

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

MM Docket No. 87-393

In the Matter of

Amendment of Section 73.202(b),	RM-5966
Table of Allotments,	RM-6170
FM Broadcast Stations,	
(Roland and Heavener, Oklahoma)	

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 1989; Released: February 6, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration and Motion for Stay¹ filed by Double Eagle Broadcasting Corp. (Double Eagle) challenging the *Report and Order* in this proceeding, 3 FCC Rcd 2684 (1988). That *Report and Order* allotted Channel 222A to Roland, Oklahoma, as a first local service, and denied Double Eagle's counterproposal to substitute Channel 223C2 for allotted and applied for Channel 223A at Heavener, Oklahoma. Family Broadcasting Company (Family), the proponent of the allotment to Roland, and LeRoy Billy (Billy), the sole applicant for Channel 223A at Heavener, filed separate oppositions to the Petition for Reconsideration.

2. On October 5, 1987, the Commission issued a *Notice of Proposed Rule Making (Notice)*,² proposing to allot Channel 222A to Roland, Oklahoma, as that community's first local FM service. Prior to that *Notice*, the Commission had allotted Channel 223A to Heavener, Oklahoma, in MM Docket 84-231. The application window for that channel did not open until after the issuance of the *Notice* in the instant proceeding. Billy applied for Channel 223A during the window, and proposed in this proceeding a site restriction on the Roland allotment which would allow the Commission to accommodate both his preferred transmitter site and the new allotment. Double Eagle filed a counterproposal requesting that the Commission upgrade the already allotted and applied for Channel 223A at Heavener (for which the application window had closed) to Channel 223C2, and reopen the window for the new allotment so that all those who had not filed an application for Channel 223A might apply for Channel 223C2. The *Report and Order* denied Double Eagle's request pursuant to a policy enunciated in *Lafayette, Louisiana*,³ due to objections raised by Billy, to the reopening of the Heavener window. The *Report and Order* also granted the proposed allotment of Channel 222A to Roland, Oklahoma, but with an increased site restriction designed to accommodate Billy's proposed transmitter site for Channel 223A at Heavener.

3. In its Petition for Reconsideration, Double Eagle claims that service for Channel 223A at Heavener is "in jeopardy" since it is not known whether Billy, the sole

applicant for a license for that channel, will utilize it "given the Commission's action in short spacing his transmitter site." Therefore, Double Eagle urges that "a more clear finding must be obtained as to whether the Heavener allotment will be useable or of interest to anyone else in the event Billy does not prosecute an amended application for Heavener." Double Eagle also requests, without stating with specificity the grounds for its request, that the Commission "stay the opening of the filing window for Roland, or . . . hold any applications for Channel 222A in abeyance, pending further study." Double Eagle "believes that the Commission should find a more appropriate solution to the Roland-Heavener conflict," for example, one which might uncover an alternate class A channel for Roland that, in turn, would allow the grant of Double Eagle's counterproposal. In addition, Double Eagle argues that the precedent cited by the Commission in support of its denial of Double Eagle's proposal to upgrade the channel at Heavener, *Lafayette, Louisiana*, is invalid because it enunciates a change from prior practice, is still subject to "judicial review," and because reliance on this precedent presupposes that a valid application is pending for the lower class channel for which the upgrade is proposed. Petitioner argues that Billy's application is defective, because when filed it was short-spaced to the Roland reference point, and it should therefore be returned in accordance with the Commission's "hard look" policy. Finally, Double Eagle argues, without elaboration, that a class C2 Channel at Heavener would better serve the public interest, as enunciated in Section "310(b)" (sic) of the Communications Act, than the allotment to Roland.

4. Billy responded by letter, dated June 16, 1988, stating that his intent to construct and operate an FM radio station on Channel 223A at Heavener has not changed since he first filed an application for the channel on November 24, 1987. He states that he is continuing his pursuit of a construction permit for the station and "if granted will place it into service."

5. Family also filed an Opposition to Double Eagle's Petition. Family challenges Double Eagle's comprehension of the ruling below, stating that Double Eagle demonstrated a misapprehension of law and fact when it claimed that the Commission short-spaced Billy's transmitter site. In fact, Family notes, the Commission actually insured full spacing between the Roland allotment and the Heavener application by increasing the Roland site restriction from 4.2 kilometers north to 5.5 kilometers north of Roland. Family also argues that Billy's reply letter dispels whatever merit may have attached to Double Eagle's claim that the Heavener channel might remain unused should Billy decide to forego his application. Family also views as lacking in merit Double Eagle's assertion that the Commission erroneously relied on *Lafayette, Louisiana* and observes that, as stated in that case, the Commission policy of not opening up an allotment for a higher class channel over the objections of applicants for the lower class channel is sensible, fair and consistent with standard Commission policy. Finally, Family disputes Double Eagle's contention that the Commission should perform a channel study to resolve the Roland-Heavener conflict. Such a study, Family asserts, would be the responsibility of interested parties such as Double Eagle, and not the obligation of the Commission, especially when those interested parties have "made no

effort whatever to present information justifying an upgrade." Family urges summary denial of Double Eagle's petition.

6. After full consideration of the pleadings before us, we find Double Eagle's claims to be without merit. First, we agree with Family that Double Eagle misconstrued the Commission action in the *Report and Order* which denied its counterproposal. In that action, we increased the Roland site restriction, thereby obviating any conflict between Billy's preferred transmitter site and the Roland allotment. In addition, Billy has clearly stated in his reply letter that he fully intends to pursue a construction permit for Channel 223A at Heavener and commence broadcast service to that community as soon as possible. We do not believe further questioning of Billy's intent, as requested by Double Eagle, is either appropriate or necessary.

7. We also reject Double Eagle's challenge to our reliance on *Lafayette, Louisiana* wherein we denied a proposal to upgrade a class A channel to a class C2 channel because the filing window for the class A Channel had already closed and the applicants for that channel objected to the reopening of the window for the purpose of accepting applications for the proposed class C2 channel. First, *Lafayette, Louisiana* does not represent a change in Commission policy. Double Eagle cites no precedent contrary to the general proposition that the Commission will not open a new filing window over the objection of an applicant that has a timely and cut-off application on file, especially in a case, such as this, where the applicant had no notice prior to filing its application that a higher class channel might be substituted. To do so would be unfair to applicants, in that it would obviate their cut-off protection, would unduly burden the Commission's resources, and would significantly delay the provision of new service to the public.⁴

8. Petitioner argues that under the Commission's "hard look" policy Billy's application should be rejected, because, when filed, it was short spaced to the proposed allotment at Roland. However, under Commission policy, an application is acceptable for tender and filing if it is short spaced to an allotment that is merely proposed. If an allotment proposal is adopted that is short spaced to the application, it is generally Commission policy to order the applicant to amend its application. However, in this case it was not necessary to order Billy to amend his application, because the proponent of the potentially conflicting allotment to Roland acquiesced in a site restriction that obviated any conflict between Billy's application and the Roland allotment. Accordingly, neither the proposal to allot Channel 222A to Roland nor our action in the *Report and Order* made Billy's application unacceptable.

9. Accordingly, IT IS ORDERED, That the petition for reconsideration and motion for stay submitted by Double Eagle IS HEREBY DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Karl A. Kensinger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
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FOOTNOTES

¹ Section 1.44(e) requires that a request to stay the effectiveness of any decision or order shall be filed as a separate pleading, and need not be considered if not so filed. Double Eagle did not separately request a stay.

² See *Notice of Proposed Rule Making*, 2 FCC Rcd 5933 (1987).

³ See *Lafayette, Louisiana*, 3 FCC Rcd 4614 (1987).

⁴ See also *Table of Allotments (Santa Margarita and Guadalupe, California)*, DA 87-1615 (released November 18, 1987).