



**Federal Communications Commission
Washington, D.C. 20554**

July 26, 2011

DA 11-1237

In Reply Refer to:

1800B3-HOD

Released: July 26, 2011

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In re: **AM Broadcast Auction No. 84
MX Group 84-18**

Nelson Multimedia, Inc.

WSPY(AM), Geneva, Illinois

Facility ID No. 69700

File Nos. BMJP-20040127ACW

BMJP-20051031ADG

**Applications for Major Change to
AM Broadcast Station**

L & L Communications, L.L.C.

Monona, Wisconsin

Facility ID No. 161066

File No. BNP-20040129ATZ

**Application for New AM Station
Construction Permit**

Dear Counsel:

We have before us two mutually exclusive (“MX”) AM construction permit applications. The first (“Nelson Application”),¹ filed by Nelson Multimedia, Inc. (“Nelson”), proposes to change the community of license of WSPY(AM) from Geneva to Millbrook, Illinois and seeks a waiver of the Commission’s policy prohibiting the removal of a community’s sole local transmission service. The

¹ As discussed below, Nelson initially filed a short-form application on FCC Form 175 in January 2004. Nelson later filed a long-form application on FCC Form 301 in October 2007. We refer to both of these applications as the “Nelson Application” herein.

second (“L & L Application”), filed by L & L Communications, L.L.C. (“L & L”), proposes a new AM station at Monona, Wisconsin. We also have before us a Joint Request for Approval of Agreement (“Joint Request”) filed by Nelson and L & L on October 31, 2005. Finally, we have before us a Petition to Deny the Nelson Application (“Petition”) filed by William Davis (“Davis”) on behalf of himself and other local residents (collectively, “Petitioners”) on August 9, 2006,² and an informal objection to the Nelson Application (“Objection”) filed by William Ostrander, the Supervisor of Northville Township, on behalf of Northville Township on October 23, 2006. For the reasons set forth below, we deny the Nelson waiver request, dismiss the Nelson Application, and dismiss the Petition and Objection as moot. We also deny the Joint Request, dismiss the Agreement, retain the L & L Application in pending status and instruct L & L to file a long-form application on FCC Form 301 within 60 days of the release of this letter.

Background. Nelson filed an FCC Form 175 application to change the community of license of WSPY(AM) during the filing window for AM Auction 84 (“Auction 84”).³ The Nelson Application was determined to be mutually exclusive with the L & L Application and an application (“WCFJ Application”) filed by WCFJ, Inc. (“WCFJ”), which proposed to move the community of license of WCFJ(AM) from Chicago Heights to Dolton, Illinois.⁴ These three applications were designated MX Group 84-18. On June 15, 2005, the Media Bureau released a Public Notice that, among other things, required each applicant in MX Group 84-18 to file either a settlement agreement, an engineering solution resolving all mutual exclusivities, or a Section 307(b) showing by September 16, 2005.⁵ Accordingly, on October 31, 2005, Nelson and L & L filed the Joint Request and a copy of their settlement agreement (“Agreement”). Under the terms of the Agreement, Nelson is to reimburse L & L for its legitimate and prudent expenses in exchange for the dismissal of the L & L Application.

Along with the Agreement, on October 31, 2005, Nelson filed a long-form application on FCC Form 301 seeking to implement the community of license change for Station WSPY(AM) from Geneva to Millbrook, Illinois.⁶ Accompanying the long-form application was a Section 307(b) submission, addressing the implications of the proposed community change under Section 307(b) of the Communications Act of 1934, as amended (the “Act”), which directs the Commission to make a “fair, efficient, and equitable” distribution of radio service among communities in the United States.⁷ Nelson

² Davis supplemented the Petition on March 18, 2009. *See Letter from William Davis* (rec’d Mar. 18, 2009) (“Supplement”).

³ *See AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

⁴ The Bureau dismissed the WCFJ Application on January 29, 2007 “for failing to file or untimely filing the required settlement agreement, engineering solution resolving all mutual exclusivities, or Section 307(b) showing.” *See AM Auction No. 84 Mutually Exclusive Applications Dismissed for Failing to File or Untimely Filing of Required Settlement Agreement, Engineering Solution, or Section 307(b) Showing*, Public Notice, 22 FCC Rcd 1055 (MB 2007). Accordingly, we do not discuss this application further herein.

⁵ *See AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction, Settlement Period Announced for Certain Mutually Exclusive Application Groups; September 16, 2005 Deadline Established for Section 307(b) Submissions*, Public Notice, 20 FCC Rcd 10563 (MB 2005). This filing deadline was extended to October 31, 2005, because of Hurricane Katrina. *See Auction No. 84 Settlement Period and Section 307(b) Submission Deadline Extended to October 31, 2005*, Public Notice, 20 FCC Rcd 14492 (MB 2005).

⁶ This application was accepted for filing and placed on Public Notice on August 19, 2008. *See Broadcast Applications*, Public Notice, Report No. 26803 (MB Aug. 19, 2008).

⁷ 47 U.S.C. § 307(b).

supplemented its Section 307(b) showing on March 29, 2006 (“Section 307(b) Supplement”). On October 2, 2006, Nelson filed an application amendment updating the Commission on the zoning status of the site proposed in the Nelson Application. Nelson filed an application amendment on January 24, 2008 (“January 2008 Amendment”), which responded to a staff letter notifying Nelson of certain deficiencies in the Nelson Application. Subsequently, Nelson filed two additional application amendments on October 14, 2008 and November 19, 2008 (“November 2008 Amendment”), which responded to staff requests for further information.

Nelson proposes to change WSPY(AM)’s community of license from Geneva (2000 Census population 19,515) to Millbrook, Illinois (estimated 2000 Census population 326),⁸ as that community’s first local transmission service. Nelson’s Section 307(b) analysis indicates that Geneva, located within the Chicago metro area, will continue to receive protected service⁹ from at least five stations.¹⁰

Nelson acknowledges that WSPY(AM) is the sole local transmission service licensed to Geneva. Accordingly, Nelson seeks waiver of the Commission’s policy prohibiting the removal of a community’s sole local transmission service. Nelson claims that waiver is justified because WSPY(AM) lost its licensed transmitter site and Nelson has been unable to find another suitable site that would serve Geneva and satisfy the Commission’s technical requirements.¹¹ In addition, Nelson argues that its application “should be processed pursuant to the Commission’s Interference Reduction Policy.”¹² Nelson characterizes this policy as permitting the surrender or modification of an AM station license, including the license of a station providing a community’s sole local transmission service, in order to reduce interference on the AM band.¹³

Both Petitioners and Northville Township oppose the Nelson Application, alleging that Nelson manipulated the local land use system in order to get local zoning approval for the transmitter site proposed in the Nelson Application.¹⁴ Petitioners also claim that Larry Nelson, one of the principals of

⁸ Millbrook incorporated in 2002. Therefore, the 2000 Census did not include a population figure for Millbrook. Nelson estimates the population using 2000 Census data and specifies the data used. *See* Section 307(b) Engineering and Field Report attached to January 2008 Amendment.

⁹ 5 mV/m for AM stations and 3.16 mV/m (70 dB μ) for FM stations.

¹⁰ Response to the FCC Letter of July 25, 2007, attached to January 2008 Amendment; Section 307(b) Supplement at 2-3.

¹¹ Nelson also points out that it is proposing to move WSPY(AM) from the Chicago urbanized area to a more rural area and asserts that the Nelson Application therefore does not implicate the Commission’s concern about stations abandoning rural service areas in favor of urbanized areas. Section 307(b) Supplement at 3. While we agree that Nelson’s proposal does not implicate this concern, for the reasons discussed herein, we do not find that Nelson’s proposal to remove Geneva’s sole local transmission service would serve the public interest, convenience and necessity. We note that the Commission recently revised the procedures for performing a Section 307(b) analysis of a proposal to change a station’s community of license. *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 26 FCC Rcd 2556 (2011). However, the Commission specifically excluded Auction 84 applications such as this one from the changes adopted there. *Id.*, 26 FCC Rcd at 2575. Thus, we analyze Nelson’s proposal to change WSPY(AM)’s community of license under the procedures that remain in effect for Auction 84 applications.

¹² Section 307(b) Supplement at 3.

¹³ *Id.*

¹⁴ Petition at 1-2.

Nelson, “had a 50 year lease and established tower site” at another location from which Nelson could have served Millbrook but “sold this tower site off.”¹⁵ Petitioners argue that these circumstances “show unethical behavior” and call into question Larry Nelson’s character.¹⁶ In addition, Petitioners request that an Environmental Impact Study (“EIS”) be prepared to address possible impacts on migratory birds and historic properties.¹⁷ Finally, Petitioners allege that Nelson failed to satisfy the Commission’s rules regarding local public notice regarding the Nelson Application.¹⁸

Nelson opposes both the Petition and the Objection.¹⁹ Nelson asserts that, “[w]ith limited exception, the Commission traditionally yields to state and local law concerning zoning matters.”²⁰ Nelson argues that neither Petitioners nor Northville Township have shown that Nelson’s proposed use of the site specified in the Nelson Application is “prevented by zoning matters.”²¹ Accordingly, Nelson asserts that the Commission must deny the Objection and reject Petitioners’ arguments related to local zoning issues. Nelson also submits a letter dated February 5, 2007, from the Illinois Historic Preservation Agency. The letter states that “no significant historic, architectural, and archaeological resources are located in the project area.”²² Finally, Nelson states that it consulted with a bird biologist with the Division of Migratory Bird Management – Mississippi Flyway, United States Fish and Wildlife Service. The biologist indicated that “he is aware of no current data that any migratory bird path exists in the vicinity of the proposed WSPY tower site.”²³

Discussion. *Nelson Application. Interference Reduction.* Nelson asserts that its proposal will significantly reduce interference from WSPY(AM) to stations operating on first adjacent channels.²⁴ Nelson, acknowledges, however that its proposal results in WSPY(AM) receiving increased interference from two AM stations and requests a waiver of Section 73.37 to permit this.²⁵ Nelson states that

¹⁵ Petition at 2.

¹⁶ Petitioners also note that Nelson failed to respond to the question regarding character issues on its long-form application. Petition at 2. Nelson also failed to respond to the questions regarding adverse findings and alien ownership and control, and failed to make the required program service certification.

¹⁷ Petition at 2.

¹⁸ Supplement at 1. With respect to Millbrook, Petitioners claim that Nelson should have published notice of the Nelson Application in the Aurora Beacon News instead of the Ottawa Daily Times. Petition at 1. With respect to Geneva, Petitioners state “[t]he FCC public notice for the transferring community of [I]icense holder of Geneva has also not been met” but do not offer any support for this allegation. *Id.*

¹⁹ See Opposition to Objections and Request for Expedited Processing (“Opposition”) filed by Nelson on November 19, 2008, as part of its November 2008 Amendment.

²⁰ Opposition at 2.

²¹ Opposition at 3, 4.

²² Opposition at 3-4 and Attach. 3.

²³ Opposition at 4 and Attach. 2

²⁴ Section 307(b) Supplement at 3.

²⁵ See Response to the FCC Letter of July 25, 2007, attached to January 2008 Amendment. WSPY(AM) would receive interference from WZOE to an additional 22,724 persons and an increased 399.87 square km, and interference from WMBD to an additional 21 persons and an increased 12.52 square km. See Comprehensive Technical Exhibit at 1 and WSPY Interference Reduction Study, both attached to January 2008 Amendment.

interference received by WSPY(AM) from all other stations “has been greatly decreased.”²⁶ Nelson also notes that, on balance, over 542,710 persons and 2,863.93 square km will receive less interference.²⁷ Nelson argues that the Commission should grant the Application pursuant to its interference reduction policies.

We find the AM interference reduction policies adopted by the Commission in 1993 are inapplicable here. In adopting these policies, the Commission sought “to encourage *interstation agreements* proposing a reduction in AM interference and to provide a procedural framework that would facilitate such agreements.”²⁸ Accordingly, the Commission created an exception to the general prohibition on filing of contingent applications for construction permits proposing either new or modified facilities set forth in Section 73.3517 of the Rules to permit the filing of contingent applications that lead to “an overall reduction in AM interference.”²⁹ Nelson has not indicated that it has entered into an Interference Reduction Agreement with any other licensee – a key prerequisite to application of the Commission’s Interference Reduction Policy.³⁰ Moreover, nothing suggests that the Nelson Application is a contingent application.³¹

While grant of the Nelson Application could result in a reduction in interference, we find that this alone does not justify its grant or bring it within the bounds of the Interference Reduction Policy.³² Nelson has filed a stand alone application that happens to offer some interference reduction benefits.³³ As such, the Application is subject to the Commission’s policies governing changes in a station’s community of license, including the general prohibition on the removal of sole local transmission service from a community.

²⁶ Response to FCC Letter of July 25, 2007 attached to January 2008 Amendment.

²⁷ Comprehensive Technical Exhibit at 1, attached to January 2008 Amendment.

²⁸ *Policies to Encourage Interference Reduction between AM Broadcast Stations*, Report and Order, 5 FCC Rcd 4492, 4494 (1990) (emphasis added).

²⁹ *Id.* at 4493.

³⁰ See *Kovas Communications, Inc.*, Letter, 21 FCC Rcd 2196 (MB 2006) (declining to consider whether the exception “for mutually contingent AM applications that cross-reference each other and are filed pursuant to an interference reduction arrangement” applied where “no such arrangement [was] disclosed” by either applicant).

³¹ We acknowledge that the Commission has recognized as application “contingencies” actions other than the grant or denial of another application. For example, the Commission recognizes and permits the processing of applications which are contingent on the deletion of other facility authorizations in the context of its AM interference reduction policies. See *JCE Licenses, LLC*, Letter, 24 FCC Rcd 4161, 4162 (MB 2009) (interference reduction agreement approved that involved deletion of one station and grant of contingent application to improve the facilities of another station). However, even under this more inclusive view of what constitutes a “contingency,” the Nelson Application is not contingent.

³² Indeed, if we were to permit an applicant to remove the sole local transmission service from a community based solely on the fact that its application offers the benefit of interference reduction, the exception would swallow the rule.

³³ We find Nelson’s reliance on *Kovas Communications, Inc.*, Letter, 23 FCC Rcd 12706 (MB 2008) (“*Kovas*”), inapt. See October 2008 Amendment. In *Kovas*, we granted an application to increase one AM station’s daytime power, which was contingent upon the surrender of the license of a second AM station providing a community’s sole local transmission service. The licensees of the two stations had entered into an interference reduction agreement. Grant of the application was contingent upon surrender of the other station’s license. Unlike Nelson’s situation where there is only one station involved and no interference reduction agreement, the circumstances in *Kovas* fell squarely within the Commission’s AM interference reduction policies.

Section 307(b). Our policies on allowing broadcast stations to change their communities of license are based on Section 307(b) and the goals of fair, efficient, and equitable distribution of radio service that underlie it. Our FM Assignment Policies delineate three core priorities: provision of first aural reception service to a community, provision of second aural reception service to a community, and provision of first local transmission service at a community.³⁴ The fourth priority is “other public interest matters,” which encompasses any other factors that the Commission may take into consideration.³⁵ Retention of the first local transmission service at Geneva, and the institution of first local transmission service at Millbrook, implicate Priority (3) – first local transmission service. However, notwithstanding that the existing and proposed arrangement of stations both trigger the same allotment priority, the Commission prohibits the removal of an existing station representing a community’s sole local transmission service.³⁶ This policy is subject, as are all Commission policies, to waiver under appropriate circumstances.³⁷ However, the Commission has emphasized that “the fact that a proposal would create a new local service (at the expense of an existing service) is not sufficient, by itself, to warrant a waiver.”³⁸ Rather, such a proposal “is presumptively contrary to the public interest.”³⁹ In this regard, the Commission has stated that:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.⁴⁰

In 2006, the Commission reexamined the policy disfavoring removal of a community’s sole local transmission service and concluded that “the better course is to continue our policy . . . , subject to waiver of the policy upon a detailed showing that retention of local service at a station’s current community is

³⁴ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 88, 91-93 (1982) (“*FM Assignment Policies and Procedures*”). Priorities (2) and (3) are co-equal. The FM allotment priorities are applied to Section 307(b) determinations for community change proposals for AM stations. *Allesandro Broadcasting Co.*, Decision, 99 FCC2d 1 (Rev. Bd. 1984).

³⁵ *FM Assignment Policies and Procedures*, 90 FCC2d at 93.

³⁶ *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) (“*New Community R&O*”), recon. granted in part, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 (1990) (“*New Community MO&O*”). The Commission re-affirmed this policy in *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14227-30 (2006) (“*Community of License R&O*”).

³⁷ *New Community MO&O*, 5 FCC Rcd at 7096; *Community of License R&O*, 21 FCC Rcd 14227-30. On waiver standards generally, see *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest,” citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) (“*WAIT Radio*”).

