

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

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

TO: Marlene H. Dortch, Secretary
For transmission to: The Commission

**STATEMENT OF THE ALASKA BROADCASTERS ASSOCIATION, THE ARKANSAS
BROADCASTERS ASSOCIATION, THE MISSISSIPPI ASSOCIATION OF BROADCASTERS, THE
NEW MEXICO BROADCASTERS ASSOCIATION AND THE WASHINGTON STATE
ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITION FOR PARTIAL
RECONSIDERATION**

1. The Alaska Broadcasters Association, the Arkansas Broadcasters Association, the Mississippi Association of Broadcasters, the New Mexico Broadcasters Association, and the Washington State Association of Broadcasters (collectively, the “State Broadcast Associations”), hereby file this Statement in support of reconsideration of the Report and Order, 21 FCC Rcd 14,212 (FCC 2006) (the “Report and Order”), in the above-referenced proceeding.

2. The State Broadcast Associations endorse the Petition for Partial Reconsideration of American Media Services, LLC, Mattox Broadcasting, Inc. and the Minority Media and Telecommunications Council, filed on January 19, 2007 (the “AMS/MMTC Petition”), insofar as it demonstrates the need for the Commission to eliminate imposition of an arbitrary limit of four coordinated contingent applications in any linked group of community of license minor-change applications (the “Four Contingent Application Limit”).

3. The *AMS/MMTC Petition* demonstrated that the basis for maintaining the Four Contingent Application Limit – administrative overload – was not valid when the salient facts are reviewed and was, therefore, born “of speculative fear and uncertainty.” *AMS/MMTC Petition* at 7. Such a limit has never existed for AM stations – and the lack of such a limit has not overwhelmed the Commission’s standard band regulatory resources. *Id.* The difference in physics and engineering between AM and FM does not explain why the AM processing staff has not been overwhelmed in the absence of the Four Contingent Application Limit. In the absence of any reasonable rationale for this discrepancy, the Commission is treating similarly situated applicants differently – despite prohibition of such a distinction in the absence of a reasonable and articulated difference. *See Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

4. Nor was the staff overwhelmed in the past when no such restrictions were applied to community change requests made uniquely, until the *Report and Order* became effective, through rulemaking processes. Indeed, no such restriction on community change rulemakings has ever been imposed.¹ Such a restriction was advocated in *Revision of Procedures Governing Amendments to FM Table of Allotments*, Notice of Proposed Rulemaking (the “NPRM”), 20 FCC Rcd 11169 (FCC 2005), which began this rulemaking process. Specifically, the NPRM proposed a limit of five on the number of communities which could be changed. But that proposal was explicitly rejected in the *Report and Order*

¹ The Four Contingent Application Limit is a rule held over from procedures guiding “minor change” applications that, in the past, specifically excluded community change requests. As the *AMS/MMTC Petition* notes: “any upgrade proposal which involved, for example, change of an FM station’s community of license could be undertaken *only* pursuant to the rulemaking process, which was subject to no equivalent numerical limit at all.” *AMS/MMTC Petition* at 1.

at 14,226. There, the Commission found insufficient evidence to approve the limit of five. Although, at the same time, the Commission warned that it would keep tabs to ensure that processing was not adversely affected by the new minor modification procedures and would allow staff, on a case-by-case basis, to determine if a proposal was so cumbersome as to cause administrative disruption.

5. As the Commission found no actual justification for the limit of five considered in the NPRM, it strains credulity to believe that the same lack of data provided a supportable rationale for the Limit of Four Contingent Applications that now applies after release of the *Report and Order*. Indeed, rejection of the five application limit, described above, simply cannot be reconciled with the seemingly inadvertent decision to apply the Four Contingent Application Limit to community changes. Stated another way, use of the case-by-case discretionary approach adopted in the Report and Order in one context (rulemaking proposals for changes in the Table of Allotments), while at the same time imposing the Four Contingent Application Limit in a parallel context is just plain illogical –whether measured by the nuanced methods of jurists or by everyday common sense. Lacking any basis, it can only be described as arbitrary and capricious – and therefore, in violation of longstanding requirements of administrative law.

6. The *AMS/MMTC Petition* sums up the situation neatly when it says that, in the final analysis, the maintenance of the Four Contingent Application Limit “is merely an unintended consequence of the admittedly complicated and wide-ranging changes effected. . . .” *AMS/MMTC Petition* at 9-10. But as also noted, “it is a consequence that should be corrected” *Id.*

7. It should be corrected because, unless the Four Contingent Application Limit is removed, it threatens to upend significant public interests underlying the rationale for this proceeding. As noted in the comments of American Media Services, Radio One, Inc. *et al*, filed in the first phase of this proceeding on Oct. 3, 2005 (“October 3 Comments”): “The only way to create more stations to meet current and future demographic needs, without increasing harmful interference, is to re-engineer existing allotments to more efficiently apportion the available spectrum.” *October 3 Comments at*

9. Careful re-engineering can increase both opportunity and diversity in more populated areas and allow for new stations to utilize vacated spectrum. But maintaining the arbitrary Four Contingent Application Limit places an unnatural barrier in the way of effective re-engineering; it limits efforts to both provide better service to the communities of today and create new stations in less populated areas by utilizing spectrum that has been vacated. The net result will be underserved populations in geographic communities both large and small – and fewer new stations and voices on the air. This result can hardly be described as commensurate with the public interest.

8. The public interest in new entrants and diversity of voices is at stake, as is an improvement in localism that will arise as more spectrum is unlocked and available to serve more communities through a careful re-engineering process.

9. The Commission should also clarify its interpretation of the new rules that applicants with pending applications for new AM stations can not utilize these new procedures to change community of license. In two recent letters, the Media Bureau dismissed amendments that proposed to change the community of license of pending applications for new AM stations because the Bureau claims that such amendments were a

major change in community of license as defined by Section 73.3571 of the Commission's Rules.² This interpretation, however, is inconsistent with the Commission's treatment of changes permitted by applicants for new FM stations and for new AM stations changing to a first, second, or third-adjacent frequency.

10. In the June 6, 2007 letters denying the amendments filed by Rainey and Rivers, the Bureau claimed that, because these proposals were for new AM stations, they did not have daytime facilities for which they could establish mutual exclusivity. Because "mutual exclusivity" is a requirement for a change of community of license application to be considered "minor," the Bureau classified both amendments as "major."³ In addition to being contrary to the Commission's auction procedures,⁴ it is inconsistent with the Commission's *R&O* in this proceeding.

11. In the Rainey and Rivers letters, the Commission seems to be concerned that new AM stations do not have "current daytime facilities" to establish mutually exclusivity. However, if that were the case, the Commission could not allow new AM applicants to amend to a first, second, or third-adjacent frequency because there are no "current daytime facilities" to be mutually exclusive with.⁵ Yet the Commission staff has

² See BNP-20041029AIW filed by Rainey Broadcasting, Inc ("Rainey"); BNP-20041029AHO filed by Rivers, L.P. ("Rivers").

³ See §73.3571(a)(1).

⁴ See *AM Auction 84 Singleton Applications*, 19 FCC Rcd 16655 (2004). See also, *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, 13 FCC Rcd 15920, 15991 (1998) (states that a winning bidder, or non-mutually exclusive applicant, may change facilities so long as such change is minor).

⁵ The Commission has granted a number of amendments filed by applicants for new AM stations to change to a first, second, or third-adjacent frequency. See, e.g., BNP-20041029AJI; BNP-20050118ACQ; BNP-20050118AAB; BNP-20041029AGJ. In doing
(Footnote continued on next page)

allowed such minor changes on at least four occasions. In addition, if the Commission required current facilities in order to establish mutual exclusivity, then it would not allow FM applicants for new facilities to amend to a new city of license. However, Section 73.3573(a)(1) allows a winning bidder to change city of license which is in conflict with the “current assignment”. In the AM context, there are winning bidders as well and the “current assignment” can be established by the original window short form application just as it is done for adjacent frequency changes.

12. The Commission permits stations, including new AM stations, to change frequency to a first, second, or third-adjacent frequency because such a change is consistent with the *Ashbacker* doctrine.⁶ In this regard, as long as the new frequency is in conflict with the frequency previously specified, then no other potential applicant has had its *Ashbacker* rights affected. This rationale is equally applicable to community of license changes for pending applications for new AM stations where no other applicant could specify the same facilities. Therefore, the Commission should take this opportunity to clarify that applicants for new AM stations can file a minor amendment to change community of license. This will ensure that the Commission treats applicants for new AM and FM stations similarly.

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so, it used the facilities proposed by the applicant in the underlying application to determine mutual exclusivity (and thus whether the amendment qualified as minor).

⁶ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); see also, *Amendment of the Commission’s Rules Regarding Modification of FM Broadcast Licenses to Higher Class Co-channel or Adjacent Channels*, 60 RR 2d 114 (1986).

13. For radio to remain relevant and viable, it must expand. The only way it can expand is to allow for the re-engineering of its mid-twentieth century spectrum allocation schema. Continued imposition of the Four Contingent Application Limit and continued exclusion of AM stations from the provisions of the *Report and Order* create demonstrable impediments. These issues should be revisited and the arbitrary limitation on much needed re-engineering should be eliminated. Doing so will remove artificial caps hindering the true goal of this proceeding: to unlock spectrum so that more communities, whether geographic, cultural, linguistic, or ethnic, will be served – and support the strong public interests in both the entry of new voices into the broadcast field and in localism, writ both large and small.

Respectfully submitted,



Frank R. Jazzo

Howard M. Weiss

Michael W. Richards

*Counsel for the Alaska Broadcasters Association, the
Arkansas Broadcasters Association, the Mississippi
Association of Broadcasters, the New Mexico
Broadcasters Association and the Washington State
Association of Broadcasters*

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
(703) 812-0400

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