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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 19, 1997

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Application for Review
Amendment of Section 73.202(b),
FM Broadcast Stations
(Mt. Juliet and Belle Meade, Tennessee)
MM Docket No. 97-97; RM-9047

Dear Ms. Salas:

Transmitted herewith on behalf of The Cromwell Group, Inc. is an original and four copies of its Application for Review, seeking review of the Commission's Memorandum Opinion and Order in the above-referenced rule making proceeding, released October 31, 1997, pursuant to Section 1.115 of the Commission's Rules.

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

Sincerely,



John F. Garziglia
Patricia M. Chuh

Enclosure

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DEC 19 1997

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

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Section 73.202(b)) MM Docket N. 97-97
 Table of Allotments) RM-9047
 FM Broadcast Stations)
 (Mt. Juliet and Belle Meade, Tennessee))

To: The Commission

APPLICATION FOR REVIEW

The Cromwell Group, Inc. ("Cromwell"), by its attorneys, pursuant to Section 1.115 of the Commission's Rules, hereby respectfully submits its Application for Review of the Policy and Rules Division's Memorandum Opinion and Order, MM Docket No. 97-97, RM 97-9047, released October 31, 1997 ("MO&O"), denying the Petition for Reconsideration of the Report and Order, MM Docket No. 97-97, RM 97-9047, released July 25, 1997, reallocotting Channel 294A from Mt. Juliet to Belle Meade, Tennessee ("R&O").^{1/} Review is warranted because the action taken in the MO&O is in conflict with the Commission precedent, under 47 C.F.R. §1.115(b)(2)(i), and involves an erroneous finding as to an important and material question of fact, under 47 C.F.R. §1.115(b)(2)(iv). Accordingly, the Commission should reverse the MO&O, delete the allotment of Channel 294A at Mt. Juliet, Tennessee, and rescind the grant of Mt. Juliet Broadcasting, Inc.'s February 21, 1997 modification application specifying operation of WNPL on Channel 294A at Belle Meade, Tennessee, in accordance with Commission precedent. In support whereof, the following is respectfully submitted:

^{1/} This Application for Review is timely filed pursuant to §1.115(d) and §1.4 of the Commission's Rules in that notice of the MO&O denying Cromwell's Petition for Reconsideration in this matter was published in the Federal Register on November 19, 1997. 62 Fed. Reg. 61692 (1997).

BACKGROUND

1. The Commission granted the application for construction permit for WNPL [formerly WAOF(FM)], specifying Channel 294A at Mt. Juliet, Tennessee, on August 14, 1995,^{2/} as the result of a settlement agreement in a comparative proceeding, MM Docket No. 91-84. MJBFI accepted the grant of the original WNPL construction permit with knowledge that the allotment of Channel 294A to Mt. Juliet, Tennessee could create a hazard to air navigation. MJBFI was notified as early as June 27, 1990 that the Mt. Juliet allotment "would cause substantial adverse effects upon air navigation." See FAA Termination of Aeronautical Study of Proposed Construction or Alteration, April 19, 1991, attached as Exhibit No. 1 to Cromwell's Petition for Reconsideration. MJBFI filed an amendment to its construction permit application on July 31, 1991.

2. In its amendment, MJBFI expressly stated that it would accept the grant of the WNPL construction permit with the following condition:

Upon receipt of notification from the Federal Communication Commission that harmful interference is being caused by the operation of the licensee's transmitter, the licensee shall either immediately reduce the power to the point of no interference, cease operations, or take such immediate corrective action as necessary to eliminate the harmful interference.

See Amendment to application of Jamal Broadcasting, L.P., July 31, 1991 (FCC File No. BPH-891011MJ), attached as Exhibit No. 2 to Cromwell's Petition for Reconsideration.

^{2/} The application was originally granted to Jamal Broadcasting, L.P. ("Jamal"). See Public Notice Report No. 43573, released August 17, 1995. Jamal subsequently assigned the original WNPL [formerly WAOF(FM)] construction permit (BP-891012MS) to Mt. Juliet Broadcasting, Inc. ("MJBFI"), a corporation owned by Jamal (FCC File No. BAPH-960424GG). For purposes of clarity, references to the licensee of WNPL will be referred to as "MJBFI" even when Jamal was technically the licensee.

3. MJBFI proceeded with construction of WNPL and began program testing. However, because of interference to air navigation, MJBFI terminated operations on November 7, 1996. Stating that it was unable to implement operation of WNPL because of electromagnetic interference ("EMI"), MJBFI filed a modification application on February 21, 1997 (FCC File No. BMPH-970221ID).^{3/} MJBFI's modification application sought to change the authorized transmitter site for WNPL and the community of license from Mt. Juliet to Belle Meade, Tennessee, among other things, and was simultaneously accepted for filing and tender on March 5, 1997. See Public Notice Report No. 23942, released March 5, 1997.

4. Also on February 21, 1997, MJBFI filed a Petition for Rule Making and Request for Modification of Authorization, seeking reallocation of Channel 294A from Mt. Juliet to Belle Meade, Tennessee and modification of the WNPL construction permit to specify operation on Channel 294A at Belle Meade, Tennessee. The Commission released a Notice of Proposed Rule Making ("NPRM") seeking comment on MJBFI's proposed allotment plan on March 21, 1997. The NPRM established May 12, 1997 as the deadline for filing comments and May 27, 1997 as the deadline for reply comments. MJBFI, Great Southern Broadcasting, Inc., and David J. Waynick filed timely comments. Cromwell filed its Comments and Motion for Acceptance of Late-Filed Comments on July 21, 1997.^{4/}

^{3/} Because the filing of MJBFI's modification application violates Section 73.203 of the Commission's Rules, among other things, Cromwell filed an Informal Objection on July 16, 1997.

^{4/} In the interest of compiling a full and complete record, Cromwell filed late-filed comments to present controlling and dispositive authority that none of the commenting parties addressed or discussed in their comments.

5. In its comments and reply comments, MJBFI asserted that the allotment of Channel 294A to Mt. Juliet, Tennessee is defective due to interference to FAA navigational radio facilities. Comments of MJBFI, MM Docket No. 97-97, May 12, 1997; Reply Comments of MJBFI, MM Docket No. 97-97, May 27, 1997. MJBFI also declared in its February 21, 1997 modification application that the allotment of Channel 294A to Mt. Juliet is defective because "it is not possible for WNPL to operate on Channel 294A from any location which will provide the required city grade coverage to Mount Juliet while also eliminating the FAA's concerns regarding EMI." MJBFI's February 21, 1997 modification application, at Section 1.0 of Engineering Statement.

6. On July 16, 1997, before Cromwell's comments were filed, the July 25, 1997 R&O was adopted, with public notice on July 25, 1997. On August 12, 1997, Cromwell filed a Petition for Reconsideration. On October 31, 1997, the Commission released the MO&O, denying Cromwell's Petition for Reconsideration. By the instant Application for Review, Cromwell now seeks review of that action.

DISCUSSION

7. In light of Commission precedent, the Policy and Rules Division's MO&O is clearly in error. It is established Commission precedent that when no broadcast facility for a particular allotment can be built, the appropriate remedy is the deletion of the allotment. See e.g., San Clemente, California, 10 FCC Rcd 8291, para. 6 (1995) (deletion of channel appropriate because there is no available fully spaced site in compliance with the Commission's technical allotment requirements); see also Letter from Dennis Williams, Assistant Chief, Audio Services Division,

Mass Media Bureau, to ECI License Company, Inc., 11 FCC Rcd 1797, 1800 (1996) (deletion of the substandard allotment is appropriate when a short-spaced transmitter site is necessary before the allotment can be used); Harkers Island, North Carolina, 10 FCC Rcd 13159, para. 3 (1995) (deletion of allotment appropriate when no site complies with the Commission's minimum separation and principal city coverage requirements); Atlantic City, New Jersey, 57 RR 2d 1436, para. 8 (1985) (channel deletion appropriate where allotment of channel was based on specific representation by the petitioner that an offshore transmitter site was available); Pinckneyville, Illinois, 41 RR 2d 69 (1977) (allotment deleted because there was no showing that a transmitter site meeting the Commission's technical requirements was available).

