

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.)
(Mercedes, San Benito, Brownsville,)
Premont, and Falfurrias, Texas))

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 2005

Released: September 26, 2005

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Clear Channel Broadcasting Licenses, Inc., licensee of Station KHKZ(FM), Mercedes, Texas and Capstar TX Limited Partnership, licensee of Station KTEX(FM) Brownsville, Texas (“Petitioners”) directed to the letter dated June 10, 2005, returning their joint Petition for Rule Making. For the reasons discussed below, we deny the Petition for Reconsideration.

Background

2. In their Petition for Rule Making, Petitioners proposed: (1) the substitution of Channel 292C3 for Channel 292A at Mercedes, Texas, the reallocation of Channel 292C3 to San Benito, Texas as a first local service, and the modification of Station KHKZ’s license to reflect the upgrade and change of community, and (2) the reallocation of Channel 262C0 from Brownsville to Mercedes, Texas, and the modification of Station KTEX’s license to reflect the change of community. To accommodate Channel 292C3 at San Benito, Petitioners proposed the substitution of Channel 287A for Channel 292A at Falfurrias, Texas and modification of Station KPSO-FM’s license to reflect the channel change. To accommodate Channel 287A at Falfurrias, Petitioners proposed the substitution of Channel 292A for vacant Channel 287A at Premont, Texas – without modifying the reference coordinates of the vacant allotment. Commission staff determined that the Petition for Rule Making was unacceptable for consideration because the proposed Channel 292C3 reallocation to San Benito is short-spaced to the proposed Channel 292A substitution of the vacant allotment at Premont.¹

Petition for Reconsideration

3. Petitioners argue that the dismissal of their Petition for Rule Making should be reconsidered because “the only defect was due to the specification of incorrect coordinates [for Channel 292A at Premont] and the current freeze on filing new petitions [for rule makings] necessitates filing this [petition for] reconsideration.”² They now propose new reference coordinates for Channel 292A at Premont to eliminate the short spacing, and state that there is Commission precedent for modifying

¹ 47 C.F.R. § 73.207.

² Petition for Reconsideration at 1. See also *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making*, 20 FCC Rcd 11142 (2005).

reference coordinates of vacant allotments.³ Petitioners assert that there is also precedent for the Media Bureau to modify allotment reference coordinates on its own motion when such modification would serve the public interest, citing *Bayboro, North Carolina* (“*Bayboro*”).⁴

Discussion

4. Section 1.429 of the Commission’s rules⁵ sets forth the limited provisions under which the Commission will reconsider a rulemaking action. Reconsideration is warranted only if the petitioner cites errors of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior action. Petitioners have not set forth any errors of law or facts, nor presented new facts or changed circumstances that would warrant reconsideration. Changes in reference coordinates of vacant allotments are permissible in petitions for rule makings or counterproposals to amend the FM Table of Allotments.⁶ However, Petitioners failed in their Petition for Rule Making to propose the necessary changes in reference coordinates for the vacant allotment at Premont that would comply with our minimum separation requirements. Nor have Petitioners provided any basis for permitting corrected coordinates on reconsideration to outweigh the public interest concerns for technical compliance at the outset to ensure fairness to other parties who file proposals in compliance with our technical rules and the efficient transaction of Commission business.⁷ Petitions for rule making and counterproposals must be technically correct at the time they are filed.⁸

5. *Bayboro* is distinguishable because therein petitioner complied with the Commission’s technical rules for city grade coverage⁹ and minimum distance separation requirements. The staff *sua sponte* specified an alternate site in the notice of proposed rule making because the petitioner had specified a site located in a wetlands area. The alternate site for an otherwise acceptable proposal avoided the necessity of resolving any site suitability issue. In allotment proceedings, the Commission generally requires a petitioner to provide a theoretical site and presumes the suitability and availability of a proposed site unless that presumption is rebutted¹⁰ by a “sufficiently compelling showing.”¹¹ In *Bayboro*, aside from a preliminary staff determination regarding the wetlands, it had not been established that the originally proposed site was, in fact, unsuitable. In this instance, site suitability was not at issue. Rather, Petitioners failed to comply with the Commission’s minimum distance separation requirements. Thus, we affirm the dismissal of Petitioners’ Petition for Rule Making.

6. Accordingly, IT IS ORDERED, That the Petition for Reconsideration IS DENIED.

³ Petitioners cite to *Eldorado, Texas et al.*, 19 FCC Rcd 9179 (MMB 2000) and *Fair Bluff, North Carolina*, 10 FCC Rcd 9255 (MMB 1995).

⁴ Petitioners cite to the *Notice of Proposed Rule Making in Bayboro, North Carolina*, 6 FCC Rcd 4850 (MMB 1991). See also the *Report and Order in Bayboro, North Carolina*, 7 FCC Rcd 6305 (MMB 1992).

⁵ 47 C.F.R. § 1.429.

⁶ See Note 3, *supra*.

⁷ See e.g. *Shorter, Alabama*, 19 FCC Rcd 6844 (MB 2004) (affirming on reconsideration the dismissal of petition for rule making due to short spacing to licensed site).

⁸ See *Caldwell, Texas, et al.*, 15 FCC Rcd 20641 (2000)

⁹ 47 C.F.R. § 73.315.

¹⁰ *San Clemente, California*, 3 FCC Rcd 6728 (MMB 1988) *appeal dismissed sub. nom. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989). See also *San Clemente, California*, 10 FCC Rcd 8291 (1995).

¹¹ *Key West, Florida*, 3 FCC Rcd 6423 (MMB 1988).

7. This document is not subject to the Congressional Review Act. (The Commission, is, therefore, not required to submit a copy of this *Memorandum Opinion and Order* to the Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. Section 801(a)(1)(A), because the proposed petition for rule reconsideration was denied.)

8. For further information concerning this proceeding, contact Helen McLean, Media Bureau, and (202) 418-2738.

FEDERAL COMMUNICATIONS COMMISSION

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