

FCC DOCKET NO. 94-100 COPY ORIGINAL

Oct 31 3 29 PM '95 Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 94-100

In the Matter of

Amendment of Section 73.202(b),	RM-8509
Table of Allotments,	RM-8549
FM Broadcast Stations.	RM-8550
(Okmulgee, Nowata, Pawhuska, Bartlesville, Bixby, Oklahoma, Rogers, Arkansas)	

REPORT AND ORDER

Adopted: October 20, 1995; Released: October 31, 1995

By the Chief, Allocations Branch:

1. At the request of Integrated Broadcasting Company, Inc. ("Integrated"), licensee of Station KTHK(FM), Okmulgee, Oklahoma, and KRIG, Inc. ("KRIG"), licensee of Station KRIG(FM), Nowata, Oklahoma, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 4882 (1994), and *Order to Show Cause*, 10 FCC Rcd 7704 (1995), directed to KRIG, Inc. Comments in response to the *Notice of Proposed Rule Making* were filed by Rhema Media ("Rhema"), KRIG and Integrated. Counterproposals were filed by Singer Broadcasting Group, Inc. ("Singer"),¹ Johnson Communications, Inc. ("Johnson") and KYFM Radio, Inc. ("KYFM").² Reply comments were filed by Singer/KJMM,³ KRIG and Integrated. KRIG responded to the *Order to Show Cause*.

¹ KJMM, Inc. has submitted a "Notice of Appearance and Statement for the Record" stating that, pursuant to Commission approval, consummation of the transfer of control (File No. BTCH-950418GH) from Singer to Perry Broadcasting Company, Inc., 100% shareholder of KJMM, Inc., was effective July 17, 1995. KJMM, Inc. goes on to state its intention to apply for Channel 287C2 at Bixby, if allotted, and to promptly build the modified facilities. Therefore, we will refer to the pleadings submitted by Singer as Singer/KJMM.

² Public Notice of the filing of the counterproposals by KYFM and Singer/KJMM was given on November 18, 1994, Report No. 2041. However, on November 17, 1994, KYFM withdrew its counterproposal (RM-8549) which requested the upgrading of Station KYFM(FM), Bartlesville, Oklahoma, from Channel 261A to either Channel 286C3 or Channel 261C1. In its request for dismissal, KYFM, in compliance with Section 1.420(j) of the Commission's Rules, states that no consideration has been or will be received in exchange for the dismissal of its comments and counterproposal. Therefore, no consideration of its comments and counterproposal will be given and its proposal will be dismissed. Johnson also filed comments and a counterproposal requesting the substitution of Channel 232C2 for Channel 232C3 at Rogers, Arkansas, and the modification of Station KAMO-FM's license accordingly. However, there is no conflict with any of the proposals under consideration herein and thus

2. The *Notice* proposed the substitution of Channel 231C1 for Channel 231C2 at Okmulgee and the modification of Station KTHK(FM) to specify operation on the higher class channel. To accommodate the upgrade at Okmulgee, the *Notice* also optionally proposed the substitution of Channel 286C3 or Channel 285A for Channel 232A at Nowata, Oklahoma, and the modification of Station KRIG(FM) to specify operation on either channel. To accommodate the allotment of Channel 286C3 to Nowata, we also proposed the deletion, without replacement, of vacant and unapplied-for Channel 285A at Pawhuska, Oklahoma, or the substitution of Channel 280A for Channel 285A at Pawhuska, if an interest in use of the channel were expressed during the pendency of the rule making.

