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

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 93-28
Table of Allotments,	)	RM-8172
FM Broadcast Stations.	)	RM-8299
(Colonial Heights, Tennessee)	)	

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: January 6, 2000 **Released: January 7, 2000**

By the Chief, Allocations Branch:

1. The Commission has before it a petition for reconsideration of the *Memorandum Opinion and Order* ("*MO&O*") in the above-docketed proceeding, 11 FCC Rcd 18,079 (1996), filed by Newport Publishing Co. ("Newport"), licensee of Station WMXK(FM), Channel 240A (95.9 MHz), Morristown, Tennessee. An opposition was filed by Murray Communications ("Murray"), permittee of Station WRZK(FM), Channel 290A (105.9 MHz), Colonial Heights, Tennessee. We will deny Newport's petition for reconsideration.

2. *Background.* The Commission issued a *Notice of Proposed Rule Making* in this proceeding, 8 FCC Rcd 1794 (1993), in response to a petition filed by Murray, proposing the substitution of Channel 290C3 in lieu of Channel 290A at Colonial Heights. In filing a counterproposal to its initial request, Murray proposed that Channel 240C2 be allotted to Colonial Heights, or, alternatively, that Channel 240C3 be allotted in lieu of Channel 290A, and that its permit be modified accordingly. In order to accommodate its counterproposal, Murray proposed the following channel substitutions: Channel 290A for Channel 231A (94.1 MHz) at Station WCTU(FM), Tazewell, Tennessee; Channel 231A for Channel 240A at Station WMXK(FM), Morristown, Tennessee; and Channel 252A (98.3 MHz) for Channel 290A at Station WHAY(FM), Whitley City, Kentucky. As a final accommodation, Murray proposed a relocation of the transmitter site for Station WAEY-FM, Channel 240A, Princeton, West Virginia.

3. The Commission subsequently issued an *Order to Show Cause*, 8 FCC Rcd 7901 (1993), to WFSM, Inc. and to Newport's predecessor Franklin Communications, Inc. ("Franklin"), respective licensees of Stations WCTU(FM), Tazewell, and WMXK(FM), Morristown, directing them to show cause why their licenses should not be modified to specify operation on Channel 290A in lieu of Channel 231A and Channel 231A in lieu of Channel 240A, respectively. By *Report and Order*, 9 FCC Rcd 6767 (1994) ("*R&O")*, we denied Murray's counterproposal[1] but granted its initial proposal to substitute Channel 290C3 in lieu of Channel

[1]In doing so, we rejected its contention that the counterproposal constituted an incompatible channel swap. We

290A at Colonial Heights. Grant of this proposal did not require any existing station to change either its frequency or its site. Therefore, the issues raised by Newport and WFSM, Inc. to the *Order to Show Cause* were not addressed.

4. Murray filed a petition for reconsideration taking issue with our finding that its proposal was not an incompatible channel swap and did not qualify for treatment under Rule Section 1.420(g)(3). We issued an *MO&O* affirming our finding that Murray's proposal for a non-adjacent channel upgrade did not fall under that section. We determined that Murray's counterproposal did not possess all the required attributes of mutually exclusivity and therefore was not an incompatible channel swap. Nevertheless, we granted Murray's upgrade proposal as a non-adjacent channel upgrade under that section because no timely expressions of interest were filed.

5. The non-adjacent channel upgrade, however, required a change in the operating frequency of Franklin's Station WMXK(FM), Morristown. Therefore, in the *MO&O* we addressed for the first time, in response to the *Order to Show Cause*, Franklin's questioning of Murray's financial viability to reimburse Franklin as well as the licensees of the three other stations that had to be modified. We restated our consistent policy under *Circleville, Ohio*, 8 FCC 2d 159 (1967) ("*Circleville*"), that a party such as Murray, which would benefit from the change of frequency of another station, is required to reimburse that station for the reasonable costs associated with its channel change. We deemed Franklin's arguments as non-persuasive and refused to depart from the Commission's policy, Murray having stated it would reimburse Franklin's costs of changing all of its logos throughout the company, the equipment changes necessary for changing frequencies, and its other reasonable costs. Additionally, we stated that this policy incorporates a steadfast refusal to require demonstrations of financial ability in a rulemaking context.

6. Accordingly, we concluded that the *R&O* was correct in adopting Murray's counterproposal to upgrade its station at Colonial Heights because it fell within the terms of Section 1.420(g) as no other timely expression of interest was filed. Therefore, the *MO&O* ordered that Channel 240C2 be substituted for Channel 290A at Colonial Heights including the substitution of Channel 231A in lieu of Channel 240A at Morristown, channel substitutions at two other communities, and a transmitter site relocation at still another community.

7. *Petition for Reconsideration of MO&O.* Bruce G. Morrison, Chief Operating Officer ("COO") of Media Services Group ("Media Services"), on behalf of Newport, asks that we reconsider the involuntary channel substitution ordered for Station WMXK(FM) at Morristown. Newport questions Murray's commitment to reimburse Newport's reasonable costs. It claims

---

concluded that the channel substitutions did not constitute a mutually exclusive relationship contemplated to comply with Section 1.420(g)(3) of the Commission's Rules because all substitutions were not each mutually exclusive, which would qualify the proposal for an upgrade without consideration of competing proposals.

that it has not been contacted regarding its reimbursement of the costs of changing its frequency and other other facets of its operation. Newport, therefore, requests that the channel substitution at its Station WMXK(FM) be reversed or delayed until it and Murray can reach agreement on reimbursement. Newport also complains that it does not know when Murray would effect its upgrade, thereby delaying Newport's promotion of the new frequency on which it would be required to operate. It requests that the Commission require Murray to negotiate with Newport the reasonable costs and timeliness of the channel substitution.

8. Newport also contends that its "earlier filing met this requirement [that is, the filing of a timely expression of interest]." It further questions our statement in the *MO&O* that we deemed it unnecessary to address in the *R&O* the issues raised by Franklin. Newport asks that we address those issues here. Further, it argues that Murray should be required to meet its burden to demonstrate that Channel 290A was the only channel available at Tazewell "to protect the interests of Newport." Finally, Newport asks that the Commission recognize that it should be reimbursed, as reasonable costs, the attorney's fees it incurred.

9. Murray filed an opposition to Newport's request, citing several alleged deficiencies of a procedural nature in addition to substantive ones. First, Murray argues that neither Media Services nor its COO may be heard by the Commission because neither qualifies as a party in this proceeding. Murray cites Rule Section 1.21(a) and 1.23(a), which state that a party may appear before the Commission in person or through an attorney qualified to practice before it. Murray notes that neither Media Services nor its COO qualifies, and, therefore, neither is properly before the Commission as a representative for Newport. Second, Murray points out that the request is not verified and signed by either the party, Newport, or a qualified attorney. The filing is, therefore, subject to return and may be given no consideration.[2]

10. With respect to Murray's alleged failure to obtain consent, Murray argues that if Newport is complaining that its consent was not sought for the channel changes, such complaint is not cognizable under Commission policy or case law. Therefore, it was not required to obtain the Newport's consent for a channel substitution at its Station WMXK(FM). Moreover, Murray points out, granting Newport's petition for reconsideration is contrary to the principle that substitution of an existing station's channel is in the public interest where it permits the provision of expanded service at another community, citing *Coleman, Sebewaing and Tuscola, Michigan,* 11 FCC Rcd 11286, 87-88 (1996).

11. Regarding the allegedly excess payments Murray made to Betap Broadcasting to relocate its Station WAEY(FM)'s transmitter site, Murray responds that there is no prohibition

[2] Murray disputes Newport's allegation that it was not contacted prior to Murray's efforts to have the channel substitutions effected. In opposition, Murray notes that the Commission served Newport or its predecessor by certified mail, return receipt requested, copies of the two relevant documents at issue, the *Order to Show Cause*, *supra*, and the *MO&O*.

on the payment amount for the movement of the site in order to accommodate its upgrade of its station. Murray argues, in any event, in accord with Commission precedent prohibiting a transmitter site relocation without consent of the affected licensee, that it had to negotiate directly with Betap to obtain that consent. As to Newport's questioning Murray's commitment to reimburse Newport its reasonable costs of changing channels, Murray insists that the mail correspondence between them, as shown by copies attached to its opposition, indicates clearly that each party has been actively negotiating the level of reasonable costs. This obviates the Commission's taking any further action in this matter, argues Murray.

12. Finally, Murray disagrees that Franklin, Newport's predecessor, ever expressed any interest in utilizing the non-adjacent channel proposed to be allotted. Franklin had only expressed its concern with Murray's financial viability and the several adverse consequences of its changing the operating frequency of its Station WMXK(FM) in order for Channel 231A to be upgraded to Channel 240C2 at Colonial Heights. Murray argues that neither this issue nor any other issue raised by Newport constitutes any substantive basis for reconsideration, particularly given that Murray has already committed itself to reimburse Newport its reasonable expenses for changing its channel.

13. *Discussion*. As a threshold matter, we find that Newport's petition is not procedurally defective. First, we accept Media Services as a valid representative of Newport, given Murray's apparent prior acceptance of that status. While it now argues that neither Media Services nor its COO is properly before the Commission, Murray apparently had accepted Media Services as a representative of Newport. This is demonstrated in the letters between Murray and Media Services, copies of which are attached to Murray's opposition pleading. The letters show that Media Services was indeed acting in a representative capacity for Newport and that Murray dealt with Media Services in that capacity. On this basis, we recognize it as a proper representative of Newport, as permitted by Section 1.22, and will not ask Media Services to show its authority to so act. Moreover, Section 1.21(a), cited by Murray as a basis for dismissing the petition, is not mandatory. It states that "any party *may* appear before the Commission in person or by an attorney. [emphasis added]" Second, we recognize that Section 1.52 requires that a party not represented by a qualified attorney *shall* sign and verify the original of any petition filed with the Commission. Here, Newport is the party and has neither signed nor verified its reconsideration request. However, Newport's representative, Media Services, signed the pleading, and Section 1.429(h) specifically exempts reconsideration petitions in FM and TV allotment rulemaking proceedings from the verification requirements of Section 1.52 of the Rules. Under these circumstances, Newport's reconsideration petition is procedurally acceptable.

14. With respect to the substantive issues raised by Newport, we believe that its reconsideration petition should be denied. It is well-settled that in addition to the obligations of the proponent of the frequency change to reimburse under *Circleville,* which include the payment of reasonable attorney's fees, a licensee like Newport, required to change its frequency to accommodate the new allotment, may continue to operate for a reasonable period of time after the effective date for modifying its operating frequency. *See Broken Arrow and Bixby,*

Oklahoma, and Coffeyville, Kansas, 4 FCC Rcd 6981 (1989). We have also stated that it is generally not necessary for the affected station to change its frequency until it "prevents a newly authorized station from inaugurating service." *See Orders to Show Cause (Albany, Buffalo, Ilion, and Utica, New York, and Boston, Massachusetts*, 2 FCC Rcd 4300, n. 12 (1987).

15. Here, on the contrary, the would-be newly upgraded station is not prevented from providing service on its new frequency and Newport's affected station may continue to operate without changing its frequency as long as Murray has not effected its upgrade. Therefore, Newport is not required to do anything to accommodate the change of channel until Murray seeks to implement the upgrade. While Newport may be subject to some uncertainty as to when it must change its frequency, continuing to operate on its current frequency unfettered appears to be far less burdensome than actually changing its channel and promoting the change in frequency. As to Newport's questioning of Murray's commitment to fully and timely reimburse Newport's reasonable expenses, there appears to be no basis for that claim. We take particular note of Murray's and Newport's efforts to coordinate the change of channels so that service disruptions would be minimized and reimbursement issues could be decided. It appears, therefore, that no further Commission involvement is necessary. To resolve such issues, it is expected that parties will negotiate in good faith. *See, for example, Dennison-Sherman, Paris, Jacksboro, Texas, and Madill, Oklahoma,* 14 Fed Rcd 122 (1999).[3]

16. Accordingly, IT IS ORDERED, That the Request for Reconsideration filed by Newport Publishing Co IS DENIED.

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

18. For further information concerning the above, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Mass Media Bureau

[3] As to other concerns raised by Newport, none warrants reconsideration. As noted by Murray, concerns raised by Newport's predecessor, Franklin, regarding the impact of the change of its frequency do not rise to the level of an expression of interest in applying for an allotment or pledging to operate a station on that allotment. Finally, Murray was not required to demonstrate that Channel 290A was the only channel available at Tazewell, even though it appears to have been. That showing was not necessary because Murray's proposal, we concluded in the *MO&O,* did not constitute an incompatible channel swap for other reasons.