

REQUEST FOR WAIVER FOR THE MARCH 15, 2001
FCC FORM 346 APPLICATION DEADLINE

Sorensen Pacific Broadcasting, Inc., applicant for a new low power television station to operate on Channel 22 at Agana, respectfully requests waiver of the Commission's February 13, 2001 Public Notice mandating March 15, 2001 as the application and filing fee deadline for filing FCC Form 346 in low power television auction No. 81 for non-mutually exclusive proposals and respectfully requests acceptance of the instant application nunc pro tunc.

Background

On June 23, 2000, the Mass Media Bureau and Wireless Telecommunications Bureau announced a limited auction filing window for certain low power television (LPTV), television translator, and Class A television broadcast stations. The filing window was extended to permit the engineering portion of the application to be submitted up to August 31, 2000. On August 1, 2000, Sorensen filed the instant application on FCC Form 346 and FCC Form 175 (the applicant had previously electronically filed FCC Form 175 as required by the Commission's Rules). The FCC Form 346 filed in Sorensen's application on August 8, 2000 was complete.

By Public Notice entitled "Low Power Television Auction No. 81 Non-Mutually Exclusive Proposals", DA01-383, Released February 13, 2001, the Video Services Division listed those applications which were not mutually exclusive with any other proposal in the filing window, i.e., singletons, and, therefore, which were not subject to the Commission's auction procedures. The Public Notice also announced processing procedures for the singleton proposals. The processing procedure mandated was that "the parties listed in Attachment A must now submit complete FCC Form 346 (June, 2000 version) by March 15, 2001 pursuant to procedures set forth in the Commission's Rules. Parties submitting an FCC Form 346 must also

simultaneously submit the required application filing fee of \$570.00 for an FCC Form 346 and an FCC Form 159, Remittance Advice.” Furthermore, the Public Notice stated that applicants filing their FCC Form 346 electronically may obtain a “prefiled” version of their FCC Form 346 by checking “amendment to pending application” as their response to question 5 of Section I and should include the file number listed in attachment A in the space provided in Question 5(a) of Section 1 of the form. Further, the Public Notice stated that the “staff will dismiss, without further processing, the previously filed technical submissions of any applicant that fails to submit the complete FCC 346 and/or pay the requisite filing fee by **March 15, 2001.**”

Sorensen’s instant application was listed on page 29 of the February 13, 2001 Public Notice as a singleton. However, Sorensen inadvertently failed to file its FCC Form 346 and submit its fee payment by the March 15, 2001 deadline and is doing so now and requesting waiver of the deadline requirement and acceptance of the application nunc pro tunc.

Grounds for Waiver

The Commission’s March 15, 2001 deadline should be waived and the instant application accepted for filing because acceptance of the application would not cause any injury to nor disadvantage any other applicant or interested party nor would it provide the applicant with any advantage over any other applicant or party. While the applicant’s failure to meet the required deadline has technically violated the Commission’s mandated rule and slightly delayed the Commission’s processing of its long-form application, dismissal of the instant application would greatly disadvantage the applicant and delay new service to Agana, Guam, and would, therefore, be contrary to the public interest.

The applicant’s failure to timely file FCC Form 346 and make its filing fee payment is solely due to miscommunication between the applicant, its attorney and its engineer and the

inherent difficulty of the time differences between mainland United States and Guam, the location of the applicant and its principal. Further, when the licensee's legal representative belatedly realized that the deadline had been missed, the delay was increased by the fact that the principal of the applicant was on vacation in the Far East and was therefore unreachable. Obviously, this does not excuse the applicant's tardy filing.

Despite the Commission's requirement that a complete FCC Form 346 be filed by March 15, 2001, the applicant had a complete FCC Form 346 on file on August 1, 2000, and which is identical to that filed on August 1, 2000. No technical changes are being made to the instant application. Consequently, while the late filing has delayed the Commission's staff and its processing, the late filing will add no additional work load to the staff's burden as there are no changes to the proposal.

In contrast, the applicant would be harmed if its application was not accepted nunc pro nunc and was dismissed. First, the applicant has expended time and money, legal and engineering fees, in preparation of the application. Second, it is unknown when the Commission will open another LPTV window to allow for the refilling of the application. Further, there is no guarantee that the applicant would be a singleton applicant in the next window and, therefore, would have to compete with mutually-exclusive applicants in a subsequent auction which it might not win.

Finally, and most importantly, the Commission may take official notice that there are only three (3) local commercial video services currently licensed to Agana, Guam. Consequently, the instant singleton application when ultimately granted, built and licensed, would provide another competing local video service to the over 154,000 inhabitants of Guam. Therefore, the public interest militates for grant of the waiver request and acceptance of the application nunc pro tunc.

An agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of the safety valve procedure for consideration of applications for exemption based on special circumstances. United States v. Storer Broadcasting Company, 351 U.S. 192, 204-205 (1956). The Supreme Court held therein, as follows:

. . . [A]n application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities . . .

And a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the "public interest". That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases . . . [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". WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

Moreover, this is not a case where the integrity of the Commission's cutoff process stands to be undermined in that the application was already "cut off" by its filing in the previous auction window and had already been determined to be a singleton application.

Furthermore, the Commission has waived its rules in a number of situations where applications were filed with incomplete financial and/or technical information and where the applicant made a good faith effort to cure the deficiency. See, Central Florida Enterprises, 22 FCC 2d 260 (1970); K and L Communications, Inc., 70 FCC 1987 (1979) and Gaviota Wireless Communications Company, 68 FCC 2nd 960 (1978). In the instant situation, all of the relevant processing information had been filed. The applicant had merely not tendered its redundant application and its filing fee.

In that vein, the Commission may distinguish this case from Styles Interactive, Inc., 10 CR 582 (1977) wherein Styles was the successive bidder for one IVDS license in the auction. As an eligible small business, Styles elected to pay its net bid amount through installment payments, but requested waiver stating that it was prevented from making its second down payment because the party supplying its financing needed to reassess whether it was making a prudent investment. The Commission rejected the waiver request stating that the up-front and down payment provisions of the Commission's Rules were designed to insure that the ultimate purpose of the auction - facilitating the provision reliable service to the public - was not undermined by winning bidders who lack the financial capacity to pay for the license, construct a system and provide service to the public. In the instant situation, the applicant did not request waiver to defer its fairly minimal payment of \$570.00, which it is simultaneously submitting, but rather neglected to timely make its filing fee payment. There is no question that the applicant, once granted, has the financial wherewithal to construct the facility and will construct the facility on a timely basis.

Therefore, the licensee respectfully submits that the public interest strongly mandates the Commission to waive its March 15, 2001 filing deadline in that no other applicant or party would be harmed or disadvantaged by grant of the waiver; the Commission's processes have only been

slightly delayed by the applicant's failure to timely file; the applicant would be greatly disadvantaged by failure to grant the waiver and accept the application nunc pro tunc and grant of the waiver and acceptance of the application nunc pro tunc would greatly be in the public interest by allowing the earlier provision of a new first local competitive transmission and reception video service to Agana, Guam, an area with a paucity of local services. Therefore the applicant respectfully requests that the Commission grant its instant waiver of its March 15, 2001 filing deadline and accept the instant application nunc pro tunc.