

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

MAILED

SEP 25 2006

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 06-65
Table of Allotments,)	RM-11320
FM Broadcast Stations.)	RM-11335
(Ashland, Greensburg, and Kinsley, Kansas; and)	
Alva, Medford, and Mustang, Oklahoma))	

FCC Room

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: September 20, 2006

Released: September 22, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making*¹ issued in response to a petition for rule making (RM-11320) filed by OKAN Community Radio ("Petitioner"), requesting the allotment of Channel 288C3 at Ashland, Kansas. Chisholm Trail Broadcasting Company ("Chisholm") filed a timely counterproposal (RM-11335), proposing to: (1) substitute Channel 259C2 for Channel 259C1 at Alva, Oklahoma, reallocate Channel 259C2 to Mustang, Oklahoma, and modify the license of Station KNID to reflect the channel downgrade and change of community; (2) allot Channel 260C3 at Medford, Oklahoma; (3) allot Channel 259C3 at Ashland, Kansas; and (4) allot Channel 288C3 at Kinsley, Kansas.² Chisholm also filed a Request to Withdraw a pending Petition for Rule Making ("Greensburg Petition") which requested some of the same allotments as the counterproposal. The Greensburg Petition had proposed to: (1) substitute Channel 259C2 for Channel 259C1 at Alva, Oklahoma, reallocate Channel 259C2 to Mustang, Oklahoma, and modify the license of Station KNID to reflect the channel downgrade and change of community; (2) allot Channel 260C3 at Medford, Oklahoma; and (3) allot Channel 259C1 at Greensburg, Kansas.

2. Petitioner did not file comments expressing its continuing interest in pursuing the proposed Channel 288C3 allotment at Ashland. No other party has expressed an interest for this proposed allotment. It is the Commission's policy to refrain from making an allotment to a community absent an adequate expression of interest. Therefore, we dismiss Petitioner's petition to allot Channel 288C3 at Ashland, Kansas. We also dismiss Chisholm's Greensburg Petition pursuant to its request for withdrawal. In compliance with Section 1.420(j) of the Commission's Rules, Chisholm states that no consideration was received in connection with the withdrawal of the petition.³ Next we consider Chisholm's counterproposal.

3. Chisholm states that its counterproposal to allot Channel 288C3 at Kinsley conflicts with the *Notice's* proposal to allot Channel 288C3 at Ashland, Kansas. Our staff engineering analysis confirms that the requisite mutual exclusivity exists between Channel 288C3 at Kinsley and Channel

¹ See *Ashland, Kansas*, Notice of Proposed Rule Making, 21 FCC Rcd 3319 (MB 2006) ("*Notice*").

² The counterproposal was placed on Public Notice on July 19, 2006, Report No. 2779, (RM-11335).

³ 47 C.F.R. § 1.420(j).

288C3 at Ashland to qualify as a valid counterproposal. However, with regard to the remaining aspects of Chisholm's counterproposal there is no mutual exclusivity between those proposed channels and Channel 288C3 at Ashland. Accordingly, we deny Chisholm's proposals to: (1) substitute Channel 259C2 for Channel 259C1 at Alva, Oklahoma, reallocate Channel 259C2 to Mustang, Oklahoma, and modify the license of Station KNID to reflect the channel downgrade and change of community; (2) allot Channel 260C3 at Medford, Oklahoma; and (3) allot Channel 259C3 at Ashland, Kansas -- as invalid components of Chisholm's counterproposal.⁴

4. We also note that components 1 through 3 *supra* of Chisholm's counterproposal conflict with its earlier filed application for an upgrade of KNID to Channel 259C0 at Alva with a new set of coordinates.⁵ Specifically, Chisholm's proposal to downgrade and change the community of license for Station KNID from Channel 259C1 at Alva to Channel 259C2 at Mustang, as well as its other proposals to allot Channel 260C3 at Medford and Channel 259C3 at Ashland, all conflict with its earlier filed upgrade application. In *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments ("Conflicts")*, the Commission clearly states that a construction permit application is entitled to cut-off protection as of the date it is filed with the Commission from subsequently filed conflicting applications and petitions for rule making, and that later filed applications and petitions are subject to dismissal.⁶ There is no indication in *Conflicts* or Section 73.208(a) (3) of the Commission's Rules,⁷ that the dismissal of later filed petitions is applicable to only those filed by another party. We recognize the potential for abuse where the same party files an application and then files its own conflicting petition for rule making to cut off competing petitions or counterproposals from another party. Therefore, consistent with *Conflicts* and Section 73.208(a) (3), and to avoid the appearance of potential abuse while ensuring fairness and administrative efficiency, we will, on a going forward basis, dismiss a petition for rule making that conflicts with an application filed earlier by the same party.⁸

5. We find that Kinsley is a community for allotment purposes and that the public interest would be served by allotting Channel 288C3 as a first local aural transmission service. Kinsley is the county seat of Edwards County and is a city listed in the 2000 U.S. Census with a population of 1,658 persons. The community has several businesses, churches, a public library, and a fire department.

⁴ See e.g. *Centre Hall, Pennsylvania, et al.*, Report and Order, 20 FCC Rcd 458 (MB 2005) (rejecting counterproposal "because it does not conflict with any component" of initiating proposal set forth in a Notice of Proposed Rule Making "and is not, therefore, a valid counterproposal"); *Cameron, Arizona, et al.*, Report and Order, 19 FCC Rcd 6846 (MB 2004) (excluding from consideration proposal "which does not conflict with the proposal set forth in the Notice"). Compare *Statesville, North Carolina, et al.*, Report and Order 21 FCC Rcd 57 (MB 2006) (finding counterproposal is not defective but valid because it is mutually exclusive with initiating petition).

⁵ Chisholm's upgrade application for Station KNID from Channel 259C1 to Channel 259C0 at Alva proposing new coordinates at 36-37-31 NL and 98-15-21 WL was filed on May 9, 2005 and granted on June 23, 2006. See File No. BPH-20050509ADS.

⁶ Report and Order, 7 FCC Rcd 4917 (1992) *recon. granted in part*, Memorandum Opinion and Order, 8 FCC Rcd 4743, 4743 (1993). The Commission stated, "we amended Section 73.208 of our Rules to provide FM applications with cut-off protection from rulemaking proposals at the same time that they receive such protection from other mutually exclusive applications -- that is, FM applications for new stations or major changes filed during a filing window are protected from rulemaking petitions at the close of the filing window. All other FM applications are protected as of the date they are filed with the Commission. Rulemaking petitions filed after these cut-off dates must protect the transmitter sites proposed in previously filed FM applications or be subject to dismissal."

⁷ 47 C.F.R. § 73.208(a) (3).

⁸ *C.f.* e.g. *Taccoa, Georgia, et al.*, Memorandum Opinion and Order, 16 FCC Rcd 21191 (MMB 2001) (establishing new policy of requiring explanations such as unforeseen circumstances as to why the counterproposal, filed by an original rulemaking proponent, could not have been advanced in the initiating petition otherwise reserving the right to process the counterproposal in a new proceeding).

Channel 288C3 can be allotted at Kinsley consistent with the Commission's minimum distance separation requirements at 37-53-20 North Latitude and 99-24-34 West Longitude with a site restriction of 3.8 kilometers (2.4 miles) south of city reference.

6. 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. Section 801(a)(1)(A).

7. Accordingly, pursuant to the authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective, November 6, 2006, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED for the community listed below, as follows:

<u>Community</u>	<u>Channel No.</u>
Kinsley, Kansas	288C3

8. A filing window period for Channel 288C3 at Kinsley, 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.

9. IT IS FURTHER ORDERED, That the Petition for Rule Making (RM-11320) filed by OKAN Community Radio proposing to allot Channel 288C3 at Ashland, Kansas IS DISMISSED.

10. IT IS FURTHER ORDERED, That the counterproposal (RM-11335) filed by Chisholm Trail Broadcasting Company IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

11. IT IS FURTHER ORDERED, That the Petition for Rule Making (Greensburg Petition) filed by Chisholm Trail Broadcasting Company IS DISMISSED.

12. IT IS FURTHER ORDERED, That the aforementioned proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Helen McLean, Media Bureau, (202) 418-2738.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
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