

CONFIDENTIAL

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

In the Matter of)
)
Amendment of Section 73.202(b),)
FM Table of Allotments)
For FM Broadcast Stations)
(Meeteetse, Wyoming, Fruita, Colorado, Ashton,)
Burley, Dubois, Idaho Falls, Pocatello, Rexburg,)
Shelley, Soda Springs, and Weston, Idaho, Lima,)
Montana, American Fork, Ballard, Brigham City,)
Centerville, Delta, Huntington, Kaysville, Logan,)
Manti, Milford, Naples, Oakley, Orem, Price)
Randolph, Roosevelt, Roy, Salina, South Jordan,)
Spanish Fork, Vernal, Wellington, and Woodruff,)
Utah, Diamondville, Evanston, Kemmerer,)
Marbleton, Superior, Thayne, and Wilson,)
Wyoming))

MB Docket No. 05-243
RM-11363
RM-11364
RM-11365

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Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
to forward to Audio Division, Media Bureau

**RESPONSE OF CITICASTERS LICENSES, L.P.
TO "REPLY" OF
MILLCREEK BROADCASTING, LLC, SIMMONS SLC-LS, LLC, 3 POINT MEDIA-
COALVILLE, LLC, COLLEGE CREEK BROADCASTING, LLC AND 3 POINT
MEDIA-DELTA, LLC**

Citicasters Licenses, L.P. ("Citicasters"), the licensee of KXRV(FM), Centerville, Utah, and KOSY-FM, Spanish Fork, Utah, by its attorneys, hereby responds to the "Reply to 'Request For Exercise of Commission's Staff Discretion In MB Docket No. 05-243'" dated May 21, 2007 (the "Joint Parties Reply"), submitted by Millcreek Broadcasting, LLC, Simmons SLC-LS, LLC, 3 Point Media-Coalville, LLC, College Creek Broadcasting, LLC and 3 Point Media-Delta, LLC (the "Joint Parties").

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Citicasters submitted in this docket on April 17, 2007, a “Request For Exercise of Commission Staff Discretion in MB Docket No. 05-243” (the “Request”), which urged the Commission staff to dismiss the Counterproposals in this docket, without prejudice to the submission in the future by the proponents of any compliant proposals under the Commission’s improved community of license/channel change procedures. The Request observed that the Counterproposals in this docket represent the type of “extreme case” that the Commission stated would warrant exercise of its discretion to return complex counterproposals in their entirety. Not only do the Counterproposals here well exceed the five-change threshold justifying extra scrutiny, but worst yet, they are multiple and inconsistent, and no longer bear any relationship to the allotment originally considered in the Notice of Proposed Rulemaking.

In response to an “Order to Show Cause” issued by the Assistant Chief, Audio Division, Media Bureau, DA 07-1792 (released April 20, 2007) (the “OSC”), Citicasters timely responded, on May 21, 2007 (“Response to Order to Show Cause”), stating that, for the reasons set forth in the Request, its license for KXRV(FM) should not be modified to specify operation on Channel 290C in lieu of Channel 289C and its license for KOSY-FM should not be modified to specify operation on Channel 294C in lieu of Channel 293C. 1/

On May 21, 2007, the Joint Parties filed the Joint Parties Reply, implying that it was filed as reply comments to the OSC. In essence, however, the Joint Parties Reply is an

1/ By way of erratum to the Response to Order to Show Cause, which contained typographic errors as to certain call sign references, note that the call sign of the Centerville, Utah, station, Facility ID. No. 69555, should be reflected throughout the Response to Order to Show Cause by the proper call sign, KXRV(FM).

opposition to the Request, and as such, Citicasters hereby responds to the points raised therein. 2/

First, the Joint Parties attempt to deflect Citicasters' observation that only fifteen days were given for comment on the Counterproposals, notwithstanding the minimum 60-day comment period under the new application procedures, by noting that Citicasters was served with one of the Counterproposals when first filed. 3/ The Joint Parties somehow expect that Citicasters would be compelled at the outset to undertake a detailed analysis of a mere counterproposal that could be dismissed by the Commission for procedural or technical deficiencies. 4/ Clearly, it is not unless, and until, a counterproposal reaches the stage of public notice that a potentially impacted broadcaster or the public is put on notice that the counterproposal has the potential to move forward.

Next, the Joint Parties cite to a disparate and unconnected paragraph in the *Report and Order* in MB Docket No. 05-210 5/ for their leap of faith conclusion that, in authorizing the return of complex community proposals "the Joint Parties believe that the Commission was speaking of new filings rather than pending proposals. ..." 6/ However, paragraph 14 of the *Report and Order* speaks only to the decision of the Commission not to dismiss across the board all pending petitions for rule making. There is nothing in the

2/ To the extent that leave to file might be deemed required for acceptance of this pleading at this time, it is hereby requested so that the record in this docket will reflect the response of the moving party to the Joint Parties' opposition to the Request.

3/ See Joint Parties Reply at ¶ 2.

4/ For example, just recently the Media Bureau dismissed a similarly complicated counterproposal involving one of the Joint Parties for technical deficiencies. See *Grants and Church Rock, New Mexico*, DA 07-2196 (MB rel. May 25, 2007).

5/ *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212 (2006) ("*Report and Order*").

6/ See Joint Parties Reply at ¶ 3 (*citing* Paragraph 14 of the *Report and Order*).

Commission's discussion in paragraph 14 – which is eleven paragraphs and two topical sections removed from its discussion of restricting complex proposals in paragraph 25 – that in any way limits the Commission's discretion to dismiss previously-filed proposals for undue complexity.

As to the extensive effort that the Commission would need to expend to consider all the Counterproposals, a major concern for administrative efficiency, the Joint Parties assert that the “Commission staff has already processed this proposal and if the staff were inclined to return it, there have been several opportunities for it to have already done so.” 7/ Citicasters admits that the Commission staff has already suffered the imposition of having issued *three* separate public notices on the *three* separate Counterproposals filed by one counsel in this proceeding, as well as having amended the caption in this docket to add *fifty* additional communities. Yet, just because this matter is past the initial processing stage during which the Commission has incurred some administrative burdens, does not relieve the Commission staff of the significant analysis it must still undertake to review, legally and technically, and compare and judge the multiple Counterproposals, as well as objections from Citicasters and Brigham Young University-Idaho. 8/ The Joint Parties claim that a single Counterproposal “does not contain any complex issues”; 9/ while Citicasters disputes that facile conclusion, even if so, there is nothing uncomplicated about comparing and evaluating all three Counterproposals.

7/ See Joint Parties Reply at ¶ 3.

8/ Brigham Young University-Idaho filed an Opposition to Order to Show Cause in this docket on May 21, 2007.

9/ Joint Parties Reply at ¶ 3.

The Joint Parties also argue that dismissal of the Counterproposals would be unfair for entities with “auction channels which are about to expire...” as they would be forced to “attempt to file for some lesser improvement within the short amount of time left until the permits’ expirations dates.” 10/ However, as each auction bidder is well aware, any attempt to change the channel, class or community of a permit awarded at auction is entirely at the auction winner’s own risk. 11/ Nor are such auction winners forced to find a substitute change; they are free to construct the permits they initially applied for and have been granted.

The Joint Parties argue that to dismiss the Counterproposals would be to elevate procedure over substance. 12/ Yet, the *Report and Order* in MB Docket No. 05-210 is not just about procedural streamlining; as detailed in the Request, it also instituted substantive reforms in regards to public notice and public comment periods.

Counsel for the Joint Parties raise a couple of other misguided concerns in an attempt to preserve the complex, multiple and inconsistent Counterproposals. These concerns are addressed next.

One, the Joint Parties overstate the point made in the Request by suggesting that Citicasters is arguing that any time an alternate channel is found for the original rule making proposal, the Commission should no longer consider counterproposals rendered non-mutually exclusive. 13/ Citicasters does not suggest that the Commission is required to do so in every instance; rather, here, such channel substitution allows the original Meeteetse

10/ *Id.*

11/ *See, e.g., Public Notice, Auction Notice and Filing Requirements For FM Broadcast Construction Permits*, DA 01-119, Report No. AUC-00-37-C (MMB and WTB rel. Jan. 19, 2001) (“bidders are solely responsible for investigating and evaluating all technical and market place factors that may have a bearing on the value of the [auction permits].”).

12/ Joint Parties Reply at ¶ 4.

13/ *See id.* at ¶ 6.

proceeding to be severed and swiftly resolved, while the Counterproposals, if re-filed, would be processed under the streamlined procedures of MB Docket No. 05-210. While the Joint Parties assert there is no precedent for severing proposals when there is no longer mutual-exclusivity, the Commission has indeed often done so. ^{14/} As to the Joint Parties claims that they should not be “punished” for their good deed in undertaking an engineering review to find alternate channels for the Meeteetse allotment, ^{15/} it is hardly rocket science for either the parties or the Commission to find an alternate channel when in fact a good handful are available. And here, it is not just that alternate channels for the allotment at issue were suggested, but that via concurrently-filed amendments to the three Counterproposals, the parties went back beyond square one by eliminating altogether any mutually exclusivity with the channel for Meeteetse originally selected in the Notice of Proposed Rule Making. ^{16/} No matter how you slice it, because there is no mutual-exclusivity between any Counterproposal with the Meeteetse allotment, there is no prejudice to the proponents of the Counterproposals on that score by the Commission severing the Counterproposals from this docket and acting at this time just on the Meeteetse allotment.

^{14/} See, e.g., *Bon Air, Chester, Mechanicsville, Ruckersville, and Williamsburg, Virginia, First Report and Order*, 6 FCC Rcd 4917, 4917 [¶ 2] (MMB 1991) (granting motion to sever upgrade proposal from other proposals because there was no longer a technical conflict between the proposals); *Arlington, McKinney, Celina, Terrell, Daingerfield, College Station, Caldwell, and Howe, Texas; and Durant, Oklahoma, Memorandum Opinion and Order*, 6 FCC Rcd 142, 142 [¶ 5] (MMB 1991) (granting motion to sever when no longer any technical conflict between proposals).

^{15/} Joint Parties Reply at ¶ 6.

^{16/} See “Minor Amendment to Counterproposal” submitted by Millcreek Broadcasting, LLC, Simmons SLC-LS, LLC, 3 Point Media-Coalville, LLC and College Creek Broadcasting, LLC (Feb. 10, 2006) (“allotment of Channel 283A (instead of Channel 259A) at Ashton eliminates the conflict with the *NPRM*’s proposal to allot Channel 259C at Meeteetse, Wyoming”); “Minor Amendment to Counterproposal” submitted by Millcreek Broadcasting, LLC, Simmons SLC-LS, LLC, 3 Point Media-Coalville, LLC, College Creek Broadcasting, LLC and 3 Point Media-Delta, LLC (Feb. 10, 2006) (“the allotment of Channel 261C3 (instead of Channel 260C3) at Wilson eliminates the conflict with the *NPRM*’s proposal to allot Channel 259C at Meeteetse, Wyoming”); “Minor Amendment to Counterproposal” submitted by Sand Hill Media Corporation and Sandhill Media Group, LLC (Feb. 10, 2006) (same).

Lastly, the Joint Parties also get it wrong when they assert that an unbuilt permit represents the same degree of unrelieved service as a proposal for a new allotment, so that the white and gray areas that would be created by the removal of an unbuilt permit may be disregarded. ^{17/} First, to be clear, Citicasters agrees with the Joint Parties that the technical analysis undertaken by Citicasters' engineering consultant did not consider the coverage from a proposed drop-in allotment to constitute adequate replacement for the removal of service by a granted, but not yet operating, construction permit. That is consistent with the policies set forth by the Commission in *Refugio* ^{18/} and *Sells, Arizona*, ^{19/} and their progeny.

The Bureau recently summarized these cases:

We recognize that in the past, we have routinely processed rulemaking proposals involving a loss of a sole local service or service to underserved areas when a vacant allotment or proposed allotment would eventually serve this area. Such actions were conditioned on the commencement of service by the vacant allotment. In *Refugio*, the Commission ceased this practice with respect to the removal of a sole local service. In doing so, the Commission stated that delays in licensing vacant allotments and in commencement of service for potentially significant periods of time have resulted in a burden on Commission resources and have led to spectrum entanglements. In *Sells, Arizona*, we extended this processing policy to proposals involving the loss of a sole reception service. ^{20/}

Quite clearly, the Commission has enunciated that proposed vacant allotments do not qualify to back-fill white or gray loss areas.

^{17/} See Joint Parties Reply at ¶ 7.

^{18/} *Pacific Broadcasting of Missouri, LLC* (“*Refugio*”), Memorandum Opinion and Order, 18 FCC Rcd 2291 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 10950 (2004).

^{19/} *Sells, Arizona*, Report and Order, 19 FCC Rcd 22459 (MB 2004), *recon. pending*.

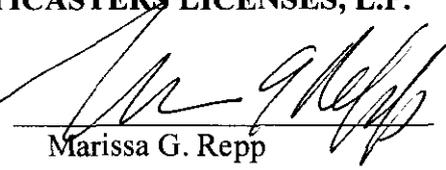
^{20/} *Eldorado, Mason, Mertzon and Fort Stockton, Texas*, DA 07-61 at ¶ 6 (MMB rel. Jan. 12, 2007) (“*Eldorado*”).

Nor do the Joint Parties properly acknowledge that while in some circumstances an unconstructed permit is not considered to be a loss of existing service, that presumption would not necessarily apply when the loss involves first or second service, that is, white or gray areas. For example, the Joint Parties fail to acknowledge the Bureau's decision in *Cheyenne, Wyoming and Gering, Nebraska*. 21/ There, while recognizing that the permit to be downgraded was unbuilt, the Bureau denied the proposal where the downgrade of that permit would have resulted in the creation of white areas. 22/

In sum, for the same reasons set forth in the Request and the Response to Order to Show Cause, Citicasters objects to the proposed modification of the channels of operation of its stations KXRV(FM) and KOSY-FM, and urges the Commission to exercise its discretion to sever the Meeteetse allotment from the Counterproposals and dismiss the Counterproposals in their entirety.

Respectfully submitted,

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21/ 15 FCC Rcd 7528 (MB 2000).

22/ *Id.* at 7530 [¶ 5].

CERTIFICATE OF SERVICE

I, C. Regina Anderson-Kemper, do hereby certify that a copy of the foregoing Response is being sent via first-class U.S. Mail, postage prepaid, this 4th day of June, 2007, to the following:

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