

Amendment Re: Section 307(b)

The pending application of Southwest FM Broadcasting, Co., Inc. (“Southwest FM”) for a minor change in the facilities of Station KAHM(FM), Prescott, Arizona, includes a proposal to change the station’s community of license to Spring Valley, Arizona.¹ This amendment is submitted in response to three developments which have taken place subsequent to the initial filing of the application which relate to the Section 307(b) implications of the proposal. These developments are as follows: (i) the publication of 2010 US Census data, including updated population information for Spring Valley and the areas which will receive service from Southwest FM’s proposed facility; (ii) the issuance by the Commission of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, 26 FCC Rcd 2556 (2011), petitions for reconsideration pending (“Rural Radio”), which includes new standards and requirements for applications in which licensees of FM stations propose a change in the station’s community of license; and (iii) the understanding of Southwest FM’s consulting engineer (Donald Lynch) that, for purposes of assessing gains/losses under Priority 4 of Revision of FM Assignment Policies and Procedures, 90 F.C.C 2d 88 (1982), and Rural Radio, the methodology which has traditionally been used by the staff for making such determinations is being reconsidered. See the Engineering Statement (dated June 16, 2012) of Donald Lynch (hereafter “2012 Engineering Statement”).

¹ In the application, Southwest FM asked the Commission to issue orders to show cause to Kemp Communications, Inc. (“Kemp”), licensee (petition for reconsideration of grant of license pending) of Station KVGG, Salome, Arizona (FCC ID No.165984) why its licensee should not be changed from Channel 270A to Channel 231A, and to Martin Vosper (“Vosper”), licensee of Station KBUX, Quartzsite, Arizona (FCC ID No. 7694), why his license should not be changed from Channel 232A to Channel 243A. On March 21, 2012, the Commission issued orders to show cause to Kemp and Vosper as requested by Southwest FM.

I. Spring Valley Is a “Community” for Commission Licensing Purposes.

Southwest FM contended in its initial application that Spring Valley, which was recognized by the 2000 US Census as a Census Designated Place (“CDP”), qualified as a “community” for Commission licensing purposes, and supplied information regarding the attributes of Spring Valley in support of this position. The Commission has made it clear that recognition of an area by the US Census as a CDP creates the presumption that the area is deserving of recognition as a “community” for Commission licensing purposes.² Southwest FM believes that the information which it supplied in the application, supplemented by the additional information included in the 2012 Engineering Statement, fully justifies the presumption in this case.

Southwest FM now brings to the Commission’s attention to the fact that, as evidenced by figures from the 2010 US Census (which were not available at the time the application was filed), Spring Valley is a growing community. Specifically, according to the 2010 US Census, the population of the Spring Valley CDP has reached 1,148, which represents an increase of 12.6% over its population of 1,019 as reported in the 2000 US Census.

II. Southwest No Longer Claims Priority 3 Credit under Section 307(b).

In its application, Southwest FM claimed Priority 3 Section 307(b) credit for bringing a first service to the community of Spring Valley, Arizona.³ However, under Rural Radio, if an FM minor change application includes a proposal to change the station’s community of license and would result in the station covering 50% or more of a recognized urbanized area, it is presumed that the proposed facility would realistically serve the entire urbanized area and that, absent a

² See, Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 at 101 (1982) (“Revision”); Greenwood, South Carolina, et al., 2 FCC Rcd 3583 (1987), and Essex, New York, 4 FCC Rcd 5774 (1989).

³ See, Revision.

special showing by the applicant which rebuts the presumption, the Commission will no longer grant such applications Priority 3 credit. Rural Radio, at Paragraph 38. As Southwest FM's proposal would result in KAHM completely encompassing (as it currently does) the entire Prescott Valley-Prescott, Arizona Urbanized Area (2012 Engineering Statement, Exhibit C), and because of the Commission's decision in Rural Radio, Southwest FM no longer claims Priority 3 credit under Section 307(b) of the Communications Act.⁴

III. Southwest Continues to Claim Priority 4 Credit under Section 307(b).

In its application, Southwest FM also claimed Priority 4 credit ("other public interest matters") under Section 307(b) because, as it demonstrated, the small service losses its proposal would create were far outweighed by the very large service gains the proposal would provide. For the reasons set forth below, and notwithstanding the Commission's decision in Rural Radio to reduce the weight which is given to proposals which increase service to already well-served populations, Southwest FM continues to believe that its proposal to increase service to more than 1.3 million people outweighs the small increase in service to underserved areas, and is therefore a "preferable arrangement" under Section 307(b) Priority 4 analysis (as revised by Rural Radio).

A. Alternative Methodology for Gains/Losses Analysis

In reply to the "Comments and Informal Objection" filed by Kemp in this proceeding, Southwest FM filed a Response (February 25, 2011) which noted that Commission has, in determining gains/losses for a proposal to change an FM station's community of license, traditionally compared coverage from the licensed site using hypothetical contours with the

⁴ However, in the event the Commission's new presumption under Rural Radio as regards the award of Priority 3 credit is ultimately modified or overturned in the course of the current review proceedings, Southwest FM reserves the right to renew its claim to Priority 3 credit for proposing to bring a first local service to Spring Valley.

proposed coverage at the allotment site using hypothetical contours. Using this methodology, Southwest FM's consulting engineer (Lynch) determined that there would be no increase in either white/gray area or other "underserved" areas (and, therefore, no gain/loss analysis was included in the initial application). Nevertheless, Mr. Lynch also supplied an analysis based on a comparison of the KAHM current facility at the licensed site using hypothetical contours and the KAHM proposed facility at the application site using uniform terrain and maximum facilities. Based on this methodology, Mr. Lynch concluded as follows: (i) no white or gray area would be created; (ii) the number of people who would receive fewer than five (5) services from the proposal would increase by a net of 2,395; and (iii) the total number of people who would receive additional service from the proposal would increase by a net of 1,346,175 (i.e., increase of 1,613,733/reduction of 267,558).⁵

In the period subsequent to the filing of the Response, Mr. Lynch has been led to believe that the Commission is considering using a new methodology in making such gains/loss assessments. In particular, he understands that the staff may be considering making such gain/loss analyses based on a comparison of the actual FCC F(50, 50) 60 dBu contours of the facility at the licensed site and the proposed coverage from the application site. See 2012 Engineering Statement, page 2. The 2012 Engineering Statement provides population gain/loss analysis based on this alternative approach.⁶

B. Priority 3 Analysis Using the Alternative Methodology

Under the alternative approach described above, Mr. Lynch has determined that the Southwest FM proposal will result in an increase in the total net population served of 1,330,751

⁵ These figures were based on information from the 2000 U S Census.

⁶ These figures are based on information in the 2010 US Census.

(i.e., increase of 1,449,088/reduction of 118,337). He further confirms that (as he had concluded in his prior Engineering Statement based on the traditional methodology) no white or gray area will be created, and that any increase in “underserved” areas contain only a few people. Specifically, he now concludes that Southwest FM’s proposal will result in an increase of 313 people who will receive only three (3) services, and 1,656 people who will receive only four (4) services, a total increase of 1,969 persons who will be “underserved.” See Table 1 of 2012 Engineering Statement (“Granular Analysis of Population and Number of Services in Gain/Loss Areas”). These 1,969 people represent 0.58% of the 326,122 total population within the station’s current protected contour. See 2012 Engineering Statement, page 3.

In Rural Radio (Paragraph 39), the Commission stated that it would strongly disfavor affording Priority 4 credit to any proposal in which the population in the net “underserved” areas would constitute as much as 15% of the population in the station’s current protected contour. Southwest FM’s proposal would increase the underserved population to only a minimal extent—i.e. to only 0.58% of the people within KAHM’s currently protected contour, which is less than 1/25th of the 15% limiting standard set forth in Rural Radio.⁷ Further, the number of people in the underserved area (1,969) is miniscule (less than 0.15%) in comparison with the more than 1.3 million people (net) who will gain additional service from Southwest FM’s proposal.

In compliance with Paragraph 39 of Rural Radio, the 2012 Engineering Statement contains a complete breakdown of each of the 219 distinct areas which would gain service and the 83 distinct areas which would lose service from Southwest FM’s proposal, and shows exactly which other stations would be received in each of the areas under consideration. See Table 2 and Table 3 to 2012 Engineering Statement. This analysis shows that the overwhelming portion of the loss

⁷ 15% divided by 0.58% is 25.9.

areas will continue to be well served. For example, of the 118,337 who will lose service, 91.8% will receive seven (7) or more services⁸, 87.3% will continue to receive 9 or more services⁹, and 75.2% will receive 14 or more services.¹⁰ See Table 1 to 2012 Engineering Statement.

C. The Balance Is in Favor of Southwest FM's Proposal under Priority 4.

In Rural Radio at Paragraph 39, the Commission stated that henceforth it would “limit the presumption that raw net population gains, in and of themselves, represent a preferential arrangement of allotments or assignments under Section 307(b)”, and would deemphasize the relative weight to be accorded to Priority 4 claims based on coverage to well-served populations. The key word is “limit.” Additional service to large numbers of people is indisputably in the public interest, and nothing in Rural Radio remotely suggests that the Commission intended to eliminate giving some Priority 4 credit to proposals which would result in bringing additional coverage to large numbers of people. It follows, as a matter of logic, that in appropriate cases such credit may be of decisional significance.

The issue here, of course, is the proper weighing of service gains to a very large number of well-served persons versus service losses to very small numbers of “underserved” persons. Southwest FM is unaware of any guidance which the Commission has provided, post-Rural Radio, in weighing these countervailing considerations in resolving Priority 4 issues. Southwest FM's position is that a fair weighing of all considerations, and not only that the proposal would increase service to more than 1.3 million additional people, but also that the increase in the number of underserved people by 1,939 represents only 0.58% of the population in the station's currently protected contour, and that 87.3% of the people in the loss area will continue to receive

⁸ I.e., 116,368 persons.

⁹ I.e., 103,256 persons.

¹⁰ I.e., 89,049 persons.

nine (9) or more services, tips the balance of equities in its favor, if only modestly, under Priority 4. And as Priority 4 is the sole relevant criteria under Revision, Southwest FM believes that approval of its application would be a preferable arrangement under Section 307(b) of the Communications Act, would serve the public interest, and should therefore be granted.