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

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JUL - 7 2005

Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-162
Table of Allotments)	RM-11227
FM Broadcast Stations)	
(Enfield, New Hampshire; Hartford and)	
White River Junction, Vermont; and)	
Keeseville and Morrisonville, New York))	

TO: Office of the Secretary

Attn: Assistant Chief, Audio Division, Media Bureau

MOTION TO DISMISS PETITION FOR RULE MAKING

1. Hall Communications, Inc. ("Hall"), by and through its attorneys, hereby submits that: (a) the Petition for Rule Making ("Petition"), filed by Nassau Broadcasting III, L.L.C. ("Nassau") to initiate the above-captioned proceeding, should be summarily dismissed, and (b) this proceeding should be terminated. As set forth below, longstanding and unvarying Commission precedent establishes that Nassau's Petition – which is nothing more than a thinly-veiled effort to resurrect an already-rejected proposal – is irremediably flawed.

Background

2. In 2002, at the suggestion of the then-licensee of Station WWOD(FM), Hartford, Vermont, the Commission considered the possible reallocation of that station's channel (Channel 283C3) to Keeseville, New York. *See Keeseville, New York and Hartford and White River Junction, Vermont*, MM Docket No. 02-23, 19 FCC Rcd 16106 (Audio Div. 2004) ("*Keeseville I*"). Keeseville at that time had no other channels allotted to it.

 [Signature]

3. In response to the Notice of Proposed Rule Making in the *Keeseville I* proceeding, Hall filed a counterproposal urging the allotment of a new, vacant channel (Channel 282A) to Keeseville. The WWOD licensee, apparently determined to wangle its way into Keeseville (and, as a result, the Burlington Urbanized Area), countered with the suggestion that both Channels 282C3 *and* 231A be allotted to Keeseville, with the former being reserved for a reallocated WWOD operation.

4. After fully evaluating the competing proposals, the Commission came down firmly on the side of Hall in *Keeseville I*, declining to move Station WWOD(FM) from Hartford to Keeseville. That move would have necessitated the corresponding reallocation (proposed by the WWOD licensee) of Channel 237A from White River Junction to Hartford, to backfill the loss of Hartford's only local service. In the Commission's view, "adopting the new drop-in channel [*i.e.*, Channel 231A] to Keeseville and at the same time maintaining the balance of the existing services would best serve the public interest." *Keeseville I*, 19 FCC Rcd at 16109, ¶10. The Commission expressed particular concern about maintaining the first competitive and first nighttime service at White River Junction, service which would have been lost under the WWOD proposal. *Id.* Noting that Hall had explicitly and unequivocally expressed its interest in applying for vacant Channel 231A at Keeseville¹, *see id.*, the Commission opted to allot vacant Channel 231A to Keeseville

¹ To the extent that it may be relevant here, Hall hereby reiterates its continued interest in filing for vacant Channel 231A at Keeseville, its continued intent to file an application therefor, and its continued commitment to construct and operate a station on that channel should Hall be granted a construction permit to do so.

The Current Proposal

5. Several months after the release of *Keeseville I*, Nassau acquired Station WWOD(FM). Undeterred by the fact that the Commission had already declined to move that station to Keeseville at the expense of White River Junction, Nassau filed its Petition here. The Petition proposes essentially the same allotment scheme which the Commission already considered, and rejected, in *Keeseville I*. Nassau would have the Commission move Station WWOD(FM)'s channel, Channel 282C3, from Hartford to Keeseville – just like the earlier proposal – and Nassau would have the Commission replace that channel in Hartford with Channel 237A, which would be plucked from White River Junction – just like the earlier proposal. In an apparent effort to slap a new coat of paint onto the proposal to hide the dents and scratch marks evidencing the earlier, unsuccessful, effort to effect the same reallocation, Nassau tosses in a proposed drop-in of Channel 282A at Enfield, New Hampshire. And as a final element, Nassau proposes to move Channel 231A – the sole vacant channel at Keeseville – to Morrisonville, New York, leaving Keeseville without a vacant channel for prospective applicants.

Discussion

6. That final element – the elimination of a vacant channel in Keeseville – is fatal to Nassau's proposal. Where a vacant channel has been allotted to a community and expressions of interest in filing for that channel in that community have been submitted, an allotment to that community must be retained. *E.g.*, *Martin et al.*, *TN*, 13 FCC Rcd 17767, 17770, ¶6 (Allocations Branch 1998), *recon. denied*, 15 FCC Rcd 12747 (Allocations Branch 2000); *Driscoll, TX*, 10 FCC Rcd 6528, ¶2 (Allocations Branch 1995). No matter how Nassau may try to slice it, its

proposal would eliminate a vacant allotment (*i.e.*, Channel 231A) in Keeseville, a vacant allotment for which Hall, for one, has expressed an interest.

7. Nassau attempts to dodge this problem by suggesting that there may be some distinction between (a) a proposal which “deletes” a vacant allotment and (b) a proposal which would simply reallocate a vacant channel. Nassau Reply Comments at 5-6, n. 16. While Nassau would doubtless prefer to view its proposal as a mere “reallotment” of Channel 231A, the fact of the matter is that that mere “reallotment” would in reality “delete” that channel from Keeseville. Hall, for one, has unequivocally expressed its interest in filing for that channel *in Keeseville*. If Nassau’s proposal were to be adopted, no opportunity to file for that channel – or any other channel – in Keeseville would remain. Rather, the vacant *Keeseville* channel would be deleted from the Table, notwithstanding Nassau’s glib contrary suggestion.

8. Nassau attempts to sidestep this gaping hole in its proposal by claiming that the Commission issued the Notice of Proposed Rulemaking in the instant proceeding even though the Commission “*presumably*” was aware of *Keeseville I*. See Nassau Reply Comments at 3-5. According to Nassau, the issuance of that NPRM “is indicative that Commission policy permits the reallocation of a vacant but unapplied for FM allotment.” *Id.* at 5. This argument, though, is not supported by citation to any authority; rather, it is based solely on the Commission’s “*presumed*” awareness of *Keeseville I*. Nassau’s reasoning appears to be that, since the FCC “*presumably*” knew about *Keeseville I* and nevertheless issued the NPRM in response to Nassau’s Petition, well, then, obviously the FCC must have concluded, some way, some how, that the vacant Keeseville channel is expendable.

9. We emphasize the qualifier “presumed” because Nassau itself can say only that the Commission “*presumably* was aware” of that earlier decision. Nassau Reply Comments at 3,

n. 7 (emphasis added). According to Nassau, that awareness may be *presumed* because the Nassau Petition “cite[d] *Keeseville I* at least three times.” *Id.*

10. And sure enough, a fine-toothed comb search of Nassau’s Petition does turn up three references to the earlier proceeding (although only two of those references are to the final allotment decision). All three references appear in footnotes. The first, at page 5, n. 13, cites *Keeseville I* as a factor precluding consideration of a later-filed proposal to allot Channel 231A to Morrisonville. The second, at page 8, n. 18, cites it in support of the proposition that Keeseville has the indicia of a community. And the third, at page 9, n. 20, refers to language in the NPRM in the earlier Keeseville proceeding relative to the extent of Nassau’s proposed coverage of the Burlington Urbanized Area. So Nassau is technically correct that it cited to the earlier Keeseville proceeding three times in its Petition.

11. But in its Petition Nassau did *not* happen to mention to the Commission that, in *Keeseville I*, interest was clearly and unequivocally expressed in vacant Channel 231A at Keeseville. Nor did Nassau focus the Commission’s attention on the fact that Nassau’s proposal would deprive interested parties of the opportunity to file for that vacant Keeseville channel. Instead, in a textbook demonstration of misdirection, Nassau ignored those considerations and pitched its proposal as if the Commission were writing on an absolutely clean slate. But the slate here is far from clean. To the contrary, relying on, *inter alia*, Hall’s expression of interest, the Commission allotted vacant Channel 231A to Keeseville, and neither Hall nor any other potential applicant has yet had the opportunity to apply for that channel. As discussed above, Commission policy precludes the removal of that Keeseville channel under those circumstances.²

² In its Reply Comments Nassau suggests that the Commission’s policy mandates retention of a vacant channel *only if* an application for construction permit specifying that channel has been filed. See Nassau Reply Comments at 5. Nassau misstates the policy. While the failure of a
(Footnote continued on next page)

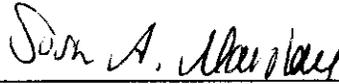
12. Not surprisingly, the NPRM in the instant proceeding is silent on this point. But that silence cannot be viewed as a wholesale endorsement of Nassau's fanciful claims. To the contrary, as demonstrated above, longstanding Commission precedent plainly contradicts those claims. If the Commission were in fact inclined to upset more than a decade of caselaw, it would have to do so explicitly, supplying a reasoned analysis for its about-face. *E.g.*, *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 57 (1983), citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). No such reasoned analysis is set out in the NPRM. So contrary to Nassau's presumption-based argument, the issuance of the NPRM in response to Nassau's Petition cannot seriously be said to reflect any awareness, consideration or deliberate endorsement of Nassau's self-servingly myopic, and incorrect, version of the Commission's policy in this area.

(Footnote continued from preceding page)

party to file an application for a vacant channel *when the opportunity is presented* may be deemed an abandonment of an earlier expression of interest, *see, e.g., Brookline, MO*, 16 FCC Rcd 8698, 8699, n. 1 (Allocations Branch 2001), such constructive abandonment cannot occur unless and until the party has, in fact, had the opportunity to file such an application. *See Driscoll, TX, supra*. Here, the vacant Keeseville channel has not yet been made available for application. As a result, Hall's earlier expression of interest retains its vitality – over and above the fact that that expression has been expressly renewed in the instant proceeding.

13. In view of the foregoing, and particularly in view of the fact that Nassau's proposal would require the deletion of a vacant channel for which a continued interest has been clearly expressed, Nassau's Petition must be dismissed and this proceeding must be terminated.

Respectfully submitted,



Susan A. Marshall
Harry F. Cole
Lee G. Petro

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
703-812-0482

Counsel for Hall Communications, Inc.

July 7, 2005

CERTIFICATE OF SERVICE

I, Barbara L. Lyle, a secretary at the law firm of Fletcher, Heald & Hildreth PLC, do hereby certify that I caused copies of the foregoing "Motion to Dismiss Petition for Rule Making" to be placed in the U.S. mail, first class postage prepaid, on this 7th day of July, 2005, addressed to the following:

John A. Karousos*
R. Barthen Gorman*
Assistant Chief, Audio Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Stephen Diaz Gavin
Patton Boggs LLP
2550 M Street, NW
Washington, D.C. 20037-1350
Counsel for Nassau Broadcasting III, L.L.C.

David G. O'Neil
Rini Coran, PC
1501 M Street, NW
Suite 1150
Washington, D.C. 20005
Counsel for Great Northern Radio, LLC

Barry A. Friedman
Thompson Hine LLP
Suite 800
1920 N Street, NW
Washington, D.C. 20036
Counsel for Radio Broadcasting Services, Inc.


Barbara L. Lyle

* via hand-delivery