

Before the  
Federal Communications Commission  
Washington, DC 20554

FILED/ACCEPTED

APR - 7 2009

Federal Communications Commission  
Office of the Secretary

In the Matter of

Amendment of Section 73.202(b)	)	
Table of Allotments	)	MB Docket No. 04-219
FM Broadcast Stations	)	RM-10986
(Evergreen, Alabama and Shalimar, Florida)	)	

Attn: Office of the Secretary  
To: The Commission

**COMMENTS**

The Opp Broadcasting Co., Inc. ("Opp"), licensee of Station WAMI-FM, Opp, Alabama,<sup>1</sup> by its counsel, hereby submits these comments to report a new development which responds to the "Petition for Reconsideration" in this proceeding.<sup>2</sup> On December 22, 2008, Qantum of Fort Walton Beach License Company, LLC ("Qantum") submitted a Petition for Reconsideration of the Commission's decision which reaffirmed the Media Bureau's decision to change the city of license for Station WNCV(FM) (formerly WPGG(FM)) Evergreen, Alabama to Shalimar, Florida. The primary basis for Qantum's filing is the extent of the loss area created as a result of the move. Qantum claims that 164,459 people will lose the service and, of that number, more than 15,000 people will receive less than five full time aural services. However, as a result of the recent permit

<sup>1</sup> On March 3, 2009, the Commission issued a permit to change the city of license for Station WAMI-FM to Fort Deposit, Alabama. (BPH-20070122AIT). No Informal Objection or Opposition was filed to the application and the grant of the application is expected to be final on April 16, 2009.

<sup>2</sup> Opp is simultaneously filing a Motion for Leave to File Comments.

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issued to Opp for WAMI-FM, the number of persons receiving less than five aural services will be 253. In support hereof, Opp states as follows:

1. On January 22, 2007, Opp filed an application to change city of license for Station WAMI-FM and to increase the facilities to Class C1. This change required one other station (WYVC(FM), Camden, AL) to change channel. The Camden channel change, in turn, was conditioned on the move of WNCV to Shalimar, Florida.<sup>3</sup> Cumulus Licensing, LLC, licensee of Station WNCV, made reference to the Opp application in its “Contingent Opposition to Petition for Reconsideration” stating that Quantum ignored the public interest benefits of the WNCV relocation which, *inter alia*, makes it possible to provide a first local service to Fort Deposit and increase Station WAMI-FM’s “net population coverage by 108,886 persons, the vast majority of whom will be located within WPGG’s (WNCV) loss area (licensed 60 dBu contour).”<sup>4</sup> In other words, WAMI-FM’s move and the public interest benefits associated with it, was only possible due to the move of WNCV to Shalimar.

2. The Commission’s *Memorandum Opinion and Order*<sup>5</sup> found that the WNCV move would result in a net gain in service to 62,865 persons and that net gain coupled with a first local service to Shalimar (Priority 3) outweighed the loss of service to areas which would receive less than five aural services (Priority 4).<sup>6</sup> Nevertheless, Quantum describes this action as unprecedented due to the number of persons that would

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<sup>3</sup> Opp noted in its application it was filing under the *Auburn, Alabama* policy which permits the filing of proposals on a conditional basis as long as the proposal is filed after the effective date of the non-final action. See *Memorandum Opinion and Order*, 18 FCC Rcd 10333 (2003).

<sup>4</sup> Contingent Opposition at p. 9-10.

<sup>5</sup> 23 FCC Rcd 15846 (2008).

<sup>6</sup> *Id* at paragraph 5.

no longer receive “abundant” service.<sup>7</sup> Since Qantum relies so heavily on this loss of service for its reconsideration, Opp thought it would be appropriate to let the Commission take official notice that, as a result of the grant of the WAMI-FM permit for Class C1 facilities at Fort Deposit, the population within the WNCV area that would no longer receive five aural services will be 227 persons and within the area that would no longer receive four aural services will be 26 persons. *See* attached Engineering Statement of Reynolds Technical Associates. This is a significant difference from the more than 15,000 people Qantum claims will receive less than five full time aural services.

3. In addition to the grant of the WAMI-FM application, another recent decision impacts this proceeding. In that case, involving an application by Station KLVF(FM) to change its city of license, the Media Bureau stated that new service to 42,057 people who are already well served (*i.e.*, they receive 5 or more aural services) under Priority 4 is favored over service to 3,000 people who would be receiving a 3<sup>rd</sup>, 4<sup>th</sup> or 5<sup>th</sup> aural service.<sup>8</sup> If the Commission does not favor service to areas with five or less aural services under a Priority 4 comparison then it clearly cannot favor that service under a Priority 3 comparison as Qantum is advocating for in this proceeding. When the Commission factors in the first local services to Fort Deposit and Shalimar as well as the net gain in service compared to service to just 253 people that are not receiving abundant

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<sup>7</sup> *Id* at note 15 citing *Family Broadcasting Group*, 53 RR2d 662 (Rev. Bd.1983), *rev. denied* FCC 83-559 (Comm’n Nov. 29, 1983); and *LaGrange and Rollingwood, Texas, Memorandum Opinion and Order*, 10 FCC Rcd 3337 (1995).

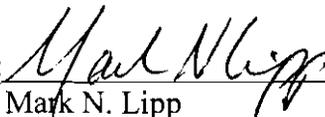
<sup>8</sup> *See* Letter to Barry D. Wood, Esq., March 13, 2009 (attached).

service, the decision is obvious.<sup>9</sup>

4. Accordingly, The Opp Broadcasting Company, Inc. urges the Commission to take official notice of the grant of the permit for Station WAMI-FM to provide a first local service to Fort Deposit, Alabama which will cover almost the entire area that would have been left with five or less aural services.

Respectfully submitted,

The Opp Broadcasting Company, Inc

By: 

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April 7, 2009

Its Counsel

<sup>9</sup> Opp understands that the Commission may not take into account service from an unbuilt permit in a gain/loss analysis. However under Priority 4, the Commission can consider other public interest factors such as the fact that service will be provided at a future date. Furthermore, when the grant becomes final, the station must construct at Fort Deposit and WAMI-FM cannot turn in the permit and move back to Opp, Alabama. WAMI-FM's operation at Opp will become an implied-STA and the Commission does not take into account STA facilities in its gain/loss analysis.

**FEDERAL COMMUNICATIONS COMMISSION**  
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**WASHINGTON DC 20554**

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March 13, 2009

Barry D. Wood, Esq.  
Wood Maines & Nolan, PC  
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Re: KLVF(FM), Las Vegas, NM  
Facility ID #34441  
Meadows Media, LLC  
BPH-20081114AAL

Dear Mr. Wood:

This letter refers to the above-captioned minor change application of Meadows Media, LLC ("MM"), licensee of Station KLVF(FM), Las Vegas, New Mexico, as amended January 7, 2009 (the "Application"). The Application proposes to modify the community of license of Station KLVF(FM) from Pecos, NM, to Las Vegas, NM, and to change effective radiated power, class, antenna height, and station location.

**Background.** The Application was filed pursuant to Section 73.3573(g) of the Commission's rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file a competing expression of interest. Any reallocation proposal must result in a preferential arrangement of allotments.<sup>1</sup> We make this determination using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.<sup>2</sup> This application would provide a tenth local transmission service<sup>3</sup> to Las Vegas under Priority (4).

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<sup>1</sup> See *Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License")*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

<sup>2</sup> *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

<sup>3</sup> Noncommercial educational stations KEDP(FM) and KRRE(FM), and commercial stations KBQL(FM), KMDZ(FM), KBAC(FM), KFUN(AM) and KNMX(AM), and vacant Channel 296A are assigned to the community of Las Vegas. Additionally, Channel 229C2 is assigned to the community. See File No. BNP-20070501AHC.

**Discussion.** We cannot approve the proposed city of license modification of Station KLVF(FM) from Pecos, to Las Vegas, New Mexico. Previously, the staff modified Station KLVF(FM)'s license to specify operation on Channel 264C3 at Pecos, as the community's third local service.<sup>4</sup> The *Pecos R&O* found that the Pecos reallocation would result in KLVF(FM) serving an additional 52,000 people. Las Vegas, on the other hand, would continue to be served by five local radio stations with potential expansion of local service from three vacant allotments.<sup>5</sup> For these reasons, the *Pecos R&O* concluded that the reallocation to Pecos would result in a preferential arrangement of allotments as required by *Community of License*. For the exact same reasons, we conclude that the proposed re-allocation to Las Vegas would not result in a preferential arrangement of allotments, notwithstanding the fact that KLVF(FM) has not commenced operations in Pecos.

We decline to credit MM's showing that the proposed reallocation to Las Vegas results in a preferential arrangement of allotments by providing coverage to significant underserved areas. Specifically, MM states that the proposed facility at Las Vegas would provide a new second service to 128 persons, a new third service to 430 persons, and a new fourth service to 461 persons. However, MM's showing is fundamentally flawed in two respects. First, MM's underserved areas showing is based on the Section 73.313 prediction methodology and actual terrain. For the purpose of Section 307(b) gray and white area determinations, the Commission has never accepted such showings. Rather, determinations of coverage are based on the Commission's standard FM propagation methodology in accordance with Section 73.313(a), the F(50,50) curves, assuming omnidirectional signals and "uniform terrain for all existing FM services that overlap any portion of the gain/loss areas."<sup>6</sup> This case illustrates precisely the potential for manipulating coverage showings when uniform terrain is assumed in evaluating one proposed allotment and actual terrain is assumed in evaluating another. We will not allow such gamesmanship to influence our public interest determinations, and therefore we re-emphasize our position that only the Commission's standard FM propagation methodology with uniform terrain is appropriate in the FM allotment context.<sup>7</sup> Second, MM's study is fundamentally flawed because it failed to consider all of the existing FM stations that overlap the gain area. MM's underserved areas showing only took into account the existing stations licensed to Las Vegas. The omission of all other relevant FM service data is inexplicable and completely unjustified.

Based on the totality of factors, we find that the retention of Station KLVF at Pecos is favored under Priority (4) of our FM allotment priorities.<sup>8</sup> The provision of a third local service at Pecos, and an additional net reception service gain to 42,057 persons outweighs a tenth local service at Las Vegas, and the provision of a third, fourth or fifth reception service to fewer than three thousand persons.<sup>9</sup>

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<sup>4</sup> See *Cimarron, Las Vegas and Pecos, New Mexico*, Report and Order, 20 FCC Rcd 16255 (MB 2005)(the "*Pecos R&O*").

<sup>5</sup> At MM's request, the *Pecos R&O* allotted vacant Channel 296A at Las Vegas.

<sup>6</sup> See *Arriba, Colorado*, Report and Order, 17 FCC Rcd 2245 (MMB 2002); *Meeker and Craig, Colorado*, Report and Order, 15 FCC Rcd 23858 (MMB 2000), and *Indian Springs, Nevada*, Report and Order, 14 FCC Rcd 10568 (stating that our policy is to assume uniform terrain for gain and loss calculations for FM reallocation proposals).

<sup>7</sup> See *Jerrold Miller, Esq.*, Letter, 23 FCC Rcd 9362, 9365 n.19 (MB 2008).

<sup>8</sup> See n. 2 *supra*.

<sup>9</sup> See *Tullahoma, Tennessee and Madison, Alabama*, Report and Order, 18 FCC Rcd 17636 (MB 2003) (finding that the creation of an underserved area, as well as an extremely large net loss in the area and the number of persons

Pursuant to 47 C.F.R. § 73.3522, "... an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff." Additionally, 47 C.F.R. § 73.3564 states that, "[a]pplications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment." See Appendix B in the Report and Order in MM Docket No. 91-347. This letter constitutes your opportunity for corrective amendment pursuant to 47 C.F.R. § 73.3522.

Further action on the Application will be withheld for a period of thirty days from the date of this letter to provide MM an opportunity to respond. Failure to correct all tender and acceptance defects within thirty days from the date of this letter will result in dismissal of the Application with no further opportunity for corrective amendment pursuant to 47 C.F.R. § 73.3564. Please note that any amendment must be submitted in triplicate and signed in the same manner as the original Application.

Sincerely,



Rodolfo Bonacci  
Assistant Chief  
Audio Division  
Media Bureau

cc: Meadows Media, LLC

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served, are significant disadvantages); *see also, Seabrook, Texas*, Memorandum Opinion and Order, 10 FCC Red 1232 (MB 2008). Based on the Commission's standard FM propagation methodology and assuming uniform terrain, a staff engineering analysis determined that the proposed reallocation of Station KLVF to Las Vegas would result in loss in service to 45,672 persons. All but eight of these people would continue to receive five or more reception services. Those eight individuals would continue to receive four services. The net gain area consists of 3,615 persons. The reallocation to Las Vegas would provide a third reception service to 1,326 persons, a fourth reception service to 959 persons, and a fifth reception service to 447 persons. The white and gray areas are unpopulated, and therefore this case does not implicate Priority (1) or Priority (2) of our FM allotment priorities.

## CERTIFICATE OF SERVICE

I, Randy Pannell, in the law firm of Wiley Rein LLP, do hereby certify that I have on this 7<sup>th</sup> day of April, 2009, caused to be mailed by first class mail, postage prepaid, copies of the foregoing “**Comments**” to the following:

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