

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 05-146
FM Table of Allotments,) RM-11213
FM Broadcast Stations.)
(Caliente and Moapa, Nevada))

To: Office of the Secretary
Attn: Chief, Audio Division

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Federal Communications Commission
Office of Secretary

COMMENTS TO PETITION FOR RECONSIDERATION

Aurora Media, LLC ("Aurora"), permittee of an unbuilt station on Channel 233C, Caliente, Nevada (*see* FCC File No. BNPH-20050103AFD), hereby submits these Comments to its Petition for Reconsideration filed on June 23, 2006 (the "Petition").¹ In this Petition, Aurora requested that the Commission reconsider and reverse the *Report and Order* of the Assistant Chief, Audio Division, released May 26, 2006, DA 06-1075 ("*Report and Order*"), denying Aurora's proposal to reallocate Channel 233C from Caliente to Moapa, Nevada and to modify Aurora's construction permit accordingly.² The deadline for the filing of petitions for reconsideration in this proceeding was July 14, 2006. Aurora filed its Petition on June 23, 2006. However, due to an administrative error, Aurora inadvertently addressed the filing to the Media Bureau instead of to the Secretary's Office. Even though Aurora filed the Petition three weeks before the filing deadline, the Bureau did not deliver Aurora's Petition to the Secretary's Office until July 31, 2006, over a month after it was filed.

¹ Public Notice of Aurora's Petition for Reconsideration was published in the Federal Register on August 23, 2006. *See* 71 Fed. Reg. 49,456. Thus, these Comments are timely. *See* Report No. 2786.

² Aurora Media, LLC, Petition for Rule Making, filed in MB Docket No. 05-146 (received Mar. 7, 2005) ("Petition for Rule Making").

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Due to circumstances unique to this proceeding, including the fact that Aurora's Petition for Rule Making is unopposed, the public interest benefits of Aurora's proposal, and the freeze on the filing of petitions for rule making to amend the FM Table of Allotments, the Bureau should waive the policy that pleadings must be addressed to the Secretary's Office in order to be considered timely.³ In support hereof, Aurora states as follows:

1. As discussed in Aurora's Petition for Reconsideration, the Bureau's decision in the *Report and Order*, was based on outdated population figures. Thus, after completing its research to ascertain the most recent population figures for Caliente and Moapa, Nevada, Aurora immediately submitted its Petition for Reconsideration on June 23, 2006. Aurora acknowledges that it should have addressed its Petition to the Secretary's Office. However, this is not a case where Aurora filed a pleading with the Bureau (instead of with the Secretary) on the day that the pleading was due. This is not even a case where a mislabeled pleading was filed a couple of days or weeks before the pleading was due. Rather, Aurora filed its Petition for Reconsideration three weeks before it was due. Thus, the Bureau had ample time to deliver the Petition to the Secretary as it has done in the past.⁴ This fact alone warrants acceptance and consideration of the Petition for Reconsideration. However, there are additional reasons why the Commission should accept the Petition.

³ See *Filing Requirements in FM Allotment Rule Making Proceedings*, 20 FCC Rcd 7502 (Med. Bur. 2005) (the "*Filing Requirements Notice*"). It appears that the Bureau has the discretion to accept a pleading as timely even if it is filed with the Bureau (and not with the Secretary). Specifically, the last sentence of the *Filing Requirements Notice* states that "[f]ailure to follow these requirements *may* result in the treatment of a filing as untimely." (emphasis added).

⁴ See, e.g., Willsyr Communications, Limited Partnership, Petition for Reconsideration, filed in MB Docket Nos. 02-352 and 05-191 (petition was filed with the Bureau on October 24, 2005 and immediately forwarded to the Secretary's Office on the same day); Justin Robinson, Petition for Reconsideration, considered in MB Docket No. 04-427) (petition was filed with the Bureau on May 25, 2004 and forwarded to the Secretary's Office three days later on May 28, 2004).

2. First, Aurora's proposal to reallocate Channel 233C from Caliente to Moapa, Nevada, is in the public interest because it will result in a first local service to the larger community of Moapa.⁵ Second, Aurora's proposal was unopposed and no other party filed comments in this proceeding. Thus, no party will be adversely impacted by acceptance and consideration of Aurora's Petition for Reconsideration.⁶ Finally, the current freeze on the filing of petitions for rule making to amend the FM Table Allotments prohibits Aurora from refileing its proposal as a new petition for rule making.⁷ Thus, if the Commission treats Aurora's Petition as late filed and dismisses it, the public interest benefits of Aurora's proposal will be lost because Aurora cannot refile.

3. The circumstances in this proceeding are similar to those in *Monument, Oregon*.⁸ There, the Bureau waived the filing deadline for an untimely counterproposal addressed to the Bureau rather than to the Secretary because it was filed before the Bureau issued the *Filing Requirements Notice*.⁹ Here, even though Aurora's Petition for Reconsideration was filed after the issuance of the *Filing Requirements Notice*, Aurora, like the petitioner in *Monument, Oregon*, did not have express notice that the policy that pleadings must be received by the Secretary's Office in order to be considered timely, would be strictly applied to petitions for reconsideration.

⁵ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1982).

⁶ The Commission routinely accepts late filed Comments in FM Allotment proceedings where no other party will be adversely impacted. See, e.g., *Chillicothe, Dublin, Hillsboro, and Marion, Ohio*, 20 FCC Rcd 6305 (Med. Bur. 2005); *Willows, California*, 11 FCC Rcd 9180 (Mass Med. Bur. 1996); *Bagdad and Chino Valley, Arizona*, 11 FCC Rcd 14459 (Mass Med. Bur. 1996).

⁷ See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Notice of Proposed Rule Making in MB Docket No. 05-210, 20 FCC Rcd 11169, ¶ 47 (2005).

⁸ See *Monument, Oregon, et al.*, 21 FCC Rcd 3332, fn. 4 (Med. Bur. 2006) ("*Monument, Oregon*").

⁹ *Id.* Cf. *Roma, Texas*, DA 06-1756 (Med. Bur. 2006) (Bureau did not waive the filing deadline because the pleading at issue was filed after the Bureau issued the *Filing Requirements Notice*).

This is because the *Filing Requirements Notice* only addresses petitions for rule making, counterproposals, and comments. It is silent on whether this new policy also applies to petitions for reconsideration and undersigned counsel has been unable to locate a case where the *Filing Requirements Notice* was applied to a late filed petition for reconsideration. Further, the facts in this proceeding make an even more compelling case for a waiver because, as discussed above, Aurora's pleading was filed three weeks before it was due and Aurora's proposal was unopposed. In *Monument, Oregon*, the mislabeled counterproposal was filed on the day it was due and it was opposed.

4. The Commission is permitted to waive its rules for good cause shown.¹⁰ A waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.¹¹ These requirements are met here. First, as discussed above, the Petition was filed three weeks early. In other cited cases, the mislabeled pleading was taken to the Secretary's Office to be restamped on the same day or within 3 days. Second, Aurora's Petition for Rule Making is unopposed no party would be adversely affected by waiver of the rule. Third, the freeze on the filing of petitions for rule making to amend the FM Table of Allotments prevents Aurora from refileing. Fourth, grant of a waiver would be in the public interest because it would result in a first local service to the larger community of Moapa, a preferential arrangement of allotments. Fifth, the *Filing Requirements Notice* did not expressly refer to petitions for reconsideration and thus Aurora did not have actual notice that strict compliance with the policy was required. Finally,

¹⁰ 47 C.F.R. § 1.3.

¹¹ See *Northeast Cellular Telephone Co. v. FCC*, 897 F2d 1164, 1166 (D.C. Cir. 1990).

the purpose of the policy, to ensure that pleadings are promptly entered into the Commission's Electronic Filing Comment System (ECFS),¹² would not be frustrated.

For all of the reasons discussed herein, the Bureau should waive its policy that pleadings must be received by the Secretary's Office in order to be considered timely. This will ensure that the larger community of Moapa will receive its first local service.

Respectfully submitted,

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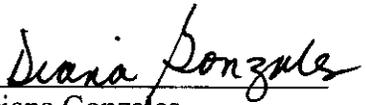
Dated: September 7, 2006

¹² See *Filing Requirements Notice*.

CERTIFICATE OF SERVICE

I, Diana Gonzales, in the law firm of Wiley Rein & Fielding LLP, hereby certify that on this 7th day of September, 2006, I caused copies of the foregoing "Comments" to be hand delivered to the following:

Helen McLean
Audio Division, Media Bureau
Federal Communications Commission
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Diana Gonzales