

Before the  
Federal Communications Commission  
Washington, DC

NOV 20 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations )  
(Barnwell, South Carolina and Pembroke, )  
Douglas and Willacoochee, Georgia; )  
Statesboro, Pulaski, East Dublin, )  
Swainsboro, Twin City, Georgia) )  
 )  
To: Assistant Division Chief, Audio Division )  
Media Bureau )

MM Docket No. 00-18  
RM-9790

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Multi-Service Corp. ("Multi-Service"), by its attorney, hereby submits its opposition to the "Petition for Reconsideration" filed by Bullie Broadcasting Corporation ("Bullie") with respect to the *Memorandum Opinion and Order*, DA 02-2224 (MMB Oct. 4, 2002) in this proceeding. With respect thereto, the following is stated:

As Bullie concedes, due to the fact that Station WBUB(AM), Barnwell, South Carolina, has been deleted, Barnwell currently has no locally licensed service other than WBAW-FM. Therefore, were WBAW-FM, Barnwell, South Carolina immediately to change its city of license to Pembroke, Georgia, it would deprive Barnwell of any locally licenced service. Admittedly, Channel 256C3 is being allotted as a "backfill" allotment, and Bullie has committed to applying for that channel. However, that allotment does not constitute replacement "service" until such time as the allotment is associated with a construction permit, the construction permit is

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constructed, and an underlying station operating on the allotment begins operation.’

Bullie makes essentially two claims. First, it claims that the Bureau’s foreclosure of operations on its new channel (*i.e.*, including Special Temporary Authority) until new replacement service commences Bamwell is inconsistent with Commission precedent. Bullie is incorrect. Commission precedent is clear. In *Refugio and Taft, TX*, 15 FCC Rcd 8497 (MMB 2000), a petitioner requested a change in city of license and, as here, proposed a “backfill” allotment at the community it was departing, stating its willingness to file an application for the channel should the channel be made available. *Id* at ¶ 6. The city of license change and new allotment were approved, but the change of city of license was made conditional.

To ensure that local service will continue to be provided to Refugio, we will condition the grant of an authorization to operate Station KTKY on Channel 293C2 at Taft upon activation of service at Refugio either on Channel **263A** or 291A. See *Llano and Marble Falls, TX*, 12 FCC Rcd 809 (1997). In comments, Pacific has requested that activation of Channel 293C2 at Taft not be conditioned on commencement of service at Refugio. Pacific states that it is not backing away from its commitment to provide local service at Refugio but is concerned with the possible delay in providing service to the community of Taft as service may be delayed for years at Refugio if the frequencies are required to be awarded by way of auction. We deny Pacific’s request. **The Commission has specifically stated that the public has a legitimate expectation that existing service will continue, and that this expectation is a factor to be weighed independently against the service benefits that may result from reallocating a channel. We have weighed the factors and are granting Pacific’s reallocation request because of the public interest benefits of providing first local service to both Taft and Refugio. However, we are compelled to condition the the reallocation of Channel 293C2 to Taft on activation of a channel at Refugio to insure continued service at Refugio.**

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<sup>1</sup> See *Change of Community Order*, 5 FCC Rcd at 7097, ¶ 19 (1990) (vacant allotments or unconstructed construction permits are not considered to be existing services for change of community proceedings under Section 1.420(i) of the Commission’s Rules). See also, e.g., *Olney, Archer, Denison-Sherman and Azle, TX and Lawton, OK*, 13 FCC Rcd 18920, ¶ 4 (MMB 1998) (“we recognize that a removal of a sole local service...is not obviated by the allotment of a vacant channel”).

*Id.* (emphasis added; footnotes omitted). Thus, the condition imposed stated as follows:

(c) Operation of Station KTKY on Channel 293C2 in Taft, Texas, including program test operation pursuant to Section 73.1620, will not be commenced until such time as express authorization from the Commission has been granted. **Such authorization will not be granted until a construction permit has been issued for Channel 263A or Channel 291A at Refugio, Texas. and activation of service has been initiated on Channel 263A or Channel 291A at Refugio.**

*Id.* at ¶ 9 (emphasis added).

The primary argument made by Bullie is identical to that raised in *Refugio*,<sup>2</sup> and this language is functionally and substantively equivalent to the condition imposed by the Bureau in the instant case.<sup>3</sup> It is not sufficient, as Bullie suggests, for Bullie simply to have given a “commitment to apply” for the channel. Petition at 5. As in *Refugio*, the Commission has determined that local service to Bamwell must at all times be *maintained*, and therefore operations on the still-vacant channel assigned to the community Bullie wishes to abandon must *begin* before the channel/community change may be implemented. Although Bullie argues that Pembroke “grew” from 1,503 to 2,379 between 1990 and 2000 while the population of Bamwell “declined over the same period by more than 200 persons” (Petition at 4), Bullie glosses over the fact that the remaining population of Bamwell nevertheless is “5,035 persons.” See Attachment 1. Imposing a condition such as in the *Nogales* case<sup>4</sup> cited by Bullie (Petition at 5) would do

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<sup>2</sup> *E.g.* “Refugio but is concerned with the possible delay in providing service to the community of Taft as service may be delayed for years at Refugio if the frequencies are required to be awarded by way of auction.” *Refugio* at ¶ 6.

<sup>3</sup> It also is essentially the condition already requested by Multi-Service previously. See Multi-Service “Reply to Opposition” at 3. *Cf.* Petition at 2 (the condition “went beyond the relief requested in the Petition for Reconsideration by Multi-Service Corporation”).

<sup>4</sup> *Nogales, Vail and Pantagonia, AZ*, 16FCC Rcd 6935 (MMB (2001)).

nothing to ensure the continuity of service to this substantial population comprising Barnwell during the years prior to auction of a new allotment, subsequent to the auction (while a construction permit application is being processed), and the up-to-three year period subsequent to grant of the permit (*i.e.*, the time prior to the permit's expiration). As even a more risky proposition, there is no guarantee that permit holder, whoever that may be, will successfully construct any new Barnwell facility within the required 3-year construction permit: which creates even more uncertainty as to precisely when service to Barnwell may be replaced. For these reasons, the Commission's approach – to maintain service to Barnwell during all these intervening periods – is in the public interest, and should be affirmed.

Moreover, procedurally, Bullie argues that Multi Service, and the Commission, lacked standing to seek or issue reconsideration in this case. Bullie is wrong in both cases. First, Multi-Services is a party to this proceeding, and therefore has full standing to seek reconsideration in this case. Moreover, even if Multi-Service did not, the Bureau itself was fully permitted and obliged to issue reconsideration in this proceeding, and is permitted to correct errors as long as this case lacks finality. *Alva*, *Mooreland*, *Tishomingo*, *Tuttle* and *Woodward*, Oklahoma, 17 FCC Rcd 1477 (MMB 2002). As the Commission recognized in that case:

Under Section 1.113(a) of the Commission's Rules, we may modify or set aside on our own motion, any action taken pursuant to delegated authority within 30 days of the public notice of such action. The filing of an application for review tolls the 30-day period.

Id. at ¶ 4. See also, *Winslow*, *Camp Verde*, *Mayer* and *Sun City West*, Arizona, 17 FCC Rcd

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<sup>5</sup> As the Commission recognized in *Cut and Shoot*, TX, 11 FCC Rcd 14383 (1996): “the facilities set forth in some outstanding construction permits are never built and licensed.” Id. at ¶ 4.

14688 ¶ 6 (MMB 2002). Legally, the filing of a “petition for reconsideration” also tolls the 30-day period. In both cities cases, changed factual circumstances caused the Bureau to modify its earlier decisions. The Bureau is equally free to do so in this case, as well.

*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 (1990), the Commission addressed the removal of a sole local service from a community as “presumptively” disserving the public interest. As the Commission has stated, “in general, we do not believe that the public interest would be served by removing a community’s sole local transmission service merely to provide a first local transmission service to another community.” See *Ardmore, Oklahoma, and Sherman, Texas*, 6 FCC Rcd 7006, ¶ 7 (1991). The underpinning for this policy is that the public has a legitimate expectation that existing local service will continue. In this connection, the Commission stated that a vacant allotment or an unbuilt construction permit does not adequately cure a disruption of this service.“ Thus, under Commission policy, in order to qualify for an unconditional change of city of license, there must be an **operating station** licensed to Barnwell. In short, both Commission policy and the public interest fully dictate that Station WBAW-FM remain licensed to Bamwell until such time as a new service is assigned to Barnwell and begins operation. Consequently, reconsideration of the decision of the Policy and

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<sup>6</sup> See *Change of Community Order*, 5 FCC Rcd at 7097, ¶ 19 (1990) (vacant allotments or unconstructed construction permits are not considered to be existing services for change of community proceedings under Section 1.420(I) of the Commission’s Rules). Accord, *Sparta and Buckhead, GA*, 15 FCC Rcd 21536 (MMB 2000) (unbuilt construction permit); *Rugio and Taft, TX*, 14 FCC Rcd 11609 ¶ 3 (MMB 1999) (the Commission has defined “existing service” for change of community cases as “on air stations”); *Olney, Archer, Denison-Sherman and Azle, TX and Lawton, OK*, 13 FCC Rcd 18920, ¶ 4 (MMB 1998) (“we recognize that a removal of a sole local service...is not obviated by the allotment of a vacant channel”).

Rules Division was entirely warranted.

**WHEREFORE**, it is respectfully requested that the Petition for Reconsideration filed by Bullie Broadcasting Corp. be denied.

Respectfully submitted,

**MULTI-SERVICE CORP.**

By: \_\_\_\_\_

Dan J. Alpert

Its Attorney

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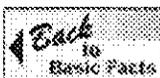
November 20, 2002

*Attachment 1*

## U.S. Census Bureau

American FactFinder

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## Quick Tables

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**DP-1. Profile of General Demographic Characteristics: 2000**  
**Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data**  
**Geographic Area: Barnwell city, South Carolina**

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see <http://factfinder.census.gov/home/en/datanotes/expsf1u.htm>.

Subject	Number	
<b>Total population</b>	<b>5,035</b>	<b>100.0</b>
<b>SEX AND AGE</b>		
Male	2,340	46.5
Female	2,695	53.5
Under 5 years	407	8.1
5 to 9 years	364	7.2
10 to 14 years	431	8.6
15 to 19 years	363	7.2
20 to 24 years	316	6.3
25 to 34 years	671	13.3
35 to 44 years	720	14.3
45 to 54 years	617	12.3
55 to 59 years	239	4.7
60 to 64 years	164	3.3
65 to 74 years	386	7.7
75 to 84 years	278	5.5
85 years and over	79	1.6
Median age (years)	34.6	(X)
18 years and over	3,603	71.6
Male	1,598	31.7
Female	2,005	39.8
21 years and over	3,419	67.9
62 years and over	827	16.4
65 years and over	743	14.8
Male	282	5.6
Female	461	9.2
<b>RACE</b>		
One race	4,985	99.0
White	2,508	49.8
Black or African American	2,385	47.4
American Indian and Alaska Native	20	0.4
Asian	53	1.1
Asian Indian	13	0.3
Chinese	18	0.4
Filipino	3	0.1
Japanese	2	0.0
Korean	1	0.0
Vietnamese	8	0.2
Other Asian <sup>1</sup>	8	0.2
Native Hawaiian and Other Pacific Islander	2	0.0
Native Hawaiian	1	0.0
Guamanian or Chamorro	1	0.0
Samoan	0	0.0

**CERTIFICATE OF SERVICE**

I, ~~Dan~~ J. Alpert, hereby certify that the foregoing document has been sent to the following parties via First Class Mail, postage prepaid:

J. Geoffrey Bentley, P.C.  
Bentley Law Office  
P.O. Box 71207  
Herndon, VA 20171

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