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

JUN 29 2006

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Enfield, New Hampshire; Hartford and)
White River Junction, Vermont; and)
Keeseville and Morrisonville, New York)

MB Docket No. 05-162
RM-11227
RM-11295

TO: Marlene H. Dortch, Secretary

For transmission to: The Commission

APPLICATION FOR REVIEW

1. Pursuant to Section 1.115 of the Commission's rules, Hall Communications, Inc. ("Hall") hereby seeks review, by the Commission, of the action taken by the Assistant Chief, Audio Division, Media Bureau ("Bureau"), in the Report and Order ("*R&O*"), DA 06-1007, released May 12, 2006, in the above-captioned proceeding.¹ In that action, the Bureau, *inter alia*, deleted a vacant FM channel from Keeseville, New York, despite the fact that Hall had repeatedly expressed an interest in filing for that channel once Hall is given the opportunity to do so. The deletion of a channel under such circumstances flatly contravenes longstanding and well-established Commission policy. Accordingly, the Bureau's action should be reversed.

¹ The *R&O* was published in the Federal Register on May 31, 2006, 71 Fed. Reg. 20827 (May 31, 2006).

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List A B C D E

Question presented

2. Where an FM channel allotment decision by the Bureau is inconsistent with longstanding, consistently-applied Commission policy, and where the Bureau's asserted justification for its decision ignores the rationale for the Commission policy and misstates the facts underlying the relevant case law, should not the Bureau's decision be reversed?

Factors which warrant Commission consideration

3. The action taken by the Bureau below is in conflict with longstanding case precedent established by the full Commission and, at least up until now, routinely followed by the Bureau. The *R&O* fails to acknowledge that conflict and provides no explanation whatsoever for the Bureau's departure from well-established agency policy. Moreover, the *R&O* appears to be based on an obviously erroneous factual premise.

Discussion

4. In 2004, the Bureau allotted Channel 231A to Keeseville, New York, as that community's only local FM channel. *Keeseville, New York, and Hartford and White River Junction, Vermont*, MM Docket No. 02-23, 19 FCC Rcd 16106 (Audio Div. 2004). Hall, a party to that proceeding, had supported the allotment of a channel to Keeseville. In connection with that possibility, Hall explicitly and unequivocally expressed interest in applying for vacant Channel 231A at Keeseville.

5. The allotment of Channel 231A to Keeseville was not uncontested. Another party – the licensee of Station WWOD(FM), Hartford, Vermont – had originally proposed that WWOD(FM)'s channel (283C3) be moved to Keeseville, with a corresponding change in

WWOD(FM)'s city of license. But after carefully considering the alternatives before it, the Bureau concluded that, in the overall public interest analysis, allotment of vacant Channel 231A to Keeseville would be preferable to moving Station WWOD(FM) there.

6. The ink was barely dry on the Channel 231A-Keeseville allotment when another Keeseville-related allotment proposal was filed. Surprise, surprise – it was the licensee of Station WWOD(FM) again, back with a revised version of the earlier, unsuccessful proposal to move WWOD(FM) into Keeseville.² While the 2004 version of the “WWOD(FM) – Keeseville Or Bust” proposal featured a couple of bells and whistles which distinguished it marginally from the 2002 version, its bottomline was the same as the earlier proposal's: if the WWOD(FM) proposal were to be implemented, WWOD(FM) would be moved to Keeseville, and the vacant channel there would be removed, eliminating the opportunity for Hall (or anyone else) to apply for it.

7. For more than 25 years, the Commission's policy in this area has been clearly stated and consistently applied. A vacant channel will *not* be deleted or reallocated if interest has been expressed in that channel. *E.g., Culebra, Puerto Rico et al.*, MB Docket No. 04-318, DA 06-1308, released June 23, 2006 (Audio Division); *Martin, Tennessee, et al.*, 15 FCC Rcd. 12747 (Allocations Branch 2000); *Driscoll, Texas, et al.*, 10 FCC Rcd 6528 (Allocations Branch 1995); *Montrose and Scranton, Pennsylvania*, 5 FCC Rcd 6306 (1990); *Snow Hill and Kinston*,

² Two years after the 2002 proceeding had been initiated, control of the original WWOD(FM) licensee was transferred, and the station's license was ultimately assigned to the transferee. As a result, the WWOD(FM) component of the 2002 Keeseville proceeding was championed by one party while the matching component in the instant Keeseville proceeding was championed by another – but in both instances, those parties shared a common goal, *i.e.*, to move WWOD(FM) into Keeseville.

North Carolina, 55 FCC2d 769 (1975).³ Here, Hall explicitly and unequivocally expressed interest in applying for Channel 231A at Keeseville. Thus, longstanding Commission policy mandated the rejection of the removal of Channel 231A from Keeseville.

8. But the Bureau ignored that policy and, instead, deleted the channel from Keeseville less than two years after it was first allotted there. Acknowledging the case precedent on which Hall relied, the Bureau attempted to distinguish that line of authority by asserting that those earlier cases “involve situations in which a community would have been denied any first local service if the channel had been deleted or reallocated.” *R&O* at 3, ¶4.

9. The Bureau’s decision is flawed in a number of ways.

10. First, the Bureau misconstrues the rationale for the Commission’s policy. It appears from the Bureau’s terse statement, quoted above, that the Bureau believes that the goal of the prohibition against the deletion of vacant channels is the avoidance of removing a

³ The range of precedent reflecting this policy is particularly striking not only because it is more than a quarter century long, but also because it has been applied as recently as last week! See *Culebra*, *supra*. The Bureau has itself thus reaffirmed the vitality of the policy barely a month *after* the issuance of the *R&O* in which the Bureau seemed perfectly content to effectively write that policy out of existence. The consistent application – both before and after the issuance of the *R&O* – of the policy underscores the aberrational and anomalous nature of the *R&O*.

It should also be noted that the Bureau staff routinely implements a corollary policy. According to the Bureau, “[n]either the Commission’s rules nor our auction procedures permit allotment proponents to modify station licenses to specify vacant allotments which will be auctioned at a later date.” *Letter (dated May 19, 2006) from John A. Karousos, Assistant Chief, Audio Division, to A. Wray Fitch, III, Esq.* (copy included as Attachment A hereto), summarily dismissing a petition for rule making. In the instant case, vacant Channel 231A which was allotted to Keeseville in 2002 was unquestionably subject to the Commission’s auction procedures. And while the WWOD(FM) licensee has technically not proposed to utilize Channel 231A for WWOD(FM) in Keeseville, its proposal has the same effect – removing the vacant Keeseville channel from the pool of channels available for auction. The *R&O* does not address how the approved removal of Channel 231A-Keeseville can be squared with the Bureau’s policy which is illustrated in Attachment A.

potential first local service. The Bureau seems to think that, as long as the community in question will still have some local service, a vacant channel can be removed. In other words, the Bureau views the availability *vel non* of service to the community as the only decisionally-significant factor.

11. But as set forth *by the full Commission in Montrose, supra*, the rationale for the policy is completely different from the Bureau's latterday, self-serving revisionist version.

According to the full Commission,

[t]he policy reflects the Commission's view that one critical aspect of implementing the mandate of Section 307(b) of the Communications Act is to provide an efficient allotment system that affords prospective applicants reasonable certainty and administrative finality in seeking to initiate service. In short, the "fair distribution" of service analysis which underlay the original allotment decision should not be disturbed where an active interest in providing service exists

Montrose, 5 FCC Rcd at 6306, ¶9. This explication demonstrates that, contrary to the Bureau's approach, the policy in question is intended to benefit *prospective applicants* – *i.e.*, parties who are in Hall's position here. Moreover, the policy is further grounded in the important regulatory considerations of "reasonable certainty" and "administrative finality". The instant case illustrates the obviously adverse impact which channel deletion can have on those considerations.

12. Here, Channel 231A was allotted to Keeseville in August, 2004. The allotment was made full in the knowledge that the licensee of WWOD(FM) was champing at the bit to relocate its station to Keeseville. Of course, had the WWOD(FM) licensee felt that the 2004 decision was wrong in some way or other, it could and should have sought reconsideration or review of that decision, making its arguments as best it could. But the WWOD(FM) licensee did

not do that. Instead, it merely re-packaged the earlier proposal and lobbied it back into the Commission. By adopting that re-packaged proposal, the Bureau has made a mockery of its earlier decision, summarily reversing itself despite the indisputable recency of that decision and Hall's continued (and reiterated) interest in availing itself of that decision. In the wake of the Bureau's action below, parties dissatisfied with a particular allotment decision may well ask why they should bother to utilize established procedures (*e.g.*, petitions for reconsideration, applications for review) when they can simply re-file their already-rejected proposals a second (or third, or fourth, etc., etc.) time, in the hope of finding a more sympathetic ear the next time around.

13. The Bureau's claimed rationale is doubly flawed because it is demonstrably wrong as a factual matter. According to the Bureau, the cases in which the Commission's policy has been developed all involved "situations in which a community would have been denied any first local service if the channel had been deleted or reallocated." *R&O* at 3, ¶4. That is simply wrong.

14. Take *Montrose*, for instance. The proposal there would have removed a vacant television channel from Scranton, Pennsylvania, so that it could be used as a first local service in Montrose, Pennsylvania. The Commission can and should take official notice of the fact that there are now, and there were at the time of (and substantially prior to) the *Montrose* decision, multiple other television channels providing local service to Scranton. The *Montrose* decision itself alludes to the existence of other Scranton channels. *See Montrose*, 5 FCC Rcd at 6306, ¶9. Thus, deletion of the channel at issue in *Montrose* would *not* have denied Scranton its first local

service. And yet, in *Montrose*, the Commission rejected a proposal to remove the channel from Scranton because interest had been expressed in that channel in Scranton.

15. For another example, let's look at *Martin, Tennessee, supra*. There a Class C3 FM channel had been allotted to Tiptonville, Tennessee. A proponent proposed that that channel be deleted in order to accommodate an improvement of the proponent's station in another community. Other parties objected, expressing interest in filing for the Class C3 channel at Tiptonville. The proponent then shifted gears, suggesting that an alternate Class A channel could be allotted to Tiptonville. But the other parties who had expressed interest in the Class C3 channel insisted that they were interested only in a Class C3 channel, *not* a Class A channel.

16. Faced with this situation, the Commission stated that, "since other interested parties have expressed their interest in a Class C3 allotment only", 15 FCC Rcd at 12750, ¶6, the alternate proposal (involving allotment of a substitute Class A channel) would be rejected. Here again it is clear that the rejection of the proposal was *not* based on concerns about loss of a first service to the Tiptonville. To the contrary, the proponent's alternate proposal would have assured local service both to Tiptonville and to Martin (the primary focus of the proponent's interest). But the Commission still rejected that alternative *because other parties had expressed interest only in a Class C3 channel there. Id.*

17. In sum, then, the Bureau below failed to correctly apply a policy which was established long ago by the full Commission and which has been consistently applied since. To the extent that the Bureau offered, essentially in passing, a justification for its action, that justification ignores the Commission's rationale for the policy in question. And in any event, the Bureau's supposed justification was based on an incorrect reading of the cited cases.

18. Because of these factors and because Hall (and other potentially interested parties) are entitled to rely on the allotment decisions arising from the proper operation of the standard rule-making process, the Bureau's action below should be reversed.

Relief Sought

19. The decision of the Bureau below should be reversed so that, *inter alia*, Channel 231A is restored to Keeseville and made available for Hall to apply for in the ordinary course of the Commission's procedures.

Respectfully submitted,



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Harry F. Cole

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June 29, 2006

ATTACHMENT A



Federal Communications Commission
Washington, D.C. 20554

May 19, 2006

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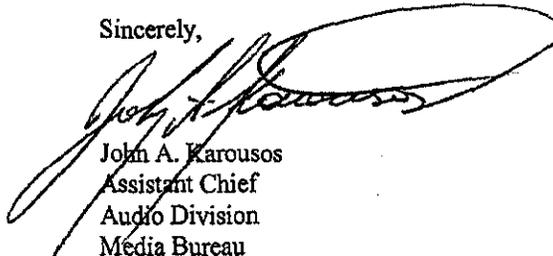
Dear Messrs. Fitch and Obits:

This is in reference to the petition for rule making you filed on behalf of Laramie Mountain Broadcasting, Inc. ("Laramie"), former licensee of Station KREO(FM), Channel 287A, Pine Bluffs, Wyoming.¹ You propose to modify Station KREO's license to specify operation on Channel 238C3, a vacant channel allotted to Pine Bluffs, in lieu of Channel 287A. To accommodate this change, you propose to substitute Channel 240C3 for Channel 239C3 at Gering, Nebraska. You also propose to delete Channel 287A at Pine Bluffs and to allot Channel 287C2 at Potter Nebraska, as the community's first local aural transmission service.

Your petition for rule making is unacceptable for consideration. Laramie is no longer the licensee of Station KREO and there is no indication that the current licensee wishes to modify its license. In addition, in the Report and Order allotting Channel 238C3 to Pine Bluffs in MM Docket No. 01-18,² we specifically stated that this channel allotment would be subject to a subsequent auction. Neither the Commission's rules nor our auction procedures permit allotment proponents to modify station licenses to specify vacant allotments which will be auctioned at a later date.

Accordingly, we are returning your petition for rule making.

Sincerely,



John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Enclosure

cc: Karl Leiber, Chisolm Trail Broadcasting, LLC

¹ Chisolm Trail Broadcasting, LLC is the current licensee of Station KREO(FM).

² *Arriba, Bennett and Brush, Colorado, and Pine Bluffs, Wyoming*, Report and Order, 17 FCC Rcd 2245 (MMB 2002).

CERTIFICATE OF SERVICE

I, Harry F. Cole, do hereby certify that I caused copies of the foregoing "Application for Review" to be placed in the U.S. mail, first class postage prepaid, on this 29th day of June, 2006, addressed to the following:

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Harry F. Cole

* via hand-delivery