Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No. 04-319
Table of Allotments,	)	RM-10984
FM Broadcast Stations.	)	
(Coal Run, Kentucky and Clinchco, Virginia)	)	
	)	

FILED/ACCEPTED

AUG - 2 2011

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attn: The Commission

OPPOSITION TO MOTION FOR STAY

East Kentucky Broadcasting Corporation ("East Kentucky"), the licensee of WPKE-FM, Coal Run, Kentucky, by its attorneys, pursuant to Section 1.45(b) of the Commission's rules, hereby opposes the July 18, 2011 Motion for Stay submitted by Dickenson County Broadcasting Corp., the licensee of WDIC-FM, Clinchco, Virginia, to the *Memorandum Opinion and Order*, DA 11-1072, released June 17, 2011 (the "*MO&O*") in the above-referenced proceeding. In opposition to the Motion for Stay, the following is submitted:

1. Dickenson County Broadcasting Corp. has filed a Motion for Stay of the *MO&O* arguing that (a) the *MO&O* is not yet published in the Federal Register, and (b) great harm to Dickenson County Broadcasting Corp. will result absent a stay. Neither reason is a justification for a stay in this proceeding.

2. Dickenson County Broadcasting Corp. had a high burden to meet to qualify for the extraordinary remedy of a stay. It must show that: (1) it is likely to prevail on the merits; (2)

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it will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.[1]

THE *MO&O* WAS NOT REQUIRED TO BE PUBLISHED IN FEDERAL REGISTER

3. Dickenson County Broadcasting Corp. claims that the actions taken in the *MO&O* cannot go into effect until 30 days after publication in the Federal Register, arguing that the *MO&O* involved a "substantive rule" and that the *MO&O* is a matter of general applicability[2] without any support for that proposition. In fact, neither is the case. The *MO&O* did not change any Commission rule. Rather, as stated in paragraph 14 (the ordering paragraph of the *MO&O*), only the assigned licensed channels for each of WPKE-FM and WDIC-FM were changed.

4. As a result of *Revision of Procedures Governing Amendments To FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services,* 21 FCC Rcd 14,212 (2006) ("*Allocation Streamlining*"), the FM Table of Allotments (Section 73.202 of the Commission's rules) now only contains vacant allotments. Authorized full-power non-reserved band FM facilities already occupying allotments are listed only in the Media Bureau's Consolidated Data Base System ("CDBS").

5. The *MO&O* involved only changes to CDBS. There were no FCC rule changes whatsoever. Therefore, there is no requirement that Federal Register publication take place. The full text of the *MO&O* was properly published in the FCC's June 17, 2011 Daily Digest which, pursuant to Section 1.4(b)(3), gave full notice to both Dickenson County Broadcasting Corp. and any other interested party of the Media Bureau's decision.

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[1] *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958).

[2] Motion for Stay at page 3.

6. Dickenson County Broadcasting Corp. complains that it was not able to determine, "despite the best efforts of counsel and his paralegal to discover whether [Federal Register] publication has taken place" in its quest to determine the timing of the channel change implementation.[3] All of that legal expense and time of searching was wholly unnecessary, however, as the answer as to the timing of the channel change implementation is contained in Section 1.4(b)(3) of the Commission's rules which states:

> If the decision fails to specify Federal Register publication, the date of public notice will commence on the release date, even if the document is subsequently published in the Federal Register.

7. As noted by Dickenson County Broadcasting Corp., "[t]here is nothing in the *MO&O* that discusses the Federal Register ...".[4] Thus, pursuant to Section 1.4(b)(3), the date of public notice, and the date of implementation of the channel changes, is governed by the release date of the *MO&O*. There is no bar to the changes made in the *MO&O* becoming effective on August 1, 2011.[5]

8. The changes in the WPKE-FM and WDIC-FM channels as reflected in the FCC's CDBS and on the radio stations' licenses are not required to be published in the Federal Register. The *MO&O* did not specify Federal Register publication. Therefore, a lack of Federal Register publication is of no consequence whatsoever to either the effective date of the changes made in the *MO&O*, nor to the substantive changes themselves.

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[3] Motion for Stay at page 3.

[4] Motion for Stay at page 3.

[5] In addition, Section 1.4(b)(3) states that even subsequent Federal Register publication will not upset the operative date of public notice. Therefore, even if the Commission should later publish the *MO&O* in the Federal Register, such publication would not upset the date of public notice which occurred upon the release of the full text of the *MO&O* in the FCC's Daily Digest. Accordingly, most of the Dickenson County Broadcasting Corp. Motion for Stay is rendered moot as it ignores the clear directives of Section 1.4(b)(3).

IT IS UNLIKELY THAT DICKENSON COUNTY BROADCASTING CORP. WILL PREVAIL ON THE MERITS

9. Dickenson County Broadcasting Corp. argues in its Motion for Stay that "[t]he action taken in the *MO&O* is based upon erroneous facts and must be reversed."[6] Remarkably, however, that is not what Dickenson County Broadcasting Corp. argues in its Application for Review filed the same day. Rather, in its Application for Review, Dickenson County Broadcasting Corp. states that it "respectfully must disagree that East Kentucky has demonstrated that a 70 dBu signal will encompass Coal Run".[7] A disagreement with FCC findings is far different than an *MO&O* based upon "erroneous facts". Dickenson County Broadcasting Corp. mischaracterizes what it argues in its Application for Review.

10. In its Application for Review, Dickenson County Broadcasting Corp. simply vociferously argues that it believes it should prevail. That is far short of a substantial likelihood that it will succeed on the merits, particularly since, as shown in the concurrently filed Opposition to Application for Review, Dickenson County Broadcasting Corp.'s proffer of new maps, engineering calculations, analyses and arguments is directly contrary to Commission precedent.

DICKENSON COUNTY BROADCASTING CORP. WILL NOT SUFFER IRREPARABLE HARM ABSENT A STAY

11. The remainder of Dickenson County Broadcasting Corp.'s arguments in favor of a stay barely pass the laugh test. Dickenson County Broadcasting Corp. states that a change in channels for WDIC-FM might result in a loss in revenue. No showing is made, however, that FM stations operating on 92.1 MHz are more profitable or garner more revenue that FM stations operating on 103.1 MHz. Dickenson County Broadcasting Corp. would have the FCC believe

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[6] Motion for Stay at page

[7] Application for Review at Page 6.

that if it changed frequency, even though it is the only FM radio station licensed to its county, local residents may conclude there "was no longer a radio station in Clinchco to which they could turn for new, weather and entertainment".[8] Further, Dickenson County Broadcasting Corp. argues that a change in frequency would be difficult for employees to adjust to and "[t]hey might not be able, or willing, to continue to work at the station".[9] As noted above, the laugh test is about the only metric by which this Motion for Stay can be judged.

OTHER INTERESTED PARTIES WILL BE HARMED IF A STAY IS GRANTED

12. Dickenson County Broadcasting Corp. argues that East Kentucky Broadcasting Corporation will be less harmed by a stay because East Kentucky Broadcasting Corp. "simply wants to increase the power of WPKE-FM" which will result in better service to the public, but it cannot build its facilities until it obtains a construction permit. It is difficult to fathom the point that Dickenson County Broadcasting Corp. was attempting to make. In fact, delayed service to the public cannot be compensated for by monetary redress while the change in channels for Dickenson County Broadcasting Corp.'s station can be, so the equities are on the side of East Kentucky Broadcasting Corp. and the public in not forestalling better service from WPKE-FM.

THE PUBLIC INTEREST DOES NOT FAVOR A GRANT OF THE STAY

13. Finally, Dickenson County Broadcasting Corp. argues that the stay is in the public interest because WDIC-FM listeners "would be confused if WDIC-FM were required to change the dial position of WDIC-FM from 92.1 to 103.1."[10] Dickenson County Broadcasting Corp., however, ignores the countervailing public interest found by the FCC in the expanded service that would be provided by WPKE-FM. The FCC fully took public interest considerations into

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[8] Motion for Stay at Page 7.

[9] Motion for Stay at Page 7.

[10] Motion for Stay at Page 8.

account in its issuance of the *MO&O*. Notably, the FCC did not mention listener confusion as a public interest reason for not proceeding with the channel change.

CONCLUSION

14. Dickenson County Broadcasting Corp. had a high burden to meet to qualify for the extraordinary remedy of a stay. Dickenson County Broadcasting Corp. has utterly failed to meet its burden. Its Motion for a Stay must be denied.

Respectfully submitted,

EAST KENTUCKY
BROADCASTING CORPORATION

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August 2, 2011

CERTIFICATE OF SERVICE

I, John F. Garziglia, an attorney at the law firm of Womble Carlyle Sandridge & Rice, PLLC, do hereby certify that a true copy of the foregoing "Opposition to Motion for Stay" was sent this 2nd day of August, 2011 via U.S. Mail, postage prepaid, to the following:

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