

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

In the Matter of: )  
)  
Policies to Promote Rural Radio Service and to )  
Streamline Allotment and )  
Assignment Procedures )  
)

MB Docket No. 09-52  
RM-11528

FILED/ACCEPTED

To: The Commission, Office of the Secretary

MAY - 6 2011

Federal Communications Commission  
Office of the Secretary

**PETITION FOR RECONSIDERATION**

Educational Media Foundation (“EMF”) and the Kent Frandsen Radio Companies<sup>1</sup> (collectively, the “Joint Parties”) submit this Petition for Reconsideration in the above-referenced proceeding.<sup>2</sup> Educational Media Foundation is the licensee of over 200 FM stations, and has been involved in many cases where it has improved the service provided by its stations through changes in their cities of license or other technical modifications of the types that could be impacted by the Commission’s Order in this proceeding. M. Kent Frandsen, either individually or through companies he controls, holds an interest in 13 radio station licenses in Utah, Idaho and Wyoming, and also has experience in allocation and allotment issues. EMF filed comments earlier in this rule making proceeding and has plans affected by this Order. Similarly, Mr. Frandsen has an application that is directly affected by the Order adopted in this docket, and may

<sup>1</sup> Frandsen Media Company, LLC, Canyon Media Group, LLC, Canyon Media Corporation, Sun Valley Radio, Inc. In addition, the principal of these companies, M. Kent Frandsen, also holds licenses for radio stations as an individual.

<sup>2</sup> *In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 26 FCC Rcd 2556, FCC 11-28, (rel. Mar. 2, 2011) (hereinafter “Order”). Notice of this Order appeared in the Federal Register on April 6, 2011 (76 FR 18942), thus this Petition is timely filed consistent with Section 1.4 of the Commission’s Rules.

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have other applications in the future that could be impacted by the ruling in this proceeding. Accordingly, the parties have standing to submit this Petition seeking reconsideration of the Commission's Order.

The Joint Parties submit that the Commission had no need to amend its rules to make the reallocation of stations from rural into urban areas more difficult, as the public interest is actually served by providing more service where there are more people, rather than in attempting to provide the same level of broadcast service to all residents of the United States. As set forth in more detail below, the Commission's decision does not further the public interest, but instead impedes service that advances overriding public interest goals, goals that were not adequately considered by the Commission in reaching the decision announced in the Order. Little meaningful service to small communities will be preserved that is not already protected under existing FCC rules or which could not easily be replicated, if there is a public need and economic base to do so. At the same time, the principal result of the newly adopted rules is to freeze the competitive landscape in larger markets, locking out new entrants and possible competitors. Clearly, the FCC does not want to take a position so antithetical to its goals of increasing diversity in the broadcast marketplace. Yet that is precisely what it has done in this proceeding.

The Joint Parties are particularly concerned with the sections of the Commission's Order that deal with changes to the community of license of existing stations, and the grandfathering provisions of the Order. While many of the same shortcomings in the Commission's on these matters also apply to other changes in policy adopted by the Order, these are the specific areas in which these petitioners are harmed, and thus are the focus of this Petition.

## Discussion

The premise of the Order is that the Commission should be concerned, under Section 307(b) of the Communications Act, with the migration of radio stations from rural areas into larger metropolitan areas.<sup>3</sup> The Order adopts policies that effectively presume that the movement of radio stations into larger communities will leave rural areas unserved, and that such moves will result in smaller communities failing to receive necessary broadcast service. Thus, the Commission adopted restrictions on the removal of a second local transmission service from communities of more than 7,500 people, and adopted presumptions against the movement of stations that would leave an area with fewer than five aural services. Further, the new rules require a far more extensive showing by broadcasters to demonstrate exactly how many services are received within all gain and loss areas, and a justification as to why gains in service to a well served area are better than a loss to other areas that receive multiple services, but fewer services than the gain areas. The Joint Parties believe that such restrictions have not been adequately justified by the Commission based on any empirical evidence, ignore current marketplace realities, and are counterproductive to other stated Commission goals. Accordingly, the Joint Parties urge the Commission to reconsider its actions in this Order.

All of the decisions made by the Commission stem from a conclusion that the FCC somehow needs to protect the amount of service that rural residents receive from broadcast stations. The Commission concludes that Section 307(b) of the Act is a consumer protection statute, rather than a broadcast-centric model that is meant to promote spectral efficiency.<sup>4</sup> Many broadcasters, including EMF, argued in comments in this proceeding that the needs of rural communities are already met though the base level of service that the FCC guarantees when

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<sup>3</sup> See, e.g., Order at ¶ 12.

<sup>4</sup> Order at ¶ 21.

it essentially prohibits the movement of stations that are providing a first or second broadcast service to a geographic area. Almost unanimously in comments in this proceeding, broadcaster groups contended that broadcast services are in far greater demand in more densely populated areas where they can serve a greater number of people, and where, on a station per capita basis, each station may serve a far greater number of potential listeners. Broadcasters argue that leaving current policies in place will provide new entrants with no opportunity to serve more urban markets, where opportunities to buy existing stations are few, and where the available stations are often prohibitively expensive.

The Commission rejected those contentions, finding that broadcasters had not shown specific cases where certain groups of new entrants had been able to enter urban markets through the use of facilities moved in from adjacent communities. While not a minority owner, EMF is a noncommercial operator, and it has many times been able to use move-ins to enter a market where the purchase of an existing station would be prohibitive in cost if not flat-out impossible. For instance, EMF recently completed the move of station WKVF(FM) from Byhalia, Mississippi to Bartlett, Tennessee, with a major increase in effective coverage of the Memphis radio market. In addition, EMF was able to move station WJKL(FM) from Elgin, Illinois to Glendale Heights, Illinois and achieve a significant increase in effective coverage of the Chicago, Illinois market. Further, a station that carries EMF programming, WNLT(FM), has received a construction permit to move from Harrison, Ohio to Delhi Hills, Ohio, and provide enhanced service to the Cincinnati, Ohio market. EMF is also familiar with the Denver market, where there have been several move-ins that were acquired by new, local companies that would never have otherwise been able to operate in that market, as the bulk of the existing FM stations were already in combined into clusters held by very large corporate broadcasters. These are not

unique cases. Move-ins have provided many broadcasters with an entrée to a market that they could not otherwise serve.

In other proceedings, the Commission has sought to make available, new stations to new entrants to broadcast ownership – particularly in urbanized areas.<sup>5</sup> If new stations in urbanized areas are to be made available to new entrants, they have to come from somewhere. Interference restrictions in the Commission’s rules preclude the allotment of new stations in virtually all urbanized areas. Interference from stations already located in the urbanized area itself is unlikely to ever disappear. Thus, the only way that a truly new service to these urbanized areas can ever be provided is if that service is moved into the area from a more rural area, as these rural stations can have a preclusionary effect on locating stations in urban areas. Only by “migrating” these stations toward urban areas can new stations be created where there is demand for the use of frequencies in these areas. To forbid this “migration” is to ensure ownership stagnation in major markets, foreclosing opportunities for new entrants in these markets. The Commission Order seems to mandate this stagnation, and ignore the practical result of its actions.

Despite the repeated use of move-ins to serve large broadcast markets by new entrants, the Commission seemingly concludes that the need for new stations in larger markets is somehow inferior to the need of rural residents for a multiplicity of broadcast services. Yet the Commission does not cite a single comment from a rural listener arguing that their service is insufficient, or that somehow move-ins of stations adversely affected their interests and well-being.<sup>6</sup> The Commission recognizes that most broadcasters have an economic incentive to serve

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<sup>5</sup> See *In re Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (March 5, 2008).

<sup>6</sup> Instead, the only comments cited by the Commission to support its rule changes are those of William Clay and certain public interest groups, whose principal interest seems to be the protection of spectrum in urban areas for use by LPFM stations, not to protect any public benefits that will supposedly accrue to listeners in rural areas.

areas with more people. But, from this truism, the Commission concludes that any move-in to an urbanized area is a problem, without any evidence whatsoever that there is a real dearth of rural service, or that rural populations are being hurt by their not receiving a multiplicity of broadcast services. Without any record evidence showing real injury to these populations, how can the Commission possibly conclude that there is a crying need for rural service that justifies the changes made to its allotment priorities?

The Commission assumes too much in its premise that there is something contrary to the public interest in stations moving from rural to more urban areas. The Commission provides no economic justification for that premise, and in fact it hardly discusses the economics of small market radio at all. While the Commission assumes that all areas should receive a multiplicity of broadcast services, it does not do any analysis of whether there is a sufficient economic base to support the kinds of services that it envisions. In fact, in many cases there simply is not the economic base to provide a third, fourth, or fifth service to a particular area. Broadcasters, not the FCC, are in the best position to judge the economic ability of an area to support a radio station. The FCC has given no indication of how such a need would be judged to rebut the presumption of need for third through fifth services, and the Joint Parties can fathom no objective, or even subjective, criteria that the Commission will use to evaluate such requests. Criteria to determine the economic viability of such rural services are even more illusive – and indeed, none are set out in the Order.

Moreover, the Order assumes that, when a station moves from a rural area toward a more urban one, the service in the rural community will disappear. The Commission seems to assume that there will be no service to “back fill” for the station which has moved, and makes no provision in its Order for a backfill of service to substitute for a station that is moved into a

larger community. In fact, any significant move of a broadcast station creates opportunities for new allocations, or improvements to the facilities of existing stations, to operate in the areas abandoned by the station that is moving toward a larger community. As the FCC has recognized in other proceedings,<sup>7</sup> it already is far easier for new services to locate in rural areas to serve the populations there than it is to locate in more urbanized areas. For instance, Canyon Media Group, LLC, a company controlled by Mr. Frandsen, has an application pending to move a station from Pioche, Nevada, to Leeds, Utah, a community nearer to an urbanized area. In the Pioche area, which is in very rural, very sparsely populated eastern Nevada, there is the possibility of allotting multiple new services, so that any local resident that feels disenfranchised by the move of the station from Pioche could apply for a new service. Yet the new policies do not make any provision for new services being allowed to substitute for existing stations that are moved out of an area. But, in fact, if a rural area is being abandoned by a broadcast service, and if there is a true need for such service, it can usually be provided.

While the FCC may desire that each and every area in the country receive a multiplicity of free over-the-air services, in this day and age, is there really a compelling need for such service? The Commission has assumed in its order that that the justifications underlying Section 307(b) have not changed since the 1930s, yet the order fails to recognize that the radio industry and the media landscape generally have changed dramatically in the intervening 77 years since the section was adoption as part of the Communications Act. The multiplicity of services to rural areas that the Commission seems to attempt to guarantee by this Order, with no analysis of the economics of trying to provide such service, is actually now provided by alternative media, as anyone, anywhere, can receive hundreds of channels by buying a Sirius XM receiver. Where

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<sup>7</sup> *In the Matter of Creation of a Low Power Radio Service*, Third Report and Order and Second Notice of Proposed Rulemaking, 22 FCC Rcd 21912, ¶50, 53 (December 11, 2007).

some local service is guaranteed with the requirements that first and second services not be abandoned, where is the justification for requiring the additional services seemingly mandated by the Order?

The complex series of rebuttable presumptions set up by the Order is nothing but a recipe for a quagmire. The FCC simply does not have the resources to determine the relative needs of each such community, and to resolve questions like the ones that will be posed by the new information that is being required of applicants. Questions will arise – like whether the gain of a 20<sup>th</sup> service to 100,000 people outweighs the loss of a 7<sup>th</sup> service to 7,500 people. How will such an analysis be made? The FCC offers little clue, and the lack of any such specificity spells interminable proceedings to determine where channels can be operated. Such uncertainty simply serves no one's interest – much less the public interest.

The Commission's presumptions will have the effect of freezing stations in place even when that may not be necessary. The Commission should be satisfied with its current policies, of guaranteeing that local service exists as first and second reception services cannot abandon significant populations, and not further extend the required service floors to the detriment of a flexible broadcast spectrum able to respond to marketplace needs. Given today's technology, listeners in even the most rural areas have access to satellite radio and television, and other portable music and news sources, and often have access to the Internet in addition to broadcast radio and TV. Moreover, service from translators and LPFM stations should count in analyzing any third, fourth, or fifth service area loss. After the basic service has been provided by first and second full-power, local reception services, additional additive service from secondary sources should suffice to provide the populations of these areas with the programming choices the Commission seems to be encouraging. Mandating more service than the Commission does now

serves no purpose other than to lock stations into serving areas that may not be their most productive uses. Is a fifth service to 1,000 people worth sacrificing a new Spanish or religious or other new niche program offering to potentially ten times as many listeners? The Order provides absolutely no record evidence as to why such service to rural areas must be protected.

Finally, the Commission's grandfathering policy on allotments is also internally inconsistent. For AM stations, the FCC grandfathers all pending applications under the old standards, relying on applicants' expenditure of "considerable resources in technical studies, settlements and technical resolutions, and Section 307(b) showings."<sup>8</sup> For FM rulemaking cases, the grandfathering is limited to only those cases where "the Commission has modified a radio station license or granted a construction permit."<sup>9</sup> But for FM city of license changes, the FCC applies no grandfathering whatsoever. Why is the expenditure of resources on technical studies and settlements for AM stations sufficient to grandfather all pending proposals, while similar expenditures for FM city of license changes justify no grandfathering at all? FM city of license change applicants have also spent considerable sums in the prosecution of their applications. In some cases, they may even have bought stations with the expectation that those stations could be moved to serve larger areas and, based on that expectation, bought a station they might not have otherwise purchased, or paid a higher price than would be justified if the station was left at its current location. Yet, while FM city of license change applicants may have spent just as much or, in many cases, much more than other applicants in reliance on the rules as they were, the Commission arbitrarily applies different grandfathering standards. This arbitrary distinction cannot stand, and must be reconsidered.

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<sup>8</sup> Order at ¶ 33.

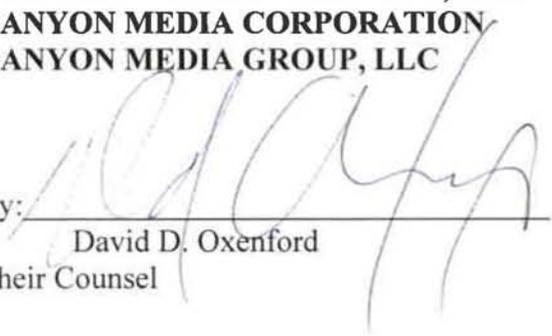
<sup>9</sup> Order at ¶ 35.

**Conclusion**

For the reasons set forth above, the Joint Parties urge the Commission to reconsider its decision in this proceeding and to provide broadcasters with more flexibility, not less, to adjust to changing conditions and to maximize their service to the public. We respectfully request that this reconsideration petition be granted.

Respectfully submitted,

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FRANSEN MEDIA COMPANY, LLC  
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