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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))
of the Rules (Table of Allotments))
(Barnwell, SC; Pembroke, GA;)
Douglas, GA; Willacoochee, GA))

MM Docket No. 00-18
RM-9790

To: Chief, Allocations Branch, Policy and
Rules Division, Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Bullie Broadcasting Corporation ("Bullie"), through counsel, hereby opposes the petition filed by Multi-Service Corp. ("Multi-Service") on November 5, 2001, seeking reconsideration of the FCC's *Report and Order* in the above-captioned proceeding, DA 01-2316, released October 5, 2001 (the "R&O"), granting Bullie's petition to amend the Table of FM Allotments to (1) substitute Channel 257C1 for Channel 256C3 at Barnwell, South Carolina and reallocate Channel 257C1 to Pembroke, Georgia; (2) reallocate Channel 258C1 from Douglas, Georgia, to Willacoochee, Georgia; (3) modify the licenses of WBAW-FM, Barnwell, South Carolina, and WDMG-FM, Douglas, Georgia, respectively, to reflect the new allotments; and (4) also allot Channel 256C3 to Barnwell, South Carolina, at new, restricted coordinates, as a replacement (and first) FM transmission service to that community.

Before the merits of the petition – or lack thereof – may be addressed, it is first necessary to note that Multi-Service's petition was filed substantially in advance of the

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procedural deadlines created by the statute and the FCC's rules. Petitions for rehearing of FCC action in rule making proceedings are due not later than 30 days after publication of notice of the action in the *Federal Register* (47 CFR § 1.429(e)) , which in this case occurred only on November 2, 2001. 66 *Fed. Reg.* 55596 (November 2, 2001). Multi-Service's deadline for filing, therefore, was December 3, 2001. Oppositions to petitions for rehearing, moreover, are not due until fifteen days after the FCC's publishes a notice of the filing of the reconsideration petition, which in this proceeding has yet to take place. 47 CFR § 1.429(f). This Opposition, therefore, filed fifteen days after the filing and service of Multi-Service's petition, is well in advance of any deadline which might be established pursuant to the rules.

Bullie is not suggesting that there is anything wrong with Multi-Service's early filing. In fact, as shown below, there is every reason for the FCC to dispose of this petition expeditiously. However, having elected to commence the process before the establishment of formal deadlines, Multi-Service should not be permitted, following this Opposition, to file a new or supplemented petition. See *Gosnell and Osceola, Arkansas*, 6 FCC Rcd 4579 (Ass't Chief, Policy & Rules Div. 1991) ("The Commission's rules do not provide for the filing of supplements to petitions for reconsideration for the purpose of presenting additional arguments"). Multi-Service has had its bite of the apple. When the last permitted pleading in this cycle is filed, the FCC should rule promptly.

Multi-Service's petition is limited to a single – and incorrect – claim: that the cancellation of the license for WBUB(AM), Barnwell, impermissibly causes the reallocation of Channel 257C1 and WBAW-FM to Pembroke to deprive Barnwell of its only broadcast

transmission service. Multi-Service does not challenge either of the reasons set forth in the *R&O* for dismissing its counterproposal: (1) Multi-Service's counterproposal, which like Bullie's proposal was dependent on the reallocation of Channel 258C1 from Douglas to Willacoochee, failed to include a commitment to reimburse the licensee of WDMG-FM for the reasonable expenses incurred in relocation of the station; (2) Multi-Service's proposed reordering of the Table of FM Allotments was an untimely counterproposal in MM Docket No. 99-259.

The failure to articulate a single ground for reconsideration that would – if granted – lead to even the consideration, let alone the adoption, of Multi-Service's counterproposal is a fatal flaw requiring dismissal of the petition. Multi-Service has no standing, no stake in the outcome of the petition. Indeed, just last week, the FCC, in MM Docket No. 99-259 (Soperton, Swainsboro and East Dublin, Georgia), the FCC assigned Channel 251C3 to East Dublin, meaning that Multi-Service's counterproposal (which proposed allotment of Channel 251A to Twin City, Georgia) is no longer technically feasible. *Report and Order*, DA 01-2880, released November 16, 2001.

Standing to seek rehearing requires more than mere status as a party. Necessarily, it also requires the existence of a redressable injury. See *California Association of the Physically Handicapped, Inc. v. FCC*, 778 F. 2d 823, 824 (D.C. Cir. 1985). No disposition of this petition will result in a grant of Multi-Service's counterproposal. Multi-Service's status in this proceeding is now that of an interloper, a "dog in the manger," not a party.

The Multi-Service petition is as ineffectual on the merits as it is defective on the crucial question of standing. First, in violation of Section 1.429(b) of the Rules, it relies on

facts not previously presented, without making the required showing that the facts were unknown to Multi-Service until after the last opportunity for presenting them to the FCC. Multi-Service claims that the cancellation of the WBUB(AM) license in April 2001, occurred approximately a year after the deadline for filing Reply Comments. While that may be correct, Multi-Service made no effort to call the FCC's attention to the cancellation at any time in the nearly six months between the event and the release of the R&O. The information was clearly available to the public, as it was part of the FCC's data base accessible via the Internet. Multi-Service could have sought leave to file supplemental comments, to permit the FCC to consider the implications of that information in an orderly fashion, together with the other issues in the rule making proceeding, but it did not. Instead, Multi-Service has reserved the use of this information to a stage of the proceedings where it is most disruptive, because, under Section 1.420(f) of the Rules, the filing of any petition for reconsideration (without regard to the merits or lack thereof) automatically stays the effective date of the new Pembroke and Barnwell allotments. This selective use of so-called "new" information to disrupt FCC processes, and delay implementation of service, is not permitted by the rules when means exist for the information to be brought to the FCC's attention in an orderly fashion. *Cf. Big Spring, Sterling City and Coahoma, Texas*, 7 FCC Rcd 4834 (Chief, Allocations Branch 1992)(good cause shown for acceptance of late-filed comments that would facilitate resolution of the proceeding; other late-filed comments rejected because, among other reasons, they were not accompanied by a motion for leave to file).

Second, and of at least equal importance, Multi-Service's claim that FCC policy does not permit backfill allotments of new channels to prevent a community from losing its only local broadcast service, and to prevent disruption of service, is simply incorrect. In its Petition for Rule Making, Bullie specifically proposed reallocation of Channel 256C3 to Barnwell to continue the service that Barnwell currently receives (Petition, pp. 4-5) and pledged to:

(1) file an application for a construction permit for a new station on the site-restricted channel at the first opportunity; (2) if there are mutually-exclusive applications for the site-restricted facility, make a qualifying up-front payment and bid for the construction permit, and (3) if its application is granted, proceed promptly to construct the station and begin operation on the site-restricted Channel 256C3 allotment.

Petition, p. 4. These representations were expressly adopted and incorporated by reference in Bullie's initial Comments, filed March 23, 2000. Comments, p. 3.

Further, the Petition for Rule Making specifically noted that the Barnwell "backfill" proposal was made in accordance with FCC policy articulated in the then-recent *Notice of Proposed Rule Making* in MM Docket 99-256 (Refugio and Taft, Texas), 14 FCC Rcd 11609 (Chief, Allocations Branch 1999) ("*Refugio NPRM*"). In the *Refugio NPRM*, the FCC had proposed substitution of Channel 293C2 for Channel 291C3 at Refugio, reallocation of Channel 293C2 from Refugio to Taft (and modification of the license for KTKY(FM), Refugio, to specify operation on Channel 293C2 at Taft), and allotment of Channel 291A at Refugio as a replacement channel. To ensure that local service would continue to be provided to Refugio, the FCC proposed to condition any authorization to operate KTKY(FM) on Channel 293C2 at Taft on activation of service at Refugio on either

Channel 291A or Channel 263A (previously allotted to Refugio but not an operating station). 14 FCC Rcd at 11611. In a subsequent *Report and Order*, the FCC granted the proposal and affirmed the conditional authorization. *Refugio and Taft, Texas*, 15 FCC Rcd 8497, 8500 (Chief, Allocations Branch 2000) (the "*Refugio R&O*").

The policy reflected in the *Refugio* decision was not new. In both the *Refugio NPRM* and the *Refugio R&O*, the FCC cited its decision in *Llano and Marble Falls, Texas*, 12 FCC Rcd 6809 (Chief, Allocations Branch 1997). In that proceeding, the FCC granted a proposal to substitute Channel 285C3 for Channel 284C3 at Llano, Texas, reallocate Channel 285C3 to Marble Falls, Texas, and modify the license of Station KBAE to specify operation on Channel 285C3 at Marble Falls. In addition, the FCC allotted Channel 242A to Llano as a replacement service. In so doing, the FCC stated:

We are also concerned by any disruption in service that would be occasioned by removing the sole local service from Llano. . . . Ordinarily, allotment of a replacement channel is not sufficient to overcome the concern pertaining to a disruption of local service. To address this adverse result of its proposal, Maxagrid proposed a Channel 242A allotment at Llano. In regard to disruption of service, Maxagrid states that "assuming no one else applies for Channel 242A at Llano, Maxagrid intends to simultaneously commence program tests on Channel 285C3 at Marble Falls and on Channel 242A at Llano." . . . Therefore, grant of Maxagrid's proposal is premised on its pledge that Maxagrid will file an application to operate Channel 242A at Llano and, if authorized, to build the facility promptly. Were it not for this pledge, we would not consider granting this proposal. We will condition the grant of an authorization to operate Station KBAE(FM) on 285C3 at Marble Falls upon Maxagrid's activation of Channel 242A at Llano, Texas.

12 FCC Rcd at 6812.

Nor do *Llano and Marble Falls* and *Refugio* stand alone. For example, in *Rangley, Silverton and Ridgway, Colorado*, 15 FCC Rcd 18266 (Chief, Allocations Branch 2000),

on facts identical to those here, the FCC granted a counterproposal to substitute Channel 279C1 for Channel 279C2 at Silverton, reallocated Channel 279C1 to Ridgway and modified the license of KBNG(FM) accordingly, and allotted Channel 273A to Silverton as a replacement channel based the counterproposal proponent's "requisite commitment to apply for the Class A Channel." *Ibid.*

Bullie has made the necessary commitment to file an application for the new Channel 256C3 allotment at Barnwell, if necessary to make at least the minimum opening bid for the Barnwell allotment in the event more than one application is filed, and to promptly construct and operate the station if its application is granted. This is what *Llano and Marble Falls, Refugio, and Ranglely, Silverton and Ridgway* require. The "requisite commitment" having been made, the FCC's job is act expeditiously to dismiss the Petition for Reconsideration and make it possible for Bullie and other interested parties to file applications for the new Barnwell allotment as quickly as possible, enabling not only the continuation of local service at Barnwell but also the inauguration of new services at Pembroke and Willacoochee and the overall service gains that are attainable through implementation of the changes in the Table of FM Allotments adopted in the *R&O*.¹

¹ In its Comments, Bullie showed that the overall net service gain that would follow from the adoption of the proposal was 526,843 persons. *Comments*, March 23, 2000, p. 8 n.4.

on facts identical to those here, the FCC granted a counterproposal to substitute Channel 279C1 for Channel 279C2 at Silverton, reallocated Channel 279C1 to Ridgway and modified the license of KBNG(FM) accordingly, and allotted Channel 273A to Silverton as a replacement channel based the counterproposal proponent's "requisite commitment to apply for the Class A Channel." *Ibid.*¹

Bullie has made the necessary commitment to file an application for the new Channel 256C3 allotment at Barnwell, if necessary to make at least the minimum opening bid for the Barnwell allotment in the event more than one application is filed, and to promptly construct and operate the station if its application is granted. This is what *Llano and Marble Falls, Refugio, and Rangley, Silverton and Ridgway* require. The "requisite commitment" having been made, the FCC's job is to act expeditiously to dismiss the Petition for Reconsideration and make it possible for Bullie and other interested parties to file applications for the new Barnwell allotment as quickly as possible. This will assure not only the continuation of local service at Barnwell but also enable the inauguration of new services at Pembroke and Willacoochee and the overall service gains that are attainable

¹ Because Bullie's proposal of a "backfill" allotment at Barnwell – and the FCC's adoption of the new allotment – in accordance with the precedents described above effectively render the status of WBUB irrelevant, there is no compelling public interest reason under Section 1.429(b)(3) of the Rules for the FCC to consider this untimely, so-called "new" information on reconsideration. In fact, the public interest has been found to be served by assignment of the new channel to Barnwell and implementation of the other changes in the Table of Allotments.

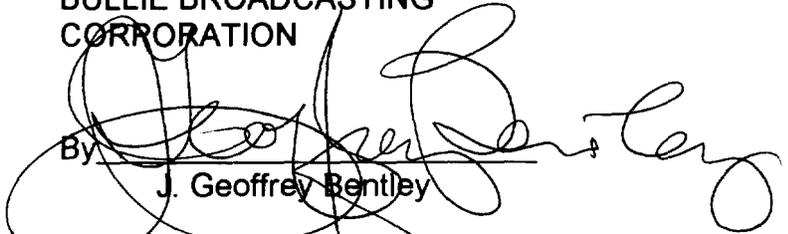
through implementation of the changes in the Table of FM Allotments adopted in the R&O.²

For the foregoing reasons, the Petition for Reconsideration should be quickly and summarily dismissed.

Respectfully submitted,

BULLIE BROADCASTING
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By


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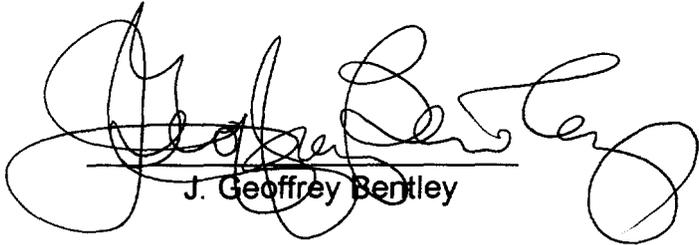
Its Attorney

November 20, 2001

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposition to Petition for Reconsideration to be served this 20th day of November 2001, by U.S. mail, postage prepaid, on the following:

Law Office of Dan J. Alpert
2120 N. 21st Road
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J. Geoffrey Bentley

² In its Comments, Bullie showed that the overall net service gain that would follow from the adoption of the proposal was 526,843 persons. *Comments*, March 23, 2000, p. 8 n.4.