³⁸ *New Community MO&O*, 5 FCC Rcd at 7097.

³⁹ *Id.*

⁴⁰ *Id.*

contrary to the public interest, convenience, and necessity.”⁴¹ The Commission went on to offer examples of the types of showings that might justify waiver of the policy. Among other things, the Commission stated that “[a]n AM licensee that has lost its transmitter site, and due to terrain or lack of available land cannot find a substitute site that would provide adequate community coverage, might also be able to present a compelling case for waiver.”⁴² The Commission cautioned, however, that “the bare assertion that a station has lost its site, absent evidence showing an exhaustive but fruitless search for sites from which a sole local transmission service could comply with our technical rules, would not suffice to justify grant of a waiver to allow the station to move to another community.”⁴³ Finally, the Commission noted that: “a broadcaster that sought to locate in a community is expected to serve that community, as is a broadcaster that purchased the sole local transmission service in a particular community.” In the latter case, the Commission warned that “no broadcaster should invest in a station with the expectation that the Commission will routinely approve a request to move to a different community.”⁴⁴

Nelson acknowledges that it seeks to remove Geneva’s sole local transmission service. Accordingly, Nelson requests a waiver of the prohibition on removal of a community’s sole local transmission service,⁴⁵ contending that the application falls within the “loss of transmitter site” circumstance discussed by the Commission.⁴⁶ In support of its waiver request, Nelson alleges that WSPY(AM) operated at a loss for years prior to its acquisition by Nelson.⁴⁷ According to Nelson, in early 2001, the station’s previous owner, Valley Communications, Inc., took the station off the air and sold the station’s transmitter site to cover accumulated losses.⁴⁸ Nelson states that, when it acquired the station in June 2001, the station’s licensed transmitter site was under development and unavailable for purchase or use by Nelson.⁴⁹ Nelson returned the station to the air at reduced power from a temporary transmitter site pursuant to special temporary authority (“STA”) granted by the Commission on March 4, 2002.⁵⁰ Nelson states that, at that time, it also began a search for a permanent transmitter site that would allow it to serve Geneva.⁵¹

Nelson alleges that, after a “thorough search,” it “determined that the scarcity of sufficiently sized and situated parcels of vacant land in the urbanized area, the very tight area to locate the different licensed

⁴¹ *Community of License R&O*, 21 FCC Rcd at 14229.

⁴² *Id.* at 14229-30.

⁴³ *Id.* at 14230.

⁴⁴ *Id.*

⁴⁵ October 2008 Amendment. Nelson also argues that the Commission should consider the interference reduction benefits of its proposal in performing the Section 307(b) analysis. We reject this argument. The Commission has never taken interference reduction into account in this context.

⁴⁶ *See Community of License R&O*, 21 FCC Rcd at 14229-14230 (“An AM licensee that has lost its transmitter site, and due to terrain or lack of available land cannot find a substitute site that would provide adequate community coverage, might also be able to present a compelling case for waiver”).

⁴⁷ Section 307(b) Supplement at 1.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See Loss of Transmitter Site Exhibit*, Item 1, attached to October 2008 Amendment. The station has continued to operate from this location at reduced power pursuant to a series of STA extensions. *Id.*

⁵¹ Section 307(b) Supplement at 1.

day and night directional patterns, zoning concerns, and airport locations (air space clearance) precluded an alternate licensed tower site which would serve Geneva consistent with the Commission's technical requirements."⁵² Nelson explains that the transmitter site must be at least 9 and more likely 10 acres in order to accommodate the tower array specified in the Application.⁵³ In addition, the towers, which must be 179 feet above ground level,⁵⁴ must be located to the North or Northeast of Geneva in order to ensure compliance with the Commission's interference protection and city grade coverage requirements.⁵⁵ Nelson claims it also faced limitations related to zoning⁵⁶ and the economic feasibility of the price of the sites considered.⁵⁷ Nelson submits a list of 14 sites that it investigated during its search.⁵⁸ According to Nelson's "notes and recollections," all but two of the sites involved air space clearance⁵⁹ or environmental issues, less land than required for the WSPY(AM) array, and/or owners uninterested in selling or leasing to Nelson.⁶⁰ Nelson indicates that it rejected two sites on the basis of price alone.⁶¹ Because of this asserted unavailability of sites, Nelson states that it explored alternatives. According to Nelson, it ultimately found an alternate location and filed a major change application during the auction filing window seeking authority to move WSPY(AM)'s operations to this location and change the station's community of license to Millbrook.⁶²

