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In Reply Refer to:

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Quorum Radio Partners of Virginia, Inc.
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WVJT, LLC
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Positive Alternative Radio, Inc.
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Booth, Freret, Imlay & Tepper, PC
7900 Wisconsin Avenue
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In re: **AM Broadcast Auction No. 84**

WVJT, LLC
WSLW(AM), White Sulphur Springs,
West Virginia
Facility ID No. 59678
File No. BMJP-20041029AIO

**Application for Major Modification to
AM Broadcast Station**

Dear Applicants and Counsel:

This letter refers to the above-noted application, filed October 29, 2004, by Quorum Radio Partners of Virginia, Inc. ("Quorum"), for major modification to the facilities of station WSLW(AM), White Sulphur Springs, West Virginia, seeking, *inter alia*, to change the community of license from White Sulphur Springs to Bexley, Ohio (the "Application"). For the reasons set forth below, we return the Application as inadvertently accepted for filing.

Background. Quorum timely filed its FCC Form 175 application to change the WSLW(AM) community of license during the filing window for AM Auction No. 84 ("Auction 84").¹ The Form 175 application was determined not to be mutually exclusive with any other proposal filed in the Auction 84 filing window, and Quorum was invited to file its complete FCC Form 301 application by October 29,

¹ See *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

2004.² Quorum timely filed its complete FCC Form 301 Application on October 29, 2004. Quorum proposes to change the community of license, frequency, and technical facilities of the station. Quorum was thereafter instructed to submit an amendment to the Application addressing the implications of the proposed community change under Section 307(b) of the Communications Act of 1934, as amended (“Section 307(b)”), which directs the Commission to make a “fair, efficient, and equitable” distribution of radio service among communities in the United States.³ However, Quorum did not provide a Section 307(b) showing at that time.

In November 2005, Quorum, which had filed for bankruptcy and was acting as debtor-in-possession,⁴ filed applications to assign the licenses of all its stations, including WSLW(AM), to WVJT, LLC (“WVJT”).⁵ The assignment applications were granted January 24, 2006, and the transactions were consummated April 14, 2006.⁶

On June 1, 2006, the staff sent Quorum a letter addressing technical deficiencies in the Application, and also requesting a Section 307(b) showing.⁷ No response was provided. On October 17, 2006, the staff again requested a curative amendment, including a Section 307(b) showing, to be provided by December 1, 2006.⁸ On December 8, 2006, WVJT filed an amendment dated December 1, 2006, addressing the technical deficiencies as well as Section 307(b) issues.⁹

WSLW(AM) is the sole local transmission service licensed at White Sulphur Springs, West Virginia (2000 Census population of 2,315). Quorum/WVJT propose to change WSLW(AM)’s community of license to Bexley, Ohio (2000 Census population of 13,203) as that community’s first local radio transmission service. WVJT claims in its Section 307(b) analysis that “[n]o portion of the WSLW 0.5 mV/m contour is served by fewer than two existing aural services.”¹⁰ On April 11, 2007, Positive Alternative Radio, Inc. (“PAR”) filed a Consolidated Petition to Deny against, *inter alia*, the

² See *AM Auction No. 84 Singleton Applications*, Public Notice, 19 FCC Rcd 16655 (MB 2004).

³ 47 U.S.C. § 307(b). See *Section 307(b) Amendment Deadline Established for Certain AM Auction No. 84 Singleton Applications*, Public Notice, 20 FCC Rcd 10710 (MB 2005).

⁴ Quorum became debtor-in-possession by filing Form 316, File No. BALH-20050325AMM, on March 25, 2005.

⁵ The application to assign the WSLW(AM) license was assigned File No. BAL-20051122ACK.

⁶ Pursuant to 47 C.F.R. § 1.65, within 30 days of an event affecting the accuracy or completeness of a pending application, an applicant must amend that application to reflect additional or corrected information. Neither Quorum nor WVJT timely filed a corrective amendment to the Application advising the Commission of WVJT’s acquisition of WSLW(AM). WVJT did not amend the Application until December 8, 2006, almost eight months after the sale was consummated, and only then after being prompted by two separate Bureau inquiry letters.

⁷ *Letter to Mark N. Lipp, Esq.*, Ref. No. 1800B3-EAL (MB June 1, 2006).

⁸ *Letter to Mark N. Lipp, Esq.*, Ref. No. 1800B3-EAL (MB Oct. 17, 2006).

⁹ See also 47 C.F.R. § 73.3571(c) (application for changes in the facilities of an existing station will continue to carry the same file number even though the Commission has approved an assignment of the station license if, upon consummation, the application is amended to reflect the new ownership).

¹⁰ Engineering Statement, Attachment 11 to amended application, at 3.

Application,¹¹ arguing that the Application violates the Commission’s policy against removal of sole local service from a community, and also that Quorum/WVJT propose to build two new towers without providing a showing that the new structures have been approved pursuant to the National Programmatic Agreement under Section 106 of the National Historic Preservation Act of 1996.¹²

Discussion. Our policies on allowing broadcast stations to change their communities of license are based on Section 307(b) and the goals of fair, efficient, and equitable distribution of radio service that underlie it. Our *FM Assignment Policies* delineate three core priorities: provision of first aural reception service to a community, provision of second aural reception service to a community, and provision of first local transmission service at a community.¹³ The fourth priority is “other public interest matters,” which encompasses any other factors that the Commission may take into consideration.¹⁴ Retention of the first local service at White Sulphur Springs, and the institution of first local service at Bexley, implicate Priority (3) – first local transmission service. However, notwithstanding that the existing and proposed arrangements of stations both trigger the same allotment priority, the Commission generally prohibits the removal of an existing station representing a community’s sole local transmission service.¹⁵ This policy is subject, as are all Commission policies, to waiver under appropriate circumstances.¹⁶ However, the Commission has emphasized that “the fact that a proposal would create a new local service (at the expense of an existing service) is not sufficient, by itself, to warrant a waiver.”¹⁷ Rather, such a proposal “is presumptively contrary to the public interest.”¹⁸ In this regard, the Commission has stated that:

¹¹ PAR’s Petition to Deny is untimely as to the Application, which was accepted for filing on February 12, 2007, with Public Notice of acceptance being given February 15, 2007. *Broadcast Applications*, Public Notice, Report No. 26424 (MB Feb. 15, 2007). PAR was thus subject to a ten-day period for filing petitions to deny. 47 C.F.R. § 73.5006(b). We therefore consider its Petition to Deny as an informal objection with regard to the Application.

¹² See generally 16 U.S.C. § 470a. See also *Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004).

¹³ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 F.C.C.2d 88, 91-93 (1982). Priorities (2) and (3) are co-equal. The FM allotment priorities are applied to Section 307(b) determinations for community change proposals for AM stations. *Allesandro Broadcasting Co.*, Decision, 99 F.C.C.2d 1 (Rev. Bd. 1984).

¹⁴ *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d at 93.

¹⁵ *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 (1990) (“*New Community MO&O*”). The Commission re-affirmed this policy in *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14227-30 (2006).

¹⁶ *Id.* On waiver standards generally, see *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.” (citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969))).

¹⁷ *New Community MO&O*, 5 FCC Rcd at 7097.

¹⁸ *Id.*

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.¹⁹

Quorum and WVJT do not request waiver of this policy. Instead, they appear to rely on the fact that White Sulphur Springs has a vacant FM allotment at Channel 227A, previously occupied by station DWXMD(FM), the permit of which was canceled, and call sign deleted, on July 28, 1994. We do not consider the existence of a vacant allotment to constitute a “service” sufficient to enable WSLW(AM) to move. As noted above, WSLW(AM) has provided radio service upon which the residents of White Sulphur Springs have relied for over 25 years. In contrast, former WXMD(FM) was never licensed, and there is no evidence that it ever provided service. Even if WXMD(FM) had provided service before its permit was canceled, that service ended almost 14 years ago, and WSLW(AM) has been the sole local transmission service in White Sulphur Springs since then. The Commission has determined that a community of license modification proponent may not rely on a vacant FM allotment, or anything other than an operating station, to preserve a community’s sole local transmission service.²⁰

Finally, while Bexley is unquestionably a larger community than White Sulphur Springs, and would be preferred if this were a comparison between proposals for new service, this in and of itself does not justify a change of community of license that would deprive the community of White Sulphur Springs of a radio service on which it has come to rely for programming serving its needs. The Commission has held that the fact that a licensee proposes to remove a station to a larger community does not by itself justify the removal of a smaller community’s sole local broadcast service.²¹

Conclusion. We cannot find, on the existing record in this case, that there are sufficient public interest factors to offset the expectation of continued local service at White Sulphur Springs, West Virginia. Accordingly, we cannot find that the public interest, convenience, and necessity will be served by Quorum’s and WVJT’s proposal. Therefore, the Application of Quorum Radio Partners of Virginia, Inc. and WVJT, LLC, File No. BMJP-20041029AIO, for major modification to the facilities of station

¹⁹ *Id.*

²⁰ *Pacific Broadcasting of Missouri LLC*, Memorandum Opinion and Order, 18 FCC Rcd 2291, 2296 (2003), *recon. denied*, 19 FCC Rcd 10950, 10958 (2004) (“We direct the staff to dismiss in the ordinary course those rulemaking petitions, notices of proposed rulemaking and counterproposals that rely solely on a vacant allotment to replace a community’s sole local transmission service.”). While this case involved FM rule making proceedings, the policy objectives are equally compelling in the AM major change context.

²¹ *See, e.g., Potts Camp and Saltillo, Mississippi*, Memorandum Opinion and Order, 16 FCC Rcd 16116 (2001) (denying relocation of sole local service at a town of 483 to a town of 1,782).

WSLW(AM), White Sulphur Springs, West Virginia, IS RETURNED AS INADVERTENTLY ACCEPTED FOR FILING.²² Positive Alternative Radio, Inc.'s Petition to Deny, as it pertains to the subject application, IS DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mark N. Lipp, Esq., Counsel for Quorum Radio Partners of Virginia, Inc.
A. Wray Fitch III, Esq., Counsel for WVJT, LLC

²² The corresponding AM Auction No. 84 Tech Box submission filed by Quorum, File No. BMJP-20040130BHM, IS ALSO DISMISSED.