

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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FEB 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re)
)
Amendment of Section 73.202(b),) MM Docket No. 94-116
Table of Allotments,) RM-8507
FM Broadcast Stations) RM-8567
(Jefferson City, Cumberland Gap)
and Elizabethton, Tennessee; and)
Jonesville, Virginia))

TO: Chief, Policy and Rules Division
Mass Media Bureau

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OPPOSITION TO PETITION FOR RECONSIDERATION

Dennis J. Kelly

CORDON AND KELLY
Post Office Box 6648
Annapolis, MD 21401

Counsel for:

**HOLSTON VALLEY BROADCASTING
CORPORATION**

February 15, 1996

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SUMMARY

The Commission's action of November 8, 1995 allocating FM Channel 256A to Jonesville, Virginia, 10 FCC Rcd 12207, must be affirmed. Jonesville, the seat of Lee County, Virginia, has no aural broadcast service of any kind at present. Jonesville is entitled to a dispositive preference over Cumberland Gap, Tennessee under the Commission's FM channel allocation priorities and 47 U.S.C. §307(b).

The "Petition for Reconsideration" filed by the Messrs. Govan and Cagle must be rejected for the following reasons:

1. There are at least two applications on file at the Commission for a construction permit for a new FM Broadcast Station on Channel 256A at Jonesville, including one filed by HVBC.

2. Jonesville has over four times as many persons as Cumberland Gap, while Cumberland Gap is in close proximity to seven commercial radio stations (4 full-time), while Jonesville is in close proximity to just two commercial radio stations (1 full-time).

3. G&C's proposal would withdraw the only licensed full-time aural broadcast service from Jefferson City, Tennessee, population 5,494, and there is no public interest benefit in that occurrence.

4. G&C's attempt to make a "Tech Note 101" showing of line-of-sight coverage of Cumberland Gap raises more questions than it solves; and such a showing should have been made at the time G&C submitted its proposal, and certainly not later than the comment stage in this case--not at this late date.

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OPPOSITION TO PETITION FOR RECONSIDERATION

Holston Valley Broadcasting Corporation (HVBC), by its attorney, and pursuant to Section 1.429(f) of the Commission's Rules, hereby respectfully submits its Opposition to the "Petition for Reconsideration" filed December 15, 1995 in the above-entitled matter by Eaton P. Govan III and Berton B. Cagle, Jr. (G&C). It is HVBC's position that the **Report and Order** in this matter, DA 95-2237, 10 FCC Rcd 12207 (November 8, 1995) is eminently correct on the ruling law and policy of the Commission and must be affirmed. In support whereof, the following is shown:

I. PRELIMINARY STATEMENT

1. **Timeliness.** Notice of the filing of the G&C "Petition for Reconsideration" was published in the Federal Register on January 31, 1996, 61 Fed. Reg. 3423. That notice explicitly stated that "Opposition to this petition must be filed February 15, 1996". As HVBC's Opposition to G&C's "Petition for Reconsideration" is being filed on February 15, 1996, it is timely filed.

2. **Fulfillment of Commitment.** The Policy and Rules Division is to be aware that, on January 25, 1996, HVBC fulfilled the commitment it made in this proceeding by filing an application on FCC Form 301 for a construction permit for Channel 256A at Jonesville. The Commission has assigned HVBC's application the reference number "960125MC".

3. In addition, a second application for Jonesville, that of Regina Kay Moore, has been filed; the Commission has assigned it the reference number "960126MA".

4. In view of the pendency of these two applications, it is submitted that the public interest would be best served by affirming the allocation of Channel 256A to Jonesville. Jonesville is assured (particularly if HVBC's

application is granted) of a first local broadcast service of any type; and Jefferson City, Tennessee will retain its only full-time broadcast service.

II. DISCUSSION OF ALLOCATION PRIORITIES

5. Legal Precedents Support Affirmance. In *FM Assignment Policies and Procedures*, 90 FCC 2d 88, 51 RR 2d 807, 810 (1982), the Commission adopted simplified priorities for the allocation of FM channels:

- (1) First full-time aural service.
- (2) Second full-time aural service.
- (3) First local service.
- (4) Other public interest matters.

Co-equal weight is to be given to factors (2) and (3).

