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

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MM Docket No. 01-19
FM Broadcast Stations.	)	RM-10048
(Saint Joseph, Clayton, Ruston, and	)	RM-10027
Wisner, Louisiana)	)	
	)	
(Wisner, Ruston, Clayton, and	)	MM Docket No. 01-27
Saint Joseph, Louisiana)	)	RM-10056
	)	RM-10118

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 15, 2006 **Released: March 17, 2006**

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration of a *Report and Order*[1] in this proceeding filed by Communications Capital Company II of Louisiana, LLC ("CCC"). No responsive pleadings were filed. For the reasons discussed below, we deny CCC's Petition for Reconsideration.

BACKGROUND

2. This consolidated proceeding began with the issuance of two unrelated *Notices of Proposed Rule Making*. First, at the request of Saint Joseph Broadcasting Company ("SJBC"), the *Notice of Proposed Rule Making*[2] in MM Docket No. 01-19 proposed the allotment of Channel 257C3 to Saint Joseph, Louisiana (pop. 1,517) as a first local service. To accommodate the Saint Joseph allotment, *NPRM I* also proposed the substitution of Channel 266A for vacant Channel 257A at Clayton, Louisiana. Second, at the request of Wisner Broadcasting Company ("WBC"), the *Notice of Proposed Rule Making*[3] in MM Docket 01-27 proposed the allotment of Channel 300C3 to Wisner, Louisiana (pop. 1,148) as a first local service.

3. In response to *NPRM I* and *NPRM II*, Ruston Broadcasting Company ("RBC"), the predecessor in interest to CCC,[4] simultaneously and timely filed an identical counterproposal in both proceedings. In its counterproposal, CCC proposed to upgrade its Station KNBB(FM), Ruston,

[1] *Saint Joseph, Clayton, Ruston, and Wisner, LA*, 18 FCC Rcd 22 (MB 2003) ("*R&O*").

[2] *Saint Joseph and Clayton, LA*, 16 FCC Rcd 2305 (MMB 2001) ("*NPRM I*").

[3] *Wisner, LA*, 16 FCC Rcd 2568 (MMB 2001) ("*NPRM II*").

[4] On March 4, 2002, CCC consummated the acquisition of Station KNBB(FM) from RBC pursuant to Commission consent. (File No. BALH-20010806ABH). CCC is now the licensee of Station KNBB(FM). For simplicity of exposition, we refer to each entity as CCC.

Louisiana, from Channel 257C3 to Channel 257C2, pursuant to the provisions of Section 1.420(g)(3) of the Commission's rules.[5] To accommodate this co-channel upgrade, CCC proposed to (1) substitute Channel 266A for vacant Channel 257A at Clayton, Louisiana; (2) allot Channel 300C3 at Saint Joseph, Louisiana, rather than Channel 257C3 as proposed by SJBC in MM Docket No. 01-19; and (3) allot Channel 279A at Wisner, Louisiana, rather than Channel 300C3 as proposed by WBC in MM Docket 01-27.

4. In the *R&O*, Dockets 01-19 and 01-27 were consolidated to permit the simultaneous consideration of conflicting proposals. CCC's counterproposal is mutually exclusive with SJBC's proposal in Docket 01-19 because Channel 257C2 at Ruston is short-spaced to Channel 257C3 at Saint Joseph.[6] Second, CCC's counterproposal is mutually exclusive with WBC's proposal in Docket 01-27 because Channel 300C3 at Saint Joseph is short-spaced to Channel 300C3 at Wisner.[7]

5. The *R&O* next dismissed CCC's counterproposal in each proceeding because it was not technically correct at the time it was filed.[8] Specifically, on March 19, 2001, the date when CCC filed its counterproposal, CCC's proposed allotment of Channel 257C2 at Ruston was short-spaced by 15.4 kilometers to a pending and cut-off counterproposal in MM Docket 00-228 to allot Channel 257C1 to Linden, Texas.[9] Although a request to withdraw the Linden counterproposal had been filed on March 15, 2001, the *R&O* explained that our policy is not to accept a rulemaking proposal that is dependent upon action in another rulemaking proceeding that has not become final.[10] Because the request for dismissal of the Linden rulemaking proposal had not been acted upon on the date that CCC had filed its counterproposal, CCC's counterproposal was dismissed. The two remaining proposals, the allotment of Channel 257C3 at Saint Joseph[11] and Channel 300C3 at Wisner, were also granted because they were not mutually exclusive with each other and would provide first local services to these communities. To accommodate the Saint Joseph allotment, Channel 266A was substituted for vacant Channel 257A at Clayton.

6. In its Petition for Reconsideration, CCC argues that the cases relied upon by the *R&O* to support the procedural dismissal of the counterproposal involve, *inter alia,* situations where a rulemaking proposal is contingent on the outcome of another contested proceeding that was not final due to a pending petition for reconsideration. CCC contends that such a situation is inapposite because the counterproposal was contingent solely on the Commission's formal dismissal of the conflicting Linden, Texas, counterproposal. CCC asserts that there is no public interest or policy justification for dismissing the

[5] This section permits upgrades of FM stations on mutually exclusive co-channels or adjacent channels without affording other interested parties an opportunity to file competing expressions of interest in the upgraded channel.

[6] *See* 47 C.F.R. § 73.207. The required spacing between Channel 257C2 at Ruston and Channel 257C3 at Saint Joseph is 177 kilometers whereas the actual spacing between these proposals is 155.8 kilometers.

[7] The required spacing between Channel 300C3 at Saint Joseph and Channel 300C3 at Wisner is 153 kilometers whereas the actual spacing between these proposals is 12.1 kilometers.

[8] *See, e.g., Fort Bragg, CA,* 6 FCC Rcd 5817 (MMB 1991) (counterproposals must be technically correct and substantially complete when filed); *Broken Arrow and Bixby, OK, and Coffeyville, KS,* 3 FCC Rcd 6507, 6511 n.2 (MMB 1988); and *Sanford and Robbins, NC,* 12 FCC Rcd 1 (MMB 1997).

[9] The Linden counterproposal was filed on January 2, 2001, the deadline for filing counterproposals in MM Docket 00-228, and was, therefore, cut-off from other rulemaking proposals on that date.

[10] *See Auburn, Northport, Tuscaloosa, et al., AL,* 17 FCC Rcd 16227 (MB 2002), *rev'd* 18 FCC Rcd 10333 (MB 2003) ("*Auburn MO&O*"); and *Columbia City, FL,* 14 FCC Rcd 21165 n.1 (MMB 1999).

[11] The reference coordinates for Channel 257C3 at Saint Joseph were incorrectly listed in the *R&O*. The correct reference coordinates for Channel 257C3 at Saint Joseph are 31-51-44 NL and 91-11-41 WL.

counterproposal and that such dismissal is not supported by any relevant case precedents. Consequently, CCC requests that its counterproposal be reinstated and considered on the merits in this proceeding.

DISCUSSION

7. Section 1.429 of the Commission's rules sets forth the limited provisions under which the Commission will reconsider a rulemaking action. Reconsideration is warranted only if the petitioner cites error of fact or law or has presented facts or circumstances that otherwise warrant Commission review of its prior action.[12] After careful review of the record, we deny CCC's Petition for Reconsideration because it has demonstrated no errors of fact or law.

8. CCC's counterproposal was properly dismissed as an impermissibly contingent proposal. Counterproposals must be technically correct and substantially complete when filed.[13] This standard was not met because on March 19, 2001, the date that the counterproposal was filed, it was contingent on the withdrawal of the cut-off proposal for Linden, Texas, in MM Docket 00-228 and there was no decision in that docket. Although our policy on the treatment of non-final rulemaking proceedings was modified after the adoption of the *R&O*, that change in policy does not help CCC's counterproposal. Previously, a rulemaking proposal could not be contingent upon a decision in an earlier, cut-off proceeding unless that decision had become final.[14] We subsequently modified that policy so that a rulemaking proposal could be contingent upon an effective but not yet final decision in another rulemaking proceeding.[15] However, this change in policy does not affect CCC's counterproposal because the decision approving the request for withdrawal of the Linden proposal in MM Docket 00-228 was not effective until July 3, 2001. Accordingly, CCC's counterproposal was correctly dismissed.[16]

9. Additionally, CCC's counterproposal was untimely under longstanding precedent and could have been dismissed on that ground. The *R&O* noted that, although CCC's counterproposal was timely filed in MM Dockets 01-19 and 01-27, it conflicted with a cut-off counterproposal in MM Docket 00-228 to allot Channel 257C1 at Linden, Texas, and was filed after the January 2, 2001 comment deadline in that proceeding.[17] Initial rulemaking petitions or counterproposals that conflict with proposals that are filed in other rulemaking proceedings must be filed by the comment deadline in those proceedings.[18] Contrary to CCC's assertion, case precedent supports the dismissal of the counterproposal as late filed.[19] Even if the earlier filed, cut-off proposal is subsequently determined to be defective[20] or is

[12] *See Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975).

[13] *See* cases cited *supra* note 8.

[14] *See, e.g., Oxford and New Albany, MS*, 3 FCC Rcd 6626 (MMB 1988); and *Esperanza, PR, and Christiansted, VI*, 11 FCC Rcd 2908 (MMB 1996).

[15] *See Auburn MO&O*, 18 FCC Rcd at 10340-41 (¶¶ 22-24).

[16] In two decisions released after the *Auburn MO&O*, we stated that "[I]n allocations proceedings, both counterproposals and initial rulemaking proposals are deemed defective if they are in conflict with, or contingent upon, a cut-off proposal or a non-final decision in another pending proceeding." *Eden, TX*, 21 FCC Rcd 85 (MB 2006); and *Amboy, Baker, and Desert Center, CA, Kingman, et al., NV*, 19 FCC Rcd 12405, 12408 (MB 2004) ("*Amboy, CA*"). In light of our *Auburn MO&O*, we clarify the last part of the preceding sentence. Both counterproposals and initial rulemaking proposals may be contingent upon action in a non-final proceeding provided that on the date that the proposal is filed, there is a decision in the earlier, cut-off proceeding that is effective but not final.

[17] 8 FCC Rcd at 25 n.15.

[18] 47 C.F.R. § 1.420(d).

[19] *See, e.g., Crawford v. FCC*, 417 F.3d 1289 (D.C. Cir. 2005) (Commission dismissal of a rulemaking petition affirmed because the petition conflicted with a timely filed, cut-off counterproposal in another proceeding); *Amboy,*

(continued....)

the subject of a pending request for withdrawal,[21] we have dismissed subsequently filed and conflicting counterproposals as untimely.[22] Moreover, there are no unique circumstances in this case that would warrant waiver of our cut-off rule.

10. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed by Communications Capital Company II of Louisiana, LLC IS DENIED.

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

12. For further information concerning this proceeding, contact Andrew J. Rhodes, Audio Division, Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
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CA, supra note 16 (counterproposal dismissed because it conflicted with and sought to modify cut-off proposals in another proceeding); *Pinewood, SC,* 5 FCC Rcd 7609 (1990) (Commission affirmed staff dismissal of rulemaking petition because it conflicted with an earlier filed, cut-off alternate channel suggested by the parties to resolve the proceeding); and *Milford, UT,* 19 FCC Rcd 10335 (MB 2004) (counterproposal dismissed because it requested channel changes to cut-off proposals in three earlier proceedings).

[20] *See, e.g., Amboy, CA*, 19 FCC Rcd at 12407-08, 12409.

[21] *See, e.g., Eden, TX, supra* note 16 (counterproposal in conflict with a cut-off proposal in an earlier proceeding dismissed as untimely even though request for dismissal of the cut-off proposal was on file). *Cf., Dubach, Natchitoches, Oil City, and Shreveport, LA, and Groesbeck, et al., TX,* 20 FCC Rcd 19495 (2005) ("*Oil City, LA*") (late filed counterproposal in conflict with cut-off proposals in an earlier proceeding is subject to dismissal but was considered because of extraordinary circumstances – the station was ordered by the Commission to discontinue operation due to interference to navigational equipment used by military aircraft and the counterproposal was the only technical solution that would enable the station to resume operations promptly). The Commission emphasized, however, in *Oil City, LA,* that, on a going-forward basis, it will continue strictly to apply Section 1.420(d).

[22] The policy justification for this approach is that "[acceptance] of counterproposals after the comment date is disruptive to the efficient processing of allotment rulemaking proceedings . . . [and] waivers of this filing deadline could lead to abuses of our FM allotment procedures by permitting parties with no timely expression of interest in a proceeding to affect its outcome." *Oil City, LA,* 20 FCC Rcd at 19498.