

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 03-44
FM Table of Allotments,)	RM-10650
FM Broadcast Stations.)	RM-11396
)	
Water Mill and Noyack,)	
New York)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 20, 2008

Released: August 22, 2008

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Audio Division has before it: (1) a Petition for Reconsideration ("Petition I") of the *Report and Order*¹ in this proceeding filed by Monroe Board of Education ("Monroe"), licensee of noncommercial educational ("NCE") Stations WMNR(FM), Monroe, Connecticut, and WGRS(FM), Guilford, Connecticut, and FM translators W233AG, New London, Connecticut, W233AI, Sag Harbor, New York, and W233AJ, Old Saybrook, Connecticut; (2) a Petition for Reconsideration ("Petition II") filed by Sacred Heart University ("SHU"), licensee of NCE Station WSUF(FM), Noyack, New York, and FM translator W277AB, Noyack, New York; and (3) various related pleadings.² For the reasons discussed below, we delete the allotment of FM Channel 233A at Water Mill, New York, and dismiss SHU's counterproposal.

II. BACKGROUND

2. At the request of Sepulveda, the *Notice of Proposed Rule Making*³ proposed the allotment of FM Channel 277A to Water Mill, New York (pop. 1,724) as a first local service. In response to the *NPRM*, SHU filed Comments and a Counterproposal, claiming that the allotment of Channel 277A at Water Mill would result in interference to and displacement of its translator W277AB, Noyack, New York. The pleading suggested that "[i]f the Commission finds Water Mill, New York deserving of a first local service, SHU urges that the Commission allot Channel 233A in place of Channel 277A."⁴ Alternatively, it stated that "[i]n the event that the Commission decides that it cannot allot Channel

¹ *Water Mill and Noyack, New York*, Report and Order, 21 FCC Rcd 1150 (MB 2004) ("R&O").

² These pleadings include: (1) an Opposition to Petition I filed by SHU; (2) Comments on Petition II filed by Monroe; (3) a Reply to Monroe's Comments filed by SHU; (4) Reply to *Public Notice* filed by SHU; (5) Comments on Petition II filed by Isabel Sepulveda, Inc. ("Sepulveda"); (6) a Reply to Sepulveda's Comments filed by SHU; (7) an Informal Request for Clarification filed by Sepulveda; (8) a Reply to Informal Request for Clarification filed by SHU; and (9) a Motion To Accept Supplemental Information filed by SHU.

³ *Water Mill and Noyack, New York*, Notice of Proposed Rule Making, 18 FCC Rcd 2387 (MB 2003) ("NPRM").

⁴ SHU's Comments and Counterproposal, filed April 11, 2003, at 2 ¶ 4.

233A to Water Mill to satisfy the interest expressed by the petitioner, Isabel Sepulveda, for any reason and instead decides to allot Channel 277A to Water Mill, Sacred Heart requests that the Commission consider the following counterproposal – allot Channel *277A to Noyack, New York reserved for NCE use and modify the license of Station WSUF from Channel 210B1 to Channel *277A at Noyack.”⁵ SHU contended that Channel *277A could be reserved for NCE use because no other NCE frequencies were available in the reserved FM band⁶ and operation on Channel *277A with Class A facilities would be an improvement over WSUF(FM)’S existing Channel 210B1 directional facilities. SHU also claimed that authority exists for modifying WSUF(FM)’s license from the reserved band to the nonreserved FM band.⁷

3. The *R&O* allotted Channel 233A, the alternate channel suggested by SHU, rather than Channel 277A, at Water Mill. The *R&O* stated that alternate Channel 233A meets our technical requirements and would provide a first local service to the community.⁸

4. In Petition I, Monroe contends that it is adversely affected by the *R&O* because the allotment of Channel 233A at Water Mill will cause severe interference to and the possible displacement of its three licensed co-channel translator stations. It requests that the Water Mill allotment be rescinded for several reasons. Foremost, Monroe states that it is well settled that FM translators are a secondary service and are not considered in FM allotment proceedings.⁹ Thus, to the extent that the *R&O*’s decision to allot Channel 233A, in lieu of the *NPRM*’s proposal of Channel 277A, at Water Mill was to protect SHU’s translator on Channel 277A, Monroe argues that the *R&O* erred as a matter of law by not following Commission policy or explaining why interference to SHU’s translator warrants departure from established policy. Monroe also contends that the *R&O* violated the notice provisions of the Administrative Procedure Act (“APA”)¹⁰ because no timely notice was given of any change in the Commission’s allotment policy or of the proposed allotment of Channel 233A to Water Mill, thereby depriving Monroe of the opportunity to participate in the proceeding. Finally, Monroe contends that the *R&O* did not consider the impact of the allotment of Channel 233A at Water Mill on other FM translators and that the public interest would be better served by preserving Monroe’s three translators, as well as low power FM station WLIX-LP, Channel 234, Ridge, New York,¹¹ rather than SHU’s single translator.

⁵ SHU’s Comments and Counterproposal at 3 ¶ 5. For other language regarding the conditional nature of SHU’s counterproposal, see also *Id.* at 4 ¶ 4 (“If the Commission allots Channel 233A to Water Mill here, then SHU will be able to preserve this translator and no other Commission action is required.”)

⁶ FM channels 201 to 220 have been reserved for NCE use. See 47 C.F.R. § 73.501(a).

⁷ See *Siloam Springs, Arkansas*, Report and Order, 2 FCC Rcd 7485 (MMB 1989), *recon. denied*, Memorandum Opinion and Order, 4 FCC Rcd 4920 (MMB 1989) (NCE FM station’s license modified from reserved band to a nonreserved band channel due to TV Channel 6 interference problems) (“*Siloam Springs*”). The nonreserved FM band consists of FM Channels 221 to 300. See 47 C.F.R. § 73.202(a). The nonreserved FM band can be used by both NCE and commercial stations.

⁸ 21 FCC Rcd at 1151.

⁹ See *Willows and Dunnigan, California*, Memorandum Opinion and Order, 15 FCC Rcd 23852, 23856-57 (MMB 2000); and 47 C.F.R. § 74.1203 (as a secondary service, FM translators are not entitled to any protection from full-power FM stations).

¹⁰ 5 U.S.C. § 553(b).

¹¹ WLIX-LP is licensed to Pine Barrens Broadcasting, Inc., which is not related to Monroe.

5. In its Opposition, SHU argues that Petition I should be dismissed because Monroe has not shown why it was not possible for it to participate in the earlier stages of the proceeding.¹² Although Monroe claims that it was not given proper notice that the Commission intended to allot Channel 233A at Water Mill, SHU contends that this argument has no merit because the *NPRM* expressly stated that “the filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.”¹³ Under these circumstances, SHU asserts that it was Monroe’s responsibility to monitor the pleadings filed in this proceeding to determine if an alternate channel was proposed for Water Mill. However, if Petition I is considered on the merits, SHU contends that there is no basis to reverse the allotment of Channel 233A to Water Mill because Monroe has overstated the harm that this allotment can cause to its translators.¹⁴

6. In Petition II, SHU agrees with the *R&O* insofar as it allotted Channel 233A instead of Sepulveda’s proposed Channel 277A at Water Mill. However SHU contends that the *R&O* erred by not also considering SHU’s counterproposal to reserve Channel *277A at Noyack and to modify the license of NCE Station WSUF(FM) accordingly. It claims that the public interest would be better served by grant of its counterproposal because this channel change would improve WSUF(FM)’s facilities by negating the need to protect WLNE(TV), Channel 6, New Bedford, Massachusetts.¹⁵

7. In two subsequent pleadings, SHU offers a solution that will accommodate both SHU and Monroe.¹⁶ SHU states that Sepulveda, the original rulemaking petitioner in this proceeding, has failed to file an acceptable expression of interest for its proposal to allot an FM channel at Water Mill because none of Sepulveda’s filings were verified.¹⁷ SHU points out that the Commission has strictly enforced Section 1.52 of the Commission’s Rules (the “Rules”) in FM allotment proceedings because of the potential for abuse and has not permitted this defect to be cured if it would prejudice other mutually exclusive proposals.¹⁸ Thus, SHU contends that the allotment at Water Mill should be reversed, thereby eliminating the need to make a choice between Channels 277A or 233A at Water Mill. As a result, SHU claims that its counterproposal is the only remaining proposal and should be granted for the public interest benefits previously mentioned.

8. In its Comments, Sepulveda contends that Petition II should be denied because the *R&O* fully granted SHU the relief it requested by allotting alternate Channel 233A at Water Mill. By SHU’s own wording, asserts Sepulveda, the counterproposal for the reservation of Channel *277A at Noyack and the associated modification of WSUF(FM)’s license was contingent on the staff not allotting Channel 233A at Water Mill.

¹² See 47 C.F.R. § 1.106(b).

¹³ *NPRM*, 18 FCC Rcd at 2391, Appendix.

¹⁴ Specifically, SHU claims that Monroe’s two Connecticut translators can remain on Channel 233 without violating the Commission’s technical Rules and that the New York translator can be moved to Channel 286 and continue to provide service to the public without any loss of population.

¹⁵ Thereafter, public comment was solicited on SHU’s counterproposal. See *Public Notice*, Report No. 2830 (rel. August 28, 2007).

¹⁶ SHU’s Reply to *Public Notice*, filed August 17, 2007, at 1-2; and SHU’s Reply Comments, filed September 10, 2007, at 2-4.

¹⁷ 47 C.F.R. § 1.52 (a party who is not represented by an attorney shall sign and verify the document).

¹⁸ See *Lincoln, Osage Beach, Steelville, and Warsaw, Missouri*, Memorandum Opinion and Order, 17 FCC Rcd 6119, 6123 (2002) (“*Steelville*”).

9. In its Reply, SHU argues that changed circumstances have occurred in this proceeding that have superseded SHU's intent when it originally filed its counterproposal and justify grant of Petition II.¹⁹ SHU refers to the filing of Petition I by Monroe, which raised the impact of the R&O on translators not previously considered, and the failure of Sepulveda to verify its expression of interest, which it contends has made the allotment at Water Mill defective. Because its counterproposal is the only remaining proposal, SHU contends that the Commission should act in accordance with the public interest rather than focus on the language cited by Sepulveda. SHU believes that the public interest would be served by grant of its counterproposal because it would provide a second NCE service ("NCE Gray Area") to 23,654 persons.²⁰

III. DISCUSSION

10. *Standing.* As a threshold matter, we find that Monroe has standing to file Petition I. SHU claims that Monroe has not met the burden under Section 1.106(b)(2) of the Rules²¹ to show why it did not participate at an earlier stage of this proceeding. We note, however, that Section 1.429 of the Rules²² governs the filing of reconsideration petitions in rulemaking proceedings, and Section 1.429 does not contain this requirement. Rather, Section 1.429 permits any "interested person" to file a petition for reconsideration of a final action in a rulemaking proceeding. We believe that Monroe is an interested person based on the potential impact on its translators caused by the R&O's allotment of Channel 233A at Water Mill.

11. *Water Mill Allotment.* Next, although an *NPRM* was issued in response to Sepulveda's rulemaking petition, we agree with SHU that the initial rulemaking petition, as well as its supporting comments, do not comply with Section 1.52 of the Rules. This section requires that all pleadings filed by parties not represented by legal counsel be signed and verified by the petitioner and provide the petitioner's mailing address. Although Sepulveda's rulemaking petition and its supporting comments were signed by a principal of Sepulveda, neither filing contained a verification that the statements in the petition are accurate to the best of the principal's knowledge. Such a defect with respect to an expression of interest in an FM allotment proceeding is fatal and cannot be cured when it would adversely affect other parties' interests.²³ Because no other valid expressions of interest are on file for an FM allotment at Water Mill, the allotment of Channel 233A must be deleted, and Petition II is, therefore, granted to the extent that it is consistent with this decision. The deletion of this allotment also obviates the need to rule on Petition I. Accordingly, we will dismiss Petition I as moot. Nevertheless, we clarify that our actions in this proceeding have not been intended to change our policies regarding the treatment of FM translators in allotment rulemaking proceedings. Translators are secondary services and are not entitled to any protection from full-power stations.²⁴

12. *Noyack Counterproposal.* We will also dismiss SHU's counterproposal to reserve Channel *277A for NCE use at Noyack and to modify the license for Station WSUF(FM) accordingly because it violates our policy of no longer entertaining optional or alternative proposals presented in either an

¹⁹ 47 C.F.R. § 1.429(b) (reconsideration in rulemaking proceedings can be granted based on changed circumstances).

²⁰ SHU's Reply Comments, filed September 10, 2007, at 4 ¶ 4.

²¹ 47 C.F.R. § 1.106(b)(2).

²² *Id.* at § 1.429.

²³ See *Steelville*, 17 FCC Rcd at 6123.

²⁴ 47 C.F.R. § 74.1203.

initial rulemaking petition or in a counterproposal.²⁵ SHU proposed two alternatives. First, it suggested the allotment of alternate Channel 233A at Water Mill. Second, in the event that the Commission rejects the Water Mill Channel 233A allotment, then SHU requested the reservation of Channel *277A at Noyack and the associated modification of the Station WSUF(FM) license in lieu of the allotment of Channel 277A to Water Mill. In *Winslow*, we stated “[t]here is no provision our Rules requiring us to consider such proposals. Based upon our experience, even a single optional or alternative proposal has required us to speculate on the proposal actually preferred by the proponent or what proposal would, in our view, have the greatest public interest benefit.”²⁶ Further, we found that “[i]f a proponent subsequently disagrees, either on the basis of changed circumstances or a personal preference, with the option adopted, it could seek reconsideration.”²⁷ Petition II illustrates this exact problem that led to the adoption of the *Winslow* policy. Having achieved its primary relief of the preservation of its translator on Channel 277A at Noyack, SHU now has changed its preferences and would like also to accomplish its contingent relief of the reservation of Channel *277A at Noyack and the associated modification of the Station WSUF(FM). As we concluded in *Winslow*, such reconsideration petitions are unnecessary and burden our limited administrative resources.

13. Finally, even if we were to consider the merits of SHU’s counterproposal, we would not adopt it. The Commission has entertained only on several occasions the modification of a reserved band NCE license to a nonadjacent channel in the nonreserved band and has permitted such modifications in only limited circumstances.²⁸ We do not believe that this case presents such rare circumstances. The interference problems caused by Station WLNE-TV, Channel 6, New Bedford, Massachusetts, will be eliminated by the station’s move to UHF television Channel 49 as part of the transition from analog to digital television, thereby undermining SHU’s primary rationale for its alternate proposal. Accordingly, we dismiss SHU’s counterproposal and deny Petition II to the extent that it seeks adoption of the alternative proposal set forth in its counterproposal.

14. *Downgrade Policy.* In this case, the staff did not issue a public notice seeking competing expressions of interest in the allotment of Channel *277A at Noyack because SHU proposed a downgrade of its licensed facilities (the “Downgrade Policy”). It appears that the staff first endorsed the Downgrade Policy in *Key West and Hialeah, FL*,²⁹ less than one year after the Commission adopted rules to permit certain modifications of a station license through rule-making procedures.³⁰ The staff has followed this policy without comment or discussion in a number of subsequent cases.³¹ We

²⁵ See *Winslow, Camp Verde, Mayer, and Sun City, West, Arizona*, Memorandum Opinion and Order, 16 FCC Rcd 9551, 9955 (MMB 2001) (“*Winslow*”).

²⁶ *Winslow*, 16 FCC Rcd at 9555.

²⁷ *Id.*

²⁸ See *Siloam Springs*, 4 FCC Rcd at 4092; and *Sioux Falls, South Dakota*, 51 Fed. Reg. 55585 (December 14, 1983) (modifying the license of an NCE station in the reserved band to operate on a commercial frequency in the nonreserved band to correct a staff error and restore a Class A FM channel). Cf. *Rosendale, New York*, Memorandum Opinion and Order, 12 FCC Rcd 10020 (1997), *recon. denied*, Memorandum Opinion and Order, 13 FCC Rcd 308 (1998), *further review denied*, Memorandum Opinion and Order, 13 FCC Rcd 20590 (1998) (denying rulemaking request to allot a nonreserved band channel and modify the license of a reserved band station to this nonreserved band frequency that would be available for commercial use).

²⁹ Notice of Proposed Rule Making, 50 Fed. Reg. 26,229 (Jun. 25, 1985) (“*Key West NPRM*”).

³⁰ *Modification of FM and Television Station Licenses*, Report and Order, 98 FCC2d 916 (1984) (“*License Modification Order*”); see also 47 C.F.R. § 1.420(g)(1) and (2).

³¹ E.g., *Opal and Reliance, WY*, Report and Order, 20 FCC Rcd 12994 (MB 2005).

conclude that the Downgrade Policy is inconsistent with the plain language of the rule, the limited guidance provided by the Commission on this issue, and current nonreserved band license modification policy. Accordingly, effective with the release of this order, the staff will issue a public notice seeking competing expressions of interest in the rare situation of a proposed downgrade from a reserved band to a nonadjacent, nonreserved band channel.

15. The *License Modification Order* proceeding was initiated to establish rules to promote the expansion of service consistent with the *Ashbacker*³² obligation to entertain competing expressions of interest for a newly assigned channel. Historically, this situation arose in the context of a licensee seeking an upgrade in station class. The Commission concluded that, in these situations, *Ashbacker* would be satisfied if no expression of interest in the upgraded channel is expressed or if an alternative equivalent channel is identified for those parties expressing such an interest. The rule was intended to encourage the filing of modification proposals by limiting the ability of other parties to compete for upgraded allotments, *i.e.*, the rule codifies a new licensing right for a certain class of licensees.

16. Section 1.420(g) unambiguously applies to any modification to “another class of channel,”³³ *i.e.*, any upgrade or downgrade proposal. Although the *License Modification Order* considered upgrades exclusively, it did not set forth an alternate rule for downgrades, and certainly did not announce a Rule which strips away the requirements imposed on upgrade proponents. Importantly, the Commission suggests – in the context of a television allotment example – that it would make a modified allotment available for application for all interested parties when the modification does not constitute an upgrade. “[W]e are aware of no public interest benefits which would impel us to treat requests for [non-upgrade] modifications . . . as upgrading requests to which the instant proposed amendment would apply.”³⁴

17. The *Key West NPRM* concludes that a downgrade petitioner is not required to identify an additional equivalent channel on the theory that provisions of Section 1.420(g) do not apply “since no upgrade in facilities is contemplated.”³⁵ It does not address the fact that this conclusion conflicts with the clear and contrary language of the rule. Nor does the decision attempt to harmonize the policy it announces with the Commission’s view that shielding a modification from competing applications is only in the public interest in certain upgrade situations. Rather, this new policy seems to rest solely on the logical fallacy of denying the antecedent: in upgrade situations, the Commission must seek competing expressions of interest in certain circumstances. Therefore, in non-upgrade situations it need not seek competing expressions of interest in those circumstances. This is both bad logic and bad policy. The *License Modification Order* established a limited exception to the general *Ashbacker* requirement to provide an opportunity for competing expressions of interest. Assuming, *arguendo*, that the exception codified at Section 1.420 does not apply to downgrades, then the general *Ashbacker*-based policy of seeking competing expressions of interest does apply. In this regard, the failure of the *License Modification Order* to establish explicitly a rule for downgrades and the absence of any such policy in case law prior to adoption of the new rule is fatal to the *sub silentio* policy change announced in the *Key West NPRM*. Finally, we note that the Commission in 2006 modified city of license and other license modification procedures.³⁶ Among other actions, this order specifically imposes Section

³² *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

³³ 47 C.F.R. § 1.420(g).

³⁴ *License Modification Order*, 98 FCC 2d at 921-22 ¶ 10.

³⁵ *Key West NPRM*, 50 Fed. Reg. at 26229 ¶ 4.

³⁶ *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006) (“*Change of License R&O*”).

1.420(g)(1) and (2) requirements on downgrade proposals in the nonreserved band.³⁷ We see no reason for a different approach for proposals seeking to modify a reserved band NCE permit or license. Accordingly, on a going forward basis we will modify our procedures to conform to Section 1.420(g) and current policy.

18. Conclusion and Ordering Clauses. For the reasons stated above, and pursuant to the Communications Act of 1934, as amended, and our rules,³⁸ Monroe Board of Education's Petition for Reconsideration IS DISMISSED AS MOOT.

19. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Sacred Heart University is GRANTED to the extent indicated above and IS DENIED in all other respects.

20. IT IS FURTHER ORDERED, That the counterproposal (RM-11396) filed by Sacred Heart University IS DISMISSED.

21. Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b), and 0.283(b), IT IS ORDERED, That effective October 6, 2008, the FM Table of Allotments, 47 C.F.R. Section &3.202(b) IS AMENDED as follows:

<u>Community</u>	<u>Channel No.</u>
Water Mill, New York ³⁹	---

22. IT IS FURTHER ORDERED, That a copy of this *Memorandum Opinion and Order* be sent by Certified Mail, Return Receipt Requested, to Isabel Sepulveda, Inc., 9 Lake Side Drive, Southhampton, New York 11968; Mark N. Lipp, Esq., Wiley Rein LLP, 1776 K Street, N.W., Washington, D.C. 20006 (Counsel for Sacred Heart University); and John Crigler, Esq., Deborah J. Salons, Esq., Garvey Schubert Barer, 1000 Potomac Street, N.W., Fifth Floor, Four Mill Building, Washington D.C. 20007 (Counsel for Monroe Board of Education).

23. IT IS FURTHER ORDERED, That this proceeding is terminated.

24. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁷ *Id.* at 14222 ¶ 15.

³⁸ See 47 U.S.C. § 405; 47 C.F.R. § 1.429.

³⁹ The allotment of Channel 233A at Water Mill, New York, was inadvertently removed from the Table of Allotments in *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14241-42 (2006), Appendix. This allotment was, however, added to the Table of Allotments in 2006. See 71 F.R. 9266 (February 23, 2006).