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MB Docket No. 09-52 In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures

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Hatfield & Dawson Consulting Engineers, LLC respectfully submits its comments in response to the Notice of Proposed Rulemaking in MB Docket No. 09-52, *In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*.

We support several of the Commission's proposals, offer critiques of others, and suggest further enhancements. Each of the Commission's major proposal areas will be discussed below in turn.

A. Modify Priority (3) and (4) Section 307(b) Radio Licensing Standards

The NPRM appears to presuppose that the limited number of AM applicants participating in auctions (and thus the limited utilization of bidding credits) is a bad thing. This is not necessarily so. By prevailing under a Section 307(b) analysis, applicants have been able to avoid the unnecessary expense of participating in an auction.

The Commission cites to the fact that only seven AM applicants (out of 116 total mutually exclusive applications) participated in Auction No. 32. However, no analysis is provided to indicate what percentage of the other 109 applicants a) were eligible for the bidding credit, b) possessed the funds to participate in a potentially expensive auction, or c) even had technically viable applications (see the Commission's proposal in this proceeding to establish "technically eligible for auction processing" criteria for new and major change applications in the AM broadcast service). Without hard data to support the contention that the current policy works against new entrants, the

Commission's vague conclusion that "new entrants. . .*may* be excluded from the process without being able to employ the bidding credits"¹ carries little or no weight.

The fact is that constructing a new AM radio station is an expensive proposition. By utilizing Section 307(b) criteria applicants are able to avoid yet one more expense – an auction – and more of the prevailing applicant's funds remain available to facilitate construction of the station.

The Commission tentatively concludes that "Priority (3) preference should not be awarded where the proposed new station would *or could* place a principal community signal over the majority of an Urbanized Area."² We would caution the Commission that the determination of whether a station *might* be able to place a principal community signal over an Urbanized Area ("UA") is one which is fraught with pitfalls.

Will the Commission require proponents to evaluate up-front whether their proposal (for example, for a new commercial FM allotment) *might* be able to provide such service to a UA? Will the Commission perform this analysis itself? Or will this hypothesis be left to competing or opposing parties?

Just because there is some hypothetical location where the channel may be able to provide 70 dBu service to both the unserved community and to a nearby Urbanized Area, does not mean that the location is a viable transmitter site or that a station will be constructed in that fashion. It can take many years for a vacant FM allotment to come up for auction after it is allotted; in that time other stations may change their facilities in such a way as to prevent the allotment from ever providing 70 dBu service to the Urbanized Area.

Furthermore, the mere existence of a physical location which *might* provide service to the UA is non-definitive. Such a site might be located within the boundaries of a designated protected Wilderness Area, a National Forest or National Park, or even a military reservation. Proximity to an airfield or VFR route might restrict potential tower height. Terrain may make site access difficult if not nearly impossible.

By entertaining consideration of whether the allotment *might* be able to serve a nearby UA, the Commission will in fact run the risk of potentially depriving rural communities situated near a UA

¹ NPRM at 6, emphasis added.

² NPRM at 7, emphasis added.

of an outlet for local self-expression. Furthermore, such analysis will increase the costs to proponents, with little or no apparent benefit to the public.

B. Limit Moves of Existing Stations from Smaller Communities

It would be a mistake for the Commission to absolutely prohibit any community of license change which creates "white" or "gray" areas. In many cases those areas are unpopulated, and it would be nonsensical to require stations to provide reception service in unpopulated areas. In many other cases in our practical experience, such areas have very limited population. Current policies that permit the creation of white and gray areas with *de minimis* population serve quite well to balance the Section 307(b) priorities.

We are also opposed to the proposal to treat community change applications as providing service to an Urbanized Area if the new facilities *could* place a principal community signal over 50% or more of the UA. We have already outlined in the previous section the pitfalls involved in the assumption that a site which will serve the UA *might* be available. The Commission should limit its consideration to the specific technical proposal before it.

We are particularly concerned with the Commission's expressed interest in "other criteria that should be considered in evaluating a proposed change of community of license *or change of facilities*"³, since it appears by this statement that additional requirements might be placed on evaluation of a station's routine minor change application, for example for a change in transmitter site. No additional criteria should be applied in evaluating minor change applications which do not involve a change in community of license.

Likewise, we are opposed to any prohibition against removing the second local transmission service from a community, particularly where such a modification would provide a first local service to a new community.

C. Establish Section 307(b) Priority for Native American and Alaska Native Tribal Groups Serving Tribal Lands

We understand the Commission's intent in proposing the establishment of a Section 307(b) priority for federally recognized Tribes. In the commercial FM service, however, such a priority would be nothing more than a symbolic measure. As the Commission itself notes, "The proposed tribal

³ NPRM at 18, emphasis added.

priority would be applied only at the allotment stage of the commercial FM licensing procedures, as this is the only point at which a Section 307(b) analysis is currently conducted."⁴

In other words, a Tribe could go to the time, trouble, and expense of prosecuting a rulemaking proceeding to get a vacant FM channel allotted to a community on tribal land (including the payment of a \$3740 filing fee for the accompanying Form 301 application), only to see the allotment go to the highest bidder in the Congressionally-required auction, which auction may not occur for several years. The auction winner, while possibly required to provide principal community service to some percentage of tribal lands (should that particular proposal be adopted), may still not provide the type of service which the original (tribal) proponent had in mind.

Therefore, any tribal Section 307(b) priority adopted should be limited to non-table services such as the AM, NCE FM, and LPFM radio services, where that priority can be applied at the application stage. We leave to other commenters to address the question of whether such a priority would be legally viable, or would be deemed a racial classification.

D. Absolute Prohibition Against Downgrading Proposed AM Facilities After Receiving Dispositive Section 307(b) Preference

Some amount of flexibility must be permitted for new AM stations which have received a dispositive Section 307(b) preference. The realities of AM tower siting can make it extremely difficult to preserve service area if the original tower site is lost or is unable to receive local permitting.

Even so, the Commission should actively enforce the requirement that the applicant have reasonable site assurance at the time of filing. In particular, we are familiar with several AM auction cases where an applicant filed an application to co-locate with an existing AM station without first contacting and securing the consent of the existing AM station (also the landowner). The lack of reasonable site assurance at the time of filing can lead to a situation where a subsequent amendment or modification cannot serve substantially the same area.

If the Commission is going to establish a requirement that modified AM auction facilities provide service "substantially as proposed" in the short-form, there should be a bright-line definition of what that phrase means in order to provide certainty for both applicants and the Commission staff.

⁴ NPRM at 22.

E. Establish "Technically Eligible for Auction Processing at Time of Filing" Criteria for New and Major Change Applications in the AM Broadcast Service

We strongly support the Commission's proposal to establish technical acceptability standards for applications for new stations and for major changes in the AM broadcast service. Our experience with the AM auction filing windows is that an unacceptable percentage of the applications filed have one or more major technical flaws. These fatally flawed applications can nevertheless remain on file for an inordinate length of time, creating larger and more cumbersome MX groups, complicating settlements and engineering solutions within those MX groups, and standing in the way of grant of viable minor change applications by existing stations.

Examples of such flawed applications include applications for 50 kW nondirectional facilities which cannot hope to provide interference protection to existing stations.

Section 73.3571(h)(1)(ii) should be modified as proposed, to require that applicants in future AM auctions meet basic technical eligibility criteria including community of license coverage (day and night), and protection of co- and adjacent-channel stations and prior-filed applications (day and night). The rule should also be modified to permit the filing of objections against short-form applications by competing parties in order to demonstrate that the applicant did not have reasonable site assurance at the time of filing. Likewise, we support the proposal to modify the rules to prohibit the amendment of applications that are technically unacceptable at the time of filing.

We also propose that the rules be modified to extend this principle to the NCE FM service. We have seen many of these same types of technical deficiencies in applications filed during the October 2007 NCE FM filing window, including applications which do not protect co- and adjacent-channel stations and prior-filed applications, and applications which do not provide the required level of service to the proposed community of license. When these fatally flawed applications have been included in MX groups, they have unnecessarily complicated any negotiated resolution of those MX groups. Parties with viable applications have had to negotiate with, and in many cases make settlement payments to, applicants whose proposals cannot be granted. While such settlement payments are limited to an applicant's "reasonable and prudent" expenses in prosecuting the application, the typical \$3000 to \$5000 payment required is often exorbitant compared to what was apparently a minimal effort expended on preparing the application, and can be an exceptional expense for a non-commercial entity with limited funds. Given the Commission's "winner take all" rules for determining the winner of an MX group, resulting in dismissal of the remaining applications, a viable application in an MX group – linked to the apparent winner by a

technically deficient application in a daisy chain – often faces no choice but to negotiate and pay off the party who filed the technically deficient application.

In some cases, dismissal of the technically deficient application could split one large MX group into two or more smaller MX groups, thereby allowing the Commission to award additional construction permits for new stations and expanding the number licensees.

In such a situation, we propose that an NCE FM applicant in an MX group which includes a technically deficient application be permitted to make a filing which demonstrates the technical rule violation of the deficient application, in order to either claim singleton status or break the original MX group into two or more MX groups.

F. Codify the Permissibility of Non-Universal Engineering Solutions and Settlement Proposals

We support the Commission's proposal to codify the permissibility of non-universal engineering solutions and settlement proposals. Our experience with such engineering solutions and settlements, particularly with regard to the October 2007 NCE FM filing window, has demonstrated that they are very effective at resolving MX situations and facilitating grants of construction permits to local applicants and new entrants.

We have assisted many of our clients in extricating themselves from MX groups and securing CPs, among them:

KPLK 202A at Manson, WA for Pacific Lutheran University

KPYU 205A at Sedro-Woolley, WA for Pacific Lutheran University

KSQM 218A at Sequim, WA for Sequim Community Broadcasting

KPTA 220A at Port Townsend, WA for Radio Port Townsend

KACW 217A at South Bend, WA for Chehalis Valley Educational Foundation

None of these applicants would have prevailed in their MX groups, but were nevertheless able to secure permits for new stations thanks to a policy permitting non-universal engineering solutions.

We are opposed, however, to the proposed requirement that an applicant submitting a technical amendment pursuant to this policy must resolve *all* of its mutual exclusivities. Rather, the Commission should codify the policy employed in the October 2007 NCE FM filing window, which has allowed an applicant to file an amendment so long as *at least one* application becomes a

singleton. This can often be accomplished in such a manner that the non-singleton amendment will retain its priority relative to the remaining members of the MX group; where that is not the case, the non-singleton applicant would not have the motivation to file the amendment.

For example, our client Sequim Community Broadcasting (“SCB”) filed an application for a new NCE FM station on Channel 216A at Sequim, WA (see FCC File No. BNPED-20071012ACD). That application was mutually exclusive with an application filed by Port Townsend Seventh-Day Adventist Church (“PTSDA”) for a new NCE FM station on Channel 216C3 at Port Townsend, WA (see FCC File No. BNPED-20071022BDU). Our review of the MX group as a whole indicated that PTSDA would prevail as the overall winner of the MX group on Section 307(b) grounds. We were able to develop a plan whereby SCB amended its application to specify operation on Channel 218A at a new transmitter site, while PTSDA amended its application to incorporate a slight modification of its directional pattern while still retaining its Section 307(b) priority. Without PTSDA's gracious cooperation, SCB would not have been able to secure its construction permit, which is now on the air as KSQM, providing the first local service to the city of Sequim.⁵

Accordingly, we propose that the revised Section 73.5002 read as follows:

§ 73.5002 Application and certification procedures; return of mutually exclusive applications not subject to competitive bidding procedures; prohibition of collusion.

(e) The staff may permit applicants seeking to resolve their mutual exclusivities by means of engineering solution or settlement as specified by public notice, pursuant to paragraph (d) of this section, to submit a non-universal engineering solution or settlement proposal, so long as such engineering solution or settlement proposal results in the grant of at least one application from the mutually exclusive group. A technical amendment submitted under this subsection must resolve all of at least one applicant's mutual exclusivities with respect to the other applications in the specified mutually exclusive application group.

As an additional matter, we propose that the Commission modify its NCE FM selection procedures so that the selection and grant of the winning application from an MX group results in the dismissal

⁵ PTSDA has also been granted its construction permit for KROH 216C3 Port Townsend.

of *only* those applications in the MX group with are *directly* mutually exclusive with the winner. In many cases this will result in the creation of additional singletons and/or smaller MX groups from which an additional winner can be selected. This would not occur until the primary winner is granted its initial construction permit; until that time, it may not be certain that the primary winner's application will in fact be granted. This modification of the NCE FM selection procedures will serve the public interest by ensuring that a maximum number of permits can be granted from each MX group, thereby increasing the number of outlets for local self-expression and sparing non-commercial entities the cost and uncertainties of waiting for a future filing window to re-apply.

G. Cap on Number of AM Applications That May Be Filed in an Auction Window

We support the Commission's proposal to establish a cap on the number of applications that may be filed in an AM auction window. The 10-application cap and the attribution rules adopted for the October 2007 NCE FM filing window have served well, and should be adopted for future AM auction filing windows.

H. Modify Section 73.5005 to Provide Flexibility in the Deadline for Filing Post-Auction Long-Form Applications

The proposed modification of Section 73.5005, to provide the Media Bureau and Wireless Telecommunications Bureau with flexibility to set the deadline for the filing of post-auction long-form applications, is long overdue. While many auction winners will still drag their feet, and prepare and file their applications in the final days before the deadline, we have found that 30 days is simply too short a period in which to make final site determinations, and to secure technical data and reasonable site assurance, particularly where that 30-day period has overlapped the end-of-year holiday season.

As a result, many of the initial post-auction long-form filings have been little more than placeholder applications that are "good enough for now".

As an alternative to providing flexibility to the Media Bureau and Wireless Telecommunications Bureau to set the deadline, the Commission could instead modify Section 73.5005 to set a 60-day or 90-day deadline. A longer, but still firm, deadline would provide a measure of certainty and would be much less frustrating than would working diligently towards an initial deadline, only to have the deadline moved back another 30 days at the eleventh hour based on requests to the MB and WTB to extend the initial deadline.

Providing too much flexibility could also lead to situations where applicants who did not proceed diligently and who did not meet the deadline could claim afterwards that the deadline should have been extended for their benefit. For that reason, a longer but still firm deadline would be preferable and easier to administer.

I. Prohibit FM Translator "Band Hopping" Applications

It is not at all clear from the NPRM just how prevalent "band hopping" is. The NPRM states only that "a number" of Auction No. 83 applicants attempted to move into the reserved band after grant of their initial construction permits. If this amounts to just a handful of translators, this situation does not rise to a level of concern requiring a prohibition of this nature. Accordingly, we are opposed to the Commission's proposal to prohibit "band hopping" applications.

Should the Commission nevertheless determine to impose such a prohibition, an exception should be made for translators in the reserved band which are forced by circumstance of interference to seek modification to an adjacent or IF channel in the commercial band.

We are much more concerned with the lack of formal displacement relief for FM translators which are displaced by subsequently-authorized full-power stations. The Rules should be modified to permit the filing of an FM translator displacement application to a non-adjacent channel upon an appropriate showing that the displacement is necessitated by interference to or from a new or modified full-power station, and that no first-, second-, or third-adjacent channel (or intermediate frequency channel) is available. Displacement applications should otherwise be held to the current minor modification requirement that there be some overlap of the present and proposed FM translator 60 dBu contours.

Certain restrictions should, however, be placed on such displacement applications, prohibiting displacement relief where the translator was originally authorized in such a manner that it would clearly receive damaging interference from a licensed or authorized full-power station on the co- or first-adjacent channel. Without such a restriction, there could be widespread abuse of the displacement policy.

J. Codify Technical Standards for Determining AM Nighttime Mutual Exclusivity Among Window-Filed AM Applications

At paragraphs 39-41 of the NPRM, the Commission proposes codification of the determination in *Nelson Enterprises, Inc.* (18 FCC Rcd 3417) holding that two (or more) applications filed in the same window, one or more of which enters into the 25% RSS limitation of one or more of the others, are considered mutually exclusive even if the applications would otherwise be fully grantable and meet the nighttime principal community coverage requirement. The *Nelson* determination upheld staff action in that case, and followed other unchallenged similar determinations of mutual exclusivity of applications filed in the 2000 and 2004 AM filing windows.⁶

The effect of this policy and the proposed rule is to limit the number of grantable applications in a single filing window, and therefore to act directly against one of the stated objectives of the NPRM, policies to promote rural radio service. Indeed, the application of this policy has had exactly that effect in several cases in the filing windows.

The fundamental rule defining allocation standards for AM stations is 47CFR73.37.

"The first major change in this section was made in 1964 (Docket No. 15084, FCC 64-609, 45 FCC 1515), at which time, concerned with the erosion of the service of existing stations under an allocations system which, in effect, sanctioned the imposition of measured amounts of interference on such stations, we adopted the "go-no-go" rules, which, inserted in 73.37, proscribed the acceptance of any application involving overlap of daytime service and interference contours. At this time, we also adopted, for nighttime operation, as an amendment to Sec. 73.24, the requirement that each new nighttime proposal serve 25% "white area," (later amended to apply to area or population) as a result of our apprehension that new unlimited time stations, which, in the great majority of cases were being assigned to communities already having nighttime service, although nominally not causing objectionable interference under our rules, were nevertheless eroding the nighttime service actually provided by previously authorized stations." (34 RR 2d 605 ¶12)

⁶ Ironically, were two such applications filed in different windows, the second could, as noted further in this discussion, be fully grantable despite receiving interference that entered into its 25% RSS calculation from the first.

This discussion from the Report & Order in Docket 20265, June 27, 1975, describes the process by which the Commission revised AM allocation standards from the permissive “public interest interference balancing” standards which prevailed during the 1940's and 1950's to the “no new interference is allowed” standards which have prevailed since. These standards were reinforced by the “go-no go” procedure and eligibility rules changes adopted in Docket 20265.

AM nighttime allocation standards differ from daytime standards in one important regard, however. While an AM applicant cannot propose a facility which *causes or receives* interference daytime (or increases it in the case of existing facilities making changes), essentially all AM nighttime applications involve receipt of interference above the “normally protected” values during nighttime operation.

This leads to an important processing standard for the nighttime operation of applications which are “simultaneously” filed, that is, within the same filing window or cutoff period. Prior to *Nelson* the leading case was decided by the full Commission, in January, 1978, well after the current procedural “go-no go” rules were adopted. The case is *In re Application of KLUC Broadcasting Company* 42 RR 2d 178, 67 FCC 2d 586.

In the KLUC case, the Commission affirmed the processing line practice of considering that two applications simultaneously filed are not mutually exclusive even if one contributes to the nighttime RSS calculation of another, so long as the resulting nighttime interference service of the affected station (1) is an improvement over its previous condition, if any, or (2) continues to meet the “substantial compliance” coverage requirement historically applied (and reaffirmed and numerically established as 80% in the Report & Order in Docket 18651, Feb. 21, 1973, 39 FCC 2d 645, 26 RR 2d 1189 ¶55.)

Prior to *Nelson*, four actions by the Commission occurred subsequent to the KLUC case and require examination to determine if they modify or revise this circumstance in any way. In the Report & Order and the Memorandum Opinion & Order in MM Docket 87-267 (FCC 91-303, September 26, 1991 and FCC 93-198, April 13, 1993) the Commission established a new calculation methodology for the determination of the RSS nighttime interference free service area and the determination of allowable new interference for the nighttime operation of AM stations. Although a “two-tier” RSS calculation procedure and the inclusion of interference calculations from first adjacent channel stations were established, nothing about these changes modified in any way the standards for processing “simultaneously filed” applications.

The subsequent "Freeze Order" of November 26, 1997, the First Report and Order in MM Docket 97-234 (FCC-98-194, August 6, 1998) and the AM Auction Filing Window Public Notice of November 19, 1999 all discuss the provisions which are to be applied to applications which are mutually exclusive, but make no changes whatever in the *definition* of mutual exclusivity.

In some cases, two applications can be filed a hundred or more kilometers distant from each other specifying the same or a first adjacent channel frequency. Such applications can be designed originally or modified by amendment to have no daytime or nighttime conflicts with any other authorizations or applications filed up to the end of a filing window.

If one or both of the applications enters into the 25% RSS computation of the other, this, of course, does not result in *any* reduction of nighttime service area for the application receiving the interference, since the nighttime service area is computed using the 50% RSS level calculation. Not only does this situation squarely fit the KLUC precedent, but there need not even be an analysis of the impact, since there is none! In the case of co-pending applications where one or both enter into the 50% RSS calculation of the other, the KLUC precedent clearly states that so long as both applications meet the principal community service requirement, the applications are not mutually exclusive.

Not long after the January 2000 Auction Filing Window, the Commission staff advised that any contribution to the nighttime RSS calculation of another "simultaneous" application results in mutual exclusivity, and the "MX group" designations by the staff and affirmed by the Commission in *Nelson* have followed this novel interpretation. This, despite the clear language of the applicable rule. Section 73.37(d), which requires that an application for a new station not produce interference to "an authorized station, as determined pursuant to §73.182(l)," thus underscoring the Commission's determination in the KLUC case. The discussion at paragraph 8 of *Nelson* dismisses this by stating that "Petitioners misconstrue a drafting convention as a dramatic and unexplained shift in nighttime interference protection standards..." when in fact it is clear language providing a distinction that had been clearly adopted by the full Commission in the KLUC case.

Legal counsel for KLUC prepared an e-mail memo to the staff not long after this novel interpretation was first promulgated, subsequent to the January 2000 filing window. He stated in part:

"Section 73.37(d) only requires applications for new facilities to satisfy Section 73.182(1) with respect to "an authorized station." Thus, the rule cannot properly be read as having any applicability to simultaneously filed applications for new facilities.

If the Commission had intended section 73.182(1) to apply to pending applications as well as "authorized" stations, clearly it would have said so. The fact that it not only did not say so, but limited the applicability of the rule to situations where a new proposal impacted on an "authorized station" precludes applying Section 73.37(d) to make two simultaneously filed applications MX.

In the KLUC case, the Commission found that the KCMJ applications was not MX with that of KLUC, notwithstanding the fact that the KLUC proposed service raised the RSS nighttime limit of the KCMJ significantly, precisely because the KLUC impact on the nighttime interference limit only pertained to the KCMJ proposal, not KCMJ's existing service.

If KCMJ's proposal had been an already authorized service, KLUC's application would not have been grantable. Nothing has changed since 1978 which would render the Commission's analysis and holding in KLUC inapplicable to applications filed in an auction window.⁷

In the Public Notice: AM New Station and Major Modification Filing Window issued November 6, 2003, the Commission, at footnote 11, cited *Nelson Enterprises Inc* 18 FCC Rcd 3414 as the touchstone for determination of nighttime mutual exclusivity. The determination in *Nelson* alleges that it relies on the technical standards adopted in the 1991 *AM Improvement Report and Order* without ever providing an explanation of just how that document's findings can be read to overturn the explicit language of §73.182 or the determination of its specificity in the KLUC case. The discussion in *Nelson* is extensive, but it employs circular logic. Additionally, it fails to recognize that the simultaneity of applications filed in an auction window is not distinguishable from the simultaneity of applications filed during the "cutoff" windows employed prior to the auction rules.⁸

The Commission, of course, is clearly entitled to adopt as a rule the interpretation it made in *Nelson*, but to do so and to maintain the policy acts to thwart the objective of improving rural radio

⁷ E-mail message to Edward DeLaHunt from David Tillotson, Esq., October, 2000.

⁸ It appears that appellants in *Nelson* did were not aware of *KLUC* and therefore did not cite it.

service by unnecessarily limiting the number of grantable applications and adding to the administrative burden of processing mutually exclusive “MX” groups.⁹

K. Clarify Application of the New Entrant Bidding Credit Unjust Enrichment Rule

We support clarification of the New Entrant Bidding Credit unjust enrichment rule. The proposed clarification, however, needs further clarification. The Commission has proposed to clarify that the contour of a new FM broadcast facility is defined by "the maximum class facilities at the allotment site." It nevertheless remains unclear whether the Commission intends that to mean the perfectly circular standard 70 dBu contour distance for the class of station (i.e. 16.2 km for Class A, 23.2 km for Class B1 and C3, etc.) or the 70 dBu contour as calculated pursuant to Section 73.313 for a class-standard facility at the allotment site coordinates (i.e. similar to the Section 73.215 contour calculation for the contours of a non-73.215 station). The distinction between circular and calculated is a significant one, particularly in the mountainous West.

Adoption of a clear definition will avoid unnecessary confusion on the part of applicants. We suggest, given that ultimate site selection will almost certainly be different from the allotment site, that the contour be defined by the standard 70 dBu contour distance for the class of station.

As a related clarification, the Commission should also define which contour should be used for existing (licensed or authorized) FM stations. Since the facilities of existing FM stations are known, the principal community contours of existing stations could be defined by their authorized or licensed facilities as calculated under Section 73.313.

L. Clarify Maximum New Entrant Bidding Credit Eligibility

We support the Commission's proposal to clarify Section 73.5007(a).

⁹ An example of a mutual exclusivity interpretation by the staff which is clearly consistent with the longstanding AM interference rules but which had been, prior to the adoption of the changes in MM Docket 87-267, interpreted to not result in mutual exclusivity is the situation where nighttime groundwave overlap in 2nd and 3rd adjacent channel cases was ignored if the nighttime 50% RSS values for each station were greater than the groundwave signal values. The staff now strictly interprets these situations as resulting in prohibited overlap.

M. Codify Guidelines for Section 73.313(e) Supplemental Showings

We strongly support the proposal to codify the guidelines for Section 73.313(e) supplemental showings. It has been seven years since the Commission issued the KMAJ-FM Letter,¹⁰ in which it set forth guidelines similar to those proposed in this proceeding. Since that time those guidelines have become the *de facto* standard employed by applicants and their consultants, as well as by the Audio Division staff, in order to determine whether terrain "departs widely" enough to permit study utilizing alternative coverage prediction methodology.

Certain fine points of the proposed "Note to Section 73.313(e)" should be modified or clarified, however.

The proposed Note refers in two instances to the "community center". The phrase "community center" is too vague, as it could refer variously to either the community reference coordinates, the "centroid" or geometric center (which location may not even occur within the boundaries of the community), the average of the maximum and minimum of latitude and longitude (which location may not even occur within the boundaries of the community), or the population center. Other definitions may also be possible. The distinction is not meaningless, as even an incorporated city may include large unpopulated areas which often comprise park area or protected watershed. Since there is no clear definition of "community center" which can be applied across the board in all cases, we suggest that the phrase be stricken from the proposed Note.

The proposed Note does not make clear that the terrain roughness factor (delta-h) should be calculated out to 50 kilometers or the far side the community, *whichever is less*. For communities whose far side is located less than 50 km from the transmitter site, the terrain beyond the community has no bearing on the characteristics of the terrain path between the transmitter site and the community, and should therefore not be included in the calculation of delta-h.

The proposed Note includes a requirement that "for stations in the non-reserved FM band, the 70 dBu contour predicted by the alternate method may not be greater than the 60 dBu contour predicted by the standard methodology." The understood intent of this requirement is to ensure that the community of license be wholly contained within the station's protected contour. But this is an awkward way to express this intent, and overlooks the fact that Class B and B1 stations have different protected contours. Indeed, the leading case on this point involved a Class B station, and

¹⁰ See Letter to Mr. Mark Lipp in re KMAJ-FM, Topeka, Kansas, Cumulus Licensing Corp., Application BPH-20000316ACF, dated August 8, 2002.

in that case the Commission expressly addressed this point.¹¹ The requirement should be changed to read: "for stations in the non-reserved band, the community of license must be fully encompassed by the protected contour (54 dBu for Class B, 57 dBu for Class A, and 60 dBu for all other classes) predicted by the standard methodology."

As correctly noted in the NPRM, these guidelines preclude the use of alternate contour prediction methods for NCE FM stations in the reserved band. While the Audio Division has granted at least one such case for a station in the reserved band since the 50% community coverage requirement in Section 73.515 was first adopted (see BMPED-20060302ACU for KCPB-FM at Warrenton, Oregon), that case must be considered to be anomalous. Indeed that application, to make a slight height and power modification (no change in coordinates) to an authorized facility which *also* fell short of the 50% requirement, should have been decided on the equity of maintaining or expanding the existing 60 dBu service to the community of license. The fact is that Section 73.515 is overly restrictive and does not account for situations where the reserved-channel-station's community of license is already located wholly or substantially outside the 60 dBu contour.

The guidelines should also account for situations where the community of license is located closer than 10 km from the transmitter site, on a slope which extends upward from the transmitter site. In our consulting practice we have encountered just this situation on more than one occasion, where the community was fully encompassed by the proposed facility's protected contour, but not by the 70 dBu contour owing to negative HAAT values in the direction of the community (the HAAT calculation being influenced by high terrain on the opposite site of the community). Nevertheless an alternative showing – if permissible – would demonstrate 70 dBu coverage of the entire community owing to close-in line-of-sight conditions. The guideline in its present form does not

¹¹ See Letter to Ms. Rebecca L. Dorch in re KDAY; Independence, California, Benett Kessler, Petition for Reconsideration of BMPH-19921002IJ, dated May 17, 1994 and released June 10, 1994.

"Moreover, we note that Independence, CA is not only far outside the 70 dBu community coverage contour...but is located 6 km outside the 54 dBu protected contour as well...This represents the first instance known to the staff of an applicant seeking to provide service to a community of license outside its predicted protected contour.

...

For Class B stations, such as KDAY, the protected service contour is the 54 dBu contour. Outside of this contour, interference from other cochannel and adjacent channel stations can occur under our rules...

...

Simply put, the Commission will not authorize a broadcast station to serve a community of license located outside its protected service contour, as predicted by the standard contour prediction method in §73.313(e), since service to that community cannot be protected from interference under our rules. . ."

account for a situation such as this; the terrain roughness calculation does not pertain at distances less than 10 km, and the determination of whether a "truncated radial" HAAT value varies by more than 30% from a *negative* 3-16 km HAAT value is an exercise for advanced mathematicians. We propose that the guidelines include a condition to account for this possibility.

Taking these considerations into account, we propose the following revised text for the proposed Note:

Note to Section 73.313(3). Terrain will be considered to "depart widely" under the following conditions: (1) When the antenna height above average terrain ("HAAT") along a single radial in the direction of the community, from 3 to 16 kilometers from the antenna site (i.e. the Commission's standard measurement methodology), varies by more than 30 percent from the HAAT measured from three kilometers from the antenna site to the community's outer boundary; (2) When there is line of sight from the antenna to the community of license, when the actual terrain roughness factor ("delta-h") measured along the radial running from the antenna site to the community, from 10 kilometers to the lesser of 50 kilometers or the community's outer boundary, is less than or equal to 20 meters or greater than or equal to 100 meters; (3) When there is line of sight from the antenna to the community of license, but where along a single radial in the direction of the community the 3 to 16 kilometer HAAT is a negative value. If one of these three conditions is met, the staff will allow a contour showing using an alternate prediction method, providing that (a) the contour predicted by the alternate method is at least ten percent greater than that predicted by the standard methodology, and (b) for stations in the non-reserved band, the community of license must be fully encompassed by the protected contour (54 dBu for Class B, 57 dBu for Class A, and 60 dBu for all other classes) predicted by the standard methodology.

One additional matter regarding Section 73.313(e) supplemental showings should be adopted as a policy. The staff has always, in our experience, correctly required applicants or objectors who employ supplemental methodology to provide a sample calculation. The Audio Division refers supplemental showing cases to the staff of OET, who then make their own independent analysis and provide the results, either supporting or refuting the applicant/objector, to the Audio Division. The memoranda from OET staff to Audio Division staff are sometimes – but far from always –

available in the engineering file for the facility in question. As a matter of policy, the OET memorandum should be included with the relevant application both in the publicly-available engineering file and in the CDBS correspondence folder. By making the OET memorandum readily available the Commission will be able to make clear the reasoning behind its determination, thereby promoting consistency and fairness in the utilization and evaluation of supplemental showings. As additional benefits, this will help to spare the Commission the administrative hassle of a FOIA request from the losing party in a contested case, and assist future applicants in preparing their own supplemental showings.

Respectfully submitted this 13th day of July, 2009.



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