

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

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Cumberland, Kentucky, Weber City,
Glade Spring, and Marion, Virginia)
MB Docket No. 05-295
RM-11280

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 2006

Released: June 9, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Notice of Proposed Rule Making and Order to Show Cause issued in response to a rulemaking petition filed by JBL Broadcasting, Inc. ("Petitioner"), licensee of Station WVEK-FM, Cumberland, Kentucky; and (2) supporting comments filed by the Petitioner. For the reasons discussed below, we deny the Petitioner's rulemaking petition.

BACKGROUND

2. At the request of the Petitioner, the NPRM/OSC proposed the reallocation, upgrade, and change of community of license for Station WVEK-FM from Channel 274A at Cumberland, Kentucky (pop. 2,611) to Channel 274C3 at Weber City, Virginia (pop. 1,333) as a first local service, pursuant to Sections 1.420(g)(3) and (i) of the Commission's rules. To accommodate this reallocation, the NPRM/OSC also proposed: (1) the substitution of Channel 263A for vacant Channel 274A at Glade Spring, Virginia, and (2) the substitution of Channel 273A for Channel 263A at Marion, Virginia, and the modification of Station WOLD(FM)'s license accordingly.

1 Cumberland, KY, Weber City, Glade Spring, and Marion, VA, Notice of Proposed Rule Making and Order to Show Cause, 20 FCC Rcd 18039 (MB 2005) ("NPRM/OSC").

2 These rules permit the modification of a station's authorization to specify a new community of license and the upgrade of the class of FM station on a mutually exclusive co-channel or adjacent channel without affording other interested parties an opportunity to file competing expressions of interest.

3 The NPRM/OSC noted that Channel 274A at Glade Spring was listed among other vacant non-reserved band FM allotments in Broadcast Auction No. 62, which subsequently occurred on January 12, 2006. ASRadio, LLC became the successful auction bidder for Channel 274A at Glade Spring, and its application for construction permit (File No. BNPH-20060308ALW) was granted on May 26, 2006.

4 Previously, in MM Docket No. 99-244, the license for Station WOLD-FM was modified from Channel 273A to Channel 263A to accommodate the allotment of Channel 274A at Glade Spring, Virginia, as a first local service. See Cumberland, KY, Weber City, Glade Spring, Marion, Richlands, and Grundy, VA, Report and Order, 17 FCC Rcd 5024 (MMB 2002). However, Station WOLD-FM has not commenced operations on Channel 263A. We note

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3. The *NPRM/OSC* also requested that the Petitioner submit a *Tuck* showing to demonstrate that Weber City is sufficiently independent of the Kingsport, Tennessee-Virginia Urbanized Area to warrant a first local service preference because Station WVEK-FM's proposed 70 dBu contour would cover 100 percent of this Urbanized Area. The Petitioner filed comments, submitted a *Tuck*⁵ showing, and reiterated its expression of interest in the reallocation of Station WVEK-FM to Weber City.

DISCUSSION

4. Although the *NPRM/OSC* solicited comment on the Petitioner's proposal, we now recognize that there is a short-spacing with one of the related channel changes. Accordingly, the proposal must be denied because it fails to comply with Section 73.207(a) of the Commission's rules. Specifically, the proposed substitution of Channel 273A for Channel 263A at Marion, Virginia, and the modification of the license for Station WOLD-FM, accordingly, is 6.6 and 0.6 kilometers short-spaced to two mutually exclusive applications for a new FM station on Channel 273A at Shawsville, Virginia.⁶ These applications were filed in 1997 under the contour protection provisions of Section 73.215 of the Commission's rules and protected Station WOLD-FM, then a licensed Channel 273A station, from interference. However, in MM Docket 99-244, Station WOLD-FM's license was subsequently modified to specify Channel 263A at a different transmitter site, with the licensee's consent, to accommodate the new allotment of Channel 274A at Glade Spring. This action is now final. As a result of that action, WOLD-FM is fully protected at the modified site for maximum class facilities on Channel 263A. It continues to operate lawfully under an implied Special Temporary Authority on Channel 273A at its formerly licensed transmitter site. Contrary to Petitioner's claim,⁷ WOLD-FM is neither a licensed Channel 273A station nor entitled to any protection based on its formerly licensed facilities. As the Commission explained in the similar context involving a one-step FM station application, "[s]uch a grant amends the table of allotments and modifies that station license to operate on the new channel and/or class. During the construction period, the licensee may continue to operate the previously authorized facilities on an interim or 'implied Special Temporary Authority' basis."⁸ Under Section 73.208(a), a petitioner must provide Section 73.207 spacing to all pending applications. Because the Petitioner's proposal fails to specify a fully-spaced transmitter site with regard to the Shawsville applications, it must be denied.⁹

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that two other stations, WRIC-FM, Richlands, Virginia, and WMJD(FM), Grundy, Virginia, were also required in MM Docket 99-244 to change channels to accommodate the allotment of Channel 274A at Glade Spring and have already implemented their respective channel changes.

⁵ See *Faye and Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988).

⁶ See File Nos. BPH-19971022MC and BPH-19971023ME. The actual spacing between the transmitter site specified in BPH-19971022MC for Channel 273A at Shawsville and Channel 273A at Marion is 108.4 kilometers, and the actual spacing between the transmitter site specified in BPH-19971022ME is 114.4 kilometers. The required spacing between Channel 273A at Marion and Channel 273A at Shawsville is 115 kilometers. There are two other mutually exclusive applications pending for Channel 273A at Shawsville, File Nos. BPED-19971021MF and BPH-19971023MC, which are fully spaced to Channel 273A at Marion.

⁷ See Petitioner's rulemaking petition at 5 n.3.

⁸ *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Notice of Proposed Rule Making, 13 FCC Rcd 14849, 14855 n.22 (1998).

⁹ See, e.g., *Chester and Wedgefield, SC*, Memorandum Opinion and Order, 5 FCC Rcd 5572 (1990), *petition for review denied*, No. 90-1496 (D.C. Cir. June 6, 1991) (denial of waiver of the minimum distance separation requirements affirmed because Commission has a strong policy in preserving the integrity of the FM Table of allotments and compelling need for waiver not shown).

5. Finally, contrary to the Petitioner's assertion, *Beloit Broadcasters, Inc. v. FCC*,¹⁰ is distinguishable. Therein, the Court held that the grant of an interim authorization to operate on 1380 kHz in St. Louis, without a hearing, did not act as a modification of the license for Station WBEL(AM), 1380 kHz, Beloit, Illinois, under Section 316(a) of the Communications Act of 1934, as amended, because the scope of WBEL(AM)'s authority to operate was subject to the pre-existing signal of the St. Louis station. The substitution of an interim operator pending selection of a new licensee on 1380 kHz at St. Louis did not change the technical relationship between the stations. In contrast, MM Docket 99-244 modified the WOLD-FM license. The reallocation of Channel 273A at Marion must meet all Section 73.207 spacing requirements with regard to all prior filed applications and outstanding authorizations.

6. This document is not subject to the Congressional Review Act. The Commission is, therefore, not required to submit a copy of this Report and Order to the Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A), because the proposed rule was denied.

7. IT IS FURTHER ORDERED, That the petition for rule making filed by JBL Broadcasting, Inc. IS DENIED.

8. IT IS FURTHER ORDERED, That the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following licensee and permittee and their principal/contact representative:

Emerald Sound, Inc.
P.O. Box 1047
Marion, VA 24354
(Licensee of Station WOLD-FM,
Marion, Virginia)

ASRadio, LLC
5835 Lawrence Drive
Indianapolis, IN 46226
(Permittee of Channel 274A,
Glade Spring, Virginia)

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Washington, D.C. 20018-0577
(Counsel for JBL Broadcasting,
Inc.)

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

10. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

¹⁰ 365 F.2d 962 (D.C. Cir. 1966).