

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),)
Table of Allotments,)
FM Broadcast Stations)
(Arlington, The Dalles, Moro, Fossil, Astoria,)
Gladstone, Tillamook, Springfield-Eugene,)
Coos Bay, Manzanita and Hermiston, Oregon)
and Covington, Trout Lake, Shoreline, Bellingham,)
Forks, Hoquiam, Aberdeen, Walla Walla, Kent,)
College Place, Long Beach and Ilwaco, Washington))

MB Docket No. 02-136

ORIGINAL

To: Assistant Chief, Audio Division, Media Bureau

REPLY TO SUPPLEMENT

Triple Bogey, LLC; MCC Radio, LLC and KDUX Acquisition, LLC (collectively "Triple Bogey") herein reply to the Supplement filed in the above-captioned proceeding on April 28, 2003 by First Broadcasting Company, L.P. ("FBC"); Mid-Columbia Broadcasting, Inc., and Saga Broadcasting Corp. ("Saga") (collectively "First Broadcasting"). In reply, the following is stated:¹

I. The Taccoa/Bridgeton Policy is Well-Founded and Should Result in the Dismissal of First Broadcasting's Amended Proposal

Contrary to First Broadcasting's assertion, the question of whether First Broadcasting's counterproposal to its own proposal should be considered in this proceeding was not first raised in Triple Bogey's Reply Comments. The issue was addressed initially in Triple Bogey's Motion to Sever Counterproposal, filed August 13, 2002, with respect to which First Broadcasting filed an

¹ Triple Bogey simultaneously is filing a motion to accept this Reply to Supplement.

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Opposition on August 28, 2002. Despite having the opportunity to do so in its August 28 Opposition and in its Reply Comments, First Broadcasting has presented no legitimate justification for filing a counterproposal to its own proposal. First Broadcasting has never credibly explained why it could not have waited and filed its current proposal (hereinafter “Amended Proposal”) as its initial proposal.² If First Broadcasting had filed its current proposal initially, all parties, including Triple Bogey, would have been able to determine what course of action would have been appropriate to serve both their objectives and the public interest.

But First Broadcasting was not forthcoming regarding its true objectives. Instead, it initially presented a proposal to move KMCQ, The Dalles, Oregon, to Covington, Washington, a community substantially smaller than Kent. Whether the timing of the Covington proposal was the product of gamesmanship or some yet undisclosed circumstance that FBC and Mid-Columbia faced is of no consequence. The fact remains that, without sufficient justification, First Broadcasting abandoned its original proposal on the counterproposal deadline.

The Commission’s staff properly has concluded that the filing by a rulemaking proponent of a counterproposal to its own proposal results in an unnecessary expenditure of staff resources, is not conducive to efficient transaction of the Commission’s business and raises a concern regarding fairness to other parties. *Taccoa, Georgia*, 16 FCC Rcd 21191, 21192 (¶ 5) (Chief, Allocations Branch 2001). Under such circumstances, the Commission reserves the right to dismiss such a

² First Broadcasting’s Amended Proposal seeks to relocate Station KMCQ(FM) from The Dalles, Oregon, to Kent, Washington, in the Seattle Urbanized Area. KMCQ also would be downgraded from Class C to Class C2 status on Channel 283. First Broadcasting’s Amended Proposal seeks to change the frequency of Saga’s Station KAFE, Bellingham, Washington, from Channel 282C to Channel 281C. Because Channel 281C would be short-spaced to two vacant Canadian allotments, the Amended Proposal contemplates that either KAFE would operate with a directional antenna to protect the Canadian allotments or the Canadian government would modify the allotments to specify different channels.

counterproposal. *Bridgeton, New Jersey*, 17 FCC Rcd 25136 (Assistant Chief, Audio Div. 2002). The Commission should do so in this case.

Remarkably, in arguing against the application of the *Taccoa/Bridgeton* Policy, First Broadcasting claims that *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), compels the Commission to give comparative consideration to First Broadcasting's counterproposal. But First Broadcasting turns *Ashbacker* on its head. Indeed, whatever rights to comparative consideration First Broadcasting may have in this proceeding were derived from its initial proposal, which was properly processed and announced to the public in a notice of proposed rulemaking, and not from its eleventh-hour revision to that proposal. Acceptance of First Broadcasting's novel argument would serve only to legitimize a two-step approach that, whether intentional or not, hid its ultimate plan from public scrutiny until the deadline for true counterproposals had passed, and thus denied other parties the opportunity to submit proposals that might be mutually exclusive with First Broadcasting's belatedly revealed new plan. First Broadcasting should not be permitted to have it both ways; it is the other counterproponents, and not First Broadcasting, who have been prejudiced in the notice and counterproposal process by First Broadcasting's unjustified amendment to its initial allotment plan. The *Taccoa/Bridgeton* Policy is correctly intended to prevent such inequities, and is in no way inconsistent with *Ashbacker* or any other Commission policy or procedure.

First, the specific holding in *Ashbacker* was that if two mutually exclusive *applications* are pending, the grant of one application without a hearing deprives the other applicant of its right to a hearing under Section 309 of the Communications Act. Here, Section 309 of the Act is inapplicable. No allotment rulemaking proponent has a right to an adjudicatory hearing under the Communications Act. The treatment of rulemaking petitions is governed by the Administrative Procedure Act and the Commission's own rules. First Broadcasting does not argue that the *Taccoa/Bridgeton* Policy violates the Administrative Procedure Act or the Commission's own rules.

Second, even if *Ashbacker* were applied to the circumstances here, it would only mean that a *valid* counterproposal is entitled to comparative consideration with other proposals and counterproposals properly before the Commission. *Ashbacker* does not compel the Commission to give any consideration to a defective proposal or counterproposal. The Commission clearly has the power to develop and use procedural tools to promote the goals of administrative orderliness and certainty. *Cf. Ashbacker*, 326 U.S. at 333 n.9. The *Taccoa/Bridgeton* Policy is just such a tool. First Broadcasting cannot gain any purported *Ashbacker* rights by attempting to side-step its way through the Commission's procedural framework. First Broadcasting, without good cause to do so, abandoned its original proposal and presented a new proposal on the deadline for counterproposals.

Such actions, as *Taccoa* and *Bridgeton* underscore, are contrary to the goals of administrative efficiency and fairness and *Ashbacker* does not require the Commission to tolerate them. Nor does *Ashbacker* require the Commission to give a rulemaking proponent a fresh opportunity to present its plan when its previous proposal is dismissed for running afoul of a Commission policy.

The *Taccoa/Bridgeton* Policy does not contravene the holding, or even the spirit, of *Ashbacker*. On numerous occasions, the Commission has adopted policies to deal with allotment petitions. *E.g., Cut and Shoot, Texas*, 11 FCC Rcd 16383 (Chief, Policy & Rules Div. 1996) (under Commission policy, a rulemaking proposal contingent on the construction of facilities set forth in an outstanding construction permit will be dismissed); *clarified in Auburn Alabama* DA 03-1124 (Asst. Chief, Audio Div., released May 20, 2003); *Esperanza, Puerto Rico*, 11 FCC Rcd. 2908 (Policy and Rules Div. 1996) (under Commission policy, a counterproposal must be technically correct and substantially complete when filed). These policies, like the *Taccoa/Bridgeton* Policy, are useful and proper methods the Commission employs to avoid the unnecessary expenditure of staff resources and to promote administrative efficiency.

A rulemaking allotment policy is not rendered invalid under *Ashbacker* or the Administrative Procedure Act simply because it may have the effect of precluding consideration of procedurally defective allotment proposals. In *Conflicts Between Applications and Petitions for Rulemaking*, 8 FCC Rcd 4743 (1993) (hereinafter “*Conflicts Recon.*”), the Commission dealt with challenges to its then-new procedure under which the filing of a minor change application would immediately cut off subsequently filed conflicting allotment proposals. Various parties pointed out that under the new rule, a counterproposal in an allotment proceeding that would otherwise be timely and acceptable could be rendered unacceptable because a conflicting FM application was filed earlier. The Commission did not find such a result inequitable. It pointed out that parties may desire to file on the last day of a rulemaking comment period for tactical reasons, but the Commission found no public interest reason to preserve “potential tactical ploys by petitioners.” *Id.* at 4745 (¶ 13). The Commission noted that the risk would be minimized by filing a counterproposal at the earliest possible time rather than waiting for the end of the comment period. *Id.*

Like the cut-off rule discussed in *Conflicts Recon.*, the *Taccoa/Bridgeton* Policy may have the result of blocking use of a potential tactical ploy (*i.e.*, allowing a rulemaking proponent to avoid “showing its hand” until the counterproposal deadline). But preserving that tactical option does not serve the public interest. A rulemaking proponent can easily avoid application of the *Taccoa/Bridgeton* Policy; it simply needs to stick with the proposal it first presents. The policy recognizes that where unforeseen circumstances arise, a rulemaking proponent legitimately may need to present a modified proposal. But here, as Triple Bogey has previously argued, First Broadcasting can point to no such *bona fide* “unforeseen circumstances.”

Acceptance of First Broadcasting’s novel *Ashbacker* argument would not, as it claims, preserve a legal entitlement. Rather, it would deny every other participant in the rulemaking proceeding the right to receive fair notice of the real proposal advocated by the original petitioner.

First Broadcasting essentially argues that it has the right, as a matter of law, to withhold its real plan until the counterproposal deadline. Tolerance of First Broadcasting's argument would, therefore, legitimize a process that results in the very harms that *Taccoa* was intended to address – administrative inefficiency and unfairness to other parties. For this reason, dismissal of First Broadcasting's counterproposal would, pursuant to *Taccoa*, make perfect legal and public policy sense.

Accordingly, First Broadcasting's Counterproposal should be dismissed. Furthermore, given that Triple Bogey and other parties filed timely counterproposals, First Broadcasting must stand aside until those counterproposals are acted upon before re-filing its Amended Proposal or some variation of it.³

II. The Possibility of Replacement Service Sometime in the Future Does Not Justify Creation of White Areas

In its Reply Comments, Triple Bogey demonstrated that First Broadcasting's proposed relocation of KMCQ will leave 1,799 people without *any* radio service for an indefinite period of time. *See* Triple Bogey Reply Comments at pp. 10-15 & Exhibit A thereto. Triple Bogey also pointed to numerous cases confirming that the withdrawal of existing service, without significant offsetting benefits, is contrary to the public interest. *E.g.*, *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); *TV Corp. of Michigan v. FCC*, 294 F.2d (D.C. Cir. 1961); *West Michigan Television v. FCC*, 460 F.2d 883 (D.C. Cir. 1971).

To read First Broadcasting's Supplement, one would believe that Triple Bogey's argument is based solely on a misreading of the Commission's recent decision in *Pacific Broadcasting of*

³ First Broadcasting's original proposal similarly should be dismissed since it obviously has been abandoned by its proponent.

Missouri, LLC, 18 FCC Rcd 2291 (2003), which held that “back-fill” allotments may no longer be used to “preserve” local transmission service. While certainly citing the recent *Pacific* decision, Triple Bogey’s argument rests on the long-established principle that the withdrawal of existing reception service from an area with no or few other services is contrary to the public interest. *E.g.*, *Hall Broadcasting*, 237 F.2d at 572; *TV Corp. of Michigan*, 294 F.2d at 732.

In *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990) (hereinafter “*Community of License II*”), the Commission reiterated that the public has a legitimate expectation that existing service will continue and that the removal of service is warranted only if there are sufficient public interest factors to offset that expectation. 5 FCC Rcd at 7097 (¶ 19). The Commission further stated that “replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to existing service occasioned by the removal of an operating station.” *Id.* The Commission continued: “From the public’s perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today by simply turning on a TV or radio set.” *Id.*

First Broadcasting cannot deny the fact that if it were to relocate KMCQ to the Seattle area, nearly 1,800 persons would lose their only over-the-air radio service until some unspecified future date. As the Commission recognized in *Community of License II*, a vacant allotment is not the same as an existing station. Where a rulemaking proponent seeks to take away the only existing station a significant population can hear, a particularly strong showing of offsetting benefits must be made. First Broadcasting’s showing falls far short of justifying the creation of a large white area.

In reinforcing this point, citation of *Pacific* is particularly appropriate. That case dealt with the staff practice of relying on a vacant so-called “back-fill” allotment to “preserve” local service

when the only station licensed to a particular community sought to change its city of license. In *Pacific*, the Commission ordered the Media Bureau to immediately cease this practice.

If a vacant allotment is an inadequate vehicle to preserve first local service, which is the third allotment priority,⁴ it follows that a vacant allotment also is an inadequate vehicle to preserve a population's only aural reception service, which is the first allotment priority.⁵ Obviously, the use of vacant allotments to cover newly created white areas entails the same uncertainty and delay the Commission deemed unacceptable in *Pacific*. For instance, no one can predict with any degree of confidence (a) when a filing window for a vacant white area allotment will open, particularly given the fact the Commission currently has a backlog of some 500 allotments, (b) how many, if any, applications for the allotment will be filed and whether an auction will have to be conducted, thereby delaying the award of a construction permit and (c) if a construction permit is awarded, when or whether the station actually will begin operation.

If anything, the now-discredited staff practice of using a back-fill allotment to preserve local service in a community was more limited than the practice First Broadcasting advocates to cover white areas created by relocation of a station. Under the pre-*Pacific* policy, the relocation of a community's sole local station could be effectuated only when the designated replacement station went on the air. Here, First Broadcasting argues that a vacant allotment alone, regardless of when, if ever, actual service is initiated, is sufficient to compensate for the removal of a population's sole reception service. But quite obviously, the legitimate expectation of 1,799 persons that they will continue to receive *the only radio signal available to them* demands more than a mere hope that someday a replacement service will be forthcoming.

⁴ *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) (Priority Three, first local service, is of co-equal weight with Priority Two, second full-time aural service).

⁵ *Id.*

First Broadcasting's arguments blur the significant distinction between the creation of a white area by removal of an existing service and proposed coverage of an existing white area by a new allotment. First Broadcasting points to *Greenup, Kentucky*, 6 FCC Rcd 1493 (1991) for the proposition that in determining whether an FM allotment would provide a first or second aural service, the Commission normally would assume that service will be provided on existing vacant allotments. *Id.* at ¶ 11. The case, however, did not involve creation of a white area by withdrawal of an existing service.

Similarly, neither *Nogales, Arizona*, 16 FCC Rcd 20515 (Chief, Allocations Branch 2001),⁶ nor *Meeker, Colorado*, 15 FCC Rcd 23858 (Chief, Allocations Branch 2000), both cited by First Broadcasting, entailed the creation of any white or gray areas. *Nogales* at ¶ 3, *Meeker* at ¶ 9.

First Broadcasting continues its argument by asserting that the Commission's discussion in *Community of License II* applies to changes in community of license only, not to the removal of reception service. First Broadcasting is simply wrong. To again quote *Community of License II*: "The public has a legitimate expectation that service will continue and that this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, *regardless of whether the service removed constitutes a transmission service, a reception service, or both.*" *Id.* at 7097 (¶ 19) (emphasis added).

The Commission has made clear that it will carefully evaluate proposals that would result in the loss of a population's sole authorized reception service. *E.g., Community of License II*, 5 FCC

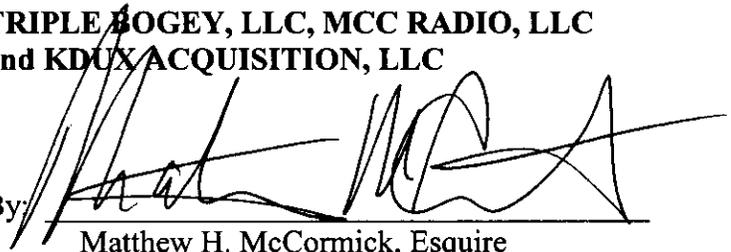
⁶ The *Nogales* proceeding, if anything, demonstrates the gravity of withdrawing a first or second aural service. In the *Notice of Proposed Rulemaking* in that proceeding, 15 FCC Rcd 4323 (Chief, Allocations Branch 2000), the Commission seriously questioned the public interest benefits of the proposal because it appeared the proposed relocation would result, *inter alia*, in creation of a white area with a population of five persons and a gray area with a population of 50 persons. *Id.* at ¶ 9. The Commission subsequently determined, however, that in fact there would be no white or gray area created. 16 FCC Rcd at 20517 (¶ 3).

Rcd at 7097; *accord, KTVO, Inc.*, 57 RR 2d 648, 650 (1984) (“grave consequences” are entailed in depriving a population its only service); *Television Corp. of Michigan v. FCC*, 294 F.2d 730 (D.C. Cir. 1961) (TV transmitter site move not justified where over 100,000 people would gain Grade A service but 900 people would be deprived of any service and about 42,000 people would lose all but one service); *see Littlefield, Texas*, 12 FCC Rcd 3215, 3220 (Chief, Allocations Branch, 1997) (change in an authorized, but unbuilt, station’s community of license denied where retaining the current allotment would result in 411 persons receiving their first aural service, thereby eliminating the white area).

In sum, the First Broadcasting proposal to relocate KMCQ and thereby create a significant white area is *prima facie* contrary to the public interest. The vacant allotments First Broadcasting proposes to cover the white area created would only become active at some uncertain time in the future, if ever, and are not sufficient to offset the legitimate expectation of some 1,800 people who can receive only KMCQ that they will continue to have radio service every day.

WHEREFORE, In light of all circumstances, First Broadcasting’s Amended Proposal should be DISMISSED and Triple Bogey’s counterproposal should be ADOPTED.

**TRIPLE BOGEY, LLC, MCC RADIO, LLC
and KDUX ACQUISITION, LLC**

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May 21, 2003

CERTIFICATE OF SERVICE

I, Janice M. Rosnick, do hereby certify that I have on this 21st day of May, 2003, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing REPLY TO SUPPLEMENT to the following:

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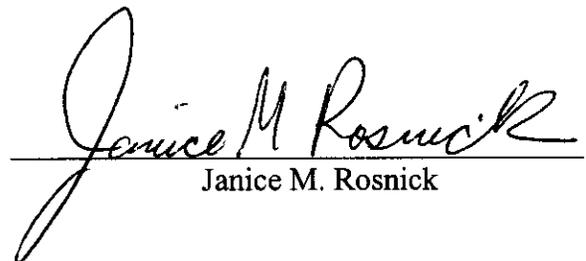
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