

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-4
Table of Allotments,)	RM-11133
FM Broadcast Stations.)	
(Hagerstown and Myersville, Maryland))	
)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: May 31, 2006

Released: June 2, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making*¹ issued at the request of Manning Broadcasting, Inc., former licensee of Station WARX(FM), Hagerstown, Maryland (“Petitioner”),² proposing the reallocation of Channel 295B from Hagerstown to Myersville, Maryland, as the community’s first local transmission service, and the modification of the license for Station WARX(FM) to specify the new community. Petitioner filed comments reiterating its intention to file an application for the channel and to construct the facilities if the application is granted. Infinity Broadcasting Corporation of Washington, DC (“Infinity”), licensee of Station WJFK-FM, filed comments in opposition. Petitioner filed reply comments.

2. Petitioner filed this proposal for reallocation in accordance with the provisions of Section 1.420(i) of the Commission’s Rules, which permits the modification of a station’s license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.³ 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.⁴

3. Infinity argues that Petitioner should be required to provide an analysis of the community using the factors in *Faye and Richard Tuck, Inc.*⁵ Infinity notes that by relocating to Myersville, Station WARX(FM) will be close to the larger Frederick, Maryland Urbanized Area, and Station WARX(FM) will be able to provide city-grade service to Frederick.

4. In response, Petitioner points out that it is not proposing to move the Station WARX(FM)

¹ See *Hagerstown and Myersville, Maryland*, Notice of Proposed Rule Making, 20 FCC Rcd 398 (2005).

² Manning Broadcasting has been superseded in interest by Nassau Broadcasting, III, LLC, but for expediency, we will refer to the proponent as “Petitioner.”

³ See *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (“Change of Community R&O”)* Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

⁴ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 88, 91 (1988). The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to given to priorities (2) and (3)].

⁵ *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) (“*Tuck*”).

transmitter site, and from its current site, the station already places a 70dBu signal over more than 50 percent of the Frederick, Maryland, Urbanized Area and has done so for over twenty years. Thus, it argues, a *Tuck* showing is not required.⁶

5. We agree that a *Tuck* analysis is not required here because Petitioner is not using a first local service preference as a pretext to enter an urban market. Station WARX(FM) currently provides a city grade signal to more than 50 percent of the Frederick Urbanized Area and is not proposing a transmitter site change.

6. We will grant the change of community. This proposal satisfies the requirements for reallocation set forth in *Change of Community R&O*. First, Myersville, 2000 U.S. Census population 1,382 persons, is a community for allotment purposes.⁷ Second, the allotment of Channel 295B at Myersville is mutually exclusive with the current use of Channel 295B at Hagerstown. Third, the community of Hagerstown, 2000 U.S. Census population 36,687 persons, would not be deprived of its sole local service.⁸ Fourth, the proposal would provide a first local aural transmission service at Myersville, under Priority (3), which will result in a preferential arrangement of allotments over the retention of a fifth local transmission service at Hagerstown, a Priority (4) factor. Finally, there is no loss area because Petitioner does not propose a change of transmitter site.

7. Channel 295B will be reallocated at Myersville at a site 3.9 kilometers (2.4 miles) west of the community.⁹

8. 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).

9. Accordingly, pursuant to the authority contained in 47 U.S.C. §§ 4(i), 5(c)(1), 303(g), and (r), and 307(b), and 47 C.F.R. §§0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective July 17, 2006, the FM Table of Allotments, 47 C.F.R. § 73.202(b) IS AMENDED, with respect to the communities listed below, as follows:

<u>Community</u>	<u>Channel</u>
Hagerstown, Maryland	284B
Myersville, Maryland	295B

10. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 316(a), the authorization of Nassau Broadcasting, III, LLC for FM Station WARX, Channel 295B, Hagerstown, Maryland, IS MODIFIED to specify operation on Channel 295B at Myersville, Maryland, subject to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the licensee of FM Station WARX shall submit to the Commission a minor change

⁶ *Citing Tullahoma, Tennessee and New Market, Alabama*, Report and Order, 19 FCC Rcd 11,000 (Audio Div. 2004).

⁷ Myersville is incorporated, and has its own post office and zip code. It is in the 2000 U.S. Census with a population of 1,382 persons. The community has its own elected government, provides water and sewer service, fire protection, law enforcement through a dedicated county sheriff, and its schools are part of the Frederick County School System. There are also parks, churches, community service organizations, and businesses.

⁸ Stations WARK(AM), WJEJ(AM), WAYZ-FM and NCE Station WETH(FM) will remain in Hagerstown.

⁹ The coordinates for Channel 295B at Myersville are 39-29-57 NL and 77-36-42 WL.

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.

11. Pursuant to 47 C.F.R. §§ 1.1104(1)(k) and (3)(l) of the Commission's rules, Nassau Broadcasting, III, LLC, licensee of Station WARX(FM), Hagerstown, Maryland, is required to submit a rulemaking fee in addition to the fee required for the application to effectuate the community of license for FM Station WARX(FM) to specify operation on Channel 295B at Myersville, Maryland at the time its Form 301 application is submitted.

12. IT IS FURTHER ORDERED, That the opposition filed by Infinity Broadcasting Corporation of Washington, DC IS DENIED.

13. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Victoria M. McCauley (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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