



**Federal Communications Commission
Washington, D.C. 20554**

August 21, 2008

DA 08-1950

In Reply Refer to:

1800B3-MJW

Released: August 21, 2008

Mr. William B. Clay
5629 Charing Place
Charlotte, NC 28211

Sunburst Media - Louisiana
c/o Peter Gutmann, Esq.
Womble, Carlyle, Sandridge and Rice, PLLC
1401 Eye Street, NW
Seventh Floor
Washington, DC 20005

In re: **Sunburst Media - Louisiana**
KCIL(FM), Houma, Louisiana
Facility ID No, 25520
File No. BPH-20070119ABG

Application for Minor Change

Petition for Reconsideration

Dear Mr. Clay and Counsel:

We have under consideration a Petition for Reconsideration (the "Petition") filed by William B. Clay ("Clay"), seeking reconsideration of grant of the referenced application (the "Application") to Sunburst Media - Louisiana ("Sunburst") authorizing a change to the community of license of KCIL(FM) from Houma, Louisiana ("Houma"), to Jean Lafitte, Louisiana ("Jean Lafitte").¹ For the reasons set out below, we dismiss the Petition.

Background. The staff granted the Application pursuant to Section 73.3573(g) of the Commission's Rules (the "Rules")² which permits modification of a station's authorization to specify a new community of license without affording other parties the opportunity to file a competing expression of interest.³ All such applications must result in a preferential arrangement of allotments.⁴

Clay argues that grant of the Application does not represent a preferential arrangement of allotments because: (1) the population of Jean Lafitte is small relative to the population residing within

¹ Sunburst filed an Opposition to Petition for Reconsideration (the "Opposition").

² 47 C.F.R. § 73.3573(g).

³ See *Revision of Procedures Governing Amendments to the FM Table of Allotments and Changes of Community of License in the Radio Broadcast Service*, Report and Order, 21 FCC Rcd 14212, 14217 (2006) ("Changes of Community").

⁴ See *id.* at 14218. See also *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 (1990).

the KCIL(FM) protected contour;⁵ (2) there are “at least 40 other communities” in the area, each of which “contain[s] a substantially greater share of the population to be covered;”⁶ (3) the contiguous communities of New Orleans and Metairie comprise a “more compelling commercial market;”⁷ (4) Sunburst has not made an explicit commitment to serve Jean Lafitte and there is no Commission rule requiring Sunburst to do so;⁸ and (5) although the Commission has determined that its rules and policies guard against “urban migration of FM broadcast stations,” the Commission’s determination is “clearly false in this case.”⁹

Clay is a resident of Charlotte, North Carolina, a community located more than 650 miles from both Houma and Jean Lafitte, and does not allege that he is a regular listener of KCIL(FM). He thus lacks “listener standing” to file his Petition.¹⁰ He argues, however, that he should be accorded standing because grant of the Application causes him a “procedural injury,”¹¹ which he describes as “the threat of injury in fact through imminent changes to the broadcast radio service available to petitioner where he resides and regularly pursues recreational activities.”¹²

Clay acknowledges that Section 1.106(b)(1) of the Commission’s Rules (the “Rules”)¹³ provides that petitions for reconsideration are unacceptable from non-parties unless they show why it was not possible to earlier participate in the proceeding. He acknowledges, further, that he could have participated earlier in this proceeding by filing an informal objection. He claims he did not do so, however, to avoid “wasting the Commission’s resources with the filing of an essentially identical [to the Petition] informal objection.”¹⁴

The remainder of Clay’s Petition recites his participation in the *Changes of Community* proceeding¹⁵ and other filings he has made opposing applications granted pursuant to the Rules adopted in that proceeding.¹⁶ As relief, Clay requests that the Commission vacate the grant of the Application “and stay all similar proceedings until the Commission acts on the pending reconsiderations of the preceding rule making and corrects its errors with a new *Report and Order*.”¹⁷

Discussion. Clay lacks standing to file the Petition. His “procedural injury” arguments relying on the Supreme Court’s holding in *Lujan* are misplaced. *Lujan* clearly states that a “procedural right”

⁵ See Petition at 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ See, e.g., *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Red 13041, 13042 (1999). (“[W]e will accord party-in-interest status to a petitioner who demonstrates either residence in the station’s service area or that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station.”)

¹¹ Petition at 5-6 and n.23 (citing 5 U.S.C. § 706(2)(D); *Lujan v. Defenders of Wildlife*, 504 U.S. 572, 573, nn.7-8 (1992) (“*Lujan*”); *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); *Portland Audubon Society v. Endangered Species Commission*, 984 F.2d 1534, 1537 (9th Cir. 1993)).

¹² Petition at 6.

¹³ 47 C.F.R. § 1.106(b)(1).

¹⁴ Petition at 4-5.

¹⁵ Clay claims that the Commission ignored his comments and reply comments in that proceeding. *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.* at 6-7.

accrues only if there is an associated “concrete harm” to the person asserting the right.¹⁸ Similarly, under the Commission’s standing requirements,¹⁹ a petitioner must show that not granting the relief it seeks would cause it a direct injury, that there is a causal link between that claimed injury and the action challenged, *i.e.*, that the claimed injury can “fairly be traced” to the action challenged, and that granting the relief requested would prevent or redress the claimed injury.²⁰

Clay does not explain, and we do not perceive, how grant of an application for a station more than 650 miles from Clay’s residence is a direct injury that threatens or otherwise affects the broadcast radio service available to him in Charlotte, North Carolina. Moreover, the vague “threat” of such harm that Clay adverts to is conjectural and, therefore, not the direct injury prerequisite to the acceptability of a petition for reconsideration. Even accepting, *arguendo*, Clay’s conjecture that changes in his broadcast service are “imminent” in Charlotte, North Carolina, he has not shown how that supposed injury would be prevented or redressed if the Application were denied. Accordingly, we find no merit in Clay’s argument that he has standing on “procedural injury” grounds, or otherwise.

We do not accept Clay’s rationalization that he did not file an informal objection in order to avoid wasting Commission resources. Section 1.106(b)(1) of the Rules required Clay to show why it “was not possible for him to participate in the earlier stages of a proceeding.”²¹ By Clay’s own admission it was possible for him to do so – he simply elected not to. His failure to comply with Section 1.106(b)(1), therefore, compels dismissal of his Petition.

We will not consider the Petition as an informal objection pursuant to Section 73.3587 of the Rules. Such informal objections must be filed “[b]efore FCC action on any application for an instrument of authorization.”²² Clay’s Petition, however, postdates grant of the KCIL(FM) Application. Therefore, Clay’s Petition – even considered as an informal objection – is untimely, mandating its dismissal.²³

Its procedural infirmities aside, Clay’s Petition lacks substantive merit. Sunburst has demonstrated that it meets the well-established *Tuck*²⁴ criteria that apply when a licensee seeks to change its community of license to a suburban community in or near an Urbanized Area.²⁵ These criteria include the extent to which the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central cities, and most importantly, the extent to which the suburban community is independent of the Urbanized Area.²⁶ Clay concedes that Sunburst has met the most important criterion,

¹⁸ 504 U.S. at 568 n.8. (In which the Court stated that it found no case “in which we actually found standing solely on the basis of a ‘procedural right’ unconnected to the plaintiff’s own concrete harm.”)

¹⁹ Within the mandate of the Communications Act, the Commission may consider petitions from parties who might lack standing before a federal court, *i.e.*, parties who lack “Article III standing.” *See, e.g., Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976).

²⁰ *See, e.g., Daniel R. Goodman*, Order on Reconsideration, 14 FCC Rcd 20547, 20549 (1999) (citing *Los Angeles Cellular Telephone Company*, Order, 13 FCC Rcd 4601, 4603-4604 (CWD, 1998), citing *AmericaTel Corporation*, 9 FCC Rcd 3993, 3995 (1994) citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)).

²¹ 47 C.F.R. § 1.106(b)(1) (emphasis supplied).

²² 47 C.F.R. § 73.3587 (emphasis supplied).

²³ *See Community Television of Southern California*, Memorandum Opinion and Order, 6 FCC Rcd 4995 n.1 (1991) (dismissing informal objection filed after Commission action on a renewal application); *Association for Community Education*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12684 (2004) (dismissing late-filed informal objection and denying standing for objecting party’s failure to show why it could not have participated earlier in proceeding).

²⁴ *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) (“*Tuck*”).

²⁵ *See Application*, Ex. 32.

