

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

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FCC Mail Room

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 02-167
Table of Allotments,)	RM-10479
FM Broadcast Stations.)	RM-10770
(Eldorado, Mason, Mertzon, and Fort)	
Stockton, Texas) ¹)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: April 5, 2006

Released: April 7, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it (1) a *Notice of Proposed Rule Making*² issued in response to a petition for rule making filed by Katherine Pyeatt ("Petitioner"); (2) supporting comments filed by the Petitioner; (3) a counterproposal and comments filed by BK Radio ("BK"), licensee of Station KOTY(FM), Channel 239C2, Mason, Texas; (4) reply comments filed by BK; and (5) other related pleadings.³ On February 28, 2006, Petitioner filed a request for approval of withdrawal.⁴

Background

2. At the request of the Petitioner, the *NPRM* proposed the allotment of Channel 241A at Eldorado, Texas, as the community's fourth local FM transmission service (RM-10479). The Petitioner filed comments in support of the proposal, reaffirming her intention to apply for Channel 241A, if allotted.

3. In response to the *NPRM*, BK filed a counterproposal proposing to reallocate and change the community of license for Station KOTY(FM) from Channel 239C2 at Mason, Texas, to Channel 240C2 at Mertzon, Texas (RM-10770).⁵ BK Radio submitted its counterproposal pursuant to the

¹ The communities of Mason, Mertzon, and Fort Stockton, Texas, have been added to the caption.

² *Eldorado, Texas*, Notice of Proposed Rule Making, 17 FCC Rcd 12824 (MB 2002).

³ After the record closed, a supplement was jointly filed by BK and the Petitioner, accompanied by a motion to accept, and another supplement was later filed by BK. We will accept the two supplements because they will facilitate resolution of this case and will not prejudice any party based upon a full and complete factual record.

⁴ In accordance with Section 1.420(j) of the Commission's Rules, Petitioner filed an affidavit stating that she has not received, either directly or indirectly, any money or other consideration in connection with the withdrawal of her petition.

⁵ The counterproposal was placed on Public Notice on August 26, 2003.

provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.⁶ BK's counterproposal is mutually exclusive with the Petitioner's proposal because Channel 240C2 at Mertzon, Texas, is short-spaced to Channel 241A at Eldorado.

Discussion

4. Generally, conflicting proposals are comparatively considered under the Commission's FM allotment priorities.⁷ In the instant proceeding, however, it is not necessary to compare the Petitioner and BK's proposals because Petitioner subsequently filed a request for withdrawal of her proposal.

5. Adoption of the BK counterproposal would not result in a preferential arrangement of allotments under the FM Allotment Priorities.⁸ Specifically, the reallocation of Channel 240C2 to Mertzon would create a loss area of 8,560 square kilometers with a population of 14,156 persons. A population of 7,372 persons residing within a 2,284 square kilometer portion of the loss area would lose one of two reception services if the reallocation were implemented. Although there are two or more vacant FM channel allotments in this gray area, vacant allotments are not sufficient to offset the loss of an existing service which provides a first or second reception service to a significant number of listeners. We held in *Sells, Arizona*,⁹ following *Pacific Broadcasting of Missouri, LLC ("Refugio")*,¹⁰ that vacant allotments cannot be used to avoid loss of first or second reception service. Here, we further extend that reasoning to include both previously allotted and proposed vacant channels as "backfills."

6. As the Commission held in *Refugio*, the ultimate licensing of a "backfill" through our auction procedures is both an uncertain and time-consuming process. Further, we held in *Change of Community* that "the public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel regardless of whether the service removed constitutes a transmission service, a reception service, or both."¹¹ The Commission further stated that removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service. As we stated in *Change*

At the time the counterproposal was filed, BK had a construction permit for unbuilt Station KOTY(FM). During the pendency of the proposal, a license was granted, and on November 29, 2004, the station received a STA for six months to remain silent. Station KOTY(FM) resumed broadcast operation on March 30, 2005.

⁶ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990) ("*Change of Community*").

⁷ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁸ See *Change of Community*, 4 FCC Rcd at 4873.

⁹ *Sells, Arizona*, Report and Order, 19 FCC Rcd 22459 (MB 2004), recon. pending.

¹⁰ See *Pacific Broadcasting of Missouri, LLC*, 28 FCC Rcd 2291 (2003); recon. denied, 19 FCC Rcd 10,950 (2004).

¹¹ *Id.* at 7097.

of Community, "replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered . . . , does not adequately cure the disruption to 'existing service' occasioned by removal of an operating station. From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a TV or radio set." Therefore, we find that allotting a third local FM transmission service to a community does not outweigh the creation of a gray area in which 7,372 persons reside. We conclude for the same reasons articulated in *Refugio* and *Sells, Arizona*, that an existing or proposed vacant allotment is insufficient to offset the loss of service that would result from the allotment of Channel 240C2 from Mason to Mertzon, Texas.

7. Moreover, the engineering analysis also revealed that within the loss area a population of 1,563 persons within an area of 2,236 square kilometers would receive two aural services; and a population of persons of 1,348 within an area of 1,446 square kilometers would receive three aural services. On the other hand, the gain area would provide new service to an area of 8,560 square kilometers with a population of 102,943 persons. Within the gain area, service would be provided to a very small white area of approximately 55 square kilometers with a population of 124 persons, which is de minimis.¹² A population of 137 persons within an area of 478 square kilometers would receive two aural services; a population of 46 persons within an area of 731 square kilometers would receive three aural services; and a population of 232 persons within an area of 361 square kilometers would receive four aural services.

8. IT IS ORDERED, That, as requested, the petition for rule making (RM-10479) filed by the Katherine Pyeatt, IS DISMISSED.

9. IT IS FURTHER ORDERED, That the counterproposal filed by BK Radio (RM-10770), IS DENIED.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail Return Receipt Requested, a copy of this *Report and Order* to the following:

Mr. Bryan A. King
1809 Lightsey Road
Austin, Texas 78704

11. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. §801(a)(1)(A).

12. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

¹² See *Seabrook, Huntsville, Bryan, Victoria, Kenedy and George West, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 9360 (MMB 1995).

13. For further information concerning the above, contact Sharon P. McDonald, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau