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Federal Communications Commission
Office of Secretary

In the Matter of:)
)
Amendment of Section 73.202(b),)
FM Table of Allotments, FM Broadcast Stations)
(Evergreen, Alabama and Shalimar, Florida))

MB Docket No. 04-219
RM-10986

TO: Marlene Dortch, Secretary
Attn: Audio Division

OPPOSITION TO APPLICATION FOR REVIEW

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SUMMARY

Qantum's Application for Review is procedurally defective. It relies upon arguments which were never presented to the Commission's Staff and which cannot, therefore, be raised for the first time at the appellate level. Furthermore, it fails to specify the factors warranting Commission review of the Staff's decision. Even if the Application for Review is considered on its merits, however, Qantum has failed to demonstrate that the Staff decision was at variance with case precedent or with the applicable law.

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Attn: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Star Broadcasting, Inc. ("Star"), successor-in-interest to Gulf Coast Broadcasting Company, Inc., by its attorney,¹ hereby opposes the Application for Review filed in this proceeding by Qantum of Ft. Walton Beach License Company, LLC ("Qantum"), on April 14, 2006.

I. PRELIMINARY STATEMENT

1. Qantum's Application for Review is directed against a decision of the Audio Division (the "Staff"), *Memorandum Opinion and Order*, DA 06-382 (AD February 24, 2006) (the "*MO&O*"), in which the Staff denied a Petition for Reconsideration filed by Qantum with respect to an earlier decision by the Audio Division, *Report and Order*, DA 05-763 (AD March 25, 2005) (the "*Report and Order*"), in which the Staff approved a change in location of FM radio station WPGG(FM) ("WPGG") from Evergreen, Alabama, to Shalimar, Florida. Qantum's Application for Review complains that the Staff has developed a practice over the years of "routinely

¹ Star is currently a debtor-in-possession, under Chapter 11 of the Bankruptcy Code. The undersigned has been appointed Special Counsel to the Bankruptcy Estate.

ignoring the safeguards established by the Commission” in prior decisions to prevent the loss of service to rural communities in favor of well-served urban communities. Application for Review at ii. The Application for Review further contends that the Staff’s actions in the instant matter reflect a “paradigm case of the Commission staff’s failure” to honor those earlier decisions. *Id.*

2. Quantum’s broadside attack on the Staff is obviously well beyond the scope of the decisions at issue in the instant proceeding and is certainly not justified by the *Report and Order* or the *MO&O*. Those decisions are entirely consistent with Commission rules and case law. If there is any deviation from Commission rules and case law, it lies with the arguments in Quantum’s Application for Review.

3. One basic deviation in the Application for Review is the new Engineering Statement in the Application for Review which the Staff has never seen but which Quantum now wants to use to impugn the Staff’s decisions. Applications for Review are authorized by §155 of the Communications Act, 47 U.S.C. §155. Section 155(c)(5) provides as follows:

In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. *No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.* (Emphasis added.)

Similarly, Section 1.115(c) of the FCC’s Rules, 47 C.F.R. 1.115(c), which regulates applications for review, reads as follows:

No 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.

NOTE: Subject to the requirements of §1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

Qantum's Application for Review ignores these limitations. It has introduced a new Engineering Statement and made many legal arguments to the Commission which it did not make to the Staff and which, accordingly, may not be considered in connection with its Application for Review.

4. Another basic and fundamental flaw in Qantum's Application for Review is its total failure to grapple with the standards established by the Commission in allocating FM licenses. Those standards reflect the following system of priorities:

- (1) First fulltime aural service;
 - (2) Second fulltime aural service;
 - (3) First local service; and
 - (4) Other public interest matters.
- Co-equal weight is given to Priorities (2) and (3).

Revision of FM Assignment Policies and Procedures, 90 FCC2d 88 (1988). See *MO&O* at 1 n.3. Nowhere does Qantum's Application for Review cite, let alone discuss, those priorities or the Staff's application of those priorities in the *Report and Order* and the *MO&O*. Instead, the Application for Review claims that the Staff's application of those criteria conflicts with other Commission decisions. There too, however, the Application for Review is premised on a distorted reading of the case law.

Accordingly, contrary to the question posed in Qantum's Application for Review, the more appropriate question for review should be as follows:

Did the Staff apply the Commission's established priorities for allocating FM stations in a manner consistent with case law in deciding that WPGG could be reallocated from Evergreen, Alabama, to Shalimar, Florida, when reallocation would (1) result in Shalimar receiving its first local broadcast service, (2) leave Evergreen with a local

broadcast service, (3) result in a net gain of service for 62,864 persons, and (4) leave all of the persons in the Evergreen service area with at least three fulltime aural services and, for the overwhelming majority of persons, at least five fulltime aural services?

Commission rules and policies require that that question be answered in the affirmative.

II. QANTUM'S NEW ENGINEERING STATEMENT IS WITHOUT PROBATIVE VALUE

5. A prime focus of Qantum's Application for Review are the people within WPGG's current service contour in Evergreen, Alabama. Assuming maximum facilities, the *MO&O* determined that 164,459 persons would lose service if WPGG were relocated to Shalimar and that 227,324 persons would gain service, resulting in a net gain of 62,864. *MO&O* at 2. The *MO&O* found that all but 105 of those persons losing service would receive five aural services after WPGG's relocation, and that those 105 persons would receive four aural services. The *MO&O* criticized the engineering study that Qantum had previously provided because Qantum (a) "has not provided supporting information regarding its [sic] populations that would be within the respective service contours" of other stations which serve the Evergreen market and (b) failed to identify "additional stations' which serve portions of the existing Station WPGG service area." *MO&O* at 2.

6. In response to that criticism, Qantum's Application for Review includes a new Engineering Statement, dated April 12, 2006. As explained above, that new Engineering Statement was not previously provided to the Staff and cannot be considered by the full Commission. *See supra* at ¶3.

7. Even if it were to be considered, however, the new Engineering Statement is without probative value. First, the Engineering Statement only calculated the number

of fulltime services to Evergreen; however, the Commission's FM assignment priorities do not distinguish between daytime-only services and fulltime services and, by failing to include daytime-only services, the new Engineering Statement presents a distorted view of the loss of service from WPGG's relocation. Second, even if Qantum's defective engineering showing were accepted at face value, it would not require a change in the result: according to Qantum's new Engineering Statement, 13,600 persons in the Evergreen area would be left with only four fulltime aural services, and 510 would be left with only three fulltime aural services, Application for Review at 17; but the Commission has previously explained that (a) access to five or more aural services is deemed "abundant," see *MO&O* at 2 n. 8 and sources cited therein, and (b) a relocation otherwise warranted by the Commission's FM priorities remains warranted if, as Qantum concedes in its Engineering Statement, "the majority of the loss area will continue to receive at least five fulltime services" and "no area would be served by fewer than three such services." *Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896, 1996 FCC LEXIS 6579, page 5 (AD 1996).²

8. Qantum's Application for Review fails to cite any applicable legal authority to challenge those conclusions and instead relies on two television cases that provide no support whatsoever for Qantum's specious claims. Application for Review at 17, citing *West Telecasters, Inc.*, 22 FCC2d 943, 945 (1970) (history omitted) (proposed reallocation of television station rejected because, *inter alia*, "49,718 persons would be left with only two predicted Grade B services"), and *Triangle Publications, Inc.*, 37 FCC

² The copy of the decision published in the FCC Record inadvertently omitted everything after page 16901. For that reason, the LEXIS citation is also provided.

307, 313 (1964) (proposed reallocation for television station rejected because "104,364 [persons] will lose their only grade A signal").³

III. THE *KFRC* AND "NEW COMMUNITY" DECISIONS DO NOT WARRANT REVERSAL

9. Quantum's Application for Review relies heavily upon two Commission decisions. The first is *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (hereinafter referred to as "*New Community*"). The second is a decision in a comparative hearing case, *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990) (hereinafter referred to as "*KFRC*"). Neither of those decisions warrants any change in the Staff's decisions in the instant matter.

10. In *New Community*, the Commission established standards to allow an FM radio licensee to change its community of license. In so doing, the Commission said that, in cases involving changes to the FM and TV Tables of Assignments, it would not allow a change of location of an FM radio station if the change of location would deprive a community of its only local broadcast service or if the change would reflect an improper usage of the FM priorities to deprive a more rural community of needed service so that

³ The *MO&O* stated that only 105 persons in the Evergreen service area would receive less than five aural services, but the *Report and Order* stated that 1400 persons would receive less than five aural services. Compare *MO&O* at 2 with *Report and Order* at 3. Quantum complains that the Staff never explained the bases for identifying the lower figure. Application for Review at 6. The difference, however, is of no import to the ultimate decision because, as even Quantum concedes, the overwhelming majority of Evergreen area residents will still receive at least five fulltime aural services and all will continue to receive at least three fulltime aural services. See *supra* at ¶7 and sources cited therein.

the licensee could expand service in an already well-served urban area. *See* 5 FCC Rcd at 7096.

11. Recently, in two cases, both of which are on appeal, the Audio Division sought to expand this policy to AM stations and to dismiss applications to move AM stations out of communities where the move would deprive a community of its only local broadcast service. *Fort Bend Broadcasting Company*, 2006 WL 708183, DA 06-631 (Audio Div. 2006) and *Kovas Communications of Indiana, Inc.*, 2006 WL 507970, DA 06-502 (Audio Div. 2006).

12. Here, however, the change in location of WPGG from Evergreen, Alabama, to Shalimar, Florida, will not deprive Evergreen, Alabama of its only local aural service. Quite the contrary. Evergreen will continue to be served by AM Broadcast Station WIJK, operating with 1 kW day, and 177 W night. Evergreen and the surrounding area served by WPGG will also have access to at least three fulltime aural services and, for the overwhelming majority of people, at least five fulltime aural services. *See supra* at ¶7. Nor should the Commission give any credence to Qantum's effort to paint the WPGG relocation as a move from a "rural" community to an "urban" community. Although Ft. Walton Beach, Florida is an Urbanized Area, Shalimar (with 718 residents) is about one-fifth the size of Evergreen (3,630 residents), and the Ft. Walton Beach Urbanized Area to be served by WPGG (with 227,324 residents) has only 38% more people than the area currently served by WPGG in Evergreen, Alabama. The relocation will therefore enable WPGG to serve more people but, as explained above, will leave behind an area that will continue to be well served by other aural services.

13. In this context, the Application for Review's reliance on *Green Valley Broadcasters, Inc.*, DA 05-3171 (MB December 9, 2005), is misplaced. Green Valley was a comparative case in which the Staff had to determine whether to provide a dispositive §307(b) comparative preference to an applicant who proposed service to Las Vegas, Nevada instead of a second aural service to the nearby community of Sahuarita, Arizona. The Staff had initially granted a dispositive preference to a Las Vegas applicant who would serve more people but, on reconsideration, decided that the public interest factors in the FM allocation priorities required that the Sahuarita applicant be given preference. The instant matter is not a comparative case and, in any event, the dynamic is completely different because Shalimar will receive its first local broadcast service (the third priority) and still leave Evergreen with local broadcast service.

14. *KFRC* does not require any change in the result either. That case involved competing applications for a new station in the San Francisco, California market. It did not involve a proposal to change the location of a station's community of license.

15. The issue in *KFRC* was whether to apply the so-called Huntington Doctrine to prevent some applicants who had proposed Richmond as a community of license from obtaining a comparative advantage over other applicants who had proposed San Francisco as their community of license. The Huntington Doctrine was established in *Huntington Broadcasting Co. v. FCC*, 192 F. 2d 33 (D.C. Cir. 1951). There, the Court of Appeals held that in any case involving a central city and a suburb, the Commission would be justified in refusing to grant a §307(b) comparative preference to the applicant for the suburb where the evidence showed that the suburb did not have needs independent of the needs of the central city. In *KFRC*, the issue was particularly difficult for the

Commission because all of the applicants – including those who had proposed Richmond as their community of license – had advanced proposals that were “technically identical” to each other. 5 FCC Rcd at 3223. The Commission was therefore concerned that it not “appear to condone an artificial and unwarranted manipulation of the Commission’s policies.” 5 FCC Rcd at 3223. The Commission ultimately decided not to grant a §307(b) preference to the Richmond applicants because they had not demonstrated a sufficient independence of that community from San Francisco.

16. The Commission and the Staff have subsequently invoked *KFRC* to assess whether a relocation otherwise required under the established FM priorities should be rejected because it would unfairly deprive a less populated area of service so that the station can serve an already well-served urban area. The *Report and Order* and the *MO&O* invoked prior Commission decisions to explain why the WPGG relocation satisfies two of the three *KFRC* standards: the scope of service to the Urbanized Area, and the relative populations of the community of license to the population of the Urbanized Area. See *MO&O* at 3. Quantum’s Application for Review does not provide any authority to show that the Staff applied that precedent incorrectly. Quantum is therefore left to quibble about the Staff’s application of the third criteria identified in *KFRC*: namely, the extent of interdependence between the new community of license (Shalimar) and the Urbanized Area in which it is located (Ft. Walton Beach) as determined by the criteria in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) (“*Tuck*”). That effort similarly fails.

**IV. QANTUM’S EFFORTS TO NITPICK THE STAFF’S APPLICATION OF
TUCK ARE UNAVAILING**

17. The Staff decisions concluded that a majority of the *Tuck* criteria supported the relocation of WPGG to Shalimar. Qantum's Application for Review challenges that conclusion with arguments that it made to the Staff on two occasions and that have already been rejected. There is no basis to justify a different result at this point.

18. The first favorable *Tuck* factor relates to the Shalimar's work patterns. As the *MO&O* explained, "Shalimar is a 'net importer of workers' due to the fact that a majority of the Shalimar residents are retired." *MO&O* at 3. The *MO&O* found, however, that Shalimar workers have an average commuting time of 16.3 minutes, which indicates that most Shalimar residents work in or near the community. According to Qantum, that statistic cuts the other way because Ft. Walton Beach is allegedly only 1.5 miles from Shalimar. Application for Review at 21. Qantum provides no information to support that last factual statement concerning the distance between Shalimar and Ft. Walton Beach, but the map annexed hereto as Exhibit A shows that Shalimar is more than 1.5 miles from Ft. Walton Beach. And even if Shalimar were that close to Ft. Walton Beach, the *average* time of 16.3 minutes means that many workers are traveling less than that time and would therefore be unable to travel a local road to a job in Ft. Walton Beach.

19. The *MO&O* found that another favorable factor is transportation because Shalimar has a local bus service. *MO&O* at 10. Not satisfied with that conclusion, Qantum complains that the Staff should not have given credit to Shalimar for its bus system. However, Qantum does not cite any case to support its complaint.

20. The Application for Review fails to provide any facts or authority to challenge the *MO&O*'s findings on four other criteria (local government, community

perception, post office and zip code, and commercial establishments). Instead, Quantum is forced to resort to nothing more than its own rhetoric.

21. Lacking any precedent to support its attack on the *MO&O's* application of the *Tuck* criteria, Quantum is forced to claim that "[t]he conclusion was inescapable that either the [Staff's] *Report and Order* had misapplied the *Tuck* criteria or that the *Tuck* criteria were simply not doing their job . . .". Application for Review at 6. Quantum's real argument, then, is with not with the Staff's application of the *Tuck* criteria but with the *Tuck* criteria themselves. Nowhere, however, has Quantum shown that the end result here will deprive Evergreen, Alabama of needed radio service.

V. QANTUM HAS FAILED TO MEET ITS BURDEN UNDER §1.115(b)(2) OF THE COMMISSION'S RULES

22. Section 1.115(b)(2) of the Commission's Rules provides as follows:

. . . the application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

- (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
- (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
- (iii) The action involves application of a precedent or policy which should be overturned or revised.
- (iv) An erroneous finding as to an important or material question of fact.
- (v) Prejudicial procedural error.

Quantum's Application for Review has not referenced §1.115(b)(2) and has failed to explicitly specify the factors which warrant Commission consideration of the questions

presented. For that reason, standing alone, the Application for Review is procedurally defective and should be dismissed.

23. Section 1.115(b)(1) of the Commission's Rules and Regulations requires an applicant for review to concisely and plainly state the questions presented for review.

In this instance, Qantum did, in fact, specify the following single question:

May the Commission staff ignore the explicit directive of the full Commission, adopted to prevent broadcast stations from withdrawing service from rural communities and moving to urban areas, and permit a licensee to (i) withdraw the second local transmission service from a rural community, (ii) withdraw service from nearly 165,000 people, and (iii) in the process create underserved areas populated by more than 9,000 people receiving fewer than five fulltime radio services, in order to permit first local service to a community that is deeply embedded in an Urbanized Area and that fails to meet the criteria established by the Commission for the awarding of credit for first local service?

24. Qantum's own specified issue demonstrates, however, the lack of merit of its appeal. It assumes relocation of Station WPGG from Evergreen, Alabama to Shalimar, Florida will create an allegedly underserved areas with more than 9,000 people "receiving fewer than five fulltime radio services." But, as demonstrated above, Qantum has not demonstrated that this is so.

25. Even if Qantum could demonstrate that the figure of 9,000 people is correct it would not matter because (a) the Commission's FM allotment criteria do not distinguish between fulltime and daytime-only radio services and (b) it is sufficient if, as is the case, everyone in the Evergreen service area continues to receive at least three fulltime aural services. *See supra* at ¶7. Thus, Qantum's own "Question Presented for Review" demonstrates that its appeal is fatally flawed.

VI. CONCLUSION

26. Qantum's Application for Review is procedurally defective. It relies heavily upon arguments which were not presented to the Staff and which may not be now raised at the appellate level. It fails to specify the factors which warrant Commission consideration of the Application for Review. For these reasons, standing alone, it should be dismissed.

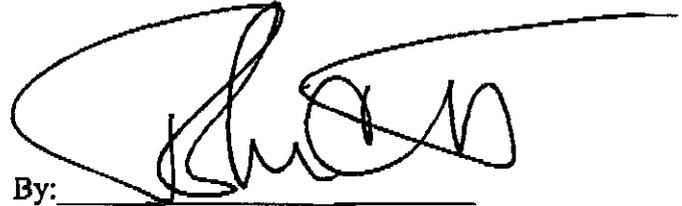
27. Even if the Application for Review is considered on the merits, Qantum has failed to show that the Staff made any procedural or substantive errors requiring reversal. Therefore, in the alternative, the Commission should deny the Application for Review.

Respectfully submitted,

STAR BROADCASTING, INC.

May 1, 2006

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By: _____

John C. Trent
Its Attorney

CERTIFICATE OF SERVICE

I, Sharon L. Hinderer, a secretary in the law office of Putbrese, Hunsaker & Trent, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 1st day of May, 2006, to the offices of the following:

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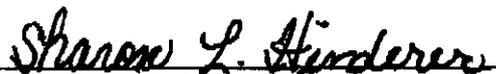
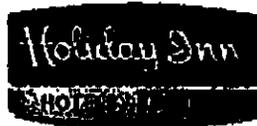

Sharon L. Hinderer

EXHIBIT A



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