

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 95-181
Table of Allotments,)	RM-8727
FM Broadcast Stations.)	
(Bagdad and Chino Valley, Arizona))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1996

Released: November 8, 1996

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 11 FCC Rcd 523 (1996), issued in response to a petition for rule making filed by 21st Century Radio Ventures, Inc. ("petitioner"), permittee of Station KAKP(FM), Channel 280A, Bagdad, Arizona, proposing the substitution of Channel 280C3 for Channel 280A at Bagdad, the reallocation of Channel 280C3 from Bagdad to Chino Valley, Arizona, and modification of its authorization (File No. BPH-930804MC), as requested. Petitioner filed supporting comments in response to the *Notice*.¹ Opposing comments were filed on behalf of Rainbow Broadcasting, Inc. ("RBI"),² to which petitioner filed a reply. Petitioner and RBI each filed an erratum.³ No other comments were received.

¹Petitioner's comments, although dated in advance of the initial comment period established herein, were received at the Commission after the deadline. The Commission's Rules do not contemplate the acceptance of comments filed beyond the comment cycle unless specifically requested or authorized by the Commission. See Section 1.415(d) of the Commission's Rules. Neither criteria is applicable in this instance. However, inasmuch as the comments consist of the petitioner's continuing expression of interest, and in consideration of our ultimate analysis of the opposing comments, *infra*, the acceptance of petitioner's comments can be accommodated without prejudicing any other pending request. Therefore, we will consider the late-filed comments to enable us to resolve this proceeding on the basis of a complete record.

²At the time comments were filed, Rainbow was licensed to operate Station KBZR(FM), Channel 280A, at Coolidge, Arizona. However, pursuant to the subsequent grant of its rule making request, Rainbow was modified to specify operation on Channel 280C2 at Gilbert, Arizona. See *Coolidge and Gilbert, Arizona*, 11 FCC Rcd 3610 (1996). A conditional construction permit has been issued to Rainbow (BPH-960520IA). An assignment of Rainbow's license and transfers of control followed. See File Nos. BALH-960209GG, BTCH-960520GE, BTCH-960520GF. However, according to available Commission information, consummation of the assignment has not occurred.

³These additional comments were also filed after the deadlines announced in this proceeding. However, as they each consist merely of a correction to the docket number reference contained in the caption of the RBI's comments and in the petitioner's response thereto, they have been accepted to ensure an accurate record in this proceeding.

2. As explained in the *Notice*, petitioner seeks to invoke the provisions of Section 1.420(g) and (i) of the Commission's Rules to enable it to provide a first local transmission service to Chino Valley and increase its service capability. See *Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). In support of the proposal petitioner stated that the reallocation to the incorporated community of Chino Valley, which is not within an urbanized area, is mutually exclusive with its existing authorization at Bagdad. The distance between Bagdad and the petitioner's specified site at Chino Valley is 64 kilometers (40 miles) whereas a distance of 142 kilometers (88 miles) is required between Class A and C3 co-channels.

3. RBI opposes the instant request, alleging that the petitioner's proposal is inconsistent with Commission policy as set forth in *Change of Community, supra*. RBI argues that the requested removal of Station KAKP(FM) from Bagdad would deprive that community of its only authorized radio facility. While acknowledging that the Commission has permitted exemptions from its ban on the removal of the only aural transmission service authorized to a community, RBI comments that petitioner's proposal does not meet the exceptions to that rule. RBI disagrees with petitioner's claim that it is entitled to the requested reallocation since it is not an "existing service" as its facilities have not been constructed.⁴ RBI remarks that the *Change of Community MO&O* disfavors the removal of a channel from a community, particularly an unserved, rural one. RBI further believes that while the paramount concern embraced in *Change of Community* is the impact of disruption of service from the reallocation of an operating station, it does not afford an implicit entitlement for a permittee to seek reallocation in instances where the station remains unbuilt within the time constraints of its construction permit.

4. Additionally, RBI maintains that the cases relied upon by the petitioner to support its proposal as set forth in the *Notice*,⁵ are inapposite, as in each instance the permittee presented a public interest benefit to merit removal of the only authorized facility in the community. RBI comments that the factors surrounding Sanibel (environmental constraints), Glencoe (spacing constraints and site unavailability) and Pawley's Island (the community was not left unserved), are not found in the instant case. RBI insists that as Bagdad does not have another authorized permittee, and based upon the petitioner's initial representation in its application for Channel 280A at Bagdad that it intended to serve that community, it should not

⁴In this regard, RBI remarks that to distinguish an unbuilt station from a constructed one is illogical, professing that such treatment privileges the party that has not fulfilled the obligations of its construction permit while precluding a party that has built its station from an equal advantage.

⁵*Sanibel and San Carlos, Florida ("San Carlos")*, 10 FCC Rcd 7215 (1995); *Pawley's Island and Atlantic Beach, South Carolina ("Pawley's Island")*, 8 FCC Rcd 8657 (1993); and *Glencoe and Le Sueur, Minnesota ("Glencoe")*, 7 FCC Rcd 7651 (1992).

abandon its commitment.⁶ RBI maintains that the residents of Bagdad have a right to receive broadcast service, and that such entitlement transcends petitioner's desire to become licensed to a larger community.⁷

5. Petitioner responds that its proposal would result in a preferential arrangement of allotments⁸ consistent with the *Change of Community, supra*, as Chino Valley (population 4,837)⁹ would receive its first local aural transmission service, whereas Bagdad (population 1,858) would retain potential local aural transmission service from Channel 276C3.¹⁰ Additionally, petitioner remarks that as Station KAKP(FM) is unbuilt, it is not a service upon which the public has come to rely, and therefore, the proposed reallocation does not equate to the removal of an existing service, citing *Pawley's Island and Atlantic Beach, South Carolina, supra*.¹¹

6. Petitioner disputes RBI's suggestion that the disparity of treatment the Commission affords an unbuilt station from a constructed one is unsound. Petitioner remarks that unlike an unbuilt facility, once a station is on the air it is committed to provide daily information to its community of license and becomes an integral part of the community.

7. Petitioner reiterates that its proposal meets the relevant criteria necessary to obtain a change in its community of license pursuant to Section 1.420(i), as it is mutually exclusive with its existing authorization; it would result in a preferential arrangement of allotments; and the change would not divest the community of its only existing allotment. Beyond that, petitioner avers that in situations such as the present one, no additional public interest showings are required, citing *Change of Community MO&O, supra*. Moreover, petitioner asserts that

⁶Also, RBI states that by petitioner's own showing, the reallocation, if granted, would result in areas and populations with less than five signals losing broadcast service. RBI mentions that although the numbers are nominal, the fact that Channel 280C3 serves an underpopulated rural area that stands to lose some degree of service, cannot be ignored in the final analysis.

⁷RBI suggests that if the petitioner desires to serve Chino Valley, Channel 263C3 could be allotted there. However, no interest in Channel 263C3 at Chino Valley was expressed and therefore, RBI suggestion will not be given further consideration in this proceeding. As a result of our determination, Channel 263C3 will be removed from the Commission's data base as an "ADD" proposal at the conclusion of this proceeding.

⁸The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).]

⁹Population figures reported herein were taken from the 1990 U.S. Census.

¹⁰Hualapai Broadcasters, Inc. ("HBI") has filed an application for a construction permit to operate on Channel 276C3 at Bagdad (File No. BPH-950824MI).

¹¹In that case the Commission distinguished between the removal of an operating radio facility whose service the public has become reliant upon, and the removal of an unbuilt facility that would not deprive the community of any service.

while RBI stresses the factual distinctions between the cases upon which it relies, RBI failed to indicate that the underlying rationale in those cases was that a preferential arrangement of allotments would occur, without depriving the community of an *existing* service. Petitioner observes that in *Glencoe and Le Sueur, Minnesota, supra*, the Commission determined that removal of Le Sueur's only potential local service would not disrupt existing service since an unbuilt station sought the reallocation to Glencoe. As to *Pawley's Island, supra*, petitioner remarks that the reallocation of a construction permit to Atlantic Beach was granted premised on the fact that an issued, but unbuilt construction permit remained at Pawley's Island. Further, petitioner observes that in examining loss of service from an unbuilt construction permit, the Commission stated that "... we do not consider removal [of a construction permit] from a community to represent the same concerns with loss of service that removal of an operating station would represent."

8. Based upon the information presented, we will reallocate Channel 280A from Bagdad to the incorporated community of Chino Valley as a Class C3 channel, since it will result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. *See Change of Community, supra*. Moreover, the reallocation and concomitant modification of petitioner's authorization will afford it an opportunity to provide service to an additional 58,622 persons within Station KAKP(FM)'s projected 1 mV/m contour at Chino Valley. Although we carefully evaluate a proposal that would result in a loss of existing reception service, in this instance Station KAKP(FM) is unbuilt. Therefore, we do not consider its removal from Bagdad to present the parallel concerns with loss of service represented by the removal of an operating station, as it does not constitute a service that the public has become reliant upon. *See, Glencoe and Le Sueur, Minnesota, supra*. Additionally, the reallocation will not result in the relocation of Station KAKP(FM) from a rural to an urban area. Moreover, grant of this proposal will not deprive Bagdad of an allotment as Channel 276C3 remains in the community.

9. Channel 280C3 can be allotted to Chino Valley, Arizona, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's specified site located 4.6 kilometers (2.8 miles) southwest of the community, utilizing coordinates 34-43-46 and 112-29-22. As Chino Valley is located within 320 kilometers (199 miles) of the Mexican border, the Commission obtained concurrence of the Mexican government to this proposal.

10. 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 December 23, 1996, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>
Bagdad, Arizona	276C3
Chino Valley, Arizona	280C3

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the authorization of 21st Century Radio Ventures, Inc. for Station KAKP(FM) (File No. BPH-930804MC), IS MODIFIED to specify operation on Channel 280C3 in lieu of Channel 280A, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

12. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, 21st Century Radio Ventures, Inc. , permittee of Station KAKP(FM) is required to submit a rule making fee in addition to the fee required for the applications to effectuate the change in community of license and upgrade at Chino Valley, Arizona.

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

14. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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