

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 03-24
Table of Allotments,)	RM-10636
FM Broadcast Stations.)	
(Apopka, Maitland, and Homosassa Springs,)	
Florida))	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: November 12, 2003**Released: November 14, 2003**

By the Assistant Chief, Audio Division:

1. The Audio Division issued a *Notice of Proposed Rulemaking* in response to a Petition for Rule Making filed by Cox Radio, Inc. ("Petitioner"), licensee of FM Station WPYO, Apopka, Florida.¹ The *Notice* proposes to upgrade the license for FM Station WPYO from Channel 237A to Channel 237C3, and to change the community of license from Apopka to Maitland, Florida. Petitioner's request was filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.² In order to facilitate the proposed upgrade and change of community, the *Notice* further proposes to relocate the transmitter site of Station WXCW(FM), Homosassa Springs, Florida, and to modify its license accordingly.³ Petitioner filed comments supporting the changes proposed in the *Notice*. No other comments were received in response to the *Notice*.

2. In determining whether to approve a change of community, we compare the existing versus the proposed arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.⁴ 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).

¹ *Apopka, Maitland, and Homosassa Springs, Florida*, 18 FCC Rcd 783 (M.Bur. 2003) ("Notice").

² See *Modification of FM and TV Authorizations to Specify a New Community of License* ("Community of License"), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

³ Petitioner submitted a copy of the consent to this change by WXOF, Inc., licensee of WXCW(FM), in which WXOF, Inc. verified its consent and stated that it had filed an application (File No. BMPH-20010717AAI) to modify its license for WXCW(FM). That application, specifying reference coordinates of 28-50-03 NL and 82-39-34 WL for WXCW(FM), was granted on July 25, 2003.

⁴ 90 FCC 2d 88 (1982), *recon. denied*, 56 RR 2d 448 (1983).

3. Adoption of the proposals advanced in this proceeding will not result in any white or gray areas (priorities one and two under the Commission's allotment priorities). The proposed change of community will provide Maitland with a first local aural service, whereas the current allotment provides Apopka with a second local aural service.⁵ Retention of Channel 237A at Apopka thus would satisfy only the fourth priority, other public interest matters, but allotment of Channel 237C3 at Maitland satisfies the third allotment priority, first local service.

4. We recognize that Maitland is located within the Orlando Urbanized Area. In such circumstances, we do not blindly apply a first local service preference; rather, we determine whether to apply a local service preference after evaluating the independence of the proposed community, based upon existing precedent.⁶ The situation presented here, however, differs from one in which a licensee uses the first local service preference as a pretext to enter an urban market, because both Apopka and Maitland, the current and proposed communities, are located in the Orlando Urbanized Area. In such instances, we have declined to apply *Huntington* and *Tuck*.⁷ Even applying the *Tuck* criteria,⁸ Maitland is sufficiently independent of Orlando to qualify for a first local service preference, for the reasons discussed below.

5. In *Tuck*, the Commission specified the following three factors for evaluating a community's independence: (1) signal population coverage, *i.e.*, the degree to which the proposed station will provide service to both the suburban community and the larger metropolis; (2) the size and proximity of the suburban community relative to the metropolis; and (3) the interdependence of the suburban community with the metropolis. Of these three factors, the most significant is the third.⁹

6. The proposed allotment changes would increase FM Station WPYO's signal coverage of the Orlando Urbanized Area. From its current community of license, WPYO provides service to 46.8 percent of the population of the Orlando Urbanized Area, and that coverage would increase to 60.6 percent if the proposed allotment changes are adopted. As to the relative size of Maitland and Orlando, Maitland's population of 12,019 persons represents approximately 6.5 percent of the population of Orlando. As Petitioner points out in its petition for rulemaking, the Commission has granted change of community

⁵ Apopka also is served by a full-time AM station, WHIM-AM.

⁶ See, e.g., *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C.Cir. 1951) ("*Huntington*"); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*").

⁷ *Long Beach and East Long Angeles, California*, 10 FCC Rcd 2864, 2869 (M.M.Bur. 1995) ("first local service preference is not being used as a basis to enter the market").

⁸ See *Ardmore, Brilliant, Brookwood, Badsden, Hoover, Moundville, New Hope, Pleasant Grove, Russellville, Scottsboro, Troy, Tuscaloosa, and Winfield, Alabama, Okolona and Vardaman, Mississippi, and Linden, McMinnville, Pulaski, and Walden, Tennessee*, 17 FCC Rcd 20,536 (M.Bur. 2002).

⁹ *Tuck*, *supra*. See also *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6,580 ¶23 (M.M.Bur. 1991), *app. for rev. dismissed*, 12 FCC Rcd 8392 (M.M.Bur. 1997).

requests in other cases involving significantly greater size disparities between the population of the proposed community and that of the central city.¹⁰ Moreover, FM stations have been allotted to numerous communities the size of Maitland or smaller. Although Maitland is only eight miles from Orlando, change of community proposals have been approved in instances where the new community was closer to the central city than is the case in this proceeding.¹¹ Neither the extent of signal coverage, nor the relative size or proximity of Maitland and Orlando, precludes a finding that Maitland is an independent community for allotment purposes.

7. Turning to the most important consideration, the interdependence of the proposed community with the primary city in the urbanized area, we find that Petitioner has established that Maitland is an independent community, rather than dependent upon Orlando for its existence. Maitland, founded in 1838, is one of the oldest incorporated municipalities in central Florida. Maitland has its own ZIP code (32751), and Maitland residents consider their community to be separate from Orlando. Maitland has its own elected officials and a local government which provides extensive municipal services to its residents. For example, the Maitland Police Department employs forty-three full-time and six part-time employees and operates on a budget of more than \$3.5 million. Maitland has numerous local commercial establishments, including more than 100 businesses, many of which specifically identify themselves as Maitland establishments. Considerable local health care resources are available to Maitland residents, including a hospital, health clinics, and specialty medical services. Maitland offers its residents substantial employment opportunities: In addition to other types of employment, 26,000 persons work in office parks located in Maitland. Maitland has local media outlets, including a weekly newspaper (the *Winter Park-Maitland Observer*), and Maitland businesses can and do advertise to Maitland residents directly through the *Winter Park-Maitland Observer*.

8. The proposed upgrade and change of community will produce a net gain of 2,288.3 square kilometers and 169,414 persons.¹² Both the gain and loss areas are, and will continue to be, well-served by five or more aural transmission services.

9. For all of the foregoing reasons, we conclude that the public interest would be served by upgrading Channel 237A to Channel 237C3 and reallocating Channel 237C3 at Maitland, Florida. Channel 237C3 can be allotted to Maitland in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 14.7 kilometers (9.2 miles) east of Maitland at coordinates 28-39-38 NL and 81-13-02 WL.

¹⁰ See *Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (M.M.Bur. 1996) (Newcastle had population equal to 0.9 percent of Oklahoma City), and cases cited therein.

¹¹ See, e.g., *Mullins and Briarcliffe Acres, South Carolina*, 14 FCC Rcd 10516 (M.M.Bur. 1999) (new community of allotment four miles from the central city of the urbanized area).

¹² The gain area consists of 233,638 persons in 3,007.1 square kilometers, and the loss area consists of 64,224 persons in 718.8 square kilometers.

10. Accordingly, pursuant to the authority contained 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), 0.283, and 1.420(i) of the Commission's Rules, IT IS ORDERED, That effective January 5, 2004, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED as follows:

<u>Community</u>	<u>Channel Number</u>
Apopka, Florida	-----
Maitland, Florida	237C3

12. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Cox Radio, Inc., for FM Station WPYO, IS MODIFIED to specify operation on Channel 237C3 at Maitland, Florida, 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.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(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, unless the proposed facilities are categorically excluded from environmental processing.

13. Pursuant to Commission Rule Section 1.1104(1)(k) and (3)(l), 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, Cox Radio, Inc., licensee of FM Station WPYO, is required to submit a rule making fee in addition to the fee required for the applications to effectuate the changes specified above.

14. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail Return Receipt Requested, a copy of this Order to the following:

Kevin F. Reed
Elizabeth A.M. McFadden
Nam E. Kim
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D.C. 20036
(Counsel for Cox Radio, Inc.)

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

16. For further information concerning this proceeding, contact Deborah Dupont, Media Bureau, (202) 418-7072.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau