



Federal Communications Commission
Washington, D.C. 20554

June 1, 2006

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In Reply Refer to:
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Mr. Hal Rose, Senior Vice-President
First Broadcasting Capital Partners, L.L.C.
10th Floor
750 North St. Paul
Dallas, TX 75201

In re: First Broadcasting Capital Partners, L.L.C.
WOXY(FM), Mason, OH
Facility ID No. 3653
File No. BPH-20050928AQQ

Dear Mr. Rose:

This letter refers to the captioned application (the "Application") filed by First Broadcasting Capital Partners, L.L.C. ("First Broadcasting") for minor modification of the facilities of station WOXY(FM), Mason, Ohio. The Application was filed to implement a rule making reallocation of WOXY(FM) from Oxford, Ohio, to Mason, Ohio.¹ On October 19, 2005, Mr. Bradley J. Beer ("Beer") filed an informal objection to the proposal.² For the reasons set forth below, we deny Beer's objection and grant the Application.

Background. In 2004, the then licensee of WOXY(FM), Balogh Broadcasting Company, Inc. ("Balogh"),³ along with several other licensees, filed a Joint Petition for Rule Making to amend the FM Table of Allotments⁴ by, *inter alia*, reallocating Channel 249A from Oxford to Mason, Ohio as the latter community's first local service and modifying the station WOXY(FM) license accordingly. The Commission issued a *Notice of Proposed Rule Making*⁵ in November of 2004. Beer timely filed comments opposing the WOXY(FM) reallocation on December 29, 2004, claiming that the WOXY(FM) proposal was a "migration" of WOXY(FM) from a rural area to the suburbs of Cincinnati, Ohio. Beer argued that "Mason, Ohio was selected as the closest community to Cincinnati where the [WOXY(FM)] signal could go yet meet spacing requirements with other broadcasters."⁶ He also asserted that the Oxford

¹ *Georgetown, Mason, Oxford, and West Union, Ohio, and Salt Lick, Kentucky*, Report and Order, 20 FCC Rcd 12976 (MB 2005) (the "Mason Report and Order").

² The Informal Objection indicates that it was served on First and its engineering consultant. First did not file an opposition to the objection.

³ Balogh subsequently assigned WOXY(FM) to First Broadcasting. See Application No. BALH-20040126AMT, granted on March 17, 2004 and consummated on May 15, 2004.

⁴ 47 C.F.R. § 73.202.

⁵ *Georgetown, Mason, Oxford, and West Union, Ohio, and Salt Lick, Kentucky*, Notice of Proposed Rule Making, 19 FCC Rcd 22016 (MB 2004).

⁶ Beer Comment at 1.

business community would be deprived of its only local radio advertising outlet by the removal of commercial station WOXY(FM). Beer noted that the other commercial stations providing service to Oxford were licensed to much larger communities and would not likely be cost-effective alternatives for advertisers in Oxford.

The Bureau rejected Beer's contentions, reallocated Channel 249A from Oxford to Mason, and modified WOXY(FM)'s authorization accordingly. The Bureau found that the reallocation to Mason resulted in a preferential arrangement of allotments because it would establish a first local service at Mason, while Oxford would retain noncommercial educational station WMUB(FM). Under well settled policies, the establishment of a first local service at Mason, priority (3), is preferred to the retention of a second local service, a priority (4) consideration.⁷ Additionally, the Joint Petitioners submitted a *Tuck* showing⁸ demonstrating that Mason is sufficiently independent of the Cincinnati Urbanized Area to warrant a first local service preference. First Broadcasting subsequently filed the Application to implement the rule making.

In his objection to the Application, Beer reargues his opposition to the reallocation of WOXY(FM)'s frequency to Mason and challenges First Broadcasting's "intent" to serve residents of Mason. He contends that First Broadcasting "succeeded in changing the Table of Allotments to move [WOXY(FM)] for the benefit of the 'underserved' citizens of Mason, Ohio."⁹ Additionally, Beer charges that First Broadcasting chose the small community of Mason¹⁰ – as opposed to a larger, more economically viable community – solely to facilitate the adoption of the *Mason Report and Order*. Finally, Beer observes that First Broadcasting proposes to locate the WOXY(FM) transmitter to maximize service to the urbanized area, a site location which would provide minimum city-grade signal coverage to Mason.¹¹ He therefore requests that the Application be denied.

Discussion. Beer improperly seeks to relitigate the Mason reallocation in this application proceeding. The *Mason Report and Order* is final, and issues regarding the propriety of reallocating WOXY(FM) from Oxford to Mason will not be collaterally examined by the staff here. Additionally, to the extent Beer challenges the Application's compliance with the Commission's core technical rules, we reject those contentions. The Application complies with Section 73.315(a) of the Commission's Rules.¹²

⁷ 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). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 91 (1988).

⁸ See *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) ("*Tuck*").

⁹ Objection at 1.

¹⁰ Mason has a population of approximately 22,000 people. Beer suggests that First "should have" chosen Middletown, Ohio, as WOXY(FM)'s community of license, as Middletown has a population of 51,605, and the WOXY(FM) transmitter will be located at the edge of Middletown, serving all of that community's residents with a city grade (70 dBμ/3.16mV/m) signal.

¹¹ First cites *John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985) and *Letter to Southwest Communications, Inc.*, ref. 8920-HVT (MMB July 16, 1986) (80 percent city-grade signal coverage of community deemed substantial compliance with 47 C.F.R. § 73.315).

¹² 47 C.F.R. § 73.315(a). See *John R. Hughes, supra*. In that case, the Commission determined that an AM application proposing coverage of 80% of the "residential area" of a community was in "substantial compliance"

Finally, to the extent Beer challenges First Broadcasting's intention to serve the residents of Mason, Ohio, the Commission does not presume that applicants proposing suburbs of large cities as their communities of license do not intend to serve the needs and interests of those communities.¹³ Recognizing that an applicant might have an incentive to seek a frequency in a smaller, under-served community of license that is geographically proximate to another community with a larger population and economic base with the goal of serving the larger community, the Commission initially adopted several policies to determine which community an applicant actually intended to serve.¹⁴ In *Suburban Community* in 1983, however, the Commission abandoned these tests of an applicant's intent on the grounds that they inhibited entry into unserved communities and frustrated competition in metropolitan communities. The Commission adopted, instead, a presumption that an applicant intends to serve its designated community of license so long as (1) the applicant provides a city-grade service to the designated community of license; (2) the applicant proposes programming that will serve the designated community of license; and (3) the applicant's main studio location complies with Section 73.1125 of the Commission's rules.¹⁵ In *Suburban Community*, the Commission concluded that "the risk of a renewal challenge for failure actually to serve the designated community constitutes a more effective regulatory tool than utilization in advance of guidelines and factors that are inexact in divining intent."¹⁶ Thus, the Commission decided that if an application satisfies the three objective factors adopted in *Suburban Community*, it is preferable to provide the applicant an "opportunity to demonstrate its good faith" rather than try to determine how the station will be operated in the future.¹⁷ No further action on this allegation is warranted at this time.

with the city coverage rules. First Broadcasting's Application states, and we have confirmed, that WOXY(FM)'s predicted coverage contour will encompass 93 % of the population and 86 % of the area within the town of Mason, Ohio. We find that this constitutes "substantial compliance" under *John R. Hughes*.

¹³ See *Tuck*, 3 FCC Rcd at 5374, citing *Suburban Community Policy, the Berwick Doctrine, and the de Facto Reallocation Policy*, Report and Order, 93 FCC 2d 436, 450-51 ¶ 30 (1983), recon. denied, 56 RR 2d 835 (1984) ("*Suburban Community*").

¹⁴ See *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, Public Notice, 2 FCC 2d 190 (1965) (adopted objective test of AM applicant's intent to serve a larger geographically proximate community); *Berwick Broadcasting Corp.*, Memorandum Opinion and Order, 20 FCC 2d 393 (1969) (applied the public interest consideration underlying the AM suburban community policy to FM radio); *Hall Broadcasting Co., Inc.*, Memorandum Opinion and Order, 71 FCC 2d 235, 237 (1979) (defined *de facto* reallocation as involving an attempt to utilize a channel assigned to one community in order to establish a broadcast service in another community).

¹⁵ 47 C.F.R. § 73.1125. See *Suburban Community*, 93 FCC 2d at 456; see also *Roberts Communications, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 1138 (1996) (although Section 73.1125 no longer required location of a broadcast station's main studio to be in the station's community of license, an applicant that locates its studio within the geographic parameters of Section 73.1125 will satisfy *Suburban Community*'s third criterion).

¹⁶ *Suburban Community*, 93 FCC 2d at 456 (emphasis in original).

¹⁷ *Id.* at 457 (quoting *Robert Adams*, 38 FCC 2d 1, 4 (1972)).

Conclusion/Actions. Accordingly, IT IS ORDERED, that for the reasons set forth above, the October 27, 2005 informal objection filed by Bradley J. Beer IS DENIED, and the Application (File No. BPH-20050928AQQ) for minor modification of the facilities of station WOXY(FM), Mason, Ohio, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Bradley J. Beer
Mark N. Lipp, Esq.