Correspondence file
64556

Federal Communications Commission
Washington, D.C. 20554

November 16, 2004

In Reply Refer to:
1800B3-LAS

Roy R. Russo, Esq.
Cohn and Marks LLP
1920 N Street NW Suite 300
Washington D.C. 20036-1622

Re: WRCR(AM), Spring Valley, New York
Alexander Broadcasting, Inc.
Facility ID No. 64556
Request for waiver to file AM expanded band application in AM Auction No. 84 window

Dear Counsel:

This letter responds to your January 30, 2004, correspondence on behalf of Alexander Broadcasting, Inc. ("Alexander") requesting a waiver of Section 73.30(c) of the Commission's rules, and waiver of the exclusion of AM expanded band migration applications from the AM Auction No. 84 filing window. ("Waiver Request").[1] Also transmitted on behalf of Alexander was a paper-filed FCC Form 175 application, Application to Participate in an FCC Auction, which included Section I and the Tech Box of Section III-A of FCC Form 301 for a major change in the licensed facility of AM station WRCR(AM), Spring Valley, New York. For the reasons set forth below, we deny your waiver request and dismiss the non-electronically filed application.

Background. On November 6, 2003, the Media Bureau ("MB") and the Wireless Telecommunications Bureau ("WTB") announced an auction filing window for certain AM station construction permit applications. The window opened on January 26, 2004, and closed on January 30, 2004.[2] Among other things, the *Auction No. 84 Window Public Notice* described procedures and provided instructions for the electronic filing of FCC Form 175 ("short-form") applications. The window was available for proposals for new AM stations and major modifications to authorized AM facilities, as defined in Section 73.3571(a)(1). The public notice specifically stated that the window "will not be available for frequencies in the AM expanded band or for major changes in existing AM expanded band

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1 Alexander seeks waiver of 47 C.F.R. § 73.30(c), the rule providing petitioners for expanded band allotments 60 days from the awarding of the allotment to file an application for construction permit.

2 "AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze," *Public Notice*, DA 03-3532, 18 FCC Rcd 23016 (MB/WTB 2003) ("*Auction No. 84 Window Public Notice*").

stations,"[3] citing a public notice previously released by MB on February 1, 2002, which instituted a freeze on the filing of all AM expanded band major change applications.[4]

Alexander, licensee of station WRCR(AM), currently operating on 1300 kHz in Spring Valley, NY, filed the application to modify its facilities by increasing daytime and nighttime power and migrating to the AM expanded band frequency 1700 kHz. Recognizing that the *Auction No. 84 Window Public Notice* specifically precluded the filing of such AM expanded band applications in the Auction No. 84 filing window, Alexander requests waiver of the expanded band application freeze and asks that its application be accepted in the Auction No. 84 filing window. Alexander supports its waiver request by noting that technical limitations foreclose its ability to improve coverage on its current standard band frequency. It further argues that the application neither specifies a new community of license, nor proposes relocation of the station facilities a substantial distance, and therefore the proposal does not involve the principal concerns expressed by the Commission in adopting the freeze. Finally, Alexander notes that station WRCR(AM) is located near New York's Indian Point nuclear power plant, a possible terrorist target and potential source of a serious accident. Accordingly, Alexander contends that, as the only station licensed to Spring Valley, WRCR(AM) serves the critical public safety and security interests of its community of license and surrounding areas.

Discussion. When an applicant seeks a waiver, it must plead with particularity the facts and circumstances which warrant such action.[5] "A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[6] Based on the record before us, Alexander has not satisfied the Commission's criteria for granting a waiver.

The development of a national allotment plan to encourage the migration of certain AM stations to the AM expanded band was part of the Commission's wide ranging rulemaking proceeding to revitalize the AM service.[7] In the *Expanded Band R&O* the Commission specifically expressed an intention to manage the migration process to "maximize the benefits to the AM service as a whole."[8] The Media Bureau's implementation of the AM expanded band application freeze was a component of this broad course of action. Concerned that the continued acceptance of AM expanded band applications might limit opportunities for additional expanded band stations, MB stated that a freeze would "best preserve the right of potential applicants for new expanded band stations and provide the opportunity to use competitive bidding to award those authorizations."[9]

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3 *Id.* at 23017. AM expanded band stations operate on one of the ten channels in the 1605-1705 kHz band. *See* 47 C.F.R. § 73.30.

4 "Freeze Announced on the Filing of AM Expanded Band Major Change Applications," *Public Notice*, DA 02-239, 17 FCC Rcd 1806 (MMB 2002) ("*AM Freeze Public Notice*").

5 *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). In addition, Section 73.3566(a) of the Commission's radio broadcast rules provides that requests for waiver "shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof." 47 C.F.R. § 73.3566(a).

6 *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).

7 *See Review of the Technical Assignment Criteria for the AM Service*, 6 FCC Rcd 6273 (1991) ("*Expanded Band R&O*") (subsequent history omitted).

8 *Id.* at 6277.

9 *AM Freeze Public Notice*, 17 FCC Rcd at 1806.

Alexander has not demonstrated unique circumstances meriting grant of its waiver to permit the filing of its AM expanded band application in the AM Auction No. 84 window. Clearly, Alexander's expanded band application is beyond the scope of this particular AM auction filing window. Alexander, however, pleads special circumstances based on its inability to improve station coverage through means other than migration to an expanded band frequency, as well as the supposed limited nature of its request, involving "no change in its community of license or its authorized transmitter location."[10] Neither contention constitutes a distinguishing circumstance, warranting waiver of the expanded band application filing freeze. The Commission specifically stressed a systemic approach in its management of the expanded band allotment plan and migration process. Furthermore, the Commission recognizes the efforts of all radio broadcast stations in their provision of public safety and security based programming to the areas they serve. Public safety is an invaluable public service provided by all broadcast stations, including WRCR(AM), especially with respect to those stations in close proximity to urban areas or potential terrorist targets. The public interest as a whole however, is best served when the Commission's rules are applied in a fair and consistent manner.

Finally, unilateral acceptance of the Alexander application will preclude other AM stations from migrating to and competing for expanded band spectrum. Granting Alexander's freeze waiver would be fundamentally unfair to all parties potentially interested in expanded band authorizations. Moreover, accepting the Alexander application without providing an opportunity for the filing of competing proposals would undermine the Commission's auctions policies. These policies were implemented pursuant to a Congressional directive to use competitive bidding as the primary means of awarding new commercial broadcast station construction permits.[11]

The Bureau has departed from its strict adherence to a no-waiver policy only in the rare situation in which the applicant can demonstrate a lack of radio service, i.e., significant white and/or gray areas, and overriding health and/or safety concerns, i.e., potential for flooding, wildfires, etc. Importantly, the staff issued FM translator station authorizations to these waiver applicants. These secondary service authorizations do not, of course, preclude the licensing of full-service facilities at a later date.

We conclude that Alexander's request for waiver is not in public interest. Accordingly, the request for waiver is denied.[12] This action is taken under authority delegated pursuant to Section 0.283 of the Commission's rules.[13]

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

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10 Waiver Request at 1.

11 *See* 47 U.S.C. § 309(j). *See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, 13 FCC Rcd 15920 (1998), *recon denied*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12541 (1999).

12 Applicants were unable to electronically file expanded band applications during the AM Auction No. 84 filing window in CDBS. Because we substantively deny the Alexander waiver request in this letter, the separate request for waiver of the electronic filing requirements for the two submitted forms is dismissed.

13 47 C.F.R. § 0.283.