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Federal Communications Commission

DA97-1491

DISPATCHED

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

In the Matter of

Amendment of Section 73.202(b),

Table of Allotments

FM Broadcast Stations.

(Denison-Sherman, Paris, Jacksboro,

Texas, and Madill, Oklahoma)

) MM Docket No. 95-126
) RM-8671
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MEMORANDUM OPINION AND ORDER

Adopted: July 9, 1997

Released: July 18, 1997

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a Petition for Reconsideration filed by CarePhil Communications ("CarePhil"), licensee of Station KBUS(FM), Channel 270C2, Paris, Texas, of the Report and Order ("R&O"), 11 FCC Rcd 5316 (1995), in this proceeding.¹ Hunt Broadcasting, Inc. ("Hunt"), licensee of Station KDVE(FM), Channel 269C3, Denison-Sherman, Texas, and permittee of Station KAIH(FM), Jacksboro, Texas filed an opposition. Reply comments were filed by CarePhil.

2. Background. The Notice of Proposed Rule Making and Order to Show Cause ("NPRM/OSC"), 10 FCC Rcd 8303 (1995), was issued in response to a petition filed by Hunt requesting the substitution of Channel 269C1 for Channel 269C3 at Denison-Sherman, Texas, and modification of Station KDVE(FM)'s license to specify the higher powered channel. In order to accommodate this proposal, Hunt also requested the substitution of Channel 282C2 for Channel 270C2 at Paris, TX, Channel 273A for Channel 272A at Madill, OK, and Channel 252A for Channel 269A, as well as a change of site, for Station KAIH(FM) at Jacksboro, TX. Although the NPRM/OSC was sent to the licensees of Station KBUS(FM) at Paris, TX and to Station KMAD(FM) at Madill, Oklahoma, respectively, neither licensee responded. Consequently, pursuant to Section 1.87 of the Commission's Rules, the licensees were deemed to have consented, and the R&O granted the upgrade at Denison-Sherman and substituted channels at Jacksboro, Paris, and Madill as proposed in the NPRM/OSC.

¹Public Notice of the petition for reconsideration was given on July 8, 1996, Report No. 2141.

3. Petition for Reconsideration. CarePhil argues that it was not provided with proper notice of the proposed change in channel for KBUS(FM), and that failure impinged upon its rights in this proceeding.² CarePhil argues that since it did not receive proper notice as required by Section 1.87 of the Commission's Rules, it cannot be deemed to have consented to the change. Notwithstanding the above, CarePhil states that once it learned of Hunt's proposal, it began in September 1995, to negotiate the terms of the reimbursement which thus far remains unresolved. CarePhil contends that while it is willing to consent to the change, it is not willing, nor is it required to make a change at its own expense. CarePhil states that Hunt has failed to follow through on its commitment to reimburse CarePhil for its reasonable expenses. CarePhil concludes that until negotiations are finished and an agreement for reimbursement is signed, the R&Q should not become final.

4. Opposition. Hunt contends that CarePhil's petition should be rendered moot and dismissed since it has filed an application for Channel 269C1 which meets the spacing requirements to KBUS(FM) on Channel 270C2, which will not require KBUS(FM) to change its channel.³ Hunt also requests that we amend the Table of Allotments for Paris, Texas, to specify Channel 270C2 instead of Channel 282C2. Hunt contends that, due to the filing of the petition for reconsideration, the instant proceeding remains active and changes for any of the communities can still be made without the issue of an Order to Show Cause.⁴

5. In reply comments, CarePhil opposes the dismissal of its petition for reconsideration. CarePhil states that it generally supports Hunt's proposal to return its channel to status quo; however, it disagrees that its petition is moot merely due to the filing of Hunt's opposition and application. CarePhil argues that until the Commission acts to change the allotment for KBUS(FM) back to Channel 270C2, an order still remains outstanding requiring it to change to

²CarePhil states that the NPRM and the R&Q in this proceeding were mistakenly served on the former licensee. CarePhil notes that it notified the Commission on May 17, 1995, that it had become the licensee of KBUS(FM) on May 5, 1995, upon consummation of the assignment of license. (See File No. BALH-941011GJ).

³Hunt notes that its application for its Class C1 facility was filed on July 12, 1996, at 33-31-47 N and 97-07-28 W, thus clearing KBUS on Channel 270C2 by 2.56km.

