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In re: WHLY(AM), South Bend, IN
Facility ID No. 67133
Times Communications Inc.
File Nos. BAL-20061019ADO
BAL-20121102ACN

Applications for Assignment of License

Dear Counsel:

We have before us the referenced applications filed on October 19, 2006, and November 2, 2012, by Times Communications Inc. ("Times") requesting approval to assign Station WHLY(AM), South Bend, Indiana ("Station") to St. Thomas More Foundation, Inc. ("2006 Application") and I.B. Communications, Ltd. ("2012 Application"), respectively. For the reasons set forth below, we dismiss the 2006 Application and deny the 2012 Application.

Background. Pursuant to the *Review of the AM Service Order*,¹ the Commission permitted AM licensees awarded expanded band frequencies to operate both the existing band AM station and the expanded band AM station for a period of five years from the grant of the license for the expanded band station. One of the stated goals of this proceeding was not to authorize more AM stations, but rather to "improve the technical quality of the AM service...by reducing congestion and interference in the AM band."² Thus, the dual operating authority was conditioned on the surrender of one of the two licenses at

¹ See *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273 (1991) ("Review of the AM Service Order"), recon. granted in part and denied in part, 8 FCC Rcd 3250 (1993), recon. granted in part and denied in part, 10 FCC Rcd 12143 (1995), recon. denied, 11 FCC Rcd 12444 (1996), recon. granted in part and denied in part, 12 FCC Rcd 3361 (1997).

² *Review of the AM Service Order*, 6 FCC Rcd at 6276.

the end of this period.³ Additionally, licensees and permittees granted dual operating authority are not permitted to assign or transfer control of the authorization of one of the “paired” frequencies.⁴

The Station is an AM existing band station. Its paired expanded band station is WDND(AM), South Bend, Indiana, currently owned by Artistic Media Partners, Inc. (“Artistic”). On September 24, 1999, Times filed an assignment application to assign both WDND(AM) and WHLY(AM) to Artistic (the “1999 Assignment Application”).⁵ The staff granted the uncontested application on November 23, 1999. However, notwithstanding the prohibition on severing the paired stations, on March 31, 2000, Artistic consummated the sale only of WDND(AM). Artistic subsequently informed the staff that it did not consummate the acquisition of WHLY(AM) “due to environmental issues,” and indicated that it intended to continue operating WDND(AM) notwithstanding the imminent expiration of the five-year transition period.⁶ On October 19, 2006, Times filed the 2006 Application,⁷ which remains pending. Subsequently, on November 2, 2012, Times filed the 2012 Application, and one week later voluntarily requested dismissal of the 2006 Application.⁸ Neither party indicated in either application that the Station had once been part of a jointly-operated AM station pair or that the assignment was unique in any way. Additionally, the parties certified both that the agreements for the sale of the Station “comply fully with the Commission’s Rules and policies.”⁹

Discussion. As stated above, Times and Artistic violated Section 73.1150(c) of the Commission’s Rules (“Rules”)¹⁰ subsequent to grant of the 1999 Assignment Application. Therefore, although none is requested here, we cannot grant the Application without waiving that Rule.

The Commission may waive its policies or rules upon a showing of good cause. It also may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.¹¹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹² However, waiver of the Commission’s policies or 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.¹³

³ See *Review of the AM Service Order and WGIT(AM), Canovanas, PR*, Letter, 21 FCC Rcd 2200, 2202, n.16 (MB 2006) (discussing the assignment of one license in an expanded band pair and the need to surrender one upon expiration of the trial period, respectively.)

⁴ 47 C.F.R. § 73.1150(c). *Review of the AM Service Order*, 6 FCC Rcd at 6320.

⁵ See File No. BAP-19990924AAG.

⁶ Artistic stated that, if the continued operation of WHLY is not authorized, it presumed Times would cease operation of that Station by May 18, 2006, and that “any efforts to sustain or continue the operation of [WHLY] beyond May 18, 2006, will be undertaken by, and should be attributed to, [Times] only.” *Letter from Lee Shubert, Esq.*, (rec’d May 1, 2006) (“*License Surrender Letter*”).

⁷ Accepted for filing October 20, 2006, amended received March 19, 2007.

⁸ See *Letter to Marlene Dortch from John C. Trent, Esq.* (Nov. 9. 2012).

⁹ 2006 Application, Section II Item 3.c. and Section III, Item 3.b.; 2012 Application, Section II, Item 3.c. and Section III, Item 3.b.

¹⁰ 47 C.F.R. § 73.1150(c).

¹¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

¹² *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹³ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

We will not waive Section 73.1150(c) on the facts presented here, and we deny the 2012 Application and reject any further assignment of this license except as specified below. There are no “special circumstances” here, as the rule violation was occasioned by Times and Artistic’s own conduct and, as evidenced by the *License Surrender Letter*, undertaken with full knowledge of the Rules. Additionally, grant of the 2012 Application would be contrary to the public interest, as it would have several negative consequences. It would: (1) constitute a further violation of a Commission-imposed processing policy; (2) bestow a further benefit on a party that knowingly engaged in such violation; (3) be unfair to those licensees that have returned one of the paired licenses;¹⁴ and (4) be inconsistent with the expanded band licensing principle that each licensee surrender one license at the expiration of the dual operating authority period. We note that the Commission has faced a similar situation involving standard band station WMHG(AM), Muskegon, Michigan, and its expanded band paired station WPRR(AM) (then WDSS(AM)), Ada, Michigan, and similarly declined to grant the subsequent assignment of one of the expanded band station pair.¹⁵

Accordingly, we find that grant of the 2012 Application would not serve the public interest and therefore deny the 2012 Application pursuant to Section 309(a) of the Communications Act of 1934, as amended.¹⁶ We note that the only assignment application we will approve for this Station is one which will result in the Station and WDND(AM) being held by a single licensee.

Conclusion. Accordingly, IT IS ORDERED that the application for consent to assignment of license for Station WHLY(AM), South Bend, Indiana filed on October 19, 2006, by Times Communications Inc. and St. Thomas More Foundation, Inc. (File No. BAL-20061019ADO) IS DISMISSED.

IT IS FURTHER ORDERED that the application for consent to assignment of license for Station WHLY(AM), South Bend, Indiana filed on November 2, 2012, by Times Communications Inc. and I.B. Communications, Ltd. (File No. BAL-20121102ACN) IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁴ See *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922, 5952 (2007) (noting that, “To date, 19 licensees have surrendered their lower band licenses and one licensee has surrendered its expanded band license at the end of each of these licensees's five-year dual operating authority period.”).

¹⁵ In that case, Goodrich initially held the license for standard band station WMHG(AM) and obtained a construction permit for a paired expanded band station (WPRR(AM)) at 1680 KHz. In August of 1999, Goodrich assigned the license for WMHG to Connoisseur Communications of Muskegon, L.P. (“Connoisseur”) (see File No. BAL-19990608GJ, granted on July 28, 1999), while retaining ownership of WDSS(AM), in violation of Section 73.1150(c). Connoisseur subsequently sold WMHG(AM) to Cumulus Licensing, LLC (“Cumulus”) (See File No. BAL-19991208ABA, granted on March 15, 2000). Later that same year, Goodrich filed a request for *nunc pro tunc* waiver that would retroactively excuse Goodrich’s apparent breach of Section 73.1150(c) of the Rules and allow Goodrich to continue owning and operating the AM expanded band station separately from its standard band companion, and Cumulus applied for Commission approval to assign WMHG(AM) to Clear Channel Communications, Inc. (see File No. BAL-20000817ADC). See *Existing Shareholders of Clear Channel Communications, Inc. (Transferors)*, Memorandum Opinion and Order, 23 FCC Rcd 1421, 1435 (2008)). Ultimately, pursuant to settlement, Cumulus surrendered the authorization for WMHG(AM) and requested dismissal of the application to assign the station license to Clear Channel.

¹⁶ 47 U.S.C. §309(a).

cc: I.B. Communications Ltd.
Times Communications Inc.
St. Thomas More Foundation, Inc.