3. Singer/KJMM opposes the substitution of Channel 286C3 for Channel 232A at Nowata. Instead, it requests the substitution of Channel 287C2 for Channel 287C3 at Bixby and the modification of Station KJMM's (formerly KRMP-FM) construction permit to specify the higher powered channel. Singer/KJMM states that the allotment of Channel 287C2 to Bixby would allow Station KJMM to serve an additional 194,026 persons within an area of 3,796 square kilometers. In comparison, it states that the allotment of Channel 286C3 to Nowata will result in an increase of only 32,632 persons within a 2,234 square kilometer area. However, Singer/KJMM suggests that both upgrades can be accomplished if Station KRIG's license is modified to Channel 285A in this proceeding and then KRIG applies for a co-channel upgrade through the Commission's "one-step" upgrade application procedure.⁴ The transmitter sites for the Nowata and Bixby allotments are located approximately 102 kilometers apart while the Commission's Rules stipulate a minimum distance separation of at least 117 kilometers for first adjacent Class C2 and Class C3 allotments. Therefore, the two proposals are mutually exclusive.

4. Rhema opposes the deletion of Channel 285A from Pawhuska. It states that Pawhuska, as the seat of Osage County and the "heart" of the Osage Nation, needs its own local radio station to provide local news and emergency weather information, community calendars for local church, school and civic organizations, news of particular

is not a valid counterproposal. Rather, Johnson's proposal is contingent upon the migration of Station KRIG from Channel 232A to either Channel 286C3 or Channel 285A. Therefore, we will accept Johnson's pleading only as comments in support of the deletion of Channel 232A from Nowata.

³ Singer/KJMM's reply comments were accompanied by a "Motion to Accept Late-Filed Reply Comments" because they were filed with the Commission on the day after the reply comment deadline specified in the *Notice of Proposed Rule Making*. However, we do not consider these reply comments to be late-filed. In cases such as this, where the Public Notice announcing the filing of the counterproposal is issued prior to the close of the reply comment period set forth in the *Notice of Proposed Rule Making*, the reply comment period is considered to have been extended to coincide with the response time specified in the counterproposal Public Notice. See *Corinth, Hadley and Queensbury, New York*, 2 FCC Rcd 3316 (1987). This informal extension of the reply comment period does not occur where the Public Notice announcing the filing of counterproposals is issued after the close of the reply comment period set forth in the *Notice of Proposed Rule Making*. Rather, parties are then limited to responding solely to the counterproposals themselves.

⁴ See *Amendment of Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993).

interest to Native Americans, and live broadcasts of sports events, church services, rodeos, and musical productions. It argues that a station licensed to any community other than Pawhuska cannot provide this needed local service. Rhema also states that it has filed an application (BPH-941122MV) to operate a station at Pawhuska. Further, it states that its intention was to file an application immediately following the suspension of Station KMYB in March 1991, but was prevented from doing so until the Commission opened a new application filing window.

5. Integrated filed comments reiterating its intention to apply for Channel 231C1, if allotted to Okmulgee, and to reimburse Station KRIG if its license is modified to specify Channel 285A in lieu of its present Channel 232A. In response to Rhema's comments, Integrated points out that Rhema's interest in providing Pawhuska with a local FM service can be accommodated without depriving either Okmulgee or Nowata of upgraded service since the *Notice* optionally proposed the allotment of Channel 280A to accommodate any such interest. Integrated points out that while Rhema opposes the deletion of Channel 285A from Pawhuska, it provides no information as to why Channel 280A is an unacceptable substitute.

6. KRIG supports the substitution of Channel 286C3 for Channel 232A at Nowata and the modification of Station KRIG's license accordingly. It states that if both Station KRIG and KTHK(FM) are upgraded as proposed, a total of 150,843 persons would receive a new service. KRIG notes that the reference coordinates proposed in the *Notice* for Station KRIG on Channel 286C3 are short-spaced to the reference coordinates for Station KJMM, Channel 287C3, Bixby, Oklahoma. To avoid any potential delays, KRIG requests that the coordinates for Channel 286C3 at Nowata be changed.⁵ Finally, KRIG disassociates itself from that portion of the joint petition for rule making which indicates its willingness to change to Channel 285A. It states that it would not find such a change to be acceptable and opposes such an action.⁶

7. Johnson, licensee of Station KAMO-FM, Channel 232C3, Rogers, Arkansas, supports the modification of Station KRIG at Nowata to either Channel 285A or Channel 286C3. Johnson states that the deletion of Channel 232A from Nowata will enable the upgrading of Station KAMO-FM from its present Class C3 operation to Class C2 on its present channel. Johnson states that Rogers has increased in population from 24,692 persons to 32,251 persons since the 1990 U.S. Census. Further, the upgrading of Station KAMO-FM, according to Johnson, will enable the station to increase the population it serves within its 60 dBu contour by 91,887 persons to a total of 243,155 persons. Therefore, it urges that Station KRIG's license be modified to either Channel 285A or Channel 286C3.

8. In reply comments, Integrated urges the substitution of Channel 231C1 for Channel 231C2 at Okmulgee. It points out that Channel 231C1 can be allotted to Okmulgee consistent with all of the upgrades proposed herein. Integrated also reiterates its intention to reimburse KRIG for the costs involved in changing to Channel 285A if the Commission declines to upgrade Station KRIG to Channel 286C3.

9. Singer/KJMM, in reply comments, reiterates its intention to apply for Channel 287C2, if allotted to Bixby. It again suggests that KRIG accept the modification of its license to Channel 285A in this proceeding and then apply for an upgrade to Channel 286C3 under the Commission's "one-step" procedures.

10. KRIG questions the service gains which Singer/KJMM claims will occur if Station KJMM is upgraded to Channel 287C2. It states that the figures are premised on the use of a fully-spaced transmitter site which requires that Station KJMM relocate to a new transmitter site. However, it argues that Singer/KJMM has not unequivocally stated that it will move from its present transmitter site. KRIG agrees that the allotment of Channel 287C2 to Bixby would result in greater total area/population gains (195,900 persons within a 3,742 square kilometers area) than would accrue from the allotment of Channel 286C3 to Nowata (25,894 persons within a 2,371 square kilometer area). However, it argues that this increased service would occur exclusively to areas which are already very well served. Specifically, KRIG states that all of the people within the gain area already receive at least nine fulltime aural services with more than half of the gain area receiving at least eighteen fulltime aural services. In contrast, it states that the allotment of Channel 286C3 to Nowata would provide a fourth or fifth fulltime service to 3,786 persons, a sixth fulltime service to 17,682 persons and a seventh such service 3,644 persons. Thus, it argues that the provision of a fourth through seventh fulltime aural service to 25,112 persons by Station KRIG outweighs the public interest benefit of the provision of no less than a tenth service by Station KJMM. In response to the *Order to Show Cause*, KRIG again urges that the Commission look beyond the gross population gain figures from the upgrading of the Bixby and Nowata stations and award decisional credit to the Nowata upgrade because it would provide service to a less well-served area. Further, it objects to the modification of Station KRIG's license to specify operation on Channel 285A because it would disrupt the listening patterns of the station's audience without resulting in the expected public interest benefits. Specifically, KRIG argues that Singer/KJMM has not made a commitment to change Station KJMM's transmitter site even though the station cannot upgrade to Channel 287C2 at its present location. Therefore, since the superiority of the Singer/KJMM proposal is based on the relocation of Station KJMM's transmitter site, KRIG submits that the Commission must deny the Bixby upgrade unless Singer/KJMM unequivocally state their intention to build facilities which will provide the population gains represented in their comments.

DISCUSSION

11. We have carefully reviewed all of the pleadings before us and find that the public interest is best served by substituting Channel 231C1 for Channel 231C2 at Okmulgee, substituting Channel 287C2 for Channel 287C3 at Bixby, substituting Channel 285A for Channel 232A at Nowata, and substituting channel 280A for Channel 285A at Pawhuska. As proposed, we will also modify the licenses

⁵ The new coordinates requested by KRIG for Channel 286C3 at Nowata are 36-49-59 North Latitude and 95-44-47 West Longitude.

⁶ KRIG states that the change from Channel 232A to Channel

285A was included in the proposed draft of the petition by counsel for Integrated and was overlooked by counsel for KRIG who was substituting for the licensee's regular counsel.

to Stations KTHK(FM), Okmulgee, KJMM, Bixby, and KRIG, Nowata, to specify the alternate channels allotted herein. In accordance with Commission policy, Rhema will be permitted to amend its pending application (BPH-941122MV) to specify Channel 280A without loss of cut-off protection.

12. With the substitution of Channel 280A for Channel 285A at Pawhuska, Channel 231C1 can be allotted to Okmulgee regardless of whether Channel 285A or Channel 286C3 is allotted to Nowata or Channel 287C2 is allotted to Bixby. However, a comparison of the public interest benefits between the Bixby and Nowata proposals must be made since the two proposals are mutually exclusive.

13. In *Revision of FM Policies and Procedures*, 90 FCC 2d 88 (1982), the Commission set forth the following allotment priorities: (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). Here, the proposals are compared under the fourth priority, other public interest matters. In this category, the Commission looks first at population gains achieved by the respective proposals as well as reception services available within the gain area. Further, as is Commission policy, we consider simple net differences in the number of persons newly served by each proposal. In this case, the allotment of Channel 287C2 to Bixby will result in a population gain of 127,320 persons, with no loss area, as compared to a gain of only 25,449 persons, with a loss area of 76 square kilometers and a population of 734 persons, if Channel 286C3 is allotted to Nowata. Parties wishing to discount the raw population totals in proportion to the number of services available in the proposed service areas must submit showings using the methodology set forth in *Greenup, Kentucky*, 2 FCC Rcd 4319 (1987). Further, as stated in *Greenup, supra*, the parties wishing to discount the raw population totals are responsible for furnishing the information using the methodology set forth therein. This KRIG has failed to do. It merely states that the Nowata allotment would provide a fourth or fifth fulltime service to 3,786 persons, a sixth fulltime service to 17,682 persons and a seventh such service to 3,644 persons while the Bixby proposal will provide no less than a tenth fulltime service. This does not comport with the methodology set forth in *Greenup supra*. Therefore, our decision herein is based on the fact that Channel 287C2 at Bixby will provide an additional service to approximately five times more people. See *Seabrook, Texas, et al.*, 10 FCC Rcd 9360 (1995). Further, the staff's study shows that all of the population within the Nowata gain area currently receives at least five fulltime services with the exception of 842 persons within a 201 square kilometer area which would be provided with a fourth such service. We find that the provision of a fourth fulltime service to 842 persons does not warrant the denial of a proposal which could provide an additional service to 127,320 persons, albeit within an area which is presently well-served.

14. We also find that KRIG has not raised a substantial and material question of fact which would require a hearing on the proposed modification of Station KRIG's li-

cense. It is well settled that the public interest is served where the substitution permits the provision of new or expanded service at another community. See e.g., *Marietta, Ohio and Ravenswood, West Virginia*, 2 FCC Rcd 4681 (1987) and *Albany, New York, et al.*, 2 FCC Rcd 4300 (1987). Further, we find that Singer/KJMM has made the requisite commitment to apply for Channel 287C2 at Bixby, having stated that it will apply for and promptly build the modified facilities. We do not believe it appropriate to impose a condition beyond the requirement that the petitioner state its intention to apply for the channel, if allotted. As the Commission has stated:

The Table of Allotments is designed to provide the potential for the optimum distribution of FM radio services. In allotting channels, we do not account for the actual facilities a licensee or permittee may build. We assume that since FM radio is the dominant aural medium, stations will respond to economic incentives and provide FM service to the largest area possible.

Elkins, West Virginia, et al., 60 FR 49512, published September 26, 1995. In accordance with Commission policy, Singer/KJMM will be required to reimburse KRIG, Inc. for the reasonable costs associated with changing its operating frequency from Channel 232A to Channel 285A.

15. The *Notice* had optionally proposed either the deletion of unoccupied and unapplied-for Channel 285A at Pawhuska, or the substitution of Channel 280A for Channel 285A, if an interest were expressed in use of the channel. Rhema opposed the deletion of Channel 285A at Pawhuska, and, in fact, has submitted an application for use of the channel. Based on this expressed interest in activating a Pawhuska channel, we will substitute Channel 280A for Channel 285A there. While Rhema opposes the substitution, we find that it has provided no information demonstrating that Channels 280A and 285A are not equivalent. The Commission considers channels of the same class to be equivalent unless a showing is made that a station cannot be constructed for reasons such as environmental consequences or hazard to air navigation. See *Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989). Rhema has provided no evidence that Channel 280A is an unusable channel.⁷

TECHNICAL SUMMARY

16. Channel 231C1 can be allotted to Okmulgee at Station KTHK(FM)'s presently licensed site, which is 27.5 kilometers (17.1 miles) northwest of the city. Channel 285A can be allotted to Nowata in compliance with the Commission minimum distance separation requirements at Station KRIG's presently licensed transmitter site. Channel 280A can be allotted to Pawhuska with a site restriction of 8.4 kilometers (5.2 miles) northwest. Channel 287C2 can be allotted to Bixby with a site restriction of 2.4 kilometers (1.5 miles) south.⁸

⁷ According to a staff study, Channel 280A can also be used at the transmitter site specified in Rhema's pending application (36-44-56 NL; 96-17-51 WL).

⁸ The coordinates for Channel 231C1 at Okmulgee are 35-50-02 North Latitude and 96-07-28 West Longitude. The coordinates

for Channel 280A at Pawhuska are 36-44-00; 96-23-00. The coordinates for Channel 285A at Nowata are 36-44-35; 95-45-17. The coordinates for Channel 287C2 at Bixby are 35-55-15; 95-52-25.

17. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 15, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Bixby, Oklahoma	287C2
Okmulgee, Oklahoma	231C1
Nowata, Oklahoma	268A, 285A
Pawhuska, Oklahoma	280A

18. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of Integrated Broadcasting Company, Inc., for Station KTHK(FM), Channel 271C2, Okmulgee, Oklahoma, and Perry Broadcasting Co., Inc., for Station KJMM, Channel 287C3, Bixby, Oklahoma, ARE MODIFIED to specify operation on Channel 231C1 and Channel 287C2, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

19. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KRIG, Inc., for Station KRIG, Nowata, Oklahoma, IS MODIFIED to specify operation on Channel 285A in lieu of Channel 232A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KRIG's license, BLH-930517KA, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-930517KA, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

20. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KRIG, as follows: KRIG, Inc., P.O. Box 877, Bartlesville, Oklahoma 74005.

21. IT IS FURTHER ORDERED, That Rhema Media may amend its pending application (BPH-941122MV) for Channel 285A, Pawhuska, OK, to specify Channel 280A, without loss of cut-off protection.

22. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Integrated Broadcasting Company, Inc., licensee of Station KTHK(FM), Okmulgee, Oklahoma, and Perry Broadcasting Company, Inc., licensee of Station KJMM, Bixby, Oklahoma, are required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

23. IT IS FURTHER ORDERED, That the proposal of KRIG to substitute Channel 286C3 for Channel 232A at Nowata, OK, and modify the license of Station KRIG accordingly, IS DENIED.

24. IT IS FURTHER ORDERED, That the counter-proposal filed by KYFM (RM-8549), requesting the substitution of Channel 286C3 or Channel 261C1 at Bartlesville, Oklahoma, and the modification of Station KYFM(FM)'s license according, IS DISMISSED.

25. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
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Mass Media Bureau