

ORIGINAL

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

MAY 24 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Hart, Pentwater, and)
Coopersville, Michigan))

MB Docket No. 02-335
RM-10545

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

CONSOLIDATED REPLY TO OPPOSITIONS

Fort Bend Broadcasting Company ("Fort Bend"), licensee of Station WBNZ(FM), Frankfort, Michigan, by its counsel, and pursuant to Section 1.429(g) of the Commission's Rules, hereby replies to the oppositions to Fort Bend's Petition for Partial Reconsideration in the above-captioned proceeding. Two parties filed oppositions: Northern Radio of Michigan, Inc. ("Northern") and WATZ Radio, Inc. ("WATZ"). Neither opposition has merit.

I. Neither Opposition Disagrees with Fort Bend's Conclusion that *Pacific Broadcasting* Does Not Apply to This Case.

1. Neither opposition addresses the central premise on which reconsideration is warranted in this proceeding. The Commission dismissed Fort Bend's counterproposal because it concluded that its recent *Pacific Broadcasting* decision¹ applied to bar Fort Bend's use of a new allotment at Frankfort, Michigan to avoid the loss of that community's only local service. As Fort Bend pointed out in its Petition for Partial Reconsideration, the *Pacific Broadcasting*

application here would also give that decision impermissible retroactive effect. No party to this proceeding disagrees with Fort Bend's analysis and conclusions in this regard. The Commission should reconsider its dismissal of Fort Bend's counterproposal in this regard. As set forth in Fort Bend's Petition for Partial Reconsideration, the Commission should hold that Fort Bend's proposed allotment of Channel 227A at Frankfort to avoid depriving Frankfort of its only local service was a valid application of existing law.

II. Fort Bend's Counterproposal Was In Conflict with the Proposals Set Forth in This Proceeding.

2. WATZ argues, as it has before, that Fort Bend's counterproposal was not in conflict with the Hart-Coopersville-Pentwater rule making proposal. This argument, made with no engineering support, simply ignores the facts. In the channel study for Channel 287A at Glen Arbor, Michigan furnished with Fort Bend's Counterproposal, the conflict is clearly demonstrated between that proposed allotment and Channel 287B at Coopersville. The proposed allotment of Channel 287A at Glen Arbor is, in turn, necessary in order to allot Channel 227A to Frankfort. The allotment of Channel 227A at Frankfort is, in turn, necessary to relocate Channel 257 from Frankfort to Garfield Township. This causative chain was set forth in Fort Bend's counterproposal.

3. Because Fort Bend's counterproposal clearly conflicted with the changes proposed in this proceeding, the Commission's (and WATZ's) reasoning to the contrary is clearly erroneous. The cases cited by the Commission as precedent, *Ironton, Malden and Salem, Missouri*, 13 FCC Rcd 6584 (1998) and *Indian Springs, Nevada et al.*, 14 FCC Rcd 10568

counterproposal. Indeed, grant of the counterproposal under these circumstances is consistent with precedent. *See McCook, Nebraska et al.*, 16 FCC Rcd 8910 (2001).

III. Fort Bend's Counterproposal Meets the "Logical Outgrowth" Test.

4. WATZ complains that Fort Bend's counterproposal violates the "logical outgrowth" test required of rules adopted by an agency under the APA. *See* WATZ opposition at 6-8. This is a spurious argument, flying in the face of decades of case law at the Commission. The Appendix to the notice of propose rule making in this case contained standard provisions notifying the public that timely filed counterproposals would receive cut-off protection, and that different channels could be allotted to any community involved. Specifically, it stated "the filing of a counterproposal may lead the Commission to allot a different channel than was requested at any of the communities involved." [Cite] The Commission has repeatedly and definitively held that these notice provisions comply with its obligations under the Administrative Procedure Act. *See, e.g., Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). It has been upheld in this regard by the courts of appeals. *See, e.g., Owensboro on the Air v. U.S.*, 262 F.2d 702 (D.C. Cir. 1958). The acceptance of Fort Bend's timely filed counterproposal is no different in this respect from hundreds of other counterproposals the Commission has processed and granted.

IV. Fort Bend's Counterproposal Contained All Necessary Consents.

5. WATZ also alleges, as it has before, that the consent of George S. Flinn ("Flinn") to the substitution of Channel 287A for 227A at Glen Arbor was defective. It was not. Through his attorney, Flinn had communicated his consent to Fort Bend's attorneys. Because neither Flinn nor his attorney were available to sign a statement to that effect, Flinn's attorney directed

6. Flinn personally executed a copy of the consent statement shortly after the filing of the counterproposal. In order to avoid any question regarding the effectiveness of Flinn's consent, and out of an abundance of caution, a copy of that executed consent statement is attached hereto.

V. A Proposal to Allot Channel 297C3 at Cass City, Michigan was Defective When Filed and Does Not Require Protection, Even Though a Decision In That Proceeding is Not Yet Final.

7. Northern alleges that Fort Bend's counterproposal was defective by virtue of a short spacing to a "counterproposal" filed by Edward Czelada ("Czelada") involving a proposed allotment of Channel 297A at Cass City, Michigan. However, it was the Czelada proposal that was defective, not Fort Bend's. On May 11, 2001, the Commission released an "Erratum" to its Report and Order in MM Docket 01-33, stating that the Czelada counterproposal was defective when filed. *Caro and Cass City, Michigan*, 16 FCC Rcd 9461 (2001), *Erratum* (rel. May 11, 2001). It went on to enumerate those defects: (i) an attempt to allot a channel in the FM reserved band, (ii) failure to include an engineering study; (iii) failure to meet the minimum distance requirements of Section 73.207(b), and (iv) failure to meet the principal community coverage requirements of Section 73.315(a). *Id.* The proposals in the Czelada counterproposal were never properly entered into the Commission's data base. An erroneous entry for Channel 297C3 at Ubyly, Michigan appeared in the data base, but since this entry was obviously erroneous it did not need to be protected. Neither did the defective counterproposal itself.

8. As Northern points out, a petition for reconsideration of the Commission's action in MM Docket 01-33 is pending. However, the pendency of that petition for reconsideration

the pendency of a petition for reconsideration does not stay the effectiveness of an amendment to the Table of Allotments. Id. Therefore, the Commission can process and grant Fort Bend's counterproposal notwithstanding the pending reconsideration of the dismissal of Czelada's defective counterproposal.

VI. Conclusion.

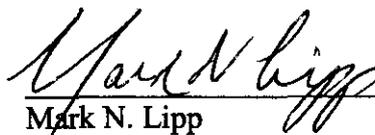
Fort Bend has demonstrated that its counterproposal is technically correct and grantable. The Commission should grant it, because its grant would further the public interest. It would provide a first local service to Garfield Township, a community of substantial size (2000 pop. 13,480) that currently lacks local service. It would provide a net gain in area served of 9,072 sq. km., and in population served of 155,851. These benefits can be most expeditiously realized through grant of the counterproposal in this proceeding.

WHEREFORE, for the foregoing reasons, the Commission should reconsider that portion of its Report and Order in this proceeding dismissing Fort Bend's counterproposal, and grant the counterproposal.

Respectfully submitted,

FORT BEND BROADCASTING COMPANY

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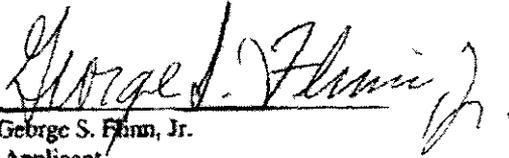
APPLICATION FOR NEW FM STATION
GLEN ARBOR, Michigan

BPH19970724M4
GEORGE S. FLINN, JR.

George S. Flinn, Jr. ("Flinn"), applicant for a new FM station on Ch. 227A, Glen Arbor, Michigan, hereby agrees to have its pending application modified to specify Channel 287A instead of Channel 227A at a new transmitter site in connection with the counterproposal of Fort Bend Broadcasting Company to reallocate Channel 227A to Frankfort and Channel 287A to Glen Arbor. Flinn requests that the Commission permit the modification of Flinn's pending cut off application to specify Channel 287A. Flinn will file an amendment to its pending application should the Commission grant the proposal to substitute Channel 287A for Channel 227A at Glen Arbor in MB Docket 02-335. Flinn understands that this statement may be used in a filing with the Commission and hereby authorizes its use for that purpose.

I verify that this statement is true, complete and correct to the best of my knowledge and belief and is made in good faith.

By:


George S. Flinn, Jr.
Applicant

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 24th day of May, 2004, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Consolidated Reply to Oppositions" to the following:

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* HAND DELIVERED


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