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

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In the Matter of	)	
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Amendment of Section 73.202(b),	)	MM Docket No. 95-135
Table of Allotments	)	RM-8681
FM Broadcast Stations	)	
(Bear Lake and Honor,	)	
Michigan)	)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 26, 1999 **Released: May 6, 1999**

By the Commission:

1. The Commission has before it an Application for Review filed by Roger L. Hoppe, II ("Hoppe"), directed to a Memorandum Opinion and Order in this proceeding, 12 FCC Rcd 4933 (Policy and Rules Div. 1997). For the reasons discussed below, we deny the Application for Review.

Background

2. At the request of Jacqueline F. Bourgard, the Notice of Proposed Rule Making[1] in this proceeding proposed the allotment of Channel 264A to Honor, Michigan, as a first local service. Prior to the date comments were due in this proceeding, Hoppe, licensee of Station WZTU(FM), Channel 261A, Bear Lake, Michigan, filed a one-step application proposing an upgrade to Channel 264C2. The Station WZTU(FM) application was entitled to comparative consideration as a timely filed counterproposal because the Channel 264C2 proposal at Bear Lake and the Channel 264A proposal at Honor conflict under the Commission's minimum distance separation requirements and are, therefore, mutually exclusive.[2] See Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments ("Conflicts"), 7 FCC Rcd 4917 (1992), recon. granted in part and denied in part, 8 FCC Rcd 4743 (1993). However, the Hoppe one-step application was given an incorrect file number, indicating that the application was not filed by the comment date. For this reason, the Station WZTU application was not considered as a timely-filed counterproposal, and Channel 264A was allotted to Honor by the Report and Order.[3]

3. Nevertheless, the Report and Order recognized that if the application were a timely-filed counterproposal, the new allotment at Honor would have been preferred on a comparative basis because it triggered a higher allotment priority under the guidelines set forth in Revision of FM Assignment Policies

[1] 10 FCC Rcd 9288 (1995).

[2] Section 1.420(d) of the Rules requires that counterproposals be filed by the initial comment date.

[3] 11 FCC Rcd 5301 (1996).

and Procedures, 90 FCC 2d 88 (1982).[4] Specifically, the allotment at Honor constituted a first local service under priority (3), while the upgrade at Bear Lake falls under priority (4) (i.e., "other public interest matters"). Finally, although Hoppe had alleged that there was no useable or suitable transmitter site for Channel 264A at Honor, Michigan, due to the proximity of an airport and the location of the reference coordinates in a state forest, the Report and Order rejected this argument, noting that he had not provided evidence of environmental or air hazard problems.

4. Hoppe filed a Petition for Reconsideration directed to that Report and Order, arguing that his one-step application was, in fact, timely filed by the comment date and entitled to comparative consideration. He also contended that the Report and Order had ignored his argument that there is no useable site for Channel 264A at Honor.

5. The staff Memorandum Opinion and Order conceded that Hoppe's one-step application was filed by the comment deadline and, therefore, should have been accepted as a counterproposal in this proceeding. However, the Memorandum Opinion and Order agreed with the Report and Order's analysis that the proposed allotment at Honor should be preferred over Hoppe's application because the Honor allotment constituted a first local service under priority (3), while the upgrade application at Bear Lake fell under priority (4). Moreover, Hoppe had not demonstrated that expanded service at Bear Lake would better serve the public interest than a first local service at Honor. Lastly, the Memorandum Opinion and Order rejected the allegation that there is no useable site for the Channel 264A allotment at Honor, observing that two applications for that channel had been accepted for filing and had received FAA clearance.