⁴In a matter unrelated to the petition for reconsideration, Hunt requests that the Commission amend the Table of Allotments to specify Sherman as the community of license instead of Denison-Sherman as dual city allotment. Hunt argues that the rationale for the dual city licensing is no longer applicable in this case, citing Casey Broadcasting Company, Inc., 89 FCC 2d 618 (1982). Hunt contends that it is an unreasonable burden on KDVE to be licensed to serve two large communities when other stations licensed to Denison or Sherman are not saddled with the burdens of dual city licensing. Hunt requests that Sherman retain the allotment because the main studio is located in Sherman, primary programming has been directed toward Sherman, the larger community, and Sherman has a more favorable transmitter site location. Finally, Hunt argues that the requested change does not require a separate rule making to implement the change since KDVE is not changing its city of license. With respect to Hunt's request we will not address it here because we believe it is beyond the scope of this proceeding.

Channel 282C2.⁵

6. Discussion. As a preliminary matter we agree that the NPRM/OSC was sent to the former licensee. Our records indicate that there is no return receipt from the existing licensee. However, we believe that the Commission's failure to serve a copy of the NPRM/OSC on CarePhil at best constitutes harmless error. Although CarePhil did not receive a certified copy of the NPRM/OSC, CarePhil admits that it did have actual notice of the proposed channel change and, based on that knowledge, in September 1995 entered into negotiations with Hunt to reach an agreement as to the amount to be reimbursed. CarePhil further acknowledged its willingness to consent to the change but not at its own expense. Furthermore, we believe that the Commission's failure to serve a copy of the NPRM/OSC did not impinge upon any of CarePhil's rights because the objections previously raised are being addressed in this proceeding.

7. Secondly, we disagree that CarePhil's petition for reconsideration is rendered moot in light of the application filed by Hunt for Channel 269C1. Hunt's original rulemaking proposal required three stations to change channels at Jacksboro and Paris, Texas, and Madill, Oklahoma, to accommodate the upgrade at Denison-Sherman and that Hunt reimburse the affected stations for their expenses. After negotiations with the Paris station failed to produce a reimbursement agreement, Hunt filed an application that is inconsistent with the rulemaking petition that was granted by the R&O. While the application still requires the Jacksboro and Madill stations to change channels, it no longer requires the Paris station to change channels. In addition, the application creates a new short spacing of 4.2 kilometers to a Lawton, Oklahoma, station which was not included in the original rulemaking petition. Although this short-spacing can be remedied at the application stage by the use of a directional antenna or contour protection under Section 73.215 of the Commission's Rules, these remedies are not available in a rulemaking proceeding. See Chester and Wedgfield, South Carolina, 4 FCC Rcd 4503 (Policy and Rules Div. 1989), aff'd mem., No. 90-1496, slip op. (D.C. Cir. June 6, 1991). Consequently, if Hunt had specified its application site in its rulemaking petition, then the Lawton station, rather than the Paris station, would have been required to change channels and Hunt would have been required to reimburse the affected station for its reasonable costs associated with the channel change.

8. Since Hunt had requested channel changes at Paris, Jacksboro, and Madill to accommodate its upgrade at Denison-Sherman and pledged to reimburse the stations, both Hunt and the stations are required under our guidelines set forth in Circleville, Ohio, 8 FCC 2d 159 (1967) to negotiate in good faith to reach an agreement on the amount of reimbursable expenses. As we have stated before, "Our experience indicates that parties generally enter into good faith negotiations and resolve the amount of reimbursement well before a station actually changes channel." Churchville and Larry, VA, 6 FCC Rcd 1313 (1991). In the event that the parties are unable to reach an agreement, Commission review may be sought. See, e.g., Mayfield and

⁵CarePhil also stated that Hunt's discussion of the negotiations for reimbursement were inaccurate but CarePhil declined to provide further details.

Wickliff, KY, 48 RR 2d 1232 (1981). In the instant proceeding, Hunt has stated its willingness to fully comply with the reimbursement requirements. Although the parties have not been able to reach agreement on the amount of reimbursable expenses, there is no evidence that Hunt is unwilling nor unable to pay. On the other hand, CarePhil has specifically stated that it is willing to consent to the change in channel provided the parties can work out the reimbursement terms. We continue to believe that these matters are best left to resolution by good faith negotiations by Commission licensees.

9. In view of the above, IT IS ORDERED, That the Petition for Reconsideration filed by CarePhil Broadcasting, IS DENIED.

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

11. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Policy and Rules Division
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