

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	
FM Broadcast Stations.)	MB Docket No. 12-92
(Centerville, Midway, Lovelady, and Oakwood,)	RM-11650
Texas))	RM-11679
)	
Applications of Stations KTWL(FM), Hempstead,)	File No. BPH-20120529ADK
Texas (Facility ID No. 21204), and KLTR(FM),)	File No. BPH-20120529ADI
Brenham, Texas (Facility ID No. 40775),)	
to Change Communities of License ¹)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: July 11, 2013

Released: July 12, 2013

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making*,² issued in response to a Petition for Rule Making (the "Petition") filed by Katherine Pyeatt ("Pyeatt"). Also before us are a Counterproposal and "hybrid" applications (the "Counterproposal" and "Applications") filed on May 29, 2012, by Roy E. Henderson ("Henderson"), licensee of Stations KTWL(FM), Hempstead, Texas, and KLTR(FM), Brenham, Texas, and various related pleadings.³ For the reasons discussed below, we grant the Petition by allotting an alternate FM channel at Midway, Texas, and also grant the Counterproposal for a new allotment at Oakwood, Texas. Additionally, we clarify the circumstances under which an otherwise timely filed counterproposal in an FM allotment proceeding may be amended to cure a conflict with a previously filed application under our *Conflicts* rule.⁴ Further, for the reasons set forth below, we bifurcate the Applications from the Counterproposal and will consider the non-mutually exclusive Applications at a later date.

¹ The communities of Lovelady, Oakwood, Hempstead, and Brenham, Texas, have been added to the caption. *See Public Notice*, Report No. 2963 (Sept. 28, 2012) ("*Public Notice*").

² *See Centerville and Midway, Texas*, Notice of Proposed Rule Making, 27 FCC Rcd 3303 (MB 2012) ("*Notice*").

³ These pleadings include (1) Pyeatt's April 11, 2012, Comments; (2) Henderson's October 15, 2012, Amendment to Counterproposal (the "Amendment"); and (3) Pyeatt's October 26, 2012, Reply Comments to Amendment to Counterproposal ("Reply Comments").

⁴ *See* 47 C.F.R. § 73.208(a)(3)(iii), Note (the "Note"). *See also Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report and Order, 7 FCC Rcd 4917 (1992) ("*Conflicts R&O*"), *recon. granted in part and denied in part*, Memorandum Opinion and Order, 8 FCC Rcd 4743 (1993) ("*Conflicts MO&O*").

2. **Background.** The *Notice* proposed the allotment of FM Channel 267A at Midway, Texas, as a first local service. To accommodate the proposed allotment, the *Notice* also proposed the substitution of Channel 232A for vacant Channel 267A at Centerville, Texas. The *Notice* established a deadline of May 29, 2012, for filing counterproposals.

3. In response to the *Notice*, Henderson filed concurrently on May 29, 2012, his Counterproposal and Applications, which are mutually contingent. The Counterproposal requests the allotment of Channel 233A at Oakwood, Texas, as the community's first local service.⁵ In addition, one of the Applications requests a change of community of license for Station KTWL(FM) from Channel 287C3 at Hempstead, Texas, to Channel 287C3 at Todd Mission, Texas, as the community's first local service, and a change of transmitter site.⁶ To prevent the removal of Hempstead's sole local service, the second of the Applications requests an upgrade in the class of channel, a change of transmitter site, and a change of community of license of Station KLTR(FM) from Channel 231C3 at Brenham, Texas, to Channel 231C2 at Hempstead, as a "backfill."⁷ Finally, in order to accommodate the relocation of Station KTWL(FM) to Todd Mission, the Counterproposal also proposes the substitution of Channel 232A for vacant Channel 288A at Lovelady, Texas. The Counterproposal and Applications are mutually exclusive with the *Notice*'s proposal because the Channel 233A allotment at Oakwood and 232A allotment at Lovelady conflict with Channel 232A at Centerville, Texas, under the Commission's minimum distance separation requirements.⁸

4. Although the Counterproposal and the Applications were timely filed vis-à-vis the *Notice*, a conflicting minor modification application (the "Burke Application") was filed on May 21, 2012, to upgrade the class of channel and to change the community of license for Station KAGZ(FM) from Channel 230A at Lufkin, Texas, to Channel 230C2 at Burke, Texas.⁹ Specifically, the Counterproposal was mutually exclusive with the previously filed and cut-off Burke Application because Channel 232A at Lovelady conflicts with Channel 230C2 at Burke under the Commission's minimum distance separation requirements. To resolve this conflict, the staff issued the *Public Notice* on September 28, 2012, providing Henderson an opportunity to amend his Counterproposal within 15 days.¹⁰ On October 15, 2012, Henderson filed the Amendment, seeking to remove the conflict. Specifically, the Amendment modifies the Counterproposal by changing the reference coordinates of vacant Channel 288A at Lovelady instead of substituting Channel 232A for Channel 288A at Lovelady as previously proposed.¹¹

⁵ As required by the Commission's procedures, Henderson filed a construction permit application for Channel 233A at Oakwood and paid the necessary filing fees. See File No. BNPH-20120529AEB.

⁶ See File No. BPH-20120529ADK.

⁷ See File No. BPH-20120529ADI.

⁸ See 47 C.F.R. § 73.207.

⁹ See File No. BPH-20120521BEQ.

¹⁰ See *Public Notice supra* note 1.

¹¹ See Henderson's Amendment to Counterproposal, Exhibit 1.

5. **Discussion. Due Diligence.** Generally, a counterproposal must be technically correct and substantially complete at the time it is filed.¹² However, in the *Conflicts* proceeding,¹³ the Commission established an exception, providing that if an otherwise timely filed counterproposal is in conflict with a previously filed application, the counterproposal can be considered if it is amended to remove the conflict within 15 days from the date the counterproposal appears on public notice.¹⁴ The Note also requires a counterproponent to show that it could not have known of the pending conflicting FM application by exercising due diligence.¹⁵

6. In the Amendment, Henderson claims that he was unaware of the pending Burke Application. In support of this position, Henderson submits a statement from his technical consultant, explaining that (1) the Lovelady portion of the Counterproposal was prepared on May 8, 2012; (2) although the allotment was rechecked after the original search date, this occurred prior to the Burke Application filing on May 21, 2012, and (3) while portions of the Counterproposal were prepared after May 21, 2012, those portions were at different cities of license.¹⁶

7. In her Reply Comments, Pyeatt argues that Henderson did not exercise due diligence. She notes that one of Henderson's spacing studies for Channel 231C2 at Hempstead was dated May 28, 2012, which was one day before the counterproposal deadline of May 29, 2012.¹⁷ Under these circumstances, Pyeatt suggests that Henderson could have run updated spacing studies for all the communities involved on May 28, 2012, and could have learned of the pendency of the Burke Application before filing his Counterproposal and Applications.

8. Although Henderson submitted his Amendment to resolve the conflict within 15 days from the release of the *Public Notice* accepting the Counterproposal, we find that the facts of this case present a close question as to whether he exercised the necessary "due diligence" under the Note that would warrant acceptance of the Amendment. We recognize, as Pyeatt argues that, with the advent of electronic filing of applications, it was possible for Henderson to learn of the conflicting filing before the counterproposal deadline. Specifically, because the May 21, 2012 filing of the Burke Application was announced in a Public Notice on May 24, 2012, Henderson could have conducted an updated spacing study between May 24 and May 29, 2012, and discovered the conflicting application.¹⁸ However, the Note provides a 15-day cure period in which the proponent of an otherwise timely filed counterproposal

¹² See, e.g., *Cloverdale, Alabama*, Memorandum Opinion and Order, 12 FCC Rcd 2090, 2093 (MMB 1997), *app. for rev. denied*, Memorandum Opinion and Order, 15 FCC Rcd 11050 (2000). See also 47 C.F.R. § 73.208(a)(3) (requiring FM rule making petitions and counterproposals to protect existing licenses, construction permits, vacant allotments, and cut-off applications).

¹³ See *Conflicts MO&O*, 8 FCC Rcd at 4745.

¹⁴ See 47 C.F.R. § 73.208(a)(3)(iii), Note.

¹⁵ *Id.*

¹⁶ See Henderson's Amendment to Counterproposal, Exhibit 1, at 1. The technical consultant also states that this complex Counterproposal took weeks to prepare and file. *Id.*

¹⁷ See Pyeatt's Reply Comments at 2.

¹⁸ We also recognize that Henderson may have been able to minimize the risk of a conflict with the Burke Application by submitting his Counterproposal and Applications earlier as suggested in the *Conflicts* proceeding. See *Conflicts MO&O*, 8 FCC Rcd 4745, ¶ 13.

can modify its proposal to protect a conflicting application, provided that it does not introduce a new community.¹⁹ The 15-day cure period reflects the judgment of the Commission that some additional time is necessary for a counterproponent to study the conflict, devise a plan to resolve the conflict, and file an amendment. In this case, Henderson only had five days from the release of the Public Notice until the counterproposal deadline to discover the conflict with the the Burke Application and to address this issue in his Counterproposal. We believe that holding Henderson responsible for identifying and resolving the conflict within such a truncated time period would reduce the 15-day cure period to a nullity. Moreover, the record reveals that Henderson's technical consultant had made efforts to recheck its engineering after the original search date. Given the closeness of the facts on both sides of this due diligence issue, as well as the lack of authoritative Commission guidance,²⁰ we find that the public interest is, on balance, better served in this case by accepting Henderson's Amendment and resolving this case on Section 307(b) grounds than by basing our decision on a tenuous interpretation of the "due diligence" requirement of Section 73.208(a)(3).