Application for Review

6. In his Application for Review of the Memorandum Opinion and Order, Hoppe argues that the Commission should re-examine its priorities regarding the allotment of FM channels because "[m]uch has happened since 1982" and "stations such as WZTU are precluded from improving their facilities and increasing coverage in homage to proposals to provide a 'first local service' to population groupings of fewer than 300 people." Hoppe claims that the Commission should make a "reasoned analysis" of this case under Section 307(b) of the Communications Act and grant Hoppe's one-step upgrade application. He asserts that Honor, Michigan, is merely a "population grouping of some 292 people" and is less deserving of having its own channel than Station WZTU is of upgrading its signal. In support of his Application for Review, Hoppe reiterates his claim made at the comment stage that his proposed upgrade would result in a more efficient use of the broadcast spectrum, because it could provide service to 77,915 more people than Station WZTU now serves, while the Honor proposal could serve only 25,255 persons. Hoppe also claims that the Memorandum Opinion and Order erred in finding that there are suitable transmitter sites for the Honor allotment.[5] Hoppe argues that even though two applicants for the Honor channel had certified that they had available transmitter sites, the fact that an applicant may have permission of a landowner to erect

[4] The FM priorities are as follows: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3).]

[5] On April 24, 1998, the Commission approved a settlement agreement which provides for the dismissal of Jay Keuning's application for Channel 264A at Honor (File No. BPH-960722MC), the substitution of Northern Radio of Michigan, Inc. (Northern) for Xavier University (Xavier) as the applicant in Xavier's application for the Channel 264A facilities at Honor, and the grant of Northern's application (File No. BPH-960719MA). Xavier University and Northern have filed a "Request for Expedited Action" in which they ask for expedited action on Hoppe's pending Application for Review. In light of our action herein denying Hoppe's Application for Review, the "Request for Expedited Action" has been rendered moot.

a tower does not guarantee that the site is useable. He also argues that it appears that Bourgard, who filed the petition to allot Channel 264A to Honor, Michigan, did not restate her intention to apply for the channel in her comments.

Discussion

7. After carefully considering the record in this proceeding, we deny Hoppe's Application for Review. As a threshold matter, it is not clear whether Hoppe is questioning Honor's status as a community for allotment purposes under Section 307(b) of the Communications Act of 1934, as amended. Since the establishment of community status is a prerequisite to the allotment of an FM channel, we will briefly address this issue. We agree with the Report and Order's finding that although the population of Honor is small (292 people), it is a "community" for allotment purposes. Honor is an incorporated community, is listed in the 1990 U.S. Census, and has several indicia of a community, including local businesses, a library, civic organizations and a church.[6] See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcasting Assignments (Semora, North Carolina), 5 FCC Rcd 934 (1990) (small rural community not listed in the U.S. Census, having an estimated population of 150, found to be a "community").

8. Having made this determination, we conclude that the Memorandum Opinion and Order properly follows our existing policies and precedents in preferring the allotment of Channel 264A to Honor, Michigan, as a first local transmission service over Hoppe's proposal to upgrade the operation of Station WZTU at Bear Lake, Michigan. The allotment at Honor constitutes a first local service which, under our precedent, is entitled to higher priority than upgrading an existing facility.[7] Basically, the Application for Review contends that we should reconsider our policies in light of current conditions in the radio industry because they are preventing existing stations such as Station WZTU from making upgrades to their facilities. We will not do so for several reasons.

9. First, after lengthy rulemaking proceedings, the Commission has previously determined that, in implementing the requirement of Section 307(b) of the Communications Act "to provide a fair, efficient, and equitable distribution of radio service" among the States, a first local transmission service is more important than other public interest matters, such as a second local service or an upgrade of existing service. See Revision of FM Assignment Policies and Procedures, supra. The reason for this is that a first local transmission service represents a new primary service to a community, whereas an upgrade, for example, would provide enhanced secondary service to people living beyond the community of license of the station being upgraded. Hoppe has not pointed to any specific reason or particular change that has occurred in the radio industry since 1982 that would cause us to reexamine the question of whether the provision of first local service in this case should outweigh Hoppe's desire to upgrade his station. Likewise, Hoppe has not demonstrated that we should otherwise revise the allotment priorities set forth in Revision of FM Assignment Policies and Procedures as the best means of implementing Section 307(b) of the Act.

