

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 07-279
FM Broadcast Stations.)	RM-11411
(Buffalo, Iola, Normangee, and Madisonville)	RM-11422
Texas) ¹)	RM-11423
)	
)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: June 17, 2009

Released: June 19, 2009

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a *Notice of Proposed Rule Making*² issued at the request of Charles Crawford (“Petitioner”); (2) Comments and Counterproposal filed by Roy E. Henderson (“Henderson”); (3) Counterproposal filed by Katherine Pyeatt, permittee for Station KKL B(FM),³ Channel 267A, Madisonville, Texas (“Pyeatt”); (4) Reply Comments to Counterproposals filed by Pyeatt; (5) Reply Comments filed by Henderson; and (6) various related pleadings.⁴ For the reasons discussed below, we dismiss the Petitioner’s rulemaking petition, deny Pyeatt’s counterproposal, and grant Henderson’s counterproposal.⁵

2. **Background.** In response to the Petitioner’s rulemaking petition, the *NPRM* proposed the allotment of Channel 299A at Iola, Texas, as a second local aural service (RM-11411). As noted in the *NPRM*, the Petitioner had contemporaneously submitted a construction permit application⁶ for Channel 299A at Iola and paid the requisite filing fee in compliance with the Commission’s new procedures.⁷

¹ The communities of Buffalo, Normangee, and Madisonville, Texas, have been added to the caption.

² *Iola, Texas*, Notice of Proposed Rule Making, 22 FCC Rcd 21662 (MB 2007) (“*NPRM*”).

³ See File No. BNPH-20060310ACN. The construction permit was granted on January 12, 2007, and expires on January 12, 2010.

⁴ These pleadings include (1) a Motion to File Factual Update and a Factual Update filed by Henderson on February 20, 2008; (2) an Expression of Interest filed by Gerald Proctor (“Proctor”) on November 4, 2008; and (3) Comments on Order and Commission Request for Additional Expressions of Interest filed by Henderson on November 12, 2008. We will grant Henderson’s motion and consider the Factual Update because it points out a changed factual circumstance that occurred since the filing of Henderson’s counterproposal, *i.e.*, the grant of a construction permit for a new noncommercial educational station in Buffalo, Texas (File No. BNPED-20071017ACA).

⁵ A *Report and Order* in this proceeding, 23 FCC Rcd 14770 (MB) (“*R&O*”) was set aside by the staff on its own motion, 23 FCC Rcd 15375 (MB 2008) (“*Order*”). See *infra* at ¶ 7.

⁶ See File No. BNPH-20071009AKZ.

⁷ *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).

Two counterproposals were timely filed in response to the *NPRM*. First, Henderson requests the allotment of Channel 299A to Buffalo, Texas, as a second local service (RM-11422).⁸ Henderson contends that Buffalo (population 1,804) is a community for allotment purposes. In support of this position, Henderson states that Buffalo has a local government with an elected mayor and five city council members, its own police force, fire department, judicial system, school system, local businesses, churches, and civic and service organizations. Henderson also submitted a construction permit application for Channel 299A at Buffalo and paid the requisite filing fee.⁹ The proposed allotment of Channel 299A at Buffalo is mutually exclusive with the *NPRM*'s proposed allotment of Channel 299A.

3. Second, Pyeatt proposes the allotment of Channel 267A at Normangee, Texas, as a first local service (RM-11423). To accommodate this allotment, Pyeatt proposes the non-adjacent channel upgrade of Station KKLb(FM), Madisonville, Texas, from Channel 267A to Channel 299C3 at a new transmitter site and the associated modification of her construction permit, pursuant to Section 1.420(g) of the Commission's Rules.¹⁰ Pyeatt's counterproposal is mutually exclusive with the *NPRM*'s proposal because Channel 299C3 at Madisonville is short-spaced under the minimum distance separation rules¹¹ with Channel 299A at Iola, Texas. In addition, Pyeatt's counterproposal is also mutually exclusive with Henderson's counterproposal because Channels 299A at Buffalo, Texas, and 299C3 at Madisonville are short-spaced to each other.

4. In support of her counterproposal, Pyeatt contends that Normangee (population 719) is a community for allotment purposes because it is incorporated and has 86 businesses, its own school district, fire department, post office, and local churches. Pyeatt further alleges that her counterproposal is preferable to the Petitioner's proposal because it will provide a first local service under FM Priority (3)¹² and will improve the service area for Station KKLb(FM), Madisonville, Texas. Pyeatt also states that she contemporaneously filed a construction permit application for Channel 267A at Normangee,¹³ will participate in the auction for that channel, and will build and operate the channel if selected as the permittee.

5. In his Reply Comments, Henderson argues that the Petitioner's proposal should be dismissed because, according to Commission records, the Petitioner did not file any comments and did not reaffirm his interest in the allotment as required by the *NPRM*. He also contends that Pyeatt's counterproposal should be dismissed because the proposed allotment of Channel 267A at Normangee is not mutually exclusive with the *NPRM*'s proposed allotment of Channel 299A at Iola and is too remote to be included in this proceeding. In support of this position, Henderson argues that the non-adjacent channel upgrade of Station KKLb(FM) from Channel 267A to Channel 299C3 could be implemented without the additional allotment at Normangee and questions whether Pyeatt's motive is to upgrade her construction permit or provide a first local service at Normangee. Finally, Henderson argues that, if both the

⁸ Although Henderson's counterproposal claimed that its proposed allotment for Buffalo would be a first local service, a construction permit for a new noncommercial educational FM station at Buffalo was subsequently granted. See *supra* note 4.

⁹ See File No. BNPB-20080208AEJ.

¹⁰ 47 C.F.R. § 1.420(g) (permitting, in the course of a rulemaking proceeding, the modification of the license or permit of an FM station in the non-reserved FM band to a higher class, non-adjacent channel in the same community provided that there is no other timely filed expression of interest in the non-adjacent channel).

¹¹ 47 C.F.R. § 73.207.

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*, Second Report and Order, 90 FCC 2d 88 (1982).

¹³ See File No. BNPB-20080211ABN.

Petitioner's and Pyeatt's proposals are dismissed, then his counterproposal would stand by itself and should be granted because it would provide a first commercial radio service to Buffalo.

6. In her Reply Comments, Pyeatt contends that Henderson's counterproposal is late filed and should be dismissed. She notes that under the Commission's new procedures, a party filing a rulemaking petition for a new allotment must simultaneously file a construction permit application and the appropriate fee. Although she acknowledges that Henderson submitted his application before the February 11, 2008, counterproposal deadline in this proceeding, she notes that the filing fee for the application was not received until February 18, 2008. Because an application is not considered filed until the Commission receives the filing fee, she argues that Henderson's entire counterproposal is late filed and should be dismissed. However, even if Henderson's counterproposal were not considered late, she argues that her counterproposal should be preferred on a comparative basis because it would provide a first local service under FM allotment priority (3). By way of comparison, she alleges that Henderson's counterproposal would trigger lesser priority (4) because it would provide a second local service to Buffalo.

7. The initial *R&O* in this proceeding was subsequently rescinded to correct a procedural deficiency.¹⁴ Specifically, although a *Public Notice*¹⁵ had been issued in this proceeding, announcing the filing of the two counterproposals and providing a 15-day period for filing reply comments to these counterproposals, the *Public Notice* did not, with respect to Pyeatt's counterproposal, solicit competing expressions of interest for upgraded, non-adjacent Channel 299C3 at Madisonville. As a result, the *Order* set aside the *R&O* in order to comply with Section 1.420(g) and provided a 15-day period in which parties could file competing expressions of interest in Channel 299C3 at Madisonville.

8. In response to the *Order*, Proctor submitted a timely pleading, expressing his interest in applying for upgraded, non-adjacent Channel 299C3 at Madisonville, Texas, participating in any auction for the allotment, and constructing a new station if he becomes the permittee. In his Comments, Henderson reiterates the argument that Pyeatt's counterproposal should be dismissed because the Normangee proposal does not have the nexus necessary to be considered in this proceeding.

9. **Discussion.** As a threshold matter, we agree with Henderson that the Petitioner's proposal should be dismissed. As stated in the *NPRM*, a showing of continuing interest is required before a channel will be allotted.¹⁶ It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest.¹⁷ Because no such interest has been expressed by the Petitioner or any other party, we will dismiss the proposal to allot Channel 299A at Iola.

10. Next, we reject Henderson's argument that Pyeatt's counterproposal should be dismissed because the proposed allotment of Channel 267A at Normagee is not mutually exclusive with the *NPRM*'s proposed allotment of Channel 299A at Iola. It is well established that "a counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made."¹⁸ As long as the proposed set of allotments are directly related to each other and at least one of the proposed allotments is mutually exclusive with an aspect of the *NPRM*'s proposal, then a counterproposal is acceptable even if all of the other parts of the

¹⁴ See *supra* note 5.

¹⁵ Report No. 2859 (rel. Apr. 2, 2008).

¹⁶ See *NPRM*, 21 FCC Rcd at 21665, Appendix, ¶ 2.

¹⁷ See, e.g., *Powers, Michigan*, 13 FCC Rcd 22295 (MMB 1998) (dismissing rulemaking petition because no continuing or other expressions of interest were submitted).

¹⁸ See *Implementation of BC Docket 89-90 to Increase the Availability of FM Broadcast Assignments*, Memorandum Opinion and Order, 5 FCC Rcd 931, 933 n.5 (1990).

counterproposal are not mutually exclusive with the *NPRM*.¹⁹ As in *Bowling Green*, the proposed allotment of Channel 267A at Normangee is not in conflict with the *NPRM*'s proposed allotment of Channel 299A at Iola, but the Normangee allotment is directly dependent upon the deletion of Channel 267A at Madisonville. And, because the proposed allotment of Channel 299C3 at Madisonville is short-spaced to the *NPRM*'s proposed allotment of Channel 299A at Iola, Pyeatt's entire counterproposal is properly before us.²⁰

11. However, Pyeatt's counterproposal is no longer capable of being implemented and must, therefore, be denied on technical grounds. Specifically, the allotment of Channel 267A at Normangee requires that Pyeatt's construction permit for Station KKLB(FM), Madisonville, be modified from Channel 267A to Channel 299C3. Under Section 1.420(g) of the Commission's Rules, Pyeatt's construction permit cannot be modified to specify a higher class, non-adjacent channel unless no other expressions of interest are filed for the non-adjacent, upgraded channel, or if additional expressions of interest are filed, there is an alternate higher class channel available to accommodate the additional expressions of interest.²¹ However, Proctor has filed an expression of interest for Channel 299C3 at Madisonville, and a staff engineering analysis reveals that there are no other Class C3 FM channels available for allotment to Madisonville. Under these circumstances, we cannot modify Pyeatt's construction permit, pursuant to Section 1.420(g), to specify Channel 299C3 in lieu of Channel 267A. Because the allotment of Channel 267A at Normangee is dependent upon the modification of Pyeatt's construction permit from Channel 267A to Channel 299C3, the allotment at Normangee cannot be made, and Pyeatt's counterproposal must be denied.

12. In view of the dismissal of the Petitioner's rulemaking petition and the denial of Pyeatt's counterproposal, only Henderson's counterproposal remains. Although Pyeatt contends that Henderson's counterproposal should be dismissed because the filing fee for the related construction permit application for this allotment was filed after the February 11, 2008, counterproposal deadline, we disagree. The record in this proceeding reveals that Henderson's counterproposal was filed on February 11, 2008, and the related construction permit application was electronically filed on February 8, 2008. Both of these documents were required to be filed by February 11, 2008. However, pursuant to Media Bureau processing procedures, the filing date for an application will hold, provided that payment is received by the Commission's designated bank within 14 calendar days of the date that the application is filed.²² Because the application was filed on February 8, 2008, and the payment was received on

¹⁹ See, e.g., *Bowling Green and Elizabethtown, Kentucky, and Ferdinand, Indiana*, 8 FCC 2097, 2098 n.6 (MMB 1993) (finding that a proposed new allotment on Channel 253A at Ferdinand, Indiana, which was fully spaced to a Notice of Proposed Rule Making's proposal to allot Channel 252C3 at Bowling Green, Kentucky, is properly included in a counterproposal because it was directly dependent on the deletion of Channel 253A at Elizabethtown, Kentucky, and the proposed allotment of Channel 252C3 at Elizabethtown was mutually exclusive with the Notice of Proposed Rule Making's allotment of Channel 252C3 at Bowling Green, Kentucky) ("*Bowling Green*").

²⁰ Likewise, we do not attempt to scrutinize a proposal to determine what motivated the proponent to recommend each part of that proposal, so long as the proposal serves the public interest. Rather, a rulemaking proposal to amend the FM Table of Allotments is examined to determine whether it complies with the Commission's technical engineering rules, and whether on a comparative basis, adoption of such proposal would best serve the public interest.

²¹ See 47 C.F.R. § 1.420(g) (1) and (2). See also *Modification of FM and Television Station Licenses*, Report and Order, 98 FCC 2d 916 (1984).

²² See CDBS User's Guide, http://fjallfoss.fcc.gov/prod/cdbs/forms/prod/cdbs_ug.htm (Note: Payment must be received by Mellon Bank within 14 (calendar) days of the date that the application is officially received by the Media bureau's electronic filing system (indicated by the reference number assigned to the electronically filed application). This deadline applies to any payment submission method (electronic or via a paper check). If payment is not received in time, the filed application will be considered to be **not paid** and will therefore not be processed by the MB.) (emphasis in original). See also *Letter to Leon F. Pettersen*, DA 07-3504, rel. Aug. 2, 2007.

February 18, 2008, the payment was timely made and the original application filing date holds. Accordingly, we conclude that Henderson's counterproposal is not late filed.

13. Finally, we will grant Henderson's counterproposal and allot Channel 299A to Buffalo, Texas, because it will provide a second aural transmission service, as well as first commercial service, to the community.²³ Henderson has demonstrated that Buffalo is a community for allotment purposes because it has a local government, police force, fire department, school system, local businesses, churches, and civic and service organizations.

14. 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 0.61, 0.204(b), and 0.283, IT IS ORDERED, That effective August 3, 2009, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the community listed below, as follows:

<u>Community</u>	<u>Channel No.</u>
Buffalo, Texas	299A

15. A filing window for Channel 299A at Buffalo, Texas, 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.

16. IT IS FURTHER ORDERED, That the counterproposal (RM-11422) filed by Roy E. Henderson IS GRANTED.

17. IT IS FURTHER ORDERED, That the rulemaking petition (RM-11411) filed by Charles Crawford IS DISMISSED.

18. IT IS FURTHER ORDERED, That the counterproposal (RM-11423) filed by Katherine Pyeatt IS DENIED.

19. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

20. IT IS FURTHER ORDERED, That a copy of this *Report and Order* be sent by Certified Mail, Return Receipt Requested, to Charles Crawford, 4553 Bordeaux Ave., Dallas, Texas 75205; Katherine Pyeatt, 2215 Cedar Springs Road., #1910, Dallas, Texas 75201; Robert J. Buenzle, Esq. 11710 Plaza America Drive, Suite 2000, Reston, Virginia 20190 (Counsel for Roy Henderson); and Dan J. Alpert, Esq., 2120 N. 21st Rd., Arlington, Virginia 22201 (Counsel for Gerald Proctor).

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

²³ The reference coordinates for Channel 299A at Buffalo, Texas, are 31-28-44 NL and 96-10-02 WL, which is located 16.8 kilometers (6.6 miles) west of Buffalo.

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

FEDERAL COMMUNICATIONS COMMISSION

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