

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

FILED/ACCEPTED

FEB 23 2007

In the Matter of

Federal Communications Commission
 Office of the Secretary

Amendment of Section 73.202(b))	
Table of Allotments)	MB Docket No. 02-167
FM Broadcast Stations)	RM - 10479
(Eldorado, Mason, Mertzon,)	RM - 10770
and Fort Stockton, Texas))	
)	

To: Office of the Secretary
 Attn: The Commission

APPLICATION FOR REVIEW

Bryan A. King ("King"), licensee of Station KOTY(FM), Mason, Texas, by its counsel and pursuant to Section 1.115 of the Commission's Rules, hereby seeks review of the *Memorandum Opinion and Order* in the above captioned proceeding.¹ The Media Bureau's decision reverses established Commission policy and over 15 years of case law without a reasoned decision. That policy, which was established in *Greenup*,² holds that the Commission will consider actual service and potential service when determining service to gain/loss areas.³ However, in the *Eldorado MO&O* the Bureau held that some, but not all, potential services can no longer be used in this calculation. This decision, combined with the Bureau's earlier decision

¹ See *Eldorado, Mason, Mertzon, and Fort Stockton, Texas, Memorandum Opinion and Order*, 22 FCC Rcd 280 (Med. Bur. 2007) ("*Eldorado MO&O*"). A summary of the *Eldorado MO&O* was published in the Federal Register on January 24, 2007. 72 Fed. Reg. 3080. Accordingly, this Application for Review is timely. See 47 C.F.R. § 1.115(d). Also, King notes that the docket number in the *Eldorado MO&O* was incorrect.

² *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991) ("*Greenup*").

³ When a radio station modifies its facilities it creates a new service footprint (designated by a circle). Part of this new footprint contains an area that was not part of the old service footprint. This is the gain area. Similarly, part of the old service footprint contains an area that is not part of the new service footprint. This is the loss area. As discussed herein, the Bureau's decisions in *Eldorado* and *Sells* pertain to determining services that cover the gain/loss areas. However, it is unclear based on these decisions how the gain/loss areas themselves should be calculated (i.e., how should a station determine the size of the new and old service footprints for gain/loss area purposes).

in *Sells* (discussed below),⁴ creates a tremendous amount of uncertainty as to what the Bureau's ever shifting policy is with respect to gain/loss showings. Absent clarification by the Commission, any party that modifies its facilities will be left to guess what those standards are. Thus, King respectfully requests that the Commission reverse the Bureau's decision in the *Eldorado MO&O* and also clarify its policy regarding the services that should be included for the purpose of determining service to gain/loss areas.⁵ In support hereof, King states as follows:

I. BACKGROUND.

1. The King proposal in this proceeding requested (i) the deletion of Channel 239C2 at Mason, Texas, (ii) the allotment of Channel 240C2 at Mertzon, Texas, and (iii) the modification of KOTY accordingly. King provided an engineering study which documented that the gain and loss areas associated with this modification. This study demonstrated that no gray or white area would be created taking into account vacant allotments consistent with *Greenup*. The Bureau, however, denied King's proposal because it used vacant allotments to demonstrate coverage to the loss area. In doing so, the Bureau relied on its decision in *Sells*. The Bureau's reliance on *Sells*, however, was misplaced because *Sells* held that the creation of white area could not be cured with a proposal for a vacant allotment. King's proposal is distinguishable because it relied on existing vacant allotments to demonstrate that no white or gray area was created. However, the Bureau held for the first time that, in addition to proposed vacant channels, previously allotted vacant channels cannot be used for the purpose of determining service to gain/loss areas.⁶ This was another piece meal erosion of *Greenup*.

⁴ *Sells, Arizona*, 19 FCC Rcd 22459, MB Docket No. 02-376 (Med. Bur. 2004), *pet. for recon. pending* ("*Sells*").

⁵ The Bureau's decisions in *Sells* and *Eldorado* focus on loss areas. One would assume that the same analysis applies to the determination of service to gain areas, but the Commission should also clarify this point.

⁶ See *Eldorado, Mason, Mertzon, and Fort Stockton, Texas, Report and Order*, 21 FCC Rcd 3572 (Med. Bur. 2006) ("*Eldorado R&O*").

2. King submitted a Petition for Reconsideration of the Bureau's decision and raised a number of legal arguments.⁷ In addition, King submitted a new gain/loss analysis that demonstrated that no gray or white area would be created. This analysis excluded proposed and existing vacant allotments (consistent with *Sells* and the *Eldorado R&O*), but included unbuilt construction permits (consistent with established case law). The Bureau, however, again denied King's proposal and held for the first time that unbuilt construction permits can no longer be used to determine service to gain/loss areas.⁸ This, again, is entirely inconsistent with the Commission's decision in *Greenup*. Thus, to summarize, in three decisions (*Sells*, the *Eldorado R&O*, and the *Eldorado MO&O*) the Bureau has eroded the Commission's *Greenup* policy. First in *Sells* it held that proposed vacant channels cannot be used to cover white or gray area. Second in the *Eldorado R&O*, the Bureau held that existing vacant channels cannot be used for the purpose of determining service to gain/loss areas. Finally in the *Eldorado MO&O*, it held that unbuilt construction permits cannot be used for the purpose of determining service to gain/loss areas. This piece meal approach is not only unfair to the public which has no idea what standards the Bureau is operating under, it is also prejudicial to King who has had to endure two policy changes by the Bureau in this proceeding alone both of which resulted in the denial of his proposal.

⁷ The Bureau ignored the vast majority of these legal arguments and failed to adequately explain its departure from *Greenup*. The Bureau contends that "consistent with *Greenup, Kentucky*," vacant allotments are considered in comparing competing proposals (i.e., proposals advanced by different parties) but not when comparing the existing arrangement of allotments to the proposed arrangement of allotments of one proposal. However, this is a distinction without difference. Both comparisons are made using the Commission's allotment priorities and the Bureau has not offered a rational reason why one comparison can utilize the *Greenup* methodology while the other cannot. See *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982).

⁸ *Eldorado MO&O*, 22 FCC Rcd at ¶5. The Bureau's decision in the *Eldorado MO&O* does not expressly hold that unbuilt construction permits cannot be considered when determining the services in a gain/loss area. However, King attempted to use unbuilt construction permits to cover a loss area and the Bureau did not take these permits into consideration when it, on its own, determined service to the loss area.

II. THE BUREAU'S DECISIONS VIOLATE THE APA.

3. The *Eldorado R&O* and *MO&O* reversed settled precedent, without having raised the issue. Proceeding in this way is troubling in two respects. First, it violates basic administrative procedure. An agency undertaking to change its interpretation must afford the public adequate notice and an opportunity to comment. *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992). The Bureau did not do so here. True, this was a rule making proceeding conducted under the informal rule making provisions of the Administrative Procedure Act. See 5 U.S.C. § 553. However, the Bureau gave no notice that it intended to address this particular rule in this proceeding, which it must do in order to satisfy its procedural obligations. See *Chemical Waste Management v. EPA*, 976 F.2d 2, 33 (D.C. Cir. 1992). See also 5 U.S.C. § 553(c).

4. Second, making law on an ad hoc basis is unfair to the parties before the Commission. The *Report and Order* applied the new policy to the parties in this case, who had acted in good faith on the application of existing case law. Thus, the Bureau applied its new rule interpretation not merely prospectively (*i.e.*, to future cases), but retroactively to the parties before it as well. While the Bureau may be entitled to engage in retroactive rule making given appropriate circumstances, it is an absolute requirement that it must make an affirmative finding on the record that the retroactive application of such a rule is appropriate. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986). It made no such finding here.

III. THE BUREAU'S DECISIONS IN *SELLS* AND *ELDORADO* ARE ERODING *GREENUP* AND LEAVE THE GENERAL PUBLIC WITH LITTLE GUIDANCE REGARDING GAIN/LOSS CALCULATIONS.

5. The issue in this proceeding is how to determine service to the gain/loss areas created by the modification of radio broadcast facilities. The gain and loss areas are important

because they help determine if proposed modifications are in the public interest.⁹ As discussed above, in 1991 the Commission issued the seminal decision on this point.¹⁰ In *Greenup*, the Commission held that it would consider actual services (operating stations) and potential services (vacant allotments) when determining service to gain/loss areas.¹¹ In addition, for all but Class C allotments, the Commission would consider service to be provided to the maximum of an allotment's class of channel, *regardless of the station's actual facilities*.¹² For example, for gain/loss purposes, all Class C1 stations (even those Class C1 stations that are not operating with the maximum permissible facilities) are considered to operate with an ERP of 100kW and an HAAT of 299 meters. This is uncontested and the Bureau has stated this in numerous rule making proceedings. Thus, for the past 15 years, broadcasters have been using actual and potential services when determining service to the gain and loss areas created by their facility modifications.

6. The Commission's decision in *Greenup* has been applied to literally hundreds of rule making and application proceedings. For example, every community of license case which involves a site change or where a station's circle contour is affected, results in a gain/loss area analysis. However, in *Sells*, the Bureau radically and without any prior notice changed course. For the first time, it held that proposed vacant allotments (one type of potential service) "are

⁹ See, e.g., *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982).

¹⁰ *Greenup*, 6 FCC Rcd 1493.

¹¹ *Id.* at 1494 (emphasis added). Regarding potential service, the Commission's decision in *Greenup* did not expressly address unbuilt construction permits, however, subsequent decisions have held that these permits should also be considered when determining the services to gain/loss areas.

¹² *Id.* at 1495. Although the actual language excludes Class A channels, the principle is the same but the maximum facilities may be limited to 3 kW ERP instead of 6 kW ERP by grandfathering provisions. The considerations for Class C stations are different because of the relative difficulty of achieving maximum facilities for that class. *Greenup, Kentucky and Athens, Ohio*, 4 FCC Rcd 3843, 3847 n. 12 (1989).

insufficient to offset the loss of service.”¹³ In other words, if the Bureau’s decision in *Sells* is affirmed, proposed vacant allotments can no longer be considered in the gain/loss area analyses for an existing station’s move. This decision is contrary to the Commission’s *Greenup* policy and thus Lakeshore Media , LLC (“Lakeshore”) filed a Petition for Reconsideration of the *Sells* decision, which has been pending for more than two years. This, however, was only the first step in the Bureau’s apparently piece meal rescission of *Greenup*.

7. Notwithstanding Lakeshore’s pending Petition for Reconsideration of *Sells*, the Bureau relied its decision in *Sells* in this proceeding. In doing so, however, as discussed above it went two steps further and held that (in addition to proposed vacant channels) previously allotted vacant channels and unbuilt construction permits cannot be considered when determining the services in a gain/loss area. If this reasoning is taken a step further, it would also be improper to evaluate existing stations which cover part of the loss area by using the maximum facilities (rather than their actual facilities) for their class of channel as prescribed in *Greenup*. It has not done so which is curious because it is much more unlikely that existing stations will upgrade their facilities to the maximum for their class than an unbuilt CP or vacant allotment will eventually be constructed. This is due to a number of factors including short-spacings under Sections 73.213 and 73.215. Yet, the Bureau apparently considers this type of potential service acceptable for gain/loss analysis while it will not consider vacant allotments and unbuilt construction permits even though a party has committed to implementing these “potential” services. The Bureau has failed to provide a reason for this distinction.

8. In addition to disregarding the Commission’s decision in *Greenup* (and 15 years of established case law), the Bureau’s decision in this proceeding and in *Sells* creates a

¹³ *Sells*, 19 FCC Rcd at ¶9.

tremendous amount of uncertainty regarding what types of services should be considered when calculating service to gain/loss areas. This uncertainty is demonstrated by the fact that King and its consulting engineer attempted to utilize two types of potential services (existing vacant allotments and unbuilt construction permits) in its gain/loss analysis but each time were denied by the Bureau. Engineers have been operating under the *Greenup* guidelines for the past 15 years and are now unsure how to proceed. This will inevitably (and to some extent already has) led to differing methodologies for determining service to gain/loss areas. For example, on January 19, 2007, the FCC received approximately 140 community of license change applications. It is likely that, because of the uncertainty created by *Eldorado* and *Sells*, these applications utilized different methodologies for determining service to gain/loss areas. In most cases the gain/loss calculations are irrelevant because the areas are well-served. However, in some cases (like the instant proceeding) gain/loss calculations are of decisional significance. Additionally, if it has been the Bureau's position that potential services are not considered in gain/loss calculations, why have they been permitting parties to use potential services since *Greenup*? Just as puzzling is what potential services can be used in the gain area analysis. Does the Bureau believe that, since a proposal is merely potential service in the gain area, vacant allotments, unbuilt facilities, and maximum class facilities can be used, whereas, in the loss area, these potential services cannot be used? Clarification is desperately needed.

IV. THE BUREAU'S DECISIONS MISSTATE THE COMMISSION'S POLICY REGARDING DE MINIMIS SHOWINGS.

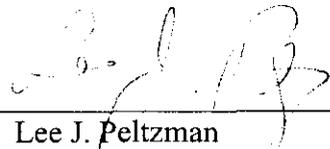
9. In the *Eldorado MO&O* the Bureau held that King's provision of a first service to 124 persons was *de minimis* and did not justify favorable action on his proposal. In so doing it attempted to distinguish prior Commission decisions including *Cheyenne, Wyoming* and *Gering*,

Nebraska.¹⁴ However, the Bureau's attempt is unsuccessful. In *Cheyenne, Wyoming*, the Commission concluded that "the creation of 'white area' under Priority 1" was the deciding factor "because it trigger[ed] the highest allotment priority – that is, the retention of a first full-time reception service." Thus, the decision was based on the Commission's acceptance of service to 211 persons as being of decisional significance.¹⁵ Similarly, in this case, the provision of a first service to 124 persons is decisionally significant and justifies favorable action.

V. CONCLUSION.

The Bureau's decisions in this proceeding and in *Sells* purport to exclude any potential service from gain/loss area calculations involving actual facilities. This is contrary to the Commission's decision in *Greenup* and must be reversed. The Commission should grant review and approve King's proposal.

Respectfully submitted,
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¹⁴ 15 FCC Rcd 7528 (Med. Bur. 2000).

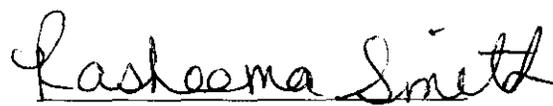
¹⁵ 15 FCC Rcd at 7530.

CERTIFICATE OF SERVICE

I, Rasheema S. Smith, do hereby certify that I have on this 23rd day of February, 2007, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Application for Review**" to the following:

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