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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 96-7
Table of Allotments,	)	RM-8732
FM Broadcast Stations.	)	RM-8845
(Banks, Redmond, Sunriver and Corvallis, Oregon)	)	
	)	
In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 96-12
Table of Allotments,	)	RM-8741
FM Broadcast Stations	)	
(The Dalles and Corvallis, Oregon)	)	
	)	
In re Application of	)	
	)	
Madgekal Broadcasting, Inc.	)	File No. BPH-960206IE
Station KFLY(FM), Corvallis, Oregon	)	
	)	
For Construction Permit to Modify	)	
Licensed Facilities (One-Step Upgrade)	)	

To: The Commission

APPLICATION FOR REVIEW

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SUMMARY

Madgekal Broadcasting, Inc. ("MBI"), former licensee of Station KFLY(FM), Corvallis, Oregon, and Jacor Licensee of Louisville, Inc. ("Jacor"), current licensee of Station KFLY requests the Commission to review and reverse the *Memorandum Opinion and Order* released in this proceeding on January 26, 2001.

Specifically, MBI and Jacor request the Commission to approve the settlement under which the above-referenced application for modification of KFLY to specify Class C facilities shall be amended to specify Class C1 facilities (thereby clearing the way for effectuation of the allotment proposals advanced in MM Docket Nos. 96-7 and 96-12) in exchange for a payment of $950,000.00. Under the unusual circumstances of this case, the settlement is not contrary to the Commission's rules and is in the public interest. This settlement, contrary to the conclusion reached by the Allocations Branch, is not within the scope of Section 1.420(j) of the Rules. Approval of the settlement is consistent with the policy of the Commission and Congress encouraging settlements to avoid mutual exclusivity.

If the settlement is not approved, the Commission should reverse the Allocation Branch's decision to allot Channel *268C3 to The Dalles, Oregon. First, the conflicting proposed allotment of Channel 268C3 to The Dalles was raised by the Commission, not the petitioner, after MBI filed its application. Accordingly, Section 73.208(a)(3)(iii) should have barred any consideration of allotment of Channel 268C3 to The Dalles. Second, the facts before the Allocations Branch should have precluded allotment of Channel 268C3 at The Dalles. Those facts include (a) the availability of at least one reserve band frequency at The Dalles, (b) the liability of a fully spaced station operating on Channel 268C3 to provide a city-grade signal to all of The Dalles and (c) the

availability of a non-conflicting channel for allotment at The Dalles. Finally, the Commission should have dismissed the Channel *268C3 allotment proposal because of the petitioner's failure to provide, as required by the Notice of Proposed Rulemaking, an affirmative statement that it would build a tower of sufficient height to provide city-grade coverage to the community.

With the elimination of the proposed new allotment at The Dalles, the KFLY upgrade would be preferred over the conflicting upgrade proposal for KVMX at Banks, Oregon. Of course, instead of choosing between the two proposals, the Commission may resolve the case by approving the parties' settlement.

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To: The Commission

APPLICATION FOR REVIEW

Madgekal Broadcasting, Inc. ("MBI"), former licensee of Station KFLY(FM), Corvallis, Oregon, and Jacor Licensee of Louisville, Inc. ("Jacor"), current licensee of Station KFLY,[1] herein ask the full Commission to review the *Memorandum Opinion and Order* in this proceeding, DA 01-

[1] MBI, pursuant to the Commission's grant of BALH-19990622GI, assigned Station KFLY to Jacor on September 1, 1999. Although MBI is no longer an interested party with respect to the proposed modification of KFLY at issue in this proceeding, MBI is still an interested party with respect to the settlement agreement discussed herein.

