

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

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

To: The Commission

COMMENTS OF FRANK G. McCOY
SUMMARY

This NPRM refers often to “community of license” and service to the “community of license.” The FCC seeks to make a distinction between service to the entire community of listeners and those residents (some of whom may be listeners) within the community of license. The FCC seems convinced that service to a larger community of listeners is mutually exclusive with service to a community of license, with the latter being ignored in favor of the former. If the proposed rules are adopted on the strength of this assumption, the result will be less service, fewer choices and fewer independent voices in the places where the majority of Americans live and work.

Various rules changes that support the assumptions are proposed in the NPRM and rebutted in the instant pleading. In particular, the instant pleading offers anecdotal prediction of the loss of service that will result if the proposed rules are adopted. It provides some historical background as to the assignment of FM channels, offers some explanations for the seemingly-anomalous failure of some AM applicants to file long form applications and offers an alternative to the proposed Tribal preferences.

Finally it suggests that the waiver of deadlines in the context of auctions be limited and that the solution for translator band hopping requires no new rule, just a new approach.

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COMMENTS OF FRANK G. McCOY

I, Frank G. McCoy, hereby respectfully submit Comments in response to the *Notice of Proposed Rule Making*, FCC 09-30, released April 20, 2009 ("*NPRM*"), in the above-captioned proceeding. In support thereof, the following is stated:

Introduction and General Comments:

Throughout the *NPRM*¹ reference is made to "community of license" and service to the "community of license." The FCC seeks to make a distinction between service to the

¹ Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket 09-52, FCC 09-30, Released April 20, 2009.

entire community of listeners and those residents (some of whom may be listeners) within the community of license.²

How has the FCC convinced itself that service to a larger community of listeners is mutually exclusive with service to a community of license? The last time I checked, my local food pantry accepts donations from neighboring towns and the metro at large. I suspect listeners appreciate hearing snow day closing information about schools outside the station's community of license. I, for one, do not think news coverage of activities and issues in adjoining communities comes *necessarily* at the expense of service to the community of license.

Following common sense, the FCC Rules contain no requirement that the issues addressed by programming be *exclusively* applicable to the community of license. Thus, the notion that coverage of a substantial fraction of an Urbanized Area somehow guarantees that broadcasters won't address issues of local concern to the community of license is simply unsupportable. This assumption underlies most of the substantive rules changes proposed in sections A and B of the NPRM. These proposals are without merit and potentially harmful.

² The FCC rules, Part 73, are more ambiguous in the use of language and defined terms. The AM definitions in 73.14 contain no references to "community." AM coverage requirements in 73.23(c) mention "...primarily a community and the suburban and rural areas thereto." If coverage is a model for where service is to be delivered, then this would imply a broader target than simply the community of license. The AM coverage standards in 73.24(i) use "...principle community to be served." 73.203(b) mentions "community of license" while 73.202(b) uses "community." It is worthy of note that the text of 47 USC 307(b) capitalizes "States" and not "communities" in the clause "...among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service..." Thus broadcasters may not be wrong in assuming that community service extends beyond the bounded geography of the particular community of license.

In my time in radio, I have inspected hundreds of examples of required *Issues and Programs Lists* prepared by licensees.³ I have never seen an issue listed that was singularly inapplicable to the community of license of the associated radio station. Stations routinely address many issues that have import to more than just those living in the community of license. For example, electoral candidates are often interviewed, but these can include those running for county or statewide office without offense to the service-to-community-of-license obligation, can't they? So much of what is in this NPRM simply assumes as fact that broadcasters cannot serve both a community of listeners unbounded by geography and a community of license that is. This is untrue.

If the proposed rules are adopted on the strength of this assumption, the result will be less service, fewer choices and fewer independent voices in the places where the majority of Americans live and work⁴. It would also serve to further entrench the existing regime of consolidated broadcast companies that presently own most of the competitive stations in the largest radio markets.

Further, a recurring theme in this NPRM is the suggestion that by limiting the number and scope of applications, administrative convenience will be served. This, in turn, will result in more efficient processing of worthy applications and the provision of more expeditious service to the public. This is an effort to substitute administrative convenience for service to the public and, in particular, to limit the numbers and diversity

³ FCC Rules Part 73.3526

⁴ The lower 48 states encompass approximately 3 million square miles, of which 2% is classified as Urbanized Area. 65% of Americans live in this 2%, as do 78% of African-Americans and 83% of Hispanics.

of stations in the most populous places – indeed everywhere. I submit that if the FCC staff cannot efficiently process the volume of applications it now receives, it should automate⁵ or outsource its processes as necessary to do so, instead of simply raising the bar for application acceptance or limiting the number of applications that are permitted.

It is worth noting that applications received by the FCC were, for the most part, painstakingly prepared and filed by individuals who are desirous of an opportunity to serve some community or population somewhere at considerable personal expense and risk. Numerous parts of this NPRM propose rules that will only serve to discourage and limit this effort, by virtue of the FCC's unproven ability to divine the intent of these applicants. Isn't service somewhere preferable to speculation that if there were fewer applications, they'd somehow be more meritorious?

(A) Two examples of what to expect if the rules are adopted as suggested in this NPRM:

A genuine concern is the unintended consequence of adoption of the rules proposed by the NPRM. I'd like to relate a narrative of the path of radio market change likely to be repeated if Rural Radio's proposed rule changes are adopted.

⁵ At least one vendor of broadcast coverage prediction software has asserted that the FCC's 301 processing, for all but applications seeking a waiver, could easily be operated entirely as an online, ecommerce website like numerous others with which we are all familiar. This would free FCC staff for endeavors that warrant human intervention.

In Chicago,⁶ where I live, we have had a jazz FM station for a long time. Not every market can support a jazz station but Chicago did. The call sign was WNUA and the frequency was 95.5 MHz. The station enjoyed a loyal following but in recent times was having difficulty generating sufficient revenue. On May 22, 2009, WNUA-FM dropped the jazz format in favor of a Hispanic format.

Unquestionably, this was responsive to the increase in the numbers and purchasing power of the Chicago Hispanic community. A third full-service FM covering the entire Chicago metro will be welcome competition for Hispanic listeners and will raise the bar of programming quality as a result. No one can find fault with that.

But the situation illustrates the inevitable result of artificially limiting the number of stations in cities. By freezing the population of stations with coverage of the Chicago metro, the largest (or richest) audience segments get served. Formats with narrower appeal get the axe.

By allowing the supply of stations to be flexible and responsive to audience and population trends, the public interest would be much better served. An adequate supply of stations guarantees that broadcasters who fail to pay close attention to their audiences' needs and concerns do so at their economic peril. If jazz was unprofitable for broadcaster A and was abandoned, broadcaster B, operating his moved-in signal (likely acquired at a sharp discount to the market price for Chicago stations) could step in and serve this

⁶ Full disclosure: I live in an unincorporated area of Lake County suburban to Chicago. As a CDP within the Chicago Urbanized Area, it would likely not qualify for allotment priority 3 under the Tuck criteria.

audience. Instead, jazz is now mostly orphaned in my home town. Yes it can be heard on the Internet and yes, perhaps it will live on as an HD2 channel, but no one believes this is anything like equivalent.

If, on the other hand, by virtue of speculation that service to the larger non-geographic community of jazz aficionados is mutually exclusive with service to a suburban community of license, WNUA owner Clear Channel will have abandoned the jazz crowd for the more lucrative Hispanic audience, without concern that a competitive service might follow along behind and claim that former audience.

In another example, several years ago a group of gay entrepreneurs began a GLBT⁷ program service over WVVX-FM⁸ in Highland Park, IL.⁹ WVVX was a weak class A station but could be heard with reasonable success in the North and Northwest suburbs as well as on Chicago's North Side.

For obvious reasons, the program required a morning drive time slot. The GLBT community is comprised, in part, of individuals who conceal their true sexual identity and so cannot openly listen at work or perhaps even at home. Commuting alone in the car was the only environment that permitted regular listening.

⁷ Gay, Lesbian, Bi-sexual and Trans-gender.

⁸ Now WVIV-FM 276A Highland Park, IL.

⁹ There is no reason to believe the citizens of Highland Park, IL are any more likely to be gay, bi-sexual lesbian, or trans-gender than any others within the coverage area of WVVX-FM. I believe WVVX chose to air this program service because the licensee felt it was important and deserved a broadcast outlet.

The former WVXX-FM is also now a Hispanic format station.¹⁰ Once again, there can be no reasoned argument against additional choices for the Hispanic community. But artificial scarcity of signals in metro areas again claims a victim. This time it is not a Census-enumerated minority but is unquestionably a community needful of service. Once again, had there been more stations in the Chicago metro area, the competitive pressures of artificial shortage would have been less and the GLBT radio service might still exist. The same can be said for several such niche format offerings. Thus an unfortunate consequence of limiting the numbers of stations in cities is that there are necessarily fewer choices and voices.

As always, it is easy to ignore the opportunity that simply never becomes manifest. In both these cases, the loss was service to “communities” whose definition does not involve a particular geography. By restricting stations from moving into cities, no matter what the justification, it is a certainty that some such services will disappear and some aspiring broadcasters will be deprived of a chance at success. Since these proponents may not be broadcasters now, they will never know that Rural Radio is the reason they will never be.

Ironically, concentrating stations geographically in cities naturally results in vacant spectrum in suburban and exurban areas. The robust interest in recent auctions of allotments (located mostly in rural and exurban locations) is a strong indication that if the FCC simply accelerates processing of allotment requests, the preservation of Rural Radio

¹⁰ According to the 2000 Census, Highland Park, IL has 28,915 residents of which 26,891 or 93% are classified as white and 1,952 or 7% identified themselves as Hispanic. Yet to declare that the Spanish language and culture now broadcast on the station fails to serve the Community of Highland Park begs the question what *would* be appropriate?

will take care of itself. Instead, the strategy proposed in the NPRM is based on the notion that the radio spectrum is full and the reallocation process is therefore a zero sum game. There is a belief that somehow any station moved results in irreparable coverage loss. It isn't and doesn't. Further, there is a suggestion that an "absolute bar" is needed to protect communities from loss of sole transmission service. Again, there isn't such a need in cases where a suitable technical solution is available. To codify this as a rule will limit the Commission's ability to craft desirable solutions as was done in Llano, TX.¹¹ There, the community change proponent affirmatively committed to build a replacement station at Llano before moving the existing Llano service to Marble Falls, TX.

Expanding on the idea of Llano, TX, perhaps it would be appropriate to require that applicants seeking approval of community changes for presently-operating facilities that would create white or gray areas take responsibility for building and operating stations which would serve these vacated areas. Thus a perceived negative consequence comes with a built-in, self-financed solution.

(B) A better idea that would broaden community service and listener choice:

Many commenters will likely give examples of new stations and station upgrades that have made use of spectrum vacated by community changes. Ideally the FCC would encourage such spectral efficiencies, particularly where the result is improved service to

¹¹ The policies of the FCC and its precedents, as presently constituted, effectively forbid removal of the sole active broadcast service from a community unless and until a new station is allotted, built and on the air. See Llano and Marble Falls, TX, DA No. 97-1115 at 7 and Albion, Lincoln and Columbus, Nebraska, 8 FCC Rcd 2876 (1993).

both rural and urban areas, such as in the case of Llano. DTV provides a terrific example of the kinds of efficiencies that are possible when an open mind is applied.

In the heyday of analog, broadcast TV occupied 5 VHF channels (Ch 2 through Ch 6) below the FM band, 6 VHF channels (Ch 7 through Ch 13) above the FM band, and 70 UHF channels. When TV licenses were first made available, channels were assigned on a more or less ad-hoc basis. Because there were more channels than applicants, little effort was made to assign them efficiently. Over time, television broadcasters moved their stations, changed channels and otherwise rearranged the spectrum to accommodate many more stations. The process was repeated when UHF channels were offered. At any point in time, the consensus was that no more TV stations could fit in the allotted channel space. But moves and upgrades continued nonetheless.

The DTV transition was a once-in-a-lifetime opportunity to plan channel assignments in advance using the latest computer modeling. Beginning from a clean slate, somehow the television service that required all that spectrum was compressed into considerably less and can now offer more and better service from a smaller spectral footprint. The remaining spectrum, now freed up for other productive use, was auctioned to wireless providers or otherwise redeployed.

Early FM frequencies were assigned in the same random way. Current-day radio broadcasters are laboring to clean up this legacy of spectral inefficiency. Channel and facility rearrangements, organized and implemented through cooperation among

members of the broadcast community, are making this happen. The DTV band plan shows what can happen if broad freedom is given to engineering efficiency. That there is a cadre of private sector actors prepared to shoulder the burden of discovering rules-compliant solutions and negotiating for voluntary consent to enact them should be encouraged by the FCC. There already exist significant restrictions on the removal of transmission and reception services. There is no need for more. Particularly when relaxation of the artificial restrictions of 73.3517(e) promises improved service and broader choices to both urban areas and the nearby suburban or exurban area from which the station moved. FM spectrum is a limited resource. Let's make the best use of it that we possibly can using all the tools at our disposal, even if it does involve some extra administrative burden. We owe as much to the listening public and to voices that deserve an airing.

(C) Some reasons why AM applicants fail to file long form applications:

The NPRM has observed that some AM applicants fail to file long form applications when they are offered an opportunity to do so. The NPRM suggests this might be evidence of speculative applications.¹² But if an applicant receives permission to file as a singleton or under 307(b) (i.e., without requirement to pay for the construction permit at auction), why on earth would the applicant elect not to? I suspect there is a lack of appreciation at the FCC for the difficulties associated with the construction of AM stations.

¹² In auction 32, applicants filed an average of two expressions of interest each, while in Auction 83, the number increased to approximately three. This is hardly evidence that speculative applications are a problem. *NPRM* at 31.

First among these is the issue of a suitable tower site. In an environment where it is uncertain whether the applicant will prevail (whether as a technical singleton, under 307(b) criteria or at an eventual auction) and be allowed to file a long form, it is unrealistic to expect the applicant to purchase land in advance. Indeed, some technical settlements have the effect of adding required towers or changing their physical layout and, as such, it often is not possible to know for sure at the time of application how much land will be required to build the station or what the required property dimensions will be. Entering into an option-to-purchase agreement for land usually requires the payment of an option fee and such agreements usually have a finite term. Multi-year application processing timelines frustrate commercial agreements and sometimes upend them. Thus the issue of site qualification is the first likely reason that applicants fail to file a long form. All too often, the planned-for site is lost and there is no suitable replacement available.

Construction requires capital and, while applicants are required to certify that they have adequate funds, time changes things, as we have seen in the recent market downturn and financial crisis. Thus changed financial circumstances might be another likely reason applicants fail to file a long form.

Finally, sometimes applicants simply lose interest over time. They become discouraged and invest money and time elsewhere. Some fall ill or die waiting.

There are likely countless other reasons that have nothing to do with speculation.

Perhaps, rather than ascribe this to speculative intent or to a desire to avoid participating in an auction, the FCC might simply ask some of the applicants why they failed to file? In any event, an assumption that applicants are filing speculatively or seeking to avoid auction is unwarranted, based on the information at hand.

Finally, if the burden of processing is too great it is certainly counterproductive to delay service unnecessarily. Delays are at the root of each of the scenarios I have listed in this section. Why not simply outsource the engineering and 307(b) fact-based information gathering? Governments everywhere use outside consulting engineering firms to design buildings, bridges and other public works. Why not here as well? By outsourcing, service to the public could be commenced more rapidly and the need for limits on the numbers or level of detail of new AM applications would be unnecessary. To avoid conflicts, the consulting firm that is selected to perform this work would have to agree not to act as consultant on tendered applications.

(D) Native American preferences:

A preference for Native American Tribes is unnecessary, based on the needs outlined in the NPRM. The poorly-served Tribal areas in the West, by virtue of their being few stations there, allow for many available FM channels. I and several of my associates have already made it known that we will provide consulting on a pro-bono basis to Tribes that are referred by the FCC, insofar as finding available frequencies for application. The FCC's own website has a channel finder tool which is also applicable. In places where

no channels are available, the FCC is empowered to waive spacing requirements (for second-adjacent, as an example) to permit allotments that would serve tribal lands.

(E) Extending deadlines is unwise:

The NPRM suggests that the Commission be granted authority to extend the filing deadline for long form applications from winning high bidders. The example given relates a timeline where the application deadline fell during the holidays.

Auctions have been conducted for several years now and some experience has been gained as to their expected progress and duration. An auction that begins in the first week of November is almost a certainty to result in deadlines that occur during the holidays. A better answer might be to schedule auctions by taking into account the likely duration and the deadline benchmarks that will predictably result.

If, for some reason, auctions must be scheduled at times that make holiday conflict likely, the extended deadlines should be a part of the initial Public Notice, not granted on an ad-hoc basis after the auction has concluded. Permitting such extensions will only encourage requests for extensions from those who cannot abide by deadlines, with the inevitable requests for reconsideration when they are denied. Why unnecessarily open the door to more administrative burden and uncertainty for applicants?

(F) Translator band hopping:

Rather than add another rule, why not simply open windows for translator applications to encompass both the reserved and non-reserved band? Accepting applications in one band or the other, because of the interrelated nature of the spacing and interference rules between them, will still permit artful applicants to foreclose opportunity for others in the band that is closed to applications, by choosing sites and facilities that afford technical preclusion. Simultaneous windows would eliminate this residual unfairness.

(G) Summary and suggestions:

Many of the proposed rules seek to further restrict the application process for almost all of the aural services. If the Commission is satisfied with the present state of the FM and AM bands, then adoption of the proposals will mostly freeze the competitive landscape in the top US radio markets. The largest group owners need not worry about significant new competition. If, on the other hand, the Commission believes that new voices are welcome in the largest markets, the only likely path to providing a platform for such voices is by moving stations in from outlying areas. In rough numbers, about 350 community-change proposals are submitted each year. Some involve multiple stations. Of the universe of some 14,000 radio stations, this seems modest and approximately consistent with rural-to-urban population trends in general. This is not a problem that warrants attention or needs repair.

Concerns about the volume of or motivations behind AM applications can be discerned through direct queries or a simple presumption that broadcast applicants mean to do no harm.

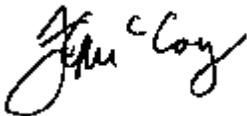
Auction application deadlines can be managed by more careful calendaring.

Tribal radio needs can be met easily through the offer of pro-bono engineering, the use of the Commission's own website and/or by spacing waivers, as required. Again, no real regulatory adjustment is needed.

In the event there are future application windows for translators, the simple expedient of opening windows for both the reserved and non-reserved bands simultaneously is sufficient.

In short, none of the NPRM's proposed rules are essential and several pose genuine threats to flexibility and to minority opportunity. They should not be adopted.

Respectfully,

A handwritten signature in black ink, appearing to read "Frank G. McCoy". The signature is written in a cursive, flowing style.

Frank G. McCoy
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July 13, 2009