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DA 18-447

By Electronic Mail

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Re: Request of Auction 99 Applicants J.J. & B. Broadcasting, Inc. and Macon Media, Inc. for Waiver of Section 1.2105 of the Commission's Rules

Dear Counsel:

This letter waives section 1.2105(c) of the Commission's rules with respect to communications between J.J. & B. Broadcasting, Inc. (JJ&B) and Macon Media, Inc. (Macon), two jointly-owned applicants for two new cross-service FM translator stations in Auction 99.¹ JJ&B and Macon are both controlled by Robert and LuAnn Wilkins indirectly through Wilkins Parent Corporation.² For the reasons set forth below, subject to the applicants' compliance with all other regulations, terms, and requirements for auction participation, we grant the applicants' request for waiver of section 1.2105(c) with respect to communications between them so that they may participate in Auction 99 as separate applicants under common control.

Background. In its AM Revitalization proceeding, the Commission decided to conduct two auction filing windows in which licensees and permittees of AM broadcast stations could apply for a permit for a new cross-service FM translator to re transmit its AM station signal full time.³ Mutually exclusive proposals filed during the first auction window will be resolved through competitive bidding in Auction 99.⁴

As the Bureaus previously recognized, the AM Revitalization proceeding established eligibility requirements for cross-service FM translator stations that might make it difficult for an applicant in

¹ See 47 CFR § 1.2105(c).

² See FCC Form 175 applications of J.J. & B. Broadcasting, Inc. and Macon Media, Inc. for Auction 99, FCC File Nos. 0007873601 and 007873526.

³ See *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145, 12150-51, para. 12 (2015) (*AMR First R&O*).

⁴ See generally *Auction of Cross-Service FM Translator Construction Permits Scheduled for May 15, 2018; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 99*, AU Docket No. 17-143, Public Notice, DA 18-260 (WTB/MB Mar. 23, 2018) (*Auction 99 Procedures Public Notice*).

certain circumstances to comply with the Commission's competitive bidding rules as amended in 2015.⁵ In the first filing window, only existing licensees and permittees of Class C and D AM broadcast stations could apply for a cross-service FM translator station to provide fill-in service to the AM primary station's service contour and each AM station could apply for only one translator.⁶ If multiple eligible licensees were jointly owned, however, each of them could not apply without violating section 1.2105(a)(3) of the Commission's competitive bidding rules, which bars a party from having control of more than one applicant in a Commission auction.⁷ Accordingly, when announcing the details and filing instructions for the Auction 99 filing window, the Bureaus waived section 1.2105(a)(3) for Auction 99 applicants under common control.⁸

In a subsequent public notice, the Bureaus further sought comment on whether it would be appropriate to waive or modify the application of other provisions of section 1.2105 so that commonly controlled Auction 99 applicants relying on the waiver of section 1.2105(a)(3) would not thereby violate such other provisions.⁹ In particular, the Bureaus noted that, in the event that Auction 99 applicants under common control may have filed separate short-form applications pursuant to the waiver of section 1.2105(a)(3), such applicants could be at risk of violating section 1.2105(c) because the Commission presumes that bidding strategies are communicated between entities that share a common officer or director.¹⁰ Accordingly, the *Auction 99 Comment Public Notice* sought comment on whether it would be appropriate to waive or modify the application of section 1.2105 provisions discussed above so that commonly controlled Auction 99 applicants relying on the waiver of section 1.2105(a)(3) will not thereby violate such other provisions.¹¹ Having received no comments on these issues, the Bureaus concluded in the *Auction 99 Procedures Public Notice* that there was no basis for further waiving or modifying the application of section 1.2105 provisions to Auction 99 applicants under common ownership.¹²

JJ&B and Macon now request waiver of section 1.2105 to provide an exception from the prohibition of communications imposed by the rule to allow these applicants to participate in Auction 99 with separate auction applications.¹³ They point out, as noted above, that the Bureaus had previously

⁵ See *Filing Instructions for Cross-Service FM Translator Auction Filing Window for AM Broadcasters to be Open July 26-August 2, 2017; Freeze on FM Translator and Low-Power FM Stations Minor Change Applications and FM Booster Applications July 19-August 2, 2017*, Public Notice, 32 FCC Rcd 4663, 4666-67, para. 13 (MB/WTB 2017)(*Auction 99 Filing Instructions Public Notice*).

⁶ See *id.*, 32 FCC Rcd at 4664-65 para 5, citing *AMR First R&O*, 30 FCC Rcd at 12153-54, para. 17.

⁷ See 47 CFR § 1.2105(a)(3); see also *Auction 99 Filing Instructions Public Notice*, 32 FCC Rcd at 4666-67, para. 13.

⁸ See *id.*, 32 FCC Rcd at 4666-67, para. 13; see also *Auction of Cross-Service FM Translator Construction Permits Scheduled for May 15, 2018; Comment Sought on Competitive Bidding Procedures for Auction 99*, AU Docket No. 17-143, Public Notice, DA 18-91, para. 10 (WTB/MB Jan. 31, 2018) (*Auction 99 Comment Public Notice*), citing 47 CFR § 1.2105(a)(3).

⁹ See *Auction 99 Comment Public Notice*, paras. 9-14.

¹⁰ *Id.* at para. 10.

¹¹ *Id.* at paras. 8-14.

¹² See *Auction 99 Procedures Public Notice*, para. 12.

¹³ See Letter from John C. Trent, counsel to JJ&B and Macon, to Marlene H. Dortch, Secretary, FCC (submitted via auction99@fcc.gov, April 17, 2018).

waived section 1.2105(a)(3) to permit the filing of separate auction applications by licensees that are commonly owned and controlled.¹⁴

Discussion. The Commission may waive rule provisions “for good cause shown” by the petitioner.¹⁵ A party seeking waiver of a rule’s requirements must demonstrate that “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁶

We grant a limited waiver of section 1.2105(c) to JJB and Macon to provide an exception from the prohibition of communications imposed by the rule to allow these applicants to participate in Auction 99 through separate auction applications, subject to meeting all other terms and requirements for participation in this auction. Grant of such waiver is consistent with the Bureaus’ prior recognition of the unique circumstances of the Auction 99 filing window, including the specific eligibility requirements adopted by the Commission in the AM Revitalization proceeding. Moreover, waiving section 1.2105(c)’s prohibition to the limited extent so that JJB and Macon may participate in Auction 99 while necessarily sharing bidding information by virtue of having the same ownership and control will give effect to that prior waiver. As outlined in the *Auction 99 Comment Public Notice*, we believe that in this regard the circumstances of Auction 99 are analogous to those of Auction 1001, the reverse auction portion of the broadcast spectrum incentive auction, where the Commission by rule provided an exception to the prohibition on certain communications with respect to communications between commonly owned applicants.¹⁷

Conclusion. For the foregoing reasons, the waiver request filed by Macon Media, Inc., and J.J. & B. Broadcasting, Inc., IS GRANTED, to the extent set forth above.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

Margaret W. Wiener
Chief,
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

¹⁴ *Id.* at 2.

¹⁵ 47 CFR § 1.3. This waiver standard, and the waiver standard applied in the context of wireless radio services licenses, 47 CFR § 1.925, have been found to be substantially the same. *See Delta Radio, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16889, 16891, para. 7 & n.19 (2003) (citing *Bellsouth Corp. v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999)).

¹⁶ *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). *Accord, e.g., NetworkIP, LLC, v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008). *See also* 47 CFR § 1.925(a)(3).

¹⁷ 47 CFR § 1.2205(b)(2)(ii). *See Auction 99 Comment Public Notice*, DA 18-91, paras 11-14.