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DA 12-1259

In Reply Refer to:
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Eastern Sierra Broadcasting
c/o Dan J. Alpert, Esq.
The Law Office of Dan J. Alpert
2120 N. 21st Road
Arlington, Virginia 22201

In re: KCWK(AM), Laughlin, Nevada
Facility ID No. 160324
File No. BMP-20111004AED

Dear Mr. Alpert:

We have before us the referenced application (“Application”) and accompanying request for waiver of Section 73.3571(k)(1) of the Commission’s Rules (“Rules”),¹ filed by your client, Eastern Sierra Broadcasting (“ESB”). The Application proposes a minor modification of ESB’s construction permit, requesting Commission permission to change the community of license from North Las Vegas, Nevada, to Laughlin, Nevada. For the reasons discussed below, we grant the waiver request in part and grant the Application.

Background. ESB’s initial application to provide AM service at North Las Vegas, Nevada, was mutually exclusive with two other applications. Consistent with Commission policy,² the staff undertook a traditional Section 307(b) analysis, in preparation for a potential auction for these mutually exclusive applications. Upon consideration of the three applications, the staff determined that the ESB proposal was entitled to a dispositive Section 307(b) preference under Priority (4) of the applicable allotment priorities.³ In reaching this determination, the staff compared the number of persons receiving service within each proposal’s 0.5 mV/m contour and 2 mV/m contour,⁴ as well as the number of persons who would receive nighttime interference-free service. In each category, ESB’s proposal would serve the greatest number of people. Accordingly, the staff concluded that it would serve the public interest “to give preference to ESB’s North Las Vegas proposal, which will serve significantly more people.”⁵

¹ See Application at Exhibit 12 (“Waiver Request”).

² See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses* (“Broadcast First Report and Order”), First Report and Order, 13 FCC Rcd 15920, 15964-65 (1998), *recon. denied*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *modified*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

³ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime service aural service, (3) First local transmission service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984).

⁴ See 47 C.F.R. § 73.182(d).

⁵ Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Dr. Charles W. Love, Christopher L. Hicks, and Eastern Sierra Broadcasting (September 15, 2008) (“2008 Staff Letter”). Because ESB’s application was filed in the 2004 AM Auction 84 filing window, the new limitations on dispositive Section 307(b) preferences based on Priority 4 did not apply. See Second Report and Order, cited *infra* at n. 8, 26 FCC Rcd at 2573.

ESB's original application for North Las Vegas was granted on September 28, 2010. ESB subsequently filed an application for minor modification of its construction permit, seeking to change the community of license from North Las Vegas, Nevada, to Laughlin, Nevada. In response to a staff request,⁶ ESB submitted a Section 307(b) analysis on January 30, 2012.

On May 9, 2012, ESB also submitted a "Request for Waiver" of Section 73.3571(k)(1) of the Commission's Rules,⁷ a provision which is triggered by a decrease of more than 20 percent in the number of persons served. Although ESB concedes that the number of persons who would receive nighttime interference-free service would decline by more than 20 percent under the proposed modification, ESB questions whether such service was "a material factor" in its receipt of a dispositive Section 307(b) preference. ESB contends that the proposed change of community would result in a preferential arrangement of allotments because it would bring a first competitive local service to Laughlin. ESB states that North Las Vegas is located within the Las Vegas Urbanized Area, which receives service from at least 38 stations. Laughlin, in contrast, is not located within an urbanized area, nor would the proposed station provide service to any portion of an urbanized area. In addition, ESB argues that grant of the proposed change of community would further the Commission's policies under *Rural Radio*.⁸ In *Rural Radio*, the Commission adopted policies to promote service to rural and other less-well-served areas, and to discourage changes of community from less-populated areas into urbanized areas.

Discussion. The Commission's rules may be waived only for good cause shown.⁹ An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.¹⁰ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"¹¹ and must support its waiver request with a compelling showing.¹² The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹³ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁴ However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹⁵

⁶ Letter from Son Nguyen, Supervisory Engineer, Audio Division, Media Bureau, to Dan J. Alpert (November 9, 2011).

⁷ Request for Waiver (filed May 9, 2012). See 47 C.F.R. § 73.3571(k)(1).

⁸ *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order, 25 FCC Rcd 1583 (2010) ("First Report and Order"), and Second Report and Order, 26 FCC Rcd 2556 (2011) ("Second Report and Order"), *recon. pending* (collectively, "*Rural Radio*").

⁹ See 47 C.F.R. § 1.3.

¹⁰ 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)).

¹¹ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) ("*WAIT Radio*"). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

¹² *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)).

¹³ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

¹⁴ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁵ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

An AM applicant receiving a dispositive Section 307(b) preference is limited in the extent to which it may modify its facilities. Where, as here, an AM applicant has received a dispositive Section 307(b) preference on the basis of service totals, a proposed modification must not result in a decrease of more than 20 percent of any population figure that was a material factor in obtaining the preference.¹⁶ The Commission staff's calculations reveal that the number of persons who would receive nighttime interference-free service from KCWK at Laughlin is approximately 93 percent less than the number who would receive nighttime interference-free service at North Las Vegas.¹⁷ Therefore, ESB requests a waiver of Section 73.3571(k)(1) of the Commission's Rules.

As an initial matter, we do not accept ESB's contention that the population receiving nighttime interference-free service was not a "material factor" in award of the dispositive preference to ESB. The issue of whether a fact is material turns upon the question of whether "its existence or nonexistence has the potential to change the outcome" of the proceeding.¹⁸ In deciding to award ESB a dispositive Section 307(b) preference, the staff did not single out any factor as determinative. Instead, the staff looked at the population receiving service as defined by each proposal's 0.5 mV/m contour, 2 mV/m contour, and the nighttime interference-free service.¹⁹ There was a large difference in the number of persons served under each measure, and absent the specific identification of a single key factor, we believe that all three are properly regarded as material factors.²⁰

We agree with ESB that the special circumstances of this proposal warrant a deviation from the general rule, and that such deviation would serve the public interest. In *Rural Radio*, the Commission emphasized that a primary goal of Section 307(b) is to prevent "the excessive concentration of radio service in larger cities, and to check the predictable interest of broadcasters to congregate in major markets."²¹ In adopting new policies for proposals for change of community of license, the Commission's goal was to "safeguard the interests of listeners in less well-served areas."²² ESB's proposal does not fit the pattern of broadcasters "congregat[ing] in major markets;" quite the opposite, the proposed change of community represents a move from a major market to a less well-served area. The effect of the proposed move is therefore consistent with the goal of Section 307(b) as well as the policies expressed by the Commission in *Rural Radio*. Moreover despite a decrease in the number of persons receiving nighttime interference-free service as a result of the change of community, KCWK would still

¹⁶ See 47 C.F.R. § 73.3571(k)(1).

¹⁷ Commission staff calculations using 2010 U.S. Census data indicate that the number of persons served by KCWK's nighttime interference-free contour would decrease from 648,564 to 44,555 persons, a net loss of 604,009 persons. In contrast, the number of persons served by KCWK's 0.5 mV/m contour would increase from 1,954,825 to 2,022,350 persons, a net gain of 67,525 persons (3.5 percent). The number of persons covered by the 2 mV/m contour would decrease less than 20 percent, from 1,496,039 to 1,277,932, a net loss of 218,107 persons (14.6 percent).

¹⁸ See *United States v. Baxter*, 841 F.Supp.2d 378, 388, (D.Me. 2012), citing *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995). See also *WSTE-TV, Inc.*, 75 FCC2d 52 (1979) (distinguishing between a "material factor" and a "vital difference").

¹⁹ See 2008 Staff Letter.

²⁰ See *TELNS Broadcasting Company, Inc.*, Letter, 19 FCC Rcd 24093 (MB 2004), *app. for rev. denied*, 23 FCC Rcd 8815 (2008) (finding no dispositive difference between parties, when one proposal would provide superior nighttime service and another would provide superior daytime service).

²¹ Second Report and Order, 26 FCC Rcd at 2568.

²² *Id.* at 2577.

provide such service to more than 91 times the level of service proposed by either of ESB's two original competitors.²³ We find that these factors constitute special circumstances that warrant consideration of whether a waiver of Section 73.3571(k)(1) would serve the public interest.

In reaching a decision on ESB's proposed modification, we will compare the public interest benefits from service at North Las Vegas, as originally proposed, with the benefits of service at Laughlin, the proposed new community of license. North Las Vegas is located within the Las Vegas Urbanized Area. Under the Commission's *Rural Radio* decision, service to North Las Vegas is presumed to constitute a proposal to serve the Las Vegas Urbanized Area.²⁴ Laughlin, on the other hand, is located 73 miles from Las Vegas, and KCWK could not cover any portion of any urbanized area with its principal community signal. Grant of the waiver to allow the change of community is also supported by the policy changes adopted in *Rural Radio*, in which the Commission specifically determined to de-emphasize differences in population coverage as a primary factor in awarding Section 307(b) preferences, in order to provide opportunities to broadcasters seeking to serve smaller communities and rural areas.²⁵

As a result of the proposed change of community, the loss area would contain one person with four reception services, with all others continuing to be well-served, and the gain area would contain 98 persons with four reception services and 72 persons with five reception services. Las Vegas Urbanized Area currently receives at least 27 services, whereas Laughlin receives only 12 services. We believe that the proposed change of community to Laughlin constitutes potential service to a less well-served area from an urbanized area already enjoying abundant service. We find that the proposed change of community is consistent with important Commission policy goals to increase service to smaller communities outside urbanized areas. Moreover, in light of the Commission's determination to place less emphasis on population differences, we believe that the decrease in nighttime interference-free coverage due to the change of community should not override the public policy benefits of providing service to Laughlin. Accordingly, considering all factors discussed herein, we find that the public interest would best be served by granting ESB's waiver request.

Conclusion/Action. Accordingly, IT IS ORDERED that Section 73.3571(k)(1) of the Commission's Rules IS WAIVED to the extent indicated, and that the application of Eastern Sierra Broadcasting (File No. BMP-20111004AED) to relocate KCWK from North Las Vegas, Nevada, to Laughlin, Nevada, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²³ KCWK at Laughlin would provide nighttime interference-free service to 44,555 persons, whereas only 489 persons would receive nighttime interference-free service from either of the other two mutually-exclusive applicants.

²⁴ *Id.*, 26 RCC Rcd at 2567.

²⁵ *Id.*, 26 FCC Rcd at 2567.