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FEDERAL COMMUNICATIONS COMMISSION
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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

MOTION TO STRIKE
BRYAN BROADCASTING LICENSE SUBSIDIARY, INC.
"SUPPLEMENT TO COMMENTS ON REMAND"

On November 24, 1999, Bryan Broadcasting License Subsidiary, Inc. ("Bryan") filed a pleading styled as a "Supplement To Comments On Remand". For the reasons set forth below, Roy E. Henderson ("Henderson"), moves that the Bryan Supplement To Comments on Remand be stricken and rejected for filing in this proceeding.

The Bryan Supplement is just the latest in what seems like a never-ending series of pleadings by Bryan relating to the nomination or loss of its transmitter site du jour (it is now on its fourth proposed site). There are several problems with this: First of all, it has long been Commission policy in any comparative type case, which this is, 1/ to not allow amendments to the factual proposal of any party once the case has been considered, decided, and on appeal. The only exception to this

1/ See paragraph 12 of the Commission's Memorandum Opinion and Order, 13 FCC Rcd 13772 (1998) where the Commission specifically recognized this case as a "comparative rulemaking proceeding" (emphasis supplied)

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policy was where a party could show that the change was not foreseeable, beyond the control of the party proposing the amendment, and that the party seeking to amend had acted with diligence in seeking to cure the defect. Even there, if the amendment were allowed, it could not be recognized or relied upon for any comparative purpose, the original proposal being held as the "high water mark" for any purpose in the comparative case. Further, if the defect were a disqualifying one, an amendment was generally not allowed at all.

Throughout the early part of this proceeding, Bryan led the Commission to believe that its proposal would fully meet the requirements of FCC Rule 73.315(a). Consistent therewith, when it filed its initial application for construction permit in October of 1996, pursuant to its selection over Henderson in the rulemaking proceeding, it proposed construction of a new tower fully compliant with all FCC Rules. At that same time, it requested an extension of time so that it would not have to proceed with the construction until the case was final, basing that request upon the substantial cost that it would have to bear in "building" "its" tower.

When the Commission staff discovered that there was no record of such proposed tower construction either in its file or in the FAA file, Bryan quickly "amended" its proposal in July of 1997, now specifying leasing space on an existing tower that also just happened to miss compliance with 73.315(a) by a wide mark (8.4% area and 4,158 persons). Bryan's position was that that was

fully acceptable to Bryan and should also be fully acceptable to the FCC since it was not disclosed until the application phase of the case. 2/ In any event, the Mass Media Bureau proceeded to issue a construction permit to Bryan for that non-compliant site on March 20, 1998, and Bryan was more than content to hold and extend that permit for more than a year, until a little over one month after this case was remanded back to the FCC from the Court of Appeals when Bryan decided it was time to seek to amend again to a fully compliant site. For the reasons stated above, neither this 11th hour Amendment nor any of the subsequent amendments should be recognized for any purposes by the Commission in reaching a new Decision in this case.

In addition, beyond the general "no upgrade" policy that should apply in this case, there is also a further specific bar to any such proposed upgrades in this case, that being the Commission's statement in its Request For Supplemental Comments In Response To Court Remand (FCC 99-673, released April 9, 1999) where it said the following:

In the interest of administrative finality, no information submitted by a party concerning its proposal following the comment period [May 14, 1999] will be deemed of decisional significance.

Bryan's first attempt to change the facts of this case and to upgrade its position with a new site filed on April 19, 1999

2/ It was in response to this scenario that Henderson in September of 1997 filed his Second Supplement outlining deceptions and misrepresentations by Bryan in this incident, and it was this Second Supplement that the Commission failed to review in reaching its decision in July of 1998, leading to the present Judicial remand.

ended in failure when the FAA on June 28, 1999 declared the new proposed site as a "hazard" unacceptable to the FAA, and was reported by Bryan as such almost two months later. So much for that (the proposed third site).

Having failed with its third site, Bryan tried again on September 1, 1999, when it filed an application for its Fourth site. This proposed new site was filed almost four months after the date that the FCC stipulated that it would attach no decisional significance to any such filing. The filing was therefore not relevant and the Supplement as to FAA approval of the fourth site, filed approximately seven months after the May 14 closing date for any pleading of decisional significance, is likewise totally irrelevant and of no meaning in this proceeding. Whether this fourth site proposed by Bryan would be subsequently approved by the Mass Media Bureau is in any case a matter of speculation not relevant to this proceeding.

As such, the Supplement reporting on the FAA approval of the fourth site (as well as the Bryan "Reply" filed on September 1, 1999, suggesting the fourth site) is simply irrelevant to this proceeding as are prior pleadings by Bryan suffering the same basic defects. Although this fact has been repeatedly pointed out by Henderson (see, for example, Henderson's September 15, 1999, "Comments on Bryan Broadcasting 'Reply' Pleading" at page 7) Bryan continues to file such pleadings, burdening the record with matters which are unacceptable and by definition, "of no

decisional significance". As such, we move that this most recent filing simply be stricken from the proceeding.

The one thing that can be gleaned by Bryan's desperate gyrations is that its whole approach to alleged compliance with 73.315(a) and the various representations made on that subject have been shot through with repeated, patent and unmistakably deliberate deceptions and misrepresentations which the evidence indicates was submitted to mislead the Commission. We will not recount them all again here in detail since that has already been done in Henderson's "Reply Comments in Response to Comments of Bryan Broadcasting License subsidiary, Inc., And FCC Order DA 99-1050 Subsequent to Judicial Remand", filed by Henderson June 18, 1999. Suffice it to remind th Commission of the crown jewel of the deception, the representation by Bryan in October of 1997 that it was building a new tower in full compliance with FCC rules. At that time Bryan, in not one but two applications, referred at length to the new tower it was about to construct and, in fact, specifically relied upon the high cost of its proposed tower construction to seek an extension of time in which to construct to some time after the case had become final. Had the Commission bought that whopper and asked no further questions until after the case had become final, one can only guess how long after finality it would have then taken Bryan to show its true intentions and amend to lease a site on a non-compliant tower.

That, of course was not the case, and the FCC staff, to its credit, raised a question as to why the proposed tower did not appear in FCC or FAA data bases. In response to that inquiry, Bryan did not really answer the questions but simply avoided them by quickly abandoning its "new fully compliant tower" in favor of a leased spot on an existing tower that missed compliance with 73.315(a) by a wide mark but which Bryan now boldly suggested was fully acceptable for them at the application stage of this proceeding.

Bryan did not volunteer the information that its representation that it had notified the FAA of its tower construction had been totally false (This information was provided by Henderson in his Second Supplement), and of the utmost significance, Bryan did not admit that it **NEVER INTENDED TO BUILD ITS OWN TOWER, EVER**, until it was essentially **REQUIRED** to disclose that information in a filing with the Mass Media Bureau, NOT to the Commission, in an Opposition to Henderson's Informal Objection to their proposed amended site filed by Bryan on June 7, 1999. 3/ In that extraordinary pleading, Bryan finally admitted that it had never intended to build its own tower, and "suggested" that it was really hoping to go on a new tower that might be built by someone else, although even in Bryan's own pleading it seems that other person was not terribly

3/ Since Bryan had not favored the Commission with a copy of that pleading, for reasons that seem all too obvious, Henderson appended a full and complete copy of the Bryan pleading as Attachment One of Henderson's own Reply Comments filed with the Commission on June 18, 1999.

aware of that, since when this other person did build his tower at a different site, he never even mentioned it to Bryan and Bryan never asked. Doesn't that seem odd.

Henderson again requests that along with Henderson's Second Supplement filed on September 9, 1997, that the Commission be sure to also review the related pleadings i.e. the Bryan Opposition filed on October 14, 1997, and Henderson's Reply of October 24, 1997. Please note particularly, Henderson's repeated reference in the Second Supplement to Bryan's original tower that Bryan had proposed to build in its October, 1997 filings and the reliance placed upon that fact. Then note further that Bryan in its Opposition offers no "correction" whatsoever to that characterization of what it had said. Could there be any logical or acceptable explanation of that action or rather "non-action" by Bryan other than the fact that it was continuing in its concealment of its original deception, a deception not really disclosed and admitted to by Bryan until its Opposition to Informal Objection filed with the Mass Media Bureau (but not with the Commission) on June 7, 1999, almost three years after the false statements had first been made to the Commission by Bryan in October of 1996.

As noted, that is simply the most egregious of the misrepresentations made by Bryan in this case. When viewed as simply one of the elements in its entire sorry course of action in this case, it presents a clear and unmistakable picture of misrepresentation and abuse of the Commission's processes that

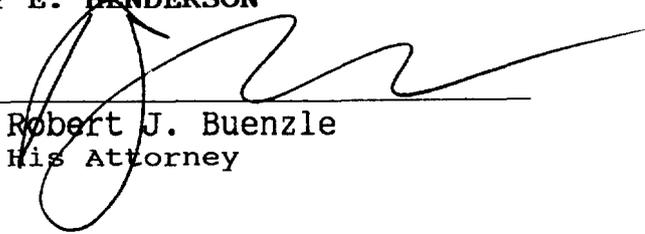
simply cannot be ignored. In that respect, we also request that the Commission give a close reading to Henderson's June 18, 1999 Reply Comments and the full record of irrefutable evidence of Bryan's extraordinary lack of candor, deception, and deliberate misrepresentations as documented therein.

In sum, Henderson submits that the pleadings being filed by Bryan are by the Commission's own definition, of no decisional significance in this proceeding. As such they should be ignored or stricken from the proceeding and Bryan admonished to cease and desist from filing further such pleadings. To the extent that such pleadings by Bryan may have already delayed the Commission's decision in this case, they are contrary to the public interest and should not be tolerated.

Wherefore, Roy E. Henderson submits that the Commission should strike the Bryan "Supplement To Comments On Remand" filed by Bryan on November 24, 1999, and proceed to render a Decision in this case in favor of Henderson's proposal, consistent with the remand by the U.S. Court of Appeals.

Respectfully Submitted,

ROY E. HENDERSON

by 

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December 8, 1999

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing MOTION TO STRIKE BRYAN BROADCASTING LICENSE SUBSIDIARY, INC. 'SUPPLEMENT TO COMMENTS ON REMAND' have been served by United States mail, postage prepaid this 8th day of December, 1999, upon the following:

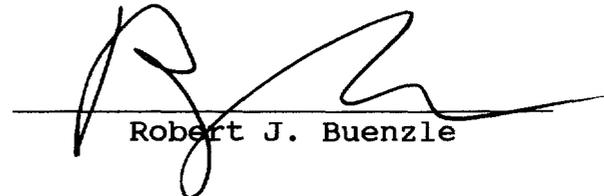
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