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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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JAN 23 2002

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Nogales, Vail and Patagonia, AZ)

DOCKET FILE COPY ORIGINAL

) MM Docket No. 00-31/
) RM - 9815
) RM - 10014
) RM - 10095

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Desert West Air Ranchers Corporation ("Desert West"), licensee of Station KZNO(FM), Nogales, Arizona, by its counsel, hereby opposes the Application for Review submitted on January 8, 2002 by Big Broadcast of Arizona, LLC. ("BBA"). As will be discussed, the Allocations Branch properly considered relevant case law and the public interest benefits in approving Desert West's request to change the city of license of Station KZNO to Vail, Arizona as a first local service. In support hereof, Desert West states as follows:

1. On November 1, 1999, Desert West filed a Petition for Rule Making pursuant to Section 1.420(i) of the Commission's Rules to change the community of license for Station KZNO(FM) from Nogales, Arizona to Vail, Arizona and change its channel from 252A to 253A. Desert West's proposal was eligible for consideration under Section 1.420(i) because its proposed reference point was mutually exclusive with its existing facility and the proposal would result in a preferential arrangement of allotments with Vail (population 3,124) receiving a first local service and Nogales (population 20,878) retaining two local services.¹ The Notice of Proposed Rule Making

1. Nogales is located on the Mexican border adjacent to Nogales, Mexico. Petitioner noted that
(continued...)

(“NPRM”), 15 FCC Rcd 4323 (2000) treated Station KZNO as if it were eligible to operate as a 6 kW Class A facility and determined that its removal would create the potential for a small amount of unserved (5 persons) and underserved (50 persons) areas and a net loss in 60 dBu service. In its comments, Desert West noted that when the Commission adopted Section 1.420(i) in Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recons. granted in part, 5 FCC Rcd 7094(1990), it was only concerned with the loss of existing service not potential service. In this regard, Station KZNO operates with 215 watts ERP at 70 meters HAAT and is limited to 3 kW at 100 meters under the U.S.-Mexican treaty. Therefore, Desert West argued that the Commission staff should not have calculated the loss area treating KZNO as a 6 kW Class A facility. As a 3 kW facility, the actual loss area figure was greatly reduced and no white or grey areas would be created. As an alternative, and in the event the Commission was still concerned about the potential for white and grey areas and for the net loss in service, Desert West proposed the allotment of Channel 251A to Patagonia, Arizona as its first local service. Desert West expressed interest in applying for this channel which could only be made available by virtue of the removal of Channel 252A from Nogales, Arizona.

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1. (...continued)
Nogales residents are 92% Spanish speaking Mexican-American and listen primarily to the 12 radio stations licensed to Nogales, Mexico.

2. BBA counterproposed the allotment of Channel 253A at Vail at a different reference point which was not short spaced to Station KZNO's licensed site on Channel 252A at Nogales. BBA argued that its proposal for a new allotment at Vail was preferable to the relocation of Station KZNO to Vail.

3. In its Reply, Desert West noted that two other channels (272A or 283A) were available for allotment to Vail to satisfy BBA's interest in applying for a station at Vail and would also permit Station KZNO's relocation to Vail.

4. The Commission staff agreed and, in the Report and Order, ("R&O"), DA 01-2735, rel. 11/23/01, Station KZNO was modified to Vail as its first local service and Channel 283A was allotted in response to BBA's interest for an additional channel.² The R&O agreed with Desert West's contention that the Commission is concerned with loss of existing service in the context of a change in community of license proposal particularly where, as here, the station was limited by international treaty to a 3 kW facility. The R&O also determined that a reinstated permit for Station KOFH was appropriate for consideration in the analysis of loss area. Therefore, the Allocations Branch found that no white or grey area would be created and that despite a predicted net loss in secondary service (Priority 4), the provision of a first local service (Priority 3) was of greater importance. Although not decisionally significant, the Commission staff also allotted Channel 251A at Patagonia which was made available by the Station KZNO move to Vail. The provision of a first local service to Patagonia added greater public interest benefits.³

2. In this regard, the Commission indicated that "[n]o party to this proceeding challenged (Desert West's) suggested resolution." R&O at para. 8.

3. As a further benefit, the decision to allot 253A and 283A instead of Channel 272A to Vail, permitted Station KCMT, Oro Valley, Arizona to upgrade its facility and KWRQ, Clifton,
(continued...)

5. In its Application for Review, BBA argues that the Allocations Branch did not need to grant a change in community of license for Station KZNO because Channel 253A could be allotted to Vail at a further site restricted location of 5.9 km and be made available for application by interested parties. As a result, Station KZNO would remain at Nogales. BBA also argued that the Patagonia proposal was not entitled to be considered in the proceeding because it was not, strictly speaking, a counterproposal. Thus, any consideration of the Patagonia proposal toward the comparative benefits of Desert West's proposal was improper in BBA's opinion.

DISCUSSION

6. The R&O properly decided that the public interest would be better served by the change in community of license for Station KZNO to Vail as a first local service, the allotment of a second channel to Vail and the allotment of a first local service to Patagonia rather BBA's proposal to allot one channel to Vail for future use. The determination was well supported and analyzed by the Commission's staff. At Desert West's suggestion, the staff allotted Channel 283A to Vail in response to BBA's professed interest yet BBA is still dissatisfied. It does not complain that Channel 283A is inadequate to serve Vail⁴ nor does it argue that it needs to apply for Channel 253A rather than 283A for some particular reason. It just does not want Station KZNO to operate on Channel 253A at Vail.

7. Without citing any cases in support, BBA argues that the Commission should have rejected Desert West's proposed site for Vail and forced Desert West to propose a different site. Not

3. (...continued)
Arizona to make a modification for which both stations had previously applied.

4. Indeed, in Desert West's view, Channel 283A is a preferable channel to Channel 253A due to the limitations toward the Mexican border and the area to locate a transmitter site.

only did BBA fail to make this argument at an earlier stage in this proceeding Section 1.115(c) and fail to cite any FCC requirement for involuntary site location, there does not appear to be any valid reason for the Commission to go beyond the prerequisites it already has in place for a station to change its community. Those prerequisites include being mutually exclusive with its own authorization, avoiding the loss of the existing community's only local service and a preferential arrangement of allotments to the communities in question. The Commission has certainly allowed stations to specify a preferred site in several contexts, including a site which is inconsistent with its existing operation. See e.g., Eufala, Oklahoma, et al. 12 FCC Rcd 3743 (1997). There are a number of reasons to select a site preference including an existing tower location, cost of the land for purchase or lease, FAA concerns, favorable terrain, the desire to reach a populated area, etc. The Commission should not preclude such preferences by forcing a licensee to accept a restricted site which eliminates the opportunity for a change in community of license.

8. The Commission may, of course, review the proposal to decide whether it is in the public interest to permit the relocation. However, the fact that there is another interest in the same community is not relevant particularly where an alternate channel is available. The Commission staff did conduct a proper public interest analysis. It found that the removal of Channel 252A from Nogales would not create any unserved or underserved areas in view of the recent activation of Station KOFH, Nogales, Arizona, the service offered by Station KNOG, Nogales, Arizona as well as the recent allotment of Channel 300A to Rio Rico, Arizona. The staff indicated that its prior concerns about the level of service at Nogales were now satisfied. Indeed, BBA acknowledged that the Commission staff's loss area concerns were no longer an issue. See Application for Review at note 2. In this regard, the staff did not need to decide whether the 12 stations licensed to Nogales, Mexico and primarily listened to by the 92% Spanish speaking residents were also relevant to the

analysis.⁵ Therefore, the comparison between Nogales and Vail was based on the Commission's longstanding priorities, a first local service to Vail (Priority 3) compared to a third local service at Nogales (Priority 4) with a net loss in population served (Priority 4).

9. Clearly, Desert West's proposal for a first local service at Vail deserved to be preferred under the Commission's priorities and case law. See e.g., Anniston, Alabama, et al. 15 FCC Rcd 9971 (2000). BBA argues that the case of Harrisburg and Albemarle, North Carolina 7 FCC Rcd 108 (1992) cited by Desert West, is, in fact, contrary to Desert West's position. BBA notes that the Commission favored the new allotment proposal for Harrisburg rather than the change in community of license proposal for Harrisburg. BBA missed the point. Desert West cited the case for the proposition that when two proposals for the same community are pending, the first to file is entitled to the first local service preference. The new allotment proposal for Harrisburg was filed first and therefore was compared under Priority 3. Two recent cases stand for the same proposition. See Galveston and Missouri City, Texas, 16 FCC Rcd 747 (2001) and Paonia and Olathe, Colorado, DA 01-2909 (released 12/14/01). Here, Desert West filed its petition to provide a first local service to Vail on November 1, 1999. BBA filed its counterproposal to provide a second service to Vail on April 17, 2000. It would be a contrivance for the Commission to consider these proposals in any other manner. See Application for Review at para. 13 and note 10.

10. The staff's decision to include the proposal for a first local service at Patagonia, was well within its discretion. First, it is important to note that the Patagonia allotment was not decisionally significant. The staff did not need to rely and did not, in fact, rely on a first local service

5. Desert West argued that these stations were appropriate for consideration in that the residents of Nogales primarily listened to these Spanish language stations and that the Commission counts foreign stations in calculating how many stations serve a market for multiple ownership purposes under Section 73.3555 of the Commission's Rules.

at Patagonia in its public interest determination. The evaluation of unserved/underserved areas was made with respect to Station KZNO's existing facility and the coverage of Station KOFH, KNOG and Channel 300A at Rio Rico. The comparison of a net loss in reception service (Priority 4) versus a first local service at Vail (Priority 3) was decided in Vail's favor without regard to Patagonia.

11. The Commission staff decided the Patagonia proposal was related and though not a technical counterproposal, the proposal was timely filed to be included in the proceeding. Such additional proposals are commonly added at the comment deadline as a replacement service or to fill in service to unserved and underserved areas. See Moberly, Missouri et al., (where Madison, Missouri was added) and Wickenburg, Bagdad and Aguila, Arizona 16 FCC Rcd 7970 (2001) recons. granted 16 FCC Rcd 5793 (2001) (where Aguila, Arizona was added).

CONCLUSION

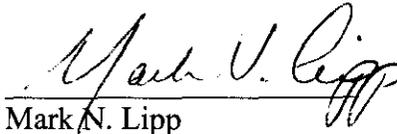
12. The staff's public interest determination that Desert West's proposal for a first local service at Vail was correct and properly decided. BBA requested an opportunity to apply for a channel at Vail and has been given a channel. In a desperate effort to obtain Channel 253A instead of Channel 283A, BBA makes the new argument that Desert West should be forced to accept a different reference point to avoid a change in community of license. BBA cites no authority for such an approach.⁶ BBA also argues that Patagonia should not have been accepted in the proceeding. However, it was within the Commission's discretion to accept the Patagonia proposal and to allot the channel.

6. As previously indicated, Desert West would prefer to be modified to Channel 283A, a non adjacent channel, but cannot do so in the context of this proceeding. See 1.420(i) of the Commission's Rules. Desert West suggests that with BBA's willingness and as a resolution to this proceeding, that the Commission institute a new proceeding to modify Station KZNO to Channel 283A and make Channel 253A available for application at Vail.

13. Accordingly, Desert West urges the Commission to affirm the R&O allotting Channel 253A to Vail as a first local service and modifying Station KZNO's license to specify Vail.

Respectfully Submitted,

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Date: January 23, 2002

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 23rd day of January, 2002 caused to be mailed by first class mail, postage prepaid, copies of the foregoing **OPPOSITION TO APPLICATION FOR REVIEW** to the following:

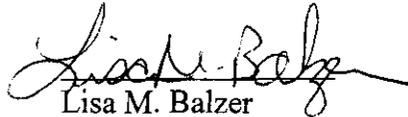
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