

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
of the Rules (Table of Allotments))
(Barnwell, SC; Pembroke, GA;)
Douglas, GA; Willacoochee, GA))

MM Docket No. 00-18
RM-9790

To: Chief, Media Bureau

PETITION FOR RECONSIDERATION

Bullie Broadcasting Corp. ("Bullie"), through counsel and pursuant to Section 405 of the Communications Act and Section 1.106(k)(3) of the FCC's rules, hereby petitions the staff to reconsider the Memorandum Opinion and Order by the Assistant Chief, Audio Division, in this proceeding, DA 02-2224, released October 4, 2002 (the "MO&O"), insofar and to the extent that the MO&O imposed a novel and extraordinary condition on the grant at some time in the future of operating authority for WBAW-FM at its new community of license, Pembroke, Georgia.

Specifically, in Paragraph 5 of the MO&O the staff modified the Report and Order in this proceeding, Barnwell, South Carolina, et al., 16 FCC Rcd 17860 (Mass Media Bur., 2001) (the "R&O"), "to the extent of withholding program test authority and precluding special temporary authority with respect to the reallocation of Channel 257C1 to Pembroke, Georgia, until the ultimate permittee of the Channel 256C3 allotment at Barnwell, South Carolina, commences operation." (Emphasis added.) The Channel 256C3 allotment at Barnwell is a new allotment proposed by Bullie in its original Petition for Rule Making and adopted in the R&O. The modification of the R&O was supposedly justified by the

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cancellation of the license for AM broadcast station WBUB, Barnwell, between the time Comments and Reply Comments were filed in this proceeding and the adoption and release of the R&O. As a consequence of the cancellation of the WBUB license, WBAW-FM -- even though the FCC had proposed fifteen months previously to change the station's community of license to Pembroke--was, at that time, the only broadcast station licensed to Barnwell.

In preemptively foreclosing any possibility of permitting operation of WBAW-FM at Pembroke pursuant to special temporary authority (as opposed to program test authority, which implies regularized operation in accordance with the rules, subject only to the formality of approval of a license application), the staff exceeded the remedial measures taken in previous rule making proceedings involving "backfill allotments" and, in fact, went beyond the relief requested in the Petition for Reconsideration by Multi-Service Corporation ("Multi-Service Corp.") The staff also exceeded its authority under Section 405.

I. The Preemptive Foreclosure of Special Temporary Authority Goes Beyond That Cited in Rulings by FCC Precedent.

Paragraph 4 of the MO&O wrongly asserts that its conditions . . . consistent with previous actions involving . . . of a 'backfill' channel replacing the allotment of a sole local service," citing, in Footnote 3, *Refugio* and *Texas*, Texas, 15 FCC Rcd 8497 (Mass Media Bur., 2000), and *Llano and Marble Falls, Texas*. 12 FCC Rcd 6809 (Mass Media Bur., 1997). Neither case, and no decision citing either case, specifically bars the

licensee of a station with a changed community of license from seeking special temporary authority.

At this moment in time, Bullie is in no position to say whether it might ever seek special temporary authority for WBAW-FM. As noted in the *MO&O*, however,

the Commission has no immediate plans to commence competitive bidding for the Barnwell new Barnwell allotment. Additionally, any construction permit issued for the "backfill" Barnwell facility will specify a construction period of three years. In short, Bullie Broadcasting's opportunity to implement its license modification is both uncertain and possibly years away.

MO&O, Paragraph 4.

The FCC should not contemplate such a delay lightly. First, Bullie has committed to reimburse the licensee of WDMG-FM, Douglas, Georgia, for the very substantial cost of relocating its transmitting facilities to serve the station's new community of license, Willacoochee, Georgia. That relocation *must* occur if WBAW-FM is to be relocated at a site from which it can serve Pembroke, and once authorized *will* take place, at its own pace and at Bullie's expense, without regard to the proximity of a date when WBAW-FM can begin operating at Barnwell. Second, the circumstances that are addressed by the *MO&O* are certainly not of Bullie's making. Bullie had no role in the cancellation of the WBUB license. Further, Bullie has absolutely no control over the timetable for accepting applications for a new FM station -- or any other station -- at Barnwell. The FCC has not accepted applications for new stations in the unreserved portion of the FM band since 1994. Public Notice, "FCC Freezes Comparative Proceedings," February 25, 1994, 1994 LEXIS 832. It has not accepted applications for new AM stations since February 1, 2000 (and apparently has not finished processing the applications received during that filing

window). It has not accepted applications for new noncommercial educational FM stations since April 14, 2000. Public Notice, "FCC Adopts Comparative Standards for Noncommercial Educational Broadcast Stations," April 14, 2000, 2000 LEXIS 1937. These inordinate delays in providing an opportunity for interested parties to file applications for new stations are not of Bullie's creation. In its Petition for Rule Making, and again in its Comments, Bullie promised to (a) file an application for the new Barnwell allotment at the first opportunity; (b) in the event of an auction for the right to operate on the new frequency, make at least the minimum required opening bid; (c) if it receives the construction permit, construct the station expeditiously. Bullie can do no more.

The foreclosure of any consideration of special temporary authority implies that the FCC is prepared to postpone indefinitely the realization of any the public interest benefits that would ensue from completion of the relocation of WBAW-FM to Pembroke, specifically, the provision of a new FM service to nearly 402,000 persons. Report and Order, Paragraph 5.¹ Pembroke is a growing community. Its population grew from 1,503 in 1990 to 2,379 in 2000, according to the most recent census – an increase of more than 58 percent -- and municipal officials believe that the population currently exceeds 2,500. The population of Barnwell, on the other hand, declined over the same period by more than 200 persons.

At the very least, it is premature for the staff to decide that in all circumstances, foreseeable and unforeseeable, special temporary authority should not be granted. The

¹ The figures cited in the *R&O* are from Bullie's Comments, filed March 23, 2000, Engineering Statement of William Culpepper, p. 8. They do not reflect the results of the 2000 census and are undoubtedly significantly higher.

FCC does not know when new applications will be permitted, or what applications may be granted, or when or to whom. The time to address whether special temporary authority would serve the overall public interest is if and when such a request is filed – not now.

If, notwithstanding Bullie’s commitments to apply for, bid and, if successful, build the new Barnwell station, there remains any uncertainty about the future implementation of service on the new allotment, the FCC has – and has exercised – ample authority to assure that the ultimate result is not to leave Barnwell with local service. For example, in an analogous situation (and roughly contemporaneously with the release of the *R&O*), in ***Nogales, Arizona***, et al., 2001 LEXIS 6336, the staff made new channel allotments at Vail and Patagonia, Arizona, that were subject to concurrence by the Mexican government.”

The staff said that

rather than delay . . . [the filing of applications], we allot those channels at this time. If construction permits are granted prior to the receipt of formal concurrence in the allotments by the Mexican government, the authorizations will include the following conditions: “Operation with the facilities specified herein subject to modification, suspension or termination without right to a hearing, if found by the Commission to be necessary in order to conform to the USA-Mexico FM Broadcast Agreement, or if specifically objected to by Mexico.

Nogales, Arizona, Paragraph 11. A similar condition would permit the realization of the public interest benefits of the Pembroke allotment and, at the same time, protect the FCC’s interest in the preservation of local service at Barnwell.

II. The FCC Lacked Authority to Grant Any Part of the Petition for Reconsideration.

The *MO&O* fails to address in any respect Bullie's showing that the petitioner for reconsideration lacked standing to request the relief sought in the Petition for Reconsideration and that the FCC, therefore, was without authority to grant the relief. The petition was limited to a single – and incorrect – claim: that the cancellation of the license for WBUB(AM), Barnwell, impermissibly resulted in depriving Barnwell of its only broadcast transmission service. The petitioner did not challenge either of the reasons set forth in the *R&O* for dismissing its counterproposal: (1) the counterproposal, which like Bullie's proposal was dependent on the reallocation of Channel 258C1 from Douglas to Willacoochee, failed to include a commitment to reimburse the licensee of WDMG-FM for the reasonable expenses incurred in relocation of the station; (2) the petitioner's proposed reordering of the Table of FM Allotments was an untimely counterproposal in different rule making proceeding.

The failure to articulate a single ground for reconsideration that would – if granted – lead to even the consideration, let alone the adoption, of the petitioner's counterproposal was a fatal flaw requiring dismissal of the petition. The petitioner had no standing, no stake in the outcome of the petition. Indeed, the petitioner's counterproposal was no longer technically feasible.

Standing to seek rehearing requires more than mere status as a party. Necessarily, it also requires the existence of a redressable injury. **See *California Association of the Physically Handicapped, Inc. v. FCC*, 778 F. 2d 823, 824 (D.C. Cir. 1985).** Because no

disposition of the petition would have resulted in a grant of the petitioner's counterproposal, its status in the proceeding was only that of an interloper, a "dog in the manger," not a party.

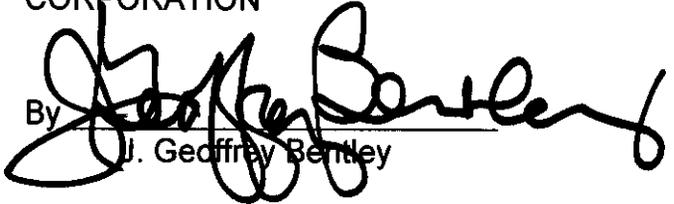
The filing of a legally defective petition did not give the FCC, in the guise of "reconsideration," *carte blanche* or a roving commission to discover error in its previous action. Such a holding would deprive every proceeding of any finality, as the FCC could then modify any order at any time on the basis of any piece of paper filed by any one. The rules (Sections 1.108, 1.113 and 1.117(a)) prescribed the time within which the Commission, or the staff acting on delegated authority, may modify an action or set it aside on its own motion). That time was long past by the time the *MO&O* was adopted.'

² This is even more clearly the case in regard to the gratuitous extension of prior FCC decisions to include the foreclosure of special temporary authority, an issue which was not raised in the petition for reconsideration and which Bullie, prior to the release of the *MO&O*, had no opportunity to address.

For the foregoing reasons, this Petition for Reconsideration should be granted, and the condition prohibiting the consideration of special temporary authority for the operation of WBAW-FM at Pembroke, Georgia, should be deleted.

Respectfully submitted,

BULLIE BROADCASTING
CORPORATION

By 
J. Geoffrey Bentley

BENTLEY LAW OFFICE
P.O. Box 710207
Herndon, Virginia 20171
(703)793-5207
(703)793-4978 (fax)

Its Attorney

November 4, 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Petition for Reconsideration to be served this 4th day of November 2002, by U.S. mail, postage prepaid, on ~~the~~ the following:

Law Office of Dan J. Alpert
2120 N. 21st Road
Arlington, VA 22201


J. Geoffrey Bentley