

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Expanding the Economic and Innovation) GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)
Auctions)

To: Marlene H. Dortch, Secretary
For transmission to: The Commission

PETITION FOR CLARIFICATION AND/OR DECLARATORY RULING

1. PMCM TV, LLC (“PMCM”) hereby seeks clarification and, to the extent warranted, a declaratory ruling setting forth in detail the process by which the Commission plans to publicize, provide opportunity to comment on, and ultimately evaluate any requests for waiver of the multiple ownership rules that may be required in connection with channel sharing arrangements entered into by participants in the reverse auction component of the upcoming Incentive Auction.

2. In the Report and Order setting forth the essential elements of the Incentive Auction, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, ¶¶690-91 (2014), the Commission expressly provided that “we will not accept channel sharing bids in the reverse auction that would cause a media ownership rule violation by a party to the channel sharing arrangement based on the rules and facts as they exist at the time the application to participate in the auction is filed.” That proviso, however, was prefaced with the phrase “absent a waiver of the rules”. In other words, the bar against the creation of new ownership combinations that would violate existing limits on

local ownership of stations is not absolute; to the contrary, waivers of those limits may be available, presumably upon the request of an applicant and a demonstration of good cause.

3. Since establishing that partial bar, the Commission has shed no light on the process by which any waiver request will be considered, the time frame during which that process will occur, or what factors may be relevant in assessing “good cause” to determine whether or not a waiver is warranted. As the March 29 deadline for initial commitments draws near, it is imperative that the Commission publicly clarify those matters.

4. The general availability of some waiver process has, of course, been mandated since at least 1969, when the U.S. Court of Appeals for the D.C. Circuit held that “[s]ound administrative procedure contemplates waivers”. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). But the Court there was careful to emphasize that such waivers are to be “granted only pursuant to a relevant standard — expressed at least in decisions accompanied by published opinions.” In other words, while waivers must be available (subject to a “hard look” by the agency), they should be granted only subject to an appropriate standard, and that standard should be published. More recently, the Court has underscored that principle:

Before the FCC can invoke its good cause exception [*i.e.*, waiver policy], it both “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.”

Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C.Cir.1990).¹

And even more recently, the Court has held that:

¹ See also *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986): “Ad hoc departures from [an agency’s] rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.”

The criteria used to make waiver determinations are essential. If they are opaque, the danger of arbitrariness (or worse) is increased. Complainants the agency “likes” can be excused, while “difficult” defendants can find themselves drawing the short straw. If discretion is not restrained by a test more stringent than “whatever is consistent with the public interest (by the way, as best determined by the agency),” then how to effectively ensure power is not abused? ... Otherwise, we are left with “nothing more than a ‘we-know-it-when-we-see-it’ standard,” and “future [parties]-and this court-have no ability to evaluate the applicability and reasonableness of the Commission's waiver policy.” *Northeast Cellular*, 897 F.2d at 1167.

NetworkIP v. FCC, 548 F.3d 116 (D.C. Cir. 2008).

5. The law is therefore clear: if the Commission plans to consider waiver requests (as it must), it must do so subject to reasonably well-defined standards that are available for public scrutiny. Moreover, in view of the “danger of arbitrariness” that lurks in the waiver process, it is important that that process be undertaken publicly, so that any and all members of the public who might potentially be affected by the requested waiver may have some effective recourse to seek meaningful review of any waiver decisions.

6. In the ordinary course of broadcast applications, the Commission does not routinely issue public notices advising of the submission of waiver requests. **BUT** it does invariably issue public notices advising of the submission of applications, and in all but a very small number of cases it provides interested members of the public the opportunity to review those notices, inspect any of the applications listed thereon, thereby determine whether any waiver requests have been filed, and submit comments on or oppositions to such requests before they are acted on. That is, while Commission processes may not expressly highlight waiver requests when they are submitted, the public is nonetheless routinely able to learn of, access, and comment on such requests before they are resolved. Furthermore, when applicants seek waiver of the multiple ownership rules, the disposition of such requests are routinely announced in written decisions.

7. In the case of potential multiple ownership waivers that might be sought in connection with the reverse auction, however, the Commission to date has provided no indication of when or how requests for such waivers will be considered. While that might, in other circumstances, not be problematic, in the context of the reverse auction – where time is of the essence – it plainly is.

8. Unlike conventional applications, Forms 177 – the application form for participation in the reverse auction – are not reflected in any public notice, so the public has no idea which stations may have filed. Moreover, even if they were so reflected, the forms themselves are unavailable for review by the public. Indeed, it is not clear that even the Commission's staff will have fully vetted each Form 177 (including, in particular, the details of any proposed channel-sharing arrangement included in the application) prior to the completion of the auction.

9. These circumstances are problematic because, once the initial commitment deadline has passed, the universe of participants in the reverse auction is effectively set in stone. But if any of those participants has included in its application a request for waiver of the multiple ownership rules necessitated by an anticipated post-auction channel-sharing arrangement, inclusion of such an applicant in the reverse auction necessarily constitutes grant of that waiver. As a practical matter, given the complexity of the auction and repack process, it is inconceivable that the Commission would permit a television licensee to proceed all the way through the auction process only to deny it an essential waiver at the conclusion of that process.

10. Therefore, consideration and disposition of waiver requests must occur prior to the initial commitment deadline. But that's less than a month away, and the Commission has yet to explain how it plans to address whatever waiver requests it has received, and also how it plans

to make the consideration and resolution of such waiver requests a transparent and publicly-accessible process, as is clearly anticipated by the courts. It is, of course, possible that no broadcaster has included in its Form 177 (or otherwise) a request for waiver of the multiple ownership rules arising from a proposed channel-sharing arrangement. But if that's the case, the Commission can and should say so. And if it's not the case, the Commission should promptly announce when and how it plans to deal with whatever requests that have been submitted. All other participants in the auction, and all members of the public, are entitled to know when and why waivers have been sought, and they are equally entitled to know when and why waivers are granted. Competing concerns about auction-related confidentiality cannot take away those rights.

WHEREFORE, for the reasons stated, PMCM TV, LLC requests that the Commission issue a clarification and, to the extent warranted, a declaratory ruling setting forth in detail the process by which the Commission will publicize, provide opportunity to comment on, and ultimately evaluate any requests for waiver of the multiple ownership rules that may be required in connection with channel sharing arrangements entered into by participants in the reverse auction component of the upcoming Incentive Auction.

Respectfully submitted,

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