

Shainis & Peltzman, Chartered

Counselors at Law
Suite 240
1850 M Street, N.W.
Washington, D.C. 20036

ORIGINAL

Aaron H. Shainis
aaron@s-plaw.com
Lee J. Peltzman
lee@s-plaw.com

(202) 293-0011
Fax (202) 293-0810
e-mail: shainispeltzman@s-plaw.com

Of Counsel
William H. DuRoss, III
bill@s-plaw.com
Robert J. Keller
bob@s-plaw.com

May 26, 2006

RECEIVED

MAY 26 2006

Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

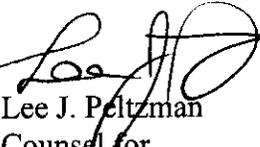
Ms. Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
Portals II – 12th Street Lobby
Filing Counter – TW-A325
445 12th Street, SW
Washington, D.C. 20554

Re: **MB Docket No. 02-167**
RM-10479, 10770
(Eldorado, Mason, Mertzon, and Fort Stockton, Texas)
Petition for Reconsideration

Dear Ms. Dortch:

Transmitted herewith, on behalf of Bryan A. King, successor to BK Radio, is an original and four (4) copies of his Petition for Reconsideration in the above-referenced rulemaking docket. Please contact undersigned in the event the Commission has any questions with respect to this Petition for Reconsideration.

Sincerely,


Lee J. Peltzman
Counselor
BRYAN A. KING

Enclosure

cc: John A. Karousos (w/encl.) – *via hand delivery*
Sharon P. McDonald (w/encl.) – *via hand delivery*

No. of Copies rec'd 0+4
List ABCDE

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

RECEIVED

MAY 26 2006

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b)) MB Docket No. 02-167
Table of Allotments) RM-10479
FM Broadcast Stations) RM-10770
(Eldorado, Mason, Mertzson and Fort)
Stockton, Texas))

To: Office of Secretary
Attn: Chief, Audio Division
Media Bureau

PETITION FOR RECONSIDERATION

Bryan A. King, successor to BK Radio ("BK"), licensee of Station KOTY(FM), Mason, Texas, by his counsel, and pursuant to Section 1.429 of the Commission's rules, hereby petitions for reconsideration of the staff decision in the *Report and Order* in the above-captioned proceeding. *See Report and Order*, DA 06-796 (rel. April 7, 2006).¹ The staff decision failed to take into account the fact that unserved areas are calculated based on potential, not actual service. Even more importantly, the decision expands an Audio Division policy that is in direct conflict with an earlier Commission decision which has never been modified or overruled. In fact, the staff action is inconsistent with language contained in the very case which is cited in the decision. Clearly, this staff action requires reconsideration so that a fair and equitable result may result in this case and so future rulemaking parties can have some idea as to what the staff's ever shifting policy is with respect to areas and populations showings. Absent reconsideration, parties partaking in future rulemakings will be left to guess at what those standards are.

¹ A summary of the *Report and Order* was published in the Federal Register on April 26, 2006. 71 Fed. Reg. 24635. Accordingly, this petition for reconsideration is timely. *See* 47 C.F.R. § 1.429(d).

The BK counterproposal requested the reallocation and change of community of license for Station KOTY(FM) from Channel 239C2 at Mason, Texas to Channel 240C2 at Mertzon, Texas.² BK provided an engineering study which documented that the loss area resulting from the relocation of KOTY would create neither “white” area nor “gray” area. The BK engineering study was completed in a manner consistent with Commission precedent. *See Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493, 1494 (1991).

Despite this, the *Report and Order* denied the BK counterproposal. The staff concluded that “gray” area was created by the relocation of KOTY, which was considered fatal to the counterproposal. The staff recognized that it was creating new law since it referred to an earlier staff decision, *Sells, Arizona*, 19 FCC Rcd 22459 (MB 2004), *recon. pending*, then noted that it was “further extend[ing] that reasoning to include both previously allotted and proposed vacant channels as ‘backfills’.” *Report and Order* at para. 5.