6. In the instant case, neither HVBC nor G&C has claimed that their respective proposals would provide any listeners with either a first or a second full-time aural service. HVBC's proposal is to provide a first local broadcast service of any kind to Jonesville, Virginia, the county seat of Lee County, Virginia, without a loss of service at any other community. By contrast, G&C's proposal

would rob Jefferson City, Tennessee, population 5,494, of its only full-time licensed broadcast service and would reallocate the Jefferson City frequency (Channel 257A) to Cumberland Gap, Tennessee, population 210 (where it would be repositioned onto Channel 256A), which receives abundant broadcast service from the neighboring communities of Middlesboro, Kentucky and Harrogate and Tazewell, Tennessee.

7. While G&C's proposal is designed to upgrade G&C's WAEZ(FM), Elizabethton, Tennessee (located in the Arbitron-defined and well-served Kingsport-Johnson City-Bristol radio market), G&C has failed to show that any listeners would be receiving a third, fourth or fifth aural service. Further, G&C fails to explain the public interest benefit inherent in depriving Jefferson City, Tennessee of its only licensed full-time aural broadcast outlet. It therefore must be concluded that G&C's proposal is designed for its own private benefit, rather than for the public interest, and would merely give an additional signal to radio listeners who already have abundant aural services available to them.

8. The case law clearly supports the allocation of Channel 256A to Jonesville, Virginia. Just last September,

the Commission en banc decided **FM Table of Allotments, Blanchard, Louisiana and Stephens, Arkansas**, 10 FCC Rcd 9828 (1995). Therein, at ¶11 and ¶13, the Commission stated:

Accordingly, in a choice among competing counterproposals both involving priority 3 (first local service), the Commission had uniformly made the decision based on population difference and a comparison of reception services. And, where it has found that neither community falls below a threshold level of reception services, the Commission has based its decision on a straight population comparison.

* * * * *

Because there was a tie under the FM priorities since both competing proposals propose a first local service under priority 3, the tie was resolved by examining the proposals under priority 4, and, in examining the proposals under priority 4, substantial weight was given to the population of the community sought to be served, as the proposals seek to provide a first local transmission service. Thus, as the staff did not err in basing its decision in this case on the population difference between the two communities, we decline to delineate a framework of tests to be used in a very close case between two equally deserving communities

9. Furthermore, in allocations cases, there is precedent for the awarding of a dispositive 47 U.S.C. §307(b) preference to one community over another on population grounds, even though both communities are under 1,000 persons. See **Report and Order (Bostwick and Good**

Hope, Georgia) in MM Docket No. 89-566, 6 FCC Rcd 5796 (Bureau, 1991) (Bostwick preferred over Good Hope based on population (370 vs. 250)¹. This case was cited with approval by the Commission in **Blanchard**.

10. **No Public Interest Factors Favor Cumberland Gap Over Jonesville**. Cumberland Gap, Tennessee cannot overcome Jonesville's superiority in population. As HVBC pointed out in its "Counterproposal and Comments", Cumberland Gap is located in Claiborne County, Tennessee (1990 Census population 26,137). Cumberland Gap is already well-served by aural broadcast stations in adjacent communities. Stations WFSM(FM), Channel 231A, and WNTT(AM) (daytime-only) are licensed to Tazewell, Tennessee, the county seat of Claiborne County, which is located 12 miles south of Cumberland Gap. Stations WXJB-FM, Channel 243A, and

¹The cases cited by G&C for the proposition that Jonesville not be accorded a decisional preference on population are not apposite. **Santee Cooper Broadcasting Co.**, 57 RR 2d 662 (Rev. Bd. 1992) involved the denial of a Section 307(b) preference for a first "voice" for Bluffton, South Carolina (population 541) over a second (competitive) "voice" for Hilton Head Island (population 11,000+). **Ruarch Associates**, 101 FCC 2d 1358 (1985), involved the denial of a Section 307(b) preference for a first station at Edinburg, Virginia (population 762) over a second (and competitive) station at Woodstock, Virginia (population 2,627).

WSVQ(AM) (daytime-only) are licensed to Harrogate, Tennessee, which is less than two miles from Cumberland Gap. Additionally, Cumberland Gap's needs for a local outlet of self-expression and reception are also met by the stations licensed to Middlesboro, Kentucky, which is less than 3 miles from Cumberland Gap. Middlesboro (1990 Census population 11,328) is the city of license of WMIK-FM, Channel 224A, full-time AM station WFXY(AM) and daytime-only station WMIK(AM). For all practical purposes, Cumberland Gap is nothing more than a suburb of Middlesboro and Harrogate.

11. By contrast, Jonesville is the county seat of Lee County, Virginia. Lee County's only radio stations are co-owned daytimer WSWV(AM) and full-time WSWV-FM, licensed to Pennington Gap, Virginia. Contrary to the seven commercial radio stations (four full-time) in close proximity to Cumberland Gap, Jonesville has just two commercial radio stations (one full-time) in close proximity to it. Thus, Jonesville has a real need for the new FM service on Channel 256A, which would provide a first local competitive radio service in Lee County. On this basis alone, Jonesville's

need for Channel 256A is *prima facie* greater than that of Cumberland Gap.

12. Additionally, and contrary to insinuations in pleadings heretofore filed by G&C, there is public support for the new FM service that HVBC would provide on Channel 256A. There is appended hereto as Exhibit A letters from the Lee County Area Chamber of Commerce and Lee County Industrial Development Authority. The Lee County Area Chamber of Commerce "is very excited about [HVBC's] plan to offer F.M. radio to citizens of Jonesville and Lee County". The Lee County Industrial Development Authority describes the growth that is taking place in Virginia's southwesternmost county, which it estimates "should create at minimum of about 1,200 new jobs in Lee County by the year 2000" and "approximately 600 families or about 2,000 new residents" for Lee County by the year 2000.

13. Thus, on the basis of its larger population and fewer commercial radio stations in close proximity to it, Jonesville emerges victorious under the Commission's precedents for decisions in cases such as this.

14. There Is No Public Interest Benefit in Withdrawing Existing Full-Time FM Service From Jefferson City. G&C has never attempted to rebut the presumption that it is inimical to the public interest to withdraw existing service from a larger community to give it to a smaller community, particularly where there is no replacement channel available for the larger community.

15. The Commission's policy in this area is stated in *FM Table of Assignments, St. Augustine and Callahan, Florida*, 46 RR 2d 1295 (Bureau, 1980). Therein, a petitioner sought to reallocate an FM channel from a county seat with a population of 12,352 to a small town with a population of 883, thereby (1) leaving the county seat without an FM allocation and (2) reallocating the channel to a place which would provide service to Jacksonville, Florida, a city with many broadcast stations. On those facts, the Commission declined to reallocate the channel from St. Augustine to Callahan; its rationale was as follows:

Furthermore, we regard the deletion of an assigned channel for which an interest has been expressed as requiring a heavier burden on the party requesting its deletion to demonstrate its greater need elsewhere. In fact we have found no case in

which an applied for channel has been deleted in favor of a community this small and which is so close to a much larger city.²

It is to be remembered that Jefferson City's only full-time broadcast station, Station WEZG (formerly WUSK-FM and, before that, WJFC-FM), has been on the air since February 1, 1976.³

16. G&C has failed to demonstrate that Jefferson City somehow has lost its need for continued full-time FM service from WUSK, the only such service licensed to Jefferson City or to any other community in Jefferson County, such that there is justification to relocate the facility in question from a community of 5,494 residents to a place with just 210 inhabitants. Indeed, G&C's own numbers (Petition for Reconsideration at p. 10) show that, at present, station WEZG's 60 dBu contour encompasses 109,566 persons. This full-time service to Jefferson City and Jefferson County would be lost, with no substitute service to be provided.

²Citing *Arcadia, Englewood and Lake Placid, Florida*, 41 Fed. Reg. 3880 (Bureau, 1976); and *Burlington and Newport, Vermont*, 44 FR 25228, 45 RR 2d 786 (Bureau, 1979).

³Source: 1992 *Broadcasting & Cable Market Place*, p. A-322.

By contrast, G&C would relocate WEZG's service to the already well-served Tazewell/Harrogate/Cumberland Gap/Middlesboro corridor, where a WEZG operation on Channel 256A would by G&C's calculation serve 66,527 persons, a loss of 43,039 persons.

17. G&C claims that its upgrade of WAEZ(FM), Elizabethton, Tennessee would increase the number of persons within WAEZ's 60 dBu contour by 93,766 persons. It is apparent that most of these new persons would be located within the Johnson City-Kingsport-Bristol metropolitan area⁴, which already has abundant local media.

18. G&C's proposal thus has a net population gain of 50,727. G&C has made no showing that any of these 50,727

⁴The 1990 Census shows that the total population in the Johnson City-Kingsport-Bristol metropolitan area (also known as the "Tri Cities") is 436,047, of which 348,530 are in Tennessee and 87,517 are in Virginia (Source: **The 1992 World Book Year Book** (Chicago: World Book, Inc., 1992), p. 546). According to G&C (Petition for Reconsideration, p. 10), WAEZ currently serves 355,187 persons, which, were WAEZ to be upgrade to a Class C1, would increase to 448,953. As the Tri-Cities metropolitan area population is 436,047, it is apparent that most of WAEZ's gain is in the Tri Cities, where there are numerous radio stations, four full-service over-the-air commercial television stations and daily newspapers published at Kingsport, Johnson City, Bristol and Elizabethton.

persons receive fewer than five full-time aural services. Moreover, in order to achieve this gain of 50,727 persons, G&C would withdraw the only full-time radio service licensed to either Jefferson City or Jefferson County, Tennessee.

19. Contrary to an assertion by G&C, its proposed gain does not "dramatically exceed" the numbers of persons receiving new FM service under HVBC's proposal. As it turns out, HVBC's FM facility as proposed in reference number 960125MC would encompass 44,671 persons within 2,497 square kilometers (source: Dataworld's population count computer program). The difference between G&C's proposal and HVBC's Jonesville application is just 6,056 persons, or 13.56%, a difference which is certainly something far less than "dramatic". The only thing that would be "dramatic" would be the loss of the only local licensed full-time aural service at Jefferson City were G&C's proposal to be adopted.

20. HVBC's proposal thus better serves the public interest because it would provide new FM service to 44,671 persons, without depriving Jefferson City or Jefferson County of full-time local FM service.

21. It Is Doubtful That Cumberland Gap Is a Community To Which a Station Can Be Licensed. G&C has failed to conclusively demonstrate that Cumberland Gap is a community for licensing purposes, let alone a community with problems, needs and interests which requires the stripping of Jefferson City's only FM station in favor of Cumberland Gap.

22. Although Cumberland Gap is listed in the 1990 Census (population 210) and although Cumberland Gap is an incorporated town, it is not a "community" for licensing purposes. Our support for this proposition is found in **Risner Broadcasting, Inc.**, 20 FCC 2d 790, 17 RR 2d 1215 (Rev. Bd., 1969), *rev. den. as to Bagnell applicant*, 28 FCC 2d 330, 21 RR 2d 529 (1971). Therein, it was found that Bagnell, Missouri, population 62, while an incorporated town governed by five trustees, was not a community for licensing purposes, as it had few commercial enterprises and no other indicia of "community attributes".

23. In its "Counterproposal and Comments", HVBC showed that Cumberland Gap lacked such basic community attributes as: a school; a bank or bank branch; a gas station; a full-service dry-goods store; a supermarket; a hardware store; a

car dealership. Such enterprises exist, but only along U.S. 25E and in the neighboring towns of Harrogate and Middlesboro. Thus, there is no essential difference between Cumberland Gap and Bagnell, Missouri. Neither place is a community to which a station can be licensed. **Risner Broadcasting, supra.**

24. While there is doubt as to Cumberland Gap's status for licensing purposes, there is no doubt that Jonesville, as the county seat of Lee County, Virginia, is a community to which a station may be licensed. Clearly, under the precedents discussed herein, it is the preferred community for the allocation of Channel 256A. The result of this case must be affirmed.

III. "LINE OF SIGHT" TO CUMBERLAND GAP IS IRRELEVANT

25. In view of all of the arguments and case law stated above, it is not decisionally significant whether or not G&C's hypothetical transmitter site for Channel 256A can provide city-grade service to Cumberland Gap, Virginia. However, we would observe that, at page 6 of G&C's engineering testimony (of John J. Mullaney, P. E.), Mr.

Mullaney concludes that his Tech Note 101 study shows that "[c]onsequently, 76.2 percent of the locations exceed the minimum city grade value". For what it is worth, when judging compliance with the city-grade coverage requirement of Section 73.315 of the Rules, the Commission requires city-grade coverage of at least 80 percent of the community of license. **Marc A. Albert**, 4 FCC Rcd 5573, ¶9 (HDO, 1989), citing **John R. Hughes**, 50 Fed. Reg. 5679 (1985). Indeed, in **Albert**, the Bureau ruled that city-grade coverage of 77.2% of the city of license was not sufficient to justify a waiver of Section 73.315(a) of the Rules, and therefore designated a hearing issue against the offending applicant.

