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

MM Docket No. 91-348

In the Matter of

Conflicts Between Applications
and Petitions for Rulemaking to
Amend the FM Table of Allotments.

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 28, 1993; Released: July 13, 1993

By the Commission:

1. The Commission has before it a petition for reconsideration of the *Report and Order* in this proceeding, 7 FCC Rcd 4917 (1992), filed on behalf of the Association of Federal Communications Consulting Engineers ("AFCCE"). Comments on the petition were filed by Rosenman & Colin ("R&C"), the Federal Communications Bar Association ("FCBA"), and Communications Technologies, Inc. ("CTI").[1] Reply comments were filed by Paul Reynolds.

BACKGROUND

2. The *Report and Order* determined that FM applications should be entitled to "cut-off" protection from conflicting rulemaking petitions to amend the FM Table of Allotments at some point in time just as rulemaking petitions are protected from subsequently filed rulemaking petitions and applications are protected from subsequently filed applications.[2] Therefore, we amended Section 73.208 of our Rules to provide FM applications with cut-off protection from rulemaking proposals at the same time that they receive such protection from other mutually exclusive applications -- that is, FM applications for new stations or major changes filed during a filing window are protected from rulemaking petitions at the close of the filing window.[3] All other FM applications are protected as of the date they are filed with the Commission. If conflicting rulemaking petitions are filed on or before these cut-off dates, they are considered mutually exclusive with FM applications, and the conflicts are resolved under our existing policy for making substantive choices between conflicting proposals.[4] Rulemaking petitions filed after these cut-off dates must protect the transmitter sites proposed in previously filed FM applications or be subject to dismissal.

SUMMARY OF PLEADINGS

3. *AFCCE's Petition for Reconsideration.* AFCCE requests that we reconsider the new rule insofar as it provides cut-off protection to various types of FM applications on the dates they are filed. AFCCE proposes that we instead adopt a rule cutting off FM applications from rulemaking petitions 30 days after a publicly released notice of acceptance, as initially proposed in the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 7346 (1991).

4. AFCCE contends that cutting off rulemaking petitions on the date an FM application is filed undermines Section 307(b) of the Communications Act of 1934, as amended, because the new cut-off rule substantively changes a system that previously favored rulemaking proposals over applications. Under this system, AFCCE argues, rulemaking petitions were generally favored over applications because they either served higher allotment priorities or would result in a new primary service or a substantial improvement in secondary service while applications usually constituted a less beneficial improvement in secondary service. However, AFCCE asserts that, under the new rule, FM applications will now be favored over rulemaking petitions for new allotments that would serve higher allotment priorities -- such as a first local transmission service -- if the application is filed first. AFCCE believes that such a substantive change should have been considered in a generic rulemaking proceeding that evaluates whether the needs of existing stations for site changes are now greater than the need for new services or upgrades in class of channel.

5. AFCCE also contends that protecting FM applications on the date they are filed can result in inequitable treatment to parties filing counterproposals in rulemaking proceedings to amend the FM Table of Allotments. AFCCE notes that each Notice of Proposed Rule Making in an FM allotment proceeding establishes a time period of at least 30 days for filing counterproposals. However, AFCCE contends that, under the new rule, it is possible that a counterproposal could be filed during that time period and may still be rendered unacceptable because a conflicting FM application was filed earlier.[5] AFCCE asserts that since the Commission announces that it will accept counterproposals

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[1] Mullaney Engineering, Inc. ("Mullaney") filed an untimely petition for reconsideration four weeks after the deadline for submitting petitions for reconsideration set forth in Section 405 of the Communications Act of 1934, as amended, and Section 1.429 of the Commission's Rules. Therefore, it will not be considered as a petition for reconsideration. However, we will consider it as a comment to the extent that it discusses issues raised in AFCCE's petition because the pleading was filed by the deadline for submitting comments in response to petitions for reconsideration.

[2] Prior to the adoption of the *Report and Order,* at any time during the pendency of an FM application, a rulemaking petition for a new FM allotment or an upgrade in the class of an existing FM allotment could be filed that conflicted with the transmitter site proposed in the FM application. This policy is fully explained in the *Report and Order,* 7 FCC Rcd at 4917.

[3] Likewise, applications for new FM stations or major changes in the band reserved for noncommercial educational broadcasting, which are not subject to window filing procedures, are protected at the end of the 30-day period for filing mutually exclusive applications as established in periodically released Commission Public Notices.

[4] *See Report and Order,* 7 FCC Rcd at 4917.

[5] For example, if a Notice of Proposed Rule Making establishes a counterproposal deadline of May 1, and if a conflicting FM

as of a certain date, it cannot, consistent with *Ashbacker Radio Corporation v. FCC,* 326 U.S. 327 (1945), accept only those counterproposals filed prior to a conflicting application.

6. Furthermore, AFCCE alleges that rulemaking petitioners do not receive the same procedural treatment as applicants when the rulemaking petition is filed first. AFCCE states that, unlike applications, rulemaking petitions are not cut off when filed. Indeed, AFCCE contends that the Commission accepts later-filed conflicting applications from four to six months after a petition is filed. AFCCE believes that providing an opportunity for conflicting filings, such as 30 days after public notice of the filing of petitions and 30 days after public notice of the acceptance of applications, would be more equitable to parties filing counterproposals.

7. Finally, AFCCE contends that the new rule imposes a difficult burden on parties preparing rulemaking petitions because they will often not know that a conflicting application has been filed. AFCCE claims that the public is not aware of the filing of an application until public notice is given and the Commission's database is updated and published, which generally takes approximately three to four weeks. Although AFCCE recognizes that, in some cases, it may be possible to refile the petition to avoid the conflict, this is not true in the case of counterproposals, since counterproposals must be technically and procedurally correct when filed and cannot be revised.[6]

8. *Comments.* Five comments and one reply comment were filed in response to AFCCE's petition for reconsideration. R&C, CTI, and Reynolds agree that FM applications should not be given cut-off protection on the dates they are filed. They argue that the lag time between the filing of an FM application and both its appearance in the Commission's FM Database and its publication in a commercially available database make it difficult to prepare rulemaking petitions and advise clients. As a result, R&C and CTI believe that, at a minimum, the rule should be modified so that FM applications do not receive cut-off protection until 30 days after public notice of acceptance for filing. Alternatively, both Reynolds and CTI suggest that FM applications be given cut-off protection as against rulemaking petitions 30 days after the applications appear in commercially available databases.[7]

9. The FCBA addresses and supports AFCCE's contention that the prior filing of an application may render an otherwise timely filed counterproposal unacceptable. It believes that this places an unfair burden on parties desiring to file otherwise legitimate counterproposals and on attorneys advising their clients on when to file. The FCBA believes that this new rule in effect has taken away the "reasonable time" period provided for the filing of comments as set forth in Section 1.415(b) of the Commission's Rules, which implements Section 553 of the Administrative Procedure Act. As an alternative, the FCBA suggests that the Commission should not protect applications filed during a rulemaking comment period as against timely filed counterproposals. Rather, such applications should be considered as conflicting proposals and evaluated on their merits in the context of the rulemaking proceeding.

10. NAB and Mullaney support the new rule. They believe that it will give existing broadcasters the ability to apply for upgrades of their facilities without fear of their applications being blocked by a subsequent rulemaking petition.[8]

DISCUSSION

11. After carefully reviewing AFCCE's petition and the comments filed in response thereto, we continue to believe that the public interest is best served by retaining the cut-off rules adopted by the *Report and Order* in their current form. As we will explain below, we are not convinced that cutting off certain FM applications on the dates they are filed will create the problems alleged by AFCCE. On the contrary, providing additional time for the filing of rulemaking petitions would disserve the public interest. It would result in additional rulemaking/applications conflicts and would cause unnecessary and undesirable uncertainties and delays for FM applicants without an offsetting public benefit. We will address each of AFCCE's contentions separately.

12. *Section 307(b).* We do not agree with AFCCE's contention that our new cut-off rule violates Section 307(b) of the Act because it substantively changed a system that favored rulemaking proposals over applications. In both proposing and adopting a rule that provides cut-off protection to FM applicants from subsequently filed rulemaking petitions, we did not alter any of the substantive policies and Commission precedent for choosing between mutually exclusive rulemaking proposals and FM applications. Rather, as we stated in the *Report and Order,* rulemaking petitions filed on or before the various cut-off dates in Section 73.208 of the Rules will be considered under existing Commission precedent. What we have done, however, is to establish a deadline for filing rulemaking petitions so that FM applicants will not be exposed for a lengthy and unpredictable period of time to potentially conflicting rulemaking proposals. If resources permitted us to grant an application within a few days of a filing date or the close of a filing window, such an act would preclude the filing of a mutually exclusive petition for an allotment. Our rule compensates for inequities imposed by resource constraints. While this rule limits the filing of petitions, it does not violate Section 307(b) of the Act because it does not eliminate a party's ability to file a rulemaking proposal which may serve a higher allotment priority under Section 307(b) of the Act than a conflicting FM application. Furthermore, it is well established that the Commission has the authority to adopt procedural cut-off rules in order to promote the goals of administrative orderliness and finality. *Cf. Ashbacker Radio Corporation v. FCC,* 326 U.S. 327, 333 n.9

application is filed and given cut-off protection on April 30, then that application is entitled to cut-off protection as against a counterproposal filed after that date.

[6] The Commission's staff has held that counterproposals must be technically correct and substantially complete when filed. *See, e.g., Eldorado and Lawton, OK,* 5 FCC Rcd 6737 (Policy and Rules Div. 1990), and cases cited therein.

[7] Reynolds also comments on the *Notice of Proposed Rule Making* in MM Docket 92-159, 7 FCC Rcd 4943 (1992) and its relationship to the instant proceeding. These matters are more appropriately considered in MM Docket 92-159.

[8] As requested in a petition for rule making (RM-7933) filed on February 10, 1992, NAB also urges the Commission to consider other rule changes that would advance the interests of stations seeking to upgrade facilities. These matters are not properly before us in this proceeding and will be addressed separately.

(1945). Without such rules, it would be difficult for the Commission to process and grant applications or rulemaking petitions. Likewise, our case law recognizes that Section 307(b) of the Act is not violated if a rulemaking petition or counterproposal is dismissed for being filed after a deadline even though, as a substantive matter, the petition or counterproposal might be preferable to those filed prior to the deadline. *See Pinewood, NC,* 5 FCC Rcd 7609, 7610 (1990). Accordingly, we reject AFCCE's contention that the new cut-off rule violates Section 307(b) of the Act.

13. *Impact on Counterproposals.* We recognize that AFCCE is correct that, under the new rule, a counterproposal filed before the counterproposal deadline in an FM allotment proceeding could be rendered unacceptable because a conflicting FM application was filed earlier. However, we do not believe that this is inequitable because potential petitioners do not have to wait to the end of the comment period to file their counterproposals. While parties may desire to file on the last day of a comment period to minimize the possibility that other counterproposals may be filed, or for other tactical reasons, they do so at a risk that an application could be filed earlier. This risk could in large part be minimized by filing a counterproposal at the earliest possible time, rather than waiting for the comment period to expire. Indeed, rulemaking petitioners could protect themselves by filing their proposals as initial petitions for rule making in lieu of waiting for a proceeding in which to file them as counterproposals. We see no public interest reason to alter the rule adopted simply to preserve potential tactical ploys by petitioners. Further, the new cut-off rule does not remove the ability of anyone to file comments under Section 1.415(b) of the Commission's Rules or Section 553 of the Administrative Procedure Act. While these sections permit interested parties to participate in rulemaking proceedings, they do not guarantee that a counterproposal will be accepted if it conflicts with other reasonable, procedural rules.

14. Likewise, we do not believe that the new rule violates *Ashbacker Radio Corporation v. FCC,* 326 U.S. 327 (1945). In essence, *Ashbacker* requires the Commission to treat similarly situated, *bona fide* applications or petitions in a like manner.[9] We believe that the new rule meets this requirement because it treats both initial rulemaking petitions and counterproposals in the same manner. The new rule requires that either type of petition be filed on or before the date that a conflicting FM application is filed to receive cut-off protection. On the contrary, if we did not protect FM applications filed during a counterproposal filing period, we would be giving counterproposals more protection than initial petitions. Moreover, *Ashbacker* does not preclude the Commission from adopting cut-off rules.[10]

15. Furthermore, the FCBA's suggestion that FM applications not be protected from subsequently filed rulemaking petitions on the date the applications are filed but at the end of the period for the filing of counterproposals is simply unworkable. It is impossible for the staff to determine if the grant of a specific application will conflict with all potential counterproposals that might be filed in response to pending rulemaking proposals. Nor does there appear to be any apparent limit to the length of time that an application must be held under this proposal since new rulemaking petitions are constantly filed, and constantly result in new comment deadlines. Each comment deadline, in turn, would create the opportunity for a potentially conflicting counterproposal. Accordingly, we do not believe that it is workable to protect FM applications at the end of counterproposal filing periods. In addition, no valid reason has been presented for departing from our conclusion in the *Report and Order* that a 30-day period for submitting rulemaking petitions after an FM application has been accepting for filing is less desirable than the rule we adopted. As we stated in the *Report and Order,* such an approach would create additional application/rulemaking conflicts, unnecessarily exposing FM applicants to additional delays and uncertainties.

16. However, in recognition of the potential difficulties created by the new cut-off rule, if the filing of a conflicting FM application renders an otherwise timely filed counterproposal unacceptable, we will permit the counterproposal to be considered in the rulemaking proceeding if it is amended within 15 days after being placed on the Public Notice routinely issued by the staff concerning the filing of counterproposals, to protect the transmitter site of the previously filed FM application. Consistent with our current procedure, however, no proposals involving communities not already included in the proceeding can be introduced during the reply comment period as a method of resolving conflicts. We will require the counterproponent to make a showing that, at the time it filed the counterproposal, it did not know, and could not have known by exercising due diligence, of the pendency of the conflicting FM application.[11] [12]

17. *Impact on Rulemaking Petitions.* AFCCE is also correct in noting that, under the new rule, rulemaking petitions do not receive the same procedural treatment as FM applications because FM applications, unlike rulemaking

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[9] *Ashbacker* specifically held that, if two mutually exclusive applications are pending, the grant of one application without a hearing to both deprives the other applicant of its right to a hearing under Section 309 of the Communications Act.

[10] *See Ashbacker Radio Corporation v. FCC,* 326 U.S. at 333 n.9.

[11] Section 73.208(a) of the Commission's Rules will be amended to include a Note stating this exception. The Appendix to this *Memorandum Opinion and Order* indicates the amended language. This amendment does not affect the Final Regulatory Flexibility Analysis included in the *Report and Order* in this proceeding.

[12] We also note that a rulemaking petitioner who seeks an upgrade that would conflict with a previously filed and cut-off FM application may be able to achieve an upgrade by proposing the allotment of an alternate channel for the applied-for frequency, so long as the transmitter site of the application is protected. Our current process allows such a result with respect to authorized FM stations, and we see no reason to give applicants any greater degree of protection. Likewise, as we stated in both the *Notice of Proposed Rule Making* and the *Report and Order* in this proceeding, the staff will attempt prior to dismissing a rule making petition to resolve any conflict between that petition and a previously cut-off FM application by imposing a site restriction on the rulemaking petition. The staff will also attempt to resolve conflicts between a rulemaking petition and a later-filed FM application by imposing a site restriction on the proposal in the petition, or by allotting an alternate channel for that proposed in the petition, whenever it is possible to do so without prejudice to a timely filed FM application or rulemaking petition.

petitions, can be given cut-off protection on the dates they are filed. However, we do not believe that this disparity warrants modifying our new cut-off procedures. The disparity is the result of inherent differences between the rulemaking and application processes. Since a petition to amend the FM Table of Allotments is subject to notice and comment rulemaking procedures, it cannot be given cut-off protection from other rulemaking petitions or counterproposals until a period for filing counterproposals has elapsed. However, an FM minor change application can be given cut-off protection on the date it is filed as against subsequently filed applications and could be granted as soon as it is received.

18. *Database Concerns.* Although AFCCE contends that the new rule imposes an unfair burden on parties preparing rulemaking petitions because they will often not know that a conflicting FM application has been filed, we do not believe that the rule unfairly treats rulemaking petitioners. On the contrary, both prospective rulemaking petitioners and applicants are treated the same in terms of accessibility to information. Consequently, concerns about unfairness deriving from the availability of information in the Commission's FM Database do not warrant modifying our new rule.[13]

19. *Conclusion.* We do not believe that providing cut-off protection to certain types of FM applications on the dates they are filed as against subsequently filed rulemaking petitions will unfairly prejudice parties seeking to file rulemaking petitions. On the contrary, we are of the view that providing an additional 30-day period for the filing of rulemaking petitions after an FM application has been accepted for filing will result in additional rulemaking/application conflicts, thereby unnecessarily exposing applicants to precisely the delays and uncertainties that this proceeding was intended to obviate.

20. Accordingly, IT IS ORDERED, That the petition for reconsideration filed on behalf of the Association of Federal Communications Consulting Engineers IS GRANTED IN PART AND DENIED IN PART.

21. IT IS FURTHER ORDERED, That Section 73.208(a) of the Commission's Rules IS AMENDED as set forth in the Appendix below, effective 30 days after publication of a summary in the Federal Register.

22. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Mullaney Engineering, Inc. IS DISMISSED.

23. IT IS FURTHER ORDERED, That MM Docket No. 91-348 IS TERMINATED.

24. For further information, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[13] As a general matter, we note that the FM Database constitutes an unofficial listing of data. *See* 47 C.F.R. § 0.434(e).

APPENDIX

Rule Changes

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 73 - Radio broadcast services

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154 and 303.

2. Section 73.208 is amended by adding a note at the end of paragraph (a) to read as follows:

Section 73.208 Reference points and distance computations.

(a) * * *

Note: If the filing of a conflicting FM application renders an otherwise timely filed counterproposal unacceptable, the counterproposal may be considered in the rulemaking proceeding if it is amended to protect the site of the previously filed FM application within 15 days after being placed on the Public Notice routinely issued by the staff concerning the filing of counterproposals. No proposals involving communities not already included in the proceeding can be introduced during the reply comment period as a method of resolving conflicts. The counterproponent is required to make a showing that, at the time it filed the counterproposal, it did not know, and could not have known by exercising due diligence, of the pendency of the conflicting FM application.

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