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In Reply Refer to:

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Southern Stone Broadcasting, Inc.
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In re: **WMGZ(FM), Lexington, Georgia**
Southern Stone Broadcasting, Inc.
Facility ID Number: 41993
File No. BPH-20070416ACW

Petition for Reconsideration

Dear Applicant and Counsel:

We have before us a Petition for Reconsideration ("Petition") filed July 10, 2009, by Southern Stone Broadcasting, Inc. ("Southern Stone Broadcasting"), licensee of Station WMGZ(FM), Channel 249C2, Lexington, Georgia. Southern Stone Broadcasting seeks reconsideration of the June 10, 2009, staff letter that dismissed its amended community of license application (the "Application"), as unacceptable for filing.¹ For the reasons set forth below, we deny the Petition.

Background. In 2006, the Commission modified the license of Station WMGZ(FM) from Channel 249C3 at Eatonton, Georgia, to Channel 249C2 at Lexington, Georgia.² Southern Stone Broadcasting continues to operate with the formerly licensed Eatonton facilities pursuant to an implied STA.³ Notwithstanding the fact that the *Lexington Reallotment R&O* is now final, the Application requests a change in Station WMGZ(FM)'s community of license from Eatonton, Georgia, to Washington, Georgia, and modification of its license to reflect this change. The proposed reallotment would provide a first local nighttime transmission service and second competitive transmission service to

¹ *Letter to Southern Stone Broadcasting, Inc.* (MB rel. June 10, 2009) ("Division Letter").

² *See Eatonton and Lexington, Georgia*, Report and Order, 21 FCC Rcd 10032 (MMB 2006) ("Lexington Reallotment R&O").

³ *See 1988 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540 n.55 (1999) (licensee has at best an 'implied STA' to operate formerly licensed facilities following final order in rulemaking proceeding modifying facilities).

Washington, under Priority (4).⁴ The Application was filed pursuant to Section 73.3573(g) of the Commission's Rules (the "Rules"), which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. To effectuate its mandate under Section 307(b) of the Act,⁵ the staff compares the existing arrangement of allotments to the proposed arrangement of allotments. A reallocation proposal must result in a preferential arrangement of allotments⁶ based on the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.⁷

The *Division Letter* found that the proposed Station WMGZ(FM) reallocation to Washington would not result in a preferential arrangement of allotments as required by *Community of License*. Specifically, the *Division Letter* stated that a first local service at Lexington (Priority 3) was preferred over a first local nighttime transmission service and second competitive transmission service to Washington (Priority 4). The *Division Letter* announced that the proper comparison is between Lexington and Washington because the modification of the Station WMGZ(FM) license to specify Lexington is now final.

In its Petition, Southern Stone Broadcasting requests that we reconsider the staff decision because the Division's rationale is flawed. It claims that the proper § 307(b) comparison is between Eatonton and Washington. In support of this position, it argues that the station relocation, in fact, involves the removal of an Eatonton service. It notes that it never initiated service in Lexington in accordance with the *Lexington Reallocation R&O*. However, it states that since Station WMGZ(FM) is considered an unbuilt station at Lexington, an allotment to that community essentially becomes a nugatory, *ab initio*, unless a station is constructed and operations are initiated. As such, Southern Stone Broadcasting's proposal would not constitute the removal of Lexington's sole local service since Station WMGZ(FM) never operated at that community.⁸

Discussion. The Commission will consider a Petition only when the applicant demonstrates that there was a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.⁹ Southern Stone Broadcasting has not met this burden.

We find no error in the *Division Letter* and, accordingly, deny the Petition. We disagree with Southern Stone Broadcasting's claim that the proper comparison is between its former community of license, Eatonton, and the proposed community of Washington, under Priority (4). Specifically, the

⁴ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). 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).

⁵ 47 U.S.C. § 307(b).

⁶ See *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989) ("*Community of License*"), *recon. granted in part*, Memorandum Opinion and Order ("*Community of License MO&O*"), 5 FCC Rcd 7094(1990) ("*Community of License Reconsideration Order*").

⁷ *Id.* note 3.

⁸ Citing *Vernon Center and Eagle Lake, Minnesota*, Report and Order, 21 FCC Rcd 14714 (MB 2006); *Sanibel and San Carlos Park, Florida*, Report and Order, 10 FCC Rcd 7215 (MMB 1995); and *Oraibi and Leupp, Arizona*, Report and Order, 14 FCC Rcd 13547 (MMB 1999).

⁹ 47 C.F.R. § 1.106(b)(2).

Report and Order in MB Docket 04-379 modified the Station WMGZ(FM) license to specify Lexington as its new community of license. The *Report and Order* is final. As noted previously, Station WMGZ(FM) current operations at Eatonton are pursuant merely to an implied STA which has no § 307(b) significance. Given this fact, we find that the *Division Letter* was correct in finding that the proper comparison is between the communities of Lexington and Washington.¹⁰ We agree with Southern Stone Broadcasting's contention that the proposed reallocation of Station WMGZ(FM) from Lexington to Washington would not violate the Commission's policy generally prohibiting the relocation of a community's sole local service¹¹ because the station has not commenced operations at Lexington. However, we find that the *Division Letter* properly analyzed the proposed reallocation of Station WMGZ(FM) as a first local nighttime and second competitive transmission service at Washington, under Priority (4) versus a first local service at Lexington, Georgia, under Priority (3). Therefore, we conclude that the proposed reallocation of Station WMGZ(FM) to Washington would not constitute a preferential arrangement of allotments as required by *Community of License*.

Conclusion. IT IS ORDERED, that Southern Stone Broadcasting, licensee of Station WMGZ(FM), shall submit promptly to the Commission an acceptable amendment to the pending minor change application for a construction permit (Form 301),¹² specifying Channel 249C2 at Lexington, Georgia consistent with the *Report and Order* in MB Docket No. 04-379. Accordingly, IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Southern Stone Broadcasting, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁰ See *Loretto, Tennessee and Killen, Alabama*, Report and Order, 21 FCC Rcd 5834 (MB 2006) (stating that the Commission will carefully review all two-step reallocation proposals for potential abuse of process issues).

¹¹ The Commission strongly disfavors the removal of a community's sole local existing service. This policy is subject, as are all Commission policies, to waiver in appropriate circumstances. However, the Commission emphasized in *Community of License Reconsideration Order* that a proposal that would create a new local service at the expense of an existing service is not sufficient, by itself, to warrant a waiver, and concluded that such a proposal would be presumptively contrary to the public interest. To this end, the public has a legitimate expectation that existing service will continue, and this expectation is a factor weighed independently against the service benefits that may result from reallocation of a channel from one community to another. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service. *Community of License Reconsideration Order*, 5 FCC Rcd at 7097.

¹² File No. BPH-20070416ACW.