

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 08-85
Table of Allotments,)	RM-11427
FM Broadcast Stations.)	RM-11517
(Needles, California; Ehrenberg, First Mesa,)	RM-11518
Kachina Village, Wickenburg, and Williams,)	RM-11519
Arizona))	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: December 21, 2011

Released: December 23, 2011

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division considers herein the *Notice of Proposed Rule Making and Order to Show Cause*¹ issued in response to a Petition for Rule Making (“Needles Petition”)² filed by Michael Cusinato (“Petitioner”). Also before us are: (1) a Petition for Rule Making (“Williams Petition”)³ filed by Rocket Radio, Inc. (“Rocket Radio”); (2) a Petition for Rule Making and hybrid Application⁴ (“Wickenburg Petition and Application”) filed by Univision Radio License Corporation (“Univision”), licensee of Station KHOV-FM, Channel 287C2, Wickenburg, Arizona; and (3) various related pleadings.⁵ For the reasons discussed below, we dismiss the Needles Petition, terminate this proceeding, and concurrently issue a *Notice of Proposed Rule Making* to consider the mutually exclusive Williams Petition and the Wickenburg Petition and Application.

2. **Background.** The *Notice* proposed the allotment of FM Channel 287B1 at Needles, California, as the community’s fourth local transmission service.⁶ To accommodate the proposed Needles allotment, the *Notice* proposed channel changes for two vacant allotments. Specifically, the *Notice* proposed the substitution of Channel 228C2 for vacant Channel 286C2 at Ehrenberg, Arizona, and the substitution of Channel 281C for vacant Channel 247C at First Mesa, Arizona. Furthermore, to facilitate the

¹ *Needles, California, Ehrenberg and First Mesa, Arizona*, Notice of Proposed Rule Making and Order to Show Cause, 23 FCC Red 11129 (MB 2008) (“*Notice*”).

² See RM-11427.

³ See RM-11517.

⁴ See RM-11518 and File No. BPH-20080915AFP, respectively.

⁵ These pleadings include: (1) Reply to Order to Show Cause filed by Univision; (2) Comments filed by Rocket Radio; (3) Comments, Response to Order to Show Cause, and Counterproposal filed by Grenax Broadcasting II, LLC (“Grenax”), licensee of Station KBTK(FM), Kachina Village, Arizona; (4) Reply Comments and Opposition to Counterproposal filed by Univision; (5) Reply Comments filed by Grenax; and (6) Reply comments filed by Rocket Radio.

⁶ The *Notice* also acknowledged that, along with the Needles Petition, the Petitioner had concurrently filed an application, File No. BNPH-20070312ACB, for a new station on Channel 287B1 at Needles and paid the requisite filing fee, pursuant to Commission policy.

Needles allotment, we issued an *Order to Show Cause* to Univision as to why its license for Station KHOV-FM, Wickenburg, Arizona, should not be changed from Channel 287C2 to Channel 286C2 and to Grenax as to why its license for Station KBTK(FM), Kachina Village, Arizona, should not be changed from Channel 286C2 to Channel 246C2.

3. In response to the *Notice*, Rocket Radio filed Comments, alerting the staff that Rocket Radio had concurrently filed the non-conflicting, Williams Petition to allot Channel 287C2 to Williams, Arizona, as a second local service. To accommodate the Williams allotment, Rocket Radio proposed the same channel changes at Ehrenberg, First Mesa, Wickenburg, and Kachina Village that were proposed in the Needles Petition. Rocket Radio noted that, as a result of these channel changes, it would be possible for both Needles and Williams to have new local services.

4. Univision filed a Reply to Order to Show Cause, stating that it does not oppose modification of its license for Station KHOV-FM, Wickenburg, Arizona, to specify operation on Channel 286. However, it also concurrently filed the hybrid Wickenburg Petition and Application. Specifically, the Wickenburg Application proposes the upgrade of Station KHOV-FM, Wickenburg, from Channel 287C2 to Channel 286C0. To accommodate the Wickenburg Application, Univision also proposed the same channel changes at Ehrenberg, First Mesa, and Kachina Village proposed by the Needles Petition. We note that the Wickenburg Application is mutually exclusive with the Williams Petition because proposed Channel 286C0 at Wickenburg is short-spaced to proposed Channel 287C2 at Williams under the Commission's minimum distance separation rule.⁷

5. After these pleadings were filed, the staff issued a *Public Notice*, accepting the Williams Petition and the Wickenburg Petition and Application as counterproposals in this proceeding.⁸ In response to the *Public Notice*, Grenax filed Reply Comments which raised two issues. First, Grenax contends that the Needles Petition should be dismissed and this proceeding should be terminated because neither the Petitioner nor any other party filed an expression of interest in the proposed Needles allotment, which is required in order to allot a new channel. Second, Grenax argues that the Williams Petition and the Wickenburg Petition and Application should not be treated as counterproposals in this proceeding because they do not conflict with the Needles Petition and thus do not have the necessary nexus to be considered in this proceeding. Rather, Grenax states that these two proposals are consistent with the Needles Petition and should be considered together in a separate rulemaking proceeding.

6. **Discussion.** *Needles Petition.* We agree with Grenax that the Needles Petition should be dismissed. The Commission's well established policy is to refrain from allotting a channel absent a *bona fide* expression of interest.⁹ Because the Petitioner did not file a continuing expression of interest in proposed Channel 287B1 at Needles and no other party filed an interest in the proposed channel, we cannot allot Channel 287B1 at Needles. Accordingly, we will dismiss the Needles Petition and terminate this proceeding.

⁷ 47 C.F.R. § 73.207.

⁸ *Public Notice*, Report No. 2883, March 10, 2009. The *Public Notice* also accepted as a counterproposal an alternate channel suggestion by Grenax to modify its license for Station KBTK(FM), Kachina Village, Arizona, on Channel 285C2 in lieu of the *Notice*'s proposal to modify its license to specify Channel 246C2, and assigned it RM-11519. See Grenax's Comments, Response to Order to Show Cause, and Counterproposal, filed on September 15, 2008, at 4-5.

⁹ See e.g., *Clarendon, Texas*, Report and Order, 18 FCC Rcd 12701 (MB 2003) and *Jasper, Texas*, Report and Order, 18 FCC Rcd 418 (MB 2003)(stating that it is Commission policy to refrain from making a new allotment to a community absent an expression of interest).

7. *Williams Petition and Wickenburg Petition and Application.* Although the *Public Notice* accepted the Williams Petition and the Wickenburg Petition and Application as counterproposals in this proceeding, we also agree with Grenax that these pleadings are not counterproposals and should not have been considered in this proceeding. A counterproposal is defined as a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which it is made.¹⁰ While both the Williams Petition and the Wickenburg Petition and Application are related to the Needles Petition as they require the same related channel substitutions at other communities, they lack the element of mutual exclusivity with the Needles Petition to be treated as counterproposals in this proceeding.¹¹ Under these circumstances, these proposals should be considered in a separate rulemaking proceeding, affording the opportunity for the filing of comments and counterproposals, because they are mutually exclusive with each other.¹² Accordingly, we are concurrently issuing a separate Notice of Proposed Rule Making to consider the Williams Petition and the Wickenburg Petition and Application.¹³

8. The Commission will not send a copy of this *Report and Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because this proceeding is terminated without the adoption of any rules.

9. IT IS FURTHER ORDERED, That the Petition for Rule Making, RM-11427, filed by Michael Cusinato IS DISMISSED.

10. IT IS FURTHER ORDERED, That the application, File No. BNPB-20070312ACB, filed by Michael Cusinato IS DISMISSED.

11. IT IS FURTHER ORDERED, That the rulemaking proposal, RM-11519, filed by Grenax Broadcasting II, LLC IS DISMISSED.

12. A copy of this *Report and Order* will be sent to Michael Cusinato, 1705 Peridot Ct., Castle Rock, Colorado 80108 (Petitioner) Scott R. Flick, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, DC 20037 (Counsel to Univision); M. Scott Johnson, Esq., Fletcher, Heald and

¹⁰ *See Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, Memorandum Opinion and Order, 5 FCC Rcd 931 n.5 (1990).

¹¹ For the same reasons, the *Public Notice* should not have accepted Grenax's suggestion to allot alternate Channel 285C2 at Kachina Village as a counterproposal in this proceeding because it is not in conflict with any of the allotments proposed in the *Notice*. Although Channel 285C2 at Kachina Village is short-spaced to the Wickenburg Application's proposed Channel 286C0 at Wickenburg, that conflict does not make Grenax's alternate channel a counterproposal because the Wickenburg Application is not mutually exclusive with the Needles Petition. Accordingly, we will dismiss Grenax's proposal but afford Grenax the opportunity to file comments in response to an Order to Show Cause, which will be included in our concurrently adopted Notice of Proposed Rule Making.

¹² The Williams Petition and the Wickenburg Application are mutually exclusive with each other because (1) Channel 287C2 at Williams conflicts with Channel 286C0 at Wickenburg under the minimum distance separation requirements; and (2) both proposals were filed on the same day, September 15, 2008. *See* 47 C.F.R. § 73.208(a)(3)(iii) (providing that a rulemaking petition to amend the FM Table of Allotments not meeting the minimum distance separation requirements specified in a pending minor change application will not be considered unless it was filed no later than the date of the minor change application). *See also Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report and Order, 7 FCC Rcd 4917 (1992), *recon. granted in part and otherwise denied*, Memorandum Opinion and Order, 8 FCC Rcd 4743 (1993).

¹³ In this new proceeding, we will entertain counterproposals with respect to the Williams Petition because it is a rulemaking petition. However, the Wickenburg Application is cut-off vis-à-vis any subsequently filed proposals because, as a minor change application, it receives cut-off protection as of the date it is filed. *See* 47 C.F.R. § 73.3573(f). As a result, counterproposals to the Williams Petition must protect the proposed allotment of Channel 286C0 at Wickenburg, Arizona.

Hildreth, PLC, 1300 North 17th St., 11th Floor, Arlington, VA 22209 (Counsel to Grenax); Erwin G.Krasnow., Esq., Garvey Schubert Barer, 1000 Potomac Street, N.W., Fifth Floor, Flour Mill Building, Washington DC 20007 (Counsel to Rocket Radio); Univision Radio License Corporation, 1999 Avenue of the Stars, Suite 300, Los Angeles, CA 90067; and Grenax Broadcasting II, LLC, 10337 Carriage Club Drive, Lone Tree, Colorado 80124.

13. IT IS FURTHER ORDERED, That the aforementioned proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Andrew J. Rhodes or Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Nazifa Sawez
Assistant Chief
Audio Division
Media Bureau