

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 04-318
Table of Allotments,)	RM-11040
FM Broadcast Stations.)	
(Culebra and Vieques, Puerto Rico)	

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 2009

Released: January 16, 2009

By the Assistant Chief, Audio Division, Media Bureau:

1. The Commission has before it a Petition for Reconsideration filed by Western New Life, Inc. (“Petitioner”), permittee of Station WJZG(FM) (“WJZG”), Channel 293A, Culebra, Puerto Rico,¹ directed to the *Report and Order* in this proceeding.² Oppositions to the Petition for Reconsideration were filed by V.I. Stereo Communications Corp. (“V.I. Stereo”), Raul G. Rivera Menendez (“Menendez”), International Broadcasting Corporation (“IBC”), and Aerco Broadcasting Corporation (“Aerco”). Petitioner filed a Motion to Accept Late Filed Reply and a Reply.³ For the reasons stated below, we deny the Petition for Reconsideration.

2. **Background.** Station WJZG received a construction permit to operate on Channel 293A at Culebra, Puerto Rico in 1995, but the permit was conditioned upon the outcome of a rulemaking proceeding in MM Docket No. 91-259. The *Report and Order*⁴ in that rulemaking proceeding involved a “daisy chain” of allotments and substituted Channel 254A for Channel 293A at Culebra. Petitioner states that neither it nor its predecessor in interest could be licensed on Channel 293A at Culebra because that allotment had been removed. Moreover, it cannot commence operations on Channel 254A until other station modifications are implemented. Petitioner obtained an STA to operate the Culebra facility on Channel 293A in 1998 and has regularly renewed the STA which permits WJZG to provide a first local service to Culebra.

¹ Petitioner currently operates WJZG(FM) pursuant to Special Temporary Authority (“STA”).

² *Culebra and Vieques, Puerto Rico*, Report and Order, 21 FCC Rcd 6884 (MB 2006).

³ For good cause shown, Petitioner’s motion is granted.

⁴ *Canovanas, Culebra, Las Piedras, Mayaguez, Quebradillas, San Juan and Vieques, Puerto Rico and Christiansted and Frederiksted, Virgin Islands*, Report and Order, 10 FCC Rcd 6673 (MMB 1995); *recon. denied*, Memorandum Opinion and Order, 11 FCC Rcd 16392 (MMB 1996); *app. for rev. denied*, Memorandum Opinion and Order, 12 FCC Rcd 10055 (1997); *further recon. denied*, Memorandum Opinion and Order, FCC 99-147, released June 21, 1999 (64 Fed. Reg. 48307, September 3, 1999).

3. At the request of Petitioner, the *Notice of Proposed Rule Making* (“*Notice*”) ⁵ in this proceeding proposed the substitution of Channel 291A for Channel 254A at Culebra, Puerto Rico, in an attempt to obtain a permanent authorization for Station WJZG. To accommodate the foregoing allotment, the *Notice* proposed the deletion of Channel 291B at Vieques, Puerto Rico. The *Notice* also stated that Channel 291B would not be deleted at Vieques if there was an expression of interest for the channel. IBC, Aerco, Menendez and V.I. Stereo opposed the deletion of Channel 291B at Vieques and expressed their interest in applying for that channel. In its comments and reply comments, Petitioner argued that if there were expressions of interest for Channel 291B at Vieques, that Channel 254A could be substituted for Channel 291B at Vieques, thus providing a second local aural transmission service to Vieques, which is already served by a fulltime AM station, to allow Station WJZG to obtain a permanent authorization on Channel 291A at Culebra, Puerto Rico. Petitioner also claimed that Station WJZG is providing a first local service that the residents of Culebra have come to rely upon after many years of operation, whereas the Vieques Channel 291B allotment was never constructed, so that the residents of Vieques have not come to rely on that particular service. Lastly, Petitioner asserted that the instant case is similar to the *Bethel Springs et al., Tennessee* (“*Bethel Springs*”) case. ⁶ Petitioner claims that, in *Bethel Springs*, a vacant allotment at Tiptonville, Tennessee, was downgraded to enable the reallocation, upgrade, and change in community of license of an existing station which would provide first local service to a new community of license. Thus, Petitioner argues, the Commission concluded that downgrading the vacant allotment was appropriate because the public interest benefit of providing a first local service outweighed downgrading an existing channel.

4. The *Report and Order* in this proceeding denied Petitioner’s initial proposal to substitute Channel 291A for Channel 254A at Culebra, Puerto Rico, as well as Petitioner’s alternate proposal to substitute Channel 254A for Channel 291B at Vieques and to allot Channel 291A to Culebra. The *Report and Order* rejected both proposals because several parties had filed expressions of interest to retain Channel 291B at Vieques and to apply for it as a Class B allotment. In addition, the *Report and Order* observed that since the *Notice* had not proposed the substitution of Channel 254A for Channel 291B at Vieques as an alternative, the public had not been afforded the required opportunity to respond to this alternate proposal. Lastly, the *Report and Order* found no compelling public interest benefit for deleting Channel 291B at Vieques or substituting Channel 254A for Channel 291B at Vieques in order to accommodate the allotment of Channel 291A at Culebra as a permanent authorization. The *Report and Order* also explained that Petitioner’s reliance on *Bethel Springs* as a similar case was misplaced. In this regard, the *Report and Order* noted that, in *Bethel Springs*, the downgrade of the Tiptonville, Tennessee channel was proposed in the *Notice of Proposed Rule Making* in that proceeding, and no formal expression of interest was submitted either opposing the downgrade or explicitly indicating that any party had an interest in applying for the vacant Tiptonville channel.

5. **Discussion.** In its Petition for Reconsideration, Petitioner repeats the arguments it made in its comments and reply comments. Petitioner claims that the staff should have given serious consideration to Petitioner’s alternative proposal, namely, substituting Channel 254A for Channel 291B at Vieques in order to accommodate the allotment of Channel 291A at Culebra. Petitioner states that the Commission could have treated Petitioner’s alternative proposal as a counterproposal since it was recommended in Petitioner’s comments as well as in its reply comments. Petitioner also asserts

⁵ *Culebra and Vieques, Puerto Rico*, Notice of Proposed Rule Making, 19 FCC Rcd 15389 (MB 2004).

⁶ Memorandum Opinion and Order, 17 FCC Rcd 14472 (MMB 2002).

that it was not necessary to publish a separate notice about Petitioner's alternate proposal, that the alternative proposal was a "logical outgrowth" of the *Notice*, and that the public had ample opportunity to review the comments on the Commission's website and at the Commission's offices and could have filed reply comments. Petitioner observes that it and one other party filing reply comments expressed interest in applying for Channel 254A at Culebra. Petitioner also argues that the commenters who expressed their interest in applying for Channel 291B at Vieques did not file reply comments stating any objection to substituting Channel 254A for Channel 291B at Vieques. We note that the filing of reply comments is not required. We also observe that four commenters who expressed their interest in applying for Channel 291B in Vieques also filed Oppositions to Petitioner's Petition for Reconsideration, stating explicitly that they wished to apply for Channel 291B in Vieques. Further, the staff was simply following relevant Commission precedents when it stated in the *Notice* that Channel 291B in Vieques would not be deleted if there was an expression of interest for the channel.⁷ Although the *Report and Order* was somewhat ambiguous as to the weight the staff gave to the fact that the alternative proposal was not included in the *Notice*, we have considered Petitioner's alternative proposal at this stage of the rulemaking proceeding and we do not perceive any compelling public interest reason for granting Petitioner's original proposal or its alternative proposal. In this regard, the *Notice* had already promised to retain Channel 291B at Vieques if there was an expression of interest in that channel.

6. In its Petition for Reconsideration, Petitioner also argues that the *Report and Order*'s result is contrary to *Bethel Springs*. We find that *Bethel Springs* is not applicable to the case before us. In brief, *Bethel Springs* was unique in several respects and, in any event, was a staff decision, and thus not as binding as a Commission decision. We observe that *Bethel Springs* involved the downgrade of a vacant channel in Tiptonville, Tennessee, that had received a construction permit, but whose permit had expired. Thus, parties had already had the opportunity to apply for a construction permit for Tiptonville and that process had been completed. In that light, *Bethel Springs* allowed the Tiptonville channel to be downgraded so that a first local service could be awarded to a different community under priority 3 of the FM allotment priorities.⁸ In the instant case, the process for determining whether V.I. Stereo should retain its construction permit for Channel 291B at Vieques had not been completed at the time the *Report and Order* was released. Further, in *Bethel Springs*, no formal expression of interest was submitted either opposing the downgrade, or explicitly indicating that any party had an interest in applying for the vacant Tiptonville channel, or building a station if its application were granted. In the case before us, several parties have expressed interest in applying for Channel 291B in Vieques, should that channel become vacant.

7. Previously, V.I. Stereo held a construction permit to build a new station on Channel 291B at Vieques, but failed to construct before its permit expired. At the time the *Report and Order* herein was adopted, V.I. Stereo had pending before the Commission an Application for Review of the rescission of the Vieques construction permit. Thus, at the time the *Report and Order* was adopted, Channel 291B

⁷ See, e.g., *Montrose and Scranton, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 6305 (1990); *Driscoll, Texas, et al.*, Report and Order, 10 FCC Rcd 6528 (MMB 1995); and *Martin, Tennessee, et al.*, Memorandum Opinion and Order, 15 FCC Rcd 12747 (MMB 2000).

⁸ See *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). The FM allotment priorities are: (1) first full-time aural service; (2) second full-time service; (3) first local aural transmission service and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

at Vieques was not technically vacant. Subsequently, the Commission partially granted V.I. Stereo's Application for Review and reinstated the Vieques construction permit.⁹ An application for license to cover the Vieques construction permit is currently pending.¹⁰ If V.I. Stereo receives a license for Channel 291B at Vieques, Puerto Rico, Petitioner's Petition for Reconsideration would be rendered moot, because Channel 291B would be occupied and could not be downgraded. In any event, there is no basis for the requested reconsideration at this time.

8. The Commission will not send a copy of this *Memorandum Opinion 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), because by denying the Petition for Reconsideration in this case, we are not adopting any new rule which we need to report to the Congress or the Government Accountability Office.

9. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by Western New Life, Inc. IS DENIED.

10. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Richard B. Gorman, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
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Media Bureau

⁹ *See V.I. Stereo Communications Corp. ("VISCC Decision")*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006).

¹⁰ *See* File No. BLH-20080611AAE.