

**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. 08-243
FM Broadcast Stations.)	RM-11490
(Culebra, Puerto Rico, Charlotte Amalie and)	
Christiansted, Virgin Islands))	
)	
Application of)	File No. BMPH-20071211AAQ
Western New Life, Inc.,)	Facility ID No. 3250
Station WNVE(FM), Culebra, Puerto Rico. ¹)	

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 2014

Released: July 25, 2014

By the Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration (the “Reconsideration Petition”) filed on July 13, 2010, by OCC Acquisitions, Inc. (“OCC Acquisitions”). The Reconsideration Petition seeks partial review of the *Report and Order* in this proceeding.² Specifically, OCC Acquisitions challenges the substitution of Channel 237B for vacant Channel 271B at Charlotte Amalie, Virgin Islands. Western New Life, Inc. (“WNL”), licensee of Station WNVE(FM),³ Ceiba, Puerto Rico,⁴ and Las Mas Z Radio Corporation (“Las Mas”) separately filed Oppositions to Petition for Reconsideration on October 4, 2010. For the reasons discussed below, we deny the Reconsideration Petition.

2. **Background.** On February 22, 2008, WNL filed a mutually contingent hybrid application (the “Application”)⁵ and a Petition for Rule Making (the “Rule Making Petition”).⁶ The Application requested the substitution of Channel 271A for Channel 254A at Culebra, Puerto Rico, and modification of the Station WNVE(FM) authorization to reflect the change. In order to accommodate Channel 271A at Culebra, the Rule Making Petition requested, and we proposed, the deletion of vacant Channel 271B at

¹ This application has been added to the caption because it was granted as part of this proceeding.

² See *Culebra, Puerto Rico, Charlotte Amalie and Christiansted, Virgin Islands*, Report and Order, 25 FCC Rcd 7440 (MB 2010) (“R&O”).

³ The previous call signs for this station were WZXX(FM), WJZG(FM), and WQML(FM). For administrative convenience, we will refer to the station by its current call sign of WNVE(FM).

⁴ After the R&O was released, WNL was granted a minor modification application to reallocate Station WNVE(FM) from Culebra to Ceiba, Puerto Rico. The station is currently licensed at Ceiba. See File Nos. BPH-20120305AAW and BLH-20131017AOU, which were granted on April 10, 2013, and on October 24, 2013, respectively.

⁵ See File No. BMPH-20071211AAQ. Specifically, the hybrid Application was filed as a minor amendment to BMPH-20071211AAQ. Station WNVE(FM) could not operate on Channel 254A for technical reasons and was granted a series of Special Temporary Authorizations (“STAs”) to operate on other frequencies over a ten-year period.

⁶ See RM-11490.

Charlotte Amalie, Virgin Islands.⁷ The Notice also provided that interested parties should file comments expressing an interest in the channel to prevent its deletion.⁸

4. In the *R&O*, we took several actions. First, consistent with Commission policy, we retained a Class B FM channel at Charlotte Amalie because two expressions of interest had been filed. Second, we substituted alternate Channel 237B for Channel 271B at Charlotte Amalie as suggested by Las Mas. We found that the substitution of Channel 237B had the benefits of not only retaining a Class B allotment at Charlotte Amalie but also facilitating the grant of the Application. Third, to accommodate Channel 237B at Charlotte Amalie, we involuntarily modified the license of Station WJKC(FM), Christiansted, Virgin Islands, from Channel 236B to Channel 224B because the licensee had not responded to the *OSC* and was deemed to have consented to the channel change. Fourth, we granted WNL's contingent Application, substituting Channel 271A for Channel 254A at Culebra and modifying the Station WNVE(FM) license to specify operation on the new channel. We found that grant of the Application would allow for the continuation of service by Station WNVE(FM) at Culebra. Finally, while WNL had stated that it would reimburse Station WJKC(FM) for the reasonable costs incurred in connection with the involuntary channel change, we ordered that the ultimate permittee of vacant Channel 237B at Charlotte Amalie will be required to reimburse Station WJKC(FM) for these costs, consistent with the *Circleville* policy.⁹

5. In its Reconsideration Petition, OCC Acquisitions argues that the Commission (1) should disregard La Mas' expression of interest for Channel 237B at Charlotte Amalie because it is a sham;¹⁰ (2) should have considered the option of the retention of Channel 271B and the addition of Channel 237B at Charlotte Amalie as this allotment scheme would better serve Section 307(b) than the substitution of Channel 237B at Charlotte Amalie and grant of the Application;¹¹ and (3) should require Station WNVE(FM) to bear the reimbursement costs for Station WJKC(FM), Christiansted, Virgin Islands, to change channels rather than the ultimate permittee of Channel 237B at Charlotte Amalie because Station WNVE(FM) is the sole beneficiary of the involuntary channel change.¹² Accordingly, OCC Acquisitions concludes that its Reconsideration Petition should be granted.

6. In their Oppositions, WNL and La Mas make similar arguments. First, they contend that the *R&O* would result in a preferential arrangement of allotments. Second, WNL and La Mas contend that it is not necessary to place the burden of reimbursing the costs of WJKC(FM)'s channel change upon WNL rather than the ultimate permittee of Channel 237B because they both intend to apply for the channel and, if successful, would reimburse the licensee for the channel change. Accordingly, WNL and La Mas believe that the Reconsideration Petition should be denied.

7. **Discussion.** Section 1.429 of the Commission's rules sets forth the limited provisions under which the Commission will reconsider a rule making action. Reconsideration is warranted if the

⁷ See *Charlotte Amalie, Virgin Islands*, Notice of Proposed Rule Making, 24 FCC Rcd 203 (MB 2009) ("*Notice*").

⁸ *Id.*

⁹ See *Circleville, Ohio*, 8 FCC 2d 159, 163 (1967) (requiring that, whenever an existing station is ordered to change frequency to accommodate another station, the benefiting station must reimburse the affected station for its reasonable and prudent expenses and establishing guidelines for determining reimbursement) ("*Circleville*").

¹⁰ In support of this position, OCC Acquisitions claims that La Mas' principals have not been identified and that there is common counsel between La Mas and WNL. See La Mas Reconsideration Petition at 2-3.

¹¹ See *id.* at 3-4.

¹² See *id.* at 4-5.

petitioner cites error of fact or law.¹³ Additionally, a reconsideration petition relying upon facts or arguments not previously presented will be considered only if the facts or arguments relate to events or circumstances that have occurred since the last opportunity to present such matters or were unknown to petitioner and could not have been discovered through the exercise of ordinary diligence.¹⁴ La Mas has not met this burden.

8. *Expression of Interest.* First, we address OCC Acquisitions' argument that we should disregard La Mas' expression of interest for Channel 237B at Charlotte Amalie because it is a sham. We find that this argument is defective on several grounds. Procedurally, the *bona fides* of La Mas' expression of interest for Channel 237B constitutes an impermissible new matter raised by OCC Acquisitions.¹⁵ The argument could have been raised by OCC Acquisitions in reply comments after the filing of La Mas' Comments and Counterproposal. Substantively, we reject as unsupported speculation OCC Acquisitions' attack on the *bona fides* of La Mas' expression of interest. OCC Acquisitions has not shown how common counsel between WNL and La Mas would affect the validity of La Mas' expression of interest. We also note that the La Mas expressed an interest in retaining and substituting an existing allotment, as opposed to requesting a new "drop-in" allotment. Thus, it was not required to file a long-form construction permit application or otherwise identify its principals.¹⁶ Most importantly, La Mas' motive in filing its expression of interest for Channel 237B at Charlotte Amalie is irrelevant because, as explained in the *R&O*, the staff has the flexibility to use alternate channels to resolve conflicts and could have proposed it as a solution.¹⁷ Accordingly, we reject OCC Acquisitions' argument that La Mas' expression of interest is a sham.

9. *Preferential Arrangement of Allotments.* Next, we examine OCC Acquisitions' argument that we should have considered the option of retaining Channel 271B at Charlotte Amalie and adding Channel 237B at that community because this allotment scheme is preferable to the substitution of Channel 237B for Channel 271B at Charlotte Amalie and grant of the Application. We decline to consider this argument because OCC Acquisitions as an impermissible new matter. OCC Acquisitions' Comments were limited to expressing an interest in retaining Channel 271B at Charlotte Amalie and stating that it would apply for the channel at auction. OCC Acquisitions did not file any reply or other comments in response to La Mas' pleading suggesting an alternate allotment scheme. Accordingly, we dismiss this argument as procedurally defective.

10. *Reimbursement.* Finally, we see no reason for requiring WNL to reimburse Station WJKC(FM), Christiansted, for its reasonable costs of changing channels. It is well established that, where an allotment for a new station requires an involuntary channel change by an existing station, the ultimate permittee of the new allotment bears the responsibility of reimbursing the licensee for its expenses.¹⁸ The rationale for this approach is that the new allotment is made possible by the involuntary channel change. OCC Acquisitions has not cited any authority for departing from this policy. Accordingly, we conclude that no error was committed in this case by placing the reimbursement responsibility on the ultimate permittee of Channel 237B at Charlotte Amalie.

¹³ See *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975).

¹⁴ 47. C.F.R. § 1.429(b)(1)-(2).

¹⁵ See *id.*

¹⁶ See *R&O*, 23 FCC Rcd at 7441-42.

¹⁷ See *id.*

¹⁸ See, e.g., *Irvington, Kentucky, and French Lick, Indiana*, Report and Order, 25 FCC Rcd 1147, 1148-49 (MB 2010); *Berlin, De Forest, et al., Wisconsin*, Report and Order, 10 FCC Rcd 7733, 7734 (MMB 1995).

11. **Conclusion and Ordering Clauses.** Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by OCC Acquisitions, Inc. IS DENIED.

12. A copy of this *Memorandum Opinion and Order* will be sent to Jerrold D. Miller, Esq., Miller and Neely, PC, 3750 University Boulevard, West, Suite 203, Kensington, MD 20895 (Counsel to OCC Acquisitions); Scott C. Cinnamon, Esq., 1250 Connecticut Avenue, N.W., Suite 200-144, Washington, DC 20036 (Counsel to Western New Life, Inc., and La Mas Z Radio Corporation); Radio 95, Incorporated, P.O. Box 25680, Christiansted, St. Croix, Virgin Islands 00824 (Licensee of Station WJKC(FM)); and Shelley Sadowsky, Esq., Sciarrino & Shubert, PLLC, 5938 Dorchester Way, Rockville, MD 20852 (Counsel to Station WJKC(FM)).

13. For further information concerning this proceeding, contact Andrew J. Rhodes or Rolanda F. Smith, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau