



Federal Communications Commission
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DA 13-906
In Reply Refer to:
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Re: **New FM, Avondale, Colorado**
Facility ID No. 189554
File No. BNPH-20110602AAW

Informal Objection

Dear Counsel:

This letter refers to the long-form application (the "Application"), as amended, of Alex Media, Inc, ("Alex Media"), winning bidder in Auction 91 for FM Channel 249C2 at Blanca, Colorado, to implement its winning bid on an upgraded channel at Avondale, Colorado.¹ We also have before us Comments and Informal Objection (the "Objection"), filed on October 3, 2011, by Radio 74 Internationale ("Radio 74"), permittee of Station KSJL(FM), Strasburg, Colorado, as well as various related pleadings.² For the reasons discussed below, we deny the Objection in part and direct Alex Media to amend the Application.

Background. The Application was filed pursuant to Sections 73.3573(a)(i) and (ii) of the Commission's Rules,³ which permit a winning auction bidder to file a minor amendment to its proposal to specify a new community of license or a different class channel without affording other parties an opportunity to file a competing expression of interest. The Application requests an upgrade and change of community of license from Channel 249C2 at Blanca to Channel 249C1 at Avondale, Colorado, at a new transmitter site. In support of the Application, Alex Media alleges that the proposal satisfies the requirements for changing a station's community of license because (1) the proposed use of Channel 249C1 at Avondale is mutually exclusive with Channel 249C2 at Blanca; (2) Blanca will not be deprived of

¹ See File No. BNPH-20110602AAW; *Public Notice*, 76 *Fed. Reg.* 46294 (Aug. 2, 2011) (establishing comment deadline of October 3, 2011).

² These pleadings include (1) Alex Media's February 17, 2012, Opposition to Informal Objection ("Opposition"); (2) Alex Media's December 6, 2012, letter request for an extension of time ("Extension Request") to respond to a November 7, 2012, staff request for supplemental information; (3) Alex Media's December 21, 2012, amendment to the Application (the "Amendment"); and (4) Radio 74's January 7, 2013, Response to Supplemental Information ("Response"). We hereby grant Alex Media's unopposed Extension Request.

³ 47 C.F.R. § 73.3573(a)(i)-(ii).

its only local service as the Blanca station is unbuilt; and (3) the provision of a first local service to the larger community of Avondale (population 754) under FM Priority 3⁴ will result in a preferential arrangement of allotments over the initiation of a first local service at the smaller community of Blanca (population 391).⁵ Alex Media further contends that the proposed reallocation would not violate the Commission's *Rural Radio*⁶ policies that restrict the relocation of AM or FM stations from smaller communities to larger Urbanized Areas because the proposed station will not, and could not through a minor modification, place a 70 dBu contour over 50 percent or more of any Urbanized Area.⁷

In its Objection, Radio 74 alleges that the Application should be denied because (1) it violates the Commission's prohibition against removing a community's sole local service even though the station is unbuilt; (2) it contravenes the Commission's recently adopted ban⁸ on the creation of "gray" loss area⁹ as the Application acknowledges that 87 persons in an area of 478 sq. kilometers will be reduced from two to one aural service;¹⁰ and (3) it triggers the Commission's *Rural Radio* policies as there is a site from which the station could cover more than 50 percent of the nearby Pueblo, Colorado, Urbanized Area, if an alternative propagation methodology is employed, and that under these circumstances, the proposed reallocation is not a first local service to Avondale but an additional station for the Pueblo Urbanized Area.¹¹

In its Opposition, Alex Media contends that the Objection should be denied because (1) the Application does not violate the prohibition against removing a community's sole local service as the policy does not apply to unbuilt stations; (2) the *Second R&O*'s ban on the creation of "gray" loss areas only pertains to cases under Priority 4, and not to cases, like the instant one, under higher allotment priorities; (3) even if the ban were applicable, it is not violated since the relocation of an unbuilt station does not create an actual "gray" loss area but perpetuates an existing "gray" area,¹² and that, in any event,

⁴ The FM allotment priorities are (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to Priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982).

⁵ See File No. BNPH-20110602AAW, Exhibit 35, at 1-2.

⁶ See *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 Rule Making, 26 FCC Rcd 2556 (2011) (subsequent history omitted) ("*Second R&O*"). When a station's proposed community is located in an urbanized area or the station could, through a minor modification application, cover at least 50 percent of an urbanized area, the Commission established a rebuttable presumption that the application should be treated, for Section 307(b) purposes as a proposal to serve the urbanized area rather than the named community of license. *Id.* at 2572 (¶ 30).

⁷ See File No. BNPH-20110602AAW, Exhibit 35, at 2-3.

⁸ See *Second R&O*, 26 FCC Rcd 2556, 2577 (¶ 39).

⁹ A "gray" area is an area in which there is only one fulltime aural reception service. See *Cheyenne, Wyoming, and Gering, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7530 n.8 (MMB 2000) ("*Cheyenne*").

¹⁰ See File No. BNPH-20110602AAW, Exhibit 35, at 8.

¹¹ See Radio 74's Comments and Informal Objection, Exhibit 1, utilizing a Longley-Rice study.

¹² In support of this position, Alex Media cites *Farmington and Gallup, New Mexico*, Report and Order, 11 FCC Rcd 2357, 2360 (MMB 1996), *recon. denied*, Memorandum Opinion and Order, 14 FCC Rcd 18983 (MMB 1999) ("*Farmington*"). A "white" area is an area in which there are no full-time aural reception services. See *Cheyenne*, 15 FCC Rcd at 7530 n.8.

the loss area is *de minimis*; and (4) an objecting party is not permitted to rely upon an alternative propagation methodology for the purpose of determining the extent of coverage of neighboring Urbanized Areas where an applicant has demonstrated compliance using the standard methodology.

On October 12, 2012, the Commission released the *Second Order* in the *Rural Radio* proceeding, which, *inter alia*, modified the technical standards for calculating gain and loss areas of service and the number of reception services in the gain and loss areas when radio stations change their communities of license.¹³ The Commission allowed parties with pending change of community applications as of the release date of the *Second Order* the option of amending their applications to conform to the clarified procedures or to rely upon the reception service counts in their previously filed technical showings.¹⁴ Pursuant to the *Second Order*, the staff requested supplemental information from Alex Media on November 7, 2012.¹⁵

In its Amendment, Alex Media updates the population in the “gray” loss area based on 2010 Census data but states that it will rely on the previous methodology for calculating the gain and loss areas and the number of reception services in the gain and loss areas as permitted by the Commission.¹⁶ Based upon the more current data, Alex Media states that there would be an increase in the population of the “gray” area to 132 persons.¹⁷ However, Alex Media reiterates that the creation of this “gray” loss area should not prevent grant of its Application for the reasons previously stated in its Opposition.

In its Response, Radio 74 argues that (1) a better reading of the *Second R&O* indicates that the bar on the creation of “white” or “gray” loss areas applies to FM Priority 2, and not just Priority 4; and (2) the Application violates the bar on the creation of “gray” loss area because the Commission did not limit the bar with any references to unbuilt facilities or *de minimis* figures. Accordingly, Radio 74 contends that the Application should be denied.

Discussion. Under Section 309(d) of the Communications Act of 1934, as amended,¹⁸ informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity.¹⁹

Removal of Sole Local Service. We find that Radio 74 has not raised a substantial and material question of fact regarding whether the Application violates the Commission’s prohibition against the

¹³ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Order on Reconsideration, 27 FCC Rcd 12829, 12836-40 (2012) (“*Second Order*”) (¶¶ 14-17).

¹⁴ *Id.* at 12840 n.70.

¹⁵ See *Letter to Evan D. Carb, Esq.*, Ref. 1800B3 (Nov. 7, 2012) (“*RSP*”).

¹⁶ See File No. BNPH-20110602AAW, Amendment of December 21, 2012, Exhibit 36, Engineering Supplement at 1.

¹⁷ *Id.* at 2.

¹⁸ 47 U.S.C. § 309(d) (the “*Act*”).

¹⁹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh’g denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

removal of a community's sole local service. Although Radio 74 acknowledges that the staff does not consider unbuilt stations to be "existing services" that invoke this policy,²⁰ Radio 74 claims that there is no Commission level authority for this proposition. We disagree. The Commission has explicitly recognized that holders of unbuilt construction permits are "considered eligible to file for a change of community of license without regard to the general prohibition on removal of a community's only operation on-air service (first local) because unbuilt stations do not provide such service."²¹ This distinction between "on-air" stations and unbuilt facilities has been consistently followed, and Radio 74 has not cited any case to the contrary. Because the Application proposes the reallocation of an unbuilt station, the prohibition against removal of a community's sole local service does not apply.

Urbanized Area Coverage. Next, we agree with Alex Media that Radio 74 is not permitted to use an alternative propagation methodology, such as Longley-Rice, for the purpose of demonstrating the extent of potential coverage of a nearby Urbanized Area. It is well established that where an applicant demonstrates compliance with the Commission's Rules utilizing the standard prediction method, an opponent of the application may not rely upon alternative prediction methods to rebut the showing.²² The reason for this approach is that "[s]upplemental analyses are inherently more complex than the standard contour prediction method and the underlying assumptions are often open to varying interpretations."²³ In this case, Alex Media has submitted an engineering showing, using the Commission's standard prediction methodology, that the proposed station will not, and could not through a minor modification, place a 70 dBu contour over 50 percent or more of any Urbanized Area.²⁴ A staff engineering analysis confirms this result.²⁵ Because the proposed facility could not cover 50 percent or more of the Pueblo Urbanized Area, the Application does not invoke the urbanized area service presumption set forth in *Rural Radio*.

Gray Area. As pointed out by Radio 74, we cannot grant the Application, as currently filed, because it creates an impermissible "gray" loss area. In the *Second R&O*, the Commission recently established "an absolute bar to any facility modification that would create white or gray area."²⁶ Alex

²⁰ See Radio 74's Comments and Informal Objection at 2.

²¹ See *Potts Camp and Saltillo, Mississippi*, Memorandum Opinion and Order, 16 FCC Rcd 16116, 16120 (2001) (¶ 9), *aff'd, sub nom. Sisk v. FCC*, 2003 WL 21076921 (D.C. Cir.). This case further states that in adopting the prohibition on removal of a sole local service, ". . . the Commission specifically defined existing service for change of community of license cases as that provided by stations that were on-the-air and on which their listeners had come to rely." *Id.* at 16121, *citing Modification of FM and TV Authorizations to Specify a New Community of License*, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 (1990).

²² See, e.g., *Shaw Communications, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 5852 (2009) (¶ 5) (not considering a Longley Rice study in a petition to deny that sought to question the coverage of an FM station); *Lee Shubert, Esq.*, Letter, 10 FCC Rcd 3159, 3160 (MMB 1995) (rejecting an attempt to apply Longley-Rice calculations to disqualify an applicant that had demonstrated compliance with the multiple ownership rules using the Commission's standard calculation methods).

²³ See *Amendment of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371, 12403 (1997) (¶ 71). Further, "[b]ecause supplemental showings are both complex and unique to each case, staff analyses require engineering review by propagation experts which places a substantial demand on our finite resources." *Id.*, at 12402 n.53.

²⁴ See File No. BNPH-20110602AAW, Exhibit E35, at 2.

²⁵ Specifically, the staff engineering study determined that the proposed station could cover approximately 31% of the Pueblo Urbanized Area with a 70 dBu signal.

²⁶ *Second R&O*, 26 FCC Rcd at 2577 (¶ 39).

Media contends that this bar applies only to cases involving FM Priority 4, and not the higher allotment priorities. We disagree. While the prohibition on creating “white” or “gray” area is contained in a paragraph of the *Second R&O* that also discusses Priority 4 showings, the sentence establishing the bar contains no language limiting its applicability to Priority 4 cases.²⁷ Indeed, we have already interpreted this bar as applying to the higher allotment priorities.²⁸ Further, to the extent that Alex Media alleges that, under *Farmington*, the bar is not violated because the relocation of the unbuilt allotment will perpetuate a pre-existing “gray” area, as opposed to creating a new “gray” area, we find that *Farmington*, a television case, has been superseded by the Commission’s *Second R&O* with respect to radio stations. Moreover, *Farmington* is also distinguishable because there was another vacant VHF television allotment in Gallup, New Mexico, that would provide coverage to the “white” loss area created by the relocation of an unbuilt station.²⁹ Unlike *Farmington*, there is no current vacant allotment that would provide service to the “gray” loss area in the instant case. Finally, we reject Alex Media’s contention that a “gray” loss population of 132 persons is *de minimis*.³⁰ The Commission’s imposition of an absolute bar on the creation of “white” or “gray” loss areas in change of community cases makes the size of the loss area immaterial and supersedes prior decisions to the contrary. Under these circumstances, we cannot grant the Application, as currently filed.

Conclusion. Accordingly, for the reasons discussed above, we deny the Objection in part and direct Alex Media to amend the Application to remedy the creation of a “gray” loss area within thirty (30) days of this letter.³¹ Radio 74 may submit a response to the amendment within fifteen (15) days.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁷ *Id.*

²⁸ See, e.g., *Karl Lieber*, Letter, 27 FCC Rcd 2424 (MB 2013) (finding Priority 1 concerns to be dispositive and dismissing a minor modification application to change a station’s community of license to provide a Priority 3 first local service because it would create a “white” loss area of 1,586 persons in violation of the Commission’s ban).

²⁹ See *Farmington*, 11 FCC Rcd at 2360 (¶ 20).

³⁰ Alex Media calculated a 132 person “gray” loss using an old methodology. See *Greenup, Kentucky, and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493 (1991). We conducted our own engineering analysis to determine whether any “white” or “gray” loss exists under a new methodology required for applications submitted after the release of the *Second Order* on October 12, 2012. See *Second Order*, 27 FCC Rcd at 12836-40. Our staff study reveals that the Application would create a “gray” loss area of 832 sq. kilometers containing 286 persons.

³¹ See *Able Radio Corporation and Entravision Holdings, LLC*, Letter, 26 FCC Rcd 16161 (MB 2011) (permitting an FM auction winner to amend its long-form application to specify a different transmitter site because, with respect to auction winners, the Commission has established a more lenient approach for processing defective applications).