⁵² Section 307(b) Supplement at 2. *See also* Loss of Transmitter Site Exhibit, Item 2, attached to October 2008 Amendment ("[T]he tight directional patterns, the unavailability of adequate sites, metro air space and zoning issues and the high real estate costs are major impediments that have made it impractical if not impossible to locate a technically sufficient tower site providing the necessary city-grade signal to Geneva").

⁵³ Loss of Transmitter Site Exhibit, Item 2, attached to October 2008 Amendment. Nelson submits coverage patterns and other materials to support its conclusion. *Id.*

⁵⁴ Loss of Transmitter Site Exhibit, Item 3, attached to October 2008 Amendment.

⁵⁵ Loss of Transmitter Site Exhibit, Item 2, attached to October 2008 Amendment.

⁵⁶ Loss of Transmitter Site Exhibit, Item 4, attached to October 2008 Amendment.

⁵⁷ Loss of Transmitter Site Exhibit, Item 3, attached to October 2008 Amendment. *See also* Loss of Transmitter Site Exhibit, Item 2, attached to October 2008 Amendment ("Even if each of these substantial hurdles could be cleared successfully, the exorbitant cost of prime real estate in a highly developed urbanized area would irrationally overwhelm the modest revenue of a low powered AM station which receives significant interference in a competitive market"). Based on recollections of discussions with realtors in 2001 and 2002, Nelson asserts that "[I]and, undeveloped, in off-the-path locations was in the \$9.00 to \$12.00 per square foot range" with 10 acres costing "\$3,920,000 to \$5,227,000." *Id.*, Item 5. Nelson states that "[d]evelopable land in better locations" cost "\$15.00 to \$20.00 per square foot" with 10 acres costing between "\$6,534,000 to \$8,712,000, plus development costs of land, towers, phasers, etc." *Id.* According to Nelson, "[t]he debt service of this mortgage could not be paid by the operation of a station this size." In addition to these recollections, in 2008, Nelson again examined the cost of land on the North and Northeast side of Geneva. *Id.* Nelson submits listing information for a 5.8 acre parcel on the East side of Geneva. *Id.* Using this information, Nelson extrapolates that a 10 acre site would cost \$5,662,000 and concludes that the cost of such a site would be "exorbitant." *Id.* Nelson notes that the cost of a 10 acre site near Millbrook is between \$120,000 to \$150,000 and claims that "[a]fter adding development costs, including towers, phasor, transmitter building, etc., the debt is reasonable, allowing a small AM to be viable." *Id.*

⁵⁸ Loss of Transmitter Site Exhibit, Item 3.

⁵⁹ The DuPage County Airport is contiguous with the Northeast side of Geneva. Loss of Transmitter Site Exhibit, Item 4, attached to October 2008 Amendment.

⁶⁰ Loss of Transmitter Site Exhibit, Item 3, attached to October 2008 Amendment.

⁶¹ Loss of Transmitter Site Exhibit, Item 3, attached to October 2008 Amendment.

⁶² Loss of Transmitter Site Exhibit, Item 2, attached to October 2008 Amendment.

When an applicant seeks waiver of a rule, its burden is to plead with particularity the facts and circumstances that warrant such action.⁶³ Thus, an applicant for waiver “faces a high hurdle even at the starting gate.”⁶⁴ While the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.⁶⁵ “A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”⁶⁶ We reject Nelson’s arguments that the dealings surrounding the community of license change constitute special circumstances, and that deviation from the policy prohibiting removal of a sole local transmission service will serve the public interest, offsetting the expectation of continued transmission service at Geneva, and therefore, deny its request for waiver.

We initially find unconvincing the foundation of Nelson’s argument - the necessity of relocating the Station. Nelson purchased the station with full knowledge that it lacked a transmitter site. This situation is one of its own making.⁶⁷ The Commission has warned that “no broadcaster should invest in a station with the expectation that the Commission will routinely approve a request to move to a different community.”⁶⁸

In addition, while we agree with Nelson regarding the size (approximately 10 acres) and location (North or Northeast of Geneva) of the parcel of land required for the WSPY(AM) tower array, we find that Nelson failed to demonstrate that it diligently undertook an exhaustive but unsuccessful search for alternative sites. The Commission has always required detailed documentation whenever a “lack of suitable site” argument is raised.⁶⁹ The Commission recently reiterated this standard in the *Community of License R&O* when it confirmed that:

We also remind applicants that our waiver standard requires a detailed recitation of facts and circumstances, including documentary or testimonial evidence where appropriate, demonstrating special circumstances that warrant deviation from the policy, and showing that such deviation serves the public interest. For example, the bare assertion that a station has lost its site, absent evidence showing an exhaustive but fruitless search for sites from which a sole local transmission

⁶³ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987), citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968).

⁶⁴ *WAIT Radio*, 418 F.2d at 1157.

⁶⁵ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999), citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974).

⁶⁶ *Northeast Cellular*, 897 F.2d at 1166.

⁶⁷ See *Birach Broadcasting Corp.*, Letter, 24 FCC Rcd 8945, 8949 (MB 2009). See also *P & R Temmer, d/b/a Mobile Communications Service Company*, Memorandum Opinion and Order, 93 FCC 2d 1051, 1062 (1983) (finding that “problems with site selection” were not beyond the licensee’s control because they “resulted from independent business judgments made by the licensee”), *aff’d sub nom. P & R Temmer v. FCC*, 743 F. 2d 918 (D.C. Cir. 1984) (affirming Commission’s finding that a licensee’s difficulties resulted from “its own business decisions” and thus “were attributable to circumstances under [licensee’s] control”).

⁶⁸ *Community of License R&O*, 21 FCC Rcd at 14230.

⁶⁹ See, e.g., *R&S Media*, Memorandum Opinion and Order and Order to Show Cause, 19 FCC Rcd 6300 (MB 2004); *Greater Media Company*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999). In the *R&S Media* case, for example, the applicant detailed its extensive six month search, including its collaboration with BLM officials, in evaluating other potentially available sites.

service could comply with our technical rules, would not suffice to justify grant of a waiver to allow the station to move to another community.⁷⁰

We find insufficient the list of 14 sites that Nelson reconstructed from notes and memory. Nelson provides no evidence to permit us to determine whether these 14 sites were the only sites located to the North or Northeast of Geneva that were large enough to accommodate the WSPY(AM) tower array. Indeed, Nelson does not even appear to have engaged the services of a realtor to assist with the search, conducting its search primarily by driving around. This does not constitute an exhaustive search. Similarly, Nelson does not indicate that it engaged the services of an expert to perform an aeronautical study that indicated which areas to the North and Northeast of Geneva work from an aeronautical perspective and which areas do not. Instead, Nelson submits results from the Commission's Towair Determination system for two sites that failed regarding "slope" and makes the unsubstantiated claim that all other sites also failed regarding "slope." This is insufficient support for Nelson's claim that the search was limited by the vicinity of DuPage County Airport.⁷¹ Further, we note that Nelson rejected two possible sites on the basis of cost alone but failed to submit any financial documentation to support its assertion that the revenues from WSPY(AM) would not support the purchase of either of these sites.⁷² For all of these reasons, we cannot conclude that Nelson conducted a comprehensive or in-depth search for a new site that would enable it to continue to serve Geneva.

Finally, even if we were to conclude that we should waive the prohibition on removal of sole local service and perform a traditional Section 307(b) analysis, we would reject Nelson's proposal.⁷³ As noted above, both provision of a first local service to Millbrook and maintenance of the sole local transmission service at Geneva implicate priority (3). When two applicants qualify for a Priority (3) preference, and both propose communities of license that are currently well-served by at least five aural services,⁷⁴ the Commission bases its decision on a straight population comparison and awards a dispositive fair distribution preference to the application proposing to serve the community with the larger population.⁷⁵ Here, both communities are well-served. Thus, we would compare their populations and the comparison would favor Geneva, which is significantly larger than Millbrook.

⁷⁰ *Community of License R&O*, 21 FCC Rcd at 14230 (first citation omitted). See also *Pacific Broadcasting of Missouri, LLC*, Memorandum Opinion and Order, 18 FCC Rcd (2003) (applicant sought removal of condition requiring replacement service at original community before commencing operations at new community; Commission found that applicant failed "to demonstrate that it has exhausted all possibilities for temporary operation" at current community).

⁷¹ See *Edens Broadcasting, Inc.*, 2 FCC Rcd 689, 691-92 (Rev. Bd. 1987), *aff'd*, 5 FCC Rcd 2576 (1990), *recon. denied*, 6 FCC Rcd 4327 (1991) (discussing a site search which included a more thorough aeronautical study).

⁷² Similarly, Nelson identified "some potential vacant land" while preparing its response to a request for further information but rejected these parcels on the basis of price too. Loss of Transmitter Site Exhibit, Item 3, attached to October 2008 Amendment. Here too, Nelson failed to submit financial documentation to support its claims that the prices quoted to it were too high to allow WSPY(AM) to remain viable.

⁷³ We assume for the sake of argument that Millbrook is a community for Section 307(b) purposes.

⁷⁴ See Response to the FCC Letter of July 25, 2007, attached to January 2008 Amendment; Section 307(b) Supplement at 2-3. See also *Family Broadcasting Group*, 53 RR 2d 662 (Rev. Bd. 1983), *rev. denied*, FCC 83-559 (Comm. Nov. 29, 1983) (the Commission considers areas which receive five or more services to be abundantly served).

⁷⁵ See, e.g., *Royce International Broadcasting Co.*, Memorandum Opinion and Order, 24 FCC Rcd 5880, 5889 (2009) *citing Blanchard, Louisiana and Stephens, Arkansas*, Memorandum Opinion and Order, 10 FCC Rcd 9828, 9830 (1995) ("When comparing two or more proposals, each of which contemplates first local transmission service

Having carefully considered all of the arguments and evidence presented, we cannot find, on the existing record in this case, that there are sufficient public interest factors to offset the expectation of continued local service at Geneva, Illinois. Accordingly, we cannot find that the public interest, convenience, and necessity will be served by Nelson's proposal. Therefore, we will deny the Waiver Request and dismiss the Nelson Application. We note that our dismissal of the Nelson Application on other grounds renders it unnecessary for us to reach the issues raised by Petitioners and Northville Township. Accordingly, we will dismiss the Petition and Objection as moot.

Settlement Agreement. We also deny the Joint Request. Approval of the Agreement would not serve the public interest primarily because a principal component of the Agreement requests that we grant the Nelson Application. In light of the public interest determinations made with respect to the Application, and our finding that Nelson's proposal fails to advance the public interest, we dismiss the Agreement. Furthermore, given this finding, the instant Agreement cannot be fully implemented and consequently, the L & L Application should not be dismissed at this time.

Conclusion/Action. For the foregoing reasons, IT IS ORDERED that the waiver request of Nelson Multimedia, Inc. IS DENIED.

IT IS FURTHER ORDERED that the tech box application (File No. BMJP-20040127ACW) and the FCC Form 301 long form application (File No. BMJP-20051031ADG) filed by Nelson Multimedia, Inc., for major modification to change the community of license of Station WSPY(AM), Geneva, Illinois, ARE DISMISSED.

IT IS FURTHER ORDERED that the Petition to Deny filed by William Davis on behalf of himself and other local residents on August 9, 2006, and the informal objection filed by William Ostrander, the Supervisor of Northville Township, on behalf of Northville Township on October 23, 2006, ARE DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the Joint Request for Approval of Agreement filed by Nelson Multimedia, Inc., and L & L Communications, L.L.C. on October 31, 2005, IS DENIED and the parties' Agreement IS DISMISSED.

IT IS FURTHER ORDERED that the tech box application filed by L & L Communications, L.L.C. (File No. BNP-20040129ATZ) for a new AM station at Monona, Wisconsin, IS RETAINED in pending status for further processing.

under Priority (3) to two well-served communities, it is well-settled Commission policy to compare the relative populations of the communities and award the Section 307(b) preference to the more populous community").

Finally, IT IS FURTHER ORDERED that L&L Communications, L.L.C., within 60 days of the release date of this Letter, shall file a long-form application on FCC Form 301 in connection with its application for a new AM broadcast station at Monona, Wisconsin, pursuant to the procedures set forth in the Commission's rules.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Nelson Multimedia, Inc.
L & L Communications, L.L.C.
William Davis
William Ostrander