

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 11-207
FM Broadcast Stations.)	RM-11517
(Ehrenberg, First Mesa, Kachina Village, Munds)	RM-11518
Park, Wickenburg, and Williams, Arizona) ¹)	RM-11669
)	
Application of)	
Univision Radio License Corporation)	File No. BPH-20080915AFP
KHOV-FM, Wickenburg, Arizona)	

REPORT AND ORDER

Adopted: February 14, 2013

Released: February 15, 2013

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division considers herein a *Notice of Proposed Rule Making*² issued in response to a Petition for Rule Making (“Williams Petition”) filed by Rocket Radio, Inc. (“Rocket Radio”)³ and a Petition for Rule Making and hybrid Application (“Wickenburg Petition and Application”) filed by Univision Radio License Corporation (“Univision”), licensee of Station KHOV-FM, Wickenburg, Arizona.⁴ Also before us are: (1) a Counterproposal and Response to Order to Show Cause (“Munds Park Counterproposal”) filed by Grenax Broadcasting II, LLC (“Grenax”), licensee of Station KBTK(FM), Kachina Village, Arizona;⁵ and (2) various related pleadings.⁶ For the reasons discussed below, we grant the Munds Park Counterproposal and dismiss the Williams Petition and the Wickenburg Petition and Application.

2. **Background.** The *Notice* solicited comment on two mutually exclusive proposals that were previously being considered in another proceeding.⁷ First, in response to the Williams Petition, the *Notice*

¹ The community of Munds Park, Arizona, has been added to the caption. See *Public Notice*, Report No. 2957 (rel. Jul. 27, 2012).

² See *Ehrenberg, First Mesa, et al., Arizona*, Notice of Proposed Rule Making and Order to Show Cause, 26 FCC Rcd 16965 (MB 2011) (“*Notice*”).

³ See RM-11517.

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

⁵ See RM-11669.

⁶ These pleadings include: (1) Comments and Response to Order to Show Cause filed by Univision on February 21, 2012; (2) Reply Comments filed by Grenax on March 6, 2012; (3) Reply Comments and Response to Counterproposal filed by Univision on March 6, 2012; (4) Reply Comments filed by Grenax on August 10, 2012; and (5) Reply Comments filed by Univision on August 12, 2012.

⁷ See *Needles, California, Ehrenberg, First Mesa, Kachina Village, Wickenburg, and Williams, Arizona*, Report and Order, 26 FCC Rcd 16973 (MB 2011).

proposed the allotment of FM Channel 287C2 at Williams, Arizona. Second, in response to the Wickenburg Application, the *Notice* proposed the upgrade of Univision's Station KHOV-FM, Wickenburg, from Channel 287C2 to Channel 286C0 at a new transmitter site. To accommodate the Wickenburg Application, the *Notice* proposed, as requested in the Wickenburg Petition, 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 Wickenburg Petition and Application, we issued an *Order to Show Cause* to Grenax as to why its license for Station KBTK(FM), Kachina Village, Arizona, should not be modified from Channel 286C2 to Channel 246C2.

3. In response to the *Notice*, Grenax filed the Munds Park Counterproposal, proposing the allotment of Channel 246C2 to Munds Park.⁸ In order to accommodate that allotment, Grenax requests the substitution of Channel 281C for vacant Channel 247C at First Mesa. The Munds Park Counterproposal is mutually exclusive with the Wickenburg Application and Petition because stations on Channel 246C2 at Munds Park and Channel 246C2 at Kachina Village would not satisfy the minimum distance separation requirements.⁹

4. In support of the Munds Park Counterproposal, Grenax argues that its proposal would serve the public interest by providing a second local and first competitive service to Munds Park (population 691)¹⁰ and a new reception service to 119,500 persons.¹¹ Grenax states that the Commission has previously recognized that Munds Park is a community for allotment purposes.¹²

5. In its Reply Comments, Univision compares the Wickenburg Petition and Application and the Munds Park Counterproposal under the FM Allotment Priorities.¹³ Univision contends that the Wickenburg Petition and Application are entitled to a dispositive preference over the Munds Park Counterproposal under Priority 2 because the Wickenburg Application will provide a second full-time reception service to 1,428 people,¹⁴ whereas the Munds Park Counterproposal would not result in a second full-time service to anyone. Alternatively, Univision alleges that, even if the Wickenburg Petition and Application do not prevail under Priority 2, its proposal is superior when evaluated under Priority 4 because it would result in a substantially higher level of service to underserved areas than the Munds Park Counterproposal.¹⁵

⁸ As required by Commission policy, Grenax filed a construction permit application (File No. BNPH-20120221ACZ) for Channel 246C2 at Munds Park and paid the filing fees.

⁹ See 47 C.F.R. § 73.207.

¹⁰ Grenax's Counterproposal and Response to Order to Show Cause, at 1 and 6.

¹¹ *Id.* at 5. Grenax also points out that the proposed facility would provide 70 dBu coverage of greater than 50 percent of the Flagstaff, Arizona, Urbanized Area. *Id.* at 3.

¹² *Id.* at 2, citing *Munds Park, Arizona*, Report and Order, 14 FCC Rcd 6773 (MMB 1999) (allotting FM Channel 291A to Munds Park as a first local service).

¹³ The FM Allotment Priorities are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982) ("*FM Assignment Policies*").

¹⁴ See Univision's Reply Comments and Response to Counterproposal of March 6, 2012, at 2-3.

¹⁵ Specifically, Univision alleges that the Wickenburg Application would result in new third service to 840 people, new fourth service to 58 people, and new fifth through ninth service to 294 people. *Id.*, at 3. By way of contrast, (continued....)

6. Grenax replies that, although Univision's proposal appears to provide some public interest benefits in expanded service to a small number of listeners with fewer than five services, the total percentage of underserved people who would receive new service would be 0.18 percent of Univision's total expanded service.¹⁶ Grenax argues that such a small percentage should be considered *de minimis* and that the public interest would be better served by a second local and first competitive service at Munds Park.

7. **Discussion.** *Williams Petition.* As a preliminary matter, we note that Rocket Radio did not file comments in response to the *Notice*. The Commission's well established policy is to refrain from allotting a channel absent a *bona fide* expression of interest.¹⁷ Because Rocket Radio did not file a continuing expression of interest in Channel 287C2 at Williams and no other party filed an interest in the proposed channel, we cannot allot Channel 287C2 at Williams. Accordingly, we will dismiss the Williams Petition.

8. *Comparative Evaluation.* With the dismissal of the Williams Petition, the mutually exclusive Wickenburg Petition and Application and the Munds Park Counterproposal remain. Although the staff searched for an alternate channel to eliminate the conflict between these proposals, none was available that would meet Section 73.207 spacing requirements. Therefore, these conflicting proposals must be comparatively considered under the FM Allotment Priorities.

9. At the outset, we note that Univision proposes simply to upgrade the class of channel for its Station KHOV-FM at a new transmitter site and claims that it is entitled to a dispositive preference under Priority 2 because it would provide a second full-time reception service to a "gray" area¹⁸ of 1,428 persons. However, we are unable to confirm Univision's claim that the Wickenburg Application would provide a second full-time reception service to 1,428 persons. Although Univision submitted an engineering study, seeking to show the population that would receive a second full-time service, Univision did not provide sufficient information for us to identify where this new service would occur.¹⁹ As a result, the staff conducted its own engineering analysis. The staff's study reveals that the proposed Station KHOV-FM upgrade would provide a net gain of service to 1,294,275 persons with no loss of service. The study further shows that 264 persons within a "gray" area of 556 sq. km. would receive a second full-time reception service.

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Univision contends that the Munds Park Counterproposal would not result in third through ninth service to anyone. *Id.*

¹⁶ See Grenax's Reply Comments of March 6, 2012, at 2; Grenax's Reply Comments of August 10, 2012, at 2. Univision alleges that the Wickenburg Application will result in new service to additional 1,258,966 people. See Univision's Comments and Response to Order to Show Cause, at 5.

¹⁷ See, e.g., *Jasper, Texas*, Report and Order, 18 FCC Rcd 418 (MB 2003) (dismissing a rule making petition to allot a new FM channel because no continuing expression of interest was filed). See also *Notice*, 26 FCC Rcd at 16972 (stating that the proponent of a proposed allotment must restate its present intention to apply for the channel and the failure to do so may lead to denial of the request).

¹⁸ A "gray" area is an area in which there is only one full-time aural reception service. A "white" area is an area in which there are no full-time aural reception services. See *Cheyenne, Wyoming, and Gering, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7530 n.8 (MMB 2000).

¹⁹ See Univision's Comments and Response to Order to Show Cause, at Exhibits 1-A and 1-B. These exhibits provide a service count for populations within the proposed 60 dBu contour of Station KHOV-FM but do not include a map identifying locations for each claimed service level population figure within the 60 dBu contour.

10. The Commission's policy is that a first full-time or second full-time reception service gain or loss to more than a *de minimis* population generally will trigger Priorities 1 or 2.²⁰ The Commission determines whether an additional service gain or loss to a particular population is *de minimis* by examining the level of underserved population relative to the overall number of people that would be served.²¹ We find that the provision of a second full-time reception service to 264 persons is *de minimis* when compared to the net gain in service to 1,294,275 people because this "gray" area service constitutes approximately 0.02 percent of the population in the gain area. Our view is buttressed by the fact that in *Seabrook*, the provision of a second full-time reception service was considered *de minimis* because it amounted to approximately 0.3 percent of the differential in population between the two proposals. Accordingly, we conclude that the Wickenburg Petition and Application are not entitled to a dispositive preference under Priority 2.

11. Next, we compare the proposals under Priority 4, other public interest matters. A variety of factors are considered under this priority such as the number of aural services received in the proposed service area, the number of local services, the relative size of the proposed communities, and their growth rate.²² In this case, the comparison is between the need for a second local or first competitive service at Munds Park and an increase in existing service at Wickenburg.²³ The Commission's policy under Priority 4 is generally to favor a conflicting new allotment over a proposed increase in existing service because ". . . a modification of license to upgrade facilities to a superior channel is regarded as an increase in existing service which does not provide as great a public benefit as that of a new primary service."²⁴ A new primary transmission service must provide local programming to the community of license whereas an increase to existing service merely enhances the ability of listeners beyond the station's community of license to receive programming.²⁵ However, this preference could be outweighed by a showing of need for the proposed increase in existing service such as the new areas to be covered and the extent to which they are underserved.²⁶ As noted above, the Wickenburg Application would provide a second full-time reception service to 246 persons. In addition, our staff engineering study shows that the Wickenburg Application would provide a third reception service to 2,280 persons in an area of 705 sq. km. and a fourth reception service to 52 persons in an area of 775 sq. km.

²⁰ See *Seabrook, Huntsville, et al., Texas*, Memorandum Opinion and Order, 10 FCC Rcd 9360, 9362 (1992) ("*Seabrook*").

²¹ See *Seabrook*, 20 FCC Rcd at 9362 (finding that a second aural service to 455 persons is *de minimis* and not entitled to a preference under Priority 2 over another proposal that would serve 144,000 more people); *Live Oak and St. Augustine, Florida*, Report and Order, 4 FCC Rcd 758 (MMB 1989) (determining that a first full-time aural service to 60 persons was *de minimis* in light of the disparity in the population gains of the two proposals).

²² See *FM Assignment Policies*, 90 FCC 2d at 92 n.8.

²³ Station KFSZ(FM) is currently licensed to Munds Park, Arizona.

²⁴ See *Benton, El Dorado, et al., Arkansas*, Notice of Proposed Rule Making, 2 FCC Rcd 1963,1966-67 (MMB 1987) (proposing mutually exclusive proposals for increases in existing service and new allotments and explaining the policy for resolving conflicts between such proposals) ("*Benton, Arkansas*").

²⁵ See, e.g., *Saranac Lake, New York*, Report and Order, 6 FCC Rcd 5121, 5122 (MMB 1991), *recon. dismissed*, Memorandum Opinion and Order, 8 FCC Rcd 3066 (MMB 1993) (stating that "the Commission has long recognized that reception service from nearby communities is not an adequate substitute for local service") ("*Saranac Lake*"). See also *Pueblo, Pueblo West, et al., Colorado*, Report and Order, 13 FCC Rcd 690, 697 (MMB 1998), *citing Saranac Lake*; and *Royston and Commerce, Georgia*, Report and Order, 15 FCC Rcd 5676, *citing Saranac Lake*.

²⁶ See *Benton, Arkansas*, 2 FCC Rcd at 1966-67.

12. While we acknowledge that the Wickenburg Application's provision of service to underserved areas does have public interest benefits, we believe that, on balance, they do not outweigh the need for a second local or first competitive service to Munds Park. We are not aware of a Priority 4 case which preferred an increase in service to underserved listeners to a competing proposal for a new allotment, and Univision has not cited such a case. On the contrary, there are numerous cases following *Benton, Arkansas*, favoring new allotments over proposed increases in existing service.²⁷ Moreover, while stating that it would give greater weight generally to proposed service to underserved populations, the Commission limited application of the revised Priority 4 policy to proposals that would have more than a *de minimis* impact on underserved populations.²⁸ In this case, total service gains to underserved listeners, expressed as a percentage of the 1.29 million persons that would receive new service from KHOV-FM, would be only 0.2 percent.²⁹ This is significantly less than coverage levels that have been found to be *de minimis*.³⁰ Accordingly, we conclude that a second local service at Munds Park is preferred under Priority 4 and therefore that the Munds Park Counterproposal would better serve the public interest than an increase in existing service at Wickenburg.

13. *Technical Matters.* Channel 246C2 can be allotted to Munds Park at a site 7.6 kilometers east of Munds Park at reference coordinates of 34-58-06 NL and 111-30-29 WL. To accommodate this allotment, we will substitute Channel 281C for vacant Channel 247 at First Mesa at reference coordinates 35-41-09 NL and 110-21-43 WL.

14. **Conclusion/Ordering Clauses.** In view of the above, we conclude that the public interest is served by grant of the Munds Park Counterproposal. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) 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, April 23, 2013, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, for the communities listed below, as follows:

<u>Communities</u>	<u>Channel Number</u>
First Mesa, Arizona	281C
Munds Park, Arizona	246C2

15. A filing window for Channel 246C2 at Munds Park, Arizona, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent order.

²⁷ See, e.g., *St. Maries, Idaho, and Spokane, Washington*, Report and Order, 14 FCC Rcd 17012 (MMB 1999) (favoring a second local aural service over the expansion of an existing noncommercial educational FM station); *Chehalis, Washington, et al.*, Report and Order, 13 FCC Rcd 20262 (MMB 1998) (determining under Priority 4 that the public interest would be better served by a second local service than an expansion of existing service).

²⁸ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2576 (2011) (subsequent history omitted).

²⁹ This calculation includes listeners that would receive a new second full-time reception service from the Wickenburg Application.

³⁰ See, e.g., *Dalhart and Perryton, Texas*, Report and Order, 22 FCC Rcd 4201 (proposal resulting in loss of second full-time service equal to 1.8 percent of total service gain treated as *de minimis*).

16. IT IS FURTHER ORDERED, that the Counterproposal (RM-11669) filed by Grenax Broadcasting II, LLC IS GRANTED.

17. IT IS FURTHER ORDERED, that the Petition for Rule Making (RM-11517) filed by Rocket Radio, Inc., IS DISMISSED.

18. IT IS FURTHER ORDERED, that the Petition for Rule Making (RM-11518) and the application (File No. BPH-20080915AFP) filed by Univision Radio License Corporation ARE DISMISSED.

19. The Audio Division SHALL SEND a copy of this *Report and Order* to Mace Rosenstein, Esq. and Daniel H. Kahn, Esq., Covington & Burling LLP, 1201 Pennsylvania Avenue, N.W., Washington, DC 20004 (Counsel to Univision); M. Scott Johnson, Esq., and Anne Goodwin Crump, Esq., Fletcher, Heald and Hildreth, PLC, 1300 N. 17th Street – Eleventh Floor, Arlington, Virginia 22209 (Counsel to Grenax); and Erwin G. Krasnow, Esq. Garvey Schubert Barer, 1000 Potomac Street, N.W., Fifth Floor, Flour Mill Building, Washington, DC 20007 (Counsel to Rocket Radio).

20. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2120.

FEDERAL COMMUNICATIONS COMMISSION

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