8. Contrary to the decision of the Rules and Policy Division, it does not matter that the cases cited did not involve "outstanding" construction permits because the broadcast facility authorized in the WNPL construction permit (specifying Channel 294A at Mt. Juliet, Tennessee) cannot be built. The original WNPL construction permit (specifying Channel 294A at Mt. Juliet, Tennessee) was a construction permit for which no application for a license to cover could ever be filed because the broadcast facilities, as then authorized, could not be built and operated.

9. The happenstance that the Commission granted a construction permit for an allotment for which a facility cannot be built should not, and cannot, be the distinguishing factor that takes this case out of established precedent and policy. Here, MJBFI induced the Commission to grant the construction permit with full knowledge that a facility might not be able to be built for the Mr. Juliet allotment. MJBFI expressly acknowledged that the

construction permit might not be able to be legally built by accepting its construction permit with the FAA condition specifically placed upon it.

10. In San Clemente the Commission deleted Channel 285A at San Clemente, California because the only site location that would accommodate the allotment was located on the grounds of Camp Pendleton and the U.S. Marine Corps would not approve the construction of a commercial broadcast tower on military property. 10 FCC Rcd 8291, paras. 2, 6. It is instructive to ask whether San Clemente would have been decided differently if the Commission had erroneously or conditionally granted the San Clemente construction permit, even though there was no site upon which it could be legally built. The answer is no, of course. The principal of law enunciated in San Clemente would remain the same. The deletion of the underlying allotment is appropriate where there is no site upon which a facility may be built. Likewise, in this case, there is no site from which a facility may legally be built.

11. It is not disputed that the allotment of Channel 294A at Mt. Juliet, Tennessee is defective. MJBI explicitly stated that the allotment of Channel 294A to Mt. Juliet cannot be implemented because of FAA concerns and thus "the Mt. Juliet allotment is technically defective." Reply Comments of MJBI, MM Docket No. 97-97, May 27, 1997, at 1; See also Comments of MJBI, MM Docket No. 97-97, May 12, 1997, at 2 ("the allotment of Channel 294A to Mt. Juliet is a technically defective allotment because it cannot be implemented due to predicted electromagnetic interference ("EMI") to FAA navigational radio facilities . . .") MJBI also declared in its February 21, 1997 modification application that

the allotment of Channel 294A to Mt. Juliet is defective because "it is not possible for WNPL to operate on Channel 294A from any location which will provide the required city grade coverage to Mount Juliet while also eliminating the FAA's concerns regarding EMI." MJBI's February 21, 1997 modification application, Section 1.0 of Engineering Statement. As such, the allotment of Channel 294A to Mt. Juliet, Tennessee is defective and should be deleted in accordance with Commission precedent.^{5/}

12. It is simply not in the public interest for the Commission to allow potential applicants to propose defective allotments and apply for broadcast facilities that cannot be built for such defective allotments. Allowing for defective allotments and the permittees of broadcast facilities for defective allotments to remedy the defect by contemporaneously filing petitions for rule making will lead to connivance and trickery that is not in the public interest. An applicant could seek a defective allotment and file an application for construction permit, knowing that a broadcast facility cannot be built for the applied for defective allotment. Then, the applicant could contemporaneously file a petition for rule making to reallocate its construction permit for the defective allotment to a much more desirable community of license and seek the modification of its construction permit to specify the more desirable community of license. By using this deceptive method, the applicant would obtain a more desirable broadcast facility, possibly without competing with other potential applicants, as other more forthright potential

^{5/} Defective allotments have been deleted even when there are pending applications. See e.g., East Hemet, California, 4 FCC Rcd 7895 (1989) (deletion of because East Hemet was held not to a community for allotment purposes).

applicants simply would not apply for a facility that cannot be built. If the Commission does not reverse the MO&O in this case, the Commission will allow for just this procedure, which is unarguably against the public interest.

13. In this case, MJBFI's application for construction permit specified Channel 294A for the defective Mt. Juliet, Tennessee allotment (FCC File No. BPH-891012MS). After the application was granted on August 14, 1995, MJBFI contemporaneously filed, on February 21, 1997, a petition for rule making to change WNPL's community of license from the defective Mt. Juliet allotment to Belle Meade, Tennessee and a modification application to specify operation of WNPL on Channel 294A, Belle Meade, Tennessee. Belle Meade, Tennessee is a more desirable community of license than Mt. Juliet because it is located contiguous to Nashville, Tennessee. In fact, the new WNPL transmitter site happens to be a tower it shares with Nashville television stations! Because a station in Belle Meade, Tennessee will be able to derive revenue from Nashville, Tennessee, it is much more valuable than a station in Mt. Juliet. If the Commission does not reverse the MO&O in this case, the Commission is effectively authorizing MJBFI to build a Nashville, Tennessee station without allowing other potential applications to compete for that facility. The Commission cannot, and should not, condone such deceptive practices which are contrary to the public interest.

14. The decision in the MO&O also involves an erroneous finding as it states that it would not be in the public interest to institute revocation proceedings on the WNPL construction permit. This finding erroneously assumes that a revocation proceeding would be necessary to reach the result of a deletion

of the allotment mandated by Commission precedent. Quite the opposite is true. MJBFI presently has a construction permit which cannot be built. MJBFI stated and acknowledged that the Mt. Juliet allotment is technically defective. MJBFI's construction permit has a definitive expiration date, and it will expire if a Mt. Juliet facility is not built and placed on the air. Upon expiration, no extension application may be legally granted to the construction permit, as such an extension application would seek the extension of a facility that cannot be built. Upon the expiration of the WNPL construction permit, the Commission must only declare it forfeited pursuant to Section 73.3599 of the Commission's Rules. No revocation proceeding is required, nor would it be appropriate, to reach the result of deleting the defective allotment mandated by Commission law and policy.

15. Upon a forfeiture of the WNPL construction permit, the area in which the Mt. Juliet allotment was first made would be open once again for either a possible new facility, or for other possible allotment changes. Upon the filing of an appropriate petition for rule making, the Commission can then consider, based upon what the public interest truly compels (and not what only satisfies the private interest of MJBFI), where, if anywhere, a new allotment should be made. Any public interest concerns over a delay in instituting service are negated by the Commission's proposed new auction authority for awarding new FM construction permits. It can be expected that once any new allotment is made, a construction permit that can be built will be quickly awarded to a qualified applicant. Therefore, public interest is fully served by the Commission, following its existing case and policy

precedent, deleting the defective Mt. Juliet allotment and not modifying the WNPL construction permit.

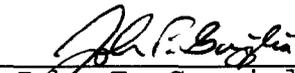
CONCLUSION

For the foregoing reasons, the Commission should reverse the Rules and Policy Division's Memorandum Opinion and Order, MM Docket No. 97-97, RM 97-9047, released October 31, 1997, delete the allotment of Channel 294A at Mt. Juliet, Tennessee, and rescind the grant of Mt. Juliet Broadcasting, Inc.'s February 21, 1997 modification application, specifying operation of WNPL on Channel 294A at Belle Meade, Tennessee.^{6/}

Respectfully submitted,

THE CROMWELL GROUP, INC.

By:


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December 19, 1997

^{6/} MJBI's construction permit for the defective Mt. Juliet allotment will simply expire on its expiration date. No extension may be granted as, by MJBI's own admission, the WNPL facility cannot be legally built. Thereafter, the construction permit should simply be declared forfeited by the Commission pursuant to Section 73.3599 of the Commission's Rules.

CERTIFICATE OF SERVICE

I, Lisa A. Skoritoski, a secretary in the law firm of Pepper & Corazzini, L.L.P., certify that the foregoing Application for Review was mailed on this 19th day of December, 1997 to the following by first class mail, postage prepaid:

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