DOCKET FILE COPY ORIGINAL

PEPPER & CORAZZINI, LLP
ATTORNEYS AT LAW

1776 K STREET, N.W., SUITE 200
WASHINGTON, D.C. 20006-2334

JOHN F. GARZIGLIA
EXT. 224
JFG@COMMLAW.COM

(202) 296-0600
FAX (202) 296-5572
WWW.COMMLAW.COM

January 9, 2002

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Bethel Springs, Martin, Tiptonville, Trenton, and South Fulton Tennessee)
MM Docket No. 99-196, RM-9619 and RM-9874

Dear Ms. Salas:

Transmitted herewith on behalf of Thunderbolt Broadcasting Company is an original and four copies of a Petition for Reconsideration of the Report and Order, MM Docket No. 99-196, RM-9619 and RM-9874, DA 01-2682, released November 16, 2001 ("Report and Order"), pursuant to Section 1.106(f) and 1.429(d) of the Commission's Rules.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,

John F. Garziglia

Enclosures

No. of Copies rec'd 0+4
List ABCDE

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

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 99-196
Table of Allotments	)	RM-9619
FM Broadcast Stations	)	RM-9874
(Bethel Springs, Martin, Tiptonville,	)	
Trenton and South Fulton, Tennessee)	)	

To: Chief, Allocations Branch

PETITION FOR RECONSIDERATION

Thunderbolt Broadcasting Company ("Thunderbolt"), by its attorneys, hereby respectfully requests reconsideration of the Report and Order, MM Docket No. 99-196, RM-9619 and RM-9874, DA 01-2682, released November 16, 2001 ("Report and Order"), pursuant to Sections 1.106(b)(1) and 1.429 of the Commission's Rules.[1] Because the Report and Order erroneously cited non-existent "applicants" for Channel 267C3 at Tiptonville as a primary reason for blocking Thunderbolt's proposed allocation plan, and the Allocations Branch failed to adopt Thunderbolt's proposed allotment plan by misapplying a single Commission ruling in clear contravention of well-established Commission policy concerning the allocation of FM allotments, the Commission should reverse its decision and adopt the allotment plan proposed by Thunderbolt. In support whereof, the following is respectfully submitted:

I. Background

This consolidated rule making proceeding was initiated by a Notice of Proposed Rule Making, 14 FCC Rcd 8250 (1999), which proposed the allotment of Channel 249A to Bethel Springs, Tennessee. Thunderbolt, the licensee of WCMT-FM, Martin, Tennessee, filed

[1] The instant petition for reconsideration is timely filed pursuant to Sections 1.106(b)(1), 1.429, and 1.4(b) of the Commission's rules. The Report and Order in this rule making proceeding was published in the Federal Register on December 10, 2001.

comments and counterproposals on October 5, 2000, one option of which proposed the substitution of Channel 267C3 for Channel 269A at Martin, Tennessee, the reallotment of Channel 267C3 from Martin to South Fulton, Tennessee, and the modification of the license of WCMT-FM's license accordingly. To accommodate this upgrade, Thunderbolt further sought: a) the substitution of Channel 249C3 for Channel 248C3 at Trenton, Tennessee, and the modification of WTNE-FM's license accordingly, and; b) the substitution of vacant Channel 267C3 with Channel 247A at Tiptonville, Tennessee. All of these actions taken together are referred to as the "Allotment Plan."

On November 16, 2001, the Allocations Branch issued a Report and Order, which dismissed the Bethel Spring's petition and denied Thunderbolt's proposed Allotment Plan.[2] In doing so, the Allocations Branch claimed that "the petitioner did not obtain the consent of the applicants to downgrade the vacant channel" in reference to Thunderbolt's proposed downgrade of the allocation at Tiptonville.[3] In addition, it cited an earlier proceeding in which the Commission had rejected another allotment proposal involving Tiptonville, Tennessee as grounds for rejecting Thunderbolt's present Allotment Plan.[4]

II. The Allocations Branch Erroneously Assumed Facts

The Commission should reverse the action of the Allocations Branch because there are no "applicants" for the Tiptonville allotment from which consent to the downgrade could be

---

[2] Should Sherry A. Brown, another petitioner in the rule making, file a petition for reconsideration and the Commission sees fit to grant it, Thunderbolt has identified an Channel 254A as an alternate channel available for allocation to Bethel Springs, thereby allowing the Commission to accommodate both proposals. *See* Channel Study (attached as exhibit to this Petition for Reconsideration).

[3] Bethel Springs, Martin, Tiptonville, Trenton, and South Fulton Tennessee, at para 6., MM Docket No. 99-196, RM-9619 and RM-9874, DA 01-2682. ("Report and Order")

[4] *See* Martin, Tiptonville and Trenton, Tennessee, *Memorandum Opinion and Order*, DA 00-1571, MM Docket No. 96-204; RM-8876 and RM-9015, released July 14, 2000 ("*Tiptonville Decision*").

obtained. Thunderbolt is certainly not aware of any applications that have been filed, and a search of the Commission's electronic records turns up no applications. In spite of this, the Allocations Branch expressly cited the non-consent of non-existent applicants in denying Thunderbolts proposed allocation plan, stating that "[s]ince [Thunderbolt] did not obtain the consent of the *applicants* to downgrade the vacant channel, [the Allotment Plan] cannot be granted."[5] Given this clear reliance on a plainly untrue set of facts, the actions of Allocations Branch should be reversed for this reason alone.

Alternatively, the Commission might assume that the Allocations Branch simply mislabeled the expressions of interest that had been filed by two other parties for a Channel 269C3 allocation at Tiptonville, in spite of the fact that the differences between actual applicants and those who have filed expressions of interest are great. The record does reflect that on October 15, 1996, Twin States Broadcasting, Inc. ("Twin States")[6] submitted a Statement of Interest in Channel 267C3 at Tiptonville, Tennessee; on November 22, 1996, Terry Hailey ("Hailey") filed Comments which also expressed an interest in the vacant Tiptonville allotment; and on December 9, 1996 Thunderbolt expressed an interest in a Class A allotment at Tiptonville.[7] While Thunderbolt has previously highlighted the fact that the Hailey expression of interest was fatally flawed, it does not dispute that Twin States had filed an adequate expression of interest.[8]

---

[5] Report and Order at para. 5 (emphasis supplied)

[6] Twin States is the licensee of WWUC(FM) and WKWT(FM), Union City, Tennessee.

[7] Hailey's expression of interest was deficient because he failed to state by the deadline for comments his then-present intention to build a station promptly, should vacant Channel 267C3 be retained at Tiptonville, Tennessee. *See* Thunderbolt's December 9, 1996 Reply Comments, at pages 2-3.

[8] *See Tiptonville Decision* at footnote 6.

III. The Allocations Branch Clearly Misapplied Precedent

The Twin States expression of interest was central to the Commission's decision in Martin, Tiptonville and Trenton, Tennessee, *Memorandum Opinion and Order*, DA 00-1571, MM Docket No. 96-204; RM-8876 and RM-9015, released July 14, 2000 ("*Tiptonville Decision*"). The Allocations Branch cited the *Tiptonville Decision* in the Report and Order as the basis of its dismissal of Thunderbolt's Allotment Plan, stating simply that "[w]e deny the instant option for the same reasons espoused in [the *Tiptonville Decision*]."[9] However, while Thunderbolt's Allotment Plan and the proposal denied in the *Tiptonville Decision* are similar in that they both involved Tiptonville, the situations are undeniably different, and clearly demand different results.

In the *Tiptonville Decision*, the Commission noted that:

> "It is Commission policy not to delete a channel in which an interest has been expressed. *See, e.g.*, Calhoun City, Mississippi, 11 FCC Rcd 7660 (Allocations Br. 1996) and Driscoll, *et al.*, Texas, 10 FCC Rcd 6528 (Allocations Br. 1995). Since at least one party has expressed its intention to file an application for Channel 267C3 at Tiptonville and Channel 247A at Tiptonville, an allotment at Tiptonville must be retained."

Thunderbolt's instant Allotment Plan *does not* contemplate the deletion of the allocation at Tiptonville, but merely the substitution of a channel, thus retaining the Tiptonville allotment in clear compliance with the policy stated above. The Allocations Branch, then, cannot mean that this reasoning in the *Tiptonville Decision* supports its action in the Report and Order.

The Commission found that since Twin States and Thunderbolt both filed expressions of interest in a Tiptonville allotment, it required the Commission to engage in an analysis of the relative merits of each proposal under the Commission's allotment priorities.[10] In regard to such

---

[9] Report and Order at para 5.

[10] The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) other pubic interest matters [co-equal weight given to priorities (2) and (3)].

an analysis, the Commission explicitly noted that the issue in *Tiptonville Decision* did *not* involve a question of first local service under the Commission's third priority—first local service—but rather that the issue was "which community will have a Class C3 allotment and which will have a Class A allotment."[11] The Commission further noted that such a decision was to be made through use of a balancing test under the Commission's fourth allocations priority-other public interest matters.[12]

While the *Tiptonville Decision* may apply to prevent Thunderbolt's Allotment Plan from including any allotment deletions, the central reasoning underlying its decision to reject Thunderbolt's allocation proposal most certainly does not, and cannot be reasonably used to support the rejection of Thunderbolt's Allotment Plan.

IV. The Commission's Well-Established Allotment Priorities Demand That Thunderbolt's Allotment Plan Be Adopted

In contrast to the facts of the *Tiptonville Decision*, the only issue here is whether the provision of first local service to *two* communities—South Fulton *and* Tiptonville—outweighs the provision of first local service to *only* Tiptonville. Thunderbolt submits that the former is the clear choice under the Commission's allotment priorities.

As set forth in previous filings by Thunderbolt, any analysis under the Commission's allotment policies plainly mandates the adoption of Thunderbolt's proposed allocation plan because it will provide first local service to Tiptonville while at the same time providing first local service to South Fulton, Tennessee. This allocation plan clearly fulfills the third priority objective in two instances, whereas the Allocations Branch's action will result in fulfilling that priority in only one instance. Thus, Thunderbolt's Allotment Plan will result in a more

---

[11] *See Tiptonville Decision* at para 6.

[12] *Id.*

preferential arrangement of FM allotments than providing a first local service only to Tiptonville.

V. Where An Allotment Is Vacant, It May Be Changed If It Will Result In A Preferred Scheme Of Allotments.

It has long been established that changes may be made to vacant allotments in order to accommodate enhanced or new service to a community.[13] In addition, vacant FM allotments are subject to the same procedures that govern all allotment proceedings and substitutions should be routinely accepted, as noted by the Court of Appeals in Reeder v. FCC.[14] If the Allocations Branch has decided it will no longer follow its established policy of allowing such substitutions, the Report and Order was not the appropriate mechanism by which to announce that decision. As Reeder established with regard to substantive rule changes generally, and with regard to channel substitutions particularly, new requirements or restrictions may not be arbitrarily imposed in the middle of an allocations proceeding without first giving the public notice of such change and an opportunity to comment.

In this case, the Allocations Branch seems to have summarily adopted without notice a new channel substitution requirement- namely, that any party seeking to downgrade a vacant allotment must first secure the consent of any party who has merely expressed an interest in the higher class allotment. Beyond the fact that imposing such a requirement in the middle of the proceeding is contrary to Reeder in that it "change[s] the substantive criteria for substitution," Thunderbolt believes that it is irrelevant under the Commission's allotment priorities in this circumstance.[15] Again, the issue is not the loss of, or gains through, an existing service. Rather,

---

[13] *See* Reeder v. FCC, 865 F. 2nd 1298, 1304 (DC Cir. 1989); *see also* Arlington and McKinney, Texas, 3 FCC Rcd 964 (1988).

[14] *See* 865 F. 2nd 1298 (DC Cir. 1989).

[15] *Id.* at 1305.

it is whether it is preferable to allot new service to one community or two.

Thunderbolt also emphasizes that there is no "downgrade" of the Tiptonville allotment under its Allotment Plan. Because the Tiptonville, Tennessee allotment is vacant (*i.e.*, there is no station at Tiptonville), there is no loss of service as a result of the substitution of a Class A channel in lieu of a Class C3 channel. Since the Tiptonville allotment is currently vacant and un-activated, loss of existing service is not a concern, as the allotment is not one that the public has become reliant upon.[16]

VI. Thunderbolt's Expression of Interest in a Class A Allocation at Tiptonville Should Be Given Priority

Thunderbolt's proposed use of a Class A facility to provide first local service to Tiptonville does not weigh against the Allotment Plan. While the Allocations Branch has previously focused on the fact that Twin States has filed an expression of interest for a Class C3 facility at Tiptonville whereas Thunderbolt's expression of interest was for a Class A facility, the Commission has never before made a distinction between a Class A allotment and a higher class allotment in awarding a channel to provide first local service to a community. Thunderbolt again respectfully submits that—contrary to the Allocations Branch's assertion in the Report and Order—Commission precedent requires the allotment of a lesser class channel to provide first local service to a community in lieu of a proposed higher class channel when there is an expression of interest in the lesser class channel and there is no showing that the lesser class channel is insufficient to provide coverage to that community. In Americus, Fort Valley and Smithville, Georgia, 6 FCC Rcd 942 (1991)("Americus"), a Class A channel was allotted in place of Class C3 channel to provide Smithville with its first local service where the allotment of the Class A

---

[16] *See, e.g.*, Chathom and Grove Hall, Alabama, MM Docket No. 97-71, RM-8920, DA 97-1170 ¶4 (Alloc. Br. 1997); Glencoe and LeSeur, Minnesota, 7 FCC Rcd 7651 ¶3 (1992) (removal of a community's sole potential local service would not cause any disruption to existing service where the station had never been on the air).

channel also allowed for the upgrade of a station at Fort Valley and there was an expression of interest in the Class A channel at Smithville. The *Tiptonville Decision* attempted to distinguish this decision from the instant case by pointing out that the Class C3 channel was only *proposed* for Smithville—but had not actually been allocated.[17]

Thus, had Channel 267C3 merely been proposed for Tiptonville, and not actually allocated, the Allocations Branch would have presumably applied Americus and allowed Thunderbolt's proposal. Should the Commission uphold the Allocation Branch's citation of *Tiptonville Decision* as a valid reason for denying Thunderbolt's Allotment Plan, it will be affirming the principle that the happenstance allocation of a particular class of channel to a vacant allotment trumps the public's interest in the efficient allocation of first local service to two communities.

Further well-settled Commission case law also supports the Thunderbolt's proposed allotment.[18] Similar to the facts of this allotment proceeding, in Cottage Grove and Bend, Oregon, 6 FCC Rcd 4208 (1991)("Cottage Grove"), there was one expression of interest in a Class A channel at Cottage Grove, Oregon and two expressions of interest in a Class C1 channel at Cottage Grove. While the Allocations Branch has attempted to distinguish Cottage Grove from the instant case in the same manner it did Americus (*i.e.,* the channels were merely proposed, rather than already allocated), Thunderbolt likewise submits that the Allocations Branch reasoning was in error for the same reasons it erred in distinguishing Americus.

In Cottage Grove, there was no showing by those seeking the higher class channel that

---

[17] *See Tiptonville Decision* at para. 7.

[18] *See also,* Cottage Grove and Bend, Oregon, 6 FCC Rcd 4208 (1991)(Class A channel allotted in lieu of a Class C1 channel to provide first local service where there was an expression of interest in the Class A channel and no showing that the lesser class channel could not cover the community); Durango and Telluride, Colorado, and Kirtland, New Mexico, 5 FCC Rcd 7467 (1990)(Class C1 channel was allotted instead of a Class C channel to provide first local service where there was no showing that the lesser class channel would not provide coverage to that community).

the Class C1 channel would provide a first or second full-time aural service (higher priorities under the Commission's allotment priorities), or that the Class A channel would be insufficient to provide the requisite signal coverage to Cottage Grove. Similarly in this allotment proceeding, there has been no showing that Channel 267C3 at Tiptonville would provide a first or second full-time aural service, or that Channel 247A would be unable to provide the necessary coverage to Tiptonville. Therefore, the two channels are equivalent under the Commission's allotment priorities. As highlighted by the Commission's allotment priorities, public interest is better served by providing first local service to *both* Tiptonville and South Fulton, rather than to Tiptonville alone.

The Commission has previously recognized the value of providing first local service to two communities, rather than one, when possible. In fact, the first time Tiptonville itself was considered for first local service, the Commission noted that:

> "Review of the proposals indicates that Obion and Tiptonville are both deserving of an FM channel. *In an effort to provide each community with its first local service*, the staff performed a search to determine if alternate channels were available. The study indicates that Channel 267C3 is the only channel that can be allotted to either community. Therefore, our decision is guided by the guidelines set forth in Revision of FM assignment Policies and Procedures, 90 FCC 2d 88 (1982)"[19]

Thus, Thunderbolt now finds itself in the curious situation in which the Allocations Branch seems to have reached the contrary conclusion that it is now better for one community to receive first local service than it is for *two* communities to receive first local service.

VII. Conclusion

Clearly, the Allocations Branch has both misstated facts and misapplied precedent in denying adoption of Thunderbolt's Allotment Plan. Commission affirmation of the actions of the Allocations Branch in the Report and Order will deny an opportunity for first local service to

---

[19] *See* Obion and Tiptonville, Tennessee 7 FCC Rcd 2644 (1992)(emphasis supplied).

South Fulton for no other reason than the fact that a non-binding expression of interest has been filed for a higher class vacant allocation. Furthermore, allowing the Report and Order to stand is contrary to clear Commission precedent supporting the mechanism of allocation changes where it leads to an efficient and preferred scheme of allotments. Finally, the actions of the Allocations Branch violate the central holding of Reeder- that the Commission may not adopt substantive changes to its allocations rules without first giving the public notice and an opportunity to comment.[20]

WHEREFORE, for the foregoing reasons, the Commission should correct its error and: 1) substitute Channel 267C3 for Channel 269A at Martin, Tennessee, reallot Channel 267C3 to South Fulton, Tennessee as that community's first local aural transmission service, and modify the license of WCMT-FM to specify operation on Channel 267C3 at South Fulton, Tennessee; (2) substitute Channel 247A for vacant Channel 267C3 at Tiptonville, Tennessee; and (3) substitute Channel 249C3 for Channel 248C3 at Trenton, Tennessee and modify the license of WTNE-FM to specify operation on Channel 249C3, all in accord with the Commission's settled allotment policies.

Respectfully submitted,

THUNDERBOLT BROADCASTING COMPANY

By: _____
John F. Garziglia
Mark Blacknell
Its Attorneys

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-0600

January 9, 2002

---

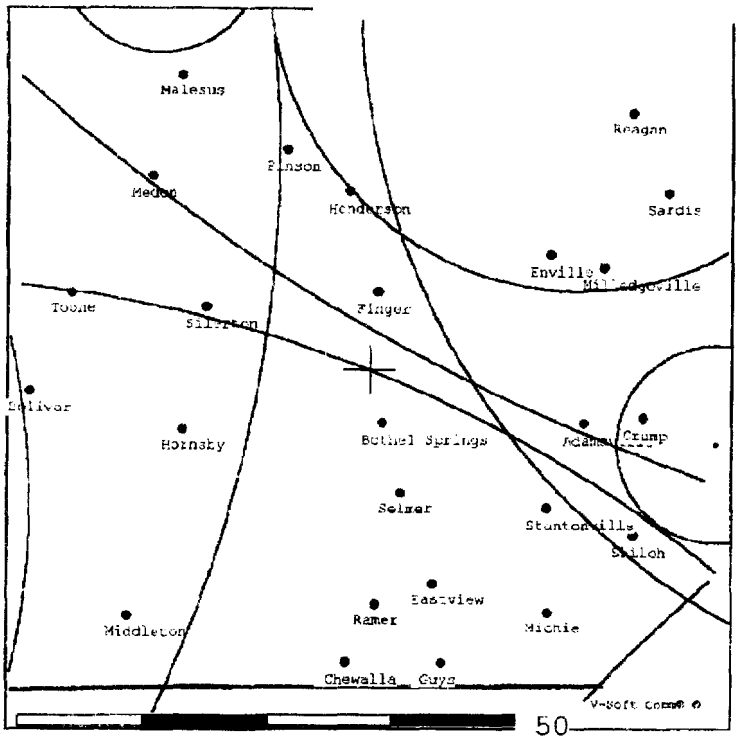
[20] *See* Reeder at 1304-1305.

Bethel Springs

SEARCHFM(TM) LOCATE STUDY

Ch 254 A
98.7 MHz

N. Lat. 35 17 02
W. Lng. 88 37 26



Call	CH#	Location		D-KM	Azi	FCC	Margin
WZLQ	253C1	Tupelo	MS	133.04	201.6	133.0	0.04
ALLO	254C1	Hopkinsville	KY	203.61	29.0	200.0	3.61
WHOPFM	254C1	Hopkinsville	KY	203.61	29.0	200.0	3.61
R---	253A	Linden	TN	80.25	62.2	72.0	8.25
WJZN	255C1	Munford	TN	143.84	278.6	133.0	10.84
ALLO	257A	Lexington	TN	44.22	28.1	31.0	13.22
WZLT	257A	Lexington	TN	44.22	28.1	31.0	13.22
WAZD	201A	Savannah	TN	35.59	102.1	10.0	25.59
WSRRFM	251C1	Millington	TN	110.04	262.8	75.0	35.04
WAMP	201A	Jackson	TN	46.90	333.2	10.0	36.90
RADD	254C1	Warrior	AL	238.88	135.4	200.0	38.88
WBTPFM	257A	Booneville	MS	71.66	176.5	31.0	40.66
ALLO	257A	Booneville	MS	71.66	176.5	31.0	40.66
ALLO	254C1	Warrior	AL	255.70	139.3	200.0	55.70
WBHK.A	254C1	Warrior	AL	260.32	139.7	200.0	60.32
WRJB	252A	Camden	TN	97.89	28.6	31.0	66.89
ALLO	251C1	Millington	TN	143.84	278.6	75.0	68.84
RDEL	254C3	Warrior	AL	223.80	133.6	142.0	81.80
WURC	201A	Holly Springs	MS	93.54	233.5	10.0	83.54
ALLO	252C1	Metropolis	IL	163.34	3.9	75.0	88.34
RADD	252C1	Puducah	KY	163.34	3.9	75.0	88.34
WRIKFM	252C1	Metropolis	IL	163.34	3.9	75.0	88.34

Charles M. Anderson

CERTIFICATE OF SERVICE

I, Regina S. McFadden, a secretary in the law firm of Pepper & Corazzini, L.L.P., certify that the foregoing Petition for Reconsideration were mailed on this 9th day of January, 2002 to the following by first class mail, postage prepaid:

* Mr. John A. Karousos
Chief, Allocations Branch
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Fifth Floor
Washington, D.C. 20554

* Ms. Sharon P. McDonald
Allocations Branch
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Fifth Floor
Washington, D.C. 20554

Eric S. Kravetz, Esquire
Brown Nietert & Kaufman, Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
(Counsel to Twin States Broadcasting, Inc.)

Philip R. Hochberg, Esquire
Verner, Liipfert, Bernhard,
McPherson & Hand, Chartered
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(Counsel to Terry Hailey)

John F. Garziglia
Pepper & Corazzini, LLP
1776 K Street
Suite 200
Washington, DC 20006
(Counsel to Gibson County Broadcasting Company, Inc., Licensee of WTNE-FM, Trenton, Tennessee)

Frank R. Jazzo, Esquire
Fletcher, Heald & Hildreth, L.L.C.
1300 North 17th Street
11th Floor
Arlington, VA 22209
(Counsel for Lyle Broadcasting Corporation)

JoeMyers Productions, Inc.
P.O. Box 68
Marion, Kentucky 42064

* via hand delivery

Regina S. McFadden

Regina S. McFadden