

APPENDIX

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 16-1290

[Filed November 21, 2017]

PRESS COMMUNICATIONS LLC,	)
APPELLANT	)
	)
V.	)
	)
FEDERAL COMMUNICATIONS COMMISSION,	)
APPELLEE	)
	)
ATLANTIC CITY BOARD OF EDUCATION,	)
INTERVENOR	)

Argued September 20, 2017
Decided November 21, 2017

On Appeal from an Order of the
Federal Communications Commission

Harry F. Cole argued the cause for appellant. With him on the briefs were *Anne Goodwin Crump* and *Ashley Ludlow*.

Thaila K. Sundaresan, Counsel, Federal Communications Commission, argued the cause for appellee. With her on the brief were *Howard J. Symons*, General Counsel at the time the brief was

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filed, *Jacob M. Lewis*, Associate General Counsel, and *Richard K. Welch*, Deputy Associate General Counsel.

Matthew T. Murchison argued the cause for intervenor. With him on the brief were *James H. Barker*, *Matthew J. Glover*, and *Alexander L. Stout*.

Before: PILLARD and WILKINS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, Circuit Judge: Press Communications (Press) runs a radio station broadcasting from a small town on the Atlantic Coast in New Jersey. Press would like to move the station to different premises further inland—a move that for technological and regulatory reasons would require it also to shift to a new channel on the radio dial. Press accordingly submitted an application to the Federal Communications Commission (FCC or Commission) for a license modification to permit its channel transfer. Specifically, Press asked the FCC to accommodate its move by authorizing Press to swap stations with Equity Communications (Equity). The proposed swap would assign Press's WBHX (FM) the channel Equity's WZBZ (FM) now occupies, and move Equity's station to Press's current channel. The FCC dismissed Press's application because bumping Equity to Press's channel would violate FCC channel spacing rules, putting Equity's station too close to the Atlantic City Board of Education's student run station WAJM(FM) and to Delaware station WJBR (FM). The Commission disagreed with Press's view that, because Press filed its application after the lapse and before the untimely

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renewal of the Board of Education's license, the short spacing problem was irrelevant. Press now asks us to set aside as arbitrary and capricious and inconsistent with the Communications Act of 1934 (Act) the FCC's *Memorandum Opinion & Order* denying its application for review of the FCC Media Bureau's decision. Because we conclude that the FCC acted reasonably and complied with the Act, we affirm the FCC's *Order*.

I. BACKGROUND

A. LEGAL FRAMEWORK

Title III of the Act regulates American broadcast radio. 47 U.S.C. § 301 *et seq.* The Act confers on the United States control “over all the channels of radio transmission,” *id.* § 301, charges the FCC with implementing a licensing scheme pursuant to the Act, *id.* § 303, and sets “public convenience, interest, or necessity” as the Commission’s guiding principles, *id.* Operation of a broadcast radio station requires a license from the FCC, *id.* §§ 301, 307(a)-(d), and a station must apply to the FCC for permission to modify its license, *see* 47 C.F.R. § 73.3573. The FCC may dismiss an application that does not comply with FCC rules. *Id.* § 73.3566. The FCC’s rules cover a lot of regulatory terrain, from the construction of radio towers to the conditions of broadcast operation. *See generally* 47 C.F.R. subpts. B & H. Those rules spell out the conditions for modifying a station’s operation, whether by “major change” such as new ownership, or “minor change” such as change to an adjacent channel. *See id.* § 73.3573. As FCC regulations explain, an application that does not comply with FCC “rules, regulations or other requirements,” “unless accompanied by an appropriate request for waiver, will

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be considered defective and will not be accepted for filing.” *Id.* § 73.3566.

The rule at the heart of this case is Section 73.207 of the Commission’s regulations, which establishes minimum separation requirements for FM radio stations. *Id.* § 73.207. Each radio station has a home on the ground (its transmitter), and on the dial (its frequency). When two stations are not far enough apart both on the ground and on the dial, their signals are likely to interfere with one another, disrupting their broadcasts. The spacing requirements laid out in Section 73.207 are designed to prevent that unwanted interference. The distance the FCC requires between station transmitters on the ground corresponds inversely to the distance between their frequencies on the dial. For example, for our purposes, the transmitters of “first-adjacent” channels, such as 99.3 and 99.5 or 100.7 and 100.9, must be at least 113 kilometers apart; transmitters for “second-adjacent” channels, such as 99.3 and 99.7 or 100.7 and 101.1, must have at least 69 kilometers between them. *Id.* § 73.207(b)(1) (Table A). As a general matter, an application that fails to meet these spacing requirements, both on the ground and between frequencies, is said to create short spacing and is therefore defective. *Id.* § 73.207(a).

Section 73.213 exempts the preexisting locations of “grandfathered” short spaced stations from compliance with the spacing rules of Section 73.207. *See id.* § 73.213. When the FCC adopted its minimum spacing requirements, it excused stations at already-authorized locations from complying with the new spacing criteria; as Section 73.213 explains, stations operating at

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locations authorized prior to 1964 or 1989 are thereby “grandfathered.” *See id.* § 73.213(a), (b). Grandfathered short spaced stations “may be modified or relocated” under Section 73.213, *id.*, but any application for minor modification such as a change in channel “must” satisfy “the minimum spacing requirements of § 73.207” at the proposed new site “without resort” to the grandfathering provision, *id.* § 73.203 Note.

The FCC’s regulations also spell out licensing procedures. The Act provides that no station may broadcast without a federal license. 47 U.S.C. § 301. Once granted, “no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.” *Id.* A license term is “not to exceed 8 years,” *id.* § 307(c)(1), and may be renewed, *id.* §§ 307(c)(1), 309(k)(1). According to Section 73.3539 of the Commission’s regulations, applicants must submit broadcast license renewal applications to the FCC at least four months before the expiration of their current license terms. 47 C.F.R. § 73.3539. In addition to processing license renewals, the FCC also handles license modifications. The FCC follows a “first come/first serve” processing sequence for license modification applications. *Id.* § 73.3573(f)(1). Under this cut-off rule, “the first acceptable application cut[s] off the filing rights of subsequent applicants” that would be mutually exclusive because, for example, they would use the same frequency or be so close as to create interference. *Id.*

B. FACTUAL BACKGROUND

On August 27, 2010, Press submitted a minor modification application to the FCC. At the time it applied, Press operated radio station WBHX from a

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facility it leased on a monthly basis in Beach Haven, Ocean County, New Jersey. Press sought to move the transmitter for WBHX to a new location that would be less prone to natural disaster and where it might find a longer term lease. Because moving its transmitter to a new location would make WBHX short spaced to nearby radio stations, Press proposed that the FCC effectuate an involuntary channel swap with the frequency now used by Equity's station, WZBZ. Under Press's proposal, Equity would keep its transmitters in their current location, but would switch frequencies with Press; that is, Equity would move on the radio dial from 99.3 to 99.7, while Press would move from 99.7 to 99.3. Broadcasting from 99.3, Press could move its physical transmitters inland without short spacing itself to stations adjacent to 99.7.

In response to Press's application, the FCC's Media Bureau sent a deficiency letter notifying Press that its application involved two impermissible short spacings. The letter first explained that the proposed swap would leave Equity's station, WZBZ, short spaced to Atlantic City Board of Education station WAJM, located at 88.9 on the dial. Press had acknowledged in its application that, were the swap to take place, Equity's station would "theoretically" be short spaced to the Board of Education's station, but argued the concern was "moot" because the Board of Education had failed to renew its broadcast license. J.A. 57. The Board of Education's license had expired in June 2006, and it did not submit a renewal application to the FCC until three weeks after Press submitted its minor modification application. Even though the Board of Education's license had expired, the Media Bureau recognized WAJM as an operational station (albeit broadcasting

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unlawfully) and disagreed with Press's contention that the minimum distance requirement between WZBZ and WAJM was "moot" or otherwise immaterial.

Second, the new dial position Press proposed for Equity's WZBZ—i.e. the position Press now holds—would, if occupied by Equity, make the station short spaced to Delaware station WJBR 99.5. Equity's current dial position is also short spaced to WJBR, but enjoys grandfather status there. The move from 99.3 to 99.7 would not change the distance between Equity and WJBR on the dial: At either location, Equity would be .2 MHz away from Delaware station WJBR 99.5. Nor would the physical distance between the two stations change: The tower locations and hence ground distance between the two stations would remain the same. The move, therefore, would not exacerbate Equity's existing short spacing. But the Media Bureau wrote that the conventional spacing rules of Section 73.207 applied to Equity's move, and Equity would not meet those minimum spacing requirements with respect to WJBR at its new location; that short spacing, the Commission ruled, "constitute[d] an acceptance defect." J.A. 261. The Bureau noted that Press had "failed to cite any precedent for proposing an *involuntary* channel substitution to a grandfathered short-spaced station." J.A. 261 n.3. It therefore deemed the WZBZ-WJBR short spacing a defect in Press's application.

The Media Bureau gave Press thirty days to cure those two defects, and warned Press that failure to do so would result in a dismissal of its application. Press responded by insisting that its initial application was not defective because it "would not result in any unacceptable channel separations." J.A. 276. It neither

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cured the defect nor sought a waiver, but urged the Bureau to accept its application as-is.

In an Order also granting the Board of Education's renewal application, the FCC's Media Bureau formally dismissed Press's minor modification application. *In re Applications of Atl. City Bd. of Educ. & Press Commc'ns, LLC*, 30 FCC Rcd. 10,583 (Media Bureau 2015) (*Bureau Order*). The Bureau determined that the two short spacings rendered the application defective. Because Press declined to remedy the defects or to seek a waiver of the spacing rules, the Bureau dismissed its application. *Id.* at 10,585-87. Press then submitted to the full Commission an application for review of the Media Bureau decision. The Commission denied the application. *In re Atl. City Bd. of Educ. & Press Commc'ns, LLC*, 31 FCC Rcd. 9380 (2016) (*FCC Order*). This appeal followed.

II. DISCUSSION

Press advances two arguments for reversal of the FCC's decision to dismiss its modification application. It asserts first that the transfer of a grandfathered short spaced station is permitted under the FCC's grandfathering rule, 47 C.F.R. § 73.213, making arbitrary and capricious the agency's enforcement of its conventional spacing rules against a short spacing between Equity's WZBZ and Delaware station WJBR. Second, Press contends that the agency's decision to accept the Board of Education's late-filed application to renew the license for WAJM is contrary to the Communications Act and constitutes an arbitrary and capricious waiver of the agency's deadline and cut-off rules.

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Press must prevail on both arguments in order for us to set aside the *FCC Order*. If either of those arguments fails—that is, if the FCC acted reasonably in rejecting the application on the basis of either the WZBZ-WBJR short spacing or the WZBZ-WAJM short spacing—we must uphold the agency’s decision to dismiss Press’s application.

A. GRANDFATHERED SHORT SPACING: WZBZ-WJBR

We review the FCC’s decision only to determine whether it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Our review is “very deferential,” *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). “Normally, an agency [decision] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As we consider the FCC’s explanation for its decision, we recognize the FCC’s interpretation of its own regulations “control[s] unless plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotations omitted).

We first consider whether the Commission permissibly dismissed Press’s application to move Equity’s station without Equity’s consent from its current location, where it is short spaced but grandfathered under the Commission’s rules, to an

alternative short spaced location. The FCC contends that any change in channel must meet the spacing requirements. Press would therefore at least need to establish that its proposed move yields adequate channel spacing or, alternatively, obtain a waiver of the spacing rule. Press does not dispute that its proposed move would leave Equity short spaced to Delaware station WJBR, and it did not ask the Commission to waive its spacing rules. It also failed to point to any precedent for an involuntary transfer of a third party's station to a short spaced location in the absence of a waiver. Press instead rests on its assertion that grandfathered stations simply are not subject to the conventional spacing rules. We conclude otherwise.

The FCC rationally applied its spacing rules, consistent with its past practice, when it dismissed Press's application. Press focuses on Section 73.213(b) of the Commission's rules, which provides that "[s]tations at locations authorized prior to May 17, 1989, that did not meet the . . . separation distances required by § 73.207 and have remained short-spaced since that time"—such as Equity's station WZBZ—"may be modified or relocated." 47 C.F.R. § 73.213(b). But the regulation does not require the Commission to grant a modification application that imposes involuntary relocation on a third party, nor does it grandfather that third party's short spacing in the absence of a request to waive the short spacing prohibition. Our inquiry, then, cannot end with Section 73.213(b).

A grandfathered station qualifies for a change in channel, says the FCC, only if it meets standard spacing requirements at its new location. Press's

argument to the contrary ignores a crucial provision of the regulatory scheme: Applications for a change in channel—like the one Press seeks for itself and Equity’s station WZBZ—must satisfy “the minimum spacing requirements of § 73.207 at the site specified in the application, *without resort* to the provisions of the Commission’s rules permitting [grandfathered] short spaced stations as set forth in [§] 73.213.” 47 C.F.R. § 73.203 Note (emphasis added). Even without any deference to the Commission, we find it plain that the Note to Section 73.203 means that a short spaced station grandfathered under the rule is not necessarily permitted to rely on its prior grandfathering when it transfers channels. In any event, under *Auer v. Robbins*, the FCC’s interpretation of Section 73.203 is “controlling” because it is neither “plainly erroneous” nor “inconsistent with the regulation.” 519 U.S. at 461. Press’s application to swap Equity into a new short spaced channel position was therefore “not in accordance with the FCC rules,” and defective “unless accompanied by an appropriate request for waiver.” 47 C.F.R. § 73.3566(a).

At argument, counsel for Press suggested that we could not rely on the Note to Section 73.203 without running afoul of the *Chenery* principle that a reviewing court may only affirm an agency’s action on the grounds the agency articulated. *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943). We have explained that “the contested decision need not be a model of clarity. As long as ‘the agency’s path may reasonably be discerned,’ we will uphold the decision even if it is ‘of less than ideal clarity.’” *Casino Airlines, Inc. v. Nat’l Transp. Safety Bd.*, 439 F.3d 715, 717 (D.C. Cir. 2006) (quoting *Bowman Transp., Inc. v. Ark-Best Freight*

Sys., Inc., 419 U.S. 281, 286 (1974)). The FCC’s discussion of the WZBZ-WJBR short spacing is admittedly sparse, but the *Bureau Order* invokes the principle that involuntary channel changes for grandfathered stations must meet the FCC’s minimum spacing requirements. The agency need not have cited the Section 73.203 Note by name, so long as it made clear that Equity was subject to the spacing rules of Section 73.207. *Bureau Order*, 30 FCC Rcd. at 10,586. We can reasonably discern the Bureau’s path in its decision enforcing the spacing requirements. Our consideration of the FCC’s citation of the Note in support of an already-familiar argument is therefore consistent with *Chenery*. In *Chiquita Brands International, Inc. v. SEC*, for example, we found “no violation of the *Chenery* principle” where the SEC’s reasoning was initially “articulated only briefly and in a somewhat conclusory fashion” and the agency in this court invoked reasoning “not specifically discussed in the order under review.” 805 F.3d 289, 299 (D.C. Cir. 2015).

The FCC’s enforcement of its spacing rules was also consistent with its past practice. Press sought an unprecedented license modification from the Commission. It asked to move Equity involuntarily to a new short spaced location. As Press conceded at oral argument, it could identify no prior case in which the Commission granted an application to move a third party’s grandfathered station to a different short spaced location without its consent. The FCC emphasized in its Staff Letter and the *Bureau Order* that there is no precedent for “*involuntarily* changing one station’s short-spaced channel to another short-spaced channel.” *Bureau Order*, 30 FCC Rcd. at 10,586;

see also J.A. 261 n.3. Regardless of a station's grandfathered status, the FCC may force an involuntary transfer only if, "in the judgment of the Commission," doing so would "promote the public interest, convenience, and necessity." 47 U.S.C. § 316(a)(1). The statute leaves to the Commission's discretion whether a transfer benefits the public, and Press has failed to identify any way in which the Commission exercised that discretion arbitrarily here.

Press rests instead on precedent approving voluntary moves by grandfathered stations. Even if Equity had joined with Press to apply for a voluntary station swap, however, the FCC's precedent would not compel the agency to disregard its spacing rules. Rather, the FCC would merely be authorized to do so if, in its judgment, waiving the short spacing prohibition were shown to be in the public interest. In *In re Eatonton*, the Commission laid out the framework under which it is "appropriate to consider waiving strict application of Section 73.207." *In re Eatonton and Sandy Springs, Ga., and Anniston and Lineville, Ala.*, 6 FCC Rcd. 6580, 6583 (Media Bureau 1991) (*Eatonton*). Waiver may be proper if: (1) no new short spacings are created; (2) no existing short spacings are exacerbated by bringing the relevant stations closer together; and (3) the potential for interference does not increase. See *id.* The Commission has applied that waiver framework to applications seeking voluntary transfers of grandfathered stations to alternative short spaced locations. See *In re Newnan and Peachtree City, Ga.*, 7 FCC Rcd. 6307, 6308 (1992). While a grandfathered station may change channels, then, it may only do so pursuant to an FCC waiver of Section 73.207's requirements.

Press responds that its application did not create “any unacceptable channel separations,” J.A. 276, so Press “did not propose a waiver [because] no waiver request was necessary,” Appellant’s Br. 39—an assertion we have already rejected. To the extent Press argues it did in fact seek a waiver by eventually claiming that its request met the *Eatonton* framework, that belated contention does not render the Commission’s decision arbitrary and capricious. *Eatonton* creates no entitlement to a waiver even where the specified circumstances are present, but merely sets out factors under which the Commission will “consider” waiver. The decision explains that “waivers of our spacing rules will not be granted absent a showing of compelling need,” *Eatonton*, 6 FCC Rcd. at 6584, and, indeed, the Bureau declined to waive the spacing requirements in *Eatonton* itself, where the proposed channel transfer would have actually reduced existing short spacing. *Id.*

Press has also argued that *Eatonton* does not impose an affirmative burden on applicants to seek spacing waivers; in other words, Press suggests the Commission should have conducted an *Eatonton*-style waiver analysis as a matter of course. Press cites rulemakings in which the Bureau applied the three-factor test without specifying that it did so in response to a party’s waiver request. Even where the *Eatonton* requirements may be met, however, the agency still makes case-by-case public-interest determinations, *see id.*, and no party is entitled to waiver of the minimum spacing criteria as a matter of right.

Waivers of the spacing requirements are but one avenue by which the FCC may further the public’s

“interest, convenience and necessity”; the *Eatonton* factors are a subset of the agency’s more general public interest consideration. *See id.* at 6580, 6584. When the Bureau offered Press an opportunity to supplement its initial application—which did not so much as allude to waiver—Press eventually asserted that “*all*” of the *Eatonton* “factors are present here” and claimed its application would further the public interest. J.A. 275-78. The Media Bureau, however, remained unpersuaded. Press discussed the anticipated spacing effects of its proposed swap, but offered no support for its contention that the swap would not increase interference. It also did not convince the FCC that the order approving the swap, which Equity opposed, would nonetheless be in the interests of the public. Equity, meanwhile, told the Commission that “there was a good policy reason” that Press’s proposed involuntary swap was unprecedented: Not all short spaced allotments are created equal. “Equity should not be forced to accept an alternate short-spaced allotment that may prove to be operationally deficient to that of its existing allotment merely to facilitate a change by another station.” J.A. 104. With Press’s and Equity’s arguments before it, the Commission determined there was no “compelling need,” *Eatonton*, 6 FCC Rcd. at 6584, or public interest sufficient to merit departure from its spacing rules. That decision, based on the objectives the Communications Act sets for the agency and FCC precedent seeking to serve those objectives, was not arbitrary or capricious.

In short, FCC regulations, decisions, and practice support the Commission’s contention that applications for minor modifications are subject to the spacing requirements articulated in Section 73.207. Any

nonconforming application requires a waiver of that rule, and Press failed to justify such waiver. The Commission reasonably rejected its application as defective. We accordingly deny Press's challenge to the FCC's *Order*.

B. LICENSE RENEWAL: WZBZ-WAJM

The *Bureau Order* also relied on a separate ground: The channel swap Press proposed in its application would create a conflict with WAJM, a station run by the Atlantic City Board of Education. Press argues that because WAJM had not filed for renewal of its expired license at the time of Press's mutually exclusive application, the FCC was required to give Press the benefit of the cut-off rule and deny WAJM's subsequent, late-filed renewal application.

Because the short spacing defect between WZBZ and WJBR is independently sufficient to support the FCC's *Order*, we do not reach Press's alternative argument. Press's assertion of cut-off rights vis-à-vis the Board of Education's station also is of limited prospective importance because the Media Bureau has adopted a new policy for processing license renewal applications that makes lapses like the Board of Education's less likely to recur. *FCC Order*, 31 FCC Rcd. at 9384 n.30. Under its new policy, the Bureau monitors licenses due to expire and issues "a notice of apparent liability if the renewal has not been filed within 30 days of the original due date." *Id.* A licensee in receipt of such a notice faces apparent liability that presumably will prompt it to file a renewal application before its license expires.

* * *

We uphold the FCC's *Order* as valid based on the failure of Press's proposed channel swap with Equity to comply with the applicable short spacing bar or establish its entitlement to a waiver of that bar. Because that defect suffices to support the *Order*, we do not reach Press's challenge to the FCC's license-renewal practices, which have in any event been superseded by the new policy.

So ordered.

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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 16-1290

[Filed November 21, 2017]

PRESS COMMUNICATIONS LLC,	)
APPELLANT	)
	)
V.	)
	)
FEDERAL COMMUNICATIONS COMMISSION,	)
APPELLEE	)
	)
ATLANTIC CITY BOARD OF EDUCATION,	)
INTERVENOR	)

September Term, 2017

FILED ON: NOVEMBER 21, 2017

On Appeal from an Order of the
Federal Communications Commission

Before: PILLARD and WILKINS, *Circuit Judges*, and
SILBERMAN, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from an order of the Federal Communications Commission and was argued by counsel. On consideration thereof, it is

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ORDERED and **ADJUDGED** that the order of the FCC appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken Meadows

Deputy Clerk

Date: November 21, 2017

Opinion for the court filed by Circuit Judge Pillard.

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APPENDIX B

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

FCC 16-104

NAL/Acct. No. MB201541410031

FRN: 0020207858

Facility ID No. 3123

**File Nos. BRED-20100921AAN, BRED-
20140128ABC and BPED-20120215AAW**

Facility ID No. 56233

File No. BPH-20100827ABW

[Filed August 9, 2016]

In the Matter of	)
	)
Atlantic City Board of Education	)
	)
Applications for Renewal of License and For	)
Minor Modification of Licensed Facilities of	)
WAJM(FM), Atlantic City, New Jersey	)
	)
and	)
	)
Press Communications, LLC	)
	)
Application for Minor Modification of Licensed	)
Facilities of WBHX(FM), Tuckerton, New Jersey	)

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 2016

Released: August 9, 2016

By the Commission: Commissioner Clyburn dissenting;
Commissioner O’Rielly concurring and issuing a
statement.

I. INTRODUCTION

1. The Commission has before it the Application for Review (AFR) filed by Press Communications, LLC (Press) on November 9, 2015.¹ Press seeks review of a Media Bureau (Bureau) decision that (a) approved a Consent Decree providing for the short-term renewal of the license of WAJM(FM), Atlantic City, New Jersey (Station), which is licensed to the Board, (b) denied a Press Petition to Deny (Petition) WAJM’s 2010 license renewal application (2010 Application), (c) approved a minor modification of the license of that Station, and (d) dismissed Press’s conflicting application (Press Application) for minor modification of the license of WBHX(FM), Tuckerton, New Jersey, which was

¹ We also have before us a Joint Opposition to Application for Review (Joint Opposition) filed by the Atlantic City Board of Education (Board) and Equity Communications LP (Equity) on November 24, 2015, a Reply to Joint Opposition to Application for Review (Reply) filed by Press on December 9, 2015, and a Statement for the Record filed by Press on February 1, 2016. Equity, the licensee of WZBZ(FM), Pleasantville, New Jersey, is involved in this proceeding because Press proposed an involuntary channel substitution for WZBZ in connection with Press’s proposed change in facilities for its station. That channel substitution would result in short-spacing between WAJM and WZBZ. *See* FCC File No. BPH-20100827ABW at Exh. 30.

premised on Press's argument that WAJM's license had expired on June 1, 2006 and was accordingly not entitled to spacing protection from the Press modification proposal.² For the reasons stated below, we deny the AFR. Press's contention that a broadcast licensee's failure to timely file a license renewal application mandates the loss of its license if another licensee discovers its omission and files a conflicting application is contrary to the Communications Act of 1934, as amended (Act), the Commission's rules (Rules), pertinent precedent and the public interest.

II. BACKGROUND

2. *License Renewal Issue.* Under Section 73.3539 of the Rules (Application Deadline Rule), the Board was required to file a license renewal application for WAJM on or before February 1, 2006, which was four months prior to the license term's expiration on June 1, 2006.³ Although the Board continued to operate the Station, it did not file a license renewal application until it filed the 2010 Application on September 21, 2010. The Board's filing of the 2010 Application appears to have been precipitated by the Press Application, filed on August 27, 2010, wherein Press argued that a "theoretical" short-spacing of facilities proposed in the Press Application for Equity's WZBZ (on a new channel) *vis-a-vis* the Station was moot because no

² *Atlantic City Bd. Of Educ.*, Order and Consent Decree, 30 FCC Rcd 10583 (MB 2015) (*Order*). Any citations herein to the Consent Decree attached to the *Order* will refer to the Consent Decree rather than the *Order*.

³ See 47 CFR § 73.3539(a).

license renewal application had been filed for WAJM and therefore the Station license expired on June 1, 2006.⁴ Press repeated this argument in its Petition to Deny the 2010 Application.⁵

3. Simultaneously with its filing of the 2010 Application, the Board filed a request for special temporary authority (STA) to continue to operate the Station.⁶ The Bureau granted that STA request on September 29, 2010 and WAJM continued to operate pending action on the 2010 Application.⁷

4. In the *Order*, the Bureau rejected Press's argument that the WAJM license expired on June 1, 2006, at the end of the station's eight-year license term, pursuant to Section 307(c)(1) of the Act, and that the Press Application filed after that date merited cut-off protection from the subsequent, late-filed 2010 Application pursuant to Section 73.3573(f) of the Rules. The Bureau held that relevant Commission precedent

⁴ See Press Application, Exh. 30.

⁵ Petition to Deny at 3 (filed Dec. 22, 2010).

⁶ See FCC File No. BLSTA-20100921AAP, Ex. 38 (Board requesting "temporary relief" from 47 CFR § 73.3539 until the 2010 Application was granted). Upon expiration of that STA, the Board timely sought an extension of the STA. See FCC File No. BELSTA-20110317ACS), Att. 39.

⁷ See Consent Decree, 30 FCC Rcd at 10589 n.30. The Board subsequently filed a timely license renewal application in 2014 to be processed with the 2010 Application. See FCC File No. BRED-20140128ABC.

supported the processing of the 2010 Application and the dismissal of the Press Application.⁸

5. *Spacing Waiver Issue.* The Bureau's *Order* also found that the Press Application was properly dismissed due to Press's failure to seek or justify a waiver of the proposed short-spacing between WJBR-FM, Wilmington, Delaware (on Channel 258A) and Equity's station, WZBZ(FM), Pleasantville, New Jersey, which the Press Application proposes to involuntarily modify from Channel 257A to Channel 259A. Press argued that the proposed short-spacing is identical to the existing grandfathered short-spacing between the stations, and that the proposed involuntary channel change for WZBZ would simply substitute one channel that is first-adjacent to WJBR-FM's channel to another first-adjacent channel, without any change in the location, power or antenna height of Equity's station. Under these circumstances, Press argued that no waiver of the spacing rules *vis-à-vis* WJBR-FM was necessary to process its application.⁹ The Bureau rejected this argument, finding that Press had failed to request a waiver of the applicable Rule, Section 73.213(c), or to show that, absent such a waiver, grant of the Press Application

⁸ *Order*, 30 FCC Rcd at 10585-86, para. 6 (citing *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 7433, 7437-38, paras. 13-14 (2004) (*Discussion Radio*), and *Superior Commc'ns*, Letter, 22 FCC Rcd 16634, 16635-36 (MB 2007) (*Superior*)).

⁹ See Press's Response to June 20, 2014 Letter (Jul. 18, 2014), Letter from Kevin C. Boyle and David D. Burns, Latham & Watkins LLP, to Marlene H. Dortch, Secretary, FCC (filed Aug. 11, 2014), and Press's Reply (Aug. 21, 2014).

would have been consistent with any precedent interpreting or waiving that Rule.¹⁰

III. DISCUSSION

6. Press argues that the Order is inconsistent with Section 307 of the Act. Specifically, Press argues that Section 307(c)(1) provides that “[e]ach license granted for the operation of a broadcasting station shall be for a term not to exceed 8 years.”¹¹ Press argues that, in light of this limitation, the Commission “must give effect to the unambiguously expressed intent of Congress”¹² and hold that WAJM had no license or “licensed facilities” when Press filed the Press Application on August 27, 2010.¹³ In particular, Press notes that the *Order* and Consent Decree clearly hold that WAJM’s operation after June 1, 2006 was

¹⁰ *Order*, 30 FCC Rcd at 10586, paras. 7-8.

¹¹ 47 U.S.C. § 307(c)(1). Press argues that Section 307(c)(3) is the only exception to the statutory eight-year license term limitation of Section 307(c)(1), as it provides, according to Press, “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.” According to Press, because the Board failed to file its renewal application until after Press had filed its WBHX modification Application, that fact preempts Section 307(c)(3)’s requirement that the license remain in effect “[p]ending any administrative or judicial hearing and final decision and the disposition of any petition for rehearing” regarding the ultimately filed renewal application. AFR at 3-5.

¹² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

¹³ AFR at 4-6 (quoting the *Order*’s reference to protection of WAJM’s licensed facilities under Section 73.207 of the Rules).

“unauthorized.”¹⁴ Press argues that, although there may be circumstances where an expired license can be resurrected, WAJM’s license cannot be resurrected because it would override the cut-off protection that Section 73.3573(f) of the Rules provided to the Press Application.¹⁵

7. Press contends that the precedents cited by the Bureau in the *Order* do not support the dismissal of the Press Application and the grant of the WAJM license renewal application.¹⁶ It argues that the Bureau implicitly waived the Application Deadline Rule, in contravention of applicable precedent for waiving filing deadlines.¹⁷

8. As an initial matter, Press ignores precedent recognizing the agency’s broad discretion to settle enforcement actions.¹⁸ Although a third party may prefer a different outcome than the terms the Bureau negotiated in its Consent Decree with the Board that would better serve the third party’s business purposes, the only relevant issue is whether the Bureau’s

¹⁴ *Id.* at 3 n.3 and 6-7.

¹⁵ *Id.* at 7 n.6.

¹⁶ *Id.* at 7-10.

¹⁷ *Id.* at 10-12; *see also* Press’s Statement for the Record (filed Feb. 1, 2016).

¹⁸ *See, e.g., University of San Francisco*, Memorandum Opinion and Order, 30 FCC Rcd 10530, 10535, para. 9 (2015); *U.S. Cellular Corp.*, Order, 24 FCC Rcd 8729, 8738, para. 26 (2009); *Viacom, Inc.*, Order on Reconsideration, 21 FCC Rcd 12223, 12226, para. 6 (2006).

settlement terms are lawful. In this case, the renewal of WAJM's license was consistent with established Commission procedures and precedent, notwithstanding the untimeliness of the 2010 Application. As explained in the *Order*, the Commission consistently has allowed broadcast station licenses to be renewed even though the license renewal application was filed after the license term expired.¹⁹ Adopting a contrary position in this case, without any prior notice to the Board, would violate the Board's due process rights.²⁰

9. Press fails to cite any case in which the Commission has denied a broadcast station's license renewal application due to its having been filed after the end of the license term, in the absence of any explicit license cancellation notice from the Bureau. Although Press criticizes the *Order* for limiting its illustrative cites to two cases (*Discussion Radio* and *Superior*), the Commission's consistent practice in this situation has been to process the untimely license renewal application rather than dismiss it, even if it

¹⁹ See *Order*, 30 FCC Rcd at 10585, para. 6 and n.16.

²⁰ We acknowledge that the Commission could apply another type of procedural system, such as that adopted for wireless licenses under the purview of the Wireless Telecommunications Bureau, but has not done so in the broadcast context. See *East Ky. Power Coop., Inc.*, Letter Order, 28 FCC Rcd 2071, 2072 (WTB 2013) (explaining Wireless Telecommunications Bureau's policy for late-filed license renewal applications, as adopted in *Biennial Regulatory Review (Wireless Telecommunications Services)*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 11476, 11485, para. 22 (1999)).

was filed long after the license expired.²¹ The Bureau treats a broadcast license as having been cancelled only after it has issued a letter, public notice, or both, affirmatively stating that the license has been

²¹ See, e.g., *Salmon River Commc'ns, Inc.*, Forfeiture Order, 28 FCC Rcd 9111 (MB 2013), resolved by Consent Decree, Order, 29 FCC Rcd 5724 (MB 2014) (renewal application filed over 5 years after filing deadline); *J. Thomas Development of NM, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 10859 (MB 2012) (over 5 years); *Hope Broad., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16370 (MB 2011) (over 7 years); *Hartford Bd. of Ed.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14476 (MB 2011) (over 4 years); *St. Mary's Coll. of Minn.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 13345 (MB 2011) (over 5 years); *Westport Bd. of Ed.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 3215 (MB 2010) (over 3 years) (collectively, *Late Renewal Cases*). The Application Deadline Rule requires broadcast licensees to file license renewal applications four months prior to the end of the current license term. The *Late Renewal Cases* and similar decisions treat violations of the Application Deadline Rule as a forfeiture matter under Section 1.80 of the Rules. See 47 CFR § 1.80, Note to Para. (b)(8) (base forfeiture amount for failure to file required form is \$3,000). If the license renewal application is filed after the license term has ended, continued operation that is not authorized by special temporary authority (STA) will be considered unauthorized operation under Section 301 of the Act. *Id.* (base forfeiture amount for unauthorized operation of station is \$10,000). See *Order*, 30 FCC Rcd at 10584-85, para. 3 (imposing a sanction for the Board's violation of Section 301 while providing a reduced forfeiture amount for the Board's violation of the Application Deadline Rule because WAJM was a student-run station); see also *Late Renewal Cases*.

cancelled.²² Such Bureau action begins the period for filing a petition for reconsideration or an application for Commission review of the Bureau's order.²³ In such a situation, conflicting applications may not be filed until there is a final agency order cancelling the license.²⁴ Thus, Press's attempt to claim cut-off protection for the Press Application is unavailing.²⁵ The cut-off rule that Press has tried to invoke provides that minor modification applications "may be filed at any time, unless restricted by the FCC."²⁶ The protection of existing licenses until cancelled by a final order is a restriction consistently applied by the Commission.²⁷

²² See, e.g., *Christian Family Network, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 2459 (2016) (upholding dismissal of renewal application filed more than four years after license expiration and more than two and one-half years after Bureau issued cancellation notice to licensee and public notice of cancellation).

²³ See 47 U.S.C. §§ 155(c)(4) and 405, 47 CFR §§ 1.106 and 1.115.

²⁴ See e.g., *Superior*, 22 FCC Rcd at 16636.

²⁵ See AFR at 4 and 7 n.6.

²⁶ 47 CFR § 73.3573(f).

²⁷ See *Superior*, 22 FCC Rcd at 16636. Press attempts to distinguish *Superior* by claiming that the conflicting application there was only dismissed because the late-filed renewal application was filed within 30 days of the license expiration date. Press interprets *Superior* as holding that filing the renewal application within 30 days of the license expiration date prevented finality of license expiration. AFR at 8-10. We disagree with this interpretation, particularly Press's incorrect claim that the Bureau's reference to non-finality in *Superior* was a "contrivance

10. As Press acknowledges, Section 307(c)(3) requires the Commission to “continue such license in effect” pending “any administrative or judicial hearing and final decision on [an] application [to renew that license].”²⁸ That is, this provision applies specifically to pending renewal applications.²⁹ Although it is silent on protections that apply when, as here, no renewal application has been filed, the Commission has broad discretion to fashion its renewal application processing policies, and nothing in our policy or practice violates the Act. In fact, they complement it. The Commission has developed and applied this interstitial processing policy to give fuller effect to the policies underlying Sections 307(c)(3) and 309(k), which promote continuity in broadcast station operations and protect existing licensees from conflicting applications pending final agency action on license renewal applications, for the

. . . [that] cites no authority.” AFR at 10 n.7. In reality, *Superior* cited and relied upon Section 309(k)(3) of the Act, which allows conflicting applications only after a final determination that an existing station’s license renewal application is denied for failure to meet the standard for renewal in Section 309(k)(1) of the Act. *See Superior*, 22 FCC Rcd at 16636 n.15. Accordingly, the timing of the renewal application was a happenstance that Press has erroneously claimed to be decisional. Non-finality in *Superior* was due to the absence of an order either cancelling the existing station’s license for failure to file a renewal application or denying the renewal application pursuant to Section 309(k)(1). The same is true here, as there was no order cancelling the WAJM license.

²⁸ 47 U.S.C. § 307(c)(3).

²⁹ Section 309(k) also is specifically limited to situations in which a renewal application has been filed. “*If* the licensee of a broadcast station submits an application to the Commission for renewal of such license . . .” 47 U.S.C. § 309(k)(1) (emphasis added).

benefit of the public.³⁰ The Commission's policy and practices regarding the treatment of late-filed renewal applications provide stations with the opportunity to rectify their failure to timely seek renewal and afford them protection against competing applications, thus avoiding disruption in service to the public, while subjecting the licensee to appropriate enforcement action on account of its rule violations.³¹ Such a policy is fully consistent with the Act and with the public interest in the continuity of broadcast service. Nothing in the Act requires us to impose a "death sentence" on licensees

³⁰ By prohibiting the possibility of modifications to other stations that could compromise the ability of the station seeking renewal to continue its service to the public if the renewal application is granted unless renewal is denied, the Commission maintains such continuity. We note that the Bureau, in recent years, has required licensees that file their license renewal applications after the license term ended to file requests for STA to operate while their renewal applications are pending. *Compare Late Renewal Cases with Discussion Radio*, 19 FCC Rcd 7433, 7436, para. 11. The Commission has found that this practice is an appropriate way to enforce Section 301 of the Act. *Discussion Radio*, 19 FCC Rcd at 7437-38, para. 14. However, whether or not the station has received an STA, the Bureau still includes these stations in its database as requiring protection from conflicting applications until there is a final order cancelling the license. *See Superior*, 22 FCC Rcd at 16635. We also note that the Bureau, in recent years, has modified its processing policies to promptly notify stations that have failed to file their renewal applications, and to issue a notice of apparent liability if the renewal has not been filed within 30 days of the original due date.

³¹ In the rare case where an existing licensee did not file a license renewal application because it did not intend to continue station operations, any party seeking to file a conflicting application may do so (absent any other relevant filing restriction), but not until the Bureau has issued a cancellation notice that became a final order.

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and deprive audiences of established broadcast service because the licensee files its renewal application late. We have other means to enforce our rules.³²

11. The Commission's practice of applying procedural protections comparable to those in Sections 307(c)(3) and 309(k) until the Bureau issues a cancellation notice that becomes a final order is not the same as extending a license term. If the eight-year license term has expired, continued station operation is unauthorized under Section 301 of the Act, unless and until the licensee requests and receives an STA to operate the station.³³ Such unauthorized operations, as well as violations of the Application Deadline Rule, are

³² In *Discussion Radio*, the Commission dealt with the situation in which a licensee that had violated the Application Deadline Rule and the eight-year license period limitation contained in Section 73.1020 of the Rules by late-filing its renewal application and continuing to operate after the end of the license term. On review of the Bureau's grant of reconsideration of its earlier cancellation of the license, the Commission ultimately issued the licensee a notice of apparent liability for the violations, while stating that "waivers of [47 CFR §§ 73.1020 and 73.3539] are warranted in the instant circumstances for the limited purpose of accepting and acting on the station's license renewal application." 19 FCC Rcd at 7437, para. 14. Press cites this language to argue that a waiver is required here but is not warranted here in light of pertinent waiver precedent. AFR at 10-12 and Press's Statement for the Record. In this case, we are not waiving the rule violation, but have instead resolved the case by Consent Decree. Nevertheless, to the extent that the *Discussion* case suggested that a waiver is necessary for our consideration of a late-filed renewal application, we hereby overrule it.

³³ See *Order*, 30 FCC Rcd at 10584, para. 3; see also *Late Renewal Cases*.

penalized.³⁴ If a late-filed renewal application is granted, the new license term begins as of the grant date; operation during the interim period after license expiration but prior to renewal is considered unauthorized operation to the extent not authorized by STA.³⁵ In seeking its next license renewal, the station must “run on [its] record” for that license term,³⁶ with an appropriate disclosure of all rule and statutory violations, including the violations of Section 301 and the Application Deadline Rule.³⁷ Accordingly, we reject Press’s claim that the *Order* violated the “statutory mandate” of Section 307(c)(1).³⁸

12. Finally, we uphold the Bureau’s determination with respect to Press’s failure to seek or obtain a waiver of 47 CFR § 73.213(c) regarding short-spacing involving WJBR-FM and WZBZ-FM, for the reasons stated in the *Order*.³⁹

³⁴ *Id.*

³⁵ *See Superior*, 22 FCC Rcd at 16636.

³⁶ *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966); *see* 47 U.S.C. § 309(k).

³⁷ 47 CFR § 73.3539(a); *see* FCC Form 303-S, Instructions at 7 (“an applicant is required to disclose only violations of the Communications Act of 1934, as amended, or the Rules of the Commission that occurred at the subject station during the license term, as preliminarily or finally determined by the Commission, staff, or a court of competent jurisdiction”) and Section II, Question 4.

³⁸ AFR at 6.

³⁹ *See* para. 5 *supra*; 30 FCC Rcd at 10586, paras. 7-8.

IV. CONCLUSION

13. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Press Communications, LLC on November 9, 2015, IS DENIED pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the FCC's rules.⁴⁰

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁰ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(g).

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

*Re: Atlantic City Board of Education Applications
for Renewal of License and For Minor
Modifications of Licensed Facilities of
WAJM(FM), Atlantic City, New Jersey and Press
Communications, LLC Application for Minor
Modification of Licensed Facilities of
WBHX(FM), Tuckerton, New Jersey*

I concur in the result reached by this order. While it achieves an acceptable conclusion consistent with past precedent, the item highlights a fairly major discrepancy in our treatment of late license renewal applications depending on whether they are filed with the Media Bureau or the Wireless Telecommunications Bureau. As the order acknowledges, the Commission consistently has allowed broadcast station licenses to be renewed even when the license term expired long before the renewal application was filed. This seems inappropriate and problematic: we ought not have different standards for deadlines based on the service being offered and we ought not allow late filings.

Given the importance of licenses for many services the Commission oversees, it would behoove all licensees to file their renewal applications either early or on time. In fact, the vast majority of broadcasters already do this. Thus, a deadline should mean just that.

In light of this, I suggest that the Commission should examine, with proper notice, whether the discrepancy in the treatment of the two types of renewal applications should be eliminated, and

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possibly take action to equalize the treatment of these licensees with emphasis given to timely filings.

APPENDIX C

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

DA 15-880

NAL/Acct. No. MB201541410031

FRN: 0020207858

Facility I.D. No. 3123

File No. BRED-20100921AAN

File No. BRED-20140128ABC

File No. BPED-20120215AAW

Facility ID No. 56233

File No. BPH-20100827ABW

[Filed October 9, 2015]

In re Applications of	)
	)
ATLANTIC CITY BOARD OF EDUCATION	)
	)
For Renewal of License for Station WAJM(FM),	)
Atlantic City, New Jersey	)
	)
and	)
	)
For Minor Modification of the Licensed Facilities	)
of Station WAJM(FM), Atlantic City, New Jersey	)
	)
and	)
	)

PRESS COMMUNICATIONS, LLC)
)
For Minor Modification of the Licensed Facilities)
of Station WBHX(FM), Tuckerton, New Jersey)
_____)

ORDER

Adopted: October 8, 2015

Released: October 9, 2015

By the Chief, Media Bureau:

1. The Media Bureau (“Bureau”) has before it: (1) the applications (“2010 Renewal Application” and “2014 Renewal Application”) of Atlantic City Board of Education (“Licensee” or “Board”) for renewal of license for expired Station WAJM(FM), Atlantic City, New Jersey (“Station”); and (2) a Petition to Deny (“Petition”)¹ the 2010 Renewal Application filed on December 22, 2010, by Press Communications, LLC (“Press”). We also have before us the application by the Board for modification of the licensed facilities of the Station (“Modification Application”) filed on February 15, 2012. Finally, we have before us the application by Press for modification of the licensed facilities for its Station WBHX(FM), Tuckerton, New Jersey (“Press Application”).²

¹ On January 28, 2011, the Board filed an Opposition, to which Press replied on February 17, 2011.

² On September 29, 2010, William Hawkes, Jr., filed a Petition to Deny the Press Application, which Press opposed on October 18, 2010. On October 5, 2010, the Board filed an Informal Objection to the Press Application, which Press opposed on October 27, 2010; the Board replied on November 8, 2010. On October 12, 2010,

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

Equity Communications, L.P. (“Equity”), filed an Informal Objection to the Press Application, which Press opposed on October 27, 2010; Equity replied on November 8, 2010. Because we are dismissing the Press Application in this action, we need not consider these pleadings.

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

⁴ *Id.*, 28 FCC Rcd 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 Rcd 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.”

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

⁶ *Id.*, 28 FCC Rcd 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. Rahtes, District*

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 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

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.

¹⁰ 47 C.F.R. § 73.1350(a).

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

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).

Station license. Press argues in its Petition that there is no rule violation because “the WAJM 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

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

¹⁴ See *Letter to Press Communications, LLC*, Ref. 1800B3 (MB 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).

that we may process the late-filed 2010 Renewal Application and timely 2014 Renewal Application. To the extent Press argues that 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

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

¹⁸ 47 C.F.R. § 73.207.

¹⁹ Petition at 1-2.

²⁰ *Id.*

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 259A,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,

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); *Newnan and Peachtree 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)

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 staff's 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 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

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

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).

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.

²⁷ 47 U.S.C. § 154(i).

²⁸ 47 C.F.R. §§ 0.61, 0.283.

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

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. BRED-20100921AAN and BRED-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;

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(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

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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.²⁹ In addition, Licensee continued to operate the Station after the Station’s license had expired in violation of Section 301 of the Act.³⁰ 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

²⁹ 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.

³⁰ 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.

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;³¹ 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, 1998,³² 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 *NOV* 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.³³ It subsequently filed the Modification Application to Application to correct the height of its transmitting antenna by 2.3 meters.³⁴

5. In light of the compliance issues raised in the 2010 Renewal Application, the *NOV*, and various

³¹ 2010 Renewal Application, Exhibit 11.

³² *Id.*; see also *id.* at Exhibit 6.

³³ 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).

³⁴ See Modification Application at Exhibit 18, Attachment 18. In the *Order* adopting this Consent Decree, the Bureau grants the Modification Application.

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.

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 *NOV*.

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

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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.

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**MEDIA BUREAU
FEDERAL COMMUNICATIONS COMMISSION**

By: _____
William T. Lake, Chief

Date: _____

ATLANTIC CITY BOARD OF EDUCATION

By: _____
Donna Haye, Superintendent

Date: _____

APPENDIX

**COMPLIANCE PLAN FOR
STATION WAJM(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 *NOV* 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); 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); 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.
- 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

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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.

APPENDIX D

47 U.S.C. § 301

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the

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transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 307(c)

§ 307. Licenses

* * *

(c) Terms of licenses

(1) Initial and renewal licenses

Each license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years. Upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby. Consistent with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action.

(2) Materials in application

In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to

the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings.

(3) Continuation pending decision

Pending any administrative or judicial hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 or section 402 of this title, the Commission shall continue such license in effect.

47 U.S.C. § 309(h)

§ 309. Application for license

* * *

(h) Form and conditions of station licenses

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.