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Federal Communications Commission

FCC 98-69

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

In the Matter of)
)
)
Implementation of the AM Expanded) MM Docket No. 87-267
Band Allotment Plan)

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1998

Released: April 28, 1998

By the Commission:

1. The Commission has before it two petitions for reconsideration of *Implementation of the AM Expanded Band Allotment Plan*, 12 FCC Rcd 3361 (1997) ("Order III") filed by Press Broadcasting, Co., Inc., licensee of WBUD(AM) and WKXW(FM), Trenton, New Jersey and WBSS-FM, Millville, New Jersey ("Press")¹ and Kovas Communications, Inc., licensee of WONX(AM), Evanston, Illinois. *Order III* is the fourth reconsideration action in this proceeding to improve and revitalize the AM broadcast band and to license stations in the frequencies between 1605 and 1705 kHz, the "Expanded Band." *See Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991) ("AM Improvement Order"), *recon. granted in part and denied in part*, 8 FCC Rcd 3250 (1993) ("Reconsideration Order"), *recon. granted in part and denied in part*, 10 FCC Rcd 12143 (1995) ("Order I"), *recon. denied*, 11 FCC Rcd 12444 (1996) ("Order II"), *recon. granted in part and denied in part*, *Order III*, 12 FCC Rcd 3361 (1997).² For the reasons set forth below, we deny the Press and Kovas petitions.

BACKGROUND

2. The Commission has crafted a three-part process to identify the best station candidates for potential migration to the Expanded Band and assign specific frequencies to these migrators. Initially, the staff comparatively ranked the approximately 700 AM stations that expressed an interest in 1993 in migrating to the Expanded Band. Rankings were based on each station's "interference improvement factor," a measure of the extent to which a station's authorized facilities causes and receives interference. Secondly, a frequency preclusion program eliminated from consideration on a station-specific basis those allotments which could not be assigned in conformance with technical and international treaty requirements. Finally, the allotment program matched allotments to migrators, beginning with the stations with the highest interference improvement rankings.

¹ On January 14, 1998 Press completed a corporate reorganization and assigned these licenses to Press Communications, LLC. File Nos. BAL-970603IB, BALH-970603IC and BALH-970603ID. "Press" is used herein to refer to both entities.

² See *Order III*, 12 FCC Rcd at 3361, for a more detailed summary of prior actions taken in this proceeding.

3. *Order III* rescinded the second allotment plan, modified both the frequency preclusion and allotment programs, and clarified the second harmonic interference standard used in the frequency preclusion program. The Mass Media Bureau concurrently issued the Third Allotment Plan. See *Public Notice, Mass Media Bureau Announces Revised AM Expanded Band Allotment Plan and Filing Window for Eligible Stations*, 12 FCC Rcd 3185 (M.M. Bur. 1997) ("*Public Notice III*"). *Public Notice III* listed specific allotments for the eighty-eight stations eligible to receive Expanded Band assignments and invited the filing of construction permit applications.³ As a result of the computer program revisions adopted in *Order III*, nine stations listed in the second allotment plan lost allotments, ten new stations became eligible for migration and nineteen stations changed frequencies. The dual frequency authorizations which potential migrators obtain will expire in five years. At that time either the existing or Expanded Band authorization must be submitted for cancellation.

THE PETITIONS FOR RECONSIDERATION

4. **The Press Petition.** On May 16, 1996 Press filed a petition for reconsideration (the "1996 Petition") of *Order II*. It argued that technical and marketplace developments since the 1991 *Report and Order* have made unnecessary a five-year transition period for dual frequency operations. In its place it recommended a six-month transition period. Press also questioned the Commission's interference improvement rankings of potential migrators on the basis of construction permits and, more generally, the Commission's reliance on a frozen 1993 database for generating the Expanded Band allotment plan. Finally, Press complained that this proceeding has been inattentive to the Section 307(b) mandate to provide a "fair, efficient, and equitable distribution" of radio services.⁴

5. *Order III* dismissed the 1996 Petition as "untimely." Press now contends that the 1996 Petition was timely filed and therefore, that the Commission must reach the substantive issues raised therein. Press concedes that the 1996 Petition raises issues "not directly discussed" in *Order II*. However, it argues that reconsideration of the five-year transition time frame is particularly appropriate in connection with an order directed to the implementation of the Expanded Band licensing plan.

6. Press filed its original Petition on May 16, 1996, less than 30 days after *Order II* was published in the Federal Register. Therefore, the 1996 Petition was timely filed. However, the Commission previously considered and rejected every argument raised by Press in its 1996 Petition. Moreover, none of the policy determinations challenged by Press was modified in *Order II*. Accordingly, the petition is, in any event, subject to dismissal. See 47 C.F.R. § 1.429(i) (limiting subsequent reconsiderations to modifications made to original order on reconsideration). The five-year transition period was adopted in 1991 based on the technical and economic uncertainties of implementing new service in the AM Expanded Band. See *Report and Order*, 6 FCC Rcd at 6320. In response to several petitions, the Commission rejected on reconsideration both a shorter transition period and an allotment plan that would favor immediate migrators as a policy that would "tend to forego greater long term

³ Sixty-seven construction permit applications were filed by stations listed in *Public Notice III*. The staff has granted approximately fifty-five of these applications and will complete its processing of the remaining applications in the next several weeks.

⁴ In June 1993, Press filed with the Commission an expression of interest on behalf of WBUD, Trenton, New Jersey for an AM Expanded Band allotment. None of the three allotment plans has included WBUD among the stations eligible to receive Expanded Band assignments.

benefits for lesser short term gains." 8 FCC Rcd at 3256. In a subsequent reconsideration action the Commission reaffirmed its decision to use a fixed database, reasoning that this approach would promote administrative finality and basic fairness, and that it would not be feasible to use a changing database. *Order I*, 10 FCC Rcd at 12145. Finally, in *Order I* the Commission rejected as *untimely* reconsideration arguments directed to the alleged failure of the AM Expanded Band allocations process to take into account Section 307(b) requirements, concluding that the time to reconsider this issue has long since passed. 10 FCC Rcd at 12147. This same reasoning applies equally to Press's dilatory effort to seek further reconsideration of these same issues at a latter stage of the same proceeding. See 47 C.F.R. § 1.429(i) (permitting staff to dismiss as repetitious matters previously considered and rejected by the Commission).

7. The Commission has recognized that Section 1.429(i) is permissive and that it may consider untimely or repetitious arguments where the public interest would be better served thereby. *E.g., MTS and WATS Market Structure*, 99 FCC 2d 708, 712 (1984). However, the justification proffered by Press is unpersuasive. Each of the orders in this proceeding has been "directed to the implementation of the expanded band migration." The Communications Act, our rules and the need for administrative orderliness require petitioners to raise issues in a timely manner. We emphatically reject Press's apparent contention that it may delay its participation in this rulemaking until actual licensing actions are imminent.

8. Nevertheless, we are cognizant of our responsibility to reevaluate regulatory standards over time and to modify policies in response to changes in the broadcast industry. *E.g., Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (1983). In this regard, it is clear that full-band radio receivers have become broadly available since our 1991 decision to grant migrators a five-year transition period. In contrast, it remains difficult to forecast audience listening patterns and preferences, and potential advertising revenues, particularly of stand-alone AM stations. We find unpersuasive the fact that Press, in its 1996 Petition, has identified one station where one experienced broadcaster believes that one stand-alone AM Expanded Band facility is economically viable in the nation's largest media market. In contrast, one-fourth of the stations selected in the March 1997 allotment plan chose not to file construction permit applications, a fact which we believe is substantially more probative of the uncertainties that broadcasters continue to face and which substantially refutes Press's contention that the five-year transition period constitutes a "lucrative windfall" for migrators. We conclude that any modification of the five-year transition period is unwarranted and deny reconsideration for this reason.

9. **The Kovas Petition.** Kovas was listed as receiving an Evanston, Illinois 1700 kHz assignment in the second plan but did not appear on the third plan. It claims that the assignment of 1700 kHz to KKSO(AM), Des Moines "on its face precluded" the allotment of this channel to Kovas and seeks reconsideration of the Des Moines assignment on several grounds. It specifically challenges the second harmonic interference protection standard announced in *Order III* and the staff's apparent determination that the proximity of WAIT(AM), Crystal Lake, Illinois, which operates on 850 kHz, precludes a 1700 kHz allotment to Kovas.

10. Stations operating on 810, 820, 830, 840, and 850 kHz have the potential to cause interference to Expanded Band stations operating on 1620, 1640, 1660, 1680, and 1700 kHz. This so-called second harmonic interference is caused by the generation of the (higher) second harmonic of the lower frequency within a radio receiver. This interference can impede or make impossible reception of the higher frequency station, but has no impact on the reception of the lower frequency station. Second

harmonic interference occurs most commonly in the immediate vicinity of the lower frequency station where its signal strength is high. Section 73.182 restricts the location of existing band AM stations, prohibiting the location of the transmission facilities of a lower frequency (540-800 kHz) station within the service area of the harmonically-related higher frequency station. In *Order III* we recognized that the Commission's technical rules use a two-part standard for determining where second harmonic interference may occur, protecting the higher frequency AM station's primary service area on the basis of its 2.0 mV/m contour in communities of at least 2,500 and its 0.5 mV/m contour elsewhere.⁵ We concluded, however, that for purposes of compiling a national allotment plan for Expanded Band spectrum it is more appropriate to determine harmonic preclusions on the basis of a uniform 0.5 mV/m standard "regardless of the population of the community in which the transmission facilities of the lower frequency station is located." 12 FCC Rcd at 3363 - 64. We explained that this standard is consistent with our objective to authorize interference-free AM service in the Expanded Band and the interference protection standards that we have applied generally in the AM service. *Id.*

11. Kovas's analysis of the second harmonic standard is erroneous.⁶ Kovas asserts that under the rules, WONX would only be protected to its 2.0 mV/m contour in the vicinity of the WAIT transmitter because Crystal Lake has a population of 10,000. This is incorrect. As noted in *Order III*, the routine processing of AM facility applications requires the staff to determine whether the calculated groundwave service contour of the second harmonic station would encompass the transmitter site of the lower frequency station. The population count that is critical in determining whether the 0.5 or 2.0 mV/m contour is used is that of the community where the lower frequency station transmitter is located, not the city to which the station is licensed. In fact, staff studies based on Census Bureau data⁷ have concluded that the WAIT transmitter is situated in an unincorporated area just outside the incorporated limits of Crystal Lake. In these circumstances, the population of Crystal Lake is irrelevant and the 0.5 mV/m contour is the correct standard for determining prohibited second harmonic overlap between a 1700 kHz Evanston facility and WAIT. *Id.* Accordingly, Kovas is ineligible to receive an Expanded Band allotment since the WAIT transmitter site would be located within the 0.5 mV/m contour of the proposed Evanston allotment.

12. We also note that one of the reasons given in *Order III* for adopting the 0.5 mV/m contour protection standard was to avoid detailed factual analyses of this kind. "Moreover, the use of two contour

⁵ AM signal reception varies with the extent of electromagnetic frequency "noise" in the AM band. Such noise can be generated by a number of factors, including commercial and industrial activity. Thus, listenable signals may generally be obtained at lower signal strengths in rural areas. As a result, Section 73.182 provides greater protection (to the larger area encompassed by the second harmonic station's weaker 0.5 mV/m contour) in low population areas.

⁶ Kovas argues that the second harmonic standard set forth in *Order I* was designed to protect the protected service areas of existing stations. As a preliminary matter, we previously acknowledged that *Order I* misstated Sections 73.182(d) and (s). *Order III* at 3362 - 63. Kovas's attempt to draw some inference from this error is clearly specious. More fundamentally, the application of Section 73.182 is not -- and has never been -- designed to protect either "existing" or "new" service. Rather, its purpose is always to protect a station operating on a second harmonic, *i.e.*, higher, frequency. As a practical matter, second harmonic concerns in this proceeding will always involve an existing band signal impeding signal reception of an Expanded Band station.

