

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

AUG 1 2 2002

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of allotments,)	MM Docket No. 98-155
FM Broadcast Stations.)	RM-9082
(Alva, Mooreland, Tishomingo, Tuttle and)	RM-9133
Woodward, Oklahoma))	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 31, 2002

Released: August 2, 2002

By the Assistant Chief, Audio Division:

1. The Audio Division has before it an Application for Review filed by Ralph Tyler directed to the *Memorandum Opinion and Order* in this proceeding.¹ Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail") filed an Opposition to Application for Review and Ralph Tyler filed a Reply to Opposition to Application for Review. Ralph Tyler filed a Motion for Leave to File Supplement to Application for Review and a Supplement to Application for Review. Chisholm Trail filed an Opposition to Supplement to Application for Review. For the reasons discussed below, we are reallocating Channel 259C3 from Tishomingo to Tuttle, Oklahoma, and are modifying the Station KTSH license to specify Tuttle as its community of license. In view of this action, we are dismissing the Application for Review.

Background

2. The *Report and Order* in this proceeding denied a request by Ralph Tyler, licensee of Station KTSH, Channel 259C3, Tishomingo, Oklahoma, to reallocate Channel 259C3 to Tuttle, Oklahoma, and modify his license to specify Tuttle as the community of license.² The reason for that denial was that the sole remaining service in Tishomingo, noncommercial educational FM Station KAZC, did not provide any portion of Tishomingo with the principal city 70 dBu signal and provided only 23% of the Station KTSH service area with a primary 60 dBu signal. As such, we concluded that Station KAZC was not an adequate replacement service and we would, in effect, be removing the sole local service from Tishomingo. In our *Memorandum Opinion and Order*, we denied a Petition for Reconsideration filed by Ralph Tyler directed against that action. In doing so, we reiterated our view that the current Station KAZC service was not an adequate substitute and that the removal of Station KTSH would be analogous to the removal of a sole local service. In this regard, we noted that the Commission addressed the removal of a sole local service as "presumptively" disserving the public interest.³ In making this

¹ *Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*, 16 FCC Rcd 7979 (M.M. Bur. 2001).

² *Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*, 16 FCC Rcd 1525 (M.M. Bur. 2000).

³ See *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License")*, 4 FCC Rcd 4870 (1989); *recon. granted in part*, 5 FCC Rcd 4870 (1989).

determination, we recognized that Station KAZC had filed an application on January 26, 2001, that would replicate the existing Station KTSH service area. However, we stated that the pending Station KAZC application was comparable to a vacant allotment or unbuilt construction permit referred to by the Commission in *Community of License* and does not cure the disruption in service. Subsequent to this determination, the Station KAZC application has been granted and Station KAZC has commenced operation with new facilities.

Application for Review and Supplement to Application for Review

3. In his Application for Review, Ralph Tyler reiterates arguments set forth in his earlier Petition for Reconsideration. Thereafter, Ralph Tyler filed a Motion for Leave to File Supplement to Application for Review as well as the Supplement to Application for Review. The Supplement pertains to the fact, as discussed above, that subsequent to the filing of his Application for Review, noncommercial educational FM Station KZAC has commenced operation in Tishomingo with its upgraded facilities and the covering license application has been filed. Station KZAC now operates with the equivalent of Class C2 facilities which more than replicate the Station KTSH operation in Tishomingo with Class C3 facilities. In its Opposition to Supplement to Application for Review, Chisholm Trail sets forth two arguments. First, it contends that our underlying *Report and Order* and *Memorandum Opinion and Order* in this proceeding were correct at the time they were rendered and should not be revisited on the basis of any subsequent change in fact. Second, it refers to the ongoing inquiry regarding Ralph Tyler and Station KZAC and this inquiry should be resolved before any resolution of this reallocation proceeding.

4. We are granting the Motion for Leave to File Supplement to Application for Review. This action is based upon the fact that our earlier action was predicated on the level of technical service to Tishomingo, the upgraded operation of Station KZAC is already reflected in Commission records and the fact that consideration of the Supplement will enable us to resolve this proceeding on the basis of a complete record. We reject both arguments advanced by Chisholm Trail. The upgraded operation of Station KZAC removes the sole impediment in our proceeding to favorable action on the Ralph Tyler reallocation proposal. Ralph Tyler could immediately file a petition for rule making proposing the same reallocation to Tuttle. It is not necessary to do so. Under Section 1.113(a) of the Commission's Rules, we may modify or set aside on our own motion, any action taken pursuant to delegated authority within 30 days of the public notice of such action.⁴ The filing of an application for review tolls the 30-day period.⁵ We do not see any public interest benefit in expending administrative resources to institute a new proceeding looking toward reallocation of Channel 259C3 from Tishomingo to Tuttle, Oklahoma. With respect to the second argument advanced by Chisholm Trail concerning Ralph Tyler and Station KZAC, we see no public interest reason or benefit in withholding action in this proceeding pending the resolution of a separate proceeding. The allegations regarding Ralph Tyler and Station KZAC are outside the scope of this reallocation proceeding and our action herein does not impact or prejudice that separate proceeding. We will evaluate the Ralph Tyler proposal on the basis of the record now before us.

5. We are reallocating Channel 259C3 from Tishomingo to Tuttle, Oklahoma, and are modifying

⁴ 47 C.F.R. § 1.113(a).

⁵ See *Com/Nav Marine, Inc.*, 2 FCC Rcd 2144 (Priv. Rad. Bur. 1987); see also *Florida Enterprises, Inc.*, 598 F.2d 37, 48 n. 51 (D.C. Cir. 1978) (the fact that appeal from original order was before the court did not preclude *sua sponte* reconsideration of that action by the bureau).

the Station KTSH license to specify Tuttle, as the community of license.⁶ This will result in a preferential arrangement of allotments as required by the Commission on Section 1.420(i) of the Commission's Rules and *Community of License, supra*. In reaching this determination, we compared the existing versus the proposed arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.⁷ This will provide Tuttle, with a population of 2,807 persons, with a first local service under Priority 3 while Station KZAC will now provide an equivalent local service to Tishomingo. The reallocation will also increase the number of persons receiving service from Station KTSH from 36,134 to 767,353 persons, and the population losing service from this reallocation will continue to receive five fulltime aural services.⁸

6. In order to accommodate Channel 259C3 at Tuttle, it is necessary to make channel substitutions at Alva and Woodward, Oklahoma. To this end, we issued *Orders to Show Cause* directed to Chisholm Trail, licensee of Station KXLS, Channel 259C1, Alva, Oklahoma, Classic Communications, Inc., licensee of Station KWFX, Channel 260C1, Woodward, Oklahoma. Chisholm Trail was directed to show cause why its license should not be modified to specify operation on Channel 260C1 and Classic Communications was directed to show cause why its license should not be modified to specify operation on Channel 292C1.⁹ In response to its *Order to Show Cause*, Classic Communications does not object to the proposed modification of its license as long as Ralph Tyler will be required to reimburse it for its reasonable and prudent expenses in changing its channel. On the other hand, Chisholm Trail contends that the proposed reallocation and Station KTSH license modification should be denied. In this regard, Chisholm Trail first notes that the remaining station in Tishomingo, noncommercial educational Station KZAC provides a 70 dBu signal to only 23% of the population within Station KTSH's current 70 dBu service area. As such, the reallocation would have a "negative impact" upon the ability of the Tishomingo residents to receive local news, weather and public affairs. Finally, Chisholm Trail notes the proximity of Tuttle to Oklahoma City and contends that the proposed reallocation is an attempt to move into the Oklahoma City Urbanized Area. We will discuss each of these contentions below.

7. The Chisholm Trail arguments do not warrant a departure from our view that the reallocation of Channel 259C3 to Tuttle would result in a preferential arrangement of allotments. At the outset, we reiterate that Station KZAC has commenced operation in Tishomingo with facilities that replicate the Station KTSH facilities. As a consequence, the fact that Station KZAC formerly served only 23% of the Station KTSH service area is no longer an impediment to favorable action on the reallocation of Channel 259C3 to Tuttle. We also note that a noncommercial educational FM station has an obligation to serve the significant programming needs of its community.¹⁰ In view of the availability of Station KZAC, any

⁶ The reference coordinates for the Channel 259C3 allotment at Tuttle, Oklahoma, are 35-17-33 and 97-42-58.

⁷ *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

⁸ The Commission has considered five or more services to be "abundant." *Family Broadcasting Group*, 53 RR2d 662 (Rev. Bd. 1983), *rev. denied* FCC 83-559 (Comm'n Nov. 29, 1983); *see also LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (1995).

⁹ *Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*, 13 FCC Rcd 25353 (M.M. Bur. 1998).

¹⁰ *See Valley Broadcasters, Inc.*, 5 FCC Rcd 2785 (1990); *see also Public Broadcasting*, 98 FCC 2d 746 (1984).

argument that the reallocation of Station KTSH would have a negative impact as to the availability of local public affairs and news is not well taken. Finally, we recognize that Tuttle is located approximately 15 miles from the Oklahoma City Urbanized Area. In this regard, we do not blindly apply a first local service preference to a proposal for a community in an Urbanized Area.¹¹ In such situations, we examine the extent the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central city, and, most importantly, the independence of the suburban community. Subsequently, the Commission extended this inquiry into situations where the suburban community is outside the Urbanized Area and provides a 70 dBu signal to more than 50% of the Urbanized Area.¹² In this situation, the proposed reallocation to Tuttle will result in 28% of the Oklahoma City Urbanized Area being within the Station KTSH 70 dBu service contour. There is nothing in the record in this proceeding that would warrant extending the policy set forth in *Headland, Alabama, and Chattahoochee, Florida, supra*, to this proceeding, attributing the radio stations licensed to Oklahoma City to Tuttle or otherwise denying a first local service to Tuttle.¹³

8. In view of the above, we are modifying the license of Station KWFX, Channel 261C1, Woodward, Oklahoma, to specify operation on Channel 292C1.¹⁴ The Station KWFX license was previously modified in MM Docket No. 90-286 to operate on Channel 261C1.¹⁵ Classic Communications, Inc., licensee of Station KWFX, has submitted an application to implement this upgrade (File No. BPH-19970811IC). Classic Communications, Inc. will be permitted to amend this application to specify operation on Channel 292C1 without loss of cut-off protection. In addition, we are modifying the license of Station KXLS, Channel 259C1, Alva, Oklahoma, to specify operation on Channel 260C1.¹⁶ Ralph Tyler will be required to reimburse the respective licensees of Station KWFX and Station KXLS for their reasonable costs in implementing the modification of these licenses.¹⁷

9. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective September 17, 2002, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Alva, Oklahoma	248C2, 260C1, 289C2, 296C3

¹¹ See e.g. *Huntington Broadcasting Co. v. FCC*, 192 F 2d 33 (D.C. Cir. 1951); *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

¹² *Headland, Alabama, and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995).

¹³ See *Suburban Community Policy*, 93 FCC 2d 436 (1983).

¹⁴ The reference coordinates for the Channel 292C1 allotment at Woodward, Oklahoma, are 36-25-42 and 99-24-10.

¹⁵ *Woodward, OK*, 5 FCC Rcd 6628 (M.M. Bur. 1990).

¹⁶ The reference coordinates for the Channel 260C1 allotment at Alva, Oklahoma, are 36-35-41 and 98-15-38.

¹⁷ *Circleville, Ohio*, 9 RR 2d 1579 (1967).

Tishomingo, Oklahoma	-----
Tuttle, Oklahoma	259C3
Woodward, Oklahoma	221C3, 240A, 266C, 272A, 292C1

10. IT IS FURTHER ORDERED, That the license of Ralph Tyler for Station KTSH, Tishomingo, Oklahoma, IS MODIFIED to specify operation on Channel 259C3 at Tuttle, Oklahoma, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules;
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Chisholm Trail Broadcasting Co., Inc. for Station KXLS, Alva, Oklahoma, IS MODIFIED to specify operation on Channel 260C1 in lieu of Channel 259C1, subject to the following conditions:

- (a) Nothing contained herein shall be construed to authorize any change in the Station KXLS authorization except for the channel as described above. Any other changes, except for those so specified under Section 73.1690 of the Commission's Rules, require prior pursuant to an application for construction permit (FCC Form 301);
- (b) Program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules, PROVIDED the transmission facilities comply in all respects with the authorization for Station KXLS except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Classic Communications, Inc. for Station KWFX, Woodward, Oklahoma, IS MODIFIED to specify operation on Channel 292C1 in lieu of Channel 261C1. This modification may be implemented by Classic Communications amending its pending application (File No. BPH-19970811IC) to specify operation on Channel 292C1.

13. Pursuant to Sections 1.1104(1)(k) and (2)(k) of the Commission's Rules, any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rulemaking fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Ralph Tyler is required to submit a rulemaking fee in addition to the fee required for the application to effect the change in community of license.

14. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this Memorandum Opinion and Order BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to:

Chisholm Trail Broadcasting Co., Inc.
316 East Willow
Enid, Oklahoma 73701

Classic Communications, Inc.
P.O. Box 1600
Woodward, Oklahoma 73802

15. IT IS FURTHER ORDERED, That the aforementioned Application for Review filed by Ralph Tyler IS DISMISSED.

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

17. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau