

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

FILED/ACCEPTED

NOV 17 2006

Federal Communications Commission  
Office of the Secretary

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) )  
)

To: Office of the Secretary  
Attn: Assistant Chief, Audio Division,  
Media Bureau

**PETITION FOR RECONSIDERATION**

Chisholm Trail Broadcasting Co. ("Chisholm Trail"), licensee of Station KNID(FM), Alva, Oklahoma, hereby submits its Petition for Reconsideration of the Media Bureau's (the "Bureau") decision to dismiss the majority of Chisholm Trail's Counterproposal in this proceeding.<sup>1</sup> Chisholm Trail proposed to (i) allot Channel 288C3 to Kinsley, Kansas as that community's first local service, (ii) allot Channel 259C3 at Ashland, Kansas (instead of Channel 283C3 as proposed in the *NPRM*)<sup>2</sup> as that community's first local service,<sup>3</sup> (iii) delete Channel 259C1 at Alva, Oklahoma and allot Channel 259C2 to Mustang, Oklahoma as that community's first local service, and modify the license of KNID(FM) accordingly, and (iv) allot Channel 260C3 to Medford, Oklahoma as that community's first local service. The Bureau, however, dismissed Chisholm Trail's Counterproposal because it claimed that "there is no mutual

<sup>1</sup> See *Ashland, Kansas, et al., Report and Order*, 21 FCC Rcd 10625 (Med. Bur. 2006) ("*Ashland R&O*"). The *Ashland R&O* was published in the Federal Register on October 18, 2006. See 71 Fed. Reg. 61425 (Oct. 18, 2006). Thus, this Petition for Reconsideration is timely. See 47 C.F.R. § 1.429(d).

<sup>2</sup> See *Ashland, Kansas, Notice of Proposed Rule Making*, 21 FCC Rcd 3319 (Med. Bur. 2006) ("*NPRM*").

<sup>3</sup> Channel 259C3 was the channel originally proposed by OKAN Community Radio ("OKAN") in this proceeding, which facilitated the *NPRM*.

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exclusivity” between proposals (ii)-(iv) and the *NPRM*’s proposal for Channel 288C3 at Ashland, Kansas.<sup>4</sup> Its basis for this decision was that OKAN did not express a continuing interest in the proposed allotment of Channel 288C3 at Ashland, yet, as discussed below, it cited no controlling case law to support its claim. This is not surprising as the Bureau’s rationale is contrary to established case law in allotment rule making proceedings.<sup>5</sup> Thus, the Bureau must reinstate Chisholm Trail’s Counterproposal and consider it on the merits in this proceeding. In support hereof, Chisholm Trail states as follows:

1. OKAN, the original petitioner in this proceeding, proposed to allot Channel 259C3 at Ashland, Kansas. However, this proposal conflicted with an earlier proposal filed by Chisholm Trail for Station KNID(FM),<sup>6</sup> and thus the Bureau in the *NPRM* proposed instead to allot Channel 288C3 at Ashland. In its Counterproposal, Chisholm Trail proposed to allot Channel 288C3 to Kinsley, Kansas as that community’s first local service. This proposal conflicted with the *NPRM*’s proposal for Channel 288C3 at Ashland, Kansas. Thus, Chisholm Trail proposed to allot Channel 259C3 at Ashland (as originally requested by OKAN). The allotment of Channel 259C3 at Ashland conflicted with Channel 259C1 at Alva, Oklahoma. As a result, Chisholm Trail proposed delete Channel 259C1 at Alva, Oklahoma and allot Channel 259C2 to Mustang, Oklahoma, and modify the license of KNID(FM) accordingly. This allotment could be made without any other changes to the FM Table of Allotments. However, as a result of the proposed deletion of Channel 259C1 at Alva, Chisholm Trail also proposed to allot Channel 260C3 at Medford, Oklahoma as that community’s first local service.

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<sup>4</sup> *Ashland R&O*, 21 FCC Rcd at ¶3.

<sup>5</sup> See, e.g., *Riverdale and Huron, California*, 12 FCC Rcd 2474 (Mass Med. Bur. 1997) (“*Riverdale*”); *Cloverdale, Montgomery and Warrior, Alabama*, 10 FCC Rcd 13630 (Mass Med. Bur. 1995) (“*Cloverdale*”).

<sup>6</sup> Chisholm Trail requested approval to withdraw this rule making proposal in order to file the Counterproposal in this proceeding (the “Chisholm Trail Rule Making”).

2. The Counterproposal was in the public interest because it would provide (i) first local service to three communities (Mustang, Medford, and Kinsley) with a combined population of 15,986) and (ii) a total net gain in aural service to 824,140 persons. The Bureau, however, dismissed Chisholm Trail's Counterproposal because OKAN failed to file comments expressing its continued interest in Channel 288C3 at Ashland. According to the Bureau, because there was no longer a continued interest in Channel 288C3 at Ashland, Chisholm Trail's Counterproposal was no longer mutually exclusive and it was dismissed. However, as discussed below, the Bureau did not cite any controlling case law supporting its decision. Instead, it appears to have applied a new policy retroactively. This new policy is contrary to the established case law in allotment rule making proceedings.<sup>7</sup> Prior to the Bureau's decision in the *Ashland R&O*, the Bureau would routinely consider and grant counterproposals in rule making proceedings even though the original petitioner failed to express a continued interest in the channel proposed in the Notice of Proposed Rule Making. Put another way, the Bureau's policy was that counterproposals were acceptable if they were mutually exclusive with the proposal in the Notice of Proposed Rule Making irrespective of whether a continued expression of interest in the original proposal was filed.

3. For example, in *Cloverdale*, the FCC issued a Notice of Proposed Rule Making in response to a Petition for Rule Making filed by Pulaski Broadcasting, Inc. ("Pulaski") proposing the allotment of Channel 254A at Cloverdale, Alabama. North Jefferson Broadcasting Company, Inc. ("North Jefferson") filed a Counterproposal that was mutually exclusive with the allotment of Channel 254A at Cloverdale. Pulaski, however, failed to file a continuing expression of interest in the allotment of Channel 254A at Cloverdale. Notwithstanding the fact

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<sup>7</sup> See, e.g., *Riverdale*, 12 FCC Rcd 2474; *Cloverdale*, 10 FCC Rcd 13630.

that Pulaski failed to file a continuing expression of interest, the Bureau still considered and granted North Jefferson's Counterproposal even though there was no longer mutual exclusivity. The Bureau considered this a routine matter and did not even discuss the fact that the failure of the original petitioner to file a continuing expression of interest theoretically stripped North Jefferson's Counterproposal of its mutual exclusivity.<sup>8</sup>

4. In support of its decision to dismiss Chisholm Trail's Counterproposal, the Bureau cites three cases that are easily distinguishable from this proceeding.<sup>9</sup> *Centre Hall* and *Cameron* are distinguishable because in those cases the Bureau dismissed Counterproposals that did not conflict with the initiating proposal set forth in the Notice of Proposed Rule Making. Here, Chisholm Trail's Counterproposal does conflict with the initiating proposal (the allotment of Channel 288C3 at Ashland) set forth in the *NPRM*. The Bureau's decision in *Statesville* is also distinguishable. There, as is the case here, the Counterproposal at issue conflicted with the Notice of Proposed Rule Making. The difference between *Statesville* and this proceeding is that in *Statesville* the Bureau accepted the Counterproposal at issue and considered it on the merits. It failed to do that here. In addition to being distinguishable, the Bureau's reliance on these cases is misplaced because none address the factual situation at issue in this proceeding. More specifically, in *Centre Hall*, *Cameron*, and *Statesville*, all of the original petitioners filed comments expressing a continued interest in the initiating proposals set forth in the notices of proposed rule making. Here, OKAN did not file a continued expression of interest and this was the primary reason the Bureau dismissed Chisholm Trail's Counterproposal.

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<sup>8</sup> Similarly in *Riverdale*, the Bureau granted a Counterproposal to allot Channel 252A at Huron, California, even though the original Petitioner failed to file a continuing expression of interest in the allotment of Channel 252A at Riverdale, California and thus the Counterproposal was no longer mutually exclusive.

<sup>9</sup> See *Centre Hall, Pennsylvania, et al., Report and Order*, 20 FCC Rcd 458 (Med. Bur. 2005) ("*Centre Hall*"); *Cameron, Arizona, et al., Report and Order*, 19 FCC Rcd 6846 (Med. Bur. 2004) ("*Cameron*"); *Statesville, North Carolina, et al., Report and Order*, 21 FCC Rcd 57 (Med. Bur. 2006) ("*Statesville*").

5. The Bureau's decision to apply a new policy in this case was not merely prospective (*i.e.*, it only applied to future cases), but it was also retroactive because Chisholm Trail did not have the benefit of knowing this new policy existed before it filed its Counterproposal. While the Bureau may be entitled to engage in retroactive rule making given appropriate circumstances, it is an absolute requirement that it must make an affirmative finding on the record that the retroactive application of such a rule is appropriate.<sup>10</sup> It made no finding whatsoever regarding retroactive application in this case, and so its action is invalid.

6. The Bureau's attempt to dismiss Chisholm Trail's Counterproposal through the application of a new policy is surprising considering the FCC has a mandate to "provide a fair, efficient, and equitable distribution of radio service" to the public.<sup>11</sup> If the Bureau were interested in serving the public interest and it believed that Chisholm Trail's Counterproposal lacked mutual exclusivity, it could have issued a new Notice of Proposed Rule Making proposing the changes in Chisholm Trail's Counterproposal. If, however, the Bureau felt that it was prohibited from doing this by the freeze on the filing of new petitions for rule making to amend the FM Table of Allotments,<sup>12</sup> it could have allowed Chisholm Trail to rescind its withdrawal of the Chisholm Trail Rule Making and considered that proposal.<sup>13</sup> The Bureau had options in this proceeding to further its 307(b) mandate. It did not choose any of these options, but instead, it opted to dismiss Chisholm Trail's Counterproposal and Rule Making to the detriment of the public interest.

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<sup>10</sup> *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986).

<sup>11</sup> 47 U.S.C. § 307(b).

<sup>12</sup> 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*, 20 FCC Rcd 11169, ¶ 47 (2005).

<sup>13</sup> It is clear the Bureau recognized the connection between the Chisholm Trail Rule Making and the Chisholm Trail Counterproposal because it dismissed the Chisholm Trail Rule Making in the *Ashland R&O*.

7. Finally, the Bureau, in the *Ashland R&O*, announces another new policy. Specifically, in paragraph 4 of the *Ashland R&O*, it states that where a party has filed an application and then files a rule making proposal, there is a potential for abuse because the application could affect the ability of other interested parties to file a counterproposal. The Bureau cites the *Conflicts* decision,<sup>14</sup> not for its authority to dismiss the later filed rule making proposal, but to state that there is nothing in that decision that prohibits the staff from dismissing the later filed petition.<sup>15</sup> No rule or case law is cited for the Bureau's authority to dismiss a later filed rule making proposal. In addition, the *Conflicts* decision is not on point because it deals with (i) a rule making proposal that conflicts with a previously filed cut-off application, and (ii) a rule making and application filed by separate parties. In the instant situation, there is not a conflict and the rule making and application were filed by the same party. More specifically, there is no conflict between an application filed by a licensee and a rule making proposal filed by the same licensee because both can be implemented albeit at different times.

8. The Bureau seems to again be losing sight of the public interest. The public can benefit from station improvements and, as the Commission has recognized in the most recent streamlining proceeding, those improvements are delayed for much too long by the rule making process.<sup>16</sup> Such delays may be unavoidable at times but in such circumstances a station should not have to wait on the outcome of the rule making to file an application. There are numerous legitimate reasons why a station may need to file such an application. For example, it may need

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<sup>14</sup> *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments, Report and Order*, 7 FCC Rcd 4917 (1992) ("*Conflicts*"), *recon granted in part, Memorandum Opinion and Order*, 8 FCC Rcd 4743 (1993).

<sup>15</sup> *Ashland R&O*, 21 FCC Rcd at ¶4.

<sup>16</sup> *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*, 20 FCC Rcd 11169 (2005).

to move its transmitter site due to the termination of a lease or, due to a spectrum change, there is an opportunity to improve the signal while remaining at the same city of license.

9. The Bureau seems to be overly concerned with the small number of applications that are filed and may not be legitimate. In such cases, there is a better way to handle the matter. If a competing party wants to file a counterproposal and cannot do so because there is a pending application that blocks it, that party may raise the issue of whether the application is legitimate in comments. Then, the applicant can demonstrate that it has a legitimate reason for needing to move in the short term. The Bureau can make an informed decision on that basis. But where the Bureau makes an assumption without any basis for that assumption and where the issue has not been raised by any party, the public interest benefits of the Bureau's new policy are questionable.<sup>17</sup>

10. Moreover, the type of problem that the policy is designed to guard against may never arise again. In the recent streamlining proceeding, the Commission has proposed to eliminate the rule making process for licensees desiring to change city of license.<sup>18</sup> There is already a rule that would seem to prohibit a licensee from filing two minor change applications (Section 73.3518). Thus, assuming there will not be any more instances of the alleged abuse that the new policy is designed to prohibit, it is curious that the *Ashland R&O* would seek to establish the new policy at this time. To the extent that this policy will be applicable in a rare case, the only recourse that a licensee will have is to file for Special Temporary Authority to modify its facilities where it would otherwise file for permanent authority for the modification. It is

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<sup>17</sup> The potential abuse problem that the Bureau is trying to guard against has been present in previous instances and has even been raised as an issue in some cases but the Bureau apparently never before perceived that there was a problem that needed to be addressed. See *Glenville, North Carolina, et al.*, 20 FCC Rcd 16269 (Med. Bur. 2005) *recon. pending*.

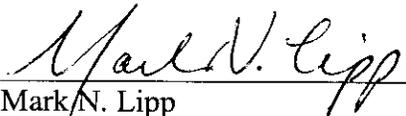
<sup>18</sup> *Id.* That item has not been released at the time this pleading is being written and Chisholm Trail would like the opportunity to supplement this argument after the item is released and the impact of the policy analyzed.

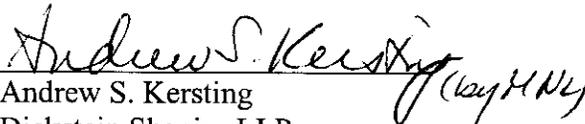
questionable how the public interest would be served by the use of STAs in this manner. Accordingly, Chisholm Trail requests that the Bureau reconsider the new policy established in paragraph 4 of the *Ashland R&O*.

For the foregoing reasons, Chisholm Trails respectfully requests that the FCC (i) reinstate Chisholm Trail's Counterproposal and consider it on the merits in this proceeding, and (ii) reconsider the new policy established in paragraph 4 of the *Ashland R&O*.

Respectfully submitted,

CHISHOLM TRAIL BROADCASTING CO.<sup>19</sup>

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November 17, 2006

Its Co-Counsel

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<sup>19</sup> Please note the change in address for both of Chisholm Trail's counsel for the purpose of service.

**CERTIFICATE OF SERVICE**

I, Diana Gonzales, in the law firm of Wiley Rein & Fielding LLP, do hereby certify that, unless otherwise noted, I have on this 17th day of November, 2006, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Petition for Reconsideration**" to the following:

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