



Federal Communications Commission
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In Reply Refer to:
1800B3-AJR/PHD

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In re: **KOMO-FM, Oakville, Washington**
Facility ID No. 51167
File No. BMPH-20110630AGT

New FM Station, Ilwaco, Washington
Facility ID No. 189496
File No. BNPH-20110630AGJ

Dear Counsel:

We have before us two mutually contingent applications, as amended, filed by South Sound Broadcasting, LLC ("SSB"), licensee of Station KOMO-FM, Oakville, Washington, and Sunnylands Broadcasting LLC ("Sunnylands"), winning bidder in Auction 91 for Channel 253A at Ilwaco, Washington. In the first application (the "Belfair Application"),¹ SSB proposes to change the community of license of Station KOMO-FM from Oakville to Belfair, Washington. In the second application (the "Oakville Application"),² Sunnylands proposes to implement its winning bid for FM Channel 253A at Ilwaco on upgraded Channel 253C3 at Oakville, Washington. We also have before us three staff requests for additional information³ and amendments filed by SSB and Sunnylands.⁴ For the reasons set forth below, we

¹ See File No. BMPH-20110630AGT.

² See File No. BNPH-20110630AGJ.

³ See *Letter to Peter Gutmann, Esq.*, Reference 1800B3-RFS (MB Sept. 12, 2011) ("Deficiency Letter 1"); *Sunnylands Broadcasting LLC, et al.*, Letter, 27 FCC Rcd 4209 (MB 2012) ("Deficiency Letter 2"); and *Letter to Peter Gutmann, Esq., and J. Dominic Monahan, Esq.*, Reference 1800B3-AJR (MB Nov. 14, 2012) ("Deficiency Letter 3").

⁴ In response to the *Deficiency Letters*, Sunnylands filed amendments to the Oakville Application on November 18, 2011, and December 13, 2012; SSB filed amendments to the Belfair Application on July 23, 2012, and December 13, 2012.

provide SSB an opportunity to cure acceptability defects regarding the contingent filings and the Section 307(b) showings.⁵

Background. The Belfair and Oakville Applications are coordinated moves, filed pursuant to Sections 73.3517(e)⁶ and 73.3573(g)⁷ of the Commission's Rules. The Belfair Application requests a minor modification to change the community of license for Station KOMO-FM from Channel 249C at Oakville to Channel 249C at Belfair, without a change of transmitter site or existing facilities. This proposal is an intra-urbanized area move because Station KOMO-FM would continue to cover 100 percent of the Olympia-Lacey, Washington, urbanized area, as either an Oakville or Belfair station.⁸ To prevent the removal of Oakville's sole local service, the Oakville Application proposes to upgrade the class of channel, reallocate, and change the transmitter site for Sunnylands' FM assignment on Channel 253A at Ilwaco to Channel 253C3 at Oakville, as a "backfill" station.⁹ As a result of these changes, Sunnylands' proposed new station at Oakville would provide a 70 dBu signal over 51 percent of the Olympia-Lacey urbanized area. The staff subsequently requested additional information regarding both applications, and Sunnylands and SSB submitted amendments to their applications.

Discussion. *Belfair Application.* We first must determine whether the Belfair Application complies with our Section 307(b) processing policies. The Commission established a rebuttable presumption "that when the community proposed is located in an urbanized area or could through a minor modification application, cover 50 percent or an urbanized area, we will treat the application for Section 307(b) purposes as proposing service to the entire urbanized area rather than the named community of license."¹⁰ SSB has attempted to rebut this presumption and claims that the relocation of Station KOMO-FM would result in a first local service at Belfair under Priority 3 of the FM Allotment Priorities¹¹ rather

⁵ 47 U.S.C. § 307(b) ("Section 307(b)") (requiring that the Commission will provide a fair, efficient, and equitable distribution of radio service among the several States).

⁶ See 47 C.F.R. § 73.3517(e) (allowing FM licensees or permittees to file up to four contingently related applications for minor modification of facilities).

⁷ See 47 C.F.R. § 73.3573(g) (permitting the modification of an FM station's authorization or a winning bidder's FM assignment to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest, provided, *inter alia*, the reallocation would result in a preferential arrangement of allotments).

⁸ See, e.g., *Gearhart, Madras, Manzanita, and Seaside, Oregon*, Report and Order, 26 FCC Rcd 10259, 10262-63 (MB 2011) ("*Gearhart*") (treating a station relocation between communities located in the same urbanized area or between communities from which it will continue to provide a 70 dBu signal to 50 percent or more of the same urbanized area as an "intra-urbanized area" move and not applying the same requirements as if the station were moving into the urbanized area).

⁹ Specifically, Sunnylands proposes a change of transmitter site of approximately 101 kilometers (63 miles) for the Ilwaco assignment. Sunnylands also alleges that its proposal would result in a net gain of service to 246,755 persons.

¹⁰ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Policies*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 25 FCC Rcd 2556, 2567 (subsequent history omitted) ("*Rural Radio*"). The Commission further provided that this presumption may be rebutted by a "compelling showing" of the independence of the community from the urbanized area, the community's specific need for an outlet for local expression, and the ability of the proposed station to provide that outlet. *Id.* at 2572.

¹¹ 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, 90-93 (1982).

than an additional station in the Olympia-Lacey urbanized area. We disagree. The two primary prongs of the *Tuck*¹² test – (1) the degree to which the proposed station will provide coverage to the urbanized area and (2) the size and proximity of the proposed community relative to the central city of the urbanized area -- support application of the presumption. Specifically, under prong (1), Station KOMO-FM would continue to cover 100 percent of the Olympia-Lacey urbanized area with a 70 dBu signal. Likewise, under prong (2), Belfair’s population (3,931) is relatively small in relation to the population of Olympia (46,478).¹³ While there is a mixed showing on the third prong, the interdependence of the proposed community and the urbanized area, we find that this is insufficient to rebut the presumption given that primary emphasis is now placed on the first two prongs.¹⁴ Accordingly, we conclude that SSB has not made a “compelling” showing to rebut the presumption that the reallocation of Station KOMO-FM to Belfair would be an additional station in the Olympia-Lacey urbanized area rather than a first local service at Belfair under Priority 3. We, therefore, will examine the Belfair Application under Priority 4, other public interest considerations.

We find, under Priority 4, that the Belfair Application proposes an intra-urbanized area move that is neither a plus nor a minus from a Section 307(b) perspective. On the one hand, the Belfair Application does not propose any change of transmitter site or technical facilities that would increase Station KOMO-FM’s area or population served. Likewise, SSB has not attempted to show any efficiencies or economies of operation that would result from the proposed move. On the other hand, we do not see any detriments from a Section 307(b) standpoint that would be caused by the proposed station relocation. Station KOMO-FM would still provide a 70 dBu signal over the entire Olympia-Lacey urbanized area as well as the community of Belfair. Under these circumstances, we reject the legal basis for the contingent filing, *viz*, that a “backfill” is necessary to permit the Oakville to Belfair community of license modification. On the contrary, a “backfill” station at Oakville is not needed because implementation would not result in the loss of Oakville’s sole local service. As such, its relocation would not trigger the prohibition on removal of a sole local service.¹⁵ Accordingly, we conclude that the Oakville and Belfair Applications are not “contingently related,” as required by Section 73.3517(e) Rules.

Oakville Application. Next, we determine whether the Oakville Application complies with our Section 307(b) processing policies. Sunnylands claims that the reallocation and upgrade of Channel 253A from Ilwaco to Channel 253C3 at Oakville should be considered as a first local service under Priority 3 and has amended the Oakville Application to rebut the presumption that this would be an additional station in the Olympia-Lacey urbanized area. However, we find that Sunnylands has not made a compelling showing to rebut the presumption. On the contrary, the first two primary prongs of the *Tuck* test favor application of the presumption. Under the first prong, the degree to which the proposed station would provide coverage to the urbanized area, Sunnylands proposes to relocate the transmitter site approximately 101 kilometers (63 miles) in the direction of Olympia and would cover 51 percent of the Olympia-Lacey urbanized area. Under the second prong, the size and proximity of the proposed

¹² See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374, 5378 (“*Tuck*”).

¹³ We recognize that, under prong (2), the considerable distance of 42.2 kilometers between Belfair and Olympia, is factor weighing against applying the presumption. However, this factor is outweighed by Station KOMO-FM’s coverage of 100 percent of the Olympia-Lacey urbanized area and the substantial disparity of population between Belfair and Olympia.

¹⁴ See *Rural Radio*, 26 FCC Rcd at 2572 (¶ 30).

¹⁵ See, e.g., *Marissa G. Repp, Esq., and Gary S. Smithwick, Esq.*, Letter, 27 FCC Rcd 13090, 13094 (MB 2012) (finding that a “backfill” is not required to prevent the removal of a second local service from a community with a population greater than 7,500 because the lead application proposes an intra-urbanized area move and dismissing the “backfill” application as moot).

community relative to the central city of the urbanized area, the population of Oakville (684) is only 1.5 percent of the population of Olympia (46,478).¹⁶ While there is again a mixed showing under the third prong, the interdependence of the proposed community and the urbanized area, it is insufficient to rebut the presumption. Accordingly, we conclude that Sunnylands has not made a “compelling” showing to rebut the presumption that the reallocation and upgrade of the Ilwaco assignment to Oakville would be an additional Olympia-Lacey station. We, therefore, will examine the Oakville Application under Priority 4.

We further find that the Oakville Application would not result in a preferential arrangement of allotments under Priority 4. On the contrary, the effect of the Oakville Application is a “move-in” of the Ilwaco assignment as at least a tenth service to the Olympia-Lacey urbanized area and the loss of a second local service at the small community of Ilwaco (population 936). Such a result is not a preferential arrangement of allotments because, under established precedent, the retention of a second local service at Ilwaco would be favored over the addition of at least a tenth transmission service in an urbanized area.¹⁷ While there would be a net gain of service to approximately 250,000 persons, this gain in service does not outweigh the loss of a second local transmission service.¹⁸ The entire gain area is well served with more than five reception services. Further, by upgrading and reallocating Channel 253A from Ilwaco to Channel 253C3 at Oakville, the station would be losing the entire population of approximately 39,000 people in its rural service area to migrate to an urbanized area. Such a shift in service is contrary to the revised allotment principles of *Rural Radio*. Accordingly, we conclude that the Oakville Application is disfavored under Section 307(b) and Priority 4 and cannot be granted at this time.

Opportunity to Amend. We give SSB one opportunity to correct each of the two acceptability defects noted above – the attempt to have applications that are not contingently related processed under Section 73.3517 and the fact that the Oakville Application is disfavored under Section 307(b). Pursuant to 47 C.F.R. § 73.3522 of the Rules, “... an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staff’s deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff.” Additionally, 47 C.F.R. § 73.3564 states that “[a]pplications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for amendment.” This letter constitutes your opportunity for corrective amendment pursuant to 47 C.F.R. § 73.3522. We caution both SSB and Sunnylands that in the event they continue to seek processing under Section 73.3517, that the dismissal of either application as unacceptable will result in the dismissal of both applications.¹⁹

¹⁶ Under prong (2), there is a lack of proximity between Oakville and Olympia, approximately 33.5 kilometers (20.8) miles. However, we find that the combined effects of the relocation of the proposed station’s transmitter site, its coverage of 51 percent of the Olympia-Lacey urbanized area, and the substantial disparity in population between Oakville and Olympia outweigh the lack of proximity.

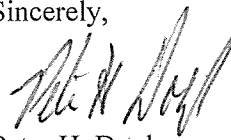
¹⁷ See, e.g., *KTIA Letter*, 27 FCC Rcd at 172 (finding, under Priority 4, that retention of fourth local service at Boone is preferred over the allotment of a seventeenth local service to the Des Moines, Iowa, urbanized area; *Bryan Broadcasting, Letter*, 27 FCC Rcd 8058, 8064 (MB 2012) (dismissing application and finding that retention of second local service at one community is preferred under Priority 4 over addition of a twelfth local service to an urbanized area).

¹⁸ See, e.g., *KTIA Letter*, 27 FCC Rcd at 172 (finding that a net gain of service is not decisionally significant where gain and loss areas are well served and there would be a loss of a fourth local service).

¹⁹ See 47 C.F.R. § 73.3517(e). As a related matter, Section 73.3517(e) does not permit contingent applications for new stations and for changes of existing facilities. See *Marissa G. Repp, Esq., et al.*, Letter, 28 FCC Rcd 3257, 3262 (MB 2013). In light of this decision, the parties are reminded that an amendment making the Oakville Application contingent upon another minor modification application may lead to dismissal of the applications.

Further action on the subject applications will be withheld for a period of thirty (30) days from the date of this letter to provide the applicant an opportunity to respond. Failure to correct all tender and acceptance defects within thirty (30) days from the date of this letter will result in the dismissal of the application with no further opportunity for corrective amendment pursuant to 47 C.F.R. § 73.3564

Sincerely,

A handwritten signature in black ink, appearing to read "Peter H. Doyle", written in a cursive style.

Peter H. Doyle
Chief, Audio Division
Media Bureau