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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Federal Communications Commission
Office of the Secretary

In re:

Allotment of UHF Television
Channel 54 to Slidell, Louisiana

and

Application of
Caroline K. Powley d/b/a
Unicorn/Slidell LPTV
for Construction Permit
for a New Commercial Television
Station on Channel 54 at Slidell,
Louisiana

File No. BPCT-900518KO

To: Chief, Television Branch

**PETITION TO RESCIND WAIVER OF TELEVISION FREEZE ORDER AND TO
DISMISS APPLICATION**

WGNO Inc., licensee of WGNO(TV), Channel 26, New Orleans, Louisiana, hereby petitions the Commission to rescind the waiver of its television freeze order for Slidell, Louisiana, which was granted on October 6, 1987 (see Exhibit 1 attached) and to dismiss as improvidently accepted for filing the pending application of Caroline K. Powley d/b/a Unicorn/Slidell LPTV ("Powley") for a construction permit for a new commercial television station on Channel 54 at Slidell. In support thereof, the following is shown.

Background

On July 16, 1987, in order to preserve available spectrum for new technologies, including high definition

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television, the Commission imposed a freeze on amendments to the Television Table of Allotments and applications for new television stations within a specified radius of 30 designated markets. Advanced Television Systems, Mimeo No. 4074 (released July 17, 1987) ("Freeze Order") (See Exhibit 2 attached). The Commission's Order provided that, within an area around each market defined by the minimum co-channel separation distances, as specified in Section 73.610(b) of the Commission's Rules, no new television channel would be allotted nor would an application be accepted for a construction permit for a new television station until the freeze is lifted. However, the Commission's Order also provided that waiver requests would be considered "on a case-by-case basis . . . for applicants which provide compelling reasons why this freeze should not apply to their particular situations or class of stations." Freeze Order at 2 (emphasis added).

New Orleans, Louisiana is one of the cities affected by the Freeze Order, see Appendix to Freeze Order, and is located in Zone III as defined in Section 73.610(b). Section 73.610(b) specifies that the required co-channel separation for UHF stations in Zone III is 329 kilometers. Accordingly, absent an appropriate waiver, the Commission no longer will accept applications for new UHF television stations located within 329 kilometers of New Orleans. Slidell, Louisiana is 45.5 kilometers from New Orleans.

On August 11, 1987, Ron Hunter/Northshore Television ("Hunter") requested a waiver of the television Freeze Order to permit the filing of applications for UHF television Channel 54

at Slidell, Louisiana.¹ In his request, Hunter claimed that he had detrimentally relied on the Commission's June 10, 1987 allocation of UHF television Channel 54 to Slidell and asserted, therefore, that "compelling reasons" existed to grant a waiver of the Freeze Order. Hunter argued that he had invested considerable time, money, and effort in attempting to secure a first local service for Slidell. In particular, he asserted that he had spent \$47,000 in obtaining the allocation of Channel 54 and preparing an application for the station. Hunter also stated that he had passed up employment opportunities in order to be in a position to apply for the channel and had taken several steps toward filing an application for a construction permit, including: "conferring with communications counsel on the various requirements, contacting property owners to identify land usable as a transmitter site, obtaining local zoning approval and the environmental status of the land, and preparing a detailed financial plan of operation." See Exhibit 1 at 1. In addition, Hunter noted that operation of a television station on Channel 54 at Slidell would provide a first local television service for that area and that utilization of Channel 54 in Slidell would leave several other channels available in New Orleans for the new technology.

¹ In response to Hunter's petition for rulemaking, the Commission allotted Channel 54 to Slidell on June 10, 1987, seven days before the freeze became effective. However, that allotment did not become effective until July 23, 1987, six days after issuance of the Freeze Order.

The Commission granted Hunter's waiver request on October 6, 1987 (see Exhibit 1).² In so doing, the Commission took note, in particular, of the fact that Hunter's interest in Channel 54, as manifested in his original petition for rulemaking, arose more than one and one half years prior to its decision, and of the series of steps that Hunter had taken toward the filing of an application for the channel, in reliance on the Commission's expected allocation of the channel. The Commission noted that the public interest would be served by providing a first local service for Slidell and agreed with Hunter that, "[w]hile acceptance of this application might reduce the number of options available for implementing high definition television in the New Orleans area, it still appears, however, that there is sufficient spectrum available to satisfy any augmentation needs of the existing stations in the market if additional spectrum is necessary." See Exhibit 1 at 2.

Notwithstanding the Commission's Order granting Hunter's request for waiver, Hunter never filed an application for a construction permit for Channel 54. However, two other applicants recently have filed applications for Channel 54. The first, Trudy M. Mitchell, was dismissed by the Commission on June 22, 1990, for failure to comply with the Commission's financial qualification requirements. The second, Powley, has been accepted by the Commission and public notice given of a cut-off date for the filing of mutually exclusive applications. Public

² However, so far as WGNO Inc. is aware, the Commission did not issue any public notice of its decision.

Notice, Report No. A-163, released June 25, 1990.

THE FACTUAL AND LEGAL BASIS FOR THE COMMISSION'S GRANT OF A WAIVER FOR SLIDELL, LOUISIANA NO LONGER EXISTS. ACCORDINGLY, THE COMMISSION SHOULD RESCIND ITS DECISION GRANTING THE WAIVER AND DISMISS THE PENDING APPLICATION FOR CHANNEL 54.

The Commission's grant of Hunter's request for waiver to allow the filing of his contemplated application for a new station on Channel 54 at Slidell was predicated in large part upon the particular and compelling circumstances to which Hunter alone, and no one else, could lay claim. Unlike Mr. Hunter, no one else invested over one year and tens of thousands of dollars in securing the allotment of Channel 54 to Slidell.

Moreover, the Commission's decision granting that waiver was based not only upon Mr. Hunter's uniquely compelling showing but upon the Commission's understandable assumption (based on Hunter's representations) that Mr. Hunter would, in fact, file his own application for Channel 54. The fact that, almost three years after the Commission's waiver decision, he has not done so, renders invalid the key factual predicate of the Commission's decision.

Hunter's failure to file an application for Channel 54 also undercuts the legal basis for the Commission's waiver decision. As noted above, in its Freeze Order, the Commission stated that waivers would be granted only for "compelling reasons." While's Hunter's case for waiver arguably was compelling, it would have been extraordinarily difficult, if not impossible, for anyone else to have made the necessary showing

required by the Commission's Freeze Order to justify grant of the Slidell waiver. Without question, no other possible applicant for Channel 54 invested the time and money spent by Mr. Hunter in procuring the allotment of Channel 54 to Slidell.

The legal standard applied by the Commission in evaluating requests for waivers of the Freeze Order also has tightened considerably since its decision granting the Slidell waiver. For example, in Community Television of Southern California, 4 FCC Rcd. 6202 (1989), the Commission denied a request for a waiver of the Freeze Order to allot Channel 39 to Bakersfield, California.³ There, Community Television argued that the use of Channel 39 in Los Angeles already was precluded because of the proximity of KNSD(TV), Channel 39 in San Diego, whose transmitter is located only 199.2 kilometers from Mount Wilson, the transmitting site of the major Los Angeles television stations. Although a grant of the waiver would have provided Bakersfield with its first over-the-air noncommercial educational television channel, the Commission found that the proposed allotment "would make Channel 39 significantly less attractive for possible ATV use." Id. Accordingly, the Commission denied the waiver request, concluding "that the impact on ATV spectrum availability in Los Angeles outweighs the public interest benefits of earlier introduction of noncommercial educational television service in Bakersfield." Id.

³ Bakersfield is 163.0 km from Los Angeles, a designated city located in Zone II, and therefore, within the freeze area.

Similarly, in the case of Slidell, the Channel 54 allotment precludes use of Channel 68 in New Orleans and would require a substantial site restriction on a Channel 54 station in New Orleans. See Engineering Report of Alvin H. Andrus (Exhibit 3). Thus, the Channel 54 allotment at Slidell makes these two channels at New Orleans "significantly less attractive for possible ATV use."

Grant of the Slidell waiver is plainly inconsistent with the Bakersfield decision and with the stricter standard now applied by the Commission. In view of the change in legal standards, as well as the fact that the Commission's decision to grant the Slidell waiver was predicated upon the unique and compelling factual showing made by Ron Hunter, the original proponent of the Channel 54 allotment -- a showing that could not have been made by any other possible applicant for Channel 54 -- the Commission should rescind the Slidell waiver.

CONCLUSION

The special circumstances underlying the grant of the Slidell waiver no longer exist, thus completely undercutting the factual and legal bases for the Commission's original decision. Moreover, during the almost three years that has passed since its grant of the Slidell waiver, the Commission has adopted a stricter test, as set forth in the Bakersfield decision, for granting such waivers. Accordingly, WGNO Inc. respectfully

requests that the Commission rescind the grant of the waiver of the Freeze Order for UHF Channel 54 in Slidell, Louisiana and dismiss the pending application for a new commercial television station on Channel 54 as having been improvidently accepted for filing.

Respectfully submitted,

WGNO INC.

By: 

Robert A. Beizer
Craig J. Blakeley
Paula G. Friedman

SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Its Attorneys

July 31, 1990

EXHIBIT 1

MAIL BRANCH
OCT 6 1987 OCT 9 1987

signed by
mailed by

8940-MLB

Ron Hunter
Northshore Television, Inc.
397 Fairway Drive
New Orleans, LA 70124

Re: Channel 34
Slidell, LA

Dear Mr. Hunter:

This is with respect to your August 11, 1987 request for waiver of the recent Commission's Report and Order suspending the availability for application of channels in certain designated metropolitan areas (the "Freeze Order"). Advanced Television Systems, Mimeo No. 4074 (released July 17, 1987). In that Order, the Commission imposed a "freeze" on applications for new television stations in order to preserve the status quo in certain listed metropolitan areas while it studies the feasibility of initiating the use of advanced television systems in those areas.

On February 25, 1986, you filed a petition for rulemaking to add Channel 34 in Slidell to the Commission's Television Table of Assignments. On June 10, 1987, the Commission issued a Report and Order in MM Docket No. 86-351, wherein it granted your request. Before that Report and Order became effective on July 23, 1987, however, the Commission issued its Freeze Order. One of the markets affected by the freeze was New Orleans, Louisiana, and, because of Slidell's proximity to that city, no applications for the new channel are now being accepted for filing. Your waiver request followed on August 11, 1987.

In support of your request, you argue that the Freeze Order provides for the consideration of waiver requests on a case-by-case basis and that the facts of this case provide the kind of compelling reasons envisioned by the Commission. Specifically, you state that the public interest would be served by the initiation of a first local television service on the channel, especially since Slidell is located in one of the fastest growing metropolitan counties in the country. Further, you contend that you have invested \$47,000 and considerable time and effort to achieve the allocation of the channel and to prepare an application for it. In so doing, you maintain that you have passed up employment opportunities in order to be in a position to apply for the channel. Moreover, you state that you have already taken several steps toward filing the application, including conferring with communications counsel on the various requirements, contacting property owners to identify land usable as a transmitter site, obtaining local zoning approval and the environmental status of the land,

and preparing a detailed financial plan of operation. Finally, you contend that utilization of CHANNEL 54 in Slidell would still leave several channels available for use in New Orleans for the new technology.

For the reasons stated above, we believe that waiver of the Commission's Freeze-Order is warranted. Your interest in the channel arose more than 1 1/2 years ago when you filed the petition for rulemaking, and the channel was allocated on June 10, 1987 -- nearly 1 1/2 months before the Commission's Freeze-Order was announced. In the interim you took a series of steps toward the filing of an application for the channel, based on your reliance that the channel would be available for application on July 23, 1987. The Freeze-Order, however, truncated your plans six days before they were realized. More importantly, the initiation of service on the channel would result in a first local television service to Slidell. While acceptance of this application might reduce the number of options available for implementing high definition television in the New Orleans area, it still appears, however, that there is sufficient spectrum available to satisfy any augmentation needs of the existing stations in the market if additional spectrum is necessary. Based upon the foregoing, we believe that you have demonstrated a sufficient basis for waiver. Accordingly, your request for waiver of Section 73.610(b) IS GRANTED, and applications will now be accepted for Channel 54 in Slidell.

Sincerely,

Roy J. Stewart
Chief, Video Services Division
Mass Media Bureau

cc: Richard J. Bodorff, Esq.

MLBerlin/mlb/tv/vsd:MMB
slidell

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

4074

In the Matter of)
)
Advanced Television Systems)
and Their Impact on the) RM-5811
Existing Television Broadcast)
Service)

ORDER

Adopted: July 16, 1987

Released: July 17, 1987

By the Commission:

1. On February 13, 1987, the Association of Maximum Service Telecasters, Inc., (MST) and 57 other broadcast organizations and companies filed a joint "Petition for Notice of Inquiry," requesting the Commission to initiate a proceeding to explore the issues arising from the introduction of advanced television technologies. These technologies are designed to improve upon television picture quality and are in various stages of planning and development. These systems use different amounts of spectrum and different transmission and reception methods, many of which, to some extent, cannot be decoded or displayed by existing television receivers. The issues involved in this proceeding relate to the impact of the new technologies, on broadcast and non-broadcast uses and on the existing television broadcast service. One essential issue relates to the possible allocation or reallocation of available broadcast spectrum for use by the new technologies. On March 27, 1987, the Commission placed the MST petition on public notice.¹ Comments have been received.

2. On the basis of the record compiled to date, we find it in the public interest to initiate an Inquiry to consider these issues. As a

¹ Public Notice, Report No. 1650, Mimeo No. 2543, released March 27, 1987.

result, it is necessary to preserve sufficient broadcast spectrum to insure reasonable options relating to spectrum issues for these new technologies. Accordingly, we will temporarily freeze the TV Table of Allotments in certain areas.² No petitions to amend the table will be accepted for these areas. Further, construction permit applications for vacant television allotments in these areas will not be accepted. This freeze, however, will not apply to changes requested by existing stations. Moreover, applications and petitions for rule making already on file will continue to be processed as usual. Specifically, we will accept and process applications filed after the freeze that are mutually exclusive with applications filed before the freeze. Further, although new allotments will result from the affected pending petitions, no applications will be accepted for allotments in the specified areas during the freeze.³ The areas covered by the freeze are those areas where high densities of existing TV stations leave relatively limited spectrum available for the new technologies. In our judgment, this would preserve spectrum options in areas where we believe that additional station assignments would unduly restrict possibilities for providing additional spectrum for advanced television.⁴ The Commission will also consider waiver requests on a case-by-case basis for non-commercial educational channels, or for applicants which provide compelling reasons why this freeze should not apply to their particular situations or class of stations.

3. Accordingly, IT IS ORDERED, that effective immediately as of the close of Commission business on the day of adoption of this Order, and until further notice, the Commission WILL NOT ACCEPT amendments to the TV Table of Allotments or applications for television construction permits for

2 The affected areas are those circumscribed by the minimum co-channel separation distances specified in Section 73.610(b) of the Rules, from the reference points as given in Section 76.53 for the cities listed in the appendix.

3 The rule making Report and Order will indicate in each case whether the freeze will apply to the particular allotment.

4 This freeze will not apply to low power television (LPTV) and television translator applications. Therefore, LPTV and TV translator applications may continue to be filed in accordance with the restrictions announced in Docket No. 85-172. These constitute a secondary service and pursuant to present rules are subject to displacement by a primary service. Therefore, LPTV and TV translator grants will not restrict Commission options.

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vacant television allotments within the minimum co-channel separation distance of the cities listed in the Appendix.⁵ Any television application received by the Commission that is not acceptable due to this freeze will be returned, along with any accompanying filing fee, to the applicant.

4. This action is taken pursuant to authority contained in Sections 1, 4(i), 5(d), 303(c) and (r) and 309(b) of the Communications Act of 1934, as amended.

5. For further information concerning this proceeding, contact Terry Haines, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

5 Pursuant to 5 USC Section 553(d)(3) we find that a delay in the effectiveness of this freeze could substantially undercut the goals we intend to achieve thereby. Accordingly, we find good cause to make this freeze effective on the day of adoption.

APPENDIX

List of the Cities Affected by this Freeze.

NEW YORK, NY
LOS ANGELES, CA
CHICAGO, IL
PHILADELPHIA, PA
SAN FRANCISCO, CA
BOSTON, MA
DETROIT, MI
DALLAS-FT WORTH, TX
WASHINGTON, DC
HOUSTON, TX
CLEVELAND, OH
PITTSBURGH, PA
SEATTLE-TACOMA, WA
MIAMI, FL
ATLANTA, GA
MINNEAPOLIS-ST PAUL, MN
TAMPA-ST PETERSBURG, FL
SAINT LOUIS, MO
DENVER, CO
SACRAMENTO-STOCKTON, CA
INDIANAPOLIS, IN
HARTFORD-NEW HAVEN, CT
PORTLAND, OR
MILWAUKEE, WI
CINCINNATI, OH
KANSAS CITY, MO
CHARLOTTE, NC
NASHVILLE, TN
COLUMBUS, OH
NEW ORLEANS, LA

EXHIBIT 3

ENGINEERING STATEMENT
IN SUPPORT OF
PETITION TO RESCIND WAIVER OF TV FREEZE ORDER
AND TO DISMISS APPLICATION BPCT-900518KO
CAROLINE K. POWLEY dba UNICORN/SLIDELL LPTV For SLIDELL, LOUISIANA
ON BEHALF OF
WGNO INC.
NEW ORLEANS, LOUISIANA
JULY 1990

This Engineering Statement was prepared by Alvin H. Andrus, Broadcast Consulting Engineer, President and employee of Andrus and Associates, Inc. with offices at 351 Scott Drive, Silver Spring, Maryland 20904.

This Engineering Statement was prepared on behalf of WGNO Inc., in support of a Petition To Rescind Waiver of TV Freeze Order and to Dismiss Application of Unicorn/Slidell LPTV ("Unicorn") for Slidell, Louisiana (BPCT-900518KO).

The Unicorn application for a Construction Permit proposes to operate on the assigned UHF-TV Channel 54 in Slidell, Louisiana. The applicant proposes to operate with a visual effective radiated power of 14 kilowatts at an effective antenna height above average terrain of 153 meters.

Slidell, Louisiana (reference location N 30° 16' 30", W 89° 47' 06"), is located 45.5 kilometers from New Orleans, Louisiana (reference location N 29° 56' 53", W 90° 04' 10"), one of the markets defined in the FCC TV "Freeze" Order RM-5811 / 1 .

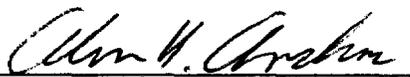
/ 1 "Advanced Television Systems and Their Impact on the Existing Television Broadcast Service", adopted on July 16, 1987.

ANDRUS AND ASSOCIATES, INC.
CONSULTING ENGINEERS

Section 73.610(b) of the FCC Rules specifies the minimum co-channel separation for UHF-TV stations in Zone III as 329 km. Slidell, Louisiana and New Orleans, Louisiana, are both located in Zone III. As noted above, the distance between the Slidell, Louisiana, reference point and the New Orleans, Louisiana reference point is 45.5 km. Accordingly, operation of a station on Channel 54 in Slidell, Louisiana, would preclude the operation of a station on Channel 54 in New Orleans, Louisiana.

Operation of a station on Channel 54 at Slidell, Louisiana, also would preclude the use of Channel 68 in New Orleans, Louisiana (fourteenth adjacent channel required separation is 95.7 km and the actual separation between reference locations is 45.5 km).

Respectfully Submitted,


Alvin H. Andrus, P.E.

State of Maryland)
) SS:
County of Montgomery)

Alvin H. Andrus, being duly sworn, deposes and says that he is a broadcast consulting engineer, President and an employee of Andrus and Associates, Inc., with offices at 351 Scott Drive, Silver Spring, Maryland 20904; that he is a graduate electrical engineer of the Massachusetts Institute of Technology; that his qualifications are on file with the Federal Communications Commission and that he is a registered Professional Engineer in the State of Maryland (No.5136) and in the District of Columbia (No.4723).

Affiant states that all statements made in this report are true of his own knowledge except where stated to be on information or belief and those statements he believes to be true.

Alvin H. Andrus
Affiant

Subscribed and sworn to before me this 30th day of July, 1990

Jean Manduca
Notary Public

My Commission expires 8/1/91

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 1990, a copy of the foregoing "Petition to Rescind Waiver of Television Freeze Order and to Dismiss Application" was mailed, postage prepaid, to the following:

Caroline K. Powley
d/b/a Unicorn/Slidell LPTV
1536 Logan Avenue
Altoona, Pennsylvania 16602

* Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 702
Washington, D.C. 20554

* By Hand

Paula Friedman