

DOCKET FILE COPY ORIGINAL

RECEIVED & INSPECTED

JUN 23 2004

FCC - MAILROOM

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	MB Docket No. 02-248
)	
Amendment of Section 73.202(b))	RM-10537
Table of Allotments)	
FM Broadcast Stations)	
Smiley, Texas)	

To: Assistant Chief,
Audio Division
Media Bureau

REQUEST FOR WAIVER

On October 21, 2002, New Ulm Broadcasting Company ("New Ulm"), filed its Comments and Counterproposal in this proceeding. As part of its proposal to bring a new first reception service to the town of Schulenburg, Texas, New Ulm proposed to utilize a channel already occupied and assigned to New Ulm in the community of New Ulm, Texas, also proposing an equivalent replacement for the channel taken from New Ulm and including its commitment to apply for, build and operate that replacement channel. At the time of the filing, this "backfill proposal" was totally consistent with all applicable FCC Rules and Policies.

On February 11, 2003, the Commission issued a Memorandum, Opinion and Order in Pacific Broadcasting of Missouri, 18 FCC Rcd 2291 (2003), and in the course of denying an STA requested by Pacific in that proceeding, went on to also indicate its unhappiness with the existing backfill policy and directed the

No. of Copies rec'd
List ABCDE

044

staff to "immediately cease this practice". Seven days thereafter, by pleading dated February 18, 2003, Linda Crawford ("Crawford"), another party in this case at that time 1/ moved for immediate dismissal of the New Ulm petition, based upon the backfill discussion in the Pacific case.

New Ulm opposed Crawford's request, indicating that the application of the new more restrictive backfill policy to existing cases was not clear and that clarification of the new policy and its application would be sought in the Pacific case. 2/ New Ulm also indicated there that if the Commission did in fact suggest that its new policy would be applied directly to everyone, new case or longtime pending cases, with no distinction (as suggested by Crawford) that in cases such as New Ulm's, waiver requests of application of that new policy would be filed.

Subsequently on June 11, 2003, the Commission issued a Notice of Proposed Rulemaking in this proceeding which did omit any reference to consideration of the New Ulm petition. New Ulm noted that action in a Motion for Expedited Action and Stay of Further Staff Action filed in Pacific on June 25, 2003, and also filed Reply Comments in this proceeding in response to the NPR on

1/ It is noted here that Crawford subsequently moved to dismiss her interest in a pleading filed with the Commission dated April 6, 2004, only to show up again almost two months later with an announced "Reinstatement of Interest", conspicuously absent any explanation or showing of "good cause", the receipt or consideration of which was opposed by both New Ulm and LBR Enterprises, Inc.

2/ New Ulm proceeded to file its Petition for Reconsideration and Clarification of the new backfill policy in the Pacific case on March 13, 2003

June 26, 2003. In those Reply Comments, New Ulm pointed out that its proposal would bring a new first Reception service to the town of Schulenburg which has a population of almost 3,000 persons. There is no doubt that to do this, it is essential to use the channel presently allocated and occupied by the station in New Ulm, and that in taking that station, it would temporarily deprive New Ulm of its only transmission service. At the same time however, it has to be recognized that New Ulm already receives at least three other existing reception services ^{3/} while the town of Schulenburg receives NO reception service from anyone and the station proposed by New Ulm would provide that community with its first Reception service as well as its first transmission service. This proposal by New Ulm represents Schulenburg's only practical chance to ever receive radio reception service of any kind.

So the analysis is whether it would be better to deprive Schulenburg of any radio service of any kind than to inconvenience New Ulm by a temporary loss of its transmission service, during any which time New Ulm would continue to be fully served by at least three other existing radio reception services.

Without addressing any other aspect of whether the new backfill policy would be more generally protective of the public interest than the old policy, we would have to suggest that in THIS case, application of the new policy does substantial

^{3/} KTTX-FM, and KULF-FM in Brenham, Texas, and KULM-FM in Columbus, Texas, See Engineering Statement Attachment to New Ulm Reply Comments (6-26-03)

violence and damage to the absolute bedrock mandate of the Commission, i.e. to do all that can be done to assure that every community gets SOME radio service.

The Communications Act was adopted early in the 20th century in 1934, and it is just beyond understanding that now, in the 21st century, there is still such a sizable community of people who still have NO radio service at all. Without disputing the Commission's basic conclusion that stability of an existing transmission service is of a very high priority, could that ever possibly be a higher priority than providing a first reception service to a town of 3,000 that currently has none? Going a step further and recognizing that the town which would temporarily lose its transmission service is already served by at least three reception services (and would continue to be so while its own transmission service was being replaced) while the other town has no service at all and no prospects for any service of any kind other than what is proposed here, what policy could possibly intend such an unfair and illogical result?

In more basic terms, in the event of an emergency, even if this proposal is adopted, the residents of New Ulm could still rely upon reception of emergency broadcast information from at least three radio existing radio services. On the other hand, if this proposal is NOT adopted, then the 3,000 citizens of Shulenburg and its contiguous suburbs would remain "on their own", just as they are now, and just as they have always been, with no radio service at all. This is simply not fair and could

not have been reasonably intended either by the Congress which wrote the Communications Act, nor, for that matter, by this Commission in adopting its new backfill rule, and if that is the case, then the policy should be waived here in such circumstances.

To be sure, the Commission itself in adopting an interpretation of its new policy which could only be seen as very strict and also very broad in application, at the same time recognized that even in those stringent circumstances, the staff must give a hard look at the unique circumstances before them in an individual case, to consider whether the new policy does or does not not serve the intended purpose in that case, does or does not serve the public interest in that case, and, if not, whether it should be waived. That is not just the "right" thing to do or just the "logical" thing to do. As recognized by the Commission, that is the reasonable expectation of the Federal Courts. See Storer Broadcasting v. FCC, 351 U.S. 192 (1956) Wait Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir, aff'd 459 F.2d 1203 (1972) cert denied, 409 U.S. 1027 (1972). See also the further supporting citations cited by the Commission at footnote 59 of Pacific.

And having said that, the Commission itself recognized that as high a priority as it was giving to maintaining an existing local transmission service, that "...the Commission has determined that there may be 'rare circumstances where removal of

a sole local service might serve the public interest". Well, if not here, then where?

We also note that in making that quoted statement, the Commission cited Community of License MO&O, 5 FCC Rcd at 7096, and what the Commission said there may be dispositive of this issue. When they spoke of their concern as to the removal of an existing sole transmission service perhaps being construed as elevating that concern from a third priority to a de facto first priority above the long stated and undisputed stated first priority of first RECEPTION service, the Commission observed that

...there are virtually no populated areas of the country where our higher allotment priorities such as first reception service have not been attained... [and]...Under these circumstances, we believe a prohibition against the removal of local [transmission] service is warranted.

Clearly, "those circumstances" do not exist here.

But the Commission went even further there, saying that while a prohibition against removal of a local transmission service was generally justified,

...we wish to clarify that, in the rare circumstances where removal of a local service might serve the public interest by, for example, providing a first reception service to a significantly sized population, we will entertain requests to waive the prohibition. (emphasis supplied)

What more can we say? In the Reply Comments filed in this docket on June 26, 2003, New Ulm discussed at length the special circumstances that clearly demonstrated the public interest in temporarily removing the existing channel in New Ulm to provide a

first reception service to the town of Schulenburg. It pointed out the existing multiple reception services serving New Ulm and the utter absence of any such service to Schulenburg. And it requested that

"...in the event that the commission rules that the policy would apply retroactively to New Ulm, that the Audio Division consider waiver of that policy as it might apply to New Ulm, and based upon the unique benefits that would result from adoption of the New Ulm counterproposal, to waive that new policy and adopt the New Ulm Proposal.

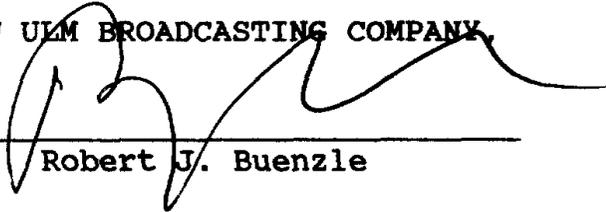
Since that time the Commission has now ruled that the new policy would be generally applied to everyone at every phase of an open proceeding and, as such, New Ulm repeats its request here that the new backfill policy be waived and that the New Ulm proposal to bring a first reception service to Schulenburg be adopted. New Ulm and New Ulm alone has prosecuted its proposal in this docket with unrelenting vigor, has never wavered one iota in its full, complete, and continuous commitment to its proposal, and in its unqualified commitment to fulfill every part of that proposal. We submit that adoption of the New Ulm proposal is clearly in the public interest in bringing a first reception service to Schulenburg, as well as an overall increase in local service once the temporary loss of a local transmission service in New Ulm is restored.

Wherefore, New Ulm respectfully requests that the new backfill policy be waived in this case as it relates to New Ulm's proposal and that the New Ulm proposal be adopted.

Respectfully submitted,

NEW ULM BROADCASTING COMPANY,

by



Robert J. Buenzle

Its Counsel

Law Offices
Robert J. Buenzle
11710 Plaza America Drive
Suite 2000
Reston, Virginia 20190
(703) 430-6751

June 23, 2004

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Request for Waiver have been served by United States mail, postage prepaid this 23rd day of June, 2004, upon the following:

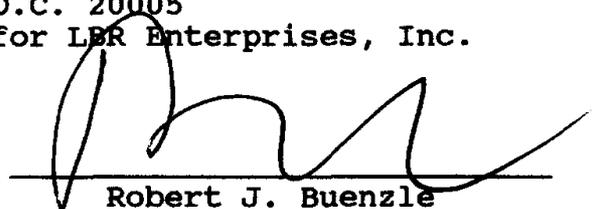
*John A. Karousos, Esq.
Assistant Chief, Audio Division
Office of Broadcast License Policy
Media Bureau
Federal Communications Commission
Portals II, Room 3-A266
445 12th Street SW
Washington, D.C. 20554

*R. Barthen Gorman, Esq.
Media Bureau, Audio Division
Federal Communications Commission
Portals II, Room 3-A224
445 12th Street SW
Washington, D.C. 20554

Linda Crawford
3500 Maple Avenue, #1320
Dallas, Texas 75219
Smiley Petitioner

Gene A. Bechtel, Esq.
Attorney At Law
1050 17th Street N.W.
Suite 600
Washington, D.C. 20036
Counsel for Elgin FM Limited
Partnership and Charles Crawford

Gregg P. Skall, Esq.
Patricia M. Chuh, Esq.
Womble Carlyle Sandridge & Rice, PLLC
1401 Eye Street, 7th Floor
Washington, D.C. 20005
Counsel for LER Enterprises, Inc.


Robert J. Buenzle

* Also Sent By Fax