

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re)
)
INDIANA COMMUNITY RADIO) FCC File No. BLFT-20151120AGX
CORPORATION) FCC Facility ID No. 143744
)
License of W275BD, Greenfield, Indiana)
)

To: Office of the Secretary
Attn: Media Bureau, Audio Services Division

OPPOSITION TO MOTION FOR W275BD TO SUSPEND OPERATIONS

Radio One of Indiana, LLC (“Radio One”), the licensee of WNOW-FM, Speedway, Indiana, the primary station of W275BD, Greenfield, Indiana,¹ by its attorneys, pursuant to Section 1.45(b) of the Commission’s rules, hereby respectfully opposes the December 1, 2017 Reising Radio Partners, Inc. (hereafter “WXCH”)² Motion for W275BD to Suspend Operations (the “Motion”).³ In opposition thereto, the following is submitted:

INTRODUCTION

1. The issues raised by WXCH in its Motion are presently before the full Commission in a November 14, 2016 Application for Review and January 4, 2017 Supplement to Application for Review (collectively, the “Application for Review”). To this date, the Application for Review remains unopposed by WXCH or by any other party-in-interest.

¹ As shown in previous filings in this proceeding, the licensee of W275BD, Indiana Community Radio Corporation, requested that Radio One, the licensee of the primary station WNOW-FM, assist with responses in this proceeding. *See e.g.* January 14, 2016 Letter to James D. Bradshaw, Deputy Chief, Audio Division, regarding the request of Indiana Community Radio Corporation for assistance.

² Reising Radio Partners, Inc. is the licensee of WXCH(FM), Columbus, Indiana.

³ Radio One, in an unopposed Motion for Extension of Time, requested until January 10, 2018 to file this Opposition.

2. WXCH, rather than timely opposing the Application for Review,⁴ or even now seeking Commission leave to submit an untimely opposition to the Application for Review, attempts an end-run around the Application for Review by filing an unsupported pleading styled a “Motion” without citing any Commission rule, precedent or policy in procedural support of such a motion.⁵ The Motion is procedurally and legally deficient.

THE APPLICATION FOR REVIEW

3. The Application for Review applied for a Commission review of the decisions of the Audio Division in response to the Radio One February 11, 2016 Request for Dismissal of Complaints (the “Request for Dismissal of Complaints”). The Request for Dismissal of Complaints was summarily decided by: (1) an October 14, 2016 email from Robert Gates, writing for the Audio Division (the “Gates Email”); (2) an October 18, 2016 Letter from James D. Bradshaw (the “2nd FCC Letter”); and (3) a December 5, 2016 Letter from James D. Bradshaw (the “3rd FCC Letter”).⁶

4. The Application for Review challenges the *Decision Documents*, addressing on a legal and factual basis each of the alleged WXCH listeners with reception issues. It requests that

⁴ The deadline under Section 1.115(d) of the Commission’s rules for submitting an opposition to the Application for Review was November 29, 2016.

⁵ Notably, this proceeding is not an administrative law hearing in which motions would be, in certain circumstances, procedurally and legally correct. *See e.g.* Section 1.323(c) Motion to Compel an Answer; Section 1.334 Motions to Quash; and Section 1.291 governing hearing pleadings in general. WXCH points to no FCC rule, precedent or policy authorizing a motion such as the one filed here at the Audio Division in a non-hearing matter.

⁶ As background, on December 15, 2015, James D. Bradshaw, Deputy Chief, Audio Division issued a letter to Indiana Community Radio Corporation (the “1st FCC Letter”) regarding eleven allegations of interference apparently submitted by Reising Radio Partners, Inc., the licensee of WXCH(FM), Columbus Indiana (there was no indication in the 1st FCC Letter as to the source of the allegations – they did not appear to have been filed directly with the FCC by the complainants themselves). On January 14, 2016, Radio One submitted the 1st Detailed Report addressing each of the eleven complaints individually with detailed verified factual information as requested by the 1st FCC Letter. On October 8, 2015, James D. Bradshaw, Deputy Chief, Audio Division issued a letter to Indiana Community Radio Corporation (the “2nd FCC Letter”) regarding 22 allegations of interference submitted by Reising Radio Partners, Inc., the licensee of WXCH(FM), Columbus Indiana. On November 17, 2016, Radio One submitted the 2nd Detailed Report addressing each of the 22 complaints individually with detailed verified factual information as requested by the 2nd FCC Letter. On January 4, 2017, Radio One submitted the 3rd Detailed Report addressing each of the complaints as requested by the 3rd FCC Letter.

the *Decision Documents* be reversed or rescinded. With a reversal of the *Decision Documents*, none of the alleged WXCH listeners are, for the reasons stated in the Application for Review, entitled to radio reception remediation pursuant to Section 74.1203(a)(3) & (b) of the Commission's rules.

5. The Application for Review shows that Section 74.1203(a)(3) of the Commission's rules, relied upon by the *Decision Documents* contains a protected signal limitation which, if ordinary rules of statutory construction are used, means that cognizable interference complaints are limited to those within the protected 60 dBμ contour of WXCH. "Protected" cannot mean one thing in Section 74.1203(a)(3), and have another meaning in every other FCC rule section (including the very next rule Section 74.1204) in which it is used.

6. In addition, the Application for Review shows that the Local Community Radio Act of 2010 (the "LCRA")⁷ requires that decisions licensing new translator and LPFM stations be based upon the needs of the local community, and that LPFM and FM translators remain equal in status. Therefore, certain interference standards that are imposed upon LPFM stations should apply equally to translators. Further, the LCRA appears, by statute, to have changed the manner in which Section 74.1203(a)(3) is to be applied – if FM translators and LPFMs are to remain equal in status then certain co-channel interference and adjacent channel interference is not cognizable and is not required to be remediated under Section 74.1203 of the Commission's rules.

7. The Application for Review further notes that with respect to the *Decision Documents*, it is wholly unclear what either Section 74.1203(e) or Section 74.1232(h), cited as the basis for FCC authority under the 1st FCC Letter, the 2nd FCC Letter, and the 3rd FCC Letter,

⁷ 111th Congress Public Law 371 (Pub.L. 111-371)

has to do with allegations of interference under Section 74.1203(a)(3) of the Commission's rules. Section 74.1203(e) specifically and only refers to "any condition of interference which results from the radiation of radio frequency energy by its equipment on any frequency outside the assigned channel (emphasis added)." There is no allegation that W275BD is emanating RF emissions outside of its assigned Channel 275. Likewise, Section 74.1232(h) is equally inapplicable as it specifically and only refers to "[a]ny authorization for an FM translator station issued to an applicant described in paragraphs (d) and (e) of this section ... (emphasis added)". The referred to Subsections 74.1232(d) & (e) address only FM translators whose coverage contour goes or extends beyond the protected contour of the commercial primary station. The W275BD coverage contour does not extend beyond the protected contour of its primary station.

8. As detailed in the Application for Review, none of the 1st FCC Letter, the 2nd FCC Letter or the 3rd FCC Letter provides a cognizable basis for their threats to impose a death sentence upon W275BD prior to a resolution of the questions now presented to the full Commission in the Application for Review. The *Decision Documents*, issued subsequent to and in response to the Request for Dismissal of Complaints, are bereft of the factual and legal bases necessary to reach their stated conclusions and ordered actions.

THE EQUITIES

9. The repeated instances described in the 1st Detailed Report, the 2nd Detailed Report and the 3rd Detailed Report of WXCH presenting complainants to the FCC only to have the complainants turn out to be connected to WXCH through friends, family or employees raise significant questions as to the processes employed by the FCC in seeking compliance with Sections 74.1203(a)(3) & (b) of the Commission's rules. The *ad hoc* procedure used by the Audio Division where unverified complaints are taken as truth, complainants can refuse to

truthfully answer as to their relationships with the complaining station, informal email exchanges take place between the FCC's staff and complaining station, and it is suspected that many complainants are shells for the complaining station, is not a model of administrative procedural due process.

10. This is a proceeding in which an FM translator serving a large local audience with diverse programming is being threatened with removal from the air by a radio station owner who has procured distant listener complainants through employees, friends and business associates. Some semblance of procedural regularity could be brought to the process by affirmative action on the Application for Review. Now, as the FCC's procedures stand, a radio station owner or manager is encouraged to troll for distant complaining individuals to enable that owner or manager to hear his or her station's signal out to the "Owner's Contour" – that last gasp of his or her radio signal coming through the hash.

11. Action on the outstanding Application for Review by the full Commission addressing the policy and legal questions set forth therein is respectfully requested so that Indiana Community Radio Corporation, Radio One, and other translator owners put in a similar position by a distant station defending its Owner's Contour, are not put through the expense and uncertainty of similar complaints.

12. Radio One is appreciative of the FCC's interest and support of radio broadcasting and its focus on FM translators as an enhancement to local radio listening. Radio One notes, however, that while the FCC's FM translator initiatives are tremendous successes, they have also created unintended consequences and raise serious policy issues that need to be resolved by the full Commission. The pending Application for Review assists with bringing the unintended consequences and serious policy issues before the FCC.

13. The FCC's FM translator rules, when adopted some three decades ago, did not envision the important purposes now served by FM translators which include bringing enhanced service from AM stations to local listeners and providing diverse local programming through niche formats by rebroadcasting HD sub-channels. These important purposes need to be equitably addressed by the FCC through the protection of local listeners of both existing FM stations and FM translator stations. To protect the public interest, the FCC needs to use a balancing approach as to harms and benefits to local radio listeners in considering FM translator interference issues.

14. It is likely that approximately 2,000 new FM translators have been or are about to be deployed in the near term. Therefore, the public interest question that is raised in the Application for Review -- what is an appropriate standard for protecting the local listeners of FM translators that carry AM stations or HD sub-channels accused of causing interference to distant listeners outside a station's local audience area -- is a critical question.

15. Prior to the filing of the Application for Review, the FCC's FM translator interference standard unreasonably appeared to be that any claimed interference to any existing full power FM station's listeners, even from less than a handful of distant purported listeners procured by the subject station owner, who live far outside the FM station's local audience area, constitutes a basis for ordering the FM translator off the air. This would result in distant listeners of questionable province far outside the normal audience listening area of an FM station removing radio service from local listeners by forcing FM translators carrying local radio stations off the air.

16. Silencing an FM translator carrying a local station is contrary to the FCC's goal of providing consistent and reliable signals to local radio listeners. In short, local radio service to

thousands of local listeners can be shut down if the FCC's policy fails to consider the extent to which local listeners will be affected if the programming provided by the FM translator is removed from the air.

17. Therefore, the pending Application for Review asks the Commission to place a priority on protecting local radio audiences for both existing FM stations and FM translators in this complaint proceeding. The public interest will be well-served by FCC action on the Application for Review, as well as FCC action on the two pending petitions for rulemaking on the subject of FM translator interference: the Aztec Capital Partners, Inc. Petition for Rulemaking in RM-11786, and the National Association of Broadcasters Petition for Rulemaking in RM-11787.

18. In order to protect the public interest, the Audio Division must be particularly judicious in giving full due process protections to the local radio service provided by FM translators prior to any removal of that service from local listeners, particularly in situations like the one in this proceeding where complaining radio listeners are located far outside of the existing station's local radio audience. The Application for Review asks for this protection for local radio audiences.

19. Indeed, the FCC's threatened cognizance of distant complaints of reception difficulties well outside the local radio audience area appears to be a perversion of the "fair, efficient, and equitable distribution" provisions of Section 307(b) of the Communications Act. FM stations are authorized by the FCC under Section 307(b) to serve a discrete service area encompassed by the FM station's licensed protected contour. Removing FM translator service from local listeners due to purported interference to a distant FM station listeners far outside the local listening area unfairly, inefficiently and inequitably favors the extension of a weak signal of

the distant station to vast non-local areas, to the disfavor of thousands, or tens of thousands of local listeners to the FM translator, in contravention of Section 307(b) of the Communications Act.

