

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-146
Table of Allotments,)	RM-10798
FM Broadcast Stations.)	
(Caliente and Moapa, Nevada))	

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: October 11, 2006

Released: October 13, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Aurora Media, LLC (“Aurora”), permittee of an unbuilt station for Channel 233C at Caliente, Nevada, directed to the *Report and Order* in this proceeding.¹ Aurora seeks reconsideration of a *Report and Order* that denied Aurora’s petition for rule making to reallocate Channel 233C from Caliente to Moapa, Nevada because the reallocation would result in a smaller population being served with a first local service at Moapa rather than retention of first local service at Caliente.² Moapa’s population of 928 persons is smaller than Caliente’s population of 1,123 persons by 195 persons according to the 2000 U.S. Census. Aurora also filed “Comments to Petition for Reconsideration” (“Comments”) requesting waiver of the filing requirements for FM allotment rulemaking proceedings. No opposing pleadings have been filed. For the reasons discussed below, we dismiss the Petition for Reconsideration as untimely filed and deny waiver of this filing requirement.

2. Aurora’s Petition for Reconsideration was improperly addressed “To: Chief, Audio Division.” It received a Media Bureau date stamp of June 23, 2006. The petition for reconsideration was date stamped by the Office of the Secretary, and therefore treated as filed, on July 31, 2006. The 30-day statutory deadline for filing petitions for reconsideration of the *Caliente R&O* was July 14, 2006.³ In its Comments, Aurora argues that waiver of the requirement that all filings for allotment rulemaking proceedings be addressed to “Marlene H. Dortch, Secretary, Federal Communications Commission, Office

¹ *Caliente and Moapa, Nevada*, Report and Order, 21 FCC Rcd 5839 (MB 2006) (“*Caliente R&O*”).

² See *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990); *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982), *recon. denied*, Memorandum Opinion and Order, 56 RR 2d 448 (1983). (In considering a reallocation proposal, the Commission compares the existing versus the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments based upon the FM allotment priorities.). See e.g. *Alberta, Virginia, et al.*, Memorandum Opinion and Order, 20 FCC Rcd 406 (MB 2005) (Population is the deciding factor in comparing competing proposals that would each provide a first local service under Priority 3 and where each community is well served with at least five full-time aural reception services.).

³ 47 U.S.C. § 405; 47 C.F.R. §§ 1.4(b), 1.7, 1.429(d). Petitions for reconsideration shall be filed within 30 days from the date of public notice of a rulemaking action. In notice and comment rulemaking proceedings, the date of publication in the Federal Register establishes public notice. The *Caliente R&O* was published in the Federal Register on June 14, 2006. 71 FR 34298 (June 14, 2006).

of the Secretary,” should be granted because: (1) the Public Notice on “*Filing Requirements in FM Allotment Rulemaking Proceedings*”⁴ did not expressly refer to petitions for reconsideration and Aurora did not have actual notice that strict compliance of the filing requirement was required; (2) the petition for reconsideration was filed three weeks prior to the filing deadline but the Bureau did not deliver it to the Secretary’s Office until a month after it was filed rather than the one to three days that has occurred in other cases; (3) Aurora’s Petition for Rule Making is unopposed so that no party would be adversely affected by the waiver; (4) the freeze⁵ on filing petitions for rule makings prevents Aurora from refile; (5) the purpose of the filing requirements to ensure that pleadings are promptly entered into the Commission’s Electronic Filing Comment System (“ECFS”) would not be frustrated; and (6) grant of the waiver would be in the public interest because it would result in a first local service to the larger community of Moapa.

3. We have carefully considered the waiver requested under the “hard look”⁶ standard and find that waiver of the filing requirements is not warranted in the public interest. Aurora was provided with ample actual notice of the filing requirements in FM allotment proceedings. On April 1, 2005, almost 16 months prior to Aurora’s untimely filing of its petition for reconsideration on July 31, 2006, the Audio Division, Media Bureau issued the *Public Notice on Filing Requirements*, reminding the public that “all filings in these [FM allocations rulemaking] proceedings are to be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary, and addressed for delivery, as appropriate, to the addresses established by the Secretary for hand delivered, commercial overnight mail, and United States Postal Service-delivered filings. The first page and cover sheet of each filing must indicate ‘To: Office of the Secretary.’”⁷ Petitioners were explicitly warned that, “[i]ncorrectly addressed filings will be treated as having been filed on the receipt date shown on the official ‘Office of the Secretary’ date stamp. Failure to follow these requirements may result in the treatment of a filing as untimely. See 47 C.F.R. § 1.7.”⁸

4. In conjunction with the *Public Notice on Filing Requirements*, we revised the Audio Division’s standard language in each FM allotment Notice of Proposed Rulemaking as follows: “**All filings must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. See 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**” (emphasis in the original). This language was explicitly stated in the *Notice of Proposed Rule Making* issued in response to Aurora’s petition for rule making.⁹

5. By contrast, we waived the filing deadline in *Monument, Oregon, et al. (“Monument”)*,¹⁰ for a counterproposal that was late-filed when date stamped by the Office of the Secretary because the improper filing with the Bureau occurred prior to the revision of standard language in the notice of proposed rule making. However, for the benefit of future filers, we reiterated in *Monument* the warning “that failure

⁴ 20 FCC Rcd 7502 (MB 2005) (“*Public Notice on Filing Requirements*”).

⁵ *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Notice of Proposed Rule Making, 20 FCC Rcd 11169 (2005) (imposing freeze on the filing of new petitions for rule making to amend the FM Table of Allotments, effective June 9, 2005).

⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“An applicant for waiver faces a high hurdle even at that starting gate.”).

⁷ 20 FCC Rcd 7502.

⁸ *Id.*

⁹ *Caliente and Moapa, Nevada*, Notice of Proposed Rule Making, 20 FCC Rcd 6271, ¶ 7 (MB 2005).

¹⁰ Order to Show Cause, 21 FCC Rcd 3332, n.4 (MB 2006).

to follow the specified requirements will result in the treatment of a filing as filed on the day it is received in the Office of the Secretary. This processing rule will be strictly followed.”¹¹ Thus, it was incumbent upon Aurora to adhere to the strict filing requirements to ensure that its petition for reconsideration was timely filed rather than depending upon the Bureau to obtain a timely date stamp from the Office of the Secretary.

6. In view of the ample public notice and explicit warnings, Aurora’s inadvertence does not excuse its lack of due diligence with regard to the untimely filing of its petition for reconsideration. The purpose of requiring all parties to address all filings in FM allotment proceedings to the “Office of the Secretary” is to provide interested parties and the public with adequate notice of pleadings that may result in changes to the FM Table of Allotments, to ensure fair and efficient processing including entry in ECFS, and to conserve the Commission’s limited resources.¹² In this regard, “all filings” encompasses all pleadings filed in a rulemaking proceeding until the proceeding is final and no longer subject to review. Numerous types of pleadings are filed in rulemaking proceedings. A petition for reconsideration is a pleading in a rulemaking proceeding and Aurora has provided no basis to suggest that a petition for reconsideration is excluded from this filing requirement. Thus, we dismiss Aurora’s petition for reconsideration as untimely.

7. We note nevertheless that if the Petition for Reconsideration were considered on the merits, it would have been denied. Aurora submits new 2005 population estimates prepared by the Nevada Department of Taxation and the Nevada State Demographer in 2005.¹³ This data show that Moapa has a population of 1,261 persons, 251 persons larger than Caliente, population of 1,015. However, we would have rejected Aurora’s assertion that because this 2005 population data was certified by Nevada Governor Kenny C. Guinn on February 27, 2006, that it creates new facts which have occurred since the last opportunity to present them to the Commission.¹⁴ Aurora had nearly three months to present the Governor’s February 27, 2006 certified population prior to the May 24, 2006 adoption of the *Caliente R&O*.

8. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration IS DISMISSED and the Waiver requested in Comments to Petition for Reconsideration IS DENIED.

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

10. This document is not subject to the Congressional Review Act. The Commission, is, therefore, not required to submit a copy of this Memorandum Opinion and Order to the Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. Section 801(a)(1)(A), because the aforementioned petition for reconsideration was dismissed.

¹¹ *Id.* (citing *Public Notice on Filing Requirements*).

¹² In this instance, the fact that the petition for reconsideration did not reach the Office of the Secretary until 38 days after it was filed with the Bureau illustrates the importance of having a petition for reconsideration filed initially at the correct office.

¹³ Petition for Reconsideration, Appendix A “Governor Certified Population of Nevada’s Counties, Cities and Towns 1986 to 2005 Estimates from NV Department of Taxation and NV State Demographer, University of NV, Reno.” (“Nevada 2005 Population Report”).

¹⁴ 47 C.F.R. § 1.429(b) (3) (a petition for reconsideration which relies upon previously undisclosed facts may be considered if the facts occurred after the last opportunity to present them or consideration of the new facts is required in the public interest).

11. For further information concerning this proceeding, contact Helen McLean, Media Bureau, (202) 418-2738.

FEDERAL COMMUNICATIONS COMMISSION

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