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In re: MB Docket No. 02-167
RM-10479
RM-10770

Petition for Reconsideration and
Reinstatement

Dear Counsel:

The Commission has before it a timely Application for Review ("AFR") filed on February 23, 2007, by Bryan A. King ("King"),¹ licensee of FM Station KOTY ("KOTY"), Mason, Texas, seeking review of the January 12, 2007, decision ("*Reconsideration Decision*") of the Media Bureau ("Bureau").² In the *Reconsideration Decision*, the Bureau denied King's Petition for Reconsideration ("PFR") of an earlier Bureau action,³ which denied King's counterproposal ("Counterproposal")⁴ in this rulemaking and terminated the proceeding. As a result of changed circumstances and as explained more fully below, the Bureau, *sua sponte*, treats the AFR as a petition for reconsideration, grants reconsideration of the Bureau's decision and grants the Counterproposal.

Background. This proceeding was initiated in response to a petition for rulemaking by Katherine Pyeatt, who requested the allotment of Channel 241A at Eldorado, Texas. In the Counterproposal, King sought a change in the FM Table of Allotments⁵ to allow KOTY to operate on FM Channel 240C2 rather than 239C2, and to relocate Channel 240C2 from Mason, Texas, to Mertzon, Texas. In the *Staff Decision*, the Bureau granted Pyeatt's request to withdraw her proposal and statement of interest.⁶ The Bureau also denied the Counterproposal, finding that the proposed change of community

¹ King is the successor in interest of BK Radio, the licensee of KOTY at earlier stages of this proceeding.

² *Eldorado, Mason, Mertzon, and Fort Stockton, Texas*, Memorandum Opinion and Order, 22 FCC Rcd 280 (MB 2007). Public notice of the decision was published in the Federal Register on January 24, 2007, 72 Fed.Reg. 3080.

³ *Eldorado, Mason, Mertzon, and Fort Stockton, Texas*, Report and Order, 21 FCC Rcd 3572 (MB 2006) ("*Staff Decision*").

⁴ The Counterproposal was filed on August 26, 2002. See *Consumer & Governmental Affairs Bureau Reference Information Center Petitions for Rulemaking Filed*, Report No. 2624 (August 26, 2003).

⁵ See 47 C.F.R. § 73.202(b).

⁶ *Staff Decision*, 21 FCC Rcd at 3574.

of license would remove a second reception service from 7,372 persons.⁷ Citing the Commission's holding in *Refugio*,⁸ the Bureau held that "vacant allotments cannot be used to avoid loss of first or second reception service to a significant number of listeners."⁹ Accordingly, the Bureau found that adoption of the Counterproposal would not result in a preferred arrangement of allotments under the FM Allotment Priorities, and denied the Counterproposal.¹⁰

King petitioned for reconsideration, arguing that the Bureau was obliged to provide notice and comment before changing its processing procedures to exclude vacant allotments from service calculations. King also contended that applying the change to this pending proceeding constituted impermissible retroactive rulemaking. Finally, King provided new service calculations to reflect three new construction permits that would provide service to a portion of the purported gray area. The Bureau denied the PFR, finding that the *Staff Decision*'s application of *Refugio* was consistent with the policies articulated in the *Community of License* rulemaking, wherein the Commission stated that "a vacant allotment or an unbuilt construction permit is a 'poor substitute' and does not adequately cure the disruption in [existing] service [from a proposed reallocation]."¹¹ The Bureau explained that the *Staff Decision* merely applied a Commission change in processing policy, which did not require notice and comment. The Bureau also rejected King's retroactive rulemaking argument, noting that a filer does not have a vested right to continuation of processing policies in effect at the time of filing.¹² Finally, the Bureau expressed its continuing view that a potential first service to 124 persons would be *de minimis* and did not justify favorable action on the Counterproposal.

In his AFR, King contends that the *Staff Decision* and *Reconsideration Decision* demonstrate error in these respects: (1) the Bureau's actions violate the Administrative Procedure Act ("APA") by reversing settled precedent (*i.e.*, *Greenup*¹³) without notice and an opportunity for public comment, and by applying the changed processing policy for vacant allotments to pending proceedings; (2) the Bureau neither explains why it departed from the prior practice of including potential services in gain/loss calculations, nor specifies what potential services, if any, may be considered in the gain-loss analysis; (3) the *Reconsideration Decision* fails to address evidence of changed circumstances, as presented in the PFR; and (4) the Bureau erred in concluding that the provision of a first reception service to 124 persons was *de minimis*, and did not satisfy FM Allotment Priority 1. Upon review, King asks that we: (1)

⁷ *Staff Decision*, 21 FCC Rcd at 3574. A populated area with only one full-time aural reception service is known as a "gray area." See *Cheyenne, Wyoming, and Gerring, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7530 n.8 (MMB 2000).

⁸ *Application of Pacific Broadcasting of Missouri, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 2291 (2003) ("*Refugio*"), *recon. denied*, 19 FCC Rcd 10950 (2004) ("*Refugio Reconsideration*").

⁹ *Staff Decision*, 21 FCC Rcd at 3573.

¹⁰ *Staff Decision*, *supra*, applying *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 91(1982). The allotment priorities are: (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) ("FM Allotment Priorities").

¹¹ *Reconsideration Decision*, 22 FCC Rcd at 281, citing *Modification of FM and Television Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 (1990) ("*Community of License*").

¹² *Reconsideration Decision*, 22 FCC Rcd at 282, citing *Chadmore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997).

¹³ *Greenup, Kentucky and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493, 1494 (1991) ("*Greenup*").

provide clarification of the accepted methodology for calculating gain and loss, specifying what potential services may be reflected in those calculations; (2) find that the Bureau erred in excluding vacant allotments from calculations of gain and loss; and (3) approve the Counterproposal in the public interest.

Discussion. Upon review of the AFR and the entire record, we find that the Bureau did not violate the Administrative Procedure Act, nor err in excluding vacant allotments from calculations of gain and loss. As to the remaining components of the AFR, we grant King's request for clarification of the accepted methodology for calculating gain and loss and, based upon the results of a new engineering study reflecting correct methodology as well as changed circumstances, we approve the Counterproposal because it results in the public interest.

Administrative Procedure Act Issues. The Administrative Procedure Act describes procedures that an agency must follow before adoption of a new rule,¹⁴ but it is well-settled that agencies also may develop policies through adjudications and *ad hoc* actions.¹⁵ The practice of considering vacant allotments as potential services began with the Commission's decision in *Roanoke Rapids*,¹⁶ upon which *Greenup* elaborated.¹⁷ That processing policy was never specified in our rules; rather, "it was developed through case-by-case adjudications," and the Commission retains the authority to change the policy based in the context of individual applications and allotment proceedings.¹⁸ The Commission eliminated that policy in *Refugio*,¹⁹ a case involving removal of a first local service, and there is no reason to depart from *Refugio* here. This case and *Refugio* raise similar public interest issues. Here, listeners would lose an existing broadcast service to which they had become accustomed, with no guarantee in either case of prompt (or even eventual) replacement.

Clarification of Gain-Loss Calculations. In our *Rural Radio* proceeding, we amended our policies for evaluating mutually exclusive proposals for radio service and for considering applications to change a station's community of license.²⁰ We determined, however, that those new procedures and standards should not apply to, *inter alia*, FM allotment proceedings where the petition for rulemaking had been filed, and the rulemaking proceeding initiated, prior to the release date of the *Rural Radio* NPRM.²¹

¹⁴ See 5 U.S.C. § 553.

¹⁵ See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); see also *Chisholm v. FCC*, 538 F.2d 349, 364-66 (D.C.Cir. 1976), *cert. denied*, 429 U.S. 890 (1976).

¹⁶ *Roanoke Rapids, North Carolina*, Third Report and Order, 9 FCC2d 672 (1967) ("*Roanoke Rapids*"); See also *Greenup*, 6 FCC Rcd at 1493 (¶ 4), explaining the Commission's conclusions in *Roanoke Rapids*.

¹⁷ *Id.* at 1494 (¶ 11) ("[w]e reiterate the general principle implicit in *Roanoke Rapids*, that, in determining whether an FM allotment would provide first or second aural service, the Commission should normally assume that service will be provided on existing vacant allotments").

¹⁸ See *Refugio*, 19 FCC Rcd at 10956 (¶ 13), citing *Chisolm v. FCC*, 538 F.2d 349, 365 (D.C.Cir. 1976).

¹⁹ In *Refugio*, the Commission held that vacant allotments should no longer be treated as potential service, because "the ultimate licensing ... through our auction procedures is both an uncertain and time-consuming process." The Commission stressed the potential problems in relying upon "the construction and initiation of operations of two distinct facilities, including one for which the permittee will be selected at some unknown future time." *Refugio*, 18 FCC Rcd at 2296.

²⁰ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Order on Reconsideration, 27 FCC Rcd 12829 (¶ 1) (2012) ("*Rural Radio*, Second Order on Reconsideration"). We will refer generally to the proceeding as "*Rural Radio*."

²¹ *Id.* at 12842 (¶ 21).

This FM allotment proceeding was pending before the *Rural Radio* NPRM was released on April 20, 2009,²² so we will evaluate the *Reconsideration Decision* pursuant to pre-*Rural Radio* procedures and policies. Our analysis and conclusions in this proceeding will not apply to new filings, which are subject to the procedures and standards prescribed in *Rural Radio*.²³

We agree with King that the *Reconsideration Decision* is unclear about what potential services may be included in gain-loss analysis. The *Reconsideration Decision* correctly applies *Refugio* in determining that vacant allotments should not be counted as potential services, but it does not explain the appropriate treatment of unbuilt construction permits, an issue raised in King's PFR.²⁴ We, therefore, grant reconsideration to clarify the former processing policies that apply in this proceeding. In accordance with *Refugio*, we find that the correct processing policy here should exclude vacant allotments from gain-loss calculations, but unbuilt construction permits should be included, because they are not subject to the same delays and uncertainties as vacant allotments.²⁵ Based on this finding, the staff performed a new gain-loss analysis which includes construction permits. A new study also is warranted because the *Reconsideration Decision* does not discuss the evidence of changed circumstances presented by King,²⁶ and because significant changes in services and facilities have occurred in this area since the Counterproposal was filed in 2002.

Section 307(b) Analysis. The new staff engineering study assumes the use of maximum facilities and uniform terrain, following the pre-*Rural Radio* methodology.²⁷ The updated engineering analysis shows that no first reception service would be provided or eliminated, and that the proposed move would create a gray area of 150 persons in an area of 81 square kilometers. In addition, 3,570 persons would be left with two services, 1,253 persons would be left with three services, and 3,056 persons would be reduced from five to four services. At Mertzon, the new community, all of the populated areas within KOTY's proposed new 60 dBu signal contour are already well-served with at least five reception services. Finally, the proposed change of community will produce a net increase of 95,887 persons in the number of persons within KOTY's 60 dBu signal contour.

In determining whether a proposed change of community of license would serve the public interest, we employ the FM Allotment Priorities to compare the proposed allotment plan to the existing state of allotments for the communities involved.²⁸ Our updated engineering study shows that no populated area will gain or lose a first reception service; therefore, Priority (1) is inapplicable, and King's

²² *Rural Radio*, Notice of Proposed Rulemaking, 24 FCC Rcd 5239 (2009) ("*Rural Radio* NPRM").

²³ See *Rural Radio*, Second Order on Reconsideration, 27 FCC Rcd at 12838-39 (¶ 17).

²⁴ See PFR at 4 and Technical Statement. The *Reconsideration Decision* summarizes King's argument and evidence regarding changed circumstances, 22 FCC Rcd at 281 (¶ 4), but does not address them on the merits.

²⁵ A construction permit identifies specific facilities and establishes a deadline for initiation of service, whereas the licensing of vacant allotments is remote and contingent. *Refugio Reconsideration*, 19 FCC Rcd at 10956 (¶ 14).

²⁶ The *Reconsideration Decision* does not evaluate King's evidence of changed conditions, but merely provides, in conclusory fashion, the staff's projection of the "gray area" population, if outstanding construction permits were included in the gain-loss analysis. *Reconsideration Decision*, 22 FCC Rcd at 282 n12.

²⁷ See *Rural Radio* Second Order on Reconsideration, 27 FCC Rcd at 12836-12838 (¶¶ 14-15) (requiring use of specified effective radiated power, specified transmitter coordinates, and actual terrain, and distinguishing from prior practice), citing *Greenup*, 6 FCC Rcd at 1494.

²⁸ See *Modification of FM and TV Authorizations to Specify a New Community of License*, Memorandum Opinion and Order, 4 FCC Rcd 4870, 4873 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990) ("*Change of Community*")

request for review of the Bureau's findings on that point is moot.²⁹ Next, applying pre-*Rural Radio* standards, we find that the population of 150 persons in the gray loss area is *de minimis* in comparison with a net increase of nearly 100,000 persons in the gain area,³⁰ thus, this small gray area population does not trigger Priority (2), second reception service. Because Priorities (1), (2), and (3) (first local service) are inapplicable, our Section 307(b) analysis will proceed under Priority (4), "other public interest matters."

Prior to *Rural Radio*, our Priority (4) analyses first considered raw population differences before taking other factors into account.³¹ In cases such as this, where the raw population difference is very large, the Commission previously held that other public interest factors generally did not outweigh the benefit of providing an additional reception service to the greater number of people.³² Under our pre-*Rural Radio* policies, the large net population gain favors the proposed relocation at Mertzon, which will enable Station KOTY(FM) to provide an additional reception service to 95,887 more persons than at the station's existing community of license. That significant public benefit is not outweighed by the removal of a reception service from 8,029 underserved listeners. We, therefore, find that it will serve the public interest to substitute FM Channel 240C2 for 239C2, to re-allot Channel 240C2 from Mason, Texas, to Mertzon, Texas, and to modify the Station KOTY license to specify operation on FM Channel 240C2 at Mertzon, Texas. This change of community of license will provide a potential fourth local service at Mertzon,³³ while Mason will continue to receive local service from Stations KZZM (Channel 269C3) and KHLB (Channel 273C2).

Conclusion/Actions. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 405 of the Communications Act of 1934, as amended,³⁴ and Section 1.106 of the Commission's rules,³⁵ that the Application for Review, treated as a petition for reconsideration, filed by Bryan A. King IS GRANTED, as indicated herein and IS DENIED in all other respects.

IT IS FURTHER ORDERED, that the Counterproposal filed by Bryan A. King is GRANTED.

IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KOTY(FM), Channel 239C2, Mason, Texas, IS MODIFIED to specify operation on Channel 240C2 at Mertzon, Texas, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file a

²⁹ King sought review of the Bureau's finding that the provision of a first reception service to 124 persons in the gain area was *de minimis*.

³⁰ See *Seabrook, Huntsville, Bryan, Victoria, Kenedy, and George, West, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 9360, 9361-62 (1992) (¶¶ 6 and 8, finding that a second aural service to 455 persons is *de minimis* and not entitled to a preference under Priority (2) ("*Seabrook*").

³¹ *Id.*, 10 FCC Rcd at 9362 (¶ 10). See also *Greenup*, 6 FCC Rcd at 6 FCC Rcd at 1495 (¶ 15).

³² See *Seabrook*, 10 FCC Rcd at 9362 (¶10). (finding that an additional reception service for an underserved population of 38,179 did not outweigh the overall population differential of 144,628 persons). See also *Jeffrey B. Bate and Jeffrey Eustis*, Memorandum Opinion and Order, 24 FCC Rcd 5844 (2009).

³³ FM Station KMEO (Channel 220C3) is licensed at Mertzon; a construction permit was issued for FM Channel 278C2 (Facility ID 191504, Application No. BNPH-20130724AFZ, granted Sept. 25, 2013); and an application for a construction permit for FM Channel 266C2 is pending (BNPH-20151013AIA).

³⁴ 47 U.S.C. § 405.

³⁵ 47 C.F.R. § 1.106.

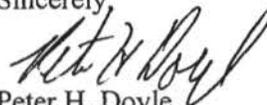
minor change application for construction permit (FCC Form 301) specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's rules;

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's rules, unless the proposed facilities are categorically excluded from environmental processing.

IT IS FURTHER ORDERED, That this proceeding is terminated.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau