

**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. 07-163
FM Broadcast Stations.)	RM-11385
(Markham, Ganado, and Victoria, Texas))	RM-11416

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

Adopted: June 27, 2011

Released: June 28, 2011

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration (“Petition”), filed by Victoria Radio Works, LLC (“VRW”), licensee of Station KVIC(FM), Victoria, Texas, of the *Report and Order* in this proceeding.¹ VRW requests reconsideration of the Division’s denial of VRW’s proposal for an interim channel change, pending full implementation of the *R&O*. Roy E. Henderson (Henderson”), licensee of Station KHTZ(FM), Ganado, Texas, filed two Oppositions to VRW’s Petition.² For the reasons discussed below, we deny the Petition.

2. **Background.** At the request of Katherine Pyeatt (“Petitioner”), the *Notice of Proposed Rule Making*³ proposed the allotment of FM Channel 235A at Markham, Texas, as a second local service (RM-11385). In response to the *NPRM*, Fort Bend Media Broadcasting Company, then-licensee of Station KHTZ,⁴ filed a counterproposal (RM-11416), requesting the upgrade of Station KHTZ(FM), from

¹ *Markham, Ganado, and Victoria, Texas*, Report and Order, 25 FCC Rcd 836 (MB 2010).

² Henderson filed his first Opposition on March 15, 2010, following the submission of VRW’s Petition, and his second Opposition was filed after Public Notice of the Petition. *See* Public Notice, FCC Report No. 2922 (December 1, 2010).

³ *Markham, Ganado, and Victoria, Texas*, Notice of Proposed Rule Making, 22 FCC Rcd 15125 (MB 2007) (“*Notice*”).

⁴ Fort Bend Media Broadcasting Company, owned by Roy E. Henderson, was previously designated as the licensee of Station KHTZ. The licensee was changed to “Roy E. Henderson” by Form 316 assignment of license BALH-20080305ADM, granted March 13, 2008, and effective March 31, 2008.

Channel 284C2 to Channel 235C at a new transmitter site and the modification of its license to specify operation on non-adjacent Channel 235C. To accommodate the proposed upgrade at Ganado, Fort Bend also requested the substitution of Channel 284C3 for Channel 236C3 at Victoria, Texas, and the associated modification of the license for Station KVIC(FM). Finally, Fort Bend noted the availability of Channel 283A at Markham and suggested that Channel 283A be allotted to Markham in lieu of Channel 235A. That change would eliminate the conflict between Petitioner's and Fort Bend's proposals, thus facilitating the grant of both proposals.

3. VRW stated that it conditionally supported Fort Bend's counterproposal. Although VRW was willing to move Station KVIC to Channel 284C3 at Victoria, VRW asserted that it would like to do so quickly because this channel change would enable Station KVIC to improve its service significantly.⁵ In order to do so, VRW suggested that the Commission modify the license for Station KHTZ(FM) at Ganado to specify operations on Channel 235C2 on an interim basis, thereby removing Channel 284C2 at Ganado as a bar to Station KVIC's immediate commencement of operations on Channel 284C3 at Victoria.

4. In the *R&O*, we allotted Channel 283A in lieu of Channel 235A at Markham, thus providing a second local, as well as a first competitive, service at that community.⁶ We did not grant VRW's proposal to expedite the implementation of the Station KHTZ(FM) upgrade by requiring the station to operate on an interim basis on Channel 235C2. We explained that it would not be permissible to propose an involuntary lower class of channel than was proposed by Fort Bend, the licensee of Station KHTZ(FM), in the absence of Fort Bend's consent to a lower class channel.⁷

5. VRW timely filed the Petition. VRW limited its reconsideration request to one issue: VRW requests "that the Commission order Fort Bend to immediately change frequencies to Channel 235 . . . and require interim operations as a Class C2 facility on that frequency pending its transition to the authorized full-Class C operation." VRW argues that we incorrectly characterized its request as a proposal to impose a lower class of channel on Station KHTZ, noting that its request pertains only to an interim period of operation, not to KHTZ's permanent frequency assignment. VRW also asserts that KHTZ, which currently operates on Channel 284C2, would be able to operate on Channel 235C2 at its present transmitter site, height, and power, without having to file a Form 301.

6. Henderson filed oppositions to VRW's petition. Henderson points out that, in response to the OSC, VRW did not submit any showing as to why its license for KVIC should not be modified to specify operation on Channel 284C3 in lieu of Channel 236C3. Henderson argues that a response to an

⁵ Specifically, VRW stated that KVIC currently operates with a power of 6.5 kW pursuant to a license issued under Section 73.215 of the Commission's Rules and that this is approximately one half of the power normally authorized for a Class C3 station at KVIC's height above average terrain (140 meters).

⁶ Markham currently has one licensed radio station, KKHA(FM), Channel 223A.

⁷ See *Fishers, Lawrence, Indianapolis, and Clinton, Indiana*, Report and Order, 22 FCC Rcd 11660 (MB 2007), *recon. denied*, 24 FCC Rcd 2612 (MB 2009) (dismissing a counterproposal as defective because it proposes an involuntary site change and a lower class of channel than was proposed by the station's licensee in its rulemaking petition). See also *Parker, Arizona*, Report and Order, 17 FCC Rcd 9578 (MB 2002) (dismissing a counterproposal because it proposes an involuntary class downgrade, site change, and community of license change for another station).

OSC is not the proper method of suggesting modification of the pending proposals. Henderson notes that the parties had discussed a temporary “swap” of antennae, but that VRW refused to proceed, absent a Commission order directing Henderson to operate on Channel 235C2 on an interim basis. Henderson states that VRW has not explained the importance of a Commission order requiring Station KHTZ to operate on a lower channel on an interim basis.

7. **Discussion.** Section 1.429 of the Rules sets forth the limited provisions under which the Commission will reconsider a final action in a rule making proceeding. Reconsideration is warranted only if the petitioner cites error of fact or law, or has presented facts or circumstances that otherwise warrant Commission review of its prior action.⁸

8. VRW has not cited a material error of fact or law that would warrant reconsideration of the R&O in this proceeding. Similarly, VRW does not present new facts or changed circumstances that have occurred or come to light since issuance of the R&O. Rather, VRW merely restates its proposal that Station KHTZ be required to operate on Channel 235C2 for an interim period, prior to commencing operation on Channel 235C, as authorized in the R&O.

9. It is “well settled that the Commission will not require the involuntary downgrade of a station ... to accommodate another ... proposal.”⁹ In applying this principle, we find that this policy reasonably applies to both permanent and interim involuntary downgrades. Moreover, we agree with Henderson that there is no need for adoption of an interim operating requirement. VRW has failed to provide sufficient reason for reconsideration of the R&O in this proceeding, and we continue to believe that the public interest will be served by the provisions of the R&O, which provide a second local service at Markham, Texas, and an improvement in service for Station KHTZ(FM). Finally, VRW is incorrect in stating that an interim channel change to Channel 235C2 would not require Fort Bend to file a Form 301.¹⁰ For these reasons, we will deny the Petition.

10. **Ordering Clauses.** Accordingly, IT IS ORDERED, that the aforementioned Petition for Reconsideration filed by Victoria Radio Works, LLC, IS DENIED.

11. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

12. The Commission will send a copy of this *Memorandum Opinion and Order* to Congress and the Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)A).

⁸ See 47 C.F.R. § 1.429; and *Eagle Broadcasting Co. v FCC*, 514 F.2d 852 (D.C. Cir. 1975).

⁹ *Murrieta, California*, Memorandum Opinion and Order, 21 FCC Rcd 9440, 9442 (2006).

¹⁰ See Section 73.3573 of the Commission’s Rules, 47 C.F.R. § 73.3573, which indicates that all changes in the facilities of authorized stations require an application for either a major change or a minor modification.

13. For further information concerning this proceeding, contact, Deborah A. Dupont, Media Bureau, (202) 418-7072.

FEDERAL COMMUNICATIONS COMMISSION

Nazifa Sawez
Assistant Chief
Audio Division
Media Bureau