

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

DOCKET FILE COPY ORIGINAL

MAILED
JUL - 1 2010
FCC Mail Room

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 04-258
FM Broadcast Stations.)	RM-11000
(Boulder Town, Levan, Mount Pleasant, and)	RM-11149
Richfield, Utah))	
)	
)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 25, 2010

Released: June 29, 2010

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Micro Communications, Inc. ("Micro"), licensee of Station KCFM, Channel 244C, Levan, Utah, and a Petition for Partial Reconsideration filed by Sanpete County Broadcasting, Inc. ("Sanpete"), licensee of Station KLGL (formerly KCYQ), Channel 229C, Richfield, Utah, both directed to the *Report and Order* in this proceeding.¹ Micro filed an Opposition to Petition for Partial Reconsideration and a Reply to Opposition to Petition for Reconsideration. Sanpete filed an Opposition to Petition for Reconsideration and a Reply to Opposition to Petition for Partial Reconsideration.² For the reasons discussed below, we deny the Micro Petition for Reconsideration and grant the Sanpete Petition for Partial Reconsideration.³ In doing so, we modify the Station KLGL license to specify Mount Pleasant, Utah, as the community of license.

2. **Background.** At the request of Micro, the *Notice of Proposed Rule Making and Order to Show Cause* proposed the substitution of Channel 229C for Channel 244C at Levan, and modification of its Station KCFM license to specify operation on Channel 229C.⁴ At the proposed facility on Channel 229C, Station KCFM would achieve a net gain in service to 266,336 persons. In order to accommodate this substitution, Micro also proposed the substitution of Channel 244C for Channel 229C at Richfield,

¹ *Boulder Town, Levan, Mount Pleasant, and Richfield, Utah*, Report and Order, 21 FCC Rcd 4850 (MB 2006).

² Prior to the *Report and Order* in this proceeding, Sanpete acquired Station KCYQ from Mid-Utah Radio, Inc. and changed its call sign to KLGL (File No. BALH-20051228ACH). For clarity, we will only use the KLGL call sign.

³ In its Opposition to Petition for Partial Reconsideration, Micro contends that the Petition for Partial Reconsideration was untimely. The *Report and Order* was released on May 5, 2006, and the Petition for Partial Reconsideration was filed 30 days after the May 24, 2006, publication date in the Federal Register. In this regard, Micro notes that Section 1.4(b)(3) of the Rules regarding rulemakings of particular applicability, the date of public notice commences on the release date unless the report and order specifically states that it will be published in the Federal Register. In this instance, the *Report and Order* did not do so. The untimeliness argument is not well taken. This proceeding is a matter of general applicability and, under Section 1.4(b)(1) of the Rules, the applicable public notice date would be 30 days after publication in the Federal Register. See *Prineville and Sisters, Oregon*, Order Denying Motion to Strike, 8 FCC Rcd 4471 (MMB 1993).

⁴ *Levan and Richfield, Utah*, Notice of Proposed Rule Making, 19 FCC Rcd 13103 (MB 2004).

Utah, and modification of the Station KLGL license to specify operation on Channel 244C. To effectuate this proposal, it was necessary to include an *Order to Show Cause* directed to Mid-Utah Radio, Inc. ("Mid-Utah"), then licensee of Station KLGL, to show cause why its license should not be modified to specify operation on Channel 244C in lieu of Channel 229A. In response to the *Notice*, Mid-Utah filed a Counterproposal proposing the reallocation of Channel 229C from Richfield to Mount Pleasant, Utah, and modification of the Station KLGL license to specify Mount Pleasant as the community of license.⁵

3. The *Report and Order* dismissed the underlying Micro proposal and denied the Mid-Utah Counterproposal. In regard to the dismissal of the Micro proposal for a Channel 229C substitution at Levan, we noted that a Channel 244C station at KLGL's licensed site would be short-spaced to vacant allotments on Channel 246A at Beaver, Utah, and Channel 244C at Mesquite, Nevada. Even though Channel 244C would be rule compliant at the site specified in an outstanding Station KLGL construction permit, we determined that the proposal was defective when filed because Section 73.208 of the Rules requires a rulemaking proposal to comply with the minimum spacing requirements for both the licensed and permitted site for Station KLGL.⁶ With respect to the denial of the Mid-Utah Counterproposal, we determined that a transmitter site would not be available because the site specified in the Counterproposal is located in the Manti-La National Forest. We also noted that the proposed reallocation of Channel 229C to Mount Pleasant would create white area containing 1,103 persons and a gray area containing 1,057 persons.⁷

4. In its Petition for Reconsideration, Micro notes that prior to the *Report and Order* in this proceeding, Station KLGL was licensed at Richfield at the new site thereby obviating any issue regarding compliance with *Cut and Shoot* and Section 73.208 of the Rules. In any event, Micro also argues that the Commission decision in *WKVE, Semora, North Carolina*, "tempered" the *Cut and Shoot* policy.⁸ In its Petition for Partial Reconsideration, Sanpete disputes our earlier findings that the proposed transmitter site for Channel 229C at Mount Pleasant was located in the Manti-La National Forest and would create white and gray areas.

5. **Discussion.** Upon further review of the original Mid-Utah Counterproposal, we grant the Sanpete Petition for Partial Reconsideration. On the basis of a Declaration from the Sanpete County Recorder, the proposed transmitter site is not, in fact, located in the Manti-La National Forest. We have also reviewed the engineering exhibits submitted by both Sanpete and Micro and have undertaken our own engineering study. Considering all operating stations providing service to the area losing service as a result of the reallocation of Channel 229C to Mount Pleasant, there will be no white area created. On the other hand, this reallocation will create a gray area consisting of 1,057 persons. As discussed below, the creation of gray area is not fatal to the Counterproposal.

6. As stated earlier, the Counterproposal proposes to reallocate Channel 229C from Richfield to Mount Pleasant and modify the Station KLGL license to specify Mount Pleasant as the community of license. This proposal was filed pursuant to Section 1.420(i) of the Commission's Rules, which permits the modification of a station authorization to specify a new community of license without affording other

⁵ The Mid-Utah Counterproposal also included a proposed allotment of Channel 231C to Boulder Town, Utah. Since this proposed allotment did not conflict with any proposal in this proceeding, the *Report and Order* stated that this would be considered as a separate proposal in a new Notice of Proposed Rule Making.

⁶ See *Cut and Shoot, Texas*, Memorandum Opinion and Order, 11 FCC Rcd 16383 (MMB 1996).

⁷ A white area is defined as having no aural reception service while a gray area is defined as having only one aural reception service.

⁸ *WKVE, Semora, North Carolina* ("*WKVE*"), Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411 (2006).

interested parties an opportunity to file a competing expression of interest.⁹ Any reallocation proposal must result in a preferential arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.¹⁰ This proposal would be a preferential arrangement of allotments because it would provide a first local service to Mount Pleasant (with a 2000 U.S. Census population of 2,707 persons) and a net gain in service to 233,493 persons.¹¹ We recognize that this proposal would create a gray area containing 1,057 persons which is considered under Priority (2). A first local service to Mount Pleasant is considered under Priority (3). Inasmuch as Priorities (2) and (3) are co-equal, a first local service to a community of 2,707 under Priority (3) would be preferred over a second fulltime aural service to 1,057 persons under Priority (2).¹²

7. We deny the Micro Petition for Reconsideration. The Micro proposal was defective at the time it was filed and there was no basis to favorably consider it in the context of this proceeding. In allocations proceedings, both the initial proposal and counterproposal must be capable of being effectuated at the date of filing.¹³ Initial compliance with Commission technical requirements is essential to the efficient resolution of allocation proceedings. In this regard, processing proposals which rely on actions by third parties to effectuate compliance with a technical requirement places an unnecessary burden on the administrative resources of the Commission and could delay final resolution of a rulemaking proceeding. Furthermore, we see no public interest benefit in initiating a rulemaking proceeding involving a proposal that may never come into compliance with a technical requirement. We reject the Micro argument that the Commission action in *WKVE* tempered or otherwise negated the requirement that a rulemaking proposal be rule compliant at the time of its filing. Unlike this rulemaking proceeding, *WKVE* involved an application procedure which specifically provides for a corrective amendment deadline. *WKVE* involved an application short-spaced to a licensed facility but not to the outstanding construction permit for that facility. In *WKVE*, the construction permit became licensed prior to the corrective amendment date thereby obviating the need for a corrective amendment. There is no provision for a corrective amendment in a rulemaking proceeding.¹⁴

8. The Commission will send a copy of this *Memorandum Opinion and Order* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

⁹ *See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License")*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

¹⁰ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

¹¹ The reference coordinates for the Channel 229C allotment at Mount Pleasant, Utah, are 39-37-52 NL and 111-19-47 WL.

¹² *See Canton, Cartersville, Douglas, Villa Rica and Newman, Georgia*, Report and Order, 3 FCC Rcd 737 (MMB 1988).

¹³ *See, e.g., Pinewood, South Carolina*, Memorandum Opinion and Order, 5 FCC Rcd 7609 (1990); *Amboy, Baker, Desert Center, California, and Boulder City, Caliente, Henderso, and Pahrum, Nevada*, Report and Order, 19 FCC Rcd 12405 (MB 2004).

¹⁴ According to Micro, its proposal would result in a net service gain to 266,360 persons. This service gain would be comparatively considered under Priority (4) while first local service at Mount Pleasant would be considered under Priority (3). As such, even if we were to consider the Micro proposal, the Counterproposal for a first local service at Mount Pleasant would prevail under *Revision of FM Assignment Policies and Procedures*.

9. Accordingly, pursuant to the authority contained in 46 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and Sections 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective August 13, 2010, the Media Bureau's Consolidated Data Base System will reflect Channel 229C at Mount Pleasant, Utah, as the reserved assignment for Station KLGL in lieu of Channel 229C at Richfield, Utah. A summary of this decision will be published in the Federal Register.

10. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the license for Station KLGL, Channel 229C, Richfield, Utah, IS MODIFIED to specify Mount Pleasant, Utah, as the community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, 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 a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

11. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and 3(1), Sanpete County Broadcasting, Inc., is required to submit a rulemaking fee in addition to the fee required to effectuate the change of community of license for Station KLGL at the time the application is submitted.

12. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Micro Communications, Inc., IS DENIED.

13. IT IS FURTHER ORDERED, That the aforementioned Petition for Partial Reconsideration IS GRANTED.

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

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

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau