

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	
FM Broadcast Stations.)	
(Lane and Quinby, South Carolina))	
)	File No. BPH-20080404ACE
Applications of)	WIBZ(FM), Wedgefield, South Carolina
)	
Miller Communications, Inc.)	File No. BP-20080404ACC
)	WVHM(AM), Sumter, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 2009

Released: August 14, 2009

By the Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) the Petition for Reconsideration (the “Petition”) filed by Miller Communications, Inc. (“Miller”), licensee of Station WIBZ(FM), Channel 238A, Wedgefield, South Carolina, and Station WVHM(AM), Sumter, South Carolina, directed against the staff letter¹ that dismissed its Petition for Rulemaking to amend the FM Table of Allotments and the above referenced applications; and (2) a Request for Official Notice. No additional comments were received in this proceeding. For the reasons set forth below, we deny the Petition.

2. **Background.** Miller’s rulemaking petition requested the deletion of vacant FM Channel 237A at Quinby, South Carolina, and the allotment of Channel 238A at Lane, South Carolina, as its first local service. The proposed deletion of vacant Channel 237A at Quinby accommodated Miller’s hybrid application (the “Quinby Application”) for Station WIBZ(FM) to substitute Channel 237A for Channel 238A at Wedgefield, South Carolina, reallocate Channel 237A from Wedgefield, to Quinby, as its first local service, and modify the Station WIBZ(FM) license to reflect this change.² Additionally, Miller filed a contingent application for Station WVHM(AM) to change its community of license from Sumter to Wedgefield, South Carolina, to prevent the removal of Wedgefield’s sole local service.³

3. The staff dismissed Miller’s rulemaking petition along with the associated hybrid applications for Stations WIBZ(FM) and WVHM(AM) for two reasons. First, the *Letter* held that the proposed deletion of Channel 237A at Quinby contravened the Commission’s longstanding policy of, absent compelling public interest reasons, refraining from deleting a vacant FM allotment where there are *bona fide* expressions of interest in the vacant allotment. The *Letter* stated that Miller’s application to reallocate and change the community of license of Station WIBZ(FM) to Channel 237A at Quinby constituted such an expression of interest in Channel 237A at Quinby and, therefore, under the policy, the channel could not be deleted. Second, the *Letter* found that, absent extraordinary circumstances, deleting vacant Channel 237A at Quinby would be inconsistent with the competitive bidding requirements set forth in Section

¹ See *Letter to Gary S. Smithwick, Esq.* (MB December 8, 2008) (“*Letter*”).

² See File No. BPH-20080404ACE.

³ See File No. BP-20080404ACC.

309(j) of the Communications Act⁴ and would also be contrary to the specific representation in the *Report and Order*⁵ that the Channel 237A allotment at Quinby would be ultimately available at auction.

5. The Petition requests reconsideration of the staff's Letter on two grounds. First, the Petition claims that Miller's combined rulemaking and application proposal is consistent with the Commission's traditional policy on refraining from deleting vacant allotments because its application to reallocate and change the community of license for Station WBIZ(FM) to Channel 237A at Quinby is not a conventional expression of interest in applying for the channel at auction. Rather, it is a request to use the Commission's change of community procedures to activate the Quinby allotment more expeditiously than could be accomplished through the auction procedures. Because there are no other expressions of interest in the allotment, Miller argues that the Commission can issue a *Notice of Proposed Rule Making*, proposing to delete the vacant allotment at Quinby. Second, Miller argues that the deletion of Channel 237A at Quinby would not be inconsistent with the competitive bidding requirements of Section 309(j) of the Communications Act because there is no explicit language in the section that would prohibit the deletion of a vacant allotment where no applications have yet been filed or accepted. Although Miller recognizes that the Commission could change its policy and no longer permit the deletion of vacant allotments that are subject to auction, it argues that the Commission should only do so on a going forward basis.

6. On February 17, 2009, Miller filed a Request for Official Notice to point out that, subsequent to the release of the *Letter* dismissing Miller's rulemaking petition, the staff issued a *Notice of Proposed Rule Making* in response to a similar rulemaking petition that requested the deletion of a vacant FM allotment that has not been the subject of an auction.⁶ In view of this latter action, Miller contends that its rulemaking petition should not have been dismissed and instead should be reinstated *nunc pro tunc*.

7. **Discussion.** We find unpersuasive the argument that we should not treat the Quinby Application as an expression of interest in the vacant Quinby allotment. While an "expression of interest" filed as a comment in an allotment rulemaking is generally sufficient to bar the deletion or reallocation of a vacant allotment, the policy is not limited to such expressions. In the leading case of *Montrose and Scranton, Pennsylvania*, the Commission stated that "the 'fair distribution' of service analysis which underlay the original allotment decision should not be disturbed where an active interest in providing service exists."⁷ Importantly, the "active interest" relied upon by the Commission in *Montrose* consisted of two pending applications for the vacant allotment that a petitioner sought to reallocate. Similarly, we conclude that the pendency of the Quinby Application constitutes an "active interest" barring the deletion of the Quinby allotment. For this reason, we also find that the staff action did not constitute a change in policy. However, *arguendo*, a clarification of this processing policy and its application in this proceeding would be permissible.⁸

⁴ See 47 U.S.C. § 309(j).

⁵ *Id.* note 5.

⁶ See *Nevada City and Mineral California*, Notice of Proposed Rule Making, 24 FCC Rcd 1282 (MB 2009) (proposing to delete vacant FM Channel 297A at Mineral City, California, to accommodate an application to reallocate and change the community of license of an FM station from Alturus, California, to Fernley, Nevada). The Mineral City allotment was subsequently deleted because no expressions of interest were filed to retain the allotment. See *Nevada City and Mineral California*, Report and Order, 24 FCC Rcd 5387 (MB 2009).

⁷ *Montrose and Scranton, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 6305, 6307 (1990) ("*Montrose*").

⁸ *Pacific Broadcasting of Missouri, LLC*, Memorandum Opinion and Order, 19 FCC Rcd 10950, 10957 (discontinuing the practice of permitting the "backfill" of new allotments and applying the revised policy to pending cases); and *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997) (filing of application did not

(continued....)

8. Moreover, changed circumstances have occurred since the release of the *Letter* that also warrant denial of the Petition. Specifically, vacant Channel 237A at Quinby was included in FM Auction 79, among other FM broadcast construction permits, scheduled for auction on September 1, 2009.⁹ In response to the *Public Notice*, we received 22 applications, including one by Miller, each expressing an interest to participate in FM Auction 79 for vacant Channel 237A at Quinby. Under these circumstances, we conclude that the proposed deletion of this vacant allotment would violate our longstanding policy of refraining from deleting vacant allotments where there are *bona fide* expressions of interest in the allotment. We also find that Miller's recent filing in response to the FM Auction 79 Public Notice is inconsistent with the relief that it is requesting in the Petition in which it disavowed any interest in pursuing Channel 237A at Quinby through auction.

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Miller Communications, Inc. IS DENIED.

10. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

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vest applicant with a legally cognizable expectation that criteria for considering its application would remain unchanged).

⁹ Channel 237A at Quinby is listed as construction permit number MM-FM699-A. See *Auction of FM Broadcast Construction Permits Scheduled for September 1, 2009*, Public Notice, 24 FCC Rcd 7141 (2009) ("Public Notice"). Channel 237A at Quinby is listed as construction permit number MM-FM699-A.