

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(East Brewton, Alabama and)
Navarre, Florida))

MM Docket No. 97-233
RM-9162

To: Chief, Allocations Branch,
Mass Media Bureau

OPPOSITION TO MOTION TO DISMISS

Root Communications Group, L.P. ("Root"), by its attorneys, respectfully submits this Opposition to 550-AM's Motion to Dismiss Root's Comments in the above-captioned proceeding. Root requests that the Commission deny 550-AM's Motion to Dismiss because 550-AM has suffered no harm or prejudice from the possible two-day delay in the service of Root's Comments upon counsel for 550-AM.

Background.

550-AM requested a *Notice of Proposed Rule Making* ("NPRM") in the above-captioned proceeding. On November 21, 1997, the Commission instituted the NPRM, stating that any comments should be received by the Commission on or before January 12, 1998. In addition, the NPRM stated that copies of such comments were to be served upon the counsel for 550-AM, providing only the name and a post office box for the petitioner's attorney. In compliance with the NPRM, Root timely filed its Comments with the Commission on January 12, 1998, including a Certificate of Service showing service of its Comments on counsel for 550-AM.

On January 13, 1998, Root's counsel realized that its Comments might not have been mailed to counsel for 550-AM on the date as stated in the Certificate of Service, because of an administrative error. Root sought to remedy this situation by attempting to locate a facsimile number for 550-AM's counsel. Unfortunately, counsel for 550-AM is not listed in the Federal Communications Bar Association directory. Thus, Root mailed its comments to 550-AM on January 14. In the interim, Root's counsel received a telephone call from another communications attorney stating that he, too, represented 550-AM; Root's counsel faxed Root's Comments to that attorney.

Commission Precedent Allows Root's Comments To Be Considered in the NPRM.

550-AM seeks to have Root's Comments dismissed even though no prejudice resulted to 550-AM and 550-AM timely filed reply comments in the docket. 550-AM's request is contrary to Commission precedent.

In *Gareth F. Garlund*, 43 R.R. 2d. 1515 (1978), the Commission accepted a petition to deny which was not served on the applicant until one day after the filing date, although the certificate of service stated that the petition was properly served a day earlier. The Commission held that it did not appear that the applicant was prejudiced by the error or that the discrepancy was intentional. *Id.* at 1517. In *KSAY Broadcasting Co.*, 29 RR 2d 809 (1974), the Commission found that while the service requirements were not technically met, the objecting party made no showing of prejudice and had such a showing been made additional time for responding would have been granted. The Commission stated that "late service, amounting to a few days delay in service upon the applicants, does not render the petition procedurally defective as untimely." *Id.* at 813.

When counsel for Root realized that service might not have been properly effectuated, counsel attempted to effectuate service via a more expedient method -- facsimile. Unfortunately,

counsel for Root was unable to timely locate a facsimile number and proceeded to complete service upon counsel for 550-AM via first class mail. Counsel for Root had no intent to harm or prejudice counsel for 550-AM. Indeed, had counsel for 550-AM requested extra time to file its reply comments, counsel for Root would have readily consented. However, counsel for 550-AM did not request an extension of time and timely filed its Reply Comments in the docket. Because counsel for 550-AM has not established how it was prejudiced and harmed by the slight delay in service of Root's Comments, those comments should be considered in the NPRM and the Commission should deny 550-AM's Motion to Dismiss.

WHEREFORE, for the foregoing reasons, 550-AM's Motion to Dismiss should be denied and Root's Comments in the above-proceeding should be considered.

Respectfully submitted,

ROOT COMMUNICATIONS GROUP, L.P.

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February 13, 1998

CERTIFICATE OF SERVICE

I, Nellie Martinez-Redicks, a secretary at the law firm of Arter & Hadden, hereby certify that the foregoing Opposition to Motion to Dismiss has been sent, via first class mail on this 13th day of February, 1998 to the following:

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Nellie Martinez-Redicks