

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

In the Matter of)	
)	
ALEXANDER BROADCASTING, INC.)	Filed January 30, 2004
)	Facility ID No. 64556
Station WRCR(AM))	
Spring Valley, New York)	
)	
For Major Change in Facilities)	

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 2006

Released: August 22, 2006

By the Commission:

1. We have before us a December 16, 2004, Application for Review filed by Alexander Broadcasting, Inc. ("Alexander"), licensee of WRCR(AM), Spring Valley, New York. Alexander seeks review of the staff's November 16, 2004, denial of its request for waiver of Section 73.30(c) of the Commission's Rules¹ and waiver of the exclusion of AM expanded band major change applications from the AM Auction No. 84 filing window.² For the reasons set forth below, we grant review, waive certain Commission rules, and direct the Media Bureau to open a limited filing window to permit the filing of applications for a new AM station on 1700 kHz. Applications filed in the window will be required to meet certain requirements that are designed to ensure that the new station will meet critical safety and informational needs of Rockland County residents.

I. BACKGROUND

2. On November 6, 2003, the Media Bureau ("Bureau") and the Wireless Telecommunications Bureau announced an auction filing window.³ The window was available for construction permit applications for new AM stations and major modifications to authorized AM facilities, as defined in Section 73.3571(a)(1) of the Commission's Rules.⁴ The public notice specifically stated that the window "will not be available for frequencies in the AM expanded band or for major

¹ 47 C.F.R. § 73.30(c).

² *Letter to Roy R. Russo, Esq.*, Ref. No. 1800B3-LAS (MB Nov. 16, 2004).

³ *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003) ("*Auction No. 84 Window Public Notice*") (DA 03-3532). The *Auction No. 84 Window Public Notice* described procedures and provided instructions for the electronic filing of FCC Form 175 applications. The window opened on January 26, 2004, and closed on January 30, 2004.

⁴ 47 C.F.R. § 73.3571(a)(1).

changes in existing AM expanded band stations,”⁵ citing a previously released February 1, 2002, public notice, which instituted a freeze on the filing of all AM expanded band major change applications.⁶

3. Alexander, licensee of WRCR(AM), 1300 kHz, Spring Valley, NY, filed an application to modify its facilities to operate on 1700 kHz with increased daytime and nighttime power. Recognizing that the *Auction No. 84 Window Public Notice* specifically precluded the filing of AM expanded band applications in the Auction No. 84 filing window, Alexander sought waiver of the expanded band application freeze and requested acceptance of its application.⁷ Alexander supported its waiver request by arguing that technical AM protection requirements foreclose its ability to improve coverage on its current standard band frequency. It further observed that the application neither specified a new community of license nor proposed relocation of the station facilities a substantial distance. Thus, Alexander contended, the proposal did not raise the principal concerns expressed by the Commission in adopting its freeze on the filing of AM expanded band major change applications. Alexander based its waiver request chiefly on the fact that station WRCR(AM) is located near New York’s Indian Point nuclear power plant, a possible terrorist target and potential source of a serious radiological emergency.⁸ It contended WRCR(AM)’s current facilities would be unable to reach significant populations in and around Rockland County with emergency information in the event of an accident or terrorist act at the Indian Point nuclear facility. Alexander urged the Commission to waive various rules to permit the processing of its modification application, which specifies facilities that could better meet the critical safety and security needs of Spring Valley and Rockland County residents.

4. As part of a wide ranging rulemaking proceeding to revitalize the AM service, the Commission adopted rules to manage the expanded band migration process to “maximize the benefits to the AM service as a whole.”⁹ Recognizing the Commission’s commitment to systematically manage

⁵ *Auction No. 84 Window Public Notice*, 18 FCC Rcd at 23017. AM expanded band stations operate on one of the ten channels in the 1605-1705 kHz band. See 47 C.F.R. § 73.30.

⁶ *Freeze Announced on the Filing of AM Expanded Band Major Change Applications*, Public Notice, 17 FCC Rcd 1806 (MMB 2002) (“*AM Freeze Public Notice*”) (DA 02-239).