179 (released January 26, 2001) ("*MO&O*").[2] Through the *MO&O*, the Chief of the Allocations Branch, Mass Media Bureau, denied MBI's Petition for Reconsideration of the *Report and Order* in the above-captioned proceeding, DA 98-612, 62 Fed. Reg.19663 (April 21, 1998) ("*R&O*"). In support of this Application for Review, the following is stated:

I. BACKGROUND

In this case, two broadcasters found their respective proposals before the Commission inadvertently to be in conflict. Each was seeking to significantly improve the coverage and thus value of its station. Confronted with this accidental mutual exclusivity and acting in good faith, the two parties negotiated a settlement and presented it for Commission approval. The Allocations Branch rejected the settlement, first in the *R&O* and then again in the *MO&O*. The Allocations Branch's ruling should be reversed. The settlement, arising under a very unusual set of circumstances, does not contravene the Commission's rules and is in the public interest.

On February 6, 1996, MBI filed an application for a one-step upgrade of Station KFLY from Class C2 to Class C status on Channel 268. Unbeknownst to MBI, its application was in conflict with a rulemaking petition looking toward an upgrade of Station KDBX-FM (now KVMX), Banks, Oregon, from Class C2 to Class C1 on Channel 298.[3] To accommodate the Banks upgrade,

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[2] A summary of the *MO&O* was published in the *Federal Register* on February 9, 2001, 66 Fed. Reg. 9679. Publication of that summary in the *Federal Register* constitutes "public notice" of the *MO&O*. 47 C.F.R. §1.4(b)(1). This Application for Review is being filed within 30 days of publication of the *MO&O* summary in the *Federal Register* and, thus, is timely. 47 C.F.R. §1.115(d).

[3] Subsequent to the filing of the petition, the Banks station was assigned by Common Ground Broadcasting, Inc. to American Radio Systems License Corp.("ARS"), which subsequently assigned the station to CBS Radio License Inc.("CBS"). The licensee is now a successor entity, (continued...)

substitution of Channel 269C2 for Channel 298C2 at Redmond, Oregon, was requested as was the modification of the license of Station KLLR, Redmond, Oregon, to specify the substitute channel. On the same day that MBI's application was filed, the Commission, in response to the Banks upgrade petition, released a *Notice of Proposed Rule Making and Order to Show Cause*, 11 FCC Rcd 1686 (Chief, Allocations Branch, 1996) (hereinafter "*Banks NPRM*").

After MBI filed its application, the situation became more convoluted due to the Commission's *sua sponte* presentation of a conflicting allotment proposal. On November 20, 1995, LifeTalk Broadcasting Association ("LifeTalk") filed a petition for allotment of FM Channel 256C3 at The Dalles, Oregon, and reservation of that channel for noncommercial educational use. Channel 256C3 would not have conflicted with MBI's upgrade application. But a week after MBI's application was filed, the Commission released a *Notice of Proposed Rule Making*, 11 FCC Rcd 1788 (Chief, Allocations Branch, 1996) (hereinafter "*The Dalles NPRM*"), proposing allotment of Channel *268C3, rather than Channel *256C3, because a station operating on Channel 256C3 supposedly would have covered only half of The Dalles with a city-grade signal.[4]

On March 28, 1996, the petitioners in the Banks/Redmond proceeding filed comments supporting their proposed allotments. On April 5, 1996, LifeTalk filed comments in support of the proposed allotment at The Dalles. Subsequently the FCC released a Public Notice

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[3](...continued)
Infinity Radio Infinity Radio Licensee, Inc.("Infinity"). The call sign of the station was first changed to KBBT-FM and then to KVMX. For the purposes of this petition, MBI will refer to the Banks station as "KVMX."

[4] LifeTalk's rulemaking petition did not propose Channel *268C3 as an alternate channel. It merely referenced in passing Channel 268C3 as one of three channels available for "commercial operation in the area."

noting the conflict between the MBI application and the Banks/Redmond proposal and The Dalles proposal. Public Notice, Rpt. No. 2135 (released June 5, 1996). The Public Notice also called for comments regarding the MBI application.

MBI filed comments on July 5, 1996, stating that if no alternative channels were available for allotment at Redmond and The Dalles, the public interest would be better served by granting the application to upgrade KFLY.

In response to the Public Notice regarding KFLY's application, the Banks/Redmond proponents proposed a new reference point for Channel *268C3 at The Dalles and a Class C1, rather than a Class C, upgrade for KFLY. The Banks/Redmond proponents also argued that if their "global solution" was not adopted, the upgrade of the Banks station and the allotment of a new noncommercial frequency to The Dalles should be preferred over the upgrade of KFLY -- notwithstanding that KFLY, operating with Class C facilities, would serve an additional 325,969 persons, compared to an aggregate net gain in service area population of 270,406 persons from the upgraded allotment at Banks and the new allotment at The Dalles.

After the record closed, ARS and MBI reached a settlement to remove the conflict between the KFLY upgrade application and the Banks/Redmond allotment proposal. On March 20, 1997, the settlement was filed with the Commission along with a joint request for its approval. Under the settlement, if approved by the Commission, MBI's application would be amended to specify Channel 268C1, instead of Channel 268C. In return for doing so (and thereby clearing the way for adoption of the Banks/Redmond allotment), MBI is to be paid $950,000.

In their joint request for approval, MBI and ARS argued that the agreement to modify MBI's application was not a request for withdrawal or dismissal of "an expression of interest" within the

meaning of Section 1.420(j) of the Commission's Rules. The parties also argued that Section 73.3525 of the Rules was not applicable because there was not a conflict between two construction permit applications. Rather, there was only a single application involved -- MBI's. No opposition to the joint request was filed.

On August 26, 1997, MBI and ARS filed further comments in support of the petition. Therein, they took note of the Commission's then-recent decision in *Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253 (1997), in which the Commission, following the directive of Congress in Section 3002(a)(3) of the Balanced Budget Act of 1997, waived Section 73.3525(a)(3) of the Rules to permit settlement payments in excess of the dismissing applicants' reasonable and prudent expenses. In their joint comments, MBI and ARS noted that Congress had obligated the Commission to try to eliminate mutual exclusivity through the use of, inter alia, negotiations. *See* CONG Rec. Daily Ed. (July 29, 1997) H6173 (discussion in Conference Report of Commission's continuing obligations under Section 309(j)(6)(E) of the Communications Act to "use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings").

The *R&O* rejected the ARS/MBI settlement as being in conflict with Section 1.420(j) of the Rules. The *R&O* also held that from the alternate antenna site ARS proposed for Channel *268C3 at The Dalles an extraordinarily tall tower would not be necessary. On the basis of that conclusion, the *R&O* declared moot the question whether LifeTalk's petition should be dismissed. Thereafter, the Commission comparatively considered the proposed allotments at The Dalles and Banks versus the KFLY upgrade and concluded that combination of the Banks and The Dalles proposals would better serve the public interest.

MBI's Petition for Reconsideration followed. In that pleading, MBI, which was still the licensee of Station KFLY at the time, argued (a) the Allocations Branch should have approved the settlement presented and (b) if it did not approve the settlement, allotment of Channel *268C3 to The Dalles (and thus rejection of MBI's upgrade application) was in error because several critical facts had not been properly considered. In a pleading filed June 30, 1998, CBS, which had succeeded ARS as licensee of KVMX, supported MBI's arguments in favor of approving the settlement but opposed its arguments with respect to The Dalles allotment.

In its *MO&O,* Allocations Branch rejected all of MBI's arguments, leading to the filing of this Application for Review.

II. RELIEF REQUESTED

MBI urges the Commission, upon due consideration of the facts, law, and equities presented, to approve the settlement agreement presented by MBI and Infinity's predecessor in interest, ARS. If the Commission declines to bring this case to an end by approval of the settlement, the above-captioned application for modification of KFLY should be granted.[5]

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[5] By way of background, on May 15, 1998, MBI tendered a one-step upgrade application for KFLY (BPH-19980515IC) specifying Class C1 facilities at the same site identified in BPH-960206IF. In an accompanying transmittal letter, MBI stated that the modification application was being submitted as an interim measure because final resolution of this proceeding may take a substantial amount of time. MBI requested, to the extent necessary, waiver of Section 73.3517 and Section 73.3518 of the Rules. The Commission granted BPH-19980515IC on September 28, 1998. Subsequently filed construction permit and license applications to correct the coordinates of KFLY facilities currently in use (BPH-19990512IJ and BALH-19990512KC) were submitted. Subsequently , MBI filed an application (BPH-19990727ID) to modify the Class C1 construction permit issued pursuant to the grant of BPH-19980515IC. That modification application was granted October 29, 1999. The denial in the MO&O of the above-captioned application for (continued...)

III. DISCUSSION

A. The Settlement Agreement Presented Should Have Been Approved

Faced with a conflict between their upgrade proposals, MBI and ARS, acting in good faith, reached an accommodation between themselves. In exchange for a payment of $950,000, MBI would accept something less than it wanted -- Class C1 facilities, rather than Class C facilities for KFLY. In the bargain, the KVMX licensee would get what it sought -- the ability to specify Class C1 facilities for the Banks station.

Because MBI filed a modification application and ARS filed a rulemaking proposal, their settlement fell between Section 1.420(j), which involves the withdrawal of "an expression of interest" in a rulemaking proceeding, and Section 73.3525, which concerns the removal of conflicts between mutually exclusive construction permit applications. Given this unusual, if not unique, set of circumstances, and given the Commission's general policy in favor of settlements, MBI and ARS urged approval of the settlement agreement. The Allocations Branch refused to do so, citing *Abuses of Commission Processes,* 5 FCC Rcd 3911 (1990) *recon. denied*, 6 FCC Rcd 3380 (1991). *R&O* at ¶ 14,. The Allocation Branch held that MBI's application for a one-step upgrade fell within the ambit of the "expression of interest" provisions of Section 1.420(j) of the Rules. Significantly, however, the Commission did not adopt its one-step application procedures until some three years after adoption of Section 1.420(j).[6]

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[5](...continued)
Class C facilities is not final and the above-captioned Class C application continues to be listed as pending in the CDBS.

[6] Section 1.420(j) was adopted in *Report and Order in MM Docket No. 87-314,* 5 FCC (continued...)

MBI urges the Commission to reexamine and reverse the Allocations Branch's ruling. The settlement is contrary neither to the Commission's Rules nor the public interest.

First, the settlement does not contravene Section 1.420(j) of the Rules. MBI submitted an application, not an "expression of interest." MBI had no desire to become entwined in the Banks/Redmond proceeding or The Dalles proceeding. At the time its application was filed, MBI was completely unaware of the Banks and Redmond allotment proposals.[7] MBI filed its application on the very same day the Commission released the *Banks NPRM* and the conflict with The Dalles proceeding arose a week ***after*** MBI filed its application through the Commission's *sua sponte* proposal in *The Dalles NPRM* to allot Channel *268C3, rather than Channel *256C3 as LifeTalk requested. Since MBI obviously had no notice of either proceeding, its application clearly was not an "expression of interest" in either rulemaking. Furthermore, the amendment of MBI's application contemplated by the settlement (*i.e.,* proposing Class C1 rather than Class C facilities) does not constitute a "withdrawal" or "dismissal" as those terms are used in Section 1.420(j). Neither the *R&O* nor the *MO&O* cite any case in which such an amendment has been deemed a "withdrawal" or "dismissal."[8]

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[6](...continued)
Rcd 3911(1990). The one-step upgrade procedures were adopted in *FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4739 (1993).

[7] See Exhibit B of the Joint Request for Approval of Agreement (statement of facts supported by declaration of Mario Pastega, MBI's President).

[8] The settlement likewise does not contravene Section 73.3525 of the Rules. That rule concerns the removal of conflict between mutually exclusive construction permit applications (emphasis added). Here, there is only one application (MBI's) involved. Significantly, neither the *R&O* nor the *MO&O* relies upon Section 73.3525 as the basis for rejection of the settlement.

Second, the settlement is consistent with Commission's policy of encouraging settlements where conflicts arise. In adopting its competitive bidding rules, the Commission decided not to subject minor change applications to auction procedures. Instead, it encouraged parties "'to use engineering solutions, negotiation . . . and other means' to resolve mutual exclusivities." *Implementation of Section 309(j) of the Communications Act – Competitive Bidding,* 13 FCC Rcd 15920, 15928 (1998)("*Competitive Bidding*"), *quoting* 47 U.S.C. § 309(j)(6)(E). *See* 47 C.F.R. § 73.3573 (f)(1)(mutually exclusivity between minor change applications must be resolved through settlement or technical amendment). The Commission on numerous occasions has waived applicable limitations on payments to settling parties if the settlement was otherwise in the public interest. *E.g., Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253 (1997); *Competitive Bidding, supra*, 13 FCC Rcd at 16003 (waiving payment limitations with respect to settlement of mutually exclusive ITFS applications). Indeed, only days ago the Commission announced it would waive, for a period of time, payment limitations with respect to settlements among mutually exclusive noncommercial educational applications. *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, FCC 01-64, ¶ 99 (released February 28, 2001). Here, approval of the settlement finally brings to an end proceedings that began more than five years ago. Such a resolution, particularly given the significant procedural difficulties this case entails (*see, e.g.*, pp.12-15 below), would serve the interest of the public and the parties by bring this matter to an end.

Third, the approval of the settlement is not going to open the door for abuse of the Commission's processes. The situation here is extremely unusual. In order to fit within the factual framework this case presents, an FM licensee first would have to file its conflicting one-step upgrade

B. Channel *268C3 Should Not Be Allotted to The Dalles

Stated simply, the Allocations Branch should not have allocated Channel *268C3 to The Dalles. First, the Commission's own cut-off rules should have precluded consideration of allotment of Channel *268C3. Second, as demonstrated in the report of consulting engineer Robert McClanathan attached to MBI's Petition for Reconsideration (hereinafter "McClanathan Report"), the staff erred in concluding (a) no reserved band noncommercial frequency was available at The Dalles due to Channel 6 preclusion (*R&O*, ¶17, n. 18), (b) Channel *256C3, the channel originally proposed by LifeTalk, was not available for allotment due to terrain obstructions (*The Dalles NPRM*, ¶ 1, n.1) and (c) construction of a fully spaced station operating on Channel 268C3 at The Dalles would not require the use of anything more than conventional facilities to provide the entire community with a city-grade signal (*R&O*, ¶17).[10] Finally, the staff should have dismissed The Dalles proposal after LifeTalk's failure to commit to the construction of a tall tower, which commitment was explicitly required in *The Dalles NPRM.*

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[10] The *M0&0,* brushes aside the facts set forth in the McClanathan Report as being raised too late in the process. It was error to do so. A rulemaking proceeding, in which the issue is whether to adopt a rule or rule amendment of general applicability, is distinct from an adjudication in which a choice is made between the individualized claims of the contesting parties. While the choice between the Banks and Corvallis proposals may be akin to an adjudication, the process of deciding whether to allot Channel *268C3 is clearly rulemaking and thus all pertinent facts presented should be considered before the Commission makes its final decision. Consideration of the facts set forth in the McClanathan Report clearly is warranted. *See* 47 C.F.R. §1.429(b)(3).

1. <u>The Commission's Cut-Off Rules Preclude Allotment of Channel *268C3 to The Dalles</u>

The Commission's Rules prohibit filing a conflicting rulemaking proposal after an FM application has been cut-off. Minor change applications are protected from conflicting rulemaking proposals on the "date they are received at the Commission." 47 C.F.R. §73.208(a)(3)(iii). *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917, 4919 (1992) (hereinafter "*Conflicts*"), *recon. granted in part*, 8 FCC Rcd 4743 (1993). LifeTalk's petition for rulemaking, filed on November 20, 1995, presented no conflict with MBI's one-step minor change application filed on February 6, 1996. The conflict arose only when the Commission released *The Dalles NPRM* on February 13, 1996, seven days ***after*** MBI filed its application. In allotting Channel *268C3 to The Dalles, the Commission would violate its own cut-off rule.

The Commission adopted the cut-off policy set forth in Section 73.208(c)(3) because of the tremendous uncertainty and delay associated with its previous approach, which left applicants in a position of "unlimited exposure to potentially conflicting petitions." *Conflicts,* 7 FCC Rcd at 4919. The previous policy was "both inequitable and inconsistent with our treatment of mutually exclusive proposals in both the allotment and application contexts." *Id.* The Commission concluded that "[g]iven the time and effort required by FM applicants to secure new transmitter sites, we believe that FM applicants . . . should receive protection from conflicting rulemaking

proposals at the same time that they receive protection from other mutually exclusive applications." *Id.*

Thus, initial consideration of any allotment for The Dalles that would conflict with KFLY's application for Class C facilities was proscribed as of the date MBI's application was filed. The cut-off rule clearly applies in cases where the Commission itself, rather than a member of the public, proposes to use an alternative channel to resolve a conflict between mutually exclusive proposals. *Id.* at 4920. As the Commission stated in *Conflicts*, "it would be in inequitable for the Commission to use generally alternative channels in a way that would prejudice the FM applicant who already has cut-off protection." Indeed, in providing an example of how the rule applies to the Commission, *Conflicts* describes a scenario very close to the one present here. *Id.* at n. 20.

In this case, as in the Commission's example, it was both unfair and a violation of the rules for the Commission to select Channel *268C3 as an alternative channel for The Dalles. MBI had no notice that any alternative channel was contemplated. LifeTalk proposed no alternative channels in its petition. It sought only the allotment of non-conflicting Channel *256C3. LifeTalk merely noted that three channels in the area remained available for "commercial operation in the area," but in no way suggested any of these as alternate frequencies. Indeed, the plain language of the petition clearly indicates that LifeTalk's observation regarding available commercial channels was made to support its argument that Channel 256C3 at The Dalles should be reserved for non-commercial educational use. Put simply, there was no proposal to use the alternative

channel that would justify the Commission's consideration of Channel *268C3 after the filing of KFLY's application. *Id.* at 4920.

It is a fundamental precept of administrative law that an agency must by abide by its own procedural rules. "It is a 'well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.'" *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (quoting *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1082 (1974)..

2. The Facts Before the Allocations Branch Preclude Allotment of Channel 268C3 at The Dalles

(a) At Least One Reserved Band Frequency Is Available At The Dalles

The McClanathan Report demonstrates that using a site on Stacker Butte[11] near The Dalles, a noncommercial educational station with at least minimum Class C3 facilities could be operated on Channel 215C3 (90.7 MHz). Given the fact that at least one reserved band frequency is available at The Dalles, the community is not eligible for a reserved noncommercial educational frequency outside of the reserved portion of the band. *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, 20 CR 301, ¶ 114 (2000), *recon. granted on other issues,* FCC 01-64 (released February 28, 2001); *accord, e.g., Ukiah, California,* 11 FCC Rcd 13933 (Chief, Allocations Branch, 1996), *recon. denied*, 12 FCC Rcd 2414 (Chief, Policy and Rules Div. 1997); *Collegeville, Minnesota*, 10 FCC Rcd 328 (Chief, Allocations Branch 1995).

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[11] Stacker Butte is the site of numerous broadcast facilities that serve The Dalles.

(b) A Fully Spaced Station Operating on Channel *268C3 Cannot Provide a City-Grade Signal to The Dalles

The Dalles is located on the south shore of the Columbia River, which separates Oregon and Washington. The city is surrounded by hills on the southeast, south and southwest. McClanathan Report, p. 1. Most of The Dalles, including nearly all of the business and industrial areas, is located in low elevations near the Columbia River in an area shaped somewhat like the bottom of a bowl. *Id.*

Many of the antenna sites for FM and TV broadcast stations serving The Dalles are located on Stacker Butte, which is located across the Columbia River approximately 14 kilometers north of The Dalles. Another existing radio communications site is on Haystack Butte, which is also located north of the Columbia River and is to the east of The Dalles. *Id.*, pp. 1-2.

In order for Channel *268C3 to be fully spaced, the transmitter site must be located to the south of The Dalles. Because The Dalles is surrounded by high ridges, terrain obstructions between any fully spaced site and The Dalles city area will preclude delivery of a city-grade signal. The obstructions are so severe that even a very tall tower will not overcome the terrain shielding. The McClanathan Report demonstrates that from the coordinates referenced at n. 20 of the *R&O* (45-34-00 NL, 120-55-00 WL), even with a 213 meter (700 foot) tower, all of The Dalles would be severely shadowed. Indeed, even with a 474 meter (1,555 foot) tower, less than one-half of The Dalles would receive a line-of-sight signal. McClanathan Report, p. 4 and Ex. 8.

A similar study was conducted using the coordinates referenced in *The Dalles NPRM* at n. 3 (45-31-28 NL, 121-07-22 WL). From that site, even using a 700-foot tower, The Dalles would

not receive a line of sight signal due to significant terrain obstructions. McClanathan Report, p. 4 and Ex. 9.

In summary, the allocation of Channel *268C3 to The Dalles is unsuitable because, from a fully spaced site, severe terrain obstructions render it impossible to deliver a city-grade signal to the community. Commission precedent, therefore, indicates that the allotment should not be made. *E.g., Jefferson City, Tennessee, et. al*, 10 FCC Rcd 12207, 12209 (Chief, Allocations Branch 1995), *recon. denied*, 13 FCC Rcd 2303 (Chief, Policy and Rules Div. 1998); *Eugene, Oregon*, 10 FCC Rcd 9793 (Chief, Allocations Branch 1995); *Belfry and Harold, Kentucky*, 6 FCC Rcd 6019, 6020 (Asst. Chief, Allocations Branch 1991); *Creswell, Oregon*, 4 FCC Rcd 7040 (Chief, Policy and Rules Div. 1989) (denying reconsideration).

(c) <u>A Non-Conflicting Channel Available for Allotment at The Dalles</u>

As discussed above, LifeTalk proposed the allotment of Channel *256C3 at The Dalles. The Commission staff, in *The Dalles NPRM*, determined that a station operating on Channel 256C3 would need to be located 22.8 kilometers from The Dalles and that only half the community would be covered by a 70 dBu signal. In fact, as the McClanathan Report demonstrates, using a transmitter site at Haystack Butte (45-41-01 NL, 120-57-17 WL),[12] a station operating on Channel 256C3 would be able to provide a city-grade signal to The Dalles as well as Goldendale, Washington. *See* Exhibit 11 of McClanathan Report.

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[12] As noted above, Haystack Butte is an existing communication site. McClanathan Report, p. 2.

Significantly, allotment of Channel 256C3 at The Dalles would ***not*** conflict with the proposed upgrade of Station KFLY to Class C status as specified in BPH-960206IE. It is the Commission's policy to avoid allotment conflicts where possible. *E.g., Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 8 FCC Rcd 4743, 4745 n. 12 (1993). Here, allotment of Channel *256C3, as LifeTalk originally proposed, would serve that policy.[13]

3. LifeTalk's Failure to Respond to the Commission's Explicit Directive in The Dalles NPRM Precludes Consideration of Its Allotment Proposal

Under Section 73.1015 of the Commission's Rules, the Commission may require any person filing an expression of interest in an FM or TV allotment proceeding to submit "written statements of fact relevant to that allotment proceeding." In *The Dalles NPRM*, the Chief, Allocations Branch, called upon LifeTalk to submit a specific written statement of fact:

> [T]o overcome intervening terrain obstructions between [the proposed site] and The Dalles, a tower of at least 209 meters (686 feet) is required. Because a Class C3 station, without such obstructions, can generally provide city-grade coverage with a tower of only 100 meters, Petitioner is requested to affirmatively state it will apply for and construct a station with the necessary higher tower.

The Dalles NPRM at ¶ 3 (emphasis added).

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[13] A conflict would remain, however between the KFLY modification application and the proposal to substitute Channel 269C2 for Channel 298C2 at Redmond, Oregon, in order to accommodate the upgrade KVMX at Banks, Oregon.

LifeTalk, in its comments filed April 5, 1996, did not affirmatively state that it would "apply for and construct a station with the necessary higher tower." That defect was noted in MBI's comments filed July 5, 1996. In reply comments filed the same day, LifeTalk reiterated a commitment to file an application for Channel *268C3 if allotted - but was silent as to whether it would build a tall tower. In its supplement, filed July 15, 1996, it danced around the question of a tall tower. After noting MBI's comments, LifeTalk stated: "Implicit within LifeTalk's commitment was its intention to apply for a facility that would meet at least the minimum requirements of the Commission's rules, including providing city-grade signal coverage to the community of license." But that's not what the Commission asked. *The Dalles NPRM* did not call for a commitment only to place a city-grade signal over a community; it called for a commitment to "apply for and construct a station with the necessary higher tower." Because LifeTalk failed to make that commitment, its expression of interest was defective and its rulemaking proposal should have been dismissed.[14]

The Allocations Branch attempts to excuse the inadequacy of LifeTalk's expression of interest, ruling the question moot because, supposedly, the theoretical antenna site for Channel *268C3 at The Dalles would not require the use of the extraordinarily tall tower proposed in *The Dalles NPRM*. *R&O* at ¶1 n. 5. As discussed above, the use of Channel *268C3 at The Dalles in fact would require the construction of an extraordinarily high tower (in excess of 474 meters).[15]

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[14] To date no application has been filed for Channel *268C3 at The Dalles.

[15] See McClanathan Report at p. 4.

Thus, if Channel *268C3 is to be considered for allotment at The Dalles at all, LifeTalk's failure to respond to the explicit directive set forth in *The Dalles NPRM* remains at issue and is fatal.

Thus, for any of the several reasons discussed above, Channel *268C3 should not -- and indeed must not -- be considered for allotment at The Dalles.

C. If the Settlement Is Denied, Grant of KFLY's Upgrade Application Would Better Serve The Public Interest

With the allotment of Channel *268C3 at The Dalles no longer in consideration, the Commission (if it continues to refuse approval of the settlement tendered) is faced with a conflict between the KFLY upgrade and the KVMX upgrade. A comparison of the difference in population of the gain areas of each station very well may decisional. The *R&O at* ¶ 18 acknowledged that the upgrade of KFLY at Corvallis would provide additional reception service to a larger population than would the upgrade of KVMX at Banks and the new allotment at The Dalles *combined*. With the elimination of the allotment at The Dalles, KFLY's advantage is even stronger. Furthermore, KFLY is only one of two commercial FM stations licensed to Corvallis, which had a 1999 estimated population of 50,784. Indeed, there are only two FM commercial allotments in Benton County, in which Corvallis is situated. Conversely, KVMX is situated in the Portland, Oregon metropolitan market -- the nation's 25th largest radio market. BIA Radio Yearbook 2000, pp. 290-291. BIA lists the Portland as having 40 stations (14 FMs and 26 AMs).[16] Corvallis and the surrounding area has a greater need for improved service from KFLY than Portland does from KVMX.

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[16] According to an engineering statement filed in this proceeding, the additional area that would be served as the result of KVMX's upgrade is within the primary service contour of 44 other stations. Comments of Hurricane Broadcasting, Engineering Statement, Table A (filed March 28, 1996)

IV. CONCLUSION

The Commission is urged to approve the settlement agreement proffered in good faith. In doing so, this proceeding will be at an end. If the Commission declines to approve the settlement, it must chose between the KFLY upgrade and the conflicting proposals before it. But in making that choice, it must disregard the proposed allotment of Channel *268C3 to The Dalles. Any one of the numerous reasons set forth above, the Allocations Branch should not have added the allotment. Faced with the comparison between the KFLY upgrade and the KVMX upgrade, the KFLY upgrade must be preferred.

WHEREFORE, in light of all circumstances present, Madgekal Broadcasting, Inc. and Jacor Licensee of Louisville, Inc. herein respectfully request that the Commission grant the relief requested herein.

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CERTIFICATE OF SERVICE

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