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

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FCC Mail Room

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 07-163
FM Broadcast Stations.)	RM-11385
(Markham, Ganado, and Victoria,)	RM-11416
Texas) ¹)	
)	
)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: January 27, 2010

Released: January 29, 2010

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a *Notice of Proposed Rule Making*² issued at the request of Katherine Pyeatt ("Petitioner"); (2) Comments filed by the Petitioner; (3) Comments and Counterproposal filed by Fort Bend Media Broadcasting Company ("Fort Bend"), licensee of Station KHTZ(FM), Ganado, Texas;³ (4) Reply Comments filed by Fort Bend; and (5) various related pleadings.⁴ For the reasons discussed below, we grant the Petitioner's rulemaking petition and Fort Bend's counterproposal.

2. **Background.** At the request of the Petitioner, the *NPRM* proposed the allotment of FM Channel 235A at Markham, Texas, as a second local service (RM-11385). As noted in the *NPRM*, the Petitioner had contemporaneously submitted a construction permit application⁵ for Channel 235A at Markham and paid the requisite filing fee in compliance with the Commission's new procedures.⁶ In response to the *NPRM*, Fort Bend filed a counterproposal (RM-11416), requesting the upgrade of its Station KHTZ(FM), Ganado, Texas, from Channel 284C2 to Channel 235C at a new transmitter site and the modification of its license to specify operation on non-adjacent Channel 235C, pursuant to Section

¹ The communities of Ganado and Victoria, Texas, have been added to the caption. See *Public Notice*, Report No. 2849, released January 24, 2008.

² *Markham, Texas*, Notice of Proposed Rule Making, 22 FCC Rcd 15125 (MB 2007) ("*NPRM*").

³ The station's call letters were formerly KULF(FM) and were changed to KHTZ(FM) on September 10, 2008.

⁴ These pleadings include (1) Comments filed by the Petitioner on May 29, 2009; and (2) Conditional Consent to License Modification filed by Victoria RadioWorks, Ltd., licensee of Station KVIC(FM), Victoria, Texas, on June 1, 2009 ("KVIC").

⁵ See File No. BNPB-20070524ABR.

⁶ *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006).

1.420(g) of the Commission's Rules.⁷ To accommodate the proposed upgrade at Ganado, Fort Bend also requests the substitution of Channel 284C3 for Channel 236C3 at Victoria, Texas, and the associated modification of the license for Station KVIC(FM). This counterproposal is mutually exclusive with the NPRM because Channel 235C at Ganado is short-spaced to Channel 235A at Markham under the Commission's minimum distance separation requirements.⁸ However, Fort Bend notes the availability of an alternate Class A Channel for Markham, Channel 283A, that would eliminate the conflict between the Petitioner's and Fort Bend's proposals and suggests that Channel 283A be allotted to Markham in lieu of Channel 235A, thereby facilitating the grant of both proposals.

3. In support of its counterproposal, Fort Bend claims that this alternate scheme of allotments is superior to the original proposal for Markham, Texas, because it will accommodate a second local service for Markham and enable Station KHTZ(FM) to upgrade its facilities and increase significantly the area and population it serves. Specifically, Fort Bend states that Station KHTZ(FM) presently serves 123,190 persons and an area of 8,139 square kilometers within its 60 dBu contour, but, with upgraded Class C facilities, Fort Bend alleges that the station could serve 246,293 persons and an area of 21,936 square kilometers. Fort Bend also pledges to reimburse the licensee of Station KVIC(FM), Victoria, Texas, for its reasonable and prudent out-of-pocket expenses incurred in making the requested channel change.

4. In her initial Comments, the Petitioner expresses a continuing interest in the allotment of Channel 235A at Markham. She reiterates the arguments made in her rulemaking petition that Markham, a community of 1,138 persons, deserves a second local and first competitive radio service. In its Reply Comments, Fort Bend continues to argue that adoption of the alternate scheme of allotments suggested in its counterproposal would be in the public interest.

5. Although a *Public Notice*⁹ had been issued in this proceeding, announcing the filing of Fort Bend's counterproposal and providing a 15-day period for filing reply comments, the *Public Notice* did not solicit competing expressions of interest for upgraded, non-adjacent Channel 235C at Ganado. As a result, in order to comply with Section 1.420(g), an additional *Public Notice*¹⁰ was released and provided a 15-day period in which parties could file competing expressions of interest in Channel 235C at Ganado. At the same time, an *Order to Show Cause* was issued to KVIC as to why its license should not be modified to specify operation on Channel 284C3 in lieu of Channel 236C3.¹¹

6. In response to the *OSC*, KVIC states that it conditionally supports Fort Bend's counterproposal. Although KVIC is willing to move to Channel 284C3 at Victoria, KVIC asserts that it would like to do so quickly because this channel change will enable Station KVIC to improve its service significantly.¹² In order to do so, KVIC suggests that the Commission should modify the license for Station KHTZ(FM) at Ganado to specify operations on Channel 235C2 on an interim basis,

⁷ 47 C.F.R. § 1.420(g) (permitting, in the course of a rulemaking proceeding, the modification of the license or permit of an FM station in the non-reserved FM band to a non-adjacent channel in the same community provided that there is no other timely filed expression of interest in the non-adjacent channel).

⁸ 47 C.F.R. § 73.207. The required spacing between Channel 235A at Markham and Channel 235C at Ganado is 226 kilometers whereas the actual distance between these proposed allotments is 13.6 kilometers.

⁹ See *supra* note 1.

¹⁰ DA No. 09-846, rel. April 17, 2009.

¹¹ 24 FCC Rcd 4598 (MB 2009) ("*OSC*").

¹² Specifically, KVIC states that it currently operates with a power of 6.5 kW pursuant to a license issued under Section 73.215 of the Commission's Rules and that this is approximately one half of the power normally authorized for a Class C3 station at KVIC's height above average terrain (140 meters).

thereby removing Channel 284C2 at Ganado as a bar to KVIC's immediate commencement of operations on Channel 284C3 at Victoria. KVIC explains that the modification for KHTZ(FM) on Channel 284C2 at Ganado could be accomplished at that station's current site and with same power and height that are now utilized by KHTZ and that Station KHTZ(FM) could operate on Channel 235C2 until it constructs its new facilities on Channel 235C at its proposed new site. Because of the benefits of an immediate improvement in its service area, KVIC states that it is willing to implement non-directional operations on Channel 284C3 at Victoria with no reimbursement expected from Fort Bend.

7. **Discussion.** Generally, conflicting proposals are comparatively considered under the Commission's FM allotment priorities.¹³ However, in the instant proceeding, it is not necessary to compare the Petitioner's and Fort Bend's proposals because an alternate channel is available for Markham, eliminating the conflict between the proposals. We will, therefore, allot Channel 283A in lieu of Channel 235A at Markham because this will provide a second local, as well as a first competitive, service at Markham.¹⁴ Channel 283A can be allotted with a site restriction of 12 kilometers (7.5 miles) south of the community at the same reference coordinates proposed for Channel 235A.¹⁵

8. Because the conflict has been resolved, we find that the public interest would also be served by the upgrade of Station KHTZ(FM) at Ganado from Channel 284C2 to Channel 235C at a new transmitter site,¹⁶ thereby significantly increasing the station's area and population served. Specifically, a staff engineering analysis reveals that, from Fort Bend's proposed site, there will be a gain of 231,184 persons within an area of 10,915 square kilometers and a loss of 62,698 persons within 3,117 square kilometers, for a net gain of 168,486 persons and 7,798 square kilometers. We also note that the gain and loss populations are well served with 5 or more aural services. Furthermore, because no competing expressions of interest were filed for Channel 235C at Ganado, Fort Bend's license can be modified to specify operation on non-adjacent Channel 235C in compliance with Section 1.420(g) of the Commission's rules.

9. In order to accommodate Fort Bend's counterproposal, we will substitute Channel 284C3 for Channel 236C3 at Victoria, Texas, and modify the license for Station KVIC(FM) to specify operation on Channel 284C3.¹⁷ As set forth above, Fort Bend has indicated its willingness to reimburse KVIC for

¹³ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982).

¹⁴ Markham currently has one licensed radio station, KHHA(FM), Channel 223A.

¹⁵ The reference coordinates for Channel 283A at Markham, Texas, are 28-51-18 NL and 96-02-06 WL. We also dismiss the Comments filed by the Petitioner on May 29, 2009, as an unauthorized pleading. See *OSC*, 24 FCC Rcd at 4599, ¶ 5 (providing an opportunity for KVIC to object to the proposed channel change at Victoria but not re-opening comments on the merits of the proposals in this proceeding by other parties). To the extent that the Petitioner is concerned about a delay in auctioning Channel 283A at Markham until Station KHTZ(FM) ceases operating on Channel 284C2 at Ganado, we note that the auction of Channel 283A at Markham can be scheduled without regard to when the Ganado station moves to Channel 235C because the grant of Fort Bend's counterproposal would only give it an implied Special Temporary Authorization to operate on Channel 284C2. See *1988 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540 n.55 (1999) (licensee has at best an 'implied STA' to operate formerly licensed facilities following final order in rulemaking proceeding modifying facilities). See also *Pacific Broadcasting of Missouri LLC*, Memorandum Opinion and Order, 18 FCC Rcd 2291, 2296 (2003); and *Gunnison, Crawford, et al., Colorado*, Memorandum Opinion and Order, 20 FCC Rcd 5908, 5913, ¶ 14 (MB 2005).

¹⁶ The reference coordinates for Channel 235C at Ganado, Texas, are 28-43-58 NL and 96-02-28 WL.

¹⁷ The reference coordinates for Channel 284C3 at Victoria, Texas, are 28-46-55 NL and 96-56-29 WL. Because Victoria is located within 320 kilometers (199 miles) of the U.S.-Mexican border, Mexican concurrence was obtained for this allotment.

its reasonable and prudent expenses incurred in changing channels.¹⁸ We believe that the public interest is served by this modification because it will result in a second local service at Markham and an improvement in service for Station KHTZ(FM) at Ganado. To the extent that KVIC would like to expedite the implementation of the Station KHTZ(FM) upgrade by requiring the station to operate on an interim basis on Channel 235C2, it is not permissible to propose an involuntary lower class of channel than was proposed by Fort Bend, the licensee of Station KHTZ(FM), and Fort Bend has not consented to a lower class channel.¹⁹

10. Accordingly, pursuant to the authority contained 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 March 15, 2010, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the community listed below, as follows:

<u>Community</u>	<u>Channel No.</u>
Markham, Texas	283A

11. IT IS FURTHER ORDERED, That effective March 15, 2010, the Media Bureau's Consolidated Data Base System will reflect Channel 235C at Ganado, Texas as the reserved assignment for Station KHTZ(FM) in lieu of Channel 284C2, and Channel 284C3 at Victoria, Texas, as the reserved assignment for Station KVIC(FM) in lieu of Channel 236C3.

12. A filing window for Channel 283A at Markham, Texas, 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.

13. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the licenses for Station KHTZ(FM), Ganado, Texas, and KVIC(FM), Victoria, Texas, are modified to specify operations on Channels 235C and 284C3, respectively, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission minor change applications for construction permits (Form 301), specifying the new facilities;
- (b) Upon grant of the construction permits, 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 changes in transmitter location or to avoid the necessity of filing environmental assessments pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

14. IT IS FURTHER ORDERED, That the counterproposal (RM-11416) filed by Fort Bend Media Broadcasting Company IS GRANTED.

¹⁸ See *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159 (1967).

¹⁹ See *Fishers, Lawrence, Indianapolis, and Clinton, Indiana*, Report and Order, 22 FCC Rcd 11660 (MB 2007), *recon. denied*, 24 FCC Rcd 2612 (MB 2009) (dismissing a counterproposal as defective because it proposes an involuntary site change and a lower class of channel than was proposed by the station's licensee in its rulemaking petition). See also *Parker, Arizona*, Report and Order, 17 FCC Rcd 9578 (MB 2002) (dismissing a counterproposal because it proposes an involuntary class downgrade, site change, and community of license change for another station).

15. IT IS FURTHER ORDERED, That the rulemaking petition (RM-11385) filed by Katherine Pyeatt IS GRANTED.

16. 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. § 801(a)(1)(A).

17. IT IS FURTHER ORDERED, That a copy of this Report and Order shall be sent by certified mail, return receipt requested, to the following: Victoria RadioWorks, Ltd., 8023 Vantage Drive, Suite 840, San Antonio, Texas 78230 (Licensee of Station KVIC(FM)); Harry C. Martin, Esq., Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, 11th Floor, Arlington, VA 22209 (Counsel to Victoria RadioWorks, Ltd.); Katherine Pyeatt, 3500 Maple Avenue, #1350, Dallas, Texas 75219 (Petitioner); and Robert J. Buenzle, Esq., 11710 Plaza America Drive, Suite 2000, Reston, Virginia 20190 (Counsel for Fort Bend Media Broadcasting Company).

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

19. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
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