

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

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| In the Matter of |) |
| |) |
| Amendment of Section 73.202(b), |) MM Docket No. 94-78 |
| Table of Allotments, |) RM-8472 |
| FM Broadcast Stations. |) RM-8525 |
| (Cloverdale, Montgomery |) |
| and Warrior, Alabama) |) |

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1997

Released: February 21, 1997

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by William P. Rogers ("Rogers") of the Report and Order¹ in this proceeding. North Jefferson Broadcasting Company, Inc., the licensee of Station WLBI(FM), Channel 254C3, Warrior, Alabama, and Deep South Broadcasting Company, the licensee of Station WBAM-FM, Channel 255C, Montgomery, Alabama, (jointly referred to as "WLBI/WBAM") filed an Opposition to Rogers' Petition for Reconsideration.² For the reasons discussed below, we deny Rogers' Petition for Reconsideration.

2. Background. The Notice of Proposed Rule Making ("NPRM") in this proceeding³ was issued in response to a petition for rulemaking filed on behalf of Pulaski Broadcasting, Inc. ("Pulaski") and proposed the allotment of FM Channel 254A to Cloverdale, Alabama. In response to the NPRM, several counterproposals were filed, including that of Rogers.⁴ Rogers

¹ 10 FCC Rcd 13630 (Allocations Br. 1995).

² WLBI/WBAM also filed a "Motion for a Waiver of Automatic Stay." Rogers filed an Opposition to the foregoing motion and a request that such Opposition also be treated as Rogers' Reply to WLBI/WBAM's Opposition to Rogers' Petition for Reconsideration. WLBI/WBAM filed a Reply to Rogers' Opposition to WLBI/WBAM's motion. For reasons stated below, we dismiss WLBI/WBAM's motion as moot.

³ 9 FCC Rcd 3311 (Allocations Br. 1994).

⁴ Ultimately, a joint counterproposal filed by WLBI/WBAM was granted, pursuant to which Channel 254C1 was substituted for channel 254C3 at Warrior, Alabama, and the license for

requested the allotment of Channel 254A to Florence, Alabama. The Report and Order in this proceeding did not accept Rogers' counterproposal for three reasons. First, the staff found that Rogers' counterproposal is short-spaced to the licensed site of Station WZLQ(FM), Channel 253C1, Tupelo, Mississippi. Although Rogers' counterproposal met the minimum distance separations requirements to the construction permit issued to Station WZLQ(FM) (File No. BPH-9308121B), that authorization had expired at the time the Report and Order was adopted. Second, Rogers' counterproposal did not provide a 70 dBu contour over the entire principal community to be served, as required by Section 73.315 of the Commission's Rules. Rogers argued that it would provide coverage over 88 percent of Florence and that such coverage substantially complies with the provisions of Section 73.315(a) of the Commission's Rules, citing Barry Skidelsky, 70 RR 2d (P&F) 722 (Rev. Bd. 1992). Nevertheless, the Report and Order ruled that Rogers' reliance on Barry Skidelsky was misplaced because that case involved a request for waiver of Section 73.315 of the Rules at the application stage and the Commission has required 100 percent city grade coverage at the allotment stage. Third, the Report and Order found that Rogers improperly used terrain enhancement to demonstrate coverage of Florence, which is permitted only for existing stations at the allotment stage, citing Woodstock and Broadway, Virginia, 3 FCC Rcd 6398 (1988).

3. Petition for Reconsideration. Rogers filed a Petition for Reconsideration of the Report and Order, claiming that the staff erred in dismissing his counterproposal for the three grounds stated above. First, Rogers asserts that the staff should not have considered the short-spacing to Station WZLQ(FM)'s licensed transmitter site because the licensee of Station WZLQ(FM) has a construction permit for a new transmitter site which is not short-spaced to the Florence proposal. Rogers argues that even though the referenced construction permit has expired, it has not been deleted by the Commission and therefore it remains in effect.⁵ Rogers also asserts that the licensee of Station WZLQ(FM) has, in fact, completed construction at its new site and is filing a license application on FCC Form 302. Second, with regard to the 70 dBu coverage of Florence, Alabama, Rogers contends that there is no logical reason why 80 percent coverage of a community is insufficient for allotment purposes but sufficient for application processing purposes. In this regard, Rogers claims that the Commission has made allotments where no transmitter site was available from which the predicted city grade contour would reach the entire community of license, citing Oak Beach and Bay Shore, N.Y. (Bay Shore), 57 RR 2d 1275 (Policy and Rules Div. 1985) and Woodstock and Broadway, Virginia, (Woodstock), 2 FCC Rcd 7064, 7065 n.2 (Policy and Rules Div. 1987). Third, Rogers contends that he should be allowed to use terrain factors to enhance the predicted propagation of his 70 dBu signal.

Station WLBI(FM) was modified accordingly. To accommodate this upgrade, the Commission substituted Channel 255C1 for Channel 255C at Montgomery, Alabama, and modified the license for Station WBAM-FM to specify the lower class of channel. The foregoing changes will result in a significantly expanded coverage area for Station WLBI(FM) at Warrior, Alabama. In addition, the Report and Order dismissed Pulaski's petition for the reasons stated in footnote 2 of that document.

⁵ Rogers cites Baker v. FCC, 834 F.2d 181 (D.C.Cir. 1987) for this proposition.

4. WLBI/WBAM filed an Opposition to Rogers' Petition for Reconsideration in which they disagree with each of Rogers' contentions. They argue, *inter alia*, that Rogers' Florence counterproposal should be rejected because it would not provide 70 dBu coverage to the entire community of Florence and would thus violate Section 73.315(a) of the Commission's Rules. WLBI/WBAM also note that the licensee of Station WZLQ(FM), San-Dow, filed an application for replacement of an expired construction permit on November 21, 1995, which is more than 30 days after the expiration date of the authorization and in violation of Section 73.3534(e) of the Commission's Rules. WLBI/WBAM argue that the Commission should not reconsider the expiration of the WZLQ(FM) authorization and grant Rogers' Florence counterproposal if doing so would alter WLBI's authorization to operate on Channel 254C1 as ordered in the Report and Order. WLBI/WBAM contend that the grant of authority to WLBI to operate on Channel 254C1, in part because of the expiration of the WZLQ(FM) authorization, is a perfect illustration of the Commission's concern with providing expeditious service to the public and therefore should not be rescinded.

5. After having reviewed all the facts, circumstances, and arguments raised by the parties, we have decided to affirm the Report and Order in this proceeding in all respects. First, we concur that Rogers' counterproposal does not provide 70 dBu coverage to Florence as required by Section 73.315(a) of the Rules and that Rogers has failed to present any compelling reason for waiving that coverage rule. It is standard Commission practice to deny waivers of Section 73.315(a) of the Rules at the allotment stage. See Greenwood, Seneca, Aiken and Clemson, South Carolina, and Biltmore Forest, North Carolina (Greenwood), 3 FCC Rcd 4108 (1988). In Greenwood, the Commission explained that it is only at the application stage that it has before it the information necessary to make informed judgments regarding requests for waiver of the city grade coverage requirement.⁶ Further, as WLBI/WBAM observes, the Greenwood case states: "The Commission generally cannot, in the course of rulemaking proceedings, evaluate the actual transmitter sites that will be specified in applications not yet filed."⁷ We note that in Bay Shore, supra, the Commission waived the city grade coverage requirement in the rule making context because the evidence in that case showed that there was only one site from which to operate a station serving the affected community and thus no reason to limit consideration of a Section 73.315(a) waiver to the application stage.⁸ No similar facts are presented here. Second, we observe that the Commission's rationale for not permitting the petitioner in a rulemaking proceeding for an allotment for a new station to use terrain

⁶ Greenwood at 4109.

⁷ Id.