²⁶ *See, e.g., William B. Clay*, Letter, 23 FCC Rcd 8412, 8413 (MB 2008).

i.e., that Sunburst has “demonstrated [Jean Lafitte’s] independence from New Orleans,”²⁷ Thus, the other factors cited by Clay - the size of Jean Lafitte, the existence of larger communities where the allotment supposedly could be used with greater commercial success, and the lack of an explicit commitment by Sunburst to serve Jean Lafitte - are either secondary or irrelevant.²⁸

Jean Lafitte is, as Clay states, much smaller than New Orleans. FM stations, however, have been allotted to many cities of equivalent size even when there has been a large disparity with the population of the central city of an Urbanized Area.²⁹ Clay’s argument that other communities would be more commercially advantageous locations for the allotment is not relevant. To the extent Clay’s claim is in the nature of a counterproposal to the Jean Lafitte allotment, such counterproposals are barred by Section 73.3573(g) of the Rules which permits modification of a station’s authorization to specify a new community of license without affording other parties the opportunity to file a competing expression of interest.³⁰ In any event, the Commission’s allotment policy centers on the public interest, not whether an allotment is commercially advantageous to the allotment’s proponent.

Although Clay claims that Sunburst has made no explicit statement that it will serve the needs and interests of Jean Lafitte, he fails to note that Sunburst is not required to make such a commitment as part of the application process. The obligation to serve a community of license is implicit in the Commission’s Rules and policies. Thus, as Sunburst points out, the “Commission has long cited the ‘fundamental obligation of licensees to service the needs and interests of their communities of license.’”³¹ Although the Commission no longer requires detailed ascertainment procedures, various Commission Rules are designed to ensure that stations serve their communities. For example, each licensee is required to list in a public inspection file the programs that have addressed the most significant community issues during the prior three months.³² The lists are retained in the public inspection file until final action on the station’s renewal application. This provides Sunburst with a significant incentive to serve Jean Lafitte and for the public and the Commission to evaluate Sunburst’s record of service in connection with the KCIL(FM) renewal application. We therefore find no merit in Clay’s unsupported, speculative assertion that Sunburst will not serve Jean Lafitte. For the same reasons, we reject the charge that our policies do not adequately guard against “urban migration” of KCIL(FM) from Houma to the New Orleans area.

Having found the Petition fatally defective, procedurally, and substantively unmeritorious, we decline to address Clay’s request to “vacate the captioned grant and stay all similar proceedings,” except to point out that stay requests may not be integrated into other pleadings³³ and that Clay has failed to

²⁷ Petition at 6.

²⁸ Signal population coverage and the size of a proposed community of license relative to an adjacent community are “pertinent but less significant” than evidence that the proposed community has needs and interests independent of those of the larger community. *See, e.g., Bay St. Louis and Poplarville, Mississippi*, Report and Order, 10 FCC Rcd 13144, 13145 (MMB 1995).

²⁹ *See, e.g., Ada, Newcastle and Watonga, Oklahoma*, Report and Order, 11 FCC Rcd 16896 (MMB 1996).

³⁰ *See* 47 C.F.R. § 73.3573(g).

³¹ Opposition at 4 (citing, *e.g., Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 20594, 20608 (2001); *Notice of Inquiry – Broadcast Localism*, 19 FCC Rcd 12425 (2004). *See also Changes of Community*, 21 FCC Rcd at 14214. (“The importance of our Section 307(b) criteria is directly tied to the fact that broadcasters must provide programming that is responsive to the interests and needs of their communities of license, and the concomitant importance of local radio service to the communities served.”)

³² *See Deregulation of Radio, Report and Order*, 84 FCC 2d 968 (1981), *recon. granted in part*, Memorandum Opinion and Order, 87 FCC 2d 796 (1981), *aff’d in relevant part, Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413, 1435 (D.C. Cir 1983). *See also* 47 C.F.R. §§ 73.3526, 73.3527.

³³ *See* 47 C.F.R. § 1.44(e).

demonstrate that grant of the Application causes him irreparable harm or that he has a probability of succeeding on the merits.³⁴

Decision/Action: Clay's Petition is procedurally defective. Even were it not so, we would deny it on substantive grounds. Accordingly, the Petition for Reconsideration filed by William B. Clay IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁴ See *Hispanic Information and Telecommunications Network, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 5471, 5479 (2005) (citing *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as revised by *Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).