



Federal Communications Commission
Washington, D.C. 20554

June 29, 2006

DA 06-1327
In Reply Refer to:
1800B3-TSN
Released: June 29, 2006

Mark Goodman Productions, Inc.
P.O. Box 177
Hodgenville, KY 42748

In re: **WXAM(AM), Buffalo, Kentucky**
Facility ID No. 40213
Application for Major Modification
File No. BMJP-20050118AEV

Dear Counsel:

This letter refers to the above-noted application filed by Mark Goodman Productions, Inc. (“MGP”) for major modification to the facilities of station WXAM(AM), Buffalo, Kentucky, seeking to change the community of license from Buffalo, Kentucky to Hodgenville, Kentucky. For the reasons set forth below, we dismiss the application.

Background. MGP timely filed its FCC Form 175 application to change the WXAM(AM) community of license during the filing window for AM Auction No. 84 (“Auction 84”).¹ The application was determined not to be mutually exclusive with any other proposal filed in the Auction 84 filing window, and MGP was invited to file its complete FCC Form 301 application by January 18, 2005.² MGP timely filed its complete FCC Form 301 application on January 18, 2005. MGP proposes only a change in community of license, with no change to the WXAM(AM) technical facilities. MGP attached to its application a narrative and technical report addressing the implications of the proposed community change under Section 307(b) of the Communications Act of 1934, as amended,³ which directs the Commission to make a “fair, efficient, and equitable” distribution of radio service among communities in the United States.⁴

WXAM(AM) is the sole local transmission service licensed at Buffalo, Kentucky, which has a ZIP code but is not a Census Designated Place. MGP estimates its population at 500. MGP proposes to change WXAM(AM)’s community of license to Hodgenville, Kentucky (2000 Census population 2,874)

¹ See “AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze,” Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

² See “AM Auction No. 84 Singleton Applications,” Public Notice, 19 FCC Rcd 22569 (MB 2004).

³ 47 U.S.C. § 307(b).

⁴ See “Section 307(b) Amendment Deadline Established for Certain AM Auction No. 84 Singleton Applications,” Public Notice, 20 FCC Rcd 10701 (MB 2005).

as that community's second local / first competitive radio transmission service.⁵ BCI's Section 307(b) narrative indicates that Buffalo will continue to receive aural reception service from at least 16 stations.⁶

Discussion. The Commission may permit a licensee to change a broadcast station's community of license only if the proposal would advance the Section 307(b) mandate to provide for the fair, efficient, and equitable distribution of radio services.⁷ Our *FM Assignment Policies* delineate three core priorities: provision of first aural reception service to a community, provision of second aural reception service to a community, and provision of first local transmission service at a community.⁸ The fourth priority is "other public interest matters," which encompasses any other factors that the Commission may take into consideration, including provision of a second local transmission service.⁹ Retention of the sole local service at Buffalo implicates Priority (3) – first local transmission service, while provision of a second local service at Hodgenville implicates Priority (4) – other public interest matters. Generally, the Commission prohibits the removal of an existing station representing a community's sole local transmission service, even when the proposed move would provide a first local transmission service at a new, larger community.¹⁰ This policy is subject, as are all Commission policies, to waiver under appropriate circumstances.¹¹ But the Commission has emphasized that "the fact that a proposal would create a new local service (at the expense of an existing service) is not sufficient, by itself, to warrant a

⁵ Hodgenville is currently served by WKMO(FM).

⁶ MGP lists the following stations providing at least a 60 dB μ (FM) or .5 mV/m (AM) signal to Buffalo: WHAS(AM), WXXA(AM), WAMZ(FM), WKJK(AM), and WGTK(AM), Louisville, Kentucky; WVLK(AM) and WLAP(AM), Lexington, Kentucky; WKUE(FM), WQXE(FM), and WIEL(AM), Elizabethtown, Kentucky; WJCR-FM, Upton, Kentucky; WCKQ(FM), Campbellsville, Kentucky; WKMO(FM), Hodgenville, Kentucky; WDRD(AM), Newburg, Kentucky; WXAM(AM), Buffalo, Kentucky; and WKRC(AM), Cincinnati, Ohio. Five or more reception services are considered to be "abundant" service. See *Family Broadcasting Group*, Decision, 53 R.R.2d 662 (Rev. Bd. 1983), *rev. denied*, FCC 83-559 (Nov. 29, 1983); see also *LaGrange and Rollingwood, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 3337 (MMB 1995).

⁷ See 47 U.S.C. § 307(b) ("Section 307(b)").

⁸ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 91-93 (1982) ("FM Assignment Policies"). Priorities (2) and (3) are co-equal. The FM allotment priorities are applied to Section 307(b) determinations for community change proposals for AM stations. *Allesandro Broadcasting Co.*, Decision, 56 R.R.2d 1568 (Rev. Bd. 1984).

⁹ *FM Assignment Policies*, 90 FCC 2d at 93. On second local transmission service being considered under Priority (4), see, e.g., *Bear Lake and Honor, Michigan*, Memorandum Opinion and Order, 14 FCC Rcd 8799, 8801 (1999) ("[T]he Commission has previously determined that, in implementing the requirement of Section 307(b) of the Communications Act 'to provide a fair, efficient, and equitable distribution of radio service' among the States, a first local transmission service is more important than other public interest matters, such as a second local service or an upgrade of existing service.").

