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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 00-31
Table of Allotments,	)	RM-9815
FM Broadcast Stations	)	RM-10014
(Nogales, Vail and Patagonia, Arizona)	)	RM-10095

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OFFICE OF THE SECRETARY

To: The Commission

APPLICATION FOR REVIEW

Big Broadcast of Arizona, LLC ("BBA"), by its attorneys and pursuant to Section 1.115 of the Commission's rules, hereby requests Commission review of the Report and Order, DA 01-2735, released November 23, 2001 ("Report and Order"), issued by the Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau (the "Bureau"), in the above-captioned proceeding.[1] The Report and Order substituted Channel 253A for Channel 252A at Nogales, Arizona, reallotted Channel 253A to Vail, Arizona as that community's first local FM transmission service, modified the license of KZNO(FM) to specify operation on Channel 253A at Vail, Arizona and allotted Channel 283A to Vail, Arizona as that community's second local FM transmission service. The Report and Order also allotted Channel 251A to Patagonia, Arizona as that community's first local transmission service. Because the Bureau's decision in the Report and Order is in conflict with Commission precedent and established Commission policy, and contrary to the public interest, the Commission should vacate the Report and Order.

In support thereof, the following is respectfully submitted for the Commissioners' consideration:

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[1] The instant Application for Review is timely filed pursuant to Sections 1.115(d) and 1.4(b)(1) of the Commission's rules in that the Bureau's Report and Order was published in the Federal Register on December 10, 2001. 66 Fed. Reg. 63629 (December 10, 2001).

BACKGROUND

1. On November 1, 1999, Desert West Air Ranchers Corporation ("Petitioner"), the licensee of KZNO(FM), Channel 252A, Nogales, Arizona ("KZNO"), filed a petition for rule making proposing the substitution of Channel 253A for Channel 252A at Nogales, Arizona, the reallotment of Channel 253A to Vail, Arizona as that community's first local aural transmission service, and the modification of the authorization for KZNO accordingly (the "Allotment Plan"). In response, the Bureau released a Notice of Proposed Rule Making, DA 00-369, MM Docket No. 00-31, RM-9815, on February 25, 2000 ("NPRM"). The NPRM set April 17, 2000 as the comment date and May 2, 2000 as the reply comment date.

2. The NPRM stated that KZNO would provide service to 7,626 people in an area of 2,135 sq. km., based on the Petitioner's "special reference point coordinate" site (31° 55' 30" North Latitude; 110° 37' 30" West Longitude). The NPRM preliminarily determined that removal of KZNO from Nogales would result in loss of service to 27,480 people in an area 1,562 sq. km, resulting in a net loss of service to 19,985 people and a net gain of 573 sq. km. in the area served. The Bureau's calculation of the loss area at this time was based on KZNO at Nogales as a maximum Class A 6 kW facility. The Bureau also determined that while the entire gain area would receive at least five fulltime services, the removal of KZNO from Nogales would result in the creation of white and gray areas and that those who would lose KZNO's signal at Nogales would receive fewer domestic signals than those in the gain area.[2] Due to these concerns over the creation of unserved/underserved areas at Nogales, the Bureau questioned the public interest benefits of the Petitioner's Allotment Plan in the NPRM and invited comments.

[2] Before issuance of the Report and Order, the activation of new services overcame the white and gray areas.

3. In response to the NPRM, the Petitioner filed its Comments on April 17, 2000. Significantly, that pleading made no specific mention of containing or comprising a counterproposal of any kind. Among other things, the Petitioner disputed the Bureau's calculation of the loss area created by Petitioner's Allotment Plan, stating that the determination of the loss area should be based on the removal of existing service, not potential service (*i.e.*, removal of KZNO's licensed facilities operating at 215 watts at 70 meters, not the potential facilities of KZNO as a 6 kW full Class A station). Petitioner further urged consideration of foreign stations to ameliorate white and gray areas or disregarding such areas as *de minimus*. However, in case the Bureau were to "still have concern with the potential loss area," the Petitioner proposed the allotment of Channel 251A to Patagonia, Arizona "to 'fill-in' the underserved/unserved areas"[3] and as that community's first local FM transmission service. Finally, the Petitioner proposed to use an actual transmitter site for KZNO operating on Channel 253A at Vail (31° 55' 39" North Latitude; 110° 37' 57" West Longitude) (Petitioner's Allotment Plan as revised by Petitioner's Comments will be referred to as the "Revised Allotment Plan").

4. BBA also filed comments and a genuine counterproposal on April 17, 2000. In light of the public interest detriments of removing KZNO from Nogales, Arizona, BBA counterproposed that the Bureau maintain KZNO on Channel 252A at Nogales, Arizona and allot Channel 253A at Vail, Arizona. BBA demonstrated that with a reference site for the new Vail channel 4.6 km. Southeast of the center of Vail, KZNO could continue operation on Channel 252A at Nogales without any conflict with the proposed new channel 253A at Vail.[4]

5. On December 5, 2000, a Public Notice was released announcing that the Bureau would treat BBA's proposal to allot Channel 253A to Vail, Arizona as a counterproposal in the

[3] See Comments filed by Petitioner on April 17, 2000, at ¶ 10.

[4] See Comments and Counterproposal filed by BBA on April 17, 2000, Engineering Statement at page 1.

instant rulemaking proceeding.[5] The Public Notice made no mention of any other counterproposal. Reply comments to BBA's counterproposal were due by December 20, 2000.

6. On December 20, 2000, the Petitioner filed its reply to the comments and counterproposal filed by BBA. The Petitioner, in its reply, proffered that Channels 272A or Channel 283A could be allotted to Vail, Arizona in lieu of BBA's counterproposal to allot Channel 253A to Vail so as to avoid conflict with Petitioner's Revised Allotment Plan. The Petitioner also reiterated its suggestion to allot Channel 251A to Patagonia, Arizona. Petitioner conceded that there was no technical conflict with its Allotment Plan set forth in the NPRM and further conceded that its Patagonia proposal had not been accepted as a timely counterproposal, but suggested nonetheless that it could be deemed a "related" proposal in the instant proceeding.[6] Petitioner offered in the alternative that it would "file a petition at the conclusion of this proceeding" to request a new channel at Patagonia, in furtherance of its expressed interest in operating such a station. Id. at ¶ 9.[7]

7. Curiously, on April 4, 2001, the Bureau released a further Public Notice without explanation or comment, but merely announcing that the Petitioner's proposal to allot Channel 251A to Patagonia, Arizona would be a counterproposal in the instant rulemaking proceeding.[8] Reply comments to the Patagonia "counterproposal" were to be due by April 19, 2001. On April 18, 2001, BBA filed its reply comments to the Patagonia "counterproposal," reiterating, among

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[5] See FCC Public Notice Report No. 2453, released December 5, 2000.

[6] See Petitioner's December 28, 2000 "Reply Comments to Big Broadcast of Arizona, LLC" at ¶ 8.

[7] In its own reply comments on December 20, 2000, BBA demonstrated, among other matters, that the Petitioner's suggestion to allot Channel 251A to Patagonia, Arizona could not be treated as a counterproposal in the instant rulemaking proceeding because it was not mutually exclusive with the Allotment Plan set forth in the NPRM.

[8] See FCC Public Notice Report No. 2476, released April 4, 2001.

other things, that it could not be treated as a counterproposal because it did not conflict with the Allotment Plan set forth in the NPRM.

8. On November 23, 2001, the Bureau released the subject Report and Order which adopted Petitioner's Revised Allotment Plan. According to the Bureau, the Petitioner's Allotment Plan would result in a preferential arrangement of allotments because Vail would receive its first local aural transmission service (priority three), while retention of KZNO at Nogales would be considered only under other public interest matters (priority four). The Bureau found that permitting KZNO to move to Vail, Arizona on Channel 253A would enable 8,181 people to receive new service, but would result in a net loss of 3,658 people being served. By adding in the service gains of the Patagonia proposal, the Bureau asserted a net population gain of 14,222 and a loss of 10,342 persons. Finally, the Bureau allotted Channel 283A to Vail, Arizona as that community's *second* local FM transmission service

QUESTION FOR REVIEW

9. Whether the Bureau's decision in the Report and Order conflicts with Commission precedent and established Commission policy, and is contrary to the public interest, insofar as the Bureau incorrectly considered the Petitioner's proposal to allot Channel 251A to Patagonia, Arizona as a counterproposal in the allotment proceeding and failed to consider the significance of loss areas which would result from removal of an existing station.

GROUND FOR REVIEW

10. As an initial matter, Petitioner's Allotment Plan was never viable in the first place. Section 1.420(i) of the Commission's rules provides as follows:

> In the course of the rulemaking proceeding to amend Section 73.202(b) or Section 73.606(b) [*i.e.*: the FM and TV Tables of Allotments], the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license where the amended allotment would be mutually

exclusive with the licensee's or permittee's present assignment.

As BBA had demonstrated in its counterproposal, there was in fact no mutual exclusivity between Petitioner's present assignment for KZNO and its proposal for Vail (assuming the modest and reasonable site restriction that BBA proposed).[9] Rather, by selecting a hypothetical "special reference point coordinate" site only slightly short spaced to its existing assignment, Petitioner contrived a spacing conflict which need not have existed. If Petitioner truly wanted to create a new station at Vail, it could have done so through rulemaking of the very same type proposed by BBA in its counterproposal. Accordingly, the Commission should not have deemed Petitioner's Allotment Plan (nor, for that matter, its Revised Allotment Plan) to have been properly mutually exclusive with KZNO's presently licensed facilities on Channel 252A at Nogales, as is required by Section 1.420(i) of the Commission's rules. There was no need for Petitioner to have proposed abandonment of Nogales in order to achieve service at Vail. For that very reason, the NPRM should never have been issued or, alternatively, BBA's counterproposal, which would provide service to both communities, should have been adopted as better serving the public interest.

11. Moreover, Petitioner's so-called counterproposal to allot Channel 251A at Patagonia, Arizona "to 'fill-in' the underserved/unserved areas" of Petitioner's Allotment Plan is not a true counterproposal because it is not mutually exclusive to the Allotment Plan proposed in the NPRM. It is well settled that "[a] counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." See e.g., Drummond and Victor, Montana, 15 FCC Rcd 19721, at ¶¶ 3 and 8

[9] A site restriction of approximately 5.9 km to either the Petitioner's original "special reference point coordinate" site (31° 55' 30" North Latitude; 110° 37' 30" West Longitude) or the actual site (31° 55' 39" North Latitude; 110° 37' 57" West Longitude) proposed by Petitioner will fully meet the Commission's full separation requirements.

(2000), citing Implementation of BC Docket 89-90 to Increase the Availability of FM Broadcast Assignments, 5 FCC Rcd 931 (1990); De Ridder, Louisiana, 14 FCC Rcd 11786, at note 1 (1999); Martin, Tiptonville and Trenton, Tennessee, 13 FCC Rcd 17767, at ¶ 5 (1998); Copeland, Kansas, 11 FCC Rcd 497, at note 2 (1996); Odessa and Los Ybanez, Texas, 10 FCC Rcd 2767, at note 1 (1995); Philpot, Kentucky, 7 FCC Rcd 2711, at note 3 (1992). Petitioner's proposal to allot Channel 251A at Patagonia, Arizona clearly fails this standard as it is *consistent* with, and in no way conflicts with, the Petitioner's Allotment Plan, as proposed in the NPRM. Petitioner readily admitted this in its December 22, 2000 Comments, and the Bureau itself properly ignored Petitioner's suggestion of another channel at Patagonia in its first Public Notice announcing counterproposals in this matter. Only after the pleading cycle had ostensibly closed did the Bureau take the bizarre and unexplained step of issuing yet a second Public Notice purporting to accept BBA's Revised Allotment Plan as a counterproposal herein.

12. Curiously, one of the very cases cited by Petitioner in its December 20, 2000 Reply Comments undercuts both the procedure and substance of the Report and Order. In Harrisburg and Albemarle, North Carolina, 7 FCC Rcd 108 (1992) the Bureau was presented with two conflicting proposals strikingly similar to those in the NPRM: the allotment of Channel 224A to Harrisburg as that community's first local transmission service, versus the substitution of Channel 264A for Channel 265A at Albemarle, the reallotment of Channel 265A from Albemarle to Harrisburg, and the modification of the license of station WABZ-FM accordingly. The Bureau properly recognized that the fundamental question to be addressed was not only whether but how Harrisburg, a previously unserved community, was to receive its first allotment. Id. at ¶ 4. Since either proposal would result in a first local service (priority three) and neither would result in the elimination or creation of white or gray area, the entire case was analyzed

within the context of other public interest matters (priority four). Id. at ¶ 5. Specifically, the Bureau weighed the proposed gain of service to 327,012 in the Harrisburg area with a loss to some 56,396 persons that would result from the channel removal from Albemarle. Id. at ¶ 7. On that basis, the Bureau granted the free-standing allotment of Channel 224A to Harrisburg and denied the reallotment of WABZ's channel. That is, the free-standing proposal would result in a first local service to a previously unserved community (priority three) but the reallotment would have resulted only in a second service (priority four) which would not outweigh the detriment of a loss of service to one-sixth of the proposed gain area.

13. Applying this analytic scheme to the Report and Order, it is clear that the Bureau (having improperly considered Petitioner's contrived proposal in the first place) should have allotted BBA's proposed channel to Vail as Vail's *first* local service (priority three) and only then determined whether Petitioner's reallotment would serve the public interest by providing a *second* service to Vail.[10]

14. In Harrisburg and Albemarle, North Carolina, supra., the Bureau further relied upon the Commission's long-standing policy that:

> [t]he public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel from one community to another.

Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, at ¶ 19 (1990). Indeed, in Harrisburg and Albemarle, North Carolina, supra, the Bureau properly considered a loss of service to 56,396 persons and found that it did not outweigh a potential gain to 327,012 persons, thus indicating that there is no mathematical equivalence

[10] In fact, the Bureau's scheme in the Report and Order was reversed – it considered the Petitioner's revised Allotment Plan as a first service to Vail and only then considered BBA's free-standing allotment as a second service. Report and Order at ¶¶ 9 and 10.

between loss and gain, but rather that a loss of service weighs far more heavily upon the public interest than a potential gain. Yet, in the Report and Order, the Bureau found that net proposed service gains to only 14,222 persons somehow outweighed the creation of an underserved (not merely total) loss area of 10,342 persons. Id. at ¶ 9.[11] [12]

15. In light of the foregoing, it was improper for the Bureau to have given any consideration to Petitioner's proposal to allot Channel 251A at Patagonia, Arizona in the instant rulemaking proceeding. Instead of deeming Petitioner's suggestion to allot Channel 251A at Patagonia as a "counterproposal," the Bureau should have rejected it as a contrived manipulation of Section 1.420(i) of the rules or alternatively, treated it as a separate petition for rule making. The correct analysis to determine whether Petitioner's Allotment Plan resulted in a preferential arrangement of allotments should have been a comparison between the Petitioner's Allotment Plan (proposing removal of KZNO from Nogales, Arizona and providing a first local FM transmission service to Vail, Arizona) and BBA's counterproposal (providing first local FM transmission service to Vail, Arizona while maintaining KZNO at Nogales, Arizona), using the

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[11] The Bureau calculated that 10,342 persons would lose their fifth full time reception service as the result of the revised Allotment Plan. The Bureau further stated that 11,081 people in the Nogales area would be left with only three full time services and 15 people would be left with only two full time aural services. Id. at ¶ 9. It is unclear why these far more serious losses were not taken into account. Nor did the Bureau suggest the total number of people (under-served and otherwise) who would lose service at Nogales as the result of the reallotment, a striking omission (and presumably greater than the underserved figure) since this would appear to be the only relevant comparison to the 14,222 persons cited as receiving a "net proposed service gain" as the result of the reallotment. Id. at ¶ 9.

[12] The Commission has also held that:

> Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service. We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to 'existing service' occasioned by removal of an operating station.

Modification of FM and TV Authorizations to Specify a New Community of License, supra, at ¶ 9. Thus, the uncertain bonus of a possible activation of service at Patagonia is hardly of the priority of public interest that Petitioner urged and that the Bureau ultimately found.

FM priorities set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1988).

CONCLUSION

16. For the foregoing reasons, Big Broadcast of Arizona, LLC respectfully requests that the Commission vacate the Bureau's Report and Order.

Respectfully submitted,

BIG BROADCAST OF ARIZONA, LLC

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January 8, 2002

CERTIFICATE OF SERVICE

I, Regina S. McFadden, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 8th day of January, 2002, copies of the foregoing Application for Review were mailed, postage prepaid, to the following:

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