

ORIGINAL

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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In the Matter of )  
 )  
 Amendment of Section 73.202(b) )  
 Table of Allotments )  
 FM Broadcast Stations )  
 (Lincoln and Sherman, IL) )

FEB 16 2005

MM Docket No. 01-120  
RM-10126

Federal Communications Commission  
Office of Secretary

To: Office of the Secretary  
Attn: The Commission

## REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Long Nine, Inc. ("Long Nine"), by its attorneys and pursuant to Section 1.115 of the Commission's Rules, hereby replies to the Opposition to Application for Review ("Opposition") filed by Saga Communications of Illinois, LLC ("Saga") in connection with the above-referenced proceeding to reallocate WMHX(FM) from the independent community of Lincoln, to Sherman, Illinois, located within the Springfield Urbanized Area.<sup>1</sup> As shown below, Saga's Opposition fails to refute the primary substantive factual and legal arguments made by Long Nine in its Application for Review. This is not surprising in light of the clear weight of evidence supporting the conclusion that the Media Bureau's decision in this case is flawed because it has allowed Saga to exploit the FCC's allotment criteria and 307(b) policies for Saga's own economic benefit, to the detriment of the public interest and the residents of the community of Lincoln.

In its Opposition, Saga faults Long Nine for arguing that the Allocations Branch ignored substantial evidence demonstrating that the change in the city of license of WMHX to Sherman

<sup>1</sup> Saga's Opposition was filed on February 3, 2005. Accordingly, the instant reply is timely filed pursuant to Section 1.115 of the Commission's Rules.

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was nothing more than an attempt to add yet another station to the Springfield metropolitan area. But Saga's Opposition does not offer any compelling refutation of the arguments made by Long Nine in its Application for Review. It does not disagree with Long Nine's contention that the Commission must look at the real intent of Saga's proposal, which in this case, is to serve the Springfield Urbanized Area. It is unable to contest Long Nine's argument that given that the Springfield Urbanized Area is more than fifty times larger than Sherman, that it would be nonsensical to expect that Saga really plans to serve this smaller community.<sup>2</sup> In fact, nowhere in its Opposition, or anywhere else in this proceeding, does Saga make any compelling assertion that its real purpose in making this request is to serve Sherman.

Instead of addressing these arguments, Saga's Opposition begins by attacking Long Nine with convoluted procedural claims. According to Saga, the Commission should refuse to consider Long Nine's "Supplemental Comments" because the comments were not filed by October 27, 2004, or 10 days after Saga filed its Comments as requested by the Commission.<sup>3</sup>

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<sup>2</sup> The single case cited by Saga allegedly demonstrating that its proposal is consistent with previous allotment decisions, *Macon, Hampton, and Roswell, Georgia*, 13 FCC Rcd 18807 (1998), is easily distinguishable from the instant case on several grounds. The most obvious of these is the fact that the community of license at issue in that proceeding, Hampton, was located *outside* the Atlanta Urbanized Area according to the U.S. Census, which was a key factor in the case. As noted, Sherman is *inside* the Springfield Urbanized Area. Moreover, the Hampton station did not place a city grade signal over 50% or more of the Atlanta Urbanized Area. Here, the record shows that it would be possible for WMHX to provide city grade coverage to 95.1% of the Springfield Urbanized Area. As a result, the case does nothing to support Saga's proposal. In contrast, the Commission's recent decision in *Romar Communications, Inc.*, 19 FCC Rcd 23128 (rel. Nov. 23, 2004) ("*Romar*"), is applicable here. In *Romar*, the Commission denied 307(b) preferences stating that the communities at issue were, like here, located within an Urbanized Area, provided principal community service to the Urbanized Area, and were thus interdependent with the Urbanized Area. As was the case with the Applicants in *Romar*, the insignificant attributes cited by Saga in the instant proceeding are insufficient to establish that Sherman is a community independent of the Springfield Urbanized Area. As the Commission put it, it will not "blindly award a first local service preference to proposed communities located in well-served urbanized areas, or where granting the preference would lead to an anomalous result." *Id.* at ¶ 6 (citation omitted).

<sup>3</sup> Opposition at 4.

Yet as Saga itself points out, the Media Bureau inexplicably failed to solicit reply comments from the public. As a result, Long Nine's Supplemental Comments could hardly be considered "untimely" as no reply deadlines were ever established by the Commission. The Media Bureau simply took Saga at its word, and hastily adopted its Report and Order without the benefit of a balanced record. Consequently, the Media Bureau reached the flawed conclusion that Sherman is sufficiently independent from the Springfield Urbanized Area without affording interested parties an opportunity to comment on Saga's inadequate *Tuck* showing. At any rate, Long Nine is now requesting that the Commission specifically consider its Application for Review and not its Supplemental Comments, rendering Saga's flawed claims moot.<sup>4</sup>

Saga's Opposition also undertakes a belated and unpersuasive effort to add makeweight to its previously submitted *Tuck* analysis in the form of a series of repetitive and conclusory declarations by residents of Sherman.<sup>5</sup> While these residents may believe they have the best interests of Sherman in mind, this fact does nothing to undermine the inevitable conclusion that Saga's efforts will not result in a preferential arrangement of allotments, but rather, will deprive Lincoln's residents of their sole remaining full-time commercial station in order to move WMHX to Sherman, within the already well-served Springfield Urbanized Area. Thus, Saga's last ditch attempt to cure its deficient *Tuck* showing must be rejected because it fails to meet the burden of proof necessary to demonstrate that Sherman is independent of the Springfield Urbanized Area. In sum, nothing in this proceeding, including the declarations provided by

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<sup>4</sup> Saga's procedural claim with respect to Long Nine alleged "failure" to "plainly state the questions presented for review" is similarly misplaced. Long Nine's Application for Review is replete with clear references regarding how the Media Bureau erred in its decision in this case and why the decision warrants review under Section 1.115. Thus, Saga's claim that it is not apparent what it is that Long Nine is appealing is disingenuous at best and should be rejected by the Commission.

<sup>5</sup> Opposition at 10.

Saga, can change the simple conclusions that Sherman is part of the Springfield Urbanized Area,<sup>6</sup> that the residents of Sherman are dependent on Springfield for nearly all of their basic needs,<sup>7</sup> that Saga's true motive in this proceeding is to serve the significantly larger Springfield Urbanized Area, and that the Media Bureau erred in allowing such an "urban move-in" in contravention of longstanding Commission precedent.<sup>8</sup>

In fact, Saga's own conduct since the city of license change was granted belies its profession of loyalty to Sherman and its desire to serve that community. Evidence of its true intentions can be found on Saga's website for WMHX and heard as part of the station's on-air identifications. As show in Exhibit 1, attached hereto, while Long Nine has been unable to locate a single reference to the community of "Sherman" on the WMHX website, nearly every link available on the website conspicuously and proudly maintains that WMHX is home to "Springfield's Continuous Soft Favorites."<sup>9</sup> Similarly, as shown in the attached Declaration of Glen Gardner at Exhibit 2, the station repeatedly refers to itself on-air as home to "Springfield's

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<sup>6</sup> See 2000 U.S. Census.

<sup>7</sup> For example, Saga grudgingly admits in its Opposition that Sherman does not have even a single grocery store. Saga fails to admit, however, that Sherman does not have its own sewer and water services which are handled by the Springfield Metropolitan Water Service. The fact that the residents of Sherman rely on Springfield for even the most basic of necessities further undercuts any notion that the community is at all independent. Accordingly, the Media Bureau's reliance on *Jupiter and Hobe Sound, Florida*, 12 FCC Rcd 3570 (1997) is misplaced as only three of the eight *Tuck* factors could conceivably demonstrate that Sherman is independent from the Springfield Urbanized Area.

<sup>8</sup> See, e.g., *Romar* (denying Section 307(b) preferences based on the interdependence between smaller communities and the Urbanized Area); *Greenfield and Del Ray Oaks, California*, 11 FCC Rcd 12681 ¶ 10 (1996) (holding that a proposal for first primary service to a community is not preferential where residences of that community are already adequately served); *Modification of FM and TV Authorizations*, 5 FCC Rcd 7094, 7096 (1990) ("We have consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission's Section 307(b) related policies").

<sup>9</sup> The WHMX(FM) website can be found at <http://www.mix939radio.com> (visited February 11, 2005).

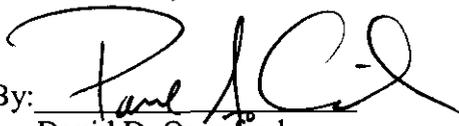
*continuous soft favorites*” and as “*Springfield’s Mix-93.9.*” In light of these recent developments, Saga can no longer maintain the farce that its proposal is not intended to serve Springfield, to the detriment of the residents of Lincoln and the public interest.

### **Conclusion**

In this case, the Report and Order allows a channel to be moved from a small community into an Urbanized Area in a manner contrary to the FCC’s allotment criteria and 307(b) policies. The relocation of WMHX is therefore contrary to the public interest and thus the Commission cannot allow this decision to stand. As nothing in Saga’s Opposition refutes these facts, and its post-grant conduct supports the claims made by Long Nine, the Commission must grant the Application for Review and reverse the decision made in Report and Order. Long Nine respectfully requests that this action be taken.

Respectfully submitted,

**LONG NINE, INC.**

By:   
David D. Oxenford  
Paul A. Cicelski

Its Attorneys

SHAW PITTMAN LLP  
2300 N Street, NW  
Washington, D.C. 20037

Dated: February 16, 2005

**EXHIBIT 1**



[COMMUNITY CALENDAR](#)

[PROGRAM SCHEDULE](#)

[ON-AIR](#)

[KEVIN LAMBERT IN THE MORNING](#)

[SCHOOL CLOSINGS](#)

[MIX E-MAIL CLUB](#)

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## Station Info

PAGE

Thanks for visiting us!

We are Springfield's Home for Continuous Soft Favorites. Mix 93.9 specializes in playing music from artists like Elton John, Billy Joel, Celine Dion, The Eagles, and Faith Hill. Give us a listen, and you'll find out why we are Springfield's choice for listening at work!

Market: Springfield, Illinois

Owner: Capitol Radio Group, a subsidiary of Saga Communications

Studio Line: (217) 527-1939

Business Line: (217) 753-5400

Business Fax: (217) 753-7902

Address: 3501 E. Sangamon Ave., Springfield, IL 62707

Office Hours: Monday through Friday 8:30am - 5:00pm

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An advertisement for mortgage rates. It features a small image of a house on the left. The text reads: "MORTGAGE RATES ARE INCREASING" in large, bold letters, followed by "Lock In NOW - Regardless of Your Credit" in a smaller font.

[Site Index](#) 

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**EXHIBIT 2**

### Declaration of Glen Gardner

I, Glen Gardner, am General Manager of radio stations WMAY(AM) and WNNS(FM), Springfield, Illinois, WQLZ(FM), Taylorville, Illinois, and WYVR(FM), Petersburg, Illinois, licensed to Long Nine, Inc. I have read the foregoing Reply to Opposition to Application for Review, and except for (a) matters cited therein contained in the FCC's records, (b) matters for which other support is provided, and (c) matters of which the Commission may take official notice, the facts set forth therein are true and correct to the best of my personal knowledge and belief.

In addition, I expressly confirm the following to the best of my knowledge:

- I recently listened to the programming aired on Saga radio station WMHK(FM) on February 14, 2005, between the hours of approximately 3 and 4 pm, and on February 15, 2005, between the hours of approximately 8 and 10 pm. During that time I repeatedly heard the station refer to itself as home to "Springfield's Continuous Soft Favorites" and "Springfield's Mix-93.9." The only time I heard any mention of Sherman was during the required hourly station identifications when the station identified itself as a "Sherman-Springfield" station.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of February, 2005.

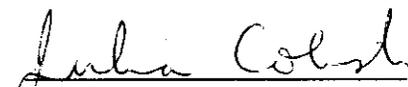
A handwritten signature in black ink, appearing to read 'Glen Gardner', written over a horizontal line.

Glen Gardner

## CERTIFICATE OF SERVICE

I, Julia Colish, a secretary with the law firm of Shaw Pittman LLP, hereby certify that copies of the foregoing "REPLY TO OPPOSITION TO APPLICATION FOR REVIEW" was served via U.S. mail on this 16th day of February 2005 to the following:

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Julia Colish

\*Via Hand Delivery