¹⁰ *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, ("New Community R & O"), 4 FCC Rcd 4870 (1989), recon. granted in part, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097(1990) ("New Community MO&O").

¹¹ *Id.* On waiver standards generally, see *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("Northeast Cellular") ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest," citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) ("WAIT Radio").

waiver.”¹² Rather, such a proposal “is presumptively contrary to the public interest.”¹³ In this regard, the Commission has stated that:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.¹⁴

MGP does not specifically request a waiver of the Commission’s policy against removing a sole local service. It argues, instead, that “Buffalo is not today a community for allotment purposes, if it ever in fact was,” and that even if it is determined to be a community for allotment purposes, “there is a greater public interest in providing a second competitive service to Hodgenville.”¹⁵ We disagree. MGP has not demonstrated that Buffalo is not a licensable community. Indeed, MGP’s own statement suggests that Buffalo’s status as a community has not changed since WXAM(AM) was licensed.¹⁶

More importantly, MGP has not shown why the Commission’s policy against removal of a community’s sole local service should be waived in a situation where, as here, the removal would result in a lower-priority allotment. The Commission has held that the fact that a licensee proposes to remove a station to a larger community to become that community’s first local transmission service does not by itself justify the removal of a smaller community’s sole local broadcast service.¹⁷ Here, WXAM(AM)

¹² *New Community MO&O*, 5 FCC Rcd at 7097.

¹³ *Id.*

¹⁴ *Id.* See also *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Notice of Proposed Rule Making, 10 FCC Rcd 11169, 11183-84 (2005); and *Sparta and Buckhead, Georgia*, 15 FCC Rcd 3474 (MMB 2000) (“[u]nder very limited circumstances, the removal of a community’s sole local service could be justified if there are compelling public interest factors to offset the expectation of continued service”).

¹⁵ MGP Section 307(b) Narrative, first unnumbered page.

¹⁶ Indeed, documents filed by WXAM(AM)’s original licensee before the station was first licensed support a finding that circumstances have not changed. On June 24, 1974, Lincoln County Broadcasting, Inc. (“LCBI”), the original licensee of what was then known as WLCB(AM), sought to modify its then-pending application for a construction permit (File No. BAP-19838). In Exhibit B to that filing, LCBI made the following representations in support of its request to locate the station’s main studio in Hodgenville:

The transmitter will be located approximately 3 miles from the city of Hodgenville, Kentucky in a rural area known as Buffalo, Kentucky. This is an unincorporated area which has only two businesses. The main business district (and all shopping) is located in Hodgenville. . . Buffalo is a rural farming community with no business district as such.

Despite these representations, LCBI did not seek to change the station’s community of license from the “rural area known as Buffalo, Kentucky” to Hodgenville.

¹⁷ See, e.g., *Potts Camp and Saltillo, Mississippi*, Memorandum Opinion and Order, 16 FCC Rcd 16116 (2001) (denying relocation of sole local service at a town of 483 to a town of 1,782).

would become Hodgenville's second local transmission service. MGP's claim that Buffalo will continue to receive service from WXAM(AM) is likewise unavailing. The Commission has stated that it will not accept continued reception service coverage by the station as a factor in favor of a licensee seeking to change its community of license.¹⁸ Lastly, we conclude that MGP's reliance on *Radio Wheeling, Inc.*,¹⁹ is misplaced. This case involved a proposal for a first local FM transmission service allotment at Bethlehem, West Virginia (a suburb of Wheeling, West Virginia) and a competing proposal for a first local FM transmission service allotment at a smaller community, Key, Ohio. First, *Radio Wheeling* antedates the *FM Assignment Policies* and the specific allotment priorities that currently govern our Section 307(b) analysis. Second, *Radio Wheeling* was decided primarily on the Administrative Law Judge's finding that Key did not qualify as a community under then-Section 73.210 of the Commission's rules and not, as MGP suggests, on a finding that the disparity in sizes between Bethlehem and Key overcame the presumptive priority of a first local transmission service.²⁰ Finally, *Radio Wheeling* involved competing proposals for new service, not the relocation of a sole existing local service. As noted above, the Commission places great weight on the expectation of continued existing service, and MGP has demonstrated no special circumstances that would outweigh that expectation.

We cannot find, on the existing record in this case, that there are sufficient public interest factors to offset the expectation of continued local service at Buffalo, Kentucky. Accordingly, we conclude that the public interest, convenience, and necessity would not be served by grant of MGP's application. Therefore, the application of Mark Goodman Productions, Inc., File No. BMJP-20050118AEV, for major modification to change the community of license of station WXAM(AM), Buffalo, Kentucky, IS DISMISSED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: John F. Garziglia, Esq.

¹⁸ See *New Community R & O*, 4 FCC Rcd at 4873.

¹⁹ 85 FCC 2d 496 (ALJ), reversed, 85 FCC 2d 486 (Rev. Bd. 1980), rev. denied, 87 F.C.C.2d 523 (1981) ("Radio Wheeling").

²⁰ *Id.* at 515. The Administrative Law Judge also denied Radio Wheeling, Inc.'s ("RWI") Bethlehem proposal, finding that the applicant actually intended to provide an additional local service to Wheeling rather than a first service at Bethlehem. The applicant for Key, Ohio did not appeal the denial of its application. The Review Board granted RWI's application on appeal, reversing the Administrative Law Judge's finding that RWI intended merely to serve Wheeling.