

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

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 01-229
Table of Allotments,	)	RM-10257
FM Broadcast Stations.	)	RM-11285
(Caseville and Pigeon, Michigan)	)	RM-11291
	)	
(Harbor Beach and Lexington, Michigan)	)	MM Docket No. 01-231
	)	RM-10259
	)	RM-11285

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 21, 2014**

**Released: August 22, 2014**

By the Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Petition for Reconsideration filed by Edward Czelada (“Czelada”), dated January 27, 2006 (“Czelada Petition”); (2) a Petition for Reconsideration filed on January 27, 2006, by Sanilac Broadcasting Company (“Sanilac”), licensee of Stations WMIC(AM) and WTGV-FM, Sandusky, Michigan (“Sanilac Petition”) (collectively, the “Petitions”); and (3) various related pleadings.<sup>1</sup> Both Petitions seek review of our action in the *Report and Order* in this consolidated proceeding,<sup>2</sup> allotting FM Channel 256A at Lexington, Michigan. For the reasons set forth below, we grant the Petitions.

**I. BACKGROUND**

2. This proceeding began with the filing of two unrelated Petitions for Rule Making for new FM allotments at different communities. In the first proceeding, we proposed the allotment of Channel 289A at Caseville, Michigan.<sup>3</sup> In the second proceeding, we proposed the allotment of Channel 256A at Harbor Beach, Michigan.<sup>4</sup> Both of these *Notices* established a deadline of October 29, 2001, for the filing of counterproposals.

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<sup>1</sup> These pleadings include: (1) an Opposition to the Sanilac Petition filed by Liggett Communications (“Liggett”) on March 1, 2006; (2) and a Reply to Opposition to Petition for Reconsideration filed by Sanilac on March 10, 2006).

<sup>2</sup> *Caseville, Pigeon, Harbor Beach, and Lexington, Michigan*, Report and Order, 20 FCC Rcd 20027 (MB 2005) (“R&O”).

<sup>3</sup> *Caseville, Michigan*, Notice of Proposed Rule Making, 16 FCC Rcd 16341, 16344-45 (MMB 2001) (“*Caseville Notice*”) (MM Docket 01-229).

<sup>4</sup> *Harbor Beach, Michigan*, Notice of Proposed Rule Making, 16 FCC Rcd 16341, 16346 (MMB 2001) (“*Harbor Beach Notice*”) (MM Docket 01-231).

3. In response to the *Harbor Beach and Caseville Notices*, Czelada filed on October 29, 2001, a multi-element Counterproposal (the “Lexington Counterproposal”) in these and several other FM allotment proceedings. In the Lexington Counterproposal, Czelada proposed the allotment of Channel 256A at Lexington, Michigan, in lieu of Channel 256A at Harbor Beach, Michigan, as proposed in the *Harbor Beach Notice*.<sup>5</sup> Because of an alleged scarcity of noncommercial educational (“NCE”) spectrum in the Lexington area, Czelada requested that Channel \*256A at Lexington be reserved for NCE use.<sup>6</sup> Alternatively, Czelada requested that the Commission make this allotment on an unreserved basis.

4. In the *R&O*, we made no allotments at Harbor Beach or Caseville because the Petitions for Rule Making for these communities had been withdrawn and no other parties expressed interest in these allotments.<sup>7</sup> Additionally, we allotted Channel 256A at Lexington on an unreserved basis as a second local aural service to that community and allotted Channel 267A at Pigeon as a first local service.<sup>8</sup>

5. Both Petitions request that we reconsider our decision in the *R&O* to allot Channel 256A at Lexington on an unreserved basis for varying reasons.<sup>9</sup> Czelada argues that the *R&O* was silent on his reservation request.<sup>10</sup> He asserts that the Lexington Counterproposal had included an engineering study purporting to show that a reserved allotment on Channel 256A at Lexington could provide a first or second NCE service to certain areas.<sup>11</sup> Under these circumstances, Czelada argues that we should reserve the channel for NCE use, or alternatively, he suggests that we should delete unreserved Channel 256A because of his belief that NCE entities could not apply for unreserved FM channels.<sup>12</sup> Sanilac, a party that had filed comments earlier in this proceeding, contends that the portion of the *R&O* that allotted Channel 256A on an unreserved basis to Lexington should be rescinded.

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<sup>5</sup> In order to accommodate Channel 256A at Lexington, Czelada also counterproposed the allotment of Channel 289A at Harbor Beach in lieu of Channel 256A as proposed in the *Harbor Beach Notice* and the allotment of Channel 267A at Caseville in lieu of Channel 289A as proposed in the *Caseville Notice*. Additionally, Katherine Pyeatt (“Pyeatt”) filed a Petition for Rule Making (the “Pigeon Counterproposal”) that proposed the allotment of Channel 267A at Pigeon, Michigan. The Pigeon Counterproposal was treated as a counterproposal to the *Caseville Notice* because (1) Channel 267A at Pigeon conflicts with Channel 267A at Caseville as proposed in the Lexington Counterproposal; and (2) it was filed before the counterproposal deadline set forth by the *Caseville Notice*. For these reasons, the *R&O* consolidated the *Caseville* and *Harbor Beach Notices*, as well as the Lexington and Pigeon Counterproposals.

<sup>6</sup> See Lexington Counterproposal at 2.

<sup>7</sup> See *R&O*, 20 FCC Rcd at 20028.

<sup>8</sup> *Id.* The Pigeon allotment is not the subject of reconsideration.

<sup>9</sup> Although the parties refer to Channel 256A at Lexington as a commercial channel, the use of that term is incorrect. Unless otherwise designated by an asterisk and reserved for NCE use, channels in the non-reserved band (*i.e.*, Channels 221 through 300) are available on an unreserved basis. See 47 C.F.R. § 73.202(a). Consequently, we will refer to a channel in the Table of Allotments that has not been reserved for NCE use as an unreserved, as opposed to a commercial, channel. FM Channels 201 through 220 have been reserved for NCE use. See 47 C.F.R. § 73.501(a).

<sup>10</sup> See Czelada Petition for Reconsideration at 1-2.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 3.

6. In its Opposition, Liggett, a broadcast licensee that was not previously a party to this proceeding, alleges that the deletion of unreserved Channel 256A is wholly unjustified as Liggett now expresses an interest in applying for the channel and the Commission's policy is not to delete an allotment if any party expresses an interest in it.<sup>13</sup> Liggett further contends that the staff correctly did not reserve Channel 256A for NCE use because Czelada provided no showing under the Commission's revised reservation criteria.<sup>14</sup> Accordingly, Liggett requests that the staff deny the Sanilac Petition.

7. In its Reply, Sanilac argues that: (1) Commission policy mandates that Liggett's expression of interest in the Lexington allotment not be considered because it is untimely and prejudicial to the Lexington Counterproposal; and (2) Czelada has shown that the public interest would be better served by the reservation of Channel 256A for NCE use than an additional unreserved channel at Lexington because a reserved channel could provide a first or second NCE service.<sup>15</sup> Accordingly, Sanilac requests that the staff either reserve Channel 256A for NCE use or delete the unreserved channel.

## II. DISCUSSION

8. Section 1.429 of the Commission's Rules sets forth the limited provisions under which the Commission will reconsider an action in a rule making proceeding.<sup>16</sup> Reconsideration is warranted only if the petitioner cites error of fact or law or has presented facts or circumstances that otherwise warrant Commission review of its prior action.<sup>17</sup> Czelada and Sanilac have met this burden.

9. *Procedure.* Although the Czelada Petition was received at the Media Bureau on January 30, 2006, it was improperly addressed "To Chief, Audio Division" and not received at the Office of the Secretary by the deadline of February 3, 2006, for filing reconsideration petitions in violation of Sections 1.429(d) and (h) of the Rules.<sup>18</sup> However, we believe that special circumstances exist in this case for waiving these rules.<sup>19</sup> The filing was necessitated by the staff's failure to consider the reservation issue previously, and it was error to do so. Moreover, the public interest would be served by considering the

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<sup>13</sup> See Liggett Opposition to Petition for Reconsideration at 5-9.

<sup>14</sup> See 47 C.F.R. § 73.201(a) (1)(ii) (providing that a non-reserved band FM channel may be reserved for NCE use by demonstrating that the applicant is technically precluded from using a reserved channel and the proposed station would provide a first or second NCE service to 2,000 or more people who constitute ten percent of the population within the proposed allocation's 60 dBu contour) (the "Reservation Standard"). See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (subsequent history omitted).

<sup>15</sup> See Sanilac Reply to Opposition to Petition for Reconsideration at 2-4.

<sup>16</sup> See 47 C.F.R. § 1.429 (the "Rules").

<sup>17</sup> See *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975).

<sup>18</sup> See 47 C.F.R. § 1.429(d) (requiring that petitions for reconsideration in rule making proceedings shall be filed within 30 days from the date of public notice of such action); 47 C.F.R. § 1.429(h) (providing that petitions for reconsideration in rule making proceedings shall be submitted to the Secretary, Federal Communications Commission).

<sup>19</sup> See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008) (waiving a rule is appropriate if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest).

Czelada Petition because it impacts on whether Lexington should have a reserved or an unreserved allotment. Accordingly, we will, on our own motion, waive Sections 1.429(d) and (h) in order to reach the merits.

10. *Reservation.* After reviewing the record in this proceeding, we agree with Czelada that Channel 256A at Lexington should be reserved for NCE use because the Reservation Standard has been met. Specifically, a staff engineering analysis confirms that 4,090 persons would receive a first or second NCE service. This population constitutes over ten percent of the total population of 23,081 persons within the allotment's proposed 60 dBu contour. Although Liggett contends that Czelada made "no showing" to comply with the Reservation Standard, we disagree. Czelada documented the first prong of the Reservation Standard by showing that no reserved band channels are available for allotment in Lexington.<sup>20</sup> Czelada also stated that the allotment would provide a first or second NCE service to ten percent or more of the population within the allotment's 60 dBu contour that would exceed 2,000 persons, but he did not submit any numbers to support this position. Although we recognize that such a showing would not be sufficient today, we also acknowledge that the type of documentation needed may not have been clear at the time that Czelada filed the Lexington Counterproposal. Indeed, the staff did not issue a Public Notice on processing procedures under the Reservation Standard until after Czelada filed his Counterproposal.<sup>21</sup> Further, while the staff has provided guidance on a parallel rule for obtaining a Section 307(b) fair distribution preference,<sup>22</sup> it did so in the context of mutually exclusive, comparative applications for NCE stations, and rule making petitioners, *i.e.*, those taking the step preceding the filing of an application, may not yet have been aware that allotments would require comparable documentation. Under these circumstances, we find that Czelada's showing was sufficient and that it would serve the public interest to reserve Channel 256A at Lexington for NCE use.<sup>23</sup>

11. *Late Filed Expression of Interest.* Next, we address Sanilac's argument that Liggett's expression of interest in Channel 256A at Lexington is late filed and cannot be considered. It is well established that the Commission will not accept late filed expressions of interest in allotment proceedings where prejudice would be caused to parties who have timely filed their pleadings.<sup>24</sup> In this case, Liggett's expression of interest in Channel 256A was filed four years after Czelada's Counterproposal

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<sup>20</sup> In support, Czelada submitted a listing of a search for reserved channels 201 through 220 at the same set of reference coordinates and showed that, for each channel, there is a short-spacing to other stations, thereby precluding the licensing of a reserved band NCE channel at Lexington.

<sup>21</sup> See, e.g., *Media Bureau Opens Window to Permit Noncommercial Educational Reservation Showings for Certain Vacant FM Allotments*, Public Notice, 18 FCC Rcd 19600 (MB 2003).

<sup>22</sup> See 47 C.F.R. § 73.7002(b). See also *Mass Media Bureau Provides Examples of Application of NCE Section 307(b) Criteria*, Public Notice, 16 FCC Rcd 10892 (MMB 2001); see also FCC Form 340, Section III, Questions 3-4; see also Instructions for FCC Form 340, Section III and Worksheet #6.

<sup>23</sup> In view of our reservation of Channel 256A at Lexington for NCE use, Czelada's and Sanilac's alternative argument that we delete the channel has become moot.

<sup>24</sup> See *Santa Isabel, Puerto Rico*, Memorandum Opinion and Order, 3 FCC Rcd 2336, 2337 (1988), *recon. denied*, 4 FCC Rcd 3412 (1989), *aff'd sub nom. Amor Family Broadcasting Group et al. v. FCC*, 918 F.2d 960 (D.C. Cir. 1991) (dismissing late filed expression of interest as prejudicial); *Kahuku and Kualapuu, Hawaii*, Report and Order 29 FCC 2d 907 (MB 2014) (not accepting late filed continuing expression of interest in an allotment proceeding because of prejudice to another party); *Butler and Reynolds, Georgia*, Memorandum Opinion and Order, 21 FCC Rcd 1516, 1518 (MB 2006) (finding that a late filed expression of interest was properly rejected as prejudicial).

was filed. Moreover, acceptance of Liggett's expression of interest would cause prejudice to Czelada's timely filed Counterproposal because it would make the proposals mutually exclusive and require a comparative determination as to whether the channel should be reserved or remain unreserved. Accordingly, we dismiss Liggett's expression of interest as untimely.

12. **Conclusion and Ordering Clauses.** 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 October 6, 2014, 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 Number</u>
Lexington, Michigan	*256A

13. The window period for filing applications for Channel \*256A at Lexington will not be opened at this time. Instead, the Commission will address the issue in a subsequent Public Notice.

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

15. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Edward Czelada IS GRANTED.

16. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Sanilac Broadcasting Company IS GRANTED.

17. A copy of this *Memorandum Opinion and Order* will be sent to Edward T. Czelada, 3302 North Van Dyke, Imlay City, Michigan 48444; Richard R. Zaragoza, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W, Washington, DC 20037 (Counsel to Sanilac Broadcasting Company); and John J. McVeigh, Esq., 16230 Falls Road, P.O. Box 128, Butler, Maryland 21023 (Counsel to Liggett Communications, LLC).

18. For further information concerning this proceeding, contact Andrew J. Rhodes, Audio Division, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
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