



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

June 27, 2016

DA 16-726

In Reply Refer to:
1800B3-NS/AD

A. Wray Fitch III, Esq.
Gammon & Grange P.C.
8280 Greensboro Drive, 7th Floor
Washington, DC 20036

Carrie Ward, Esq.
401 E. City Avenue, Suite 809
Bala Cynwyd, PA 19004

Re: **New FM, White Salmon, WA**
Facility ID No. 198745
File No: BNPH-20151013ADJ
Informal Objection

Dear Counsel:

This letter refers to the long-form application (Application) for an original construction permit filed by Jackman Holding Company, LLC (Jackman), winning bidder in Auction 98 for FM Channel 283C2 at Moro, Oregon. Jackman's Application proposes a co-channel upgrade and change in community of license for the new station to operate on Channel 283C1 at White Salmon, Washington.¹ We also have before us an Informal Objection (Objection), filed on February 2, 2016, by Entercom License, LLC (Entercom), licensee of Station KRSK(FM), Mollala, Oregon, as well as an Opposition to Informal Objection (Opposition), filed on February 29, 2016, by Jackman, and a Reply filed by Entercom on May 26, 2016. For the reasons discussed below, we grant the Application and deny the Objection.

Background. The Application was filed pursuant to Sections 73.3573(a)(i),(ii), and (g) of the Commission's rules,² which permit a winning auction bidder to file a minor amendment to its application for a new FM station to specify a new community of license, a different station class, and/or an adjacent 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 283C2 at Moro to Channel 283C1 at White Salmon, Washington, at a new transmitter site. In support of the Application, Jackman alleges that the proposal satisfies the requirements for changing a station's community of license because: (1) the proposed use of Channel 283C1 at White Salmon is mutually

¹ See File No. BNPH-20151013ADJ.

² 47 CFR §§ 73.3573(a)(i),(ii), and (g).

exclusive with the present allotment on Channel 283C2 at Moro; (2) there will be no loss of service at Moro since the current allotment of Channel 283C2 is not yet utilized; and (3) the provision of a first local service to the larger community of White Salmon (population 2,224) under FM allotment Priority (3)³ will result in a preferential arrangement of allotments over the retention of a first local service at the smaller community of Moro (population 324).⁴ Additionally, Jackman states that the proposed Moro facility would have provided no new first fulltime aural service and new second fulltime aural service to only 12 persons. In contrast, Jackson claims that the White Salmon proposal will provide new first fulltime aural service to 685 persons and new second fulltime aural service to a population of 643.⁵ Jackman 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 at White Salmon 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, Entercom alleges that the Application should be dismissed because the Commission imposed an "absolute bar" to any facility modification that would create white or gray areas.⁸ Entercom also challenges the methodology by which Jackman calculates white and gray areas, stating that the original Moro facility would have provided first fulltime aural service to 19 persons and new second fulltime aural service to 188, and thus that the proposed change of community would create white and gray "loss areas" with those populations.⁹ Similarly, Entercom claims that Jackman overstates the populations that would receive new first and second fulltime aural services under its White Salmon proposal.¹⁰ Entercom emphasizes, however, that the magnitude of any gains in white or gray area service are immaterial, due to the absolute bar on creating white or gray area.¹¹ In its Opposition, Jackman contends that, even using Entercom's population figures, the Application would provide first new fulltime aural service to 410 more persons than under the original Moro facility, and

³ 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).

⁴ See File No. BNP-20151013ADJ, Exhibit 36 at 1-2.

⁵ *Id.* at 3.

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, 2572, 2575-77 paras. 30, 35, 38 (2011), *petitions for recon. pending (Rural Radio)*. 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 para. 30.

⁷ *Id.*

⁸ Objection at 1-2, citing *Rural Radio*, 26 FCC Rcd at 2577 para. 39.

⁹ Objection at 2. A white area is a geographical area that is not served by any fulltime aural service, and a gray area is one that is served by only one fulltime aural service. See *Cheyenne, Wyoming, and Gerring, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7530 n.8 (MMB 2000).

¹⁰ Engineering Statement, attached to Objection, at 6. According to Entercom, only 429 persons would receive first fulltime aural service if the Application were granted, and only 104 would receive new second fulltime aural service.

¹¹ Objection at 2-3.

combined first and second new fulltime aural service to 326 more persons than Moro, and thus that the Objection should be denied.¹²

Discussion. Under Section 309(d) of the Communications Act of 1934, as amended,¹³ 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.¹⁴

At issue in this application proceeding is whether *Rural Radio*'s "absolute bar to any facility modification that would create white or gray area"¹⁵ applies to post-auction long-form applications seeking a change in the community of license,¹⁶ and, if not, whether to extend this licensing policy to such long-form applications. For the reasons set forth below, we conclude that the "absolute bar" does not and should not apply in this context.

Rural Radio specifically addresses three types of Section 307(b) proposals: (1) proposals for new AM facilities; (2) proposals for new FM allotments; and (3) proposals to change an existing station's community of license.¹⁷ *Rural Radio* clearly states that the new Section 307(b) analysis for proposals to change community of license, including the absolute bar of white and/or gray area, applies to "[l]icensees and permittees seeking to change community of license"¹⁸ An auction winner filing its original construction permit long-form application and seeking a change in community of license, however, is not a permittee until its long-form application is granted or a licensee until its license to cover application (FCC Form 302) is granted. Thus, *Rural Radio* does not specifically address the issue of whether the "absolute bar" prohibition applies to auction winners filing their long-form application and seeking a community of license change.

This conclusion is further buttressed by the *Second Order on Reconsideration*. There the Commission explained that the "authorized transmitter coordinates for the current facility" should be used in determining gain and loss areas under the new Section 307(b) analysis for FM proposals to change community of license.¹⁹ The Commission also emphasized, in the *Second Order on Reconsideration*, that gain and loss area comparisons should focus on actual, rather than hypothetical

¹² Opposition at 2, 4.

¹³ 47 U.S.C. § 309(d).

¹⁴ 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).

¹⁵ *Rural Radio*, 26 FCC Rcd at 2577, para. 39.

¹⁶ Previous precedent suggested that the "absolute bar" should apply in this context. *Evan D. Carb et al.*, Letter Decision, 28 FCC Rcd 5667 (MB 2013) (*Carb*) (winning bidder of new FM, Avondale, Colorado, station's post-auction long-form application's request for change in community of license denied due to theoretical creation of gray area).

¹⁷ *Rural Radio*, 26 FCC at 2572-78, paras. 30-40.

¹⁸ *Id.* at 2576, para. 36.

¹⁹ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Order on Reconsideration, 27 FCC Rcd 12829, 12836, para. 14 (2012) (*Second Order on Reconsideration*).

service, thereby demanding “a realistic picture of the populations receiving service.”²⁰ Prior to grant of its long-form application, however, an auction winner does not have an authorized facility. We therefore conclude that the “absolute bar” restriction does not apply to white and/or gray area “losses” when evaluating proposed community of license changes in initial long-form applications filed by winning auction bidders.²¹ To the extent that the *Carb* letter decision,²² cited by Entercom, holds otherwise, it is disapproved.²³

Given the Commission’s admonition not to take into account the loss of hypothetical service, we believe that the analysis in cases such as this should compare the service gains that would result from each proposal rather than comparing the gains from the proposed community of license change to the “losses” from not constructing the facilities specified in the short-form auction application. That is, the Section 307(b) analysis will be the same as that which we use when comparing proposals and counterproposals in an FM allotment rulemaking proceeding. We believe that this approach harmonizes well with our similar processing policy of allowing the relocation of a new unbuild station without implicating the allotment Priority (3) “loss of sole local service” prohibition.²⁴ Thus, under our Section 307(b) criteria we must first compare the white areas proposed to be served by the original allotment at Moro to those areas to be served by the proposed facility at White Salmon.²⁵ Using Entercom’s more conservative population figures, the allotment at Moro would have provided first

²⁰ *Second Order on Reconsideration*, 27 FCC Rcd at 12839 para. 17 (“[O]ur increased scrutiny of reception service in gain and loss areas requires that we evaluate actual, rather than hypothetical service. We therefore believe the better approach is to evaluate the reception service as of the time of application, and to count only those facilities that have advanced to the point of granted construction permit.”).

²¹ *Accord Douglas, Tifton, and Unionville, Georgia*, Report and Order, 10 FCC Rcd 7706, 7707 para. 8 (MMB 1995) (“We find that the change in community of license will not cause any disruption to existing service since Station WKZZ(FM) has never been on the air.”).

²² *Carb*, 28 FCC Rcd at 5667. We note the lack of textual analysis in *Carb* as to whether the “absolute bar” policy should apply in that particular post-auction long-form application context.

²³ We do, however, reject Jackman’s argument (Opposition at 3) that *Rural Radio* supports its proposal because *Rural Radio* states that “[l]oss of service to underserved listeners that is offset by proposed new service to a greater number of underserved listeners would not constitute a net loss of service to such listeners and would be viewed more favorably.” *Rural Radio*, 26 FCC Rcd at 2577 n.103. This statement only applies to claims under allotment Priority (4) that “result in the net loss of third, fourth, or fifth reception services to more than 15 percent of the population in the station’s current protected contour.” *Id.* at 2577 para. 39.

²⁴ See *Gearhart, Oregon*, Report and Order, 26 FCC Rcd 10259, 10261, para. 8 (MB 2011) (reallotment of station does not violate the Commission’s policy prohibiting the removal of a community’s sole local aural service because the station has never operated); see also, *Chatom and Grove Hill, Alabama*, Report and Order, 12 FCC Rcd 7664 (MMB 1997); *Bagdad and Chino Valley, Arizona*, Report and Order, 11 FCC Rcd 14459 (MMB 1996); *Sanibel and San Carlos Park, Florida*, Report and Order, 10 FCC Rcd 7215 (1995); *Pawley’s Island and Atlantic Beach, South Carolina*, Report and Order, 8 FCC Rcd 8657 (1993); and *Glencoe and LeSueur, Minnesota*, Report and Order, 7 FCC Rcd 7651 (1992).

²⁵ See *Benavides, Bruni, and Rio Grande City, Texas*, Report and Order, 13 FCC Rcd 2096 (MMB 1998) (dispositive weight given to population gain under Priority (1)); *Douglas and Tombstone, Arizona, and Santa Clara, New Mexico*, 18 FCC Rcd 6530 (MB 2003) (dispositive weight given to population gains under Priorities (1) and (2)); *Meeker and Craig, Colorado*, Report and Order, 15 FCC Rcd 23858 (MMB 2000) (dispositive weight given to comparative population gains of unbuild construction permit (Priority (3)) versus proposed community of license (Priority (2))).

fulltime aural service to 19 persons, versus 429 persons at White Salmon. Given these facts, we conclude that the White Salmon proposal's substantially greater proposed service to white areas is dispositive under allotment Priority (1).

Conclusion. In view of the above, we conclude that the public interest is served by grant of the Application. Accordingly, IT IS ORDERED that the Entercom License, LLC Objection IS DENIED, and the application (File No. BNPH-20151013ADJ) filed by Jackman Holding Company, LLC IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau