

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

In the Matter of) MM Docket No. _____
) RM- _____
)
Amendment of Section 73.202(b))
(Table of Allotments))
FM Broadcast Stations)
)
(Lula, Georgia))

FILED/ACCEPTED

MAR 14 2008

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attention: Audio Division, Media Bureau

MOTION TO DISMISS
PETITION FOR RULE MAKING
OR FOR OTHER RELIEF

Tri-State Communications, Inc. ("Tri-State") by its attorneys, hereby respectfully files this Motion to Dismiss a Petition for Rule Making filed by J. L. Brewer Broadcasting of Cleveland, LLC ("Brewer") or for other relief. In support whereof, the following is shown:

On October 29, 2007, Brewer filed a "Petition for Rule Making" seeking to modify the Table of Allotments (47 C. F. R. §73.202 (b)) to allot FM Channel 265A to Lula, Georgia, as its first local service. On the same day, Brewer filed an application (FCC File No. BNPH-20071029ACI) for a construction permit to operate a new FM radio station on Channel 248A at Lula.¹ The Brewer petition has not yet been the subject of a Notice of Proposed Rule Making.

The Lula Petition is Defective

Brewer's petition and related application are patently defective and must be dismissed. The attached Technical Statement shows that Brewer's Petition is short-spaced 27.11 km to an

1 Tri-State is today filing an Informal Objection to the Lula application.

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application (File No. BPH-20070730ASJ) filed by Sutton Radiocasting Corporation (“Sutton”) for WNCC-FM, Franklin, North Carolina. Brewer refers to the Sutton application as “Prematurely filed and technically deficient,” and ignores the Sutton application as if it did not exist. However, the Sutton application was accepted for filing by the Commission and remains accepted for filing.² Since no other applications competing with the Sutton facility were filed on the same day, the Sutton application is automatically cutoff from competing expressions of interest and Brewer must protect it. Its petition and application do not. Rather than the Sutton application, it is Brewer’s petition for rule making and the contemporaneously filed Form 301 that is untimely filed and short spaced to WNCC-FM. As a result, the Brewer petition must be dismissed.

Both Brewer and Tri-State Can Co-Exist

Tri-State is today filing an application to upgrade WLJA-FM, Ellijay, Georgia, from Channel 266A to Channel 266C3. In the event the Commission should disagree with Tri-State and determine that Brewer’s application is acceptable (i.e., that Sutton’s BPH-20070730ASJ is irreparably deficient), the Commission could allot Channel 265A to Lula at an alternate reference site while permitting the grant of Tri-State’s application to upgrade WLJA-FM. Both facilities could co-exist if the Lula allocation reference were moved to:

34 22 49 North Latitude

83 40 36 West Longitude

It should also be noted that the reference site proposed by Tri-State is in Lula. The Brewer allocation reference is 13.25 km northwest of the newly proposed reference and the small city of

² See Applications Public Notice, Report No. 26546, released August 9, 2007.

Lula.

A permit application that is mutually exclusive with an allotment proposal and which is filed after the petition for rule making but prior to the close of the initial comment period is considered a timely filing in the allotment proceeding. See *Valliant, Oklahoma, and Gainesville, Texas*, 18 FCC Rcd 7076 (2003).

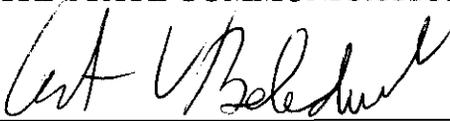
The public interest would be served by this alternative because, as shown in the Technical Statement, even though the population within the Lula predicted 60 dBu contour would decrease, the population within the WLJA-FM predicted 60 dBu contour would increase from 55,421 persons to 111,987 persons. Thus, moving the Lula allocation reference to allow not only a Lula Class A first local service but also an upgrade for WLJA-FM to Class C3 operation will result in a population gain of an additional 32,351 persons.

The Commission need not select Brewer's proposal over Tri-State's, or vice versa, since both may be granted. See *Conflicts between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992); *reconsideration granted in part and denied in part*, 8 FCC Rcd 4743 (1993) ("*Conflicts Recon. Order*"). The staff will attempt to resolve conflicts between a rulemaking petition and a later-filed FM application by imposing a site restriction on the proposal in the petition whenever it is possible to do so without prejudice to a timely filed FM application or rulemaking petition. *Conflicts Recon. Order* at Note 12. The Commission has followed the policy by specifying alternative allotment reference coordinates from which adequate community coverage is provided so that it can grant both the application and the allotment proposal. See *McCook, et al., Colorado*, 16 FCC Rcd 8910 (2001); *Warrenton, Georgia*, 6 FCC Rcd 5174 (1991); and *Saltville, Virginia and Jefferson, North Carolina*, 10 FCC Rcd 7578 (1995).

In light of the foregoing, Tri-State respectfully requests the Commission (1) to dismiss the Brewer petition to allot Channel 265A to Lula, Georgia; or, (2) in the event the Commission elects to accept Brewer's petition, to change the Brewer allocation coordinates as requested herein.

Respectfully submitted,

TRI-STATE COMMUNICATIONS, INC.

By: 
for Gary S. Smithwick
Its Attorney

SMITHWICK & BELENDIUK, P.C.
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, DC 20016
202-363-4560

March 14, 2008

ATTACHMENT A

TECHNICAL STATEMENT

**Technical Statement
in support of
Petition to Dismiss the Allocation of Channel 265 A
Lula, Georgia
March 2008**

J.L. Brewer Broadcasting of Cleveland, LLC ("Brewer") has filed a Petition For Rule Making to add Channel 265A at Lula, Georgia. This instant Petition to Dismiss the Brewer Rule Making Petition is being filed on behalf of Tri-State Communications, Inc. ("Tri-State").

Petition Exhibit 1 is an Allocation Study from the proposed Brewer allocation reference. Immediately a 27.11 short spacing is noticeable, short to the Application BPH-20070730ASJ filed by Sutton Radiocasting Corporation ("Sutton") for WNCC-FM, Franklin, North Carolina. Brewer refers to Sutton application as "Prematurely filed and technically deficient". Brewer proceeds to ignore the Sutton application as if it did not exist.

In actuality, the Sutton application was accepted for filing by the Commission. Even today, months later, the Sutton application remains accepted for filing. Since no other applications competing with the Sutton facility were filed on the same day, the Sutton application is automatically cutoff from competing expressions of interest. Tri-State suggests that it is the Commission that accepts or rejects applications rather than applicants such as Brewer. When considering the valid Sutton application for WNCC, BPH-20070730ASJ, it is the Brewer rule

making for Lula and the contemporaneously filed Form 301 that is untimely filed and short spaced to WNCC-FM.

Through a separate Form 301-FM Application, Tri-State is filing to upgrade its currently permitted WLJA-FM from Channel 266A to Channel 266C3. Tri-States further suggests that if the Commission declares Sutton's BPH-20070730ASJ application as being deficient, an alternate Channel 265A allocation reference for Lula could be utilized to allow the new service to Lula on 265A and expanded service for Ellijay on 266C3 to coexist if the new Lula allocation reference was moved to:

34 22 49 North Latitude
83 40 36 West Longitude

Petition Exhibit 2 is the Allocation Study from the newly proposed Lula allocation reference coordinates. All allocation requirements are met (assuming the Commission resolves the Sutton WNCC issue. From this location there is adequate spacing to WLJA as a Class C3 facility. Petition Exhibit 3 indicates the 70 dBu uniform terrain city grade signal from the alternate allocation site. Please note that the alternate site is *in* Lula, Georgia. The Brewer allocation reference is a distant 13.25 KM northwest of the newly proposed reference and the small city of Lula.

Other concerns of public interest would be the population served.

Present Configuration:

55,421	WLJA Present Class A CP on 266A
<u>199,571</u>	Lula (Brewer proposed site)
254,992	Persons Served

Potential Configuration:

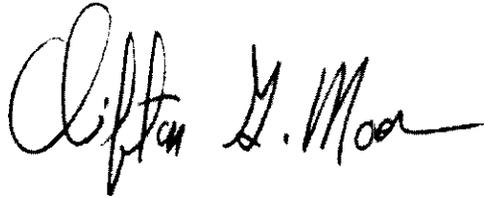
111,987	WLJA Proposed C3
<u>175,356</u>	Lula (Tri-State site)
287,343	Persons Served

Moving the Lula allocation reference to allow not only Lula Class A operation but also WLJA-FM Class C3 operation will allow a population gain of an additional 32,351 persons.

In summary, the Brewer Proposed Rule Making to add Channel 265A to Lula, Georgia is technically deficient for not protecting the Sutton application filed for Channel 265A at Franklin, North Carolina, BPH-20070730ASJ. The Sutton application was accepted for filing by the Commission and is currently in the Commission's FM database. Accordingly, these comments filed by Tri-State Communications requests that Brewer's Lula proposal be dismissed in light of the short space to Sutton. Alternatively, the proposed Tri-State upgrade of WLJA-FM can coexist with either Sutton's use of Channel 265A at Franklin, North Carolina or Brewer's use of Channel 265A at Lula if the Brewer allocation reference is moved to the coordinates specified herein. This new site is actually in Lula rather than many miles away. 32,351 more persons are afforded new FM service if both Lula and the expanded WLJA-FM Class C3 are permitted. Therefore it is in the public interest to dismiss the Brewer Petition for Rule

Making as defective or alternatively modify the Lula, Georgia allocation reference to a site that will allow both Lula and WLJA-FM Class C3 operation to coexist.

All information contained herein is correct to the knowledge of the undersigned.

A handwritten signature in black ink, appearing to read "Clifton G. Moor". The signature is written in a cursive style with a long horizontal flourish at the end.

Clifton G. Moor
Technical Consultant
Tri-State Communication, Inc.

March 13, 2008

Petition Exhibit 1

Bromo Communications, Inc.
Atlanta, Georgia

J.L. Brewer Broadcasting Of Cleveland, Llc
Searching at Brewer Reference

REFERENCE
34 28 25.0 N. CLASS = A DISPLAY DATES
83 46 00.0 W. Current Spacings to 3rd Adj. DATA 03-12-08
SEARCH 03-12-08
----- Channel 265 - 100.9 MHz -----

Call	Channel	Location	Azi	Dist	FCC	Margin
AP6682	APP	265A Lula	GA	0.0	0.00	114.5 -114.50 1
RS8770	RSV	265A Lula	GA	0.0	0.00	114.5 -114.50 1
WNCC-FM	RSV	265A Franklin	NC	13.5	87.39	114.5 -27.11
WNCC-FM	APP	265A Franklin	NC	13.5	87.39	114.5 -27.11
WLJA-FM	CP	266A Ellijay	GA	291.8	73.64	71.5 2.14
WKHX-FM	LIC	268C0 Marietta	GA	215.6	90.85	85.5 5.35
AL7878	RSV	266C1 Anderson	SC	81.5	138.68	132.5 6.18
WROQ	LIC-D	266C1 Anderson	SC	81.5	138.68	132.5 6.18
WUSY	LIC	264C0 Cleveland	TN	300.9	161.05	151.5 9.55
AP5221	APP	212A Dahlonega	GA	296.9	23.12	9.5 13.62
WPPP-LP	LIC	264L1 Athens	GA	149.0	69.18	55.5 13.68
AP7456	APP-D	212A Helen	GA	332.4	27.53	9.5 18.03
AP3632	APP-D	212A Young Harris	GA	354.9	44.61	9.5 35.11
WNNX	LIC-Z	263C2 College Park	GA	216.0	97.81	54.5 43.31
AP9724	APP-D	212A Hiwassee	GA	353.7	54.81	9.5 45.31

This Petition to Dismiss seeks to dismiss the technically deficient Lula application and rule making. Alternatively, in lieu of dismissal, a new reference point would not only a new allocation at Lula, GA, but also potential expanded service for WLJA-FM through a Class C3 upgrade.

Petition Exhibit 2

Bromo Communications, Inc.
Atlanta, Georgia

J.I. Brewer Broadcasting Of Cleveland, Llc
Searching at Potential New Lula Reference

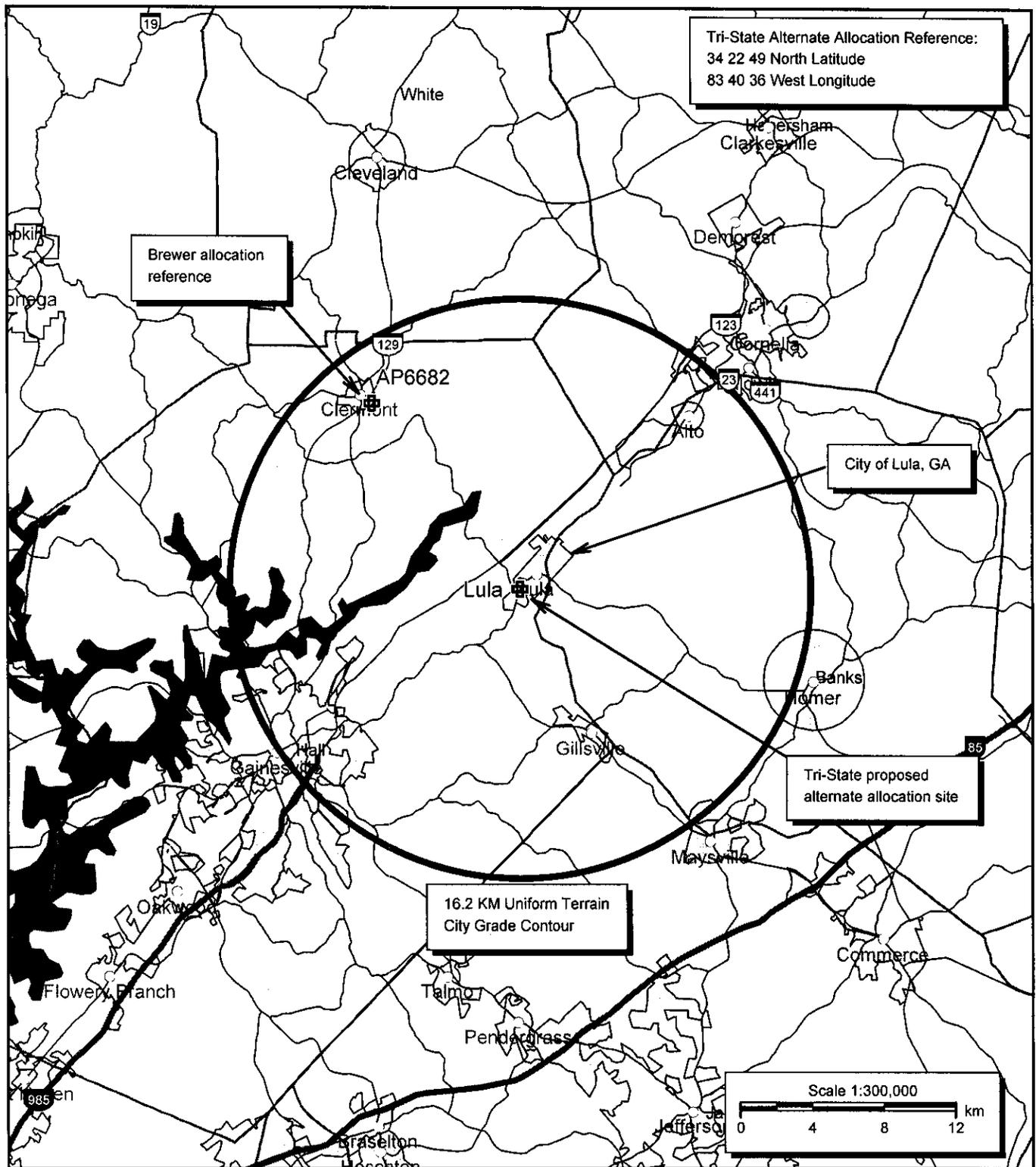
REFERENCE				CLASS = A	DISPLAY DATES
34 22 49.0 N.					DATA 03-12-08
83 40 36.0 W.				Current Spacings to 3rd Adj.	SEARCH 03-12-08

----- Channel 265 - 100.9 MHz -----

Call	Channel	Location		Azi	Dist	FCC	Margin
AP6682	APP	265A	Lula	GA	321.5	13.25	114.5 -101.25
RS8770	RSV	265A	Lula	GA	321.5	13.25	114.5 -101.25
WNCC-FM	APP	265A	Franklin	NC	7.3	96.08	114.5 -18.42
WNCC-FM	RSV	265A	Franklin	NC	7.3	96.08	114.5 -18.42
WROQ	LIC-D	266C1	Anderson	SC	76.6	132.50	132.5 0.00
AL7878	RSV	266C1	Anderson	SC	76.6	132.50	132.5 0.00
WLJA-FM	All	266C3	Ellijay	GA	293.8	89.02	88.5 0.52
WPPP-LP	LIC	264L1	Athens	GA	150.8	56.07	55.5 0.57
WKHX-FM	LIC	268C0	Marietta	GA	224.0	88.21	85.5 2.71
WUSY	LIC	264C0	Cleveland	TN	302.5	173.52	151.5 22.02
AP5221	APP	212A	Dahlonoga	GA	305.9	35.61	9.5 26.11
AP7456	APP-D	212A	Helen	GA	328.9	40.62	9.5 31.12
WNNX	LIC-Z	263C2	College Park	GA	223.7	95.19	54.5 40.69
WAKB	APP-N	265C3	Hephzibah	GA	126.6	185.11	141.5 43.61
AP3632	APP-D	212A	Young Harris	GA	347.5	56.14	9.5 46.64

This Lula, Georgia alternate allocation reference is only suggested if the Commission dismisses the WNCC-FM application at Franklin, North Carolina filed By Sutton Radiocasting Corporation.

The WLJA-FM Class C3 Allocation Reference is: 34 41 57 North Latitude, 84 34 00 West Longitude.



Petition Exhibit 3
Technical Comments
 in support of
Petition to Dismiss the Allocation of Channel 265A
Lula, Georgia

Bromo Communications, Inc.
 Atlanta, Georgia
 March 2008

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law office of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Motion to Dismiss Petition for Rule Making or For Other Relief" was mailed by First Class U.S. Mail, postage prepaid (or via hand delivery if marked with an asterisk), this 14th day of March, 2008, to the following:

*Mr. John Karousos
Media Bureau
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445 12th Street, S.W.
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Sherry L. Schunemann