

Federal Communications Commission

WASHINGTON, D.C.

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In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Lincoln and Sherman, IL))

APR 22 2002

MM Docket No. 01-120
RM-10126

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PETITION FOR RECONSIDERATION

Long Nine, Inc. ("Long Nine"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of the Report and Order, DA 02-687 ("Order"), released March 22, 2002, by the Chief, Allocations Branch, in the above-captioned proceeding initiated by Saga Communications of Illinois, Inc. ("Saga"). The decision of the Allocations Branch sanctioned Saga's thinly veiled manipulation of the Commission's change of community policies to enable WMHX(FM) to migrate from rural Lincoln to the much larger and well-served Springfield Urbanized Area. In doing so, the Allocations Branch has ignored much of the evidence before it and has made errors of fact and substantive law that are inconsistent with Commission precedent. Accordingly, Long Nine respectfully requests reconsideration of the Order and denial of the request to move WMHX(FM) to Sherman.

Discussion

In adopting its rules permitting FM stations to change their communities of license, the Commission stated that it would not permit the manipulation of its allotment criteria by granting a Section 307(b) first local service preference in situations where, as here, such a preference is

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sought for an urban community that is interdependent with and part of a larger metropolitan area. *See Modification of FM and TV Authorizations*, 5 FCC Rcd 7094, 7096 (1990). Yet that is precisely what the Allocations Branch has done here as Saga is proposing to move WMHX(FM) from the truly independent community of Lincoln to Sherman, a bedroom community in the Springfield Urbanized Area. The decision of the Allocations Branch should not have been based on a comparison of the communities of Lincoln and Sherman but, rather, on a realistic comparison between Lincoln and the already well-served Springfield Urbanized Area. Nevertheless, the Allocations Branch has chosen to blindly apply the first local preference from its allotment criteria to the detriment of the community of Lincoln, and the public interest in general.

The decision of the Allocations Branch in this case does not comply with Commission policies concerning the allotment of FM channels to communities or with Section 307(b) of the Communications Act because Sherman, a small community adjacent to, and entirely interdependent with the much larger Springfield Urbanized Area, is not entitled to a service preference over the independent community of Lincoln. If Saga is permitted to move WMHX(FM) to Sherman, the residents of Lincoln will lose their only FM station and will be left with a single daytime-only AM station.¹ In contrast, Sherman is already well-served by at least 14 stations.² The Commission stated long ago that it does

not intend to apply the first local service ... blindly. We recognize that an inflexible application of the preference, without further analysis, could consistently result in our finding that a reallocation leading to a first local service for a suburb of a much larger adjacent metropolitan center justifies removing a local service from a more remote community. We wish to dispel any concern that our new rules would lead to such a result.

¹ See Long Nine Comments at 3.

² *Id.* at 2.

5 FCC Rcd 7094, 7096. Apparently, the Allocations Branch does not share the Commission's concern. By failing to apply real-world consideration to the Saga proposal, the Allocations Branch ignored Commission precedent and has allowed Saga to carefully manipulate the first local service preference and, thereby, circumvent Section 307(b).

Through an orchestrated gaming of the Commission's rules, Saga was granted authority to completely abandon the Lincoln service area which has approximately 15,000 people and has partaken in a charade by stating that it will provide service to Sherman, a community of approximately 2,000 people.³ Inexplicably, the Allocations Branch ignored the fact that Saga is proposing to move its station to a community more than seven times smaller than its current community of license. Given this discrepancy in size, it is nonsensical for the Allocations Branch to believe that Saga is moving to Sherman for any other reason than maximizing its profit by serving the much larger Springfield market. An objective review of Saga's proposal compels the conclusion that it is Saga's obvious hope and intention to use this reallocation to move closer to the Springfield Urbanized Area and increase its advertising revenue at the expense of the residents of Lincoln.

Rather than requiring Saga to do what cannot be done, namely, to show that Sherman is independent of Springfield, the Allocations Branch let Saga off the hook by summarily finding that a *Tuck* analysis is not required in this case because Saga's selected reference coordinates for WMHX(FM) would not provide "a city grade signal to 50% or more of the Urbanized Area." Order at 3. Surely Commission precedent requires a more intensive analysis than this when strict adherence to the 50% guideline would dictate an anomalous result such as the one that exists

³ *Id.* at 1.

here.⁴ The Commission has repeatedly found that in determining the degree of interdependence between communities in 307(b) proceedings that the close proximity of a suburban community to the Urbanized Area of a larger one creates an inference of interdependence. *See RKO General Inc.*, 5 FCC Rcd 3222, 3223-24 (1990); *see also Eatonton and Sandy Springs, Georgia*, 6 FCC Rcd 6580 at ¶¶ 24, 25 (1991) (denial of a first local service preference based in part on the much smaller size of community relative to the larger central city of an urbanized area). In this case, the great difference in size between Sherman and the Springfield Urbanized Area, and the fact that that Sherman is contiguous with Springfield, are compelling indications of interdependence.⁵

What is even more compelling is that in this case, more than 70% of the available area in which to locate a transmitter site to serve Sherman will put a city-grade signal to more than 50% of the Springfield Urbanized Area. It is impossible to believe that Saga would choose to serve a community seven times smaller than its current city of license without planning to move to a transmitter site substantially closer to Springfield. The decision of the Allocations Branch does not even discuss the fact that so much of the area in which to locate a “Sherman” station would require a *Tuck* analysis. As Long Nine demonstrated in its Comments, Saga selected a set of reference coordinates as far as possible from Springfield so as to claim that no *Tuck* analysis was

⁴ As the Commission has often stated:

We have consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission’s Section 307(b) related policies. 5 FCC Rcd at 7096 (emphasis added).

⁵ The population of the Springfield Urbanized Area is 38 times larger than that of Sherman. *See* Long Nine Comments at 7. In addition, as Long Nine pointed out in its Comments, Sherman is likely to be included as part of the Springfield Urbanized Area once the Census Bureau releases its 2000 Urbanized Census data later in 2002. *Id.* at 4. Although the Allocations Branch dismisses this determination as speculative, it is but one of many indications that Sherman is not independent of Springfield.

necessary, when the vast majority of the potential areas to locate would require such a showing.⁶ The Commission cannot silently allow Saga to engage in such gamesmanship. Instead, the Commission must review the arguments advanced by Long Nine and the reality of the situation, conduct a *Tuck* analysis, and find the Saga proposal wanting under that analysis.

Should the decision of the Allocations Branch stand, Saga will undoubtedly move the WMHX(FM) transmitter site to a location that will blanket the Springfield Urbanized Area. Yet nowhere in its decision does the Allocations Branch acknowledge that by changing its city of license to Sherman, Saga will be able to change transmitter sites so as to put a city grade signal over more than 99% of the Springfield Urbanized Area. If Saga's true intent is to serve the residents of Sherman, there would be no need for a change in the station's city of license because WMHX(FM) can serve the residents of Sherman from its current site. Thus, the only rational explanation for Saga's desire to move WMHX(FM) to Sherman is that it would enable the station to provide a city-grade signal over Springfield. Common sense and economic reality dictate that Saga will eventually choose a transmitter site as close to Springfield as possible, thus increasing the value of the station. While the decision of the Allocations Branch might serve the private economic interests of Saga, it cannot be squared with Commission precedent or a common sense approach to the public interest.

Conclusion

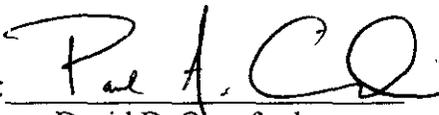
Despite the finding of the Allocations Branch to the contrary, Sherman does not effectively exist as a community independent from the Springfield Urbanized Area. Upon review, it is obvious that Saga has orchestrated its staged move not to serve the residents of Sherman, but, rather, to serve the more lucrative immediately adjacent Springfield Urbanized

⁶ See Long Nine Comments, Exhibit 4 at 2.

Area. Instead of merely providing a mechanistic reading of its understanding of the 50% Urbanized Area coverage policy, the Allocations Branch should have applied real-world considerations and common sense to Saga's proposal and rejected such gamesmanship. The public interest and Section 307(b) of the Communications Act demand that Saga not be rewarded for such disingenuous tactics. Accordingly, Long Nine respectfully requests reconsideration of the Order and denial of Saga's request to move WMHX(FM) to Sherman.

Respectfully submitted,

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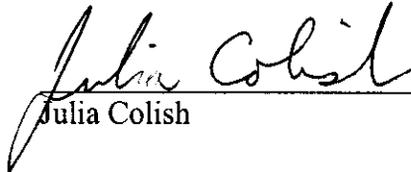
CERTIFICATE OF SERVICE

I, Julia Colish, a secretary with the law firm of ShawPittman LLP, hereby certify that copies of the foregoing "Petition for Reconsideration" was served via U.S. mail on this 22nd day of April 2002 to the following:

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