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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)	)	MB Docket No. 08-86
Table of Allotments,	)	RM-11432
FM Broadcast Stations.	)	RM-11607
(Custer and Onekama, Michigan)	)	

**REPORT AND ORDER**  
**(Proceeding Terminated)**

Adopted: November 3, 2010

Released: November 5, 2010

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making* (the "Notice")<sup>1</sup> issued at the request of Roy E. Henderson ("Petitioner"), requesting the substitution of Channel 227A for vacant Channel 263A at Custer, Michigan. The purpose of the requested allotment is to accommodate Petitioner's proposed upgrade for FM Station WCUZ, Bear Lake, Michigan, from Channel 261A to Channel 264C3.<sup>2</sup> Concurrent with the filing of its petition for rule making, Petitioner submitted a Form 301 with the requisite fee seeking authority to construct FM Channel 227A at Custer.<sup>3</sup>

2. In response to the Notice, Petitioner filed comments reiterating its interest in the allotment of Channel 227A at Custer. In addition, Northern Radio of Michigan, Inc. ("Northern") filed a counterproposal to allot Channel 227A at Onekama, Michigan, as the community's first local aural transmission service, in lieu of the substitution of Channel 227A for Channel 263A at Custer.

3. In its counterproposal, Northern states that Onekama is a community for allotment purposes. Northern also argues that Onekama, an incorporated village with a population of 647 persons, is more than twice as large as Custer, which has a population of 317 persons. Northern represents that Onekama has a government separate from that of the surrounding Onekama Township, that it passes its own ordinances, maintains its own budget, has a school system, numerous businesses, a U.S. post office, and its own zip code (49675).

4. Petitioner submitted reply comments in response to Northern's counterproposal. Petitioner argues that Northern's counterproposal was not timely filed because the wrong docket number was used. Petitioner also argues that Northern should have filed a Form 301 to retain vacant FM channel 263A at

<sup>1</sup> *Custer, Michigan*, Notice of Proposed Rule Making, 23 FCC Rcd 11113 (MB 2008).

<sup>2</sup> See File No. BMPH-20070919ACM.

<sup>3</sup> See File No. BNPH-20070919ACP.

Custer, Michigan. Petitioner submits that its proposal is superior to Northern's counterproposal, because upgrade of Station WCUZ from Channel 261A to Channel 264C3, combined with substitution of Channel 227A for Channel 263A at Custer, would serve a total of 79,272 persons, whereas retention of Channel 263A at Custer and allotment of Channel 227A at Onekama would only serve a total of 25,444 persons. Finally, Petitioner infers, based on ECFS entries indicating the total number of filings, that Northern improperly filed an unidentified pleading in the docket that was not served upon Petitioner.

5. We disagree with Petitioner's contention that Northern's use of an incorrect docket number rendered its counterproposal untimely filed. Any proposal that is mutually exclusive with a proposal in a pending allotment proceeding is treated as a counterproposal in that proceeding, if it is filed on or before the deadline specified for the submission of initial comments. The second proposal may be an independent allotment petition, a counterproposal in yet another pending proceeding, or an application to change the channel, reference coordinates, or community of interest for an existing license or permit,<sup>4</sup> so long as it is mutually exclusive with the pending allotment proceeding. We also reject Petitioner's statement that Northern was obliged to file a Form 301 application to retain vacant FM Channel 263A at Custer. The submission of a Form 301 application with an allotment proposal is required only when the proponent seeks to add a new allotment.<sup>5</sup> Northern has filed a Form 301 application for Channel 227A at Onekama, but is not required to submit an application for Channel 263A at Custer, which is an existing vacant allotment.

6. Northern's counterproposal to provide a first local service to Onekama advances Priority Three of the Commission's allotment priorities. Although Petitioner's proposal would serve more people, this is only a Priority Four factor.<sup>6</sup> We conclude that Northern's counterproposal is superior to Petitioner's original proposal. Thus, Channel 227A will be allotted at Onekama, Michigan, as that community's first local service, and Petitioner's original proposal to substitute Channel 227A for Channel 263A at Custer will be dismissed.<sup>7</sup>

7. We also dismiss in this Report and Order Petitioner's Form 301 application to upgrade FM Station WCUZ, Bear Lake, Michigan, from Channel 261A to Channel 264C3. Because this application is mutually exclusive with the existing allotment of FM Channel 263A at Custer, it is not possible for the application to be granted. Accordingly, we hereby dismiss Petitioner's Form 301 application for FM Station WCUZ, Bear Lake, Michigan.

8. A staff engineering analysis shows that Channel 227A can be allotted at Onekama without site restriction at reference coordinates 44-21-48 NL and 86-12-18 WL. The Canadian government has concurred in this allotment, which is located within 320 kilometers (199 miles) of the U.S.-Canadian border.

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<sup>4</sup> See, e.g., *The Dalles, Oregon*, Memorandum Opinion and Order, 25 FCC Rcd 5219, n.4 (MB 2010) (petition for allotment rule making treated as counterproposal in pending allotment proceeding).

<sup>5</sup> See *Revision of Procedures Governing Amendments to FM Table of Allotments*, Report and Order, 21 FCC Rcd 14212, 14223-24 (2006).

<sup>6</sup> The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982), *recon. denied*, Memorandum Opinion and Order, 56 RR 2d 448 (1983).

<sup>7</sup> Contrary to Petitioner's argument in his reply comments, we see no evidence of any pleading or other document submitted by Northern in this proceeding but not served upon Petitioner.

9. 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).

10. 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 December 20, 2010, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the community listed below, to read as follows:

<u>Community</u>	<u>Channel</u>
Onekama, Michigan	227A

11. IT IS FURTHER ORDERED, That the initial petition filed by Roy E. Henderson, seeking the substitution of FM Channel 227A for vacant Channel 263A at Custer, Michigan, IS DISMISSED.

12. IT IS FURTHER ORDERED, That the Form 301 application filed by Roy E. Henderson, for FM Channel 227A at Custer, Michigan, File No. BNPH-20070919ACP, IS DISMISSED.

13. IT IS FURTHER ORDERED, That the Form 301 application filed by Roy E. Henderson, seeking a channel substitution and upgrade for FM Station WCUZ, Bear Lake, Michigan, from Channel 261A to Channel 264C3, File No. BMPH-20070919ACM, IS DISMISSED.

14. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

Robert J. Buenzle, Esq.  
Law Offices of Robert J. Buenzle  
11710 Plaza America Drive - Suite 2000  
Reston, Virginia 20190  
(Counsel for Roy E. Henderson)

Harry C. Martin, Esq.  
Fletcher, Heald & Hildreth, PLC  
1300 N. 17<sup>th</sup> Street - 11<sup>th</sup> Floor  
Arlington, Virginia 22209  
(Counsel for Northern Radio of Michigan, Inc.)

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

16. A filing window for Channel 227A for Onekama, Michigan, 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*.

17. For further information concerning this allotment proceeding, contact Deborah A. Dupont, Media Bureau, (202) 418-7072. Questions related to the application filing process for Channel 227A at Onkama, Michigan, should be addressed to the Audio Division, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Assistant Chief  
Audio Division  
Media Bureau