FCC MAIL SECTION

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

JUL 8 3 52 PM '04

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MM Docket No. 90-66
FM Broadcast Stations.	)	RM-7139
(Lincoln, Osage Beach,	)	RM-7368
Steelville, and Warsaw,	)	RM-7369
Missouri).	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2004 **Released: July 8, 2004**

By the Commission:

1. The Commission has before it a petition for reconsideration of its prior order in this proceeding,[1] filed by Twenty-One Sound Communications ("Twenty-One Sound"), licensee of Station KNSX(FM), Steelville, Missouri. No oppositions or replies were filed.

BACKGROUND

2. This proceeding commenced with the filing of a rulemaking petition by KRMS-KYLC, Inc. ("KRMS"), the former licensee of Station KRMS-FM,[2] Channel 228A, Osage Beach, Missouri. The petition requested an upgrade of Station KRMS-FM to Channel 228C3 and a modification of its license in accordance with Section 1.420(g)(3) of the Commission's rules. To accommodate this upgrade, KRMS also proposed the substitution of Channel 253A for vacant but applied for Channel 229A at Warsaw, Missouri. In response to a *Notice of Proposed Rule Making*,[3] Twenty-One Sound counter proposed the upgrade of its Station KNSX(FM), Steelville, Missouri, from Channel 227C2 to Channel 227C1.

3. The staff *Report and Order*[4] dismissed Twenty-One Sound's counterproposal and granted the upgrade for Station KRMS-FM. Twenty-One Sound's counterproposal was dismissed for failure to comply with Section 1.52 of the rules, which requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his or her address stated. Specifically, Twenty-One Sound had failed to include either a notarized affidavit or an unsworn verification that the statements contained in its counterproposal were accurate to the best of its principals' knowledge. The *R&O* also reasoned that this dismissal was in accord with Commission

[1] *Lincoln, Osage Beach, Steelville, and Warsaw, MO*, 17 FCC Rcd 6119 (2002) ("*MO&O III*").

[2] The call letters for this station were changed from KLYC(FM) to KRMS-FM, effective January 9, 1998.

[3] 5 FCC Rcd 1119 (MMB 1990).

[4] *Lincoln, Osage Beach, Steelville, and Warsaw, MO*, 7 FCC Rcd 3015 (MMB 1992) ("*R&O*").

precedent.[5]

4. Thereafter, Twenty-One Sound filed two petitions for reconsideration and one application for review in this proceeding.[6] The staff denied Twenty-One Sound's first petition for reconsideration and rejected its argument that the Commission had not consistently applied Section 1.52 to allotment rulemakings.[7] The staff dismissed a second petition for reconsideration as repetitious under Section 1.429(i) of the rules to the extent that it questioned the dismissal of the counterproposal for lack of verification.[8]

5. Subsequently, the Commission denied Twenty-One Sound's application for review.[9] Therein, the Commission acknowledged that, while Section 1.52 has been strictly enforced in FM allotment proceedings after October 4, 1990, the effective date of the *Abuse of Process R&O*, the rule had been applied on a discretionary basis prior to that date. Since Twenty-One Sound's counterproposal was filed prior to October 4, 1990, the Commission reviewed the proposal in light of those earlier cases and rejected Twenty-One Sound's argument that the staff unfairly applied the rule to Twenty-One Sound's counterproposal but did not do so in other cases where the counterproposals were filed prior to October 4, 1990. On the contrary, the Commission found that it had exercised this discretion prior to October 4, 1990, only in cases that would not cause prejudice to other non-defective allotment proposals. Because Twenty-One Sound's counterproposal was unverified and would prejudice KRMS, which had filed a timely proposal that complied with our technical and legal requirements, the Commission concluded that Twenty-One Sound's proposal was properly dismissed by the staff.

PETITION FOR RECONSIDERATION

6. Twenty-One Sound again argues on reconsideration that the Commission has not treated similarly situated parties in the same manner or clearly explained the reasons for the differing treatment as required by *Melody Music., Inc. v. FCC.*[10] In support of this position, Twenty-One Sound reargues that it should be treated like the parties in *Brooksville or Quitman, MS,*[11] in which two unverified rulemaking proposals filed before October 4, 1990, were accepted. Since the stated reason in that case was an apparent lack of notice to the petitioners of the new strict enforcement policy for Section 1.52, Twenty-One Sound argues that its counterproposal should be likewise accepted without regard to fairness to other parties because fairness was not a stated reason in the *Brooksville and Quitman* case. Twenty-One Sound also contends that the Commission inadequately distinguished the cases of *Canton, Illinois*[12]and *Lake City, South Carolina,*[13] in which unverified proposals filed before October 4, 1990, were accepted for public interest reasons, such as the provision of a first local service, and requests that it be accorded similar treatment in the instant proceeding.

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[5] *See* 7 FCC Rcd at 3015 n.2, *citing inter alia, Amendment of Sections 1.420 and 73.3584 Concerning Abuses of the Commission's Processes ("Abuse of Process R&O")*, 5 FCC Rcd 3910, n.41 (1990).

[6] For a more detailed background of this proceeding, *see MO&O III*, 17 FCC Rcd at 6119-6120.

[7] 11 FCC Rcd 6372 (MMB 1996) ("*MO&O I*").

[8] 12 FCC Rcd 4987 (MMB 1997) ("*MO&O* II").

[9] 17 FCC Rcd at 6125.

[10] 345 F. 2d 730, 733 (D.C. Cir. 1965).

[11] 8 FCC Rcd 3537 (MMB 1993).

[12] 3 FCC Rcd 5824 (MMB 1988).

[13] 47 FCC 2d 1067 (1974).

DISCUSSION

7. A petition requesting reconsideration of an order denying an application for review may be allowed only if the petitioner relies on new facts or changed circumstances.[14] Petitions that fail to satisfy this requirement are subject to dismissal. The rationale for this limitation is that "[o]therwise, the Commission would be forced to spend its limited resources reviewing arguments it has already considered and rejected."[15] Twenty-One Sound raised the issue of inequitable treatment in its application for review in *MO&O III*. The Commission fully considered this issue.[16] It recognized the differences in approaches that had been taken before and after the adoption of the *Abuse of Process R&O* and distinguished the cases relied upon by Twenty-One Sound, as well as other cases not mentioned by that party.[17] Finally, we note that on reconsideration Twenty-One Sound has failed to cite a single pre-October 4, 1990 Commission-level case in which a non-verified proposal was accepted and granted in spite of prejudice to other non-defective allotment proposals.[18]

8. Accordingly, IT IS ORDERED That pursuant to Section 1.429, the petition for reconsideration filed by Twenty-One Sound IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[14] 47 C.F.R. § 1.115(g)(1) and (2).

[15] *Amendment of Sections 0.251, 0.281, 0.371, 1.104, 1.106, and 1.115 of the Commission's Rules of Practices and Procedures,* 46 R.R. 2d 524, 526 (1979).

[16] *See* 17 FCC Rcd at 6122-23.

[17] *Id.* at 6123-24.

[18] Although Twenty-One Sound continues to rely upon *Scottsboro, AL,* 4 FCC Rcd 6473 (MMB 1989) to support its position, *MO&O III* acknowledged that a non-verified proposal had been granted by mistake in a mutually exclusive context, distinguished that case from the instant proceeding, and overruled *Scottsboro*. *See* 17 FCC Rcd at 6124 n.18. In these circumstances, Twenty-One Sound's reliance on *Scottsboro* is misplaced.