

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

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 02-248
Table of Allotments,)	RM-10537
FM Broadcast Stations.)	RM-10710
(Smiley, Yoakum and Markham, Texas) ¹)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: October 20, 2004

Released: October 25, 2004

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making* (“*Notice*”)² issued at the request of Linda Crawford (“Petitioner”). LBR Enterprises, Inc. (“LBR”) and New Ulm Broadcasting Company (“New Ulm”) filed Counterproposals. Petitioner, New Ulm, and LBR filed Comments, Reply Comments, and related pleadings. For the reasons discussed below, we are allotting Channel 280A to Smiley, Texas.

2. At the request of Petitioner, the *Notice* proposed the allotment of Channel 280A at Smiley, Texas, as that community’s first local aural transmission service. In response to the *Notice*, both LBR and New Ulm filed Counterproposals. LBR, licensee of Station KZRC, Channel 223A, Markham, Texas, proposes to upgrade Channel 223A at Station KZRC to Channel 223C3 and to move the transmitter site of Station KZRC to a new location. To accommodate that upgrade, LBR proposes substituting Channel 280A for Channel 223A at Station KYKM, Yoakum, Texas, and moving the transmitter site of Station KYKM to a new location. New Ulm, the licensee of Station KNRG, Channel 222A, New Ulm, Texas, requests that it be allowed to upgrade to Channel 222C3 and move Station KNRG to Schulenburg, Texas. To accommodate that request, New Ulm also proposes nine channel substitutions,³ one new allotment, and one change in the location of another station’s transmitter.

3. New Ulm has filed a Motion To Dismiss Counterproposal and Withdraw From the Proceeding, in which it requests dismissal of its Counterproposal. Pursuant to Section 1.420(j) of the Commission’s rules,⁴ Roy E. Henderson, a principal of New Ulm, has filed a declaration under penalty of perjury certifying that

¹ The communities of Yoakum and Markham have been added to the caption.

² *Smiley, Texas*, 17 FCC Rcd 16208 (MB 2002).

³ One of these channel substitutions involves substituting Channel 291A for vacant Channel 242A at Yorktown, Texas. Channel 242A is included on the list of vacant allotments participating in FM Auction No. 37.

⁴ 47 C.F.R. Section 1.420(j).

neither New Ulm nor any principal of New Ulm has received or will receive any money or other consideration in exchange for dismissing its counterproposal and withdrawing from this proceeding. In this light, we dismiss New Ulm's Counterproposal.

4. The LBR Counterproposal requires that Station KYKM relocate its transmitter site in order to accommodate the proposed Station KZRC upgrade. Since LBR is not the licensee of Station KYKM, it must submit a statement from Station KYKM that gives that station's consent to the proposed transmitter site move for that station. LBR's Counterproposal did not include such a statement as part of its counterproposal. Since counterproposals must be technically correct and substantially complete when filed, LBR's Counterproposal is unacceptable for consideration and must be dismissed.⁵ We observe that even if LBR's Counterproposal were not defective, Petitioner's proposal to allot Channel 280A to Smiley would prevail over LBR's Counterproposal on a comparative basis, and LBR's Counterproposal would be denied under the Commission's FM allotment priorities. Specifically, LBR's Counterproposal would fall under priority (4) of the Commission's FM allotment priorities,⁶ whereas Petitioner's proposal to provide a first local service to Smiley, falls under priority (3) of the FM allotment priorities.

5. As stated previously, the *Notice* proposed the allotment of Channel 280A at Smiley, Texas, as that community's first local aural transmission service. In her initial comments in this proceeding, Petitioner expressed her interest in filing an application for authority to construct and operate a station on Channel 280A in Smiley, Texas, if Channel 280A is allotted to Smiley, and to construct a station there, if authorized.⁷ Petitioner has stated that Smiley is an incorporated town with its own mayor, city council, city hall, post office, zip code (78159), public library, and a volunteer fire department. The 2000 U.S. Census lists the population of Smiley at 453 persons. Petitioner explains that Smiley is part of the Nixon-Smiley Consolidated Independent School District. Smiley has a number of local businesses, including four businesses with the name "Smiley" in their titles and at least fourteen other businesses, all of which Petitioner has listed by name, address, and telephone number. Petitioner also lists five churches with Smiley addresses, several annual civic and community events, and several local civic and community organizations.

6. We believe that the public interest would be served by the allotment of Channel 280A at Smiley, Texas, since it will provide a first local aural transmission service to that community. Channel 280A can be allotted to Smiley, Texas, consistent with the requirements of Sections 73.207(b)(1) and 73.315(a) of the Commission's rules at coordinates 29-14-17 NL and 97-32-07 WL, with a site restriction

⁵ See, e.g., *Parker, Arizona*, 17 FCC Rcd 9578 (MB 2002) and cases cited therein.

⁶ 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. Equal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁷ In April 2004, Petitioner filed a motion to dismiss her initial petition for rule making. In May 2004, Petitioner filed a pleading entitled "Reinstatement of Interest," in which she stated that she wished to renew her expression of interest in allotting Channel 280A to Smiley. We accept Petitioner's statement of continuing interest in pursuing her petition for rule making. In this regard, neither New Ulm nor LBR has been prejudiced by this action, since New Ulm has requested dismissal of its Counterproposal and LBR's Counterproposal is unacceptable for consideration.

of 10.3 kilometers (6.4 miles) east of Smiley. The Mexican Government has concurred with this allotment.

7. Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.6l, 0.204(b) and 0.283, IT IS ORDERED, That effective December 10, 2004, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED for the community listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
Smiley, Texas	280A

8. A filing window for Channel 280A, Smiley, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent order.

9. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Linda Crawford IS GRANTED.

10. IT IS FURTHER ORDERED, That the Counterproposal filed by New Ulm Broadcasting Company IS DISMISSED as requested.

11. IT IS FURTHER ORDERED, That the Counterproposal filed by LBR Enterprises, Inc. IS DISMISSED.

12. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact R. Barthen Gorman, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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Audio Division
Media Bureau