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Rivers, L.P.
c/o Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street
11th Floor
Arlington, VA 22209-3801

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

Rivers, L.P.
New(AM), Jackson, MS
Facility ID No. 161445
File No. BNP-20041029AHO

Application for New AM Construction Permit

Dear Counsel:

We have before us a Petition for Reconsideration or, in the Alternative, Request for Waiver ("Petition") filed by Rivers, L.P. ("Rivers") on July 6, 2007. Petitioner seeks reconsideration of the staff's June 6, 2007, letter decision ("Staff Decision"), in which the staff denied Rivers's proposed amendment to its AM Auction No. 84 ("Auction 84") application for a new AM broadcast station at Jackson, Mississippi.[1] In the alternative, Rivers seeks waiver of Section 73.24(i) of the Commission's Rules.[2] For the reasons set forth below, we deny the Petition and the waiver request.

Background. Rivers filed a short-form (FCC Form 175) application on January 30, 2004, during the Auction 84 filing window.[3] It was determined to be a "singleton," that is, an application not mutually exclusive with any other window-filed application. Accordingly, the staff directed Rivers to file a long-form (FCC Form 301) application.[4] Rivers timely filed the Application on October 29, 2004.

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

[2] 47 C.F.R. § 73.24(i).

[3] File No. BNP-20040130BQK.

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

On May 13, 2005, the staff notified Rivers that the facilities proposed in the Application violated Section 73.37 of the Commission's Rules,[5] and afforded Rivers the opportunity to amend the Application to correct all deficiencies. After requesting and receiving an extension of time in which to amend, Rivers filed amendments to the Application on November 14, and 18, 2005. On August 22, 2006, the staff informed Rivers that the amended Application still violated Section 73.37, giving it 30 additional days to file a curative amendment. Rivers filed a further amendment on November 16, 2006. Additionally, on January 19, 2007, Rivers filed a further amendment to the Application, proposing to change the community of license from Jackson to Flowood, Mississippi. Rivers 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*.[6]

On June 6, 2007, the staff denied the proposed change in community, stating that any such change must be mutually exclusive with Rivers's existing or authorized daytime facilities, and that Rivers had no existing or authorized daytime facilities with which its proposed amendment could be mutually exclusive.[7] Rivers timely filed the Petition.

Discussion. *Petition for Reconsideration*. Rivers forwards three bases of error in the Staff Decision. It contends that the staff

> (1) interpreted the applicable rules in a way contrary to Commission mandates, which created a global processing regime rather than separate regimes for AM and FM; (2) failed to present an explanation for its decision to follow this course, making the decision arbitrary and capricious; and (3) treat[ed] similarly situated parties differently without providing an explanation for such disparate treatment, violating due process.[8]

The key to the Staff Decision, and the principal error in Rivers's analysis, lies in the fact that an AM auction applicant proposing a new station, with no authorization and no built and operating facilities, is not "similarly situated" to an FM auction applicant and winning bidder that has filed a post-auction Form 301. In the latter case, with the community of license modification, the FM applicant seeks to modify an FM allotment that has been analyzed as part of the allocations rulemaking process, has been demonstrated to be compliant with all Commission rules (including spacing and community coverage rules), and has been added to the Table of Allotments.[9] In the case of Rivers, analysis of the Application has shown that it is not rule-compliant, and thus its AM proposal cannot be authorized. Thus, in the one case, the FM applicant has a rule-compliant, Commission-allocated allotment *before* it seeks to change community in its post-auction Form 301 application, whereas in Rivers's case, the community change is necessary to make Rivers's proposed assignment rule-compliant.[10]

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[5] 47 C.F.R. § 73.37.

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

[7] *Frank R. Jazzo, Esq.*, Letter (MB June 6, 2007).

[8] Petition at 6-7.

[9] *See* 47 C.F.R. §§ 73.202(a)(2), 73.207, 73.208, 73.209(b), 73.315(a).

[10] Petition at 7 ("Without either approval of the Amendment or a waiver of Section 73.24(i), the station cannot operate.").

Rivers concedes that, in order to avail itself of the minor modification community of license change procedures, it must be mutually exclusive with, at the very least, a current assignment.[11] Implicit in that statement, however, is the fact that, for a station to have an "assignment," facilities must be assigned. In Rivers's case, the Commission has not made any assignment or granted any facility authorization. All that Rivers has is its own non-rule-compliant proposal, which it has failed to perfect through a series of amendments over several years. It is not now and has never been a grantable application. The rules set forth in the *2006 Community of License Order* include various procedures and safeguards that presuppose the existence of either operating facilities or, at the least, a Commission-approved assignment or allotment, and a comparison of those Commission-approved facilities or assignments to the proposed new facilities.[12] These procedures trace their provenance to the Commission's 1989 Report and Order establishing procedures for FM and TV licensees and permittees to change community of license.[13] In the *1989 Community of License R&O*, 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*.[14] The *2006 Community of License Order* extended this principle to AM and noncommercial educational FM licensees and permittees. Allowing an applicant to amend an ungrantable technical proposal specified in an AM auction Tech Box submission (facilities that are not examined for grantability at the short-form stage),[15] then, would be inconsistent with this principle. This is especially true where, as here, the staff has determined that the applicant-specified facilities are not rule-compliant. Rather than protecting the applicant's existing, approved facility, such an interpretation would merely give the non-compliant applicant a second chance at its initial filing, one not afforded other filing window applicants. Moreover, permitting city of license amendments in this context partially jeopardizes the integrity of the Commission's competitive bidding procedures, by encouraging the filing of patently defective proposals that applicants could then amend

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[11] *See id*. at 3.

[12] *See*, *e.g*., *2006 Community of License Order*, 21 FCC Rcd at 14218 ("[P]arties seeking to employ this procedure must file, with their applications, a detailed exhibit demonstrating that the proposed change constitutes a preferential arrangement of allotments under Section 307(b) of the Act *as compared to the existing allotment(s)*.") (emphasis added), 14219 ("[A]ny application proposing a community of license change filed by a permittee that has not built its current permitted facilities and that is not mutually exclusive with either the applicant's built and operating facilities *or its original allotment* shall be returned as unacceptable for filing.") (emphasis added).

[13] *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989) ("*1989 Community of License R&O*").

[14] 326 U.S. 327 (1945). *See 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.").

[15] *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15979 (1998) ("*Broadcast First Report and Order*"); *recon. denied*, 14 FCC Rcd 8724 (1999); *modified*, 14 FCC Rcd 12541 (1999). *See also Powell Meredith Communications Company, Victor A. Michael, and Alvin Lou Media, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12672, 12673-74 (2004).

following the Commission's release of the technical parameters of all potentially competing applications filed in the same window. For these reasons, the staff correctly determined that Rivers's un-granted and non-grantable proposal did not constitute a "current assignment," and that treating it as a "current assignment" would constitute a radical and unwarranted expansion of the current city of license modification procedures.[16]

Waiver request. In the alternative, Rivers requests a waiver of the nighttime coverage requirement set forth in Section 73.24(i) of the Commission's Rules.[17] Rivers argues that waiver is necessary in order to return AM service at 1450 kHz to the greater Jackson, Mississippi, area that was lost when station DWJXN(AM) went silent in 2004. "The service that Rivers proposes would return service otherwise lost to the Jackson area. No public interest exists in no service at all."[18]

We will grant a waiver of our rules only upon a showing of special circumstances warranting deviation from the rules, and a finding that the public interest will be served by waiver.[19] We do not find such special circumstances here. The service area proposed by Rivers is already abundantly served, and Jackson has five AM and eight FM transmission services in addition to one already licensed at Flowood. The greater Jackson, Mississippi, area cannot be said to have "no service at all," and given the level of service it cannot be said that the public interest requires deviation from the nighttime coverage rule in order to provide still another AM service. We therefore deny Rivers's waiver request.

Conclusion. Rivers's arguments fail because it assumes that differences in AM and FM licensing, which affect the processing of applications, somehow offend an asserted "global processing regime" for community of license changes. Rivers further errs in claiming that its proposed minor modification is similarly situated to an FM auction applicant seeking a community of license change that is mutually exclusive with its original allotment. As discussed above, a rule-compliant FM allotment is not tantamount to a non-compliant, wholly applicant-defined technical proposal. Had Rivers been granted a construction permit, we would have considered allowing a minor modification community of license change application under the "original allotment" exception to the requirement that such applications be mutually exclusive with the applicant's built and operating daytime facilities. However, the community of license minor modification procedures were not designed to afford an AM auction

[16] We also reject Rivers's attempt to analogize an applicant's amendment to change its community of license, specifying a site that is mutually exclusive with its originally proposed site, to the situation in which an applicant proposes amending its application to specify a frequency that is a first-, second-, or third-adjacent channel to its originally selected frequency. The two situations are not comparable. As noted above, a community of license change 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 change. *See supra* note 14. A proposed community of license change involves Section 307(b) considerations far beyond those that arise from a proposed frequency change. Moreover, while Rivers makes much of the fact that the Bureau has allowed such frequency changes, it fails to note that such changes are not automatically granted, and have been denied when they caused prohibited interference or new mutual exclusivity. *See*, *e.g*., *Frank R. Jazzo, Esq.*, Letter, Ref. No. 1800B3 (MB Nov. 19, 2007) (returning minor modification to achieve technical resolution that, while moving from 1270 to 1280 kHz, created prohibited new conflict with applicant's own singleton application on 1290 kHz).

[17] 47 C.F.R. § 73.24(i).

[18] Petition at 7 (emphasis in original).

[19] *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

applicant the opportunity to cure a non-grantable technical proposal. Moreover, the policy enunciated herein promotes the rapid introduction of service by discouraging AM auction applicants from filing patently non-grantable technical proposals. We further find that the replacement of a deleted station at an already abundantly served community does not constitute a "special circumstance" sufficient to grant a waiver of the AM community nighttime coverage requirement.

Accordingly, Rivers's Petition for Reconsideration IS DENIED, and its request for waiver of Section 73.24(i) of the Rules IS DENIED. Further action on the Application, File No. BNP-20041029AHO, will be withheld for a period of 30 days from the date of this letter to provide Rivers 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.[20]

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

[20] 47 C.F.R. § 73.3568.