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Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY In reply refer to:
1800B3-AR

January 29, 1999

John Griffith Johnson, Jr., Esq.
Paul, Hastings, Janofsky & Walker, LLP
1299 Pennsylvania Avenue, NW
Tenth Floor
Washington, D.C. 20004

Re: WZNY(FM), Augusta, Georgia
File No. BALH-970917EG

Dear Mr. Johnson:

This letter concerns the above-referenced application to assign the license of WZNY (FM), Augusta, Georgia, from Richard L. Rhoden, Executor, to Cumulus Licensing Corp. ("Cumulus"). On May 8, 1998, the staff issued a letter decision ("Letter Decision") dismissing the application as unacceptable for filing.¹ Cumulus then filed an application for review of the Letter Decision, which was opposed by GHB. On December 8, 1998, Cumulus filed a Motion to Remand, seeking to dismiss the application for review, vacate the Letter Decision, and reinstate the assignment application. GHB also opposed this Motion, to which Cumulus submitted a reply. Thereafter, GHB filed a Motion for Leave to Respond to Reply, and a response to the reply. For the reasons set forth below, we dismiss the application for review as moot and return the assignment application to pending status.

Background. The assignment application was accepted for filing on September 17, 1997. If the application is granted and the transaction consummated, Cumulus would hold attributable interests in 5 FM stations and 2 AM stations in the Augusta market. As required by our rules, Cumulus submitted a showing that purported to demonstrate that there are 45 commercial stations in the market. GHB filed a petition to deny, contending that the Cumulus study erroneously included two silent stations and a non-commercial station in the market count. In response, Cumulus submitted a supplemental station contour showing using the Longley Rice Technical Note 101 ("Tech Note 101") method. Relying on this showing, Cumulus claimed that three other stations, not previously included in its initial exhibit, should be counted as part of the relevant market. GHB countered that the use of Tech Note 101 to establish compliance with the local radio ownership limits of Section 73.3555 was not appropriate. The Staff agreed, stating that the selective use of Tech Note 101 in this context would "invite protracted disputes where

¹ See Letter to Dennis F. Begley, Esq., Ref. No. 1800B3-BSH.

contradictory results could occur depending on which FM station contours opposing parties predicted with Tech Note 101 calculations.” The assignment application was then dismissed as inadvertently accepted for filing because Cumulus failed to demonstrate compliance with Section 73.3555(a)(1)(i) of our rules. 47 C.F.R. § 73.3555(a)(1)(i).

On June 8, 1998, Cumulus filed a timely application for review of the staff’s rejection of its Tech Note 101 showing. Cumulus, however, now claims the issue before the Commission has been rendered moot. As a result of modifications by two facilities in the Augusta market, Cumulus states that there are now 45 stations in the relevant market using the Commission’s standard calculation methods. Consequently, Cumulus claims it is no longer necessary to address its Tech Note 101 arguments and asks the Commission to dismiss the application for review and return the assignment application for processing.²

GHB opposes this Motion. It claims is an untimely petition for reconsideration based on newly proffered facts. Second, GHB, citing *NewCity Communications of Massachusetts, Inc.*, 10 FCC Rcd 4985, 4986 (1995) (subsequent history omitted), contends that the Motion should be denied based on the Commission’s policy of disregarding modifications designed solely to avoid multiple ownership problems. GHB claims that these modifications result in loss of service, and therefore, that it is particularly appropriate for the Commission not to take these changes into account in connection with Cumulus’ local radio ownership study. *Id.* In its reply, Cumulus states the Motion does not seek to present the Commission with additional evidence but advises that a change in circumstances renders the application for review moot. Cumulus also states that it acted promptly to alert the Commission to these changed circumstances. In addition, Cumulus submitted an engineering statement demonstrating, contrary to GHB’s claim, that the facilities modifications resulted in significant population coverage gains. GHB’s response to the Reply distinguishes its data by stating it calculated loss of service, while Cumulus calculated net change in population served. GHB asserts that it is the withdrawal of existing service that is contrary to the public interest.

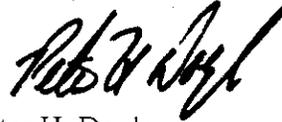
Discussion. Contrary to GHB’s assertion, we do not find that Cumulus’ Motion is an untimely petition for reconsideration. In form and substance, Cumulus seeks a remand, not reconsideration of the Letter Decision. The Motion is based on new facts and not whether the Commission should accept its Tech Note 101 showing. Such a Motion is plainly contemplated by the rules. *See* 47 C.F.R. § 1.41. Cumulus argues it complies with Section 73.3555 based on new facts and a different legal theory. Thus, it may be the case that the Commission need not reach the issues addressed in the application for review to dispose of the assignment application.³ In order to permit the staff to determine in the first instance whether the application now complies with local radio ownership limits, *see* 47 C.F.R. § 1.115(c), the Bureau dismisses the application for

² On December 8, 1998, Cumulus amended the assignment application to include a revised engineering statement and multiple ownership analysis.

review. Section 1.113 of the Commission's rules authorizes the Bureau to modify or set aside on its own motion, any action taken pursuant to delegated authority within 30 days after public notice of such action. 47 C.F.R. § 1.113. However, the filing of an application for review tolls the 30 day time period under this section. *Com/Nav Marine, Inc.*, 2 FCC 2d 2144, 2145 (Private Radio Bureau, 1987). *See also Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1997), *cert. denied*, 460 U.S. 1084 (1983) (filing of a petition for reconsideration tolls the running of the 30 day period). Cumulus filed a timely application for review. Therefore, the staff will exercise its authority under Section 1.113 to set aside the dismissal of the assignment application and return it to pending status *nunc pro tunc*.⁴

Conclusion. Accordingly, IT IS ORDERED, that the Motion to Remand filed by Cumulus Licensing Corp. on December 8, 1998, is GRANTED. It is FURTHER ORDERED, That the Application for Review filed by Cumulus Licensing Corp. on June 8, 1998, IS DISMISSED, the May 8, 1998, Letter Decision IS VACATED, and the assignment application, File No. BALH-970917EG, as amended, IS REINSTATED.

Sincerely,



Peter H. Doyle
Deputy Chief, Audio Services Division
Mass Media Bureau

cc: Dennis F. Begley, Esq.
Edward W. Hummers, Jr., Esq.

⁴ Anticipating this possibility, GHB has filed a contingent informal objection alleging claims relating to Cumulus' competitive advantage in the market if the assignment application is granted. The staff will now review these claims. In addition, we grant GHB's Motion for Leave to Respond to Reply. However, the proper context for addressing GHB's claims concerning Cumulus' amended multiple ownership showing is in the staff's review of the assignment application.