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Re: WDDD(AM), Johnston City, Illinois
Facility ID No. 122
File No. BAL-20080806AAU

Application for Consent to Assignment of AM Broadcast Station License

Dear Applicants and Petitioners:

We have before us an Application for Consent to Assignment of License ("Application") of AM broadcast station WDDD(AM) ("WDDD"), Johnston City, Illinois, from CC Licenses, LLC ("CCL") to Withers Broadcasting of Southern Illinois, LLC ("Withers").[1] We also have before us a Petition to Deny Transfer and Waiver Request ("Petition"), filed September 11, 2008, by Radio 810 Nashville, Limited ("Radio 810").[2] For the reasons set forth below, we dismiss the Application.

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[1] File No. BAL-20080806AAU. Withers filed, as part of the Application, a Request for Waiver of 47 CFR § 73.1150(c) ("Waiver Request").

[2] Withers filed an Opposition to "Petition to Deny Transfer and Waiver Request" ("Opposition") on September 24, 2008. On October 10, 2008, Radio 810 filed a second Petition that was identical to, and dated the same day as, the original, September 11, 2008, Petition. We therefore disregard the October 10, 2008, filing.

Background. WDDD is a standard-band AM broadcast station that is "paired" with former WHTE(AM), Johnston City, Illinois, a station in the 1605-1705 kHz AM band ("expanded band").[3] The license for then-WHTE(AM) (now WVON(AM)) expressly provides that, at the end of a five-year period from the WVON(AM) licensing date during which CCL may operate both stations,[4] the authorization for either WDDD or WVON(AM) must be surrendered. Thus, one of the licenses is to be surrendered by August 2, 2011.

In 2001, CCL applied for and received a modification of the WVON(AM) license, changing its community of license from Johnston City, Illinois, to Berwyn, Illinois.[5] The area served by WDDD is thus over 250 miles south of WVON(AM)'s service area.[6] Withers proposes to acquire WDDD in order to continue service to Johnston City, Marion, and Carbondale, Illinois, and the surrounding areas, rather than allowing CCL to surrender the WDDD authorization.

Discussion. In order to acquire the WDDD license, Withers seeks waiver of Section 73.1150(c) of the Commission's Rules,[7] which prohibits the assignment or transfer of the authorization for a single frequency of paired standard-expanded band stations. Waiver of a rule may be granted when there are special circumstances warranting deviation of the general rule, and such deviation is found to be in the public interest.[8] Withers contends that, because paired expanded band station WVON(AM) serves a different area than WDDD, at the end of the joint five-year operating period there is a possibility that the WDDD license would be surrendered, potentially depriving the Johnston City-Marion-Carbondale area of service upon which it has relied for over 25 years. Withers further argues that to allow even the possibility of loss of improved AM service to the area would be contrary to the Commission's intent in implementing the AM expanded band plan.[9]

Radio 810 argues that granting the waiver request "would clearly cause irreparable harm to the AM band, now and in the future," contending that the proposed assignment and waiver request are contrary to the Commission's intent in implementing the AM expanded band plan, namely, to reduce interference in the AM band and revitalize that service.[10] Radio 810, whose station WMGC(AM) is essentially a daytime-only service at Murfreesboro, Tennessee,[11] also references "numerous engineering surveys to determine the feasibility of adding a practical nighttime signal to WMGC,"[12] claiming that WDDD(AM) is the "principal impediment" to increasing WMGC(AM)'s nighttime power.[13]

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[3] The WVON(AM) license was granted August 2, 2006, thus CCL currently has authority to operate both stations until August 2, 2011. 47 C.F.R. § 73.3555 Note 10.

[4] *Id.*

[5] File No. BMAP-20010719AAN.

[6] Berwyn, Illinois, WVON(AM)'s community of license, is a suburb of Chicago.

[7] 47 C.F.R. § 73.1150(c).

[8] *See 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) ("*WAIT Radio*")).

[9] Waiver Request at 2-5, citing the summary of the AM expanded band allotment plan set forth in *Freeze Announced on the Filing of AM Expanded Band Major Change Applications*, Public Notice, 17 FCC Rcd 1806 (MB 2002).

[10] Petition at 3.

[11] WMGC(AM) is authorized to broadcast a six-watt non-directional signal at night.

[12] Petition at 4.

[13] *Id.* Radio 810 also argues that the Application violates the Commission's multiple ownership rule, 47 C.F.R. § 73.3555(a), based largely on a telephone conversation with Janet Jensen, whom Radio 810 identifies as "the general

Expanded band licenses, including the WVON(AM) license, were granted to selected "high interferer" standard band AM licensees to alleviate congestion and interference in the existing AM band.[14] This was one of several initiatives designed to improve and revitalize the AM broadcast service.[15] These licenses were paired with standard band AM licenses and granted so that the licensee could migrate its station to the new expanded band frequency and ultimately surrender its standard band license, thereby reducing congestion and interference in the standard AM band. Eligibility for "high interferer" expanded band licenses was limited to existing AM licenses in order to maximize improvement of the AM band, and priorities were granted based on the extent to which migration of the station to the expanded band would alleviate interference and congestion in the standard AM band. The paired expanded band-standard band licenses included a five-year period of dual operation, providing a transition period to expanded band operation because of the uncertainties of operating in the new band (including the availability of wideband receivers, among other issues). Since the sole purpose of granting these "high interferer" licenses was to permit migration of existing stations to these new frequencies, the Commission prohibited the assignment of either of the paired licenses separately from the other,[16] and the licenses were expressly conditioned on surrender of one of the two frequencies in five years.[17]

We do not believe that avoiding the possibility that the standard band WDDD license might have to be surrendered justifies the requested waiver. In order to justify waiving a rule, the Commission must explain not only why deviation serves the public interest, but also why grant of the waiver would not undermine the policy served by the rule.[18] CCL and Withers base their waiver request on the premise that it is somehow unfair to deprive Johnston City and the surrounding area of long-standing service when the WDDD license is surrendered, because CCL successfully sought a 280-mile relocation of WVON(AM) in order to "maximize the people served by the 1690 kHz frequency."[19] They do not attempt to argue that allowing WDDD to remain on the air would not undermine the policy served by the rule they ask us to waive – alleviating congestion and interference in the AM band. They simply contend that grant of the assignment and waiver would leave an AM station on the air in Johnston City, just as if CCL had not moved the expanded band station to Berwyn.

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manager of the Withers 'cluster' in the Marion-Carbondale market." Petition at 7. According to Radio 810, Ms. Jensen stated that her sales staff represents seven stations, rather than the six divulged in Exhibit 15 to the Application. Radio 810 takes Ms. Jensen's statement to include WQRL(FM), Benton, Illinois, licensed to Dana Communications Corporation. Petition at 7. Radio 810 thus accuses Withers of lacking candor. Because we dismiss the Application on other grounds, we do not need to consider the lack of candor argument, which involves disputed facts regarding the applicants' representations and whether Ms. Jensen actually spoke to Radio 810's principal, among other issues.

[14] Four of the 88 stations included in the AM Expanded Band national allotment plan were selected because the associated expanded band licenses would provide first local full-time radio service to communities of at least 100,000 persons. *See* 47 U.S.C. § 331(b).

[15] *See Review of the Technical Assignment Criteria for the AM Broadcast Service,* 6 FCC Rcd 6273 (1991), *recon. granted in part and denied in part,* 8 FCC Rcd 3250 (1993).

[16] *See* 47 C.F.R. § 73.1150(c).

[17] *Id.*

[18] *See, e.g., WAIT Radio,* 418 F.2d at 1157 ("a general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service *that will not undermine the policy, served by the rule,* that has been adjudged in the public interest.") (emphasis added).

[19] Waiver Request at 3.

We reject this argument. CCL was aware of the condition on the WVON(AM) license, and it alone made the choice to seek to move that station out of the Johnston City market. The fact that it was successful in doing so does not, as CCL and Withers assert, compel a finding that WDDD must be allowed to remain on the air, creating the same level of interference that led to the award of an expanded-band license in the first place. We thus decline to waive Section 73.1150(c).

Conclusion. Because we find that the Application may only be granted upon waiver of Section 73.1150(c) of our Rules, and because we find that CCL and Withers neither present special circumstances justifying waiver nor demonstrate that waiver would be in the public interest, the Request for Waiver of Section 73.1150(c) attached to the Application IS DENIED, and thus the Application IS DISMISSED. Radio 810's Petition to Deny IS GRANTED IN PART as to Radio 810's contention that waiver of Section 73.1150(c) is contrary to Commission policy and the public interest, and is DISMISSED AS MOOT in all other respects.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau