Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Amendment of Section 73.622(b),	)	MM Docket No. 00-138
Table of Allotments,	)	RM-9896
Digital Television Broadcast Stations	)	
(Boca Raton, Florida)	)	

AUG 10 2007

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2007 **Released: August 9, 2007**

By the Commission:

1. We herein consider an Application for Review filed by Sherjan Broadcasting Company, Inc. ("Sherjan"), seeking review of the Media Bureau's action substituting DTV Channel *40 for station WPPB-TV's assigned DTV Channel *44 at Boca Raton, Florida.[1]

I. BACKGROUND

2. The Bureau made the subject digital channel substitution at the request of The School Board of Broward County, Florida ("School Board"), licensee of noncommercial educational station WPPB-TV, NTSC Channel *63, Boca Raton, Florida. Sherjan, the licensee of Class A station WJAN-CA, operating on channel 41 at Miami, Florida, opposed the channel substitution.[2] It alleged, among other things, that the proposed allotment of DTV Channel *40 at Boca Raton would be first-adjacent to WJAN-CA and would result in prohibited contour overlap with its Class A station. The staff found, however, that WJAN-CA would receive interference to only 1.03 percent of its population served and, applying an interference standard based on 2 percent of the population by the Class A station, concluded that the proposed channel substitution met relevant technical requirements and interference protection rules and should otherwise be granted.[3]

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[1] *See Report and Order* in MM Docket No. 00-138, 17 FCC Rcd 7114 (*"Report and Order"*), *recon. denied in relevant part,* 17 FCC Rcd 23528 (2002) (*"Reconsideration Order"*) *further recon. denied,* 20 FCC Rcd 9783 (2005) (*"Further Reconsideration Order"*).

[2] Guenter Marksteiner, who earlier in this proceeding supported the channel substitution proposal and who Sherjan served with a copy of the subject pleading, filed an opposition to the Application for Review. In its reply thereto, Sherjan challenges Marksteiner's standing to file an opposition pleading, asserting that because the School Board, as the proponent of the channel change, did not file an opposition to its Application for Review, "the Commission must . . . evaluate whether Marksteiner alone should be permitted to pursue further review." Marksteiner filed a "Motion to Strike" Sherjan's reply pleading with regard to the standing challenge. However, the Commission need not address the Motion to Strike or Sherjan's standing challenge because it has not relied on Marksteiner's Opposition. *See Capitol Radiotelephone Co., Inc.,* 16 FCC Rcd 7468, 7471 (2001).

[3] *Report and Order,* at 7116. The calculation that WJAN-CA would receive interference to only 1.03 percent of its population was derived based on OET Bulletin 69 methodologies using a computer program with standard default values to measure interference in 2-kilometer (km) resolution calculation area "cells" at 1 km terrain profile "steps." *See Public Notice, Additional Application Processing Guidelines for Digital Television (DTV),* released August 10,

3. Sherjan sought reconsideration of the channel substitution, arguing that the 2 percent interference threshold used by the staff does not apply to Class A stations, which are entitled to protection from any new interference. It further asserted that the staff, having concluded that the Boca Raton proposal would cause interference to 1.03 percent of WJAN-CA's service population, must rescind the allotment of DTV Channel *40 at Boca Raton. However, School Board and Marksteiner (referred to collectively herein as the "Proponents" of the channel substitution request) stated that the factual premise of Sherjan's argument – that there will be interference to 1.03 percent of WJAN-CA's service population – is incorrect. They stated that when more accurate interference values are used, the proposed channel change would not cause any unacceptable interference to WJAN-CA. Specifically, using a terrain profile step size of .01 km rather than the standard default value of 1 km, the Proponents concluded that notwithstanding application of an incorrect interference standard, the channel substitution would not result in unacceptable interference to WJAN-CA.[4]

4. In denying the petition for reconsideration, the Bureau agreed that the staff erroneously concluded that a Class A station must accept interference of up to 2 percent of its service population.[5] Section 73.623(c)(5) of the Commission's Rules provides that a proposal to expand a DTV station's allotted or authorized coverage area will not be accepted if it is expected to cause interference to a Class A television station. Because the incorrect 2 percent interference standard was applied, the Bureau did not review the Proponents' alternative technical interference study as originally tendered. However, on reconsideration, the Bureau reviewed the study submitted by the Proponents to evaluate compliance with Section 73.623(c)(5) of the Rules.

5. Based on independent analysis of the alternative technical interference study, which used a finer resolution that the Commission's standard the Bureau concluded that no more than 0.03 percent new interference would be caused to WJAN-CA.[6] The Bureau therefore concluded that the Proponents demonstrated compliance with respect to predicted interference to WJAN-CA.[7]

1998 ("1998 Public Notice").

[4] The *1998 Public Notice* permits a DTV applicant to, among other things, submit and request review of an alternative technical interference study based on a finer resolution than the Commission's standard. *Id.* at 2. Such an alternative showing is permitted because the finer resolution eliminates those persons that might be included in a larger cell population count that would not actually receive interference. The Proponents' alternative showing was submitted in support of its original channel substitution request. The 0.03 percent interference figure is within the permitted rounding tolerance of 0.5 percent applicable to such interference calculations. *See Establishment of a Class A Television Service*, 15 FCC Rcd 6355, 6386 (2000).

[5] *Reconsideration Order*, at 23530.

[6] *Reconsideration Order*, at 23530-31. Although the Bureau noted that another study submitted in response to the Petition for Reconsideration and based on an even higher 1-km cell size resolution also showed that the substitution request would not result in unacceptable interference, the Bureau declined to consider that study based on Sherjan's procedural argument that it was not submitted to the Bureau prior to its original decision granting the substitution request.

[7] *See* Section 73.623(c)(5) of the Commission's Rules.

6. In its "Petition for Further Reconsideration," Sherjan argued that if the Commission is going to use the more accurate 1-km cell size measurement instead of the default value of 2 km, it should be even more precise and study several sizes smaller than the default value to establish an even more refined analysis to determine the true impact of the rulemaking proposal.[8] Sherjan further argued that the Commission should also consider population figures based on census data for 2000, rather than the 1999 data used by the staff. Thus, Sherjan submitted analysis of 14 different cell sizes using 2000 population figures to assert that interference to WJAN-CA is less than 0.5 percent in only two out of 14 cases (at 1 km and 1.8 km) and exceeds that figure in every other case.[9] It argued that the staff acted arbitrarily and capriciously by allowing the Proponents to rely on a non-standard cell size and then select a convenient cell size to yield the desired result.[10]

7. In dismissing the Petition for Further Reconsideration, the Bureau explained that, pursuant to the *1998 Public Notice*, the Proponents are permitted to make the necessary interference showing using the alternative 2-km cell size with 0.1 km terrain profile steps interference study based on the 1999 census data.[11] Sherjan did not challenge the results of that interference study at that time, but instead argued that there was no basis under the *1998 Public Notice* for the Proponents' alternative showing to demonstrate compliance with the interference standard.[12] The Bureau rejected the argument that the Commission must reopen the record for additional information concerning new and varied cell size studies with updated population figures in order to evaluate whether the Proponents originally demonstrated compliance with interference requirements. In that regard, the Bureau stated that a reconsideration petition would not be entertained to evaluate new information that could and should have been timely considered earlier in the proceeding.[13] Sherjan did not demonstrate that the Proponents' interference study as tendered was inaccurate or otherwise inappropriate, that the staff erred by following the *1998 Public Notice* with respect to the tendered interference study, or that additional interference studies must be considered in evaluating compliance with Section 73.623(c)(5) requirements.

8. In the Application for Review, Sherjan again reargues its basic contention that the Bureau's decision improperly favors a DTV allotment proposal over a Class A station. It continues to disagree with the alternative interference study proffered by the Proponents and evaluated by the staff. Moreover,

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[8] Sherjan styled its pleading as a second petition for reconsideration, rather than as an application for review, "because the Bureau has not yet had the opportunity to evaluate and to rule on the data for 14 different cell sizes and Year 2000 census data." Petition for Further Reconsideration, at 1-2.

[9] The cell sizes included in Sherjan's analysis are at 0.1 km increments from 0.2 km to 1.0 km, and 0.2 km increments from 1.0 km to 2.0 km, with population figures based on 2000 census data.

[10] In his Opposition to the Petition for Further Consideration, Marksteiner asserted that Sherjan's arguments are based on new information it did not timely present to support repetitious allegations that the Bureau previously considered and rejected. He also argued that the Commission specifically rejected the use of Year 2000 population figures. In its reply pleading, Sherjan maintained that the Commission must do what is necessary to achieve accuracy of interference prediction in this case.

[11] *Further Reconsideration Order*, at 9785.

[12] *See* Section 73.623(c)(5) of the Commission's Rules.

[13] *See* Section 1.106(c) of the Commission's Rules.

Sherjan now claims that because the Commission "shifted" the basis of its decision in response to its Petition for Reconsideration, it should be permitted to address that new basis with the updated information it submitted in its Petition for Further Reconsideration.

II. DISCUSSION

9. The Application for Review is the third instance in which Sherjan challenges the Bureau's decision. In its first reconsideration petition, Sherjan correctly pointed out that the Bureau misapplied the operative interference standard applicable to Class A stations in its initial decision. On reconsideration, the staff agreed and reexamined the record in this proceeding to properly evaluate the proper degree of interference protection for WJAN-CA. In so doing, the staff did not "shift" the basis of its decision based on any new facts as alleged, but rather applied the correct interference standard as urged by Sherjan to the existing record. In that regard, the Bureau did not reopen the record and rejected new information proffered by all parties. Thus, there is no basis to reopen that record for the submission of additional information unnecessary to rectify its analysis.

10. The Commission finds no error in the Bureau's conclusion in the 2002 *Reconsideration Order* that the substitution request would not result in unacceptable interference to WJAN-CA under Section 73.623(c)(5), 47 C.F.R. § 73.623(c)(5), or in the Bureau's reliance on the 0.03 interference figure based on its independent analysis of the Proponents' original 2-km cell size/0.1-km terrain profile step size showing. The Bureau's reliance on the alternative showing proffered by the Proponents was consistent with the Commission's procedures announced in the *1998 Public Notice*. Moreover, the Bureau's dismissal of the Petition for Further Reconsideration in the 2005 *Further Reconsideration Order* was consistent with Section 1.106(c) of the Commission's Rules, 47 C.F.R. § 1.106(c), because that pleading did not rely on new facts or changed circumstances, and did not demonstrate that consideration of Sherjan's new showings was necessary or in the public interest.[14] Finally, we find that the Bureau did not act arbitrarily by considering the Proponents' alternative 2-km cell size/0.1-km terrain profile step size showing but not Sherjan's alternative showings. The Bureau did not "shift" the basis of its decision based on facts not previously presented to it as alleged, but rather based its decision solely on the alternative showing submitted by the Proponents in support of their original channel substitution request. In this regard, the Bureau consistently and correctly declined to consider showings subsequently submitted by both the Proponents and Sherjan on the ground that considering such showings would be inconsistent with the Commission's rules and "would serve to impair the ability of the Commission to make a final decision based on information properly before it at the time."[15]

[14] As the Bureau correctly explained in *Further Reconsideration Order*, every technical proposal based on Longley-Rice methodologies is evaluated on the specific technical factors (*i.e.*, specifically identified operating parameters and values) presented, and not other hypothetical studies employing different factors and values. While Sherjan's newly submitted studies may yield different results due to the varying factors (*e.g.*, differing cell sizes and population figures), they do not undermine the Proponents' alternative technical study. *Id*, at 9786, n.9.

[15] *Id.* If it is ultimately found that interference to WJAN-CA exceeds the appropriate threshold, we will explore options with Sherjan short of displacement.

III. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, That the Application for Review filed by Sherjan Broadcasting Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary