Federal Communications Commission
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Rainey Broadcasting, Inc.
c/o Mark N. Lipp, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006

In re: **AM Auction No. 84**

Rainey Broadcasting, Inc.
New(AM), Ellisville, Mississippi
Facility ID No. 160861
File No. BNP-20041029AIW

Application for New AM Construction Permit

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed by Rainey Broadcasting, Inc. ("Rainey") on July 6, 2007. Petitioner seeks reconsideration of the staff's June 6, 2007, letter decision ("Staff Decision"), in which the staff denied Rainey's proposed amendment to its AM Auction No. 84 ("Auction 84") application for a new AM broadcast station at Ellisville, Mississippi.[1] For the reasons set forth below, we deny the Petition.

Background. Rainey filed a short-form (FCC Form 175) application on January 30, 2004, during the Auction 84 filing window.[2] It was determined to be a "singleton," that is, an application not mutually exclusive with any other window-filed application. Accordingly, the staff directed Rainey to file a long-form (FCC Form 301) application.[3] Rainey timely filed the Application on October 29, 2004.

On February 9, 2006, the staff notified Rainey that the facilities proposed in the Application violated Section 73.37(a) of the Commission's Rules,[4] and afforded Rainey the opportunity to amend the Application to correct all deficiencies. After requesting and receiving an extension of time in which to amend, Rainey filed an amendment to the Application on August 9, 2006. On September 5, 2006, the staff informed Rainey that the amended Application still violated Section 73.37 of the Commission's Rules, giving it 30 additional days to file a curative amendment. On January 19, 2007, Rainey filed a

[1] File No. BNP-20041029AIW (the "Application").

[2] File No. BNP-20040130BQK.

[3] *See AM Auction No. 84 Singleton Applications*, Public Notice, 19 FCC Rcd 16655 (MB 2004).

[4] 47 C.F.R. § 73.37.

further amendment to the Application, proposing to change the community of license from Ellisville to Laurel, Mississippi. Rainey proposed this amendment based on new rules adopted by the Commission in *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*.[5]

On June 6, 2007, the staff denied the proposed change in community, stating that any such change must be mutually exclusive with Rainey's existing or authorized daytime facilities, and that Rainey had no existing or authorized daytime facilities with which its proposed amendment could be mutually exclusive.[6] Rainey timely filed the Petition.

Discussion. In the recent case of *Rivers, L.P.*, the Bureau held that an AM new station singleton applicant may not specify a new community of license in its initial long-form application.[7] In this decision, we noted that minor change procedures for community of license modifications require mutual exclusivity between a current assignment or allotment and the proposed assignment. In the case of an applicant for a new AM station, there is no current assignment or allotment on which to establish mutual exclusivity.[8] Further, in *Rivers*, as here, the applicant has failed to demonstrate that a rule-compliant assignment for its initially proposed community is technically possible.[9] We observed that the mutual exclusivity requirement was established in order to protect applicants' existing authorizations, allowing applicants to propose new communities of license without opening said applications to competition, while remaining consonant with the requirements of *Ashbacker Radio Corp. v. FCC*,[10] and that for this reason the Commisson extended this requirement to AM and noncommercial educational FM community change applicants.[11] We also drew a distinction between Commission-allocated FM allotments and applicant-specified AM tech box submissions, holding that the former had been analyzed as part of the allocations rulemaking process, had been demonstrated to be compliant with all Commission rules (including spacing and community coverage rules), and had been added to the Table of Allotments, while the latter had been subject to no such scrutiny as to their compliance with the Commission's Rules.[12] Additionally, we held that there was a difference between an amendment to change frequency and one to change community of license, in that the latter involves numerous procedures (*e.g.*, local public notice, publication in the *Federal Register*, detailed Section 307(b) showings) that are not required when making a simple adjacent-channel

[5] Report and Order, 21 FCC Rcd 14212 (2006) ("*2006 Community of License Order*").

[6] *Mark N. Lipp, Esq.*, Letter (MB June 6, 2007).

[7] *Rivers, L.P.*, Letter, 23 FCC Rcd 4521 (MB 2008) ("*Rivers*").

[8] *Id*. at 4523.

[9] *Id*.

[10] 326 U.S. 327 (1945). *See also 1989 Community of License R&O*, 4 FCC Rcd at 4873 ("[W]here the new allotment is mutually exclusive with the existing one, foreclosing competing applications does not, as a practical matter, deprive potential applicants of opportunities for comparative consideration. Under our rules such potential applicants already are precluded from requesting such a new allotment because of the mutual exclusivity with the existing one.").

[11] *Rivers*, 23 FCC Rcd at 4522-24.

[12] *Id*.

change, thus any comparison between the two is inapt.[13] Accordingly, we find unpersuasive Rainey's contention that it submitted the amendment based on its "understanding" that the *2006 Community of License Order* countenanced such filings.

Rainey further contends that discussions with unidentified "Commission staff" also led it to believe that it could submit a community of license change in its Form 301 amendment. However, it is well established that applicants may not rely on informal staff advice rather than Commission rules or policies.[14] With regard to Rainey's claim that its review of *AM Auction No. 84 Singleton Applications*[15] led it to amend its Form 301 to specify a new community, we fail to apprehend how reliance on a May 2004 Public Notice can justify Rainey's understanding of the Commission's *2006 Community of License Order*, which was not released until November 2006.

We further reject Rainey's argument that permitting AM city of license amendments as part of new station licensing would not encourage applicants to be "less careful with their technical proposals."[16] Again, as noted in *Rivers*, the concern is that allowing applicants a second bite at the application apple, in order to cure an ungrantable technical proposal, could jeopardize the integrity of the filing window process, affording the less-conscientious applicant a survey of the post-window technical landscape not available to other applicants.[17] Finally, we decline Rainey's invitation to take up this matter on reconsideration of the *2006 Community of License Order*. As evidenced by our analysis in *Rivers*, we believe our position is solidly grounded in the procedures announced in that order and the policies that underlie them, and that the dismissal of Rainey's amendment was not merely an "ad hoc" decision, as Rainey suggests.

Conclusion. We find no merit in Rainey's arguments on reconsideration. Accordingly, Rainey's Petition for Reconsideration IS DENIED. Further action on the Application, File No. BNP-20041029AIW, will be withheld for a period of 30 days from the date of this letter to provide Rainey a final opportunity either to amend the Application or to notify the Commission that it wishes to pursue the Application as earlier amended. Failure to respond within this time period will result in dismissal of the Application pursuant to Section 73.3568 of the Rules.[18]

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[13] *Id*. at 4524 n.16.

[14] *See*, *e.g.*, *Hinton Telephone Company*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625, 11637 (1995) ("The Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk.").

[15] *See supra* note 3.

[16] Petition at 4.

[17] *Rivers*, 23 FCC Rcd at 4523-24.

[18] 47 C.F.R. § 73.3568.