

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

| | | |
|--------------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b), |) | |
| FM Table of Allotments, |) | MM Docket No. 98-29 |
| FM Broadcast Stations. |) | RM-9190 |
| (Indian Wells and Indio, California) |) | RM-9275 |

REPORT AND ORDER (Proceeding Terminated)

Adopted: November 22, 2000

Released: December 1, 2000

By the Chief, Allocations Branch:

1. The Allocations Branch has before it a *Notice of Proposed Rule Making*¹ (“*Notice*”) issued in response to a petition for rule making filed by Professional Broadcasting, Inc. (“petitioner”) requesting the allotment of Channel 238A at Indian Wells, California, as the community’s first local aural transmission service. In response to the *Notice*, Playa Del Sol Broadcasters (“Playa”), permittee of an unbuilt station on Channel 249A in Mecca, California, filed a pleading requesting that the Commission, in the alternative, allot Channel 238A at Mecca, California, reallocate Channel 249A from Mecca to Indian Wells, California, and modify the permit for its unbuilt station in Mecca to reflect the new community. Petitioner filed comments reiterating its interest in the allotment at Indian Wells, and opposing Playa’s pleading.

2. Also before us is a petition for rule making filed by Elia Tawil proposing to allot Channel 238A at Indio, California, and to reserve the channel as a noncommercial educational channel. Mr. Tawil alleges that because of Indio’s proximity to Mexico, the availability of noncommercial educational allotments is severely limited, and that no allotments are available that would comply with Section 73.504 of the Commission’s Rules. He shows that allotments of channels in both Mexico and the United States preclude allotments of another noncommercial educational channel at Indio. It therefore requests that on this basis the Commission should allot an additional commercial channel and reserve it for noncommercial educational use. This petition is mutually exclusive with petitioner’s request and will be considered as a counterproposal in this proceeding.²

3. In support of its proposal, petitioner states that the community of Indian Wells fulfills the indicia of a community for allotment purposes. It is incorporated, it has its own city hall and is governed by an elected city council who appoint a city manager and city attorney. The city is served by a weekly newspaper. It sponsors an annual lecture series and a New Year’s jazz festival, and hosts several major golf and tennis tournaments. It has five hotels, four dentists, and many other businesses.

4. Petitioner argues that its proposal should be preferred over both the Mecca proposal and

¹ 13 FCC Rcd 4628 (1998).

² This pleading was placed on Public Notice on May 13, 1998. *See* Report No. 2276.

the Indio proposal. It states that the Mecca proposal should be dismissed as procedurally defective because it is not mutually exclusive with its proposal and thus is not a counterproposal. It also argues that the Mecca proposal failed to specify a specific site for the Indian Wells allotment in its pleading and that the required reference site, the Mecca transmitter site, is 30.6 kilometers (19.0 miles) from the reference point of Indian Wells, and thus is too distant to place a city-grade signal over the community. It notes that Section 73.315 of the rules requires a maximum distance of 16.2 kilometers (10.1 miles) for Class A stations. Also, according to petitioner, on a comparative basis, Indian Wells should be preferred over Mecca, an unincorporated rural community, with a 1990 U.S. Census population of 1,966 persons. With respect to Indio, petitioner argues that the Indian Wells proposal should be preferred over the Indio proposal under the FM allotment priorities because petitioner proposes a first local service to Indian Wells and the proposal for Indio would provide a fourth aural service.³

5. As a preliminary matter, we agree with petitioner that Playa's pleading styled "counterproposal" should be dismissed. The proposal to allot Channel 238A at Mecca, California and reallocate Channel 249A from Mecca to Indian Wells, California, is not appropriately filed in this proceeding because it is not technically mutually exclusive with petitioner's proposal, and therefore is not a counterproposal. Second, as petitioner also correctly argues, Playa failed to include reference coordinates for Indian Wells and the site specified for Mecca in Playa's petition is too distant from the community of Indian Wells to comply with our city-grade coverage requirements. With this dismissal, we need not address petitioner's arguments regarding the community status of Mecca, since no comparison is being made in this proceeding.

6. With respect to the remaining proposals before us, we believe that both Indian Wells and Indio are deserving of an allotment. We take official notice of the fact that Indian Wells is a community for allotment purposes, and there is no party disputing this issue. Indio has other stations and is therefore presumably a community. Considering the communities comparatively under the FM allotment priorities, we believe that the allotment of Channel 238A at Indian Wells will better serve the public interest. The proposal for Indian Wells would provide a first local aural transmission service, which fulfills priority three, and the proposal at Indio would provide the community with a fourth aural service, which would be considered under priority four. Concurrence for the allotment of Channel 238A at Indian Wells has been received from the Mexican government.

7. As an additional matter, our comparative determination that Indian Wells is more deserving of an allotment based on the allotment priorities renders moot Mr. Tawil's request that we reserve Channel 238A at Indio as a noncommercial educational channel. However, even if we had considered that request on its merits, we would have denied it. Commercial channels are not generally reserved for noncommercial use in allotment proceedings unless channels in the reserved portion of the FM band are unavailable due to VHF television Channel 6 interference, or they are precluded due to the presence of Canadian or Mexican allotments.⁴ In this instance, our staff has determined that the unavailability of noncommercial channels within the educational band is not entirely precluded by TV 6 interference or Mexican Channel allotments. Rather, we find that while thirteen channels in the educational band are unavailable due to domestic allotments, Channels 211, 213, 214, 215 and 217 would require

³ The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local aural service; and (4) other public interest matters. See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁴ See generally, *Butte, Montana*, 9 FCC Rcd 2180 (1994); *Buhl, Minnesota*, 9 FCC Rcd 2606 (1994).

interference protection. Therefore, we have determined that the unavailability of any channel within the noncommercial educational band in this case is due primarily to the presence of domestic allotments, and would not merit the reservation on a commercial channel for noncommercial educational use at Indio.

8. Channel 238A can be allotted at Indian Wells consistent with the minimum distance separation requirements of Section 73.207(b) and the principal community coverage requirements of Section 73.315(a) of the Commission's Rules with a site restriction of 6 kilometers (3.7 miles) east of the community.⁵

9. 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 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 15, 2001, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

| <u>City</u> | <u>Channel No.</u> |
|--------------------------|--------------------|
| Indian Wells, California | 238A |

10. A filing window for Channel 238A at Indian Wells, California, will not be opened at this time. Instead, the issue of opening filing windows for this channel will be addressed by the Commission in a subsequent *Order*.

11. IT IS FURTHER ORDERED THAT the petition for rulemaking filed by Elia Tawil requesting the allotment of Channel 238A at Indio, California and reservation for noncommercial use IS DENIED.

12. IT IS FURTHER ORDERED THAT the pleading filed by Playa Del Sol Broadcasters requesting the allotment of Channel 238A at Mecca, California, reallocation of Channel 249A from Mecca to Indian Wells, California, and modification of its permit for its unbuilt station in Mecca to reflect the new community is hereby DISMISSED.

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

14. For further information regarding this proceeding contact Victoria M. McCauley, Mass Media Bureau (202) 418-2180. Questions related to the application filing process should be addressed to the Audio Services Division, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

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

⁵ The coordinates for Channel 238A at Indian Wells are 33-42-04 NL and 116-14-47 WL.