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In re: WAXY-FM, West Palm Beach, FL
Facility ID No. 29567
File No. BPH-20120529AKO

Informal Objection

NEW(FM), Islamorada, FL
Facility ID No. 189556
Alex Media, Inc.
File No. BNPH-20110523AEW

Dear Counsel:

We have before us the above-referenced contingent applications of: (1) Lincoln Financial Media Company of Florida ("Lincoln Financial") for minor modification of station WAXY-FM, West Palm Beach, Florida (the "Station"),¹ proposing to relocate the Station's transmitting antenna, downgrade from

¹ When the WAXY-FM Modification Application was filed on May 29, 2012, the call sign of the Station was WEAT-FM and the licensee was CBS Radio Stations, Inc. ("CBS"). On June 1, 2012, CBS changed the call sign to

Class C0 to Class C1 status, and change the Station's community of license from West Palm Beach to Miramar, Florida (the "Modification Application"); and (2) Alex Media, Inc. ("Alex Media") for a construction permit for a new FM station at Islamorada, Florida (the "Alex Media Application")² (collectively, the "Applications"). We also have before us an Informal Objection to the Modification Application, filed August 27, 2012, by Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"), and related pleadings.³ For the reasons set forth below, we deny the Informal Objection and grant the Applications.

Background. On April 6, 2012, CBS Radio Stations Inc. ("CBS") and Palm Beach Broadcasting, LLC ("PBB") entered into an asset purchase agreement ("CBS-PBB APA")⁴ providing for: (1) the immediate sale of three of CBS's five radio broadcast stations in the West Palm Beach-Boca Raton Arbitron Metro (the "West Palm Beach Metro") to PBB; and (2) the eventual sale of the two remaining stations, including station WAXY-FM, to third parties.⁵ The sale of station WAXY-FM would occur by means of an option agreement to be executed upon closing, in substantially the form provided by the CBS-PBB APA.⁶

After execution of the CBS-PBB APA but before closing, on May 29, 2012, CBS filed the Modification Application pursuant to Section 73.3573(g) of the rules, which permits the modification of an FM station's authorization to specify a new community of license by minor modification application without affording other interested parties an opportunity to file competing expressions of interest.⁷ The Modification Application proposes operation on Channel 283 and thus is contingent on grant of the Alex Media Application, under which the Islamorada station would vacate its originally-allotted Channel 283 and move to Channel 228. When the Modification Application was filed, Alex Media had already filed an amendment requesting the proposed substitution of Channel 228 for the allotted Channel 283, due to Federal Aviation Administration compliance issues. Alex Media filed another amendment at the same time as the Modification Application, on May 29, 2012, in order to request contingent processing.⁸

WMSF(FM) and then, on August 12, 2012, changed it to WAXY-FM. For administrative convenience, in this letter we will use the Station's current call sign.

² On May 23, 2011, Alex Media, the winning bidder in Auction 91 for the Islamorada allotment, filed its original long-form application for a construction permit. *See Winning Bidders Announced for Auction 91*, Public Notice, 26 FCC Rcd 7541, 7553 (MB/WTB 2011).

³ On September 14, 2012, CBS and Palm Beach Broadcasting, LLC filed a Joint Opposition to the Objection ("Joint Opposition"). On September 26, 2012, Clear Channel filed a Reply to Joint Opposition to Informal Objection ("Reply").

⁴ BALH-20120410ADX/ADY/ADZ, Attachment 5. PBB, as the licensee of an FM station in the West Palm Beach Metro (WRMF(FM), Palm Beach, Florida, Facility ID No. 20436), could acquire only three additional FM stations under the Commission's local radio ownership rule. *See* 47 C.F.R. § 73.3555(a)(1)(ii) (imposing an ownership limit of four commercial FM stations in a radio market with between 30 and 44 stations).

⁵ On May 23, 2012, the Commission consented to the three station CBS-PBB assignments. On June 1, 2012, the parties consummated the transaction.

⁶ CBS-PBB APA, § 1.8.

⁷ 47 C.F.R. § 73.3573(g). In such cases, the community of license change must result in a preferential arrangement of allotments under Section 307(b) of the Communications Act of 1934, as amended. *See* 47 U.S.C. § 307(b); *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 F.C.C.2d 88 (1982). The FM allotment priorities are: (1) first full-time aural service, (2) second full-time aural service, (3) first local service and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *Id.* at 91-92.

⁸ This amendment included a copy of a "Contingent Application Agreement" dated April 5, 2012, between Alex Media and PBB.

