

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

MM Docket No. 87-523

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Vancouver, Washington; Coos Bay
and Corvallis, Oregon) RM-6027

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 13, 1988; Released: January 27, 1989

By the Deputy Chief, Policy and Rules Division:

1. At the request of P-N-P Broadcasting, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making and Orders to Show Cause*, 2 FCC Rcd 7078 (1987), proposing the allotment of Channel 290C2 to Vancouver, Washington, as a first local FM service. The *Notice* also proposed to substitute Channel 290C2 for Channel 293C2 at Coos Bay, Oregon, and to substitute Channel 292C for Channel 291C at Corvallis, Oregon, in order to accomplish the new allotment at Vancouver. *Orders to Show Cause* were issued to the licensees of Stations KYNG-FM (Channel 293C2) at Coos Bay and KFAT(FM) (Channel 291C) at Corvallis, seeking comments as to why their licenses should not be modified to specify operation on Channel 290C2 and 292C, respectively. Petitioner filed late comments reaffirming its intention to apply for the channel, if allotted.¹ KLOO, Inc. (KLOO), licensee of Station KFAT(FM) at Corvallis submitted a late-filed opposition.² Michael T. McKenna (McKenna), also submitted a late-filed opposition to the proposal as well as late-filed counterproposals seeking the allotments of Channel 289A to Port Orford, Oregon, and Channel 292A to Hammond, Oregon.³ Petitioner and KLOO filed reply comments. SGB Broadcasting, Inc., licensee of Station KYNG-FM at Coos Bay, did not respond to the *Show Cause Order*.

2. KLOO argues that the proposal should be rejected because petitioner failed to present a "substantive showing called for by the Commission in Rule Makings which will affect multiple existing licensees." Citing *FM Channel Assignments*, 59 RR 2d 1184 (1986), KLOO states that the Commission warned of the potential detriment both to licensees and to the public which can result from proposals involving multiple FM channel substitutions. It further argues that the petitioner has ignored the enormous hardship the channel conversion will impose upon KLOO and its listeners. KLOO raises questions as to the petitioner's financial ability to adequately compensate KLOO for substantial expenses associated with the channel change. KLOO contends that the proposed allotment will prevent its radio signal from being interference free

to the Portland-Vancouver area. In addition, it argues that Vancouver should be denied a first local FM service because it is already more than adequately served by numerous FM and AM stations in the Vancouver-Portland metropolitan area. In its reply comments, KLOO continues to oppose the proposal.

3. In its reply comments petitioner claims that the allegations made by KLOO against the proposal are irrelevant. Petitioner asserts that the Commission policy requires a substantive showing when "more" than two substitutions of channels occupied by existing FM or TV stations are requested or necessary. Petitioner states that its financial ability to reimburse the stations is not an issue for discussion in the context of this proceeding, since it is the ultimate permittee of the new channel which becomes responsible for such reimbursement. Petitioner further states that the "value of the new allocation at Vancouver will more than justify the cost of reimbursing KLOO and KYNG for their expenses incurred no matter who the eventual permittee is."

4. After careful review of all the information presented in this proceeding, we conclude that the public interest would be served by allotting Channel 290C2 to Vancouver, Washington, as that community's first local FM service. Since SGB Broadcasting, Inc., has not responded to the *Show Cause Order* we deem it to have consented to the modification of its license for Station KYNG-FM. We also find that KLOO's opposition failed to present a valid argument for the denial of the provision of a first local FM service at Vancouver. The issues raised concerning its reimbursement lack merit since the petitioner has stated its willingness to reimburse both stations should it become the eventual permittee of Channel 290C2 at Vancouver. Furthermore, interested parties filing applications for new allotments are required to certify to the Commission that they are financially qualified, and in some circumstances to produce documentation to support the certification. Therefore, the financial qualifications of a prospective applicant are matters for consideration outside of the scope of the rule making proceeding.

5. Additionally, the Commission has long held that service from nearby communities is not a substitute for local service. As to KLOO's argument for interference free service to the Portland-Vancouver area, it is not entitled to protection beyond that provided for by Section 73.209(b) of the Commission's Rules. Its station is afforded protection from interference to the extent provided by the distance separation requirements and the rules governing maximum power and antenna heights. See *Memorandum Opinion and Order*, 50 FR 47391, November 18, 1985. We also must reject KLOO's claim that *Columbus, Nebraska*, 59 RR 2d 1154 (1986), should apply and result in the denial of the proposal. The Commission's policy is not to entertain proposals for changes in the FM Table of Allotments which involve more than two substitutions of channels occupied by existing FM or TV stations other than the substitution for the petitioner's own station, absent a compelling substantive showing in favor of the multiple substitutions. That is not the case here. Thus, we find there is no valid argument against the allotment of Channel 290C2 to Vancouver, Washington.

6. Channel 290C2 can be allotted to Vancouver in compliance with the Commission's minimum distance separation requirements provided the channel substitutions are made at Coos Bay and Corvallis, Oregon.⁴ Con-

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currence by the Canadian government has been obtained since Vancouver is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

7. As stated in the *Notice* Commission policy requires that the ultimate permittee of Channel 290C2 at Vancouver reimburse Stations KYNG-FM and KFAT(FM) for reasonable costs of changing their facilities. See *Circleville and Columbus, Ohio*, 9 RR 2d 1579 (1967).

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.293 of the Commission's Rules, IT IS ORDERED. That effective March 13, 1989, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Coos Bay, Oregon	254C2, 290C2
Corvallis, Oregon	268C, 292C
Vancouver, Washington	290C2

9. IT IS FURTHER ORDERED. That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of SGB Broadcasting, Inc., for Station KYNG-FM, Coos Bay, Oregon, IS MODIFIED, to specify operation on Channel 290C2 in lieu of Channel 293C2, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-870219KA except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-870219KA except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED. That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KLOO, Inc., for Station KFAT(FM), Corvallis, Oregon, IS MODIFIED, to specify operation on Channel 292C in lieu of Channel 291C, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-810511AL except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-810511AL except for the

channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. The window period for filing applications on Channel 290C2 at Vancouver, Washington, will open on March 14, 1989, and close on April 13, 1989.

12. IT IS FURTHER ORDERED. That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Order to: Station KFAT(FM), KLOO, Inc., 1221 South 15th Street, Corvallis, OR 97330 and Station KYNG-FM, SGB Broadcasting, Incorporated 486 E Street, Coos Bay, OR 97420.

13. IT IS FURTHER ORDERED. That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. Questions pertaining to the application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

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Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

¹ Petitioner's late-filed comments will be accepted for the purpose of permitting a continuing expression of interest in Channel 290C2 at Vancouver. Our general policy is to refuse to accept a late-filed expression of interest, unless the proceeding is uncontested. See *Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988). Although this proceeding is arguably contested due to the filing of opposition pleadings or counterproposals, we make an exception to the general rule of refusing to accept late-filed expressions of interest where the proceeding may be considered contested due solely to the filing of pleadings or counterproposals that are either procedurally defective or substantively defective for reasons unrelated to their mutual exclusivity with the original rule making proposal. See *Ocilla, Georgia*, 3 FCC Rcd 4765 (1988). Such is the case here. In such situations, the case is analogous to an uncontested case, in that it would serve no useful purpose to first dismiss the rule making proposal and then initiate a new proceeding to address the petitioner's interest in an allotment.

² KLOO petitioned for acceptance of its late-filed comments. Although we do not believe KLOO has presented a justifiable reason for such delay, and, therefore, is deemed to have consented to the change, in the interest of fully explaining the public interest benefits of our action we will address KLOO's comments due to the fact that action taken herein will result in the modification of its facilities. We note, however, that we are not required to provide such an explanation, but do so only as a discretionary matter, and that we are not presented with a case in which addressing untimely comments in opposition will adversely affect the outcome sought by other parties to the proceeding.

³ McKenna attempted to advance his counterproposals after the initial comment period in violation of Section 1.420(d) of the Commission's Rules. Section 1.420(d) sets a "cut-off" date by which competing proposals must be advanced. This "cut-off" procedure is a fundamental procedural cornerstone for the freezing of the record in allotment proceedings, and is critical to the administration of the allotment rule making process. Therefore, absent an extremely compelling showing we will not waive Section 1.420(d). McKenna did not make such a showing. We also note that our acceptance of petitioner's late-filed expression of interest does not constitute unjustifiably disparate treatment of petitioner and McKenna. Petitioner's proposal was on file prior to the cut-off date, unlike McKenna's. Moreover, petitioner filed its expression of interest one day late, on January 20, 1988, while McKenna mailed its counterproposals to the Commission on January 22, 1988, and the proposals were received at the Commission on January 28, 1988. Under such circumstances, were we to dismiss both petitioner's and the counterproposal proponent's request, we would provide an incentive for the filing of untimely counterproposals, because in any case where the petitioner files an untimely expression of interest, another interested party could, at any later time, file an untimely proposal that makes the proceeding "contested." We believe that such a ruling would jeopardize the integrity of the cut-off rule, and frustrate its purpose. Therefore, we shall not consider the counterproposals, and McKenna's opposition will not be further discussed.

⁴ The reference coordinates for the allotment of Channel 290C2 at Vancouver are 45-37-30 and 122-40-12. No changes are required in the sites presently used by Stations KYNG-FM and KFAT(FM) at coordinates and 43-21-15; 124-14-31 and 44-38-45; 122-16-13, respectively.