

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

In the Matter of)	
)	
Amendment of section 73.202(b), Table of)	MB Docket No. 23-197
Allotments, FM Broadcast Stations (Puhi and)	RM-11949
Kekaha, Hawaii))	RM-11973

REPORT AND ORDER

Adopted: February 26, 2024

Released: February 26, 2024

By the Assistant Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Audio Division has before it (1) a *Notice of Proposed Rulemaking (Notice)* issued in response to a Petition for Rulemaking (Petition) filed by SSR Communications, Inc. (SSR or Petitioner);¹ (2) Petitioner's Comments filed in response to the *Notice*;² (3) Counterproposal filed by Pacific Radio Group, Inc. (PRG);³ (4) Petitioner's "Consolidated Reply Comments and Opposition to Counterproposals;"⁴ and (5) various related pleadings.⁵ No other comments or counterproposals were received in response to this proceeding. For the reasons discussed below, we grant the Petition by allotting an alternate channel at Puhi, Hawaii, and also grant the Counterproposal for a new allotment at Kekaha, Hawaii.

¹ *Puhi, Hawaii*, Notice of Proposed Rulemaking, DA 23-592, 2023 WL 4446527 (MB July 7, 2023); *see also Radio Broadcasting Services; Puhi, Hawaii*, 88 FR 45377 (published July 17, 2023); Petition for Rulemaking of SSR Communications, Inc. (filed May 16, 2023). Petitioner concurrently filed a construction permit application for the new allotment. *See* FCC Application File No. 0000214869 (filed May 16, 2023) (Application).

² Comments of SSR Communications, Inc. (filed Aug. 14, 2023) (Comments).

³ Counterproposal of Pacific Radio Group, Inc. (filed Aug. 28, 2023) (Counterproposal). On December 19, 2023, the Counterproposal was accepted as a new Petition for Rulemaking (RM-11973). *See Office of Managing Director's Bureau Reference Information Center Petition for Rulemakings Filed*, Public Notice, Report No. 3207, 2023 WL 8826668 (OMD Dec. 19, 2023) (*December Notice*).

⁴ Consolidated Reply Comments and Opposition to Counterproposal, SSR Communications, Inc. (filed Sept. 12, 2023) (Reply). SSR submitted the Reply in response to two other counterproposals filed by PRG in substantially identical allotment cases. *See Notice; Lihue, Hawaii*, Notice of Proposed Rulemaking, DA 23-591, 2023 WL 4446524 (MB July 7, 2023); *Koloa, Hawaii*, Notice of Proposed Rulemaking, DA 23-590, 2023 WL 4446520 (MB July 7, 2023).

⁵ In response to the *December Notice*, SSR filed a "Statement in Opposition to Counterproposals" reaffirming its interest in the Lihue, Koloa, and Puhi allotments, as originally filed. *See* Statement in Opposition to Counterproposals, SSR Communications, Inc. (filed Jan. 3, 2024) (Opposition Statement); *December Notice; Office of Managing Director's Bureau Reference Information Center Petition for Rulemakings Filed*, Public Notice, Report No. 3205, 2023 WL 8803780 (OMD Dec. 15, 2023); *Office of Managing Director's Bureau Reference Information Center Petition for Rulemakings Filed*, Public Notice, Report No. 3206, 2023 WL 8826666 (OMD Dec. 19, 2023). PRG then filed a "Reply to Statement in Opposition to Counterproposals" on January 16, 2024. *See* Reply to Statement in Opposition to Counterproposals, Pacific Radio Group, Inc. (filed Jan. 16, 2024) (Reply to Opposition Statement).

II. BACKGROUND

2. The *Notice* proposed the allotment of Channel 284A at Puhi, Hawaii, as the community's first local service under Priority (3).⁶ Puhi is a census designated place (CDP) with a 2020 U.S. Census (Census) population of 3,380 persons.⁷ Puhi has its own public charter school, community college, community cemetery, park, churches, and businesses that incorporate the "Puhi" name.⁸

3. In response to the *Notice*, Petitioner submitted timely comments reiterating its interest in the proposed allotment.⁹ PRG timely filed a Counterproposal requesting the allotment of Channel 284C3 at Kekaha, Hawaii, in lieu of the allotment of Channel 284A at Puhi.¹⁰ Kekaha is not incorporated but is listed in the Census as a CDP with a population of 3,715 persons.¹¹ PRG states that the allotment of Channel 284C3 at Kekaha as the community's first local service would result in a preferential arrangement of allotments because the proposed Kekaha facility would serve 73,298 persons within the projected 60 dBμ service contour in contrast to Petitioner's proposal which would provide 60 dBμ service to 64,144 persons.¹² PRG further states that its proposal would provide service to significant underserved areas within the proposed 60 dBμ allotment service area.¹³ Concurrent with the Counterproposal, PRG filed a construction permit application¹⁴ for the Kekaha allotment and certified that it will participate in a future FM auction, and if it is the winning bidder, it will construct the station promptly.

4. In its Reply, Petitioner acknowledges that the Counterproposal would result in service to slightly greater populations and seemingly would be preferred to SSR's proposal. However, Petitioner argues that the Counterproposal would violate the Commission's multiple ownership rules and therefore must be dismissed as defective.¹⁵ Petitioner maintains that there is no reason for PRG to have filed a Counterproposal other than to delay Petitioner's proposals and that such action may not be treated as a *bona fide* expression of interest. Petitioner repeats these arguments in its Opposition Statement filed in response to the *December Notice*.¹⁶

5. In response to SSR's Opposition Statement, PRG argues that it is not barred from owning additional stations on the Island of Kauai because the requested allotments would be assigned to a non-

⁶ See *Notice; Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982) (*FM Allotment Priorities*). The FM allotment priorities are: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

⁷ See <https://data.census.gov/all?q=Puhi,%20Hawaii>.

⁸ See *Notice*.

⁹ See Comments.

¹⁰ See Counterproposal.

¹¹ See <https://data.census.gov/all?q=Kekaha%20CDP,%20Hawaii>.

¹² Counterproposal at 2.

¹³ *Id.*

¹⁴ See FCC Application File No. 0000220006.

¹⁵ See Reply (arguing that PRG already owns four full-service FM facilities on the island of Kauai and may not own any more FM stations without violating section 73.3555(a)(1)(iii) of the Commission's rules); 47 CFR § 73.3555(a)(1)(iii) (limiting ownership in a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, to not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM)).

¹⁶ See Opposition Statement.

Nielson radio market where the number of stations that may be owned by a licensee is determined by the overlapping 70 dBu contours of a proponent's stations.¹⁷ Additionally, PRG states that the argument advanced by SSR deals with the "grantability" of the construction permit application filed by PRG, and does not address the "acceptability" of PRG's allotment request contained in the Counterproposal.¹⁸ PRG argues that the instant proceeding is at the allotment stage, not the construction permit stage, and all that is being examined is whether PRG's Counterproposal will provide for a preferential arrangement of allotments.¹⁹

III. DISCUSSION

6. Generally, conflicting proposals are considered on a comparative basis consistent with the FM allotment priorities where no alternate channels are available.²⁰ In this instance, however, we have determined that there are alternate channels available to accommodate the Puhi and Kekaha allotment requests without the need for a comparative evaluation.²¹ Specifically, a staff engineering analysis has revealed that Channel 280A can be allotted at Puhi in lieu of Channel 284A, which was proposed in the *Notice*. We find that the public interest would be served by allotting Channel 280A as a first local service to the community.²² Because the conflict between the Puhi and Kekaha proposals is eliminated with the allotment of Channel 280A at Puhi, we find that the public interest also would be served by allotting Channel 298C3 at Kekaha as a first local service.²³ As discussed above, Kekaha is listed as a CDP in the Census, and thus satisfies a minimum requirement for being considered a community for allotment purposes.²⁴ Additionally, Kekaha has a post office, at least two charter schools, numerous retail establishments and restaurants, two banks, and grocery stores.

7. We reject Petitioner's argument that the Kekaha proposal should not be entertained because it would contravene the Commission's multiple ownership requirements.²⁵ It is established policy that we do not consider multiple ownership issues in conjunction with an allotment rulemaking proceeding. Rather, any

¹⁷ Reply to Opposition Statement at 2-3.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 2-3.

²⁰ See *supra* note 6.

²¹ See, e.g., *Pinewood, South Carolina*, Memorandum Opinion and Order, 5 FCC Rcd 7609 (1990) (explaining that the Commission may consider alternate channels suggested by the parties or by the Commission staff to resolve conflicts between mutually exclusive proposals). Additionally, the *Notice* in this proceeding alerts interested parties that the filing of a counterproposal may lead the Commission to allot a different channel than was requested in the Petition. See *Notice* at para. 5.

²² A staff engineering analysis determines that Channel 280A at Puhi can be allotted consistent with the minimum distance separation requirements of the Commission's rules with a site restriction of 10.8 kilometers (6.7 miles) west of the community. The reference coordinates are 21-58-24 NL and 159-29-45 WL.

²³ A staff engineering analysis determines that Channel 298C3 at Kekaha can be allotted consistent with the minimum distance separation requirements of the Commission's rules with no site restriction. The reference coordinates are 22-02-00 NL and 159-38-00 WL. Additionally, the staff engineering analysis determined that the Kekaha proposal's distinct 60 dBu contour would provide a new aural service to 996 persons that are considered "underserved" by fewer than 5 full-time aural stations. Specifically, 968 persons would receive a 4th aural service, 19 persons would receive a 3rd aural service, and nine persons would receive a 5th aural service.

²⁴ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 101, para. 33 (1982) (stating that the Commission has normally considered any incorporated place or any other place listed in the census reports as a community under section 307(b) of the Act).

²⁵ See 47 CFR § 73.3555(a)(1)(iii); Reply at 2-3; Opposition Statement at 2-3.

potential multiple ownership issues are addressed after the allotment is subject to competitive bidding and a construction permit application is filed.²⁶ We also reject Petitioner's argument that the Counterproposal does not represent a *bona fide* expression of interest.²⁷ PRG is an interested party in this proceeding in that it has filed a counterproposal suggesting a mutually exclusive use for the channel proposed for Puhi and submitted the required filing fee. PRG also has stated its intent in the Counterproposal to apply for the channel if it is allotted and, if authorized, to build a station promptly. This is sufficient for acceptance of the Counterproposal. Accordingly, and in light of the foregoing, we will grant the Petition by allotting Channel 280A at Puhi and the Counterproposal by allotting Channel 298C3 at Kekaha.

8. *Paperwork Reduction and Regulatory Flexibility.* The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980, as amended, do not apply to a rulemaking proceeding to amend the FM Table of Allotments, section 73.202(b) of the Commission's rules. This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that pursuant to authority found in 47 U.S.C. sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1), 303(g), (r), and 307(b) and sections 0.61, 0.204(b), and 0.283 of the Rules, 47 CFR §§ 0.61, 0.204(b), and 0.283, effective **April 11, 2024**, the FM Table of Allotments, 47 CFR § 73.202(b), IS AMENDED, with respect to the community listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Puhi, Hawaii	280A
Kekaha, Hawaii	298C3

10. The window period for filing applications for Channel 280A at Puhi, Hawaii, and Channel 298C3 at Kekaha, Hawaii will not be opened at this time. Instead, the issue of opening this allotment for filing will be addressed by the Commission in a subsequent order.

11. IT IS FURTHER ORDERED, that the Petition for Rulemaking, RM-11949, filed by SSR Communications, Inc., IS GRANTED to the extent indicated above.

12. IT IS FURTHER ORDERED, that the Counterproposal of Pacific Radio Group, Inc., subsequently accepted as RM-11973, IS GRANTED to the extent indicated above.

13. IT IS FURTHER ORDERED, that the Commission will send a copy of this *Report and Order* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

²⁶ *See, e.g., Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, Memorandum Opinion and Order, 17 FCC Rcd 25055 (MB Dec. 16, 2002).

²⁷ Reply at 2-3.

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

15. For further information concerning this proceeding, contact Dana Bradford, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Nazifa Sawez
Assistant Chief, Audio Division
Media Bureau