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Federal Communications Commission
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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 05-295
Table of Allotments,)
FM Broadcast Stations) RM-11280
(Cumberland, Kentucky;)
Weber City, Glade Spring and)
Marion, Virginia))

TO: Honorable Marlene H. Dortch
Secretary of the Commission

ATTN: Assistant Chief, Audio Division, Media Bureau

PETITION FOR RECONSIDERATION

JBL Broadcasting, Inc., licensee of FM Broadcast Station WVEK-FM, Cumberland, Kentucky (JBL), and pursuant to Section 405 of the Communications Act of 1934, as amended and Sections 1.429(c) and 1.4(b) of the Commission's Rules, hereby respectfully submits this Petition for Reconsideration of the **Report and Order**, DA 06-1230, released June 9, 2006 in the above-entitled proceeding denying JBL's proposal for rulemaking. For the reasons stated herein, JBL calls for the Media Bureau to vacate DA 06-1230 and instead grant JBL's proposal to amend the FM Table of Allotments, 47 CFR §73.202(b), as follows:

no. of Copies rec'd 044
List ABCDE

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Cumberland, KY	274A	None
Glade Spring, VA	274A	263A
Marion, VA	230C, 263A, 278A	230C, 273A, 278A
Weber City, VA	None	274C3

In support whereof, the following is shown:

Timeliness

1. Under the special rules governing "notice and comment rulemaking" proceedings, 47 CFR §1.429 and 1.4, the 30 day time period for reconsideration starts only upon publication of a summary of the relevant order in the **Federal Register**. In the instant case, Federal Register publication did not take place until Wednesday, June 28, 2006, 71 FR 36741-02, 2006 WL 1747004 (the Westlaw edition of the publication is attached hereto as Exhibit A). As this pleading is filed on the 30th day subsequent to Federal Register publication, it is timely filed.

Reason Given for Denial

2. JBL's proposal to relocate Channel 274 from Cumberland, Kentucky to Weber City, Virginia depends upon WOLD-FM, Marion, Virginia remaining on its present Channel

273A, which would permit a new FM allotment at Glade Spring, Virginia originally specified on Channel 274A in MM Docket No. 99-244 to operate on Channel 263A; in MM Docket No. 99-244, WOLD-FM's channel number was changed from Channel 273A to Channel 263A to accommodate the use of Channel 274A at Glade Spring.

3. All JBL asked for was for the Commission to preserve the *status quo*, which would serve the public interest in avoiding confusion caused by operating stations changing channels.

4. However, the Audio Division staff determined that (1) two of the four mutually-exclusive applications pending since 1997 for Channel 273A at Shawsville, Virginia are short-spaced to the operation of WOLD-FM at Marion on Channel 273A (although both of them have requested Section 73.215 processing), (2) WOLD-FM does not have a license to operate on Channel 273A, but rather has an "implied special temporary authority", (3) Commission case law in the area of one-step FM applications indicates that a license is automatically modified to a new channel, citing **1998 Biennial Regulatory Review, Notice of Proposed Rulemaking**, 13 FCC Rcd 14849, 14855 n. 22 (1998), and (4) the FCC will apply the law of "one-step applications" to this case, even though WOLD-FM is not a "one-step applicant". Therefore,

the Commission no longer considers the George S. Flinn, Jr. and Grace Communications, L.C. applications at Shawsville as Section 73.215 applications, and because returning WOLD-FM to Channel 273A (even though it operates there presently) would create a short-spacing to these two applications, JBL's rulemaking proposal must be summarily rejected.

Argument

5. The foregoing rationale is arbitrary, capricious and irrational in violation of 5 U.S.C. §706(2)(A) and violates the Congressional mandate of Section 307(b) that the FCC effectuate the most efficient use of the broadcast spectrum possible.

6. At the outset, we are constrained to point out Section 316 of the Communications Act of 1934, as amended, is still on the books, and still protects licensees such as WOLD-FM:

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

7. The rationale applicable to "one step" applicants is not applicable to third-parties caught up in rulemaking proceedings, such as WOLD-FM. This is because the licensee of an affected station initiates a "one-step" proceeding, and therefore can be said to consent to the modification of its license, because it asked for it. This is not the case with a third-party, such as WOLD-FM in MM Docket No. 99-244.

8. A review of the **Report and Order in MM Docket No. 99-244**, 16 FCC Rcd 19431 (2001) fails to reveal that the Commission actually modified the license of WOLD-FM. Certainly, the Commission changed the channel number of WOLD-FM to Channel 263A; however, the Commission failed to modify the license of WOLD-FM.

9. Therefore, WOLD-FM has a Section 316 right, not an "implied special temporary authorization" (subject to revocation), to continue to operate on Channel 273A, and to be protected from short-spaced allocations. Since this is so, the Flinn and Grace applications at Shawsville must still be considered as Section 73.215 applications that have consented to be short-spaced to WOLD-FM. Since this is the case, WOLD-FM can remain on Channel 273A. This will have the triple positive results of (1) allowing the relocation and upgrade of JBL's WVEK-FM, (2) eliminating confusion among the listening public in Marion and Wythe County,

Virginia that would be caused were WOLD-FM to move to another channel, and (3) saving the small businessman who has acquired the right to build a station at Glade Spring the expense of having to pay WOLD-FM to relocate to Channel 273A.

10. The Audio Division cited footnote 22 of a 1998 Notice of Proposed Rulemaking as sole support for its decision in this case. That footnote states:

We take this opportunity to clarify the consequences of the grant of a one-step FM commercial station application to change channel or station class. Such a grant amends the table of allotments and modifies that station license to operate on the new channel and/or class. See **Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, Report and Order, 8 FCC Rcd 4735 (1993)**. During the construction permit period, the licensee may continue to operate the previously authorized facilities on an interim or "implied Special Temporary Authority" basis. However, in contrast to our treatment of routine minor modification applications under **Section 73.208**, the formerly authorized facilities are no longer protected from subsequently filed applications. If the permittee fails to timely construct and lets its permit lapse, the permittee is not relieved of the obligation to change to the channel and class specified in the amended Table of Allotments. A new one-step application revising the prior modification would be required in order to return to the former allotment. This filing would be subject to the first-come, first-served processing rule for minor modifications.

11. By its terms, the foregoing refers only to "one-step applications". It does not apply to other situations, such as WOLD-FM's situation in the instant case. Were the Commission of a mind to have wanted to expand the "one-step clarification" to situations such as WOLD-FM, it would have

been obligated to have conducted a notice and comment rulemaking proceeding.

12. The FCC failed to do so, and has failed to put the public on notice that it has formally modified the WOLD-FM license. Since this is so, it is both unfortunate and contrary to law for the Commission to deny a proposal which has such positive public interest benefits because it violates a policy which does not apply to the case at bar.

13. Our understanding of decades-old interpretations of Section 316 of the Communications Act is that, when a station is to change channels, it has licensed protection on its existing channel until it is granted a covering license on its new channel. See, e.g., **A.V. Bamford**, 32 FCC 2d 912, n.6 (1972) (discussing KRVN(AM), Lexington, Nebraska's right to licensed protection on its original channel, 1010 kHz, while it prosecuted a covering license on its new channel, 880 kHz, vis a vis new station applications). See also **Southern Keswick, Inc.**, 34 FCC 2d 624 (1972), which held that the grant of a major change application to permit a broadcast station on a non-mutually exclusive channel did not create two licenses. This case is consistent with the principle that a broadcast licensee changing channels enjoys Section 316 licensed protection on its existing channel until it is licensed on its new channel. There has never been any change in this policy either enacted by Congress or

promulgated pursuant to the Administrative Procedure Act relative to third-parties in channel allotment cases such as WOLD-FM.

14. This is why the appellate precedent in ***Beloit Broadcasting, Inc. v. FCC***, 365 F.2d 962 (D. C. Cir. 1966) redounds in favor of JBL and provides legal support for the Commission to grant JBL's rulemaking proposal. The circuit court wrote in pertinent part (365 F.2d at 963):

The scope of WBEL's license was determined by the conditions under which it accepted the license¹; ^{FNB} revocation of the St. Louis license on that frequency did not expand the scope of WBEL's license and thus give a valid basis for argument that replacement of the original licensee with RTEI was a modification.

The record is adequate to sustain the Commission's finding that decision on the permanent allocation of channel 1380 would not be affected significantly by a continuation of the existing service. The Commission could reasonably believe that maintaining the status quo was less likely to affect this decision than was a change in the operation of 1380 kc which would create new broadcasting services.

In the instant case, the Grace and Flinn applications at Shawsville requested Section 73.215 processing to protect WOLD-FM. Their rights as applicants have not been expanded unless and until WOLD-FM receives a covering license on its new channel—WOLD-FM has Section 316 rights on its existing channel.

Other Matters

¹(footnote 8: *Capitol Broadcasting Co. v. FCC*, 116 U.S.App.D.C. 370, 324 F.2d 402 (1963))

13. Grace Communications, L.C. has agreed to amend its application to specify a "fully-spaced" site should reconsideration be granted and Channel 273A confirmed as remaining at Marion, Virginia; a letter to this effect is attached hereto as Exhibit B. Talks between the undersigned and counsel for George S. Flinn, Jr. are ongoing.

Conclusion

14. WOLD-FM has a statutory right to licensed protection of its current operation on Channel 273A at Marion, Virginia. It has never been a "one-step applicant", and the policies that apply to such applicants do not apply to WOLD-FM. Because of this statutory protection, the Commission can continue to treat the Grace and Flinn applications on Channel 273A at Shawsville, Virginia as 47 CFR §73.215 applications, which therefore would not be considered in determining whether JBL's proposal is consistent with all stations, allocations and applications. It is therefore arbitrary, capricious and contrary to law to deny the JBL "Petition for Rulemaking", in violation of 5 U.S.C. §706(2)(A).

15. A grant of JBL's rulemaking proposal would have three significant public interest benefits: (1) allowing the relocation and upgrade of JBL's WVEK-FM, (2) eliminating confusion among the listening public in Marion and Wythe County, Virginia that would be caused were WOLD-FM to move

to another channel, and (3) saving the small businessman who has acquired the right to build a station at Glade Spring the expense of having to pay WOLD-FM to relocate to Channel 273A.

WHEREFORE, JBL Broadcasting, Inc. urges that its Petition for Rulemaking **BE GRANTED**, that Channel 274 **BE REALLOTTED** from Cumberland, Kentucky to Weber City, Virginia and upgraded to Class C3 status, and that the changes to the FM Table of Allotments at Glade Spring and Marion, Virginia proposed herein **BE ALLOWED**.

Respectfully submitted,

JBL BROADCASTING, INC.

By


Dennis J. Kelly
Its Attorney

LAW OFFICE OF DENNIS J. KELLY
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July 28, 2006

EXHIBIT A

PROPOSED RULES

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06-1230; MB Docket No. 05-295; RM-11280]

Radio Broadcasting Services; Cumberland, KY; Glade Spring, Marion, and Weber
City, VA

Wednesday, June 28, 2006

AGENCY: Federal Communications Commission.

*36741 ACTION: Proposed rule; denial.

SUMMARY: The staff denied a petition for rulemaking filed by JBL Broadcasting, Inc. to upgrade, reallocate, and change the community of license its Station WVEK-FM, from Channel 274A, Cumberland, Kentucky, to Channel 274C3, Weber City, Virginia, because one of the required channel changes to accommodate this proposal is short-spaced in violation of Section 73.207(a) of the Commission's rules. With this action, the proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418- 2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 05-295, adopted June 7, 2006 and released June 9, 2006. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY-A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the *36742 Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20054, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>.

This rulemaking petition was proposed in a Notice of Proposed Rule Making and Order to Show Cause. See 70 FR 70777, November 11, 2005. To accommodate the upgrade and reallocation of Station WVEK-FM to Weber City, it also proposed (1) the substitution of Channel 263A for then vacant Channel 274A at Glade, Spring, VA; and (2) the substitution of Channel 273A for Channel 263A at Marion, VA, and the modification of Station WOLD-FM's license accordingly. The rulemaking petition was denied because the proposed allotment of Channel 273A at Marion, Virginia is 6.6 and 0.6 kilometers short-spaced to two mutually exclusive applications for a new FM station on Channel 273A at Shawsville, Virginia.

This document is not subject to the Congressional Review Act. (The Commission, is,

therefore, not required to submit a copy of this Report and Order to GAO, pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A) because the proposed rule was denied.)

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E6-10008 Filed 6-27-06; 8:45 am]

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71 FR 36741-02, 2006 WL 1747004 (F.R.)
END OF DOCUMENT

EXHIBIT B

July 28, 2006

Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
Washington, DC 20554

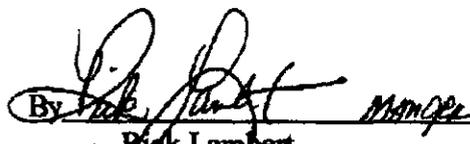
RE: MM Docket No. 05-295

Dear Madame Secretary:

This will confirm that, should the rulemaking proposal in MM Docket No. 05-295 be granted on reconsideration, Grace Communications, L.C. hereby commits to amend its application for a construction permit for a new FM Broadcast Station on Channel 273A at Shawsville, Virginia, File No. BPH-19971023ME, to specify a transmitter site which would be fully-spaced to the operation of WOLD-FM on Channel 273A at Marion, Virginia. We would file such an amendment within 30 days of the date upon which the changes to the FM Table of Allocations proposed in MM Docket No. 05-295 become effective.

Respectfully submitted,

GRACE COMMUNICATIONS, L.C.

By  Manager
Rick Lambert
Manager and Member

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Petition for Reconsideration" was served by first-class United States mail, postage prepaid, on this 28th day of July, 2006 upon each of the following:

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