

RECEIVED & INSPECTED
MAY 30 2003
FCC - MAILROOM

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of) MM Docket No. 99-331
)
Amendment of Section 73.202(b)) RM-9848
Table of Allotments)
FM Broadcast Stations)
(Madisonville, and)
College Station, Texas))

To: Assistant Chief,
Audio Division
Media Bureau

**MOTION FOR LEAVE TO FILE SUPPLEMENT TO
PETITION FOR RECONSIDERATION**

On February 20, 2003, Garwood Broadcasting Company of Texas ("hereinafter "Garwood") filed its Petition for Reconsideration in this docket as directed to the Report and Order of the Bureau (DA 03-144) as released by the Bureau on January 21, 2003. Garwood, by its counsel, and consistent with Section 1.429(d) of the Commission's rules which requires this request to file a supplemental pleading to be filed separately from the Supplement itself 1/ hereby, for the reasons stated below, files this Motion for leave to file a Supplement to that Petition.

A central argument of the Petition for Reconsideration, as filed, involved the Commission's policies and the applicable law governing rulemaking petitioners who had successfully convinced

1/ It is noted here that this is a specific requirement for a supplement to a Petition for Reconsideration under 47CFR 1.429, and is different from the general requirement of 47CFR 1.415 which does not otherwise require such a request for acceptance and consideration of an additional pleading to be filed in a separate pleading.

the Commission to upgrade an allotment and modify an existing facility to operate on that allotment, but who then subsequently ignored and failed to implement the allotment/upgrade. Garwood argued that where such failure continued over an extended period of time (12 years in the instant case) that it constituted such a clear abuse of the the Commission's processes and waste of the Commission's resources and radio spectrum that the party guilty of such action should receive no further consideration and the channel should be considered available for other requested uses.

On May 8, 2003, the Audio Division of the Media Bureau, on its own motion, released a Notice of Proposed Rulemaking in Archer City, Texas (DA 03-1534) which spoke directly to this point. As such, the case is directly relevant to consideration of the Garwood Petition and as such it is respectfully submitted that there is good cause to accept and consider the attached Supplement to Garwood's Petition for Reconsideration. See Warmack Communications, Springfield, Florida, 3 FCC Rcd 2526 (1986) where the Commission accepted a supplement of a new uncontroverted fact relevant to the core circumstances of the pending appeal; and South Congaree and Batesburg, South Carolina, 5 FCC Rcd 7480 at 7483 (1990), and Live Oak and St. Augustine, Florida, 4 FCC Rcd 758 at 760-61 (1989), which reverified the discretion of the Commission to accept such further Supplements filed for good cause.

Wherefore, since this Supplement brings to the Commission's attention a recent additional case that is clearly relevant to

consideration of a core argument in the Garwood Petition for Reconsideration, there is good cause to accept the Supplement and it is therefore respectfully requested that the attached Supplement be accepted and considered in this case.

Respectfully submitted,

GARWOOD BROADCASTING COMPANY OF TEXAS

by


Robert J. Buenzle

Its Counsel

Law Offices
Robert J. Buenzle
11710 Plaza America Drive
Suite 2000
Reston, Virginia 20190
(703) 430-6751

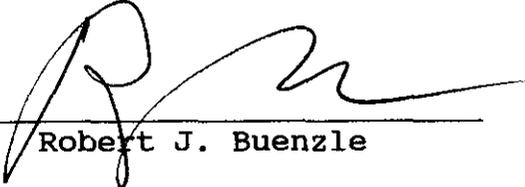
May 30, 2003

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Motion For Leave To File Supplement To Petition for Reconsideration have been served by United States mail, postage prepaid this 30th day of May, 2003, upon the following:

John A. Karousos, Esq.
Assistant Chief, Audio Division
Office of Broadcast License Policy
Media Bureau
Federal Communications Commission
Portals II, Room 3-A266
445 12th Street SW
Washington, D.C. 20554

Sandlin Broadcasting Co. Inc.
Radio Station KMKS(FM)
P.O. Box 789
Bay City, Texas 77404



Robert J. Buenzle

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of) MM Docket No. 99-331
)
Amendment of Section 73.202(b)) RM-9848
Table of Allotments)
FM Broadcast Stations)
(Madisonville, and)
College Station, Texas))

To: Assistant Chief,
Audio Division
Media Bureau

**SUPPLEMENT TO
PETITION FOR RECONSIDERATION**

On February 20, 2003, Garwood Broadcasting Company of Texas ("hereinafter "Garwood") filed its Petition for Reconsideration in this docket as directed to the Report and Order of the Bureau (DA 03-144) as released by the Bureau on January 21, 2003. For the reasons set forth in the accompanying Motion for Leave to File Supplement to Petition for Reconsideration and as set forth herein, Garwood, by its Counsel, hereby files the instant Supplement to that Petition.

A central argument of the Petition for Reconsideration, as filed, involved the Commission's policies and the applicable law governing rulemaking petitioners who had successfully convinced the Commission to upgrade an allotment and modify an existing facility to operate on that upgraded allotment, but who then subsequently ignored and failed to implement the allotment/upgrade. In Section II (pages 3-5) of the Petition for Reconsideration, Garwood fully described the actions of Sandlin

Broadcasting Company, Inc. (hereinafter "Sandlin") in seeking an upgrade of channel 273C2 to 273C1 in 1991, the grant of that upgrade by the FCC in 1991, its filing of an application for construction permit on that channel, grant of that application by the FCC in 1993, and the subsequent total abandonment of that upgraded channel and construction permit by Sandlin (the construction permit was subsequently canceled by the FCC for Sandlin's failure to build or even seek extension of the permit, by FCC letter January 12, 1995), resulting in the warehousing of the upgraded channel 273C1 unused for over twelve years.

Since Sandlin operated for all that time on the lower classification of 273C2, Garwood filed a rulemaking petition on January 10, 2000, proposing inter alia the use of channel 273C1 elsewhere and replacement of Sandlin's actual operating classification over the past twelve years of "C2", with channel 259C2 at Sandlin's present site. In its Report and Order, the Commission, in effect, indicated that it was going to give Sandlin yet 'another chance' to make use of channel 273C1 but if it did not, then the FCC would then consider a proposal to downgrade Sandlin to specify operation on the C2 channel on which it has actually operated radio station KMKS continuously since 1986, i.e. for the past sixteen years (Report and Order at paragraph 6).

In its Petition, Garwood argued that providing further considerations to Sandlin in view of this record was essentially "rewarding" Sandlin for the most egregious case of warehousing

and outright waste of radio spectrum that may have ever taken place, contrary to the will and intent of Congress as to required use of radio spectrum (Petition at pg 14-18), and that a Decision in favor of Sandlin under such circumstances was contrary to the public interest (Petition at page 18-20).

Since the date of the Garwood filing, On May 8, 2003, the Audio Division issued a Notice of Proposed Rulemaking, ("Notice") in Archer City, Texas (DA 03-1534) on its own motion, recognizing the actions of Texas Grace Communications ("Texas Grace") in that case seeking upgrade of its operating channel from 248C2 to 248C1 at Archer City, Texas, the approval of that upgrade by the Commission effective January 18, 2000, and the failure of Texas Grace since that time to implement the upgrade by filing the requisite application and constructing a station upon the upgraded channel. In its action the FCC noted that "More than three years has now passed since Texas Grace was directed to file a construction permit [for the C1 facility]" and it had not done so. A complete copy of the Archer City, Texas case is attached hereto.

Noting the "preclusionary Impact" upon other prospective applicants that could make use of that channel allocation the Commission undertook the further step in Archer of issuing the proposal to officially downgrade the channel back to a C2 absent the application by Texas Grace for a C1 construction permit prior to the scheduled comment date in the Notice.

Issuance of the Notice illustrates several matters important to our proceeding. First of all, in Archer the Commission specifically recognized the preclusionary impact there upon other potential users of the channel caused by the unapplied for, and unbuilt, status of the upgrade which had been requested, granted, and then ignored by Texas Grace. It also raises a question of how appropriate it may be for the FCC to use its limited resources to ask Texas Grace time and again to file its construction permit and build the station, and with no success there, then to use yet more of its resources to prepare and issue a new rulemaking proposal "on its own motion" in the further hopes of stimulating Texas Grace to do what it had promised to do three years ago in seeking the Archer City upgrade in the first place.

In the case of Texas Grace, the upgraded channel has been squandered for three years, precluding use by other applicants. In our case, the channel has been warehoused and squandered for over TWELVE years since the time Sandlin first requested and received the upgrade of channel 273C2 to 273C1.

In the case of Texas Grace, the goal of the FCC is to get Texas Grace to file its perfecting application, assuming that once it does and receives the construction permit that it will then proceed to build it and all will then be well. In our case however, the Commission was successful in getting Sandlin to file the necessary application (after a first application was returned as "deficient") but it all turned out to be a charade. The construction permit was issued May 12, 1993, and Sandlin never

said another word or did another thing after that. No explanation for failing to build, no request for extension, no anything. So finally, by letter January 12, 1995, the FCC canceled the Sandlin construction permit for failure to build.

But who actually prevailed on that? Following cancellation of the construction permit, the Commission did nothing further relative to the upgraded channel and just left it as it had been sought by Sandlin in 1991, and there it has sat since then, unused, warehoused, fallow, and a thus far totally successful block by Sandlin precluding use by anyone else for any other purpose, until Garwood's petition for rulemaking.

If the Commission was so concerned by the non-actions of Texas Grace, what then could be said of the non-actions by Sandlin? Is it not worse that Sandlin did in fact file for a construction permit only to totally ignore it until it was canceled by the Commission? Were the actions by Sandlin not worse in terms of the waste of FCC resources in first adopting the requested upgrade, and then processing the application and issuing a construction permit, all for nothing? Did Sandlin not renege, not once but twice, on promises to the FCC to use the upgraded channel if it were granted? Having thus so failed to honor its commitment to the FCC not once (at the rulemaking stage) but twice (at the application stage), once the construction permit was canceled in January of 1995, is Sandlin not now being "rewarded" for its actions by then simply allowing Sandlin to continue to claim total dominion and control over

channel 273C1 ever since that time, right up to the Report and Order in this case where the Commission, rather than punishing Sandlin, seems instead to be actually heaping on some additional undeserved benefit of yet 'another chance' to use the channel it has sat upon unused for twelve years ?

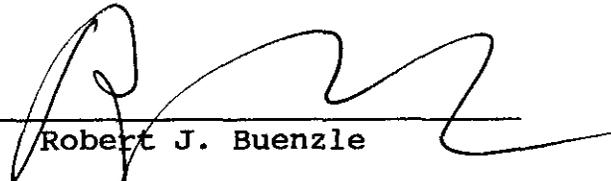
Garwood submits that the Commission's actions and statements of concern in Archer City, Texas, cannot be read in a vacuum. If the concern is recognized there, based upon the actions of Texas Grace, then there is simply no way that the far more exaggerated, repeated, and egregious actions and failures of record of Sandlin, as documented in this case and in the Garwood Petition for Reconsideration, could be further abided, let alone further 'rewarded'.

Wherefore, it is respectfully submitted that the Commission's actions in the Archer City, Texas case as discussed herein provide further relevant evidence to consider, and further grounds to grant, the pending Petition for Reconsideration as filed by Garwood Broadcasting Company of Texas in this proceeding and we respectfully request that the Garwood Petition be so granted.

Respectfully submitted,

GARWOOD BROADCASTING COMPANY OF TEXAS

by

A handwritten signature in black ink, appearing to read 'Robert J. Buenzle', written over a horizontal line.

Robert J. Buenzle

Its Counsel

Law Offices
Robert J. Buenzle
11710 Plaza America Drive
Suite 2000
Reston, Virginia 20190
(703) 430-6751

May 30, 2003

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 03-116
Table of Allotments,)	
FM Broadcast Stations.)	
(Archer City, Texas))	

NOTICE OF PROPOSED RULE MAKING

Adopted: May 7, 2003

Released: May 8, 2003

By the Chief, Audio Division:

Comment Date: June 30, 2003

Reply Comment Date: July 15, 2003

1. The Audio Division, on its own motion, proposes the substitution of Channel 248C2 for Channel 248C1 at Archer City, Texas, to conform the FM Table of Allotments to the outstanding construction permit of Texas Grace Communications ("Texas Grace") for Station KRZB, Channel 248C2, Archer City, Texas (BMPH-199902171B) ("Class C2 Construction Permit").

Background

2. In the *Report and Order* in MM Docket No. 99-23, we substituted Channel 248C1 for Channel 248C2 at Archer City, Texas, and modified the Texas Grace Communications ("Texas Grace") construction permit for Station KRZB, Archer City, to specify operation on Channel 248C1.¹ In its March 15, 1999, Counterproposal in that proceeding, Texas Grace voluntarily sought this proposed upgrade. Moreover, it pledged that in the event the Commission upgraded the Archer City permit, it would "promptly apply for, and if granted, construct" a Class C1 facility. That action became effective on January 18, 2000.² The *Order* also was conditioned upon Texas Grace filing an application to implement this upgrade within 90 days of the *Order's* effective date, i.e., April 18, 2000. Texas Grace has not done so. Thereafter, in a *Memorandum Opinion and Order* released October 26, 2001, the Commission extended the construction deadline for the Class C2 Construction Permit until October 26, 2004.³

3. We believe that the public interest is served by proposing the substitution of Channel 248C2 for Channel 248C1 at Archer City, Texas. More than three years has now passed since Texas Grace was

¹ *Tipton, Mangum, Eldorado and Granite, Oklahoma, and Archer City, Texas*, 14 FCC Red 21161 (M.M. Bur. 1999).

² The reference coordinates for the Channel 248C1 allotment at Archer City, Texas, are 33-36-58 and 98-51-42.

³ *Texas Grace Communications*, 16 FCC Red 19167 (2001). The reference coordinates for the Channel 248C2 allotment at Archer City, Texas, are 33-51-40 and 98-38-52.

directed to file a construction permit application for Class C1 facilities in Archer City. During this period, the Commission has received requests for new and modified allotments in the geographical vicinity of Archer City. Under the Commission's Rules, these proposals are required to protect the Archer City vacant Class C1 allotment. In fact, by separate action, the staff is dismissing today a twenty-two community counterproposal in MM Docket No. 00-148 as a result of a prohibited short-spacing to the Archer City Class C1 allotment. Thus, the Archer City Class C1 allotment may be frustrating the introduction of additional service to many communities in Texas and Oklahoma. In order to end the unwarranted preclusionary impact of this unused allotment, we propose the reclassification of the Archer City Class C1 allotment to Class C2 at the coordinates specified in the Texas Grace construction permit. To preserve the Class C1 allotment, Texas Grace must file the requisite application to implement this allotment prior to the comment date in this proceeding. Alternatively, Texas Grace may indicate no objection to the downgrade of the allotment in its comments.

4. Accordingly, we seek comment on the proposed amendments to FM Table of Allotments, Section 73.202(b) of the Commission's rules, with respect to the community listed below, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Archer City, Texas	248C1	248C2

5. The Commission's authority to institute rulemaking proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein.

6. Interested parties may file comments on or before June 30, 2003, and reply comments on or before July 15, 2003, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rulemaking proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁴

8. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or its staff for the clarification or adduction of evidence or resolution of issues in this proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon any other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an *ex parte*

⁴ See Certification that Sections 603 and 604 of the Regulatory Flexibility Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATION COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the

Communications act of 1934, as amended, and sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent will be expected to answer whatever questions are presented in initial comments. The proponent of the proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4.

Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's rules and regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person who filed the comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies.

In accordance with the provisions of Section 1.420 of the Commission's rules and regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. Public Inspection

of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW, Washington, D.C.

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Supplement To Petition for Reconsideration have been served by United States mail, postage prepaid this 30th day of May, 2003, upon the following:

John A. Karousos, Esq.
Assistant Chief, Audio Division
Office of Broadcast License Policy
Media Bureau
Federal Communications Commission
Portals II, Room 3-A266
445 12th Street SW
Washington, D.C. 20554

Sandlin Broadcasting Co. Inc.
Radio Station KMKS(FM)
P.O. Box 789
Bay City, Texas 77404



Robert J. Buenzle