10. Second, the facts of this case do not indicate that we should favor the upgrade of Station WZTU(FM) at Bear Lake. Although our engineering analysis reveals that the Station WZTU upgrade would provide a gain in service to 85,893 persons, these people are already considered to be well-served under our precedents because they receive five or more full-time aural services. See, e.g. Family

[6] See paragraph 2 of the Report and Order.

[7] See Revision of FM Assignment Policies and Procedures, 90 FCC 2d at 92.

Broadcasting Group, 53 RR 2d 662, 669 (Rev. Bd. 1983), rev. denied, FCC 83-559 (November 29, 1983). Specifically, our engineering study determined that, with the exception of a small area of 13.8 sq. miles containing 106 persons, all people in the gain area currently receive seven or more aural services, and with the grant of the Bear Lake proposal would receive eight or more aural services. Moreover, those 106 persons already receive six aural services, and would receive a seventh service by grant of the Bear Lake proposal. While we do recognize that the community of Honor and the service area for the Honor allotment also receive more than five full-time reception services, the Commission has consistently held that the presence of reception services is not an adequate substitute for a first local transmission service. See Saranac Lake, New York, 6 FCC Rcd 5121, 5122 (Allocations Br. 1991), and cases cited therein. Moreover, even if the Honor proposal was not considered as a first local service, but instead was considered as a new allotment, our policy generally has been to favor a new allotment because it constitutes a new primary service. See, e.g., Queensbury, New York, 5 FCC Rcd 3243 (1990) and Benton, Arkansas, 3 FCC Rcd 4840 (Policy and Rules Div. 1988), recon. denied, 7 FCC Rcd 2555 (Policy and Rules Div. 1992).

11. Third, our priorities for allotting FM channels do not preclude stations such as Hoppe's Station WZTU from upgrading their facilities. We observe that if Hoppe had filed his one-step upgrade application one day before the rulemaking petition was filed in this proceeding, and if no competing application were filed on that day, his application could have been granted without affording comparative consideration to any other application or to the rulemaking petition filed in this proceeding. See Section 73.203(b) of our Rules and Conflicts. Our records indicate that Hoppe obtained ownership of Station WZTU in April 1994, while the petition for rulemaking in this proceeding was filed in August 1995. Thus, Hoppe had more than fifteen months to file an upgrade application before the rulemaking petition was filed in this proceeding.

12. As an additional matter, Hoppe has not met his burden to show that there are no useable or suitable transmitter sites for the Honor allotment. See, e.g., Randolph and Brandon, Vermont, 6 FCC Rcd 1760 (Allocations Br. 1991). Our engineering analysis reveals that there is an area of 224 sq. kilometers (86.5 sq. miles) in which a transmitter for the Honor allotment can be located that would comply with the Commission's minimum distance separation requirements and city-grade coverage rule. Within this area, there are possible transmitter sites that are not within a state forest. Further, we note that, pursuant to a settlement agreement discussed in footnote 5, supra, a construction permit for this allotment has been granted and that the transmitter site is not located in a state forest.

13. Lastly, Hoppe's claim that Ms. Bourgard did not file any comments expressing her intention to apply for Channel 264 if it were allotted to Honor, is a matter that cannot be considered at this time. See Section 1.115(c) of the Commission's Rules. That rule section states that no application for review will be granted if it relies on questions of fact or law upon which the designated authority has been given no opportunity to pass. Hoppe did not present this matter to the Mass Media Bureau, which is the designated authority in this case, prior to the issuance of the Report and Order or prior to the issuance of the Memorandum Opinion and Order that dealt with Hoppe's Petition for Reconsideration of that Report and Order. In light of these facts, it is too late for Hoppe to raise this matter with us.

14. In view of the above, IT IS ORDERED That the Application for Review filed by Roger L. Hoppe, II IS DENIED.

15. IT IS FURTHER ORDERED That the Request for Expedited Action filed by Xavier University and Northern Radio of Michigan, Inc. IS DISMISSED as moot.

16. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary