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Federal Communications Commission
Office of Secretary

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

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No. 05-162
Table of Allotments	)	
FM Broadcast Stations	)	
Enfield, New Hampshire; Hartford and	)	
White River Junction, Vermont; and	)	
Keeseville and Morrisonville, New York	)	
	)	

To: Office of the Secretary

Attention: Chief, Media Bureau

OPPOSITION TO APPLICATION FOR REVIEW

NASSAU BROADCASTING III, L.L.C. ("Nassau"), pursuant to Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d), hereby opposes the Application for Review ("Application") filed by Hall Communications, Inc. ("Hall").[1] The Commission should deny the Application's objection to the reallotment of Channel 231A from Keeseville, New York to Morrisonville, New York and the substitution of Channel 282C3 at Keeseville. The Commission properly granted the reallotment of Channel 231A to Morrisonville, concluding that the reallotment serves the public interest by providing a first local service to the community of Morrisonville without depriving Keeseville of a first local service.

Counterstatement of the Facts

Nassau filed the petition for rulemaking that commenced this proceeding, proposing the following changes to the FM Table of Allotments: (1) allocate Channel 282A to Enfield, New Hampshire, as that community's first local service; (2) reallocate Channel 282C3 from Hartford,

[1] Section 1.115(d) authorizes the filing of an opposition to an application for review within fifteen days after the application is filed with the Commission. 47 C.F.R. § 1.115(d). Hall Communications filed its Application for Review in this proceeding on June 29, 2006. Oppositions therefore are due by July 14, 2006. Thus, this Opposition is timely filed.

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Vermont to Keeseville, New York, and modify the community of license of station WWOD(FM) to operate on Channel 282C3 at Keeseville; (3) reallocate Channel 237A from White River Junction, Vermont to Hartford, and modify the community of license of station WXLF(FM) to operate on Channel 237A at Hartford; and (4) reallocate Channel 231A from Keeseville to Morrisonville, New York as that community's first local service (the "Nassau Petition"). It is important to note that Nassau's proposal did not deprive Keeseville of a first local service. Indeed, it provided a Class C3 service, instead of simply a Class A service. The Nassau Petition represents a preferential arrangement of allotments under the *FM Priorities*[2] because it will provide a new first local service to the communities of Enfield and Morrisonville and will allow WXLF(FM) to operate as a full Class A facility in Hartford, while retaining a first local service in the communities of White River Junction, Hartford, and Keeseville. The Commission agreed and issued a Notice of Proposed Rule Making, proposing to grant the Nassau Petition.[3]

Hall filed a counterproposal in this proceeding but did not challenge the technical qualifications of the Nassau Petition. Instead, Hall argued that the Commission should deny the Nassau Petition as an untimely filed petition for reconsideration of a previous rulemaking proceeding and that the proposed reallotment of Channel 231A violates the Commission's policies. In addition to the retention of Channel 231A in Keeseville, Hall counterproposed the allotment of Channel 282C2 to Morrisonville. The proposed allotment of Channel 282C2 to Morrisonville is mutually exclusive with the Nassau Petition proposal to allocate Channel 282C3 to Keeseville.

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[2] *See Durant, Oklahoma and Tom Bean, Texas*, 20 FCC Rcd 4315, 4315 (Aud. Div. 2005); *Corydon and Lanesville, Indiana*, 20 FCC Rcd 421, 421 (Aud. Div. 2005). The FM allotment priorities are: (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). *See Revision of FM Assignment Policies and Procedures*, 99 FCC 2d 88 (the "*FM Priorities*").

[3] See *Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, 20 FCC Rcd 7587 (Aud. Div. 2005) (the "NPRM").

On May 12, 2006, the Commission Staff released their Report and Order in this proceeding.[4] The Report and Order granted the Nassau Petition in its entirety and rejected the Hall counterproposal. The Commission rejected Hall's argument that the Nassau Petition was an untimely filed petition for reconsideration of an earlier rulemaking proceeding.[5] Also rejected in the Report and Order was Hall's argument that reallotment of Channel 231A to Morrisonville violated the Commission's policies. In the Commission's analysis, it explained that the cases cited by Hall stand for the proposition that the Commission will not delete a vacant allotment where it would result in denying a first local service to the community.[6] In contrast, the Nassau Petition proposed the replacement of one first local service in Keeseville with another first local service, indeed a higher-powered facility than Channel 231, a Class A facility, while simultaneously providing a new first local service to Morrisonville.[7] Pursuant to the arrangement of allotments proposed in the Nassau Petition and adopted in the Report and Order, there is no loss of first local service in Keeseville; indeed, there would be an improved service.

The Commission held that the Nassau Petition is superior to Hall's counterproposal because the Nassau Petition provides for a first local service to two communities whereas Hall's counterproposal only proposes a first local service to one community. To the extent that the Nassau Petition and Hall's counterproposal are mutually exclusive, the Commission further held that the Nassau Petition better serves the public interest because the community of Enfield is larger than the community of Morrisonville, making Enfield more deserving of a first local service, so that

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[4] *See Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, 21 FCC Rcd 5136 (Aud. Div. 2006) ("Report and Order").

[5] *Id.* at 5137.

[6] *Id.* at 5137-38.

[7] *Id.* at 5138.

instead of providing new service only to Morrisonville, the Nassau proposal is superior because it accomplishes both.[8]

On June 29, 2006, Hall filed its Application for Review ("Application"). In the Application, Hall challenged only the Commission's decision to change the community of license for Channel 231A from Keeseville to Morrisonville. Hall did not challenge the changes in the FM Table of Allotments for Enfield, White River Junction, Hartford and Keeseville or the Commission's factual determination that the larger community of Enfield is more entitled to a first local service than Morrisonville. Instead, Hall raised the same arguments in the Application that were rejected by the Commission in the Report and Order as to why Channel 231A should be retained in Keeseville.

I. Procedural Matters

A. The Report and Order is Final Except for Reallotment of Channel 231A

The Application seeks limited review of the Report and Order, objecting only to the reallotment of Channel 231A from Keeseville to Morrisonville. Nowhere does the Application challenge the determination in the Report and Order that the public interest is better served by the allotment of Channel 282A to Enfield as a first local service, the reallotment of Channel 282C3 from Hartford to Keeseville as a first local service, or the reallotment of Channel 237A from White River Junction to Hartford to retain first local service in Hartford. Nor does the Application challenge the factual conclusion that the community of Enfield is more deserving of a first local service than the community of Morrisonville, or seek the allotment of Channel 282C2 to Morrisonville. By its own terms, therefore, the Application is limited to the issue of whether Channel 231A should be allocated to Morrisonville from Keeseville.

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[8] *Id.* at 5138 (¶ 5).

The amendments to the FM Table of Allotments granted in the Report and Order but not associated with the Channel 231A reallotment matter are now final. The Report and Order was published in the Federal Register on May 31, 2006.[9] The deadline for filing a petition for reconsideration or application for review of the Report and Order was June 30, 2006. Hall timely filed its Application, which as noted, is limited to the reallotment of Channel 231A from Keeseville to Morrisonville.[10] Accordingly, the Report and Order is now final with respect to the amendment of the FM Table of Allotments for the communities of Enfield, White River Junction, Hartford and Keeseville. The only amendment to the FM Table of Allotments adopted in the Report and Order that is not final is the allotment of Channel 231A to Morrisonville.

B. The Allotment of Channel 231A to Keeseville or Morrisonville is Not Mutually Exclusive with the Remainder of the Report and Order

Even assuming *arguendo* that Hall is correct and the Report and Order mistakenly reallocated Channel 231A to Morrisonville, the retention of Channel 231A in Keeseville is not mutually exclusive with the remainder of the changes to the FM Table of Allotments adopted in the Report and Order. The allocation of Channel 231A to Keeseville is technically compatible with the amendments to the FM Table of Allotments adopted in the Report and Order for the communities of Enfield, White River Junction, Hartford and Keeseville, including the reallocation of Channel 282C3 to Keeseville. Regardless of whether Channel 231A is allocated to Keeseville or Morrisonville (although it is clearly preferable to serve both communities, as proposed by Nassau and adopted in the Report and Order), the allotment has no effect upon the remainder of the Report and Order, which is now a final decision.

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[9] 71 Fed. Reg. 30,827 (May 31, 2006).

[10] The deadline for the Commission to reconsider the Report and Order on its own motion was July 10, 2006. 47 C.F.R. § 1.117. But the Commission did not issue a decision reconsidering the Report and Order by that date.

Although, as noted below, Nassau's proposed allocation scheme better serves the public interest by bringing a first service to an additional community, even if the Commission were to retain Channel 231A in Keeseville, the public interest still supports the changes in the FM Table of Allotments for Enfield, White River Junction, Hartford and Keeseville. The previous arrangement of allotments that was changed by the Report and Order does not provide a first local service to the community of Enfield. The Nassau Petition proposed a first local service to Enfield, retention of a first local service to Hartford, a full Class A service to White River Junction, and either a first or second local service to Keeseville, depending upon whether Channel 231A is allocated to Keeseville or Morrisonville. The Nassau Petition, as accepted by the Report and Order, qualifies under priority 3 of the FM Priorities whereas the previous arrangement of allotments qualifies as priority 4. Accordingly, the Report and Order correctly concluded that the public interest was better served by the adoption of the Nassau Petition, including the reallocation of Channel 231A to Morrisonville.

II. The Report And Order Correctly Reallotted Channel 231A to Morrisonville

The Application misinterprets Commission policy for reallotting vacant FM Allotments. The Application cites the same cases as it did in the rulemaking for the proposition that the Commission will not delete an allotment when at least one party has expressed an interest in filing for and constructing facilities for that allotment. In fact, these cases are inapposite because the Commission declined to delete a vacant allotment because it would deprive a community of its first local service. In contrast, the Report and Order did not eliminate a proposed first local service from Keeseville; indeed, it provided a superior service. Hall does not cite any case where the Commission considered a rulemaking proponent's mere expression of interest in a vacant FM allotment a complete and absolute bar to reallocation of that allotment. If Commission policy was to consider a prior expression of interest by a rulemaking proponent as barring future reallocation of a vacant allotment, the Commission should have dismissed that portion of the Nassau Petition seeking

reallotment of Channel 231A as procedurally defective. However, the Commission has no such policy and issued an NPRM proposing to adopt the Nassau Petition.[11] The public interest is that of having transmission service, not in necessarily in having a particular party, in this case Hall, be the applicant for that service at Keeseville.[12]

Even if Hall's interest in the Channel 231A vacant FM Allotment constituted an expression of interest, that expression can be overcome if the public interest so warrants. In the cases cited by Hall, the Commission declined to reallocate a vacant FM allotment because the deletion would deprive a community of a first local service. The Nassau Petition not only provides a first local service to Keeseville but it also reallots Channel 231A to Morrisonville as its first local service. Furthermore, the public benefit of allocating a first local service to Enfield and Morrisonville is more than sufficient to overcome any expression of interest in the vacant FM Allotment in Keeseville.

An expression of interest in a vacant FM allotment does not preclude subsequent modification of the allotment. In *Bethel Springs, Martin, Tiptonville, Trenton and South Fulton, Tennessee*,[13] the successor case to the *Martin, Tiptonville and Trenton, Tennessee*[14] cited in the Application, the Commission downgraded a vacant FM allotment in Tiptonville from a Class C3 to a Class A facility. In *Martin I*, the rulemaking proponent proposed to downgrade the vacant allotment in Tiptonville in order to upgrade another allotment in Martin, a Priority 4 consideration. The Commission in *Martin*

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[11] By way of comparison, when a rulemaking petition proposes the deletion of a vacant allotment (instead of reallotment), Commission policy is to retain the allotment if there is a valid expression of interest filed during the comment period, and the Commission specifically solicits such an expression of interest in the Notice of Proposed Rulemaking proceeding. *See Culebra, Puerto Rico*, 19 FCC Rcd 15389 (Aud. Div. 2004). A similar policy does not exist for reallotment of a vacant FM channel.

[12] See, e.g., *City of Angels Broadcasting, Inc. v FCC*, 745 F.2d 656 (D.C. Cir. 1984) which denied an untimely filed motion to intervene in a television renewal proceeding. The Court affirmed the Commission's decision to apply the cut-off rule to advance administrative finality and protect timely filed applicants from "opportunistic late-comers." The decision confirms, by analogy, that an individual potential applicant's rights are, at times, subordinate to the public interest of providing service to the public.

[13] 17 FCC Rcd 14472 (Aud. Div. 2002) ("*Martin II*").

[14] 13 FCC Rcd 17767 (Aud. Div. 1998), *recon. denied*, 15 FCC Rcd 12747 (Aud. Div. 2000) ("*Martin I*").

I denied the proposal, holding that the public interest in retaining the vacant allotment in Tiptonville outweighed upgrading an existing allotment in Martin. In *Martin II*, the same rulemaking proponent filed the same rulemaking proposal, but with one notable difference: the new petition not only would upgrade the allotment in Martin, but would change the community of license for the allotment from Martin to Fulton, which did not have a first local service.

The Commission in *Martin II* approved the proposal to downgrade the vacant allotment in Tiptonville, because the public interest benefit of providing a first local service to Fulton outweighed downgrading the vacant allotment.[15] The Commission stated that the provision of a first local service triggered one of the higher FM allotment priorities while not depriving Tiptonville of a first local service.[16] The Commission further held that the downgrade was in the public interest because the vacant allotment would not result in the loss of any actual service.[17] Finally, the Commission held that even if official notice was taken of *Martin I* as the functional equivalent of an expression of interest in retaining a Class C3 channel in Tiptonville, the aforementioned public interest benefit of a new first local service outweighed that expression of interest.[18]

The Application mistakenly cites *Culebra and Vieques, Puerto Rico*, MB Docket No. 04-318, DA 06-1308 (Audio Division) (released June 23, 2006) and *Letter dated May 19, 2006 from John A. Karousos, Assistant Chief, Audio Division to A. Wray Fitch III, Esq. ("KREO")* for the proposition that the reallotment of Channel 231A from Keeseville violates the Commission's policy. In *Culebra*, the FCC denied the deletion of a vacant FM allotment because the allotment would eliminate a vacant allotment from the community of Vieques in favor of an existing radio station (Priority 4). In *KREO*, the Commission denied a rulemaking petition that proposed to modify the FM Table of Allotments to allow KREO(FM) to operate on a vacant FM allotment (also Priority 4). In denying

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[15] *Id.* at 14476.
[16] *Id.*
[17] *Id.*

the petition, the Commission stated that the Commission's rules do not allow rulemaking proponents to modify station licenses to specify vacant FM allotments that will be auctioned at a later date. The Application concedes that the Report and Order does not propose the use of Channel 231A for an existing FM radio broadcast station. The Report and Order proposes reallotment of Channel 231A for a first local service, Priority 3. *KREO* therefore does not support the proposition that the Commission's policies prohibit the reallotment of a vacant FM allotment, if the reallotment serves the public interest.

Conclusion

The Report and Order correctly determined that (1) the Nassau Petition serves the public interest by providing two first local services and (2) the reallotment of Channel 231A from Keeseville to Morrisonville complies with the Commission's procedures because the reallotment will not deprive Keeseville of a first local service. Accordingly, Hall's professed interest in the allotment of Channel 231A to Keeseville is not a prohibition to the reallocation of Channel 231A to Morrisonville.

Even if the Application is correct, the retention of Channel 231A in Keeseville does not nullify the remaining changes to the FM Table of Allotments adopted in the Report and Order. The Application does not challenge the Report and Order aside from the reallotment of Channel 231A, and the allotment of Channel 231A to either Keeseville or Morrisonville is not mutually exclusive with the remainder of the Report and Order. So even if the Commission should decide to grant the Application and reverse the Report and Order with regard to the reallotment of Channel 231A, the remainder of the Report and Order would remain in full force and effect.

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[18] *Id.*

WHEREFORE, for the foregoing reasons, Nassau Broadcasting III, L.L.C. hereby requests that the FCC deny the Application for Review filed by Hall Communications, Inc.

Respectfully submitted,

NASSAU BROADCASTING III, L.L.C.

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Dated: July 14, 2006

CERTIFICATE OF SERVICE

I, Lisa Ealley, an assistant in the law firm of Patton Boggs LLP, Washington, D.C., hereby certify that on the 14th day of July, 2006, a copy of the foregoing **"Opposition to Application for Review"** is being sent via electronic mail, to the following:

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