On June 1, 2012, CBS and PBB consummated the three-station CBS-to-PBB assignment transaction and executed the option agreement for the sale of station WAXY-FM (“Option Agreement”).⁹ Under the Option Agreement, CBS granted PBB the option (“Option”) to acquire station WAXY-FM, subject to its immediate sale to a qualified third party of PBB’s choosing (the “Designated Buyer”). The Option Agreement also allowed the Designated Buyer to acquire air time on the Station pursuant to a local marketing agreement, subject to CBS’s consent (the “LMA Option”). On August 22, 2012, PBB exercised both the Option to acquire the Station and the LMA Option, designating Lincoln Financial as the Designated Buyer. Accordingly, on August 24, 2012, PBB and Lincoln Financial entered into an asset purchase agreement, under which Lincoln Financial agreed (subject to Commission consent) to acquire station WAXY-FM from PBB simultaneously with the consummation of PBB’s acquisition of the Station from CBS.¹⁰ On August 29, 2012, CBS applied for the Commission’s consent to this “pass-through” assignment, which was granted on October 22, 2012.¹¹ On December 10, 2012, the parties consummated the WAXY-FM assignment, and, on January 10, 2013, Lincoln Financial filed an amendment to the pending Modification Application to reflect the new ownership of the Station. Lincoln Financial’s January 10 amendment stated that it had assumed PBB’s obligations under the Contingent Application Agreement and included a copy of that agreement, dated April 5, 2012.¹²

Pleadings. In the Informal Objection, Clear Channel objects to the Modification Application on two grounds. First, Clear Channel argues that CBS transferred control of station WAXY-FM to PBB without Commission authorization. It claims that, with the execution of the Option Agreement, CBS no longer had a “critical financial interest or financial risk in WAXY-FM’s operations or programming.”¹³ Because of this allegedly unauthorized transfer of control, Clear Channel urges that the Modification Application be dismissed as “fruit of the poisoned tree”¹⁴—i.e., a direct consequence of CBS’s “relinquishment of fundamental licensee decisions.”¹⁵ Second, Clear Channel argues that the Modification Application should be dismissed or denied because it is an invalid contingent application under Section 73.3517(e) of the rules.¹⁶ Clear Channel notes that the Commission does not permit contingent filings unless expressly authorized.¹⁷ Such authorization, according to Clear Channel, is limited to minor modification applications filed by licensees and permittees only and does not include applications for new station authorization, such as the Alex Media Application.¹⁸ The policy rationale for this rule, Clear Channel contends, is to avoid delay of initiation of service to the public and avoid the risk

⁹ See File No. BALH-20120829AFB (“Lincoln Financial Assignment Application”), Attachment 5.

¹⁰ See *id.*, Attachment 13. Also on August 24, 2012, CBS and Lincoln Financial entered into an LMA for the Station. *Id.*, Attachment 5.

¹¹ See *id.*; see also *Broadcast Actions*, Public Notice, Report No. 47581 (Oct. 25, 2012). No party filed a petition to deny or petition for reconsideration of the grant of the Lincoln Financial Assignment Application.

¹² Modification Application, Exhibit 1, Attachment 30.

¹³ Informal Objection at 3.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 7.

¹⁷ See 47 C.F.R. § 73.3517 (introduction).

¹⁸ *Id.* at 8-9.

of a new station application being dismissed as part of a contingent application group if any other application is defective.¹⁹

Clear Channel also argues that the Modification Application fails to meet several other contingent application filing requirements. First, Clear Channel claims that the May 29, 2012, amendment of the Modification Application failed to include a copy of the Contingent Application Agreement as required.²⁰ While conceding that a copy of the Contingent Application Agreement was submitted with the Alex Media Application, Clear Channel argues that this copy was unacceptable, as it was heavily redacted and Lincoln Financial, the present applicant, was not a party. Finally, Clear Channel contends that, in this case, an amendment—rather than the original application filing—cannot satisfy the requirement of Section 73.3517(e) that “[a]ll applications must be filed on the same date.”²¹ Acknowledging that the Commission has waived this rule in the past, Clear Channel argues that it has only done so when waiver would not “prejudice the filing rights of any other applicant.”²² Clear Channel claims that here it would be prejudiced, because it has been waiting for grant of the Alex Media Application in order to file a petition for rulemaking for a “drop in” Class C2 allotment that is mutually exclusive with the Modification Application and likewise relies upon Alex Media’s proposed channel change. Clear Channel asserts that it is “confident” that if other parties filed competing applications, its proposal would be preferred because it would provide first local transmission service to its proposed community of license.²³ Therefore, Clear Channel requests that the Commission “preserve the right to comparative review” by dismissing or denying the Modification Application.²⁴

