

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

In the Matter of	)	
	)	
Revision of Procedures Governing Amendment	)	MB Docket No. 05-210
to FM Table of Allotments And Changes of	)	RM-10960
Community of License in the Radio Broadcast	)	
Services	)	

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To: Office of the Secretary – The Commission

**PETITION FOR RECONSIDERATION  
AND  
REQUEST FOR CLARIFICATION**

SIMMONS MEDIA GROUP  
CITADEL BROADCASTING  
CORPORATION  
HUNT BROADCASTING, INC.  
ON-AIR FAMILY, LLC  
SMOKE AND MIRRORS, LLC  
MAD DOG WIRELESS, INC.  
HOLLADAY BROADCASTING OF  
LOUISIANA, LLC  
SCOTT COMMUNICATIONS, INC.  
CHARLES M. ANDERSON & ASSOCIATES  
SPANISH PEAKS BROADCASTING, INC.  
MARATHON MEDIA GROUP, LLC  
CHATTERBOX, INC.  
MINORITY MEDIA AND  
TELECOMMUNICATIONS COUNCIL  
CONTOURS, INC

POWELL MEREDITH COMMUNICATIONS  
CO.  
RADIO LAYNE, LLC  
AUBURN NETWORK, INC.  
DOT COM PLUS, LLC  
BRANTLEY BROADCAST ASSOCIATES,  
LLC  
GREAT SOUTH RFDC, LLC  
GRAHAM BROCK, INC.  
RADIO ONE, INC.  
BLUE CHIP BROADCASTING LICENSES,  
LTD.  
MULLANEY ENGINEERING, INC.  
REYNOLDS TECHNICAL ASSOCIATES,  
LLC  
PALMETTO RADIO GROUP  
COLORADIO, INC

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January 19, 2007

Their Attorneys

## SUMMARY

The Parties, a group of twenty-three primarily small group broadcasters with stations in smaller markets, request the Commission reconsider a key aspect of its Order that streamlines the process whereby existing AM and FM stations can change their community of license and modify their facilities. The significant public interest benefits offered by the new procedures are substantially abrogated by the decision to limit the number of related changes that such proposals can involve. In capping the number of such related changes at 4, the Commission has undermined, if not virtually eliminated, the potential for increased competition in larger markets, the prospect for improved service in rural areas and small markets, the opportunities for improved and expanded service by existing stations, particularly in smaller markets, as well as first local services and new reception service in both urban and rural communities – all in the name of avoiding the unfounded expectation of a flood of overly complex proposals. Historically, the number of proposals involving more than 4 station changes have averaged only about that 5 per year, making this an unnecessary concern.

The Commission has never imposed a limit on the number of stations involved in rule making proceedings. Yet, in streamlining its rule making procedure and combining it into a one step minor modification application process, it has cavalierly imposed a draconian 4-station limit. The Parties submit that by failing to retain the singular hallmark of the rule making process – the flexibility to make unlimited changes that capitalize on the dynamic flexibility of the FM spectrum, which allows a shift in one place to open up opportunities for changes and improvements in another -- the Commission may have fatally undermined the potential public interest benefits otherwise provided by the changes. The Commission should reconsider this unexpected consequence of its Order and adopt, at most, a wait-and-see approach. In short, it

should leave the imposition of limits to a later time, in the event the agency's resources are taxed beyond its ability to implement the time-saving efficiencies inherent in the new procedures.

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REQUEST FOR CLARIFICATION**

Simmons Media Group; Citadel Broadcasting Corp.; Hunt Broadcasting Inc.; On- Air Family LLC; Smoke and Mirrors, LLC; Mad Dog Wireless, Inc.; Holladay Broadcasting of Louisiana, LLC; Scott Communications, Inc.; Charles M. Anderson & Associates; Spanish Peaks Broadcasting, Inc.; Marathon Media Group, LLC; Minority Media and Telecommunications Council, Palmetto Radio Group, Contours, Inc, Coloradio, Inc, Chatterbox, Inc.; Powell Meredith Communications Co.; Brantley Broadcast Associates, LLC; Great South RFDC, LLC; Graham Brock, Inc.; Radio One, Inc.; Blue Chip Broadcasting Licenses Ltd.; Radio Layne, LLC; Auburn Network, Inc.; Dot Com Plus, LLC; Mullaney Engineering, Inc. and Reynolds Technical Associates, LLC (“the Parties”), by their counsel and pursuant to Section 1.429 of the Commission’s Rules, submit this Petition for Reconsideration and Request for Clarification to the *Report and Order* (“R&O”) 71 Fed. Reg. 76208 (2006) in this proceeding.<sup>1</sup> The *R&O* made several beneficial changes to the process whereby existing AM and FM stations

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<sup>1</sup> The Parties is a diverse group of broadcasters, both large and small, as well as minority-owned broadcasters, many of them with stations in smaller, rural markets.

can change their community of license and new FM channel allotments are established. However, for the first time, the Commission imposed a limit on the number of FM stations that can be involved in what was formerly a rule making proceeding. This limit was adopted (1) inconsistent with the mandate of Section 307(b) of the Communications Act of 1934, as amended; (2) in complete disregard of the views expressed by most commenters; and (3) without adequate justification. The Parties strongly urge the Commission to reconsider the imposition of a limit on the number of FM stations involved in what was formerly a rule making procedure and is now a one step minor change application process.

### **BACKGROUND**

1. The *Notice of Proposed Rule Making* (“*NPRM*”), 20 FCC Rcd 11169 (2005) (“*NPRM*”) in this proceeding specifically requested comments on whether the existing limit on contingent applications filed pursuant to Section 73.3517 (c) and (e) should be increased -- “should the contingent application rule be modified in order to allow more contingent applications to be filed simultaneously?”<sup>2</sup>

2. In contrast, the Commission proposed, *sua sponte*, to limit to five (5) the number of allotment proposals that may be submitted in a rule making proposal. The reason given for this proposed limit was to avoid complex proposals “enabling the staff to more effectively process them.”<sup>3</sup> The comments were overwhelmingly in support of imposing no limit on the number of stations that could participate in a proposal under Section 307(b).

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<sup>2</sup> *NPRM* at ¶ 28.

<sup>3</sup> *Id.* at ¶ 37.

## THE COMMENTS

3. Minority Media and Telecommunications Council (“MMTC”) stated that it was opposed to a limit on the number of station changes that may be proposed. MMTC noted that in the top 30 markets it is difficult or impossible to move a station into the market unless more than five station facilities are modified. By allowing such moves, competition in the larger markets could be created.<sup>4</sup> National Association of Broadcasters (“NAB”) also opposed the limit stating that “[a]lthough NAB is sympathetic to the burden on Commission staff reviewing long chains of proposed channel changes, limiting the number of proposed changes in uncontested petitions to five (or any other number) may unintentionally limit significant public interest benefits, including enabling multiple broadcasters to improve service in their current communities, or expand service to reach a larger audience, or perhaps bring a first local transmission service to a new community.”<sup>5</sup>

4. First Broadcasting Investment Partners, LLC opposed the imposition of the limit stating that the shift of community of license proposals to the application stage as a minor modification was not designed to “alter existing Section 307 (b) – related rules or policies. . . . Because the Minor Mod Approach is a procedural, and not substantive, change, there is no reason to believe that the Commission’s current rules and policies will be insufficient to ensure a proper distribution of stations under Section 307(b).”<sup>6</sup> Cox Radio Inc. states that imposing a limit would be unwise due to the public interest benefits that multi-station proposals can

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<sup>4</sup> See Comments of the Minority Media and Telecommunications Council at n.31.

<sup>5</sup> See Comments of National Association of Broadcasters at 4.

<sup>6</sup> See Comments of First Broadcasting Investment Partners, LLC at 6.

provide.<sup>7</sup> Keymarket Licenses, LLC, et al. also opposes the limit as inimical to the public interest when it could allow stations to maximize their facilities.<sup>8</sup>

5. American Media Services, LLC, et al. (“AMS”) argues that “the Commission’s interest in administrative convenience of easier proceedings and lighter workloads can not take precedence over the statutory requirement that it manage and regulate spectrum to create fair, efficient and equitable distribution of radio services.”<sup>9</sup> At p. 10. AMS goes on to state that “given the statutory commands imposed by Section 307(b), the Commission must provide hard evidence before imposing the limitations proposed or any like them.... In the absence of evidence to support its chosen level of limitation and to demonstrate the limitation proposed comports with the mandates of, and furthers the goals of Section 307(b), the Commission may not impose them, or its actions would be arbitrary and capricious, as well as contrary to law.”<sup>10</sup> Brantley Broadcast Associates (“BBA”) notes that large proposals create many opportunities in rural areas and small markets as a result of the various station moves.<sup>11</sup> BBA also points to the great respect that the broadcast community has for the spectrum and that creativity would be encouraged by not limiting the number of stations involved in a filing.<sup>12</sup>

6. Finally, Apex Broadcasting, Inc. et al. observed that if the Commission decides to eliminate the rule making process for existing stations, it is important that it not place a limit on

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<sup>7</sup> See Comments of Cox Radio, Inc. at 4.

<sup>8</sup> See Comments of Keymarket Licenses, LLC et al. at 2, 7-8.

<sup>9</sup> See Comments of American Media Services, LLC et al. at 10.

<sup>10</sup> *Id.* at 11. Similar comments were filed by Friendship Broadcasting, LLC, Mullaney Engineering, Inc., duTreil, Lundin & Rackley, Inc., and Graham Brock, Inc.

<sup>11</sup> See Comments of Brantley Broadcast Associates, LLC at 15.

<sup>12</sup> *Id.*

the number of proposed changes that could be made in the contingent application process. In this regard, Apex et al. stated, “the Commission cannot simply turn away beneficial proposals because they are too ‘complex.’ Doing so would elevate the Commission’s interest over the public interest. Moreover, even if ‘complexity’ were a valid concern, the connection between the number of changes proposed and the ‘complexity’ of the rule making proceeding is far from clear.”<sup>13</sup> Apex et al. submitted an analysis of the proposals filed from 2000 to mid-2005 and discovered that over this period an average of only 3.3% or (17 out of 507 proposals) of the Commission’s decisions contained over four changes to the FM Table. On the other hand, these proposals brought numerous first local services and new reception service to millions of listeners in many urban and rural communities that would never have been able to receive these services otherwise. Apex et al. noted that the reason originally given for the limit of four applications in Section 73.3517 was simply that it was a way for the Commission to gain experience with the contingent application process. After approximately seven years of experience, there is no indication and certainly no discussion in the *R&O* to suggest that the processing of such applications has been overly burdensome to the Commission’s resources. The Apex group viewed the limit on the number of stations involved in a proposal as a substantive change and the Commission emphasized that it was not considering any substantive changes in this proceeding.

7. On the other hand, the few opponents that offered opposing comments focused solely on the burdens on Commission staff. *See* Comments of Clear Channel Communications, Inc. (this position was reversed in Reply Comments) and Entercom Communications Corp.

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<sup>13</sup> *See* Comments of Apex Broadcasting, Inc. et al. (“*Apex Comments*”) at 6.

8. Despite these comments, it appears that the Commission has shifted all of the substantive rule making policies to the application process except it has now imposed a limit of four stations that can participate in the new one-step process. Ostensibly the Commission believed that these comments pertained to what is left of the rule making process, *i.e.*, the allotment of new channels, substitution of vacant channels and non-adjacent upgrades and downgrades. Yet the Commission has never been faced with multiple contingent new allotments, vacant channel substitutions or non-adequate upgrades or downgrades and certainly not in excess of five such proposals.

9. The Commission seems to have completely misunderstood and misapplied these comments when it shifted the rule making process to the application stage. It should have been abundantly clear that the comments in support of not placing a limit on the number of related proposals were directed to the process by which existing stations modify their facilities or community of license. In adopting a one-step process, differences between the allocations policies and the application policies were retained in several contexts. In the allotment process, for example, there must be a set of coordinates that complies with Section 73.207 of the Commission's Rules and the proposed 70 dBu contour from those coordinates must cover 100% of the community. At the application stage, the proposed coordinates are not required to be consistent with Section 73.207 as long as they comply with Section 73.215. The principal community coverage can be 80%. The new one-step application process maintains the differences in all these policies. However, now there is a limit on the number of stations that can participate in one group of related and simultaneously filed minor change applications. The Parties would like to believe that this limit was inadvertent and an unintended consequence -- an

artifact of the application process not intentionally applied to the streamlined one-step allocation procedures adopted in this proceeding. There is no discussion in the *R&O* that would cause the Parties to conclude otherwise. For that reason, the Parties are asking the Commission to clarify that the limit of four contingent applications set forth in Section 73.3517 does not apply to the substantive allocation policies that have been retained under the new processing rules. If, on the other hand, the Commission meant to impose, for the first time, a limit on the number of stations that can participate, the Parties ask that the Commission reconsider. As detailed below, the reasons for doing so are numerous and compelling.

### **PUBLIC INTEREST BENEFITS**

10. As the *NPRM* recites, the FM Table of Allotments was adopted in 1963. The last major revision to the FM allotment policies took place in 1982.<sup>14</sup> As a result, the Commission entertained large numbers of allotment proposals which were designed to improve existing station facilities or create new FM stations in accordance with new spacing rules and new policies adopted in those proceedings. In both cases, there were long freezes on the filing of proposals prior to the effective date of the new rules and a large number of new filings were expected. Yet no limits were imposed. Although the availability of FM spectrum space was vastly different in 1963 and 1982, the goals of Section 307(b) to distribute frequencies among the various states and communities in a fair, efficient, and equitable manner has not changed today. If anything, the challenges of achieving the goal of providing a first local service to as many communities as possible is more difficult today. The FM band is very congested in the more populated areas. Although the FM priorities created in 1982 have been very successful in

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<sup>14</sup> *NPRM* at p.11171.

providing first local services to many communities, there are still a large number of communities waiting for the opportunity to obtain their own local service.

11. The streamlined process adopted in this proceeding will indeed assist many stations in improving their signals, offer competition and provide local service to new communities. However there are also many situations where stations had plans to provide similar beneficial results but will not be able to do so as a result of the unexpected limit that has been imposed. It is virtually impossible for stations in many areas of the country to make improvements without including more than three other stations. As a result, there are many deserving communities in these areas that will never obtain local service. It is important to recognize in this regard that while the more congested areas have many signals, the FM spectrum is dynamic. As such, every time a station moves its site in a certain direction or changes channels, there are one or more stations on the co-channel or adjacent channels that can benefit. These benefits often occur in the more rural areas and can make a difference to listeners in those areas and to the stations that reach more people thereby. There are many instances where rule making proposals involved more than four stations and produced benefits for other stations that were either involved in the proceeding or able to take advantage of the spectrum space made available as a result. In fact, the more stations involved in a proposal the greater the potential for the more rural stations and rural area listeners to benefit. This benefit is of paramount importance to those entities, including many among the Parties, that operate stations in smaller and more rural markets. But those benefits have been eliminated as another unintended consequence of the newly imposed limit on new proposals.

12. The Commission also has an opportunity to permit the entrance of new competitors in many markets by allowing stations to propose city of license changes which include more than four stations. But, as discussed, it is virtually impossible in these markets to introduce a new station unless the proposal involves more than four stations. For the most part the large group broadcasters already have stations that are centrally located. Thus it is more likely that the smaller station owner would be the one applying for a move into a larger market. The Commission has the opportunity to create competition and diversity of ownership in these markets by entertaining proposals that involve multiple station participants. The new limit serves to discourage creative proposals and the resulting introduction of first local service and new competition.

13. The Commission should not be so cavalier about the elimination of these public interest benefits. There is no discussion in the *R&O* of the reason for this newly imposed limit. The only justification for imposing a limit is found in the *NPRM* where the Commission described these proposals as being burdensome on Commission staff. Needless to say, there are many other types of filings that are burdensome such as complex transactions (the recent AT&T/Bell South merger comes to mind), hearings or generic rule makings. Yet there is no effort to ease the burden of Commission staff by imposing a limit on other types of filings. How does the Commission justify the limit when the process involves Section 307(b) proposals, first local service and competition in the larger markets? The Commission suggests that perhaps the filings can be broken down into groups of four. It is not clear to the Parties how a proposal that requires more than four stations to change facilities can be broken down into smaller sections.

14. The discussion thus far has been limited to the FM band. It is noteworthy that there is no limit on the number of AM stations that can be filed as contingent applications pursuant to Section 73.3517. Subsection (c) states “the Commission will accept two or more applications filed by existing AM licensees for modification of facilities that are contingent ....if granting such contingent applications will reduce interference to one or more AM stations or will otherwise increase the area of interference-free service.” (The ability to show interference reduction or increase in interference free service is not a big hurdle.) It is indisputable that the typical AM application is more complicated to process than the typical FM application. Yet the Commission did not see fit to limit the filing of AM contingent applications. It is true that the filing of multiple contingent AM applications are more infrequent. However, that is a result of the fact that the previous window filing process for AM stations to change city of license did not lend itself to such filings. Now that AM stations can change community of license in a minor change application, the likelihood of multiple station filings is increased.

15. Finally, the Commission made no effort to justify the limit based on the number of such filings per year. One group of commenters demonstrated that the number of proposals that exceed four stations is only about five per year or 3.3% of all of the proposals filed over the four and a half year period of time studied.<sup>15</sup> There is no basis to expect a significantly larger number of such filings due to the procedural changes adopted.

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<sup>15</sup> See *Apex Comments* at 7.

## **CONCLUSION**

16. The Commission's most fundamental responsibility is to distribute the available frequencies fairly, effectively and efficiently. The Commission has always taken this mandate seriously and resisted placing barriers in the way of providing new and improved service. However, the Commission has finally succumbed to the unfounded fear of numerous filings of multiple contingent applications. The commenters have convincingly argued that there are many public interest benefits to be achieved by having no limit and that there should not be many such filings. The Commission has failed to offer any countervailing harms. The Parties urge the Commission to reconsider.

Respectfully submitted,

Simmons Media Group  
Citadel Broadcasting Corporation  
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Mad Dog Wireless, Inc.  
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Council  
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Contours, Inc  
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Dated: January 19, 2007