

**MULLANEY ENGINEERING, INC.**  
4937-G GREEN VALLEY ROAD  
MONROVIA, MD 21770

**Before the  
Federal Communications Commission  
Washington, DC 20554**



In the Matter of: )  
 )  
Amendment of Section 73.202(b) ) ORDER  
FM Table of Allotments ) DA 17-757  
FM Broadcast Stations ) (Rel. Aug 11, 2017)  
(Various Locations) )

To the Commission:

## **PETITION FOR RECONSIDERATION**

Mullaney Engineering, Inc. (“MEI”), hereby files a Petition for Reconsideration to a public notice announcing an **Order (DA 17-757)** released by the Audio Division - Media Bureau (“A-D”) on August 11, 2017. By that Order, the A-D is seeking to amend the FM Table of Allotments **without the benefit of Notice & Comment** - Notice of Proposed Rule Making (“NPRM”) - as required by Section 1.420 of the FCC rules.. The original Order proposes to reinstate 91 separate channels involving 81 distinct cities back into the FM Table of Allotments as being Vacant. In a subsequent ERRATUM to the Order released on August 16, 2017, one of the proposed reinstatements was removed from the list provided as an Appendix to the Order since it was determined that the Channel was actually fully licensed (leaving only 90 channels in 80 cities)

It should be noted that as of today the only electronic copy available on the FCC web site of the Appendix attached to the Order, released on 8/11/17, has been altered to incorporate the ERRATUM released on 8/16/17 - which deleted Ch. 280C3 at Wheeler, TX, from the list of “Vacant” Allotments proposed to be reinstated. The new Appendix **fails to note** that the deletion has already been incorporated, thus, leaving the public to wonder why the ERRATUM was issued. Appendix should be modified to include a note.

The A-D believes, without proper legal foundation, that it already has Delegated Authority to Amend Section 73.202(b) of the FCC Rules without following the normal Notice & Comment required by Section 1.420 of the FCC Rules as was done for more than 40 years. It appears that this is the **second time** that A-D has caused the Federal Register to publish similar unauthorized orders reinstating Channels into the FM Table of Allotments.

	Reinstatement Public Notices	(Channels / Cities)
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- |          |                            |           |
|----------|----------------------------|-----------|
| 1. Order | DA 11-1689 Rel. 10/07/2011 | (31 / 30) |
| 2. Order | DA 17-757 Rel. 08/11/2017  | (90 / 80) |

In each of the two Orders, the A-D points to a 2006 Report & Order (MB Doc 05-210) "*Revision of Procedures Governing Amendments To FM Table of Allotments and Changes of Community of Licenses in the Radio Broadcast Services*" as providing the A-D with authority to change the FM Table of Allotments as - *a ministerial action to effectuate licensing procedures adopted in the Changes of Community R&O.. Therefore, we find good cause that further notice and comment are unnecessary.* However, the A-D has **mischaracterized** what was adopted by the full Commission in that Order.

The following text is taken from the second of these orders (rel. 08/2017) to explain how the A-D justifies why it believes its has delegated authority to change the rules **without** normal Notice & Comment by using a Notice of Proposed Rule Making. This is nearly the identical statement used by the A-D in the first Order it issued.

**Para-2.** Formerly, the FM Table listed all vacant FM allotments as well as FM channels and communities occupied by authorized facilities.<sup>2</sup> In 2006, the Commission removed the allotments of authorized and awarded FM facilities from the FM Table in order to accommodate the new application procedures for radio stations to change their communities of license.<sup>3</sup> As contemplated by the Changes of Community R&O, when an authorization is **cancelled**, the vacant allotment must be **reinstated** in the FM Table to **preserve** the opportunity to license a **future** station in the specified community.<sup>4</sup> The allotments listed in the attached Appendix was removed from the FM Table of Allotments because a construction permit and/or license was granted. These FM allotments are considered vacant because of the cancellation of the associated authorizations or the dismissal of long-form auction applications. We are, therefore, reinstating the allotments set forth in the Appendix. On a going-forward basis, we will periodically issue Orders to update the FM Table reinstating allotments that have become vacant due to the cancellation of an authorization or license.

**Para-3.** The vacant FM allotments listed in the Appendix have previously undergone notice and comment rule making. Reinstatement of the vacant allotments is merely a **ministerial** action to effectuate licensing procedures adopted in the Changes of Community R&O. Therefore, we find for good cause that further notice and comment are unnecessary.

**Emphasis added by MEI.**

MEI has reviewed the *Changes of Community R&O* (MB 05-210) both the initial **NPRM** (FCC 05-120, rel. 6/14/2005) and the final **R&O** (FCC 06-163, rel. 11/29/2006) and have found **no basis for the claim by the A-D** as to its ability to use Delegated Authority to Order the FM Table of Allotments to be amended. A **ministerial** action **cannot be used** to reinstate previous allotments that were **intentionally removed** from the FCC rules as specifically required by a docket adopted by the full Commission.

MEI expanded its review of both the NPRM and R&O to include a search for five significant words (including derivations) used by the A-D in paragraphs 2 or 3 above (those words are highlighted in **RED**). The word “reinstate or reinstated” was never used

in either the NPRM or the R&O. The word “cancellation” was used once in the NPRM (in footnote #43, page 10) when describing how a used allotment could once again become Vacant. The word “ministerial” was used once in the NPRM (in footnote #51 page 12) when describing what other rules would need to be changed to implement the new procedures. Both of the words “preserve” and “future” were used but not in the same context as the A-D used them above.

The only conclusion one can arrive at when the A-D included the following sentence (in Order DA 11-1689 or 17-757) “*As contemplated by the Changes of Community R&O, when an authorization is cancelled, the vacant allotment must be reinstated in the FM Table to preserve the opportunity to license a future station in the specified community*” they **mischaracterized** what was adopted by the full Commission in that R&O MB Docket 05-210.

The use of a simple Order by the A-D rather than the well established NPRM process **IS NOT A LOGICAL OUTGROWTH** of the docket which had a goal of preventing the FM Table from being filled up with new insincere channels requests. The docket adopted **new rules specifically designed** to discourage such filings - rules requiring the filing of an FCC form 301 with the appropriate filing fee.

The A-D claims that the FM allotments listed in the Appendix have previously undergone notice and comment rule making. However, the A-D has failed to consider instances where the Auction High Bidder **may have changed** its channel Class or its city of license via the form 301 process. Thus, only the High Bidder may have had a Valid Continuing Expression of Interest in this new city but **forfeited** its expression when the facility was cancelled.

This is **not the first time** the A-D has been challenged on its claim that it has Delegated Authority to modify the FM Table **without** Notice and Comment. A very similar argument was filed on 11/04/2011 (by Anderson Associates) as a Petition for Reconsideration in the first Order of this kind which was reinstating some 31 channels (DA 11-1689). In that proceeding, the Chief of the Audio Division, **did personally requested** the petitioner **“withdraw”** its Petition for Reconsideration (withdrawal made on 12/20/2011). Despite being concerned enough about this argument for the Chief of the Division to **personally requested** withdrawal, the **A-D took no action over the next 5+ years** (68 months) to seek the Authority it **severely lacks**.

MEI would like to incorporate by reference the Petition for Reconsideration filed by Anderson Associates. If the FCC staff is unable to find the Anderson filing in its sophisticated electronic filing system we can provide them a stamped copy for their use upon request.

### **Purpose of Changes of Community R&O**

One purpose of Docket 05-210 was to streamline the process by which authorized facilities could more easily modify their community of license - which it appears to have achieved.

However, another purpose of the Docket was to **restore the integrity** of the FM Table of Allotments by limiting petitions for newly proposed channels from only persons which have a Valid Continuing Expression of Interest to apply for (bid at Auction), build and ultimately operate the station. As pointed out in the Docket MB 05-210, the proponents of many channels already in the FM Table have **failed to participate** in the Auction

process, thus, calling in to question their **sincerity**. To help minimize insincere petitions to add a new FM channel, the Docket specifically adopted rules requiring the filing of an FCC form 301 CP application and the payment of the 301 filing fee as part of the channel allotment process.

The A-D failed to grasp that the **vast majority** of channels it is seeking to reinstate were **never subject** to the new rules which require the filing of a FCC form 301 and payment of the filing fee. Thus, simple reinstatement by an A-D Order in lieu of the traditional NPRM process, **thwarts the clearly expressed intention** of the rule changes adopted by the full Commission in Docket 05-210.

In addition, the vast majority of the channels sought to be reinstated into the Table were acquired through the Auction process. Thus, despite having **paid a substantial sum of money** in the Auction process, the High Bidder (CP holder or Licensee) has simply decided **to walk away**. Thus, rather than a Valid Continuing Expression of Interest, the channel has a **Significant Expression of “NO INTEREST”**. *See e.g. Olustee, Oklahoma*, 20 FCC Rcd 8209 (Audio Division 2005) (“A showing of continuing interest is required before a channel can be allotted”). The use of a simple Order **does not meet this test**. Just because there once was a Valid Expression of Interest **does not mean** there still is a Valid Expression of Interest.

The Docket recognized that protection of channels for which there is no real intention to build & operate is contrary to the intent of 307(b) and the future creation of new allotments and modification of existing facilities by requiring the continued protection of Allotments **for which there is No Valid Continuing Expression of Interest**.

Rather than issue an Order to reinstate “Orphan” Channels, the A-D **already has** the Authority to issue an NPRM **on its own motion** requesting “**new**” **Expressions of Interest** accompanied by the filing of the FCC form 301 with the requisite filing fee.

However, before issuing a new NPRM, the A-D should conduct a FM channel study to verify that **a properly spaced reference point** still exists that is also close enough to encompass the entire city of license with the Class based allotment circle **as is currently required by every new allotment**. The A-D indicates that it did conduct channel studies in its first reinstatement Order (11-1689) but has omitted such a statement in its newest Order (17-757). As in the past, the A-D will place this burden of due diligence upon future Auction participants.

As a result of Docket 05-210, all **existing** authorized facilities (with a License or a CP for a **new** facility) were **immediately** removed from the FM Table and similarly, once the Auction High Bidder is declared, that specific Allotment is also **immediately** removed from the FM Table. Thus, the only protection that facility receives is by the records contained within CDBS (LIC, CP or the pending app for a new CP). So now, if the existing or pending authorizations are terminated (by expiration, revocation or voluntarily surrendered) CDBS no longer provides any protection once those authorizations are archived (hidden from view). So if the ultimate plan is to recreate new allotment in the FM Table - **Expedited Action is Needed**. The A-D **cannot continue to wait years** to take action to recreate these Orphan Allotments since **CDBS has no avenue** to continue any protection from future modification by other authorized FM facilities or from the filing of a NPRM for new a allotment.

The present Order (17-757) which is the subject of this Petition for Reconsideration proposes to reinstate 90 channels into 80 separate cities. Or said another way, 4 cities are having **multiple Vacant channel allotments reinstated at the “same time”**. The current Order proposes to simultaneously reinstate:: **4-Vacant** channels into Big Lake, TX; **2-Vacant** channels into Matador, TX; **2-Vacant** channels into Menard, TX and **2-Vacant** channels into Wellington, TX. In addition, some cities already have at least 1-Vacant allotment. So the question is given that Big Lake already had four entities walk away from their authorizations what makes the A-D think reinstating all 4 Vacant allotments simultaneously is Good Allotment Policy.



## Summary

The Audio Division (A-D) has issued an Order (DA 17-757) to reinstate 90 allotments into the FM Table **without using Notice & Comment** as required by Section 1.420 of the FCC Rules. Contrary to its unfounded assertion, the **A-D does not have any authority to take such an action**. Furthermore, its action is in **direct opposition** to the rule changes that were specifically adopted by the full Commission in MB Docket 05-210 (rel. 11/29/2006). That is to avoid filling up the FM Table with allotments that have No Valid Continuing Expression of Interest to apply for (Bid at Auction), build and operate the station. **The A-D can issue its own NPRM to determine Continued Interest still exists.**

*All facts contained herein are true of my own knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.*

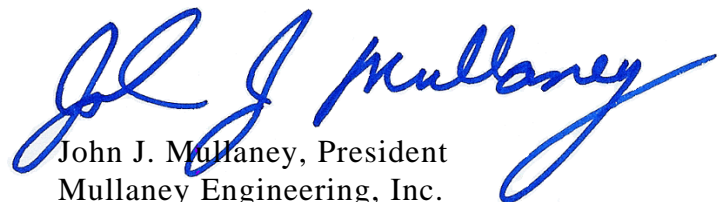
I do hereby certify that a true copy of this "Petition for Reconsideration" was sent today via e-mail to: Peter Doyle, Chief & to Nazifa Sawez, Assistant Chief of the Audio Division, Media Bureau.

Respectfully submitted,

MULLANEY ENGINEERING, INC.

12 September 2017

By:



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