⁸ Further, we note that in Woodstock, supra, 2 FCC Rcd 7064, 7065 n. 2, the Commission explained that, in recent years, the only situation other than Bay Shore where a waiver was granted was in Docket 84-231, Memorandum Opinion and Order, 59 RR 2d 679 (1985). There, the Commission granted waiver of its city grade requirements due to the uniqueness of the proceeding and noted that it was waiving those requirements "for that proceeding only."

enhancement to demonstrate coverage of the city of license is the lack of certainty as to the eventual transmitter site location. See Woodstock and Broadway, Virginia, 3 FCC Rcd 6398 (1988). Therefore, we affirm the staff's ruling that Rogers cannot use terrain enhancement to demonstrate coverage of Florence at the allotment stage.

6. Third, even if the licensee of Station WZLQ(FM) had filed a timely request to reinstate the expired construction permit, the Commission would not be under any obligation to withhold action in this proceeding until it determines whether to reinstate the construction permit in question and the facilities authorized under that permit are built and licensed. Counterproposals are required to be "technically correct and substantially complete" at the time they are filed. See, e.g., Fort Bragg, California, 6 FCC Rcd 5817 (Allocations Br. 1991), Provincetown, Dennis, Dennis Port, West Yarmouth and Harwich Port, Massachusetts, 8 FCC Rcd 19 (Policy and Rules Div. 1992), and Sanford and Robbins, North Carolina, 12 FCC Rcd 1 (Allocations Br. 1997). Clearly, Rogers' counterproposal was not technically correct and substantially complete at the time it was filed, because it was short-spaced to the licensed site of Station WZLQ(FM). Further, proposals and counterproposals are supposed to be capable of being effectuated at the time they are granted and cannot be contingent upon future actions by third parties. In this regard, since some authorized facilities are never built and licensed, we cannot assume that such facilities are in existence for the purpose of resolving related rulemaking matters. See, e.g., Cut and Shoot, Texas, 11 FCC Rcd 16383 (Policy and Rules Div. 1996). Finally, we observe that even if Station WZLQ(FM)'s expired construction permit were reinstated and the facilities authorized by that permit were built and licensed at the time Rogers filed his counterproposal, we would still deny Rogers' counterproposal because it fails to comply with Section 73.315(a) of our Rules. See, e.g., Terrell and Daingerfield, Texas, 5 FCC Rcd 556 (1990).

7. Motion for a Waiver of Automatic Stay. At the time Rogers filed his petition for reconsideration, Section 1.420(f) of the Commission's Rules stated that the filing of a petition for reconsideration of an order modifying an authorization to specify operation on a different channel automatically stayed the effect of a change in the rules pending action on the petition. WLBI/WBAM correctly assumed that this rule would stay the effect of an upgrade for Warrior on Channel 254C1 and a downgrade to Channel 255C1 for Montgomery. Therefore, WLBI/WBAM filed a Motion for a Waiver of Automatic Stay on February 15, 1996, in which they ask the Commission to remove the automatic stay and enable them to file their Form 301 applications for the Class C1 channels. On August 8, 1996, the Commission released a Report and Order in MM Docket No. 95-110⁹ deleting the portion of former Section 1.420(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), that provides for the automatic stay in question. Further, that Report and Order states that the Commission would apply this procedural change to pending proceedings, thereby lifting automatic stays in effect pursuant to the former rule on the date the procedural change takes effect. Since this procedural change is now in effect, the automatic stay imposed in this proceeding pursuant to former Section 1.420(f) of the Rules has

⁹ 11 FCC Rcd 9501 (1996).

been lifted. Accordingly, the referenced Motion for a Waiver of Automatic Stay is dismissed as moot.

8. In view of the above, IT IS ORDERED, That the Petition for Reconsideration filed by William P. Rogers IS DENIED and the Motion for a Waiver of Automatic Stay filed by North Jefferson Broadcasting Company, Inc. and Deep South Broadcasting Company, Inc. IS DISMISSED as moot.

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

10. For further information concerning the above, contact R. Barthen Gorman, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau