

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

15 JAN 1993

IN REPLY REFER TO:
1800B3-DEB/CJI

WYNY-FM, Inc.
1700 Broadway
New York, New York 10019

Group W Radio, Inc. (NY)
Suite 550
400 North Capitol Street NW
Washington, D.C. 20001

Shore Media, Inc.
Suite 12E
3 Sheridan Square
New York, New York 10014

In re: Station WBSI (FM)
Bay Shore, New York
Shore Media, Inc.
BMPH-910730ID

Gentlemen:

This letter is in reference to the above-captioned construction permit BMPH-910730ID for WBSI, granted November 26, 1991 to Shore Media, Inc. ("Shore Media"). This construction permit modified permit BPH-850712VE, which was granted by the Administrative Law Judge pursuant to a settlement agreement approved in the context of a comparative proceeding.¹ Warren Price

¹ Because the Bay Shore allotment had originally been allocated in 1970, the Commission permitted the applicants for this allotment to use the spacing criteria then in effect (i.e., the spacing requirements in effect prior to Docket 80-90). See FM Channel Assignment for Bay Shore, NY, 57 RR 2d 1275, 1278 n. 10, 50 Fed. Reg. 10768 (1985). Thus, any application for Bay Shore, NY was required to be spaced at least 40 miles (64.4 km) from second-adjacent channel Class B stations WYNY (then WAPP) and WNEW-FM (then WQHT). Because of the unavailability of alternative transmitter sites, virtually all the applicants for this vacant allotment sought use of the Fire Island Lighthouse, which was located 67.8 km and 66.1 km from stations WYNY and WNEW-FM, respectively, in compliance with the 64.4 km spacing requirement. However, because one applicant (later dismissed) had secured an exclusive lease for the Fire Island Lighthouse, thereby foreclosing other applicants from use of this location, a site availability issue was specified against the remaining applicants in this proceeding. Warren Price Communications, Inc., 5 FCC Rcd 2906, 2909 (1990). To address this issue, several applicants, including amended to specify different transmitter sites, including Susan Lundborg on August 10, 1989. (Susan Lundborg's application became that of Shore Media, Inc. in the merger and settlement approved by the Administrative Law Judge. Warren Price Communications, FCC 90M-3570.) Some specified the WLIX(AM) tower, requesting processing pursuant to 47 CFR § 73.215 to protect first-adjacent

Communications, Inc., MM Docket 87-246, FCC 90M-3570, released November 8, 1990, affirmed, 6 FCC Rcd 575 (Rev. Bd. 1991), review dismissed, 6 FCC Rcd 4424 (1991), recon. denied, 7 FCC Rcd 4344 (1992), further recon. dismissed, 7 FCC Rcd 6850 (1992), appeal docketed sub nom. Long Island Music Broadcasting Corp. v. FCC, No. 92-1615 (D.C. Cir. November 25, 1992).² Petitions for reconsideration against the grant of application BMPH-910730ID were filed on December 26, 1991 and January 3, 1992 by WYNY-FM, Inc. ("WYNY"), licensee of second-adjacent channel station WYNY, Lake Success, NY, and Group W Radio, Inc. (NY) ("Group W"), licensee of second-adjacent channel station WNEW-FM, New York, NY, respectively. The modification application, which is the subject of WYNY's and WNEW-FM's appeals, proposed to change WBSI's effective radiated power and antenna height above average terrain from 3.0 kW at 100 meters to 1.7 kW at 87 meters. The application proposed no change in antenna site and, thus, no change in spacing to WYNY or WNEW-FM.

In its petition, WYNY argues that WBSI's tower site is not fully spaced under 47 CFR § 73.207 (in its present form), nor does it meet the 69 km minimum spacing requirement of 47 CFR § 73.213(c) for stations which became short-spaced as a result of the revision of the Class A rules in Docket 88-375.³ Consequently, WYNY believes that the Commission erred in its grant of this application, stating that any site change must necessarily meet either the provisions of § 73.213(c) or provide contour protection pursuant to § 73.215, which is not the case according to WYNY's calculations. WYNY states that it will suffer "massive destructive interference" within its 54 dBu protected contour, affecting up to 6,127 persons residing in a 3.6 sq. km area. Group W, in its petition for reconsideration, further notes that with respect to its own station WNEW-FM, the site cannot meet even the 67 km minimum spacing

channel station WDRC-FM, Hartford, CT. These amendments were not required to meet the revised spacings of § 73.207, § 73.213(c), or § 73.215(e) with respect to WYNY-FM and WNEW, because the Commission's statement that the earlier established spacing requirements would apply to the the Bay Shore allotment [57 RR 2d at 1278, n. 10] applies to all applications and minor amendments filed in relation to Docket 87-246 for that allotment. Consequently, since the WLIX transmitter site is spaced 67.7 km from WYNY and 65.2 KM from WNEW-FM, it conforms to the applicable spacing rules with respect to these stations. Following grant of application (BPH-850712VE) as amended to specify use of the WLIX (AM) site, Warren Price, FCC 90M-3570, and in order to allay FAA concerns relating to electromagnetic interference, Shore Media filed application BMPH-910730ID to propose operation with a reduced effective radiated power (ERP) of 1.7 kW instead of 3.0 kW, utilizing a 6 bay antenna instead of a 10 bay antenna. Since this application was filed before permit BPH-850712VE could be issued with the parameters granted by the Administrative Law Judge in MM Docket 87-246, the staff processed and granted application BMPH-910730ID without issuing the superseded construction permit BPH-850712VE.

² If WBSI were to construct its authorized facilities during the pendency of the appeal, it would do so at its own risk that the appeal could ultimately be decided adversely to its interests.

³ See the Second Report and Order in Docket 88-375, 4 FCC Rcd 6375 (1989), recon. denied, 6 FCC Rcd 3417 (1991).

requirement of § 73.215(e), being only 65.2 km from WNEW-FM. Group W further asserts that while FM Channel Assignment for Bay Shore, NY, *supra*, permitted applicants for the Bay Shore allotment in 1985 to file pursuant to the pre-Docket 80-90 spacings, that determination applied only to the specific site addressed in that document (the Fire Island Lighthouse). Group W states that Shore Media is not entitled to forever use the pre-Docket 80-90 64.4 km spacing requirement to demonstrate "protection" to WNEW-FM and WYNY. Instead, any subsequent application must apply the new rules in effect as of the date of the filing of the amendment, according to Group W.

We deny the petitions for reconsideration. The WBSI modification application at issue does did not propose to change the transmitter site from that formerly authorized. Therefore, spacing changes are not at issue.⁴ The real focus of the petitions for reconsideration is petitioners' discontent with the grant of WBSI's original construction permit, BPH-850712VE. However, we do not reach this issue because the grant of that permit is final, subject of course to the pending court appeal cited above. Thus, the staff is without authority to revisit that matter.⁵

⁴ We note, however, that Group W is correct insofar as WBSI no longer retains the right to move closer to WYNY and WNEW-FM than is authorized at its present site. Pursuant to the Memorandum Opinion and Order in Docket 80-90, 97 FCC 2d 279, 287 (paragraph 19), 49 Fed. Reg. 10260 (1984), WBSI is grandfathered at its present site: any future transmitter site change application must be spaced at least 67.7 km from WYNY and 65.2 km from WNEW-FM, or comply with § 73.213(e). Moreover, we note that at this grandfathered site, WBSI may operate with maximum facilities of 3 kW ERP/100 meters HAAT toward WYNY and WNEW-FM, pursuant to § 73.213(c).

⁵ As petitions for reconsideration of the grant of BPH-850712VE, the pleadings are untimely. Pursuant to 47 CFR § 1.106(f), the petitions for reconsideration should have been filed within 30 days of the release of the November 8, 1990 Order granting that application. Instead, these pleadings were filed over two years after that date. The petitioners attempt to explain the tardiness by stating that the Commission did not release a public notice regarding the filing of amendments for Shore Media (then Susan Lundborg) and several other applicants to specify use of the WLIX (AM) tower. However, our review shows that the record is clear regarding the acceptance of these amendments. Specifically, in addition to the November 8, 1990 MO&O granting the settlement agreement (which acknowledges an amendment filed for "revised technical facilities"), the Commission released (and subsequently published) MO&Os dated May 10, 1990 (5 FCC Rcd 2906), February 22, 1991 (6 FCC Rcd 992); and 6 FCC Rcd 4424 (July 19, 1991) which directly refer to applicants' proposed use of the WLIX (AM) tower. In addition, the MO&O released October 24, 1990 refers to a "new site specified by several applicants". Consequently, sufficient information existed for Group W and WYNY to have known about the amendments to use the WLIX (AM) transmitter site. Neither petitioner appears to have explained convincingly its lack of diligence for not filing its pleading against BPH-850712VE until after the modification application had been granted on November 26, 1991. See 47 CFR § 1.106(b) (2) (ii).

Accordingly, the petitions for reconsideration filed by WYNY-FM, Inc. and Group W Radio, Inc. (NY) against the November 26, 1991 grant of modification application BMPH-910730ID ARE DENIED. This action is taken pursuant to 47 CFR § 0.283.

Sincerely,



Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Kaye, Scholer, Fierman, Hays & Handler
: Wilkes, Artis, Hedrick & Lane, Chartered
: Verner, Liipfert, Bernhard, McPherson & Hand, Chartered
: Moffit, Larson & Johnson, Inc.
: Carl T. Jones Corporation
: Cohen, Dipell & Everest