

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

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| In re Application of |) | |
| |) | |
| INTERMART BROADCASTING OF GEORGIA, INC. |) | File No. BMAP-20010719AAO |
| WSWK(AM), Adel, Georgia |) | Facility ID No. 87118 |
| |) | |
| |) | |
| HAS: 1690 kHz, 10 kW-D, 1 kW-N |) | |
| Adel, Georgia |) | |
| |) | |
| REQ: 1690 kHz, 10 kW-D, 1 kW-N |) | |
| Avondale Estates, Georgia |) | |
| |) | |
| TO: Chief, Audio Services Division |) | |

MEMORANDUM OF POINTS AND AUTHORITIES

InterMart Broadcasting of Georgia, Inc. ("InterMart"), by its attorney, hereby respectfully submits the within Memorandum of Points and Authorities in support of a grant of its above-described application. In support thereof, it is alleged:

I. Preliminary Statement:

1. This proceeding involves an application by InterMart for a change of location of expanded band station WSWK(AM), Adel, Georgia, to Avondale Estates, Georgia. By agreement with Clear Channel Broadcasting, Inc. ("Clear Channel") the application was filed simultaneously with and is contingent upon a grant of an application by Clear Channel to change the location of AM Broadcast Station WHITE from Johnston City, Illinois to Berwyn, Illinois. The contingency exists because InterMart's station and Clear Channel's station are authorized to operate on the same

frequency and, if Clear Channel's station is not moved to Berwyn, there would be intolerable electrical interference by the InterMart station operating on 1690 kHz at Avondale Estates, Georgia, to Clear Channel's station, operating on 1690 kHz at Johnston City.

2. InterMart has already requested a waiver of 47 C.F.R. Section 73.3517, the contingent application rule. InterMart is not withdrawing that request; if the Commission for any reason determines that a waiver is required, there are compelling public interest factors supporting such a waiver and such a waiver is requested. In this Memorandum, however, InterMart will demonstrate that its application can be granted without a waiver of the rule, upon a finding that the application already complies with the exception to the rule, set forth in 47 C.F.R. Section 73.3517(c).

II. Background and History of the Contingent Application Rule:

3. When processing of broadcast applications resumed after WWII, the FCC had no rule against contingent applications. To the contrary, many such applications were accepted for filing and held in something that was called the "deferred drawer". Typically, Applicant A would file an application to move a station on 650 kHz from Podunk to Smedleyville. Then, Applicant B would file a contingent application for a new station to operate on 650 kHz someplace else. Then, Applicant C might file an application for a new station at still another location which was in conflict with Applicant A's application. Then all three applications might be tied up for years, while a hearing was held to decide between Applicants A and B. Thus, the absence of a rule against contingent applications resulted in the creation of chains and clusters of applications which would not be processed until the occurrence of the required contingency.

4. Obviously, this presented a processing problem of major proportions. Accordingly, on October 16, 1961, the Commission released a public notice, discontinuing the acceptance of all

contingent applications.¹ In 1976, however, the Commission decided to amend its policy to permit the filing of facility modification applications by proposed purchasers of broadcast stations, contingent upon a grant of an application to assign the license to the purchaser and consummation of that assignment. To that end, the Commission adopted a new rule, Section 1.517 of its Rules and Regulations, which read as follows:

“Section 517 Contingent Applications.

Ordinarily, contingent applications for changes in facilities of existing broadcast stations are not acceptable for filing. Such applications, however, may be filed under the circumstances cited below.

(a) Upon the filing of an application for the assignment of a license or construction permit, or for a transfer of control of a licensee or permittee, the proposed assignee or transferee may, upon payment of the filing fee prescribed in Section 1.1111, file an application or applications in its own name for authorization to make changes in the facilities to be assigned or transferred contingent upon approval and consummation of the assignment or transfer. Provided, that any application filed pursuant to this paragraph must be accompanied by a written statement from the existing licensee which specifically grants permission to the assignee or transferee to file such application: And provided further, That the filing fee will not be refundable should the assignment or transfer not be approved. The existing licensee or permittee may also file a contingent application in its own name, but fees in such cases are also not refundable.

(b) Whenever the Commission determines that processing of any application filed pursuant to paragraph (a), above, would be contrary to sound administrative practice or would impose an unwarranted burden on its staff and resources, the Commission may defer processing of such application until the assignment or transfer has been granted and consummated.”

¹The public notice is cited in the matter of Regulation and Oversight, 47 Pike & Fischer RR 2d 913 (1980). The text of the notice, itself, does not appear in any database accessible to counsel. However, it basically proscribed the filing of any sort of contingent application as a matter of policy.

Thus, for the first time the Commission had a rule flatly prohibiting contingent applications with only one exception, i.e., the exception for proposed purchasers of a broadcast station.

5. Section 1.517 was later moved from Part 1 of the Commission's Rules and Regulations to Part 73 and renumbered "73.3517". In 1989, the Commission issued a Notice of Proposed Rule Making in MM Docket No. 89-46, Policies to Encourage Interference Reduction Between AM Broadcast Stations, 4 FCC Rcd 2430 (1989). The Commission explained that:

"We believe that the public would benefit from cleaner, more reliable service areas for AM licensees. Therefore we wish to consider the public interest utility of restructuring our policies and Rules to allow for contraction as well as expansion of service, when such contraction would allow improved service overall. While such contraction may result in a marginal loss in the number of stations receivable in some areas, the net gain in quality of the AM service could well better serve the public interest.

Thus, at this advanced stage of AM development, it may be appropriate for the Commission to consider establishing a mechanism by which licensees can coordinate to reduce interference. This proposal could permit some contraction of the AM broadcast market that would offer an opportunity for overall improvement of the AM service by reducing congestion in the AM band and allowing the remaining stations to improve service to their communities and strengthen their competitive position in the broadcast marketplace, thereby providing significant benefits to the listening public." NPRM at 2431.

6. As will be demonstrated, the proposed relocation of Station WSWK to Avondale Estates will achieve precisely the kind of competitive improvement that the Commission had in mind. At present, Intermart's 1470 kHz facilities in Adel are losing huge amounts of money, because there is no public need for the service that those facilities provide. Consequently, InterMart does not expect to continue operating any AM stations in Adel - either in the standard band or the expanded band - if the relocation of the 1690 kHz facility to Avondale Estates is not approved. If, on the other

hand, the relocation is approved, WSWK will become a viable broadcast facility, which will survive and compete vigorously in the Atlanta radio market.

7. In the NPRM, the Commission proposed two new rules: Section 73.3517(c) and Section 73.3571(c). Section 73.3517(c) was to read as follows:

“Upon payment of the filing fees prescribed in Section 1.1111 of this chapter, the Commission will accept two or more applications filed by existing AM licensees for modification of facilities that are contingent upon granting of both, if granting such contingent applications will reduce interference to one or more AM stations or will otherwise increase the area of interference-free service. The applications must state that they are filed pursuant to an interference reduction arrangement and must cross-reference all other contingent applications.”

8. Section 73.3571(c) was to read as follows:

“An application for changes in the facilities of an existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of said licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.”

9. Taken together these two proposed rules provided for the filing of contingent applications, provided that the granting of such applications would reduce interference to one or more AM stations or would otherwise increase the area of interference-free service. Furthermore, where such applications were filed, the Commission proposed to protect the applicants from the filing of mutually exclusive applications by other parties. The Commission also asked for comments as to whether it should provide for a local service floor, i.e., whether it might, for example, prohibit the removal or deletion of the only local aural service to a particular community.

10. By Report and Order released July 18, 1990, the Commission adopted the proposed modification to the contingent application and processing rules without change. *Policies*

to Encourage Interference Reduction Between AM Broadcast Stations, 5 FCC Rcd 4492. It declined to adopt a local service floor rule, but decided, instead, to “consider the issue of a local service floor on a case-by-case basis”. *Id.* at para. 11.

11. One final change to Section 73.3517 was proposed in a Notice of Proposed Rule Making, released in a separate proceeding in Docket No. 87-267 on July 18, 1990² and adopted in a Report and Order in the same docket, released October 25, 1991.³ That change consisted of adding the following subsection (d) and two notes, as follows:

“(d) Modified proposals curing conflicts between mutually exclusive clusters of applications filed in accordance with section (c) will be accepted for 60 days following the issuance of a public notice identifying such conflicts.

Note 1: No application to move to a frequency in the 1605-1705 kHz band may be part of any package of contingent applications associated with a voluntary agreement.

Note 2: In cases where no modified proposal is filed pursuant to section (d), the Commission will grant the application resulting in the greatest net interference reduction.” 6 FCC Rcd at 6459-60.

Neither the NPRM nor the Report and Order discuss the purpose of those notes. Evidently, Note 1 was added to plug a “loophole”, whereby stations in the standard band might use the exception set forth in subparagraph (c) as a device to seek new expanded band facilities. Note 2 was apparently added to provide a method of processing conflicting applications filed pursuant to subparagraph (c).

III. InterMart’s Application Complies with the Objectives of Section 73.3517(c):

²*Review of the Technical Assignment Criteria for the AM Broadcast Service*, 5 FCC Rcd 4381 (1990).

³*Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991).

12. As demonstrated in paragraph 5, supra, the rule making that resulted in the enactment of Section 73.3517(c) was initiated because the Commission recognized that it made sense to allow a contraction in the AM broadcast service if such contraction would result in a net gain in quality of service. In short, the Commission recognized that even if stations were taken off the air as a result of its policies the public interest would nonetheless be served if the remaining stations strengthened their competitive position in the broadcast marketplace. Policies to Encourage Interference Reduction Between AM Broadcast Stations, 4 FCC Rcd 2430 (1989) at page 2431.

13. Here, InterMart has a standard band facility on 1470 kHz at Adel, operating under the call letters WBIT, and a construction permit for an expanded band facility at Adel, authorized to operate on the frequency 1690 kHz, with the call letters WSWK. Because Adel is a very small town and already has an abundance of aural reception services, including a local FM station which is not owned by InterMart, Station WBIT has found little public acceptance; its listening audience is minuscule and the station is hemorrhaging large amounts of money on a monthly basis. InterMart cannot continue to operate Station WBIT indefinitely. Even if InterMart was to replace WBIT with the expanded band facility, WSWK, InterMart could not continue to operate an AM broadcast station at Adel because, ultimately, the financial losses would be too great. Therefore, if InterMart is not permitted to move Station WSWK to Avondale Estates, the number of AM broadcast stations in the U.S. will be reduced without any corresponding benefit to the public.

14. If, on the other hand, InterMart is permitted to move Station WSWK to Avondale Estates, the competitive position of the station in the broadcast marketplace will be strengthened, as contemplated by the original NPRM. Ibid. at 2431. The station will become a viable facility and will compete vigorously with the other stations in the Atlanta market for audience, advertisers and

revenues. The public will benefit from that competition. It always benefits from such competition if only because the quality of programming offered by all of the competitors is improved.

15. Section 73.3517(c) of the Rules requires that contingent applications be filed pursuant to an agreement between the participating licensees. Here, the applications of InterMart to move 1690 kHz from Adel, Georgia to Avondale Estates, Georgia, and Clear Channel to move 1690 kHz from Johnston City, Illinois to Berwyn, Illinois, were, in fact, carefully correlated and filed simultaneously pursuant to an agreement between the two companies. Attached hereto and marked Exhibit A is an email message from Jeff Littlejohn, the director of engineering for Clear Channel, confirming the existence of the agreement.

16. Section 73.3517(c) also provides for contingent applications that reduce interference. In this instance, the 1690 kHz allotment at Adel was added pursuant to a Public Notice, DA96-408, released March 22, 1996, *Mass Media Bureau Announces Revised Expanded AM Broadcast Band Improvement Factors and Allotment Plan*, 11 FCC Rcd 11419 (1996). In making the allotment, the Bureau calculated the improvement factor which would result from the deletion of a standard band allocation and a replacement of that allocation with one in the expanded band.⁴ The Commission calculated the improvement factors for 709 stations and placed these stations in a queue, ranking each station according to the improvement which would result from the deletion of that station's existing standard band allotment. The 1470 kHz operation at Adel, currently licensed to InterMart, had an improvement factor of 8.3425, yielding a ranking of 22.⁵ This meant that in terms

⁴The Improvement Factor is defined in 47 C.F.R. 73.35 as the ratio of increase in service area of other stations when the subject station is removed to the subject station's interference-free service area.

⁵11 FCC Rcd 11419, Attachment I.

of interference to other broadcast stations, the 1470 kHz operation at Adel was the 22nd worst offender in the entire country. Attached and marked Exhibit B is a Technical Statement prepared by William G. Brown, InterMart's consulting engineer. As shown, the 1470 kHz facilities are currently causing interference to no less than eight different AM broadcast stations in the standard band, scattered all over the country.

17. Obviously, the public interest will be served by discontinuing that operation just as soon as possible. InterMart is willing to do that. In fact, it needs to do that to stem the negative cash flow that the station is generating. Therefore, as soon as it is granted an expanded band construction permit at Avondale Estates, Georgia, InterMart will immediately construct expanded band facilities at that location and discontinue the operation of the 1470 kHz facilities in Adel which are causing so much interference. It will not wait five years as permitted by the rules.

18. As Mr. Brown points out in his Technical Statement, the existing 1470 kHz facility, operating under the call letters WBIT, serves a total of 45,821 persons (2000 Census) in an area of 2013 sq. km., daytime. At night, the station serves a population of 3571 persons, situated within an area of 34 sq. km. within its 17.8 mv/m, interference-free contour. As Mr. Brown points out, all of these areas and populations both day and night are already well served with other existing broadcast services. Indeed, Adel, itself, has a local FM broadcast station, so that it will continue to have local broadcast service even after WBIT goes off the air on 1470 kHz and WSWK moves to Avondale Estates on 1690 kHz.⁶

⁶Note, however, that even if Adel was losing its only local broadcast service, it would not be an impediment to a grant of the subject application. The Commission specifically said so when it declined to adopt an iron-clad "service floor". Policy to Encourage Interference Reduction Between AM Broadcast Stations, 5 FCC Rcd 4492 at para. 11.

19. If constructed at Adel, Station WSWK will serve a population of 205,682 persons, situated within an area of 5915 sq. km., daytime. When the station is moved to Avondale Estates, it will serve a population of 2,800,178 persons, situated within an area of 4132 sq. km., daytime. Nighttime, WSWK will serve 10,640 persons located within an area of 219 sq. km., within its 5.0 mv/m interference free contour at Adel, Georgia. If the station is moved to Avondale Estates, it will serve a population of 190,150 persons, nighttime, situated within an area of 130 sq. km., within its 5.0 mv/m interference free contour.

20. Because ground conductivities in the Avondale Estates area are lower than those in the vicinity of Adel, Georgia, the actual area served by the station at Avondale Estates will be less than the area served if it was constructed at Adel. There will, however, be an enormous increase in population served. In fact, the station will serve 13.6 times as many people during the day and 17.87 times as many people at night as it would serve if it was constructed as an Adel facility.

21. The Commission has recognized that population can be as important as area. In the past for example, in determining whether stations achieve adequate coverage of their communities, the Commission has deemed coverage to be adequate if *either* 80% of the area or 80% of the population is covered. Amendment of Part 73 of the Commission's Rules Regarding AM Station Assignment Standards and the Relationship Between the AM and FM Broadcast Services, 26 Pike & Fischer RR 2d 1189 at paras. 52-53.

IV. Conclusion:

22. While a grant of the InterMart application is contingent upon a grant of Clear Channel's application to move its station from Johnston City, Illinois to Berwyn, Illinois, grant of InterMart's application is nonetheless permissible under the exception to the rule, set forth in 47

C.F.R. Section 73.3517(c). As provided in that exception, the Clear Channel and InterMart applications were filed pursuant to an agreement between the parties.

23. As contemplated by the FCC when it adopted the rule, relocation of Station WSWK to Avondale Estates will strengthen the station and make it a viable competitor in the marketplace. If the station is not moved, the service it offers to the public will be lost, because InterMart cannot afford to keep operating a station at Adel, where it is hemorrhaging red ink. Also, as contemplated by the rule, grant of InterMart's application will result in the elimination of the substantial interference to other broadcast stations created by InterMart's standard band facilities on 1470 kHz at Adel. Additionally, grant of the InterMart application simultaneously with a grant of Clear Channel's application and subject to a condition that InterMart not go on the air at Avondale Estates until Clear Channel has vacated its 1690 kHz facilities at Johnston City will serve to insure that no new interference is created in the expanded band.

24. As contemplated by Section 73.3517(c), Clear Channel and InterMart coordinated their applications and filed them simultaneously. Construction of the requested facilities at Avondale Estates will result in a nearly 14 fold increase in the number of people receiving interference-free service during the day and a nearly 18 fold increase in the number of people receiving interference-free service at night, as compared with the number of people who would receive interference-free service if the same facilities were constructed at Adel. Furthermore, the expanded band facilities at Avondale Estate will serve more than 61 times as many people during the day as are served by InterMart's existing 1470 kHz facility at Adel and more than 53 times the number of people that are served by the 1470 kHz facility at night. Yet, Adel will not lose any local service, because it will continue to have a local FM broadcast station. Thus a grant of the InterMart

application is consistent with the exception to the contingent application rule, set forth in 47 C.F.R.

Section 73.3517(c).

April 17, 2002

Respectfully submitted,

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EXHIBIT A



EXHIBIT B

