

**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

18 NOV 1993

IN REPLY REFER TO:
1800B3-DEB

Valley TV 4
41701 Corporate Way, Suite 4
Palm Desert, CA 92260

Re: KVYZ(FM), Thousand Palms, CA
Rochlis-Johnson Partnership¹
BMPH-931015ID

Dear Applicant:

This letter is in reference to the above-captioned minor change application filed to increase the effective radiated power (ERP) of new unbuilt station KVYZ, Thousand Palms, CA to 0.770 kW, decrease antenna height above average terrain (HAAT) to 179 meters, change the transmitter site by 20.7 km and utilize a nondirectional antenna. This application was timely amended on November 3, 1993 to request processing pursuant to 47 CFR § 73.213(c) in lieu of 47 CFR § 73.207.

Background. The Thousand Palms, CA allotment was created by the Report and Order in Docket 90-12, 5 FCC Rcd 7019 (1990). In Footnote 4 of that document, the Commission's Allocations Branch indicated that, as the petition for rulemaking was filed prior to the October 2, 1989 effective date of the increased spacings in § 73.207, the allotment was being made in accordance with the old spacing limits in § 73.213(c).² Applicants for this allotment were thus entitled to employ the spacing provisions of 47 CFR § 73.213(c) in lieu of § 73.207 toward short-spaced Class B station KTWV, Los Angeles, CA.

Application BPH-910211MH, filed by Rochlis-Johnson Partnership for this vacant allotment, as last amended on May 21, 1992, specified a site located 155.6 km from KTWV. This separation did not meet the minimum 163 km spacing required for processing under § 73.213(c). Accordingly, the amended application requested processing pursuant to the contour protection rule (47 CFR § 73.215) with respect to KTWV. The amendment demonstrated that no prohibited contour overlap existed with KTWV, as required by the rule. The staff found the proposal to be acceptable and granted construction permit BPH-910211MH on June 23, 1992 as a § 73.215 contour protection station.

¹ Pursuant to assignment of construction permit application BAPH-930903GP, it is proposed that KVYZ's construction permit BPH-910211MH be assigned from Rochlis-Johnson Partnership to Valley 4 TV. Valley 4 TV filed BMPH-931015ID with the concurrence of Rochlis-Johnson.

² The increased separation requirements between FM stations were adopted in the Second Report and Order in MM Docket 88-375, 4 FCC Rcd 6375 (1989).

Present application. The pending modification application BMPH-931015ID proposes a new transmitter site, spaced 176.2 km from KTWV. The modification application requests processing pursuant to the grandfathered station rule § 73.213(c), noting that the site proposed exceeds the 163 km spacing requirement of that rule. Moreover, the allotment reference coordinates for the Thousand Palms, CA Channel 234A allotment are spaced closer to KTWV (163.0 km separation) than the proposed transmitter site. Thus, the applicant believes that the application is acceptable for filing and should be granted.

Discussion. 47 CFR § 73.213(c) permits only those stations which did not meet the revised spacing requirements of § 73.207 as of October 2, 1989 to use its provisions concerning permissible minimum spacings. Citing from the rule,

[this rule] does not apply to stations that became short-spaced by applications filed after October 1, 1989, or filed pursuant to § 73.215. (emphasis added).

See 47 CFR § 73.213(c). We note that KVYZ is authorized as a § 73.215 contour protection station by virtue of its original permit BPH-910211MH. Accordingly, it is not entitled to employ the provisions of § 73.213(c).

Moreover, § 73.215 makes no provisions for subsequent filings under § 73.213. Citing from § 73.215(d),

Stations authorized pursuant to this section may be subsequently authorized on the basis of compliance with the domestic minimum separation distance requirements of § 73.207, upon filing of an FCC Form 301 ...requesting a modification of authorization.

Therefore, a § 73.215 licensee or permittee can only apply under § 73.207 if the proposed transmitter site is fully spaced or § 73.215 if the proposed transmitter site is short-spaced. Such an applicant may not employ § 73.213 processing in a later application. KVYZ is limited to use of § 73.207 or § 73.215 in present and future applications.

The fact that the allotment reference coordinates were originally created using the spacings in § 73.213(c) does not alter this result. Where the reference coordinates for an allotment which has been vacant since October 2, 1989 are short-spaced as a result of the changed spacing rules in MM Docket 88-375, an applicant for that allotment may employ § 73.213(c). However, once a construction permit is granted, the allotment reference coordinates cease to be relevant. No protection is afforded to those coordinates after a permit is granted; instead, the coordinates of the permit become the reference point.³ See 47 CFR § 73.208(b). Thus, the fact that Thousand Palms, CA Channel 234A allotment was originally governed by § 73.213(c) has been mooted by the grant of the intervening § 73.215 contour protection permit BPH-910211MH.

³ The allotment reference coordinates remain in the Commission's FM engineering database for use only should the permit or license be cancelled.

Accordingly, the amendment of November 3, 1993 is unacceptable for filing and the application as originally filed, being in violation of 47 CFR § 73.207, is subject to dismissal. However, pursuant to 47 C.F.R. § 73.3522(a)(6), "...an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff." Additionally, 47 C.F.R. § 73.3564(a) states that, "[a]pplications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment." See Appendix B in the Report and Order in MM Docket No. 91-347, 7 FCC Rcd 5074, 57 Fed. Reg. 34872, released July 27, 1992. This letter constitutes your opportunity for corrective amendment pursuant to 47 C.F.R. § 73.3522(a)(6).

Further action on the subject application will be withheld for a period of thirty days from the date of this letter to provide you an opportunity to reply. Failure to respond within this time period will result in the dismissal of the application pursuant to 47 C.F.R § 73.3568(b). Please note that any amendment must be submitted in triplicate to the Secretary of the Commission and signed in the same manner as the original application.

Sincerely,



Dennis Williams
Chief, FM Branch
Audio Services Division
Mass Media Bureau

cc: Rochlis-Johnson Partnership
: Waysdorf & Van Bergh
: Lewis J. Paper