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

2001 JAN 29 A 11: 53

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
FM Table of Allotments,	)	
FM Broadcast Stations.	)	
(Banks, Redmond, Sunriver and Corvallis	)	MM Docket No. 96-7
Oregon)	)	RM-8732
	)	RM-8845
In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 96-12
FM Table of Allotments,	)	RM-8741
FM Broadcast Stations.	)	
(The Dalles and Corvallis, Oregon)	)	
	)	
In re Application of	)	
	)	
Madgekal Broadcasting, Inc.	)	File No. BPH-960206IE
Station KFLY(FM), Corvallis, Oregon	)	
	)	
For Construction Permit to Modify Licensed	)	
Facilities (One-Step Upgrade)	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 2001 **Released: January 26, 2001**

By the Chief, Allocations Branch:

1. The Allocations Branch has before it a petition for reconsideration of its *Report and Order*[1] filed by Madgekal Broadcasting, Inc. ("MBI"), licensee of Station KFLY (FM), Corvallis, Oregon.[2] CBS Radio License, Inc. ("CBS), licensee of Station KBBT-FM (now KVMX), Banks, Oregon,[3] filed a response which supports in part but generally opposes the petition for reconsideration. LifeTalk Broadcasting Association ("LifeTalk") filed an opposition to the petition for reconsideration. MBI replied

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1 13 FCC Rcd 6596 (1998).

2 Commission records show that the current licensee of Station KFLY(FM) is Jacor Licensee of Louisville, Inc. (*See* File No. BAL-19990622GH, granted on January 4, 2000).

3 According to its pleading, CBS superseded American Radio Systems, Inc. ("ARS") as licensee of Station KBBT pursuant to a transfer of control effective on June 4, 1998 (*see* File No. BTCH-19971024HS, granted on May 27, 1998), and our records show that the station was again transferred to Viacom as Infinity Radio Licensee (*see* File No. BTCH-19991116AFN, granted on May 3, 2000). However, for purposes of this proceeding, we will continue to refer to the licensee as ARS.

to CBS's opposition, CBS responded and supplemented its response. Except for the matters addressed below, the Petition for Reconsideration is repetitive with respect to matters already considered in the *Report and Order*. We will not again consider or debate these matters. For the reasons set forth below, the new matters raised by MBI do not warrant revisiting our decision in this proceeding. We deny the Petition for Reconsideration.

2. In the *Report and Order*, the staff granted the following proposals: the upgrade of Station KDBX (FM), Banks, Oregon, from Channel 298C2 to Channel 298C1, filed by Common Ground Broadcasting, superseded by ARS; to accommodate ARS's proposal, Channel 269C2 was substituted for Channel 298C2 at Redmond, Oregon; the allotment of Channel *268C3 at The Dalles filed by LifeTalk Broadcasting Association; and the allotment of Channel 224C2 at Sunriver, Oregon, filed by Hurricane Broadcasting, Inc. In doing so, the staff denied a settlement agreement between ARS and MBI in which MBI would accept an upgrade for Station KFLY(FM), Corvallis, Oregon, from Channel 268C2 to Channel 268C1 for a payment of $950,000. The staff also denied MBI's competing proposal filed as a one-step upgrade application upgrading Station KFLY to Channel 268C at Corvallis. That decision was based on two grounds. First, the settlement could not withstand scrutiny pursuant to Section 1.420(j) of the Rules because the settlement amount specifies monies in excess of the legitimate and prudent expenses incurred by MBI in preparing and prosecuting its application. Second, the public interest was better served by the allotment to The Dalles, as the community's first local noncommercial educational service, as well as a new primary service than allotting Channel 268C in lieu of Channel 268C2 at Corvallis, which only expanded service by an existing voice. In addition, the allotment at The Dalles was compatible with the upgrade at Banks.[4]

3. We deny reconsideration of the settlement. As it did in its comments, MBI again argues that the settlement should be approved pursuant to Section 309(l) of the Communications Act of 1934, as amended.[5] We disagree. Contrary to MBI's argument, the *Report and Order* correctly held it could not approve the settlement agreement filed in this matter under Section 1.420(j) of our rules, and that Section 309(l) did not apply. Specifically, the R&O stated that:

> The Budget Reconciliation Act of 1997 [Sec. 309(l)] . . . clearly concerns only the resolution of pending comparative licensing cases. This proceeding concerns mutually exclusive requests for the allotment of FM channels to various communities. Only after this proceeding is concluded would the allotments be subject of comparative applications for construction permits and/or licenses. Therefore, we find that the Congressional directive allowing waiver of the Commission's Rules to allow parties to enter into agreements which include unrestricted financial payments to resolve conflicts between mutually exclusive applicants is limited solely to those situations involving applications for construction permit, not petitions to allot channels.[6]

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4 *See* 13 FCC Rcd at 6604-5.

5 This Section of the Act was discussed and considered in the *Report and Order* as the Budget Reconciliation Act of 1997.

6 *See* 13 FCC Rcd at 6603.

We continue to believe that the ruling in the *Report and Order* on this issue is consistent with both the explicit wording and legislative history of this section. Congress was providing a settlement window for a certain class of cases – that is, mutually exclusive hearing cases involving applications for FM stations that were on file as of a certain date. The petitioner has not pointed to any language in the statute or any aspect of the legislative history that would include a proceeding such as the instant one involving mutually exclusive FM rulemaking allotment proposals. Indeed, the Conference Report describing Section 309(l) states that "[t]he Commission shall also waive its rules to permit competing applicants to procure the removal of conflict between their applications during the 180 days following enactment of this title."[7] Therefore, our review of the statue and its legislative history does not indicate that Congress intended this settlement window to apply to mutually exclusive situations involving an application and a rulemaking proposal.

4. MBI argues that ARS's petition for rulemaking to upgrade Station KBBT at Banks, Oregon, should have been considered an application for purposes of Section 309(l). Again, we disagree. Under no circumstances would we have considered ARS's petition for rule making as an application. Furthermore, neither MBI's application, nor ARS's petition, is considered an "application for initial license or construction permit" within the meaning of Section 309(l), which MBI alleges has been interpreted by the Commission to include modifications of existing facilities. While we acknowledge that the Commission has held that Section 309(l) applies to major modification applications, it has specifically excluded minor modification applications, such as one-step upgrade applications, from this definition.[8] CBS repeats its earlier arguments in favor of the settlement.

5. With respect to the comparative proceeding, we also deny reconsideration. MBI makes five arguments challenging the allotment at The Dalles and the comparative analysis between the upgrades at Banks and Corvallis. These are: (1) a reserved band frequency is available for use at The Dalles; (2) a fully spaced station operating on Channel 268C3 will not be able to place a city-grade signal over The Dalles; (3) a non-conflicting allotment, Channel 256C3, is available at The Dalles; (4) Section 73.208(a)(3)(iii) of the Rules should have precluded consideration of Channel 268C3 at The Dalles; and (5) LifeTalk's failure to state affirmatively that it would build the requisite tall tower rendered its expression of interest defective.

6. Argument (5) was made and addressed in the *Report and Order* and we will not address it further. Arguments (1) through (4) rely on new facts not previously presented to the Commission. Pursuant to Section 1.429(b) of our rules, a party relying on new facts must show that these facts (1) relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) were unknown to it until after its last opportunity to present them to the Commission, and it could not, through the exercise of ordinary diligence, have learned of the facts in question until after the last opportunity; or (3) the consideration of these facts would serve the public interest.

7. The facts in question are adduced in the "McClanathan Report" MBI proffers which alleges that alternate reserved-band channels are available for use at The Dalles; that a fully spaced station operating on Channel 268C3 at the site allotted will not be able to place a city-grade signal over The Dalles; and that Channel 256C3 is available for allotment at The Dalles. All of the issues to which these

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7 143 Congressional Record H 6173 (July 29, 1997).

8 *See Report and Order* in MM Docket 97-234 (1998); 47 CFR §73.3573(a)(1).

facts apply were in play prior to the issuance of the *Report and Order* in this case.[9] Since MBI has failed to make any showing that these facts are due to changed circumstances, or were unknown or could not be discovered through the use of ordinary diligence prior to issuance of the *Report and Order*, or that their consideration would serve the public interest, under Section 1.429(b), we will not consider them.

8. It is well settled that the Commission will not consider new facts on reconsideration unless they fulfill one of the three prongs of Section 1.429(b).[10] In this regard, we also believe that it would not be in the public interest to allow a party to sit back and hope that a decision will be in its favor, and when not, to parry with additional submissions. No Commission process could operate efficiently or expeditiously if such a procedure were allowed.[11]

9. ACCORDINGLY, the Petition for Reconsideration filed by Madgekal Broadcasting, Inc., IS DENIED.

10. IT IS FURTHER ORDERED That the *Report and Order* in this matter IS AFFIRMED.

11. IT IS FURTHER ORDERED THAT This proceeding IS TERMINATED.

12. For further information on this proceeding contact Victoria M. McCauley, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[9] The use of reserved band spectrum, Channels 256C3, 268C3 at the Dalles and the site for Channel 268C3 at The Dalles were raised in the *Notice of Proposed Rule Making* in this proceeding, *see* 11 FCC Rcd 1788 (1996).

[10] *See Memorandum Opinion and Order* in MM Docket 91-306 (Safford, AZ) 8 FCC Rcd 4498 (1993); *Memorandum Opinion and Order* in MM Docket 86-289 (Santa Margarita and Guadalupe, CA) 4 FCC Rcd 7887 (1989); *see also Memorandum Opinion and Order* in MM Docket 94-70 (Moncks Corner, Kiawah Island, and Sampit, SC) 15 FCC Rcd 8973 (2000); Memorandum *Opinion and Order* in MM Docket 90-189 (Farmington, Grass Valley, Jackson, Lindon, Placerville and Fair Oaks, CA, and Carson City and Sun Valley, NV) 14 FCC Rcd 18971 (1999).

[11] *See Colorado Radio v. FCC*, 118 F.2d 24 (D.C. Cir. 1941).