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

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JUL 10 2006

FCC Mail Room

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Americus and Emporia, Kansas))

MB Docket No. 05-139
RM-11218

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: July 5, 2006

Released: July 7, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division issued a *Notice of Proposed Rulemaking and Order to Show Cause* in response to a Petition for Rule Making filed by Dana J. Puopolo ("Puopolo").¹ The *Notice and OSC* proposed the allotment of FM Channel 240A at Americus, Kansas, and, in order to accommodate the use of Channel 240A at Americus, the *Notice and OSC* required C&C Consulting, Inc. ("C&C"), the licensee of Station KANS(FM), Channel 241A, Emporia, Kansas, to show cause why its KANS(FM) license should not be modified to specify operation on Channel 244A, in lieu of Channel 241A, at Emporia, Kansas.²

2. In his petition for rule making, Puopolo stated his intention to apply for Channel 240A at Americus. Consistent with *Circleville, Ohio*, Puopolo committed to compensate the licensee of KANS(FM) for the reasonable expenses necessary to move to Channel 244A from Channel 241A, should he become the permittee of Channel 240A at Americus.³ Puopolo filed comments supporting the allotment of Channel 240A at Americus and reaffirming his intention to apply for the channel if it is allotted and, if authorized, to build and operate a station on that channel.

¹ *Americus and Emporia, Kansas*, Notice of Proposed Rule Making and Order to Show Cause, 20 FCC Rcd 6265 (MB 2005) ("*Notice and OSC*").

² At the time that Puopolo filed his petition for rulemaking, Channel 241A was reserved for use by Station KRWW-FM, Emporia, Kansas. The licensee, C&C, subsequently has constructed facilities and has been granted a license for the use of Channel 241A, Emporia, Kansas, by Station KANS(FM).

³ *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159 (1967).

3. C&C filed comments in opposition to the substitution of Channel 244A for Channel 241A at Emporia. C&C notes that, in 2001, Station KANS(FM) was required to change from Channel 258A to Channel 241A, and that modification was implemented in 2004. The license, C&C states, was granted on October 20, 2004, less than one year prior to the issuance of the *Notice and OSC* in this proceeding. C&C contends that in this situation, where the FM station recently has been forced to change channels involuntarily, a hearing should be held to determine whether a second channel change is in the public interest. C&C asserts that the proposed channel change would cause serious additional disruption to the operations of Station KANS(FM) and to KANS(FM)'s listeners. C&C argues that requiring a second channel change in such a short time period is an undue imposition upon C&C as an existing licensee. Finally, C&C states that Puopolo has no ability to consent to compensate KANS(FM) for the reasonable expenses of moving from Channel 241A to Channel 244A, because he cannot know whether he will be the ultimate permittee of Channel 240A at Americus.

4. We find that C&C has not raised a substantial and material question of fact to warrant a hearing on the proposed channel substitution. It is well-settled that the substitution of an existing station's channel serves the public interest where the substitution permits the provision of new or expanded service at another community.⁴ In *Ava, Branson, and Mountain Grove*, we considered and rejected the argument that a station should not be required to change channels again after a recent involuntary channel change, and, in that case, we denied the licensee's request for a hearing. C&C has not alleged any material facts in this proceeding that would justify a departure from our holding in *Ava, Branson, and Mountain Grove*.

5. We also reject C&C's contention that Puopolo's commitment to reimburse C&C for its reasonable costs of changing channels is inadequate. C&C cites several cases in support of its argument, but none of them is on point with the circumstances of this proceeding. Three of those cases involved requests for channel upgrades pursuant to Section 1.420(g) of the Commission's rules, and we held that the wording of Section 1.420(g) conveys the Commission's intent to restrict the rule's applicability to licensees and permittees.⁵ The fourth case turned on the Commission's holding that upgrades requested while applications are pending should not be allowed.⁶ None of those cases involved circumstances such as those presented here, where a new allotment would require a channel substitution at another

⁴ See *Ava, Branson, and Mountain Grove, Missouri*, Report and Order, 10 FCC Rcd 13,035 (MMB 1995) ("*Ava, Branson, & Mountain Grove*"), and cases cited therein.

⁵ See *Santa Margarita and Guadalupe, California*, Report and Order, 2 FCC Rcd 6930 (MMB 1987), *aff'd*, Memorandum Opinion and Order, 4 FCC Rcd 7887 (MMB 1989); *Arlington, McKinney, Celina, Terrell, Daingerfield, College Station, Caldwell, and Howe, Texas, and Durant, Oklahoma*, Memorandum Opinion and Order, 8 FCC Rcd 4281 (1993); and *Mount Pleasant, Iowa*, Memorandum Opinion and Order, 10 FCC Rcd 12,069 (MMB 1995). In *Mount Pleasant, Iowa*, we denied an upgrade request from a person who was not the permittee nor licensee of the existing FM station for which he proposed a channel upgrade, and we denied his petition for reconsideration because he was not a party in the earlier proceeding nor an authorized representative of the station for which he purported to work.

⁶ *Lafayette, Louisiana*, Memorandum Opinion and Order, 4 FCC Rcd 5073, 5075 (1989).

community. Contrary to C&C's argument, if a channel substitution is required to accommodate a new allotment at another community, our policy is to make the new allotment and require that the ultimate permittee of the station utilizing the new channel reimburse the licensee of the station required to change channels.⁷ We will include the same provision in this *Report and Order* to ensure that C&C is reimbursed for its cost of changing from Channel 241A to Channel 244A at Emporia.

6. Americus, an incorporated community with a population of 938 persons, is a community for allotment purposes and is deserving of a first local service. We therefore find that the public interest would be served by the allotment of Channel 240A at Americus, Kansas, as a first local service. Channel 240A can be allotted at Americus with a site restriction of 12.5 kilometers (7.8 miles) southwest of Americus, at the following reference coordinates: 38-25-13 North Latitude and 96-21-12 West Longitude. In order to accommodate that allotment, we further find that the public interest would be served by the substitution of Channel 244A for Channel 241A at Emporia, Kansas, at the current transmitter location for Station KANS(FM): 38-24-21 North Latitude and 96-14-13 West Longitude, with a site location of 4.9 kilometers (3.0 miles) west of Emporia.

7. A filing window period for Channel 240A at Americus, Kansas, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent *Order*. Because this allotment requires the substitution of Channel 244A for Channel 241A at Emporia, Kansas, any requisite conditions for the channel change will be stipulated in said *Order*.

8. Accordingly, IT IS ORDERED, That effective August 21, 2006, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED as follows:

<u>Community</u>	<u>Channel Number</u>
Americus, Kansas	240A
Emporia, Kansas	244A, 269A, 285A

9. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of C&C Consulting, Inc., for Station KANS(FM), Channel 241A, Emporia, Kansas, IS MODIFIED to specify operation on Channel 244A at Emporia, Kansas, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a

⁷ See *Vancouver, Washington, and Coos Bay and Corvallis, Oregon*, Report and Order, 4 FCC Rcd 839 (MMB 1989) (issues raised concerning reimbursement found to lack merit, because petitioner had stated its willingness to provide reimbursement should it become the eventual permittee of new channel). See also *Clatskanie, Oregon, Long Beach and Ilwaco, Washington*, Report and Order, 20 FCC Rcd 8811 (MB 2005); *Alberta and Dinwiddie, Virginia, and Whitakers and Garysburg, North Carolina*, Memorandum Opinion and Order, 20 FCC Rcd 406 (MB 2005); *Susanville, Quincy, Corning, and Portola, California*, Report and Order, 19 FCC Rcd 22,022 (MB 2004); and *Charlotte Amalie, Frederiksted, and Christiansted, Virgin Islands*, Report and Order, 19 Fcc Rcd 30 (MB 2004).

minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

10. IT IS FURTHER ORDERED, that the ultimate permittee of Channel 240A, Americus, Kansas, shall reimburse C&C Consulting, Inc., for its reasonable costs of changing the frequency of its Station KANS(FM), Emporia, Kansas, from Channel 241A to Channel 244A.

11. IT IS FURTHER ORDERED, that the request of C&C Consulting, Inc., for a hearing on the merits of the proposed substitution of Channel 244A for Channel 241A at Emporia, Kansas, IS DENIED.

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

Dana J. Puopolo
1434 – 24th Street
Santa Monica, California 90404

Dan J. Alpert, Esq.
Law Office of Dan J. Alpert
2120 N. 21st Road
Arlington, Virginia 22201
(Counsel for C&C Consulting, Inc.)

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

14. 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.⁸

⁸ See 5 U.S.C. 801 (a)(1)(A).

15. For further information concerning this proceeding, contact Deborah Dupont, Media Bureau, (202) 418-7072. Questions related to the application filing process for Channel 240A at Americus, Kansas, should be addressed to the Audio Division, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

**John Karousos
Assistant Chief
Audio Division
Media Bureau**