

pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to permit FM Channel and Class Modifications [Upgrades] by Applications*, 8 FCC Rcd 4735 (1993).

**DATES:** Effective June 24, 2002.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Scheuerle, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report and Order, adopted May 29, 2002, and released June 7, 2002. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by removing Channel 262C and adding Channel 262C1 at Tusculumbia.

3. Section 73.202(b), the Table of FM Allotments under Iowa, is amended by removing Channel 277C1 and adding Channel 277C0 at Pella.

4. Section 73.202(b), the Table of FM Allotments under Missouri, is amended by removing Channel 282A and adding Channel 282C3 at Vandalia.

5. Section 73.202(b), the Table of FM Allotments under South Carolina, is amended by removing Channel 253A and adding Channel 253C3 at Pawley's Island.

6. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 240A and adding Channel 241C3 at Dalhart and by removing Channel 286a and adding Channel 286C2 at Seadrift.

7. Section 73.202(b), the Table of FM Allotments under Washington, is amended by removing Channel 256C2 and adding Channel 256C1 at Walla Walla.

8. Section 73.202(b), the Table of FM Allotments under Wyoming, is amended by removing Channel 287C2 and adding Channel 287C1 at Diamondville.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Office of Broadcast License Policy, Media Bureau.*

[FR Doc. 02-15671 Filed 6-21-02; 8:45 am]

**BILLING CODE 6712-01-P**

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 73

[DA 02-1340; MM Docket No. 02-42; RM-10382]

#### Radio Broadcasting Services; Chester and Westwood, CA

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In response to a *Notice of Proposed Rule Making*, 67 FR 12501 (March 19, 2002), this document reallocates Channel 259A from Chester, California, to Westwood, California, and provides Westwood with its first local commercial aural transmission service. The coordinates for Channel 259A at Westwood are 40-14-21 North Latitude and 121-01-52 West Longitude.

**DATES:** Effective July 22, 2002.

**FOR FURTHER INFORMATION CONTACT:** R. Barthen Gorman, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 02-42, adopted May 29, 2002, and released June 7, 2002. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractors, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 reads as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by removing Channel 259A at Chester and adding Westwood, Channel 259A.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Office of Broadcast License Policy, Media Bureau.*

[FR Doc. 02-15668 Filed 6-21-02; 8:45 am]

**BILLING CODE 6712-01-P**

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 95

[WT Docket No. 98-169; FCC 02-130]

#### Regulatory Flexibility in the 218-219 MHz Service

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; denial of petition for reconsideration.

**SUMMARY:** This document denies the Ad Hoc Coalition's ("Coalition") second petition for reconsideration of the Commission's *218-219 MHz Second Reconsideration Order*. The Coalition's petition contains previously raised constitutional and price inflation arguments and a newly raised, albeit untimely, Administrative Procedure Act ("APA") argument. The Commission dismisses as repetitious the Coalition's constitutional and price inflation arguments because these arguments were previously the subject of reconsideration and fully considered in the *218-219 MHz Second Reconsideration Order*. The Commission also dismisses the Coalition's untimely APA argument because the Coalition does not plead or otherwise establish new facts, changed circumstances, or public interest considerations that would merit review of the untimely request for reconsideration.

**FOR FURTHER INFORMATION CONTACT:** Francis Gutierrez, Auctions and Industry Analysis Division, Wireless Telecommunications Commission, at (202) 418-0660.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order (*Third Report and Order*) released on May 8, 2002. The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

## I. Introduction

1. The Commission has before it the Ad Hoc Coalition's ("Coalition") second Petition for Reconsideration. The Coalition seeks reconsideration of the *218-219 MHz Second Reconsideration Order*, 66 FR 9212 (February 7, 2001), that denied the Coalition's first Petition for Reconsideration. The Commission dismisses the second Petition for Reconsideration for the reasons set forth.

## II. Background

2. On July 28 and 29, 1994, the Commission conducted an auction in the 218-219 MHz Service ("Auction No. 2"). The applicable rules at the time included provisions to encourage participation by small businesses and minority- and women-owned entities. Small businesses were entitled to pay eighty-percent of their winning bids in installments while businesses owned by minorities and/or women were entitled to a twenty-five percent bidding credit that could be applied to one of the two licenses available in each market. Bidders that were both, small businesses and minority- and/or women-owned entities could use installment financing as well as bidding credits.

3. At the time our rules were adopted for Auction No. 2, the standard of review applied to federal programs designed to enhance opportunities for racial minorities and women was an "intermediate scrutiny standard." In June 1995, almost a year after the conclusion of Auction No. 2, the U.S. Supreme Court decided *Adarand Constructors v. Peña*, holding that racial classifications are subject to "strict scrutiny" and will be found unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests."

4. On December 5, 1995, the Coalition filed a Petition for Relief that alleged

that the bidding credits in Auction No. 2 were unconstitutional and sought a twenty-five percent reduction of its members' winning bids to match the bidding credits provided to minority- and women-owned entities. At the same time, members of the Coalition sought judicial review as petitioners and intervenors in appeal of the Commission's *IVDS Omnibus Order*, 11 FCC Rcd. 1282 (1996), in which the Commission denied a challenge to race- and gender-based bidding credits brought by Graceba Total Communications. The Commission held the Petition for Relief in abeyance pending the outcome of this case.

5. On June 26, 1996, the U.S. Supreme Court decided *United States v. Virginia*, which held that to successfully defend a gender-based program, the government must demonstrate an "exceedingly persuasive justification" for the program.

6. On November 21, 1996, the Commission released the *Competitive Bidding Tenth Report and Order*, 61 FR 60198 (November 27, 1996), which modified certain competitive bidding provisions concerning the treatment of small businesses, businesses owned by members of minority groups and women, and rural telephone companies for the then-planned second IVDS auction, in order to address the legal requirements of the Supreme Court's decisions in *Adarand* and *VMI*. Additionally, in order to avoid undue delay of future auctions in other services, the Commission eliminated the race- and gender-based provisions for those auctions and instead employed a similar provision for small businesses.

7. On June 20, 1997, the D.C. Circuit dismissed the Coalition's challenge to the *IVDS Omnibus Order*, finding that the appeal was not ripe due to the Coalition's Petition pending before the Commission. Subsequently, on January 9, 1998, the Coalition filed with the Commission a Supplement to its Petition for Relief that claimed that: (i) failure to provide the twenty-five percent reduction in the license payments amounts to an unconstitutional taking of property without due process of law; and (ii) finality-related concerns do not bar the retroactive application of *Adarand*. The Coalition also expanded its requested remedy to include all Auction No. 2 winning bidders who did not receive a 25 percent bidding credit.

8. On May 28, 1998, the Wireless Telecommunications Bureau ("Bureau") issued the *Community Teleplay Order*, 13 FCC Rcd. 12426 (1998), which denied the Coalition's requests based on its finding that members of the Coalition

had sufficient opportunity to raise a challenge in a timely manner, but failed to do so. On June 29, 1998, the Coalition filed an Application for Review.

9. On September 10, 1999, the Commission released the *218-219 MHz Order*, 64 FR 59656 (November 3, 1999), which, among other things, dismissed the Coalition's Application for Review as moot because the *218-219 MHz Order* eliminated from the Commission's rules the bidding credit for minority- and women-owned businesses. Thus, all minority- and women-owned businesses lost the bidding credit they had previously received in Auction No. 2. At the same time, to fulfill the Commission's statutory mandate of encouraging participation by small businesses, rural telephone companies, and businesses owned by members of minority groups and women, the Commission granted a retroactive twenty-five percent bidding credit to the accounts of "every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualifications for that auction." The Commission noted that this approach minimized the disruption to entities that have previously received a bidding credit and the public, and that similar bidding credits had been provided to bidders in other services. The Commission also rejected the Coalition's takings argument.

10. On December 3, 1999, the Coalition filed its first Petition for Reconsideration ("First Petition for Reconsideration") alleging that the remedial bidding credit adopted in the *218-219 MHz Order* represented a "conversion" of an unconstitutional race- and gender-based preference to a small business preference and that the new credit did not resolve its constitutional claims and should be subject to strict scrutiny. The Coalition requested that the Commission extend the remedial bidding credit to all Auction No. 2 bidders regardless of size.

11. On December 13, 2000, the Commission denied the Coalition's First Petition for Reconsideration in the *218-219 MHz Second Reconsideration Order*. The Commission rejected the argument that the remedial bidding credit was impermissibly motivated and found that the remedial bidding credit satisfied rational basis review because it was adopted to further Congress's objective to disseminate licenses among a wide variety of applicants. Finally, the Commission determined that there was no evidence to support the allegation, previously raised by Kingdon Hughes (another Petitioner), that the original bidding credits inflated the prices paid by auction participants. The

Commission declined to expand the remedial bidding credit to all winning bidders in Auction No. 2.

12. On February 15, 2001, the Bureau exercised its delegated authority and issued a *Refund Procedures PN*, 16 FCC Rcd. 3453 (2001), explaining the procedures relating to the remedial bidding credit. The Commission is presently processing the refund requests of all eligible requestors.

13. On March 9, 2001, the Coalition filed its second Petition for Reconsideration ("Second Petition for Reconsideration") seeking reconsideration of the Commission's *218-219 MHz Second Reconsideration Order*. The Coalition, in its Second Petition for Reconsideration, argued that the remedial bidding credit was unconstitutional and that the price inflation argument (previously raised by Kingdon Hughes in his Petition for Reconsideration of the *218-219 MHz Order*) was not "wholly speculative." The Coalition also raised, for the first time with sufficient particularity, the argument that the remedial bidding credit violated the notice and comment provisions of the Administrative Procedures Act ("APA") because the remedial bidding credit was not included in the *218-219 MHz Notice of Proposed Rule Making*, 66 FR 9212 (February 7, 2001).

### III. Discussion

14. The Commission dismisses as repetitious the Coalition's Second Petition for Reconsideration with respect to the constitutional and price inflation arguments because these arguments were previously the subject of reconsideration and fully considered in the *218-219 MHz Second Reconsideration Order*. The Commission also dismisses the Coalition's untimely APA argument because the Coalition does not plead or otherwise establish new facts, changed circumstances, or public interest considerations that would merit review of this untimely request for reconsideration.

15. Repetitious Arguments. The Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented. This is particularly true, where a petitioner advances arguments that the Commission previously considered and rejected in a prior order on reconsideration. If this were not the case, the Commission "would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion."

However, the Commission will entertain a petition for reconsideration if it is based on new evidence or changed circumstances or if reconsideration is in the public interest. In this case, a comparison of the Coalition's Second Petition for Reconsideration with the Coalition's First Petition for Reconsideration and the Petition of Kingdon Hughes establishes that the Coalition's constitutional and price inflation arguments were previously raised and fully addressed in the *218-219 MHz Second Reconsideration Order*.

16. In its First Petition for Reconsideration, the Coalition argued that the remedial bidding credit adopted in the *218-219 MHz Order* represented a "conversion" of an unconstitutional race- and gender-based preference to a small business preference. The Coalition argued that this "conversion" failed to resolve its constitutional claims. Additionally, the Coalition contended that the remedial bidding credit was impermissibly motivated, violated *Hunt v. Cromartie*, (which states that "a law that is facially neutral with respect to race classification warrants strict scrutiny under the Equal Protection Clause only if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race") and should be subject to strict scrutiny review. The Commission rejected these arguments in the *218-219 MHz Second Reconsideration Order*. The Commission explained that the remedial bidding credit was adopted not to remedy the race- and gender-discrimination that allegedly occurred in 1994. Rather, the Commission explained that the extent of any "remedy" for the alleged race- and gender-discrimination was the elimination of the race and gender-based bidding credit. The remedial bidding credit was accorded to small businesses to fulfill the Commission's statutory mandate of encouraging participation by small businesses and to make the rules consistent with those in other services. Thus, the Commission resolved a multi-faceted and complex set of regulatory issues by leveling the bidding credit upward. Because the remedial bidding credit was not based on race- or gender-classifications, the Commission found that it is not subject to strict scrutiny review and satisfied rational basis review. In its Second Petition for Reconsideration, the Coalition reiterated its constitutional arguments concerning the remedial bidding credit. Because these arguments were fully addressed by the Commission

in a prior order, these arguments are dismissed as repetitious.

17. The Coalition also raised in its Second Petition for Reconsideration, an argument previously raised by Kingdon Hughes in his Petition for Reconsideration of the *218-219 MHz Order*, which asserted that the bidding credits inflated the prices paid by licensees. The Commission rejected this argument as wholly speculative in the *218-219 Second Reconsideration Order*. Again, because this argument was previously raised by another petitioner, and fully addressed by the Commission in the *218-219 MHz Second Reconsideration Order*, this argument is dismissed as repetitious.

18. APA Argument. The Coalition's APA argument is untimely. Although the Commission did not previously address this argument, it was not originally made with enough particularity in the Coalition's First Petition for Reconsideration to merit the Commission's attention. The Coalition's inclusion of this argument in its Second Petition for Reconsideration does not correct its earlier failure or obviate the fact that the argument is now untimely.

19. The Commission's rules require that petitioners state with particularity the grounds on which reconsideration of a Commission action is sought. The precedent is clear that the Commission "need not sift pleadings and documents" to identify arguments that are not "stated with clarity" by a petitioner. It is the petitioner that has the burden of clarifying its petition before the agency." The mere mention of a legal concept is insufficient to properly raise an argument for review. As the Court of Appeals for the D.C. Circuit has noted "even where an issue has been "raised" before the Commission, if it is done in an incomplete way \* \* \* the Commission has not been afforded a fair opportunity [to pass on the issue]." In the First Petition for Reconsideration, the Coalition's passing reference to the APA in a section devoted to the constitutionality of the remedial bidding credit does not meet the standard. Although the Coalition characterized the adoption of the remedial bidding credit as "dubious" under the APA, it did not develop any argument or cite any authority. Indeed, the Coalition did not even specifically claim that the remedial bidding credit violated the APA. Thus, this passing reference in the First Petition for Reconsideration did not comport with the requirement that the basis for a petition for reconsideration be stated with particularity and, accordingly, the issue was not properly raised for our review.

20. As previously noted, “[t]he Communications Act, our rules, and the need for administrative orderliness require petitioners to raise issues in a timely manner.” Accordingly, unless the public interest would be served by reconsideration, § 1.429(i) of the Commission’s rules limits subsequent reconsideration to modifications made to the original order on reconsideration. The *218–219 MHz Second Reconsideration Order* did not modify the remedial bidding credit. Thus, a petition for reconsideration of the *218–219 MHz Second Reconsideration Order*

that challenges the remedial bidding credit is precluded under § 1.429(i). This result is particularly appropriate where, as here, the Coalition’s Second Petition for Reconsideration did not establish that the public interest would be served by review of the untimely APA argument. Accordingly, the Coalition’s APA argument is dismissed.

#### IV. Ordering Clause

21. It is ordered that, pursuant to the authority of sections 4(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 257,

303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a), and § 1.429 of the Commission’s rules the Second Petition for Reconsideration filed by the Ad Hoc Coalition is dismissed.

22. It is further ordered that the *Third Report and Order* is adopted and that a copy be sent to the Ad Hoc Coalition via certified mail, return-receipt requested.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 02–15787 Filed 6–21–02; 8:45 am]

**BILLING CODE 6712–01–P**