

The AFR complies with Section 1.115(b)(1)-(2) It addresses a clearly framed question – whether the Media Bureau’s decision in the above-captioned proceeding released July 24, 2003, DA 03-2413 (“Order”) contravenes the Commission’s rule against contingent applications.³ It plainly enumerates the errors in the Order⁴ For example, the AFR Attachment states: “In its Order, the Bureau again fails to give ‘reasoned consideration’ to Joint Parties’ arguments. The Bureau *cites no precedent* for its bald assertion that ‘Section 73.3517 of the Rules is limited to contingent applications and does not apply to related application and rulemaking proceedings.’ The Bureau makes no attempt to reconcile its decision with its own contrary precedent.” AFR Attachment at 6 The AFR therefore “specifi[ies] with particularity” that “[t]he action taken pursuant to delegated authority is in conflict with regulation, case precedent, or established Commission policy” under 47 C.F.R. § 1.115(b)(2)(i)

Next, Clear Channel disputes Joint Parties’ contention that the Division failed to give “reasoned consideration” to Joint Parties’ arguments Clear Channel erroneously states that the Order contained “at least 3 pages of reasoned analysis, all devoted to rebutting the Joint Parties’ arguments” Opp. at 2.⁵ Paragraphs 1 and 2 of the Order merely provide the background of the Clear Channel Rulemaking Order at 1-2 Paragraphs 3 and 4 of the Order summarize Joint Petitioner’s pleadings without analysis⁶ Order at 2 Paragraphs 5 and 6 provide “reasoned

³ AFR Attachment at 3

⁴ AFR Attachment at 3-9 This enumeration is sufficient for purposes of Section 1.115(b)(2) *Noble Syndications, Inc.*, 74 FCC 2d 124, 128 (1979) (finding an Application for Review conforms to the requirements of Section 1.115(b)(2) where a “fair reading” of the Application for Review indicates that the applicant attempted to argue that a ruling conflicted with case precedent or established Commission policy). *See also American Music Radio*, 10 FCC Rcd 8769 (1995), *ADF Communications Co.*, 11 FCC Rcd 19701, 19704 (1996).

⁵ Even a cursory review of the Order demonstrates that it consists of 3 pages of discussion *total*, including background and summaries of the parties’ positions, and including very little analysis

⁶ The sole sentence not constituting pure summary of Joint Parties’ arguments in these paragraphs states flatly “We reject these inventive but flawed contentions.” *Order* at 2.

analysis” as to why the Division *agreed* with the Joint Parties’ contention that grant of the Clear Channel Application would effectively remove Johnston City’s sole local transmission service⁷ Order at 2-3. Paragraph 7 ends the Division’s discussion of the Clear Channel Rulemaking and contains the sole sentence in the Order that even touches upon the merits of Joint Parties’ argument⁸. Without explanation or supporting precedent, the Division in Paragraph 7 makes the bald assertion that “Section 73.3517 of the Rules is limited to contingent applications and does not apply to related application and rulemaking proceedings.” Order at 3. Both before and after the grant of the Clear Channel Rulemaking, Joint Parties’ provided considerable authority to refute this contention. AFR Attachment at 6-8. Without explanation and without citation, the Division ignored the Joint Parties’ proffered authority, choosing instead to be “intolerably mute”⁹ regarding Joint Parties’ contrary arguments and conflicting precedent and failing to “supply a reasoned analysis” for its decision¹⁰. The Opposition provides not one instance of “reasoned analysis” on the part of the Division in rejecting the Joint Parties’ arguments and precedent demonstrating that rulemakings contingent on applications violate the Commission’s Rules and policies. In addition, the Opposition makes no effort whatsoever to challenge Joint Parties’ position in this regard.

⁷ In Paragraph 6, the Division goes on state that the Clear Channel Rulemaking would remedy this deficiency by “preserving local service in Johnston City.” Order at 3.

⁸ The remaining paragraphs of the Order solely address the administrative matters associated with the grant of the Clear Channel Application. Order at 3-4.

⁹ *Greater Boston Television Corp v FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert denied*, 403 U.S. 923 (1971) (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”) (internal citations omitted); *see also PG & E Gas Transmission v FERC*, 315 F.3d 383 (D.C. Cir. 2003) (“FERC’s failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking process.”)

¹⁰ *Greater Boston Television Corp*, 444 F.2d at 852.

Clear Channel goes on to claim that Joint Parties' positions in opposing the Clear Channel Rulemaking and the Clear Channel Application are "irreconcilable." Opp at 3. "The Joint Parties are reduced to arguing, on the one hand, that grant of the WHITE application has deprived Johnston City of its only local service, and the other hand, that Johnston City is not entitled to a first local service preference " Opp at 3 Clear Channel, and indeed, the Division, complicate Joint Parties' simple position Joint Parties merely request that the Division follow its own precedent - founded in more than four decades of experience in the pitfalls of contingent applications - and refuse to be reduced to an oddsmaker Joint Parties sought the dismissal of the Clear Channel Application and the denial of the Clear Channel Rulemaking Such an action would have preserved local transmission service at Johnston City as much as Clear Channel's contorted manipulations, without undermining the Commission's policies and rules. The long and twisted progression through the avalanche of pleadings associated with the Clear Channel Rulemaking and Clear Channel Application provide a textbook example of the confusion and mischief created when the Division strains to guess at intentions, motives, and outcomes in an effort to grant impermissibly contingent proposals such as Clear Channel's

Clear Channel fails to cite any basis to challenge Joint Parties' position in the AFR. Accordingly, the Commission should grant the AFR, reverse the Order, and deny the Clear Channel Rulemaking

Respectfully submitted,

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CERTIFICATE OF SERVICE

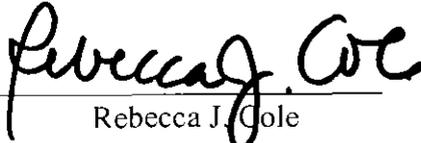
I, Rebecca J. Cole, hereby certify that a copy of the foregoing "Reply to Opposition to Application for Review" was mailed, first class postage prepaid, this 24th day of September, 2003 to the following

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