

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	MM Docket No. 92-7
)	
Amendment of Section 73.202(b),)	RM-7879
Table of Allotments,)	
FM Broadcast Stations)	
(Scotland Neck and Pinetops,)	
North Carolina))	

To: Chief, Allocations Branch
Mass Media Bureau

OPPOSITION OF RADIO TRIANGLE EAST COMPANY TO MOTION TO STRIKE

Radio Triangle East Company ("RTE"), by its attorneys and pursuant to Section 1.45(a) of the Commission's Rules, hereby opposes the "Motion to Strike Reply of Radio Triangle East Company" that was filed in the above-captioned proceeding by WYAL Radio, Inc. ("WYAL"). WYAL's Motion is completely baseless. RTE's Reply was timely under the applicable Commission rules. Because WYAL's Motion is nothing more than a ruse designed to enable WYAL to have one more bite at the apple, it should be denied.

I. RTE's Reply Was Both Permissible And Timely.

WYAL claims that RTE's Reply was untimely under Section 1.45 of the Commission's Rules. WYAL has applied the wrong rule.

Petitions for reconsideration of Commission and staff actions are not governed by the pleading cycles established in Section 1.45. Instead, Section 1.429(a) governs petitions for

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reconsideration of final actions in allocation rulemaking proceedings conducted pursuant to Section 1.420. 47 C.F.R. § 1.429(a) and Note. RTE timely filed its Reply under Section 1.429.

Section 1.429(g) specifies that replies "shall be filed within 10 days after the time for filing oppositions has expired" 47 C.F.R. § 1.429(g) (emphasis added). As explained in detail below, the deadline for filing oppositions to RTE's Petition was January 4, 1993, and the deadline for RTE to file a reply to WYAL's Opposition was January 20, 1993. RTE filed its Reply on January 12, 1993 -- eight days early.

Oppositions to petitions for reconsideration of rulemaking actions must be filed within 15 days after notice of the petition for reconsideration is published in the Federal Register. See 47 C.F.R. §§ 1.4(b), 1.429(e), and 1.429(f).^{1/} The Public Notice announcing the filing of RTE's Petition was published in the Federal Register on December 18, 1992 -- thereby establishing January 4, 1993 as the last day for the submission

^{1/} When WYAL filed its Opposition on September 23, 1992, it did not purport to file within the time frame specified in Section 1.429. Instead, WYAL purported to file its Opposition "pursuant to Section 1.106(g)." See WYAL Opposition at 1. WYAL's failure to follow the correct rule in its Opposition may be the source of some of the defects that permeate its current Motion, but it does not explain all of WYAL's mistakes. For example, WYAL's earlier reliance on Section 1.106 is inconsistent with its current attempts to argue that the five day reply period specified in Section 1.45(b) -- and not the seven day reply period specified in Section 1.106(h) -- applies.

of oppositions to RTE's Petition. See Public Notice Report No. 1924 (released December 15, 1992); 57 Fed. Reg. 60202 (1992).^{2/}

As the time for filing oppositions to RTE's Petition expired on January 4, 1993, RTE's Reply was due, at the earliest, on January 14, 1993.^{3/} By filing on January 12, RTE thus filed at least two days (and as many as eight days) early.^{4/}

WYAL is playing games with the Commission's rules. Shamelessly accusing RTE of costing "other parties money" and "needlessly delay[ing] proceedings[,]" WYAL is itself guilty of filing a frivolous motion. RTE invites WYAL to give up this charade, and voluntarily withdraw its baseless Motion. Although this action would neither cure WYAL's abuse of the Commission's processes nor compensate RTE for its expense in opposing this

^{2/} The fifteenth day after December 18 was, in fact, January 2, 1993. Inasmuch as January 2 was a Saturday, the deadline for oppositions was extended to Monday, January 4, the next business day. See 47 C.F.R. § 1.4(j).

^{3/} Inasmuch as WYAL served its opposition on RTE by mail, and the response period under Section 1.429(g) is ten days or less, RTE could have added an additional three business days to the filing period. See 47 C.F.R. § 1.4(h). With this rule, the filing deadline for RTE's Reply was extended to January 20, 1993 (January 18 was a federal holiday).

^{4/} Although RTE does not necessarily seek such an action here, it does note that WYAL's Opposition is itself ripe for a motion to strike. Section 1.429(f) specifies that oppositions to petitions for reconsideration in rulemaking proceedings "shall be filed within 15 days after the date of public notice of the petition's filing" 47 C.F.R. § 1.429(f) (emphasis added). Because WYAL filed its opposition nearly three months before the date of public notice, and did not perfect its filing during the 15 day opposition window, WYAL's opposition arguably is not properly before the Bureau.

frivolous motion, it would preclude the need for further resources to be expended unnecessarily on this matter.