9. We also believe that this case presents an opportunity to clarify how we will handle similar matters on a going-forward basis so that parties will have an understanding of what constitutes "due diligence" under the Note. While we recognize that the electronic filing of applications enables prospective counterproponents to learn of the filing of conflicting applications at any time during the 30-day comment period, we also realize that each of these "checks" of the Commission's database can be burdensome and result in additional proponent expenses. Also, the potential for a conflict is not "patent" from a Public Notice announcing the filing of an FM application and requires separate engineering studies, which may prove to be unnecessary if the application is not conflicting. To address these practical difficulties, we adopt a three-pronged test. First, we clarify that prospective counterproponents in FM allotment rule making proceedings are required to take into account all FM application filings "released" by Broadcast Actions Public Notices more than 15 days from the counterproposal deadline. Unacceptable counterproposals under this fact scenario will be dismissed. Such an approach affords parties at least 15 days from the Public Notice of the filing of a potentially conflicting application to identify the conflict and modify the counterproposal, which is a sufficient amount of time and is consistent with that proved by the Note.

10. Second, we also hold that applicants are required to confirm the acceptability of their engineering no more than five business days prior to the counterproposal deadline. If changes to the Commission's database occur between 5 and 15 days from the counterproposal deadline and result in a conflict, the counterproposal must note the conflict and must request release of a Public Notice starting a 15-day cure period. Failure to note a conflict under these circumstances results in dismissal of the counterproposal. Third, we clarify that conflicting applications announced by Broadcast Actions Public Notices less than five business days from the counterproposal deadline do not have to be noted or accounted for in an otherwise timely filed counterproposal. Under these circumstances, we will issue a Public Notice *sua sponte*, and counterproponents will have 15 days to resolve the conflict. Due to the short time frame involved in this last scenario, we will presume diligent applicant conduct. We believe that this three-pronged approach appropriately balances the need for proponents of counterproposals to exercise due diligence in checking for conflicting applications that may be filed during the 30-day comment period with the practical difficulties and costs involved in identifying and resolving conflicts.

¹⁹ 47 C.F.R. § 73.208(a)(3)(iii), Note.

²⁰ We are aware of only one case in which a curative amendment was filed by a counterproponent after the counterproposal deadline to resolve a conflict with a previously filed application, and that case has materially different facts. See *Quannah, Texas, et al.*, Report and Order, 18 FCC Rcd 9495 (MB 2003) (subsequent history omitted) (finding that a counterproponent had not shown it could not have known about a conflicting application filed nearly three months earlier).

We will apply these new procedures to all counterproposals filed in FM allotment proceedings after release of this *Memorandum Opinion and Order*.

11. *Mutual Exclusivity*. Next, Pyeatt argues in her Reply Comments that the Amendment's proposed change in the reference coordinates for vacant Channel 288A at Lovelady, Texas, in lieu of the substitution of Channel 232A for vacant Channel 288A at Lovelady, eliminates the mutual exclusivity between the Applications and the *Notice's* proposed allotment of Channel 232A at Centerville.²¹ Absent this conflict, Pyeatt contends that there is no nexus between these Applications and the *Notice*, thereby rendering the Counterproposal defective.

12. A counterproposal must propose an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made.²² While the Counterproposal's proposed allotment of Channel 233A at Oakwood continues to be mutually exclusive with the *Notice*, we agree with Pyeatt that the Amendment does eliminate the mutual exclusivity between the two hybrid Applications and the *Notice's* proposal. As Pyeatt correctly points out, the only connection between the Applications and the *Notice* is the conflict between the proposed substitution of Channel 232A at Lovelady and the allotment of Channel 232A at Centerville. The Amendment eliminates this conflict by changing the reference coordinates for Channel 288A at Lovelady in lieu of substituting Channel 232A at that community. Under these circumstances, the two hybrid Applications no longer meet the definition of a counterproposal. However, contrary to Pyeatt's contention, the removal of this exclusivity does not render the entire Counterproposal defective. Rather, the portions of the Counterproposal that remain mutually exclusive may be considered on a comparative basis in the proceeding, and the non-mutually exclusive aspects may be considered on a separate basis.²³ Accordingly, we will bifurcate the hybrid Applications from the Counterproposal and consider the Applications separately.

13. *Midway and Oakwood, Texas, Allotments*. As to the merits of this case, we have mutually exclusive proposals, on the one hand for a new allotment on Channel 267A at Midway Texas and a related substitution of Channel 232A at Centerville and, on the other hand, for a new allotment on Channel 233A at Oakwood. Generally, conflicting proposals are considered on a comparative basis consistent with the FM allotment priorities²⁴ where no alternate channels are available. However, we have determined that there is an alternate channel available to accommodate both the Midway and Oakwood allotment requests without the need for a comparative evaluation.²⁵ Specifically, a staff

²¹ See Pyeatt's Reply Comments at 1-2.

²² See *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, Memorandum Opinion and Order, 5 FCC Rcd 931, 933 n.5 (1990).

²³ See, e.g., *Boulder Town, Levan, Mount Pleasant, and Richfield, Utah*, Report and Order, 21 FCC Rcd 4850 (MB 2006), *recon granted in part*, Memorandum Opinion and Order, 25 FCC Rcd 8232 (MB 2010) (granting a portion of a counterproposal to change a station's community of license but bifurcating a proposed new allotment at another community and considering it in a separate proceeding because it is not mutually exclusive with the initial Notice of Proposed Rule Making proposal).

²⁴ The 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). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

²⁵ See, e.g., *Pinewood, South Carolina*, Memorandum Opinion and Order, 5 FCC Rcd 7609 (1990) (explaining that the Commission may consider alternate channels suggested by the parties or by the Commission staff to resolve conflicts between mutually exclusive proposals). Additionally, the *Notice* in this proceeding alerts interested parties that alternate channels may be substituted for either the original proposal or a counterproposal in an FM allotment proceeding. See *Notice*, 27 FCC Rcd at 3304, Appendix.

(continued....)

engineering analysis has determined that Channel 251A can be allotted at Midway in lieu of Channel 267A, which was proposed in the *Notice*. We find that the public interest would be served by allotting Channel 251A at Midway because it would provide a first local service to this community.²⁶ We also find that Midway is a community for allotment purposes because it is incorporated and listed in the Census with a population of 228 persons. It also has a post office, city hall, volunteer fire department, community center, six churches, and fifteen local businesses.²⁷ We also note that the allotment of Channel 251A at Midway eliminates the need for a related channel substitution at Centerville as proposed in the *Notice*. Consequently, we will not substitute Channel 232A for vacant Channel 267A at Centerville.

14. Because the conflict between the Midway and Oakwood proposals has been resolved, we find that the public interest also would be served by allotting Channel 233A at Oakwood as a first local service.²⁸ We find that Oakwood is a community for allotment purposes because it is incorporated and listed in the Census with a population of 510 persons. Oakwood also has a mayor, city hall, municipal court, police force, volunteer fire department, multiple businesses, two public schools, and nine churches.²⁹ Accordingly, we will grant the Petition to the extent of allotting Channel 251A at Midway and the Counterproposal to the extent of allotting Channel 233A at Oakwood.

15. **Ordering Clauses.** Accordingly, pursuant to the authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED that effective September 9, 2013, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, to read as follows:

<u>Communities</u>	<u>Channel No.</u>
Midway, Texas	251A
Oakwood, Texas	233A

16. IT IS ORDERED, that the Petition for Rule Making, RM-11650, filed by Katherine Pyeatt IS GRANTED to the extent indicated above.

17. IT IS FURTHER ORDERED, that the Counterproposal, RM-11679, filed by Roy E. Henderson IS GRANTED to the extent indicated above.

18. The Commission will send a copy of this *Report and Order* in a report to Congress and the

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²⁶ The reference coordinates for Channel 251A at Midway are 31-03-40 NL and 95-45-00 and WL, which are approximately 4.3 kilometers (2.7 miles) north of the community. A staff engineering analysis reveals that Midway is not located in any urbanized area and that the proposed allotment could not be modified to cover 50 percent or more of any urbanized area with a 70 dBu signal.

²⁷ See *Notice*, 27 FCC Rcd at 3303.

²⁸ The reference coordinates for Channel 233A at Oakwood are 31-39-42 NL and 95-52-53 WL, which are located approximately 9.1 kilometers (5.6 miles) south of Oakwood. A staff engineering study demonstrates that Oakwood is not located in any urbanized area and that the allotment could not be modified to cover 50 percent or more of any urbanized area with a 70 dBu signal.

²⁹ See Henderson's Counterproposal at 2.

Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

19. The window period for filing applications for Channel 251A at Midway, Texas, and Channel 233A at Oakwood, Texas, will not be opened at this time. Instead, the issue of opening a filing window for these allotments will be addressed by the Commission in a subsequent order.

20. A copy of this *Report and Order* will be sent to John C. Trent, Esq., Putbrese Hunsaker & Trent, P.C., 200 S. Church Street, Woodstock, VA 22664 (Counsel to Roy E. Henderson); and Katherine Pyeatt, 2215 Cedar Springs Road #1605, Dallas, TX 75201.

21. IT IS FURTHER ORDERED, that this proceeding is terminated.

22. For further information concerning this proceeding, contact Andrew J. Rhodes or Rolanda F. Smith, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

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