

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

In the Matter of)

Amendment of Section 73.202(b),) MM Docket No.91-58
Table of Allotments,) RM-7419
FM Broadcast Stations.) RM-7797
(Caldwell, College Station) RM-7798
and Gause, Texas))

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 17, 2000

Released: October 27, 2000

By the Commission:

1. The Commission has before it the Petition for Reconsideration filed by Roy E. Henderson (“Henderson”) of the Memorandum Opinion and Order in this proceeding released February 15, 2000, 15 FCC Rcd 3322 (2000). Bryan Broadcasting License Subsidiary, Inc. (“Bryan Broadcasting”) filed an Opposition and Henderson filed a Reply. The Memorandum Opinion and Order was in response to a remand from the U.S. Court of Appeals requested by the Commission. Order in Henderson v. FCC, D.C. Cir. 98-1372 (March 8, 1999). Except for three new matters, the Petition for Reconsideration is repetitive with respect to matters already considered in the Memorandum Opinion and Order released February 15, 2000, and our earlier Memorandum Opinion and Order affirming a staff action denying Henderson’s proposal to upgrade Station KLTR (formerly KHEN), Channel 236A, Caldwell, Texas, to Channel 236C2. 13 FCC Rcd 13772 (1998). We will not again consider or debate these matters.¹ For the reasons set forth below, the new matters raised by Henderson do not warrant revisiting our decision in this proceeding. We deny the Petition for Reconsideration.

2. In the Report and Order, the staff granted a proposal by Bryan Broadcasting, licensee of Station KTSR, Channel 297C3, College Station, Texas, to upgrade to Channel 236C2. In doing so, the staff denied a competing proposal by Henderson for upgrading Station KLTR to Channel 236C2. 10 FCC Rcd 7285 (MM Bur. 1995). That decision was based on two grounds. First, the Henderson upgrade would not provide the requisite 70 dBu signal to any part of Caldwell in contravention of Section 73.315(a) of the Rules. Second, the Bryan Broadcasting proposal would comply with all Commission technical requirements and was preferable to a competing proposal that did not comply with Section 73.315(a) of the Rules. Thereafter, the staff denied a Petition for Reconsideration filed by

¹See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom., Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

Henderson, 11 FCC Rcd 5326 (MM Bur. 1996), and we denied an Application for Review, 13 FCC Rcd 13772 (1998). The Memorandum Opinion and Order released February 15, 2000, affirmed our action denying the Application for Review.

3. In his Petition for Reconsideration, Henderson, for the first time, disputes the staff reference to the existing tower at his proposed transmitter site as being 59 meters in height above average terrain (HAAT). Instead, Henderson now claims that this tower is actually 152 meters "tall" and, as such, the Commission should not have denied his proposal on the grounds that he did not demonstrate FAA would approve such a tower. On the basis of our own engineering review of this matter and the engineering exhibit submitted with the Petition for Reconsideration, this Henderson reference in his petition to 152 meters refers to the radiation center of the tower above mean sea level (RCAMSL). This conclusion is based upon the fact that at the tower site, the ground level above mean sea level is 93.8 meters. Coupled with a tower 58.2 meters in height above average terrain, Henderson appears to claim the existence of a 152-meter tower. FAA approval of a tower is based upon its height above ground level (AGL) at a specific location, not its height above mean sea level. The height of a tower above ground level at a specific location approximates the HAAT of a tower that takes into consideration the average terrain in the area. Thus, the FAA would, in this instance, have to approve the construction of a new tower of approximately 150 meters above ground level. There is no basis in the record of this proceeding or the Petition for Reconsideration to suggest that such a tower at this location already exists.

4. In a separate context, Henderson notes that on August 13, 1999, the staff granted an application by Station KRXN (formerly KAMG), Channel 236C1, Victoria, Texas, to downgrade to Channel 236C3 (File No. BPH-990121IE). After the grant of that application, Henderson filed a one-step application on February 24, 2000, to upgrade Station KLTR from Channel 236A to Channel 236C2 at a transmitter site closer to Caldwell. At this new site, Station KLTR operating as a Class C2 facility, would, for the first time, provide Caldwell with the requisite 70 dBu signal as required by Section 73.315(a) of the Rules.² We will not consider the grant of the Station KRXN downgrade application or the subsequent application Henderson in the context of this proceeding. This is because at the time Henderson filed his upgrade proposal and throughout this proceeding, his proposal has not complied with Section 73.315(a) of the Rules.³ Petitions for rule making and counterproposals must be technically correct at the time they are filed. See Broken Arrow and Bixby, Oklahoma, Coffeyville, Kansas, 3 FCC Rcd 6507 (MM Bur. 1988). We will also not permit a rulemaking proponent to perfect its proposal after the comment date to the prejudice of another party in the rulemaking proceeding.⁴

² In this application, Henderson notes that this one-step upgrade application is subject to the final determination in this proceeding. Bryan Broadcasting has filed a Request for Dismissal directed against that application.

³ At the date Henderson filed this application, the licensee of Station KRXN had not filed a license application for the Class C3 construction permit. In this situation, any applicant or rulemaking proponent must protect the Station KRXN Class C1 authorization until the Class C3 authorization is licensed. See Revision of Section 73.315(a) of the Commission's Rules Concerning the Lower Classification of an FM Allotment, 4 FCC Rcd 2413, 2415, (1989).

⁴ We recognize that we considered and evaluated technical information filed by Henderson after the comment

See Santa Margarita and Guadelupe, California, 4 FCC Rcd 7887 (MM Bur. 1989). In view of the above, the grant of the Station KAMG downgrade application does not now warrant revisiting this proceeding in order to favorably consider the Henderson proposal.

5. In response to the Court remand, the staff issued a Request for Supplemental Comments, 14 FCC Rcd 6258 (MM Bur. 1999), in order that our Memorandum Opinion and Order released February 15, 2000, would have the benefit of comments by the parties in this proceeding. In regard to the Request for Supplemental Comments, Henderson refers to the last sentence of paragraph 4 which states as follows:

“In the interest of administrative finality, no information submitted by a party concerning its proposal following the comment period will be deemed of decisional significance.”

In view of this caveat and notwithstanding the filing of his own one-step application, Henderson argues that the subsequent applications by Bryan Broadcasting proposing a transmitter site in compliance with Section 73.315(a) of the Rules cannot be considered in the context of the Memorandum Opinion and Order addressing the Court remand. The filing of a Bryan Broadcasting application in compliance with Section 73.315(a) of the Rules is not of decisional significance in this proceeding. This is because our underlying decision in this comparative rulemaking proceeding was predicated on the Bryan Broadcasting proposal being able to provide the requisite 70 dBu signal to all of College Park. Henderson has not disputed this technical finding. Any favorable finding on the technical aspect of the Bryan Broadcasting application merely confirms an already stated basis for our earlier decision.

6. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Roy E. Henderson IS HEREBY DENIED.

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

8. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

date in this proceeding. However, this did not prejudice Bryan Broadcasting and enabled us to resolve all issues in this proceeding.