

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

MM Docket No. 89-299

In the Matter of

Amendment of Section 73.202(b), RM-6696
Table of Allotments, RM-6961
FM Broadcast Stations.
(Lopez and Dushore, Pennsylvania)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: January 21, 1992; Released: January 28, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* in this proceeding, 5 FCC Red 2022 (1990), filed by Stewart C. West ("West").¹ The *Report and Order* denied a petition for rule making filed by Robin B. Thomas ("Thomas"), which proposed an allotment of Channel 233A to Lopez, Pennsylvania, and dismissed West's counterproposal for an allotment of Channel 233A to Dushore, Pennsylvania. No opposition or other reply comments were filed in response to West's petition for reconsideration.

BACKGROUND

2. This proceeding originated with a petition for rule making filed by Thomas proposing the allotment of Channel 233A to Lopez, Pennsylvania. In the *Notice* the Commission stated there was inadequate information in the petition regarding the community status of Lopez and requested Thomas to provide specific data to demonstrate that Lopez had the social, economic or cultural indicia to qualify it as a community for allotment purposes. Thereafter, West filed a timely counterproposal to the *Notice*, proposing the allotment of Channel 233A to Dushore, Pennsylvania, as a first local service.² Anita L. Clark ("Clark"), licensee of Station WKGW, Tioga, Pennsylvania filed opposing comments to the counterproposal.

3. The *Report and Order* dismissed the petition filed by Thomas for Lopez, Pennsylvania, due to Thomas' failure to provide sufficient information to allow a determination of community status for allotment purposes. The *Report and Order* also dismissed West's counterproposal for his failure to provide proof of service of the counterproposal on Thomas as required by Section 1.420 of the Commission's Rules.

Petition for Reconsideration

4. The petition for reconsideration filed by West contends that service was made on Thomas at the time of filing and that West's failure to provide proof of such service was inadvertent. West's petition contains a Certificate of Service from West and a Declaration from West's counsel verifying that service was made at the time the petition was filed. In addition, West attached an Addendum to the Certificate which states that, in subsequent conversations, Thomas acknowledged receipt of the petition. West also attached telephone records for this purpose. West requests that the Commission accept this late proof of service on Thomas as cure of this technical defect and that we then consider the counterproposal on its merits.

5. After the close of the comment period, West filed a letter with the Commission indicating a change in his address. In that letter, West states that he has semi-retired and that although he has moved out of state, he will participate in the development of the proposed station by means of assisting a community group which is interested in the allotment.

DISCUSSION

6. Section 1.420 of the Commission's Rules and Regulations requires that comments and counterproposals be served upon a petitioner for rule making by the party who is submitting those comments. Proof of service must be provided before action may be taken pursuant to those comments or counterproposal. Pursuant to Section 1.47(g), the Commission may allow proof of service to be supplied at any time, provided no party is materially prejudiced. After a review of the documents submitted by West, we believe that timely service of the counterproposal was made on Thomas. West has submitted a Certificate of Service, a Declaration by his counsel, as well as other records. Thomas was served with the petition, and its attachments verifying his receipt of service, and he has not challenged this information. We also are of the view that no party will be prejudiced by any action taken here only because there are no other parties participating in this proceeding. The proposal for Lopez was denied and that decision has not been challenged. There are no oppositions on file against the Dushore allotment proposal. We note that reconsideration would not have been necessary if West had provided the proof of service with the original counterproposal. However, West's submission of appropriate documentation, as well as the lack of prejudice, persuades us in this instance, to permit the proposed cure. We, therefore, accept West's correction of this technical defect and will now consider his counterproposal and subsequent correspondence.

7. One of the most basic requirements of a rule making proceeding for an FM allotment is a statement of interest in the channel to be allotted. The petitioner must state an interest in the channel, a present intention to apply for the channel if an allotment is granted, as well as an intention to promptly construct a station. Although West's counterproposal contains a clear expression of interest as described above, his subsequent letter indicates a change

¹ Public notice of the filing of West's petition was given on June 26, 1990, Report No. 1818.

² Public notice of the counterproposal was given on August 30, 1989, Report No. 1793.

of position. After careful review of West's letter, we find that he no longer has a bona fide interest in actually constructing an FM station on Channel 233A at Dushore, but rather, simply supports the possibility of an FM allotment to Dushore.³ West's reference to a community group having an interest in the allotment is not a sufficient expression of interest for allotment purposes. The proponent of an allotment proposal, to be bona fide, must state a clear intention to apply for the channel and indicate a willingness to construct a station. Such statements may only be made by the party who holds that intent, and not on behalf of a party who has not come before the Commission to state its own intent. Although West states that a community group has an interest, neither he nor anyone from that group has expressed the intent to apply for a channel or construct a station if an allotment is made. Therefore, although the allotment to Dushore may be technically feasible, we must deny West's petition for reconsideration in so far as there is lack of a continuing expression of interest in the allotment.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED. That the petition for reconsideration filed on behalf of Stewart C. West is GRANTED in part and in all other respects DENIED.

9. IT IS FURTHER ORDERED. That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

³ See *Columbia, Eldon and Centralia, Missouri*, 2 FCC Rcd 6512

(1987), *Llano and Kerville, Texas*, 4 FCC Rcd 7900 (1989).