The staff *Report and Order* suffers from several maladies. Its most grievous error is its violation of the long-standing Commission precedent set forth in *Greenup, supra*. That Commission decision is cited with approval by the staff in the *Sells* decision, where the staff sought to differentiate the facts occurring in *Sells* - - an unsuccessful attempt by a party to use *proposed* vacant allotments to prevent the creation of “white” area - - from those in *Greenup* and its progeny. The Commission stated that “those cases refer to the status of *previously allotted vacant channels*. In *Greenup, Kentucky and Athens, Ohio*, we stated that we will take into account *vacant allotments* in determining whether a proposed allotment should receive priority one or two credit. This policy is based on our conclusion that the Commission ‘should normally’ assume that *service would be provided on previously allotted vacant channels*.” 17 FCC Rcd at

² The BK counterproposal was initially in conflict with a Petition for Rulemaking filed by Katherine Pyeatt (“Petitioner”) for the allotment of Channel 241A at Eldorado, Texas. However, the Petitioner requested the withdrawal of her proposal and it was dismissed by the Commission in the *Report and Order*.

22461 (emphasis added). Thus, the staff action here conflicts with, not only the *Greenup* decision, but the staff's own language in the *Sells* case.³

Not only is the staff attempting to make new policy which is in conflict with Commission precedent and its own language, but the very policy that it seeks to extend makes little sense. The entire premise used in Commission's areas and populations showings is that the Commission considers potential service rather than actual service in its calculations. This is not only specifically noted in the *Greenup* case, but is also reflected in the Commission policy that service is calculated to the maximum of an allotment's class of channel, regardless of the station's actual facilities. *Id.* at 1495. If the Commission fails to count concurrently allotted vacant channels or, as here, previously allotted channels, in its areas and populations calculations, how can it then permit parties to assume that service is provided to the maximum of a facility's class of channel, regardless of the station's actual facilities. In fact, the Commission has concluded that an area is not considered to be without reception service if it is within the theoretical coverage of a station's assumed maximum facilities, even when the licensee has demonstrated that it has no intention of upgrading to maximum facilities. *See Banks, Sunriver, Redmond and Corvallis, Oregon*, 19 FCC Rcd 10068 (2004). In other words, in such cases potential service may negate white area. The staff does not explain how it can permit the same allocation study to consider potential service when dealing with existing stations (despite their unwillingness to construct maximum facilities), while simultaneously refusing to count potential

³ The Commission in *Greenup*, specifically considered and rejected an argument that the Commission should disregard vacant allotments in rulemaking cases. Instead, the Commission chose to "reiterate the general principle implicit in *Roanoke Rapids* that . . . the Commission should normally assume that service will be provided on existing vacant allotments." 6 FCC Rcd at 1494. While the facts in *Greenup* concerned whether a party should receive priority credit for its provision of service to a gray area whereas the present facts consider whether a party should be penalized for no longer providing service to a loss area, it is hard to decipher how the cases could be factually closer. In any event, the Commission has to do more than enumerate factual differences; it would need to explain the relevance of those differences to the purposes of the Federal Communications Act. *See Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. 1965).

service by permitting existing allotments to negate white area. If the Commission is to apply *Greenup* correctly, it must permit potential service to negate white area in all cases.⁴

The engineering showing submitted by BK on December 25, 2005, detailing the remaining services that cover the KOTY loss area, demonstrates that there will be no white or gray area in that loss area. BK is providing another engineering summary which does not include vacant allotments (without conceding that such allotments should not be considered), but which does include FM auction applications which have recently been filed. Specifically, three applications, for Mason (BNPH-20060309AAT), Leakey (BNPH-20060308AIQ) and Hunt, Texas (BNPH-20060309AAU) have been in FM Auction 62. By definition, these applications are “singletons”. When granted, they will cover significant portions of the KOTY loss area including part of the “gray” area. Because its “gray” area has changed, BK is entitled to have its counterproposal reconsidered under the standards set forth in *Greenup, supra*. In that case, a proposal was reversed on reconsideration because intervening changes had occurred since the original decision. 6 FCC Rcd at 1494. This case stands in the same procedural posture.

Further, the decision to “extend” the *Sells* policy in this case is troubling on several procedural as well as substantive levels. First, it violates tenants of basic administrative procedure. An agency undertaking to change its interpretation must afford the public adequate notice and opportunity to comment. *See National Family Planning and Reproductive Health Association v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992). The staff failed to do so in this case. The staff gave no notice that it intended to address and, in so doing, change its policy in this proceeding, which it must do in order to satisfy its procedural obligations. *See Chemical Waste Management v. EPA*, 976 F.2d 2, 33 (D.C. Cir. 1992). *See also* 5 U.S.C. § 553(c).

⁴ BK does not dispute, and it is not an issue nor is it valid precedent in this proceeding, the Commission decision that vacant channels may not be used as “backfills” when dealing with the loss of a transmission service. *See Pacific Broadcasting of Missouri, LLC*, 18 FCC Rcd 2291 (2003), *recon. denied*, 19 FCC Rcd 10950 (2004).

Moreover, making law on an *ad hoc* basis is inequitable to the parties appearing before the Commission. BK filed its counterproposal in good faith in August, 2002, based on its application of existing case law. BK had no way of knowing that it would take the Commission a full year to accept its counterproposal and place it on *Public Notice* and then almost thirty-four months more to render a decision based on the application of a new policy interpretation. The decision by the staff to apply its new rule interpretation, not merely prospectively, but, retroactively, on BK is so inequitable as to border on a violation of BK's due process rights. While an agency may engage in retroactive rulemaking in appropriate circumstances, it is an absolute requirement that it first make an affirmative finding on the record that the retroactive application of the rule is appropriate. See *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986). There was no such finding in this case. There is no reason why BK should not have its counterproposal considered under the rules and policies in effect when its counterproposal was filed. The *Report and Order* does not explain why the public interest demands that the staff's new interpretation must be immediately implemented in this case to the substantial detriment of a private party who reasonably relied on settled precedent. Such an approach tramples on the public interest.

The staff recognized that the gain area resulting from the relocation of KOTY would provide new service to an area of 8,560 square kilometers with a population of 102,943 persons. Within this gain area, service would be provided to a relatively small white area of approximately 55 square kilometers with a population of 124 persons. Despite recognizing that BK would provide service to that white area, the Commission discounted this service, calling it *de minimus*. This staff decision ignores the needs of those 137 persons who currently receive *no*

service from any station. Those people reside within an area known for tornadoes, yet the staff decision would ignore their need for emergency service.

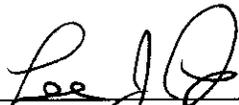
Moreover, the Commission has in the past found populations in the same range to be of decisional significance. See *Cheyenne, Wyoming and Gering, Nebraska*, 15 FCC Rcd 7528 (2000) (211 people losing potential first aural service triggers Priority (1)). In the *Cheyenne* case, the Commission specifically distinguished *Seabrook and Huntsville, Texas*, 10 FCC Rcd 9360 (1995) based on the fact that that decision triggered Priority (2) rather than Priority (1) as was the case in *Cheyenne* and here. See also *Silverton and Bayfield, Colorado*, 14 FCC Rcd 21502 (1999) (white area consisting of 121 persons sufficient to invoke Priority (1)); *LaMesa and Tahoka, Texas*, 10 FCC Rcd 11018 (1995) (loss of service to 328 persons in "white" area invokes Priority (1)). In sum, the Commission should not forget about the 124 persons who, but for the BK proposal, will continue to go without any broadcast service.

For the foregoing reasons, the Commission should reconsider its *Report and Order* and should grant the BK counterproposal.

Respectfully submitted,

BRYAN A. KING

By:



Lee J. Peltzman
His Counsel
Shainis & Peltzman, Chartered
1850 M Street, NW, Suite 240
Washington, D.C. 20036
Tel: 202-293-0011

Dated: May 25, 2006

**PETITION FOR RECONNSIDERATION
RULE MAKING
MB DOCKET #02-167
BK RADIO
RE-ALLOT CHANNEL 240C2
MERTZON, TEXAS**

TECHNICAL STATEMENT

This technical statement and exhibits have been prepared for BK Radio ("BK"), licensee of KOTY, Channel 239C2, Mason, Texas. BK herein supplements with its review of remaining services within the proposed KOTY service area, once the channel is re-allotted to Mertzon, Texas.

As a result of the re-allotment of Channel 240C2 to Mertzon, Texas, KOTY will provide service to 8494.8 square kilometers and 103,349 persons, assuming the theoretical 60 dBu at maximum Class C2 s and no terrain variations. KOTY presently serves 8,404.9 square kilometers and a population of 13,900 persons. A map showing the remaining services is attached as Exhibit #1

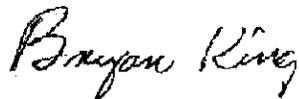
Within the area presently served by KOTY, three new services were purchased in the recent FCC Auction and construction permits for those channels should be issued within the next few weeks. Since these channels were purchased at the auction they will be constructed rapidly. In addition to these three just auctioned channels, there are a number of additional allotments that cover the northeast and southwest underserved areas (these vacant allotments were not counted in the calculations). In both areas where there

will remain only one service, there are a total of six allotments, three each covering each of these two areas so that no gray area will remain.

With the addition of these auction channels, the relocation of KOTY to Mertzon creates a reduced area of 2433 km in which 8101 persons reside with five or less services. (The area having only one service has been reduce to 403 km in which 1567 persons reside, two services cover 1301 km with 3659 persons, three services cover 729 km with 2863 persons, four services cover 299 km with 167 persons, and five services cover 201 km with 178 persons.)

A map depicting the loss area is attached as Exhibit #1. Exhibit #1A lists the stations serving the loss area.

Data related to the station facilities were extracted from the FCC CDBS. Population calculations were made using the current US Census database. The foregoing statement was prepared on behalf of BK Radio by Bryan A. King. All information contained herein is true and correct to the best of my knowledge and belief. My qualifications are a matter of record before the Federal Communications Commission.



Bryan A. King

Date: May 25, 2006

EXHIBIT #1A
Tabulation of stations in KOTY Loss Area

#	Call	Freq or Ch/Class	City
1	KGLF	201A	Doss
2	KKER	204C1	Kerrville
3	KTXI	211C2	Ingram
4	KRNH	222C2	Kerville
5	KDHT	227C	Cedar Park
6	KOOK	228C2	Junction
7	KRVL	232C2	Kerville
8	KCOR	236C1	Comfort
9	KNEL	237A	Brady
10	242 #	242A	Menard
11	RadioActive CP	243A	Ingram
11A	Radio Active CP App	243C3	Ingram
12	KAJA	247C0	San Antonio
13	KELI	254C0	San Angelo
14	258 #	258C1	Eldorado
15	Munbilla CP *	260C3	Hunt
16	KCYY	262C0	San Antonio
17	265 #	265C2	Menard
18	KHLB	273C2	Mason
19	277 ##	277C3	Junction
20	Munbilla CP *	281C2	Mason
21	284 #	284A	Junction
22	287 #	287C3	Menard
23	KNAF	289C3	Fredericksburg
24	E Sting Wireless CP	291A	Kerrville
25	292 #	292A	Junction
26	KEXX	293C3	Llano
27	KFAM	300C3	Johnson City
28	KM Communcations CP *	226C2	Leakey
29	KBML AM	1450	Junction
30	WOAI AM	1200	San Antonio
31	WBAP	820	Ft Worth

* Indicates Auction 62 Channels included in area & population counts
 All other allotments are not used in calculations

These allotments are not show but cover SE & NW areas
 with only 1, 2 or 3 remaining services