

Domestic Public Land Radio Services, Frequencies
Frequency Allocation, FM
Frequency Allocation, TV

Commission reallocates frequency bands 76.88 MHz (VHF-TV Channels 5 and 6) and 98-108 MHz (FM Channels 251-300) from the Common Carrier Rural Radio Service to the Broadcast Services in the State of Hawaii. This proceeding brings Hawaii into conformity with the 48 contiguous states insofar as VHF and FM broadcast frequencies are concerned.
GEN Docket No. 80-710

FCC 81-411

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Part 2 of the Commission's Rules governing Frequency Allocations; Part 22 of the Commission's Rules governing the Domestic Public Land Mobile Radio Services; Part 73 of the Commission's Rules governing the Radio Broadcast Service, and Part 74 of the Commission's Rules governing Experimental, Auxiliary, and Special Broadcast, and Other Program Distributional Services to reallocate to the Broadcast Services the Frequency bands 76-88 and 98-108 MHz in the State of Hawaii.

Docket No. 80-
710
RM-3467
RM-3782

REPORT AND ORDER

(Adopted: September 22, 1981; Released: October 2, 1981)

BY THE COMMISSION:

Summary

1. In this Report and Order, we are reallocating the bands 76-88 MHz (VHF-TV Channels 5 and 6) and 98-108 MHz (FM Channels 251-300) from the Common Carrier Rural Radio Service to the Broadcast Services in the State of Hawaii. Although this Report and Order amends three Parts of the FCC's Rules and Regulations, it only addresses the reallocation question and does not in any way prejudice the TV or FM Tables of Assignments proceedings to be initiated shortly under the existing rule making numbers.

Background

2. On November 24, 1980, we released a Notice of Proposed Rule Making (NPRM), FCC 80-633 (45 FR 79516) in the above-captioned proceeding. As stated in that Notice, the frequency bands 76-88 and 98-108 MHz were allocated to the Rural Radio Service in Hawaii in 1952. For almost thirty years, the local telephone company used this 22 megahertz of spectrum to provide reliable inter-island telephone service. With the passage of time, however, microwave technology progressed and the telephone company gradually replaced its old VHF equipment with microwave equipment. Thus, when the Hawaiian Telephone Company submitted its last two VHF station licenses for cancellation last year, the frequency bands 76-88 and 98-108 MHz became vacant in Hawaii.

3. Lee M. Holmes, aware of Hawaiian Telephone's intentions to vacate the VHF and FM Channels, petitioned the Commission on July 11, 1979, to amend the Television Table of Assignments [§73.606(b)] to make one of the two television Channels available to the Honolulu, Hawaii, market. Before such a proposal can be contemplated, however, it is necessary to reallocate the spectrum in question to the Broadcast Services. The purpose of this Report and Order, therefore, is to reallocate the 76-88 and 98-108 MHz bands after which we may initiate action to examine the outstanding requests to allot a TV and FM radio channel to certain Hawaiian markets. Such action will require further proceedings where pertinent comments will be considered. However, the action taken in this Report and Order does not presuppose the FCC's action with regard to a modification to its allotment tables for either Television or FM.

4. In addition to proposing to amend the allocation table in response to the Holmes petition, we also proposed *sua sponte* in the NPRM to allocate the upper half of the FM frequency band (98-108 MHz) to the Broadcast Services for FM use. Thus, both portions of the spectrum would then be consistent with the current allocation in the conterminous U.S. While the Commission's Notice was being considered, KHVH, Inc., filed a petition requesting the very allocation the Commission was proposing *sua sponte*, and looking toward a modification to the Table of FM Assignments (§73.202(b)). Because the two proceedings are overlapping, the KHVH petition (RM-3782) is hereby incorporated into this proceeding, i.e., Docket 80-710. The KHVH petition clearly reinforces the Commission's contention that the absence of available FM Channels in certain Hawaiian markets indicates a present or future interest in the previously unavailable half of the FM band.

Comments

5. Eight parties filed timely comments on the NPRM. One party, Sunset Communications Corporation, filed late comments. In the

interest of making the record complete, we have considered Sunset's late filing along with the other comments. The parties who filed in this proceeding are listed in Appendix A. Of the nine sets of comments, three parties favored the reallocation of the TV Channels, and two parties favored the reallocation of the FM spectrum. One party opposed the TV reallocation; one party opposed the FM reallocation; and a third party voiced opposition to both reallocations. The remaining party, RadioCall, Inc., neither favored nor opposed the Commission's Notice but rather reserved judgement until such time as the FCC acted on a petition for reconsideration (RM-2364) which was pending at the time these comments were filed. The Commission has since issued a proposal in response to RadioCall's petition, proposing the reallocation of the 488-494 MHz frequency band (TV Channel 17) to the Fixed Service in Hawaii for control and repeater operations.¹ RadioCall's comments in the instant proceeding state that reallocation of Channel 17 in Hawaii would satisfy the radio common carriers' needs.

6. The proposal to reallocate television Channels 5 and 6 for broadcast purposes in the State of Hawaii was supported by the petitioner Lee M. Holmes (Holmes), the Association of Maximum Service Telecasters, Inc. (MST), and Mid-Pacific Television Associates (Mid-Pacific).² The petitioner has modified his position somewhat in that he originally requested that either Channel 5 or Channel 6 be made available for television use in Hawaii, and now "fully support[s] the allocation of both Channels to Hawaii" (Holmes' comments, p. 4). The comments of MST favor the Commission's proposal insofar as the television Channels are concerned, and reiterate that "the full complement of television broadcast services is not available [in Hawaii] because there is no TV Channel 5 or 6" (MST comments, p. 2). Mid-Pacific is the licensee of Television Station KIKU in Honolulu and is the only independent station licensed in that market. Mid-Pacific expresses hope that the FCC will adopt the proposed allocation of both Channels, and allot one to Maui to be used as a TV satellite transmission facility. According to Mid-Pacific, KIKU could then rebroadcast its signal to as many as four other islands.

7. Sunset Communications Corporation (Sunset) and Mauna Kea Broadcasting Company (Mauna Kea) both opposed the TV reallocation.³ We accept Delta Television Corporation's motion to accept late filed comments by Sunset, but fail to see the connection between the

¹ Docket 81-460, adopted July 16, 1981, 46 FR 40536.

² Mid-Pacific later filed supplemental information which substantially contradicts its earlier comments and reply comments. The most recent filings are discussed later in this Report and Order at paragraphs 15 and 17.

³ Mauna Kea also opposed the FM reallocation. However, this portion of the Report and Order focuses on the TV allocation issue and will therefore only address that portion of Mauna Kea's comments which are germane. The remainder of Mauna

two names, i.e., Delta and Sunset. This unexplained nomenclature discrepancy notwithstanding, we recognize the permittee of new UHF television station KHAI, Channel 20, in Honolulu, Hawaii, and will henceforth refer to it as "Sunset." Arguing against reallocation of Channel 5 or 6 in Hawaii, Sunset contends that Hawaii has no need for more VHF Channels since UHF-TV Channels are still amply available, and that there is a need for an additional fixed common carrier control and repeater allocation as described by RadioCall, Inc. in the latter's comments. Sunset further contends that between the Direct Broadcast Satellite (DBS) and low power television services the Commission has proposed, there will be more than enough television service available in Hawaii without any additional television allocations. Mauna Kea, permittee of UHF-TV Channel 26 in Honolulu, Hawaii, opposes the reallocation of the two TV Channels, stating that there is no necessity for it. Mauna Kea finds it "extraordinary indeed" for the FCC to consider the simultaneous reallocation of Channel 17 in one proceeding and Channels 5 and 6 in another (Mauna Kea's comments, p. 3).

8. The proposal to reallocate the upper half of the FM radio band (98-108 MHz) to the broadcast services in Hawaii was supported by KHVH, Inc. (KHVH) and Windward Broadcasting, Inc. (Windward). The KHVH petition, as stated previously, requests the very same reallocation of the band segment 98-108 MHz which we were promulgating by our own motion in the NPRM. The comments of KHVH lend full support to that portion of the Notice which proposes the FM allocation. Windward, the licensee of a Honolulu AM station, states its support for the Commission's proposal and voices its intention to file an application for construction permit for a new FM station if additional allotments are made.⁴ Windward believes that there is "sufficient demand for additional FM allotments in Hawaii to justify reallocating Channels 251-300."⁵

9. Island Communications, Inc. (Island) and Mauna Kea opposed the FM reallocation. Island is the licensee of one AM and one FM station, both in Honolulu. Island's primary concern focuses on the Honolulu market which Island describes as "over-radioed." Island is opposed to an allocation which would lead specifically to additional FM Channels on the Islands of Oahu and Maui, and is specifically opposed to KHVH's petition where the latter proposes new Honolulu FM Assignments. Island's request that the Commission "consider channel assignments only after the allocation proceeding has been concluded"⁶ is granted in full since that was our intention throughout this proceeding (see Notice, ¶2). Mauna Kea, licensee of an FM

Kea's opposition will, however, be discussed fully in the FM allocation portion of this proceeding.

⁴ Windward's comments, ¶2.

⁵ Ibid.

⁶ Island's comments, p. 11.

station and permittee of another (both on the Island of Hawaii), opposes the FM reallocation for the same reasons it opposes the VHF reallocation: the adequacy of existing broadcast stations and the radio common carriers' need for additional control and repeater spectrum in Hawaii. Additionally, Mauna Kea hypothesizes that were the Commission to reallocate the VHF and FM Channels, and allot them to Hawaiian markets, there would be an interference problem between TV Channel 6 and the lower FM Channels. Mauna Kea suggests an alternate FM allotment scheme which would avoid such interference. Since the latter proposal is clearly of an allotment nature and not of an allocation nature, its merits will not be discussed herein. When we address KHVH's petition for assignment in some future proceeding, it will then be appropriate to evaluate Mauna Kea's suggested allotment scheme.

10. RadioCall, Inc. (Radiocall) is the petitioner in a separate proceeding, General Docket 81-460, which considers reallocation of the UHF-TV Channel 17 (488-494 MHz) in Hawaii for common carrier control and repeat operations. Although RadioCall had previously expressed interest in the 76-108 MHz spectrum, it has since indicated its preference for the UHF Channel. Its comments in this proceeding therefore no longer apply because of its change in position and our action in proposing to reallocate Channel 17.

Replies

11. Reply comments were filed by Holmes, Mid-Pacific, and Sunset.⁷ Holmes summarizes Sunset's comments and points out that nowhere in the contiguous 48 states is the 76-88 MHz spectrum allocated for Domestic Public Land Mobile Radio Service (DPLMRS) operations. Holmes also points out the weakness of relying on RadioCall's comments since the latter's needs can be satisfied elsewhere in the spectrum, and further that RadioCall was the only radio common carrier (RCC) to comment on the Notice. Holmes further contends that Direct Broadcast Satellite Service (DBS) and low power television were not intended to replace traditional VHF and UHF-TV broadcasting. Holmes summarizes Sunset's comments as a "thinly disguised effort on the part of a broadcast permittee to protect itself against the rigors of marketplace competition" (Holmes' reply comments, p. 3). Holmes treats Mauna Kea's comments in a similar fashion, pointing out the similarities of its opposition to those of Sunset's. In regard to Mauna Kea's proposed solution to the alleged interference problem, Holmes accurately identifies it as a channel assignment issue which should be addressed in another proceeding. Holmes concludes by urging the FCC to reallocate TV Channels 5 and 6 to the State of Hawaii.

12. Mid-Pacific, like Holmes, limits the scope of its reply

⁷ Once again Sunset filed late.

comments to the opposing comments filed regarding the television spectrum reallocation issue. Mid-Pacific sums up Mauna Kea's arguments as anti-competitive and discusses the FCC's policies with regard to economic competition among broadcasters concluding that the proposed reallocation should be made. Mid-Pacific reiterates its need for a VHF-TV Channel to be used as a satellite station on the Island of Maui. Mid-Pacific discusses allotment issues which are not included here because they are beyond the scope of this proceeding. Mid-Pacific asserts that Sunset's reliance, in its comments, on RadioCall's professed need for DPLMRS spectrum is "less than convincing" (Mid-Pacific's reply comments, p. 5). Mid-Pacific concludes that the benefits of increased television programming for the Hawaiian public greatly outweigh the economic considerations.

13. Sunset's reply comments, like its comments, failed to meet the dates set forth by the Commission in its Notice. In fact, Sunset's reply comments were so late that they included a discussion of Mid-Pacific's timely filed reply comments. The purpose of comment periods is obvious and need not be stated here. However, in addition to serving the Commission's needs of knowing that the record is complete as of a given date, deadlines also prevent opposing parties from having the unfair advantage of evaluating everyone else's filings before submitting their own. The Commission will therefore limit its acceptance of Sunset's late filed reply comments to that portion which addresses the timely filed comments, and Sunset's discussion of Mid-Pacific's reply comments will not be considered.

14. Sunset defines the issue before the Commission as a question of reallocating the band 76-88 MHz to broadcast service or to a non-broadcast service. Sunset contends that a new TV allocation in Hawaii will "stunt" UHF development in that State. Sunset also alleges that RadioCall has shown a greater need for the spectrum than have the broadcast interests. Sunset also seems to believe that RadioCall's lengthy history of searching for additional spectrum was entirely focused on the 76-108 MHz band. This is not so. RadioCall's original petition (Docket 19943) was for spectrum in that portion of the radio spectrum; however, since 1974, RadioCall's efforts have been directed at obtaining use of UHF Channel 17 (488-494).⁸ Sunset urges the FCC to terminate this proceeding and reallocate the available spectrum for non-broadcast use.

Miscellaneous Filings

15. The comments and replies were followed by several miscellaneous filings commencing with Mid-Pacific's "Supplement to Reply Comments" and a "Motion to Accept Late-Filed Pleading." In its

⁸ For a fuller discussion of RadioCall's various filings and the Commission's actions, see, in the Notice of Proposed Rule Making in Docket 81-460, the section entitled "Background."

pleading, Mid-Pacific partially withdraws its support for reallocation of the TV spectrum. As will be shown later in the discussion, Mid-Pacific like many others is unaware of the special definitions accorded the words "allocation," "assignment," and "allotment" under FCC terminology. The thrust of Mid-Pacific's late supplemental filings falls under the category of allotment not allocation. Since that is not within the confines of this proceeding, there is no need to summarize Mid-Pacific arguments. Grant or denial of Mid-Pacific's motion to accept its late-filed pleading is therefore moot.

16. Holmes filed an "Opposition to Motion to Accept Late Filing" in response to Mid-Pacific's late filing. Holmes remarks that Mid-Pacific should have requested an extension of time and recommends that the FCC reject the late filing. Holmes alleges that Mid-Pacific's late filing represents not only a reversal of its position as presented in its comments and replies, but also a contradiction of all of its arguments.

17. The most recently filed document in this proceeding is a "Reply to Opposition to Motion to Accept Late Filing," submitted by Mid-Pacific. In it, Mid-Pacific accuses Holmes of (1) failing to show low acceptance of Mid-Pacific's Supplement will prejudice any party to the proceeding, (2) attempting to preclude Mid-Pacific from expressing its position and (3) selfishly desiring to squelch opposition.⁹ Mid-Pacific states its belief that its Supplemental Filing "will aid the Commission in reaching a proper resolution of the issues in this proceeding and . . . must be considered".¹⁰

Discussion

18. Much of the controversy over this proceeding stems from a misunderstanding of the words allocation, allotment and assignment. The following definitions were adopted at the 1979 World Administrative Radio Conference (WARC) of the International Telecommunication Union.¹¹

Allocation (of a frequency band): Entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radiocommunication services or the radio astronomy service under specified conditions. This term shall also be applied to the frequency band concerned.

Allotment (of a radio frequency or radio frequency channel): Entry of a designated frequency channel in an agreed plan, adopted by a competent conference, for use by one or more administrations for a terrestrial or space radiocommunication

⁹ Reply to Opposition to Motion to Accept Late Filing, by Mid-Pacific, pp. 1-2.

¹⁰ *Ibid.*, p. 1.

¹¹ The U.S. has not ratified the Final Acts from the '79 WARC.

service in one or more identified countries or geographical areas and under specified conditions.

Assignment (of a radio frequency or radio frequency channel): Authorization given by an administration for a radio station to use a radio frequency or radio frequency channel under specified conditions.

Thus, for example, the frequency band 76-88 MHz is allocated to the Broadcasting Service in the continental United States; Channel 5 (76-82 MHz) is allotted to the District of Columbia, and is assigned to Metromedia, Inc.

19. The only issue which this proceeding is concerned with is the reallocation of the bands 76-88 and 78-108 MHz to the Broadcasting Services in the State of Hawaii. Nowhere in our NPRM did we suggest if or how the TV and FM Channels might be allotted or assigned. It should also be noted that the FCC cannot allocate to one island and not another. Such a piecemeal scheme would surely lead to chaos in the allocation process and diminish the usefulness of our allocation table. In fact, most of our allocation proceedings are done on a nationwide basis. The instant proceeding brings Hawaii into conformity with the 48 contiguous states insofar as the VHF and FM broadcast frequencies are concerned.

20. Most of the comments can be placed in two categories and can be described as (1) opposing a new television of FM assignment and/or (2) advocating the need for a DPLMRS allocation rather than a broadcasting one in the 76-88 and 98-108 MHz bands. The first category can be dismissed without further discussion since it has no bearing on a reallocation decision.¹² The second category represents the RadioCall proponents. Their objections might have had merit if the Commission had not proposed reallocation of Channel 17 for DPLMRS use in Hawaii in another proceeding. RadioCall has stated its preference for the UHF Channel and therefore removed the only barrier in the path of this reallocation. The concerns of the two UHF permittees are understandable and will certainly be taken into consideration when the Commission weighs the merits of Lee Holmes' request for assignment of a new station in Honolulu. Likewise, Island's objections to yet another FM station in Honolulu will be evaluated when the Commission takes action on KHVH's petition. Sunset's argument that DBS and low power TV could better serve Hawaii's television needs is also not germane to this allocation proceeding. If we decide to allot one or more television channels to Hawaiian market(s), alternative means of TV service will then be considered. Since the Commission is not closing the two rule making petitions, none of these parties will have to refile comments.

21. Therefore, the Commission has concluded that the realloca-

¹² See, for example, 42 RR 2d 1673 and 42 RR 2d 618.

tion of the 76-88 and the 98-108 MHz bands to the Broadcast Services in the State of Hawaii is in fact in the public interest. Although no benefits will be immediately available, petitions such as KHVH's and Lee Holmes' will now be considered.

Action

22. Accordingly, IT IS ORDERED That, under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, the Commission's rules ARE AMENDED as set forth in the attached Appendix, effective November 9, 1981.

23. IT IS FURTHER ORDERED That this proceeding IS TERMINATED. IT IS FURTHER ORDERED, that the Holmes petition (RM-3467) and the KHVH petition (RM-3782) ARE GRANTED to the extent consistent herewith and the issues of allotment and assignment will be addressed in further proceedings concerning RM-3467 and RM-3782. IT IS FURTHER ORDERED That Mid-Pacific's motion to accept late filing IS GRANTED, and that the miscellaneous filings of Mid-Pacific and Lee M. Holmes are incorporated into the file, RM-3467.

24. Regarding questions on matters covered in this document contact Maureen Cesaitis at (202) 653-8164.

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

* Appendix A - may be seen in FCC Dockets Branch.

Appendix B

Parts 2, 22, 73 and 74 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 2 - Frequency Allocations and Radio Treaty Matters General Rules and Regulations.

In Section 2.106, the Table of Frequency Allocations is revised by removing footnote designator NG21 in column 7 for the bands 76-88 and 88-100 MHz and by removing the text of footnote NG21 from the list of footnotes following the Table.

B. Part 22 - Public Mobile Radio Services.

Section 22.601(c) is removed.

C. Part 73 - Radio Broadcast Services.

1. Section 73.220(c) is removed.

2. Section 73.603(b) is revised to read as follows:

§73.603 Numerical designation of television channels.

(a) * * *

(b) In Alaska, the frequency bands 76-82 MHz and 82-88 MHz are allocated for

non-broadcast use. These frequency bands (Channels 5 and 6) will not be assigned in Alaska for use by television broadcast stations.

* * * * *

D. Part 74 - Experimental, Auxiliary, and Special Broadcast, and Other Program Distributional Services.

1. Section 74.702 is revised by removing the last sentence in paragraph 74.702(b)(1), and adding a new sentence in its place as follows:

§74.702 Frequency assignment.

(a) * * *

(b)(1) Any one of the 12 standard VHF channels (2-13 inclusive) may be assigned to a VHF translator on condition that no interference is caused to the direct reception by the public of the signals of any television broadcast station operating on the same or any adjacent channel. Channels 5 and 6 are allocated for nonbroadcast use in Alaska and will not be assigned to a VHF translator in that State.

(2) * * *

2. Section 74.1202 is revised by removing the last sentence in paragraph 74.1202(b)(3) as follows.

§74.1202 Frequency assignment.

(a) * * *

(b)(1) * * *

(b)(2) * * *

(b)(3) Channels 201-260 (88.1 MHz through 99.9 MHz) are allocated for government radio services and non-government fixed service in Alaska and these frequencies will not be assigned for use by FM translators in Alaska.

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