

Before the
 Federal Communications Commission
 Washington, D.C. 20554

In re Applications of:)	
)	
Pathfinder Communications Corp.)	
)	
For License to Cover Authorized Facilities in File)	File No. BL-981230AE
No. BP-941118AB)	
For Station WOWO(AM), Fort Wayne, Indiana)	
Facility ID # 28205)	
)	
ICBC Corporation)	
)	
For License to Cover Authorized Facilities in)	File No. BL-981211AE
File No. BP-941118AA and)	
For Construction Permit to Modify Facilities)	File No. BMP-991217CC
For Station WLIB(AM), New York, New York)	
Facility ID # 28204)	
)	
Salem Media of Georgia, Inc.)	
)	
For Construction Permit to Modify Facilities)	File No. BMP-991217CE
For Station WGKA(AM), Atlanta, Georgia)	
Facility ID # 72111)	

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 2003

Released: May 1, 2003

By the Commission:

1. The Commission has before it a Joint Application for Review filed by Pathfinder Communications Corp., licensee of WOWO(AM), Fort Wayne, Indiana (“Pathfinder”), ICBC Corporation, license of WLIB(AM), New York, New York (“ICBC”), and Salem Media of Georgia, Inc., licensee of WGKA(AM), Atlanta, Georgia, (“Salem”) (collectively referred to herein as “Applicants”) pursuant to Section 1.115 of the Commission’s rules.¹ Applicants seek Commission review of the

¹ See, 47 C.F.R. § 1.115. Also before the Commission are the following: Oppositions to Joint Application for Review, filed by Northwestern College, licensee of WNWC(AM), Sun Prairie, Wisconsin (“Northwestern”), Interstate Broadcasting Systems of Arizona, Inc., licensee of KMYL(AM), Tolleson, Arizona (“Interstate”), and KCBR-AM Limited Partnership, licensee of KPHN(AM), Kansas City, Missouri (“KCBR-AM”), all filed on February 18, 2000 (collectively, the “Opponents”); Joint Reply to Oppositions to Joint Application for Review, filed by the Applicants on March 2, 2000; Response to Joint Reply to Oppositions to Joint Application for Review, filed by KCBR-AM on March 16, 2000; Motion for Leave to Reply to “Response to Joint Reply to Oppositions to Joint Application for Review,” and the Response, filed by Applicants on March 27, 2000. On April 25, 2000, the National Association of Black Owned Broadcasters (“NABOB”) submitted a letter to then-Chairman William Kennard in support of the Application for Review. On January 24, 2003, Pathfinder, Salem, and ICBC filed a request to defer action on the Joint Application for Review.

December 23, 1999 (the “December 1999 Staff Decision”),² and January 14, 2000 (the “January 2000 Staff Decision”),³ decisions of the Mass Media Bureau (the “Bureau”), with respect to the above-captioned applications.⁴ In those actions the Bureau (i) on December 23, 1999, denied the requests of Pathfinder and ICBC to hold in abeyance the processing of their above-referenced respective license applications, and granted those applications, and (ii) on January 14, 2000, dismissed the above-referenced construction permit applications of Salem and ICBC. For the reasons set forth below, the Application for Review is denied.

2. **Background.** On November 18, 1994, ICBC filed construction permit applications to modify the licensed facilities of WOWO (BP-941118AB) (the “WOWO 1994 CP Application”) and WLIB (BP-941118AA) (the “WLIB 1994 CP Application”) (collectively, the “1994 CP Applications”).⁵ The 1994 CP Applications were filed pursuant to Section 73.3517(c) of the Commission’s rules, to effectuate an Interference Reduction Arrangement (“IRA”) involving WOWO and WLIB, both of which operate on 1190 kHz (the “1994 IRA”).⁶ Pursuant to the 1994 IRA, WOWO would relinquish its Class A status, thus permitting WLIB to initiate nighttime operations. The 1994 CP Applications were granted on October 18, 1995 (resulting in the “WOWO 1995 CP” and the “WLIB 1995 CP”) (collectively, the “1995 CPs”). Subsequently, in December 1998, WOWO and WLIB filed applications to license the changes authorized in the 1995 CPs,⁷ and commenced operations with these facilities on January 29, 1999, pursuant to program test authority.⁸ On October 18, 1999, WOWO and WLIB each requested that the staff temporarily suspend processing of their 1998 License Applications until December 17, 1999.⁹

² See Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, to Charles R. Naftalin, Esq., et al, dated December 23, 1999 (Mail Stop 1800B2-SKN) (the “December 1999 Staff Decision”).

³ See Letter from Peter Doyle, Deputy Chief, Audio Services Division, Mass Media Bureau, to James P. Riley, Esq., et al, dated January 14, 2000 (Reference 18000B3-PHD) (the “January 2000 Staff Decision”).

⁴ The *December 1999 Staff Decision* appeared on Public Notice on January 7, 2000 (Broadcast Actions Report No. 44647, at 1), reflecting the grants of the WOWO and WLIB License Applications (File Nos. BL-981230AE and BL-981211AE, respectively). The *January 2000 Staff Decision* appeared in a Public Notice issued on January 24, 2000 (Broadcast Actions Report No. 44657, at 1), reflecting the dismissal of the WLIB and WGKA construction permit applications (File Nos. BMP-991217CC and BMP-991217CE, respectively). The Application for Review was filed within 30 days of the Public Notices, and is therefore timely.

⁵ At the time the 1994 CP Applications were filed, ICBC was the licensee of WOWO and WLIB. In 1996, the license for WOWO was assigned to Pathfinder (See File No. BAL-19940722GE).

⁶ 47 C.F.R. § 73.3517(c) is an exception to the general prohibition against the filing of applications that are contingent upon the grant of another application. Section 73.3517(c) permits the filing of two or more applications by existing AM licensees for modification of facilities that are contingent upon granting of both applications if granting such contingent applications will reduce interference to one or more AM stations or will otherwise increase the area of interference-free service.

⁷ WLIB filed its license application on December 11, 1998 (File No. BL-981211AE) (the “WLIB 1998 License Application”). WOWO filed its license application on December 23, 1998 (File No. BL-981230AE) (the “WOWO 1998 License Application”) (collectively, the “1998 License Applications”).

⁸ See 47 C.F.R. § 73.1620.

⁹ See October 18, 1999, Letter from John Holland, counsel for Pathfinder, to Magalie Roman Salas, Secretary, FCC, requesting temporary suspension of processing WOWO 1998 License Application until December 17, 1999; see also October 18, 1999, Letter from Charles R. Naftalin, counsel for ICBC, to Magalie Roman Salas, requesting (continued....)

3. While the WOWO and WLIB 1998 License Applications were pending, on November 19, 1999, the Mass Media and Wireless Telecommunications Bureaus issued a Public Notice announcing the first filing window for new and major change AM station applications subject to the Commission's new competitive bidding procedures (the "Filing Window").¹⁰ The *AM Auction Public Notice* stated that the January 24 - 28, 2000 Filing Window also would be available for any minor change application that was contingent on the grant of the then-pending WOWO 1998 License Application (File No. BL-981230AE)¹¹ or mutually exclusive with any such contingent proposal on file by the close of the Filing Window.¹² The *AM Auction Public Notice* stated that the Bureau would treat any applications that were contingent on grant of the 1998 WOWO License Application and were filed prior to the close of business on November 19, 1999 as having been filed during the upcoming Filing Window, and would not accept any such applications filed between November 20, 1999 and the start of the Filing Window.¹³ The *AM Auction Public Notice* also stated that the Commission would not accept any minor change applications between December 24, 1999, and January 21, 2000 ("Minor Change Freeze").¹⁴ The *Second AM Auction*

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temporary suspension of processing WLIB 1998 License Application until December 17, 1999, while the parties "consider a modification to their interference reduction agreement" (collectively, the "Deferral Requests").

¹⁰ See *AM Auction Filing Window and Application Freeze*, 14 FCC Rcd 19490 (1999) ("AM Auction Public Notice"). The filing of all new station and major change applications in the commercial broadcast services had been frozen since 1997 pursuant to *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Notice of Proposed Rulemaking*, 12 FCC Rcd 22363, 22409 (1997). The auction window was announced pursuant to the auction authority established in the First Report and Order in that proceeding. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920 (1998) (granting Bureaus delegated authority to hold separate auctions for each type of broadcast service). On January 27, 2000, the Commission extended the Filing Window to February 1, 2000. See *AM Auction Filing Window and Application Freeze Extended to February 1, 2000*, DA 00-131, January 27, 2000 ("Second AM Auction Public Notice").

¹¹ *AM Auction Public Notice*, 14 FCC Rcd at 19491. The public notice stated that at least one major change and six minor change applications had been filed that were contingent on the grant of the WOWO 1998 License Application. These include applications for Station KMYL (File No. BP-990713AC); Station KEX, Portland, Oregon (File No. BP-990624AB); Station KDAO, Marshalltown, Iowa (File No. BP-990601AB); Station KKOJ, Jackson, Minnesota (File No. BP-990525AB); and Station WNWC (File No. BP-990521BH) (the "Contingent Applications"). The holders of the Contingent Applications are referred to herein as "Contingent Applicants." In addition, the Commission reinstated the application of Station KPHN, for the purpose of permitting its consideration with and under the same conditions as the other listed applications (KPHN is included in the Contingent Applications). See *AM Auction Public Notice*, 14 FCC Rcd at 19491, n. 6. It stated that the Mass Media Bureau would retain on file all applications that are contingent on the grant of the WOWO 1998 License Application provided they were on file by the close of business on the date of release of the *AM Auction Public Notice*. 14 FCC Rcd at 19491. The Public Notice stated that minor change applications filed during the Filing Window that did not fit this category would be dismissed. *AM Auction Public Notice*, 14 FCC Rcd at 19491, n.5.

¹³ See *AM Auction Public Notice*, 14 FCC Rcd at 19491, n.7. In order to be considered for the upcoming AM auction announced in the public notice, FCC Form 175s were supposed to be filed for the Contingent Applications during the Filing Window, or the application would be dismissed.

¹⁴ This prohibition was intended to eliminate the risk that a potential window filer's proposal was blocked by the filing of a mutually exclusive minor change application immediately prior to the Filing Window. *AM Auction Public Notice*, 14 FCC Rcd at 19492.

Public Notice extended the minor change freeze until February 1, 2000.¹⁵ The *AM Auction Public Notice* stated that the procedures set forth for applications contingent on grant of the 1998 WOWO License Application (File No. BL-981230AE) (the “Contingent Applications”) “will promote orderliness and fairness in the Commission’s application procedures.”¹⁶

4. On December 16, 1999, WOWO and WLIB each requested that the staff “continue” its temporary suspension of processing of the 1998 License Applications.¹⁷ The December 16, 1999, WLIB Deferral Request stated that the suspension of processing was sought in order that the parties may “finalize a modification to the interference reduction arrangement currently in effect.”¹⁸ On December 17, 1999, WLIB, WOWO and WGKA filed construction permit applications (the “1999 CP Applications”) to implement an IRA entered into between the three stations (the “1999 IRA”). Pursuant to the 1999 IRA: (1) WOWO would still relinquish its Class A status and would increase, with a new directional pattern, nighttime power to 15 kW (as opposed to 9.8kW authorized in the WOWO 1995 CP); (2) WLIB would still initiate nighttime operations, but with a modified directional pattern; and, (3) WGKA would initiate nighttime directional operations.¹⁹ On December 23, 1999, the Bureau denied Pathfinder’s and ICBC’s October 18, 1999, and December 16, 1999, requests to hold in abeyance further processing of the WOWO 1998 License Application, stating that a decision to delay action on the application would “frustrate the demonstrated desires of numerous stations to improve facilities.”²⁰ Having found that the 1998 License Applications for WOWO and WLIB met all Commission technical requirements, the staff granted the applications.²¹

5. On January 14, 2000, the Bureau dismissed the WLIB 1999 CP Application and the WGKA 1999 CP Application.²² The Bureau stated that the applications, as filed, were in conflict with formerly licensed facilities of WOWO and became grantable only with the reclassification of WOWO from a Class A to a Class B station. Thus, they were subject to the temporary freeze imposed on such applications by the *AM Auction Public Notice*, which required that any applications contingent on the grant of the WOWO 1998 License Application be filed during the Filing Window announced in the *AM*

¹⁵ The *Second AM Auction Public Notice* said that any AM minor change applications subject to the freeze but received on January 31 or February 1, 2000, would be treated as having been filed on February 2, the day after the Filing Window closed.

¹⁶ *AM Auction Public Notice* at 19491.

¹⁷ See December 16, 1999, Letters from John Holland and Charles R. Naftalin, to Magalie Roman Salas, seeking continued temporary deferral of action on the 1998 License Applications through December 23, 1999 (the “Deferral Requests”).

¹⁸ See December 16, 1999, Deferral Request from Charles R. Naftalin, counsel to WLIB, to Magalie Roman Salas.

¹⁹ Pathfinder’s application for WOWO bore file number BMP-991217CD (the “WOWO 1999 CP Application”); ICBC’s application for WLIB bore file number BMP-991217CC (the “WLIB 1999 CP Application”); and Salem’s application for WGKA bore file number BMP-991217CE (the “WGKA 1999 CP Applications”) (collectively, the “1999 CP Applications”).

²⁰ *December 1999 Staff Decision* at 5.

²¹ *Id.*

²² See *January 2000 Staff Decision*. The Bureau retained the 1999 WOWO CP Application for processing in due course.

Auction Public Notice.²³ In the *January 2000 Staff Decision*, the Bureau rejected Applicants' attempt to tie the 1999 CP Applications to a slightly modified WOWO license application, as opposed to the WOWO 1998 License Application that was granted in December 1999.²⁴ The staff also rejected Applicants' attempt to interpret the freeze announced in the *AM Auction Public Notice* as permitting them to file the 1999 CP Applications prior to January 24, 2000. The staff said that WGKA and WLIB could refile without prejudice for those facilities in the upcoming Filing Window.²⁵ Neither the WLIB 1999 CP Application nor the WGKA 1999 CP Application was re-filed during the Filing Window.

6. The Applicants filed the instant Application for Review on February 3, 2000. In the Application for Review, Applicants argue the Bureau improperly relied upon the Minor Change Freeze as its rationale for dismissing the 1999 CP Applications of WLIB and WGKA. In fact, they assert, the 1999 CP Applications could not be granted if the WOWO License Application was approved.²⁶ The Applicants insist that the Bureau's refusal to suspend processing of the 1998 WOWO and WLIB License Applications runs contrary to prior Bureau actions deferring to the requests of licensees, was an abuse of discretion and was without reasonable justification.²⁷ According to the Applicants, following commencement of operations by WOWO and WLIB with their newly-authorized facilities in January 1999, WOWO and WLIB determined that the newly-created areas of interference-free service could be increased through modifications to their constructed facilities, and they negotiated a new IRA with WGKA.²⁸ The Applicants assert that the Bureau's action is contrary to the public interest because 1.6 million more people would receive interference-free nighttime service (700,000 of which would receive WGKA at night for the first time) than was the case under the 1994 IRA.²⁹ Applicants assert that the 1999 IRA was premised on the grandfathered Class A rights in WOWO's former license. Thus, Applicants argue that, by granting the 1998 License Applications, the "Bureau rendered the effectuation of the 1999 Agreement impossible."³⁰ They claim that, in order to accomplish the greater WOWO Class B nighttime power level contained in the 1999 IRA, "it would have to be effectuated before the originally-requested WOWO Class B facility was converted to licensed status and WOWO's grandfathered rights implicit in its Class A licensed facility were lost forever."³¹ Thus, Applicants argue

²³ See ¶ 3, *supra*.

²⁴ *January 2000 Staff Decision* at 2-3.

²⁵ *Id.* at 3.

²⁶ Application for Review at 13, n.27.

²⁷ Applicants note that, as an alternative to requesting suspension of processing, they could have withdrawn their 1998 License Applications and pursued processing of the 1999 CP Applications, and subsequent licensing of those facilities. However, this would not have advanced the public interest, Applicants argue, because doing so would have denied 9,000,000 people of service from WLIB unless the Bureau granted special temporary authorization to permit WOWO and WLIB to continue to operate under the 1995 CP facilities which the 1998 License Applications covered. Application for Review at 14, n.28.

²⁸ *Id.* at 8.

²⁹ *Id.* at 11 and accompanying Engineering Statement at 3, 4.

³⁰ Application for Review at 11.

³¹ *Id.*

the Bureau's action was contrary to the public interest.³²

7. In addition, the Applicants assert the Bureau's refusal to defer processing and subsequent grant of the 1998 License Applications was motivated by a desire to accommodate the Contingent Applications, and thus was an abuse of discretion.³³ The retention of the Contingent Applications "amounts to the wholesale nullification" of Section 73.3517(c) by the Bureau, and as such "is an *ultra vires* act which cannot stand, particularly where, as here the *ultra vires* act leads the Bureau to subsequent improper actions," Applicants claim.³⁴

8. In the Oppositions to Joint Application for Review, the Opponents assert that WOWO has monopolized the 1190 kHz frequency for long enough, and that the Bureau acted properly when it brought to an end the lengthy delay in accommodating other broadcasters on the 1180, 1190 and 1200 kHz frequencies caused by the pendency of the WOWO and WLIB facilities changes authorized in 1995. KCBR-AM questions WOWO's and WLIB's motive for including WGKA in the 1999 IRA, and states that WOWO and WLIB should have completed their 1994 IRA (e.g., by licensing it) before entering into the 1999 IRA with WGKA.³⁵ The Opponents insist that additional delay in processing the 1998 License Applications would have the undesirable effect of protecting facilities to which WOWO and WLIB do not intend to return, and would clearly "frustrate the demonstrated desires of numerous stations to improve facilities."³⁶

9. The Opponents urge the Commission to allow other AM broadcasters on 1180, 1190 and 1200 kHz access to the same opportunities for signal enhancement afforded WOWO and WLIB.³⁷ KCBR-AM submits that construction permit applications should be "a reasoned, researched and well-planned request to reconfigure the signal of the station such that it conforms to the deliberate and desired objectives of the applicant," and questions why, if the signal coverages achieved through the 1995 CPs were not desirable, did WOWO and WLIB file license applications for those constructed facilities.³⁸ The Opponents challenge Applicants' assertion that the Bureau's retention of the Contingent Applications was the motive behind the Bureau's decision to grant the 1998 License Applications, noting that, even if the Contingent Applications were dismissed, they could be re-filed in the Filing Window. KCBR-AM argues that WOWO and WLIB have created this problem: had the 1994 IRA been concluded in a reasonable time frame, it is unlikely that applications would have been filed dependent on the licensing of WOWO as a Class B facility.³⁹

³² *Id.*

³³ *Id.* at 9-10 & n.21.

³⁴ *Id.* at 10-11.

³⁵ KCBR-AM Opposition at 13.

³⁶ See e.g., Interstate Opposition at 3 (citing *December 1999 Staff Decision* at 5).

³⁷ See, e.g., KCBR-AM Opposition at 2.

³⁸ *Id.* at 4-5.

³⁹ In its Joint Reply, Applicants assert that the Northwestern and Interstate proposals would still be grantable under the 1999 IRA, but that the KCBR-AM proposal is faulty because it violates the U.S. Mexican Agreement and the protection requirements for Station XEWK, Guadalajara, Mexico. KCBR-AM denies this allegation. We need not (continued....)

10. **Discussion.** The staff action was proper. As discussed below in detail, we hold that: (1) the dismissal of the WGKA and WLIB 1999 CP Applications was fully consistent with the procedures set forth in the *AM Auction Public Notice*; (2) the Bureau's grant of the 1998 License Applications was not in conflict with any Commission policy to defer application processing when requested by Applicants; (3) the Bureau's retention of the Contingent Applications was inconsistent with Section 73.3517 of our rules; (4) no party was prejudiced by the decision to treat the Contingent Applications as filed in the Filing Window rather than to require the ministerial act of refiled several weeks later; and (5) the AM Filing Window application procedures, in fact, promoted the goals of Section 73.3517 and contributed to a fair and efficient national filing window.

11. As a threshold matter, we note that the primary goal of the *AM Auction Public Notice* was to create orderly, predictable and fair procedures for the Commission's first AM Window. This necessarily included consideration of how technical proposals made possible by the reclassification of WOWO to a Class B facility should be handled under the Commission's new competitive bidding procedures. The clear intent behind the Minor Change Freeze was to put an end to the filing of applications contingent on the downgrading of WOWO to a Class B facility, *i.e.*, to effectively bar applications filed in violation of Section 73.3517 of the Commission's rules. As such, we find unpersuasive Applicants' claim that the 1999 CP Applications, which clearly could only be granted with the downgrading of WOWO to a Class B facility, were not subject to the Minor Change Freeze.

12. Applicants argue that the staff erred in the *January 2000 Staff Decision* by characterizing the Minor Change Freeze as applying to "any ... application that failed to protect WOWO's then-licensed [Class A] facility." They claim that the *AM Auction Public Notice* merely imposed a freeze on the "filing of all minor change applications that were 'contingent on the grant of a pending license application for WOWO, Fort Wayne, Indiana (File No. BL-981230AE).'"⁴⁰ Applicants argue that the 1999 CP Applications were filed in order to effectuate the 1999 IRA, which is distinct from the 1994 IRA on which the 1998 WOWO License Application was based.⁴¹ We find this distinction to be one without a difference. Most critically, the WGKA and WLIB 1999 CP Applications were contingent upon the reclassification of WOWO as a Class B station, the exact change sought in the 1998 WOWO License Application. Therefore, the 1999 CP Applications, in which WLIB and WGKA sought to take advantage of the reclassification of WOWO to a Class B, could only be filed in the January 24 to January 28 Filing Window, as prescribed by the *AM Auction Public Notice*. Because they were erroneously filed outside of that window, they were properly dismissed. As the staff correctly stated, "these technical proposals are precisely the kind of applications which are subject to the November 19, 1999 freeze and the *Public Notice* requiring that such applications be filed during the window."⁴² We reject Applicants' interpretation of the freeze which, as noted in the *January 2000 Staff Decision*, would "permit Pathfinder to select the station or stations that could gain or increase nighttime operating authority based on the WOWO reclassification. This result is in fundamental conflict with the goal in the [AM Auction] Public Notice to consider fairly all technical proposals made possible by the WOWO reclassification under the

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address this issue as it will be resolved in the context of the KCBR-AM proposal.

⁴⁰ Application for Review at 13.

⁴¹ *Id.*

⁴² See *January 2000 Staff Decision* at 2.

Commission's new competitive bidding procedures."⁴³

13. Applicants argue that the Commission should honor requests to defer application processing "as long as the Commission's processing procedures are not being abused or burdened."⁴⁴ We disagree. Permitting applicants to file hypothetical technical proposals is contrary to the public interest. Such a policy is spectrally inefficient, potentially precluding other *bona fide* facility improvements. It also can waste limited staff resources by disrupting routine application review procedures.⁴⁵ There is no provision in the Commission's rules allowing for deferral requests. To the contrary, implicit in the filing of any facility application is that the applicant stands "ready, willing, and able" to construct and operate as proposed.⁴⁶ Thus, a deferral request constitutes a departure from basic licensing procedures and requires a substantial justification. This is particularly the case here where Applicants' post-construction rethinking of an approved IRA could create significant uncertainty and burdens for many potential applicants that needed to finalize their technical proposals prior to the Filing Window. It would also require other stations and applicants to continue to protect WOWO's then-licensed, but no longer operational, facilities. The Deferral Requests of the Applicants did not present compelling circumstances to warrant further delay in our licensing process. Although the 1999 IRA would result in certain service improvements, its acceptance would undermine the procedures developed by the staff to ensure the fair consideration of all competing proposals for service enhancements made possible by the WOWO downgrade. Applicants' reliance on the staff's handling of one radio application (for which no decision document was written) and one unpublished common carrier case is misplaced.⁴⁷ In any event, these cases are inapposite. Deferrals in those cases would not impose significant burdens, as they would here, on the orderly and open licensing of a significant, but undeterminable, number of applications that were about to be filed in a national filing window under new competitive bidding procedures.

14. We also agree with the Opponents that a license application should only be filed if the constructed facilities are satisfactory to an applicant. In this case, WOWO and WLIB sought facilities changes in 1994, which the staff approved in October 1995. Three years later, in December 1998, license applications were filed, and WLIB commenced nighttime operations, pursuant to program test authority, on January 29, 1999. Eight months later, WOWO and WLIB sought to halt the licensing process while retaining the benefit of operating these modified facilities pursuant to program test authority. It is axiomatic that at the time a station files a license application and obtains program test authority, which WOWO and WLIB did on January 29, 1999, that they have done so with the full intention of operating as such.⁴⁸ The 1995 CPs had 18-month terms but were extended until, thirty eight months later, license applications were filed for those facilities. We believe that WOWO and WLIB had ample opportunity

⁴³ *Id.* at 3.

⁴⁴ Application for Review at 6-7.

⁴⁵ See 47 C.F.R. § 73.3571(f) (applications will be processed on a first come/first served basis).

⁴⁶ *E.g., Roxanne Givens*, 6 FCC Rcd 2961, 2961 (1991); *Processing of FM and TV Broadcast Applications, Report and Order*, FCC 85-125, 50 Fed. Reg. 19936, 19940 (1985) (adopting "hard look" processing policy for FM and TV broadcast applications).

⁴⁷ 47 C.F.R. § 0.445(e) (unpublished documents may not be relied upon, used or cited as precedent).

⁴⁸ In addition to operation under program test authority, licensees have ample time to examine their technical facilities while they conduct equipment tests pursuant to 47 C.F.R. § 73.1610.

during that time to seek modification of construction permits and to determine whether the facilities that were built pursuant to the 1995 CPs were satisfactory.⁴⁹

15. Applicants argue that the challenged staff actions will preclude substantial increases in nighttime service by WGKA and WLIB.⁵⁰ This is not the issue. A number of competing proposals were filed in the Filing Window. These proposals also would bring substantial nighttime service to listeners. The issue before us is whether the Commission should permit several stations to unilaterally determine the stations that will obtain authorizations for enhanced nighttime service or whether this issue should be resolved pursuant to the competitive bidding procedures mandated by Congress. We believe that the latter option promotes established licensing procedures and best serves the public interest.

16. We reject as false and irrelevant Applicants' speculative theorizing that granting the 1998 License Applications was "motivated by" a desire to accommodate the Contingent Applications. The staff actions granting these two applications were two of the many steps taken to create clear and fair rules for a first-ever AM national filing window. There is no legal nexus between the grant of the 1998 License Applications and the staff's treatment of the Contingent Applications. The attempt to link the two is a legal *non sequitur*. For the reasons stated above, the staff properly rejected Applicants' Deferral Requests. For the reasons set forth below, we uphold the procedures used by the staff to process the Contingent Applications. To the extent we find error in the retention of the Contingent Applications, we conclude that this error was harmless.

17. As argued by the Applicants and as recognized by the staff, Section 73.3517 prohibits the retention of the Contingent Applications. Both the AM Public Notice⁵¹ and the December 1999 Staff Decision⁵² identified the Section 73.3517 violation. The former specifically noted that each of the Contingent Applications was subject to dismissal. We find that it was error to retain these applications and direct the staff to strictly enforce Section 73.3517.

18. Nevertheless, we uphold the staff action. Most importantly, the staff took several actions to conform AM application procedures to Section 73.3517 requirements. It specifically announced that it would not accept any additional applications contingent on grant of the 1998 License Applications until the Filing Window, *i.e.*, until the applications could be filed in conformance with the rule.⁵³ It also stated

⁴⁹ The Applicants' licensing posture is not unusual. The licensing of modified facilities generally extinguishes protection rights associated with the formerly licensed facilities. Thus, applicants that seek technical modifications have long paid detailed attention to the potential impact of such modifications on subsequent facility improvements.

⁵⁰ Application for Review at 11-12.

⁵¹ The *AM Auction Public Notice* identified several applications that had been filed which were contingent on grant of the 1998 WOWO License Application, and noted that each is subject to dismissal pursuant to 47 C.F.R. § 73.3517 (emphasis added). See n.10, *supra*. The public notice stated that the Mass Media Bureau would retain these applications and treat them as having been filed during the filing window announced in the *AM Auction Public Notice*. This procedure would "promote orderliness and fairness in the Commission's application procedures," *AM Auction Public Notice*, 14 FCC Rcd at 19491.

⁵² The Commission has a "policy of barring the filing of construction permit applications in anticipation of the licensing of an existing station's facility modification." *December 1999 Staff Decision* at 5.

⁵³ *AM Auction Public Notice*, 14 FCC Rcd at 19491, n.7 and accompanying text.

that the Contingent Applications would be treated as having been submitted during the upcoming Filing Window. That is, the staff, *sua sponte*, made clear that these applications would not be accorded any putative first-come, first-served rights that could be tied to their premature submission in violation of the rule. Had the staff dismissed the Contingent Applications, as Applicants demand, they could have been refiled several weeks later during the Filing Window. Had the staff and interested applicants followed these procedures, the applicants would have precisely the same application status as they enjoy today. Thus, Applicants' contention that retention of the Contingent Applications was "*ultra vires*" is, in reality, a mere quibble over whether the staff should have required the essentially ministerial step of refile pending applications during the Filing Window. The staff's decision not to require refile as an administrative convenience to the applicants and to conserve its own resources was reasonable. We conclude on these facts that retention of the Contingent Applications was harmless error.

19. Accordingly, for the reasons set forth herein, IT IS ORDERED, that the Application for Review filed by Pathfinder Communications Corp., ICBC Corporation and Salem Media of Georgia, Inc., IS DENIED. 47 C.F.R. § 1.115.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary