



Federal Communications Commission  
Washington, D.C. 20554

July 17, 2008

**DA 08-1683**

*In Reply Refer to:*

1800B3-TSN

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In re: **WLDR(AM), Kingsley, Michigan  
Facility ID No. 4599**  
Application for Major Modification  
File No. BMJP-20041028ACO

**Petition for Reconsideration**

Dear Counsel:

This letter refers to the above-referenced Petition for Reconsideration (“Petition”), filed March 27, 2006, by Fort Bend Broadcasting Company (“FBB”). In that letter, FBB seeks reconsideration of the Audio Division’s March 21, 2006, letter decision denying its application for major modification to the facilities of station WLDR(AM), Kingsley, Michigan, seeking to change the community of license from Kingsley to Garfield Township, Michigan.<sup>1</sup> For the reasons set forth below, we deny the Petition.

**Background.** FBB timely filed its FCC Form 175 application to change the WLDR(AM) community of license during the filing window for AM Auction No. 84 (“Auction 84”).<sup>2</sup> The application was determined not to be mutually exclusive with any other proposal filed in the Auction 84 filing window, and FBB was invited to file its complete FCC Form 301 application by October 29, 2004.<sup>3</sup> FBB

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<sup>1</sup> *Fort Bend Broadcasting Company*, Letter, 21 FCC Rcd 2953 (MB 2006) (“*Staff Decision*”). WLDR(AM) changed its call sign to WJNL(AM) on April 25, 2007. We will continue to use the previous call sign, consistent with the *Staff Decision*.

<sup>2</sup> See *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

<sup>3</sup> See *AM Auction No. 84 Singleton Applications*, Public Notice, 19 FCC Rcd 16655 (MB 2004).

timely filed its complete FCC Form 301 application on October 28, 2004 (the “Application”), proposing only a change in community of license to Garfield Township, Grand Traverse County, Michigan (2000 Census population 13,840), with no change to the WLDR(AM) technical facilities. FBB was thereafter instructed to submit an amendment addressing the implications of the proposed community change under Section 307(b) of the Communications Act of 1934, as amended, which directs the Commission to make a “fair, efficient, and equitable” distribution of radio service among communities in the United States.<sup>4</sup> FBB timely filed its Section 307(b) amendment on July 18, 2005.

WLDR(AM) is the sole local transmission service licensed at Kingsley, Michigan (2000 Census population 1,469). Because the Commission prohibits the removal of a community’s sole local transmission service absent an appropriate waiver showing, in the *Staff Decision* we dismissed the Application. FBB timely filed the Petition, and filed a Supplement to Petition for Reconsideration (“Supplement”) on April 11, 2006. WTCM Radio, Inc. (“WTCM”), licensee of Stations WTCM(AM) and WTCM-FM, Traverse City, Michigan, filed Comments on Petition for Reconsideration (“WTCM Comments”) on May 11, 2006.

**Discussion.** FBB challenges the staff’s dismissal of the Application, arguing that if the Commission cannot grant the Application it must set it for hearing, because the prohibition against removal of sole local service does not apply to AM stations. FBB contends that the Application was fully compliant with the Commission’s rules and regulations, and cannot simply be dismissed for “alleged non-compliance with some policy.”<sup>5</sup> As discussed below, this does not accurately characterize the situation, and the *Staff Decision* was correct.

FBB contends that the policy prohibiting removal of sole local transmission service was not specifically stated as applying to AM major modification applications, and thus cannot be applied to its Application.<sup>6</sup> However, nothing in the *New Community MO&O*, in which the sole local service removal prohibition was most definitively described, limits that policy to removal of sole local FM and TV transmission services. Indeed, the heading to that section of the order labels it an “*Absolute* Restriction on Removal of Sole Existing Local Transmission Service.”<sup>7</sup> Moreover, the Commission states that the policy barring removal of sole local transmission service “furthers our statutory mandate” under Section 307(b). Section 307(b) requires the Commission to provide for the fair, efficient, and equitable distribution of “licenses, frequencies, hours of operation, and of power,” without limiting same to a particular service.<sup>8</sup>

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<sup>4</sup> 47 U.S.C. § 307(b) (“Section 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).

<sup>5</sup> Petition at 2.

<sup>6</sup> *Id.*, citing *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, recon. granted in part, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 and n.16 (1990) (“*New Community MO&O*”).

<sup>7</sup> *Id.* at 7096 (emphasis added).

<sup>8</sup> 47 U.S.C. § 307(b).

Further, as we recently observed, such an interpretation of the prohibition is untenable.<sup>9</sup> As the Commission noted in the *New Community MO&O*, AM and FM stations have long been considered to be “joint components of a single aural medium.”<sup>10</sup> FBB’s contention – that the prohibition against removal of sole local service does not apply to AM stations – would represent a significant departure from this policy, allowing sole local AM stations to abandon their communities of license for any reason or none. Moreover, as we stated in *Prieto*, such an interpretation is inconsistent with FM allocations policy, which permits an FM station to change communities when a sole AM station remains in its former community of license.<sup>11</sup> If AM stations may change communities with impunity, as FBB suggests, an AM station could never be considered the “sole local service” for purposes of such a re-allotment.

In *Prieto*, we also addressed the argument that the prohibition against removing sole local transmission service was not a Commission rule. This contention is belied by the very language of the *New Community MO&O*. “While we continue to believe that a prohibition on the removal of local service is justified because such changes presumptively disserve the public interest, we also wish to clarify that, in the rare circumstances where removal of a local service might serve the public by, for example, providing a first reception service to a significantly sized population, *we will entertain requests to waive the prohibition.*”<sup>12</sup> Moreover, the policy has the hallmarks of a rule: it is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describe the procedure or practice requirements of the agency, adopted in a rulemaking proceeding and published in the Federal Register.<sup>13</sup> The mere fact that the policy does not appear in the Code of Federal Regulations does not preclude its being considered a rule.<sup>14</sup> Thus, contrary to FBB’s assertion, its Application did fail, on its face, to comply with a Commission rule, and thus was subject to dismissal.

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<sup>9</sup> See *Ms. Teresa Prieto*, Letter, 23 FCC Rcd 5100, 5102 (MB 2008) (“*Prieto*”).

<sup>10</sup> *New Community MO&O*, 5 FCC Rcd at 7097. See also *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 88, 92 (1982) (“*FM Assignment Policies*”).

<sup>11</sup> See, e.g., *Saltville, Virginia and Jefferson, North Carolina*, Report and Order, 10 FCC Rcd 7578 (MMB 1995); *Kindred and Oakes, North Dakota*, Report and Order, 7 FCC Rcd 1996 (MMB 1992). See also *New Community MO&O*, 5 FCC Rcd at 7097 (both AM and FM stations considered in a proceeding to change an FM community of license).

<sup>12</sup> *New Community MO&O*, 5 FCC Rcd at 7096 (emphasis added).

<sup>13</sup> See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 218-19 (1988) (Scalia, J., concurring) (“Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations.”). See also *Radio Broadcasting Services; Modification of FM and TV Authorizations to Specify a New Community of License*, 54 Fed. Reg. 26199, 26200 (1989).

<sup>14</sup> See, e.g., *Cellnet Communications, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 3341, 3343 and n.33 (CCB 1994) (citing *Cellnet Communications v. FCC*, 965 F.2d 1106, 1108 (D.C. Cir. 1992)) (Commission’s cellular resale requirement is a “binding, uncodified, substantive rule adopted through notice and comment rulemaking”); *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel \*16, 482-488 MHz, Pittsburgh, Pennsylvania*, Report and Order, 17 FCC Rcd 14038, 14055 and n.58 (2002) (considering request for waiver of uncodified rule requiring that newly de-reserved noncommercial educational television channels be made available for competing applications).

We note, moreover, as we did in *Prieto*, that there is no reason to hold a hearing where, as here, there is no dispute as to the facts of the case. FBB does not dispute that WLDR(AM) is Kingsley, Michigan's, sole local service, nor does it dispute any other material facts. In such cases, no hearing is required.

There is a difference between “substantial issues” which require a hearing to elucidate the controlling factors . . . and issues such as involved here. The latter may be just as important as the former, but unless they depend on unresolved factual circumstances, no hearing is required to resolve them. *Only where the public interest cannot be determined without a resolution of disputed facts has Congress dictated that the Commission must conduct a hearing. That is the clear meaning of section 309 of the Act.* (47 U.S.C. §§ 309(d)(2) and (e) (1964).) (cite) Without hesitation we hold that the Commission was not required to hold a hearing before deciding the questions raised by [the] petition; considering the facts that the Commission had before it, “nothing suggests to us that a further hearing would produce additional facts that might change the result.”<sup>15</sup>

To the extent that FBB cites *Americom*<sup>16</sup> for the proposition that a hearing is required, we disapproved that decision in *Prieto* to the extent that it contradicts the holding in *Marsh v. FCC*.<sup>17</sup> We also reject FBB's contention that *Ark-Valley Broadcasting Company, Inc.*<sup>18</sup> requires us to make a Section 307(b) comparison of the respective community needs of Kingsley and Garfield Township. We have already determined that FBB's application violates the prohibition against removing sole local transmission service which, as discussed above, is grounded in Section 307(b) principles. We further noted, in the *Staff Decision*, that WLDR(AM)'s status as Kingsley's sole local transmission service precluded a move even to a larger community such as Garfield Township.<sup>19</sup> Thus, it is inaccurate for FBB to suggest that Section 307(b) was not considered in reaching our decision.

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<sup>15</sup> *Marsh v. FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970) (emphasis added) (citing *Capitol Broadcasting Co. v. FCC*, 324 F.2d 402, 405 (D.C. Cir. 1963)). See also *AT&T Co. v. FCC*, 539 F.2d 767, 774 (D.C. Cir. 1976) (rejecting argument that Section 309(e) of the Act mandates hearing in all cases where there is a substantial and material question of fact, citing, *inter alia*, *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965), and *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956)).

<sup>16</sup> Hearing Designation Order, 8 FCC Rcd 2499 (MMB 1993).

<sup>17</sup> *Prieto*, 23 FCC Rcd at 5104 n.23.

<sup>18</sup> Memorandum Opinion and Order, 15 FCC 818 (1951).

<sup>19</sup> *Staff Decision*, 21 FCC Rcd at 2955 and n.14.

We therefore find the matter was correctly decided in the *Staff Decision*, and moreover that no hearing is necessary to determine whether grant of the application would be in the public interest, convenience, and necessity. Accordingly, FBB's Petition for Reconsideration IS DENIED.<sup>20</sup>

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>20</sup> WTCM, in its Comments, argues that dismissal of the Application was justified because of FBB's "defective Section 307(b) showing," particularly its failure to provide a showing under *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988), due to Garfield Township's proximity to the Traverse City, Michigan, Urban Cluster. WTCM Comments at 2-3. Because we find that we have already addressed the Section 307(b) implications of the Application, we need not address either WTCM's standing or its specific allegations.