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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments)
FM Broadcast Stations)
(Banks, Redmond, Sunriver and Corvallis, Oregon))
)
)

MM Docket No. 96-7
RM-8732
RM-8845

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments)
FM Broadcast Stations)
(The Dalles and Corvallis, Oregon))
)
)

MM Docket No. 96-12
RM-8741

In Application of)
)
Madgekal Broadcasting, Inc.)
Station KFLY(FM), Corvallis, Oregon)
For a Construction Permit to Modify)
Licensed Facilities)

File No. BPH-960206IE

TO: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

LifeTalk Broadcasting Association ("LifeTalk"), by counsel and pursuant to §1.115 of the Commission's rules, hereby opposes the March 12, 2001 Application for Review filed in the above-identified proceedings by Madgekal Broadcasting, Inc. ("MBI").¹ MBI seeks Commission review of the Mass Media Bureau's rulings in the *Report and Order* in this consolidated

¹LifeTalk filed a Consent Request for Extension of Time on March 27, 2001.

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proceeding, 13 F.C.C.Rcd. 9596 (MMB 1998), and its order on reconsideration, *Memorandum Opinion and Order*, DA 01-179, 66 Fed.Reg. 9679 (February 9, 2001). On reconsideration, the Bureau affirmed its prior decision announced in the *Report and Order*, to allot FM Channel *268C3 to The Dalles, Oregon, and to upgrade the allotment for KBBT-FM, Banks, Oregon from Channel 298C2 to Channel 298C1. MBI's own mutually exclusive proposal to upgrade its station, KFLY, Corvallis, Oregon, from Channel 268C2 to Channel 268 was rejected by the Bureau.

LifeTalk originally filed a Petition for Rulemaking to request the allotment and reservation of an FM channel to serve The Dalles, Oregon. The FCC furthered this proposal in its *Notice of Proposed Rulemaking* (the "NPRM") in Docket 96-12. The establishment of such an allotment is LifeTalk's primary concern in this proceeding. Therefore, LifeTalk opposes MBI's Application for Review only to the extent that MBI seeks the reversal of the Bureau's decision to allot a reserved FM channel to The Dalles.

At one point in this proceeding MBI and the proponent of the Banks allotment had reached an agreement pursuant to which MBI would downgrade its request for KFLY and receive cash from the Banks proponent. If adopted, this settlement arrangement would not have had any preclusive effect upon the allotment of *Channel 268C3 to The Dalles. The Bureau rejected the proposed settlement as contrary to the Commission's rules and policies regarding excessive compensation in settlements. MBI now argues that that settlement proposal should have been approved by the Bureau. In the alternative, MBI asserts that its original proposal to upgrade KFLY should have been adopted to the exclusion of the Banks and The Dalles proposals. LifeTalk does not take a position on the settlement proposal put forward by MBI. The allotment

for The Dalles can be accommodated with or without the settlement. In the event that the Commission affirms the Bureau's rejection of the settlement proposal, it should also affirm the Bureau's initial ruling which included the allotment for The Dalles.

In its alternate argument, MBI reiterates its assertions made in its Petition for Reconsideration of the Bureau's *Report and Order* that Channel *268C3 should not have been allotted to The Dalles for a variety of reasons. MBI's reconsideration arguments rested heavily upon an engineering study (referred to as the "McClanathan Report") that was presented in this proceeding for the first time with MBI's Petition for Reconsideration. MBI attempted to use that Report to demonstrate the incorrectness of the Bureau's ruling. However, the introduction of this new material at the reconsideration phase of the proceeding was contrary to the provisions of §1.106(c) of the Commission's rules. That rule restricts the presentation of new evidence in the reconsideration stage that was previously available to the party but not previously introduced.

Part of the newly produced material dealt with the claimed availability of reserved band channels at The Dalles. The need to reserve a nonreserved band channel for noncommercial use arises from the fact that no reserved band channels are available to serve The Dalles, due largely to the proximity of Channel 6 television station KOIN, Portland. Under such circumstances, it is the Commission's policy to allot a nonreserved band channel and to reserve it for noncommercial use if requested to do so. LifeTalk requested the application of this policy in The Dalles. In its Petition for Rulemaking, LifeTalk asserted that no reserved band channels could support a new station at The Dalles. Thus, this issue was clearly under discussion from the beginning of this proceeding. The Commission confirmed this point in the *NPRM* in Docket 96-12 in the joint

proceeding *Report and Order*, observing that LifeTalk's assertion was consistent with its own findings.

Not until its Petition for Reconsideration did MBI present detailed engineering data in an attempt to demonstrate that reserved band channels could be used to serve The Dalles. The facts alleged were not new. MBI could have offered them on the record of this proceeding while it was still open. For whatever reason, it did not do so and had no justification to support its request for review of this data upon reconsideration before the Bureau or before the Commission now.

The same must be said about MBI's allegations that Channel *268C3 cannot provide city-grade coverage to The Dalles, and that Channel *256C3, a nonmutually exclusive channel, is available as an alternative for the allotment. Although LifeTalk had originally proposed Channel *256C3 for The Dalles, the Commission determined that that channel might not provide adequate coverage of the community of license and substituted Channel *268C3 in the *NPRM*. Again, all of these issues and facts were well-publicized in this proceeding by the time of the Commission's public notice on June 5, 1996 that MBI's application was mutually exclusive with the proposals in both Docket 96-7 and Docket 96-12. Yet, MBI's July 5, 1996 Comments were completely silent on these issues. MBI again failed to show why it could not have produced these arguments earlier. Its evidence on this issue must also then be rejected as untimely.

For the same reasons again, MBI's assertion that the Commission's allotment of Channel *268C3 to The Dalles violated the cut-off rules with respect to MBI's application to upgrade KFLY should be rejected as late. This issue was ripe for discussion at the time that MBI filed its Comments on July 5, 1996. MBI first raised this point in a Petition for Reconsideration with no demonstration about why the public interest would be furthered by considering it at that late time.

The Bureau was justified in rejecting that argument then and the Commission would be justified in sustaining the Bureau now.

An issue which MBI did timely raise during the proceeding concerned LifeTalk's commitment to construct the proposed station if the allotment were made. In the *NPRM* in Docket 96-12, the FCC asked for an "affirmative statement" in LifeTalk's Comments that it would construct a tower of adequate height, which was then deemed to be necessarily higher than that normally needed for a Class C3 station in order to overcome terrain shielding of the community of license.. The Commission's concern was that city-grade coverage would be provided to The Dalles. In Comments filed on April 5, 1996, and in Reply Comments filed on July 5, 1996, LifeTalk reiterated its intentions to apply for such a station if the channel were allotted. In a Supplement to its Reply Comments filed on July 15, 1996, LifeTalk further iterated that it intended to construct a station that would provide city-grade coverage to The Dalles as required by the Commission's rules. MBI moved to strike LifeTalk's commitment as less than adequate and untimely.

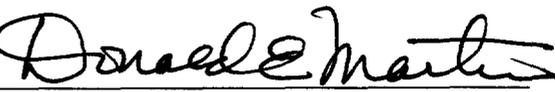
The Bureau found that LifeTalk's statement of intentions was adequate and acceptable. However, the Bureau also decided that the issue was moot because it placed the reference site for *Channel 268C3 at a different location -- a location that is not so shielded from the community of license and where it is predicted that an antenna at a more customary height will be sufficient. MBI continues to argue in the Application for Review that LifeTalk's entire proposal should be dismissed because LifeTalk failed to express clearly its intention to apply for the facilities it proposed. MBI's assertions are unsupported and illogical. LifeTalk made a commitment to construct the facilities that would be needed to cover the proposed community of license in

accord with the Commission's rules. The Bureau acknowledge and accepted LifeTalk's commitment. It defies logic to speculate that LifeTalk would continue to participate in this proceeding for five years if it were not intending to build a station that would be capable of fulfilling its original proposal — i.e., to provide a noncommercial service to The Dalles. The construction of any lesser facilities would not result in a station that the Commission is likely to license, and would therefore be a considerable waste of resources.

As they pertain to the allotment for The Dalles, MBI's arguments must be rejected as mostly untimely, and generally without merit. LifeTalk urges the Commission to affirm the Bureau's decisions below, and to allot Channel *268C3 to The Dalles, Oregon..

Respectfully submitted,

LIFETALK BROADCASTING ASSOCIATION

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April 6, 2001

CERTIFICATE OF SERVICE

I, Donald E. Martin, hereby certify this 6th day of April, 2001, that I have caused a copy of the foregoing document to be served by United States mail with first class postage prepaid upon the following:

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