

ORIGINAL

Before The  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

In the Matter of	)	MM Docket No. 91-58
	)	
Amendment of Section 73.202(b)	)	RM-7419
Table of Allotments	)	
FM Broadcast Stations	)	RM-7797
(Caldwell, Texas, et al)	)	RM-7798

To: The Commission      **DOCKET FILE COPY ORIGINAL**

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**COMMENTS IN RESPONSE TO  
JUDICIAL REMAND**

Respectfully Submitted,  
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## S U M M A R Y

This case began approximately ten years ago with Roy E. Henderson seeking a channel upgrade for his assigned channel of 236A at KLTR(FM) in Caldwell, Texas, to 236C2, and a competing proposal by Bryan Broadcasting License Subsidiary to take the channel from Caldwell and use it for a second upgrade of its station KTSR(FM) in College Station, Texas. Despite the clear superiority of the Henderson proposal in terms of area and population that would receive new service, the Commission consistently found in favor of Bryan on the basis of its belief that Bryan fully met the city grade coverage requirements of 73.315(a) and that Henderson's proposal was not in 100% compliance. Despite the de minimis nature of Henderson's alleged non-compliance, the decision was awarded to Bryan.

Nine months prior to the Commission's final decision, Henderson filed a "Second Supplement" which described the recent discovery that Bryan's proposal would also fail to meet 73.315(a) and by a substantial amount of 8.4 % area and over 4,000 people. The Commission issued its final decision without considering those facts and the U.S. Court of Appeals agreed to remand the case back to the FCC for further consideration. Henderson argues that the present facts, including the recent disclosure as to Bryan, makes it clear that Henderson not only has the better proposal but by any measure is also vastly superior in compliance with 73.315(a). Henderson also suggests that Bryan's failure to disclose its true plans throughout the case, as well as the unexplained circumstances of the disclosure when finally admitted raise substantial questions as to Bryan's conduct in this case before the Commission. Henderson also points out a substantial factual error in the Commission's latest decision as well, discusses Rule 73.315(a) in general, objects to the disparate application of the rule at various levels of the Commission, and also refers to a new fact relevant to the 73.315(a) analyses.

Henderson argues that it is no longer a close case and that the Henderson proposal should be granted and the proposal by Bryan denied.

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On July 22, 1998, the Commission released a final decision in this case, Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Caldwell, College Station, and Gause, Texas) 13 FCC Rcd 13772 (1998), rejecting an Application for Review of prior orders that had been filed by Roy E. Henderson ("Henderson") and affirming a decision in favor of Bryan Broadcasting License Subsidiary, Inc ("Bryan"). 1/ On August 14, 1998, Henderson filed a Notice of Appeal of this decision and on March 4, 1999, the Commission requested and received a remand of the case back from the Court based inter alia, upon the Commission's acknowledgment that it had failed to consider a major pleading filed by Henderson (Second Supplement

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1/ It is noted here that during the ten year period during which this case has been before the Commission, the official licensee name of "Bryan" has been changed a number of times (e.g. Hicks Broadcasting Corporation, Bryan Broadcasting L.C., and Bryan Broadcasting License Subsidiary, Inc.) but that it has always been the licensee of KTSR(FM) in College Station and its ownership has remained constant and controlled by William R. Hicks, President, as it still is today.

to Application for Review filed by Henderson on September 29, 1997) which contained facts and argument most relevant to this proceeding. On April 9, 1999, the Commission released a letter recognizing the remand and indicating that any further Comments on this matter should be filed by April 29, 1999, and any Reply Comments by May 14, 1999. Roy E. Henderson, by his counsel, herewith files the instant Comments in response to that request.

**I. FACTUAL BACKGROUND OF THE CASE**

Given the time that has gone by in this case as well as the several decisions rendered, we think it appropriate, if not essential, to restate briefly where it all came from, the background of the proceeding. It involves two protagonists, Roy E. Henderson, Permittee of KLTR(FM), Caldwell, Texas, and Bryan Broadcasting, Licensee of KTSR(FM) in College Station, Texas. Caldwell and College Station are located approximately 15 miles apart and the stations would be competitors in the same general market.

In 1988 Henderson, one of two applicants for channel 236A in Caldwell, came to a settlement agreement with the other applicant and in March of 1988 they jointly filed a request for approval of that agreement with the Commission.<sup>2/</sup> Shortly thereafter, in April of 1988, Henderson filed a petition to upgrade the channel from 236A to 236C2. Approximately two weeks thereafter, on April

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<sup>2/</sup> The Joint Request was not acted upon by the Commission until December 16, 1988, when it was approved and the construction permit issued to Henderson.

21, 1998, Bryan filed its own mutually exclusive Petition for Rulemaking requesting the deletion of channel 236 from Caldwell for use as 235C2 by Bryan at KTSR in College Station.

From that point on, for approximately the next full year, Henderson and Bryan traded pleadings and counter-pleadings in Docket 88-48 as to which of the mutually exclusive proposals should be adopted. In early May of 1989, Bryan accepted payment from another proponent in Docket 88-48 and in return for that payment on May 15, 1989, it filed an Amendment to its Counterproposal, abandoning its request to take channel 236 from Caldwell, and instead requesting the Commission to upgrade KTSR from 221A to 297C3. Implicit in this request, as with all such rulemaking requests filed with the Commission, was the indication by Bryan that the new request was being made in "good faith" with a commitment to proceed to build that improvement if so allocated. By offering this Amendment, the conflict with Henderson was removed and with no further conflicts in Docket 88-48, it left that proceeding free to proceed to final decision.

On May 19, 1998, Henderson filed Comments in support of the Bryan Amendment, but on May 26, 1998, to Henderson's surprise, Bryan filed an Opposition to the Henderson pleading, providing the first indication that there might be more to Bryan's position than had been reasonably expected. On April 23, 1990, the Commission issued its decision in Docket 88-48, granting inter alia the amended request by Bryan for an upgrade of KTSR to channel 297C3, but taking no action either way upon Henderson's

request to upgrade channel 236 from A to C2 in Caldwell. Henderson filed subsequent appeals of the Decisions in Docket 88-48 requesting action on his own request but NOT challenging or opposing the upgrade granted to Bryan or anyone else in that proceeding. The Commission took the position that Henderson's petition could not be considered in Docket 88-48 since it had been filed before Henderson had received final FCC approval of the Joint settlement request and grant of his initial construction permit. With final decision on this by the Commission, Henderson did not file a judicial appeal and allowed the decision to become final.

On March 15, 1991, the Commission issued a new Notice of Proposed Rulemaking in the present proceeding (docket 91-58) proposing to upgrade Henderson's channel from 236A to 236C2. On May 6, 1991, Bryan, which still held its upgrade permit as requested and obtained in Docket 88-48, renewed its request to take channel 236 from Caldwell for its own use in a further upgrade of KTSR in College Station, essentially the identical proposal it had earlier "abandoned" as part of the settlement terms it had agreed to in Docket 88-48. Again the two parties traded pleadings and counter-pleadings, including an allegation by Bryan that questioned Henderson's full compliance with the city grade coverage requirements of FCC rule 73.315(a).

In response to a Commission inquiry on the coverage question, Henderson re-examined his proposal and determined that under the current corporate map for Caldwell, and using the

oldest and least precise method of computation (the f(50,50) rule) Henderson's proposal met the city grade rule except for an area of about 4% including the airport and some industrial buildings calculated by Henderson's engineer to include a population of approximately 25 persons. 3/ Henderson suggested that the deficiency from full 100% compliance with the rule was clearly de minimis and in view of the vastly superior coverage and service that would be gained by the Henderson proposal and not by the Bryan proposal, 4/ that the Henderson proposal remained vastly superior and should be granted. In this same Supplemental Information Response, Henderson questioned a disparity in application of the rule between different parts of the Agency with most informally accepting 80% as full compliance, but with no official modification of the rule as stated. On the other hand, Bryan argued that even a de minimis failure to meet 100% compliance with the requirements of 73.315(a) should be

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3/ As described by Henderson's engineer, "It is noted, by inspection and analyses,..[it] is de minimis, both in terms of total area, (less than 4%), and population, (at most 25 people) and consists mainly of a strip of land about 400 feet wide and approximately 1000 which encloses the runway of a local airport, and another small land area approximately 1500 feet by 2000 feet. Henderson Supplemental Information Response, filed May 4, 1992.

4/ The Henderson proposal would yield a C2 station in Caldwell, and a C3 station in College Station, providing a total new radio coverage to 11,130 sq. Km. and a population of 283,100 versus the Bryan proposal which would yield only a low powered Class A station in Caldwell, and a C2 station in College Station providing coverage to only 8,880 sq.km. and 262,500 population. Further, if an alternate proposal submitted by Henderson for Gause were adopted, the disparity and superiority over Bryan would be even greater since that would add the additional area and population coverage of an additional full powered Class A station to service proposed by Henderson.

fatal when compared to a proposal such as theirs, admittedly inferior in area and populations that would receive new service, but at least in full 100% compliance with the coverage requirements of 73.315(a).

On July 5, 1995, the Allocations Branch issued its decision in the case, finding in favor of Bryan and against Henderson on essentially that basis. Even though Henderson had a clearly superior proposal in terms of public service in both area and population, and even though the alleged failure to meet the strict 100% compliance with the city grade coverage requirements of 73.315(a) was de minimis, since Bryan indicated that it fully met the rule, it was their proposal that was preferred and was adopted. 5/

In two subsequent decisions, in response to Henderson's Petition for Reconsideration filed August 4, 1995 and Application for Review filed June 10, 1996, the Commission continued to make it clear that the pivotal and basic defining reason for preferring the inferior Bryan proposal over the superior Henderson proposal was purely and simply its belief (misplaced, it turns out) that Bryan's station would be in full and total compliance with the city grade requirements of 73.315(a) and that

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5/ This original decision was also infected with numerous substantive factual errors, all against Henderson's case, which were fully described by Henderson in his Petition for Reconsideration and partially addressed and corrected in a subsequent decision. A full description of the extent and substantive importance of the factual errors may be found in the Petition for Reconsideration filed by Henderson on August 4, 1995.

Henderson's would be in technical non-compliance, de minimis or not, still not 100% compliance.

The importance of this fact in the determination of this case cannot be understated. From the Commission's final decision in rejecting Henderson's Application for Review:

"...we are reluctant in this comparative rulemaking proceeding involving competing upgrade proposals to prefer an upgrade proposal failing to provide the requisite 70 dbu signal to 100% of its community of license, as Section 73.315(a) requires. We recognize that, where all else is the same, there would appear to be a preference for the proposed upgrade at Caldwell because it would serve an additional 48,755 persons while the upgrade [of Bryan] at College Station will provide service to an additional 22,908 persons. All else is not the same, however, for the College Station upgrade proposal fully satisfies Section 73.315(a) while Henderson's Caldwell proposal does not...Even if we were to characterize the [Henderson] shortfall in principal city coverage to be de minimis, we do not believe that waiver in this situation would be appropriate because it would prejudice a competing proposal [Bryan] in full compliance with Section 73.315(a) of the Rules." Memorandum Opinion and Order 13 FCC Rcd 13772 (1998) at paragraph 12, and at paragraph 18 of the same decision: "Henderson's Caldwell upgrade proposal would have provided service to an additional 48,755 persons. This is a significant public interest benefit. However, this does not support, in any way, a conclusion that the staff had made a finding that the Caldwell upgrade proposal was in compliance with Section 73.315(a) or that the staff would prefer that proposal over the competing [Bryan] College Station proposal that does comply with Section 73.315(a) of the Rules."

In sum, the clear and substantial superiority of Henderson's proposal in terms of service to the public, both in terms of area and population, has never been contested anywhere in this case, and the finding in favor of the inferior proposal of Bryan and against the superior proposal of Henderson has always been upon the Commission's belief that Henderson's proposal would in some

small way fail to meet 100% the requirements of 73.315(a), but that the proposal of Bryan, inferior as it may be, would meet those requirements 100%. It is now clear that that is dead wrong, that Bryan has finally been flushed out and forced to admit that its own proposal not only will fail to meet the requirements of 73.315(a), but will do so "big time", NOT de minimis, that their proposal will fail to place a city grade signal over 8.4% of their city of license, including 4,185 persons who would not receive a city-grade signal from Bryan.

That being the case, having been finally revealed and admitted by Bryan itself in its own July 15, 1997 "Amendment" to application filed with the Mass Media Bureau, that should be sufficient, in and of itself, to reverse any prior decision to Bryan and to grant the superior proposal of Henderson. There are however three other areas we wish to address: the role of Bryan in the Commission's continuing misconception as to who was in compliance with 73.315 and who was not; the substantive intent and purpose of 73.315 as first enacted and later modified; and the disparate application of the rule within various elements of the Commission.

## **II. THE ROLE OF BRYAN IN THE COMMISSION'S MISCONCEPTION**

First of all, we must assume that at this point the Commission is fully aware of the content of the Second Supplement to Application for Review filed by Henderson on September 29, 1997 as well as Bryan's subsequent Opposition and Henderson's Reply. We will not burden the record by repeating what was

disclosed there but will refer to it here. In the circumstances of this case, we believe that Bryan bears a heavy burden for at best a gross lack of candor and at worst, a deception upon the Commission. From the earliest time in this case, Bryan has repeatedly stressed the importance of total and complete compliance with 73.315 and sought to convince the Commission that even a small de minimis failure to meet that rule should be fatal when compare to another applicant that met the rule in full. At All times Bryan offered itself as that other perfect applicant, in full and total compliance with the rule, whose inferior proposal should be preferred over the better proposal for just that very reason, that Bryan met the rule in full and Henderson did not.

That was their position, that is what they led the Commission to believe, and upon that false belief the Commission ruled, not once but three times over several years in favor of Bryan. We now know for a certainty that the Commission was "had", that it was all so much baloney, a subterfuge carried out until the last possible moment when they finally were forced to admit their violation of the rule. But by that time they simply claimed it was "O.K." since they were now before the Mass Media Bureau which routinely held that 80% compliance was just fine and just as good as 100% compliance. So said Bryan when they finally revealed their true plan in the "Amendment" to their construction permit application filed on July 15, 1997. There seemed to be a certain amount of "gotcha" evident there, that they had successfully kept their true plan secret during all the time

where it would have been relevant to the FCC's decision and they were now "safely on the other side", where missing full compliance with the stated requirements of 73.315(a) by as much as 20% would somehow be considered the same as "full compliance". They would win the case on the false premise that they would be in full compliance with the city grade coverage requirements of 73.315(a) and by the time it was disclosed that that was not the case at all, it would be too late. Case closed and final. Except that an FCC staff member caught them and they were required to disclose their true plan before the case had become final.

As described and documented in the Second Supplement, Bryan's record in this proceeding on its compliance or non-compliance with 73.315(a) raises serious questions of candor, to say the least. It was obviously well aware of the city grade requirements and lost no opportunities to underscore those requirements and their importance when attacking Henderson's proposal. For all these many years, Bryan attacked Henderson's proposal, suggesting, and convincing the Commission, that even a de minimis failure to fully meet the rule was sufficient reason for the Commission to choose the inferior proposal which the Commission had been led to believe, would fully meet the rule. During all these years, Bryan was fully aware of the basis for the decisions in its favor and said nothing, corrected nothing.

Finally, subsequent to the Commission's denial of Henderson's Petition for Reconsideration, Bryan found itself at a point where it was expected to file an application for a

construction permit to comply with the upgrade it had been granted. It had no real choice on that point and finally, on January 21, 1997, filed an Application for Construction Permit (FCC Form 301) that finally was supposed to represent to the Commission what they actually intended to do. The application was very specific in terms of the site coordinates, the fact that it was a new tower being constructed at a location in full compliance with the city grade coverage requirements of 73.315(a), the height of the tower, that the FAA had been notified with a notification date of 10/6/96, and that no waivers of any kind were being requested.

The application was personally signed by William R. Hicks, President and controlling principal of Bryan. Two other points worth noting: While the application was typed, the questions and answers as to FAA notification were written in ink, and the application was dated 10/8/96 which means that although it was completed in early October of 1996, that they had sat upon the application for over three months while the Application for Review remained pending before the Commission.

When the application finally was filed on January 21, 1997, Bryan noted in its transmittal letter that the case remained on appeal, conveying we believe, the impression that there was no urgency to processing this application until the case was final.

Further, we believe that it is most significant that on that very same day a second application was filed by Bryan, this time one requesting an extension of time on their first upgrade (on

channel 297C3 as obtained in Docket 88-48). Most notable about this second application is the vivid description on page two of Exhibit 1 of the new tower being built for the second upgrade, how the "suitable site" had been found, how the construction had been discussed with tower construction companies, and how the application for that new construction permit on "the new tower" had been filed that same day. According to the exhibit, Bryan was reluctant to proceed right away with the new tower construction, just in case Henderson's appeal might be successful but that if and when Henderson's appeal was finally denied, then Bryan pledged to proceed "expeditiously" to build that new tower. As represented by Bryan there, that was clearly their intention: to build a new tower at a site in full compliance with all FCC rules. No questions and no qualifications at all. It all seemed to work so well if the Commission simply would just wait for the appeals to be completed and final.

The unraveling for Bryan occurred in the form of a letter from the Mass Media Bureau to Bryan on May 29, 1997. It seems that the Bureau had gone ahead in processing the Bryan application for construction permit and surprise, surprise, they could find no record in their files or FAA records 6/ of the tower described so specifically in Bryan's application for

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6/ This is not really surprising since it appears that despite the direct affirmation and representation of Bryan to the Commission in its application to the FCC, specifically written in ink, that it had in fact notified the FAA of its proposed new tower construction, that it really never had done that, the FAA having no record of any such notification. See Engineering Statement attached hereto.

construction permit and in its application for extension of time. Would Bryan please submit some further information on this?

On June 30, 1997, counsel for Bryan filed a letter with the Commission indicating that there had been "some confusion" on this. It turns out that the station really wouldn't be built at the coordinates listed in the application, it turns out that the new tower described there would not really be built, and it turns out that Bryan was actually planning to lease space on an existing tower at a different site. Oh. It was then indicated that an "amendment" would be filed within 14 days to straighten everything out.

On July 15, 1997, Bryan filed its Amendment which for the first time ever disclosed Bryan's true plans for the upgraded station. Rather than being located on a new tower that would fully comply with the city grade requirements of 73.315(a), they were really going to locate their station at a different site altogether, on an existing tower which would fail to provide city grade coverage to 8.4% of its city of license. In revealing this deficiency for the first time in this proceeding, Bryan simply referred to a letter from the Acting Chief of the Mass Media Bureau on July 16, 1986, which indicated that as far as the Bureau was concerned, anything over 80% city grade coverage would be considered as full compliance. So, since their deficiency had not been disclosed until they were before the Mass Media Bureau, that should make it all right. We don't think so.

In filing its Amendment, Bryan honestly answered question 12 of the engineering section of the form (page 19 of the application) where it asked if the applicant's proposed facility would meet the requirements of 73.315(a) and they honestly answered no, it would not. However, in the second part of that question, where it asks those who responded "no" to also supply the population of the city of license that would not receive city grade coverage, Bryan simply referred to its exhibit which did not supply that information.

This deficiency was referenced by Henderson in its Second Supplement which also directly questioned how a broadcaster with over ten years experience in the same city of license could possibly be "confused" and not understand the difference between a new tower at one site that met all the FCC coverage rules and an existing tower at a different site which did not meet those rules. And how that licensee/applicant could have been so "confused" in not one but two separate applications, both of which described the original proposal in vivid detail, and both of which were signed by the President of the company.

Although both of those questions cried out for further explanation by Bryan, Bryan was silent on both of them in its Opposition filed against the Second Supplement. It did not provide the population figures required by FCC Form 301, nor did it even try to offer any possible explanation for the alleged "confusion" to explain the false information contained in its applications.

Since Bryan continued to ignore the population data for the 8.4% area that it would not serve with a city grade signal, Henderson in his Reply pleading submitted that figure of 4,158 people as computed by Henderson's own consulting Engineer.

In sum, we are left with a proponent, Bryan, that by definition, was fully aware of the importance attached by the FCC in this proceeding to compliance with 73.315(a), that knew that the one and only reason it had prevailed in Commission decisions was the Commission's belief that Henderson failed to fully meet the rule, albeit de minimis, and that Bryan did fully meet the rule, and therefore the decision went to Bryan. Bryan knew that all along and offered no correction, said nothing and just let it go. Bryan has operated its station in College Station for over ten years and it is simply unbelievable that during all this time it did not know where it intended to locate the upgraded station it had requested. It knew its location inside out and there could be no question on that.

When it was finally required to file and disclose specific information as to its plans, the evidence appears to indicate more than just a continuing appalling lack of candor, but now outright deception by Bryan. It is simply inconceivable that an experienced broadcaster such as Bryan could not know or appreciate the difference between a new tower at a site that met the rule upon which they had "won", and an existing tower at a different site that egregiously violated that same rule and would obviously remove the very basis of their "win". How could an

experienced broadcaster sign and file two applications both extolling at length and in great specificity the new tower being built, only to retreat from that position when challenged by the Commission, and seek to explain it all by simply alleging "confusion"? Was it confusion or was it timing, with the amendment to the existing site that did not meet the rules not supposed to be filed until after the case became final? The burden clearly was upon Bryan to offer any other explanation on that and thus far it has chosen to remain silent.

Early in this proceeding Henderson suggested that it was inappropriate for Bryan to accept money in a settlement of Docket 88-48 to tell the Commission it was abandoning its proposal to take channel 236 from Caldwell, in favor of a new request for an upgrade on 297C3, which was granted by the Commission, only to warehouse that first grant and return in this docket to the same plan it had "abandoned" in Docket 88-48. This argument was totally rejected by the Commission in both the original decision by the Allocations Branch and on Reconsideration, which indicated that the representations made by Bryan in another proceeding were "irrelevant". We continue to respectfully disagree on that, and only point out here that this is the same applicant that has now constructed such a sorry record here, in this proceeding. We believe that to be not only relevant but dispositive.

Finally, as to this matter, the actions of Bryan, we must add a final thought. Having dealt with Bryan over these many years we have stopped being surprised at what it may do or what

it may say. While we might expect many adversaries in circumstances such as this to simply accept the fact that their charade has been discovered and to not take any further actions to compound what has already been done, that may not be the case with Bryan. With the subterfuge revealed, and the remand from the Court underscoring the seriousness of the discovery of their non-compliance with rule 73.315(a) and apparent coverup of that fact, it is possible that Bryan will now simply try to claim more "confusion" and seek to change the facts and "make it all right" by seeking to amend its proposal and construction permit to another site that would again claim compliance with 73.315(a). We want to make it clear here that we do not think that would make things any more "right" than a perjurer agreeing to tell the truth after having been caught.

Bryan "corrected" its confusion and admitted its violation of 73.315(a) while this case was pending before the Commission on an Application for Review and Henderson brought that fact to the Commission's attention at least nine months before a decision was issued. Through that time and through the appeal before the U.S. Court of Appeals the fact of Bryan's final proposal and the construction permit that had been issued on that final proposal remained as stated and that is where it should remain for the balance of this proceeding. Should Bryan seek to change its site now, after the judicial remand, it should not be allowed to do so and such a change should not, in any case be recognized for any purpose of the Commission's decision in this case. To allow such a change at this late stage of the case would be of obvious

prejudice to the rights of Henderson and as far as Henderson is concerned would constitute a clear abuse of the Commission's processes. Bryan made its commitment and must bear the consequences of its own actions. The bed that Bryan made was the bed that it chose to make and one in which it must now continue to lie.

Such late stage "post-hearing amendments" were impermissible and clearly forbidden in the former comparative hearing process and should for similar reasons be forbidden here. In addition, the Court of Appeals, which has retained jurisdiction of this case, has dealt with such matters before and soundly recognized them for what they were, rejecting them in no uncertain language:

We cannot allow [the applicant] 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. Colorado Radio Corp v. FCC, 118 F.2d 24, 26 (D.C. Cir 1941). See also the Commission's decision in Tidewater Teleradio, Inc. 24 RR 2d 653 (1962): "...Representations made to us...are not to be put forth as part of gamesmanship or for tactical advantage: they must be seriously advanced and seriously regarded in actual operation."

We wish to make our position clear here that we believe the case coming from the Court of Appeals should be considered frozen in its facts as it stood before the Commission on the Application for Review and before the Court on review and that any 11th hour attempt by Bryan to change those facts to gain some advantage beyond its case as stated at that time would be unacceptable and an attempted abuse of process that should be seen and treated as such.

**III. THE SUBSTANCE AND MEANING OF FCC RULE 73.315(a)**

As indicated above, we believe that the facts as now known leave no doubt whatsoever that the decision in this case must go to Henderson and not to Bryan. Henderson has the vastly superior service to the public in area and population and arguably fails to meet the city grade requirements of 73.315(a) by 4% of area over an industrial/airport runway area containing 25 persons, versus Bryan which not only has a substantially inferior service in terms of area and population, but, as has now been disclosed, fails to meet city grade coverage by 8.4% area including 4,158 persons. Without even considering the questionable circumstances surrounding the disclosure by Bryan of its true intentions in this case, the decision, just on the above facts alone, must be in favor of Henderson, and by a very wide margin.

Having said as much we are constrained to offer some further comment as to Rule 73.315(a) itself, which has already caused so much difficulty in this case. The original rule is over 35 years old and the purpose for which it was originally written has vastly changed. 35 years ago, when the rule was written, broadcast technology as to AM radio, and even more for FM, was primitive both for transmitters and receivers. Given that state of technology the Commission adopted city grade coverage rules for both AM (73.24(i)) and FM (73.315(a)) setting a propagation standard that the Commission, at that time, believed to be required to assure a good quality receivable signal over the

principal community. In each case, the stated signal requirement was 100% over all the city.

Within ten years of adoption, the Commission realized that the signal requirement level for AM radio was unrealistically and unnecessarily high, and that an 80% coverage by that high a signal level had been shown to be more than adequate to assure a good and serviceable signal covering the entire principal community, the very stated purpose of the original rule. That being the case, the Commission changed the 100% requirement for AM to 80% in rule 73.24(i) In Re Amendment of Part 73 of the Commission's Rules, Regarding AM Station Assignment Standards and the Relationship Between the AM and the FM Broadcast Services, 39 FCC 2d 645 @670 (1973). At that time FM was still an unknown and untested service utilizing bad transmission and bad receivers and suffering "picket fence" and fading problems in the best of cases and no action was taken on it.

As years went by and FM technology both for transmission and reception undertook giant strides, it became equally apparent that the required signal level for city grade coverage for FM was also unrealistically high and was recognized as such in an informal letter from the Acting Chief of the Audio Services Division of the Mass Media Bureau to Southwest Communications, Inc., dated July 16, 1986. In that letter the Bureau cited the Commission's Hearing Designation Order in John R. Hughes et al., 50 Fed Reg. 5679 (1985) that referred to its 1973 Report and Order (supra) and had reverified in that AM case that an 80%

compliance with the AM coverage rule was sufficient to meet the purposes of the rule and would be considered as full compliance.

With that citation, the Bureau, in its informal letter, extended that logic and informal modification of the rule to FM cases, holding that 80% compliance with the rule as written met the purposes of the rule and would be considered as full compliance. Since that time the Bureau has followed that modification of the rule although, to the best of our knowledge, the informal letter was never published in the Federal Register. Moreover, although the change was informally adopted in 1986, 13 years ago, Rule 73.315(a) has never been changed or modified to reflect that revision and, as to the public at large, referring to the rule as reprinted several times over in the Code of Federal Regulations, it continues to indicate 100% compliance as required. No exceptions.

Against this background we have the Allocations Branch claiming full compliance required as stated in the rule and the Mass Media Bureau on record as accepting 80% as "full compliance". That this would lead to bizarre results should not be surprising. In the instant case we have a hybrid proceeding involving both the Allocations Branch and the Mass Media Bureau in the same case. Originally presented to the Allocations Branch, it decides who gets what and as part of that decision, directs the prevailing party to file an application with the Mass media Bureau to reflect the change. Using two different interpretations

of the same rule within the same agency, you get this kind of result:

The best of the proposals will be rejected in favor of the inferior proposal because the best proposal would (arguably) miss 4% area and 25 people with its city grade signal coverage, except that it is then found that the inferior "winning" proposal would itself miss **8.4% area** and well over **FOUR THOUSAND** people with its city grade signal. Huh? Explain that one to the people in Texas, or for that matter to anyone, anywhere.

Bryan claimed in its "amendment" when it disclosed its substantial deficiency that such a deficiency was "O.K." for them since it had not been disclosed until the case had reached the Mass Media Bureau with its relaxed view of the rule, the self same rule which earlier in the very same proceeding had been used to hammer Henderson on an allegation of a de minimis non-compliance.

This cannot be. The Commission should not countenance varying applications of the same rule by different parts of the same agency, not to mention the "informal" but very substantive modification of a rule over 13 years ago never reported and never codified in the rule for the benefit of the public at large. We see no excuse for this. Moreover, the uneven application of the same rule by different parts of the same Agency appears to be directly contrary to the rights of Henderson and every other member of the public to fair and equal treatment at all levels of the Agency, Melody Music Inc. v. FCC, 345 F.2d 730 (D.C. Cir., 1965); Green Country Mobilphone v. FCC, 765 F.2d 235 (D.C. Cir., 1985).

**IV. OTHER RELEVANT MATTERS**

In the course of this proceeding, questions were raised at times as to Henderson's site availability and acceptability of that site for a broadcast transmitting tower. Well prior to the first decision in the case, Henderson had submitted written documentation of the site owner confirming Henderson's right to the site and also referring at that time to the fact that the site was already being used by a tall radio broadcast tower fully acceptable to the FAA. In the first decision, the Commission simply ignored those facts of record (among others, all as fully described in Henderson's Petition for Reconsideration) but seemed to recognize them in its decision responding to the Petition.

Having thought that was finally put to rest, we were surprised by the new unfounded assertion in the Commission's Memorandum, Opinion and Order denying Henderson's Application for Review to find a new allegation as to the tower site which similarly has no basis in the record, none cited in the decision, and is once again simply wrong. Specifically, the Commission refers to the existing tower at Henderson's site as being "only 59 meters in height above average terrain", too low to be considered as an indication that the FAA would also approve Henderson's tower. We must wonder where this allegation came from.

In the Engineering Statement attached hereto, Henderson's Consulting Engineer again confirms the existence of an FAA approved tall tower at Henderson's Site and includes as an

attachment to his Statement a copy of a page from the Commission's own Data Base which confirms conclusively, and without a doubt the existence of a broadcast tower already located on the same Dryden property 1.2 miles west of Henderson's own reference site at a height of 152 meters above ground at a site elevation of 114 meters. And that tower has been there since 1983.

This gives the existing tower an overall height of 266 meters above mean sea level. The tower is registered with the FCC bearing registration number 9320 and was approved at that site by the FAA in 1983 (FAA Study Number 83-ASW-0208-OE). Henderson's proposed tower height is only 244.3 meters above mean sea level. That is 21.7 meters lower than the existing tower long approved by the FAA. All of this information is readily available on the FCC's own data base as attached herein to the Engineering Statement. We submit that the facts of record prove beyond a shadow of a doubt that Henderson's site is not only secure and fully available to him but also fully acceptable to the FAA.

**V. A NEW FACT RELEVANT TO THE 73.315(a) ANALYSES**

Finally, in the interests of the Commission having a full record on this case, we also point out that the attached Engineering Statement also notes that a proposal has been placed on file with the Commission requesting a downgrade of the existing channel allocation in Victoria, Texas, the effect of which would be to open up a large new site area in Caldwell well

within any definition of city grade coverage (see attached Engineering Statement). Henderson would propose to take full advantage of any change, resolving forever the question of complete city grade coverage of Caldwell from its present specified location. Although recognition of this change is not necessary in resolving the case in favor of Henderson's proposal under the present factual circumstances described herein, it is simply noted as one more relevant factor developing in this case.

#### **VI. SUMMARY AND CONCLUSION**

Henderson submits that in its present posture, with Bryan's true position finally revealed, resolution of the case on any basis should be in Henderson's favor and by a wide margin. This is without even taking into account the appalling lack of candor exhibited by Bryan throughout this case, with its true intentions revealed only at the last possible moment and with the greatest reluctance.

This is without even considering how an experienced broadcaster could seriously say to the Commission that it did not understand the difference between constructing a new tower in compliance with FCC rules at one site and constructing the station at an existing tower at a totally different site that did not meet the FCC Rules, that such differences were "confusing" to this longtime broadcaster, leading it to file not one but two separate applications on the same day including false and misleading information as to its intended construction plans. The Commission may draw its own conclusions from those facts and may

well decide that it should require Bryan to reveal a bit more about this "confusion". In any event, Bryan should not in any case be "rewarded" for such actions and its pending proposal for a second upgrade on channel 236 should be denied and summarily dismissed.

The disparate application of 73.315(a) by different parts of the same agency has invited the abusive actions of Bryan, and the incentive for such gamesmanship by an applicant should be removed forever by revisiting the requirements of 73.315(a) and restating those requirements in a reasonable way and in the open for all to see by formally revising the rule as is desirable. In the meantime, the mischief resulting from the disparate and unreasonable application of this rule should be recognized here. Henderson's proposal is far and way the best, not just for Henderson but for the listening public whose interests are supposed to be paramount in any decision by the Commission. To deny the substantial "significant public interest benefit" (The Commission's words) of additional service (beyond Bryan's) of the Henderson proposal to the additional 25,000 people in an area of 2,250 additional square kilometers of area in South Texas, on the basis of an alleged 25 people in 4% of the city of Caldwell not receiving a city grade signal, long recognized in both AM and FM as an unnecessarily high requirement far beyond the reality of the original purpose of the rule, is simply indefensible. To continue to deny such service to the public on that basis would be contrary to law, contrary to logic, and contrary to common

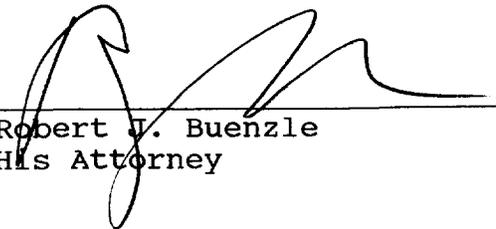
sense. To do so in this case in favor of Bryan would be simply unconscionable.

Henderson has tried to restrict its additional comments here to matters most relevant to the case in its present posture and consistent with the judicial remand. We note however that we reiterate here, reaffirm, and incorporate by reference all of our earlier arguments in this case, most especially the Supplemental Information Response filed 5-4-92; the Response to order to Show Cause filed 10-7-94; the Petition for Reconsideration filed 8-4-95; the Application for Review filed 6-10-96; the First and Second Supplements to that Application For Review filed 6-12-97, and 9-29-97, respectively; as well as all Reply pleadings filed by Henderson relative to those pleadings.

Wherefore, in view of our arguments there and in the instant pleading, we submit that the Commission's prior Decision which denied Henderson's Application for Review and granted Bryan's proposal, was based upon erroneous facts and law, and should be reversed. Henderson's proposal is in the public interest and should be granted.

Respectfully Submitted,

**ROY E. HENDERSON**

by   
Robert J. Buenzle  
His Attorney

Law Offices  
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April 29, 1999

**Roy E. Henderson  
Post Office Box 590209  
Houston, Texas 77259**

**Engineering Statement  
Caldwell, Texas  
MM Docket 91-58  
April 1999**

**(c) 1999  
F. W. Hannel, PE  
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STATE OF ILLINOIS            )  
                                  )  
COUNTY OF PEORIA            )            SS:

F. W. Hannel, after being duly sworn upon oath, deposes and states:

He is a registered Professional Engineer, by examination, in the State of Illinois;

He is a graduate Electrical Engineer, holding Bachelor of Science and Master of Science degrees, both in Electrical Engineering;

His qualifications are a matter of public record and have been accepted in prior filings and appearances requiring scrutiny of his professional qualifications;

The attached Engineering Report was prepared by him personally or under his supervision and direction and;

The facts stated herein are true, correct, and complete to the best of his knowledge and belief.



April 28, 1999

---

F. W. Hannel, P.E.

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**Roy E. Henderson  
Post Office Box 590209  
Houston, Texas 77259**

**Engineering Statement  
Caldwell, Texas  
MM Docket 91-58  
April 1999**

**This firm has been retained by Roy E. Henderson, permittee of Radio Station KLTR(FM), Caldwell, Texas, to prepare this engineering statement in the above captioned proceeding. The Commission has requested comments in the above captioned proceeding after Henderson filed an appeal in U.S. Court of Appeals of the final Report and Order in this proceeding which denied Henderson's proposed upgrade of KLTR(FM) from FM Channel 236A to FM Channel 236C2 and granted a competing proposal which allotted FM Channel 236C2 to Radio Station KTSR(FM), Bryan, Texas.**

**As an initial matter, it should be noted that the basis for the rejection of the Henderson proposal for the upgrade of KLTR(FM) is that the Henderson proposal fails to cover the entire community of Caldwell, Texas, with the required 70 dbu signal intensity. As has been shown by Henderson, if the Commission's f(50,50) curves are used in performing the analysis from the allotment reference site, only approximately 4 percent of the community is not illuminated by the required signal intensity. Examination of that area reveals that there are approximately 25 persons residing in the area not covered, and most of that area is composed of an airport and an industrial strip on the westernmost city limits. When analyzing the proposal utilizing the provisions of Tech Note 101, the entire community is apparently included within the 70 dbu contour.**

**To insure that the allotment site would be available to Henderson for use in constructing a tower, Henderson contacted the landowner on several occasions. On the first occasion, Henderson was advised that a tower near his reference site would be available for his use. KTSR(FM) then claimed that the landowner did not own the tower and that the tower owner was not willing to allow Henderson to use the existing tower to**

support the KLTR(FM) antenna. In order to lay the matter to rest, Henderson then obtained the consent of the landowner to construct another tower at the allotment reference site. In a verbal communication with the FAA, Henderson's engineer was advised that since the proposed tower was very close to an existing 152 meter tower, there should be no problem obtaining FAA approval for the construction of a tower by Henderson. As a result of Henderson's efforts, he had written site approval, which assured of the availability of a specific tower site, assured that there would be no problem with FAA approval, and that his proposal provided adequate coverage to the community of Caldwell, Texas, even if the Commission assumed that the coverage excluded a mere 4 percent, (approximately 25 persons), of the community.

In the Commission's final Report and Order, the Commission indicated that the only tower in the vicinity of Henderson's proposed site as a tower 59 meters in height above average terrain<sup>1</sup>, and that the use of actual terrain was not justified in this case. It would appear that each of these conclusions is not correct. As shown above and in the record of this case, Henderson had the consent of the landowner, the site was in the immediate proximity of a 152 meter tower and his proposal provided adequate coverage of the community of Caldwell, Texas. The Commission did conclude that even if he had all of the assurances above, that his proposal still included at least a de minimis coverage deficiency for Caldwell, (4 percent area, and 25 persons).

Following the release of the Public Notice granting the KTSR(FM) proposal, KTSR(FM) on January 21, 1997, filed an Application for Construction Permit seeking authority to construct a new tower to support the antenna for FM Channel 236C2 at coordinates N30-45-35, W96-27-56, a location meeting all city grade coverage requirements. As part of this application, KTSR(FM) included a specific claim that it had filed a request for FAA Clearance on that tower, even providing a filing date of 10/6/96. The FAA in Fort Worth, Texas, has no record of any filing whatsoever of FAA

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<sup>1</sup> See attached Exhibit E-1, a printout of the Commission's WTB database which shows that the Commission's files contain data on the 152 meter tower located on the Dryden property. This tower is clearly not 59 meters as is claimed in the Commission's Report and Order.

Form 7460 for a tower of any kind at the coordinates listed on that application, on the date indicated or any other date.

The site later specified in an amendment by KTSR(FM) which proposed that the antenna be placed on an existing tower does not provide city grade coverage to the entire community of license, as is freely admitted in the application itself. Specifically, the 70 dbu contour excludes 8.4 percent of the area containing 4,158 persons in the community of license. The ironic outcome here is that in this one proceeding the superior Henderson proposal was denied because he, arguably, missed 4 percent of the area containing 25 persons in favor of an inferior competing party who, as it turns out, will miss 8.4 percent and 4158 persons.

As a final matter, Henderson notes that there have been substantial changes in the FM Table of Allotments since this proceeding began which would completely obviate any city grade issues in this case. Attached as Exhibit E-2 is an FM Channel Study conducted on FM Channel 236C2 at the US Atlas listed community reference coordinates for Caldwell, Texas, N30-32-06, W96-41-36. Examination of this search reveals that the Commission has a proposal on file to downgrade the facilities of Radio Station KVIC(FM), Victoria, Texas, from FM Channel 236C1, to FM Channel 236C3 to accommodate an upgrade at Comfort, Texas. This downgrade would allow Henderson to construct a facility at the city reference co-ordinates on FM Channel 236C2 which meets all of the Commission's minimum mileage separation requirements as well as removing any doubt whatsoever regarding Henderson's ability to provide the community of Caldwell, Texas, the required 70 dbu coverage of the entire community.

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 Houston, Texas 77259

Engineering Statement  
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Exhibit E-1



**Federal Communications Commission**

**Site Results [WTB LAND MOBILE DATABASE]**

<b>Additional</b>	<b>Lat</b>	<b>Lon</b>	<b>ID Tower</b>
<b>FREQUENCY</b>	304535N	0962800W	9320
<b>Page</b>	<b>Street</b>	<b>City</b>	<b>County</b>
1	2 KM NW OF INT HWY 6 & S A RD	BRYAN	BRAZOS
<b>State</b>	<b>Hgt Elev</b>	<b>Hgt Structure</b>	<b>Radius Op</b>
TX	114	152	0
<b>Status</b>	<b>Area Op Lat Lon</b>	<b>Op Code</b>	<b>Faa Study No</b>
			83-ASW-0208-OE
<b>Area Op Tx Ant</b>	<b>Type of Structure</b>	<b>Pls 1</b>	<b>Pls 2</b>
	TOWER	1	3
<b>Pls 3</b>	<b>Pls 4</b>	<b>Pls 5</b>	<b>Pls 6</b>
4	13	21	
<b>Pls 7</b>	<b>Pls 8</b>	<b>Pls 9</b>	<b>Pls 10</b>
<b>Pls 11</b>			

This site is 0.23 miles from the Caldwell, Texas, reference site.

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FM Channel Study  
 N30-32-06  
 W96-41-36

Exhibit E-2

CALL	CITY	ST	CHN	CL	S	DIST	SEPN	BRNG	CLEAR
ALC	Luling	TX	234	C	U	132.0	105.0	224.1°	27.0
KAMX	Luling	TX	234	C	L	108.8	105.0	257.5°	3.8
ALC	Comfort	TX	236	C2	U	227.6	190.0	253.9°	37.6
ALC	Caldwell	TX	236	A	U	0.0	166.0	0.0°	-166.0
ALC	Victoria	TX	236	C1	U	195.8	224.0	187.1°	-28.2
KLTR	Caldwell	TX	236	C2	A	32.7	190.0	41.3°	-157.3
KLTR	Caldwell	TX	236	A	D	8.3	166.0	36.6°	-157.7
KLTR	Caldwell	TX	236	C2	A	28.6	190.0	11.3°	-161.4
KLTR	Caldwell	TX	236	A	C	11.1	166.0	76.4°	-154.9
KRNH	Comfort	TX	236	C2	L	224.7	190.0	250.4°	34.7
KTSR	College Station	TX	236	C2	A	41.0	190.0	40.3°	-149.0
KTSR	College Station	TX	236	C2	C	33.1	190.0	41.1°	-156.9
KVIC	Victoria	TX	236	C1	L	195.8	224.0	187.1°	-28.2
KVIC	Victoria	TX	236	C3	A	195.8	177.0	187.1°	18.8
KYKR	Beaumont	TX	236	C1	L	249.9	224.0	99.9°	25.9
ALC	Austin	TX	238	C1	U	108.8	79.0	257.5°	29.8
KCKR	Waco	TX	238	C	L	118.6	105.0	337.2°	13.6
KCKR	Waco	TX	238	C	L	107.1	105.0	324.5°	2.1
KKMJFM	Austin	TX	238	C1	L	108.8	79.0	257.5°	29.8
KKMJFM	Austin	TX	238	C1	C	108.8	79.0	257.5°	29.8
KKMJFM	Austin	TX	238	C1	L	108.8	79.0	257.5°	29.8

All Distances in Kilometers

CERTIFICATE OF SERVICE

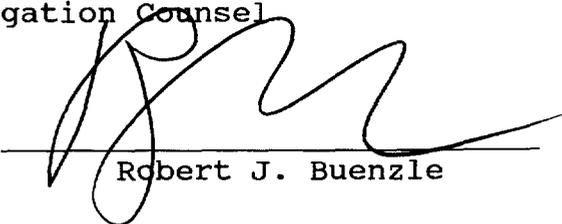
I, Robert J. Buenzle, do hereby certify that copies of the foregoing COMMENTS IN RESPONSE TO JUDICIAL REMAND have been served by United States mail, postage prepaid this 29th day of April, 1999 upon the following:

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