

**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. 09-189
FM Broadcast Stations.)	RM-11564
(Kahuku and Kualapuu, Hawaii))	
)	
Application of)	
Big D Consulting, Inc.)	File No. BPH-20090810ACM
Station KNAN(FM), Nanakuli, Hawaii)	Facility ID No. 165992

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

Adopted: January 30, 2014

Released: January 31, 2014

By the Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration (the “Petition for Reconsideration”) filed on March 21, 2011, by Kona Coast Radio, LLC (“Kona”). Kona seeks review of the *Report and Order*¹ in this proceeding that dismissed its Petition for Rule Making and associated application for a new FM station at Kahuku, Hawaii (the “Kahuku Petition and Application”)² and granted a counterproposal (the “Counterproposal”) filed by Kemp Communications, Inc. (“Kemp”) for a new allotment at Kualapuu, Hawaii and the captioned minor modification application (the “Nanakuli Application”) filed by Big D Consulting, Inc. (“Big D”).³ For the reasons discussed below, we deny the Petition for Reconsideration.

2. **Background.** On July 23, 2009, Kona filed its Kahuku Application for a new FM station on Channel 296C3 at Kahuku, Hawaii, and on July 24, 2009, it submitted the Kahuku Petition for the allotment of Channel 296C3 at Kahuku as a first local service. The Kahuku Petition was addressed to the Chief, Audio Division, rather than to Office of the Secretary, as required by Section 1.401(b) of the Commission’s Rules, and was stamped as “Filed/Accepted” by the Office of the Secretary on August 18, 2009, the date actually received in that office. In response to the Kahuku Petition, the staff released a *Notice of Proposed Rule Making* on October 23, 2009, proposing a new allotment at Kahuku and

¹ See *Kahuku and Kualapuu, Hawaii*, Report and Order, 26 FCC Rcd 1983 (MB 2011) (the “R&O”).

² See RM-11564 and File No. BNPH-20090723AED.

³ Kemp and Big D jointly filed an Opposition to Petition for Reconsideration on March 31, 2011 (the “Opposition”) and Kona filed a Reply to Opposition to Petition for Reconsideration on April 12, 2011 (the “Reply”).

establishing a December 14, 2009, deadline for filing counterproposals.⁴ The *Notice* did not take into account the intervening and conflicting Nanakuli Application, which Big D had filed on August 10, 2009. The Nanakuli Application requested an upgrade of Station KNAN(FM), Nanakuli, Hawaii, from Channel 294C3 to Channel 294C2, which was short-spaced with the Kahuku Petition for Channel 296C3 at Kahuku under the Commission's minimum distance separation requirements.⁵

3. In response to the *Notice*, Kemp timely filed its Counterproposal on December 14, 2009, requesting the allotment of Channel 296C2 at Kualapuu as a first local service. While the Counterproposal is mutually exclusive with Kona's Kahuku Petition, the Counterproposal does not conflict with Big D's Nanakuli Application. In addition, Kona filed Comments, expressing its continued interest in the Kahuku allotment, one day late on December 15, 2009. On this same date Kona separately filed a Motion for Late Acceptance.

4. Citing both Commission policy and rule regarding proper filing procedures,⁶ the staff ruled in the *R&O* that, although the Kahuku Petition was received at the Audio Division on July 24, 2009, its official filing date was August 18, 2009, the date that the Kahuku Petition was received by the Office of the Secretary.⁷ The staff also explained that, under Section 73.208(a)(3)(iii), a petition for rule making to amend the FM Table of Allotments will not be considered if it is filed after the date that a conflicting FM application was filed.⁸ Because Kona's Kahuku Petition was officially filed eight days after Big D submitted its Nanakuli Application, the staff found that the Nanakuli Application enjoyed cut-off protection against the subsequently filed Kahuku Petition and, therefore, dismissed the Kahuku Petition.⁹ On the merits, the staff also granted Kemp's Counterproposal by allotting Channel 296C2 at Kualapuu and granted Big D's Nanakuli Application to upgrade to Channel 294C2. The *R&O* stated that these proposals were not mutually exclusive and would provide a first local service and an upgrade in existing service.¹⁰

5. In its Petition for Reconsideration, Kona argues that the staff erred in three ways when it dismissed the Kahuku Petition. First, Kona contends that it was arbitrary and capricious for the staff to

⁴ See *Kahuku, Hawaii*, Notice of Proposed Rule Making, 24 FCC Rcd 12905 (MB 2009) ("*Notice*").

⁵ See 47 C.F.R. § 73.207.

⁶ See 47 C.F.R. § 1.401(b) (requiring rule making petitions to be filed at the Office of the Secretary); and *Filing Requirements in FM Allotment Rulemaking Proceedings*, Public Notice, 20 FCC Rcd 7502 (MB 2005) (alerting parties in FM allotment proceedings that incorrectly addressed filings will be treated as having been filed on the receipt date shown on the official 'Office of the Secretary' date stamp) ("*FM Allotment Public Notice*").

⁷ See *R&O*, 26 FCC Rcd at 1984.

⁸ See 47 C.F.R. § 73.208(a)(3)(iii) (minor change applications are protected from subsequently filed and conflicting petitions to amend the FM Table of Allotments as of the date such applications are filed). See also *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report and Order, 7 FCC Rcd 4917, 4919-20 (1992), *recon. granted in part*, Memorandum Opinion and Order, 8 FCC Rcd 4743 (1993) ("*Conflicts*").

⁹ See *R&O*, 26 FCC Rcd at 1984.

¹⁰ *Id.*

rely upon the *FM Allotment Public Notice*, requiring that all filings in FM allotment proceedings be made at the Secretary's Office because that document has been superseded by the Commission's new procedures for FM allotment proceedings, which require a construction permit application to be filed with a rule making petition.¹¹ Because of this new requirement, Kona alleges that, if a rule making petition is not properly addressed, the filing of an application for a new allotment and the Commission's Public Notice of that filing would provide adequate notice to interested parties, which is the stated purpose for requiring FM allotment pleadings to be filed at the Secretary's Office. Second, Kona alleges that the *R&O* erroneously takes the position that the *FM Allotment Public Notice* will be strictly followed whereas it contemplates discretion and waiver of the rule as it states that failure to follow these requirements "may result in the treatment of the filing as untimely." Third, Kona contends that a waiver of the *FM Allotment Public Notice* is warranted because the Kahuku Petition would result in a preferential arrangement of allotments.¹² Accordingly, Kona requests that the staff reinstate the Kahuku Petition and associated Application and rescind the grant of the Nanakuli Application and the allotment of Channel 296C2 at Kualapuu.

6. In their Opposition, Kemp and Big D argue that, in cases involving requests for a new allotment, the public is entitled to more than simply notice that an application has been filed. Kemp and Big D note that petitions for rule making typically contain information concerning the status of the proposed community of license, such as population, available aural services, demographic information, and other facts concerning the community. In addition, they allege that Kona has provided no justification for waiver of the *FM Allotment Public Notice*, arguing that liberal grant of such waivers would wreak havoc upon the orderly processing of proposals involving conflicts between minor change applications and new allotment proposals.¹³ Finally, Kemp and Big D reiterate an argument made earlier in the proceeding that, as a separate procedural defect, Kona's proposal should be dismissed because it filed an untimely continuing expression of interest in the Kahuku allotment and its acceptance would prejudice parties to this proceeding.¹⁴ Accordingly, Kemp and Big D believe that the dismissal of the Kahuku Petition was correct.

7. In its Reply, Kona disagrees with Kemp's and Big D's argument that the Kahuku Application does not provide adequate notice to interested parties that would meet the purpose of the *FM Allotment Public Notice*. On the contrary, Kona contends that its Kahuku Application provides even more information than the Kahuku Petition and that Kemp and Big D have not identified any material data included in the Kahuku Petition that was not included in the Kahuku Application. Kona also argues that Kemp and Big D have not shown how they would be prejudiced by consideration of the Kahuku Petition. Accordingly, Kona urges reinstatement of the Kahuku Petition, as well as its associated Application, and rescission of the grant of Big D's Nanakuli Application and the allotment of Channel 296C2 at Kualapuu.

¹¹ See *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, 14223-25 (2006), *recon. pending* ("*Allotment Streamlining Order*").

¹² Specifically, Kona alleges that Channel 296C3 could be allotted to Kahuku and alternate Channel 250C2 could be allotted to Kualapuu in lieu of Channel 296C2, providing both communities with first local services. By way of contrast, Kona states that the *R&O* upgraded the service of an existing station and provided one first local service.

¹³ Kemp and Big D's Opposition to Petition for Reconsideration at 2-3.

¹⁴ *Id.* at 3-4.

8. **Discussion.** Section 1.429 of the Commission's Rules sets forth the limited provisions under which the Commission will reconsider an action in a rule making proceeding.¹⁵ 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.¹⁶ Kona has not met this standard.

9. *Late Filed Expression of Interest.* The *Notice* in this, as well as all, allotment proceedings require that the proponent of a proposed allotment is expected to file comments restating its present intention to apply for the channel, if it is allotted.¹⁷ The *Notice* further provides that failure to file a continuing expression of interest may lead to denial of the request.¹⁸ It is also well established that the Commission will not accept late filed expressions of interest in allotment proceedings where prejudice would be caused to parties who have timely filed their pleadings.¹⁹ In this case, Kona filed its Comments, restating its interest in the proposed allotment, on December 15, 2009, which was one day after the comment deadline. The Comments were accompanied by a Motion for Late Acceptance without an explanation for the late filing. Kemp filed an Opposition to the Motion for Late Acceptance, arguing that the late filed Comments should not be accepted because it would prejudice parties to the proceeding.²⁰ Although the *R&O* did not address this issue, Kemp is correct. Acceptance of Kona's late filed expression of interest would prejudice Big D because its Nanakuli Application is short-spaced to the proposed allotment of Channel 296C3 at Kahuku.²¹ Under these circumstances, we find that Kona's failure to file timely its continuing expression of interest is a separate and fatal defect that warrants dismissal of the Kahuku Petition. Accordingly, we will not accept Kona's late filed expression of interest.

10. *Improperly Addressed Rule Making Petition.* We also find that Kona has not demonstrated material error with respect to the *R&O*'s dismissal of Kona's Kahuku Petition based upon Section 1.401(b) of the Rules and the *FM Allotment Public Notice*. Kona concedes that its Kahuku Petition was improperly addressed and was not received at the Secretary's Office until August 18, 2009. Because this

¹⁵ See 47 C. F.R. § 1.429.

¹⁶ See *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975).

¹⁷ See *Notice*, 24 FCC Rcd at 12907, Appendix.

¹⁸ *Id.*

¹⁹ See *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960 (D.C. Cir. 1990); *Woodville and Liberty, Mississippi, et al.*, Report and Order, 11 FCC Rcd 4712 n.4 (MMB 1996) (dismissing late filed expression of interest because it would prejudice a party to the proceeding).

²⁰ See Kemp's December 28, 2009, Opposition to Motion for Leave to File Late Comments at 2-3.

²¹ Although Kona had suggested the use of alternate Channel 250C2 at Kualapuu in lieu of Channel 296C2, the use of this alternate channel would not entirely eliminate prejudice in this proceeding. While Channel 250C2 is available at Kualapuu, the use of that channel would eliminate only the conflict between Kona's Kahuku Petition and Kemp's Counterproposal, and the conflict between the Kualapuu and Nanakuli channels would remain. Further, a staff engineering analysis reveals that there are no alternate channels available at Kualapuu or Nanakuli that would resolve the conflict between Kona's and Big D's proposals.

official filing date is after Big D's August 10, 2009, filing of the intervening and conflicting Nanakuli Application, the *R&O* properly dismissed the Kahuku Petition. We also disagree with Kona's apparent belief that the Commission's *Allotment Streamlining Order* supersedes the *FM Allotment Public Notice*. The requirement that a proponent of a new FM allotment must file a construction permit application for the proposed allotment, as well as pay a filing fee, was intended to curb abuse of process in allotment proceedings by ensuring that expressions of interest were legitimate.²² While we acknowledge that the filing of an associated construction permit application may provide additional notice to interested parties in allotment proceedings, the Commission did not adopt this requirement to supersede the requirement under Section 1.401(b) that rule making petitions and related pleadings be filed at the Secretary's Office. Such an interpretation would undermine the other stated purposes of the *FM Allotment Public Notice*, which are "to ensure fair and efficient processing including entry in ECFS and to conserve the Commission's limited resources."²³ As pointed out by Kemp and Big D, allowing rule making petitions and other pleadings in FM allotment proceedings to be officially filed on the date received at offices other than Office of the Secretary would be inefficient and place burdens on the staff to readdress properly or deliver the pleadings to the Secretary's Office.

11. Likewise, Kona has not demonstrated that the staff erred by failing to exercise discretion in interpreting the *FM Allotment Public Notice* in this case. We have strictly applied the policy in cases arising after release of the *FM Allotment Public Notice* where there would be prejudice to other parties.²⁴ In this case, considering the Kahuku Petition as officially filed on the date received at the Audio Division would prejudice Big D because its conflicting Nanakuli Application would be dismissed. Kona has cited no authority to the contrary. Accordingly, we conclude that the *R&O* did not commit a material error in dismissing the Kahuku Petition pursuant to the *FM Allotment Public Notice*.

12. *Waiver of FM Allotment Public Notice.* As a final matter, we consider Kona's request that we waive the filing requirements of the *FM Allotment Public Notice*. The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"²⁵ and must support its waiver request with a compelling showing.²⁶ Waiver of the Commission's policies or

²² See *Allotment Streamlining Order*, 21 FCC Rcd at 14223.

²³ See *Caliente and Moapa, Nevada*, Memorandum Opinion and Order, 21 FCC Rcd 11481, 11483 (MB 2006) ("*Caliente*") (explaining the purposes of the *FM Allotment Public Notice*).

²⁴ See, e.g., *Roma, New York*, 21 FCC Rcd 10007 21 FCC Rcd 10007 (MB 2006) (denying reconsideration of dismissal of a counterproposal in FM allotment proceeding where improperly addressed filing was date stamped by the Media Bureau two days before the deadline but not date stamped by the Secretary's office until two days after the deadline). We have also dismissed other improperly addressed pleadings in FM allotment rule making proceedings even if there were no prejudice to other parties. See, e.g., *Caliente*, 21 FCC Rcd at 11483 (dismissing petition for reconsideration in FM allotment proceeding as untimely and denying waiver request where petition was improperly addressed to the Audio Division, received a Media Bureau date stamp three weeks before the reconsideration filing deadline, and bore a date stamp from the Secretary's Office that was two weeks after the filing deadline).

²⁵ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972).

²⁶ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

(continued...)

rules is appropriate only if both: (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²⁷ We find that Kona has not met this burden. While Kona characterizes strict application of the Commission’s filing requirements as “draconian,” Kona does not allege that it was subject to a particular hardship in attempting to comply with those requirements, nor does it demonstrate equitable considerations to justify waiver of the requirements in this instance. Both Rule 1.401(b) and the *FM Allotment Public Notice* had been in effect for several years prior to the filing of the Kahuku Petition, and “[p]arties appearing before the Commission . . . are charged with knowledge of its rules.”²⁸ Further, to the extent that Kona alleges that the *FM Allotment Public Notice* should be waived because the Kahuku Petition would result in a preferential arrangement of allotments, our case law recognizes that an FM allotment rule making proposal may be dismissed procedurally, even if, as a substantive matter, it would be preferable.²⁹ Accordingly, we will not grant Kona’s request for waiver of the *FM Allotment Public Notice*.

13. **Conclusion/Ordering Clauses.** IT IS ORDERED that the Petition for Reconsideration filed by Kona Coast Radio, LLC IS DENIED.

14. IT IS FURTHER ORDERED, that a copy of this Memorandum Opinion and Order will be sent to A. Wray Fitch, III, Esq., Gammon & Grange, P.C., 8280 Greensboro Drive, 7th Floor, McLean, VA 22102 (Counsel to Kona Coast Radio, LLC); and James A. Koerner, Esq., Koerner & Olender, P.C., 11913 Grey Hollow Court, North Bethesda, MD 20862 (Counsel to Kemp Communications, Inc., and Big D Consulting, Inc.).

15. For further information concerning this proceeding, contact Andrew J. Rhodes or Deborah Dupont, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

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²⁷ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁸ *APCC Services, Inc. v. CCI Communications, LLC*, Order on Review, 28 FCC Rcd 564, 571 (2013), citing *Profit Enterprises, Inc.*, Forfeiture Order, 8 FCC Rcd 2846, 2846 (1993) (¶ 5).

²⁹ See, e.g., *Pinewood, North Carolina*, Memorandum Opinion and Order, 5 FCC Rcd 7609, 7610 (1990).