

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-347
Table of Allotments,)	RM-9751
FM Broadcast Stations.)	RM-9761
(Exmore and Cheriton, Virginia, and)	
Fruitland, Maryland))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 9, 2001

Released: May 18, 2001

By the Chief, Allocations Branch:

1. The Commission has before it the Notice of Proposed Rule Making, 14 FCC Rcd 21170 (1999), requesting comments on two inter-related petitions for rule making. These proposals were combined into a single proceeding because favorable action on both of the requests would have resulted in Exmore, Virginia, not having any local aural transmission service. Initially, Be-More Broadcasting ("Be-More"), then the permittee of a new FM station on Channel 291B1 at Exmore, Virginia, sought the substitution of Channel 291B for Channel 291B1, the reallocation of Channel 291B from Exmore, Virginia, to Cheriton, Virginia, as the community's first local aural service, and the modification of its construction permit (BPH-19951109MC) to specify the higher class channel and new community of license (RM-9751).¹ Great Scott Broadcasting ("Great Scott"), licensee of Station WKHI(FM) ("WKHI"), Channel 298B, Exmore, requests the substitution of Channel 298B1 for Channel 298B, its reallocation to Fruitland, Maryland, as its first local aural transmission service, and the modification of Station WKHI's license to specify the lower class channel and new community of license (RM-9761). Both Be-More and Great Scott filed comments reiterating their intention to apply for their respective channel, if allotted. Comments were also filed by Exmore-Nassawadox Radio Partners ("Radio Partners"), Cumulus Licensing Corp. ("Cumulus"), and Sound Enterprises, Inc. ("Sound"). Reply comments were filed by Be-More, Great Scott, Cumulus, and Sound.

2. After comments and reply comments had been filed, Be-More and Great Scott submitted a "Joint Request for Approval of Withdrawal of Petition to Amend the FM Table of Assignments" ("Joint Request") that requested the Commission's approval of the withdrawal of Be-More's July 27, 1999 Petition to Amend the FM Table of Assignments and its August 11, 1999, Supplement to that petition, in return for Great Scott's payment of \$5,000 to Be-More for Be-More's legitimate and prudent

¹ Be-More's petition, and the Notice herein, proposed the reallocation of Channel 291B1 from Exmore to Cheriton. After the release of the Notice, Be-More filed a "Supplement" to its petition requesting the substitution of Channel 291B for Channel 291B1 at Exmore and its reallocation to Cheriton. The supplement was accepted as a counterproposal and Public Notice was given on September 20, 2000, Report No. 2440.

expenditures incurred in connection with MM Docket No. 99-347.² We grant that Joint Request. Since Great Scott's petition for rule making is the only remaining request for rule making, this Report and Order addresses Great Scott's petition.

3. Great Scott's petition was filed pursuant to Section 1.420(i) of the Commission's Rules which allows the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See, Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Community of License MO&O"), 5 FCC Rcd 7094 (1990).

4. Cumulus, which identifies itself as the licensee of 220 commercial AM and FM radio stations throughout the United States, and Sound Enterprises ("Sound"), then permittee of Station WZJZ, Channel 223A, Pocomoke City, Maryland, each support the denial of Great Scott's proposed reallocation of Channel 298B1 to Fruitland.³ Cumulus asserts that the Commission, in adopting the rules permitting a station to change its community of license, found that the removal of a community's sole local service would be presumptively considered to disserve the public interest and thus would only consider such requests "in the rare circumstances where removal of a local service might serve the public interest by, for example, providing a first reception service to a significantly sized population. . ."⁴

Cumulus argues that the possibility of Exmore retaining potential service from Be-More's station if Station WKHI is reallocated to Fruitland is not a sufficient reason to warrant a waiver of the prohibition against the removal of a community's sole local service. Both Sound and Cumulus observe that the Commission has stated that an unbuilt station is "not a service on which the public has come to rely" and thus its removal "does not represent the same concerns with loss of service that removal of an operating station would represent," citing Pawley's Island and Atlantic Beach, South Carolina, 8 FCC Rcd 8657 (1993).

5. Be-More argues that the proposed allotment at Fruitland should not be given a first local aural transmission service preference because Station WKHI will provide a 70 dBu signal to more than 50% of the Salisbury Urbanized Area. It states that Fruitland, with a population of 3,511 people, is located adjacent to Salisbury, which has a population of 20,592 people, and from the material provided by Great Scott in its petition for rule making, it is clear that the community is interdependent on, and not independent of, Salisbury.⁵ In its reply comments, Be-More admits that Salisbury is not an Urbanized

² Great Scott and Be-More have submitted appropriate documentation demonstrating compliance with the provisions of Section 1.420(j) of the Commission's Rules.

³ On July 10, 2000, the Commission granted the assignment of Station WZJZ's construction permit from Sound Enterprises to Delmarva Broadcasting Company (BAPH-20000517ADY).

⁴ Change of Community MO&O, supra, at 7096.

⁵ If a station seeks a change of community to one which is either within an Urbanized Area or one where the station will cover 50% or more of an Urbanized Area with a 70 dBu signal, the proponent is required to provide a Tuck showing demonstrating, among other things, that it is independent of, and not interdependent on, the Urbanized Area. See, Faye and Richard Tuck ("Tuck"), 3 FCC Rcd 5374 (1988) and Headland, Alabama, and Chattahoochee, Florida, 10 FCC Rcd

Area and thus a Tuck showing is not required. Nevertheless, it states that the Salisbury radio market (No. 153, according to the U.S. Radio Markets listing in Broadcasting & Cable Yearbook 1999) encompasses Fruitland and thus supports a finding that Fruitland's local transmission service needs are already met and any additional allotment is only a proposal to allot a channel to an already well-served market.

