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

In the Matter of	)	
	)	
Amendment of Section 73.622(b),	)	**MM Docket No. 99-277**
Table of Allotments,	)	RM-9666
Digital Television Broadcast Stations.	)	
(Corpus Christi, Texas)	)	

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To: ~~Chief, Video Division, Media Bureau~~: Secy's Off

PETITION FOR RECONSIDERATION

Introduction

1. Channel 7 of Corpus Christi, Inc. ("Channel 7"), licensee of Class A-eligible Station KTOV-LP, Corpus Christi, Texas, hereby petitions for reconsideration of the Media Bureau's ("Bureau") Report and Order in the above-referenced proceeding[1] and requests rescission of the allotment of DTV Channel 8 to Corpus Christi. Channel 7 is the successor to Sound Leasing, Inc. ("Sound Leasing") as the licensee of KTOV-LP.[2] Sound Leasing participated in this proceeding below and actively opposed the proposed allotment, on the ground that the allotment will displace KTOV-LP from Channel 7, and KTOV-LP is entitled to Class A protection.

2. Reconsideration must be granted because the Bureau improperly failed to protect KTOV-LP's primary spectrum status. It was also arbitrary and capricious for the Commission to ignore Sound Leasing's pleadings on the basis of untimeliness under the circumstances of this

[1] *Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations. (Corpus Christi, Texas)*, 18 FCC Rcd 23949, DA 03-3641, rel. Nov. 19, 2003, 68 *Fed. Reg.* 68254 (Dec. 8, 2003).

[2] *See* File No. BALTVL-20001012ABN. Although the assignment application was filed on Form 345, Channel 7 and Sound Leasing share common principals. Fred Hoffman is the President of both entities. References herein will be to pleadings filed by "Sound Leasing" because Sound Leasing's name was on those pleadings.

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case, where there was hope for a settlement with the Petitioner, Channel 3 of Corpus Christi, Inc. ("Channel 3") at the time of the initial comment cycle.

Sound Leasing Resubmitted Its Opposition within a Reasonable Time under the Circumstances.

3. In the Report and Order, the Bureau dismissed Sound Leasing's Supplemental Reply Comments of October 2, 2000, as untimely in a footnote, without considering the merits, because Sound Leasing requested dismissal of its initial comments opposing the allotment and then re-filed its objection several months later. It must be noted that Sound Leasing requested that its initial comments be dismissed *without prejudice*, because it believed that it could privately work out its differences with Channel 3 in a manner that would allow both stations to operate with their preferred facilities.[3] However, after Channel 3 dashed Sound Leasing's hope of settlement by filing a petition to deny against Sound Leasing's application for a Class A license for KTOV-LP[4] on September 14, 2000, an event that occurred some 10 months after the comment deadline in this proceeding, Sound Leasing was left with no alternative but to defend KTOV-LP's status in all applicable forums, including this rule making -- an action which Sound Leasing took less than a month later, by filing its Supplemental Reply Comments on October 2, 2000.[5]

4. In light of the public policy in favor of private settlements, and the timing of Channel 3's attack on KTOV-LP's Class A entitlement, it is submitted that Sound Leasing was diligent;

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[3] *See* Sound Leasing's letter dated November 3, 1999, received by the Commission November 8, 1999.

[4] File No. BLTVA-20000905AAE.

[5] While Channel 3 claimed in its Opposition to Leave To File Supplemental Comments filed October 13, 2000, that it had not cut off settlement negotiations with Sound Leasing, repeated contacts between Channel 7 and Channel 3 during the past three years have not resulted in any meaningful effort by Channel 3 to find an accommodation that would meet the needs of both parties. Thus Channel 7 stands by its position that any realistic hope for settlement evaporated in 2000.

and its Supplemental Reply Comments should have been considered on the merits notwithstanding that they were filed after the comment deadline specified in the Notice of Proposed Rule Making.

The Bureau Failed To Comply with its Statutory Obligation To Protect KTOV-LP's Service Area in this Proceeding.

5. Even if the Bureau determines that Sound Leasing's Supplemental Reply Comments were not timely or diligently filed, the Bureau was nevertheless obligated by statute to protect KTOV-LP's service area and was so obligated regardless of whether Sound Leasing filed anything at all in this proceeding. Section 336(f)(1)(D) of the Communications Act of 1934, as amended, states:

> The Commission ***shall act*** to preserve the service areas of low-power television licensees pending the final resolution of a class A application [*emphasis added*].[6]

Sound Leasing was eligible to apply for Class A television station status,[7] and it did so in a timely manner, under the timetable dictated by Congress in the CBPA.[8] Therefore, KTOV-LP was, and still is, an eligible Class A applicant and is thus entitled to protection of its channel.[9]

6. The statute does not require Sound Leasing or Channel 7 to have participated in this or any other rule making proceeding to protect KTOV-LP's entitlement to primary spectrum

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[6] Community Broadcasters Protection Act of 1999, 47 U.S.C. §336(f)(1)(D) (2003) ("CBPA").

[7] *See Certificates of Eligibility for Class A Television Station Status*, 15 FCC Rcd 9480, Appendix p. 14, Public Notice (June 2, 2000).

[8] *See* 47 U.S.C. §336(f)(1)(C).

[9] See *Establishment of a Class A Television Service,* 15 FCC Rcd 6355, 6370-71 (2000), clarified on recon., 16 FCC Rcd 8244, 8248-49 (2001).

status.[10] The statute directs the *Commission*, not a Class A-eligible licensee, to "act to preserve the service areas of low-power television licensees pending the final resolution of a Class A application."[11] Thus the Commission is obligated by law to take KTOV-LP's protected status into account in resolving this proceeding. Instead, the Bureau did not even mention KTOV-LP's Class A status -- a clear error of law.[12]

7. Once KTOV-LP's Class A primary status is recognized, the question comes down to whether any of the exceptions in the CBPA permit KTOV-LP to be displaced and DTV Channel 8 to be allotted for use by KIII-DT. In its earlier pleadings, Channel 3 claimed that it needs to change channels because of "technical problems" with operation in the UHF band.[13] Sound Leasing demonstrated in its Supplemental Reply Comments that Channel 3's problems are not technical in nature "requiring an engineering solution," which is what the statute requires if KTOV-LP is to be displaced.[14] Rather, as recognized by the Commission itself, Channel 3 seeks

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[10] *See, e.g., Letter to John F. Garziglia,* Esq., Ref. 1800B3-RPC, dated September 27, 1996, denying an upgrade application by Station WCDZ(FM), Dresden, TN (File No. BPH-19951120IE) because the upgrade would require an involuntary downgrade of Station WGGC(FM). There is no evidence in the Letter that WGGC participated at all in that proceeding. A copy of the Letter is attached for convenient reference.

[11] *See* the CBPA, 47 U.S.C. §336(f)(1)(D).

[12] The Bureau did mention the Class A status of Minerva Lopez' Station KTMV-LP; but it also dismissed her Comments as late filed, again contrary to its statutory obligation to protect that station's channel.

[13] *See* Channel 3's "Supplement to Petition for Rulemaking," filed Aug. 5, 1999.

[14] *See* Sound Leasing's Supplemental Reply Comments, pp. 2-4. The requirement that technical problems require an "engineering solution" is explicit in 47 U.S.C. §336(f)(1)(D). In this case, comments filed by the University of Houston System suggest that technical problems will be compounded, not simplified, by the allotment change.

to "reduce its operational expenses during the transition,"[15] a simple matter of Channel 3's economic convenience.[16] Moreover, Channel 3 has not even committed to use Channel 8 as a permanent DTV home; rather, it may ultimately move its DTV operations to its analog Channel 3 after the transition.[17] The issue of KTOV-LP's rights under Section 336(f)(1)(D) must be resolved on the merits before the Commission can forcibly displace KTOV-LP from Channel 7;[18] and in end, it is clear that the issue must be resolved in Channel 7's (KTOV-LP's) favor.

Conclusion

8. The Bureau erred by dismissing Sound Leasing's re-filed opposition to the proposal, given the circumstances and the public policy in favor of private settlements. Moreover, the Commission is statutorily obligated to protect KTOV-LP's Channel 7 facilities, even if Sound

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[15] *See* Report and Order at par. 4.

[16] The Report and Order, at par. 4, also states that moving KIII-DT to Channel 8 will enable Channel 3 to replicate a larger portion of its analog service area, but that is an unsupported conclusion. What Channel 3 actually stated, in its Supplement to Petition for Rule Making filed August 5, 1999, was that if it were required to operate on DTV Channel 47, it would elect not to construct full power facilities during the DTV transition and would choose to operate with interim lower power facilities that would not replicate KIII-TV's analog service area. On DTV Channel 8, however, it would choose to operate with sufficient power to replicate its analog service area. The choice to operate at reduced power on Channel 47 would again be a matter of Channel 3's private economic convenience and should not be given any weight in this proceeding. There has never been any showing that Channel 3 could not replicate its analog service area on DTV Channel 47 without violating any engineering rules.

[17] *See* Channel 3's Reply filed October 13, 2000.

[18] This case is significantly different from *Achernar Broadcasting Co.,* 15 FCC Rcd. 7808 (2000), where a full power TV allotment was changed at the expense of TV Translator Station W19BB, which claimed Class A eligibility. Aside from the unique aspects of that case relating to its longevity and the need to protect a radioastronomy quiet zone, the Commission found that W19BB was <u>not</u> Class A eligible because it did not broadcast local programming, and the full power proposal had been established with sufficient certainty before the enactment of the CBPA, thus entitling it to an exception under 47 U.S.C.§336(f)7)(A). *See Achernar* at fn. 35 and par. 20. None of those circumstances are present in the instant case.

Leasing had never participated in this proceeding, because KTOV-LP is Class A-eligible.[19] The only statutory exception available to Channel 3 does not apply here, as there has been no demonstration that the existing Channel 47 DTV allotment for KIII-DT cannot be used for any reason other than Channel 3's displeasure with the financial cost of construction and operation – costs that are being borne by other stations all over the country whose DTV channels are in the UHF band. Therefore, the Bureau must reconsider the Report and Order and rescind the allotment of Channel 8 to Corpus Christi.

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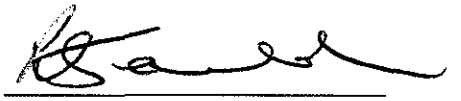
Respectfully submitted,



Peter Tannenwald
Jason S. Roberts
Gregory V. Haledjian[20]

January 6, 2004

Counsel for Channel 7 of Corpus Christi Inc. and Sound Leasing, Inc.

[19] There appears to be no reason why the KTOV-LP Class A application has not been granted other than the pendency of the instant rulemaking proceeding.

[20] Admitted in Maryland; not admitted in D.C.

Federal Communications Commission

Audio Services Division --- Mass Media Bureau

ASD Decision Document

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In reply refer to:
1800B3-RPC

September 27, 1996

Mr. John F. Garziglia, Esq.
Counsel for Thunderbolt Broadcasting Company
Pepper & Corazzini L.L.P.
1776 K Street, Suite 200
Washington, DC 20006

In re: WCDZ (FM), Dresden, TN
BPH-951120IE

Dear Counsel:

The staff has under consideration the above-captioned minor change "one-step" application filed by Thunderbolt Broadcasting Company ("TBC") to upgrade from Channel 236A to Channel 236C3. By this letter we deny the requested waivers and dismiss the application.

Background

Sections 73.3573 and 73.203 require that an allotment site comply with the minimum separation requirements of Section 73.207. TBC's proposed allotment site is short-spaced under the requirements of § 73.207(a) with respect to co-channel Class C Station WGGC(FM), Glasgow, Kentucky and first-adjacent Class A Station WTRB(FM), Ripley, Tennessee.See footnote 1. TBC recognizes the violation with respect to WGGC(FM) and requests waiver of §§ 73.203 and 73.3573.See footnote 2. The proposal is silent with respect to the short-spacing to WTRB(FM).

Waiver Request

Procedural Requirement. In support of its waiver request, TBC argues that the only restriction preventing grant of its application is the inability to specify a hypothetical, fully-spaced allotment site. TBC argues that the requirement that a "one-step" applicant demonstrate the existence of a hypothetical fully spaced allotment site is merely a procedural "key" that unlocks the door, which is later discarded upon grant of the "one-step" application.

Protection of Class C facilities. TBC asserts that, it is unable to designate a fully spaced allotment site

because the Commission's rules require TBC to presume full Class C facilities for WGGC(FM), even though it operates with close to minimum Class C facilities. TBC indicates that while WGGC(FM) is entitled to operate at minimum facilities for its class, it should not restrict other stations from making improvements that would better serve their communities of license and would have no impact on the operation of WGGC(FM).

No Prohibited Overlap. TBC indicates that granting the requested waivers would allow an upgrade that would cause no prohibited contour overlap. TBC asserts that the Commission's allotment policies were enacted long before the adoption of the contour protection provisions of § 73.215. TBC believes that in exceptional cases the allotment policies should be waived to allow better service in the public interest.

Hypothetical multi-step procedure. Additionally, TBC argues that it could upgrade its facilities without waiver by using a multi-step procedure. As the first step, WGGC(FM) would either move its transmitter site approximately five kilometers while retaining its Class C allotment, or downgrade its facilities at its present site. Following this, as a second step, WCDZ(FM) could then upgrade to Class C3 at its present site under the provisions of § 73.215. Then, as a third step, TBC indicates that WGGC(FM) could, if it had changed site, relocate back to its original site, or, if it had downgraded at its present site, upgrade back to its original class.

Case Precedent. As justification for waiver, TBC cites the Commission's decision in *Woodstock and Broadway, Virginia*.See footnote 3. TBC indicates that its situation is similar because: (1) the upgraded channel would not be available for competing applications; (2) the proposed facilities would comply with all facets of the Commission's rules; (3) the site is available since no site change is proposed; (4) no FAA approval is required since the existing site and tower would be used; and (5) the proposed facility is specified in the application.

Public Interest. Finally, TBC indicates that WCDZ(FM) is located near the New Madrid Seismic Zone where there is potential for significant earthquake activity and that WCDZ(FM) is well situated to broadcast emergency information. Further, TBC provides supplemental information regarding the Tennessee Lakes Flood Inundation Area and possible evacuation routes that are contained within the New Madrid Seismic Zone.

Discussion

Procedural requirement. TBC requests, in essence, waiver of the Commission's longstanding allotment standards. The Commission has stated that the nationwide FM allotment scheme is constructed on two core technical requirements: (1) that allotment sites comply with the minimum spacing requirements of § 73.207 and (2) satisfy the community coverage requirements of § 73.315. The goals of the allotment scheme are to prevent overcrowding of FM stations and provide a consistent, fair, efficient, and equitable distribution of FM facilities as required by Section 307(b) of the Communications Act.See footnote 4. Further, the Commission has indicated that all applicants using the "one-step" process must satisfy the same allotment requirements as petitioners in an allotment rulemaking proceeding to amend the FM Table of Allotments.See footnote 5. Furthermore, the Commission has indicated that where a station seeks modification using the "one-step" process and is unable to demonstrate that a suitable allotment site exists that would satisfy the spacing and community coverage requirements for the station's channel and class, the application would be dismissed.See footnote 6. This policy is strictly enforced even where the applicant intends to utilize the more lenient spacing and contour protection requirements of § 73.215. There is no precedent for waiver of the allotment requirements. The allotment requirements are not merely a "procedural key" which can be discarded at the application stage but the foundation mechanism which the Commission uses to protect the integrity of FM station licenses. The

Commission has generally held that to justify waiver of § 73.207 to create a sub-standard allotment, the showing must be compelling.See footnote 7. In these circumstances we decline to depart from our strict enforcement policy. Moreover, we note that TBC's proposed waiver would have far-reaching impact on our licensing policies. As a result, TBC's proposal would be best considered in the context of a formal rulemaking proceeding.

Protection of Class C facilities. TBC takes issue with the Commission's policy requiring protection of Class C stations to the maximum facilities for their class. It is longstanding Commission policy to allow stations the opportunity for future growth and expanded service within their specified station class rather than fixing a station's protected service at its currently authorized level. This is accomplished by protecting stations to the maximum allowable facilities. Thus, WGGC(FM) is entitled to such protection and to the right to commence future operations with full Class C facilities.

No Prohibited Overlap. For the reasons stated above, TBC's assertion that its proposal would not cause prohibited contour overlap is not persuasive. The Commission's allotment standards are not based upon a contour overlap methodology. The Commission will not consider § 73.215 as a factor in the allotment process.See footnote 8. In fact, the Commission has specifically precluded the use of § 73.215 as an allotment tool.See footnote 9.

Hypothetical Multi-Step Procedure. TBC's assertion that it could upgrade its facilities without a waiver by using a hypothetical multi-step procedure with Station WGGC(FM) is purely speculative. TBC has not submitted any engineering exhibits to support this assertion. Even presuming that such a scenario were technically possible, it would require WGGC(FM) to: (1) give up its protection rights as a Class C station, thereby permitting other stations to locate closer to it; (2) give up its radiation rights as a full Class C station, thereby, forfeiting the potential for future increased coverage; (3) give up its "grandfathered" short-spaced rights pursuant to § 73.213(a) with respect to WNDA(FM), Huntsville, Alabama, thereby limiting its rights to relocate in that direction, and under some options; (4) require it to move further away from its community of license. Our records indicate that WGGC(FM) has not filed an application to change its transmitter site or downgrade its facilities. Furthermore, TBC has not submitted any indication of WGGC(FM)'s willingness to pursue any of the hypothetical options presented. We will not favorably entertain a waiver request premised on a speculative outcome of a series of applications that have not been filed with the Commission.See footnote 10.

Case Precedent. TBC's reliance upon *Woodstock and Broadway* is misplaced. In *Woodstock and Broadway* the Commission accepted a supplemental showing at the allotment stage that demonstrated city grade coverage from a *fully spaced allotment site*. TBC has not specified a fully spaced allotment site. Clearly, the narrow exception regarding the city grade coverage showing permitted in *Woodstock and Broadway* from a *fully spaced allotment site* does not apply to TBC's application.

Public Interest. TBC asserts that its upgrade would better serve the emergency information needs of the New Madrid Seismic Zone. However, our study reveals that TBC's existing operation on Channel 236A already serves part of the New Madrid Seismic Zone and that the portion of TBC's proposed new service area which lies within the New Madrid Seismic Zone is already served either fully or partially by 16 other FM stations.See footnote 11 Therefore, the portion of the New Madrid Seismic Zone that TBC proposes to serve for the first time is not underserved. We do not consider the additional emergency broadcast service that would result from an upgrade of WCDZ(FM) to be sufficiently compelling to overcome the Commission's traditional prohibition against the creation of short-spaced allotments.

Conclusion

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grand Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per Curiam)). We have afforded TBC's waiver requests the "hard look" called for under the WAIT Doctrine, *WAIT Radio v. FCC*, 418 F2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in the justifications are insufficient to waive §§ 73.203 and 73.3573. Additionally, TBC did not address the short spacing with respect to WTRB(FM).

Accordingly, for the reasons stated above, the requests for waiver of 47 C.F.R. §§ 73.203 and 73.3573 ARE HEREBY DENIED and Application BPH-951120IE IS HEREBY DISMISSED for violation of the provisions of 47 C.F.R. §§ 73.203 and 73.3573 with respect to WGGC(FM) and WTRB(FM).See footnote 12 This action is taken pursuant to 47 C.F.R. § 0.283. Further, since TBC has failed to present adequate reasons which, if true, would justify the requested waivers, TBC is not entitled to an evidentiary hearing as a matter of law. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

Sincerely,

Dennis Williams
Assistant Chief
Audio Services Division
Mass Media Bureau

cc: Thunderbolt Broadcasting Company
: Lohnes & Culver

Footnotes

Footnote: 1 The required spacing toward WGGC(FM) is 237 kilometers, while the proposed spacing is 233.2 kilometers. The required spacing toward WTRB(FM) is 89 kilometers, while the proposed spacing is 88.2 kilometers.

Footnote: 2 TBC's proposed transmitter site, which is the same as the proposed allotment site, is in compliance with the contour protection requirements of § 73.215. However, processing pursuant to § 73.215 does not apply to allotment sites.

Footnote: 3 *See Woodstock and Broadway, VA*, 3 FCC Rcd 6398 (1988).

Footnote: 4 *See Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas,* 6 FCC Rcd 5356, 5358 (1991) (para. 13).

Footnote: 5 *See Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application,* 8 FCC Rcd 4735, 4737 (1993) (para. 13).

Footnote: 6 *Id.* at 4737 (para.14)

Footnote: 7 *See Bristol, Tennessee*, 46 RR 2d 650 (1979) (request to create a short-spaced substandard allotment denied).

Footnote: 8 *See Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 4 FCC Rcd 1681, 1681 (1989) (para. 5).

Footnote: 9 *See John M. Salov,* 8 FCC Rcd 172, 174 (1993) (para. 18)

Footnote: 10 Any applications submitted must not violate the contingent application prohibition of § 73.3517.

Footnote: 11 This does not include any AM or TV stations that also serve the area.

Footnote: 12 *See Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications,* 7 FCC Rcd 5074 (1992) (para. 22). (The Commission will not permit corrective amendment of defects that result from staff denial of a waiver request.)

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Links Updated December 12, 1996

CERTIFICATE OF SERVICE

I, Daniella K. Mattioli Knight, do hereby certify that I have, this 6th day of January , 2004, caused to be sent by first class United States mail, postage prepaid, copies of the foregoing "Petition for Reconsideration" to the following:

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