

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-196
Table of Allotments,)	RM-9619
FM Broadcast Stations.)	RM-9874
(Bethel Springs, Martin, Tiptonville,)	
Trenton, and South Fulton, Tennessee) ¹)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 7, 2001 ; Released: November 16, 2001

By the Chief, Allocations Branch:

1. At the request of Sherry A. Brown (“petitioner”), the Allocations Branch has before it the Notice of Proposed Rule Making (“Notice”), 14 FCC Rcd 8250 (1999), proposing the allotment of Channel 249A at Bethel Springs, Tennessee, as the community’s first local aural transmission service (RM-9619). Comments and counterproposal were filed by Thunderbolt Broadcasting Company (“Thunderbolt”), licensee of Station WCMT-FM, Channel 269A, Martin, Tennessee, proposing two options (RM-9876).² Petitioner filed untimely comments reaffirming her intention to apply for the channel, if allotted.³ S&S Broadcasting filed comments stating its interest in the Bethel Springs’ allotment. Opposing comments to the counterproposal were filed by Zimmer Radio of Mid-Missouri, Inc, licensee of Station KGKS(FM), Channel 230C3, Scott City, Missouri; and Dana R. Withers (“Withers”), licensee of Station KREZ(FM), Channel 247A, Marble Hill, Tennessee. Withers also filed reply comments and a motion to dismiss “counterproposals.” Terry Hailey filed comments and additional comments with motions to accept.⁴ We are dismissing the petition for rule making, denying Option I, and dismissing Option II of the counterproposal for the following reasons:

¹ The communities of Martin, Tiptonville, Trenton and South Fulton, Tennessee were added to the caption.

² The counterproposal (Options I and II) were placed on Public Notice on May 15, 2000, Report No 2411 (RM-9874).

³ In her comments, petitioner stated her opposition to the counterproposal and to S&S Broadcasters’ interest in the Bethel Springs’ allotment.

⁴ The comments and additional comments requested that the Commission take official notice of the decisions made in the Report and Order and the Memorandum Opinion and Order, in MM Docket No. 97-168 and MM Docket 96-204, respectively.

2. In its late-filed comments (not accompanied by a motion to accept), petitioner states that her comments should be accepted because she did not receive service of the Notice, adopted on May 12, 1999 and released on May 21, 1999, setting forth July 12, 1999 and July 27, 1999 as the comment and reply comments dates, respectively. We do not agree. It is well established that, under Section 1.412(a)(1), in notice and comment rulemaking proceedings such as the instant one, notice is given by publication of a summary of a “Notice of Proposed Rule Making” in the Federal Register. The Commission complied with this rule by publishing a Notice of Proposed Rule Making in the Federal Register on June 4, 1999. Consequently, the petitioner had constructive notice of the comment and reply dates and could have met these deadlines, but instead the petitioner filed its comments 23 days late. Furthermore, the alleged failure to receive a copy of the Notice of Proposed Rule Making mailed by the Commission is not a sufficient reason to accept the late-filed pleading because these mailings are merely courtesy and are not the official form of notice.

3. Although we recognize that late-filed expressions of interest have been accepted in certain cases, this has generally occurred where the proceedings are uncontested and no prejudice would occur to other parties. See Santa Isabel, Puerto Rico, 3 FCC Rcd 2336 (1998), aff’d, 4 FCC Rcd 3412 (1989); aff’d, sub non, Amor Family Broadcasting v. FCC, 918 F.2d 960 (D.C. Cir. 1990). However, we do not believe that such an approach is warranted here because Thunderbolt filed a timely and mutually exclusive counterproposal and could be prejudiced by acceptance of the late-filed expression of interest.

4. The expression of interest was also procedurally defective in three other respects. First, it was not accompanied by a separate motion for late acceptance. Second, although the Allocations Branch received the petitioner’s comments on August 4, 1999, the comments were not properly filed through the Secretary’s Office as required by the Commission’s Rules and the appendix to the Notice of Proposed Rule Making. Third, petitioner’s late-filed comments oppose Thunderbolt’s counterproposal, and there is no evidence that this pleading was served on Thunderbolt. In view of these reasons, we will not accept petitioner’s late-filed expression of interest.

5. We next address Thunderbolt’s filed counterproposal which has two options. Option I proposed (a) the substitution of Channel 267C3 for Channel 269A at Martin, Tennessee, the reallocation of Channel 267C3 from Martin to South Fulton, Tennessee, and the modification of Station WCMT-FM’s license accordingly; (b) the substitution of Channel 247A for vacant Channel 267C3 at Tiptonville, Tennessee; and (c) the substitution of Channel 249C3 for Channel 248C3 at Trenton, Tennessee, and the modification of Station WWEZ(FM)’s license accordingly. Option I is a proposal similar to the one denied in the Report and Order in MM Docket No. 96-204. On July 5, 2000, the Commission affirmed the action taken in the Report and Order. See Martin, et al., Tennessee, 15 FCC Rcd 12747 (2000); 65 FR 45721, July 25, 2000. We deny the instant option for the same reasons espoused in the Memorandum Opinion and Order, in MM Docket No. 96-204, supra. Specifically, this option requires the downgrade of vacant Channel 267C3 at

Tiptonville, Tennessee, and there are expressions of interest for the Class C3 channel. Since the petitioner did not obtain the consent of the applicants to downgrade the vacant channel, Option I cannot be granted.

6. In Option II, Thunderbolt proposed (a) the substitution of Channel 267C3 for Channel 269A at Martin, Tennessee, reallocation of Channel 267C3 from Martin to South Fulton, Tennessee, and the modification of Station WCMT-FM's license accordingly; (b) the substitution of Channel 247C3 for vacant Channel 267C3 at Tiptonville, Tennessee; (c) the substitution of Channel 249C3 for Channel 248C3 at Trenton, Tennessee, and the modification of Station WVEZ(FM)'s license accordingly; (d) the substitution of Channel 228A for Channel 247A at Marble Hill, Missouri, and the modification of Station KBGJ(FM)'s construction permit accordingly; and (e) the modification of the transmitter site for Station KGKS(FM) on Channel 230C3 at Scott City, Missouri. As an initial matter, we note that the allotment of Channel 228A at Marble Hill is short-spaced to Station KGKS(FM), Channel 230C3, Scott City, Missouri. Thunderbolt advised that in order to alleviate the short-spacing, it had entered into negotiations with the licensee of Station KGKS(FM) to change its transmitter site. However, consent had not been obtained at the time of the filing, and has not been obtained during this proceeding. Further, in its opposing comments, Zimmer Radio of Mid-Missouri, Inc, licensee of Station KGKS(FM), advised that it had discussed the matter with Thunderbolt but did not consent to changing its transmitter site. Since the Commission will not require a station to change its transmitter site to accommodate a rulemaking proposal and since counterproposals must be "technically correct" and "substantially complete" at the time they are filed, Option II cannot be considered. See e.g., Fort Bragg, California, 6 FCC Rcd 5817 (1991); Princeton, et al., Massachusetts, 8 FCC Rcd 19 (1992); and Sanford and Robbins, North Carolina, 12 FCC Rcd 1(1997). See also, Claremore, Oklahoma, et al., 2 FCC Rcd 5921 (1987); and Hazelhurst, et al. Mississippi, 9 FCC Rcd 6439 (1994), recon. den., 11 FCC Rcd 2353 (1996).

7. IT IS ORDERED, That the petition for rule making filed by Sherry A. Brown April 8, 1999, IS DISMISSED.

8. IT IS FURTHER ORDERED, That Option I of the counterproposal filed by Thunderbolt Broadcasting Company on July 12, 1999, IS DENIED, and Option II, IS DISMISSED.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the following:

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(Counsel for Lyle Broadcasting Corporation)

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

11. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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