

Before the
Federal Communications Commission RECEIVED
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SEP 27 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments,)
FM Broadcast Stations)
(Alva, Mooreland, Tishomingo, Tuttle,)
and Woodward, Oklahoma))

MM Docket No. 98-155
RM-9082
RM-9133

To: The Commission

OPPOSITION TO
APPLICATION FOR REVIEW

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September 27, 2002

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Table of Contents

	Page
Summary.....	i
Background.....	2
Chisholm Trail’s Latest Pleading Is Just a Rehash of Old Unpersuasive Arguments.....	3
Tyler’s Qualifications Are Not Properly the Subject of Resolution in an Allotment Proceeding.....	5
The Commission Did Not Err When it Issued <i>MO&O II</i>.....	7
<i>MO&O II</i> is Consistent With the Commission’s Procedural Rules and Administrative Finality.....	8
Conclusion.....	11

SUMMARY

On August 2, 2002, the Audio Division *sua sponte* reversed its previous actions, allotted FM Channel 259C3 to Tuttle, Oklahoma, and modified the license of Ralph Tyler's KTSH, Tishomingo, Oklahoma, to operate at Tuttle. In doing so, the Division rejected arguments made by the licensee of KNID (formerly KXLS), Alva, Oklahoma, which would be required to operate on a first adjacent channel to clear KTSH at Tuttle. The Audio Division rightly refused to consider in the rule making proceeding allegations concerning Mr. Tyler's qualifications to be a Commission licensee. The Audio Division did not err when it reversed previous actions taken by the former Allocations Branch denying Mr. Tyler's proposal. His original proposal was consistent with the Commission's policies and procedures, but, while the proposal was pending, the Commission adopted a new rule requiring noncommercial educational stations ("NCE") to provide minimum signal levels to their communities of license. The former Allocations Branch expanded this doctrine and denied Mr. Tyler's proposal on the ground that KAZC, an NCE station remaining in Tishomingo would not be an adequate replacement for KTSH on the basis of signal coverage. When KAZC constructed facilities that more than replicated those of KTSH, Mr. Tyler supplemented his then-pending application for review to bring this information to the Commission's attention. The perceived impediment having been removed, the Division, *sua sponte*, allotted Channel 259C3 to Tuttle. The Division had the requisite authority to take this action. Additionally, its action was consistent with the Commission's procedural rules and administrative finality. As shown herein, the Division's action should be affirmed by the Commission.

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OPPOSITION TO
APPLICATION FOR REVIEW

Ralph Tyler (“Tyler”), by his attorneys, and pursuant to Section 1.115 of the Commission’s Rules, respectfully opposes¹ the “Application for Review” filed September 12, 2002, by Chisholm Trail Broadcasting Co., Inc. (“Chisholm Trail”) directed against the action of the Assistant Chief, Audio Division, Media Bureau (herein the “Division”), taken in the Memorandum Opinion and Order, *Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*, DA 02-1877, released August 2, 2002, 67 Fed. Reg. 52876, published August 14, 2002 (herein “*MO&O I*”)². As shown herein, the Audio Division’s most recent decision was the correct one. In opposition to the review of *MO&O II*, Tyler shows the following:

¹ Pursuant to Section 1.115, this Opposition is timely filed by September 27, 2002 (Fifteen days after the date the Application for Review was filed.)

² *MO&O II* (a) reallocated FM Channel 259C3 from Tishomingo to Tuttle, Oklahoma, and modified the license of KTSH to operate at Tuttle; (b) substituted FM Channel 260C1 in lieu of Channel 259C1 at Alva, Oklahoma, and modified the license of KNID (formerly KXLS), Facility ID Number 37123, Alva, to operate on Channel 260C1 (this is potentially confusing since Chisholm Trail is also the licensee of KXLS, Channel 239, Lahoma, OK, with Fac. ID No. 17240. On July 24, 2000, the stations exchanged call signs.); (c) modified the license of KWFX, Woodward, Oklahoma, to specify operation on Channel 292C1 in lieu of Channel 261C1; and (d) dismissed Tyler’s Application for Review of *Memorandum Opinion and Order*, 16 FCC Rcd

Background

This proceeding began over five years ago, when Ralph Tyler, the licensee of FM Broadcast Station KTSH, Tishomingo, Oklahoma, filed a petition for rule making to change the location of Station KTSH to Tuttle, Oklahoma. As filed, Tyler's proposal satisfied all of the FCC's allocations priorities. It contemplated the provision of a first local service to the community of Tuttle, and it would not deprive Tishomingo of local service because that community would soon have service from non-commercial educational ("NCE") FM Broadcast Station KAZC, Tishomingo, Oklahoma.

On December 20, 2000, however, an event took place which Tyler could never have anticipated. On that day, the FCC issued a new rule (Section 73.315)³, requiring, for the first time, that NCE stations provide at least a 60 dbu signal to at least 50% of their communities of license. At the time of the adoption of this new rule, Station KAZC did provide a 60 dBu signal to all of Tishomingo. However, KAZC did not provide a city-grade (70 dbu) signal to the entire community of Tishomingo. There has never been a requirement that an NCE station provide a 70 dBu signal to its community of license, but, the former Allocations Branch considered this a factor and declined to reallocate Channel 259C3 to Tishomingo on the grounds that KAZC that it did not "believe this to be a replacement for the removal of a ... local service." The Branch observed that "Tyler is correct that at the time the Commission granted Station KAZC's construction permit there was no requirement that a station operating within the reserved portion of the band provide any level of service to its community of license." Nevertheless, the Branch adopted the new policy and denied Tyler's request. Thus, Tyler was "sandbagged"; his proposal,

7979 (2001), 66 Fed. Reg. 21681, published May 1, 2001 (herein "MO&O I") that denied reconsideration of *Report and Order*, 16 FCC Rcd 1525 (2000) (herein "R&O").

³ See Title 47 C.F.R. §73.515 requiring a 60 dBu signal over at least 50 percent of a noncommercial educational FM station's community of license. See 65 Fed. Reg. 79779, published December 20, 2000, effective January 19, 2001.

while perfect at the time of filing, was suddenly exposed to a novel requirement that the removal of Station KTSH to Tuttle would leave Tishomingo without a local service because KAZC did not provide a 70 dBu service to the community and replicated only 23% of the 60 dBu contour of KTSH. Tyler sought reconsideration of the *R&O*.

While Tyler's petition for reconsideration was pending, the licensee of Station KAZC took steps to apply for and obtain a construction permit for expanded facilities which do, in fact, serve all of Tishomingo with a 70 dBu signal and more than replicate 100% of the KTSH 60 dBu contour. Furthermore, those facilities have been constructed and placed in operation.

Pursuant to Title 47 C.F.R. § 1.115, on April 30, 2002, Tyler supplemented his Application for Review to report those events that occurred and circumstances that changed since Tyler's last opportunity to present such matters to the Commission. Tyler showed that, on the previous day, April 29, 2002, Station KAZC had commenced program tests using its higher powered (Class C2) facilities, which now provide a complete replacement for Station KTSH, when that station is moved from Tishomingo to Tuttle. Tyler argued that if the Commission were to deny Tyler's application for review, Tyler could raise these matters again in a petition for reconsideration of the Commission's action. On July 17, 2002, Tyler again promptly supplemented his Application for Review to report that on July 10, 2002 (public notice given on July 15, 2002) KAZC was granted a license for the improved facilities. Those changed circumstances removed any impediment to the reallocation of Channel 259C3 to Tuttle, and *MO&O II* was issued as a result. Chisholm Trail filed its Application for Review of *MO&O II*. It should be denied.

**Chisholm Trail's Latest Pleading Is
Just a Rehash of Old Unpersuasive Arguments**

Commission records reflect that Tyler acquired KTSH on May 10, 1996, as an unbuilt construction permit that had lain fallow for over six years since its grant on November 22, 1989.

Tyler constructed the station and it began operating on program test authority on September 21, 1996. On March 21, 1997, Tyler filed his "Petition for Rule Making and Request for Issuance of Order to Show Cause" seeking to reallocate Channel 259C3 to Tuttle, and shortly thereafter, on June 25, 1997, Chisholm Trail filed a "Motion to Dismiss" Tyler's petition. But the Allocations Branch denied Chisholm Trail's motion and on August 28, 1998, released its *Notice of Proposed Rule Making*, DA 98-1682, that, *inter alia*, proposed reallocation Channel 259C3 to Tuttle and modifying the license of KNID (formerly KXLS) to operate on Channel 260C1 so as to clear KTSH at Tuttle. October 19, 1998, was established as the date for filing comments and counterproposals against Tyler's proposal. On the comment date, Chisholm Trail filed its "Response to Order to Show Cause" again opposing Tyler's proposal. Although Chisholm Trail complains that Tyler was permitted to "perfect his deficient reallocation proposal 4 ½ years after the comment deadline," the delay has been due in large part to Chisholm Trail's efforts. Noting the Allocations Branch's novel policy requiring signal parity between a replacement NCE service and the commercial station being removed from the community, Chisholm Trail also opposed the grant of KAZC's applications.⁴ In light of this, it is ironic, indeed, that Chisholm Trail can blame Tyler for supplementing the record when it was Chisholm Trail's tactics that resulted in the delay in authorizing KAZC's replicating facilities.⁵ In its latest pleading,

⁴ See Chisholm Trail's Informal Objection and Request to Revoke Program Test Authority filed December 21, 1998, directed against KAZC's Application File No. BLED-19981002KA and Chisholm Trail's Informal Objection to KAZC Application File No. BPED-20010126ABC filed March 29, 2001, which delayed Commission action until February 15, 2002.

⁵ Tyler must briefly address Chisholm Trail's extraneous allegation at page 6 and footnote 4 concerning Tyler's not implementing construction permits BPH-19970220IA and BPH-20001218ADB. Since Tyler's proposal for the modification of the facilities of KTSH to operate at Tuttle has been granted, there is no reason to implement this construction permit. Tyler also notes that it is not Ralph Tyler, but a company owned by his sons that is the licensee of KKNB, Newcastle, Oklahoma.

Chisholm Trail offers nothing new that might persuade the Commission to reverse the decision made in *MO&O II*

**Tyler's Qualifications Are Not
Properly the Subject of Resolution in an Allotment Proceeding**

Chisholm Trail's first question presented for review is easily resolved. If Chisholm Trail wants the Commission to change its policy of refusing to address basic qualification issues in allotment proceedings, it should file a petition for rule making suggesting that such a change be made. The Division rightly found in *MO&O II* (para. 4) "With respect to the second argument advanced by Chisholm Trail concerning Ralph Tyler and Station KZAC [sic]⁶, we see no public interest reason or benefit in withholding action in this proceeding pending the resolution of a separate proceeding. The allegations regarding Ralph Tyler and Station KZAC are outside the scope of this reallocation proceeding and our action herein does not impact or prejudice that separate proceeding." None of the qualifications arguments and the attachments to Chisholm Trail's Application for Review is relevant to this proceeding and should be disregarded.⁷ The Commission can impose sanctions on Tyler if it should so choose, but his qualifications have no bearing on the question of whether the allotment of Channel 259C3 to Tuttle, Oklahoma, results in a preferential arrangement of allotments.

Although Chisholm Trail cites several cases that support the Commission's long-standing policy of not considering basic qualification issues in the allotment process,⁸ it cites no precedent tending to show that the Commission's policy should be overturned. Chisholm Trail makes an

⁶ This is a typographical error. The correct call sign is "KAZC" as it appears in other paragraphs of *MO&O II*.

⁷ All the attachments have been previously submitted in this docket.

⁸ *Crandon, Wisconsin*, 3 FCC Rcd 6765 (1988); *Goodland, Kansas*, 1986 FCC Lexis 3766 (Pol. & Rul. Div. 1986); *Pleasant Dale, Nebraska*, 14 FCC Rcd 18893 (MMB 1999).

unconvincing argument that it should be permitted to raise qualifications issues at the allotment stage because the allotment will already have become a *fait accompli* by the time the implementing construction permit application is filed. Chisholm Trail's reasons are unconvincing as to why the Commission's existing rules governing informal objections is inadequate.⁹ The rationale behind the policy refusing to delve into qualifications matters is clear: Considering basic qualification issues in rule making proceedings would open the floodgates to parties hoping to delay a competitor's proposal. Unleashing the proposed Chisholm Trail Doctrine in a multi-party rule making proceeding, where basic qualification issues were raised against one party, would have the effect of delaying action on the whole proposal until the allegations involving that one party are resolved. The now-defunct comparative hearing process would look rational compared to the mischief that could be wreaked in a rule making proceeding where trial by ambush became the norm. Instead of considering whether a proposed allotment would result in a preferential arrangement of allotments, the Commission staff would, in addition, be required to make a determination of the character of the parties seeking to modify their authorizations. Failure of an attorney to make such allegations could subject the attorney to a charge of professional negligence, so every attorney could be expected to bring even the most

⁹ It is because of the delay and expense caused by unwarranted litigation that the Commission eliminated the automatic stay provisions from Section 1.420(f) of the Rules ("Our proposal to repeal the rule is intended to remove the incentive it creates for parties to challenge agency approval of a competitor's modification proposal simply to forestall institution of new competitive service. The Notice asserted that these petitions cause unjustifiable expense for parties and absorb valuable staff resources that might otherwise be directed to resolution of new proposals to improve broadcast service.") See *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501 (1996).

insignificant matter to the Commission's attention in the hope of "drawing blood." Chisholm Trail, indeed, urges the Commission down a slippery slope.¹⁰

**The Division Did Not Err
When It Issued *MO&O II***

Someone unfamiliar with this extensive record might believe that Chisholm Trail had suffered some injury at the hands of the Division. Nothing could be further from the truth. In fact, it is Tyler that was injured by the delay in receiving authorization to relocate KTSH to Tishomingo. Under *MO&O II*, Chisholm Trail's only obligation is to change KNID's operating channel to a first adjacent channel. Tyler has agreed to reimburse Chisholm Trail under the *Circleville, Ohio*,¹¹ guidelines. This is a very simple modification, frequently done, and will cause not the least negative impact to KNID. On the other hand, Tyler has been hoping for years to operate KTSH to serve Tuttle, and, but for litigation delay, would have already been doing so for a significant period. Instead, Tyler has been forced to defend himself and to expend funds and scarce resources responding to Chisholm Trail's character allegations that are "outside the scope" of an allotment proceeding. Tyler has consistently argued this, but Chisholm Trail has persisted and, as a result, frustrated Tyler's plans for 4 ½ years. The Division had the authority, and in fact, the duty, to reverse its previous decisions. As Tyler has consistently argued, the Branch's initial denial of Tyler's proposal to reallocate Channel 259C3 from Tishomingo to Tuttle

¹⁰ By way of illustration, Chisholm Trail alleges in its Application for Review that "But for Tyler's willingness to deceive the Commission, his reallocation proposal could not have been granted," and suggests that "the proponent made material misrepresentations to the Commission which are critical to the success of its reallocation proposal." This characterization is demonstrably not true. Although Tyler's statement concerning the reason KTSH went off the air was incorrect, nonetheless, there was no requirement that Tyler give any reason for KTSH being off the air. In light of this, his statement was not a factor on which the reallocation proposal depended. The Division correctly refused to consider the allegations in this proceeding. If Chisholm Trail's proposal were adopted, the Commission's staff would be constantly burdened by requests to explore matters outside the scope of the allotment proposals at bar.

¹¹ *Circleville, Ohio*, 9 RR 2d 1579 (1967).

was incorrect. Tyler's proposal was acceptable as filed, but at the time of the former Allocation Branch's adoption of the *Report and Order* that initially denied Tyler's proposal; i.e., on December 13, 2000 (released December 22, 2000) the Commission was in the process of issuing a new rule that, for the first time required a noncommercial educational station to provide a signal strength of 60 db or better to at least 50% of its community. Based on a newly imposed requirement of minimum signal strength for NCE stations, the former Allocations Branch determined that KAZC would not be an adequate replacement for KTSH and, in turn, denied Tyler's proposal. Thus, it was Tyler who was confronted by a drastic change—not Chisholm Trail. All the Division has done in its *MO&O II* is to correct its original error in denying Tyler's proposal on the basis of a new policy by permitting Tyler to update the record to meet that new policy. The Division did not commit error in issuing *MO&O II*.

***MO&O II* Is Consistent with the
Commission's Procedural Rules
and Administrative Finality .**

On March 21, 1997, when Tyler filed his initial petition for rule making, he specifically noted that Tishomingo would not be left without local service because there was a pending application for construction permit for a new noncommercial educational station at Tishomingo. During the course of this proceeding, that application ripened into a license for KAZC. Tyler has argued consistently that the Branch made new law when it first denied Tyler's request on the grounds that KAZC did not place a 70 dBu signal over Tishomingo or replicate the facilities of KTSH. When Tyler learned that a new policy had been adopted, Tyler promptly brought to the Commission's attention the fact that KAZC was on the air with facilities that more than replicate KTSH. This is not a case (as Chisholm Trail argues) in which Tyler has merely sat back and hoped that the decision would be in his favor and then, when it wasn't, parried with an offer of

more evidence.¹² This is a case in which, as the result of recent actions by the FCC and the licensee of Station KAZC, there has been a change in the facts and circumstances pertaining to the proposed Tuttle allotment. Thus, although the information that Tyler proffered is new -- it didn't exist at the time of *MO&O I*—it merely provided additional information on the status of KAZC, the replacement service for KTSH described in Tyler's original petition for rulemaking, and enabled the Division to reverse the Allocations Branch's incorrect actions. Therefore, it was entirely right for the Division to consider the information in developing its *MO&O II*, and the Commission acted correctly when it considered these facts *sua sponte*.¹³ Chisholm Trail has never been confused about Tyler's position that KAZC is an adequate replacement for KTSH. Although Chisholm Trail attempts to distinguish *Com/Nav Marine, Inc.*, 2 FCC Rcd 2144 (Prv. Rad. Bur. 1978), and *Central Florida Enterprises, Inc.*, 598 F. 2d 37 (D. C. Cir. 1978), those cases support the Division's action. Chisholm Trail's reliance on *Caldwell, College Station and Gause, Texas*, 15 FCC Rcd 3322 (2000) is misplaced.¹⁴ That case involved the refusal to consider new evidence when the initial rule making proposal was fatally defective. As Tyler has shown his proposal was not defective when it was filed.

In *MO&O II*, the Division dismissed Tyler's Application for Review but granted Tyler's Motion for Leave to File Supplement to Application for Review to take note of the fact that the upgraded operation of KAZC is already reflected in Commission records and that "consideration

¹² Chisholm Trail cited *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (D. C. Cir. 1941) for this proposition.

¹³ Tyler has repeatedly responded to Chisholm Trail's unwarranted allegation repeated at footnote 17. Tyler has provided assistance to the noncommercial Christian entity that owns KAZC. That assistance constitutes a charitable contribution on Tyler's part that should be commended rather than condemned. There is not one scrap of evidence that simply providing charitable assistance to a nonprofit group makes Tyler a real-party-in-interest, where, as here, the charitable group has other donors.

¹⁴ Chisholm Trail incorrectly cited this case as 15 FCC Rcd 20641 (2000).

of the Supplement will enable us to resolve this proceeding on the basis of a complete record.”

The Division found that “The upgraded operation of Station KAZC removes the sole impediment in our proceeding to favorable action on the Ralph Tyler reallocation proposal. Ralph Tyler could immediately file a petition for rule making proposing the same reallocation to Tuttle. It is not necessary to do so.” The Division cited Section 1.113(a) of the Commission’s Rules which permits the Division to modify or set aside on its own motion any action taken under delegated authority within 30 days of the public notice of the action, and noted that the filing of Tyler’s Application for Review tolled the 30-day period for Division action. The Division quite correctly found no public interest benefit in expending administrative resources to institute a new proceeding looking toward the reallocation of Channel 259C3 from Tishomingo to Tuttle.

Chisholm Trail’s preferred route, presumably, would have resulted in another four year delay while the parties went through the same litigation dance as before. Chisholm Trail suggests that because the allocation situation may have changed – something which it does not demonstrate to be true – the Tyler proposal should be made the subject of a brand new rule making. That is a suggestion fraught with peril. If adopted, few rule making proceedings could ever become final. Always, if there was a change in the allocation picture, there’d be a basis to reopen the proceeding and start anew. Here, Chisholm Trail had a full and complete opportunity to file a counterproposal four years ago, when this proceeding began. It elected not to do so. Its failure to do so cannot be used as an excuse to reopen this proceeding at this late date in time. To do so would create a dangerous precedent, threatening the ability of the Commission to achieve finality in not just this proceeding, but virtually every rule making proceeding. *All of Chisholm Trail’s arguments were thoroughly ventilated over the past 4 ½ years. After playing Chisholm Trail’s game, the real losers would have been the residents of Tuttle, Oklahoma, who would be denied their own local radio station.*

The Court of Appeals has long sympathized with the difficulties faced by the FCC in dealing with litigants, such as Chisholm Trail, who seek to interminably prolong proceedings and frustrate the agency's need to achieve finality. In *Llerandi v. FCC*, 863 F. 2d 79 (DC Cir., 1988), the Court observed that:

“To get this evidence in, the Llerandis were forced to rely upon the sufferance of the FCC. Their effort was rebuffed, and it will not do (as the Llerandis would) to point to the interval between the close of the pleading cycle and the date of the Bureau's decision and then complain that the facts could have been considered by the agency decisionmaker. Of course they could, but that is beside the point. Not only are we mindful that rules are rules, *see Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C.Cir.1986), and that rules bind litigants before the agency as well as the agency itself, but those of us who are privileged to serve in courthouses should be the very last to fault an agency's effort to bring orderliness and predictability (and finality) to the litigation process when courts indulge (and for good reason) in precisely the same practice. 863 F. 2d 79, 81.”

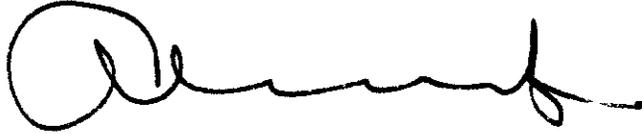
The Court has consistently endorsed the laudable efforts of the Commission to achieve administrative finality. Here, the only way for Chisholm Trail to prevail is through the sufferance of the Audio Division, however, as the Court pointed out in *Llerandi*, there is no reason for the Commission to tolerate tactics such as those advocated by Chisholm Trail that forever prolong and drag out the proceedings such that a final result is never achieved.

Conclusion

Chisholm Trail, having provided nothing that would provide a basis to do otherwise, Tyler requests the Commission to deny Chisholm Trail's Application for Review and to affirm the Division's reallocation of Channel 259C3 to Tuttle, Oklahoma, and the concurrent modification of the license of KTSH for operation at Tuttle.

Respectfully submitted,

RALPH TYLER

A handwritten signature in black ink, appearing to read "Ralph Tyler", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Sherry Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on this 27th day of September, 2002, copies of the foregoing Opposition to Application for Review were mailed, postage prepaid, to the following:

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