In their Joint Opposition, CBS and PBB argue that the Modification Application and Option Agreement expressly retain CBS’ control of the programming, personnel, and finances of the Station.²⁵ CBS remained responsible for the station’s programming, they contend, launching a new format on the Station and successfully competing with PBB in the local market. With respect to contingent processing, CBS and PBB argue that the Media Bureau “routinely has processed groups of contingent applications that include construction permit applications filed by successful bidders in auctions of FM spectrum.”²⁶ Therefore, contingent processing of the Modification Application would be “consistent with the Bureau’s longstanding practices and published precedent.”²⁷ CBS had no obligation to file a copy of an “agreement to undertake the coordinated facility modifications,” CBS and PBB contend, because CBS was not a party to such an agreement, and, in any case, no such agreement existed because Alex Media was not undertaking a modification of its facilities.²⁸ CBS and PBB claim that the degree of redaction in the Contingent Application Agreement is customary and generally acceptable under the Commission’s policy and practice. CBS and PBB also argue that Clear Channel was not prejudiced in this case because, unlike

¹⁹ *Id.* at 9-10 (noting that under Section 73.3517(e), “dismissal of any one of the related applications as unacceptable will result in the dismissal of all the related applications.”).

²⁰ *Id.* at 10.

²¹ *Id.* (citing 47 C.F.R. § 73.3517(e)).

²² *Id.* at 10-11 (citing *The Last Bastion Station Trust, LLC*, Letter, 23 FCC Rcd 4941 (MB 2008), *application for review pending*) (“*Last Bastion Station Trust*”).

²³ *Id.* at 12.

²⁴ *Id.*

²⁵ Joint Opposition at 8-9.

²⁶ *Id.* at 10 (citing *Sunnylands Broadcasting LLC*, Letter, 27 FCC Rcd 4209, 4211 (MB 2012) (“*Sunnylands*”).

²⁷ *Id.* at 9.

²⁸ *Id.* at 11-13 (citing 47 C.F.R. § 73.3517(e)).

the challenging party in *Last Bastion Station Trust*, it had not filed a mutually-exclusive application.²⁹ Finally, CBS and PBB assert that Clear Channel itself has taken advantage of the contingent amendment policy on multiple occasions, thus foreclosing potentially conflicting applications. Therefore, CBS and PBB conclude, the Modification Application is entitled to similar treatment.

In its Reply, Clear Channel contends that the cases cited by the Joint Opposition to support contingent processing are inapposite. In particular, it argues that *Sunnylands Broadcasting LLC* is of limited precedential value because, in that case, the applicants' eligibility for contingent processing was not at issue, so the Bureau did not articulate why "deviation better serves the public interest."³⁰ With respect to *Last Bastion Station Trust*, Clear Channel submits that it is factually distinguishable from the present case because there was no pre-grant expression of interest in the spectrum, and thus no concurrent prejudice to third parties.³¹ Another key difference, Clear Channel argues, is that whereas in *Last Bastion Station Trust* the waiver was an administrative convenience to accomplish the same results that the parties could equally achieve by dismissing and re-filing an application, in this case the Alex Media Application could not be dismissed and re-filed.³² Because it is prohibited from filing its non-contingent, mutually-exclusive modification application before grant of the Alex Media Application, Clear Channel requests that we accept such applications only after Alex Media vacates Channel 283, then undertake a comparative analysis in order to protect the "Ashbacker rights" of competing applicants.³³

Discussion. Informal objections, like petitions to deny, must allege properly supported facts that, if true, would establish a substantial and material question of fact that grant of the application would be inconsistent with the public interest.³⁴ As discussed below, Clear Channel has not raised a substantial and material question of fact that grant of the Applications would be inconsistent with the public interest.

De facto transfer of control. To determine whether there has been an unauthorized transfer of control, the Commission examines whether an entity other than the licensee sets a station's basic operating policies with respect to personnel, programming, and finances.³⁵ Here, Clear Channel bases its objection on the terms of the Option Agreement, under which the previous licensee, CBS, granted PBB the Option to purchase and then immediately sell the Station to an entity of its choosing. The Lincoln Financial Assignment Application was granted on October 22, 2012.³⁶ The 30-day deadline to file a

²⁹ *Id.* at 15-16 ("If the application of the amendment policy in *Last Bastion Station Trust* did not prejudice a party with a mutually exclusive application on file, it could not prejudice Clear Channel, which had not even filed an application, in the instant situation.").

³⁰ *Id.* at 6.

³¹ *Id.* at 6. Clear Channel also argues that the other contingent application group cited by the Joint Opposition (File Nos. BNPB-20120523AED, BMPH-20120611ACJ and BMPH-20120611ACL) is similarly distinguishable in that (1) the stations were under common control, and (2) contingent processing benefited the new station applicant.

³² *Id.* at 9.

³³ *Id.* at 8-9; see *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Clear Channel summarizes the *Ashbacker* holding as "where two parties' applications are mutually exclusive, the grant of one application without first considering the second application violates the due process rights of the second." Reply at 9.

³⁴ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (D.C. Cir. Sept. 10, 1993).

³⁵ See *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142-46 (2005), *vacated on other grounds sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Choctaw Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8538-39 (1997).

³⁶ See File No. BALH-20120829AFB.

petition for reconsideration of that action has passed and it is now final.³⁷ Clear Channel did not object to the Lincoln Financial Assignment Application, nor does it argue that Lincoln Financial—the current proponent of the Modification Application—is now or has been a party to an unauthorized transfer of control. Therefore, because Clear Channel’s arguments relate to a different licensee, an expired agreement, and a final action, they are not relevant to the pending Modification Application and will not be considered further here.

Contingent processing. We agree with Clear Channel that the Applications are not eligible for contingent processing under the Commission’s rules. With certain enumerated exceptions, “[c]ontingent applications for new stations and for changes in facilities of existing stations are not acceptable for filing.”³⁸ Exceptions include assignment or transfer of control applications and applications “filed by FM licensees and/or permittees for minor modifications of facilities.”³⁹ In the 2006 *Community of License Order*, we also allowed the filing of “hybrid” contingency applications involving both minor modification applications and rulemaking petitions (e.g., channel substitutions for vacant allotments).⁴⁰ The Applications, on the other hand, include an application for a *new* station construction permit. Because the Applications do not meet the requirements of any of the above exceptions, they therefore fall under the general prohibition on contingent applications.

However, in these particular circumstances, we find that it is in the public interest to waive Section 73.3517 of the Commission’s rules to the extent necessary to allow contingent processing in this case. The Commission’s rules may be waived only for good cause shown.⁴¹ The Commission may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.⁴² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁴³ Waiver of the Commission’s policies or rules is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.⁴⁴

Here, special circumstances exist due to licensee reliance on our historical processing practices. As the Joint Opposition notes, we have processed contingent application groups that included new construction permit applications filed by FM auction winners.⁴⁵ Because Lincoln Financial seeks similar treatment here, we waive the prohibition on contingent applications in light of the public interest in

³⁷ See 47 C.F.R. § 1.106(f); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 288-89 (D.C. Cir. 1971) (noting that “investments may be made in reliance on such an order,” and that at some point “the public interest in finality is dominant over the public interest in possibly improving the administrative result on further consideration”).

³⁸ 47 C.F.R. § 73.3517 (introduction).

³⁹ 47 C.F.R. § 73.3517 (a),(e).

⁴⁰ See *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, 14223 (2006) (“*Community of License Order*”).

⁴¹ 47 C.F.R. § 1.3.

⁴² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

⁴³ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

⁴⁴ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (“*Network IP*”); *Northeast Cellular*, 897 F.2d at 1166.

⁴⁵ See, e.g., *Sunnylands*, 27 FCC Rcd at 4211.

applying Section 73.3517 consistently and with fair notice to affected parties.⁴⁶ However, we caution licensees that similar waivers *will not* be routinely granted for contingent applications involving new station construction permit applications arising from the next FM auction (Auction 94), or any auctions thereafter, for as long as the current contingent application rule remains in effect.

For the same reasons, we waive the same-date filing requirement of Section 73.3517(e).⁴⁷ We agree with Clear Channel that the facts and rationale of *Last Bastion Station Trust* are distinguishable from the present case. However, we need not reach the issue of whether to expand the scope of *Last Bastion Station Trust* in this case, because we have, in the past, permitted a long-form amendment to satisfy the same-date filing requirement when processing contingent application groups. Although this practice will, of necessity, cease once new station construction permit applications are no longer accepted as part of contingent application groups, we acknowledge that licensees may reasonably rely on our current procedures and are entitled to fair notice that those informal procedures will change. The public interest in fair notice, as well as in clear and consistent treatment of similarly-situated applicants, outweighs any potential “prejudice” to a party with an inchoate plan to prosecute a proposal that it alleges would be mutually exclusive to a pending and cut-off contingent application group.⁴⁸ In this respect, we note that the purpose of the same-date filing requirement was to assist staff in processing coordinated application filings, not protecting the filing rights of prospective competing applicants.⁴⁹ Therefore, we find that it is in the public interest to waive the same-date filing requirement to allow contingent processing of the Applications. Again, we emphasize that this type of waiver *will not* be routinely granted as part of Auction 94 or any auctions thereafter, for as long as the current contingent application rule remains in effect.

Lastly, we find that the Modification Application satisfies the requirement that contingent applications submit a copy of “the agreement to undertake the coordinated facility modifications” for the limited purpose of documenting the contingency agreement between a minor modification application and a new station application.⁵⁰ Upon becoming the licensee of the Station, Lincoln Financial properly amended the Modification Application to: (1) reflect the Station’s new ownership, pursuant to Section 73.3573(c);⁵¹ (2) notify the Commission that it had assumed PBB’s obligations under, and was now a party to, the Contingent Application Agreement;⁵² and (3) submit a copy of the Contingent Application

⁴⁶ See *Network IP*, 548 F.3d at 127 (“[B]efore the Commission can invoke its good cause exception, it *both* must ‘must explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.’”) (quoting *Northeast Cellular*, 897 F.2d at 1166).

⁴⁷ 47 C.F.R. § 73.3517(e).

⁴⁸ See *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

⁴⁹ *1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, First Report and Order, 14 FCC Rcd 5272, 5280-82 (1999) (“*Tech I*”) (explaining that the limited scope of the contingent application procedures was meant to “limit the potential for significant service losses and/or disruptions and to ensure that there is sufficient staff to complete review of interrelated proposals expeditiously . . . “[a]pplications will be processed together and, if grantable, will be granted simultaneously.”).

⁵⁰ 47 C.F.R. § 73.3517(e).

⁵¹ 47 C.F.R. § 73.3522(a)(2) (auction winners permitted to make minor modifications to pending long-form applications); 47 C.F.R. § 1.65(a),(b) (applicants responsible for the continuing accuracy and completeness of application information); 47 C.F.R. § 73.3573(c) (application retains file number despite change of ownership).

⁵² Modification Application, Exhibit 1.

Agreement. Although the Contingent Application Agreement is heavily redacted, the parties' respective obligations to file and prosecute the contingent applications are clearly ascertainable.⁵³

Preferential arrangement of allotments. We find that the Modification Application proposes a preferential arrangement of allotments under Section 307(b) of the Communications Act.⁵⁴ The proposed transmitter site is mutually exclusive with station WAXY-FM's existing service and complies with the Commission's spacing rules. Because both Miramar and West Palm Beach are within the Miami Urbanized Area, a *Tuck* showing (demonstrating Miramar's independence from the Miami Urbanized Area) is not necessary.⁵⁵ We approve this modification under Priority (4)—other public interest matters. Following our approach in *Gearhart*, the appropriate basis of comparison between two suburban communities is from which community the station would be better able to serve the Urbanized Area.⁵⁶ In this case, after the facility modification, WAXY-FM will be able to provide service to a greater area and population within the Miami Urbanized Area. Specifically, the proposed change will result in a net gain of 60 dBμ service to 869,046 persons. Additionally, the Station's modified 70 dBμ contour will cover 67 percent of the Miami Urbanized Area, whereas the licensed 70 dBμ contour covers approximately 55 percent of the Miami Urbanized Area. Therefore, the change of community of license from West Palm Beach to Miramar, Florida, is a preferred arrangement of allotments.

Conclusion. Based on the above, we find that Clear Channel has not raised a substantial and material question of fact warranting further inquiry. Moreover, we find that it is in the public interest to waive Section 73.3517 of the Commission's rules to the extent necessary to allow contingent processing in this case. Accordingly, IT IS ORDERED that the Informal Objection IS DENIED and the applications for minor modification of facilities for Station WAXY-FM, West Palm Beach, Florida (File No. BPH-20120529AKO), and the application for a new station at Islamorada, Florida (File No. BNPH-20110523AEW), ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁵³ Note that our finding regarding the Contingent Application Agreement does not pertain to agreements for a station assignment or transfer of control, for which staff reviewers require a complete disclosure of the nature of the transaction, especially terms regarding consideration.

⁵⁴ 47 U.S.C. § 307(b).

⁵⁵ See *Gearhart, Madras, Manzanita, and Seaside, Oregon*, Report and Order, 26 FCC Rcd 10259, 10262-63 (MB 2011) ("*Gearhart*") ("[T]here is no need for a *Tuck* showing where both the station's current and proposed communities of license are located within an Urbanized Area because such intra-urbanized area moves do not present the same concerns as rural to urban moves.")).

⁵⁶ See *Gearhart*, 26 FCC Rcd at 10263-64.