⁷ The staff used the United States Bureau of the Census Tiger Map Service which can be accessed on the internet at <http://www.census.gov/geo/www/tiger>.

values, depending on the location of the existing band station's transmission facilities, would likely engender disputes about the location and population of particular communities, boundaries of unincorporated areas and similar factually-intensive controversies that could consume limited staff resources without necessarily improving the overall allotment plan." 12 FCC Rcd at 3364 (emphasis added). Finally, Kovas's argument that we should take into account actual ground conductivity measurements to calculate a predicted 0.5 mV/m contour is untimely. This position has been previously considered and rejected. See *Order I*, 10 FCC Rcd at 12148; *Order II*, 11 FCC Rcd at 12447-48. Reconsideration will not be granted to relitigate matters already resolved. See, e.g., *WWIZ, Inc.*, 37 FCC 2d 685(1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

13. Kovas also contends that the Commission failed to provide adequate notice of the second harmonic preclusion standard which was clarified in *Order III*. We disagree and conclude that this proceeding has satisfied the Administrative Procedure Act ("APA") requirement of adequate notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). Courts have repeatedly held that this notice requirement is satisfied where the final rule is a "logical outgrowth" of its rulemaking proposal. See, e.g., *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). The focus of this test is "whether . . . [the party], *ex ante*, should have anticipated that such a requirement might be imposed." *Small Refiner Lead Phase-Down Task Force v. FCC*, 705 F.2d 506, 549 (D.C. Cir. 1983). Moreover, notice is sufficient where the description of the "subjects and issues involved" affords interested parties a reasonable opportunity to participate in the rulemaking. *Transpacific Freight Conference of Japan/Korea v. Federal Maritime Commission*, 650 F.2d 1235, 1248 (D.C. Cir. 1980) ("*Transpacific*").

14. In *Notice of Proposed Rulemaking, Review of the Technical Assignment Criteria for the AM Broadcast Service*, 5 FCC Rcd 4381 (1990) ("*NPRM*"), we proposed to apply existing AM band technical standards "generally" to operations in the Expanded Band. *Id.* at 4386. Several parties responded to this proposal and the Commission subsequently adopted this approach. *Report and Order*, 6 FCC Rcd at 6321. In *Order I*, the Commission provided an additional thirty-day period for comments on the specific technical standards it proposed to use to generate stations' interference improvement rankings and the allotment plan. *Order I*, 10 FCC Rcd. at 12147. This list included a second harmonic interference standard that would preclude potential Expanded Band allotments on 1620, 1640, 1660, 1680 and 1700 kHz where prohibited overlap between the two harmonically-related, e.g., 810 and 1620 kHz, stations would occur. *Order I*, 10 FCC Rcd. at 12147 - 49. As previously noted in *Order III*, the two relevant rules, Sections 73.182(d) and (s), were correctly cited but erroneously described as barring the overlap of the two stations' 0.5 mV/m contours.

15. One potential migrator, Sunrise Broadcasting of New York, Inc., permittee of WGNY(AM), Newburgh, New York ("WGNY"), filed comments seeking reconsideration, arguing that the second harmonic standard, as described, was too preclusive. *Order II* denied reconsideration and the staff simultaneously released the second allotment plan. WGNY again challenged this standard, and requested that the Commission reconsider the *Order I* standard. *Order III* acknowledged the inconsistency between the rule and its description as set forth in *Order I*, and announced a resolution to this issue. In these circumstances it is beyond dispute that the public had ample notice that a second harmonic frequency preclusion standard was at issue in this rulemaking. Furthermore, the adopted standard substantially incorporates the current rule -- using an Expanded Band station signal strength contour and the existing

band station transmitter location to determine whether there is prohibited overlap. The final formulation of this standard included only one modification that would affect potential allotments only where a harmonically-related existing band station's technical facilities is located in a populated area. It leaves undisturbed Commission requirements where existing band stations are located in less populated areas, such as WAIT. This result is plainly a "logical outgrowth" of the proposal tentatively announced in the *NPRM*.

16. We have carefully considered the arguments raised by Kovas and conclude that it has failed to identify factors that warrant reconsideration of the second harmonic standard. As a preliminary matter, Kovas complains that the computer program "as designed and implemented did *not* conform to the standards articulated by the Commission." (emphasis in original). The problem, however, recognized by WGNV in its reconsideration petitions and by the Commission in *Order III*, is that two conflicting standards were "articulated" in prior orders. In any event, the Commission may modify its initial formulation of the second harmonic standard without requiring additional notice and comment. See *Transpacific*, 650 F.2d at 1269 (rejecting requirement that agency adopt rule as originally formulated as leading to interminable step-by-step process of additional notice and comment periods each time rule slightly deviated from original formulation).

17. In *Order III* the Commission concluded, based on both technical and administrative considerations, that a single signal strength contour standard drawn from Section 73.182(d) would best advance the goals of this proceeding. Kovas does not challenge this rationale. Rather, it speculates instead that the Commission "seems intent upon reaching a narrow result which will affirm the use of the computer program as designed and implemented . . ." This position ignores, of course, the fact that *Order III* rescinded the prior plan, granted reconsideration and made substantive revisions to the frequency preclusion program -- the very same computer program which Kovas suggests the Commission was unwilling to modify -- and made other software modifications on its own motion. During this agency-initiated "exhaustive review" of the Expanded Band computer programs, *Order III* 12 FCC Rcd at 3369, the staff identified an array initialization error in the frequency preclusion subprogram designed to protect potential Mexican allotments. This coding error caused valid data to be overwritten or "stepped on," resulting in erroneous preclusion tables for 51 of the 64 potential Expanded Band stations in the Mexican border zone. The Mexican array error had spill-over effects on other preclusion calculations including second harmonic preclusions, resulting in the erroneous identification of 1700 kHz as a technically viable Evanston allotment.⁸ Correcting this error, and not the Commission's decision to retain the second

⁸ Specifically, the computer routine which determined domestic allotment preclusions in the Mexican border area first identified all proposed Expanded Band stations in the border zone. The program provisionally declared all frequencies precluded for such border zone stations. However, it then made a series of calculations to determine whether any of the frequency preclusions could be removed. This would be possible only where a proposed Expanded Band allotment was sufficiently close to a theoretical domestic border zone allotment previously approved in an agreement between the United States and Mexico. The first step in this calculation involved setting a "flag" which indicated the distance between the Expanded Band station and any border zone allotment. However, instead of correctly setting the flag (and corresponding computer memory location) to a proper initial value, the program erroneously set the flag by changing, *i.e.*, overwriting, a previously calculated value at a certain memory location. In addition, the memory location was situated outside the meaningful bounds, *i.e.*, array size, of the flag. The specific location where overwritten data was placed could not be definitively established. Based on a comparison of the summary preclusion tables for each potential Expanded Band migrator made before and after this array initialization error was corrected, the staff determined that this Mexican preclusion subroutine error produced errors

harmonic standard used in the second allotment plan, resulted in Kovas being dropped from the Third Allotment Plan.

18. Kovas's attack on the Des Moines 1700 kHz assignment is in error. The computer program which makes the actual allotments is designed so that a lower ranked station, such as KKSO, could never prevent a higher ranked station, such as WONX, from receiving an allotment. As explained above, the location of the WAIT transmission facilities precluded an Evanston 1700 kHz assignment. Correction of a programming error prior to the Third Allotment Plan computer run removed WONX from consideration for this frequency and created the opportunity to assign 1700 kHz to KKSO. Nonetheless, we note that Kovas's argument against the 1700 kHz allotment to Des Moines is without merit. It claims that the allocation of 1700 kHz to KKSO would result in "substantial" prohibited daytime overlap with first adjacent channel (1690 kHz) station KILR(AM), Estherville, Iowa, and therefore, that the Des Moines allotment must be rescinded. This analysis is incorrect. Co- and adjacent channel interference protection in the Expanded Band is based on distance separations, not signal strength contours. *See* 47 C.F.R. § 73.37(e) (explicitly exempting Expanded Band facilities from general contour protection requirements); *Report and Order*, 6 FCC Rcd at 6314 (specifying, *inter alia*, a 200 kilometer separation requirement for first adjacent channel Expanded Band stations). The distance between KILR and KKSO is 230.7 kilometers and therefore the two allotments meet the relevant channel separation requirement.

ORDERING CLAUSE

19. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration filed by Press Broadcasting Company, Inc. and Kovas Communications, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

in the calculation of harmonic preclusions for a number of stations, including WONX.