26. It is to be noted that, in this case, G&C failed to present its "Tech Note 101" study during the time its "Petition for Rulemaking" was pending, despite the fact that it had ample opportunity to do so at the time. There is no public interest inherent in allowing it to present "Tech Note 101" evidence at this time. The policy of the Commission, as stated in its "Brief for Appellee" in **L.B.C., Inc. v. FCC (D. C. Cir., Case No. 88-1072)** (September 30, 1988), is as follows:

Certainly, "[w]e cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." *Valley Telecasting Co., Inc. v. FCC*, 336 F.2d 914, 917 (D. C. Cir. 1964), quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D. C. Cir. 1941).

IV. CONCLUSION

WHEREFORE, Holston Valley Broadcasting Corporation urges that the Petition for Reconsideration filed by Eaton P. Govan III and Berton B. Cagle, Jr. **BE DENIED**, and that the allocation of FM Channel 256A at Jonesville, Virginia, **BE AFFIRMED**.

Respectfully submitted,

**HOLSTON VALLEY BROADCASTING
CORPORATION**

By

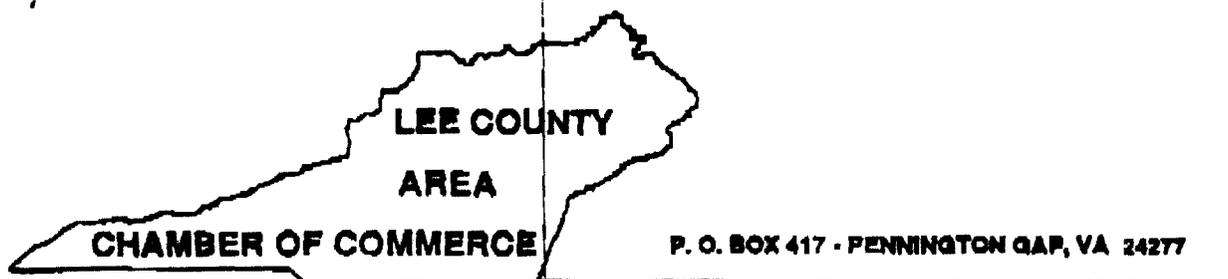


Dennis J. Kelly
(D. C. Bar #292631)
Its Attorney

CORDON AND KELLY
Post Office Box 6648
Annapolis, MD 21401

February 15, 1996

EXHIBIT A



January 24, 1996

Mr. George De Vault, President
Holston Valley Broadcasting Corporation
P.O. Box WKPT
Kingsport, Tn. 37662

Dear Mr. De Vault:

The Lee County Area Chamber of Commerce is very excited about your plan to offer F.M. radio to citizens of Jonesville and Lee County. Please be assured of our support in your endeavor.

A substantial growth in population and number of jobs in Jonesville as well as throughout Lee County is projected for the coming years. According to a 1994 report of the Lenowisco Planning District Commission, the population of Jonesville is expected to increase at a rate of 1.5%, bringing the population from 934 in 1990 to 1,345 in the year 2015. This projection was made before the announcement that a federal and state prison will locate in Lee County and therefore is a very low estimate of growth.

The idea of a radio station locating in Jonesville is very compatible with other anticipated developments. An example is plans for a new supermarket and shopping center as well as a new apartment complex.

Please be assured of the complete support of the Lee County Area Chamber of Commerce. Let me know how we may be of assistance.

Sincerely,

Nancy Myers
Secretary

LEE COUNTY, VIRGINIA**INDUSTRIAL DEVELOPMENT AUTHORITY**

Post Office Box 912, Jonesville, Virginia 24263



Ray Sherrill
Chairman

John Deane
Vice-Chairman

George Hill
Secretary

Gene Jones

Gene Britton

John Warner

Henry Gwynn

William A. Long
County Director

January 24, 1996

Mr. George De Vault, President
Holston Valley Broadcasting Corporation
P. O. Box WKPT
Kingsport, TN 37662

Dear Mr. De Vault:

This letter is to follow up on your conversation with Nancy Meyers regarding anticipated economic growth in the Jonesville Area. I will attempt to describe a few anticipated developments below.

FEDERAL PRISON CONSTRUCTION:

A site approximately eight miles from Jonesville, at Hickory Flats, has been selected for construction of a Medium/Minimum Security Federal Prison and Work Camp combination which will contain 1,900 beds altogether. Congressman Boucher's office indicates Federal employment at the facility will be approximately 500 persons. At least 200 of those employees will be relocating from other Federal Correctional facilities. The prison is due to begin construction in the fall of 1996, and construction employment will be approximately 225-250.

STATE PRISON CONSTRUCTION:

A site in Rose Hill, approximately twelve miles west of Jonesville, has been selected by the Virginia Department of Corrections as a site for construction of a medium security correctional facility to contain some 1,500 beds. Employment at this facility should be approximately 325-350. Construction should begin some time in late 1997, and be completed in 1999. Construction employment should vary between 100 to 225 at various times during the process.

INFRASTRUCTURE DEVELOPMENT:

The Federal and State Prisons will leverage significant improvements to the county's utility infrastructure system. Lee County will construct a sewage treatment plant and

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George De Vault
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upgrade water treatment capacities for the Federal Prison which will upgrade the sewage treatment capacity of Lee County Industrial Park for the Federal Prison. It will build a new sewage treatment plant, construct a water plant and upgrade lines to facilitate State Prison requirements at Rose Hill by 2000, when the State Prison is anticipated to open.

HIGHWAY 58 CONSTRUCTION:

Highway 58, connecting Interstates 75 and 26 is now being widened to four lanes in Lee County. It is under construction and the section including the Jonesville Town Bypass should be complete by 1999. This highway will reduce travel time by about fifty minutes for truckers who have been traveling to Knoxville on 75 and interchanging onto 40 to reach Asheville, North Carolina, where I-26 now ends. We anticipate at least one trucking or warehousing center will be interested in locating in the S-58 corridor.

AIRPORT CONSTRUCTION:

An airport featuring a 5,000' x 100' paved, all weather runway, complete with waiting facility, tower and hangars, is to be constructed in 1998-99 in Lee County. This airport will feature runway lighting, radar and be capable of serving light commercial traffic. While directly generating little employment, the facility will contribute significantly to the County's overall ability to attract industry in the Lee County area.

LEE COUNTY INDUSTRIAL PARK and SHELL BUILDINGS:

Lee County Industrial Development Authority intends to continue its shell building program. It is now seeking funding with which to construct a new 40,000 square foot building beginning later this year. It is also seeking funding for construction of a shell building outside the industrial park in its Champion Community Zone about a 1/4 mile West of Jonesville. We see a high probability of both being funded.

Lee County I.D.A. will also enhance the attractiveness of its industrial park later this year with the installation of full service industrial capacity natural gas lines in the park. This will lower energy costs for existing and potential tenants below that found anywhere else in the Southeastern United States because the owner sees industrial park development as a key to its future non-park gas sales.

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George De Vault
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RAILS TO TRAILS PROJECT:

Progress continues in Western Lee County on conversion of a old railroad bed to hiking and biking trails. They will extend from Cumberland Gap National Park through Western Lee County. It is anticipated they, together with the State Park upgrade and development of Karlan Mansion will improve tourism in Lee County.

CUMULATIVE EFFECT:

The cumulative effect of the anticipated changes should create at minimum of about 1,200 new jobs in Lee County by the year 2,000. Given the nature of many of the anticipated new jobs, about fifty percent of them probably will be occupied by individuals currently not residing in Lee County. This means approximately 600 new families or about 2,000 new residents who are not here now living in Lee County and the Jonesville area by the year 2,000.

Please contact me if I may be of further assistance.

Sincerely,



Bill Slough,
Community Development
Director

WFS/dds
1/24/96

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Opposition to Petition for Reconsideration" was served by first-class United States mail, postage prepaid, on this 15th day of February, 1996, upon the following:

Jerold L. Jacobs, Esquire
Rosenman and Colin
1300 - 19th Street, N. W., Suite 200
Washington, DC 20036
Counsel for Govan & Cagle

Regina Kay Moore
Route 2, Box 128B
Jonesville, VA 24263

W. T. Cooper
Jefferson County Chamber of Commerce
532 Patriot Drive
Jefferson City, Tennessee 37760

Aileen S. Craft, President
WNTT, Inc.
Route 3, Box 265
Tazewell, Tennessee 37879

Hon. Gary W. Holiway
Jefferson County, Tennessee
Post Office Box 710
Dandridge, Tennessee 37725

Hon. Darrell Brittain
Claiborne County, Tennessee
P. O. Drawer K
Tazewell, Tennessee 37879

Timothy K. Brady, Esquire
P. O. Box 986
Brentwood, Tennessee 37027-0986
Counsel for JBD, Inc. and
Country-Wide Broadcasters, Inc.