THE ALLEGED WXCH LISTENERS WITH RECEPTION DIFFICULTIES

20. WXCH is correct that this proceeding has now been ongoing for a number of years. Neither the proceeding, nor the number of years it has consumed, however, is attributable to Radio One. Rather, as repeatedly shown in the multiple filings in this proceeding, when the totality of complaints submitted by purported listeners of WXCH are considered, this complaint proceeding is an ongoing and pervasive effort by the owners, managers and personnel of WXCH to procure and solicit interference complaints having the purpose not to protect actual WXCH listeners, but rather to protect some concept of the diminishing WXCH signal as it gets closer to Indianapolis, more than twice the distance it is expected to be received as a regularly used signal.⁸

21. The last filing made by WXCH in this proceeding prior to the Motion was an unsupported and procedurally improper December 15, 2016 Motion to Dismiss (the “Motion to Dismiss”). WXCH likewise cited no rule, precedent or sworn statements in support of its Motion to Dismiss. And, as noted above, WXCH to this day has not submitted any direct responsive pleading to the Application for Review.

⁸ This is factually supported by the 1st Detailed Report, the 2nd Detailed Report, and the 3rd Detailed Report. Each of the 1st Detailed Report, the 2nd Detailed Report, and the 3rd Detailed Report shows repeated instances in which WXCH has procured non-local alleged listeners to complain about WXCH well outside its local audience area. Indicative of the subterfuge employed by WXCH is the description of alleged listener Franklin Murphy described in the 2nd Detailed Report. While Radio One was preparing to assist Mr. Murphy with his WXCH reception issues, WXCH General Manager, Mike King, inserted himself into the efforts by apparently inducing Mr. Murphy to change his request regarding what he would wish regarding WXCH reception improvement. As described in the 2nd Detailed Report, Radio One’s John Takach was aghast that Mr. King was going behind his back to induce purported WXCH “complainants” to modify what he was told in an effort to thwart Radio One reception remediation efforts. Mr. Takach concluded that this connivance between a WXCH principal and the purported WXCH complainant casts severe doubt that Mr. Murphy is simply a disinterested bona-fide WXCH listener.

22. The WXCH Motion, now submitted almost one year after its Motion to Dismiss, is just another example of WXCH trying to side-step the important public interest issues raised by the Application for Review. WXCH asserts a variety of scandalous allegations stating, for instance, that “Radio One intentionally misled WXCH listeners that their interference complaints were non-cognizable...”,⁹ “Radio One employed subterfuge ...”,¹⁰ “Radio One intentionally misled or misrepresented to the listeners the Commission’s procedures for resolving interference complaints...”,¹¹ and “Radio One did not undertake good faith efforts...”.¹² At first, Radio One was understandably insistent upon rebutting such extraneous allegations. But upon review, it is apparent that such hyperbolic assertions only serve to illustrate the ongoing attempt of WXCH to ignore, side-step and not address the pending Application for Review. In its Motion, WXCH asks for a W275BD death sentence that it be ordered off the air prior to Commission action on the Application for Review.

23. Any action by the FCC now without full Commission action on the Application for Review would greatly harm the tens of thousands of local radio listeners in the W275BD community and surrounding area who listen to and enjoy the diverse programming provided by W275BD. It would be antithetical to the public interest to administratively deny diverse radio programming to tens of thousands of radio listeners in favor of several WXCH-procured complainants trying to listen to WXCH well outside its community of license and service area.

⁹ Motion at Page i.

¹⁰ *Id.*

¹¹ Motion at Page 4.

¹² Motion at Page 9.

CONCLUSION

24. In response to Audio Division *Decision Documents*, Radio One filed its Application for Review which remains pending. WXCH disingenuously makes the claim that the Application for Review is “outside the scope of this adjudicatory proceeding”.¹³ Quite the contrary – the Application for Review directly and specifically addresses actions taken by delegated authority in this proceeding.

25. The public interest will be well served by full Commission action on the Application for Review. The Motion should either be held until Commission action on the Application for Review, and then handled in accord with the FCC’s decision on the Application for Review, or dismissed as unsupported by the Commission’s rules, precedent and policy.

Respectfully submitted,

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January 10, 2018

¹³ Motion at Page 13.

CERTIFICATE OF SERVICE

I, John F. Garziglia, an attorney at the law firm of Womble Bond Dickinson (US) LLP, do hereby certify that a true copy of the foregoing “Opposition to Motion for W275BD to Suspend Operations” was sent this 10th day of January, 2018 via U.S. Mail, postage prepaid, to the following:

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