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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	DA 02-2063
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 01-104
Table of Allotments, FM Broadcast Stations	)	RM-10103
(Auburn, Northport, Tuscaloosa, Camp Hill,	)	RM-10323
Gardendale, Homewood, Birmingham, Dadeville,	)	RM-10324
Orrville, Goodwater, Pine Level, Jemison, and	)	
Thomaston, Alabama	)	

To: The Commission

**RESPONSE TO COX'S AND RSI'S JOINT DECEMBER 16.2002 LETTER**

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**December 19,2002**

Preston W. Small (Mr. Small), by his attorney, hereby responds to the December 16, 2002 letter which Cox Radio, Inc. and Radio South, Inc. [Cox and RSI] have inserted into the record of the instant proceeding. In response thereto, the following is respectfully submitted:

1) The December 16, 2002 states that Cox and RSI “hereby notify the FCC that Cox and Radio South will not be filing a reply to Preston Small’s Opposition to Motion to Strike filed on December 4, 2002 . . . .” Because Cox and RSI have determined that they are not filing a reply to Mr. Small’s *Opposition to Motion to Strike*, Mr. Small is within his rights to respond to the matters addressed in the December 16, 2002 letter. Certainly it is not the case that Cox and RSI are able to supplement the record in this proceeding and other parties are prohibited from supplementing the record. Moreover, inclusion of the instant information will ensure that the Commission’s record in this matter is complete.

2) Cox and RSI state that they “are willing to bear that risk [of an adverse decision in the Anniston proceeding] and proceed with the expenses involved in implementing the grant of the counterproposals.” This is a curious turn of events. At the meeting held in the Commission’s offices last week, a meeting requested by Cox, the discussion centered on a solution in which Cox and RSI would have their counterproposals reinstated with the proviso that construction would not occur. It was undersigned counsel’s understanding that this was meant to address Mr. Small’s concern that allowing Cox and RSI to construct may cause Mr. Small difficulties proceeding with his own construction should he eventually prevail in the Anniston proceeding.’ Cox and RSI are now

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1 One staff member at the meeting, initially misreading the direction of Mr. Small’s concern, thought that Mr. Small was questioning the FCC’s authority to order someone off *the air* and he became somewhat agitated at the undersigned. As undersigned counsel stated at the meeting, the FCC’s authority enforcing its rules is unquestioned. What is questioned is the FCC’s willingness to use that authority in a given case. At the meeting undersigned counsel recited that he had a client in Minnesota which was granted an upgrade which required another station to change channels. After about three years of pleading before the FCC to obtain an order which would permit the client to proceed, and getting nowhere, the client sold his stations under severe financial distress due in

(continued...)

indicating that their intent is to construct the stations. Accordingly, Mr. Small hereby notes his objection to any and all solutions which reinstate the counterproposals.

3) The discussion at the December 10, 2002 meeting at the Commission offices had the staff agreeing with Cox and RSI that the precedent on the issue of authorizing construction of radio facilities which are contingent upon finality lands on both sides. The FCC's management expressed concern that the staff apparently had two decision tracks on the issue. Apparently lost in the rush to provide Cox and RSI with some form of relief, "to give them something of what they want," is the fact that undersigned counsel stated at the meeting that the Commissioners' requirements are clear: contingent grants are not allowed. If the staff has granted some applications which violate that clear requirement, the staff decisions are considered deviant actions and do not constitute Commission precedent. See *Ruralvision Central, Inc.*, 10 FCC Rcd. 11640711 (FCC 1995) quoting *Walter P. Faber*, 4 FCC Rcd at 5492, 5493 ¶ 9 (1989), *recon. denied*, 6 FCC Rcd 3601 (1991), *aff'd mem.*, *Faber v. FCC*, 962 F.2d 1076 (D.C. Cir. 1992) ("Those actions were erroneous and are not controlling here. Furthermore, inasmuch as these deviant actions were taken by delegated authority, not by the Commission, we reject Faber's attempt to rely on these cases as establishing a Commission policy on IF waivers which may not be retroactively altered."). The Commissioners' decisions are controlling, not staff decisions which deviate from the Commissioners' decisions.

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1(...continued)

significant part to the fact that the upgrade could not be implemented (the upgrade merely required the client to turn up his transmitter power). That client was perhaps the Commission's only blind, multiple-station owner and the Commission did absolutely nothing to assist that client to get the other station off the channel. Given that rather miserable experience with the FCC's "authority" to issue orders, Mr. Small is not sanguine, after years of litigation against the FCC's indefensible decisions, about the prospect of getting the FCC's assistance in removing obstacles. Moreover, it is undersigned counsel's recollection that the staff member who questioned undersigned counsel on this matter is a former member of the law firm which is representing Cox in the instant proceeding. This isn't to say that there is anything untoward occurring, the point is that obtaining prompt help from the staff in the future may be problematic for Mr. Small.

Counsel stated at the meeting that the Commission's concern is with the creation of a confusing daisy chain of contingent grants and that the Commission is not concerned with whether Cox and RSI are willing to assume construction risks. Moreover, to the extent that there are outstanding authorizations based upon deviant staff action which are not final because they are conditioned, or should have been conditioned but for ministerial error, upon the final order in the Anniston proceeding, those grants are properly rescinded at this time as having been granted in error.

4) In *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cloverdale, Montgomery and Warrior, Alabama), Memorandum Opinion and Order*, 15 FCC Rcd. 11050 ¶ 4 (FCC 2000) the Commissioners provide a history of the creation of the *Cut and Shoot* policy. In that case the Commissioners state that

At the time that Rogers submitted his counterproposal for Florence, Alabama, the staff had a policy of allotting a new channel to a community even if it was short spaced to an outstanding license, if there was an outstanding construction permit which would obviate the short-spacing with the licensed facilities. *See, e.g., Linden, Texas*, 10 FCC Rcd. 5126 (1995). In those kinds of cases, the staff would defer the licensing of a proposed new channel until the facilities specified in the relevant construction permit were constructed and licensed. This procedure made the processing of rulemaking proposals contingent on the construction and licensing of authorized facilities by third parties in separate proceedings to effect compliance with the minimum separation requirements. The staff no longer adheres to this procedure. *See Cut and Shoot, Texas*, 11 FCC Rcd 16383 (Policy and Rules Div. 1996). In *Cut and Shoot*, it was determined that such a procedure was not conducive to the efficient transaction of Commission business and imposed unnecessary burdens on the administrative resources of the Commission. It was also determined that this procedure was unfair to parties who filed proposals in compliance with our separation requirements and delayed service to the public pending the licensing of an outstanding construction permit. *We concur in the policy adopted by the staff in Cut and Shoot.*

(Emphasis added). Thus, the *Cut and Shoot* policy is not a staff policy which can be turned on and off depending upon whether it is Monday or Wednesday as was suggested by the staff might be happening on the application processing line. *Cut and Shoot* is a Commissioners' policy to which the staff must adhere

5) The Commission subsequently made clear that the short spaced licensed facilities must be protected by the rulemaking proposal, until the short spacing no longer exists, even if the short spaced station had an outstanding construction permit to relocate to a fully spaced site. The Commission determined that it was the issuance of the station license at the fully spaced coordinates which freed up the spectrum. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Winslow, Camp Verde, Mayer and Sun City West, Arizona), Memorandum Opinion and Order*, 16FCC Rcd. 9551 ¶ 8 (Alloc. Br. 2001). In that case the Commission explicitly holds that

it cannot be disputed that Channel 236C must remain protected at Yuma until a license has been issued to cover the construction permit for Channel 236C2 at Yuma. In MM Docket No. 88-118, Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment, the Commission stated: "... after grant of a construction permit to modify the facilities of an *existing* FM authorization to a lower class, we will continue to protect the authorized facilities until the modified facilities *are licensed* (emphasis added). ... Upon licensing, we will amend the Table accordingly." See 4 FCC Rcd. 2415 at ¶14 [*Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment, Report and Order*, 4 FCC Rcd. 2413 (FCC 1989)]. Therefore, as Station KTTI is not licensed to operate on Channel 236C2, Channel 236C remains in the Table of Allotments.

(emphasis in original). Instantly, WWWQ(FM) in Atlanta, GA has not been *licensed* to operate in Atlanta, it remains licensed to Anniston, AL. Accordingly, the staff correctly concluded in the instant case that Cox's and RSI's counterproposals are defective for failing to protect the Anniston, AL allocation and those counterproposals were properly dismissed,

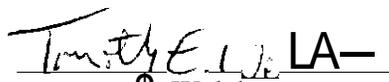
6) As a final matter, Cox and RSI claimed in their *Motion to Strike* that Mr. Small lacked standing to participate in the instant proceeding because he has not shown an injury. Mr. Small's *Opposition* demonstrates that Cox and RSI have attempted to mislead the Commission on the "interest" which a person must hold to participate in a rulemaking proceeding. Cox's and RSI's December 16, 2002 letter claims that "the Small Opposition fails to raise any arguments of merit," and they completely fail to address Mr. Small's argument that his participation in the instant

proceeding is permitted. Because it would have been reasonable for Cox and RSI to oppose Mr. Small's arguments had they had any ground to do so, it must be concluded that Cox and RSI concede the point. Moreover, it is noted that Cox and RSI have failed to take the opportunity to oppose Mr. Small's merits arguments which were presented in opposition to the merits arguments which Cox and RST presented in their *Motion to Strike*. Because it would have been reasonable for Cox and RSI to respond to Mr. Small's arguments had they had a reasonable basis to do so, it must be concluded that **Cox** and RSI have conceded the arguments. While Cox's and RSI's joint December 16, 2002 letter states that they are resting on their earlier pleadings, they leave unaddressed important issues such as why Mr. Lipp's WNNX client is interested in paying \$10-\$20 million to assist RSI in getting approval in the instant proceeding. Cox and WNNX may wish to avoid discussing the \$20 million question, but the Commission cannot ignore this indicator of a significant, yet undisclosed, relationship among WNNX and the parties in the instant proceeding.

WHEREFORE, because Cox and RSI have supplemented the record in this proceeding, and because the gist of the information presented here was presented at the December 10, 2002 meeting held by the Commission and requested by Cox, and because the Commission and the public interest would benefit from the views of all parties to this proceeding, the Commission should consider the matters set forth herein.

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Respectfully submitted,  
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CERTIFICATE OF SERVICE

I hereby certify that I have this 19<sup>th</sup> day of December 2002 served a copy of the foregoing RESPONSE TO COX'S ANDRSI'S JOINT DECEMBER 16, 2002 LETTER by First-Class United States mail, postage prepaid, upon the following:

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