

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

MM Docket No. 89-62

In the Matter of

Amendment of Section 73.202(b), RM-6522  
Table of Allotments,  
FM Broadcast Stations.  
(Quincy, Shingle Springs,  
and Sutter Creek, California)

MEMORANDUM OPINION AND ORDER  
(Proceeding Terminated)

Adopted: January 24, 1992; Released: February 4, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it petitions for reconsideration of the *Report and Order* in this proceeding, 4 FCC Rcd 8482 (1989), filed by Affinity Communications, Inc. ("Affinity"), licensee of Station KTMX(FM), Channel 298B, Colusa, California, Valley Broadcasters, Inc. ("Valley"), licensee of Station KSTN-FM, Channel 297B, Stockton, California, and Hillcrest Motor Company ("Hillcrest"), licensee of Station KXOA-FM, Channel 300B, Sacramento, California.<sup>1</sup> The *Report and Order* substituted Channel 270B1 for Channel 271A at Shingle Springs, California, Channel 271C2 for Channel 270C2 at Quincy, California, and Channel 298A for Channel 269A at Sutter Creek, California. Petitioners seek reconsideration of only the last substitution, that of Channel 298A for Channel 269A at Sutter Creek. Emerald Communications Corporation ("Emerald"), licensee of Station KTHO(FM), Channel 275C2, South Lake Tahoe, California, filed an opposition to the petitions for reconsideration, to which all three petitioners filed replies, and Valley filed supplemental reply comments.<sup>2</sup> For the reasons discussed below, we herein deny all three petitions for reconsideration.

BACKGROUND

2. This case began on September 16, 1988, when Olympic Broadcasters, Inc., ("OBI"), licensee of Station KQNC(FM), Channel 270C2, Quincy, California, and Lobster Communications Corporation ("LCC"), permittee

of Station KLIQ(FM), Channel 271A, Shingle Springs, California, submitted a joint petition for rule making asking the Commission to substitute Channel 270B1 for Channel 271A at Shingle Springs, and the modification of the permit for Station KLIQ(FM) to specify operation on the higher powered channel. In order to accommodate this upgrade, the joint petitioners requested the substitution of Channel 271C2 for Channel 270C2 at Quincy, California, the modification of Station KQNC(FM)'s license, accordingly, and the substitution of Channel 276A for Channel 269A at Sutter Creek.<sup>3</sup>

3. A *Notice of Proposed Rule Making* ("Notice")<sup>4</sup> was subsequently issued proposing the above referenced channel substitutions. After the deadline for filing comments and counterproposals in this proceeding had passed, Emerald Broadcasting Company, licensee of Station KTHO-FM, Channel 275C2, South Lake Tahoe, California, filed a counterproposal and comments asking the Commission to substitute Channel 298A at Sutter Creek, in lieu of Channel 276A, in order to accommodate its proposal to upgrade Channel 275C2 to Channel 275C at South Lake Tahoe, which was being considered in another proceeding (MM Docket No. 89-402).

4. In the *Report and Order* ("R&O"), the Chief of the Allocations Branch granted the request of OBI and LCC by amending the Table of Allotments to reflect the upgrade from Channel 271A to Channel 270B1 at Shingle Springs, and the modification of the permit for Station KLIQ(FM) to specify operation on the higher powered channel. In addition, the substitution of Channel 271C2 for Channel 270C2 at Quincy, and the modification of the license of Station KQNC(FM) was also granted. While recognizing that Emerald's counterproposal was not timely filed, the Commission staff, on its own motion, determined that the public interest would be served by the substitution of Channel 298A - as opposed to Channel 276A - for Channel 269A at Sutter Creek because, *inter alia*, an allotment of Channel 298A would not be subject to a site restriction and because this would enable Emerald to obtain a channel upgrade.

THE PLEADINGS

5. *Petitions for Reconsideration*. Affinity, Hillcrest, and Valley filed petitions for reconsideration in response to the R&O in this proceeding. These petitioners do not oppose the allotments made at either Shingle Springs or Quincy. Rather, petitioners object to the substitution of Channel 298A, instead of Channel 276A, at Sutter Creek. In its petition for reconsideration, Affinity asserts that the allotment of Channel 298A to Sutter Creek was in error because it will cause two "grandfathered short spacings," whereas only one "grandfathered short spacing" would be caused if Channel 276A were allotted.<sup>5</sup> Affinity's engineering study shows that, under the new spacing rules, its

<sup>1</sup> Public Notice of the petitions was given on February 2, 1990, Report No. 1806.

<sup>2</sup> Hillcrest also filed a "Supplement to Petition for Reconsideration." However, it was filed after the deadline for counterproposals and supplements and was not accompanied by a motion to accept. Therefore, in accordance with Section 1.429(d) of the Commission's Rules, this supplement will not be accepted.

<sup>3</sup> Two applications were then pending for the allotment at

Sutter Creek. One application had already been dismissed at the time the petition for rule making was submitted, but a petition for reconsideration of that dismissal was pending. Since then, by *Memorandum Opinion and Order*, FCC 90-581, released March 21, 1990, Administrative Law Judge Joseph P. Gonzalez granted the application for the allotment at Sutter Creek to Susan E. Turgetto. A construction permit has been issued.

<sup>4</sup> See 4 FCC Rcd 2297 (1989).

<sup>5</sup> On August 18, 1989, the Commission released a *Second*

Colusa station would be short-spaced to the Channel 298A allotment. Similarly, Valley states that Channel 298A at Sutter Creek is short-spaced to its Stockton station. Valley further complains that no effective notice was given regarding the Commission's substitution of Channel 298A for Channel 269A.

6. Hillcrest asserts that it is adversely affected by the Commission's action to allot Channel 298A to Sutter Creek on its own motion because, in 1987, Hillcrest had applied for a construction permit to relocate its Station KXOA-FM to an antenna farm in the Sacramento area. Hillcrest states that its application was ultimately withdrawn due to conflicts with the Federal Aviation Administration. However, Hillcrest alleges it was in the process of preparing a new application to move its antenna to the same location, but at a lower height, when the Commission decided to allot Channel 298A to Sutter Creek. Hillcrest complains that since the Channel 298A allotment would be short spaced to its proposed new transmitter location, this action "will make it impossible to move KXOA's transmitter site" to the antenna farm. Hillcrest also claims that the Commission failed to give proper notice as required by the Administrative Procedure Act. Petitioner further claims that no public interest benefits would be realized from the allotment of Channel 298A to Sutter Creek because this merely accommodates Emerald's counterproposal in another allotment proceeding which may not be granted.

7. *Emerald's Opposition.* In its opposition to petitions for reconsideration, Emerald urges the Commission to maintain the allotment of Channel 298A to Sutter Creek. Emerald charges that the petitions filed by Affinity, Hillcrest, and Valley were untimely and, therefore, procedurally unacceptable. Regarding the merits of each case, Emerald asserts that petitioners' argument that the allotment of Channel 298A to Sutter Creek was in error because it violates the Commission's minimum distance separation requirements is not viable. Emerald charges that petitioners have no basis for objecting to the allotment of Channel 298A at Sutter Creek because the old spacing rules apply to this rule making. Emerald stresses that petitioners' distance calculations are based, wrongly, on the newly revised minimum distance separation requirements rather than on the requirements which were in place when Emerald's original petition for rule making requesting the upgrade of its facilities on Channel 275C2 at South Lake Tahoe was filed.<sup>b</sup> Under the old rules, Emerald asserts, Channel 298A meets all minimum distance separation requirements.

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*Report and Order* in MM Docket No. 88-375, *Amendment of Part 73 of the Rules to provide for an additional FM station class (Class 3) and to increase the maximum transmitting power for Class A FM stations*, 4 FCC Rcd 6375 (1989), in which it increased the allowable transmitting power for Class A FM radio stations from 3000 watts to 6000 watts. In conjunction with this power increase, the Commission also increased the minimum distance separation requirements for Class A stations. Existing stations that did not meet the new distance separation requirements were grandfathered, *i.e.*, they would not be forced to comply with the new spacings unless they sought to increase to 6 kW. (See para. 51.) However, as stated in that document (para. 57), and as stipulated in the amended Section 73.213 of the

8. Emerald responds to Hillcrest's and Valley's claim that the Commission did not provide effective notice and to Hillcrest's allegations that the Administrative Procedure Act ("APA") had been violated, by stating that the "Commission has the authority, without providing additional notice under the APA, to allocate alternative available channels. Notice under the APA is sufficient so long as the notice indicated that the existing allotment at Sutter Creek would be affected."<sup>7</sup> Emerald cites *Medford and Grants Pass, Oregon ("Medford")*,<sup>8</sup> as supportive of this assertion.

9. In addition, Emerald implies that Affinity and Valley do not have standing to dispute the Sutter Creek allotment because neither will be harmed by it. Specifically, Emerald asserts that no petitioner has claimed eligibility for an increase in power, nor are their stations listed in any of the Public Notices naming the Class A stations that were eligible for power increases. Furthermore, Emerald asserts that no petitioner has filed an application to increase its present transmission power.

10. Finally, Emerald opposes Hillcrest's claim that it has an interest in this proceeding based on its speculative plans to move its antenna to a new location in the future. Emerald states that "the Commission cannot entertain the interests of all persons who might have some plan to do something in the future.... Otherwise, the Commission's processes would be completely paralyzed."

11. All three petitioners filed replies to Emerald's opposition. In sum, petitioners refute Emerald's accusation that their petitions were untimely and reassert their claims that they were harmed by the alleged short-spacings caused by the allotment of Channel 298A to Sutter Creek.

## DISCUSSION

12. After carefully reviewing the record in this proceeding, we continue to believe that it was proper to substitute Channel 298A for Channel 269A at Sutter Creek, California, in order to accommodate the upgrade of Station KLOC(FM), Shingle Springs, California, from Channel 271A to Channel 270B1. We will address each of the arguments raised by petitioners below.

13. *Timeliness.* To begin with, we find that Emerald is incorrect in asserting that the three petitions for reconsideration were untimely filed. Pursuant to Section 405 of the Communications Act and Sections 1.429(d) and 1.4(b) of the Commission's Rules, petitions for reconsideration in rule making proceedings are required to be filed within 30 days of public notice of the summary of the rule

Commission's Rules, "petitions filed prior to October 2, 1989 must comply with, and be processed in accordance with, the [old] rules."

<sup>b</sup> Emerald states that it filed its petition for rule making to upgrade its facilities on August 7, 1989, and offers this as the date to be considered when determining which rules, old or new, to apply to the instant case.

<sup>7</sup> In its opposition comments, Emerald erroneously states in a footnote that no one has expressed an interest in applying for the Sutter Creek allotment. In fact, at the time the R&O was released, two applications for the allotment at Sutter Creek were pending. See note 3 *supra*.

<sup>8</sup> See, 45 RR 2d 359, 362 (Broadcast Bureau 1979), *review denied*, FCC 80-661 (1980).

making action in the Federal Register. In this case, the *Report and Order* was summarized in the Federal Register on December 14, 1989. Applying the extant provisions of Section 1.4(b) for computation of time, the petitions for reconsideration were due on January 16, 1990.<sup>9</sup> Since all three of the petitions were submitted on January 16, 1990, they were timely filed.

14. *Adequacy of Notice.* While Valley and Hillcrest allege that inadequate notice and opportunity for comment in violation of the Administrative Procedure Act was given on the possible allotment of Channel 298A at Sutter Creek, we do not agree. Contrary to their assertions, it is well established under Commission precedent that, in FM and TV allotment proceedings, it is not necessary to set forth "each and every item or aspect of the rule changes to be considered." *Medford and Grants Pass, Oregon*, 45 RR 2d 359, 362 (1979). Instead, Section 553(b) of the Administrative Procedure Act requires that we "disclose either the terms or the substance of the proposed rule or a discussion of the subjects and issues involved." *Id.* As explained in *Medford* and in the Commission's recent decision in *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990), this requirement is met if we identify that we are considering allotting or substituting a channel at a specific community such as Sutter Creek. Here, the *Notice* clearly indicated that we were proposing to substitute Channel 276A for Channel 269A at Sutter Creek in order to accommodate an upgrade at Shingle Springs. The fact that we ultimately allotted Channel 298A instead of Channel 276A at Sutter Creek does not undermine the adequacy of this notice. As we said in both *Medford* and *Pinewood*, it is impossible to know at the time a notice is issued all of the possible channels that will be considered because notices of proposed rule making in FM and TV allotment proceedings elicit counterproposals for different channel allotments. To resolve the conflicts caused by the filing of such counterproposals, the Commission will often allot alternative channels. Indeed, paragraph 2(b) of the Appendix to the *Notice* in this proceeding specifically advised interested parties, such as the petitioners, of this possibility.<sup>10</sup> Therefore, consistent with *Medford* and *Pinewood*, allotting a different channel than the one originally proposed for Sutter Creek is clearly within the scope of the notice of this proceeding and complies with the notice requirements of Section 553(b) of the Administrative Procedure Act.

15. *Short-Spacing Requirement.* Affinity and Valley believe that the allotment of Channel 298A at Sutter Creek would be short-spaced under the Commission's minimum distance separation requirements to their respective stations at Colusa and Stockton, California. We disagree. The petitioners are basing their allegations upon the use of the new, as opposed to the old, spacing rules with respect to the Sutter Creek Class A FM channel. However, when the

Commission increased the maximum power for Class A FM channels from 3 kW to 6 kW in the *Second Report and Order* in MM Docket No. 88-375, we expressly stated that rule making petitions filed prior to October 2, 1989, would be processed in accordance with the rules then in effect -- the spacing requirements for 3 kilowatt maximum Class A stations.<sup>11</sup> Since the petition requesting the upgrade at Shingle Springs and the related channel substitution at Sutter Creek was filed on September 16, 1988, and since the proposal by Emerald to allot Channel 298A in lieu of Channel 276A at Sutter Creek was filed on August 7, 1989, it was proper to use the old spacing rules. Utilizing the old spacing rules, Channel 298A at Sutter Creek was not short-spaced to the Colusa or Stockton stations.<sup>12</sup>

16. As a related matter, we do not believe that Hillcrest or Affinity has demonstrated that they would be harmed by the allotment of Channel 298A to Sutter Creek. While they claim that they intend to file applications to change their transmitter sites, they have not done so. Moreover, they have not shown that they would be unable to do so because of the allotment of Channel 298A to Sutter Creek. Specifically, Affinity and Hillcrest have not indicated they could not use the contour protection provisions of Section 73.215 or could not seek a waiver of the Commission's spacing rules in order to accomplish their desired transmitter relocations. Further, they have not sought to show that, on a comparative basis, the public interest benefits from the use of their proposed transmitter sites would outweigh the benefits of the upgrade at Shingle Springs.

17. *Public Interest Considerations.* As a final matter, we disagree with Hillcrest's assertion that there are no public interest benefits in allotting Channel 298A in lieu of Channel 276A at Sutter Creek. As stated in the *R&O*, the public interest will be served by the allotment of Channel 298A to Sutter Creek because this allotment can be made without the imposition of a site restriction. On the other hand, if Channel 276A had been allotted to Sutter Creek, a site restriction of 1.4 miles north would have been required. In addition, the allotment of Channel 298A at Sutter Creek allows the Commission to consider the proposed upgrade of Emerald's station at South Lake Tahoe in MM Docket No. 89-402. This procedure also avoids the need to issue a separate order to show cause in that proceeding to modify the construction permit for the Sutter Creek station and thereby avoids further delay while reducing the administrative burdens on the Commission's staff.

18. In light of the foregoing, we find that petitioners have not raised any arguments which would warrant reconsideration of the *R&O* in this proceeding.

19. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed by Affinity, Valley and Hillcrest ARE DENIED.

<sup>9</sup> Since the thirtieth day following public notice occurred on Sunday, January 14, 1990, and since January 15, 1990, was a federal holiday, the filing date became the next business day, which was January 16, 1990, by operation of Section 1.4(j). We also note that the computation of time provisions of Section 1.4 were recently amended; however, these amendments do not apply to the instant case.

<sup>10</sup> Otherwise, the Commission would be required to issue additional notices in order to resolve conflicting proposals each

time it considered an alternative channel. The burden and delay of such additional notices is contrary to the public interest. See *Medford*, 45 R.R. 2d at 362.

<sup>11</sup> 4 FCC Rcd 6375, 6382 (1989).

<sup>12</sup> Moreover, we note that, since the *Report and Order* was adopted in this proceeding, a construction permit was issued for a station on Channel 298A at Sutter Creek which eliminates the short-spacing under the new rules to the Stockton station, and substantially reduces the short-spacing under the new rules to the Colusa station from 11.9 to 0.7 kilometers.

20. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this Memorandum Opinion and Order by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Susan E. Turgetto, 23 Eureka Terrace, Sutter Creek, CA 95685 (Sutter Creek permittee).

21. IT IS FURTHERED ORDERED, That this proceeding IS TERMINATED. Authority for this action is contained in Sections 405 and 303 of the Communications Act of 1934, as amended.

22. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

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