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

In the Matter of

Amendment of Section 73.606(b)	)	MM Docket No. 92-81
Table of Allotments	)	RM-7875
Television Broadcast Stations	)	
(Farmington and Gallup, New Mexico)	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 1999 **Released: November 5, 1999**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a Petition for Reconsideration ("petition") filed by KOB-TV, Inc. ("KOB"), licensee of TV Station KOBF-TV, Channel 12, Farmington, New Mexico, of the Report and Order ("R&O") 11 FCC Rcd 2357 (1996), in this proceeding.[1] Opposition to petition for reconsideration was filed by Pulitzer Broadcasting Company, permittee of Station KOFT-TV (formerly KOAV-TV), Channel 3, Gallup, New Mexico. KOB filed reply comments.

2. Background. The R&O reallotted Channel 3 from Gallup to Farmington and modified the construction permit for Station KOAV-TV to specify Farmington as its community of license. Although opponents argued that the removal of Channel 3 from Gallup would result in the creation of a "white area" which would encompass approximately 62,000 people, we found that in this case this fact was not sufficient to warrant the denial of the allotment since Station KOAV-TV was unbuilt and thus not operational. Consequently, there was no present service which the residents of Gallup and surrounding areas could come to rely on. We also found that the potential loss of service was mitigated by the availability of Channel 10 at Gallup which could be applied for by KOB or any other interested party.

3. We also found that KOB's expressed intent to apply for and operate a station on Channel 3, likewise was insufficient to warrant the denial of petitioner's proposal because the channel technically was unavailable for application by other parties since petitioner remained a valid permittee until the permit was either voluntarily relinquished by the petitioner or cancelled by the Commission. Finally, we refused to allot one of the available UHF channels because, 1) it would involve a non-adjacent channel, 2) no party had stated its intention to apply and operate a station on the channel and 3) there

[1]Public Notice of the petition for reconsideration was given on May 22, 1996, Report No. 2133.

was no sufficiently compelling public interest benefit.[2]

4. Petition for Reconsideration. KOB generally alleges that the R&O in this proceeding contains errors of fact and law, is arbitrary and capricious, and is inconsistent with Commission precedent because the Bureau failed to consider the circumstances concerning why Station KOAV-TV has not been constructed. KOB argues that Pulitzer's repeated violations of Section 73.3534(b) and abuse of the Commission's processes warrant the revocation and cancellation of Pulitzer's construction permit for Station KOAV-TV. KOB further contends that the grant of the extension applications allows KOAV-TV to assert that the reallotment of Channel 3 from Gallup to Farmington will not result in the removal of an existing service as set forth in Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990). As a result, KOB maintains that Pulitzer abused the Commission's processes by receiving extensions of time to construct in order to fall outside the definition of "existing service".[3] In addition, KOB asserts that Pulitzer's less than candid statements in the extension applications permitted Pulitzer to hide its true intent behind requesting Channel 3 and subsequently seeking reallotment of the channel. KOB further asserts that Pulitzer effectively gained a channel in Farmington without risking competing applications because it never intended to operate in Gallup.

5. Opposition. Pulitzer argues that KOB's extensions of time allegation is an untimely collateral attack and no violation of Section 73.3534(b) occurred. Pulitzer contends that KOB had the opportunity to challenge each of the extensions on numerous occasions and it failed to do so. Pulitzer states that the Commission recently expressly rejected KOB's claim that a permittee is obligated to construct its station notwithstanding the pendency of a rulemaking proceeding that relates to the status of the station in question citing Contemporary Media Inc., 10 FCC Rcd 13685 (1995). Pulitzer further argues that KOB's abuse of process allegation must be rejected because Pulitzer possessed a bona fide intention to construct Station KOAV-TV in Gallup at the time it filed its original application (Gallup application) and KOB failed to raise this issue in the earlier proceedings. Finally, Pulitzer contends that KOB's claim is procedurally barred because KOB possessed all of the material facts supporting its argument that Pulitzer filed the Gallup application under false pretenses when it filed its comments and reply comments in this proceeding and it never raised this factual issue. Under the Commission's Rules, Pulitzer argues that KOB may not do so now, citing Section 1.106(c) of the Commission's Rules.

6. In reply comments, KOB avers that its abuse of process allegation is not procedurally barred because the submission of its reply comments in the rule making proceeding occurred before filing of all but the first extension application. Thus the statements at issue in extension seven, which KOB

[2]We also noted that if Station KOAV-TV were an operating station a Gallup, we would be less inclined to reallot Channel 3 to Farmington as it would involve the removal of a community's sole local operating station and the necessary public interest justification is infinitely greater.

[3]Although KOB alleges the grants of the extension applications violated Commission Rules, KOB only challenges the finding that Station KOAV-TV is not an "existing service" and not the grants of the extension applications per se.

asserts prove its abuse of process allegation, were not made until after the close of the pleading cycle in the rule making proceeding.

7. Discussion. After careful consideration of the pleadings filed in this proceeding, we find that KOB's petition for reconsideration should be denied pursuant to Section 1.429 of the Commission's Rules. Section 1.429 permits grant of a reconsideration based on facts not previously presented to the Commission under certain conditions.[4] As a threshold matter, we agree with Pultizer that the alleged violation of the extensions of time to construct under Section 73.3534(b) are untimely collateral attacks upon the reallotment of Channel 3 and the modification of the community of license in Pulitzer's construction permit. Although Section 405 of the Communications Act, as amended, confers a statutory right to petition for reconsideration of a Commission action, the petitioner must file its petition within 30 days from the date upon which public notice is given of the action complained of. Although Pulitzer filed numerous extension applications, KOB never objected to the applications. Accordingly, because the thirty day filing requirement is statutory, KOB is without recourse to complain of the extensions at this late date. Consequently, KOB's extension of time arguement shall be denied pursuant to Section 405 of the Communications Act.

8. Furthermore, on the questions raised concerning the allotment of Channel 3 to Gallup and Pulitzer's alleged abuse of the Commission's processes, we believe these arguments are untimely or irrelevant as they relate to this proceeding. We agree with Pulitzer that KOB's claims with regards to the original allotment of Channel 3 are untimely and cannot be raised at this stage of the proceeding. To the extent that KOB possessed material facts to support its claim that Pulitzer filed the Gallup application under false pretenses, it appears KOB never raised these issues in any comments or reply comments in the proceeding. Consequently, we find that this so-called new information that KOB has submitted as the basis of its reconsideration request is not new and does not fall in any of the categories under Section 1.429, which would require us to reconsider the allotment of Channel 3 in this proceeding. Finally, in light of the untimely nature of KOB's arguments pertaining to the allotment of Channel 3 to Gallup, we cannot find that any abuse of the Commission's processes occurred in Pulitzer's request to reallot Channel 3 from Gallup to Farmington.

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by KOB-TV 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

[4]Section 1.429 of the Commission's Rules provides that a petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances: (1) the facts relied on relate to events which have changed since the last opportunity to present them to the Commission; (2) the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on is required in the public interest.

Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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