Broadcast LAW BLOG

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FCC Adopts Rules Restricting Rural to Urban Radio Moves and Translator Band Hopping - And Adopts Tribal Area Preferences

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The FCC's decision in its rural radio proceeding addresses numerous radio issues - some of which seem to provide a solution in search of a problem. In an era where the President has called for agencies to review their decisions to access how they will affect businesses and job creation, some aspects of this rural radio decision appear to be moving in the opposite direction - imposing new hurdles on broadcasters trying to improve their operational facilities. While the FCC in this decision adopted largely uncontested rules that would promote the **development of new radio stations on Tribal lands**, the Commission also adopted rules making it harder for radio stations to move from more rural areas into more urban ones - rule that were almost universally condemned by broadcasters. The decision also restricted the ability of **FM translators to "hop" from the commercial to the noncommercial band** and vice versa, and adopted rules that **codified the determination of how AM applications are determined to be "mutually exclusive"** when filed in the same window for new or major change applications. The changes to the procedures for consideration of AM and FM station allotment and movement are summarized below. The other changes made in this proceeding will be discussed in a subsequent post on this blog.

Easily the most controversial of the decisions made by the Commission in this proceeding was the conclusions reached as to the **movement of AM and FM radio stations from more rural areas into more urbanized ones**. We wrote about some of the concerns raised by broadcasters last week. Many of the new rules and policies adopted by the Commission were ones feared by broadcasters - though many of the policies are still undefined, and how they are enforced may well determine their ultimate impact. That impact may well take years to sort out. Regardless of the ultimate impact on the actual movement of stations, there is no question that these rules will require far more paperwork from broadcasters seeking to allot new channels and from those seeking to change the cities of license of existing stations, and open more moves to challenge, making the process slower and more expensive.

The most fundamental change in policy adopted by the FCC was to change the process used to evaluate the **Section 307(b) priorities** between competing proposals for broadcast stations that will serve different communities. Section 307(b) of the Communications Act is the section that requires that the Commission make a "**fair, efficient and equitable distribution of radio**

services" among the "several States and communities." The FCC has principally looked at three factors in making Section 307(b) determinations:

1. First priority is to proposals for coverage of "**white areas**" - areas that currently receive no other primary signals from any radio station

2. Second priority is given to coverage of "**gray areas**" - areas that currently receive only one other service - so that the new service would provide a first competitive "reception" service (a reception service meaning that the station can be received in that area, i.e. the area falls within a station's protected service contour).

3. The third criteria, equal in importance to the second, is the provision of a **first "transmission service**" to a community, i.e. the first station licensed to that community with primary responsibility to cover its needs and interests.

4. After that, the fourth priority was "other public interest factors", which traditionally looked at a comparison of proposals to see which provided more reception service to more people.

The change adopted in this case was to essentially return to an old policy, abandoned decades ago, that determines that a first reception service, priority 3 preference, was not available to applicants who file for a community that is part of an urbanized area. Instead, the FCC will look to the transmission services available to the entire urbanized area to determine if a preference should be accorded to the applicant and, as all urbanized areas have multiple stations licensed to cities in the urbanized area, that preference would never apply to such a community (except where the presumption adopted here is rebutted, as set forth below). While there are some differences, the newly adopted policy is similar to that which applied through the mid-1980s under the FCC's "suburban community policy and its "Berwick doctrine", both of which led to results similar to those that will probably result from the new rules. Under the new policy, the presumption that a station proposing to serve a community is really one for the whole urbanized area would apply when a proposed station would cover 50% of the urbanized area around a major city - either from the proposed transmitter site or from another likely site. The presumption can be rebutted, but that would require:

- Showing that the proposed community of license, while in or near the urbanized area, is still independent of the principal city in that area

- Showing that the community is not only independent but has actual needs for a local transmission service, and

- Demonstrating that the proposed station would in fact meet those needs.

In assessing the rebuttal, the FCC would look at:

- How much of the urbanized area would be covered by the proposed station
- The size of the proposed community of license versus that of the metropolitan area

- The "**Tuck" factors** - factors set out in a 20 year old case that looks at issues such as the existence of local government, civic and educational organizations in a community, whether it has an independent business and cultural existence, and whether it has its own media, post office and phone book, and generally whether it is more of an independent community or a bedroom of the nearby bigger city.

These Tuck factors would be applied more strictly than they have been in recent years, looking to give a preference only to those few communities in or near a metropolitan area that have a demonstrably separate existence from the central city.

In addition, the Commission will create a new priority 4 to the 307(b) priorities listed above, giving the provision of a third, fourth or fifth reception service to substantial areas greater weight than the simple coverage of greater populations. How that preference is applied is different in different circumstances.

In fact, all of these new policies would be applied slightly differently, depending on the circumstances in which they arise. In AM cases, where there are mutually exclusive applications filed in a window for new or major change applications, proposing different cities of license, the Commission need not reach a decision on 307(b) grounds as, if there is no winner based on these grounds, the applicants simply go to an auction. Thus, in addition to the presumptions summarized above, the Commission gave specific guidance on the evaluation of the priority 4 preferences. Preferences will only be given to applicants who have a 25% greater coverage of areas where they will provide a third, fourth or fifth service, and propose to provide a transmission service to a city that has fewer than 2 such services. In addition, an applicant can submit a Service Value Index study (a study based on the 20 year old decision setting out a formula for evaluating the number of people in coverage areas proposed by applicants, with the raw population numbers adjusted by the number of services these areas already receive) to show that their proposals would better serve the public interest. An SVI 30% better than that of a competing applicant will merit a preference. Otherwise, it's off to an auction.

In cases where two or more petitioners are seeking to **allot a new FM station to different communities**, where such proposals are mutually preclusive, in addition to the general presumptions about service to communities in or near to an urbanized area being service to the whole urbanized area, the Commission decided, as in AM, to put more weight on third, fourth and fifth services. There was no definitive percentage specified as to when such weight would

be decisive, nor was there any indication as to whether a SVI showing would be considered. No explanation of why an SVI was considered important for AM, but not for FM, was provided.

In situations involving **city of license moves**, where there are usually no competing proposals for the FCC to evaluate. So the FCC looked at standards that would make it generally more difficult for stations to move from rural to urban areas. The Commission stated that it would generally disfavor moves that removed a second service from a community of over 7,500 people, and disfavor moves that created new areas that did not receive third, fourth or fifth services, if those areas constituted over 15% of the station's service area before any proposed move. Applicants will also need to provide much more specific data on how many services are received in both the gain and loss areas (not stopping at 5 services, as is the common custom currently, but instead providing detailed analysis of how many services all gain and loss areas would receive). These required showings will make city of license changes more costly to prepare, and will also make their consideration by the FCC more time-consuming and uncertain, as there are no criteria specified by which the detailed showings will be judged. Apparently the proposals will need to be evaluated on a case-by-case basis.

These are but highlights of the changes made by the Commission. The Order provides more detail on the showings required, the grandfathering that will be accorded to pending proposals, and other implementation issues. But, needless to say, the differences from the current processing will be significant.

But what is perhaps most interesting is trying to figure out why these proposals were adopted now - when there are few new requests for the allocation of new FM channels, there is a decreasing interest in new AM service, and there are very few move-ins of stations to metropolitan areas - as the economics of those actions simply are not what they were years ago. These new rules, which will make many applications more costly to prepare, and will make challenges to proposals much more time-consuming to defend, solve problems that simply don't exist. The FCC seems to justify these new rules on its beliefs that even rural residents deserve a choice of a multiplicity of entertainment and informational outlets (deeming 307b to be a **consumer protection statute**, not a **broadcaster-centric model that encourages spectral efficiency** - an interesting conclusion in this era where efficiency, not consumer protection, seems to be the buzzword of the FCC on the television side - see the proposals about which we have written many times - to repurpose the TV band for broadband). The Commission does not consider questions of whether it is in fact economic to provide such services, and whether the multiplicity of services to rural areas is even so necessary in an age when anyone, anywhere, can receive hundreds of channels by buying a Sirius XM receiver. While the Commission states many times in this order that the justifications underlying Section 307(b) have not changed since the 1930s, they fail to recognize that the radio industry and the media landscape generally has

changed in the intervening 77 years since the section was adoption as part of the Communications Act.

No doubt there will be appeals of this decision. And there are many implementation issues that will need to be addressed by cases that try to apply the new policies that have been adopted. So the final impact of this order is not yet knowable. So watch as these issues develop.