

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

FILED/ACCEPTED
APR 14 2008
Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Amendment of Sections 73.202(b)) MB Docket No. 02-376
FM Table of Allotments,) RM-10617
FM Broadcast Stations) RM-10690
)
Sells, Wilcox, and Davis-Monthan Air Force)
Base, Arizona)

To: the Secretary, for transmission to the Commission

OPPOSITION TO APPLICATION FOR REVIEW

Journal Broadcast Corporation (“Journal”), through counsel, hereby opposes the Application for Review (“Review Application”) in the above-referenced proceeding (“Sells, Wilcox”) filed by KZLZ, LLC (“KZLZ”) on March 31, 2008. This opposition (the “Opposition”) to the Review Application is timely filed pursuant to 47 C.F.R. Sec. 1.115(d). Journal has standing in to file this Opposition, as it was a party in the cases below.

1. Repeating an argument, and then repeating it again, does not make it any more sound than the first time it was uttered. But, it appears that KZLZ believes that the truth of the matter will somehow be metamorphosed by such repetition, despite the fact that the questions posed have been asked and answered multiple times already. Nothing has changed. The analysis, correct in the first place, should not change.

2. KZLZ’s proposal failed because it offered mere theoretical service in gray and white areas, offering only vacant allotments to replace actual service lost had its proposed move-out been approved. On Reconsideration, the decision found “licensing of vacant allotments is too remote and too contingent . . .” *Sells, Wilcox*, Memorandum Opinion and Order (rel. Feb. 1,

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2008) at para. 8 (citing *Pacific Broadcasting, LLC*, 19 FCC Rcd 10,950, 10,956 (2004) (“Refugio”). The reality behind this policy has not changed. And, repetition of a discredited claim that this clear policy does not apply will not make it so – for the simple reason that accepting KZLZ’s claims will end aural reception service to nearly 3,000 people.¹ The decision below, then, correctly applied precedent and policy in this matter.

3. KZLZ also claims that the application of *Refugio* to this matter is “arbitrary and capricious.” But arbitrary and capricious means that it is without explanation or explication. But that is simply not a true statement. Both in the initial decision and on reconsideration, the Media Bureau explained the precedents and the reasons those precedents apply here.² Although the interpretation of law and precedent may not have been as clearly stated at the outset of this proceeding, it has been sufficiently explained in this docket and elsewhere to make *Refugio* binding here.³ The policy interpretation, first explained in *Refugio*, then applied in this proceeding, and upheld on reconsideration, should similarly be affirmed in response to this Application, because the policy is lawful, logical and correctly applied.

4. The only alternative that KZLZ can offer is to assert that the Commission must apply precedent that pre-dates *Refugio*, specifically, *Nogales, Vail and Patagonia, Arizona*, 16 FCC

¹ *Sells, Arizona*, Report and Order, 19 FCC Rcd 22,459 (2004) at para. 8.

² *Sells, Willcox* at paras. 7-11, and *Sells, Arizona* at paras. 9-11.

³ “[A]s long as interpretive changes create no unfair surprise -- and . . . recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation, makes any such surprise unlikely here -- the change in interpretation alone presents no separate ground for disregarding” the interpretation. *Long Island Care at Home, Ltd., v. Coke*, 127 S. Ct. 2339, 2349 (U.S. 2007) (Citing *Bowen V. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)).

Rcd 20,515, 20,519 (2001).⁴ But that case can more apply here than could *Plessy v. Ferguson*⁵ serve as binding precedent in a civil rights case.

5. The policy interpretation from *Refugio*, holding that unbuilt allocations are not an adequate substitute for actual service, was not based on speculation or hunch, but based on the real experience of regulators that an allocation is not the same thing as a radio station actually providing service to listeners. The silence created in white and gray areas would not have been theoretical, like the backfill service proposed – it would have been real whenever listeners turned on their radios.

6. In sum, KZLZ offers no evidence that this matter was decided incorrectly initially or when it was affirmed on reconsideration.⁶ No reason exists to reverse.

Respectfully submitted,



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⁴ Application at 5. The Commission explicitly considered and refuted KZLZ's appeal to superseded precedent in *Sells, Willcox* at n. 26 and n. 27.

⁵ 163 U.S. 537 (1896) (establishing the now discredited doctrine of "separate but equal").

⁶ In the interests of efficiency, Journal will not repeat arguments fully pleaded below. It requests, instead, that the Commission incorporate by reference those pleadings submitted earlier in this docket.

CERTIFICATE OF SERVICE

I, Carla M. Whitlock, a secretary at Fletcher, Heald & Hildreth PLC, hereby certify that a true and correct copy of the foregoing **OPPOSITION TO APPLICATION FOR REVIEW** was sent on this 14th day of April, 2008, via First-Class United States mail, postage pre-paid, to the following:

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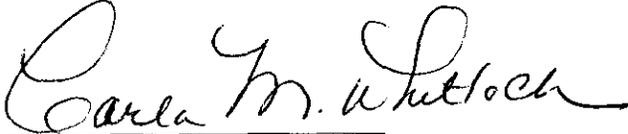
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