

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 16-320
Table of Allotments,)	RM-11774
FM Broadcast Stations.)	
(Gaylord, Michigan))	
)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: November 9, 2017

Released: November 9, 2017

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making*¹ issued in response to a petition for rule making (Gaylord Petition) filed by N Content Marketing, LLC (Petitioner),² proposing to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, by allotting Channel 246C2 at Gaylord, Michigan.³ Also before us: (1) Roy E. Henderson (Henderson) and Great Northern Broadcasting System, Inc. (Great Northern)⁴ filed a timely counterproposal (Joint Counterproposal);⁵ (2) Smile TV (Smile) filed a counterproposal (Smile Counterproposal);⁶ and (3)

¹ *Gaylord, Michigan*, Notice of Proposed Rule Making, 31 FCC Rcd 11057 (MB 2016) (*Notice*). Notice of this proposed change in community of license was published in the Federal Register. 81 Fed. Reg. 93685 (Dec. 21, 2016).

² Roy E. Henderson, the counter-proponent, is the 100% owner of N Content Marketing, LLC. File No. BNPH-20160817AAQ, Section II, No. 2.

³ Petitioner concurrently filed an FCC Form 301 application and paid the necessary filing fees. File No. BNPH-20160817AAQ.

⁴ Roy E. Henderson wholly owns Great Northern. Joint Counterproposal at n.1.

⁵ The Joint Counterproposal proposes to: (1) relocate WOUF(FM), Beulah, Michigan, to Traverse City, Michigan, on Channel 257C1 (File No. BPH-20161128AFR); (2) relocate Station WLDR-FM from Traverse City, Michigan, to Beulah, Michigan, on Channel 270C1, providing backfill for the WOUF(FM)'s change in community of license (File No. BPH-20161128AFT); (3) require Station WMJZ-FM, Gaylord, Michigan, to move from Channel 268C2 to Channel 246C2; (4) require Station WATZ-FM, Alpena, Michigan, to move from Channel 257C2 to Channel 268C2; (5) implement a voluntary Contingent Facilities Modification Agreement with Station WGLQ(FM), Escanaba, Michigan, to downgrade from Channel 246C0 to Channel 246C1; and (6) drop in new channels at Alpena, Au Gres, Harrisville, and Shelby, Michigan, which includes the following File Nos. BNPH-20161128AFV, BNPH-20161128AFU, BNPH-20161128AFW, and BNPH-20161128AFY. Notice of the proposed change in community of licenses was published in the Federal Register. 81 Fed. Reg. 93685 (Dec. 21, 2016).

⁶ Smile did not file the Smile Counterproposal properly in this docket, MB Docket Number 16-320, and therefore it will not be considered as part of this docket. Counterproposals must be filed either with the Office of the Secretary
(continued....)

WATZ Radio, Inc. (WATZ Radio), licensee of Station WATZ-FM, Channel 257C2, Alpena, Michigan, and Darby Advertising, Inc. (Darby), licensee of Station WMJZ-FM, Channel 268C2, Gaylord, Michigan, both filed timely reply comments object to the Joint Counterproposal.⁷ For the reasons discussed below, we dismiss the Gaylord Petition and the Joint Counterproposal, terminate this proceeding, and afford Smile the opportunity to pursue its FCC Form 301 application, File No. BNPH-20161128AGB, in a separate proceeding.⁸

2. **Background.** In response to the *Notice*, Petitioner did not file comments expressing its interest in pursuing the proposed Channel 246C2 allotment at Gaylord. In opposition to the Joint Counterproposal, WATZ Radio contends that it is against FCC policy for a petitioner to file a counterproposal against its own petition for rule making, as Henderson has done in this proceeding, citing to *Toccoa* and *Ashland*.⁹ WATZ Radio also directs attention to Henderson's alleged past "insincere" allotment rule making efforts and other alleged misrepresentations to the Commission.¹⁰ Moreover, WATZ Radio contends that the Alpena reference coordinates do not provide a reasonable assurance for a suitable transmitter site and endorses the Smile Counterproposal.¹¹ Darby, in its reply comments, similarly notes that Henderson filed the Joint Counterproposal against his own Petition in this proceeding and claims that it is both an abuse of process and an unfair attempt to cut-off potentially superior counterproposals.¹² Darby also states that Petitioner failed to file the required comments in this proceeding expressing a continuing interest in the Petition and that this alone, justifies denial of the Gaylord Petition.¹³ Finally, Darby questions Henderson's past practices, as well as encourages a hearing regarding the matters and requests that both the Gaylord Petition and Joint Counterproposal be dismissed.¹⁴

3. **Discussion.** It is the Commission's policy to refrain from making an allotment to a community absent an adequate expression of interest.¹⁵ Petitioner did not file comments expressing its continuing interest in pursuing the proposed Channel 246C2 allotment at Gaylord. No other party has

(Continued from previous page) _____

or through the Commission's Electronic Comment Filing System, must be served upon the petitioner proposing the new allotment, and must include a certificate of such service. 47 CFR §§ 1.415-1.420. The Media Bureau will hold Smile's FCC Form 301 application, File No. BNPH-20161128AGB, for sixty (60) days from the release of this Order affording Smile the opportunity to file a corresponding petition for rulemaking for Channel 246A at Gerrish, Michigan, reserving it for noncommercial educational use, otherwise the Media Bureau will dismiss Smile's application.

⁷ Henderson and Great Northern opposed WATZ's Objection on March 13, 2017, and WATZ filed a Reply to Opposition to Informal Objection and Comments on March 20, 2016.

⁸ New Beginning Fellowship Church (New Beginning) submitted an informal objection to Petitioner's Form 301 application, File No. BNPH-20160817AAQ, but failed to comply with the requirements to be considered a party to this allotment rule making proceeding. 47 CFR §§ 1.415-1.420; *supra* note 6. The New Beginning informal objection is dismissed.

⁹ WATZ Radio Reply Comments at 3-4 (citing *Toccoa, Georgia, et al.*, Memorandum Opinion and Order, 16 FCC Rcd 21191, 21192, para. 5 (MMB 2001) (*Toccoa*); *Ashland, Greensburg, et. al.*, Report and Order, 21 FCC Rcd 10625, n.8. (MB 2006) (*Ashland*)).

¹⁰ WATZ Radio Reply Comments at 8.

¹¹ *Id.* at 8.

¹² Darby Reply Comments at 2, 3-4.

¹³ *Id.* at n.5.

¹⁴ *Id.* at 5-6.

¹⁵ See, e.g., *Jewett, Texas*, Report and Order, 25 FCC Rcd 16935 (MB 2010); *Laramie and Grand Encampment, Wyoming*, Report and Order, 24 FCC Rcd. 4575 (MB 2009).

expressed an interest for this proposed allotment. Furthermore, Henderson filed the Joint Counterproposal against his own petition as set forth in the *Notice* and provided no reason or explanation as to why the Joint Counterproposal could not have been set forth in the original petition.¹⁶ The policy established in *Taccoa*, requires an explanation such as unforeseen circumstances as to why the counterproposal, filed by an original rule making proponent, could not have been advanced in the initiating petition.¹⁷ The *Taccoa* policy is designed to avoid the unnecessary expenditure of staff resources, without any offsetting public interest benefit, that results when a party proposes two conflicting proposals in a single rule making proceeding.¹⁸ Moreover, the Commission has recognized the potential for abuse where the same party files a petition for rule making and then files its own conflicting counterproposal to cut-off competing petitions or counterproposals from another party.¹⁹

