

RECEIVED & INSPECTED
AUG 07 2002
FCC-MAILROOM

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	MB Docket No. 02-108
)	
Amendment of Section 73.202(b))	RM-10418
Table of Allotments)	
FM Broadcast Stations)	
Harrisville, Michigan)	

To: Assistant Chief, Audio Division
Office of Broadcast License Policy
Media Bureau

**MOTION TO STRIKE AND OPPOSITION TO UNAUTHORIZED
'SUPPLEMENT OF NORTHERN MICHIGAN RADIO, INC.'**

On May 17, 2002, the Commission published a Notice of Proposed Rulemaking ("Notice") in this proceeding. The Notice provided for and requested the filing of "comments" and "reply comments" from any interested parties. In response, Comments in support of the request were filed by Northern Paul Bunyan Radio Company (hereinafter "NPB") and a Counterproposal was also filed by Northern Michigan Radio, Inc., licensee of radio station WBYC-FM, (hereinafter "WBYC") currently licensed to Atlanta, Michigan. No other pleadings were authorized by the Notice and in fact the filing of further pleadings are specifically forbidden by 47 CFR 1.415(d). Nonetheless, WBYC proceeded to file its "Supplement" on July 25, 2002, 1/ which itself is procedurally and substantively defective and should be stricken and given no

1/ It is noted here that WBYC also continues to serve its pleadings to Counsel's old address and it is requested again that WBYC take note of Counsel's current address and direct any further pleadings there.

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

consideration in this proceeding. In support whereof, NPB, by Counsel, submits the following:

I. The Supplement is Procedurally Defective And, As Such, Should Be Stricken And Given No Consideration In This Proceeding.

As a preliminary, but very important matter, it must be noted that the filing of an additional pleading in this proceeding, whether styled as a "Supplement", "Afterthought", "Addendum" or anything else, is contrary to the plain words of 47 CFR 1.415(d) which prohibits the filing of such additional pleadings, and is therefore, on its face, contrary to the law that binds all parties before the FCC and should not be received or considered. The rule is clear and prohibits any such "additional" pleadings unless "specifically requested or authorized by the Commission" which is not the case here.

We also note that, as with any other Commission Rule, it is always possible for the proponent to request a waiver of that rule, making its best case as to why that general rule should not apply to that particular party in that particular, case, usually in the form of Motion for Leave to file the additional pleading. In this case, WBYC ignored such "niceties" and simply filed what it chose to file, as if it had some inherent right to do so. Well, unless there is some unknown footnote to rule 1.415(d) exempting WBYC, that is not the case. And unless leave was requested to waive the rule and file additional pleadings, and that request granted, then the general rule continues to apply and the WBYC "Supplement" is patently contrary to that clear

Commission rule, illegal, and should therefore be stricken and returned with no consideration.

II. The Supplement Underscores and Compounds the Original Defect in The WBYC Counterproposal.

Although The WBYC "Supplement" is procedurally defective and meriting no substantive consideration, NPB is constrained to offer some comments on the "substance" of the WBYC filing should the Commission, for any reason, reach such consideration. At the outset, it should be recognized that in its Reply Comments filed in this proceeding, NPB noted that WBYC had not included an essential element in its Counterproposal, viz. it proposed to remove the only existing service from the city of Atlanta, Michigan, proposing to then allocate a lower class vacant channel there and then leaving it up to chance and fortune as to whether any new station would ever be applied for and built there by anyone to seek to, in some way, replace some of the service lost when the existing channel and station was closed and removed. Most notably, WBYC itself expressed no interest whatsoever of its own in applying for or building a new station there.

Citing the Commission's clear policy against such deletion of existing service, especially of the sole existing service, in Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a new Community of License, 5 FCC RCD 7094 @ 7097 (1990) as well as two separate cases where the Commission had specifically indicated it would not even consider any such proposal which did not include a specific unqualified commitment by the proponent to apply for and build a

new station to replace any such deleted station (see Albion and Columbus, Nebraska, 8 FCC Rcd 2876 (1993); and LLano and Marble Falls, Texas, 12 FCC Rcd 6809 (1997)) NPB suggested that the WBYC Counterproposal was not "substantially complete" since it could not be considered or adopted as filed, was therefore patently and fatally defective, and must perforce be rejected from consideration in this proceeding. NPB's position was supported by the Commission's clear statements in Albion and LLano, supra. and by its well-established rule as articulated in Cloverdale et al, 12 FCC Rcd 2090 (1997) and other cases previously cited, which require that any counterproposal must be "technically correct and substantially complete" (emphasis supplied) at the time it is filed, a requirement totally lacking in the WBYC Counterproposal that failed to include any expression of interest or concern in the lower class channel that WBYC suggested as a possible 'replacement' for the sole operating station which it proposed to close and remove from the city of Atlanta.

In response, WBYC just compounded the deficiency of its original proposal by simply proceeding to file a "Supplement" in which, if we understand it correctly, it takes the position that the commitment to the vacated channel was not required as part of its counterproposal as filed, and that it was not required to offer that commitment (or not offer it) until the Commission published the Counterproposal in a further Notice of Proposed Rulemaking. So it seems that WBYC's position is that the FCC should look at the Counterproposal, guess as to whether WBYC would ever decide to make such a commitment and proceed to

publish the Counterproposal in the hopes that it might, knowing that if it did not, that the FCC had just wasted a lot of time and taxpayer money in the process.

As support for such a novel proposition, WBYC cites two cases, neither of which can serve to prop up the WBYC deficiency. In the first case (Sulpher and South Fort Polk, 10 FCC Rcd 4952 at n5), the FCC referred to an original filer (not a counterproposal) which had in fact made its commitment in its original filing but had failed to file comments in response to the Notice of Proposed Rulemaking to restate that original commitment. but then did so in Reply Comments. Note the differences: An original rulemaking proposal and NOT a counterproposal; they DID make an original commitment, then relied upon by the FCC in publishing its Notice; and then they DID file a reconfirmation in an authorized pleading (the Reply Comment). WBYC can claim none of this and can claim no support from this case. The second case (Boalsburg, Pennsylvania et al, 7 FCC Rcd 7653 (1992) is even more strained, not even referring to a commitment to build a station but only to a proposed reimbursement of a moving channel, a claim on reconsideration denied by the FCC as not meeting the test for reconsideration, and noting inter alia, that another counterproposal filing in the same case had in fact been rejected for "procedural deficiencies". (See Boalsburg at paragraph 4).

In trying to minimize its failure here, WBYC has to ignore the importance of that failure as stated in Albion and

Llano... "Were it not for this pledge, we would not consider granting this proposal". To state the obvious, there was no such pledge by WBYC, so how could the FCC even consider the counterproposal? And if it is that important, wouldn't the failure to include such a commitment in the counterproposal, render the counterproposal ungrantable as filed, and at the very least not "substantially complete" as required?

As WBYC has simply "assumed" that it could file an extra pleading in this case, it also claims to have "assumed" that whatever it filed as a counterproposal would be automatically accepted and published by the FCC and that there was no need for WBYC to decide to offer any commitment (or not) until that time (See WBYC Supplement @ page 3). How novel.

The bottom line, as we read it, is that WBYC does not consider the commitment to apply for and build on a proposed replacement channel in a town where they have requested to delete the sole operating station in that town to be of sufficient importance that it should be included in the counterproposal as filed; that the failure to include any commitment to apply for or operate a replacement station in that community is not important enough to prevent the FCC from proceeding in processing and publishing the counterproposal anyway; and that once the FCC does publish the counterproposal, then WBYC would be ready to disclose its interest or lack of interest there.

Then again, notwithstanding its position as stated above, it also now seems to think that the commitment is important enough

to file an additional pleading, contrary to FCC Rules, and to go so far as to seeking to add such an expression of interest there in the extra pleading, although we assume, that is only done as a special accommodation here, since, according to WBYC, it didn't really have to consider making such a commitment until the FCC had published its original "no commitment" counterproposal. How even more novel.

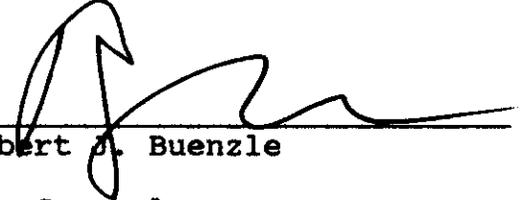
On the question of prejudice, NPB has already expressed its preference for the channels it has requested in the original rulemaking as well as its objection to the complication of this rulemaking caused by the Counterproposal and the Counterproposal's own further admitted conflict with another pending rulemaking to add channel 281A at Ossineke. But the fact is that the even greater prejudice here would be to the Commission processes themselves if the WBYC position is accepted since, if it is allowed for them, it must be allowed for all. The precedent would be clear: no need to put all your cards on the table when you file the counterproposal; under the WBYC reading of the law, the FCC would then be expected to proceed to process and publish such deficient counterproposals anyway and the proponent could then decide what, if anything, it wanted to do, what commitments to make, or not make. Or, in the alternative, it could always file a Supplement anytime that it felt that it might be in its own interest for some additional information to be parsed out, FCC Rule 1.415(d) notwithstanding. We don't think this is how it is supposed to work but it is obviously the Commission's call to make and to live with.

III. Conclusion

Wherefore, NPB moves to Strike the unauthorized Supplement filed by WBYC or, in the alternative, to deny that Supplement on the merits and to dismiss the Counterproposal filed by WBYC.

Respectfully Submitted,

NORTHERN PAUL BUNYAN RADIO COMPANY

by 
Robert J. Buenzle

Its Counsel

Law Offices
Robert J. Buenzle
11710 Plaza America Drive
Suite 2000
Reston, Virginia 20190

(703) 430-6751

August 7, 2002

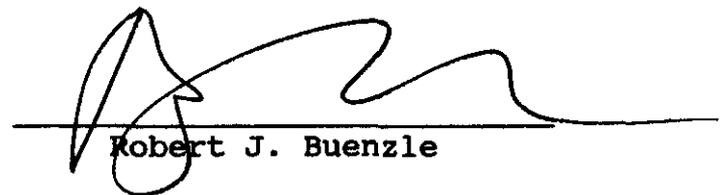
CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Motion to Strike And Opposition to Unauthorized 'Supplement of Northern Michigan Radio, Inc' have been served by United States mail, postage prepaid this 7th day of August, 2002, upon the following:

*John A. Karousos, Esq.
Assistant Chief, Audio Division
Office of Broadcast License Policy
Media Bureau
Federal Communications Commission
Portals II, Room 3-A266
445 12th Street SW
Washington, D.C. 20554

*Sharon P. McDonald, Esq.
Federal Communications Commission
Office of Broadcast License Policy
Media Bureau
Portals II, Room 3-A226
445 12th Street S.W.
Washington, D.C. 20554

Harry C. Martin, Esq.
Lee Petro, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
Counsel for Northern Michigan
Radio, Inc.


Robert J. Buenzle

* Also Sent By Fax