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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY

Madgekal Broadcasting, Inc. ("MBI"), former licensee of Station KFLY(FM), Corvallis, Oregon, and Jacor Licensee of Louisville, Inc. ("Jacor"), current licensee of Station KFLY, herein reply to the "Opposition to Application for Review," filed by LifeTalk Broadcasting Association ("LifeTalk") on April 6, 2001, and to the "Response to Application for Review" filed by Infinity

Radio License, Inc. ("Infinity") on March 27, 2001.[1] The LifeTalk and Infinity pleadings were filed in response to the MBI/Jacor Application for Review filed March 12, 2001. In the interest of brevity, MBI and Jacor herein comment on only three points raised in the LifeTalk and Infinity pleadings.[2]

1. NO OPPOSITION TO THE SETTLEMENT HAS BEEN VOICED.

Significantly, neither Infinity nor LifeTalk opposes approval of the settlement presented. As discussed in the Application for Review, approval of the settlement (a) would not contravene the Commission's Rules, given the unusual circumstances in which the inadvertent conflict between MBI and Infinity's predecessor arose, (b) would be consistent with the general policy of the Commission and Congress to encourage settlements where conflicts arise and (c) would resolve, without further significant expenditure of Commission resources, the issues as to whether the application to upgrade KFLY(FM), Corvallis, Oregon, should be granted instead of the conflicting proposal to upgrade KVMX(FM), Banks, Oregon and allot a new noncommercial FM allocation to The Dalles, Oregon. Indeed, given the length of time this case has been pending, the unique context in which the proposed settlement arose and the benefits accruing to all parties from approval of the settlement,

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[1] On April 11, 2001, MBI and Jacor filed a "Consent Motion for Extension of Time" to extend the deadline for this Reply to April 20, 2001.

[2] The fact this Reply does not further discuss a number of arguments set forth in the Application for Review should not be construed as a capitulation to the counter-arguments of LifeTalk and Infinity.

such approval would be in the public interest. *Accord, e.g., Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253 (1997).

2. IF THE SETTLEMENT IS NOT APPROVED, THE COMMISSION'S FAILURE TO FOLLOW ITS OWN CUT-OFF RULE CANNOT BE IGNORED.

Both Infinity and LifeTalk brush aside the fact the Commission violated its own cut-off rule, Section 73.208 (a)(3)(iii), by adopting a conflicting allotment proposal first raised *sua sponte* after MBI's application was filed.[3] Each argues, in line with the staff's ruling in ¶ 6 of the *Memorandum Opinion and Order* in this proceeding, DA 01-179 (released January 26, 2001) ("*MO&O*"), the rule

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[3] To assist the reader, key facts regarding this point are briefly reiterated. On November 20, 1995, LifeTalk filed a petition to allot Channel 256C3 at The Dalles and reserve that channel for noncommercial educational use. Channel 256C3 did not conflict with MBI's application, filed February 6, 1996, to upgrade KFLY on Channel 268C. 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), 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.

Under Section 73.208(a)(3)(iii) of the Commission's rules, minor change applications (such as MBI's) are protected from conflicting rulemaking proposals on the "date they are received at the Commission." *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917, 4919 (1992), *recon. granted in part*, 8 FCC Rcd 4743 (1993). 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 applies in cases where the Commission itself, rather than a member of the public, proposes an alternative channel to resolve a conflict between mutually exclusive proposals. 7 FCC Rcd at 4920 & n. 20. LifeTalk proposed no alternative channels in its petition. It sought only the allotment of non-conflicting Channel *256C3. LifeTalk merely noted, to support its argument that Channel 256C3 should be reserved for noncommercial use, that three channels in the area remained available for "commercial operation in the area."

violation is to be ignored because MBI did not bring it to the Commission's attention during the first round of pleadings. They are mistaken.

It is fundamental that "an agency's failure to follow its own regulations is *fatal* to the deviant action." *The Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (emphasis added) (failure to publish a cut-off list in Federal Register, as the FCC's rules then required, rendered the announced cut-off date a nullity); *accord, e.g., Gardner v. FCC*, 530 F.2d 1086, 1089-90 (D.C. Cir. 1976) (putative deadline for reconsideration petition void where FCC failed to provide Petitioner notice by mail as required by FCC's rules); *Florida Institute of Technology v. FCC*, 952 F.2d 549 (D.C. Cir. 1992)(cut-off notice released in contravention of FCC's rules of no legal effect); *Interstate Broadcasting Company, Inc.*, 2 FCC Rcd 4051 (Chief, Audio Services Div. 1987) (grant of application in violation of FCC's processing rules "was then and is now void").

A Commission failure to abide its own rules is not rendered irrelevant simply because it is not raised until the later stages of a proceeding. For example, in *The Way of Life, supra*, the Commission's failure to publish the cut-off list in question in the Federal Register was not raised until the case was before the Court of Appeals. Here, MBI brought the violation of Section 73.208 (a)(3)(iii) to the staff's attention through a Petition for Reconsideration. The *MO&O*, however, gave no substantive attention to this important fact, ruling it was raised too late in the proceeding and that consideration of the matter at the reconsideration stage would not serve the public interest.

But the applicability of the cut-off rule is central to this case. The allotment of Channel 268C3 to The Dalles was the key factor that led to the staff's conclusion that the combination of the

new allotment at The Dalles and the upgrade of Station KVMX status should be preferred over the upgrade of KFLY, notwithstanding that the KFLY upgrade would provide additional service to a larger population. *Report and Order* at ¶ 18.

Stated simply, if the settlement proposed is not approved, the allotment of Channel 268C3 at The Dalles must be rescinded as being adopted in violation of Section 73.208 (a)(3)(iii) of the Commission's rules. That action will lead to the direct comparison of the upgrade proposals of KFLY and KVMX and the selection of the KFLY proposal.

3. CONSTRUCTION OF KVMX'S UPGRADED FACILITIES, IF ANYTHING, MILITATES IN FAVOR OF APPROVING THE SETTLEMENT AGREEMENT

In its Response, Infinity argues that affirmation of the Bureau's decisions would be in the public interest because Infinity – notwithstanding the pendency of MBI's May 19, 1998 Petition for Reconsideration – constructed KVMX's upgraded facilities and has been operating with those facilities since February 1999. Infinity further notes the KVMX upgrade required Station KLLR (FM), Redmond, Oregon, to change frequency from Channel 298C2 to Channel 269C2, a change for which Infinity bore the expense.

The fact Infinity chose to construct KVMX's upgraded facilities before the case was over does not and cannot improve its comparative posture if the settlement is not approved. In 1996, the Commission amended its rules to permit parties requesting amendment of the Table of Allotments to implement changes adopted upon release of an initial staff decision. *Amendment of Section*

1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders, 11 FCC Rcd 9501 (1996). But in adopting this rule change, the Commission emphasized that "parties electing to proceed before the allotment decision is final do so at their own risk and must bear the cost of any subsequent action reversing or revising the allotment decision." *Id.* at ¶11; *accord, David T. Murray,* 5 FCC Rcd 5770 (1990).

While Infinity gains no advantage by choosing to construct before finality, the fact it has done so is one more item that militates in favor of Commission's approval of the settlement presented. With approval of the settlement, there will be no need to unravel the proceeding and Infinity will not need suffer the hardship (albeit self-inflicted hardship) it fears.

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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April 20, 2001

CERTIFICATE OF SERVICE

I, Janice Rosnick, hereby certify that on this 20th day of April, 2001, copies of the foregoing **REPLY** were hand-delivered or mailed, first-class, postage prepaid, to the following:

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