

JUL 14 2006

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
Federal Communications Commission
Office of Secretary

ORIGINAL

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: Office of the Secretary
Attn: Assistant Chief, Audio Division, Media Bureau

COMMENTS IN SUPPORT OF APPLICATION FOR REVIEW

Radio Broadcasting Services, Inc. ("RBS"), by its attorneys and pursuant to Section 1.115 of the Commission's Rules, hereby submits these Comments in support of the Application for Review ("Application") filed by Hall Communications, Inc. ("Hall"), in which Hall seeks review of the decision of the Media Bureau ("Bureau") in *Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, DA 06-1007 (rel. May 12, 2006) ("*Keeseville II Order*"), granting the Petition for Rule Making filed by Nassau Broadcasting III, L.L.C. ("Nassau"), the licensee of Stations WWOD(FM), Channel 282C3, Hartford, Vermont ("WWOD") and WXLFFM), Channel 237A, White River Junction, Vermont ("WXLFF").¹ Nassau's proposal includes the removal of vacant Channel 231A from Keeseville,

¹ Nassau proposed amending the FM Table of Allotments as follows: (1) to reallocate Channel 282C3 from Hartford, Vermont to Keeseville, New York and to modify the license of WWOD accordingly; (2) to reallocate Channel 237A from White River Junction, Vermont to Hartford, Vermont and to modify the license of WXLFF accordingly; (3) to reallocate vacant Channel 231A from Keeseville, New York to Morrisonville, New York; and (4) to allot Channel 282A to

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New York, an allotment in which Hall has previously expressed an interest. In granting Nassau's proposal, the Bureau abandoned the Commission's well-settled policy against deleting an allotment in which a party has expressed an interest, offering no basis – other than a factually inaccurate reading of Commission precedent – for the departure. The Bureau's actions fail to meet basic standards of rational agency decisionmaking, and, as Hall correctly argues, the *Keeseville II Order* must therefore be reversed.

Not only has RBS been a participant at each stage in the instant proceeding, it was also an active participant in the prior Keeseville rulemaking proceeding. *See Keeseville, New York, Hartford and White River Junction, Vermont*, 19 FCC Rcd 16106 (MB 2004) ("*Keeseville I*"). In *Keeseville I*, Nassau's predecessors-in-interest sought to change the allotments of Station WWOD, Channel 282C3 from Hartford, Vermont to Keeseville, New York and Station WXLN, Channel 237A from White River Junction to Hartford, Vermont. *See id.* at 16106. The Commission rejected the proposal, correctly choosing instead to accept a Counterproposal, submitted by Hall, for a new drop-in channel to Keeseville. As noted by the Commission, Hall's Counterproposal better served the public interest because it promised to bring a first local service to Keeseville without disrupting existing service at either Hartford or White River Junction, Vermont. *See id.* at 16110.

Rather than use the Commission's established reconsideration procedures to challenge the outcome of *Keeseville I*, Nassau simply petitioned for a new rule making. *See Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, 20 FCC Rcd 7587 (MB 2005) ("*Keeseville II NPRM*"). In Comments to the

Enfield, New Hampshire.

Keeseville II NPRM, RBS objected to Nassau's Petition as an unlawful attempt to achieve, by alternate means, the very same Channel 282C3 Keeseville allotment unsuccessfully sought by Nassau's predecessors-in-interest, an allotment that rightfully should have been precluded by Hall's expression of interest in Channel 231A at Keeseville. In Reply Comments, RBS supported the Counterproposal put forward by Hall as the only lawful proposal before the Commission. However, ignoring longstanding Commission policy and recent precedent, the Bureau granted Nassau's Petition. RBS now supports Hall's efforts to overturn the *Keeseville II Order*, as the Bureau's decision violates Commission precedent and the precepts of rational agency decisionmaking.

Significantly, *Keeseville I* stands as a record of Hall's expression of interest in the Channel 231A Keeseville allotment. As the Commission has consistently held: "It is Commission policy not to delete a channel in which an interest has been expressed." *Martin, Tiptonville and Trenton, Tennessee*, 15 FCC Rcd 12747 (MB 2000). *See also Montrose and Scranton, Pennsylvania*, 5 FCC Rcd 6305 (1995).² In casually dispensing with this policy in the *Keeseville II Order*, the Bureau reasoned as follows:

[T]he cases cited by Hall concerning the Commission's refusal to remove a TV or FM channel allotted to a community, if an expression of interest in that channel had been expressed, involve situations in which a community would have been

² The Bureau continues to apply this policy on a regular basis. *See, e.g., Culebra and Vieques, Puerto Rico*, Report and Order, DA 06-1308 (rel. June 23, 2006). The Bureau also regularly applies a corollary of this policy in connection with competitive bidding for new allotments, namely that "neither the Commission's rules nor [its] 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.* As noted by Hall, vacant Channel 231A was subject to auction procedures, and while WWOD had not proposed utilizing Channel 231A in Keeseville, its proposal had the same practical effect – deleting a vacant channel that would have been available for auction. *See Application for Review at 4, n. 3 and Attachment A.*

denied any first local service if the channel had been deleted or reallocated. That is not the situation here...

Keeseville II Order at ¶ 4. In fact, as demonstrated by Hall, and contrary to the Bureau's assertions, a number of cases cited by Hall did not involve first local service issues at all, but rather focused on the rights of those parties who had expressed an interest in the subject communities. See Hall's Application at 6-7 (citing *Montrose, supra* and *Martin, supra*).

The Bureau's attempt to distinguish the instant proceeding from prior cases on the basis of community/service issues represents an obvious effort to shift focus away from the rights of parties. But that effort fails. The Commission has plainly stated that its policy against deleting vacant allotments in which parties have expressed an interest is meant to provide fairness and certainty to the parties themselves:

The 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. The Bureau's decision in the *Keeseville II Order* therefore marks a sharp break with Commission policy and precedent, a break the Bureau fails even to acknowledge let alone justify. An agency must "provide an adequate explanation before it treats similarly situated parties differently." *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1987) (citing *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994)); see also *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965). Moreover, if an agency "changes its course by rescinding a rule or departing from precedent [it] is obligated to supply a reasoned analysis for such a change." *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual*

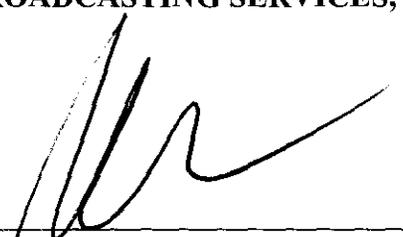
Auto Ins. Co., 463 U.S. 29, 42 (1983). The Bureau's less-than-rigorous attempt to justify its decision obviously fails these standards. Accordingly, the *Keeseville II Order* must be reversed.

WHEREFORE, Radio Broadcasting Services, Inc. respectfully requests that the Commission reverse the Media Bureau's decision granting the Petition for Rule Making submitted by Nassau Broadcasting III, L.L.C., and restore the Channel 231A allotment to Keeseville, New York.

Respectfully submitted,

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CERTIFICATE OF SERVICE

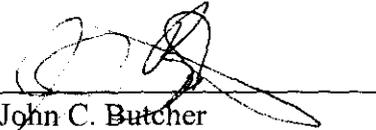
I, John C. Butcher, do hereby certify that I have, on this 14th day of July, 2006, served a copy of the foregoing "Comments" on the following parties, by first-class mail, postage prepaid:

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