

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

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In the Matter of )  
)  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations )  
(Charlotte and Grand Ledge, Michigan) )

DEC 30 2003

MB Docket No. 03-222 FEDERAL COMMUNICATIONS COMMISSION  
RM - 10812 OFFICE OF THE SECRETARY

To: The Secretary, Office of the Secretary  
Attn: Assistant Chief, Audio Division  
Media Bureau

**REPLY COMMENTS AND MOTION TO DISMISS COUNTERPROPOSAL**

Rubber City Radio Group ("RCRG"), licensee of WQTX(FM), Charlotte, Michigan, by its counsel and pursuant to Section 1.415 of the Commission's Rules, hereby files its Reply Comments in this proceeding.<sup>1</sup> RCRG is the Petitioner in this proceeding, and proposes to relocate WQTX from Charlotte to Grand Ledge, Michigan. On the comment date, Christian Broadcasting System, Ltd. ("CBSL") filed a notice of its intention, styled as a counterproposal, to file an application to relocate AM station WLCM from Charlotte to Holt, Michigan. No other comments were filed. For the reasons that follow, the Commission should (a) dismiss the counterproposal of CBSL and (b) process and grant the WQTX relocation as proposed.

**I. BACKGROUND**

1. Currently, Charlotte enjoys service from two radio stations: WQTX and WLCM. This forms an essential element of RCRG's Petition, because the Commission could not change the community of license of WQTX if the effect were to deprive Charlotte of its only local service. See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon granted in part*, 5 FCC Rcd 7094 (1990) ("*Community of*

<sup>1</sup> See *Notice of Proposed Rule Making*, DA 03-3228 (rel Oct 24, 2003)

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*License*”) CBSL’s proposal to change the city of license of Station WLCM is not properly before the Commission in this proceeding. CBSL, rather than have submitted a counterproposal, has merely filed a notice of its intention to file an application. Significantly, such a counterproposal cannot be filed until an AM filing window is opened, and thus will not be timely to this proceeding. Moreover, if and when CBSL were to file an application to change city of license from Charlotte to Holt, such an application must be treated as if it were filed as a request to deprive Charlotte of its only local service

## II. DISCUSSION

### A. The WLCM Relocation is Not a Counterproposal.

2 A counterproposal is “a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made.” *See, e.g., Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990). CBSL has not advanced a valid counterproposal in this proceeding --- it has not proposed an alternative or a set of mutually exclusive allotments that can be effectuated in the context of this proceeding. Instead, it has merely expressed an intention to file an application at a future time. *See Lufkin and Corrigan, Texas*, 14 FCC Rcd 12153 (1999) (filing a request for reservation of an FM channel is not a counterproposal). Moreover, CBSL’s expression of intention is not in technical or legal conflict with the WQTX relocation, because it has not yet filed an application to change city of license

3. In an effort to have its notice treated as a counterproposal, CBSL quotes the following language from the *Community of License* decision.

In this situation, we believe that the request of the AM licensee should be generally preferred over that of the FM licensee, *provided that the AM licensee’s request is filed prior to the expiration of the Comment period* for the Notice of Proposed Rule Making proposing the FM licensee’s request

*Community of License*, supra, at ¶ 23 (emphasis added). The deadline for CBSL to have filed its “request” was December 15, 2003. However, by that deadline, CBSL had only expressed its intention to file its request when the next AM window period opens. Such an intent falls far short of the Commission’s requirement for consideration as a timely conflicting “request” to change community of license. CBSL may not ever file such an application. Moreover, even if such an application were to be filed, it may be subject to mutually exclusive applications that are resolved, in the end, through competitive bidding. The filing of an application, its grant, and its subsequent construction are all future events which cannot be ordered by the FCC, nor, given the possibility that mutually exclusive AM applications may be filed, are necessarily resolvable favorably to CBSL. It is mere speculation whether and when all of the steps will be completed. The Commission cannot condition the outcome of this rule making proceeding on events that may or may not occur in another future proceeding.

4. Indeed, even if an application had been filed by December 15, 2003, it could not form an element of this rule making proceeding, because the eventual construction and licensing under the application would be contingent on the efforts of one who is not a party to the proceeding. For example, in *Alva, Mooreland, Tishomingo, Tuttle, and Woodward, Oklahoma*, 17 FCC Rcd 14722 (2002), the Commission could not grant a proposal to relocate KTSH from Tishomingo to Tuttle until a replacement noncommercial educational station had completed construction and commenced operation at Tishomingo. Even the filing of an application for the NCE station was insufficient to enable the grant of the requested change in community of license. The reason was that the NCE application process was outside the scope of the rule making proceeding, and could not be effectuated in the context of the proceeding. Similarly, in

this case, the AM licensing process is outside the scope of the FM rule making proceeding and cannot be considered in this context

5 The language from the FCC decision relied upon by CBSL is inapposite here. See *Community of License, supra*. Although that language appears to anticipate the situation in this proceeding, a crucial change has taken place in the meantime. In 1989, when the Commission made the quoted statement, the AM application processing rules permitted the filing of a major change application at any time. Under processing rules then in effect, it could be foreseen that a party could prepare and file an AM application as an alternative to an FM change of community of license by the rule making Comment date. However, the Commission no longer accepts AM applications on a first-come, first-served basis. See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920 (1998). Instead, AM applications are accepted only during filing windows, which occur at widely spaced intervals (the last AM window was four years ago). See, e.g., *AM Filing Window Announcement*, 14 FCC Rcd 19490 (1998). Accordingly, it no longer makes sense to consider an AM application in the context of an FM proceeding. Only those FM proceedings in which the comment period happens to include an AM filing window would be eligible for the inclusion of AM applications. Had the Commission known that the AM filing procedures would change, it would have limited the applicability of its statement to first-come, first-served application procedures.

6. To accept an expression of intent to file an AM application in an FM proceeding, as CBSL requests in this case, would be unworkable. While the opening of an AM filing window happens to be about one month away in this case, it could be as much as four years away in other cases, such as those that will be initiated just after the close of the upcoming AM filing

window An FM proceeding cannot be held up for up to four years to accommodate a party's intention to file an application, when the application may never be filed, may be subject to competing mutually exclusive applications, and may take many years to resolve If the FCC were to set a precedent and allow an expression of intention here, there would be no equitable way to distinguish between FM proceedings like this one in which an AM filing window is one month away, from those in which an AM filing window is six months, one year, or four years away.

**B. CBSL's Application, When and If Filed, Must Be Treated As Depriving Charlotte of its Only Local Service.**

7 When two parties file requests for changes in community of license, and due to Commission policy that both cannot be granted, the priority is given to the first proposal on file. *See Harrisburg and Albemarle, North Carolina*, 7 FCC Rcd 108 (1992), *recon. denied*, 11 FCC Rcd 2511 (1996) (where the first proposal received was treated as proposing a first local service, and the second proposal for the same community was treated as a second local service). *See also Galveston and Missouri City, Texas*, 16 FCC Rcd 747 (2001). In this case, RCRG's proposal was on file first. Therefore, RCRG's proposal will retain local service at Charlotte, whereas CBSL's AM application, expected to be filed at the end of January, must be treated as depriving the community of its only local service. This is particularly true here, because, as discussed above, CBSL's AM application cannot be considered as timely in the context of this proceeding. When and if CBSL's AM application were to be filed, it can only be granted at the expense of depriving Charlotte of its sole local service. This would not further the Commission's priorities.<sup>2</sup>

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<sup>2</sup> The Commission's FM allotment priorities are applied in the AM context. *See Elijah Broadcasting Corporation*, 2 FCC Rcd 4468 (1997)

### III. CONCLUSION

For the foregoing reasons, CBSL's counterproposal is not eligible for consideration in this proceeding and should be dismissed. Instead, the Commission should grant the relocation of WQTX from Charlotte to Grand Ledge, Michigan as set forth in the *Notice of Proposed Rule Making* in this proceeding.<sup>3</sup>

Respectfully submitted,

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December 30, 2003

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<sup>3</sup> Should the Commission accept CBSL's comments as a counterproposal in this proceeding, it would be required to issue a Public Notice announcing its acceptance and soliciting reply comments. RCRG will address the comparative merits of CBSL's proposal at that time.

**CERTIFICATE OF SERVICE**

I, Lisa M. Balzer, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 30th day of December, 2003 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Reply Comments" to the following:

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