6. The Notice requested Great Scott to clarify the gain and loss study which it submitted as part of its petition for rule making since it appeared to be based on Station WKHI's current parameters of 50 kW ERP at 82 meters HAAT rather than full Class B facilities. In response, Great Scott states that operation of the proposed Station WKHI, as a Class B1 FM station at Fruitland, will result in a population gain of 95,889 people within an area of 2,640 square kilometers. It also asserts that the reallocation will result in a loss of service to 33,813 people within an area of 1,437 square kilometers, leaving a net gain of 62,076 people within a 1,203 square kilometer area. Great Scott states that the entire loss area is well served during the day, with at least 5 reception services. Further, it states that the proposed operation will not create any nighttime white or gray areas.

Discussion

7. As an initial matter, we find that Fruitland qualifies as a community for allotment purposes based on the information presented as well as our own independent research. In addition, Salisbury is not an Urbanized Area as defined by the U.S. Census Bureau and thus Great Scott is not required to provide evidence pursuant to Tuck, supra, that Fruitland is independent of the larger community.

8. To determine whether a proposed change of community would result in a preferential arrangement of allotments, we compare the existing arrangement of allotments with the proposed arrangement under our FM allotment priorities. See Revision of FM Assignment Policies and Procedures.⁶ A Channel 298B1 allotment at Fruitland would provide Fruitland with its first local aural transmission service, thus furthering FM priority (3). Further, Be-More has requested that we allow it to withdraw its rulemaking proposal to substitute Channel 291B for Channel 291B1 at Exmore, Virginia, reallocate Channel 291B to Cheriton, Virginia, and modify its construction permit (BPH-19951109MC) to specify the higher class channel and new community of license (RM-9751). As stated in paragraph 2, supra, we grant that request. We assume that Be-More will build the FM station for which it has a construction permit at Exmore, and thus, that granting Great Scott's proposal to substitute Channel 298B1 for Channel 298B at Station WKHI(FM), Exmore, Virginia, reallocate Channel 298B1 to Fruitland, Maryland, and modify Station WKHI's license accordingly (RM-9761), will not

10352 (1995). Both Salisbury and Fruitland are located in Wicomico County, Maryland. Be-More states that the Wicomico County information provided in Great Scott's petition for rule making, that is, an available work force of 43,910 people, 8 auto rental companies, 14 taxi companies, 60 trucking companies, 13 FM radio stations, 3 television stations, a retail market with total retail sales in 1993 of over 581 million dollars and a 751 bed hospital, clearly demonstrates the interdependence between Fruitland and the Salisbury Urbanized Area.

⁶ The Commission's allotment priorities are: (1) first fulltime reception service; (2) second fulltime reception service; (3) first local service; and (4) other public interest matters. Priorities (2) and (3) are given co-equal weight.

result in Exmore being deprived of its sole local aural transmission service. To make sure that Exmore, Virginia, retains at least one local aural transmission service, we condition the grant of Great Scott's request to change its community of license to specify that Great Scott cannot commence operation of its new facilities at Fruitland, Maryland, until Be-More has obtained a license for its new station at Exmore, Virginia. We note that the reallocation of Channel 298B1 to Fruitland would provide that community with its first local aural transmission service and also enable Station WKHI to provide reception service to an additional 62,036 people within a 814 square kilometer area.

9. Our engineering analysis demonstrates that Channel 298B1 can be allotted to Fruitland in compliance with the Commission's minimum distance separation requirements with a site restriction of 16 kilometers (9.9 miles) southwest of Fruitland.⁷

10. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) 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 effective July 2, 2001, the Fm Table of Allotments, Section 73.202(b) of the Commission's Rules IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Exmore, Virginia	291A
Fruitland, Maryland	298B1

11. IT IS FURTHER ORDERED That the Joint Request filed April 11, 2001, by Be-More Broadcasting and Great Scott Broadcasting requesting Commission approval of the withdrawal of Be-More Broadcasting's July 27, 1999 Petition to Amend the FM Table of Assignments and its August 11, 1999 Supplement to that petition, IS GRANTED.⁸

12. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Great Scott Broadcasting for Station WKHI(FM), Exmore, Virginia, IS MODIFIED to specify operation on Channel 298B1 and to specify Fruitland, Maryland, as the community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

⁷ The coordinates for Channel 298B1 at Fruitland are 38-11-32 North Latitude and 75-41-58 West Longitude.

⁸ In footnote 1 to the Joint Request, Be-More requests that upon grant of the Joint Request, Bemore's Comments and Reply Comments be dismissed. We deny this request because our determinations in this proceeding are based upon a review of the entire record.

(b) Upon grant of the construction permit, Great Scott Broadcasting may not conduct program tests before Be-More Broadcasting receives a license for a new FM station at Exmore, Virginia.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. Pursuant to Commission Rule Sections 1.1404(1)(k) and (3)(m), any party seeking a change in community of license of a TV or FM allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Great Scott Broadcasting, licensee of Station WKHI(FM), is required to submit a rule making fee in addition to the fee required for the application to effectuate the change in community of license.

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

15. For further information concerning this proceeding, contact R. Barthen Gorman, Mass Media Bureau, (202) 41802180. For questions regarding the application filing process, contact the Audio Services division, (202) 428-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau