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In Reply Refer to:

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In re: **New(AM), Nassau Village-Ratliff, FL**
Facility ID No. 136128

File No. BMAP-20050110AAY
Major Modification Application
Petition for Reconsideration

Permit No. BNP-20010817AAF
Request for Tolling
Petition for Reconsideration

Dear Mr. Riley:

We have before us two Petitions for Reconsideration (the “Modification Petition” and the “Tolling Petition”) filed by Northeast Florida Radio, LLC (“Northeast”), permittee of a new AM station at Nassau Village-Ratliff, Florida.¹ The Modification Petition seeks reconsideration of a July 7, 2005, staff action that dismissed Northeast’s application for a major modification of its construction permit (the “Modification Application”).² The Tolling Petition asks for reconsideration of a staff letter denying the request submitted August 8, 2005, by Northeast for tolling of the running of its construction permit.³ For the reasons set forth below, we deny the Modification Petition and dismiss as moot the Tolling Petition.

Background. Initially, in AM Auction No. 32, the staff approved a settlement and merger between two applicants in MX Group No. 10, and Northeast, the merged entity, was allowed to file a new, complete construction permit application (FCC Form 301) for a new AM station on 770 kHz at Nassau Village-Ratliff, Florida.⁴ On February 12, 2003, the staff granted the Modification Application. The permit specified a three-year construction period, expiring February 12, 2006.⁵ However, Northeast had claimed that its efforts to secure a transmitter site to serve Nassau Village-Ratliff proved “infeasible.”⁶ As a result,

¹ The Modification Petition was filed on August 8, 2005, and the Tolling Petition was filed on January 3, 2006.

² *Letter to James P. Riley, Esq.*, 20 FCC Rcd 11982 (MB 2005) (“*Modification Letter*”).

³ *Letter to James P. Riley, Esq.*, Reference 1800B3 (MB Dec. 1, 1005) (“*Tolling Letter*”).

⁴ *Letter to Mark N. Lipp, Esq., and James P. Riley, Esq.*, Reference 1800B3 (MB July 18, 2001).

⁵ Permit No. BNP-20010817AAF.

⁶ See Northeast’s Request for Tolling at 4.

on January 30, 2004, Northeast filed a “short-form” application (FCC Form 175) in the window for AM Auction No. 84 for a major modification of its unbuilt construction permit to relocate the new station to Baldwin, Florida.⁷ After notification that its “short-form” application was a “singleton,”⁸ Northeast filed a long-form application.⁹ As part of the Modification Application, Northeast submitted a required Section 307(b) showing¹⁰ that the relocation of its station from Nassau Village-Ratliff to Baldwin, Florida, would provide a “fair, efficient, and equitable distribution of radio service” under Section 307(b) of the Communications Act of 1934, as amended.¹¹ In that showing, Northeast stated that the construction permit authorizes a first local service to the Census Designated Place of Nassau Village-Ratliff (population 4,667) and that the modification application proposes a second local service to the smaller community of Baldwin (population 1,634). Although Northeast recognized that grant of the Modification Application would remove Nassau Village-Ratliff’s sole local service, Northeast contended that “. . . the loss of local transmission service to Nassau Village-Ratliff is not relevant as the facility authorized by the construction permit at Nassau Village-Ratliff has never been constructed and no first local service yet exists at Nassau Village-Ratliff.”¹²

The *Modification Letter* of July 7, 2005, found that Northeast’s Section 307(b) showing was insufficient to support a determination that the proposed relocation would further the public interest, convenience, or necessity. Although the *Modification Letter* agreed with Northeast that the removal of an unbuilt new station does not raise the same concerns as would the removal of an operating station, it found that the proposed city of license modification would not result in a preferential arrangement of allotments under the service priorities. Specifically, the *Modification Letter* determined that the retention of a first local service at Nassau Village-Ratliff under Priority 3 is preferred over the provision of a second local service to Baldwin under lesser Priority 4, “other public interest matters.” As a result, the *Modification Letter* dismissed the Modification Application.

In view of the dismissal of the Modification Application, Northeast filed a “Request for Tolling” on August 8, 2005, seeking additional time to build a new station at Nassau Village-Ratliff. Recognizing that its circumstances are not among those enumerated in Section 73.3598(b)¹³ as grounds for tolling, Northeast sought a waiver based on “rare and exceptional circumstances” beyond the permittee’s control. Northeast claimed that the staff’s dismissal of the Modification Application is such a circumstance because that decision was erroneous and one over which Northeast had no control. As a result, Northeast requested that the running of its construction permit be tolled pending staff review of its Modification Petition.

⁷ File No. BMAP-20040130AYA.

⁸ *Public Notice*, 19 FCC Rcd 22569 (MB 2004).

⁹ File No. BMAP-20050110AAY.

¹⁰ *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15964 ¶ 118 (1998) (requiring singleton AM applicants seeking to change their communities of license to demonstrate compliance with Section 307(b) of the Communications Act) (the “*Auction Order*”).

¹¹ 47 U.S.C. § 307(b). The Commission analyzes Section 307(b) showings for the change of community of license for AM or FM stations by comparing the relative needs of the existing and proposed communities for radio service under its service priorities. *See Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). The priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co equal weight is given to Priorities (2) and (3).

¹² Modification Application, Exhibit 11.

¹³ 47 C.F.R. § 73.3598(b).

The *Tolling Letter* denied Northeast's request for additional construction time because its decisions to forego building at Nassau Village-Ratliff and to pursue a change of community of license at Baldwin are not rare and unusual circumstances beyond the permittee's control. Rather, they are voluntary business decisions. Nevertheless, the *Tolling Letter* stated that the denial of the tolling request ". . . is without prejudice to any additional relief that the Commission may find appropriate if the reconsideration request is resolved in Northeast's favor."¹⁴

On January 31, 2006, Northeast filed a "Request for Waiver of Tolling Rule" ("Second Tolling Request"), reiterating the arguments made in its initial request and noting two additional cases in which waivers of the tolling rule were granted. The staff dismissed the Second Tolling Request as repetitive and determined that the cases relied upon by Northeast were inapposite and would not alter our earlier conclusions.¹⁵ The *Second Tolling Letter* also pointed out that a permittee's voluntary business decision to modify its permit by changing its community of license is not a basis for granting additional time for construction, even if events delay the move.¹⁶ Finally, the *Second Tolling Letter* stated that Northeast's construction permit expired on February 12, 2006, without prejudice to whatever determinations may be made regarding the *Modification Petition* and the *Tolling Petition*.

Discussion. Reconsideration is warranted only when a petitioner shows a material error in the Commission's original order or raises additional facts not known or existing at the time of petitioner's last opportunity to present such matters.¹⁷

Modification Petition. Northeast argues that the *Modification Letter* is in error and should be reversed because Commission precedent does not support applying the Section 307(b) service priorities to applications seeking to relocate unbuilt construction permits. While Northeast acknowledges that the *Auction Order* authorizes the staff to conduct Section 307(b) analyses of change of community applications by licensed AM stations, it alleges that the *Auction Order* did not intend a similar approach for unbuilt permits.¹⁸ In support of this position, Northeast claims that all of the AM change of community cases cited by the *Auction Order* and the *Modification Letter* involved licensed, operating stations seeking to move out of the communities in which they are operating and into other communities.

Northeast further argues that a Commission interpretation of Section 307(b) in *Ark-Valley Broadcasting Company, Inc.*,¹⁹ which is cited in both the *Auction Order* and the *Modification Letter*, also supports its position. In this regard, Northeast notes that the mandate under Section 307(b) for the Commission ". . . to provide a fair, efficient, and equitable distribution of radio service" applies ". . . when and insofar as there is demand for the same." Northeast explains that in *Ark-Valley*, the Commission held that a major change application seeking to relocate a licensed, AM station from Shenandoah, Iowa, to

¹⁴ *Tolling Letter*, at 2 n.3.

¹⁵ *Letter to James P. Riley, Esq.*, Reference 1800B3-IB (MB Feb. 13, 2006) ("*Second Tolling Letter*").

¹⁶ *See Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167 (2001).

¹⁷ *See* 47 C.F.R. § 1.106; *WWIZ, Inc.*, 37 FCC 685, 686 (1984), *aff'd sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); and *Eagle Broadcasting Co. v. FCC*, 514 F.2d 8a52 (D.C. Cir. 1975).

¹⁸ Alternatively, Northeast contends that, if the staff's practice has been to require Section 307(b) showings from applicants seeking to relocate unbuilt construction permits, that practice is without foundation in Commission precedent and is beyond its authority.

¹⁹ Memorandum Opinion and Order, 15 FCC 818 (1951) ("*Ark-Valley*").

Lincoln, Nebraska, should be subject to a Section 307(b) comparison of the relative needs of the two communities for radio service because “. . . [t]he existence of Station KFNF in Shenandoah, Iowa, reflects the fact that there is a demand for the facility there” and the application “. . . constitutes in effect alternative requests, one for a new license in a new community, and the other for authority to continue operation at the existing location.”²⁰ However, Northeast points out that the Commission further stated that “[o]f course, if an applicant indicated that he would surrender his license to operate if the move is not authorized, there would not be a ‘demand’ for a station in the two communities – at least as far as [this] applicant was concerned.”²¹ Northeast notes that, after dismissal of the Modification Application, an amendment was filed, clarifying that the Nassau Village-Ratliff station is unbuilt and that the permittee will not construct the station at Nassau Village-Ratliff due to difficulties in acquiring a transmitter site on what it views as economically viable terms.²² In view of this amendment, Northeast contends that there is no “demand” within the meaning of Section 307(b) at Nassau Village-Ratliff and that, consistent with the language in *Ark-Valley*, no Section 307(b) comparison is warranted.

We find that Northeast has not demonstrated any errors of fact or law in the *Modification Letter* and, accordingly, we deny the Modification Petition. We disagree with Northeast’s claims that Commission precedent does not support applying the Section 307(b) service priorities to applications seeking to change the communities of license of unbuilt stations. The rulemaking proceeding establishing the procedures for change of community of license by FM and television stations, as well as the original rule, explicitly apply to both licensees of operating stations and permittees of unbuilt stations.²³ Further, the *New Community R&O* treats licensed stations and unbuilt stations essentially the same for change of community purposes and requires a comparison of the existing and proposed arrangement of allotments under the FM allotment priorities.²⁴ We also note that the staff has applied the FM allotment priorities to unbuilt AM and FM stations seeking to change their communities of license.²⁵ Moreover, we see no reason why AM unbuilt stations should be treated differently from FM unbuilt stations and exempted from having to make a Section 307(b) showing before changing their communities of license.²⁶ Indeed, such an approach would be

²⁰ *Id.* at 820.

²¹ *Id.*

²² See Amendment to Modification Application, filed on July 18, 2005.

²³ See *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, 4873 ¶ 24 (1989) (“*New Community R&O*”), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (“*New Community MO&O*”) (“We believe the public interest, convenience, and necessity would best be served by allowing permittees and licensees to change their community in the circumstances set forth herein without being subject to competing applications.”). See also 47 C.F.R. § 1.420(i).

²⁴ The Commission has affirmed the propriety of using the FM allotment priorities in community of license changes for AM stations. See *Alvin Lou Media, Inc.*, 19 FCC Rcd 806 (2004); and *Kidd Communications*, 15 FCC Rcd 22 (2000).

²⁵ See, e.g., *Old Forge and Black River, New York*, Report and Order, 21 FCC Rcd 2470 (MB 2006) (granting a rulemaking request to reallocate and change the community of license of an unbuilt FM station); *Saltville, Virginia, and Jefferson, North Carolina*, Memorandum Opinion and Order, 15 FCC Rcd. 24296 (2000) (denying review of a staff decision allowing an unbuilt FM station to upgrade and change its community of license); *Pawley’s Island and Atlantic Beach, South Carolina*, Report and Order, 8 FCC Rcd 8657 (MMB 1993) (approving change of community of license of an unbuilt FM station).

²⁶ See, e.g., *Letter to Broadcast Communications, Inc.*, 23 FCC Rcd 11005 (MB 2008) (applying FM policy prohibiting removal of sole local transmission service to AM change of community cases).

inconsistent with the mandate of Section 307(b) and with the Commission's view that AM and FM stations have long been considered to be "joint components of a single aural medium."²⁷

Next, we reject Northeast's argument that its amendment to the Modification Application eliminates the "demand" for the station at Nassau Village-Ratliff within the meaning of Section 307(b) and obviates the need for a comparison of the relative needs of Nassau Village-Ratliff and Baldwin for a radio service. We reach this determination for several reasons. First, Northeast's argument is predicated upon *dicta* that is not controlling in the present proceeding. Although the Commission stated in *Ark-Valley* that there would not be "demand" for a station in the two communities if the applicant were to surrender his license to operate if the move is not authorized, that fact situation was not before for the Commission in *Ark-Valley*. Equally important, that statement was not necessary for the Commission to reach the holding in *Ark-Valley* that a major change application to relocate a station's community of license implicates Section 307(b) and requires a comparison of the needs of the two communities for the station.²⁸

More importantly, regardless of the soundness of the Commission's reasoning in *Ark-Valley* nearly sixty years ago, it is of dubious value when applied to a radically different licensing regime which operates in an environment characterized by high demand for extremely limited radio spectrum. As noted above, the Commission has explicitly adopted a different approach for permits awarded through the auctions process.²⁹ Eliminating this threshold Section 307(b) determination also could undermine the integrity of the auctions process. In this regard, we note that Northeast's predecessor in interest filed the Nassau Village-Ratliff application in Auction 32 as a first local service, thereby enhancing its comparative posture against mutually exclusive applications that could be filed in the same window. Allowing a new station permittee to file a modification application proposing a less deserving community - based merely on the self-serving assertion that it will not construct at the initially authorized community - could promote gamesmanship among auction applicants while undermining the Commission's ability to promote Section 307(b) goals. We conclude that Northeast's reliance on *Ark-Valley* is misplaced.

Finally, we find no error with the *Modification Letter's* comparative analysis between Nassau Village-Ratliff and Baldwin under the service priorities. Retention of a first local service at Nassau Village under higher allotment priority 3 is clearly favored over a second local service at Baldwin under lesser priority 4.³⁰ Further, Northeast has not attempted to show that Baldwin would be more deserving of another station than Nassau Village-Ratliff under the priorities.

Tolling Petition. Northeast contends that the *Tolling Letter* misconstrued its request for tolling because it focused on the sufficiency of the reasons why Northeast could not construct at its authorized or alternative transmitter sites at Nassau Village-Ratliff. However, Northeast states that its request for tolling was premised on preserving its construction permit pending reconsideration of the erroneous dismissal of the Modification Application. In support of this position, Northeast claims that it would have been able to complete construction of its station at Baldwin within the three-year period dating from the initial grant of its construction permit if its application had not been erroneously dismissed. Northeast believes that the

²⁷ *New Community MO&O*, 5 FCC Rcd at 7097. See also *Revision of FM Assignment Policies and Procedures*, 90 FCC Rcd at 92.

²⁸ See, e.g., *Living Way Ministries, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 15070, 15076 (2008) (determining that the Commission's discussion of an additional matter about an application that had been dismissed on procedural grounds was neither essential nor relevant to the dismissal and need not be followed).

²⁹ See *supra*, n.23.

³⁰ See, e.g., *Cambridge, Newark, et al., Maryland*, Memorandum Opinion and Order, 21 FCC Rcd 10699 (2006) (retaining a first local service at St. Michael's, Maryland, under priority 3 is preferred over upgrading and reallocating a station to Cambridge as a third local service under priority 4).

Tolling Letter is tantamount to a ruling that the denial of an application to modify a construction permit will not relieve the permittee from the obligation to construct while an appeal is pending. Accordingly, Northeast concludes that the construction permit should have been tolled pending reconsideration of the dismissal of the Modification Application and that the tolling request should have been acted upon at the same time as reconsideration of the dismissal of the Modification Application.

Northeast's Tolling Petition is premised on a theory that it will prevail on the Modification Petition. Northeast seeks "to preserve its permit for construction at Baldwin" because if "the dismissal of its permit modification application is reversed and that application is granted, the tolling request by Northeast should also be granted." Our determination herein that the Modification Application was properly dismissed moots the Tolling Petition. Accordingly, the Tolling Petition is dismissed as moot. It remains the case, however, that this action is without prejudice to any additional relief that might be appropriate should the Commission reinstate and grant the Modification Application.

Conclusion. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Northeast Florida Radio, LLC regarding the dismissal of its major modification application (File No. BMAP-20050110AAY) IS DENIED. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Northeast regarding the tolling of its construction permit (File No. BNP-20010817AAF) IS DISMISSED AS MOOT. As noted in the *Second Tolling Letter*, the underlying construction permit had expired on February 12, 2006. The Commission's data base will be modified to reflect the expiration of the permit.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau