

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

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Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
Amendment of Section 73.622(b) ) **MM Docket No. 00-138**  
Table of Allotments ) RM-9896  
Digital Television Broadcast Stations. )  
(Boca Raton, Florida) )

To: The Commission

**APPLICATION FOR REVIEW**

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1. Pursuant to Section 1.115(a) of the Commission's Rules and Regulations, Sherjan Broadcasting Co., Inc. ("Sherjan") hereby requests review by the full Commission of the *Memorandum Opinion and Order* in the above-captioned proceeding, DA 04-1496, dismissing Sherjan's Petition for Further Reconsideration, as well the underlying first *Reconsideration Order*, 17 FCC Rcd 23528 (MB 2002) and the original *Report and Order*, 17 FCC Rcd 7114 (MB 2002). The *Report and Order* modified the digital allotment for Station WPPB-TV, Boca Raton, Florida, from Channel \*44 to Channel \*40. Sherjan is the licensee of Class A Television Station WJAN-CA, Facility ID 60165, Miami, Florida, which operates on Channel 41. The new DTV allotment for WPPB-TV is a first-adjacent channel to WJAN-CA, and the substantive issue in this proceeding involves whether a station broadcasting on the new allotment would cause prohibited interference to WJAN-CA.<sup>1</sup>

2. The decisions of the Media Bureau ("Bureau") in this proceeding cannot withstand any rational analysis. In effect, they favor the full power DTV allotment over the Class A station,

<sup>1</sup> Sherjan was a full participant in this proceeding below and, because of the potential interference, clearly is aggrieved and has standing to file this Application for Review.

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regardless of anything else. WPPB-TV is able to operate on its original DTV Channel 44 and petitioned to change channels only because of a private contractual agreement with another party. Indeed, WPPB-TV was really not even interested in pursuing the matter but apparently returned to the battle because of pressure relating to its private agreement.<sup>2</sup> Congress has mandated that WJAN-CA is entitled to protection under the Community Broadcasters Protection Act of 1999,<sup>3</sup> and neither the Bureau nor the Commission is free to ignore that mandate.

3. In order to reach a decision giving WPPB-DT an allotment that the station hardly wanted, and rejecting Sherjan's interference claim, the Bureau had to (a) calculate interference based on a cell size of one km., when the use of almost any larger or smaller cell size would show prohibited interference, and (b) use decade-old 1990 population figures when 2000 figures were available and are being used by the Bureau for other DTV interference determinations. These approaches were not rational, because they were not based on determining the truth about whether interference is predicted to occur. In other words, they elevated form over substance and came out with the wrong result.

4. The first decision to change the WPPB-DT allotment was based on an assumption that interference of up to 2% of WJAN-CA's service area was acceptable. Sherjan petitioned for reconsideration, noting that the 2% standard applies only to interference received by full power

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<sup>2</sup> See the Letter Request filed by the School Board of Broward County (WPPB-TV) on February 26, 2001, and their "Reply to Comments in Opposition to Letter Request" filed March 30, 2001, recognizing the interference problem with WJAN-CA and stating: "The School Board has concluded that its public interest obligations are better met by operation on Channel \*44, as presently provided in the DTV table of allotments." This statement was followed by a "Withdrawal of Letter Request" filed on August 16, 2001, which did not state any reason for WPPB-TV's change of heart, strongly suggesting outside pressure.

<sup>3</sup> Codified at 47 USC Sec. 336(f).

stations and not to interference received by Class A stations.<sup>4</sup> In the *Reconsideration Order*, the Bureau concluded that Sherjan was correct. However, the Bureau then said that its earlier error did not matter, because WPPB-TV was entitled to use a more refined analysis than the default 2 km. cell size specified in OET Bulletin 69; and if a 1 km. cell size were used, as proposed by WPPB-TV, the resulting interference to WJAN-CA would be less than 0.5% and so rounded to zero. Thus the allotment change was affirmed.

5. Sherjan then filed its Petition for Further Reconsideration, noting that if the Bureau was going to shift the basis for its decision, Sherjan should be permitted to address the new basis. Sherjan then showed that using a refined cell size analysis, the allotment could be sustained only by using a carefully chosen size or outdated 1990 census data. If more current year 2000 census data were used, then using 14 different cell sizes, both smaller and larger than 1 km. (but not greater than the 2 km. default assumption in OET Bulletin 69), interference to WJAN-CA would be less than 0.5% in only two out of 14 cases -- cell sizes of 1.0 km. and 1.8 km. In other words, if the intent is to be accurate, then the most refined analysis, with any cell size smaller than 1.0 km., shows prohibited interference, and only two cell sizes of 1.0 km. or greater yield results favorable to the allotment change.

6. In the *Memorandum Opinion and Order*, the Bureau essentially concluded that WPPB-TV was free to pick any cell size it chose and to ignore all other cell sizes and could rely on outdated census information. In addition, Sherjan could not raise the cell size issue in a second petition for

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<sup>4</sup> The Bureau found that WJAN-CA would receive interference to 1.03% of its service area.

reconsideration, even though the Bureau did not rely on that factor in the Reconsideration Order.<sup>5</sup> In other words, procedure reigned supreme, and factual accuracy was ignored. The Commission cannot tolerate this approach, nor would a court if the matter were brought there on appeal.

7. The fact is that almost any analysis, including the most accurately refined analysis, predicts prohibited interference to WJAN-CA. Twelve out of 14 cell sizes of 2 km. or less show prohibited interference. Moreover, the Bureau itself used year 2000 census data in publishing its updated Table of Station Assignment and Service Information as part of the *Second DTV Periodic Review*.<sup>6</sup> Under these circumstances, any rational approach based on the most accurate available inputs must conclude that prohibited interference is in fact predicted to occur. The Bureau's conclusion can be reached only by deciding that the full power proposal must prevail at any cost.

8. The Community Broadcasters Protection Act of 1999 protects WJAN-CA against such interference and against the result reached by the Bureau. The Commission may not ignore that statute and may not circumvent it by using outdated census figures and picking and choosing among engineering inputs. The Bureau's conclusion was arbitrary, capricious, and abuse of discretion, and not in accordance with achieving the statutory objective of protecting Class A stations from interference. The courts have told the Commission many times that it must explain its actions with

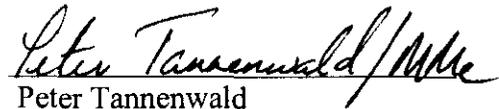
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<sup>5</sup> It is important to note that Sherjan went back to the Bureau a second time to avoid the problem of advancing an argument before the Commission on which the Bureau had not had an opportunity to pass. The Bureau was wrong to fault Sherjan for taking this approach. Otherwise, had Sherjan come directly to the full Commission in the first instance, the Commission would have sent the matter back for the Bureau to pass on, and then the matter would have come back to the full Commission later on. Section 1.115(c) of the Rules is explicit in requiring all issues to be argued first before the Bureau, stating that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."

<sup>6</sup> See Public Notice, *DTV Channel Election Information and First Round Election Filing Deadline*, DA 04-3922, released December 21, 2004.

reasoned explanations that advance statutory objectives. *See, e.g., Qwest Corp. v. FCC*, 258 F.3d 1191 (10 Cir. 2001). Thus the Commission must intervene and must direct the Bureau to rely on the most reliable and current facts. Those facts dictate that the allotment of DTV Channel \*40 at Boca Raton be rescinded and the original DTV Channel \*44 allotment restored.

Respectfully submitted,

A handwritten signature in cursive script that reads "Peter Tannenwald/Att".

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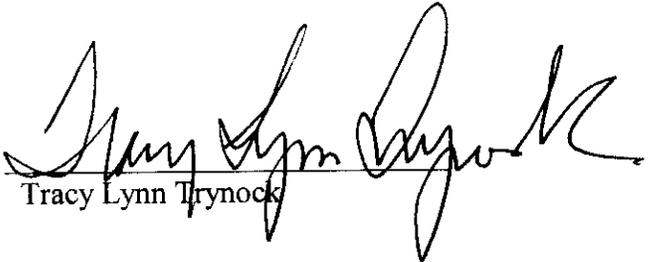
July 1, 2005

**CERTIFICATE OF SERVICE**

I, Tracy Lynn Trynock, do hereby certify that I have, this 1<sup>st</sup> day of July, 2005, caused a copy the foregoing "Application for Review" to be sent by first class United States mail, postage repaid, to the following:

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