

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 94-134
Table of Allotments,)	RM-8538
FM Broadcast Stations.)	RM-8589
(Burlington, Colorado; Brewster,)	
Kansas))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 19, 1996

Released: August 2, 1996

By the Chief, Allocations Branch:

1. The Commission has before it the Notice of Proposed Rule Making (Notice), 9 FCC Rcd 6826 (1994), issued in response to a petition filed by Bruce Corman, Kay Hanley, and Charley P. Barnes ("Petitioners"), proposing the allotment of Channel 257C1 to Burlington, Colorado. Petitioners, who are members of a general partnership, filed comments and reply comments. KNAB, Inc. ("KNAB"), the licensee of Stations KNAB(AM) and KNAB-FM, Burlington, Colorado, filed comments¹ and reply comments and two separate motions to dismiss directed against Petitioners' petition for rule making and its reply comments. For the reasons discussed below, we are allotting Channel 257C1 to Burlington, Colorado, as a new allotment.

2. At Petitioners' request, the Notice proposed the allotment of Channel 257C1 to Burlington, Colorado. Petitioners filed comments reaffirming their interest in pursuing the allocation of that channel and building a station. KNAB filed comments claiming that Burlington, Colorado, and the surrounding county could not support an additional broadcast station. In addition, KNAB submitted a counterproposal requesting that Channel 257C1 be allotted to Brewster, Kansas, in lieu of Burlington, Colorado. Although KNAB expressed its intention to file an application for Channel 257C1 if it is allotted to Brewster, it also stated that

¹ KNAB's comments were part of its pleading entitled "Comments and Counterproposal" filed January 12, 1995. KNAB also filed a Supplement to the foregoing pleading on January 13, 1995. The Supplement requested that the Commission include as part of this docket an original copy of a duplicate certification entitled "Statement of Bette Bailly" which had been filed with KNAB's Comments and Counterproposal. We hereby accept that Supplement as part of this docket.

if the Commission should allot a new channel to Burlington, either Channel 257C1 or an alternate channel, KNAB would be unable to apply for any Brewster channel. In this regard, KNAB contends that due to economic considerations, it could not compete with a new station in Burlington as well as construct and operate a new facility in Brewster. KNAB filed a pleading entitled "Reply Comments and Motion to Dismiss Petition for Rulemaking" in which it asks that the Commission dismiss Petitioners' petition for rule making because Petitioners had not yet included an affidavit verifying that the statements contained in their petition for rule making are accurate to the best of their knowledge, as required by Section 1.52 of the Commission's Rules. The Notice had already stated that the foregoing affidavit was missing and requested that Petitioners rectify this omission when they filed their comments.

3. In their reply comments filed February 27, 1995, each of the three Petitioners filed an affidavit stating their interest in the allotment of Channel 257C1 to Burlington, Colorado, and their intention to apply for the channel, if allotted. Their sworn statements also explained that in comments dated November 30, 1994, Petitioners had provided a statement of continuing interest in the foregoing channel and in building a station on that channel and had attached an affidavit of Charley P. Barnes, one of their general partners, verifying the truth and accuracy of the statements contained in the Petitioners' comments, as required by Section 1.52 of the Rules. A copy of the foregoing affidavit by Mr. Barnes is attached to each of the Petitioners' affidavits. Petitioners also argue that KNAB's counterproposal is designed to stop competition from occurring in Burlington, Colorado, and that the local economy can support a second competitive radio voice. Petitioners also contend that the Commission has a policy of not addressing the potential economic impact of new allotments on existing stations and that there are a number of allotment scenarios that would allow both Burlington, Colorado, and Brewster, Kansas, to be each allotted a Class C channel.

4. KNAB filed a motion to dismiss the Petitioners' reply comments as untimely. KNAB argues that reply comments in response to KNAB's comments regarding Petitioners' proposal to allow channel 257C1 to Burlington, Colorado, were due January 27, 1995, and that any reply comments filed on February 27, 1995, should have been limited to KNAB's counterproposal to allot channel 257C1 to Brewster, Kansas. Nevertheless, KNAB argues, most of Petitioners' reply comments address KNAB's comments regarding the Burlington, Colorado, proposal. Further, KNAB contends, any arguments addressing KNAB's Brewster counterproposal are so intertwined with Petitioners' untimely reply comments concerning the Burlington proposal, that the entire reply comments must be dismissed. Lastly, KNAB asks that if the Commission should deny KNAB's request to dismiss Petitioners' reply comments, that KNAB be given a fifteen-day extension of time subsequent to such denial to file a response to Petitioners' reply comments.²

² KNAB also filed a motion to dismiss a comment supporting the Burlington proposal filed by Roger L. Hoppe II, on the grounds that Mr. Hoppe has failed to provide a certification of the comment and to serve the other parties to the proceeding, as required by the Notice. We grant that motion. We also note that the comment did not raise any significant matter affecting the public interest. In fact, the comment offered the opinion that the Burlington area could support another FM station, which is a matter we no longer consider relevant in allotment proceedings.

5. We will allot Channel 257C1 to Burlington Colorado.³ In rule making proceedings in which two parties express an interest in building stations on the same channel in different communities, we attempt to accommodate both parties by allotting separate channels of the same class to each of the two communities. We have determined that Channel 257C1 can be allotted to Burlington, Colorado, and Channel 291C1 can be allotted to Brewster, Kansas. Inasmuch as KNAB has stated that it would not apply for a channel in Brewster, Kansas, if a new FM channel is allotted to Burlington, Colorado, we are construing that statement as a withdrawal of its expression of interest in applying for a channel in Brewster, Kansas. In that light, we will not allot a channel to Brewster, Kansas. In a separate vein, we do not address the potential economic impact of new allotments on existing stations. See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988), affirmed, 4 FCC Rcd 2276 (1989).⁴ Therefore, we must disregard KNAB's argument that Burlington, Colorado and the surrounding county cannot support an additional radio station. We believe the public interest would be served by allotting Channel 257C1 to Burlington, Colorado, since it would provide that community with an additional local commercial FM service. Channel 257C1 can be allotted to Burlington in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.

6. In regard to Section 1.52 of the Rules, each of the three Petitioners has filed an affidavit that the Section 1.52 affidavit was mailed with their comments and each petitioner has filed a copy of the earlier Section 1.52 affidavit with their subsequent filings. In this light, we will accept the Section 1.52 affidavit that was submitted with Petitioners' reply comments as constituting compliance with our directive to submit a Section 1.52 affidavit, since the proposal to allot channel 257C1 to Burlington is no longer considered to be contested. See Amor Family Broadcasting Group v. FCC, 918 F.2d 960, 963 (D.C. Cir. 1991).

7. 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 effective September 16, 1996, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

<u>City</u>	<u>Channel No.</u>
Burlington, Colorado	257C1, 281C1

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. The window period for filing applications for Channel 257C1 at Burlington, Colorado, will open on September 16, 1996, and close on October 17, 1996.

³ The reference coordinates for Channel 257C1 at Burlington, Colorado, are North Latitude 39-18-18 and West Longitude 102-16-06.

⁴ See also Cheyenne, Wyoming, 8 FCC Rcd 4473 (1993).

10. For further information concerning the above, contact R. Barthen Gorman, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 257C1 at Burlington, Colorado, should be addressed to the Audio Services Division, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

**John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau**