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FEB 4 1997

February 4, 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

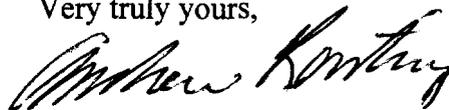
Re: Petition for Rulemaking
Channel 294A, Pulaski, Tennessee

Dear Mr. Caton:

Transmitted herewith on behalf of D. Mitchell Self Broadcasting, Inc., are an original and four copies of its Reply to Opposition to Request for Waiver of Procedural Policy, filed in connection with the above-referenced Petition for Rulemaking, which was filed with the Commission on June 26, 1996.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,



Andrew S. Kersting
Counsel for
D. Mitchell Self Broadcasting, Inc.

Enclosures

cc (w/ encl.): Certificate of Service (by hand or first-class mail)

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEB 4 1997

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. _____
Table of Allotments,)	RM No. _____
FM Broadcast Stations)	
(Pulaski, Tennessee))	

To: Chief, Allocations Branch

**REPLY TO OPPOSITION TO
REQUEST FOR WAIVER OF PROCEDURAL POLICY**

D. Mitchell Self Broadcasting, Inc. ("Self"), by counsel and pursuant to Section 1.45 of the Commission's rules, hereby replies to the Opposition to Request for Waiver of Procedural Policy, filed January 28, 1997 ("Opposition"), by Big River Broadcasting Corporation ("Big River"). In support of this reply, the following is stated:

Big River contends that by challenging the contingent applications filed by H-M-S Broadcasting Co. ("H-M-S") and Big River for Stations WDXE-FM, Lawrenceburg, Tennessee, and WXFL(FM), Florence, Alabama, and requesting the Allocations Branch to accept its "contingent" petition for rulemaking seeking the allotment of Channel 294A to Pulaski, Tennessee ("Petition"), Self has taken "inconsistent and conflicting positions." Opposition, ¶2. Big River fails to note, however, that the Commission has a rule prohibiting the filing of contingent applications (*see* 47 CFR §73.3517), but there is no similar rule precluding parties from filing rulemaking petitions contingent upon the grant of an application. Indeed, the Chief, Mass Media Bureau, has acknowledged that, "[u]nlike an application, a petition for rulemaking contingent on the grant of an

application is not prohibited by our rules.” *Eatonton and Sandy Springs, Georgia and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580, 6582, n.19 (Mass Med. Bur. 1991).¹ Therefore, there is nothing inconsistent about Self challenging the contingent applications filed by Big River and H-M-S, and seeking to ensure that its pending Petition is not dismissed. Although the Allocations Branch recently adopted a general “procedural policy” of not accepting petitions for rulemaking contingent on the licensing of facilities set forth in an outstanding construction permit, Self’s Petition was filed on June 26, 1996, long before the *Cut and Shoot* policy was announced.²

Big River also contends that Self’s waiver request is based upon “purely private matters and ha[s] no public interest merit whatsoever.” Opposition, ¶3. This simply is not true. If the Commission were to ultimately grant Self’s Petition, the residents of the Pulaski area would benefit by receiving their second FM service and first competitive service. Although Self intends to file an application for the Channel 294A facility if its Petition is granted, there is no guarantee that its application will be granted or that Self will become the eventual permittee. Moreover, if Self’s

¹ In *Eatonton and Sandy Springs*, a rulemaking petition was short-spaced to an existing station’s only authorized transmitter site. However, on the same day the rulemaking petition was filed, the licensee of the station filed an application seeking to move its transmitter to a fully-spaced site. The application was granted while the rulemaking petition was pending. The Chief, Mass Media Bureau, concluded that where an application specifying a fully-spaced site is filed on or before the date a rulemaking petition is filed, there is no reason to dismiss the petition. 6 FCC Rcd at 6582.

² See *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cut and Shoot, Texas)*, DA 96-1901, ¶4 (released November 18, 1996) (“*Cut and Shoot*”). In *Cut and Shoot*, the Chief, Policy and Rules Division, expressly acknowledged the staff’s past practice of processing rulemaking petitions contingent upon the licensing of facilities in an outstanding construction permit. Self respectfully submits that if the Commission were to apply its new procedural policy retroactively, *i.e.*, to rulemaking petitions filed prior to the date the policy was adopted, the “policy” would have the effect of a substantive rule, which would require notice and the opportunity for public comment. See 5 U.S.C. §553(b)(3)(a).

Petition is dismissed, in order to protect its interest in seeking the allotment of Channel 294A at Pulaski, Self will have no alternative but to either (i) seek reconsideration of the dismissal of its Petition, and, if reconsideration is denied, file an application for review with the full Commission and possibly a petition for reconsideration of that decision if its application for review is denied, or (ii) re-file its Petition every day to ensure that, in the event the WDXE-FM application is eventually re-filed, it will not obtain cut-off protection against Self's Petition. Self submits that both of these alternatives would result in a waste of substantial resources on the part of all parties concerned, including the Commission and its staff. Thus, contrary to Big River's allegations, Self's request for a waiver of the Allocations Branch's recently-adopted procedural policy clearly has substantial public interest implications.

What is private in nature, however, is the attempt on the part of Big River and H-M-S to manipulate the Commission's procedural rules for personal gain through the filing of two contingent applications. The WDXE-FM and WXFL applications were filed in violation of Section 73.3517 of the rules in a deliberate attempt to preclude other parties from having the opportunity to provide additional FM service as a result of the WQLT-FM downgrade.

Furthermore, the Commission should not be fooled by the statements contained in paragraph 4 of Big River's Opposition. Big River and H-M-S are fully cognizant of the fact that if Self's Petition is dismissed and Self does not keep the petition alive through either of the means set forth above, Big River and H-M-S can simply (i) seek the dismissal of their pending petition for reconsideration, (ii) reduce the power of WQLT-FM to that of a Class C1 facility in accordance with its outstanding construction permit, and re-file the license application for that facility, and (iii) on

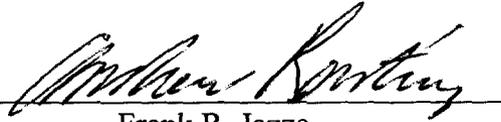
the same date, re-file the WDXE-FM application, thereby providing the WDXE-FM application with cut-off protection against Self's rulemaking petition.

Self acknowledges that its Petition seeking the allotment of Channel 294A at Pulaski is completely dependent upon the downgrade of WQLT-FM. Self also acknowledges that, if the Mass Media Bureau were to reverse its decision dismissing the WDXE-FM and WXFL applications, Self's Petition could be dismissed because the WDXE-FM application would then be entitled to cut-off protection against its Petition. However, the WDXE-FM and WXFL applications were properly dismissed because they were contingent upon the downgrade of WQLT-FM at the time they were filed, in violation of Section 73.3517 of the Commission's rules. Thus, in the event the WDXE-FM application is eventually re-filed in compliance with the Commission's rules, Self's Petition is entitled to comparison under Section 307(b) of the Communications Act along with the WDXE-FM application. Therefore, due to the unique facts of this case, Self respectfully requests that its Petition be held in pending status until a subsequently-filed license application for WQLT-FM on Channel 297C1 at Florence, Alabama, is granted, at which time the Commission could then act on its Petition.

WHEREFORE, in light of the foregoing, D. Mitchell Self Broadcasting, Inc. respectfully requests that its Petition for Rulemaking, filed June 26, 1996, to allot Channel 294A to Pulaski, Tennessee, be HELD IN ABEYANCE pending a grant of a license application for Channel 297C1 at Florence, Alabama, or the final cancellation of the construction permit to downgrade WQLT-FM to Channel 297C1.

Respectfully submitted,

D. MITCHELL SELF BROADCASTING, INC.

By: 

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Its Counsel

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February 4, 1997

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CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 4th day of February, 1997, copies of the foregoing "Reply to Opposition to Request for Waiver of Dismissal Policy" were hand-delivered or mailed first-class, postage prepaid, to the following:

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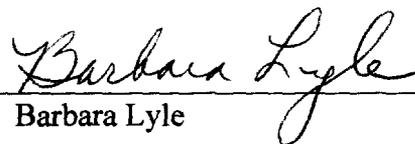
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