

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-229
Table of Allotments,)	RM-10780
FM Broadcast Stations.)	
(Rosebud and Madisonville, Texas))	

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: February 21, 2007

Released: February 23, 2007

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Gerald Proctor (“Proctor”) directed to the *Report and Order* in this proceeding.¹ Katherine Pyeatt (“Pyeatt”) filed “Reply Comments” opposing the Petition for Reconsideration and Proctor filed a “Reply to Opposition to Petition for Reconsideration.” For the reasons discussed below, we deny the Petition for Reconsideration.

2. The *Notice of Proposed Rule Making*² set forth a proposal filed by Charles Crawford (“Crawford”) to allot Channel 267A at Rosebud, Texas, (“Rosebud Petition”) as that community first local service. To accommodate the Rosebud Petition, a change in reference coordinates for then-vacant Channel 267A at Madisonville was also proposed.³ Following the close of the comment and reply comment dates, Crawford filed a request to withdraw the Rosebud Petition. Thereafter, Pyeatt became the permittee of Channel 267A at Madisonville and filed a construction permit application proposing a different set of coordinates (“Madisonville Application”)⁴ than those proposed in the Rosebud Petition for Channel 267A at Madisonville. Subsequently, Proctor filed “Comments and Expression of Interest” for the Rosebud Petition. The Madisonville Application conflicted with coordinates for a Channel 267A allotment at Rosebud.

3. The *Report and Order* granted Crawford’s request for withdrawal and dismissed as untimely filed Proctor’s expression of interest, stating that it was filed three months after Crawford had withdrawn and more than 20 months past the reply comment deadline.⁵ The *Report and Order* cited to

¹ *Rosebud and Madisonville, Texas*, Report and Order, 21 FCC Rcd 7898 (MB 2006) (“*Report and Order*”).

² *Rosebud and Madisonville, Texas*, Notice of Proposed Rule Making, 20 FCC Rcd 12202 (MB 2005) (“*Notice of Proposed Rule Making*”).

³ *Id.* at 12202. The Rosebud Petition also required the reclassification of Station KNUE as a Class C0 facility. *Id.* See also *Reclassification of License of FM Station KNUE, Tyler, Texas*, Order to Show Cause, 19 FCC Rcd 19711 (MB 2004). As stated in the *Report and Order*, because KNUE’s licensee Capstar Royal II Corp. failed to file the necessary application to implement minimum Class C facilities, its license authorization was modified to specify operation on Channel 268C0 (File No. BLH-19850307KT). *Report and Order*, 21 FCC Rcd at 7898, n.2.

⁴ See File No. BNPH-20060310ACN.

⁵ Pursuant to the *Notice of Proposed Rule Making*, the comment date was September 6, 2005, and the reply comment date was September 20, 2005.

*Butler, Georgia, et al.*⁶, as an example of a petitioner's expression of interest that was dismissed for filing two days past the comment deadline.

4. On reconsideration, Proctor asserts that *Butler* is inapplicable to the facts in the present case. In *Butler*, the Commission stated it will not consider an untimely filed expression of interest in an allotment proceeding where acceptance would cause an adverse impact on a conflicting proposal. Conversely, Proctor contends that the Commission's well-established policy to accept late-filed expressions of interest where there has been no opposition or competing proposal pending,⁷ is applicable in this instance. Proctor asserts that the Madisonville Application is subject to the priority of the earlier filed Rosebud Petition, relying on *West Hurley, New York, et al.*⁸ Thus, Proctor argues that its expression of interest for Channel 267A at Rosebud with the original coordinate changes proposed for Channel 267 at Madisonville should be considered.

5. Generally, the Commission accepts late-filed expressions of interest where the allotment proceedings are not contested and no prejudice would occur to other parties.⁹ Thus, acceptance of Proctor's late-filed expression of interest is not warranted in this case. Crawford's withdrawal of his expression of interest, filed on February 2, 2006, was a matter of public record accessible through the Commission's Electronic Comment Filing System which also showed that there were no timely filed expressions of interest or counterproposals. At the time Pyeatt filed her Madisonville Application on March 10, 2006, the Rosebud Petition had been withdrawn for over a month. As such, this was a rule-compliant application not in conflict with any pending application or rulemaking proposal. Since it is the Commission's policy to refrain from making an allotment to a community absent a bona fide expression of interest, the Madisonville application was not required to protect the proposed Rosebud allotment. On May 8, 2006, two months after the filing of the Madisonville Application, Proctor filed its expression of interest in the Rosebud Petition. To accept Proctor's late-filed expression of interest under these circumstances would prejudice the Madisonville Application. It would also be contrary to *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*,¹⁰ because the Madisonville application was entitled to cut-off protection as of the date of filing with the Commission.

6. We reject Proctor's argument that our decision in *West Hurley* would be applicable to this proceeding. In *West Hurley*, a rulemaking proponent proposed a series of channel substitutions including the substitution of Channel 255A for then-vacant Channel 273A at Rosendale, New York. Thereafter, multiple parties filed applications for the Channel 273A allotment at Rosendale. In accordance with *Conflicts Report and Order*, the transmitter sites proposed in those applications were subject to the outcome of the *West Hurley* proceeding. Subsequently, a party filed a counterproposal proposing Channel 273A at Rhinebeck, New York, along with the identical Channel 255A for Channel 273A substitution at Rosendale. We granted the counterproposal. On reconsideration, we stated that the applicants were on notice that their preferred transmitter sites would not be protected in the context of that proceeding. Unlike *West Hurley*, the underlying proposal for Channel 267A at Rosebud had been abandoned by its sole proponent. As such, there was no notice to a Madisonville applicant that any

⁶ Memorandum Opinion and Order, 21 FCC Rcd 1516 (MB 2006) ("*Butler*").

⁷ Petition for Reconsideration at 2 (citing *e.g. Kingfisher, Oklahoma*, Report and Order, 12 FCC Rcd 8293 (MMB 1997)).

⁸ Memorandum Opinion and Order, 17 FCC Rcd 5339 (MMB 2002) ("*West Hurley*").

⁹ *Santa Isabel, Puerto Rico*, Memorandum Opinion and Order, 3 FCC Rcd 2336 (1998), *aff'd* Memorandum Opinion and Order, 4 FCC Rcd 3412 (1989), *aff'd sub nom. Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990).

¹⁰ Report and Order, 7 FCC Rcd 4917 (1992) ("*Conflicts Report and Order*"), *recon. granted in part*, Memorandum Opinion and Order, 8 FCC Rcd 4743 (1993).

pending proposal would limit its selection of a transmitter site. Under *Conflicts Report and Order*, the Madisonville application was entitled to immediate cut-off protection. Consistent with *Butler*, we will not prejudice the Madisonville applicant by entertaining Proctor's untimely expression of interest in a Channel 267A allotment at Rosebud.

7. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration IS DENIED.

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

9. 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 petition for reconsideration was denied.

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

FEDERAL COMMUNICATIONS COMMISSION

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