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Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of Section 73.202(b), )  
FM Table of Allotments, FM Broadcast Stations )  
(Ft. Collins, Westcliffe and Wheat Ridge, Colorado) )  
 )  
TO: Chief, Audio Division )

MB Docket No. 03-57  
RM-10565

**PETITION FOR RECONSIDERATION**

Meadowlark Group, Inc. ("MGF"), by its attorney, hereby respectfully requests the Audio Division to reconsider and set aside its decision, reached by *Report and Order*, released March 19, 2004, dismissing MGI's Counterproposal to allocate a new FM channel to the community of Creede, Colorado. In support thereof, it is alleged:

**I. Petitioner and Its Interest in this Proceeding:**

1. By *Report and Order*, released March 19, 2004, the Audio Division dismissed a Counterproposal filed in this proceeding by MGI, contemplating the allotment of Channel 248C to the community of Creede, Colorado, as a first local service. Creede, Colorado, is a community of 377 persons (2000 Census) and the proposed allotment would serve a white area with a population of 137 people and provide service to a gray area with a population of 2285 people.<sup>1</sup> Thus, there is

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<sup>1</sup>For purposes of FM allotments, a gray area is a geographical area that is served by only one full-time aural service. On the other hand, a white area is one that is not served by any full-

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no question that the Counterproposal was meritorious.

2. The Audio Division dismissed the Counterproposal because it was in conflict with an application by Jacor Broadcasting of Colorado, Inc. (“Jacor”), the licensee of FM Broadcast Station KRFX, Denver, Colorado, for a so-called “upgrade” of Station KRFX to a full Class C facility. In this petition, we will show that the staff committed cardinal procedural error which, in turn, resulted in an outcome which is clearly contrary to the public interest.

## **II. Procedural Error:**

3. The staff put the cart before the horse. If processed in the order received, the KRFX application would have come up first, because it was filed prior to the filing of MGI’s Counterproposal. At the time of the staff’s action, the permitted six months for filing an application had expired<sup>2</sup>. Earlier in this proceeding, the staff demonstrated that they can act very swiftly and efficiently on pending applications; in fact, the KRFX application was actually granted, albeit by error, 25 days after it was filed. Yet, in this instance, the staff elected to act on the rule making prior to acting on the application. This, in itself, is illogical.

4. What the staff did in this case was to treat MGI’s Counterproposal in a vacuum without considering the merits or lack of merits of the KRFX application. In the application proceeding, MGI has filed an Informal Objection, demonstrating that the KRFX application requires a brand new waiver of the Commission’s Rules; specifically, the rule that governs the height above

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time aural service.

<sup>2</sup>In order that there be no doubt of Jacor’s reliance upon a waiver of the height rules, on April 25, 2003 counsel for Jacor tendered a letter identifying KRFX’s application [BPH-20030424AAO] as specifically in response to the Order to Show Cause in RM-10630 and seeking such a waiver.

average terrain. MGI has further shown that there is no basis for a grant of the waiver and that the application in its present form cannot be granted.

5. By bifurcating this proceeding into a separate rule making proceeding dealing with the Creede Counterproposal, and providing for consideration of the KRFX application only at a later date, the staff has committed a grave procedural error. In *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), the Commission was dealing with two conflicting applications for construction permits. The Commission elected to grant one of the applications and pronounced that it would consider the other application in a hearing at a later date. The Supreme Court held this to be error. Interpreting the intent of Congress, the Court held that the conflicting applications had to be considered in a *consolidated* proceeding. One could not be considered without also considering the other. The same is true here: the rule making cannot be considered without also considering the merits of the application; and the merits of the application cannot be considered without also considering the merits of the Counterproposal. This is especially so, because the two matters are being processed by the same division of the Commission.

6. A similar teaching can be drawn from the Court of Appeals in *LaRose v FCC*, 494 F.2d 1145 (1974). There, the Commission was considering whether to renew the license of an AM broadcast station in Baton Rouge, Louisiana. There was pending before the Commission an application to sell the radio station to a third party. The Commission elected to deny the license renewal and dismiss the transfer application on the grounds that there was no license to transfer. Here, again, the Court of Appeals held that this was error; that the renewal and transfer applications had to be considered together.

7. The Creede rule making proceeding involves the Commission's mandate to

allocate frequencies in a fair, efficient and equitable manner, pursuant to the provisions of Section 307(b) of the Communications Act. That mandate is primal and takes precedence over everything else. Thus, when licenses were awarded through a system of hearings, and there were various applications for different communities, the Commission was required to first consider which community needed the service most and only then determine which of the applicants for that community was the most qualified. *Allentown Broadcasting Corp v FCC*, 349 U.S. 358 (1955). Even today in the auction milieu, where there are multiple applications for different communities, the Commission must first determine which community needs the service most and only then proceed to auction the allotment to the applicants specifying that community.

8. By considering the Creede Counterproposal in a vacuum and ignoring the merits or lack of merits of the KRFX application, the staff deprived itself of the opportunity to make the determination required by Section 307(b) of the Act. That resulted in a substantive error as well, because as we will demonstrate the KRFX application cannot be granted in its present form. Yet, by simply assuming otherwise, the staff was led to deny an allotment which would have provided a first local service to a community of substantial size and also provide service to significant white or gray areas.

**III. The Staff Should Not Have Assumed that the KRFX Application  
Can Be Granted, Because It Cannot:**

9. The KRFX application purports to upgrade Station KRFX from a Class C0 facility to a full Class C facility. In fact, as will be demonstrated, it does no such thing. The application actually contemplates a reduction in the area and population served by the station as compared with the area and population served by the existing KRFX facility.

10. Section 73.313(d) of the Commission's Rules and Regulations specifies the procedures to be used in calculating the height above average terrain ("HAAT"). It requires that profile graphs be drawn for eight radials, beginning at the antenna site and extending 16 km therefrom. The radials are to be drawn for each 45 degrees of azimuth, starting with true North. The elevation of points from 3 to 16 kilometers distant from the antenna along these eight radials is averaged to determine "average terrain." In its application, Jacor's engineers have done no such thing. Instead, they have elected to "cherry pick" the radials they used to calculate HAAT, so as to increase the apparent HAAT as opposed to the true HAAT calculated with eight radials as required by Section 73.313(d) of the Rules. In substance, Jacor is requesting a "Denver waiver", allowing them to exclude inconvenient radials.<sup>3</sup>

11. In a Further Supplement to Informal Objection, filed in the application proceeding under date of July 14, 2003, MGI showed that KRFX has never had a Denver waiver - that its licensed HAAT was calculated using the standard eight radials. Specifically, the earliest available application for a construction permit for Station KRFX (File No. BPH-6817) was filed in October, 1968, by General Electric. It contemplated the use of the KOA-TV tower on Lookout Mountain, and specified a height of the radiation center of the antenna of 7689 feet (2344.2 meters). As shown in the Technical Narrative, prepared by Frank McCoy, and attached to the Further Supplement to Informal Objection, it does not appear that the transmitter site has ever been moved; it is still on the KOA-TV tower, which is now owned by CBS.<sup>4</sup>

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<sup>3</sup>See *Streamlining of Radio Technical Rules*, 15 FCC Rcd 21649 (2000) at para. 33.

<sup>4</sup> The coordinates of the tower have changed, very slightly, but this appears to have been the result of a simple correction, not a physical re-location.

12. The application (BPH-6817) made it very clear that HAAT was calculated using the standard eight radial method and was found to be 1045 feet (319 meters). Mr. McCoy further calculated the area and population served by these facilities. It comes to 16,210 square kilometers, containing a 2000 population of 2,710,518 persons.

13. The center of radiation shown for the antenna in the so-called “upgrade” application is 2256 meters above mean sea level (“AMSL”), which is less than the center of radiation AMSL for the existing KRFX facilities, approximately 2334 meters.<sup>5</sup> Thus, we would expect KRFX to serve a smaller area and fewer people from these facilities than it serves from its existing facilities. Mr. McCoy calculated the HAAT from the proposed facilities, using the standard eight radial method. It turned out to be 238 meters. McCoy further calculated that the proposed facilities would serve an area of 12,730 square kilometers, containing a 2000 population of 2,596,399 persons. Thus, the proposed facilities will serve a smaller area and population than KRFX serves at the present time. Under these circumstances, Jacor’s self-serving contention that the proposed facilities should be treated as an “upgrade” to full Class C status is simply absurd.

**IV. Jacor has Failed to Make an Adequate Showing Justifying the  
Issuance of a “Denver Waiver”:**

14. We see, therefore, that KRFX has never had a “Denver Waiver,” allowing the exclusion of any radials in calculating HAAT. It has never needed such a waiver. It does not need one now. As Mr. McCoy demonstrated, its application can and should be granted as a Class C1 facility.

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<sup>5</sup> The FCC data base gives a figure of 2142 meters for the height AMSL of the existing facilities but this is obviously an error, since KRFX is still on the same tower that it was on in 1968, and the tower has not moved or been reduced in height.

15. The Court of Appeals has remarked that “An applicant for waiver faces a high hurdle...”. *WAIT Radio v. FCC*, 459 F. 2d 1203, 1207 (DC Cir., 1969), cited with approval in *Melcher v. FCC*, 134 F. 3d 1143, 1163 (1998). Here, the hurdle faced by Jacor is especially high, because it is not just asking for an extension or renewal of a waiver that it already had; it is asking for a brand new waiver.

16. It cannot and does not argue that the waiver is needed to improve the service provided by Station KRFX to the listening public because, as Mr. McCoy showed, the proposed facilities will serve a smaller area and fewer people than the existing KRFX facilities. It cannot argue that the waiver is needed to protect the Table Mountain Listening Area because it has been operating without a waiver for at least 30 years, and there have been no complaints of interference to Table Mountain operations. Neither can it argue that the terrain in the Denver area is especially unusual. As shown by MGI in its Informal Objection, many stations in Colorado and the other mountain states are surrounded by very similar terrain. If KRFX is to be granted a waiver based upon “unusual terrain,” many other stations would qualify for similar waivers. In any event, such arguments are unacceptable.<sup>6</sup>

17. The only basis for a waiver would be to provide KRFX with artificial protection against new encroaching allotments, such as the one contemplated by MGI at Creede, Colorado. But that simply has the effect of further diminishing the number, variety, and diversity of outlets available to the public. Thus, it hardly constitutes a public interest reason for granting the waiver.

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<sup>6</sup> “Arguments opposing reclassification because the station provides useful extended service beyond its actual primary contour or because of obstacles to upgrading facilities will not be deemed to raise a substantial and material fact warranting hearing.” *Streamlining of Radio Technical Rules* cited supra, at Para. 29.

The truth is, there are not any public interest reasons to grant the waiver.

**V. The Commission Can and Should Grant the KRFX Application,  
But Not as a Full Class C Facility:**

18. The KRFX application has two aspects: It seeks a change in transmitter site and it seeks a change to full Class C facilities. (Jacor claims that it is an “upgrade” but, as demonstrated, the proposed facilities serve less area and population than the existing KRFX facility and, accordingly, the term “upgrade” is a misnomer.)

19. The second aspect is a change of transmitter site, which is apparently needed because Station KRFX cannot continue to operate at its present site. The Commission staff should not confuse these two aspects of the application.

20. MGI does not oppose a grant of the application in so far as it pertains to a change of transmitter site. MGI’s opposition is confined to the arbitrary determination of class. That change requires a waiver of an important Commission rule, *i e* , the rule governing the calculation of HAAT. Jacor has failed to make the case for waiver. Therefore, the application to change transmitter site should be granted, but the station class should be assigned by the method set out in the Rules which, in this case, defines KRFX as a Class C1 facility.

21. In closing, it should be noted that, as suggested in a pleading filed by MGI under date of June 6, 2003,<sup>7</sup> the Creede Counterproposal could be granted, even if KRFX was considered to be a full Class C facility, simply by imposing a site restriction on the channel substitution at

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<sup>7</sup>Meadowlark Group, Inc.’s, Response to Jacor’s Reply Comments.

Poncha Springs. The staff ignored this suggestion. This, too, was error.

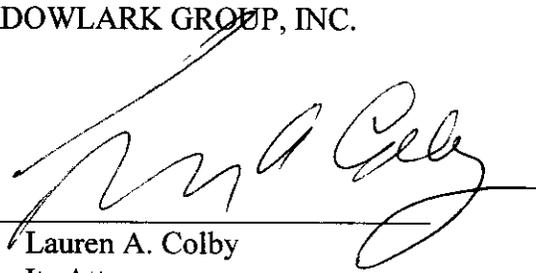
Respectfully submitted,

April 5, 2004

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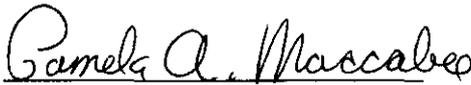
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