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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 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,	)	MM Docket No. 04-19
FM Broadcast Stations	)	RM – 10845
(Talladega and Munford, Alabama)	)	

REQUEST FOR LEAVE AND SUR-REPLY OF CALHOUN COMMUNICATIONS

Calhoun Communications ("CC"), by its counsel, hereby respectfully requests leave, pursuant to 47 C.F.R. § 1.145(d), to submit a sur-reply (the "Sur-Reply") to the Reply Comments of Jacobs Broadcast Group, Inc. (the "Reply") in the above-referenced rule making. In support whereof, CC states as follows:

I. Request for Leave

CC seeks leave to file a Sur-Reply for the limited purpose of replying to assertions made in the Reply not heretofore offered on the record by Jacobs Broadcast Group, Inc. ("Jacobs"), the proponent of the proposed rule making at issue here. The public interest would be served by the creation of a more complete record in this proceeding, especially because the arguments presented in the Sur-Reply implicate significant Commission policies regarding Section 307(B) of the Communications Act and concomitant principles of localism.

II. Argument

In its comments, CC describes the obvious – the process by which the rule making, if adopted, would allow Jacobs to move WTDR-FM away from the less-populated and lucrative market it now must serve (Talladega) and, instead, allow it to penetrate more deeply into the

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larger and more lucrative Anniston Urbanized Area by switching communities to a small, isolated community from which Anniston could easily be blanketed later with a transmitter move. CC's arguments described a reality that has become known in the communications bar as the "two-step" – a strategy that implicates localism to its very core because the designated community of license is nothing more than a "pit stop," served in name only during station identifications, while the station, in practice, serves more lucrative nearby urbanized areas.

In reply, Jacobs characterizes CC's comments as creating "a Harry Potter Sequel" – apparently suggesting that CC was engaging the blue smoke and mirrors of professional prestidigitation. However, the only magic in the record of these proceedings is the sleight of hand that Jacobs is performing when it responds to CC's localism concerns by telling the Commission: "Jacobs has no intention of moving the WTDR-FM site anywhere – period."[1]

Jacobs apparently wishes the Commission to be distracted by these reassuring words so that it will ignore the simple truth about what may actually be transpiring underneath Jacobs's cloak: WTDR-FM has already been authorized to move away from its licensed site toward the nearby more populous Urbanized Area of Anniston, Alabama. *See* FCC File No. BPH-20030414ABK (granted Sept. 11, 2003) (the "Tower Move"). As CC noted in the Engineering Statement attached to its comments, the authorized transmitter relocation placed WTDR-FM as close to Anniston as possible as long as the station was licensed to Talladega.

CC submits that the Commission would find Jacobs's assurances more comforting if the petitioner's words were made credible by deeds. If Jacobs actually means what it said in its comments, that it "has no intention of moving the WTDR-FM site anywhere – period,"[2] then why does it still contemplate the Tower Move?

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1 *Reply* at 4, para. 8.

2 *Id*

Moreover, if Jacobs truly had no intention of using this rule making as a vehicle to engage in a two-step that will help it more deeply penetrate the Anniston Urbanized Area, then it would have indicated that it has no objection to conditioning this proposed allotment on a pledge that WTDR-FM will move no closer to Anniston.

It has not done this deed, either. No doubt, as evidence indicates, because the Anniston two-step is still in play. Buried in the engineering exhibit attached to the Reply, Jacobs undermines its own reassurances when its engineer states: "[a]ny relocation application can be addressed . . . at the time it is filed."[3] Which is it? Will Jacobs never seek to move its site, or does it plan such a move once the ruling is completed, leaving the Commission, CC and any other opponents to address the issue "at the time it is filed?" As any magician would, Jacobs seeks first to divert attention, while the real ending to its trick lies secreted up its sleeve – that is, the second part of the Anniston two-step, which will occur "at the time it is filed."

Moreover, by instructing CC to wait until a relocation application is filed to raise the "two step" issue, Jacobs also conveniently ignores FCC Audio Division policy. In analogous situations, the Commission has held that an objection filed at the application stage amounts to an untimely petition for reconsideration of the underlying rule making proceeding. *See, e.g., Letter to John Garziglia, Esq., Station WEGY(FM)*, Feb. 19, 2002 (attached hereto as Exhibit A). Quite simply, CC's complaint after an application is filed would face summary dismissal. This sleight of hand is all part of a diversion designed to facilitate the implementation of Jacobs's "two-step."

III. Conclusion

In the end, the Commission should not be taken in by Jacobs's attempts at regulatory wizardry. The FCC is not Harry Potter's Hogwarts School, and no amount of conjuring can hide the fact that Jacobs's deeds cannot be reconciled with its words of reassurance. The FCC should

[3] *Reply, Technical Statement*, at 4, para. 6 (emphasis added).

hold Jacobs to its assurances by preventing it from reaching up its sleeve once the rule making process is completed to effect a move deeper into the Anniston Urbanized Area. The Commission should preempt this trickery by conditioning the proposed allotment on a binding pledge that WTDR-FM will move no closer to Anniston, or, at the very least, approve the rule making with a statement that the approval is premised on Jacobs undertaking not to move.[4]

Respectfully submitted,

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April 27, 2004.

[4] Moreover, as discussed in CC's comments, the Commission should also refuse to expand the line of precedent flowing from *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (1992), that would permit WTDR-FM to have a short-spaced allotment, unless Jacobs will undertake not to move its site.

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION
WASHISGTON, D.C. 20554

FEB 19 2002

IN REPLY REFER TO: 1800B3-JR

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In re: **Station WEGY(FM)**, Pana, IL
Facility ID No. 61225
Construction Permit Modification
File *No.* BPH-20010731AAY
Kaskaskia Broadcasting, Inc.
Informal Objection

Dear Counsel:

This letter concerns: (1) the captioned application of Kaskaskia Broadcasting, Inc. ("KBI") to modify its construction permit for Station WEGY(FM), Pana, Illinois (File No. BPH-20010731AAY); and (2) the September 12, 2001 informal objection filed by Technicom, Inc. ("Technicom")[1] For the reasons set forth below we dismiss and deny the informal objection and grant KBI's application.

Background KBI sought to change the WEGY(FM) community of license from Pana to Macon, Illinois With another party[2] it jointly filed a rule making perition in Docket No. 00-160.[3] KBI proposed to amend the FM Table of Allotments, 47 C.F.R. § 73.202(b), by moving Channel 265A from Pana to Macon, Illinois. It also proposed to modify the WEGY(FM) license to specify operation on Channel 365A at Macon in lieu of Pana. The Allocations Branch granted the perition, allotting Channel 265A to Macon and modifying WEGY(FM)'s authorization to specify the new frequency, conditioned on KBI filing a minor modification application to change channels. *See* Report and Order ("R&O"), *Pana, Taylorville and Macon, Illinois*, 16 FCC Rcd 12,588 (Allocations Br. 2001)[4] The Allocations Branch indicated that the channel substitution served the public interest by providing Macon with its first local aural service.

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[1] KBI filed an opposition on October 16, 2001 Technicom submitted a "Notice of Intent to File Reply" on November 15 and a reply on December 3, 2001

[2] Miller Communications, Inc., licensee of Station WMKR(FM) Taylorville, Illinois

[3] *See* Notice of Proposed Rule Making, *Pana Taylorville and Macon Illinois*, 15 FCC Rcd 19 046 (2000)

[4] The Allocations Branch reallotted Channel 232A to Pana to replace Channel 265A

Informal objection. Technicom. licensee of Station WXFM(FM), Mt. Zion, Illinois. characterizes KBI's application as "part of an overall scheme to abuse Commission processes." It alleges that KBI, in the rule making proceeding, misrepresented the area it intended to serve. According to Technicom, KBI argued the public service benefit of a new local service at Macon in order to deflect attention from its real goal of providing a city-grade signal to all of the Decatur urbanized area.[5] Technicom. which did not participate in the rule making proceeding, asserts that it was unable to raise this issue previously, because KBI's "deceit" was not revealed until filing of the instant application. Technicom urges revocation of the R&O, dismissal of KBI's application "which seeks to further this deceit," and a license revocation hearing to determine whether KBI is qualified to remain a licensee.[6]

As set forth in the Notice of Proposed Rule Making in Docker No. 00-160, 15 FCC Rcd 19,046 (Allocations Br 2000), interested parties were invited to file comments by October 23, 2000 and reply comments by November 7,2000 in response to KBI's rule making proposal. As noted, Technicom filed neither. Thus, to the extent that Technicom seeks to participate in the rule making action reassigning WEGY(FM) from Pana to Macon, its informal objection must be considered as an untimely comment which cannot be considered. See *Brookville and Punxsutawney, Pennsylvania*, 3 FCC Rcd 5555, 5556 (MMB 1988) (pleading filed in allotment proceeding which does not comply with rules deemed unacceptable and will not be considered); *Pinewood, South Carolina*, 5 FCC Rcd 7609, 7610 (1988) (counterproposal must be submitted by comment date to be considered in allotment proceeding). The R&O, released June 15,2001, was published in the Federal Register on June 26,2001. *See* 66 FR 33,902. Pursuant to 47 U.S.C. § 405 and *47* C.F.R. § 1 405, a reconsideration petition *must* be filed within 30 days of Federal Register publication. Therefore, deemed a perition for reconsideration of the rule making action. Technicom's instant pleading is likewise untimely and cannot be considered. ***See***

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[5] Technicom *notes* that if a reallotment would result in a city-grade contour to more than 50 percent of an urbanized area. the proponent must present a "Tuck" analysis demonstraring that the proposed community is independent of the nearby urbanized area. deserves its own station. and that a proposed community change is not designed to serve the urbanized area A "Tuck" analysis is not generally required if the 50 percent threshhold is not reached.

Technicom asserts that, during the rule making proceeding KBI was aware of Commission policies and concerns about station migration from rural to urbanized areas. yet it proposed reference coordinates at an existing and available tower site away from Decatur. thereby providing 70 dBμ service to less than 50 percent of the Decatur urbanized area Technicom notes KBI comments regarding the public interest benefits of its proposal referencing Macon's population growth and plans for a southerly extension of Route 51 towards Moweaqua Illinois and indicating thar a sire-resrricred allotment would lead to city-grade service to Macon and Moweaqua. According to Technicom, the Allocations Branch relied on these comments.

Technicom now alleges that the instant application is evidence that KBI "abandoned its public inreresl commitments made in the rule making proceeding. It asserts that KBI's application specifies a transmitter site "well north" of rhe sire-restricted coordinates and "on the very edge" of the Decatur urbanized area According to Technicom grant of the application will enable WEGY(FM) to provide city-grade service to the entire urbanized area, while the station would not provide such service to Moweaqua and other growing communities along the Route 51 corridor. Technicom maintains that had KBI revealed that it intended to provide city-grade coverage to all of the urbanized area and that it did not intend to utilize the reterenced available transmitter site or to serve the growing population and increased traffic along the expanding Route 51 corridor, the rule making proceeding would have had a *different* outcome In sum. Technicom *argues* that the *allotment substitution* was premised on specific facts and that KBI as applicant is obliged to propose facilities "serving such facts."

[6] According to Technicom, failure to do so will encourage "flagrant disregard for the public trust"

Mary R. Kupris, 5 FCC Rcd 5 142 (1990) (Commission lacks authority to waive or extend 30-day period). In sum, whether considered as a rule making comment or as a petition for reconsideration of the rule making action, Technicom's objection is procedurally defective and must be dismissed.

Even if we consider Technicom's submission as an informal objection to KBI's permit application, we would deny it. Its misrepresentation allegation rests solely on the circumstances that KBI's instant proposal would allow WEGY(FM) to provide city-grade service to more of an urbanized area. However, a successful rule making petitioner which subsequently files an implementing modification application is not limited to the reference coordinates previously specified in the context of a rule making proceeding. *See New* **Directions** *Media, Inc.*, 15 **FCC** Rcd 13,158 (2000). Although WEGY(FM) might well compete in the larger Decatur urbanized area, that in and of itself does not signal that the station would not adequately serve Macon, its community of license, see *WBBK Broadcasting, Inc.*, 15 FCC Rcd 5906, 5908 (2000). and Technicom provides no additional credible evidence that WEGY(FM) will not serve Macon.

Finally, the intent to deceive is an essential element to finding misrepresentation. *See Joseph W. Bollinger and Donna M. Bollinger*, 16 FCC Rcd 18,107, 18,108, citing *Swan Creek Communications*, 39 F. 3d 1217, 1222 (D.C.Cir. 1994); *Policy Regarding Character Qualifications in Broadcasring*, 102 FCC 2d 1179, 1196 (1986) (subsequent history omitted). Insofar as Technicom maintains that KBI had a motive not to disclose in the rule making context that its real aim was to provide city-grade service to the entire Urbana urbanized area, its evidence of misrepresentation merely consists of a speculative and conclusory allegation unsupported by credible evidence. Thus, it has failed to meet its burden of raising a substantial and material question of fact warranting further inquiry. ***See*** *Garrett, **Andrews.** & Letizia, Inc.*, 88 FCC 2d 620 (1981) (Commission will not infer improper motive from speculation lacking factual support). Accordingly, we will deny Technicom's objection.

Conclusions/orders. An examination of the application reveals that KBI is qualified to be a Commission licensee. The examination further reveals that a grant thereof would benefit the public interest, convenience, and necessity.

In light of the above, and pursuant to 47 C.F.R. § 0.283: the informal objection filed September 12, 2001 by Technicom, Inc., to the extent it challenges the Report and Order: in Docket No. 00-160, IS DISMISSED, and in all other respects IS DENIED; and the application of Kaskaskia Broadcasting, Inc for a construction permit to modify the facilities of Station WEGY(FM), Pana, Illinois (File No. BPH-2001073 IAAY) IS GRANTED. The authorization is enclosed.

Sincerely,

for Peter H. Doyle, Chief
Audio Services Division
Mass Media Bureau

cc John S. Neely, Esquire

cc: Walton E. Williams, III, Esquire