4. The Commission has also held that counterproposals are subject to dismissal if they are not technically or legally correct and substantially complete when filed.²⁰ The rationale for this policy is “to afford all parties an opportunity to fully respond in reply comments.”²¹ The Joint Counterproposal is not technically acceptable: (1) the proposed relocation of WOUF(FM), Beulah, Michigan, to Traverse City, Michigan, on Channel 257C1 would not result in a preferential arrangement of allotments;²² (2) the proposed Channel 256A at Aus Gres is short spaced with FM Station, WFMK(FM), East Lansing, Michigan; and (3) the proposed channel 256A at Alpena, Michigan, is short spaced with FM Station WKLZ(FM), Petoskey, Michigan. Accordingly, we will dismiss both the Gaylord Petition and Joint Counterproposal and provide Smile the opportunity to pursue its FCC Form 301 application, File No. BNPH-20161128AGB,²³ in a separate rule making proceeding, affording the opportunity for the filing of comments and counterproposals.

5. The Commission will not send a copy of this *Report and Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because this proceeding is terminated without the adoption of any rules.

6. IT IS FURTHER ORDERED, That the Petition for Rule Making, RM-11774, filed by N Content Marketing, LLC, IS DISMISSED.

7. IT IS FURTHER ORDERED, That the application, File No. BNPH-20160817AAQ, filed by N Content Marketing, LLC, IS DISMISSED.

8. IT IS FURTHER ORDERED, That the Informal Objection, filed by New Beginning Fellowship Church, objecting to File No. File No. BNPH-20160817AAQ, IS DISMISSED.

¹⁶ Henderson wholly owns the Petitioner, as well as Great Northern. *Supra* note 2, 4.

¹⁷ *Taccoa*, 16 FCC Rcd at 21192, para. 5; *Ashland*, 21 FCC Rcd at 10626 n.8.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Quannah, Texas, et al.*, Memorandum Opinion and Order, 26 FCC Rcd 7159, 7163-64, para.10 (2011); *Lincoln, Missouri, et. al.*, Memorandum Opinion and Order, 17 FCC Rcd 6119, 6123, para. 13 (2002); *Caldwell, Texas, et al.*, Memorandum Opinion and Order, 15 FCC Rcd 20641, 20642, para. 4 (2000).

²¹ *Springdale, Arkansas*, 4 FCC Rcd 674, at 677 n.7; *Eldorado and Lawton, Oklahoma*, Report and Order, 5 FCC Rcd 6737, para. 3 (MMB 1990).

²² WOUF(FM) is a first local service (Priority (3)) at Beulah, Michigan, while the proposed relocation would be an eighth local service (Priority (4)) at Traverse City, Michigan. The FM allotment priorities are (1) first fulltime aural service; (2) second fulltime 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*, Second Report and Order, 90 F.C.C.2d 88, 91-93, paras. 7-13 (1982).

²³ *Supra* note 6; File No. BNPH-20161128AGB.

9. IT IS FURTHER ORDERED, That the Joint Counterproposal, filed by Roy E. Henderson and Great Northern Broadcasting System, Inc., LLC, IS DISMISSED.

10. IT IS FURTHER ORDERED, That applications, File Nos. BPH-20161128AFT, BNPH-20161128AFV, BNPH-20161128AFU, BNPH-20161128AF, and BNPH-20161128AFY, filed by Roy E. Henderson, ARE DISMISSED.

11. IT IS FURTHER ORDERED, That application, File No. BPH-20161128AFR, filed by Great Northern Broadcasting System, Inc., IS DISMISSED.

12. IT IS FURTHER ORDERED, That Smile FM will file a petition for rule making for Channel 246A at Gerrish, Michigan, reserving it for noncommercial educational use, within sixty (60) days of the release of this Order, otherwise application, File No. BNPH-20161128AGB, will be DISMISSED.

13. IT IS FURTHER ORDERED, That the aforementioned proceeding, RM-11774, MB Dkt. No 16-320, IS TERMINATED.

14. For further information concerning this proceeding, contact Adrienne Y. Denysyk, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Nazifa Sawez
Assistant Chief
Audio Division
Media Bureau