

BEFORE THE
Federal Communications Commission
WASHINGTON D C 20554.

In re Application of)
)
CALOOSA TELEVISION CORPORATION) File No. BPTVA-20010712AJK
WBSP-LP, Naples, Florida)
)
For Conversion to Class A Status)

TO: Chief, Mass Media Bureau

**OPPOSITION TO
"PETITION FOR RECONSIDERATION, OR,
IN THE ALTERNATIVE, FOR DECLARATORY RULING"**

Caloosa Television Corporation (Caloosa), by its attorney, and pursuant to Section 1.106(e) of the Commission's Rules, hereby respectfully submits its Opposition to the "Petition for Reconsideration or, in the Alternative, for Declaratory Ruling" submitted by Fort Myers Broadcasting Company (FMBC). In support whereof, the following is shown:

Preliminary Statement

1. Caloosa has been the licensee of Low Power Television Station WBSP-LP, Channel 9, Naples, Florida since the station's original covering license was granted on November 1, 1990. On August 12, 2001, its above-captioned application for Class A television status was granted by the Commission.

2. FMBC is licensee of Television Broadcast Station WINK-TV, Channel 11, Fort Myers, Florida. FMBC was allocated UHF Channel 53 for its digital television operations. Apparently dissatisfied with this digital allocation, FMBC filed a "Petition for Rulemaking" to substitute Channel 9 for Channel 53 in the digital television table of allotments at Fort Myers. A "Notice of Proposed Rulemaking" ensued, MM Docket No. 00-180, which was opposed by the licensees of WFTV(TV), analog channel 9, Orlando, Florida, and of WPLG-DT, digital channel 9, Miami, Florida. It is therefore unclear, and therefore at least as unlikely as likely, that Channel 9 is in fact available for digital television use at Fort Myers.

3. FMBC filed its "Petition" on August 30, 2001. Pursuant to Section 1.106(g) of the Rules, Caloosa was afforded ten (10) days in which to file a response; pursuant to Section 1.4(h) of the Rules, because the pleading was served by mail, Caloosa was allowed an additional three days (excluding "holidays") in which to file a response. The tenth day subsequent to August 30, 2001 was Sunday, September 9, 2001. Because of the national emergency on Tuesday, September 11, 2001 which led to the closing of the Commission, said day is not counted in determining the due date pursuant to Section 1.4(e)(1). As a result, the due

date for this "Opposition" is Thursday, September 13, 2001, and this pleading is timely filed.

FMBC's Pleading Is Procedurally Defective

4. FMBC seeks *inter alia* reconsideration of a Commission action of August 11, 2000 granting Caloosa the right to file an FCC Form 302-CA application for WBSP-LP. Section 405 of the Communications Act, 47 U.S.C. §405, specifically states that "[a] petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of" [emphasis supplied]. With respect to the August 11, 2000 letter ruling, pursuant to Section 1.4(b)(5) of the Rules the "Public Notice" date is August 11, 2000, the date which appears on the letter.

5. Therefore, it was incumbent on FMBC to have filed a "Petition for Reconsideration" relative to the August 11, 2000 ruling on or before Monday, September 11, 2000. By failing to meet this deadline, FMBC's "Petition for Reconsideration" is procedurally defective, and the Commission cannot waive a statute. *Reuters, Ltd. v. FCC*, 781 F.2d 946, 952 (D. C. Cir. 1986); see also *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D. C. Cir. 1993).

6. FMBC's argument is that the August 11, 2000 action was a nullity because the Chief of the Mass Media Bureau's

Video Services Division signed the letter, while the June 9, 2000 order was issued "by the Chief, Mass Media Bureau". In fact, the June 9, 2000 "order" was an unsigned "Public Notice", DA 00-1227, with the typed words "By: Chief, Mass Media Bureau" at the end of the narrative statement which preceded the list of stations. FMBC cites no case on point for its proposition, which strikes us as a bogus argument. Caloosa timely filed a proper "Petition for Reconsideration" of the adverse June 9, 2000 ruling, and was certainly entitled to rely on the letter ruling of August 11, 2000, which was signed by a long-time member of the Commission's staff known to the undersigned to have "signing authority" on television and low power television matters¹. If FMBC wished to validly assert its rights, it was incumbent on it to file a petition by September 11, 2000. It failed to do so. If FMBC's petition were sustained, no member of the public could ever rely for sure on a Commission action, because years later a challenging party could raise alleged procedural defects on a Commission action.

7. Next, FMBC raises matters that, if it thought them probative or important, should have been raised by FMBC in a formal "Petition to Deny" subject to the various requirements of Section 309(d) of the Communications Act of

¹Counsel for FMBC, a former long-term employee of the Commission knows this too, which raises questions as to the good faith of his argument.

1934, as amended, including but not limited to the requirement that its pleading be supported by an affidavit or affidavits of a person or persons with actual knowledge of the facts alleged. FMBC's "Petition for Reconsideration" is unsupported by such affidavits, and it is procedurally defective.

8. Furthermore, one Commission licensee does not have a vested interest in the disqualification of another Commission licensee. *Crosthwait v. FCC*, 584 F.2d 550 (D. C. Cir. 1978).

9. For the foregoing reasons, FMBC's pleading is procedurally defective, and must be summarily rejected.

Section 312(g) Does Not Apply Here

10. FMBC next claims that because Caloosa had operated WBSP-LP on a "minimalist" basis, it has violated Section 312(g) of the Communications Act, and therefore the authorization for WBSP-LP was "forfeited".

11. As it turned out, WBSP-LP has never been off the air for 365 consecutive days, or for one full year. The statute in question, 47 U.S.C. §312(g), only allows the Commission to automatically cancel a license where the station has been off the air and has not broadcast for one full year. FMBC cites no precedent to the contrary. In fact, we are aware of at least one case, *WRHC Broadcasting Corporation*, 15 FCC Rcd 5551 (2000), where the station in

question, WRHC(AM), Coral Gables, Florida, operated for over two years, and for more than one full year after the effective date of Section 312(g) on the wrong frequency (1560 kHz, rather than its licensed allocation of 1550 kHz) at an unauthorized location. This violation did not incur the automatic license cancellation contemplated by Section 312(g), apparently because the station did operate in some shape or form.

12. So, even if FMBC were correct in its facts (which we do not concede, because its petition is procedurally defective for the reasons shown above), Section 312(g) does not apply in this case, because WBSP-LP did in fact return to the air before the one-year anniversary of its becoming "dark" took place.

FMBC Has No Rights Vis a Vis Channel 9

13. Although FMBC has filed an FCC Form 301 application for digital operations on Channel 9, this application is a legal nullity, and may not be accepted for filing by the Commission. This is because Section 13.622(c)(1) of the Rules states that:

Applications may be filed to construct DTV broadcast stations only on the channels designated in the DTV Table of Allotments set forth in paragraph (b) of this Section, and only in the communities listed therein. Applications that fail to comply with this requirement, whether or not accompanied by a petition to amend the DTV table, **will not be accepted for filing.** [emphasis supplied]

14. Therefore, FMBC fails in its "Petition" to state the basis for a legal claim upon which relief can be granted.

Conclusion

15. For all of the foregoing reasons, FMBC has filed a procedurally defective pleading that fails to state the basis for a legal claim upon which relief can be granted. Its "Petition for Reconsideration, or, in the Alternative, for Declaratory Ruling" must be summarily denied.

WHEREFORE, it is respectfully urged that the "Petition for Reconsideration, or, in the Alternative, for Declaratory Ruling" filed by Fort Myers Broadcasting Company **BE DENIED**.

Respectfully submitted,

CALOOSA TELEVISION CORPORATION

By 
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September 13, 2001

CERTIFICATE OF SERVICE

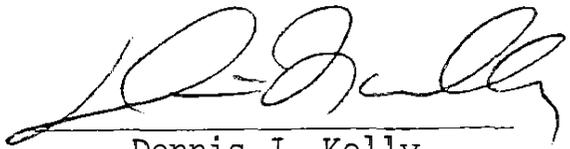
It is hereby certified that a true copy of the foregoing "Opposition, etc." was served by first-class United States mail, postage prepaid, on this 13th day of September, 2001 upon the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)
CALOOSA TELEVISION CORPORATION) File No. BPTVA-20010712AJK
WBSP-LP, Naples, Florida)
For Conversion to Class A Status)
To: Chief, Mass Media Bureau

COMMENTS IN SUPPORT OF CALOOSA OPPOSITION

Post-Newsweek Stations, Florida, Inc. (“Post-Newsweek”), licensee of WPLG-DT (DTV Channel 9, Miami, Florida), submits these comments in support of the Opposition filed by Caloosa Television Corporation (“Caloosa”) with respect to the above-captioned matter on September 13, 2001.¹ Caloosa filed its Opposition to defend against a

¹ Opposition to “Petition for Reconsideration, or, in the Alternative, for Declaratory Ruling,” filed by Caloosa Television Corporation, File No. BPTVA-20010712AJK (September 13, 2001) (“Opposition”). Post-Newsweek files these comments because it believes that the facts included herein will be of assistance to the Commission as it considers this matter. In the alternative, Post-Newsweek requests that the Commission accept these comments as a late-filed opposition to FMBC’s “Petition for Reconsideration, or, in the Alternative, for Declaratory Ruling.” Post-Newsweek notes that FMBC’s certificate of service states that Post-Newsweek counsel was served with the Petition by first-class mail on August 30, 2001, and Post-Newsweek does not dispute that FMBC did, in fact, serve Post-Newsweek counsel by mail. Perhaps because of some problem with its delivery, however, Post-Newsweek counsel has no record of having received its service copy of the Petition and accordingly did not become aware of the Petition until it received service of Caloosa’s Opposition on September 18, 2001. For that reason, Post-Newsweek has styled this pleading as comments in support of Caloosa’s Opposition, rather than as an opposition to FMBC’s Petition.

Petition filed by Fort Myers Broadcasting Company (“FMBC”) on August 30, 2001,² which seeks to overturn the FCC’s grant of Class A television status to Caloosa’s station WBSP-LP, Channel 9, Naples, Florida. FMBC challenges the grant of Class A status to WBSP-LP because it wishes to use Channel 9 for the DTV service of its station WINK-TV in Fort Myers, Florida, and specifically urges the Commission to take into account the pending rulemaking proceeding to change its DTV channel (MM Docket No. 00-180) in evaluating the merits of its Petition.’ WINK-TV’s proposed DTV operations on Channel 9 would displace WBSP-LP’s existing analog service.

As Caloosa points out in its Opposition, WINK-TV has no claim to DTV Channel 9. Citing Section 73.622(c)(1) of the FCC’s rules, which prohibits DTV applications for channels other than those specified in the DTV Table of Allotments, Caloosa rightly notes that “[a]lthough FMBC has filed an FCC Form 301 application for digital operations on Channel 9, this application is a legal nullity, and may not be accepted for filing by the Commission.”⁴ Moreover, Caloosa properly points out that while the Commission initiated a rulemaking to consider FMBC’s request to change its DTV channel from Channel 53 to Channel 9, that rulemaking proposal has been “opposed by the licensees of WFTV(TV), analog Channel 9, Orlando, Florida, and of WPLG-DT, digital channel 9, Miami, Florida.”⁵ FMBC’s

² Petition for Reconsideration, or, in the Alternative, Declaratory Ruling, filed by Fort Myers Broadcasting Company, File No. BPTVA-20010712AJK (September 13, 2001) (“Petition”).

³ Petition at 2 n.1 (“FMBC is a person aggrieved by the grant of Class A status to WBSP-LP because such status conflicts with FMBC’s proposal to allot DTV Channel 9 to Fort Myers, Florida in MM Docket No. 00-180”).

⁴ Opposition at 6.

⁵ Opposition at 2. *See also* Comments of Post-Newsweek Stations, Florida, Inc. in Opposition to WINK-TV DTV Allotment Proposal, MM Docket No. 00-180 (filed Nov. 22, 2000) (“Post-Newsweek Comments”); Reply Comments of Post-Newsweek Stations, Florida, Inc. in

channel change proposal also has been opposed by Media General Communications, Inc. (“Media General”), licensee of adjacent-channel analog station WFLA-TV in Tampa, Florida,⁶ and by Caloosa.⁷ In any event, FMBC’s proposed channel change has not been granted, and therefore provides no legitimate basis for rescinding WBSP-LP’s Class A license.*

In its Petition, FMBC asserts that “substantial public interest benefits will result from the substitution of an in-core television DTV allotment for the present out-of-core DTV allotment for WINK-TV;”⁹ that “[t]he DTV allotment proposed in MM Docket No. 00-180 is a far more efficient use of Channel 9 than the use advanced in Caloosa’s application;”¹⁰ and that “equities favor grant of the in-core DTV allotment advocated by FMBC in MM Docket No. 00-180, an allotment that will otherwise be impeded by grant of Class A protection to WBSP-LP.”¹¹ FMBC fails to disclose, however, that its channel change proposal has been opposed by Post-Newsweek, Cox Broadcasting, Inc. (“Cox”) and Media General because of harmful interference to their existing full power co-channel and adjacent-channel digital and analog service and because it would displace WBSP-LP.¹²

Opposition to WINK-TV DTV Allotment Proposal, MM Docket No. 00-180 (filed December 11, 2000) (“Post-Newsweek Reply Comments”); Comments of Cox Broadcasting, Inc., MM Docket No. 00-180 (filed Nov. 22, 2000) (“Cox Comments”).

⁶ Reply Comments of Media General Communications, Inc., MM Docket No. 00-180 (Dec. 11, 2000).

⁷ Reply Comments of Caloosa Television Corporation, MM Docket No. 00-180 (Dec. 11, 2000).

⁸ See Opposition at 2 (“It is therefore unclear, and therefore at least as unlikely as likely, that Channel 9 is in fact available for digital television use at Fort Myers.”).

⁹ *Petition at 18.*

¹⁰ *Id.* at 19.

¹¹ *Id.*

¹² See Post-Newsweek Comments; Post-Newsweek Reply Comments; Cox Comments.

Specifically, in MM Docket No. 00-180, Post-Newsweek objected to FMBC's channel change proposal because it would (i) cause harmful interference to the co-channel DTV service provided by Post-Newsweek's station WPLG-DT in Miami;¹³ (ii) cause harmful interference to WFTV's co-channel analog service in Orlando;¹⁴ (iii) cause harmful interference to WFLA's adjacent-channel analog service in Tampa;" and (iv) displace WBSP-LP's co-channel analog service in Naples.¹⁶ Post-Newsweek demonstrated that FMBC's proposal would result in a loss of full power television service to at least of 82,679 persons and, due to the better than average propagation characteristics in Florida, probably many more." In its comments opposing the channel change, Cox noted that FMBC's proposed Channel 9 allotment would be 63.3 kilometers short-spaced to WFTV's licensed site¹⁸ and "has the potential to decrease the quality of WFTV(TV) service now being received by 269,526 persons (representing 10.76% of the station's service population)."

Accordingly, Post-Newsweek in MM Docket No. 00-180 submitted that the harms resulting from FMBC's channel change proposal far outweighed the asserted benefits.²⁰ Post-Newsweek noted that WINK-TV's current DTV allotment already more than replicates its

¹³ See Post-Newsweek Comments at 2-3, 5-8. WPLG has been providing digital service on its assigned DTV Channel 9 since May 1999.

¹⁴ See *id.* at 2.

¹⁵ See *id.*

¹⁶ See *id.* at 2-3; Post-Newsweek Reply at 2 and n.6.

¹⁷ See Post-Newsweek Comments at 5-8.

¹⁸ See Cox Comments at Engineering Statement, pp. 6-7.

¹⁹ *Id.* at 2. Cox also noted that it intends to relocate WFTV's DTV service to Channel 9 at the close of the DTV transition and that its DTV operations on Channel 9 "would cause increased interference of 4.43% to co-channel operations of WINK-DT." See *id.* at 3.

²⁰ See Post-Newsweek Comments at 8-10; Post-Newsweek Reply Comments at 3-5.

existing analog service, providing a service population 11.4% greater than its analog service population,²¹ and observed that while FMBC's proposal would increase WINK-TV's digital service area by an additional 51,415 persons, it would do so at the expense of the at least **82,679** viewers that will lose their *existing* full power analog and digital service, the many more who will suffer degradations in service, and all of the viewers who otherwise would enjoy the service of WBSP-LP on Channel 9 in Naples.²² Therefore, to the extent that the Commission weighs the "equities" of preserving WBSP-LP's Class **A** status against granting FMBC's DTV channel change request – as FMBC explicitly urges in its Petition – it must take into account the harms to the public interest on the record in MM Docket No. 00-180.

* * * *

For the foregoing reasons, Post-Newsweek supports Caloosa's Opposition and urges the Commission to dismiss FMBC's Petition.

Respectfully submitted,



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September 24, 2001

²¹ See Post-Newsweek Comments at 8-9

²² See *id.* at 4.

CERTIFICATE OF SERVICE

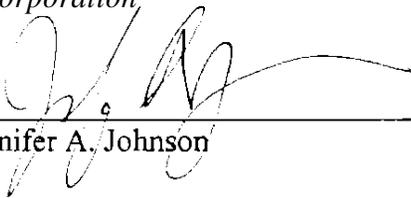
I hereby certify that on this 24th day of September, 2001, I caused a copy of the foregoing Comments In Support Of Caloosa Opposition to be delivered to the following by U.S. first class mail, postage prepaid:

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To: The Chief, Mass Media Bureau

Reply

Fort Myers Broadcasting Company (“FMBC”) hereby replies to the Opposition to Petition for Reconsideration, or in the Alternative, for Declaratory Ruling (the “opposition) filed by Caloosa Television Corporation (“Caloosa”).¹

Caloosa argues that FMBC’s Petition for Reconsideration or, in the Alternative, for Declarator), Ruling (the “Petition”) is infirm because FMBC did not seek reconsideration of the Video Services Division’s August 11, 2000 letter reinstating Caloosa’s Statement of Eligibility for Class A Low Power Television Status. This is nonsense. No portion of the proceeding reinstating Caloosa’s Statement of Eligibility was ever placed on public notice and, therefore, no one but Caloosa was afforded notice and an opportunity to participate in that proceeding. Moreover, the action granting the above-captioned license application was taken the very day the application

The silence of this reply with respect to any allegation of Caloosa in its Opposition should not be interpreted as agreement with Caloosa’s assertions. To the contrary, the complete and correct facts and law applicable to this proceeding are set out in FMBC’s pleadings.

appeared on public notice as accepted for filing. FMBC has clearly met the requirements of Rule 1.106 with respect to raising new matters in a petition for reconsideration,

Caloosa intimates that FMBC should have petitioned to deny the application to convert WBSP-LP to Class A status. Certainly FMBC, the licensee of Station WINK-TV, Fort Myers, Florida, has standing as a competitor of WBSP-LP to file such a petition. However: Caloosa filed for Class A status in an application that was not subject to public notice prior to grant. Section 309(d)(1) of the Communications Act of 1934, as Amended (“Section 309”) permits the filing of petitions to deny only against applications that are subject to pre-grant public notice. Thus, FMBC was not allowed to petition to deny Caloosa’s application.

Caloosa further argues that the factual basis for FMBC’s Petition is not supported by affidavits after the fashion of a petition to deny filed under Section 309. However, FMBC’s factual allegations are supported by Caloosa’s own filings with the Commission and these filings are subject to official notice. Documents subject to official notice meet the evidentiary criteria of Section 309.

Caloosa argues that the August 11, 2000 letter reinstating its Statement of Eligibility was signed by the Chief, Video Services Division under “signing authority” delegated by the Chief Mass Media Bureau and, therefore, was not ultra vires. It is true that Rule 0.204 permits subdelegation of delegated functions. FMBC submits that it is equally true that, in the special case of petitions for reconsideration, Section 405 of the Communications Act contemplates action only by either (a) the authority taking the order, decision, report or action being reconsidered, or (b) the Commission, itself. In other words, Section 405 prohibits subdelegation of petitions for reconsideration. An action by the Chief, Mass Media Bureau must be reconsidered by the Chief, Mass Media Bureau or the Commission, itself. The Mass Media Bureau has long been sensitive to the need to operate

strictly within the limits of delegated authority and has not hesitated to set aside actions taken outside of proper delegations. See e.g. Southern Illinois Broadcasting Corp., 46 RR 2d 155 (Broadcast Bureau 1979).

Caloosa suggests that it need not address the factual allegations in FMBC's Petition because it claims that FMBC's Petition is procedurally defective. However, Rule 1.106(c)(2) allows the Commission to consider new facts raised in a petition for reconsideration whenever consideration of the facts relied upon is in the public interest. In this connection, FMBC notes that one of the criteria for grant of a license is "that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest..." See 47 USC §319(c). FMBC submits that its Petition amply demonstrates the above-captioned application was granted solely on the basis of an incorrect and incomplete factual record. An objective appraisal of WBSP-LP's dismal operating history must conclude that the station is not within the category of stations eligible for Class A status. Accordingly, grant of WBSP-LP's Class A application is clearly against the public interest.

Caloosa claims that Station WBSP-LP's authorization is not forfeit under Section 312(g) of the Communications Act because "WBSP-LP has never been off the air for 365 consecutive days..." The fact is, however, that WBSP-LP has been without operating authority for periods well in excess of 365 days. Caloosa cannot correctly claim that a completely unauthorized transmission from facilities that Caloosa itself admitted were unsuitable for broadcast operations constitutes transmission of a broadcasting station's signal for purposes of Section 312(g) of the Communications Act. The Commission defines what constitutes broadcasting station WBSP-LP, not Caloosa.

Accordingly, the facilities that Caloosa operated ever so briefly during the sixteen months when WBSP-LP had no operating authority were not low power television station WBSP-LP.

Caloosa cites the Enforcement Bureau's decision in WRHC Broadcasting Corporation, 15 FCC Rcd 5551 (Enf. Bur. 2000) (the "WRHC Case") as authority for the proposition that a station operating on the *wrong* frequency for *over* a year was *not* subject to automatic license cancellation under Section 312(g). The facts presented in WBSP-LP's case are the reverse of those in the WRHC Case. WRHC was seeking to continue its broadcast operations and maximize its programming service. WBSP-LP, on the other hand, was seeking to curtail its broadcasting operations and to minimize its service. FMBC submits that the issue of automatic cancellation under Section 312(g) was not adjudicated in the WRHC Case and remains one of first impression.

In the case of WBSP-LP, Caloosa sought silence authority, claiming that WBSP-LP's facilities at the Naples, Florida CATV headend could not be operated because of interference to CATV operations. For obvious reasons, WBSP-LP did not renew its STA to operate with these interfering facilities. However, WBSP-LP now seeks to avoid loss of its license under Section 312(g) through claimed operation of those unauthorized and interfering transmission facilities. FMBC submits that Station WBSP-LP was silent for a period in excess of one year. Caloosa did operate an unauthorized facility during this period, but it was not WBSP-LP because WBSP-LP had no operating authority.

In view of the foregoing, FMBC requests grant of its Petition and dismissal *or* denial of the above-referenced application. In the alternative, FMBC requests deletion of Station WBSP-LP's

license and cancellation of its call sign.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph A. Belisle". The signature is fluid and cursive, with the first name being the most prominent.

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