

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 02-387
Table of Allotments,)	RM-10623
FM Broadcast Stations.)	
(Lahaina and Waianae, Hawaii))	
)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: April 6, 2005

Released: April 8, 2005

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it the *Notice of Proposed Rule Making* (“*Notice*”)¹ issued in response to a Petition for Rule Making filed by Pacific Radio Group, licensee of Station KLHI-FM, Lahaina, Hawaii (“*Petitioner*”). *Petitioner* filed comments and reply comments. Ohana Broadcasters Corporation (“*Ohana*”) filed comments. Cox Radio, Inc. (“*Cox*”) filed reply comments and *Petitioner* filed a response² to *Cox*’s reply comments. For the reasons stated below, we grant *Petitioner*’s rulemaking petition.

2. At the request of *Petitioner*, the *Notice* proposed that Channel 266C at Lahaina, Hawaii, be reallocated to Waianae, Hawaii, and that Station KLHI-FM’s license be modified to reflect the change of community. This reallocation of Channel 266C to Waianae would provide Waianae with its first local aural transmission service. *Petitioner* made the foregoing reallocation request pursuant to Section 1.420(i) of the Commission’s rules,³ which permits 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.⁴ In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities.⁵

¹ *Lahaina and Waianae, Hawaii*, 17 FCC Rcd 26133 (MB 2002).

² *Petitioner* also filed a motion for leave to file its response, arguing that *Cox* raised an argument for the first time in its reply comments that it could have raised in comments, but chose not to do so. We grant *Petitioner*’s motion to assure a complete record in this proceeding.

³ 47 C.F.R. § 1.420(i).

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

⁵ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). 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. Equal weight is given to priorities (2) and (3).

3. Since Petitioner would place a 70 dBu contour over 100 percent of the Honolulu, Hawaii and Kailua (Honolulu County)-Kaneohe, Hawaii Urbanized Areas, it must demonstrate that Waianae is sufficiently independent of those Urbanized Areas that the Commission could award Waianae a first local service preference under priority (3) of the FM allotment priorities.⁶ Under *Tuck*, we examine such proposals by considering three criteria: (1) the signal population coverage, (2) the size and proximity of the proposed community to the central city of the urbanized area, and (3) the interdependence of the proposed community to the urbanized area.⁷ The interdependence factor is the most important criteria considered in making an allotment decision involving the proposed reallocation of a station to an urbanized area. With respect to the Honolulu Urbanized Area, Waianae is about 40 kilometers away from Honolulu and Waianae's 2000 U.S. Census population of 10,506 is 2.8 percent of the population of Honolulu (2000 U. S. Census of 371,657). These figures are similar to those of other suburban communities granted a first local preference.⁸

4. Under criterion (3), which measures the relative independence of the suburban community (Waianae) from the Honolulu Urbanized Area, a majority of the eight *Tuck* factors demonstrate Waianae's independence from the Honolulu Urbanized Area.⁹ With respect to *Tuck* factor 1, the extent to which community residents work in the larger metropolitan area, rather than the specified community, 2000 U.S. Census data indicates that about 17 percent of Waianae's employed residents aged 16 years and over work in Waianae. This percentage is significant and justifies a favorable finding under *Tuck* factor 1.¹⁰ Evidence proffered pursuant to *Tuck* factor 3, whether the smaller

⁶ See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995) and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("Tuck"). See also *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951).

⁷ In *Tuck*, the Commission set forth eight factors in assessing the independence of a specified community: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own weekly newspaper or other media that cover the community's local needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facility and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries. 3 FCC Rcd at 5378. The Commission has considered a community as independent when a majority of these factors demonstrate that the community is distinct from the urbanized area. See *Parker and St. Joe, Florida*, 11 FCC Rcd 1095 (M.M.Bur. 1996).

⁸ See, e.g., *Chillicothe and Ashville, Ohio*, 18 FCC Rcd 22410 (MB 2003) (smaller community had less than one percent of the central city's population).

⁹ Petitioner explains that Waianae is a census designated place (CDP), as are all communities in the State of Hawaii, including Honolulu. Thus, every allotment the Commission has made within Hawaii has been to a CDP, including several CDP's within the Honolulu Urbanized area.

¹⁰ The Commission has found that 16 percent of a community's workforce employed in the community is sufficient to support a favorable finding under *Tuck* factor 1. See *Anniston and Ashland, Alabama, and College*

community's leaders and residents perceive Waianae as being separate from the Honolulu Urbanized area, clearly supports a favorable findings for Waianae under this factor. Waianae is located 40 kilometers (24.86 miles) from Honolulu on the southwestern coast of the island of Oahu and is separated from the City of Honolulu by the Waianae Mountains. Petitioner estimates that it takes over one hour to drive by car from Waianae to Honolulu. Petitioner asserts that given the relative distance from Honolulu, and Waianae's remote location, the residents of Waianae consider themselves as separate from the Honolulu metropolitan area. Although Waianae cannot receive a favorable finding under *Tuck* factor 4 because it does not have its own local government and elected officials, it does have a City Hall, which serves as a satellite office for local Honolulu County services, such as drivers' licenses and vehicle registration, and Waianae residents elect their own council members to represent their interests in Honolulu County Council matters. Further, pursuant to *Tuck* factor 8, Waianae's schools and library systems are operated by the State of Hawaii and its police and fire services are provided by Honolulu County. Although the city operates a harbor, and provides parks and recreation services, it cannot receive a favorable finding under *Tuck* factor 8. Nevertheless, the negative findings under *Tuck* factors 4 and 8 are mitigated by the facts that all communities in Hawaii are Census Designated Places, as opposed to incorporated communities, and the larger governmental entities of Honolulu County and the State of Hawaii already provide Waianae with major services.

5. Under *Tuck* factor 5, Waianae earns a favorable finding because it has its own zip code, two post offices and is included in a special telephone directory issued for the Leeward Coast of Oahu, which includes Waianae.¹¹ Under *Tuck* factor 6, Waianae has numerous commercial establishments and other facilities, including many businesses that use "Waianae" in their names, as well as medical and dental offices. Thus, Waianae receives a favorable finding under *Tuck* factor 6. Insofar as *Tuck* factors 2 and 7 are concerned, Waianae earns affirmative findings because Waianae residents may turn to two local monthly newspapers for coverage of local events and public affairs in Waianae and other West Coast communities on the Island of Oahu. These publications also provide advertisers with a means of reaching consumers in Waianae. Thus, under *Tuck* factors 1, 2, 3, 5, 6, and 7, Waianae deserves favorable findings. In conclusion, the reallocation of Channel 266C from Lahaina to Waianae is entitled to consideration as a first local service under *Tuck*.

6. Petitioner notes that the Kailua (Honolulu County)-Kaneohe Urbanized Area is located on the eastern side of Oahu Island while Waianae is located on the western side. Petitioner also observes that there are several large mountain ranges located between the two coasts that limit the ability of residents to travel from coast to coast. Petitioner states that Waianae's population (10,506) is 28.7 percent of that of Kailua and 30 percent of that of Kaneohe. Thus, Waianae has a larger population in relation to the two referenced cities than it does to Honolulu. Further, Waianae has the same favorable *Tuck* factors vis-à-vis the Kailua (Honolulu County)-Kaneohe Urbanized Area as it does in reference to the Honolulu Urbanized Area. Thus, the reallocation of Channel 266C from Lahaina to Waianae is also consistent with *Tuck*. Petitioner has reaffirmed its intent to implement its change of community proposal.

7. Ohana Broadcasters Corporation ("Ohana Broadcasters") has filed comments on behalf of 11 pending Low Power FM applications for Channel 266 on the island of Oahu, Hawaii. Ohana

Park, Georgia, et al., 16 FCC Rcd 3411 (MMB 2001).

¹¹ A local telephone directory is also issued for the entire island of Oahu.

Broadcasters asserts that allowing Station KLHI-FM to move to Waianae would likely prevent the operation of most of the Low Power FM applicants. We observe that a Low Power FM station is not permitted to operate if it causes interference within the community of Waianae or the 70 dBu contour of a full-power station, even if the Low Power FM station were already on the air.¹² Petitioner argues that although potential Low Power FM operations on Oahu may become impacted by the relocation of Station KLHI-FM to Waianae, an equally large area formerly precluded by Channel 266C at Lahaina, has been created on the island of Maui and nearby islands where new Lower Power FM stations may be located. Although it appears that licensing Station KLHI-FM on Waianae would preclude the continued operation of at least some Low Power FM stations, the Commission has stated clearly that Low Power FM operations could not interfere with full-power operations when it created the Low Power FM service.¹³

8. Cox Radio, Inc. (“Cox”) filed reply comments in which it argues that an FM facility operating on Channel 266C cannot place the 70 dBu signal over Waianae required by Section 73.315 of the Commission’s rules, because Section 73.1030(c) of the Commission’s Rules states that the facility must provide protection to the monitoring station at Waipahu, Hawaii. Cox states that in order to provide protection to that monitoring station, Petitioner would be obligated to utilize a directional antenna, which, in turn, would reduce the signal strength in the direction of Waianae below the level required for city-grade coverage. Cox also argues that even if Station KLHI-FM were to use an omnidirectional antenna from its proposed site, it could not provide city grade coverage to Waianae due to terrain obstructions that preclude line-of sight service from the proposed site to Waianae. In response, Petitioner points out that the monitoring station is generally southeast of the proposed transmitter site, while Waianae is generally northwest of the proposed transmitter site. We agree with Petitioner that a directional antenna can be designed to reduce power in the direction of the monitoring station while radiating full power in the direction of Waianae. In addition, we observe that the issue of whether Petitioner would need a directional antenna in this case is premature at the allotment phase. Protection of a monitoring station is a requirement imposed at the application stage, not the allotment stage.¹⁴ Further, Petitioner states that it plans to use a 150 meter tower at its proposed transmitter site to overcome any obstructions in the direction of Waianae and enable its proposed station to encompass Waianae with at least the required contour. We find that a 150 meter tower will enable Petitioner to encompass Waianae with a 70dBu contour. In light of the foregoing, Cox’s arguments are rejected.

9. By changing its community of license from Lahaina to Waianae, the licensee of Station LHI will provide new service to a net gain area containing 742,649 persons and lose service in a net loss area of 1,112 square kilometers. The gain area is well served with five or more services. The loss area will contain an area of 102 square kilometers with 217 people who will receive three services and an area of 176 square kilometers with 733 people who will receive four services. We find that reallocating Channel 266C, Station KLHI-FM, from Lahaina to Waianae would result in a preferential arrangement of allotments under the FM allotment priorities because Waianae would receive its first local aural transmission service. Thus, under the FM allotment priorities, retaining the allotment of

¹² See 47 C.F.R. § 73.809.

¹³ See *Creation of Low Power Radio Service*, 15 FCC Rcd 2205, 2231 (2000).

¹⁴ *Stuart, Florida*, 3 FCC Rcd 1901 (MMB 1998).

Channel 266C at Lahaina only satisfies priority (4) (other public interest matters), while the reallocation of Channel 266C to Waianae will satisfy priority (3) (first local service). We also observe that the reallocation of Channel 266C to Waianae would not deprive Lahaina of its sole local aural transmission outlet because Lahaina would continue to be served by FM Station KPOA, Channel 228C. Therefore, in accordance with the provisions of Section 1.420 (i) of the Commission's rules,¹⁵ we will modify the license of Station KLHI-FM to specify operation on Channel 266C at Waianae, Hawaii.

10. Consistent with the technical requirements of the Commission's rules, Channel 266C can be allotted to Waianae, Hawaii, utilizing coordinates of 21-23-51 NL and 158-06-01 WL, with a site restriction of 10.7 kilometers (6.6 miles) southeast of Waianae.

11. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

12. Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective May 23, 2005, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED for the communities listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
Lahaina, Hawaii	228C
Waianae, Hawaii	266C

13. IT IS FURTHER ORDERED, that the Petition for Rule Making filed by Pacific Radio Group IS GRANTED.

14. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of Pacific Radio Group for FM Station KLHI-FM, Lahaina, Hawaii, IS MODIFIED to specify operation on Channel 266C at Waianae, Hawaii, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee 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 47 C.F.R. Section 73.1620; and

(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 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

15. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and (3)(l), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if

¹⁵ 47 C.F.R. § 1.420(i).

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, Pacific Radio Group, Inc., licensee of FM Station KLHI-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 for FM Station KLHI-FM, Channel 266C, from Lahaina, Hawaii, to Waianae, Hawaii, at the time it submits its Form 301 application.

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

17. For further information concerning the above, contact R. Barthen Gorman, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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