⁷ Alexander also sought waiver of 47 C.F.R. § 73.30(c), the rule that requires the filing of a petition for allotment for an AM expanded band frequency, and provides such petitioners for the expanded band allotments 60 days from the awarding of the allotment, to file an application for construction permit. Furthermore, because applicants were unable to electronically file expanded band applications during the AM Auction No. 84 filing window, Alexander transmitted a paper-filed FCC Form 175 application, which included Section I and the Tech Box of Section III-A of FCC Form 301, and separately requested waiver of the electronic form filing requirements. Finally, Alexander requires a waiver of 47 C.F.R. § 73.30(b), which requires the Commission to license stations in the AM expanded band based on the extent to which the abandonment of the station’s lower band facility would yield the greatest interference reduction improvements. 47 C.F.R. § 73.35 sets forth the methodology for calculating a station’s “improvement factors.”

⁸ Indian Point is a nuclear power energy generation facility, owned and operated by Entergy Nuclear Northeast. The plant is located in Buchanan, New York, on the east bank of the Hudson River in Westchester County, close to portions of Rockland, Putnam and Orange Counties. See generally “Community Emergency Planning for Indian Point Guide,” Rockland County, 2005-2006.

⁹ See *Review of the Technical Assignment Criteria for the AM Service*, Report and Order, 6 FCC Rcd 6273, 6277 (1991) (subsequent history omitted) (“*AM Improvement Order*”). The Bureau’s implementation of the AM expanded band application freeze was a component of this broad course of action. Concerned that the continued acceptance of AM expanded band applications might limit opportunities for additional expanded band stations, the Bureau stated that a freeze would best “preserve the rights of potential applicants for new expanded band stations and the opportunity to use competitive bidding procedures to award these authorizations.” *AM Freeze Public Notice*, 17 FCC Rcd at 1806.

expanded band licensing, the staff found that neither Alexander's alleged inability to improve station coverage in the lower band nor the limited nature of its request, which would involve no change in its community of license or authorized transmitter location, constituted special circumstances warranting waiver of the expanded band application filing freeze. It further determined that granting Alexander's freeze waiver and unilaterally accepting its application would preclude other AM stations from competing for expanded band spectrum, and thus would be fundamentally unfair to parties potentially interested in expanded band authorizations. Notwithstanding the public safety and security arguments advanced by Alexander, the staff concluded that the public interest as a whole would be best served by denying the waiver.

5. On review, Alexander contends that its application was filed in response to significant and substantial concerns expressed by public officials at the local, state, and national levels over the inability of Station WRCR(AM) to reach areas and populations in and around Rockland County, New York, with emergency messages, in the event of an incident at the nearby Indian Point facility. Alexander argues that it maintains strong bipartisan support for improving its current, severely restricted coverage, which provides no protected nighttime service to Spring Valley. Alexander contends that WRCR(AM)'s signal coverage would improve dramatically if the Commission authorized operations on 1700 kHz. Moreover, Alexander argues that grant of its application would permit WRCR(AM) to provide a first local nighttime service to Spring Valley and "correct the dearth of local radio service in Rockland County."¹⁰ Alexander requested that the Commission direct the Media Bureau to take "whatever additional actions may be required to redress the perceived unfairness to other 'parties' interested in such filings, including the use of competitive bidding in the event of mutually exclusive applications for such facilities."¹¹

II. DISCUSSION

6. A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.¹² Moreover, when it waives a rule the Commission must explain why the waiver would not undermine the policy served by the rule.¹³ We believe that the public interest is served by granting review and permitting Alexander to compete for a frequency in the AM expanded band. Several factors warrant divergence from our AM expanded band licensing procedures. We agree with Alexander that the public safety issues it has identified are

¹⁰ Alexander Application for Review, attached September 7, 2004 Request for Expedited Action at 2-3. Alexander also contends that there is no room for any increase in the strength of the WRCR(AM) signal on 1300 kHz in the AM broadcast band.

¹¹ Alexander Application for Review at 5.

¹² *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) ("*WAIT Radio*"). See also *Industrial Broadcasting Co. v. F.C.C.*, 437 F.2d 680 (D.C. Cir. 1970) (heavy burden traditionally placed upon party seeking waiver to demonstrate that its arguments are substantially different than those carefully considered at the rulemaking proceeding); *State of New Hampshire*, 11 FCC Rcd 5258 (WTB 1996) (waiver denied because applicant failed to meet heavy burden to operate in manner substantially different from Commission-adopted allocation scheme); *WAIT Radio*, 418 F.2d at 1159 ("Sound administrative procedure contemplates waivers, or exceptions granted only pursuant to a relevant standard The agency may not act out of unbridled discretion or whim in granting waivers anymore than in any other aspect of its regulatory function.").

¹³ *WAIT Radio*, 418 F.2d at 1157 ("a general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.").

substantial and real. We also recognize the unique and invaluable public service that broadcast stations have provided and can be expected to provide in meeting the emergency and public safety programming needs in the areas they serve. Adequate broadcast service is particularly critical in areas in which potential terrorist targets are located and in responding to catastrophic events. Thus, we believe that waiver is warranted to permit the licensing of a station that could provide full-time local emergency radio service to Rockland County residents who would be at great risk in the event of a radiological emergency at the Indian Point facility.¹⁴ Further, we believe that the potential enhancement of broadcast service to the area that government officials have determined to be of primary concern should be accorded significant weight.¹⁵ Therefore, we waive, to the extent indicated below, the AM expanded band major change application filing freeze announced in the *AM Freeze Public Notice*, AM Auction No. 84 procedures, and Sections 73.30 and 73.35 of the Commission's Rules to permit consideration of applications which would ensure adequate local radio service to this potentially at-risk population.¹⁶

7. We recognize that our decision to grant review and waive various rules will not advance the interference reduction policies adopted in the *AM Improvement Order*. These include rules mandating the use of interference reduction criteria to award AM expanded band authorizations¹⁷ and to conduct AM expanded band licensing on a nationwide basis.¹⁸ Although the decision does not advance the Commission's *AM Improvement Order* rules and policies, it will not undermine the Commission's ability to improve the AM service as a whole by systematically relocating AM stations based on the degree to which they would reduce interference in the standard band.

8. While we grant the Alexander waiver request, we find that the staff properly concluded that the Commission should provide an opportunity for the filing of competing applications. This requirement is based primarily on Section 309(b) of the Act¹⁹ and the *Ashbacker* doctrine.²⁰ Under *Ashbacker*, the Commission may not "grant one mutually exclusive application without holding the comparative hearing required by the Communications Act."²¹ The D.C. Circuit also has held that "*Ashbacker* rights inhere in potential applicants whose right to file a timely competing application is

¹⁴ A portion of Rockland County lies within the Indian Point Emergency Planning Zone ("EPZ"), a federally designated area within a ten-mile radius of the nuclear facility. The Federal government set the ten-mile radius as the area requiring plans for protecting the health and safety in radiological emergencies. State and county planners and Entergy Nuclear Northeast have developed plans, including a public communications component, for Indian Point. We note that none of the stations that are listed in the Rockland County 2005-2006 Guide to Community Emergency Planning for Indian Point as participating in the State/Local Emergency Alert System ("EAS") plan and that provide service to the Rockland County portion of the Indian Point EPZ is licensed to a community in Rockland County. http://www.co.rockland.ny.us/ctyreports/english_emg.pdf.

¹⁵ See, e.g., *Letters from The Honorable Nita M. Lowey, U.S. House of Representatives, New York, 18th District (January 14, 2004); The Honorable Eliot L. Engel, U.S. House of Representatives, New York, 17th District (February 24, 2004) to Roy Stewart, Chief, Broadcast Licensing Division, Media Bureau.*

¹⁶ 47 C.F.R. §§ 73.30, 73.35.

¹⁷ See 47 C.F.R. § 73.35.

¹⁸ See 47 C.F.R. § 73.30.

¹⁹ 47 U.S.C. § 309(b).

²⁰ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*").

²¹ *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 689 (D.C. Cir. 2001) (citing *Ashbacker*, 326 U.S. at 327) ("*Bachow*").

frustrated by a Commission freeze order.”²² In *Bachow*, the Court upheld the dismissal (as part of a transition to competitive bidding) of applications that were not “ripe” because they were not filed at least 30 days before the freeze date. The Court explained that the Act “forbids the Commission to grant an application ‘earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.’”²³ It treated this provision as guaranteeing the right to file competing applications for a 30-day period. It explained that the 30-day “ripeness” period was necessary because without it, “the Commission could have granted applications filed less than 30 days before the freeze date, abrogating the *Ashbacker* rights of prospective applicants who could have filed timely competing applications but for the freeze.”²⁴ Accordingly, we conclude that the Commission should provide an opportunity for prospective applicants to file competing applications for facilities which meet the requirements set forth below.²⁵ We also find that providing an opportunity for the filing of mutually exclusive applications will best effectuate our competitive bidding policies.

9. Therefore, upon finality of this application proceeding, we direct the Bureau to open a limited, supplemental window for Alexander and other interested parties to file applications for facilities that would operate on 1700 kHz. To ensure that the station will serve the critical public safety needs of those residents within the Indian Point EPZ designated by emergency authorities, applicants must specify a community of license within Rockland County, and the proposed facilities must, at a minimum, provide service to (*i.e.*, place a daytime 2.0 mV/m strength contour and a nighttime interference free contour over) more than 50 percent of the persons residing in the Rockland County portion of the Indian Point EPZ.²⁶ To ensure that pertinent emergency information is conveyed, the station ultimately receiving an authorization must transmit all state and local EAS alerts and participate in state and local EAS programs.

10. We will require the use of competitive bidding if any mutually exclusive applications are filed within the window. To the extent mutually exclusive applications are filed, they will be consolidated with other pending mutually exclusive AM groups and included in AM Auction No. 84.²⁷

²² *Bachow*, 237 F.3d at 690 n.7 (citing *Kessler v. FCC*, 326 F.2d 673, 686-88 (D.C. Cir. 1963) (“*Kessler*”).

²³ *Bachow*, 237 F.3d at 689 (quoting 47 U.S.C. § 309(b)).

²⁴ *Id.* See *Kessler*, 326 F.3d at 687-88 (Commission’s refusal to process mutually exclusive applications that were filed after the freeze but were otherwise timely denied those applicants their *Ashbacker* rights).

²⁵ See *Amendment of the Commission’s Space Station Licensing Rules and Policies*, 17 FCC Rcd 3847, 3871 (2002) (in concluding that first-come, first-served procedure for satellite applications meets the requirements of Section 309 and *Ashbacker*, explaining that “[s]o long as all applicants fully meeting all pertinent licensing requirements have an equal opportunity for initial consideration and an opportunity for hearing if their application is denied, there is no basis for concluding that the procedure denies any applicant its rights to a hearing under Section 309 of the Communications Act.”). See also Conference Report to the Balanced Budget Act of 1997, Pub.L. No. 105-33, 111 Stat. 251 (1997), which provided guidance to the Commission on the procedures it should use in situations where no competing applications had been filed because the Commission had not yet opened a filing window. H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 573 (1997) (“The conferees expect that, regardless of whether the [singleton] application was filed before, on or after July 1, 1997, the Commission will provide an opportunity for competing applications to be filed, consistent with the Commission’s procedures.”).

²⁶ The Commission’s rules require AM expanded band applications to specify Model 1 facilities. See 47 C.F.R. § 73.30 (c). 47 C.F.R. § 73.14 defines a Model 1 facility as a station operating in the 1605-1705 kHz band featuring fulltime operation with stereo, competitive technical quality, 10 kW daytime power, 1 kW nighttime power, non-directional antenna (or a simple directional antenna system). We do not waive this requirement.

²⁷ *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 20 FCC Rcd 10563 (2005).

Competing proposals must comply with current AM expanded band technical rules.²⁸ The Media Bureau will provide detailed instructions for filers in a forthcoming public notice.

III. CONCLUSION

11. For the foregoing reasons, the Application for Review and request for waiver filed by Alexander Broadcasting, Inc. IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁸ AM expanded band stations must meet the following spacing criteria: co-channel, 800 kilometers; first adjacent channel, 200 kilometers; second adjacent channel, 53 kilometers. *See AM Improvement Order*, 6 FCC Rcd at 6356. Additionally, the proposed site would be expected to be located within the standardized coordination distance of 500 kilometers of the Canadian border. As such, we call attention to the coordination provisions contained in the 1990 Agreement Between the Government of Canada and the Government of the United States of America Relating to the AM Broadcasting Service in the Band 1605 to 1705 kHz.