

AM Station, Class I, Clear Channel
Application, for Review

Application for review of staff's action dismissing reconsideration petition of *Memorandum Opinion and Order* on reconsideration of Clear Channel *Report and Order* denied. No additional facts or arguments provided to overrule the Bureau on review.
Docket No. 20642

FCC 81-335

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Clear Channel Broadcasting in the AM Broadcast Band. | Docket No. 20642

MEMORANDUM OPINION AND ORDER

(Adopted: July 16, 1981; Released: July 24, 1981)

BY THE COMMISSION: COMMISSIONER DAWSON ABSTAINING FROM VOTING.

1. Before the Commission is an Application for Review filed by Midwest Television, Inc. ("Midwest"), licensee of Station KFMB, San Diego, California. Midwest seeks review of the Broadcast Bureau's action dismissing its Petition for Reconsideration of the *Memorandum Opinion and Order* on reconsideration of the Clear Channel *Report and Order*.

2. A brief review of the procedural history of this matter is necessary to an understanding of Midwest's most recent pleading. Midwest is licensee of Station KFMB, an unlimited-time Class II-B AM station operating on 760 kHz. In 1961, as a result of U.S./Mexican negotiations, KFMB was limited to 5 kW on 760 kHz by a footnote to Section 73.21(a)(2)(ii) of the Rules. Midwest filed comments in the Clear Channel proceeding seeking deletion of the footnote so that KFMB might operate at 50 kW. The footnote in fact was deleted by the *Report and Order* in this proceeding. 78 F.C.C. 2d 1345 (1980). This not being evident to Midwest, it petitioned for reconsideration, again asking for deletion of the footnote and proposing 50 kW operation for KFMB. In the *Memorandum Opinion and Order* on reconsideration, 48 RR 2d 1077 (1980), we noted our prior deletion of the footnote and directed Midwest to the application process for further pursuit of its 50 kW proposal, reiterating our position that the general Clear Channel rule making proceeding was

not the appropriate forum for consideration of the requests of individual stations.

3. Additionally, the *Memorandum Opinion and Order*, in response to a petition filed by the Clear Channel Broadcasting Service, clarified our intent that the criteria for acceptance of applications in Section 73.37(e)(2) govern all applications for facilities on the Class I channels, including those for modification of facilities and frequency changes. KFMB then filed a second petition for reconsideration, acknowledging the deletion of the footnote, but averring that KFMB's inability to meet the criteria of Section 73.37(e)(2) unfairly precluded its application to increase power on 760. In support of the propriety of its petition, under Section 1.429, Midwest argued that the Commission's statement regarding application of the Section 73.37(e)(2) criteria to major modifications on the Class I channels amounted to a modification of the *Report and Order* on reconsideration, not merely a clarification. See Section 1.106(k)(3). The Broadcast Bureau took the position that reconsideration did not lie, because the *Memorandum Opinion and Order* did not reverse or modify the *Report and Order*, but merely clarified the language of Section 73.37(e)(2), as amended, to conform to the Commission's stated intent that the criteria of Section 73.37(e)(2) apply across the board. The Bureau therefore dismissed Midwest's second petition for reconsideration by letter.

4. Midwest now seeks review of the Bureau's action, contending that the *Memorandum Opinion and Order* extended the restrictions of Section 73.37(e)(2), and that therefore reconsideration does not lie. We agree. We believe that the Bureau erred in dismissing Midwest's petition on procedural grounds. Clear Channel Broadcasting Service, in its request for clarification, pointed out a discrepancy between the Commission's intent, stated in the *Report and Order*, that the additional spectrum made available by the Clear Channel rule making be utilized to further the service objectives expressed in Section 73.37(e)(2), as amended, and the fact that the rules then governing frequency changes and power increases did not require compliance with Section 73.37(e)(2). Acknowledging this discrepancy, the *Memorandum Opinion and Order* added clarifying language to Section 73.37(e)(2), as amended, to reflect the intent of the *Report and Order* that all applications to use the newly-available spectrum serve the stated objectives. We continue to believe that the *Report and Order* clearly evidenced our intent to make the Class I-A channels available solely for the stated objectives, and that all other uses on those frequencies be proposed in the form of applications accompanied by waiver requests. However, we do find that the *Memorandum Opinion and Order* modified the *Report and Order* by making this more explicit. We are herein overruling the Bureau's dismissal and considering Midwest's application on its merits.

5. Nevertheless, on review, we reach the same substantive

result. Our review of the pleadings reveals no new persuasive reasons to reverse our ruling that Section 73.37(e)(2) would govern KFMB's proposal to increase power on 760 kHz. We have stated repeatedly that the requests of individual stations are not properly considered in a generalized rule making that was instituted to determine policy for future utilization of the Class I-A frequencies. Midwest repeatedly has been directed to pursue its proposal via application and waiver. Without passing on the merits of its potential waiver request, we reiterate that the decision whether it is in the public interest that the criteria of Section 73.37(e)(2) be waived as to Midwest's application for KFMB's power increase does not belong in this rule making, Midwest's repeated protestations to the contrary notwithstanding. While it may seem merely a procedural nicety, the Commission's general policy as to utilization of a class of frequencies and decisions regarding individual authorizations on specific frequencies are distinct questions, based upon variant considerations. Midwest's proposal for increased power for Station KFMB must be evaluated on the basis of the considerations attendant upon the application process, which cannot be circumvented via action in the context of a general rule making.

6. For the foregoing reasons, **IT IS ORDERED**, That the Application for Review of Midwest Television, Inc. **IS DENIED**.

7. This action is taken pursuant to authority contained in Section 303 of the Communications Act of 1934, as amended, and Section 1.115 of the Commission's Rules.

8. For further information, contact Molly Pauker, Broadcast Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.