

ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In re Amendment of Section 73.202(b)	)	
of the Commission's Rules, Table of Allotments,	)	
FM Broadcast Stations	)	
(CASEVILLE AND PIGEON, MICHIGAN)	)	MM Docket No. 01-229
	)	RM-10257
	)	RM-11285
	)	RM-11291
	)	
(HARBOR BEACH AND LEXINGTON, MICHIGAN)	)	MM Docket No. 01-231
	)	RM-10259
	)	RM-11285

To: The Office of the Secretary,  
for the Attention of the Assistant Chief, Audio Division, Media Bureau

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Liggett Communications, LLC (*Liggett*), by its communications counsel, hereby opposes the Petition for Reconsideration filed on January 27, 2006 by Sanilac Broadcasting Company (*SBC*) in this proceeding. As Liggett will show, the Petition for Reconsideration is devoid of merit and warrants summary denial.

**I. BACKGROUND**

**A. THE CASEVILLE PETITION AND NPRM**

1. On August 13, 2001, Charles Crawford filed a Petition for Rule Making asking the Commission to allot Channel 289A to Caseville, Michigan as a first local service." Mr. Crawford's Petition prompted the Mass Media Bureau to issue the Notice of Proposed Rule Making in Docket 01-229, 16 FCC Rcd 16341, 66 Fed. Reg. 48108 (2001) (the *Caseville NPRM*). The Caseville NPRM proposed to allot Channel 289A to Caseville and solicited Comments and

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Counterproposals, to be filed by October 29, 2001. On September 18, 2001, Mr. Crawford filed timely comments, reiterating his desire for a facility at Caseville.

#### **B. THE HARBOR BEACH PETITION AND NPRM**

2. On August 13, 2001, Charles Crawford filed a Petition for Rule Making asking the FCC to allot Channel 256A to Harbor Beach, Michigan as a “first competing FM service.” Mr. Crawford’s Petition prompted the Mass Media Bureau to issue the Notice of Proposed Rule Making in Docket 01-231, 16 FCC Rcd 16341, 66 Fed. Reg. 48108 (2001) (the *Harbor Beach NPRM*). The Harbor Beach NPRM proposed to allot Channel 256A to Harbor Beach and solicited Comments and Counterproposals, to be filed by October 29, 2001. On September 18, 2001, Mr. Crawford filed Comments, reiterating his desire for a Harbor Beach facility.

#### **C. MR. CZELADA’S COUNTERPROPOSALS**

3. On October 29, 2001, Edward Czelada filed a multielement Counterproposal involving both of the above-enumerated (and other) Dockets. Mr. Czelada accused Mr. Crawford of abusing Commission processes by filing multiple allotment requests, and Mr. Czelada urged the adoption of several alternative allotments that were mutually exclusive with those that Mr. Crawford had proposed. Among Mr. Czelada’s proposed allotments was Channel 256A at Lexington, Michigan. Mr. Czelada asked the Commission to allot the channel as a noncommercial one because of an alleged, “... scarcity of Non-commercial [sic] spectrum in the Lexington area.” However, Mr. Czelada went on to say that, if the Commission did not deem it proper to reserve the channel for noncommercial use, the Commission should allot it as a commercial channel, and he pledged to apply for Channel 256A at Lexington if allotted, and to promptly build a Channel

256A facility at Lexington if authorized. The FCC accepted Mr. Czelada's Counterproposal for rule making, and gave public notice of such acceptance via its Public Notice, Report No. 2732 (rel. October 19, 2005). The Public Notice did not propose reserved allotments.

#### **D. MS. PYEATT'S PETITION**

4. Prior to the deadline for Comments and Counterproposals in MM Docket No. 01-229, Katherine Pyeatt petitioned for the allotment of Channel 267A at Pigeon, Michigan, as a first local service. Her proposal was not mutually exclusive with Mr. Crawford's Caseville Petition, but it proved to be mutually exclusive with one element of Mr. Czelada's counterproposal... his request that the Commission allot Channel 267A to Caseville. Accordingly, the FCC consolidated Ms. Pyeatt's proposal into the Caseville proceeding.

#### **E. SBC'S COMMENTS**

5. Also on October 29, 2001, Robert Armstrong, on SBC's behalf, filed Comments asserting that Mr. Crawford had filed petitions seeking more than 20 FM allotments, but that he had never constructed, owned, or owned and operated a radio station. SBC asserted that Mr. Crawford had not shown that he had sufficient assets to construct and operate stations that would fill all of his requested allotments. Therefore, SBC argued, the staff should dismiss Mr. Crawford's petitions (and, by implication, not make the allotments that he had requested).

#### **F. MR. CRAWFORD'S WITHDRAWALS**

6. On November 2, 2001, Charles Crawford requested that the Commission dismiss his requests to allot Channel 289A to Caseville, Michigan and Channel 256A to Harbor Beach.

#### **G. THE REPORT AND ORDER**

7. On December 16, 2005, the staff issued the Report and Order in MM Docket Nos. 01-229 and 01-231, 20 FCC Rcd 20027 (the *R&O*). On January 4, a summary of the R&O appeared in the Federal Register at 71 Fed. Reg. 246-247. The R&O allotted Channel 256A to Lexington as a commercial channel, as Mr. Czelada had requested, and also allotted Channel 267A to Caseville, as Ms. Pyeatt had requested.

#### **H. SBC'S PETITION FOR RECONSIDERATION**

8. On January 27, 2006, SBC filed its Petition for Reconsideration with respect to the R&O. SBC's Petition alleges that Mr. Czelada has no intention of applying for Channel 256A at Lexington because the R&O had allotted Channel 256A as a commercial channel, as opposed to, "... his stated preference as a noncommercial channel." SBC further alleges that good cause exists for raising this issue on reconsideration because of new evidence that has only recently become available. The "new evidence" is Mr. Czelada's purported change of heart.

9. SBC has proffered a declaration from Geroge E. Benko, SBC's President. Therein, Mr. Benko asserts that he and his manager, Robert Armstrong, called Mr. Czelada. They asked if Mr. Czelada intended to apply for Channel 256A at Lexington. According to Mr. Benko, Mr. Czelada replied in the negative, saying that he really wanted the FCC to allot an NCE-FM channel to Lexington. Mr. Benko's declaration further states that he and Mr. Armstrong urged Mr. Czelada to set the record straight and to inform the FCC of Mr. Czelada's change of heart. According to Mr. Benko, Mr. Czelada said that he would do so.

10. Based on this alleged statement of Mr. Czelada, the Petition alleges that if the FCC staff had known that Mr. Czelada had not been interested in a commercial allotment at Lexington, it would not have allotted Channel 256A. BC claims that Mr. Czelada's purported change of heart means that, "... the Bureau has no choice but to reconsider and rescind at least that portion of the [R&O] which allotted commercial FM Channel 256A to Lexington, Michigan."

#### **I. PUBLIC NOTICE OF SBC'S PETITION FOR RECONSIDERATION**

11. On February 3, 2006, the Commission announced the filing of SBC's Petition. See Public Notice, Report No. 2756. Twelve days later, that Public Notice appeared in the Federal Register. See 71 Fed. Reg. 7965 (rel. February 15, 2006). The Federal Register publication specified that Oppositions to the Petition were due by March 2, 2006.

#### **II. ARGUMENT: SBC'S PETITION FOR RECONSIDERATION MUST BE REJECTED**

12. As Liggett will now demonstrate, SBC's Petition for Reconsideration is fatally flawed, and must be summarily rejected. The Lexington allotment must stand.

##### **A. SBC'S PETITION IS ENTIRELY BASED ON PURE HEARSAY**

13. The entire basis of SBC's Petition for Reconsideration is that Mr. Czelada has had a change of heart about applying for Channel 256A at Lexington because the Commission allotted it as a commercial channel. However, the only support that SBC has provided for this claim is Mr. Benko's Declaration, which describes a telephone conversation that Mr. Benko claims that he and his employee, Mr. Armstrong, had with Mr. Czelada, and in which Mr. Czelada allegedly

voiced his second thoughts. Mr. Benko's Declaration is pure hearsay and, as such, cannot form the basis for rescinding the Lexington allotment.

14. Liggett fully understands that hearsay that is both relevant and material can be admissible in administrative proceedings. See, e.g., Wine Country Radio, 11 FCC Rcd 2333, 2334 at para. 6 (1996), citing, Johnson v. United States, 628 F.2d 187, 190 (D.C. Cir. 1980). At the same time, however, the weight to be accorded to hearsay depends on its truthfulness, reasonableness, and credibility. A key indicator of hearsay's probity is whether its proponent is a disinterested witness. Wine Country Radio, supra, 11 FCC Rcd at 2334.

15. Thus, a prime determinant of the weight that should be accorded to proffered hearsay is whether its proponent is a disinterested party. Here, SBC can in no way be deemed an interested party. In fact, SBC itself, in its own Petition, claims status as, "... an interested party b[y]] virtue of the fact that its stations compete in the Lexington, Michigan radio market." Thus, SBC, by its own admission, has an economic interest in the removal of Channel 256A from Lexington. Taking this economic interest into consideration, Mr. Benko, as SBC's principal, fails to qualify as a disinterested witness.

16. Moreover, it is telling that Mr. Czelada himself has not, according to the publicly available record in this proceeding as of the date of this writing, filed *anything* with the Commission evincing any change of heart on his part. So, the Commission must look to Mr. Czelada's statement of record, in which he unequivocally expressed a desire for even a commercial allotment to Lexington:

If it is determined that [Channel] 256A at Lexington is not acceptable for noncommercial use[,] then we respectfully request that it be allocated for commercial purposes. We will

apply for [Channel] 256A at Lexington and [will] build [a station to occupy the allotment] promptly once it is authorized.

Section 1.17 of the Rules requires that such statement not be incorrect or misleading or that such statement not omit a material fact. Further, Section 1.52 required Mr. Czelada to personally subscribe to his filing. Comparing SBC's proffered hearsay against Mr. Czelada's unequivocal statement of record expressing a desire for a commercial allotment to Lexington, and given the fact that the burden of proof rests upon SBC as the proponent of Commission action<sup>1</sup> to undo the Lexington allotment, SBC simply has not even begun to satisfy its burden of proof.

#### **B. REMOVAL OF CHANNEL 256A IS WHOLLY UNJUSTIFIED**

17. Ten years ago, the Commission deleted the rule that automatically stayed the effectiveness of a Report and Order allotting an FM Channel upon the filing of a Petition for Reconsideration. See, Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders, 11FCC Rcd 9501 (1996). Accordingly, Channel 256A at Lexington must be viewed as a current and effective allotment, and SBC's Petition for Reconsideration must be viewed as an attempt to remove a preexisting allotment.

18. When the Commission receives a request to delete an allotment, it provides an opportunity for third parties to express interest in applying for the allotment, even if the original petitioner has withdrawn its statement of interest. See, e.g., Macon, Mississippi, 16 FCC Rcd 3070, 66 Fed. Reg. 14513 (2001). Only if no party expresses an interest in the retention of the

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<sup>1</sup>See, e.g., Astroline Communications Company Limited Partnership v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

allotment is deletion justified. E.g., Macon, Mississippi, 16 FCC Rcd 11063, 66 Fed. Reg. 31561 (2001). See also, Brookline, Missouri, 16 FCC Rcd 8698, 66 Fed. Reg. 22450 (2001) at para. 5. However, if any party expresses interest in the allotment, it is firmly established Commission policy *not* to delete the allotment. See, e.g., Martin et al., Tennessee, 13 FCC Rcd 17767, 66 Fed. Reg. 49684, recons. den., 15 FCC Rcd 12747, 65 Fed. Reg. 45721(200), Calhoun City, Mississippi, 11 FCC Rcd 7660 (M.M. Bur. 1996); Driscoll, et al., Texas, 10 FCC Rcd 6528 (M.M. Bur. 1995), Woodville, Mississippi, et al., 9 FCC Rcd 2769 (1994); Casper and Sheridan, Wyoming, 6 FCC Rcd 2880 (M.M. Bur. 1991) at para. 8, and the cases cited therein. Indeed, where the Commission has received an expression of interest in the retention of an existing allotment, it has required the proponent of deletion to make a “compelling showing” to justify the deletion. Belen and Grants, New Mexico, 7 FCC Rcd 4655 (M.M. Bur. 1992).

19. Because Mr. Czelada has not retracted his statement of interest, and because SBC has made no compelling showing that deletion of Channel 256A at Lexington is warranted, SBC’s suggested modification of the FM Table of allotments would fly in the face of binding precedent. Moreover, assuming, for the sake of argument, that Mr. Czelada really has had a change of heart with respect to the Lexington allotment, deletion of the Channel is still unwarranted, because Liggett itself desires to apply for Channel 256A. Liggett intends to file a short-form application when the FCC sends the channel to auction, to vigorously compete in the resulting auction if more than one party contends for the allotment, to file and to diligently prosecute a long-form application for the allotment if Liggett is the high bidder at auction, to construct the facilities authorized by the grant of Liggett’s long-form application, to expeditiously construct the authorized facilities and to begin offering broadcast service to the public promptly upon

completion of construction, and to seek a covering license for the constructed facilities. See Exhibit A, the Declaration of James A. Jensen, Liggett's President. In light of this statement of interest, the staff cannot delete Channel 256A at Lexington from the FM Table of Allotments.<sup>2</sup>

**C. THE STAFF CORRECTLY DID NOT RESERVE CHANNEL 256A FOR NCE USE**

20. Moreover, although SBC does not specifically raise this point, the staff was fully justified in not reserving Channel 256A for noncommercial use. In Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 15 FCC Rcd 7386 (2000), recons., 16 FCC Rcd 10549 (2001),<sup>3</sup> the Commission established revised criteria that a rule-making proponent must satisfy to justify reserving an FM allotment for NCE use only. Under the revised criteria, a proponent of reservation must demonstrate:

- that it is technically precluded from using a reserved channel (Channels 201 through 220); and
- that the proposal would provide a first and/or second NCE radio service to at least 10 percent of the population within the 60 dB $\mu$ <sub>f(50,50)</sub> contour of the station that would occupy the proposed allotment; and
- that such population exceeds 2,000 persons.

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<sup>2</sup>Liggett is the licensee of several stations in the Port Huron, Michigan area. Liggett has not undertaken an exhaustive analysis as to whether Liggett would need to alter its holdings so that an application for Channel 256A at Lexington would comply with the Commission's local radio multiple-ownership rule, 47 C.F.R. § 73.3555(a)(1), because such an analysis is not necessary in the context of an allotment proceeding. See, e.g., Charles Town, West Virginia and Stephens City, Virginia, DA 06-343 (rel. February 17, 2006) at para. 7, and cases cited therein. Notwithstanding, Liggett intends to make such divestiture or divestitures as may be necessary to allow it to obtain a construction permit for Channel 256A at Lexington. See Exhibit A.

<sup>3</sup>Subsequent history is omitted as not relevant.

Mr. Czelada provided *no* such showing. Hence, the staff properly allotted Channel 256A to Lexington as a commercial channel.

**D. SBC'S ECONOMIC INTEREST IN SEEING CHANNEL 256A GO AWAY  
DOES NOT JUSTIFY REMOVAL OF THE ALLOTMENT**

21. Finally, although SBC does not also specifically raise this point, the economic factors that underlie SBC's claim to party-in-interest status cannot justify any removal of Channel 256A from Lexington. Any additional or more effective competition that Channel 256A will represent to SBC is simply irrelevant to the outcome of this proceeding. See, Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988), affirmed, 4 FCC Rcd 2276 (1989).

**IV. CONCLUSION**

22. For both of the above reasons, the Commission's staff should promptly, and on delegated authority, reject SBC's fatally flawed Petition for Reconsideration in this proceeding;

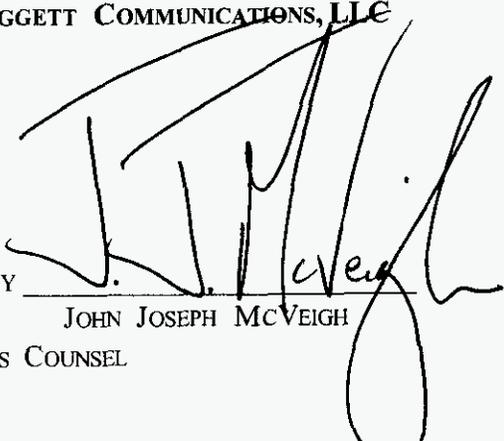
<p>JOHN JOSEPH McVEIGH, ATTORNEY AT LAW 12101 BLUE PAPER TRAIL COLUMBIA, MARYLAND 21044-2787</p> <p>TELEPHONE: 301.596.1655 TELECOPIER: 301.596.1656</p> <p>DATE: MARCH 1, 2006</p>	<p>Respectfully submitted,</p> <p><b>LIGGETT COMMUNICATIONS, LLC</b></p>  <p>BY _____ JOHN JOSEPH McVEIGH ITS COUNSEL</p>
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EXHIBIT A

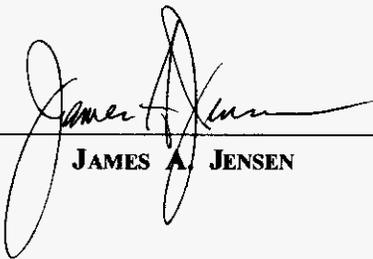
## DECLARATION

I, James A. Jensen, the President and a Member of Liggett Communications, LLC (*Liggett*), hereby offer this Declaration to accompany an Opposition to the Petition for Reconsideration filed by Sanilac Broadcasting Company, on January 27, 2006 with respect to the Report and Order in MM Docket Nos. 01-229 and 01-231. That Report and Order allotted Channel 256A to Lexington, Michigan.

Liggett is the licensee of several radio stations in eastern Michigan, including WBTI(FM), Channel 245A, Lexington, Michigan, FCC Facility ID No. 25989. In light of the fact that the Commission has allotted Channel 256A to Lexington, Liggett intends to file a short-form FCC Form 175 application for the channel in the relevant filing window when the FCC sends the channel to auction. Liggett further intends to compete vigorously during the auction for the right to apply for a construction permit for Channel 256A at Lexington. Liggett further intends, if it is provided with the opportunity to file a long-form application for the construction permit to make such divestiture commitment as may be necessary (if any), to ensure that its long-form application for Channel 256A complies with the Commission's multiple-ownership rules as may be in effect at that time. Further, if Liggett is awarded a construction permit for Channel 256A at Lexington, Liggett intends to promptly construct the authorized facility, to commence broadcast service to the public with the newly constructed facility, and to seek a license to cover the construction permit.

DECLARATION OF JAMES A. JENSEN  
FEBRUARY 10, 2006  
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The content of this declaration is true, correct, and accurate, to the best of my personal knowledge, information, and belief, under penalty of perjury.



A handwritten signature in cursive script, appearing to read "James A. Jensen", is written over a horizontal line. Below the line, the name "JAMES A. JENSEN" is printed in a bold, sans-serif font.

**DATE: FEBRUARY 10, 2006**

## CERTIFICATE OF SERVICE

I hereby certify that I have, this First day of March, 2006, sent copies of the foregoing **OPPOSITION TO PETITION FOR RECONSIDERATION** by first-class United States mail, postage prepaid, to:

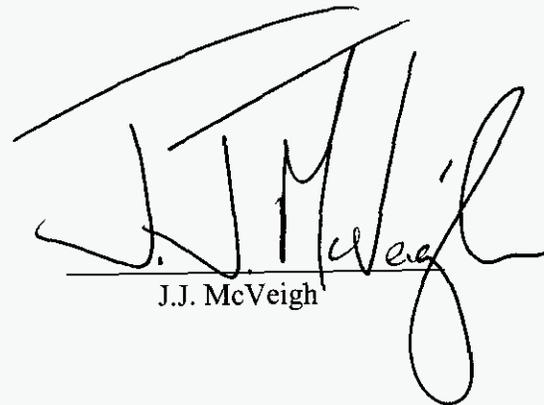
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