

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-134
Table of Allotments,)	RM-9543
FM Broadcast Stations.)	RM-9572
(Drummond and Victor, Montana))	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 4, 2000

Released: October 13, 2000

By the Chief, Allocations Branch:

1. The Allocations Branch has before it for consideration a Petition for Reconsideration (“Recon.”) of the Report and Order (“R&O”), 15 FCC Rcd 10019 (2000), in this proceeding, filed by Idaho Broadcasting Consortium (“Idaho”), permittee of FM Channel 294C2 at McCall, Idaho.¹ No comments were filed in response to the Recon. filed by Idaho.

2. **Background.** This proceeding began by the filing of two separate rulemaking petitions. The Battani Corporation (“Battani”) filed a petition requesting the allotment of Channel 268C at Drummond, Montana, while Mountain West Broadcasting (“Mountain West”) requested the allotment of Channel 269C3 at Victor, Montana. The proposed allotments would provide a first local service to either community. As the two separately-filed petitions were mutually exclusive, they were combined in a Notice of Proposed Rule Making (“NPRM”), 14 FCC Rcd 6857 (1999), providing the proponents an opportunity to demonstrate in comments why its community should be preferred.

3. In response to the NPRM, Idaho filed a counterproposal which appeared to be requesting the substitution of Channel 294C1 for Channel 294C2 at McCall, Idaho, and reallocation of Channel 294C1 to Victor, Montana, under Section 1.420(i) of the Commission’s Rules.² Idaho also requested the allotment of Channel 285C3 at Alberton, Montana, and supported the allotment of Channel 268C at Drummond. The counterproposal was found to be unacceptable and was dismissed in the Report and Order on three grounds. First, at the time the counterproposal was filed, Idaho was a first-come/first-serve applicant for Channel 294C2 at McCall, Idaho (BPH-971023MD) rather than a permittee or licensee. Since Section 1.420(i) applies to licensees and permittees but not to applicants,

¹ Public notice of the Petition for Reconsideration was given on July 24, 2000.

² Section 1.420(i) permits the modification of a station’s authorization to specify a new community of license on a mutually exclusive channel without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License (“Change of Community R&O”), 4 FCC Rcd 4870 (1989), recon. granted in part (“Change of Community MO&O”), 5 FCC Rcd 7094 (1990).

Idaho was not eligible under Section 1.420(i) to file a change of community proposal when it submitted its comments in this proceeding. Second, although Idaho's comments were titled "Counterproposal," Channel 294C1 at Victor was not mutually exclusive with Channel 269C3 at Victor or Channel 268C at Drummond, and, therefore, was not acceptable as a counterproposal. The R&O pointed out that a counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. See, e.g., Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, 5 FCC Rcd 931 (1990). Third, the Report and Order found that Channel 294C1 at Victor was short-spaced to Station KMSN-FM, Channel 295A, Butte, Montana, and to the vacant allotment site for Channel 294C2 at McCall, Idaho.

4. Having dismissed Idaho's counterproposal, the Report and Order then considered the remaining proposals for Victor and Drummond. Since an additional channel was located, there was no need to compare the two communities under the Commission's FM allotment priorities.³ Channel 268C was allotted to Drummond, and Channel 250C3 was allotted to Victor.

5. **Petition for Reconsideration.** Idaho argues that the R&O erroneously dismissed its timely-filed comments supporting the allotments of Channel 268C at Drummond, Montana, Channel 294C1 at Victor, Montana, and Channel 285C3 at Alberton, Montana, in four respects. First, Idaho contends that fundamental aspects of its proposal were misunderstood as the R&O incorrectly concluded that Idaho was requesting the substitution of Channel 294C1 for Channel 294C2 at McCall, Idaho, and reallocation of Channel 294C1 to Victor, Montana. In support of this position, Idaho alleges that its submission merely proposed the reassignment of Channel 294 from McCall, Idaho to Victor, Montana, and not the aforementioned channel substitution. Second, Idaho argues that there was an error in treating Idaho as an applicant for Channel 294C2 at McCall, as it obtained a construction permit for Channel 294C2 at McCall on December 8, 1999, and was a permittee at the time the R&O in this proceeding was adopted (BPH-971023MD). Third, Idaho alleges that the R&O incorrectly found that Channel 294C1 at Victor is short spaced to Station KMSM-FM, Channel 295A, Butte, Montana, to the vacant allotment site for Channel 294C2, McCall, Idaho, and to Idaho's application for Channel 294C2 at McCall. Idaho contends that there is sufficient spacing between its proposed site for Victor and Station KMSM-FM, Butte and that there is no spacing problem with regard to Victor and McCall stations operating on Channel 294 because Idaho's proposal calls for the reassignment of Channel 294C1 from McCall to Victor. Finally, Idaho argues that the mere fact that it labeled its comments a counterproposal, when mutual exclusivity did not exist, does not justify dismissal. Idaho states that to ensure that its proposal would be evaluated in conjunction with the proposal advanced in this proceeding, it filed its comments within the time period specified in the Notice. In light of the foregoing, Idaho requests that the Commission grant its reconsideration, reissuing the Order.⁴

³ Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982). The 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 given to priorities (2) and (3).]

⁴ In a supplemental statement to its petition for reconsideration, filed August 30, 2000, Idaho clarified that its

6. **Discussion.** Section 1.429 of the Commission's Rules sets forth the limited provisions under which the Commission will reconsider a rule making action. Reconsideration is warranted only if the petitioner cites error of fact or law, or has presented facts or circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior action. The Commission will not reconsider arguments that have already been considered. Eagle Broadcasting Co. v. FCC, 514 F.2d 852 (D. C. Cir. 1975). Here we find that Idaho has not met this burden.

7. First, we disagree that the R&O fundamentally misunderstood Idaho's proposal. Rather, the R&O interpreted Idaho's proposal as a request for a reallocation of its Channel 294 from McCall, Idaho to Victor, Montana as a Class C1 station and modification of its application accordingly, as well as a new allotment of Channel 285C3 to Alberton, Montana. A review of Idaho's counterproposal, petition for reconsideration, and supplemental statement to petition for reconsideration reveals that what the R&O perceived to be Idaho's proposal is what Idaho actually proposed. For example, in its supplemental statement to petition for reconsideration, Idaho states that "IBC offered the relocation of Channel 294C1 from McCall, Idaho to Victor, the allotment of Channel 268C at Drummond, and the additional allotment of Channel 285C3 at Alberton, Montana." In addition, in the same pleading Idaho states that "... if the allotment of Channel 294C1 is made to Victor, Montana, it will seek to modify its construction permit (BPH-19971023MD) to specify Victor, Montana, in lieu of McCall, Idaho...." Under these circumstances, it is clear that Idaho is in effect requesting the reallocation of Channel 294 from McCall to Victor as Channel 294C1 and the modification of its construction permit accordingly. Further, since Idaho now holds a construction permit for channel 294C2 at McCall and is asking for Channel 294C1 at Victor, there is also an upgrade in channel class involved. Whether or not Channel 294C1 is substituted for Channel 294C2 at McCall and then reallocated to Victor or whether the channel is reallocated and then upgraded does not make a difference in this case because the ultimate relief requested by Idaho, the reallocation and upgrade of its channel and station to Victor, was considered by the R&O.

8. Second, even if Idaho's proposed reallocation of Channel 294C1 to Victor was not intended to supercede Mountain West's proposed allotment of Channel 269C3 to Victor, Idaho's entire allotment scheme, including the additional allotment of Channel 285C3 to Alberton, Montana, could not have been considered in this proceeding. The reason for this result was set forth clearly and correctly in the R&O – that is, Idaho's allotment scheme is not mutually exclusive with either of the allotments proposed in the NPRM in this proceeding. See paragraph 3(a) of the Appendix to NPRM in this proceeding and Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, 5 FCC Rcd 931 (1990). ("a counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal

proposal for Channel 294C1 at Victor, was not intended to supercede the proposal advanced by Mountain West Broadcasting to allot Channel 269C3 at Victor. Idaho reaffirmed that if Channel 294C1 is allotted to Victor, Montana, it will modify its construction permit to specify Victor, Montana, in lieu of McCall, Idaho, as the community of license. Although Idaho states its intent to file an application for Channel 285C3 at Alberton, Montana, it also states that the allotment is not pivotal to the proposal but merely an optional proposal to provide local service to Alberton.

is made.”) Further, to consider Idaho’s non-mutually exclusive proposal in the context of this proceeding would have the effect of expanding the scope of this proceeding well beyond that proposed by the NPRM and requiring the issuance of a Further Notice of Proposed Rule Making to provide an opportunity for the filing of counterproposals to Idaho’s allotment scheme. Such an approach would be administratively burdensome and would delay finality in allotment cases.

9. Third, the R&O did not err in treating Idaho as an applicant for Channel 294C2. Section 1.420(i) of the Commission’s Rules explicitly provides that a party must be a licensee or permittee to avail itself of the change of community of license procedure. Further, it is well established under our precedent that counterproposals must be technically correct and substantially complete when filed, not at some later date in the proceeding. See, e.g., Fort Bragg, CA, 6 FCC Rcd 5817 (1991), citing El Dorado, OK, 5 FCC Rcd 6737 (1990). Since Idaho was an applicant, as opposed to a permittee or licensee, on the counterproposal deadline in this proceeding, it could not advance a change of community proposal within this proceeding. However, as Idaho is now a permittee for Channel 294C2 at McCall, it is eligible to file a petition for rule making requesting a change of community under Section 1.420 of the Commission’s Rules.⁵

10. In view of the above, IT IS ORDERED, That the Petition for Reconsideration filed by Idaho Broadcasting Consortium IS DENIED.

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

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

⁵ A staff engineering analysis indicates that at this time Channel 294C2 could be allotted to Victor, Montana. Although the R&O in Docket 99-134 indicates that there is a short spacing to Station KMSM-FM, Channel 295A, Butte, Montana, that short spacing occurs from the city reference coordinates (46-25-06 and 114-08-54) as a new allotment and not with the coordinates proposed by Idaho (46-10-07 and 114-17-06) for a change of community.

