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Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b).
Table of Allotments.
FM Broadcast Stations.
(Esperanza, Puerto Rico, Christiansted,
Virgin Islands)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 20, 1996; Released: March 4, 1996

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by Esperanza Broadcasters ("petitioner") of the September 20, 1995, letter dismissal of its petition for rule making seeking the allotment of Channel 258B to Esperanza, Puerto Rico, as the community's first local aural broadcast service.¹ To accommodate the allotment at Esperanza, petitioner also requested the substitution of Channel 293B for Channel 258B at Christiansted, Virgin Islands, and the modification of Station WVIQ(FM)'s license accordingly. Comments in opposition to the petition for reconsideration were filed by Carlos J. Colon Ventura ("Colon") and V.I. Stereo Communications Corp. ("VI Stereo").

2. Petitioner's Esperanza proposal was dismissed for two reasons. First, the petition was found to have been prematurely filed since it is contingent upon channel changes ordered in MM Docket No. 91-259, which are currently under reconsideration. Specifically, in addition to the channel change required for Station WVIQ(FM) at Christiansted, the allotment of Channel 258B at Esperanza is contingent upon channel changes at Vieques, San Juan and Quebradillas Puerto Rico. However, as pointed out in the dismissal letter, it is Commission policy not to accept petitions for rule making which are contingent upon the results of an on-going proceeding, citing *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615 (1988), *recon.* 3 FCC Rcd 6626 (1988). Second, we found that the petition was unacceptable for consideration since the petitioner did not comply with the provisions of Section 1.401(d) of the Commission's Rules which require that a copy of the petition be served on the licensee of Station WVIQ(FM).

3. Petitioner argues that the Commission erred in returning its petition for rule making. It states that following the adoption of the *Report and Order* in MM Docket No. 91-259, Colon filed its application to modify Station WSAN's license from Channel 255B at Vieques to Channel 252A at Las Piedras, along with a request to waive the

automatic stay provisions set forth in Section 1.420(f) of the Commission's Rules. Petitioner states that the application was accepted and placed on Public Notice (Report No. 23599, September 25, 1995) even though grant of the application is contingent upon resolution of the petitions for reconsideration in MM Docket 91-259. Thus, it contends that to accept an application which is contingent upon the resolution of the reconsideration requests in MM Docket 91-259 but not a new petition for rule making contingent upon the same action is "facially inconsistent." Citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), it states that the Commission must treat similarly situated parties in a like manner. Thus, petitioner requests that either its petition for rule making be accepted or that Colon's application for a construction permit to relocate Station WSAN to Las Piedras be dismissed or held without action until the Esperanza rule making petition is accepted. Finally, apparently directed at Colon's application, petitioner states that the "wisdom" of the automatic stay provision in Section 1.420(f) is "abundantly clear" in cases where multiple communities and interdependent channel changes are involved. It states that action on an application for a new or changed FM allotment in Docket 91-259 is "prejudicial" to other parties as long as the petitions for reconsideration are pending.

4. Both Colon and VI Stereo support the dismissal of petitioner's proposal. They each argue that, contrary to petitioner's assertion, the parties involved in filing Station WSAN's application and petitioner's rule making request are not similarly situated because Station WSAN's application was timely filed after the effective date of the Docket 91-259 *Report and Order* while the rule making request was prematurely filed prior to the effective date. Thus, they submit that, even if there were no automatic stay on Colon's application, the Esperanza request would still be returned as being filed prematurely while the Station WSAN application would not be. As to the request that Colon's application either be dismissed or held without action until the Esperanza petition is accepted, Colon states that the petitioner has not shown that there is any logical connection between the application and rule making request. Nor, according to Colon, has petitioner offered any legal theory or explanation as to why Station WSAN's application should be dismissed or held without action pending acceptance of the Esperanza request. Rather, Colon points out that a grant of Station WSAN's application would have no effect, detrimental or otherwise, on the Esperanza rule making.² Finally, VI Stereo states that petitioner's failure to serve Station WVIS(FM) with a copy of the Esperanza petition, as required by Section 1.401(d) of the Commission's Rules, also singularly justifies the dismissal of petitioner's proposal.

Discussion

5. After considering the pleadings before us, we will deny the petition for reconsideration. We find no public interest justification to warrant acceptance of the Esperanza petition at this time. The petition was dismissed because the petitioner failed to serve a copy of the petition on the

¹ Public Notice of the petition for reconsideration was given on November 2, 1995, 60 FR 56150, November 7, 1995.

² Both Colon and VI Stereo point out that counsel for the Esperanza petitioner also represents Arso Radio Corporation,

one of the parties involved in and requesting reconsideration in MM Docket No. 91-259, and note that there is a benefit from staying action on Colon's application vis-a-vis Arso Radio Corporation.

affected licensee, Station WVIS(FM), as required by Section 1.401(d) of the Commission's Rules, and because the request was contingent on the outcome of a contested proceeding, and thus contravened the Commission's policy of not accepting such rule making proposals. See *Oxford and New Albany, Mississippi, supra*. Further, the petitioner has not provided us with any Commission action which would lead to a finding that we had erred in returning the petition for rule making.³

6. We also find that petitioner and Colon are not "similarly situated" parties. We believe that petitioner's reliance on *Melody Music, Inc. v. FCC, supra*, is misplaced. In that case, the license renewal of AM Station WGMA, Hollywood, Florida, was denied because of the licensee's involvement in deceptive television quiz programs while the license of NBC-owned stations which, for a time, both owned the quiz shows and aired the programs was granted. The court found that the refusal to explain the different treatment of the two parties to be in error since both were connected to the same deceptive practices and their renewal applications were considered by the Commission at virtually the same time. In this case, petitioner seeks the allotment of a new "drop-in" FM channel to a community while Colon, a Commission licensee, seeks the grant of an application to implement a Commission's ordered change. There are many instances where petitioners and applicants are treated differently. For example, the Commission has a long-standing policy of not permitting the allotment of short-spaced allocations. However, once allotted, an applicant may specify a short-spaced transmitter site and seek a waiver of the mileage separation requirements. In this case, Commission policy is not to accept rule making petitions which are contingent upon the outcome of ongoing rule makings because, *inter alia*, it has been found to be wasteful of the Commission's limited resources to process a petition which may become moot since it is based on a speculative outcome. As to the filing of applications once a *Report and Order* is issued in a rule making proceeding, there is no rule or policy which prevents the party from filing an application once the allotment is effective. Section 1.420(f) does not proscribe the filing of an application but, rather, unless waived, prevents the grant of the application until the rule making petition for reconsideration is resolved. Second, Colon's application does not harm, but instead is necessary to effectuate the channel allotment desired by Esperanza Broadcasters because the allotment of Channel 258B at Esperanza requires that Channel 255B be deleted from Vieques and Station WSAN resume operation on Channel 252A at Las Piedras, as ordered in MM Docket 91-259.

7. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Esperanza Broadcasters IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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

³ In fact, the petition for reconsideration actually appears to be directed to action which the Commission might take concerning the acceptance and processing of Colon's construction permit application (BPH-950807IG) to implement the downgrading and change of community for Station WSAN. In that regard, we

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

note that by letter of November 27, 1995, the Assistant Chief, Audio Services Division, Mass Media Bureau, stated that Colon's application would be held in abeyance pending the outcome of MM Docket 91-259 and also denied the informal objection of Arso Radio Corporation.