

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 02-335
Table of Allotments,) RM-10545
FM Broadcast Stations)
(Hart, Pentwater and)
Coopersville, Michigan))

TO: Office of the Secretary
ATTN: Chief, Media Bureau

OPPOSITION TO "PETITION FOR PARTIAL RECONSIDERATION"

WATZ Radio, Inc. ("WATZ"), licensee of FM Broadcast Station WATZ-FM, Channel 257C2 (99.3 MHz), Alpena, Michigan, respectfully submits its Opposition to the "Petition for Partial Reconsideration" filed by Fort Bend Broadcasting Company ("Fort Bend") on March 25, 2004. In support whereof, the following is shown:

Preliminary Statement

1. Fort Bend's instant Petition is an appeal of the ruling by **Report and Order** of the Assistant Chief, Media Bureau, DA 04-235, 69 Fed. Reg. 8334, 19 FCC Rcd 1886, 2004 WL 329062, published in the Federal Register on February 24, 2004, dismissing a "Counterproposal" filed by Fort Bend in this case on December 30, 2002.

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2. Notice of the filing of Fort Bend's Petition was given in the Federal Register on April 27, 2004, 69 Fed. Reg. 22803; therein, the Commission notified interested parties that Oppositions "must be filed by May 12, 2004". Therefore, this pleading is timely filed.

3. Fort Bend's Petition raises two issues. First, it requests the Media Bureau to reverse its holding below that the Fort Bend "counterproposal" was not a proper counterproposal. Second, Fort Bend urges that the Media Bureau's reliance on ***Pacific Broadcasting of Missouri, LLC (KTKY(FM), Refugio, Texas)***, 18 FCC Rcd 2291 (2003) in refusing to consider Fort Bend's use of a "back-fill" channel at Frankfort, Michigan violates the Administrative Procedure Act.

4. As will be demonstrated below, the staff's decision as to the first issue was eminently correct and must be affirmed. Once the result as to the first issue is affirmed, it is unnecessary to deal with the second issue.

Fort Bend's December 30, 2002 Submission Was Not a Proper Counterproposal, and Still is Not Today

5. As WATZ has contended all along in this matter, the use of Channel 257 at Frankfort, at whatever class and power level, has never been mutually-exclusive with the use of either Channel 287 at Hart or Coopersville or Channel 231 at either Pentwater or Hart, at whatever class and power level. On December 30, 2002, the last day for

"counterproposals" in this docket, Fort Bend tried to link the use of Channel 257 in northwestern lower Michigan to the use of Channel 287 at Hart and Coopersville by proposing the allocation of Channel 287A at Glen Arbor in place of existing Channel 227A, which Fort Bend then proposed to move from Glen Arbor to Frankfort.

6. Channel 287A was not available for assignment at Glen Arbor on December 30, 2002; indeed, Channel 287A is still not available for assignment at Glen Arbor today. According to the Commission's database, WCXT's licensed Class C2 facility (BLH-20011019AAD) is located at N. Lat. 43° 40' 34", W. Long. 86° 14' 20". The Glen Arbor community coordinates assumed by Fort Bend, N. Lat. 44° 53' 50", W. Long. 85° 59' 06", are 137.191 kilometers (85.247 miles) north of WCXT(FM)'s transmitter site; Section 73.207 of the Rules calls for a spacing between co-channel A and C2 facilities of 166 kilometers (103 miles)—rendering a proposed use of Channel 287A at Glen Arbor some 28.809 kilometers (17.9 miles) short.

7. Therefore, Channel 287A would not be available for assignment at Glen Arbor unless and until WCXT's licensee is granted a construction permit to effectuate its move to Coopersville, and a covering license for the newly constructed Coopersville facility were granted. See, e.g., **Letter to Thomas J. Hutton, Esq. et al (KSTP(AM) et al)**, 16

FCC Rcd 11979, n. 7 (1991)¹. WATZ notes that a construction permit application to effectuate the changes authorized in Docket 02-335 was filed by Waters Broadcasting Corporation, current licensee of WCXT, just eight days ago on May 3, 2004, File No. BPH-20040503AFG.

8. It is well settled that Fort Bend's counterproposal is to be judged by the facts and circumstances in existence on December 30, 2002, and not by any fortuitous happenings thereafter. As was stated most recently in ***FM Table of Allotments, Caro and Cass City, Michigan***, DA 04-611, 2004 WL 445238, 19 FCC Rcd - (March 12, 2004):

Counterproposals are required to be filed by the comment deadline set in the Notice of Proposed Rulemaking and they must be technically correct and substantially complete when filed. [FN5] The comment date in this proceeding was April 17, 2001. Any changes to the counterproposal would have been timely only if they had been filed prior to that date. Under our rules, these proffered corrections have not been considered because they are not timely.

[FN5] See *Auburn et al., Alabama*, 18 FCC Rcd 10333 (2003); *Lincoln, Osage Beach, Steelville and Warsaw, Missouri*, 17 FCC Rcd 6119 (2003).

¹The text of footnote 7 states:

Note that, pursuant to long-standing Commission procedure, any application filed prior to the grant of licenses to cover the modifications granted to KSTP, WLQV and WTOP must provide protection to the currently licensed facilities of each station as well as to the modified facilities authorized herein. Any application filed prior to the grant of such license which fails to provide the required protection to any or all of these stations, (or to any other station), will be returned as unacceptable for filing. See Memorandum Opinion and Order, In Re Application of Southern Oregon University for a New AM Radio Station, Mountain Gate, California, File No. BP-971212AB, FCC 99-31, adopted October 25, 1999; released October 28, 1999

9. Therefore, on the critical day of December 30, 2002, the Fort Bend "counterproposal" was contingent upon, and not in conflict with, the granting of the Hart/Coopersville/Pentwater rulemaking proposal. The Commission held in **FM Table of Allotments, Milton, West Virginia and Flemingsburg, Kentucky**, 11 FCC Rcd 6374 (1996), that, to have a valid "counterproposal", the channel proposed must be "in conflict", not "contingent upon". See also **FM Table of Allotments, Indian Springs, Nevada et al**, 14 FCC Rcd 10568 (1999); **FM Table of Allotments, Angel Fire, New Mexico et al**, 15 FCC Rcd 11657, n. 4 (2000); **Television Table of Allotments, Wilmington, North Carolina**, 6 FCC Rcd 6969, 6971 (1991).

10. As the linchpin for the whole Fort Bend proposal, the allocation of Channel 287A at Glen Arbor in place of Channel 227A, cannot possibly be made under any circumstances until the licensee of WCXT(FM), Hart, Michigan constructs the facility proposed in File No. BPH-20040503AFG and is granted a covering license for that facility.²

11. Therefore, the ruling made by the staff in paragraph 6 of DA 04-235 was eminently correct, and the

²WCXT(FM)'s protection rights extend to both its existing and future facilities; they cannot be severed. See **Southern Keswick, Inc.**, 34 FCC 2d 624 (1972).

dismissal of "Petition for Partial Reconsideration" must be affirmed.

**Fort Bend's Counterproposal Was
Procedurally Defective on Other Grounds**

12. As the Media Bureau staff correctly determined that Fort Bend's December 30, 2002 pleading was not a proper counterproposal, two other procedural issues timely raised by WATZ were not considered in the **Report and Order**.

13. **Administrative Procedure Act; Proper Notice.** It is truly ironic that Fort Bend would claim that the FCC is violating Fort Bend's rights to administrative due process by applying **Refugio, Texas, supra**, when Fort Bend attempted to subvert the FCC's processes in the first place to deny parties such as WATZ fair notice and the right to submit a counterproposal against Fort Bend's proposal to move Channel 257 to Garfield Township, Grand Traverse County, Michigan, a suburb of Traverse City—a move which has absolutely nothing to do with WCXT(FM)'s move from Hart to Coopersville, Michigan, over 100 miles south of Traverse City, on an unrelated frequency.

14. The appellate court has stated that in rulemaking proceedings governed by the Administrative Procedure Act, 5 U.S.C. §551 et seq., the Commission must "fairly apprise interested persons of the subjects and issues [of the rule making]", and the ultimate rules adopted must be a "logical

outgrowth" of the proposals contained in the duly given notice. **Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C.Cir.1983)**. The focus of the "logical outgrowth" test, is whether a party "should have anticipated that such a requirement might be imposed." **Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (1991)**. The District of Columbia Circuit has written that "[m]ore to the point, however, this court has made it clear that an agency may not turn the provision of notice into a bureaucratic game of hide and seek". **MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1142 (D. C. Cir. 1995)**. Indeed, the Commission has recognized that channel substitutions impose a burden on licensees and cause inconvenience for listeners and thus permits such substitutions only upon a finding that these disruptions are justified by public interest benefits. **FM Table of Allotments, Blair, Nebraska, 8 FCC Rcd 4086, n. 8 (1993)**.

15. As demonstrated above, the channel in which Fort Bend has an interest, Channel 257 at either Frankfort or Garfield Township, is in no way "in conflict" with either Channel 287 at Hart or Coopersville or Channel 231 at Pentwater or Hart. A proposal to allot Channel 287A at Glen Arbor is not a "logical outgrowth" of the Coopersville/Hart/Pentwater proceeding, because WCXT(FM) totally precludes the use of Channel 287A at Glen Arbor.

Furthermore, as it was not the applicant for Channel 227A at Glen Arbor, Fort Bend has no standing to seek channel changes for an applicant such as George S. Flinn, Jr., the erstwhile "singleton" applicant for Channel 227A at Glen Arbor (File No. BPH-19970724M4, dismissed May 2, 2002, appeal pending).

16. Thus, Fort Bend attempted to subvert the right of WATZ and similarly situated parties to notice and a right to fully comment, including the submission of counterproposals. Fort Bend's "Petition for Partial Reconsideration" must be rejected upon the equitable doctrine of unclean hands; Fort Bend has unclean hands to claim that its rights to administrative due process have been violated, when it clearly sought to deny administrative due process to others.

17. **No Valid Expression of Interest by Flinn.** With respect to Glen Arbor, even assuming that the Fort Bend submission could be put out for public comment as a valid "counterproposal", Fort Bend's submission was not even complete as of December 30, 2002, because George S. Flinn, Jr., the "singleton applicant" on Channel 227A at Glen Arbor, Michigan, did not personally sign his "Declaration" consenting to the channel switch at Glen Arbor to Channel 287A (see Exhibit A hereto). Rather, Mr. Flinn's name was signed "by JTN", presumably J. Thomas Nolan, an associate attorney in the Shook, Hardy and Bacon law firm that has

appeared in this proceeding on behalf of Fort Bend. The failure of Mr. Flinn to personally sign this "Declaration" is fatal to its validity. In **FM Table of Allotments, Carmel, California et al**, 7 FCC Rcd 3056, ¶11 (1992), the Commission stated:

A basic requirement of a rule making proceeding for an FM allotment is a statement of interest in the channel to be allotted. The proponent of an allotment proposal, to be bona fide, must state an interest in the channel, a present intention to apply for the channel if an allotment is granted, as well as an intention to promptly construct a station. This statement may only be made by the party who holds that intent, and may not be made on behalf of a party who has not come before the Commission to state its own intent. [emphasis supplied]

18. A "Declaration" is defective where it fails to contain a signature by the person whose statement it purports to be, and the date upon which it was signed. **Webster-Fuller Communications Association**, 4 FCC Rcd 1438, ¶2 (Rev. Bd. 1989). In **Clyde W. Pierce**, 2 FCC Rcd 3522 (1987), the Commission rejected a signature of an attorney (in lieu of a client's signature), the existence of a power of attorney notwithstanding, where there was no explanation as to the absence of the applicant/client. In the instant case, Flinn is not even a client of "JTN" (on information and belief, his attorney is Stephen C. Simpson, Esq.).

19. The significance of the lack of a proper signature on the "Flinn Declaration" is crucial in this case, because

as noted above it is black letter law that counterproposals must be "technically correct and substantially complete" by the deadline for their filing. **Caro and Cass City, Michigan**, supra. Because the Flinn Declaration is fatally defective, the Fort Bend "counterproposal" could have been rejected on that ground alone.

Conclusion

20. Fort Bend never filed a proper "Counterproposal" in the above-captioned proceeding. The ruling in DA 04-235 was eminently correct and fair, and must be affirmed.

WHEREFORE, WATZ Radio, Inc. urges that the "Petition for Partial Reconsideration" by Fort Bend Broadcasting Company **BE DENIED**.

Respectfully submitted,

WATZ RADIO, INC.

By


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May 11, 2004

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Opposition to Petition for Partial Reconsideration" was served by first-class United States mail, postage prepaid, on this 11th day of May, 2004 upon each of the following:

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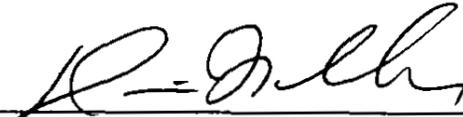
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