that will gain service as a result of the proposed change; (3) whether the proposal will create any white or gray areas; and (4) the availability of AM and FM service in the area that will experience a reduction in service due to the proposed contingent facility changes.⁶ We thus examine the IRA in light of these factors.

JCE argues that the WFTL proposal has been undertaken "in furtherance of and in compliance with" the Commission's policy to encourage interference reduction between AM broadcast stations."⁷ As discussed below, we disagree.

Reduction in Interference. The WFTL proposal will not reduce overall interference in the AM broadcast band. Rather, the WFTL proposed nighttime facility will cause interference to WABA, Aguadilla, Puerto Rico, by increasing the 25% RSS limit to WABA, in violation of Section 73.182 of the Commission's Rules.⁸ JCE indicates that the proposal will reduce the service to nearly 13,000 WABA listeners compared to WABA's licensed nighttime interference free contour coverage. JCE contends that (1) the impact on the WABA nighttime signal will be minimal; (2) much of the distance between the stations is over water; and (3) WABA has agreed to accept the new area of nighttime interference.

⁴ *Id.* at 4492.

⁵ *Id.* A "white" area is an area that does not receive interference-free primary service from an authorized AM station or does not receive a signal strength of at least 1 mV/m from an authorized FM service. See 47 C.F.R. § 73.14. A "gray" area receives one full-time service. See *Interference Reduction Proceeding*, 5 FCC Rcd at 4496, n. 14.

⁶ *Id.* at 4494.

⁷ Application No. BMP-20031204AAV, Amendment filed on February 14, 2005, "Statement re: Commission policy to Encourage Reduction Between AM Broadcast Stations" at 1.

⁸ The existing 25% limit of WABA (8.8 mV/m) is comprised of 4.4 mV/m from OAX4A, 4.3 mV/m from WEEL, 3.8 mV/m from WRUF, 3.3 mV/m from CX16, 2.97 mV/m from WRBZ, and 2.5 mV/m from WTAR. The proposal will increase the WABA limit to 10.4 mV/m. JCE may not use Region II (List B, C, D) stations YVLC, HJKC, TIOS, HRUP, YVMY, HIUA, Cuban station CMJB, or objected Mexican stations XETQ1 or XETQ as valid contributors to the WABA 25% RSS limit.

Increased Service. Grant of the subject proposal will result in a “significant increase” in the nighttime interference-free service provide to Palm Beach County, Florida, by WFTL.⁹ JCE asserts that WFTL will serve significant new populations and will cover more than 83% of Palm Beach County, whereas WFTL’s currently authorized NIF provides service to only 76.7% of the county. As stated above, grant of the proposal will reduce the NIF service for WABA by nearly 13,000 persons, from 196,544 to 183,605 persons.

Local Service Floor. JCE’s technical exhibit demonstrates that no new white or gray area will result from the modification of WFTL’s facilities. It demonstrates that the entire WABA loss area is served by 14 other aural services, including two stations licensed to Aguadilla. In addition, JCE states that WABA’s NIF contour will continue to encompass the entire city limits of Aguadilla.

We disagree with JCE’s contention that grant of the WFTL modification application is consistent with the Commission’s interference reduction policy. JCE’s proposal will not reduce overall interference in the AM band, but will in fact create new interference to WABA. WABA cannot arbitrarily decide to accept interference in violation of the Commission’s rules, and JCE may not justify its proposal by simply comparing WFTL’s gains in nighttime interference-free coverage area to the loss of service area to any other station.¹⁰ Accordingly, the Interference Reduction Arrangement proffered here is unacceptable.

Additional Technical Deficiencies:

1. The proposed 0.025 mV/m -10% skywave contour would overlap the 50 kW nighttime 0.5 mV/m – 50% skywave contour of co-channel Mexican stations XETQ and XETQ1, Orizaba, VC, in violation of the US/Mexican Agreement. It is noted that JCE may not use the licensed WFTL skywave contour to claim reduced licensed overlap to XETQ or XETQ1 because the licensed WFTL facility was never accepted by Mexican government.
2. The proposed 0.025 mV/m contour will overlap the protected 0.5 mV/m daytime groundwave contour of co-channel Cuban stations CMGB, Trinidad, and CMJB, Mayari Arrib. JCE may not use the licensed WFTL 5 kW daytime pattern contour as protected existing grandfathered overlap because that licensed pattern has been replaced by the January 2004 ITU acceptance of the daytime pattern specified in BP-19990521AI. As a result , the application must be amended to show no overlap to CMGB and CMJB. Otherwise, the application must be amended to specifically request the Audio Division to hold the application while the IB staff notifies the daytime proposal to the ITU.
3. The tower registration number for the seventh nighttime tower was not submitted.

⁹ JCE states that the existing WFTL operation provides NIF service to 891,990 persons, while the proposed NIF coverage includes 997,755 persons, a gain of 105,765 persons.

¹⁰ Pursuant to Section 73.3517(c), WABA could have filed a simultaneous minor change application to remove the interference that it receives from the WFTL proposal. Such proposals are envisioned by the Commission’s AM interference reduction policy.

Further action on the subject application will be withheld for a period of thirty days from the date of this letter to provide an opportunity to file a curative electronic amendment to resolve all problems. All questions regarding protection or use of foreign station records should be directed to George Fehlner at (202) 418- 2197. Failure to amend or respond with a formal request for additional time will result in the dismissal of the application pursuant to Section 73.3568 of the Commission's Rules.

Sincerely,



for Susan N. Crawford, Assistant Chief
Audio Division
Office of Broadcast License Policy
Media Bureau

cc: James W. Hillard, Vice President
Matthew Folkert