



AU Docket No. 17-351

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**By Hand and Email (auction83@fcc.gov)**

Margaret W. Wiener, Chief  
Auctions & Spectrum Access Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

ACCEPTED/FILED

JAN 25 2018

Federal Communications Commission  
Office of the Secretary

Re: Request for Waiver of 47 C.F.R §1.2105(b)(2)  
Indirect Subsidiaries of Clear Channel Communications, Inc.  
Action No. 83

Dear Ms. Weiner:

Monticello Media LLC ("Monticello") hereby opposes the request of the indirect subsidiaries (the "CC Applicants") of Clear Channel Communications, Inc. ("CCCI") for a waiver of Section 1.2105(b)(2) of the Commission's rules to allow the CC Applicants to participate in the forthcoming Auction No. 83 despite the change in control of CCCI and, with such change, the change in control of the CC Applicants. *See* Letter from Repp Law Firm to Margaret W. Weiner, Esq. (August 14, 2013) (the "Waiver Request").

Monticello, the licensee of six broadcast radio stations and two translators in the Charlottesville, Virginia market, has filed a separate Petition to Deny (the "Petition") with respect to the application of Clear Channel Broadcasting Licenses, Inc., one of the CC Applicants, for a Charlottesville, Virginia translator that is currently a "singleton." *See* File No. BNPFT-20130821ABF. Grant of the CC Applicants' Waiver Request could adversely affect the Commission's disposition of the Petition. Accordingly, it is necessary that the CC Applicants' Waiver Request be denied.

The Waiver Request proceeds from a fundamental flaw. The Waiver Request states that a waiver of Section 1.2105(b)(2) is necessary to allow the CC Applicants

“to amend their respective of applications to reflect the interim ‘major change’ in ownership at the holding company level.” Waiver Request at 1. That “major change” was a change in control of CCCI that was consummated on July 30, 2008 – more than five (5) years ago. No waiver was or is needed to file that amendment.

Section 1.2105(b)(4) expressly requires auction applicants like the CC Applicants to update their respective Form 175 applications to report new developments, including any change in control, within five (5) business days of the development or with five (5) business days after the applicant learns of the development, whichever is later. Consequently, the CC Applicants should have updated their respective Form 175 applications by August 6, 2008 to report the change in control of CCCI (and, with such change, the change in control of the CC Applicants). The change in control constituted a “major amendment” under Section 1.2105(b)(2), and, in accordance with that section’s dictates, would have required the dismissal of the CC Applicants’ amended Form 175 applications. However, the CC Applicants never honored their obligation to file those major amendments and, as a result, their applications remain pending today.

In view of the forgoing facts, the Waiver Request, in effect, seeks a two-fold waiver of Commission rules: first, a waiver to forgive the CC Applicants’ failure to update their applications as required by Section 1.2105(b)(4); and, second, a waiver to allow the CC Applicants to participate in Auction No. 83 despite the filing of a “major amendment.” Neither waiver request should be granted.

The Waiver Request claims that it is based on “unique circumstances.” Waiver Request at 4. However, there is nothing unique about the circumstances surrounding the Waiver Request.

First, the Waiver Request claims that the transfer of control of CCCI “advanced the public interest by rewarding public shareholder investment in broadcast media, facilitating private equity investment in the broadcast sector and diversifying media ownership through divestitures.” Waiver Request at 4. There is nothing in the Commission’s decision approving the CCCI transfer of control which states that the Commission’s requisite public interest finding under Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §310(d), was based on “rewarding public shareholder investment in broadcast media” or “facilitating private equity investment in the broadcast sector.” See *Existing Shareholders of Clear Channel Communications, Inc.*, 23 FCC Red 1421 (2008).

It may be, as the Waiver Request observes, that the Commission found the CCCI change of control to be in the public interest. See Waiver Request at 4. However, the Commission makes that same public interest finding every time it grants a Form 314 assignment application or a Form 315 transfer of control application. For that reason, the Commission has not let the presence of similar

public interest findings dissuade it from finding that other applicants could not participate in an auction because they had experienced a similar change in control. See *McKissick Enterprises*, 22 FCC Rcd 18596 (MB 2007) (post-filing assignment of an AM station required dismissal of auction application in Auction No. 84 for a major change to station); *Lee Peltzman*, 22 FCC Rcd 13523 (WTB 2007) (post-filing assignment of low power television station required dismissal of auction application in Auction No. 85 for a low power television digital companion channel). In short, to base any waiver on the Commission's public interest finding in an assignment or transfer application proceeding would create an exception that would swallow the rule.

Second, there is nothing unique about the Waiver Request's observation that the CC Applicants are not seeking any bidding credits and that allowing the CC Applicants to participate in the auction would increase the number of competitors participating in the competitive bidding and, if the CC Applicants prevail, perhaps increasing the amount paid to the Commission, "thereby potentially increasing revenues to the Treasury." Waiver Request at 3. Every applicant undergoing a major amendment – including a change of control – could say that its participation in the auction could potentially increase revenues to the United States Treasury (regardless of whether it is seeking a bidding credit, because the increase in competitors could, in and of itself, drive up the auction price). Here too acceptance of the CC Applicants' argument would create an exception that would swallow the rule.

Third, there is nothing unique about the CC Applicants' claim that there would have been no need for a waiver request if the Commission had acted "promptly" in conducting the auction. Waiver Request at 3. The CCCI change of control occurred in 2008, approximately five (5) years after the Auction No. 83 applications were due to be filed. There is nothing in Section 1.2105(b)(2) that relieves applicants of the prohibition on major amendments if the major amendment is made five (5) years after the filing of the Form 175 application. Indeed, even if it were to contemplate such an exception, the Commission would have to establish uniform standards that would apply to all applicants in Auction No. 83 as well as other auctions. In *McKissick*, for example, the prohibited assignment occurred almost three and one-half years after the Form 175 application was filed – would the applicant there have been in a position to argue, as the CC Applicants do here, that it too should have been spared the dismissal of its auction application because the Commission failed to act "promptly" in conducting an auction? Stated another way, when can it be said that the Commission has not acted "promptly" in conducting an auction? This question – coupled with the concomitant need for equal treatment – underscore the wisdom of using a notice-and-comment rulemaking proceeding rather than an *ad hoc* waiver request to decide what, if any, exceptions should be made to Section 1.2105(b)(2) based on the timing of the auction.

Fourth, contrary to the Waiver Request's claim, there is no comparison between the CC Applicants' Waiver Request and the Commission's willingness to permit certain auction applicants to de-select noncommercial status "that would otherwise be deemed a 'major change.'" Waiver Request at 4. *See Request for Declaratory Ruling*, 28 FCC Rcd 4145 (MB 2013). As the Commission explained, that waiver was granted to "avoid the harsh result of dismissing applicants based on *subsequently* adopted processing rules" which concluded that noncommercial status could be fatal to an applicant's ability to participate in the auction. 28 FCC Rcd at 4146 (emphasis added). In contrast to the waiver concerning the de-selection of noncommercial status – which reflected a situation foisted upon noncommercial applicants – the CC Applicants' Waiver Request is based on a *voluntary* decision by CCCI to sell the company's stock at great profit to its shareholders and not a new rule foisted on them by subsequent Commission action.

In the end, there is no basis for the Commission to sanction the CC Applicants' unilateral and still unexplained failure to comply with the strictures of Section 1.2105(b)(2) and Section 1.2105(b)(4). As the United States Court of Appeals for the District of Columbia Circuit observed,

[I]t is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, *Teleprompter Cable Systems v. FCC*, 543 F.2d 1379, 1387 (D.C. Cir. 1976), for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

*Reuters Limited v. FCC*, 781 F.2d 946, 957 (D.C. Cir. 1986). *Accord Teleprompter Cable Communications Corp. v. FCC*, 565 F.2d 736, 742 (D.C. Cir. 1977) ("[t]he Commission's notion of the public interest cannot justify its failure to abide by its own rules and to act in a manner consistent with its own precedents").

To be sure, the Commission has the authority to waive a rule when such action will not compromise the purpose or policy which the rule was intended to serve. *See e.g. WAIT Radio v. FCC*, 418 F.2d 1153, 1160 n. 21 (D.C. Cir. 1969). That basic principle has no applicability here. A grant of the CC Applicants' Waiver Request would eviscerate rather than preserve the integrity of Sections 1.2105(b)(2) and 1.2105(b)(4). If it were to grant that Waiver Request, the Commission would be inundated by other parties making similar waiver requests and thereby frustrate the purpose and policy those sections were designed to serve.

In view of the forgoing, it is respectfully requested that the CC Applicants' Waiver Request be denied.

Sincerely,

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By: 

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