

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-124
Table of Allotments,)	RM-11174
FM Broadcast Stations.)	
(Loretto, Tennessee, and Killen, Alabama))	

**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 for consideration the *Notice of Proposed Rulemaking*¹ proposing changes in the FM Table of Allotments, 47 C.F.R. § 73.202(b), in response to a petition filed by Pulaski Broadcasting, Inc. (“PBI”), licensee of Station WKSR-FM, Channel 252C3, Killen, Alabama, pursuant to Section 1.420(i) of the Commission’s Rules. PBI and KEA Radio, Inc. (together, “Joint Commenters”) filed comments (“Joint Comments”) supporting the changes proposed in the *Notice*. No other comments were received.

2. In an earlier proceeding, we granted PBI’s request for an upgrade to Channel 252C3 and a change of the community of license for Station WKSR-FM from Pulaski, Tennessee, to Killen, Alabama.² Shortly after release of the *Report and Order* in that proceeding, PBI’s pending request for a change of community of license from Killen, Alabama, to Loretto, Tennessee, was submitted.³ To date, PBI has not yet constructed facilities to serve Killen, Alabama, and Station WKSR-FM is still providing service at Pulaski, Tennessee.

3. **“Two-Step” Change of Community.** In the *Notice*, we expressed concern that this “two-step” change of community could provide a means to circumvent our reallocation procedures. We are concerned, in particular, with the application of Section 1.420(i) of the Commission’s rules. Section

¹ *Loretto, Tennessee, and Killen, Alabama*, Notice of Proposed Rule Making, 20 FCC Rcd 6063 (MB 2005).

² See *Ashland, Coaling, Cordova, Decatur, Dora, Hackleburg, Hobson City, Holly Pond, Killen, Midfield, Cotttsboro, Sylacauga, and Tuscaloosa, Alabama, Atlanta, Georgia, and Pulaski, Tennessee*, Report and Order, 19 FCC Rcd 6943 (MB 2004) (“*Ashland R&O*”).

³ The *Ashland R&O* was released on April 19, 2004, and PBI’s petition for rule making in this proceeding was filed on June 22, 2004.

1.420(i) permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest in the proposed allotment, so long as the amended allotment is mutually exclusive with the licensee's present assignment.⁴

A "two-step" change of community raises the possibility that the initial change of community request was an effort to circumvent the limitations set forth in Section 1.420(i) of the Rules and gain unwarranted protection for a desired move to the third community. Where the "second" reallocation step proposes facilities which are not mutually exclusive with the initially licensed facilities, we will require a detailed "good cause" showing, *e.g.*, unforeseeable circumstances beyond the petitioner's control. Absent such a showing, we will not allow the petitioner to avail itself of the procedures set forth in Section 1.420(i). In the case at hand, however, the proposed facilities for Station WKSJ-FM, Channel 25C3, Loretto, Tennessee, are mutually exclusive with that station's existing service at Pulaski, Tennessee, as well as with its current allotment at Killen, Alabama. We therefore conclude that it is appropriate to apply Section 1.420(i) to the change of community request in this proceeding.

4. We also observed in the *Notice* that "two-step" changes of community waste administrative resources. It does not serve the public interest to expend Commission resources in considering an allotment request if the proponent has no genuine interest in providing the proposed service. When the Commission receives a proposal for a change of community, the reallocation proponent must affirmatively express an interest in providing service at the new community. PBI, in fact, stated its intent to serve Killen, Alabama, when it filed its counterproposal in the *Ashland* proceeding. Very soon after PBI submitted its construction permit application to effectuate the reallocation at Killen, PBI requested a second reallocation from Killen to Loretto.⁵ In the *Notice* in this proceeding, we therefore required PBI to explain in detail its use of this two-step procedure to propose the Loretto reallocation.

5. In their comments, the Joint Commenters rely on certain potential market changes in Killen and Loretto to justify PBI's two-step filing. They note that, subsequent to the filing of PBI's counterproposal in *Ashland*, the Commission granted an application to relocate the facilities of WMXV-FM (formerly WJOR-FM), St. Joseph, Tennessee; however, our engineering analysis found that there will be no material change in that station's service to either Killen or Loretto. One hundred percent of both communities will continue to be covered by the 60 dBu signal contour of Station WMXV-FM. The Joint Commenters also note that the Commission has modified the license of WLAY-FM (formerly WMXV-FM) to specify Littleville, Alabama, as its new community of license.⁶ This reallocation will permit

⁴ See 47 C.F.R. §1.420(i), and *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

⁵ The construction permit application was filed on May 10, 2004, and the instant petition for rule making was filed on June 22, 2004. See File No. BPH-20040510AAK.

⁶ See *Russellville and Littleville, Alabama*, Report and Order, 19 FCC Rcd 6853 (MB 2004), *pet. for recon. pending*.

WLAY-FM to compete for listeners in Killen for the first time.⁷ These routine licensing events and minor station changes in the relevant radio markets would be wholly insufficient to meet the “good cause” showing that would be required if the proposed Loretto reallocation were not mutually exclusive with WKSJ-FM’s formerly licensed facilities at Pulaski. Moreover, the circumstances of this case raise a close question regarding the *bona fides* of PBI’s expression of interest in the Killen reallocation. Although the Joint Commenters’ justification is extremely weak, it also appears that PBI has derived no procedural or substantive advantage from its two-step filing procedure. In addition, there is no basis for us to conclude that PBI has attempted to circumvent the Commission’s rules and policies. Accordingly, we conclude that it is appropriate to consider the potential public interest benefits of the proposed reallocation. We caution all rulemaking proponents that the Commission will carefully review all two-step allocation proposals for potential abuse of process issues.

6. Removal of Sole Local Service. PBI asserts in its petition that its change of community request should not be treated as the removal of a sole local service from Killen, Alabama, because Station WKSJ-FM is not yet constructed as a local radio station serving Killen. We agree. The Commission’s policy against the removal of a sole local service is based upon the loss of an existing service upon which the public has come to rely.⁸ For that reason, we find that the proposed change of community for Station WKSJ-FM will not remove a sole operating service from Killen.

7. Evaluation of Proposed Arrangements of Allotments. In determining whether to approve a proposed 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*.⁹ We previously approved a change of community from Pulaski, Tennessee, to Killen, Alabama, so we now compare the existing allotment of Channel 252C3 at Killen with the proposed reallocation of Channel 252C3 at Loretto, Tennessee. Allotment of Channel 252C3 at either Killen or Loretto would satisfy the third allotment priority, “first local service.” Loretto, a town of 1,665 persons, is larger than Killen, Alabama, which has a population of 1,118 people. Both loss and gain areas are already well-served with five or more services, except for an unpopulated area of 4.3 square kilometers in the gain area, which currently receives four services. Although allotment at either community would satisfy the third allotment priority, we find that the larger population of Loretto supports the requested change of community.

8. Tuck Analysis. Loretto is not located within any urbanized area, and Station WKSJ-FM’s 70 dBu signal would cover less than 50 percent of the Florence, Alabama, Urbanized Area. We therefore

⁷ WLAY-FM’s transmitter site at Littleville, Alabama, will allow that station to provide a 60 dBu signal to 90 percent of Killen, whereas WLAY-FM did not provide any reception service to Killen from its prior allotment community of Russellville, Alabama. See File No. BMPH-20050829ABW.

⁸ See *Chatom and Grove Hill, Alabama*, Report and Order, 12 FCC Rcd 7664 (MMB 1997), and cases cited therein.

⁹ 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). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 91 (1982), *recon. denied*, 56 RR 2d 448 (1983).

conclude that a *Tuck* analysis is not necessary for us to proceed with the requested change of community.¹⁰

9. **Conclusion.** For all of the foregoing reasons, we conclude that the public interest would be served by reallocating Channel 252C3 at Loretto, Tennessee. Channel 252C3 can be allotted at Loretto in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 13.8 kilometers (8.5 miles) southwest of Loretto at reference coordinates of: 35-00-47 NL and 87-34-06 WL.

10. 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).

11. Accordingly, pursuant to the authority found 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), 0.283, and 1.420(i), IT IS ORDERED, That effective July 17, 2006, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, to read as follows:

<u>Community</u>	<u>Channel Number</u>
Killen, Alabama	-----
Loretto, Tennessee	252C3

12. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of Pulaski Broadcasting, Inc., for Station WKSR-FM, Channel 252C3, Killen, Alabama, IS MODIFIED to specify operation on Channel 252C3 at Loretto, Tennessee, 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 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.

13. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and (2)(k), Radio and Investments, Inc., licensee of Station WKSR-FM, 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 counsel of record:

¹⁰ See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) ("*Tuck*").

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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
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