

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

In re Application of)	
)	
ROBERT E. COMBS)	File No. BNP-20000131ABF
)	Facility ID No. 122542
For a Construction Permit for a New AM Station)	
at Boise, Idaho)	

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 2004

Released: July 16, 2004

By the Commission: Commissioners Copps and Adelstein concurring and issuing a joint statement.

1. Before the Commission is Robert E. Combs's ("Combs") October 7, 2002, Application for Review of a staff decision by the Media Bureau ("Bureau")¹ denying Combs's June 3, 2002, Petition for Reconsideration of a May 3, 2002, staff decision,² and also denying Combs's concurrently filed Petition for Leave to Amend his application for a new AM broadcast station at Boise, Idaho.³ Also before us is Combs's December 18, 2002, Petition for Leave to Amend his Boise application ("December 2002 Amendment Petition").⁴ For the reasons discussed below, we deny the Application for Review and the Petition for Leave to Amend.

2. **Background.** Combs, Kemp, Lotus, and Palmetto Radio Group, Inc. ("Palmetto") filed mutually exclusive ("MX") applications for AM broadcast stations during the January-February 2000 filing window for AM Broadcast Auction No. 32.⁵ Kemp and Lotus proposed new AM broadcast stations at Las Vegas, Nevada; Palmetto proposed a new AM station at Sunrise Manor, Nevada; and Combs applied for a new AM station at Boise, Idaho. After determining that the four applications were mutually

¹ *Letter to Aaron P. Shainis, Esq., Jerome Boros, Esq., James A. Koerner, Esq., and Mark N. Lipp, Esq.*, Ref. No. 1800B3-TSN (MB Aug. 30, 2002) ("Reconsideration Decision").

² *Letter to Aaron P. Shainis, Esq., Jerome Boros, Esq., James A. Koerner, Esq., and Mark N. Lipp, Esq.*, Ref. No. 1800B3-TSN (MB May 3, 2002) ("Staff Decision").

³ File No. BNP-20000131ABF.

⁴ Also before us are an October 21, 2002, Partial Opposition to Application for Review filed by Kemp Communications, Inc. ("Kemp"); an October 22, 2002, Opposition to Application for Review filed by Lotus Broadcasting Corp. ("Lotus"); and Combs's November 1, 2002, Reply to Opposition to Application for Review, filed in reply to Lotus's Opposition. Additionally, on November 18, 2003, Combs filed a second Engineering Statement of Donald L. Markley.

⁵ *See Public Notice*, "AM Auction Filing Window and Application Freeze," 14 FCC Rcd 19490 (MMB/WTB 1999).

exclusive,⁶ the Bureau made a threshold determination under Section 307(b) of the Communications Act of 1934 (the “Act”),⁷ pursuant to the Commission’s established auction procedures for the AM broadcast service.⁸ In the Staff Decision, the Bureau initially determined that the community of Sunrise Manor was interdependent with the Las Vegas Urbanized Area, and further determined that Las Vegas was entitled to a dispositive Section 307(b) preference over Boise. The Bureau thus directed that the Lotus, Kemp, and Palmetto applications – all of which proposed AM stations in the Las Vegas area – would proceed to auction, and that Combs’s application would be dismissed upon award of a construction permit to one of the other three applicants.

3. In the Staff Decision, the Bureau also denied Combs’s November 28, 2001, Petition for Leave to Amend and accompanying waiver request (collectively “November 2001 Amendment Petition”). Combs requested waiver of the anti-collusion provision of Section 1.2105 of our Rules,⁹ and sought leave to file a unilateral technical amendment to his Form 175 application to eliminate the mutual exclusivity between it and the three Las Vegas-area applications. Combs argued that grant of the waiver would be favored under Section 307(b) by allowing grant of two applications from MX Group AM 20 rather than one. The staff denied the November 2001 Amendment Petition, holding that once the deadline for filing Form 175 applications has passed, the rules do not allow MX groups composed entirely of applicants for new broadcast facilities to resolve their mutual exclusivity by filing technical amendments or settlement agreements.¹⁰ The Bureau also held that Combs’s technical amendment was impermissible because, as the Commission stated in the *Broadcast First Report and Order*, any “changes in the engineering submissions accompanying a short-form [application] will be regarded as major changes, and cannot be made after the initial filing deadline.”¹¹ In the November 2001 Amendment Petition Combs neither

⁶ The four applications were designated as mutually exclusive (“MX”) Group AM 20 in Auction No. 32. *Public Notice*, “AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction,” 15 FCC Rcd 20449 (MMB 2000) (“*Mutually Exclusive Public Notice*”).

⁷ 47 U.S.C. § 307(b).

⁸ *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, First Report and Order*, 13 FCC Rcd 15920, 15964-65 (1998) (“*Broadcast First Report and Order*”), *recon denied*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12541 (1999).

⁹ 47 C.F.R. § 1.2105.

¹⁰ The anti-collusion rule applies generally to broadcast auctions, and application of the rule in this context has been upheld against a challenge by a party claiming that the Commission must afford parties an opportunity to settle. *Orion Communications, Limited v. F.C.C.*, 213 F.3d 761 (D.C. Cir. 2000) (“*Orion*”). In AM Broadcast Auction No. 32, however, a limited exception was provided for MX groups consisting of (1) major modification AM applicants that were mutually exclusive with each other, or (2) major modification and new station applicants that were mutually exclusive with each other. *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20450. 47 C.F.R. § 73.5002(d). In the *Broadcast First Report and Order*, the Commission noted that several commenters questioned whether the auction legislation required auctioning major modification applications. 13 FCC Rcd at 15925-27. In part because of this uncertainty, and because no workable alternate means of awarding major modification applications had been suggested, the Commission determined that such major modification applicants would be allowed to resolve their conflicts by means of technical solutions or settlements during a limited period after filing Form 175. 13 FCC Rcd at 15927.

¹¹ 13 FCC Rcd at 15976. *See also* 47 C.F.R. §§ 1.2105(b)(2) and 73.5002(c). In AM Broadcast Auction No. 32, applicants were subject to the Form 175 modification provisions of 47 C.F.R. § 1.2105(b), except those applicants permitted to resolve mutual exclusivity by technical amendment. *See supra* note 10.

acknowledged violation of, nor requested relief from, the prohibition on filing major changes after the Form 175 filing deadline. Moreover, staff analysis of the November 2001 Amendment Petition showed the proposed amendment would not have eliminated the mutual exclusivity between Combs's and the other three applications.

4. In his Petition for Reconsideration, Combs argued that Boise was more deserving of a Section 307(b) preference than Las Vegas, owing primarily to its status as the capital of Idaho and to the greater number of radio stations licensed at Las Vegas (fifteen to Boise's eight). Combs also filed a further waiver request and his second Petition for Leave to Amend (collectively "June 2002 Amendment Petition"), contending that both Section 307(b) and Section 309(j)(6)(E)¹² mandated waiver of the anti-collusion rule.¹³ Additionally, in a July 29, 2002, Supplement to Petition for Leave to Amend, Combs argued that the Commission's decision in *Star Development Group*¹⁴ mandated grant of the requested waiver and amendment. The Bureau denied both reconsideration and the June 2002 Amendment Petition, citing the Commission's holding that the application and licensing procedures adopted in the *Broadcast First Report and Order*¹⁵ met "the Commission's obligations under Section 309(j)(6)(E) to avoid mutual exclusivity by various means."¹⁶ The Bureau further found that *Star Development* did not support Combs's June 2002 Amendment Petition because Combs's application was not defective due to an error in Commission databases and because, unlike in *Star Development*, Combs sought to avoid mutual exclusivity with a contemporaneously filed auction window application. The three Las Vegas area applications in MX Group AM 20 proceeded to auction, which concluded December 12, 2002.¹⁷

5. **Discussion.** *Section 307(b).* We deny the Application for Review for the reasons stated in the Reconsideration Decision. The Bureau correctly applied the priorities established by the Commission in *Revision of FM Assignment Policies*:¹⁸ (1) provision of first full-time aural service; (2) provision of second full-time aural service; (3) provision of first local transmission service; and (4) other

¹² 47 U.S.C. § 309(j)(6)(E) ("Nothing in this subsection, or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.").

¹³ Specifically, Combs requested waiver of the "Anti-Collusion Rule, 47 C.F.R. § 1.205 (sic)." June 2002 Amendment Petition at 1.

¹⁴ 17 FCC Rcd 13127 (2002) ("*Star Development*").

¹⁵ See *supra* note 8.

¹⁶ See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, Memorandum Opinion and Order* ("*Broadcast Auctions MO&O*"), 14 FCC Rcd 8724, 8756 (1999); *modified*, 14 FCC Rcd 12541 (1999). Because of this, the Commission concluded that "we are not compelled by statute to allow competing broadcast applicants to resolve their mutual exclusivities by engineering solutions or other means following the submission of short-form applications."

¹⁷ *Public Notice*, "New AM Broadcast Stations Auction Closes – Winning Bidders Announced," DA 02-3450 (MB/WTB rel. Dec. 18, 2002).

¹⁸ 90 F.C.C.2d 88 (1982) ("*FM Assignment Policies*").

public interest matters, with co-equal weight being given to Priorities (2) and (3).¹⁹ None of the four applicants in MX Group AM 20 proposed first or second full-time aural service, or first local service. The Bureau therefore made its determination under Priority (4), “other public interest matters,” concluding that Las Vegas was entitled to a dispositive Section 307(b) preference based on the greater population to be served.

6. In support of his position, Combs relies chiefly on the Court of Appeal’s holding in *Pasadena Broadcasting Company*,²⁰ focusing on the court’s statement that, while Congress was concerned that radio service extend to as large an audience as possible, “that is not to say that the license is to be awarded to the applicant who would encompass the most listeners within the range of his signal.”²¹ However, Combs neglects to place the court’s ruling in the proper factual context. In *Pasadena Broadcasting* the Commission originally awarded a Section 307(b) preference to Los Angeles over a mutually exclusive proposal for first local service at Newport Beach, California, citing the larger populations to be served by the Los Angeles proposals. In reversing this determination, the court favored the first local service proposal. The subsequently adopted Priority (3) of *FM Assignment Priorities* echoes *Pasadena Broadcasting*’s holding that first local service proposals should be preferred over proposals merely complementing “preexisting local operations.”²² Moreover, the post-*FM Assignment Priorities* cases that Combs cites are distinguishable, in that each involved a comparison between proposals for first local service.²³ In the instant case, however, Combs proposed a ninth local service at Boise. Thus, neither *Pasadena Broadcasting* nor the other post-*FM Assignment Priorities* cases he cites supports Combs’s Section 307(b) argument.

7. Both Boise and Las Vegas have numerous local transmission services and are considered abundantly served.²⁴ Combs has cited no authority wherein a dispositive Section 307(b) preference was awarded based solely on a disparity in the number of local transmission services between already well-served communities. In situations such as this, the Bureau has often used the number of people who will

¹⁹ *Id.* at 91. The priorities set forth in *FM Assignment Policies* are also used in evaluating applicants for new AM stations. *Alessandro Broadcasting Co.*, 99 F.C.C.2d 1 (Rev. Bd. 1984). The Bureau specifically stated that the FM Assignment Policies would be applied in AM Auction No. 32. *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451.

²⁰ 555 F.2d 1046 (D.C. Cir. 1977) (“*Pasadena Broadcasting*”).

²¹ *Id.* at 1049-50.

²² *Id.* at 1050.

²³ See *Anchilla-Marcocci Spanish Radio Co.*, 101 F.C.C.2d 522, 530 (Rev. Bd. 1985), *review denied*, 104 F.C.C.2d 405 (1986) (four mutually exclusive applicants, all proposing first local transmission service); *Land O’Lakes Broadcasting Corp. WTRJ(AM)*, 103 F.C.C.2d 758, 765 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 39, *reversed and remanded sub nom*, *Baker v. F.C.C.*, 834 F.2d 181 (D. C. Cir. 1987), *opinion after remand*, 4 FCC Rcd 344 (1989) (three proposals for first local service). *Ruarch Associates*, 99 F.C.C.2d 338 (Rev. Bd. 1984) *review denied*, 101 F.C.C.2d 1358 (1985), involved competing proposals for a first local service (Priority (3)) and a second local service (Priority (4)), and is distinguishable on this basis.

²⁴ We consider five or more services to be “abundant.” *Family Broadcasting Group*, 53 RR2d 662 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Nov. 29, 1983); see also *LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (MMB 1995).

receive service as the distinguishing factor under Priority (4).²⁵ Additionally, as both Kemp and Lotus point out, while Las Vegas has just under twice as many local transmission services as Boise, its 2000 population is well over twice that of Boise,²⁶ and Las Vegas's population experienced a more dramatic rise from 1990 to 2000 than did Boise's.²⁷ Given these facts, we find sufficient justification for the Bureau's determination.

8. *Requests for rule waiver – Generally.* Section 309(j) of the Act requires that the Commission use competitive bidding as its primary commercial broadcast licensing scheme.²⁸ Our procedures, then, are designed to effectuate this Congressional mandate and to ensure the efficient award of broadcast construction permits. In keeping with statutory objectives, and to minimize the potential for delay, we prohibit post-filing deadline major amendments to short-form applications.²⁹ In the context of AM auction applications, where the staff examines the technical submission solely to determine mutual exclusivity, allowing such major technical amendments carries the potential to discompose the mutual exclusivity determinations and re-align the set of MX groups, as well as to create new mutual exclusivities with those applications deemed non-mutually exclusive. The public interest is not served by the delay and administrative uncertainty that could result from accepting such amendments and subsequent re-alignment of MX groups.³⁰ Thus, any requests for waiver of the rules prohibiting such amendments will be closely scrutinized with these policies in mind.

9. Although some have argued that Section 309(j)(6)(e) of the Act requires us to accept engineering amendments in order to resolve mutual exclusivity,³¹ the Commission and the United States Court of Appeals for the District of Columbia Circuit have rejected this contention. In implementing the broadcast auction procedures, the Commission stated that filing windows – as opposed to the prior “A” and “B” cut-off procedures – and site-specific licensing would be used to reduce the occurrence of mutual exclusivity.³² The Commission declined, however, to devise procedures that would permit the broad use

²⁵ See, e.g., *Letter to Kidd Communications, et al.*, 15 FCC Rcd 22901 (MMB 2000).

²⁶ The 2000 Census showed the population of Las Vegas to be 478,434, and the population of Boise was 185,787.

²⁷ Las Vegas's population rose from 258,295 in 1990 to 478,434 in 2000, an increase of 85.2 percent. During the same period, Boise's population rose from 125,738 to 185,787, or 47.8%.

²⁸ 47 U.S.C. § 309(j). See also *Broadcast First Report and Order* at 15922-23, 15935; *Broadcast Auctions MO&O*, 14 FCC Rcd at 8725, 8755.

²⁹ 47 U.S.C. § 309(j)(3); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2377 (1994); 47 C.F.R. § 1.2105(b)(2).

³⁰ See also *Two Way Radio of Carolina, Inc.*, 14 FCC Rcd 12035, 12043 (1999) (Commission denied request for waiver of 47 C.F.R. § 1.2105(b)(2) to allow it to change its designated entity status post-auction, holding that to do so would allow winning bidders “to use the amendment process as a mechanism to gain unfair advantage over other bidders in the auction.”).

³¹ Section 309(j)(6)(e) provides that “nothing . . . in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions . . . and other means in order to avoid mutual exclusivity in application and licensing proceedings.”

³² *Broadcast Auctions MO&O*, 14 FCC Rcd at 8756-57. Additionally, in order to avoid mutual exclusivity between minor modification applications and new and major applications submitted during an auction filing window, we now routinely impose a freeze on minor change applications during the brief period that broadcast auction filing windows are open. *Broadcast First Report and Order*, 13 FCC Rcd at 15989.

of settlements or other means, including engineering solutions, to resolve mutual exclusivity after Form 175 applications have been filed.³³ The Court of Appeals has upheld this approach, holding that while Section 309(j)(6)(E) “affirms Congress’ view that statutory competitive bidding authority does not wholesale replace ‘engineering solutions, negotiation . . . and other means’ to *avoid mutual exclusivity*; it does not, as appellants would have it, forbid resort to competitive bidding unless no other means to *resolve* mutual exclusivity are available.”³⁴

10. The Commission has thus established a set of procedures designed to reduce the incidence of mutual exclusivity in a broadcast auction filing window, while remaining consonant with Congress’s direction to resolve any remaining mutual exclusivity primarily through competitive bidding. Given these procedures and the policies underlying them, we do not liberally entertain rule waivers seeking to extricate certain applications from MX groups, in order to potentially maximize the number of application grants. Our duty to preserve the integrity of our auction process requires the certain and strict application of the auction rules.³⁵ In this context, it is fundamentally unfair selectively to allow an applicant to obtain a construction permit outside the auction process, while requiring all other similarly situated applicants to comply with our competitive bidding rules. We must also be mindful of the preclusive effect of our actions on participation in future filing windows. In the AM broadcast service, unsuccessful applicants may always re-apply in a future auction filing window. However, liberal granting of rule waivers potentially disserves future applicants whose proposals could be adversely affected because we effectively exempted other parties from the auction process in an earlier filing window.³⁶

11. *Waiver Request – Application for Review.* In the Application for Review, Combs again argues that waiver of Section 1.2105 of our Rules,³⁷ to allow the filing of a post-Form 175 filing deadline technical amendment, would best serve the public interest. We will grant a waiver of our rules only upon

³³ *Broadcast Auctions MO&O*, 14 FCC Rcd at 8756 (“The Commission, by determining that its well-established anti-collusion rule should preclude competing applicants for new broadcast facilities from discussing settlements or otherwise resolving their mutual exclusivities after the filing of short-forms, has not minimized its obligations under Section 309(j)(6)(E), but has merely continued to apply consistently a rule adopted in 1994 and subsequently applied to every auction conducted by the Commission.”). See also *Orion*, *supra* note 10.

³⁴ *Bachow Communications, Inc. v. F.C.C.*, 237 F.3d 683, 691 (D.C. Cir. 2001) (emphasis in original).

³⁵ “[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, (citation omitted), 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. F.C.C.*, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

³⁶ *Cf. Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 16 FCC Rcd 5074, 5106-07 (2001), in which the Commission rejected a proposal to permit noncommercial educational applicants, determined to be mutually exclusive after window filing, to eliminate the mutual exclusivity by amending their applications to specify an alternate channel for which no one had applied, stating that to do so “would preclude other full service applicants from applying for the available frequencies in the next filing window.”

³⁷ 47 C.F.R. § 1.2105.

a showing of special circumstances warranting deviation from the rules, and a finding that the public interest will be served by waiver.³⁸ Combs has not made the showing necessary to support such a finding.

12. Combs pleads special circumstances based on the mere ability, through unilateral technical amendment, to resolve the mutual exclusivity between his application and the three others in MX Group AM 20. We cannot agree with this contention. Mutually exclusive applications are filed in every auction filing window, and in many MX groups in AM Broadcast Auction No. 32 one or more applicants could have amended the engineering portion of their applications to resolve mutual exclusivity. Neither mutual exclusivity nor the ability to resolve it through technical amendment constitutes a “special circumstance.”

13. More importantly, Combs’s assumption that the unilateral nature of his proposed technical amendment places it beyond the scope of the Section 1.2105 anti-collusion rule is incorrect. His proposed amendment represents a post-Form 175 filing effort to remove application conflict and resolve mutual exclusivity, of the type rejected by the Commission.³⁹ Moreover, each of his three amendment submissions violates not just the anti-collusion provisions of Section 1.2105, but also Sections 1.2105(b) and 73.5002(c),⁴⁰ both of which prohibit post-filing deadline major amendments to Form 175 applications,⁴¹ except in limited circumstances not present here.⁴² This prohibition on major amendments has a sound policy basis, discussed above.

14. Combs also reasserts his contention that Section 309(j)(6)(E) of the Act compels us to eliminate mutual exclusivity through engineering amendments. As discussed above, however, the statute requires us to utilize certain procedures to *avoid* mutual exclusivity, and both the Commission and the Court of Appeals have already determined that our auction procedures fulfill that mandate. Granting Combs’s request that we *resolve* mutual exclusivity after the fact, by allowing a unilateral post-filing technical amendment, is not required and, in our view, would not serve the public interest.

15. Combs also argues that the public interest, especially Section 307(b) objectives, would be better served by allowing his proposed amendment, which would enable grant of two construction permits rather than one.⁴³ However, we have already discussed and rejected Combs’s contentions regarding

³⁸ *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). In his Petition for Leave to Amend, Combs also cites *Letter to John Prendergast*, 15 FCC Rcd 10055 (WTB 2000) as stating a different waiver standard. Petition for Leave to Amend at 2. However, the waiver standard used in that letter was based on 47 C.F.R. § 1.925, which only applies to applications in the Wireless Telecommunications Services. 15 FCC Rcd at 10056 n.5. The Media Bureau has no rules-based waiver standard corresponding to 47 C.F.R. § 1.925. See *Delta Radio, Inc.*, 18 FCC Rcd 16889, 16891 n.19 (2003).

³⁹ See *supra* note 33.

⁴⁰ 47 C.F.R. §§ 1.2105(b), 73.5002(c).

⁴¹ See also *Broadcast First Report and Order*, 13 FCC Rcd at 15976 (“[C]hanges in the engineering submissions accompanying a short-form [application] will be regarded as major changes, and cannot be made after the initial filing deadline.”).

⁴² See *supra* note 10.

⁴³ Application for Review at 9.

Section 307(b). Combs does not present any case authority for the proposition that Section 307(b) mandates grant of multiple applications in all cases. Moreover, even assuming, *arguendo*, that Section 307(b) principles favor multiple grants, Combs has not persuasively demonstrated that multiple rule waivers are warranted to accomplish this end.⁴⁴ We also reject the suggestion that denial of Combs's waiver request necessarily precludes additional AM service at Boise. Dismissal of Combs's application *vis-à-vis* the Las Vegas proposals in AM Auction No. 32 does not prevent Combs from re-filing his application in a future AM filing window. Finally, and contrary to Combs's representation,⁴⁵ grant of the requested waiver would enable him to avoid the possibility of competitive bidding in a future auction, and thus would give him a competitive advantage over applicants who would file in a subsequent AM auction filing window.

16. *Waiver Request – Petition for Leave to Amend.* In the December 2002 Amendment Petition – Combs's third such request⁴⁶ – Combs seeks waiver of Section 73.3571(b) of our Rules,⁴⁷ the

⁴⁴ On May 14, 2004, Combs filed a Supplement to his Application for Review, arguing that our recent decision in *Delmarva Educational Association*, 19 FCC Rcd 6793 (2004) (“*Delmarva*”), supports his contention that rule waiver is appropriate in order to achieve multiple grants. That case is distinguishable, arising as it did in a distinctly different context. The Commission mandated a settlement window for noncommercial educational (“NCE”) applicants, and also directed the Bureau to waive 47 C.F.R. § 73.3525(a)(3), which limits consideration for dismissal of applications to legitimate and prudent expenses, during the settlement window. These Commission mandates enabled mutually exclusive NCE applicants, which are not subject to our auction procedures, to file universal settlements of their MX groups. In *Delmarva*, nine NCE applicants, with ten separate applications, agreed to the dismissal of seven applications and the grant of three. A further waiver of Section 73.3525(a)(3) was required because the joint request for settlement was filed after the Commission's settlement window had closed. We found that waiver was appropriate, *inter alia*, because it would enable grant of three applications rather than one, as would be the case if the Commission's NCE point system selection process were used. However, we also found that “waiver [of the rule] does not undermine the purpose of the limited settlement period, namely, ‘to provide an incentive to settle and to make unnecessary the filing and consideration of point supplements.’” 19 FCC Rcd at 6796 (citation omitted). As discussed in paragraphs 10 and 15 of the text, however, the multiple rule waivers Combs seeks (as opposed to the single rule waiver in *Delmarva*) would undermine the purposes of our auction procedures. In *Delmarva*, the voluntary settlement among non-auction applicants effected a universal resolution of an MX group, thus no applicants were disadvantaged. Here, as noted in the text, Combs's requested waiver would enable him unilaterally to extricate himself from the auction process, gaining an advantage over similarly situated applicants. We find, therefore, that the *Delmarva* case does not support Combs's waiver request.

⁴⁵ See Application for Review at 6 (“Further, permitting Combs to amend will not violate the integrity of the engineering amendment rule since the amendment is not being filed to obtain a competitive advantage or remove a disqualifying deficiency.”).

⁴⁶ The first amendment was submitted in November 2001, but did not eliminate the mutual exclusivity between Combs's application and the other MX Group AM 20 applications. Combs submitted the second amendment concurrently with his petition for reconsideration in June 2002. This was denied in the Reconsideration Decision. See *supra* paragraph 5; Reconsideration Decision at 4 – 6. The December 2002 Amendment Petition is Combs's third amendment and request for rule waiver to allow filing of the amendment. The amendment proposed in the December 2002 Amendment Petition proposes a new nighttime directional antenna pattern, and would eliminate interference caused by Combs's nighttime proposal to the three other MX Group AM 20 applicants' nighttime proposals. However, the December 2002 Amendment Petition still does not eliminate mutual exclusivity, because Combs's proposal would still receive impermissible interference from Palmetto's Sunrise Manor proposal. See *generally Nelson Enterprises, Inc.*, 18 FCC Rcd 3414 (2003).

⁴⁷ 47 C.F.R. § 73.3571(b).

broadcast application processing rule that we waived in *Star Development Group, Inc.*⁴⁸ He states, for the first time, that he “originally relied on erroneous information provided by the Commission’s database in preparing his original application,”⁴⁹ and that therefore, under *Star Development*, he is entitled to file a technical amendment to that application. Combs reiterates his contentions that the public interest will be served by allowing waiver, and claims “there is no competition in this case”⁵⁰ and that grant of waiver “will prejudice no other parties.”⁵¹ Because Combs seeks essentially the same relief in the Petition for Leave to Amend as in the Application for Review, in the interest of administrative efficiency we will consider his Petition for Leave to Amend here.

17. In *Star Development*, we waived Section 73.3571(b)(2)⁵² to allow an AM auction window applicant to change its proposed frequency to eliminate a technical conflict with a prior-filed minor change application that had not been recorded in the Commission’s broadcast database. We held that where an application is “patently defective due to an erroneous or erroneously omitted Commission broadcast database record, and there exists an administratively feasible solution that would not prejudice any other applicant whose application was timely filed, the public interest favors our entertaining a request that we waive our procedural rules to provide relief.”⁵³ Moreover, we pointed out that in *Star Development*, waiver applicant Star did not “seek to avoid mutual exclusivity with similarly situated contemporaneously filed applications, but rather with an application filed prior to its [auction filing] window but not properly listed in CDBS [the Commission’s broadcast database].”⁵⁴

18. The principal distinction between the instant case and *Star Development* is the fact that Combs proffers the amendment “seek[ing] to avoid mutual exclusivity with similarly situated contemporaneously filed applications.”⁵⁵ We reject Combs’s assertion that “there is no competition in this case – Combs has been, and remains, the sole applicant for the AM allotment at Boise, Idaho.”⁵⁶ Combs’s application was mutually exclusive with three others, notwithstanding that none of the other three proposed Boise as its community of license. We reiterate that our competitive bidding rules, including Sections 1.2105, 73.5002, and 73.3571(h), generally prohibit applicants from amending their

⁴⁸ 17 FCC Rcd 13127 (2002) (“*Star Development*”).

⁴⁹ Petition for Leave to Amend at 1. Ordinarily, we would not review a question of law or fact upon which the designated authority had not had the opportunity to pass. 47 C.F.R. §1.115(c).

⁵⁰ December 2002 Amendment Petition at 5.

⁵¹ *Id.* at 4.

⁵² 47 C.F.R. § 73.3571(b)(2). The rule provides that an amendment to an application that would effect a major change (as defined in Section 73.3571(a)(1)) will only be accepted during a designated filing window.

⁵³ 17 FCC Rcd at 13130. The applicant in *Star Development* was not mutually exclusive with any other application filed in that window, and was listed in *Public Notice*, “AM Auction No. 32 Non-Mutually Exclusive Applications, 15 FCC Rcd 18004 (MMB 2000).

⁵⁴ *Id.*

⁵⁵ *Star Development*, 17 FCC Rcd at 13130.

⁵⁶ December 2002 Amendment Petition at 5. Combs is incorrect when he speaks of an “AM allotment” at Boise, inasmuch as AM is a non-tabled service, meaning that AM frequencies are assigned on a demand basis rather than listed in a table of allotments. There are thus no “allotments” for full-service AM broadcast stations.

applications after the close of the filing window to resolve conflicts with other mutually exclusive applicants.⁵⁷

19. Combs's original engineering proposal, which he claims was based on allegedly flawed data from the Commission's broadcast database, shows an impermissibly high nighttime interference limit toward WTAM(AM), Cleveland, Ohio.⁵⁸ However, staff technical analysis confirms that any excessive radiation in the direction of WTAM(AM) in Cleveland is irrelevant to the mutual exclusivity determination between Combs and the Las Vegas-area applicants in MX Group AM 20.⁵⁹ In fact, Combs's proposed December 2002 amendment does not eliminate the mutual exclusivity between Combs's application and Palmetto's Sunrise Manor proposal.⁶⁰ For these reasons, then, the Petition for Leave to Amend must be denied.

20. **Conclusion.** For the foregoing reasons, Combs's Application for Review IS DENIED, and Combs's Petition for Leave to Amend IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁷ *Id.*

⁵⁸ See Letter from Mr. Dave Doherty, Dataworld, to Mr. Don Markley, D.L. Markley and Associates, Inc. (Oct. 30, 2002), attached to December 2002 Amendment Petition. Dataworld is a private company that describes itself as "the Data Utility for the North American broadcasting industry." It provides technical data and maps to broadcasters. "Dataworld Online – About Dataworld" [World Wide Web], <<http://www.dataworld.com/about.htm>> [accessed April 22, 2003].

⁵⁹ On November 18, 2003, Combs filed a further Engineering Statement of Donald L. Markley. Apart from being submitted 11 months after Combs filed the December 2002 Amendment Petition, without explanation for the delay, the new statement does not support Combs's contentions. Neither of Mr. Markley's statements establishes any link between an alleged "database error" and Combs's mutual exclusivity with the Las Vegas proposals, because WTAM(AM) in Cleveland and Las Vegas lie in different directions from Combs's proposed site.

⁶⁰ See *supra* note 45.

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN
CONCURRING**

Re: Green Valley Broadcasters, Inc., For a New AM Broadcast Station at Sahuarita, Arizona et al., Memorandum Opinion and Order; Nelson Enterprises, Inc., For a New AM Broadcast Station at Plano, Illinois et al., Memorandum Opinion and Order; and Robert E. Combs, For a Construction Permit for a New AM Station at Boise, Idaho, Memorandum Opinion and Order

Section 307(b) directs the Commission to distribute licenses across the nation to ensure the “fair, efficient, and equitable distribution of radio service.” In circumstances of mutually exclusive AM or FM applications, the Commission uses assignment priorities established in 1982 to effectuate Section 307(b)’s objectives. While the first three priorities are more straightforward, the fourth priority embodies a catch-all “other public interest matters.”

We are concerned that in practice this priority has devolved into a raw population comparison where the applicant seeking to serve the larger, more urban area nearly always wins irrespective of the number of stations already serving each community. While service to a greater population is an important criterion under our public interest examination, we have concerns when it becomes the sole criterion. As a general public interest priority, an applicant should have a chance to convince us that there are other compelling reasons – beyond mere population – to award its proposal a dispositive preference. In a handful of cases the Commission has entertained other showings to discount the raw population totals, yet that process requires applicants to undertake complicated and costly engineering calculations, straining the resources of both applicants and the Commission.

We believe there are ways to simplify the process and ensure rural applicants an opportunity to compete on a more even footing. We urge that in the near future the Commission will give some thought to reevaluating its allocation policies, and in particular its treatment of the public interest assignment priority. It is vital that the Commission provide all applicants – whether seeking to serve rural or urban America – an effective process to achieve the distribution goals set forth by Congress.