II. The Bureau Should Strike The Substantive Arguments In WYAL's Motion.

Although it neglected to respond directly to RTE's petition in its Opposition (see RTE Reply at 2-3), WYAL now, for the first time, purports to address cases cited by RTE. See WYAL Motion at 3-5. This it clearly cannot do.

As noted above, the deadline for oppositions to RTE's Petition was January 4, 1993. WYAL neglected to avail itself of the opportunity to challenge RTE's showings by that date. Moreover, even if WYAL were correct in its claim that RTE's Reply was somehow untimely or unauthorized, its substantive arguments would still be completely gratuitous, as they add nothing to the grounds on which WYAL calls for the striking of RTE's Reply. The Bureau should treat the substantive portion of WYAL's Motion as an untimely opposition or a pleading otherwise unauthorized by Section 1.429 of the Commission's rules, and refuse to consider it as it acts on RTE's Petition and Reply.

Finally, although it is not RTE's intention to compound the egregiousness of WYAL's transgression with a comprehensive surrebuttal to WYAL's substantive arguments, RTE nevertheless finds itself compelled to respond briefly to WYAL's claims. First, WYAL exaggerates the reliance that RTE placed in the Bureau's decision in Fairfield and Norwood, Ohio, 7 FCC Rcd 2377

(Alloc. Branch 1992). RTE cited the decision for its statement of the appropriate standard for evaluating community of license change cases, and noted that in Fairfield, the Bureau denied a proposed reallocation where "the smaller community was located within [an] Urbanized Area, but the larger area was only 15 times the size of the proposed new community of license[]" (as compared with a size disparity of more than 30 times between Rocky Mount and Pinetops). See RTE Petition at 8-9, 10 (citation omitted). In other words, RTE itself pointed out the factual distinctions now being "revealed" by WYAL, and placed no reliance on these points.

As for its reference to the Bureau's recent decision in Van Wert, Ohio and Monroeville, Indiana, 7 FCC Rcd 6519 (Alloc. Branch 1992), WYAL again mischaracterizes RTE's argument. Contrary to WYAL's suggestion, RTE relied upon the Van Wert case to show that the Bureau does not end its analysis in community change cases once it determines that a proposed new community is located outside the nearby urbanized area. In this regard, RTE pointed out that the Bureau placed decisional significance on the fact that the original community in Van Wert -- like Scotland Neck in this case -- was set to lose both its only local nighttime service and its sole local competitive voice. RTE noted that in those circumstances -- and irrespective of the location of the new community outside the nearby urbanized area -- the public interest assertion that the new community had no local services was insufficient to overcome the public

interest benefits to be gained by the retention of a first local full time service at the original community. RTE Reply at 4-5 (citing and quoting Van Wert, 7 FCC Rcd at 6520, 6521).

In short, WYAL's substantive arguments add nothing to its claims about the timeliness of RTE's Reply -- and thus render this portion of its pleading a transparent and altogether impermissible attempt to have the last word in this proceeding. But, being last is not enough if you are also incorrect. WYAL's response is, as shown above, incorrect.

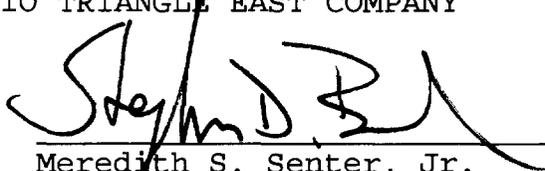
III. Conclusion

On the basis of the foregoing discussion, it is indisputable that WYAL's Motion is completely and inexcusably without legal foundation. RTE's Reply was, in fact, timely. The Bureau should deny the Motion without considering the gratuitous and incorrect substantive arguments WYAL has advanced.

Respectfully submitted,

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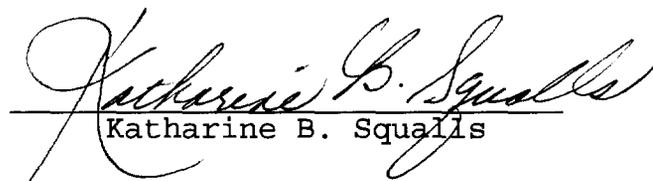
February 16, 1993

Its Attorneys

CERTIFICATE OF SERVICE

I, Katharine B. Squalls, do hereby certify that a copy of the foregoing "Reply of Radio Triangle East Company" was mailed, first-class United States postage prepaid, this 16th day of February 1993, to the following:

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