

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

In the Matter of)
)
Implementation of the AM Expanded) MM Docket No. 87-267
Band Allotment Plan)

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 2000

Released: August 10, 2000

By the Commission:

1. In March 1998 the U.S. Court of Appeals for the D.C. Circuit remanded to the Commission the captioned proceeding to license AM stations in the 1605 kHz – 1705 kHz band (“AM expanded band”). *Implementation of the AM Expanded Band Allotment Plan* in MM Docket No. 87-267, 12 FCC Rcd 3361 (1997), *appeal docketed sub nom. Sunrise Broadcasting of New York, Inc. v. FCC*, No. 97-1412 (D.C. Cir. June 25, 1997). The Commission had requested a remand in order to consider a Mass Media Bureau computer re-analysis of the existing record to determine whether Sunrise would have received an AM expanded band allotment if no interference protection had been provided to Federal Travelers Information Stations (“TIS Stations”). Now before the Commission are this staff study and comments filed by Sunrise Broadcasting of New York, Inc. (“Sunrise”), licensee of WGNV(AM), Newburgh, New York. We conclude that the computer reanalysis establishes, as the Commission represented to the Court and as Sunrise now concedes, that WGNV would not receive an AM expanded band allotment even if the Commission were to adopt the technical changes to the allotment methodology that Sunrise advocates. Moreover, we decline to consider, as grossly untimely and fundamentally unfair, Sunrise’s belated objections to several matters resolved at much earlier stages of this proceeding.

Background

2. On March 17, 1997, the Commission released *Implementation of the AM Expanded Band Allotment Plan*, 12 FCC Rcd at 3361 (“*Order*”), denying, *inter alia*, Sunrise’s “Petition for Reconsideration of Non-Inclusion in Expanded AM Band Allotment Plan.” The staff simultaneously issued a revised allotment plan which did not include an allotment for WGNV in the AM expanded band. *See Public Notice, Mass Media Bureau Announces Revised Expanded AM Expanded Band Allotment Plan and Filing Window for Eligible Stations*, 12 FCC Rcd 3185 (M.M.Bur. 1997) (“*Third Allotment Plan*”). On June 25, 1997, Sunrise filed with the Court a Petition for Review of the *Order*.” The gravamen of Sunrise’s brief was the claim that the Commission’s decision to grant certain TIS Stations “co-primary” status for a limited time period was an unexplained change of agency policy and that the result of according such interference protection to these stations was to preclude a WGNV AM expanded band allotment. In response, the Mass Media Bureau constructed a hypothetical allotment plan that eliminated any consideration of TIS Stations but otherwise tracked exactly the methodology of the Third Allotment Plan. Under this hypothetical plan some stations changed frequencies and other stations were added or deleted, but WGNV remained without an allotment. The Commission noted these results in its respondent’s brief to the Court. In a separate motion filed the same day, the Commission sought remand of the record “to demonstrate that on the basis of the existing evidence, Sunrise has not been harmed by any aspect of the

Commission decision that is essentially the sole basis for the claims in its brief." March 3, 1998 FCC Reply to "Comments on Motion for Remand of the Record" at 1.

3. Following the Court remand of the case to the Commission, the Mass Media Bureau supplemented the record on March 31, 1998 with the complete computer reanalysis that included the hypothetical allotment plan. Sunrise, in its Comments filed with the Commission on October 19, 1998, now concedes that WGNY would not receive an expanded band allotment even if no interference protection were accorded to TIS Stations. However, Sunrise also raises several issues unrelated to the proper treatment of TIS stations. It argues that the Commission should consider these comments because the Commission's prior rejection of Sunrise's TIS arguments "reasonably led Sunrise to believe" that "a Federal TIS station represented the only obstacle to an allotment on 1620 kHz for WGNY." Sunrise Comments at 6-7.

4. Substantively, Sunrise objects for the first time to a 1995 Commission decision to change the co-channel distance separation requirement for AM expanded band stations from 400 to 800 kilometers. This objection appears to be based solely on Sunrise's belief that WGNY "could" or "would" secure an allotment under the less restrictive standard. Sunrise Comments at 8 and 12. Sunrise also objects for the first time to the calculation of the improvement factors for two of the 710 potential expanded band stations listed in a 1996 Mass Media Bureau *Public Notice*.

Discussion

5. We agree with Sunrise's reading of the hypothetical allotment plan. If the Commission were to adopt completely the allotment methodology that Sunrise advocated to the Court, WGNY would not receive an AM expanded band allotment. Thus, Sunrise's argument on appeal is fundamentally flawed. The Commission's decision to grant certain TIS Stations co-primary status had no preclusive impact on a potential WGNY allotment.

6. Contrary to Sunrise's contention, the Commission has not played "hide the peanut" in this matter. An allotment plan in this proceeding is based on millions of calculations evaluating millions of potential station and frequency combinations.¹ Despite these intricacies, the goal of this proceeding is straightforward, *viz.*, to produce a national AM expanded band allotment plan that optimizes interference reduction in the AM band. Evaluating the impact of our allotment methodology on specific stations, *i.e.*, identifying allotment "winners" and "losers," is inconsistent with this goal. Station-specific research for any of the 710 potential expanded band migrators also is impractical. The staff would need to devote significant time and computer resources to analyze the allotment implications of any proposed change (or combination of changes) in the selection methodology. The main allotment selection program, alone, takes

¹ The claim that the Commission "downplayed" the importance of the allotment computer software is frivolous. The Second and Third Allotment Plans plainly show the considerable impact on allotments of even small changes in the computer software programs. *See Public Notice, Mass Media Bureau Announces Revised Expanded AM Band Improvement Factors and Allotment Plan*, DA 96-408, 11 FCC Rcd 11419 (M.M.Bur. 1996) (Second Allotment Plan); Third Allotment Plan, 12 FCC Rcd at 3186-87. In each of these revised allotment plans, approximately twenty percent of the stations listed in the prior plan either received a different frequency or was replaced by another station.

at least several weeks of high speed computer processing to consider thoroughly frequency options for each of the 710 potential migrators. In fact, the Commission did not know the impact of eliminating TIS Station protection on WGNY until it ran a specially designed allotment program following Sunrise's identification of this narrow issue on appeal.² We also note that the Commission in a previous order explicitly cautioned Sunrise that several factors other than TIS Station protection requirements were potentially decisive in precluding a WGNY allotment. *Memorandum Opinion and Order*, 11 FCC Rcd 12444, 12446 (1996).

7. Sunrise's attempt to seek reconsideration of matters that do not relate directly to the hypothetical "No TIS Station" allotment plan is misguided. As the Commission explained to the Court, "Sunrise should not operate under the impression that the remand in this case will lead to Commission consideration of a belated challenge to WGNY's improvement ranking or any similar matter." March 3, 1998 FCC Reply to "Comments on Motion for Remand of the Record" at 4. The change in co-channel distance separation requirements from 400 to 800 kilometers was announced in the Commission's 1995 reconsideration order. *See Reconsideration of Implementation of the AM Expanded Band Allotment Plan*, 10 FCC Rcd 12143, 12149 (1995). This reconsideration order specifically afforded the public "thirty days from the date of publication in the Federal Register of this order to comment on the allotment plan procedures set forth herein." *Id.* Revised station improvement factors were released on March 22, 1996 with the Second Allotment Plan and have remained unchanged since that time. *See Public Notice, Mass Media Bureau Announces Revised Expanded AM Broadcast Band Improvement Factors and Allotment Plan*, 11 FCC Rcd 11419 (M.M.Bur. 1996). Sunrise made no timely challenge to these actions. *See* 47 C.F.R. Sec. 1.429(d). Its request to reconsider now these fundamental aspects of the allotment methodology is grossly untimely and in fundamental conflict with our interest in administrative finality. Moreover, basic fairness, especially to those several dozen newly constructed and operating AM expanded band stations, strongly supports our decision not to revisit these settled issues. Accordingly, its arguments will not be considered.

Conclusion

8. For the foregoing reasons, IT IS ORDERED that the Mass Media Bureau computer reanalysis study is made part of the record in this proceeding and Sunrise's request that the Commission reexamine aspects of the AM expanded band proceeding other than those relating directly to the interference protection afforded TIS stations IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

² For the same reason, Sunrise merely repeats the same mistake it made to the Court when it speculates in its Comments that the adoption of the modifications it now advocates "could" or "would" provide WGNY the expanded band allotment it desires. It simply does not know.