

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

In the Matter of

Amendment of Section 73.202(b),) MM Docket No. 00-31
Table of Allotments,) RM-9815
FM Broadcast Stations.) RM-10014
(Nogales, Vail and Patagonia, Arizona)¹) RM-10095

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 14, 2001

Released: November 23, 2001

By the Chief, Allocations Branch:

1. The Allocations Branch has before it the Notice of Proposed Rule Making in this proceeding, 15 FCC Rcd 4323 (2000), issued in response to a petition for rule making filed on behalf of Desert West Air Ranchers Corporation (“DWAR”), licensee of Station KZNO(FM), Channel 252A, Nogales, Arizona. DWAR and Big Broadcast of Arizona, L.L.C. (“BBA”) each filed separate comments and counterproposals in response to the Notice.² Comments were also filed by REC Networks (“REC”), to which DWAR responded. Reply comments were filed by DWAR and BBA.³ Late-filed comments, accompanied by a petition for acceptance, were filed jointly on behalf of Arizona Lotus Corp. (“Lotus”) and McMurray Communications, Inc. (“McMurray”).⁴⁵ DWAR filed a motion to strike Lotus and McMurray’s joint comments. An opposition to the motion to strike was filed by Lotus and McMurray, to which DWAR responded. No other acceptable comments were received.⁶

¹ The community of Patagonia, Arizona, has been added to the caption.

² See Public Notice released December 5, 2000, Report No. 2453, and Public Notice released April 4, 2001, Report No. 2476.

³ The reply comments respond to the counterproposals filed by DWAR and BBA.

⁴ Lotus is the permittee of Station KCMT, Channel 270A, Oro Valley, Arizona, and McMurray is the licensee of Station KWRQ, Channel 271C1, Clifton, Arizona.

⁵ Although the Lotus and McMurray comments were filed after the cut-off period established in this proceeding, they were accompanied by a petition for leave to accept. While such comments are not contemplated by Section 1.415(d) unless requested or authorized by the Commission, acceptance here is premised on our interest in resolving this case on the basis of a complete record, and to eliminate the conflict with the counterproposal request at Vail, as well as pending modification applications at Oro Valley and Clifton, Arizona, as discussed, infra.

⁶ Comments received from Paul S. Lotsof (“Lotsof”) were not considered because they were not accompanied by a certificate of service indicating that a copy was served on DWAR, as required by Section 1.420(a) of the Commission’s Rules. See, Wilson Creek, Washington and Pendleton, Oregon, 11 FCC Rcd 11842 (1996).

For the reasons discussed below, we are modifying the license of Station KZNO, Channel 252A, Nogales, to specify operation on Channel 253A at Vail, Arizona. We are also allotting Channel 283A to Vail, Arizona, to accommodate BBA's counterproposal, thereby removing a conflict with the modification applications of Lotus for Station KCMT, Oro Valley, Arizona, and McMurray for Station KWRQ, Clifton, Arizona. Additionally, we are also allotting Channel 251A to Patagonia, Arizona, as requested by DWAR.

Background

2. The Notice in this proceeding proposed the substitution of Channel 253A for Channel 252A at Nogales, the reallocation of Channel 253A to Vail, Arizona, as a first local aural transmission service, and modification of the authorization of DWAR for Station KZNO accordingly. The Notice also announced that based upon the proposed site for Channel 253A at Vail at coordinates 31-55-30 NL and 110-37-30 WL, Station KZNO would provide service to 7,626 people in an area of 2,135 sq. km. It was also determined preliminarily that the removal of Station KZNO from Nogales would result in a loss of service to 27,480 people in an area of 1,562 sq. km., resulting in a net loss of 19,985 people being served and a net gain in area served of 573 sq. km. Additionally, the staff determined that while the entire gain area of proposed Channel 253A at Vail receives at least five fulltime services, DWAR's proposal would create small white and grey areas.⁷ It was also determined at that time, that the level of service remaining in Nogales consisted of an expired construction permit for Station KOFH,⁸ Channel 256A, and noncommercial educational Station KNOG, Channel 216A. The Notice also discounted service received in the loss area at Nogales, Arizona, from broadcast stations located in Nogales, Sonora, Mexico, since the Commission does not consider foreign stations when determining reception service in allotment proceedings. Finally, as DWAR could achieve full Class A facilities for Station KZNO at its present location, it was not required to relocate to Vail or any other community to operate with 6 kW. In light of the projected creation of the unserved/underserved areas at Nogales, the Notice questioned the public interest benefits of DWAR's reallocation proposal and solicited comments on our areas of concern.

3. Initially, we advise that the Notice herein calculated the projected loss area of Station KZNO at Nogales as a 6 kW facility. However, Station KZNO operates with 215 watts at 70 meters, and has never applied to have its international class modified from a Class A to a Class AA,⁹ and

⁷ Five people in an area of 32 sq. km. would receive no fulltime services (white area), and fifty people in an area of 255 sq. km would receive one fulltime service (grey area).

⁸ However, the Notice announced that should the construction permit for Station KOFH be reinstated, we would consider it in determining the level of service remaining at Nogales. The construction permit for Station KOFH was reinstated and a license has been issued (see File No. BLH-20001128AAA).

⁹ Pursuant to the terms of the 1992 USA-Mexico FM Broadcast Agreement, Mexico recognizes Class A United States stations as having a maximum ERP of 3 kW, and a Class AA United States station as having a maximum

therefore is considered a 3 kW allotment under the USA-Mexico Treaty. As a result, DWAR's proposal should have been considered premised on its existing reception service and not its potential 6 kW service. By employing the proper methodology, it has been determined that DWAR's reallocation proposal will not result in the creation of any white or grey areas. Based upon our reassessment, we have ascertained that the areas affected by the requested removal of Station KZNO are fully covered by Station KOFH-FM, as well as noncommercial educational Station KNOG-FM. Additionally, the recent allotment of Channel 300A at Rio Rico, Arizona will serve the Nogales area. See 16 FCC Rcd 5570 (2001). Therefore, our concerns raised in the Notice related to gain and loss projections, as well as the absence of domestic commercial stations which would continue to serve the local needs and interest of Nogales residents, are no longer relevant to our resolution of this proceeding. Accordingly, we find it unnecessary to burden the record in this proceeding by discussing the comments raised by the parties herein to the extent they address the impact the removal of Station KZNO at Nogales could have on the remaining services at Nogales.¹⁰

4. In support of its proposal, DWAR asserts that the public interest would be served by its proposal to provide a first local service to Vail, Arizona, (priority three). Additionally, in response to our initial concern regarding potential loss area, DWAR counterproposed the allotment of Channel 251A to Patagonia, Arizona, as that community's first local aural transmission service (priority three), upon the removal of Channel 252A at Nogales, to provide service to any unserved/underserved areas at the latter community,¹¹ citing Refugio and Taft, Texas, 15 FCC Rcd 8497 (2000); Pauls Valley and Healdton, Oklahoma, 14 FCC Rcd 3932 (1999); and Llano and Marble Falls, Texas, 12 FCC Rcd 809 (1997). Although the loss area issue has been resolved, we proceed with DWAR's counterproposal based upon its expressed desire to provide service to Patagonia. DWAR provided extensive demographic information to establish that Patagonia (pop. 888) is a *bona fide* community for allotment purposes, and committed to apply for Channel 251A if allotted to that locality, as requested.

5. BBA counterproposed the allotment of Channel 253A at Vail, for general application, thereby preserving Channel 252A at Nogales. In this regard, BBA asserts that by imposing a relatively minor site restriction on requested Channel 253A at Vail, Channel 252A may remain in Nogales consistent with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules. Therefore, BBA urges the denial of DWAR's reallocation proposal and instead seeks the allotment of Channel 253A at Vail for general application, and stated its intention to apply for the channel if allotted as requested. We have discovered an alternate channel for allotment to Vail

ERP of 6 kw.

¹⁰ The include the comments of DWAR, REC and BBA.

¹¹ BBA argues that DWAR's Patagonia proposal should not be considered as part of this proceeding as it does not conflict with the initial proposal contained in the Notice. BBA alleges that DWAR's proposal is consistent with, and in no way conflicts with the original proposal. We disagree. DWAR's proposal to allot Channel 251A to Patagonia is interrelated with its proposal and therefore is a valid counterproposal. See Wickenburg, Bagdad and Aguila, Arizona, 16 FC Rcd 15793 (2001). See also, Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia, 15 FCC Rcd 9971 (2000).

to accommodate BBA's expressed desire to provide a local FM service to that community as discussed infra, and therefore there is no basis for a comparison with DWAR's reallocation proposal.

6. REC asserts that while Vail is a rapidly growing community, that is eligible for an allotment, it expressed concern that removal of Station KZNO at Nogales could impact on the Emergency Alert System ("EAS") by eliminating the only commercial FM station in Santa Cruz County. REC also suggested the allotment of a replacement Class A channel at Nogales in the event DWAR's proposal is determined to be in the public interest as a means of preserving the need for competition in the area. Not only has REC's concern been eliminated by our initial determination regarding the level of service remaining at Nogales, but it did not commit to apply for a replacement Class A channel at that community, and in any event, it subsequently withdrew its suggestion, endorsing BBA's proposal at Vail instead.

7. Lotus and McMurray suggest the allotment of alternate Channel 267A at Vail instead of alternate Channel 272A, which appears in the Commission's data base as an additional consideration in response to BBA's counterproposal. Lotus and McMurray offer that consideration of Channel 267A would avoid a conflict with their pending applications at Oro Valley, and Clifton, Arizona, respectively. Lotus has filed a one-step application to upgrade Station KCMT(FM), from Channel 270A to Channel 271C1 at Oro Valley (see File No. BPMH-20010110AAN). McMurray seeks the modification of Station KWRQ, Clifton, to authorize a change in its facilities from Channel 271C1 to Channel 272C1. Those two applications are contingent upon each other. However, Lotus and McMurray advise that consideration of Channel 272A at Vail would be short-spaced to its pending applications, and would create a more severe short-spacing to vacant Mexican allotments than would result from the addition of Channel 267A to Vail. Lotus and McMurray urge that their suggestion would be consistent with the Commission's practice of eliminating conflicts between rulemaking petitions and later-filed applications, citing Conflicts Between Applications and Petitions for Rulemaking to Amend to FM Table of Allotments, 8 FCC Rcd 4743, 4745 n.12 (1993); Durango and Delores, Colorado, 12 FCC Rcd 9740 (1997); and Kerman, California, 11 FCC Rcd 2887 (1996). Lotus and McMurray urge that allotment of the alternate channel at Vail would also further serve the public interest by permitting Lotus to provide an expanded coverage FM service to its community of license at Oro Valley.

8. DWAR opposes Lotus and McMurray's suggested allotment of Channel 267A at Vail as a second channel instead of Channel 272A. In this regard, DWAR advises that suggested Channel 267A at Vail conflicts with an earlier-filed rule making proposal to substitute Channel 267C3 for Channel 269A at Sierra Vista, Arizona, its reallocation to St. David, Arizona, and modification of the authorization for Station KKYZ(FM). However, as a means of accommodating BBA's counterproposal, as well as the pending applications at Oro Valley and Clifton, Arizona, DWAR suggests the allotment of alternate Channel 283A to Vail. No party to this proceeding challenged DWAR's suggested resolution.

9. First we address DWAR's requests. Based upon the information presented in this proceeding, we believe the public interest would be served by substituting Channel 253A for Channel 252A at Nogales, reallocating Channel 253A to Vail, Arizona, and modifying of the license of Station

KZNO(FM) to specify operation on Channel 253A as requested. The reallocation will not deprive Nogales of local service. Vail, which is not within nor adjacent to an urbanized area will receive its first local aural transmission service (priority three), resulting in a preferential arrangement of allotments,¹² as required by the Commission's Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd. 7094 (1990). Retention of Channel 252A at Nogales would be considered under other public interest matters (priority (4)). The allotment of Channel 253A to Vail will enable DWAR to provide a new reception service to 8,181 people, while producing a net loss of 3,658 people being served. Additionally, we are also allotting Channel 251A to Patagonia, Arizona, as a first local service, as discussed below. Even assuming activation of service by Channel 251A at Patagonia, as well as vacant Channel 300A at Rio Rico, Arizona, 10,342 people in the loss area at Nogales will now receive four fulltime services, 11,081 people will receive three fulltime services, and 15 people will receive two fulltime aural services. Although the reallocation will not result in any area receiving less than two aural services, we have balanced the public interest gains of DWAR's proposal against the population that will receive less than five fulltime services.¹³ DWAR's proposals to provide a first local service at Vail and at Patagonia, are preferred under priority three and prevail over the population that would receive less than five fulltime services, which is considered under priority four. According to our engineering studies, DWAR's proposals would result in a net population gain of approximately 24,564 persons (8,181 at Vail and 16,383 at Patagonia). Therefore, we find that DWAR's net proposed service gains to 14,222 persons outweighs the loss of a fifth fulltime reception service to 10,342 persons.

10. We also allot Channel 283A to Vail, as that community's second local FM transmission service, as suggested by DWAR, based on BBA's commitment to file an application for a Class A channel at that community. Allotment of the alternate channel is consistent with the Commission's stated policy of attempting to eliminate conflicts between a rulemaking petition and later-filed FM applications where possible to do so without prejudice to the affected parties. See Conflicts, supra. In this instance the allotment of Channel 283A to Vail in lieu of other suggested alternate channels will not prejudice any party. Rather, it will simply remove the existing conflict with the Lotus' proposed upgrade of Station KCMT from Channel 270A to Channel 271C1 at Oro Valley, Arizona (File No. BMPH-20010110AAN) as well as McMurray's facility change for Station KWRQ from Channel 271C1 to Channel 272C1 at Clifton, Arizona. Additionally, alternate Channel 283A at Vail will not interfere with consideration of a pending rule making proposal regarding the communities of Sierra Vista and St. David, Arizona.

11. Channel 253A can be allotted to Vail, Arizona, at DWAR's specified site located 15.2 kilometers (9.4 miles) southeast of the community, utilizing coordinates 31-55-39 NL and 110-37-57

¹² The FM allotment 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 is given to priorities (2) and (3).] See Revision of FM Assignment Policies and Procedures, 90 FCC Rcd 2d 88 (1982).

¹³ The Commission considers five reception services to be "abundant" service. See LaGrange and Rollingwood, Texas, 10 FCC Rcd 3337 (1995); see also, Family Broadcasting Group, 53 RR 2d 662 (Rev. Bd. 1983).

WL. Additionally, Channel 283A can be allotted to Vail, Arizona, for general application, at city reference coordinates 32-02-48 NL and 110-42-42 WL. Channel 251A can be allotted to Patagonia, Arizona, at a restricted site located 1.1 kilometers (0.7 mile) northeast of the community at coordinates 31-33-05 NL and 110-44-45 WL. Additionally, the allotment of Channel 251A at Patagonia, Arizona, is mutually exclusive with existing Channel 252A at Nogales, and therefore, the grant of an authorization at Patagonia must be conditioned upon DWAR's activation of Station KZNO on Channel 253A at Vail. As Vail and Patagonia are located within 320 kilometers (199 miles) of the U.S.-Mexico border, Mexican concurrence has been requested, but not received, for Channel 253A and Channel 283A at Vail, as special negotiated, restricted allotments. Concurrence has also been requested for Channel 251A at Patagonia. However, rather than delay DWAR's opportunity to file its modification application for Channel 253A at Vail, or general applications for Channel 283A at Vail and Channel 251A at Patagonia, we allot those channels at this time. If construction permits are granted prior to the receipt of formal concurrence in the allotments by the Mexican government, the authorizations will include the following condition: "Operation with the facilities specified herein is subject to modification, suspension or termination without right to a hearing, if found by the Commission to be necessary in order to conform to the USA-Mexico FM Broadcast Agreement, or if specifically objected to by Mexico."

12. 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 7, 2002, 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>
Nogales, Arizona	256A
Patagonia, Arizona	251A
Vail, Arizona	253A, 283A

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Desert West Air Ranchers Corporation for Station KZNO(FM), Channel 252A, Nogales, Arizona (File No. BLH-7707), IS MODIFIED to specify operation on Channel 253A at Vail, Arizona, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

14. Pursuant to Commission Rule Section 1.1104(1)(k) and (3)(m), any party seeking a change in community of license of a television or FM allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Desert West Air Ranchers Corporation, licensee of Station KZNO(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license at Vail, Arizona.

15. IT IS FURTHER ORDERED, That the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order to the following:

Desert West Air Ranchers Corporation
P.O. Box 36717
Tucson, AZ 85740

16. Filing windows for Channel 251A at Patagonia, Arizona, and for Channel 283A at Vail, Arizona, will not be opened at this time. Instead, the issue of opening those allotments for auction will be addressed by the Commission in a subsequent Order.

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

18. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window 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