

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-246
Table of Allotments,)	RM-9593
FM Broadcast Stations.)	RM-9770
(Winslow, Camp Verde, Mayer and)	
Sun City West, Arizona))	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 2, 2001

Released: May 11, 2001

By the Chief, Allocations Branch:

1. The Allocations Branch has before it for consideration a Petition for Partial Reconsideration (“reconsideration”) of the Report and Order (“R&O”), 15 FCC Rcd 9155 (2000), in this proceeding¹ filed by Desert West Air Ranchers Corporation (“Desert West”), licensee of Station KFMR(FM), Channel 236C, Winslow, Arizona. Desert West filed a supplement to its petition for partial reconsideration accompanied by a request to accept.² No other comments were received. For the reasons discussed below, we deny the petition for partial reconsideration.

Background

2. The Commission issued a Notice of Proposed Rule Making (“Notice”) in this proceeding, 15 FCC Rcd 9155 (2000), in response to a rule making petition (RM-9593) filed on behalf of Desert West, proposing the reallocation of Channel 236C from Winslow to Camp Verde, Arizona, as that community’s first local aural transmission service. The reallocation proposal was filed pursuant to Section 1.420(i) of the Commission’s Rules, which permits the modification of a station’s license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.³ In response to the Notice, Desert West filed a counterproposal requesting the reallocation of Channel 236C from Winslow to Sun City West, Arizona, located in the Phoenix, Arizona, Urbanized Area, or to Mayer, Arizona, as a first local aural transmission service at either community. Desert West initially specified a site to accommodate the Sun City West proposal at

¹ Public Notice of the petition for reconsideration was given on July 24, 2000 (Report No. 2427).

² Desert West filed its supplement pursuant to Section 1.415(d) of the Commission’s Rules, to update the record in this proceeding, as discussed in paragraph 5, infra. As these comments contain information of which we would take official notice in any event, they have been accepted in this proceeding

³ See Modification of FM and TV Authorizations to Specify a New Community of License (“Community of License”), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

coordinates 34-16-35 NL and 112-07-30 WL. From that site, Desert West would have provided 1 mV/m coverage to 1,534,453 persons, resulting in a net gain in service to 1,406,730 persons. This option required a change in the designated reference coordinates for Channel 236C, Yuma, at coordinates 32-40-22 NL and 114-20-13 WL, reserved for Station KTTI, to specify alternate coordinates 33-22-00 NL and 114-21-00 WL.⁴ As Desert West was unsure whether Station KTTI would oppose its request, and was uncertain if the Commission would modify the Yuma reference point based on past case law, it alternatively requested the allotment of Channel 236C from Winslow to Mayer, Arizona, as its first local transmission service. The Mayer proposal at coordinates 34-25-00 NL and 112-00-30 WL, as specified in Desert West's counterproposal would not require a change in the reference coordinates for Channel 236C at Yuma. Desert West acknowledged that this allotment option would enable it to provide 1 mV/m service to 876,581 persons, representing an increase of 748,858. While Desert West acknowledged that the Mayer proposal was the least desirable of its options, it also stated that the service improvement would still be considerable and urged favorable consideration of the alternate proposal should the Commission determine not to grant the Sun City West proposal. Thereafter, based upon KTTI's withdrawal of its objection to a change in the reference coordinates at Yuma, and assertion that KTTI would not pursue Class C facilities, Desert West requested the deletion of Channel 236C at Yuma, to enable it to specify a site closer to Sun City West, its preferred option, or to Mayer.⁵ Desert West committed to apply for Channel 236C at either Sun City West or Mayer.

3. In the Report and Order we determined that our policy expressed in Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996) required protection to Channel 236C, Yuma, since an authorization had not been issued to cover the pending application or KTTI to operate on the lower class channel at that community. Therefore, we rejected the use of either of Desert West's revised sites as they both required the deletion of Channel 236C at Yuma. We determined that the public interest would be better served by choosing the alternate initial proposal for Mayer, since it could be allotted in conformity with the retention of Channel 236C at its current reference site at Yuma, and based upon Desert West's stated its intention to apply for Channel 236C, if it was allotted to Mayer instead of Sun City West. In taking this action, we also realized that a reallocation to Mayer would obviate the need to change the Channel 236C reference coordinates at Yuma from 17.1 to 29.3 miles southeast of Yuma.

⁴ Channel 236C was substituted for Channel 236C2 at Yuma in Docket 90-19, 5 FCC Rcd 5912 (1990), as requested by the former licensee of Station KTTI(FM). An application (File No. BPH-910910IH) was granted to allow Station KTTI(FM) to upgrade on Channel 236C, but the authorization was subsequently cancelled for failure to construct, and the channel remained vacant for many years. A construction permit has been issued to the current owner of Station KTTI to operate on Channel 236C2 at Yuma at coordinates 32-38-31 NL; 114-33-34 WL (File No. BPH-20000330ABJ).

⁵ "Site One" to serve Sun City West specified coordinates 34-14-33 NL; 112-21-53 WL, while "Site Two" to serve Mayer specified coordinates 34-16-35 NL; 112-07-30 WL.

Petition for Reconsideration

4. In its petition for reconsideration, Desert West argues that the Report and Order in this proceeding committed prejudicial, decisional error. Although KTTI initially opposed the change in reference coordinates for Channel 236C at Yuma, Desert West advises that the opposition was withdrawn and KTTI stated that it would not pursue the upgrade. Moreover, Desert West remarks that KTTI filed a one-step application to specify Class C2 at another transmitter site, thereby confirming that it had no intention of pursuing the Class C allotment at Yuma. Therefore, Desert West asserts that the Report and Order erred in relying on Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996), for the determination that Channel 236C at Yuma must be protected until an authorization had been issued to operate on Channel 236C2. Desert West states that on that basis alone, the Sun City West proposal was denied and the alternate Mayer proposal granted as the latter was consistent with the retention of Channel 236C at its present reference coordinates at Yuma. Further, Desert West avers that its requested change in the Class C reference coordinates at Yuma prior to, and independent of the KTTI application, combined with KTTI's consent not to pursue Class C facilities at Yuma, demonstrates that the Commission erred in believing that Channel 236C must be given protection under Cut and Shoot. Additionally, Desert West asserts that as KTTI consented to the deletion of Channel 236C at Yuma, its proposal was not contingent on favorable action on the Yuma downgrade application.

5. Further, Desert West argues that our decision failed to recognize that the Commission has a warehousing policy. In this regard Desert West avers that the Commission has issued admonitions to station owners for failure to file an application for higher class facilities obtained through a rulemaking proceeding.⁶ As Channel 236C was vacant at Yuma for at least nine years, and the current owner consented to its deletion, Desert West asserts it had a right to request a deletion or modification of the reference coordinates for the allotment. In any event, Desert West argues that at a minimum, the Commission should have given the Sun City West proposal comparative consideration, which it claims would have been preferred over an upgrade for Station KTTI at Yuma.

6. Desert West adds that while the Commission viewed the alternate proposal at Mayer as adequate, no support for that position was presented. Desert West believes that as the Sun City West proposal would provide a first local service to the larger community, the public interest would have been better served by allowing Station KFMR to become licensed there instead of Mayer. Further, Desert West advises the Commission subsequently granted KTTI's application for Class C2 facilities, and therein amended the FM Table of Allotments deleting Channel 236C at Yuma, replacing it with Channel 236C2.⁷ As a result, Desert West remarks that it is evident that Channel 236C will not be used at Yuma and therefore, urges the Commission to grant a first local service to Sun City West,

⁶ Citing *e.g.*, letter of June 10, 1993 regarding Station KSEY, Seymour Texas.

⁷ Although the Audio Services Division amended the FM Table of Allotments at Yuma in the KTTI authorization, such ministerial function is not a final authority. The Table of Allotments is not officially amended until notice of the amendment is published in the Federal Register. However, that action will not occur until a license has been issued to cover the outstanding construction permit for Channel 236C2 at Yuma.

rather than to Mayer, Arizona. Nevertheless, while Sun City West remains its community of choice, if the Commission determines there is a public interest reason for denying its first choice, Desert West states that it will provide a first local service to Mayer as previously granted.

Discussion

7. Section 1.429(b) of the Commission's Rules sets forth the limited provisions under which the Commission will reconsider a rulemaking 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. After carefully considering the record in this proceeding, we do not believe that Desert West has met this burden, and we will affirm the Report and Order in this proceeding.

8. In the Report and Order we determined that Channel 236C at Yuma required protection until an authorization was issued to operate on the lower class channel at that community. Therefore, we rejected Desert West's proposal to reallocate Channel 236C to Sun City West as it required the deletion of Channel 236C at Yuma. However, we did reallocate Channel 236C to Mayer, Arizona, based upon Desert West's commitment to apply at that community. Moreover, Channel 236C could be allotted to Mayer consistent with the retention of Channel 236C at its current reference site at Yuma. Also, contrary to petitioner's allegations, at the time the Report and Order was adopted, there was no authorization for the lower class channel at Yuma. Rather, an application was pending (File No. BPH-20000330ABJ) specifying revised reference coordinates for Channel 236C.⁸ A construction permit for Channel 236C2 was subsequently granted approximately three months after the issuance of our decision in this proceeding. While Desert West challenges our application of the Cut and Shoot policy to this proceeding, we continue to believe that the public interest is better served by our determination to allot Channel 236C to Mayer since it is consistent with the minimum distance separations and other technical requirements of the Commission's Rules and will not disturb the Yuma allotment. Furthermore, we note that Desert West filed an application for a construction permit to operate Station KFMR on Channel 236C at Mayer at coordinates 34-24-53 NL and 112-24-14 WL. See File No. BPH-20000710AAW. The authorization was granted September 26, 2000, and expires September 26, 2003.⁹ Moreover, it cannot be disputed that Channel 236C must remain protected at Yuma until a license has been issued to cover the construction permit for Channel 236C2 at Yuma. In MM Docket No. 88-118, Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment, the Commission stated: "... after grant of a construction permit to modify the facilities of an existing FM authorization to a lower class, we will continue to protect the authorized facilities until the modified facilities are licensed

⁸ Desert West advises that KTTI's pending application specified Class C2 facilities rather than Class C3 as referenced in our decision. Although the database is a secondary source of information, our query of the Commission's station files also indicated that the pending application specified Class C3 facilities at that time.

⁹ The authorization is however, 26.3 kilometers short spaced to the reference coordinates for Channel 236C, Yuma, at 32-40-22 NL and 114-20-13 WL.

(emphasis added). ... Upon licensing, we will amend the Table accordingly.” See 4 FCC Rcd 2415 at ¶14. Therefore, as Station KTTI is not licensed to operate on Channel 236C2, Channel 236C remains in the Table of Allotments.

9. We also take this opportunity to advise that effective upon publication of this Memorandum Opinion and Order in the Federal Register, we will no longer entertain optional or alternative proposals presented in either an initial petition for rule making or in a counterproposal. There is no provision in our Rules requiring us to consider such proposals. Based upon our experience, even a single optional or alternative proposal has required us to speculate on the proposal actually preferred by the proponent or what proposal would, in our view, have the greatest public interest benefit. Multiple optional or alternative proposals would only compound this difficulty. If a proponent subsequently disagrees, either on the basis of changed circumstances or a personal preference, with the option adopted, it could seek reconsideration. The filing of such a petition for reconsideration would be unreasonable, untenable and unnecessary. It is also our view that such a proposal is, in essence, a contingent request and it is our policy is not to entertain contingent proposals. See Oxford and New Albany, Mississippi, 3 FCC Rcd 615 (1988), recon. denied 3 FCC Rcd 6626 (1988). This procedural policy is necessary as such requests have excessively taxed our administrative resources and unreasonably cluttered the Commission’s data base system, and in some instances, precluded the acceptance of otherwise viable requests for new or a modification of existing FM facilities. Therefore, we will not consider an optional or alternative proposal submitted in the context of a single rulemaking proceeding. The appropriate procedure would be to file a separate proposal in a subsequent rulemaking proceeding.

10. Accordingly, IT IS ORDERED, That the petition for partial reconsideration filed by Desert West Air Ranchers IS DENIED.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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