

ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Sec. 73.202(b)	)	
Table of Allotments	)	MM Docket No. 95-126
FM Broadcast Stations	)	
(Denison-Sherman, Paris, and	)	RM-8671
Jacksboro, Texas and	)	
Madill, Oklahoma)	)	

TO: The Commission

**APPLICATION FOR REVIEW**

Hunt Broadcasting, Inc. ("Hunt"), licensee of Station KIKM (FM) (formerly KDVE(FM)), Denison-Sherman, Texas, by its counsel, hereby submits this Application for Review of the Memorandum Opinion and Order ("MO&O"), 13 FCC Rcd \_\_\_\_\_ (1997) in this proceeding. Pursuant to Section 1.115(b)(2) of the Commission's Rules, review is warranted due to the need to revise or clarify the staff's policy with regard to channel changes which are ordered but are not required to be made to effectuate the Petitioner's proposal. In addition, the Commission should review the staff's failure to consider without explanation a modification to the Table of Allotments. In support hereof, Hunt states as follows:

**BACKGROUND**

1. This proceeding commenced with the filing by Hunt of a Petition for Rule Making on May 2, 1995, which was adopted by Report and Order ("R&O"), 11 FCC Rcd 5316 (1996). The staff made the following changes to Section 73.202(b) of the Commission's Rules.

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<u>Texas</u>	<u>Old</u>	<u>New</u>
Denison-Sherman	269C3	269C1
Paris	270C2	282C2
Jacksboro	269A	252A
 <u>Oklahoma</u>		
Madill	292A	273A

2. The R&O ordered the licensees/permittees of the respective stations to make the modifications and ordered Hunt to reimburse these stations for their reasonable costs. Hunt had previously consented to reimbursing these stations. However, on June 4, 1996, CarePhil Communications ("CarePhil"), licensee of Station KBUS (FM), Paris, Texas filed a petition for reconsideration claiming that it had attempted to negotiate with Hunt for a reimbursement amount before making the changes but that Hunt was unwilling to negotiate. On July 16, 1996, Hunt filed an opposition in which it indicated that on July 12, 1996, it filed an application to implement the Class C1 channel change (BPH-960712IH) which is not short spaced to Station KBUS. As a result, Hunt reported that the Paris channel change is no longer necessary and CarePhil's request for reimbursement is moot.

3. In its reply, CarePhil indicated that it supports Hunt's request to maintain KBUS' current channel allotment since CarePhil prefers not to change channels but noted that the staff must change the KBUS channel back to Ch.270C2 to avoid making the change.

4. As a separate matter, Hunt requested the staff to consider deleting Denison from the dual-city allotment designation for several reasons. Hunt noted that the concept of dual city licensing is very rarely used. The factors involve the inability of one of the two very small

communities being unable to support the station. Citing Anamosa and Iowa City, Iowa, 60 FCC 2d 1041, 1045 (1976) and Casey Broadcasting Company, Inc., 89 FCC 2d 618, 620 (1982). Here, Sherman has a 1990 U.S. Census population of 31,601 while Denison's population was 21,505. Both communities have their own separately licensed stations and can certainly support stations on their own. Hunt's research revealed that when the original allotment was made for Denison-Sherman in 1966, no explanation of the need for a dual-city designation was given. See 4 FCC 2d 998 (1966). Hunt argued that it was an unfair burden on it to serve both communities while other Denison or Sherman stations are not required to maintain separate public files, ascertain and program for both communities and provide a 70 dBu signal to both communities which encompass an area of more than 20 miles from the northern portion of Denison to the southernmost portion of Sherman.

5. In fact, Hunt found it extremely difficult to find a Class C1 transmitter site for its application to provide a 70 dBu signal to both communities. An alternate prediction method was employed to provide a 70 dBu signal to all of Denison. Furthermore, KIKM's studio is located in Sherman and Hunt is primarily focused on this larger community for its service objectives. Thus, Hunt requested that the Commission staff delete the dual-city designation in the Table and allot Channel 269C1 to Sherman. Hunt noted that a separate rule making proceeding would not be required to make this change since there is no need for comments by other stations where no technical showings are involved and the change would reflect the current operation of this station.

6. The staff's MO&O held that the Paris channel change was necessary despite the absence of a short spacing from KIKM's proposed transmitter site. The staff determined that

a nonshort spaced reference point is required for the Class C1 allotment to be made. The application site could not be used as a reference point due to a short spacing to KLAW(FM), Lawton, Oklahoma. Thus, the staff decided that the reference point imposed in the R&O which requires a channel change for KBUS must remain in effect. The staff ordered the parties to negotiate in good faith for reimbursement.

### DISCUSSION

7. The Commission's policy with respect to when an ordered channel change is to be made is set forth in Churchville and Luray, VA, 5 FCC Rcd 1106 (1990), reconsideration denied 6 FCC Rcd 1313 (1991). Generally, the Commission does not require a station to change channels until the benefitting party is ready to offer its new or improved service. See also Albany, N.Y., et al. 2 FCC Rcd 4200 (1987) and Broken Arrow and Bixby, Oklahoma and Coffeerville, Kansas 4 FCC Rcd 6981 (1989). In some cases, the delay in changing channels has been as much as 10 years.

8. Here, should the Commission grant KIKM's pending application, there may never be a time which KBUS must change its channel so that KIKM can commence service consistent with the permit. Therefore, it is necessary for the Commission to clarify as to when it wants KBUS to change channels. Hunt recognizes that it will be responsible for the reasonable costs of the channel change and again commits to doing so.

9. In deciding whether and when KBUS should change channels, Hunt would like to bring to the Commission's attention that there is a pending rule making proceeding which will render the Paris channel change moot. In MM Docket 97-104, Hunt has requested the substitution of Channel 269C for Channel 269C1 for KIKM (then KDVE) and the change its

community of license from Denison-Sherman to Azle, Texas, as its first local service. Hunt also requested that Station KLAW, Lawton, OK be required to change channels from Channel 268C1 to Channel 269C1 at a new reference point and Station KLAW has consented to this change. Should the Commission grant this proposal which is unopposed and which is no longer in the conflict with any other proposal in that proceeding, it will not be necessary for KBUS to change channels. Hunt has specifically referenced this proceeding in its MM Docket No. 97-104 counterproposal.

10. In MM Docket No. 97-104, Hunt submitted a channel study for Channel 269C at Azle, Texas which demonstrates that Station KBUS could remain on its present channel (270C2) with a clearance of 29.6 km.<sup>1/</sup> Hunt suggests that an appropriate resolution to this proceeding is to await the outcome of MM Docket 97-104. In doing so, the channel changes at Paris and Madill will not be necessary and any issues concerning these stations can be eliminated.

11. As for the staff's refusal to consider eliminating the dual-city allotment for Denison-Sherman, Hunt's pending proposal in MM Docket 97-104 will also render this matter moot. Hunt requested and made the appropriate showings to support the reallocation of Channel 269C to Azle, Texas, as its first local service. Such a change will eliminate the current dual-city allotment. However, in the event the Commission decides to rule on this case prior to MM

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<sup>1/</sup> Since the KBUS channel change to Channel 282C2 has not become final, the Commission can order here that Channel 270C2 need not be changed at Paris after action is taken in MM Docket 97-104 without any further showings. In addition, it will no longer be necessary to change channels at Madill, OK should the Commission grant Hunt's proposal in MM Docket 97-104. That benefit was also mentioned in Hunt's counterproposal, both the Paris and Madill stations were served with the Hunt counterproposal.

Docket 97-104, Hunt believes that the Commission staff was incorrect in concluding that the request was outside the scope of this proceeding.

12. Section 553(b)(3) of the Administrative Procedure Act requires that the Notice include "the terms or substance of the proposed rule or a description of the subjects and issues involved". Owensboro on the Air v. United States, 262 F 2d 702 (D.C. Cir. 1958). Generally, the Commission considers all communities and classes of channels which are included in the rule making proceeding as of the deadline for comments. The Commission has held that new communities and higher classes of channels are beyond the scope of the proceeding. See, e.g., Ashland, Missouri et al., 8 FCC Rcd 1799 (1993), recons granted 9 FCC Rcd 2306 (1994).

13. Here, the communities of Denison and Sherman were already included within the scope of the notice. No further channel changes were involved in the elimination of the dual-city aspect of Hunt's request. Thus, the staff only needed to consider whether it was in the public interest to continue the dual-city allotment and license for this station. The staff refused to consider the merits of Hunt's request and failed to explain why it believed that the scope of this proceeding did not include changes for this station which affected no other stations or communities. The staff did not state whether it would entertain a new petition for this purpose. In fact, Hunt is unaware of any other instance where a petition was entertained for the purpose of eliminating a dual-city allotment with no other changes involved.

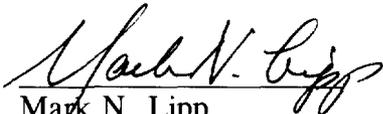
14. Hunt requests that the Commission explain why it was not proper to consider the dual-city change in this proceeding and how it would prefer to allow Commission consideration of such a change. Of course, should the staff grant Hunt's proposal in MM Docket 97-104 prior to issuing a ruling here, this Application for Review will be moot in all respects. Upon finality

of Hunt's proposal in MM Docket 97-104, Hunt would be willing to withdraw this Application for Review.

15. Accordingly, Hunt requests that the Commission rule on MM Docket No. 97-104 prior to review of the instant matter. If it is necessary to review this proceeding, the Commission should clarify whether and when station KBUS must change channels and consider the elimination of the dual-city allotment.

Respectfully submitted,

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August 18, 1997

**CERTIFICATE OF SERVICE**

I, Lisa Balzer, a secretary in the law firm of Ginsburg, Feldman & Bress, P.C., hereby certify that I have this 18th day of August, 1997, sent by first-class U.S. mail, postage-prepaid, copies of the foregoing "Application for Review" to the following:

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