

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Policies to Promote Rural Radio Service) MB Docket No. 09-52
and to Streamline Allotment and) RM-11528
Assignment Procedures)

To: The Commission

REPLY COMMENTS

These Reply Comments of Brantley Broadcast Associates, LLC (“BBA”) will discuss the Comments of several parties but primarily the Comments of the Joint Parties. The purpose of the Commission’s proposals is to stop abuses and is planning to do so by imposing a permanent freeze on all radio station modifications in Urbanized Areas and by making it much more difficult to change sites if there is a loss area. But doing so will mean a total jettisoning of the Commission’s §307(b) mandate and eviscerating the public interest. If the public interest issues for new technologies need spectrum relocations and site changes, would the Commission still restrict local service within Urbanized Areas? The point is that the public interest considers more factors than programming content.

The above arguments therefore point out that continuing spectrum modifications need to continue, but in an orderly manner. Currently there is an imbalance between what the broadcast industry needs and what the regulator allows. In this relationship, there needs to be some consistency and predictability. But what the broadcaster has experienced in recent years is a vacillation from extreme positions of regulation and micro management.

Now, in an apparent effort to close all perceived loopholes, the Commission is proposing rules that stifle the ability of stations to respond to changes in the market and which would allow no new entrants or minorities into broadcasting with new competitive signals.

The Commission proposals in MB Docket 09-52 must be viewed as over-kill as it seeks to prohibit new local service and improvements for existing AM and FM stations.

Regrettably the past several years have seen rule changes that appear to be more focused on closing loopholes than it has been on providing opportunities for new entrants, small operators and minorities. The rules are gradually becoming more stringent even though the need for such regulations is doubtful for these mature media. It is becoming increasingly clear that the Commission is more concerned with their own administrative resources and less interested in investigating ways to develop new spectrum usage and assist the industry in offering local service.

Three rule interpretations exemplify these points:

- 1) The arbitrary interpretation of the delta h parameters in the use of the Longley-Rice model is the most widely known among RF engineers. The change of delta h was made without any public notice or broadcast market engineering input despite the fact that licensee involved in the Station KMAJ-FM proceeding argued that a rule making was necessary in order to change the rules. Now seven (7) years later, the Commission agrees that a rule making is needed to codify the practice that has been in effect for all of these

years. However, the main question is why were the delta h requirements changed when the changes eliminated several small market and minority opportunities. These so-called unintended results were not of primary concern by the Commission. Instead their own resource capability determined how the concept of “terrain varies widely” would be interpreted. Nevertheless the interpretation was a setback for setback for small operators, new entrants and minorities who were in most need of establishing and improving their new stations. The large market operators seldom have a need to relocate and rely on alternative prediction methodologies. Where is the public interest in this?

2) In MB 05-210 the Commission once again attempted to close a loop-hole by limiting the number of stations that can be modified in one proceeding to only four. The public responses were overwhelmingly voiced against this limitation in the Comment and Reply Period and on reconsideration. But, in order to close a loop-hole (or reduce the workload of the staff), the Commission totally dismissed the concerns of the vast majority of comments and instituted the limit of four. This limit of four prohibits the creation of new services in areas that are congested and to reach large communities that have not been able to obtain local service. Who gains from this limit of four? The public, the industry or the Commission’s staff?

3) Currently, there are several recent cases in which the Commission staff has made a broad interpretation of a new rule to close a loop-hole. In cases where a station has changed its community of license but then is asked or forced to move to a non-adjacent channel, the changes are not permitted. But this interpretation is a departure from years of precedent in the allocations context. The Commission may have legitimate reasons for eliminating what it considers “hop-scotching” but where it is clear or could be shown that

no such activity is involved the Commission is nevertheless intent on extending its rules to cover all possible situations that come within § 73.3573(g)(2). For an example, station A has recently received a CP to change community of license, but before construction has commenced it is approached by station B with a request to modify its new station A facility. This modification (channel change, another community of license change, etc.) would allow a beneficial public interest modification by station B. Now the Commission interprets §73.3573(g)(2) to apply to the secondary changes a licensee (A) may agree to in an effort to assist another licensee(B). This means that station B now has to compensate station A not only for the required move, but for an additional build out just to satisfy an extended interpretation of a rule. Unless the licensee of station B is well funded this type development will cease and the public interest gain will evaporate.

Where is the public interest in this?

Based on the precedent of previous Commission actions shown in the three examples above, it is not a comforting thought to know that the proposed changes in MM Docket 09-52 Section II, Paragraphs 2-18 are open to staff interpretation. The end result of this proceeding should be to improve the choices for the listening public and establish greater opportunities for new entrants, small operators and minorities. But it appears that the theme of this rule making has become the closing of spectrum development to curb perceived loop-holes and decrease staff work loads which should never be a factor in the structuring and interpretation of Commission Rules.

Other commenting parties have made similar arguments. The points made by Vir James concerning relocation of nighttime AM sites are the same as those espoused by BBA in its initial comments. It is a prime example of the type of rule that has become so rigid that AM service cannot be fully developed.

The Joint Parties repeatedly made the point that for every movement in the spectrum there is other opportunities. Examples were given by the Joint Parties and by BBA. Such opportunities are numerous but unfortunately can never be filed due to the strict rule interpretations discussed previously. Many improvement projects had to be abandoned or cancelled due to the concern that there were loop-holes, or the staff workload was increased. But where is the concern for a new public voice?

In his comments, Frank McCoy mentions “..genuine concern is the unintended consequences of the adoption of the rules proposed by the NPRM.” BBA has expanded the McCoy argument with the discussion of the new Commission interpretation of §73.3573(g)(2). In essence BBA gives empirical evidence support to McCoy’s concerns.

BBA agrees with the opening statement in the comments of the Joint Parties;

“The proposals set forth in this *NPRM* will turn back the clock to an era 25 years ago when the *Suburban Community Policy*, the *Berwick Doctrine*, and the *De Facto Reallocation Policys* kept stations from moving to more populated areas in order to

preserve the FM spectrum for future use. However, the Commission announced in 1983 that the FM spectrum was a mature medium and that it had indeed preserved the spectrum during the early years of FM radio. The Commission found that, in view of the proliferation of radio stations throughout the country, it was no longer necessary to continue these policies. Despite that pronouncement and without any discussion of that proceeding in this *NPRM*, the Commission is now proposing to reinstate these pre-1983 policies and eliminate most opportunities for future improvements by stations that need them the most and during the worst economic crisis facing broadcasters. In addition, the Commission is attempting to change the allocation priorities to place more emphasis on the loss area. These proposals, if adopted, will have an inordinately more oppressive impact on new entrants, small businesses and minorities and, will instead, provide protection from competition to the larger incumbent group broadcasters, that have already improved their facilities. The Joint Parties are perplexed and confounded by the Commission's actions and will demonstrate why these proposals are ill-advised. Contrary to the Commission's beliefs, these proposals will undermine the Commission's purported goals of diversity and community service under Section 307(b) by harming rather than advancing these objectives."

See Comments of the Joint Parties, INTRODUCTION Page 2 paragraph 1

⁷ *NPRM* at ¶ 13.

⁸ See *The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983) ("1983 Suburban Community Policy Order"). The *Suburban Community Policy*, adopted in 1965 and modified in 1975, applied principally to hearings involving mutually exclusive AM license applicants, where the applicant's proposed 5 mV/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community. In those cases, a presumption arose that the applicant realistically proposed to serve the larger community rather than its specified community. *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 193 (1965). A related policy is the *Berwick Doctrine*, which applied the public interest considerations underlying the *AM Suburban Community Policy* to FM radio and television. *Berwick*

Broadcasting Corp., 12 FCC 2d (Rev. Bd. 1968); 20 FCC 2d 393 (1969). The *De Facto Reallocation Policy* was an attempt to utilize a channel assigned to one community in order to establish a broadcast service in another community, thereby depriving the assigned community of service from that channel. *Hall Broadcasting Co., Inc.*, 71 FCC 2d 235, 237 (1979).
9 See 1983 Suburban Community Policy Order.

The Commission should give strong consideration to these points and focus on the public interest in localism and diversity rather than closing loopholes.

Conclusion

BBA has used the previous examples of past Commission rule interpretations to restrict station improvements and new station opportunities. Now the Commission wants to impose a virtual freeze on all Urbanized Area moves and even rural station relocations in the name of localism and Section 307(b) obligations. However, as the Joint Parties point out this will do more harm than good to localism and Section 307(b). The only beneficiaries of these ill advised policies are the established broadcasters which avoid new competition. The best solution in the instant proceeding would be to dismiss further consideration of Section II, paragraphs 2-18 of the NPRM as unnecessary and contrary to the public interest.

Respectfully Submitted,

A handwritten signature in black ink that reads "Paul Reynolds" followed by a stylized flourish.

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