

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

MM Docket No. 90-550

In the Matter of

Amendment of Section 73.202(b), RM-7345
Table of Allotments,
FM Broadcast Stations
(Lafayette, Louisiana)

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995;

Released: June 14, 1995

By the Chief, Policy and Rules Division:

I. INTRODUCTION

1. Before the Commission is a petition for reconsideration filed by C.R. Crisler challenging our decision to allow Lafayette FM Joint Venture ("LFMJV"), the permittee of Station KRRQ(FM) in Lafayette, Louisiana, to upgrade its station by substituting Channel 238C2 for Channel 238A. For the reasons set forth below, we deny Crisler's petition.

II. BACKGROUND

2. It is helpful to provide background not only for the instant proceeding but also to summarize briefly two collateral proceedings involving the same FM station. As we shall see, Crisler's petition raises issues related to these collateral proceedings.

3. We first begin with the licensing proceeding -- MM Docket No. 87-449 -- that led to the grant of the construction permit for FM Channel 238A in Lafayette to LFMJV. Crisler was one of seventeen parties who filed an application for this channel. After these applications were designated for a comparative hearing, Crisler failed to pay the required hearing fee, instead filing a request for a waiver of this fee. Crisler's waiver request was denied, however, and his application was dismissed. The administrative law judge subsequently approved a settlement agreement among the remaining applicants and awarded the construction permit to LFMJV, the entity composed of the settling parties. *AC Broadcasting, Inc.*, FCC 88M-1567 (May 24, 1988). Meanwhile, Crisler filed a multitude of pleadings seeking to overturn these actions. In a detailed opinion, the Commission recently rejected these pleadings as being both untimely filed and substantively meritless. *Memorandum Opinion and Order* in MM Docket No. 87-449, FCC 95-50 (adopted Feb. 28, 1995; released March 22, 1995) ("*Licensing Order*").

4. Before the applications in the licensing proceeding were designated for a hearing (and before Crisler's application was dismissed), Crisler initiated another proceeding -- MM Docket No. 87-267 -- to substitute higher class Channel 238C2 for Channel 238A for Lafayette while the ap-

plications for the lower class channel were pending. The Commission sought comment on this proposal, including whether upgrading the channel required the opening of a new filing window. Crisler himself at first supported an upgrade without the opening of another window, but subsequently argued the opposite after his application was dismissed. Without addressing whether a new filing window would be required, the Commission denied Crisler's petition, finding that upgrading an allotment when applications for the original allotment are pending would unduly complicate their processing and delay service to the public. *Memorandum Opinion and Order* in MM Docket No. 87-196, 4 FCC Rcd 5073 (1989), *aff'd sub nom. Crisler v. FCC*, 919 F.2d 182 (D.C. Cir. 1990) (table). The Commission did note that, with LFMJV having by this time been granted a construction permit in the licensing proceeding, it could now seek a co-channel upgrade to Channel 238C2 pursuant to Section 1.420(g) of the Rules. *Id.* at 5074-75 n.9 & 13; 47 C.F.R. § 1.420(g).

5. This, in fact, is what LFMJV did, which brings us to the instant proceeding. LFMJV initiated this proceeding by filing a petition for rule making requesting the substitution of Channel 238C2 for Channel 238A and the modification of its construction permit to specify operations on the higher class channel. The Commission issued a *Notice a Proposed Rule Making* in MM Docket No. 90-550, 5 FCC Rcd 6954 (1990) ("*NPRM*"), seeking comment on this proposal. Crisler filed the only opposing comments, arguing that his pleadings in the collateral proceedings prevented the Commission from taking action on LFMJV's upgrade proposal. Acting under delegated authority, the Chief of the Allocations Branch rejected Crisler's arguments and granted LFMJV's upgrade proposal, finding that it would serve the public interest because it would enable LFMJV to expand the coverage area of its FM service. *Report and Order* in MM Docket No. 90-550, 7 FCC Rcd 6255 (1992).

6. Crisler has filed a petition for reconsideration of this upgrade decision. LFMJV filed an opposition to the petition, to which Crisler filed reply comments.

III. DISCUSSION

7. In his reply comments, Crisler states that he has "no objection here to the community of Lafayette, Louisiana having a class C1 allotment." Crisler Reply Comments at 2. Indeed, Crisler concedes that "[i]t is in the public interest for Lafayette to have an upgraded channel." *Id.* at 2 n.1. What Crisler does object to is the fact that LFMJV is the permittee of this channel. Crisler claims that "it is not in the public interest for [LFMJV] to be the permittee or have its permit modified." *Id.* Crisler asserts a number of vague and speculative arguments that the licensing proceeding was tainted "by abuse of process and error", and seeks to have the Commission revoke LFMJV's permit and open a new filing window for the Lafayette channel. *Id.* at 6.

8. We reject Crisler's attempt to inject these collateral issues into this proceeding. In seeking an upgrade of its channel, LFMJV invoked Section 1.420(g) of the Rules which provides for the "modification of licenses or permits to mutually exclusive higher class . . . co-channels where technically feasible." *FM License Upgrading*, 60 RR2d 114, 118-19 (1986). Crisler has not raised any technical objections to LFMJV's upgrade proposal; to the contrary, as noted above, he *supports* the upgrade of the channel. Rather, Crisler, in seeking to rehash issues from collateral proceedings, in effect is asking the Commission to entertain

competing expressions of interest for the Lafayette higher class channel. But the Commission has clearly stated that it will not accept competing proposals in the context of Section 1.420(g) upgrades. *See id.* at 119. *See also NPRM*, 5 FCC Rcd 6954. Crisler had full opportunity in the licensing proceeding to raise his objections concerning the treatment of his application and the award of the Lafayette channel. *See Licensing Order* at ¶ 15. We will not allow him to resuscitate these collateral issues here. *See Equal Access Rate Elements*, 5 FCC Rcd 2573, 2574 (1990) (rejecting argument as impermissible collateral attack).

9. Crisler also argues in his petition for reconsideration that the Commission should have withheld action on LFMJV's upgrade proposal until the Commission had taken final action on his pleadings in the licensing proceeding. We disagree. To be sure, we granted LFMJV's upgrade proposal before the Commission took action in MM Docket No. 87-449 on Crisler's efforts to overturn the denial of his fee waiver request, the dismissal of his application for the Lafayette channel, and the grant of LFMJV's construction permit. But it would have served no public interest purpose to have waited for the Commission to dispose of these pleadings. As set forth in the *Licensing Order*, these pleadings were procedurally defective in that they were filed out of time. Withholding action on LFMJV's upgrade proposal would have unfairly penalized LFMJV, which had "reasonably relied on the apparent finality" of the dismissal of Crisler's application and the grant of its construction permit, and "would [have] further impede[d] inauguration of long-delayed new service to Lafayette." *Licensing Order* at ¶ 10. Withholding action would have been especially inappropriate given that Crisler himself had no objection to the upgrade of the Lafayette channel. In any event, the point is now moot, for the Commission has recently taken action on Crisler's pleadings in MM Docket 87-449, rejecting each of them in the *Licensing Order*.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303 and 307(b) 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 the aforementioned Petition for Reconsideration filed by C.R. Crisler IS DENIED.

11. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
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