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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Murrieta, Arcadia, Fallbrook,)
Yucca Valley, and Desert Hot Springs,)
California).)

MM Docket No. 01-11
RM-10027
RM-10322

To: The Commission

APPLICATION FOR REVIEW

Big City Radio-LA, L.L.C. ("Big City Radio"), the licensee of KLYY(FM), Channel 296A, Arcadia, California, and KSYF(FM), Channel 296A, Fallbrook, California, by its attorneys and pursuant to Section 1.115 of the Commission's Rules, herein request that the full Commission review that portion of the *Report and Order* in this proceeding, DA 02-2514 (released October 9, 2002) ("*R&O*"), in which the Assistant Chief of the Audio Division, Media Bureau, denied Big City Radio's counterproposal filed in this matter. 1/ Big City Radio does not seek review of that portion of the *R&O* which allocated Channel 281A to Murrieta, California.

1/ See Big City Radio's Comments and Counterproposal dated March 12, 2001 ("Initial Counterproposal"), Big City Radio's Amendment to Comments and Counterproposal dated January 18, 2002 ("Amended Counterproposal"), and Big City Radio's Supplement to Amendment to Comments and Counterproposal dated August 22, 2002 ("Supplement to Counterproposal," and collectively with the Initial Counterproposal and Amended Counterproposal, the "Counterproposal").

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I. SUMMARY

Big City Radio's Counterproposal would clearly serve the public interest by modifying the FM Table of Allotments to permit a net increase in service to 2,310,009 persons. Big City Radio believes that the Commission's clearly stated policy mandates the grant of the Counterproposal. Specifically, the Commission's *Grandfathered Short-Spaced FM Stations Report and Order* ^{2/} eliminated the requirement that grandfathered short-spaced stations protect second-adjacent and third-adjacent channel allotments *at both the application and the allotment stage*. Pursuant to the *Grandfathered Short-Spaced FM Stations Report and Order*, Big City Radio's proposal to upgrade its grandfathered short-spaced station should be adopted. The past practices of the Commission do not warrant denial of the Counterproposal, as found by the Bureau in the *R&O*. To the contrary, Allocations Branch case law is consistent with Big City Radio's Counterproposal, Because Big City Radio's Counterproposal would serve the public interest and complies with Commission policy for pre-1964 grandfathered short-spaced station allotments, the Commission should adopt the Counterproposal.

^{2/} *Grandfathered Short-Spaced FM Stations*, Report and Order, 12 FCC Rcd 11840 (1997) ("*Grandfathered Short-Spaced FM Stations Report and Order*").

II. INTRODUCTION

On October 17, 2000, Helen Jones (“Jones”) filed a petition for rulemaking requesting the allotment of Channel 281A at Murrieta, California, as a first local aural service. A *Notice of Proposed Rulemaking* (“NPRM”) was subsequently released, on January 19, 2001, proposing the Murrieta allotment. ^{3/} In its Counterproposal, Big City Radio proposed that Channel 296B1 be allotted to Arcadia, California, in lieu of Channel 296A, and that accordingly, the license of Big City Radio station KLYY(FM) be amended to specify operations on Channel 296B1. The Counterproposal also proposed the allotment of Channel 295B1 to Desert Hot Springs, California, in lieu of Channel 295B at Yucca Valley, California, with the consequent modification of the license of KYOR(FM) to specify operation on Channel 295B1 at Desert Hot Springs, California. ^{4/} Furthermore, the Counterproposal, as amended, proposed the allotment of Channel 245A in lieu of Channel 296A to Fallbrook, California, and the modification of the license of Big City Radio station KSYU(FM) to specify operations on Channel 245A in lieu of operation on Channel 296A, along with the new allotment of Channel 281A to Murrieta, California. ^{5/}

^{3/} See *Murrieta, CA*, 6 FCC Rcd 2154 (M.M. Bur. 2001)

^{4/} Morris Communications Corporation, the licensee of KYOR(FM), Yucca Valley, California, has consented to such modification. See Initial Counterproposal at Declaration of Craig S. Mitchell.

^{5/} The Initial Counterproposal had proposed the allotment of Channel 281A to Fallbrook, with Channel 245A proposed for Murrieta. Jones filed Reply Comments objecting to the Counterproposal because she believed that Channel 245A at Murrieta would not provide 70 dBu coverage to 100% of Murrieta. To resolve the conflict between Jones’ proposal for Channel

In its Counterproposal, Big City Radio demonstrated that (1) the proposed changes at Arcadia, Falbrook and Yucca Valley/Desert Hot Springs, California would result in a net increase in service to a population of **2,310,009**, (2) the proposed upgrade of KLYY(FM) would not be short-spaced to any co-channel or first-adjacent channel allotments and (3) the existing grandfathered short-spacings to two second-adjacent channel stations would be reduced.

While granting the allotment of Channel **281A** to Murrieta, 6/ the Bureau rejected Big City Radio's Counterproposal, notwithstanding the demonstrated benefits of Big City Radio's request. Specifically, the *R&O* stated that Big City Radio's proposed upgrade of KLYY(FM) at Arcadia should be denied because: (1) the Arcadia allotment is not exempt from the second-adjacent channel spacing requirements specified in Section **73.207** of the Commission's Rules; (2) past practices of the Commission warranted dismissal; (3) due to grandfathered short-spacings to two second-adjacent channel stations, Big City Radio had failed to specify a theoretical fully-spaced reference site for the Arcadia allotment; and (4) notwithstanding that the Arcadia upgrade would ameliorate two grandfathered second-adjacent channel short-spacings, the proposal would,

281A and Big City Radio's Counterproposal, in its Amended Counterproposal, Big City Radio proposed the allotment of Channel **245A** to Falbrook, with Channel **281A** at Murrieta. Based on the filing of the Amended Counterproposal, Jones withdrew her Reply Comments and thereby withdrew her opposition to the Counterproposal. The Bureau approved the withdrawal by Jones of her Reply Comments, finding the agreement between the parties to be in compliance with Section 1.420(j) of the Commission's Rules. *See* *R&O* at ¶13.

6/ Big City Radio is not seeking review of the portion of the *R&O* that allotted Channel **281A** to Murrieta, California.

according to the Bureau, increase the area and populations that would receive second-adjacent channel interference.

III. QUESTION OF LAW PRESENTED FOR REVIEW

The question of law presented to the Commission in this Application for Review is: Whether the Commission’s policy that exempts – for both allotment and construction permit application purposes – second-adjacent grandfathered short-spaced stations from the minimum separation requirements of Section 73.207 of the Commission’s Rules warrants the adoption of Big City Radio’s Counterproposal?

IV. RELIEF SOUGHT AND BASIS FOR COMMISSION CONSIDERATION OF THE QUESTION PRESENTED

Big City Radio requests that the Commission overrule the *R&O* and approve the Counterproposal presented by Big City Radio because denial of the Counterproposal is in conflict with established Commission policy exempting second-adjacent channel grandfathered short-spaced stations from the minimum spacing requirements

V. DISCUSSION

In 1997, the Commission revised its *application and allotment* policy for grandfathered short-spaced stations with respect to second-adjacent and third-adjacent channel stations. Specifically, in the *Grandfathered Short-Spaced FM Stations Report and Order*, the Commission determined that there would no longer be any spacing requirements with respect to second-adjacent and third-adjacent channel short-spacing for the extremely limited class of pre-

1964 grandfathered stations, expressly stating that it had “no intention of relaxing second-adjacent-channel and third-adjacent-channel spacing requirements *as allotment and assignment criteria* for any group *except* pre-1964 grandfathered stations.” 7/

Despite clear direction provided in the Commission’s *Grandfathered Short-Spaced FM Stations Report and Order*, the Bureau erred in continuing to apply the Section 73.207 second-adjacent channel spacing requirements to Big City Radio’s Counterproposal. Big City Radio’s Counterproposal did not need to specify a theoretical fully-spaced reference site relating to the two second-adjacent channel stations to which its Arcadia station has been short-spaced since prior to 1964, because there are no minimum distance requirements among this small universe of stations. 8/ In addition, because the Commission has clearly indicated that there are no interference protections for second-adjacent and third-adjacent pre-1964 grandfathered short-spaced stations, the *R&O*’s discussion of potential interference is equally inapposite and irrelevant. 9/

7/ *Grandfathered Short-Spaced FA4 Stations Report and Order*, 12 FCC Rcd at 11849 (¶29) (emphasis added).

8/ On the other hand, Big City Radio’s allotment reference coordinates for operation of KLYY(FM) on Channel 296B1 at Arcadia meets all other minimum spacing requirements under Section 73.207.

9/ The *Grandfathered Short-Spaced FA4 Stations Report and Order* adopted the proposal to “permit second and third-adjacent channel grandfathered stations to implement maximum class facilities, and/or change transmitter site with complete flexibility on second-adjacent channel and third-adjacent channel short-spacings,” concluding that that “[e]ligible grandfathered stations will be able to propose facility modifications without regard to existing grandfathered second- and third-adjacent channel short-spacings.” *Grandfathered Short-Spaced FM Stations Report and Order*, 12 FCC Rcd at 11847, 11851 (¶¶ 20, 35).

As Big City Radio pointed out in its Amended Counterproposal, ^{10/} when a pre-1964 grandfathered short-spaced station proposes a change in the Table of Allotments, the Commission must apply its *current* spacing rules in deciding whether such changes are permissible. In fact, in *East Los Angeles, Long Beach, and Frazier Park, California*, ^{11/} the Allocations Branch analyzed the second-adjacent channel spacing rule *in effect at the time* of its review of a short-spaced allotment proposal and concluded that the potential interference from the proposed community change and relocation of the grandfathered station is not recognized as “harmful” or unacceptable interference. ^{12/} Although *East Los Angeles* predates the *Grandfathered Short-Spaced FM Stations Report and Order*, the principle is the same – in ruling on a short-spaced allotment, the Commission must look to the current spacing rules for pre-1964 grandfathered short-spaced stations – and the current rules contain no requirements with respect to second-adjacent and third-adjacent stations. ^{13/} Thus, as in *East Los Angeles*, under the Big City Radio Counterproposal, there is no “unacceptable interference” that is cognizable at the allotment stage. Because the Counterproposal complies with all applicable interference requirements and otherwise furthers the public interest, it should be adopted.

^{10/} Amended Counterproposal at 5-8.

^{11/} 10 FCC Rcd 2864 (Allocations Br. 1995).

^{12/} *Id.* at 2867 (¶17).

^{13/} See 47 C.F.R. § 73.213 (2001). The two pre-1964 grandfathered short-spacings here – to KROQ-FM, Pasadena, California, Channel 294B, and KLVE(FM), Los Angeles, California, Channel 298B – are both on second-adjacent channels to KLYY(FM)’s operation on Channel 296.

As the *R&O* correctly acknowledges, the Commission has routinely permitted pre-1964 grandfathered short-spaced stations to change their communities of license through rulemaking proceedings and has allowed such changes to include channel substitutions and transmitter site changes, notwithstanding that the allotment reference coordinates were not fully spaced to grandfathered short-spaced stations. ^{14/} Moreover, the Allocations Branch has also permitted a pre-1964 grandfathered short-spaced station to *change the class* of its allotment (albeit in a downgrade proposal) without consideration of pre-existing second and third-adjacent channel spacing issues. ^{15/}

The Commission has permitted pre-1964 grandfathered short-spaced stations to change class of service, communities of license and/or transmitter sites in the past so long as current short-spacing policies were met and, therefore, Big City Radio's Counterproposal involving a change in class and site is entirely consistent with Commission precedent. Although the Bureau stated in the *R&O* that Big City Radio "has not cited any case in which [the

¹⁴¹ See *R&O* at ¶ 18. See e.g., *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (Allocations Br. 1992) (permitting pre-1964 grandfathered short-spaced station to change community of license); *Oceanside and Encinitas, California*, 14 FCC Rcd 15302 (Allocations Br. 1999) (same); *Kankakee and Park Forest, Illinois*, 16 FCC Rcd 6768 (Allocations Br. 2001) (same); *San Rafael, California*, 5 FCC Rcd 1892 (Allocations Bureau 1990) (allowing pre-1964 grandfathered short-spaced station to change channel and transmitter site); *Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876 (Allocations Br. 2001) (permitting pre-1964 grandfathered short-spaced station to change community of license and transmitter site), *application for review pending on other grounds*; *Taccoa and Sugar Hill, Georgia*, 16 FCC Rcd 14069, (Allocations Br. 2001) (allowing pre-1964 grandfathered short-spaced station to downgrade class and change channel).

¹⁵¹ *Taccoa and Sugar Hill*, 16 FCC Rcd at 14070 (¶4), *set aside on other grounds*, *Taccoa, Sugar Hill and Lawrenceville, Georgia*, 16 FCC Rcd 21 191 (Allocations Br. 2001).

Commission] permitted grandfathered stations to upgrade their facilities beyond the maximum allowed in their class,” 16/ by the same token, the *R&O* did not cite to any case in which the Commission has rejected such a proposal. 17/ In short, a correct reading of the *Grandfathered Short-Spaced FM Stations Report and Order* and other Commission precedent warrants grant of the Counterproposal.

VI. CONCLUSION

The Bureau incorrectly denied Big City Radio’s Counterproposal. The *R&O* disregarded the Commission’s directive in *Grandfathered Short-Spaced FM Stations Report and Order* for pre-1964 grandfathered short-spaced stations and overlooked abundant Commission precedent that supports the Counterproposal.

For the foregoing reasons, Big City Radio herein respectfully requests that the

16/ *R&O* at ¶ 18

17/ In fact, the dearth of other cases involving pre-1964 grandfathered second- or third-adjacent channel short-spaced channel stations seeking allotment upgrades that are otherwise fully-spaced is more accurately a reflection of the extremely small universe of stations that may avail themselves of the flexibility enacted by the Commission in the *Grandfathered Short-Spaced FM Stations Report and Order*. Indeed, Big City Radio estimates that no more than two or three other grandfathered stations would meet the criteria for a similar upgrade.

Commission review the action taken by the Bureau and that the Commission grant Big City Radio's Counterproposal.

Respectfully submitted,

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November 8, 2002

CERTIFICATE OF SERVICE

I, Charlene Jones, hereby certify that on this 8th day of November, 2002, copies of the foregoing **APPLICATION FOR REVIEW** were hand-delivered or mailed, first-class, postage prepaid, to the following:

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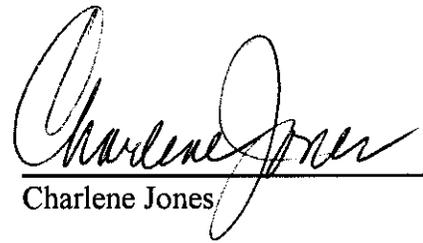
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