ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

ORIGINAL FILE

92-3

In re	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 92-3
Table of Allotments,	)	RM-7874, RM-7958
FM Broadcast Stations	)	
(Prineville and Sisters, Oregon)		

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Various radio licensees serving Central Oregon communities (collectively, the "Licensees")[1/] seek reconsideration of the Report and Order, 57 Fed. Reg. 47006 (October 14, 1992), on the ground that the Allocations Branch failed in its duty to protect FCC processes from abuse. The Bureau must reverse the Branch's ostrich-like refusal to even inquire into the circumstances underlying this proceeding and the evident abuse of process here.

I. BACKGROUND

1. Danjon, Inc. started this proceeding with a Petition to allot Channel 284A to Prineville and an anonymous printout to the effect that Channel 284A would be fully spaced from a restricted site. Danjon falsely termed its request as for a "first local service." The NPRM, 7 FCC Rcd 501 (1992), evidently relying on

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1/ Central Oregon Broadcasting, Inc. (KBND, Bend, and KLRR, Redmond); Redmond Broadcast Group, Inc. (KPRB and KSJJ, Redmond); Highlakes Broadcasting Company ("Highlakes")(KRCO and KIJK-FM, Prineville); JJP Broadcasting, Inc. (KQAK, Bend); Oak Broadcasting, Inc. (KGRL and KXIQ, Bend); Sequoia Communications (KICE, Bend); and The Confederated Tribes of the Warm Springs Reservation of Oregon (KTWS, Bend, and KTWI, Warm Springs).

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Danjon's false characterization, proposed "the allotment of Channel 284A to Prineville... [as] its first local FM service."

2. Three days later, Danjon restated: its interest in a "first local service;" its intent to "promptly" apply for a construction permit; and its intent, upon grant, "to promptly construct the facility." Two other parties filed on the Comment deadline. Highlakes pointed out that KRCO and KIJK-FM already served Prineville, and asserted that Prineville cannot support a third station. Schuyler H. Martin ostensibly counterproposed the upgrade of station KPXA, Channel 281A, Sisters, to Channel 281C1. And ostensibly to accommodate Danjon, Martin suggested Channel 271A for Prineville. He repeated Danjon's false characterization of Prineville as lacking a local service and noted that, unlike Channel 284A, 271A required no site restriction.

3. Danjon then withdrew its request. It claimed ignorance of KRCO and KIJK-FM and a desire not to be "a third station in the market." It questioned whether the town could support another station and whether Danjon could compete against "two" commonly owned, established stations. Danjon asserted it was:

> not inclined to contest this Counterproposal and does not want to obligate itself for additional engineering expense to determine the impact of the proposed channel change on its site availability prospects.

Danjon claimed, not under oath,[2/] that it had not received or been promised consideration. The withdrawal left Martin heir to Danjon's cut-off date, thus immune to further Counterproposals.

4. In Reply Comments, the Licensees decried the evident collusion. They listed a series of factors that mandated both an

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2/ Section 1.420(j) of the Rules requires an affidavit.

inquiry and withholding an upgrade from KPXA pending results of the inquiry, including: (a) demonstrably false statements in Danjon's filings; (b) privity between Danjon and Martin's FCC counsel; and (c) availability of many other, technically more desirable -- but nonconflicting -- channels at Prineville.[3/] If the inquiry confirmed the taint, the Licensees asserted, the FCC must deny Martin his upgrade and take further appropriate action.

5. The R&O summarily dismissed the Licensees' assertions and rejected their evidence as merely circumstantial and not warranting any inquiry. It then summarily granted Martin his upgrade. However, due to Danjon's withdrawal, the staff did not allot a Class A channel to Prineville.

II. ARGUMENT

The Staff Erred In Not Investigating The Circumstances Surrounding This Proceeding.

6. The FCC enjoys sweeping power to investigate:

> in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of th[e Communications] Act, or concerning any question [which] may arise under any of the provisions of th[e] Act, or relating to the enforcement of any of the provisions of th[at] Act.

47 U.S.C. § 403; see also, 47 C.F.R. § 1.1 (1991). Formal § 403 inquiries are relatively rare. Far more commonplace are informal

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3/ The Licensees will not here fully restate their evidence, but rather direct the Bureau's attention to their Reply Comments. It is odd, however, that the staff failed to even mention some of the evidence, e.g., strange datings of Danjon's and Martin's filings, and disturbingly similar formats, type faces, tab settings, and line spacings.

inquiries by staff letter when the FCC receives a telephone or letter complaint from the public. The staff routinely sends an inquiry letter to a licensee upon a complaint about a licensee-conducted contest. The staff requires neither an affidavit nor a declaration; an unverified complaint letter triggers the inquiry.

7. The FCC has sometimes applied a higher threshold to requests for formal § 403 investigations. For example, in Boston Broadcasting, Inc., 53 FCC 2d 494, 499 (1975), the FCC declined to designate a license application for hearing or to conduct a § 403 proceeding without "substantial and material questions of fact" about rule violations and other conduct. The FCC held the complainant to the statutory standard for a petition to deny.

8. The Licensees have made a far more serious, reliable, and comprehensive showing than a simple unverified complaint letter. That alone mandates an inquiry into the circumstances underlying this proceeding. Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965). The Licensees have even satisfied the Boston Broadcasting standard -- which again neither the Act nor the whole body of precedent mandates here.

9. Under Boston Broadcasting, a complainant must meet a two-part test. First, based on its content alone, the complaint must make specific factual allegations that tolerating the act complained of is prima facie inconsistent with the public interest. In this first phase, the FCC must assume "that the specific facts set forth [in the [complaint]] are true." Astroline Communications Company Limited Partnership v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988), quoting, Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1987). "The

Commission's inquiry at this level is much like that of a trial judge considering a motion for a directed verdict...." Gencom, Inc. v. FCC, 832 F.2d 171 (D.C. Cir. 1987)

10. If the complaint satisfies the threshold test, the FCC:

> determines whether, "on the basis of the... pleadings filed, or other matters which it may officially notice[,] ... a substantial and material question of fact is presented." 47 U.S.C. § 309(d)(2); see also Gencom, 832 F.2d at 181. Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that [tolerating the act complained of] would be consistent with the public interest, it should conduct a hearing in accordance with 47 U.S.C. § 309(d)(2).

Astroline, 857 F.2d at 1561. In this second phase, the complainant's burden of proof is **not** to establish conclusively that its allegations are true.[4/]

11. Here, the staff has not followed **either** prong of the WRVR test. First, the staff did not conduct a threshold analysis assuming the Licensees' factual allegations of misrepresentation and abuse of process were true. The staff said, "The [Licensees] have not shown that Danjon's request is anything more than a request for what Danjon believed to be a first local FM Allotment

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4/ The FCC has previously so interpreted the statute, to the rebuke of the Court:

> The statute in effect says that the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke; the Commission has said that it will look into a fire only when it is shown the existence of a fire.

Astroline, 857 F.2d at 1562, quoting Citizens for Jazz on WRVR, 775 F.2d at 397; David Ortiz Radio Corp. v. FCC, 941 F.2d 1253 (D.C. Cir. 1991); see also Joseph Bahr et al., 7 FCC Rcd 2147, 2151 (Rev. Bd. 1992); Raymond J. and Jean-Marie Strong, 6 FCC Rcd 5321, 5322 (Rev. Bd. 1991).

at Prineville...." R&O at para. 5. That flies directly in the face of the Court's instructions: it assumes facts directly in issue; it assumes the allegations of collusion **are false;** and it gives Danjon and Martin the benefit of the doubt -- **even though neither Danjon nor Martin ever responded to the Licensees.**

12. The staff assumed that Danjon was truly unaware of Prineville's two licensed high-power stations, one of which occupies a Class C1 Table allotment to Prineville.[5/] No question, Danjon and Martin **alleged** that Channel 284A would be a first local service, but that begs the critical questions the Licensees raised -- what did Danjon, Martin, and Martin's counsel **know or believe** about spectrum usage and availability at Prineville, and did they proceed in good faith or in collusion?

13. Assuming their ignorance not only violates the Court's instructions, it defies industry practice and plain common sense. No sane person would request a channel for a town without a motivation and prior demographic, media-market, and technical studies. That research would destroy the ignorance of KRCO and KIJK-FM -- items of public record -- that the staff assumed. Exhibit A, the Declaration of Robert Arthur McClanathan, P.E., shows that consulting engineers' standard practice is to first run a full-band sweep to determine what channels are available, and the relative improvement potential, site flexibility, dial-position advantage, and interference-free service area of each. That study would reveal:

5/ In the memorable words of ALJ Miller, "Simply put, that dog don't hunt." RKO General, Inc., 60 RR 2d 1215, 1228 (1986).

(a) the existence of many other channels available for Prineville that were, by any rational standard, far more desirable than Channel 284A -- but which would not be mutually exclusive with Martin's upgrade; and

(b) the presence of Highlakes' Class C1 station.

All of this belies both parties' first-local-service claims and good faith the staff has -- on faith -- imputed to them.[6/]

14. Had the staff properly conducted the threshold test, it would have moved to the second prong and the penultimate issue: is there a substantial and material question of fact that misrepresentation or abuse of process have occurred? In this second phase, one cannot cursorily reject the charges as based on mere circumstantial evidence, or summarily conclude that "[t]he [Licensees] have not shown that... [Danjon] filed to assist the uncontested grant of Martin's proposal." R&O at para. 5.

15. **It is not the Licensees' burden to show that an abuse has occurred. That their evidence is largely circumstantial does not diminish its value or the need for further inquiry.**

> Almost by definition, a "secret agreement" must be inferred from circumstances, since there is ordinarily a paucity of direct evidence to demonstrate what is merely tacit. Still, "[s]ome circumstantial evidence

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6/ All sorts of issues arise here. We will name only two. First, Danjon's precisely selected reference point reflects a consulting engineer's prior involvement. As Exhibit A shows, the clearances to the tightest spacing constraints are under 1 km, pointing to spacing studies prior to the anonymous printout. Who ordered, who ran, and who paid for those studies? Second, Martin's counsel is Danjon's counsel in other FCC proceedings. Because of that, Rule 1.7(b)(1) of the D.C. Rules of Professional Conduct required Martin's counsel to obtain Danjon's informed consent to the filing of Martin's Counterproposal. What exchanges occurred between them? Without discovery tools, the Licensees are powerless to press these and other relevant questions. Still, the evidence that the Licensees have amassed clearly establishes the need for further investigation. The FCC alone has the power -- and the FCC has the duty -- to make that inquiry.

is very strong, as when you find a trout in the milk [footnote omitted]."

Silver Star Communications - Albany, Inc., 3 FCC Rcd. 6342 (1988), modified, 6 FCC Rcd 6905 (1991). Demanding direct evidence of collusion here from those without discovery tools is an impossibly and illegally high burden. It requires proof of the fire rather than of smoke. To carry that burden without discovery tools would require a gratuitous confession, or a conspirator's unmitigated brazenness or incredible ineptitude. In practice, one in the Licensees' position could never establish that abuse of process or misrepresentation has occurred.

16. Dismissing the allegations, the R&O said here nothing is suspicious, because allotting alternative -- even unrestricted -- channels is routine. The Branch cited Stuart and Boone, Iowa, 5 FCC Rcd 4537 (M.M. Bur. 1990), and Chico, California, 6 FCC Rcd 4294 (M.M. Bur. 1991), as support. Both are inapposite.

17. Stuart is a simple example (apparently with unrestricted channels) of the longstanding policy to resolve conflicts via alternative frequencies.[7/] One with any FCC experience knows that policy; Martin's evident stratagem used it to dispose of Danjon's proposal after outliving its usefulness.

18. Chico did start with a restricted request and end in an unrestricted alternative. But the alternative "conflict[ed] with the [then] presently licensed operation of Station KCHH(FM)... on Channel 224A at Paradise, California." 3 FCC Rcd at 4294, n. 5. To make the alternative allotment, the staff waived the spacing

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7/ See, e.g., Williston, Florida, 50 RR 2d 1425 (B. Bur. 1982); Marshfield, Massachusetts, 33 RR 2d 611, 613 (B. Bur. 1975).

shortfall because KCHH was to change frequency. That shortfall likely deterred proposing Channel 224A at the outset, since a restricted channel met spacings to all assignments. That deterrent was absent here.[8/]

19. On suspicions of collusion, the FCC inquired into whether abuses of process "may" have occurred. Order, 3 FCC Rcd 4740 (1988). In his separate statement, Chairman Patrick said:

> Today we are opening a Section 403 inquiry into the activities of a specific individual suspected of abusing the Commission's comparative process. But more importantly, we intend to send a serious message to both would-be applicants and their legal counsel that we will not tolerate abuse in any context.... The filing of false information and applications for purposes of settlement with the Commission violates our rules, wastes our resources, and injures bona fide applicants and the public. We will not countenance such abuse.

65 RR 2d at 93. The Report and Order in MM Docket No. 87-314, 5 FCC Rcd 3911, 3914 (1990), recon. den., 6 FCC Rcd 3380 (1991), makes similar lofty statements about the need for absolute integrity in allotment proceedings. Allowing Martin's ploy to succeed without even a raised eyebrow telegraphs that not only will the FCC tolerate such behavior, the FCC will reward it.

III. CONCLUSION

Here, beyond refusing to look into the possibility of a fire, the staff tightly closed its eyes and pinched its nose so

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8/ Chico, at paras. 2-3 also recognizes the desirability, espoused in the Fort Myers (3 FCC Rcd 2671 (1988))/Vacaville (4 FCC Rcd 8315 (1989), recon. den., 6 FCC Rcd 143 (1991)) "governing policy," of imposing "the least restrictive theoretical site on the new allotment from the intended city of license." Martin's Prineville counterproposal honored that policy, but neither Danjon's original Prineville proposal nor Martin's own Sisters upgrade request did.

as to neither see nor smell the smoke. The Bureau must reverse the staff and inquire into this matter.

Respectfully submitted,

THE LICENSEES

By J. J. McVeigh
John Joseph McVeigh
Their Counsel

Fisher, Wayland, Cooper and Leader
1255 Twenty-third Street Northwest,
Suite 800
Washington, D.C. 20037-1170
(202) 659-3494

Date: November 13, 1992

EXHIBIT A

STATE OF OREGON)
) SS:
County of Multnomah)

ROBERT A. McCLANATHAN, being duly sworn upon oath, deposes and says:

1. That he is President of McClanathan and Associates, Inc., Professional Electrical Engineers.

2. That he is a licensed Professional Electrical Engineer in the States of California, Oregon, Washington and the District of Columbia and that he is a member of the Association of Federal Communications Consulting Engineers.

3. That he has been engaged in radio and television broadcast engineering and developments since 1955.

4. That he has been retained by The Confederated Tribes of the Warm Springs Reservation of Oregon and other radio station licensees in central Oregon to state the procedure he follows when performing a FM channel spacing study to support a Petition for Rule Making (PRM) to amend the FM Table of Allotments of C.F.R. 47 Section 73.202(b) and how this procedure would effect a channel selection for Prineville, Oregon.

5. That this procedure for a commercial station allocation is as follows.

   A. Given a community for the proposed allocation, the FM antenna site geographic coordinates for the computer aided spacing study are selected with consideration to the following.

      i. The site will provide line-of-sight 70 dBu signal coverage over the given community.

      ii. An existing FM or TV tower structure for which an option to locate the proposed FM facility is available and will comply with 47 C.F.R. Section 1.1306 and 1.1307.

      iii. Conditions in Part 77 of the Federal Aviation Regulations can be complied with.

      iv. If no existing communications tower is available, a new site may be selected or the community's coordinates used for the study.

   B. A computer aided FM spacing study is conducted for commercial FM channels 221 through 300 at

the selected site coordinates for the Class of station desired. This study, based on the FCC data base, will show all FM channels, if any, that are clear of short-spacing to existing and proposed allocations. This same study also shows existing allocations to the given community and nearby communities.

C. For channels with no distance short-spacing, the optimum channel is selected for the PRM in accordance with the following ranking of desirability.

i. Greatest distance clearances to co-channel and adjacent channel allocations.

ii. No site restrictions required.

iii. Channel position on the radio dial with relation to existing FM stations in the community. Generally, broadcasters prefer mid-band FM allocations, usually from channel 230 to 270 and between existing prominent local stations.

iv. Minimum disruption to existing secondary FM translator services.

D. Where only short-spaced channels are available, a study is performed to select the optimum channel with a site restriction that will serve the community and provide minimum potential for interference to existing FM allocations and translator services.

6. That this procedure conforms with good engineering practice and is, to his knowledge, standard practice with experienced consulting engineers.

7. That if similar channel selection procedures were performed by Danjon, Inc. during preparation of their Petition for Rule Making to add channel 284A to Prineville, Oregon, MM Docket 92-3, RM-7874, the existence of FM Radio Station KIJK, channel 236C1, allocated to Prineville and licensed to High Lakes Broadcasting Company, would have been known to Danjon, Inc.

8. That the antenna site proposed by Danjon, Inc., at geographic coordinates 44 degrees 15 minutes 07 seconds North latitude and 120 degrees 41 minutes 58 seconds West longitude, was selected to provide the following close clearances to two stations as required by 47 C.F.R. 73.207(b)(1).

Call	Chan.	Bearing	Distance	Req. Spacing	Clearance
KMCQ	283C	N348.6E	165.524 km	165.000 km	0.524 km
KLCX	284C	N271.1E	226.639 km	226.000 km	0.639 km

9. That because of the required site restriction, and the absence of a developed communications facility or electrical power at the site proposed by Danjon, Inc., there is no advantageous technical merit to selecting Ch. 284A for allocation to Prineville, Oregon.

10. That when using good engineering standards, Ch. 284A would be disqualified during the selection of an allocation to serve Prineville, Oregon since Ch. 271A is available with no site restrictions. Selecting Ch. 271A would minimize limitations on site and class changes for the proposed allocation to Prineville and to existing adjacent channel FM stations.

Affiant finally states that the statements were prepared by him and that he believes them to be true.

R.A. McClanathan

Robert A. McClanathan, P.E.

Subscribed and sworn to before me this 12th day of November, 1992.

STATE OF OREGON
COUNTY OF MULTNOMAH

OFFICIAL SEAL
LISA A. BURCH
NOTARY PUBLIC - OREGON
COMMISSION NO.018052
MY COMMISSION EXPIRES SEPT. 07, 1996

Lisa A. Burch

Notary Public, Oregon

In and for the County of Multnomah, State of Oregon.

CERTIFICATE OF SERVICE

I, Renee Gray, a secretary to the law firm of Fisher, Wayland, Cooper and Leader, hereby certify that I have this Thirteenth day of November, 1992, sent copies of the foregoing "**PETITION FOR RECONSIDERATION**" by first class United States mail, postage prepaid, to:

*Roy J. Stewart, Esq.
Chief, Mass Media Bureau
Federal Communications Commission
2025 M Street Northwest, Room 8322
Washington, D.C. 20554

*Michael J. Ruger, Esq.
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street Northwest, Room 8322
Washington, D.C. 20554

James M. Weitzman, Esq.
Kaye, Scholer et al.
901 Fifteenth Street Northwest,
Suite 1100
Washington, D.C. 20005
Counsel to Schuyler H. Martin

Shelton M. Binstock, Esq.
1140 Connecticut Avenue Northwest,
Suite 703
Washington, D.C. 20036
Counsel to and Principal of
Danjon, Inc.

Renee Gray

Renee Gray

* -- By Hand Delivery