

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

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| In the matter of |) | |
| |) | |
| |) | |
| Amendment of Section 73.202(b), |) | MM Docket No. 98-188 |
| Table of Allotments, |) | RM-9346 |
| FM Broadcast Stations. |) | RM-9656 |
| (Paonia and Olathe, Colorado) |) | RM-9657 |
| |) | |
| |) | |

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 28, 2001

Released: December 14, 2001

By the Chief, Allocations Branch:

1. The Allocations Branch has before it the Notice of Proposed Rule Making, 13 FCC Rcd 20283 (1998) (“NPRM”) in the above captioned proceeding, comments and counterproposals filed by Angel T. Babudro (“Babudro”) and Good Government Radio (“GGR”), comments filed by the Meadowlark Group, Inc. (“MGI”), and a motion to accept withdrawal of comments filed by MGI. After the pleading cycle set forth in the NPRM expired, GGR filed a “request for previously filed counterproposal to be brought out for comments and for a partial dismissal of that counterproposal.” Both Babudro and GGR submitted reply comments in response to the Public Notice¹ soliciting comment on their counterproposals.

Background

2. In response to a rulemaking petition filed by Babudro, the NPRM proposed the allotment of FM Channel 293A to Paonia, Colorado, (population 1,403) as a first commercial FM station.² In response to the NPRM, two counterproposals were filed. First, Babudro requested that Channel 293C1 be allotted to Paonia in lieu of Channel 293A because he believes that the Paonia community could be better served by a higher class channel in view of the rugged terrain and the wide spacing of population surrounding the community. Second, GGR counterproposed the allotment of Channel 293C to Olathe, Colorado, (population 1,263) as a first local transmission service; it further proposed that Channel 270A could be allotted to Paonia in lieu of Channel 293A.

The Pleadings

3. A third party, MGI, which is the permittee of several stations in Colorado, also requested that Channel 270A be allotted to Paonia in lieu of Channel 293A to accommodate the possible upgrade of one of its stations and to avoid the Commission having to entertain a proposal to change channels later.

¹ Report No. 2339, Mimeo No. 93714, released June 11, 1999.

² Noncommercial FM Station KVNF(FM) is already licensed to Paonia, CO.

However, MGI subsequently filed a motion to withdraw its comments because the Paonia petitioner has changed its proposal to express an interest in a Class C1 channel instead of a Class A channel. Likewise, GGR requested that the portion of its counterproposal to allot Channel 270A to Paonia be withdrawn because no interest exists for a Class A channel at Paonia. Both GGR and MGI question whether Section 1.20(j) should apply to their withdrawal requests but indicate that no consideration was received in return for their withdrawal of an alternate channel at Paonia.

4. GGR contends that its counterproposal should be preferred because it will result in a first local service to Olathe, Colorado, an incorporated community. By way of comparison, GGR states that Panonia presently has a local transmission service from noncommercial educational station KVNFM and that the grant of Babudro's counterproposal would result in a second local service to Panoia. Babudro, however, contends that both counterproposals will result in a first local commercial service to their respective communities but that the Paonia proposal should be preferred because Paonia has a larger population. Finally, although Babudro seeks the allotment of Channel 293C1 to Panoia, he states in his reply comments that "[i]f, however, the Commission determines that another lesser class FM channel (such as a Class C2, Class C3 or Class A channel) should be allotted to Paonia, petitioner hereby states his present intention to apply for such a channel if allotted, and if authorized, to build the facilities promptly.

Discussion

5. As a threshold matter, we must address a procedural issue. Babudro contends that GGR's counterproposal should be dismissed for violation of the verification requirement of Section 1.52 of the Commission's Rules. Although Babudro acknowledges that GGR's counterproposal was signed by one of its principals and contained a statement verifying that the statements contained in the instant document are true and correct to the best of that principal's knowledge and belief, Babudro appears to contend that this verification is defective because it was not in a separate, notarized affidavit. In support of this position, Babudro cites four cases where counterproposals were found to be defective because of the absence of affidavits verifying the pleadings.³ We disagree. Section 1.52 provides that a party who is not represented by an attorney shall sign and verify the original of all petitions and pleadings filed with the Commission and shall state his or her address. This requirement can be met by "a declaration, made before any officer authorized by law to administer oaths (e.g., a notary public) that the contents of the petition are true." Harrea Broadcasters, Inc., 52 FCC 2d 998, 1001 (Comm. 1975). However, pursuant to Section 1.16 of the Commission's Rules, unsworn verifications or declarations can be accepted in lieu of sworn affidavits or declarations if they are substantially in the following form: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). Signature." We conclude that the language in GGR's counterproposal as set forth above meets this requirement.

6. In reaching this result, we acknowledge that, in the four cases cited by Babudro, counterproposals were held to be defective because they did not include affidavits verifying that the statements contained in their comments are accurate to the best of their principals' knowledge. However, our review of the defective counterproposals in those four cases reveals that they are distinguishable from GGR's counterproposal in the instant case because not only were there no affidavits but also there was no language of any kind in the text of the counterproposals – sworn or unsworn – verifying the accuracy of the pleadings. Since counsel did not file those counterproposals, they were properly found to be defective. By way of contrast, GGR's counterproposal contained a statement verifying the truth and accuracy of the pleading, was signed by one of GGR's principals, and included her address. Although

³ These cases are Galena, KS, DA 97-307, released February 14, 1997, at note 2; Oakhurst, CA, 9 FCC Rcd 653 (1994); Corning, CA, 8 FCC Rcd 5149 (1993); and Blair, NE, 8 FCC Rcd 4086 (1993).

GGR's verification was not notarized, this is permissible under Section 1.16, which generally requires verification, not notarization.⁴

7. In view of the foregoing, we wish to clarify that the Galena, KS, Oakhurst, CA, Corning, CA, and Blair, NE cases cited by Babudro should not be read to require that counterproposals filed by parties not represented by counsel must contain notarized affidavits verifying the accuracy of the pleadings. Rather, it is sufficient if the counterproposal or pleading contains a statement verifying the accuracy of the pleading in a form substantially similar to that given in Section 1.16, is signed by the party or one of its principals, and contains the address of the party making the verification. However, accepting a non-notarized verification such as the one contained in GGR's counterproposal is not intended to minimize the importance of verification by parties not represented by counsel. Indeed, the Commission has held that the verification requirement should be strictly enforced in allotment proceedings,⁵ and the failure of one proposal to contain the requisite verification language could lead to its dismissal, especially in cases involving mutually exclusive proposals such as those cited by Babudro.⁶

8. As to the merits of this case, we have mutually exclusive proposals for Channel 293C1 at Paonia and Channel 293C at Olathe. A staff engineering analysis reveals that there are no alternate, equivalent class channels available for allotment at either community that could enable us to grant both proposals. Consequently, we must either compare these proposals using the FM allotment priorities or consider the possibility of allotting a lower class channel. With respect to the latter, we recognize that Babudro indicated in his reply comments that he would apply for a lower class channel at Paonia "if the Commission determines that another lesser class FM channel should be allotted [there]." However, based upon the record before us, we are unable to allot a lower class channel at Paonia for two reasons. First, Babudro's expression of interest for a lower class channel lacks specificity in that he has not referenced a specific channel number and class or provided engineering information in support of such an allotment. In this regard, it is well established that "[o]ne of the most basic requirements of a rule making proceeding for an FM allotment is a statement of interest in the channel to be allotted. The petitioner must state an interest in the channel, a present intention to apply for the channel if an allotment is granted, as well as an intention to promptly construct a station."⁷ Although Babudro originally petitioned for the allotment of Channel 293A at Paonia, this expression was superseded by his counterproposal for higher class Channel 293C1. Further, Babudro's comments take the position that, from a technical standpoint, a Class A channel should not be allotted to Paonia due to rugged terrain and the wide spacing of population. And, while GGR and MGI had proposed that Channel 270A could be allotted to Paonia in lieu of Channel 293A, GGR and MGI explicitly withdrew these proposals.

9. Second, there is no information in the record of this proceeding indicating whether any consideration was paid to Babudro in exchange for his expression of interest in a lower class channel and whether there is compliance with Section 1.420(j) establishing settlement limitations regarding withdrawals of expression of interest. In this regard, we have interpreted Section 1.420(j) as applying to mutually exclusive situations where one party agrees to accept a lower class channel because agreeing to accept a lower class channel is the functional equivalent of withdrawing a conflicting counterproposal for a higher class channel. See Banks, the Dalles, and Corvallis, OR, 13 FCC Rcd 6596, 6603 (Allocations

⁴ There are three exception in Section 1.16 where unsworn declarations are not permitted. These exceptions are for depositions, oaths of office, or oaths required to be taken before a specified official other than a notary. None of these exceptions applies to GGR's counterproposal.

⁵ See Amendment of Sections 1.420 and 73.3584 Concerning Abuses of the Commission's Processes, 5 FCC Rcd 3910, n.41 (1990).

⁶ See supra note 3.

⁷ Lopez and Dushore, PA, 7 FCC Rcd 854 (Policy and Rules Div. 1992).

Br. 1998), recon. denied, 16 FCC Rcd 2272 (Policy and Rules Div. 2001), app. for review pending. Since Babudro filed a counterproposal seeking Channel 293C1, he must demonstrate compliance with Section 1.420(j) before a lower class channel could be considered. Indeed, both GGR and MGI provided such information with respect to the withdrawal of their proposals to allot Channel 270A to Paonia.

10. Since no equivalent or lower class channels can be allotted to resolve the conflict between Babudro and GGR's proposals, we must compare them using the FM Allotment Priorities.⁸ Babudro's proposal to allot Channel 293C1 to Paonia triggers priority (4) as a second local service or a first commercial FM service because noncommercial, educational Station KVNF(FM) is already licensed to Paonia. By way of comparison, GGR's proposal for the allotment of Channel 293C1 to Olathe, Colorado, would trigger priority (3) as a first local transmission service since there are no other stations or allotments in that community.⁹ Since a first local service is a higher allotment priority than a second such service, the public interest would be better served by the allotment of Channel 293C to Olathe as opposed to the allotment of Channel 293C1 to Paonia.

11. Channel 293C can be allotted to Olathe, Colorado, in compliance with the Commission's minimum distance separation requirements at a site 1.5 kilometers north of Paonia.¹⁰

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 28, 2002, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community below, to read as follows:

| <u>Community</u> | <u>Channel No.</u> |
|------------------|--------------------|
| Olathe, Colorado | 293C |

13. A filing window for Channel 293C at Olathe, CO, will not be opened at this time. Instead, the issue of opening the allotment for auction will be addressed by the Commission in a subsequent Order.

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

⁸ The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime 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 2d 88 (1982).

⁹ We do recognize that an application for a noncommercial FM station (BPED-19980706MB) at Olathe was filed prior to GGR's proposal; however, that application is mutually exclusive with two other noncommercial applications, and a universal settlement agreement has been filed looking toward the grant of an application other than the one for Olathe. Consequently, that application does not affect our determination that GGR's counterproposal would constitute a first local service. Likewise, subsequent to the filing of GGR's counterproposal in this proceeding, a separate rulemaking petition (RM-9438) was filed for the allotment of Channel 270C2 at Olathe, and a Notice of Proposed Rule Making was issued in MM Docket 99-028. However, that rulemaking does not impact upon our determination of a first local service in this proceeding because the proposal for Channel 270C2 has not been acted upon. Further, since the Channel 270C2 proposal at Olathe was filed after GGR's counterproposal, it should not be considered as a first local service over GGR's proposal. See, e.g., Galveston and Missouri City, TX, 16 FCC Rcd 747 (Allocations Br. 2001) (a proposal to reallocate and change the community of license of a station that had initially been treated as a first local service in an NPRM was considered as a second local service because of the grant of an earlier filed allotment proposal for the same community in a separate proceeding).

¹⁰ The coordinates for Channel 293C at Olathe are 38-37-03 and 107-58-33.

15. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 418-2120.

FEDERAL COMMUNICATIONS COMMISSION

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