11 FCC Rcd 17081

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 96-165
Washington, D.C. 20554

In re:	)	
	)	
Application of	)	
TRMR, Inc.	)	
	)	
For Construction Permit for a New FM Station on Channel 230C2 at Ephrata, Washington	)	File No. BPH-930721MC
	)	
Application for Review	)	
	)	
Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations **(East Wenatchee, Ephrata, Chelan, Moses Lake and Cle Elum Washington)**[1]	)	MM Docket No. 93-221 RM-8265

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1996 **Released: May 16, 1996**

By the Commission:

1. The Commission has before it the Application for Review filed March 6, 1995 by KSEM, Inc. ("KSEM") and related pleadings.[2] KSEM seeks review of the February 2, 1995 action denying KSEM's Petition To Deny and granting the captioned application of TRMR, Inc. ("TRMR") for a construction permit for a new FM Station on Channel 230C2, Ephrata, Washington (File No. BPH-930721MC).[3] The Commission also has before it the related proceeding in MM Docket No. 93-221, in which the staff proposed the allotment of Channel 229C2 at East Wenatchee, Washington and, in order to accommodate this allotment, the

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[1] The communities of Cle Elum and Moses Lake, Washington, have been added to the caption because they were specified in counterproposals in MM Docket No. 93-221.

[2] TRMR, Inc. filed an Opposition on March 21, 1995. KSEM filed a Reply thereto on April 5, 1995.

[3] Letter to John F. Garziglia, Esq. et al. from the Chief, Audio Services Division, Mass Media Bureau, February 2, 1995 (reference 1800B3-JWR).

deletion of then-vacant Channel 230C2 at Ephrata, Washington.[4] For the reasons set forth herein, KSEM's Application for Review will be denied. With the denial of the Application for Review and affirmation of the grant of TRMR's construction permit application, there is no basis to go forward with the rule making proceeding. As demonstrated below, the Petition for Rule Making and the two counterproposals made in that proceeding are contingent upon deletion of the Ephrata channel. None of these proposals is grantable given our action here. The Petition for Rule Making and counterproposals will therefore be dismissed and the proceeding in MM Docket No. 93-221 will be terminated.

2. Background. The principals of TRMR are the same as those of Hartline Broadcasters ("Hartline"). Hartline filed a petition for rule making on May 27, 1993, seeking to amend the FM Table of Allotments, 47 C.F.R. §73.207(b), by adding Channel 229C2 at East Wenatchee, Washington. To accommodate that change, Hartline also proposed deletion of vacant Channel 230C2 at Ephrata. Since no applications for that channel had been filed during the relevant filing window, it remained available on a "first-come/first-serve" basis.[5]

3. On July 21, 1993 the staff adopted the NPRM in the East Wenatchee rule making proceeding. In the NPRM, the staff proposed to amend the Table as Hartline requested and indicated that, if no "first-come/first-serve" applications were filed for vacant Channel 230C2 at Ephrata by the comment deadline in the rule making proceeding, September 24, 1993, that allotment would be deleted. On the same day the NPRM was adopted,[6] TRMR filed a "first-come/first-serve" Ephrata application, despite the fact that Hartline had proposed deletion of the channel in the rule making. Subsequently, in response to the NPRM, KSEM, licensee of Station KDRM(FM), Channel 257A, Moses Lake, Washington, filed a timely

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[4] The Notice of Proposed Rule Making and Order to Show Cause ("NPRM") in that proceeding also proposed the substitution of Channel 238A for Channel 228A at Chelan, Washington and the corresponding modification of the license of Station KOZI-FM, Chelan, Washington. See MM Docket No. 93-221, 8 FCC Rcd 5193 (M.M.Bur. 1993). In view of our action dismissing the underlying proposal and two counterproposals, we need not consider this proposed license modification.

[5] If a commercial FM allotment remains vacant after the close of the appropriate window filing period, the allotment becomes available on a "first-come/first-serve" basis, with the first acceptable application cutting off the filing rights of subsequent applications. See 47 C.F.R. §73.3573(g)(3). The window for the subject Ephrata allotment opened on February 14, 1989, and closed on March 16, 1989. See Report and Order in MM Docket No. 87-326, 4 FCC Rcd 307 (M.M.Bur. 1989).

[6] The NPRM was released August 4, 1993.

counterproposal.[7] KSEM proposed to upgrade Station KDRM by substituting Channel 230C3 for Channel 257A at Moses Lake. That upgrade proposal also required the deletion of Channel 230C2 in Ephrata. A second timely counterproposal, filed by Brian J. Lord ("Lord") proposed the allotment of Channel 229C3 to Cle Elum, Washington, which also required deletion of Channel 230C2 at Ephrata. However, because TRMR had filed the "first-come/first-serve" application, consideration of KSEM and Lord's counterproposals was effectively blocked pursuant to the Memorandum Opinion and Order in MM Docket No. 91-348, 8 FCC Rcd 4743, 4745 ¶13 (1993) ("...a counterproposal filed before the counterproposal deadline in an FM allotment proceeding could be rendered unacceptable because a conflicting FM application was filed earlier"). [8]

4. KSEM filed a Petition to Deny TRMR's Ephrata application. The Bureau rejected KSEM's arguments that the application was in violation of 47 C.F.R. §73.3518 because it was inconsistent with the Hartline rule making proposal, that it was designed to thwart KSEM's more meritorious rule making counterproposal, and that it amounted to an abuse of Commission processes. The Bureau's decision indicated first that KSEM's reliance on Big Wyoming Broadcasting Corp. ("Big Wyoming"), 2 FCC Rcd 3493 (1987), was misplaced, because the inconsistent application rule, 47 C.F.R. §73.3518, applies only to conflicting construction permit applications and does not apply to applications which conflict with rule making petitions. Second, the ruling below noted that inasmuch as the Rules permit TRMR and Hartline to prosecute simultaneously the Ephrata application and the East Wenatchee rule making proposal, there is no abuse of process. The ruling further indicated that KSEM's reliance on the Report and Order in MM Docket No. 87-314, 5 FCC Rcd 3911 (1990),[9] was misplaced. There, the Commission acted to deter non-bona fide expressions of interest in proposed allotments, whereas TRMR's interest in the proposed East Wenatchee channel was bona fide. Finally, the ruling rejected KSEM's reliance on Calhoun County Broadcasting Co. ("Calhoun"), FCC 84-457, released January 3, 1985, 57 RR 2d 641, 646 (1985), and on Marr Broadcasting Co., Inc. ("Marr"), 2 FCC Rcd 3466 (Rev. Bd. 1987), because those cases involved the Commission's refusal to grant construction permit applications on grounds that

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[7] In response to the NPRM, Hartline and TRMR filed joint comments supporting Hartline's proposal and reaffirming Hartline's intention to apply for Channel 229C2 at East Wenatchee, if allotted.

[8] After TRMR filed its application for Channel 230C2 at Ephrata, the KSEM and Lord counterproposals were short-spaced to the application site (now construction permit site) and are technically defective. Unlike KSEM, Lord has not opposed grant of the TRMR application. In any event, the counterproposals have not been placed on Public Notice and will be dismissed. We note that a staff channel search reveals that there is no alternate Class C2 channel available at East Wenatchee or alternate Class C3 channel available at Moses Lake or Cle Elum, Washington.

[9] Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes.

the applicants had previously agreed to assign rather than construct the permit.

5. Application for Review. KSEM asserts that the TRMR/Hartline principals are not interested in operating an Ephrata station, referencing in particular their comments in the rule making proceeding evidencing an intent to utilize 47 C.F.R. §1.420(i) to seek a change of community of license to East Wenatchee if TRMR's "first-come/first-serve" application is granted. KSEM argues first that, contrary to the statement in the decision below, its Petition was not predicated on Big Wyoming. It indicates that it cited that case only to draw an analogy between the instant circumstances, involving a petition for rule making and a "first-come/first-serve" application, and the circumstances in which the inconsistent application rule bars the filing of two applications by the same party, both of which cannot be granted. Rather, asserts KSEM, its Petition was predicated on TRMR's alleged lack of intent to serve Ephrata and on its abuse of Commission processes by filing a "first-come/first-serve" application solely to block KSEM's counterproposal in the rule making proceeding and thereby further Hartline's objective of obtaining a Class C channel at East Wenatchee. KSEM essentially argues that TRMR should not be permitted to file an application for a channel allotted to Ephrata on which it has no intention to build.[10] KSEM questions the ruling below insofar as it reasons that filing in both proceedings was acceptable because the outcome of a rule making proceeding is not assured. It points out that by filing the Ephrata permit application, TRMR in fact secured protection against KSEM's rule making counterproposal. KSEM also questions language below affirming TRMR's commitment to an East Wenatchee station. According to KSEM, it did not contend, as the staff letter suggests, that TRMR is uninterested in a channel at that community. Rather, its argument concerned TRMR's alleged lack of interest in Ephrata, the community for which it applied, and thus it referenced Calhoun County and Marr.[11] Finally, KSEM argues that its Ashbacker[12] rights to advance a mutually exclusive and superior counterproposal have been compromised.

6. Discussion. There is nothing in the record to indicate that TRMR's application to construct and operate a station on Channel 230C2 in Ephrata is not bona fide. It is uncontroverted, as KSEM alleges, that TRMR intends to seek permission to relocate its proposed station to East Wenatchee. However, a request for a change of community is not now before the Commission, and, significantly, KSEM presents no evidence to indicate that TRMR's expressed commitment to provide service on Channel 230C is contingent upon a favorable disposition of a §1.420(i) petition to change community of license. On the contrary, TRMR has stated its intention to construct and operate the facility applied for, whether at

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[10] KSEM references excerpts from TRMR/Hartline's rule making comments indicating an intent to request a move of the Ephrata allotment to East Wenatchee pursuant to §1.420 once its Ephrata permit application has been granted.

[11] See ¶4, supra. KSEM charges that TRMR has indicated that it does not intend to construct and operate as proposed in the instant application, i.e., to serve Ephrata.

[12] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

Ephrata or East Wenatchee.[13] Thus, KSEM fails to demonstrate that the grant of a permit to TRMR, insofar as it was predicated on TRMR's commitment to establish and operate an Ephrata facility, was inappropriate.

7. Furthermore, even were TRMR to petition for rule making to reallot Channel 230C2 from Ephrata to East Wenatchee, as pointed out in the Bureau's February 2, 1995 ruling, there is no way to forecast the outcome of such a rule making proceeding. Any request by TRMR for a community of license change will undergo analysis pursuant to §307(b) of the Communications Act of 1934, as amended, as would any allocations rule making proposal, and KSEM may file comments and/or a counterproposal in that proceeding. Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("New Community"), 4 FCC Rcd 4870 (1989), recon. denied, 5 FCC Rcd 7054, 7095-7096 (1990). Neither TRMR nor any other party can assume such a proposal will receive favorable consideration. To the extent that TRMR's intended East Wenatchee reallotment will not require a transmitter site change, however, we expect prompt construction of the facilities approved herein and would not anticipate extending the permit on the basis of any such rule making. We will, of course, take into consideration how promptly TRMR files any subsequent petition for rule making.

8. With respect to KSEM's claim that TRMR/Hartline's actions here violated its rights under Ashbacker, we note that in Conflicts Between Applications and Petitions For Rule Making To Amend the FM Table of Allotments ("Conflicts Between Applications and Rule Makings"), 7 FCC Rcd 4917, 4919 (1992), recon. granted in part, 8 FCC Rcd 4743 (1993), the Commission specifically provided "first-come/first-serve" applicants protection from subsequently filed conflicting rule making proposals and found that Ashbacker does not preclude adoption of procedures which may limit the ability of parties to file counterproposals in allotment proceedings. The fact that such protection is here afforded TRMR does not mean that KSEM's Ashbacker rights have been abridged or diluted in any meaningful way because KSEM has no such rights as against a prior filed FM application that has cut-off protection.[14]

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[13] We agree with KSEM that a line from the February 5, 1995 staff letter is confusing, because it suggests that the decision there was based in part on TRMR/Hartline's bona fide intent to build in East Wenatchee if Hartline prevailed in the rule making. That intent has, in fact, never been questioned. However, the underlying letter taken as a whole also confirms the bona fide nature of the Ephrata "first-come/first-serve" application, since the letter finds no abuse of process on behalf of TRMR/Hartline in filing that application.

[14] The cases cited by KSEM in support of this argument are therefore inapposite. Contrary to KSEM's assertion, Cheyenne, Wyoming, 62 FCC 2d 63 (1976), does not stand for the proposition that Ashbacker mandates consideration of allotment counterproposals. Rather, it stands only for the proposition that the Commission would not grant one station's application for a proposed modification specifying a higher class frequency if so doing would foreclose the filing of applications by other interested parties for the newly assigned

The lesson of Ashbacker is that the Commission cannot grant the application of one qualified party while denying another mutually exclusive application without conducting a comparative hearing. KSEM's counterproposal is not "mutually exclusive" with TRMR's Ephrata application and does not have Ashbacker rights. Reuters Ltd. v FCC, 781 F.2d 946, 951 (D.C. Cir. 1986). Had KSEM's counterproposal been filed prior to or on the same day as TRMR's Ephrata application, it would have been mutually exclusive and would have been accorded an Ashbacker right to consideration. Conflicts Between Applications and Rulemakings, 8 FCC Rcd at 4745.[15] As indicated previously, of course, KSEM may participate in a meaningful way in any eventual rule making to reallot Channel 230C to East Wenatchee.

9. With respect to KSEM's charge that TRMR/Hartline abused Commission processes, we note that our abuse of process policies and determinations essentially are designed to inhibit the filing of non-bona fide pleadings or applications for the purpose of delay or extracting a profit from settlement. See, e.g., Radio Carrollton, et al., 69 FCC 2d 1139, 1150 (1978) and cases cited therein ("strike pleading" -- i.e., pleading filed in bad faith primarily to block, impede or delay grant of another application -- constitutes abuse of process); Report and Order in MM Docket No. 87-314, 5 FCC Rcd 3911 (1990), recon. denied, 6 FCC Rcd 3380 (1991) (limitation on consideration for withdrawal of petitions to deny, informal objections, and expressions of interest in allotment proceedings imposed to discourage non-

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frequency. In other words, it would not cut off expressions of interest or applications for newly assigned frequencies unless, as indicated above, there would be a significant public interest benefit from doing so in specific circumstances. No parties here were foreclosed from applying for the vacant Ephrata allotment. None but TRMR chose to do so.

[15] In other words, KSEM thus could have prevented the preemption of its counterproposal. As we stated in the Memorandum Opinion and Order reconsidering Conflicts Between Applications and Rule Makings, the policy of permitting applications to "cut off" subsequent rule making counterproposals is not inequitable because:

> potential petitioners do not have to wait to the end of the comment period to file their counterproposals. While parties may desire to file on the last day of a comment period to minimize the possibility that other counterproposals may be filed for tactical reasons, they do so at a risk that an application could be filed earlier. This risk could in large part be minimized by filing a counterproposal at the earliest possible time, rather than waiting for the comment period to expire.

8 FCC Rcd at 4745. Here, KSEM could have initiated the rule making to delete then-vacant Channel 230C2 in Ephrata and upgrade its station, or it could have filed immediately after Hartline's petition for rule making was placed on Public Notice.

bona fide pleadings and proposals); Report and Order in MM Docket No. 90-263, 56 Fed. Reg. 373 (January 4, 1991), 6 FCC Rcd 85 (1991), recon. granted in part, 6 FCC Rcd 2901 (1991) (limitation on settlement payments among mutually exclusive applicants designed, inter alia, to reduce the number of non-bona fide applicants). Because TRMR filed a bona fide "first-come/first-serve" application for the vacant Ephrata frequency, and because there is no evidence that Hartline's petition for rule making was not itself bona fide, we cannot find that Hartline/TRMR's principals engaged in an abuse of Commission processes.

10. In any event, abuse of process ordinarily involves an intent to gain some benefit by manipulating the Commission's procedures. Here, we are unaware of any benefit which TRMR/Hartline could have gained by first filing a rule making proposal to remove the Ephrata allotment and allot a channel to East Wenatchee, rather than simply filing a "first come/first serve" application for Ephrata, thus cutting off all prospective competition, and subsequently seeking to move its community of license to East Wenatchee. In short, TRMR/Hartline's approach in this case appears to have been more a matter of poor planning than an abuse of the Commission's processes. We admonish TRMR/Hartline for causing the Commission to waste valuable resources in studying a petition and drafting an NPRM that the petitioner itself subsequently rendered moot, but we cannot find on these facts that TRMR/Hartlline exploited Commission processes for its own benefit and to the detriment of others.

11. Finally, we affirm the Bureau's conclusion that Calhoun and Marr do not support KSEM's position. Construction permits are granted only to qualified applicants in reliance upon their bona fide intention to place the proposed station on the air and to provide broadcast service. Thus, the Commission has long sought "to preclude the use of broadcast authorizations as a means of obtaining financial gain without rendering the broadcast service which, alone, justifies grant of the permits." Assignment and Transfer of Construction Permits, 33 Fed. Reg. 12,678 (September 6, 1968). Similarly, construction permits are not granted to applicants who indicate an intention to sell rather than build. It is this proposition for which Calhoun and Marr stand. As indicated previously, TRMR has evidenced a bona fide intention to construct its station and provide broadcast service, whether at East Wenatchee or Ephrata.

12. Accordingly, IT IS ORDERED, That the Application for Review filed March 6, 1995 by KSEM, Inc. IS DENIED, and the February 2, 1995 action of the Mass Media Bureau granting the subject application IS AFFIRMED.

13. IT IS FURTHER ORDERED, That, based on the above discussion, the petition for rule making submitted by Hartline Broadcasters on May 27, 1993, as well as the counterproposals filed by Brian J. Lord on September 23, 1993 and by KSEM, Inc. on September 24, 1993, ARE DISMISSED, and the proceeding in MM Docket No. 93-221 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary