

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

In the Matter of)
)
Amendment of Section 73.202(b),)
FM Table of Allotments,)
FM Broadcast Stations.)
(East Liverpool, Ohio, and)
Moon Township, Pennsylvania))

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: June 28, 2006

Released: June 30, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it the petition for reconsideration submitted on behalf of Keymarket Licenses, LLC (“Keymarket”). Previously, we had returned Keymarket’s petition for rule making to reallocate Channel 282B from East Liverpool, Ohio, to Moon Township, Pennsylvania, and modify the license of Radio Station WOGF(FM) accordingly.¹ In its rule making petition, Keymarket proposed both a change of community and a relocation of the transmitter site of Station WOGF(FM),² a pre-1964 grandfathered station.³

2. In our letter returning Keymarket’s petition for rule making, we noted that reallocation of Channel 282B at the proposed site would increase WOGF(FM)’s short-spacing to WPGB(FM), Channel 284B, Pittsburgh, Pennsylvania, by approximately 2.8 kilometers. We explained that the Commission’s policy is to grant no waivers of the spacing requirements of Section 73.207 of the Commission’s Rules in considering the allotment of an FM channel. We further stated that waiver of the rule has been granted for proposals that would decrease an existing short-spacing, but we could not consider a proposal that

¹ See Letter of John A. Karousos, Assistant Chief, Audio Division, Media Bureau, to Allen G. Moskowitz, Esq., counsel for Keymarket Licenses, L.L.C. (April 22, 2004), returning Keymarket’s petition for rule making to reallocate Channel 282B from East Liverpool, Ohio, to Moon Township, Pennsylvania (filed August 20, 2003).

² Station WOGF(FM)’s reference coordinates at East Liverpool, Ohio, are 40-35-14 North Latitude and 80-25-15 West Longitude. The reference coordinates of the proposed new transmitter site for reallocation of Channel 282B at Moon Township, Pennsylvania, are the following: 40-30-56 North Latitude and 80-24-34 West Longitude, at a site 15.9 kilometers (9.9 miles) west of Moon Township and 8.0 kilometers south of the current transmitter site.

³ Pre-1964 grandfathered stations are those FM stations authorized prior to November 16, 1964, that do not meet the separation distances required by the later-adopted Section 73.207(b) and that have remained continuously short-spaced since that time.

would exacerbate an existing short-spacing. For that reason, we returned Keymarket's petition for rule making as unacceptable for filing.

3. In its petition for reconsideration, Keymarket contends that in *Grandfathered Short-Spaced FM Stations*,⁴ the Commission revised its application and allotment policies for grandfathered, short-spaced stations to eliminate all spacing requirements to second-adjacent and third-adjacent channel stations. Similarly, Keymarket argues that, under current Section 73.213(a)(4) of the Commission's Rules, there are no required second or third adjacent separation requirements for pre-1964 grandfathered stations. Keymarket also cites several decisions purporting to establish that pre-1964 grandfathered, short-spaced stations "are commonly permitted to change community of license via a petition to amend the FM Table of Allotments."⁵

4. Keymarket's representation of the Commission's holding in *Grandfathered Short-Spaced FM Stations* is incorrect. The stated purpose of that proceeding was to streamline the method of proposing modifications to existing facilities for pre-1964 grandfathered short-spaced FM radio broadcast stations.⁶ By focusing upon the modification of existing facilities, the Commission limited its policy changes to the standards for FM facility modification applications filed by pre-1964 grandfathered FM stations.⁷ The Commission did not, however, amend the spacing requirements applicable to those stations at the allotment rule making stage.⁸

5. Keymarket's reliance upon Section 73.213 of the Commission's Rules is equally misplaced. We previously have rejected the argument that Section 73.213(a)(4) relieves pre-1964 grandfathered stations of the need to comply with Section 73.207 with respect to second- and third-adjacent channels.⁹ In so doing, we emphasized that the Commission intended its changes to Section 73.213(a) to "permit second and third-adjacent channel grandfathered stations to implement maximum class facilities, and/or change transmitter site with complete flexibility on second-adjacent and third adjacent channel short-spacings."¹⁰ We never have relied upon Section 73.213(a)(4) in granting a reallocation request, nor is

⁴ *Grandfathered Short-Spaced FM Stations*, Report and Order, 12 FCC Rcd 11,840 (1997).

⁵ See Petition for Reconsideration, Statement of William J. Getz at 4-5. The cases cited are the following: *Newnan and Peachtree City, Georgia*, Report and Order, 7 FCC Rcd 6307 (MMB 2002); *Oceanside and Encinatas, California*, Report and Order, 14 FCC Rcd 15,302 (MMB 1999); and *Berlin and North Conway, New Hampshire*, Report and Order, 14 FCC Rcd 15,307 (MMB 1999) ("*Berlin and North Conway*").

⁶ See *Grandfathered Short-Spaced FM Stations*, Report and Order, *supra*, 12 FCC Rcd at 11841, ¶ 1, and Notice of Proposed Rule Making, 11 FCC Rcd 7245, ¶¶ 1 and 2 (MMB 1996).

⁷ See language in *Sturgis, Kentucky*, Report and Order, 13 FCC Rcd 17,786, n.2 (MMB 1998) ("We note that the Commission issued a Report and Order giving grandfathered short-spaced stations greater flexibility to improve their facilities and relocate their transmitter sites").

⁸ See *Elgin and Lombard, Illinois*, Memorandum Opinion and Order, DA 06-1226 (released June 9, 2006) ("*Elgin and Lombard*").

⁹ See *Murrieta, Arcadia, Falbrook, Yucca Valley, and Desert Hot Springs, California*, Report and Order, 17 FCC Rcd 19,458 (MMB 2002) ("*Murrieta*") (characterized counterproponent's interpretation of Section 73.213(a)(4) as an "overreaching reading of the rule"), *app. for rev. pending*; and *Elgin and Lombard, Illinois*, cited *supra*.

¹⁰ *Murrieta*, 17 FCC Rcd at 19,462, citing *Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd at 11,847.

there any language in Section 73.213 supporting its applicability to allotment rule makings.¹¹

6. Finally, none of the decisions cited by Keymarket for the proposition that pre-1964 grandfathered stations “are commonly permitted to change community of license” involved relocation of the station’s transmitter site.¹² In those cases, our decisions approving short-spaced reallocations by pre-1964 grandfathered stations were premised on the fact that the petitioners did not propose to change their transmitter sites. As we explained in *Berlin and North Conway*, “[w]e believe that a waiver of Section 73.207 is warranted *since there is no change in [the station’s] technical facilities* and thus the short-spacings, and any attendant interference, which already exist will not worsen [emphasis added].”¹³ Those cases thus are distinguishable from the instant rule-making request, which proposes both a change of community and a transmitter site relocation for a pre-1964 grandfathered station.

7. In one case not cited by Keymarket, *Albemarle and Indian Trail*, we did, in fact, grant a waiver of Section 73.207 to allow both a change of community and a transmitter relocation. In that decision, we emphasized that we were “not making a generic determination that any pre-1964, grandfathered short-spaced station may change its community of license and transmitter site;”¹⁴ rather, we recognized the need to proceed on a case-by-case basis. Based on the facts of that case, we determined to waive Section 73.207 because no new short-spacings were created by the change in transmitter site and the existing grandfathered short-spacings were eliminated or significantly reduced.

8. In its petition for reconsideration, Keymarket emphasizes that it does not request waiver of the spacing requirements of Section 73.207 of the Commission’s Rules,¹⁵ and indeed, the circumstances of the proposal do not warrant such waiver. In contrast to the facts presented in *Albemarle and Indian Trail*, Keymarket’s proposed relocation of Station WGOF(FM)’s facilities would increase an existing short-spacing. As stated in the letter returning Keymarket’s petition for rule making, we will not consider an allotment proposal that would exacerbate an existing short-spacing. For all of the reasons discussed herein, Keymarket’s petition for reconsideration must be denied.

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Keymarket Licenses, L.L.C., IS DENIED.

10. This document is not subject to the Congressional Review Act. The Commission, is, therefore, not required to submit a copy of this Memorandum Opinion and Order to the Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the

¹¹ The rule mentions only application filings. *See, e.g.*, 47 C.F.R. § 73.213(a)(2).

¹² *See* cases cited in n. 5, *supra*.

¹³ *Berlin and North Conway*, 14 FCC Rcd at 15,308. Our determination to waive Section 73.207 in that Report and Order, a decision issued subsequent to adoption of Section 73.213(a)(4) of the Commission’s Rules, further refutes Keymarket’s argument that adoption of Section 73.213(a)(4) of the Commission’s Rules eliminated the Section 73.207 distance separation requirements for pre-1964 grandfathered stations with respect to second- and third-adjacent channels. *See also Newnan and Peachtree City, Georgia*, cited *supra* at n. 5.

¹⁴ *Albemarle and Indian Trail, North Carolina*, Report and Order, 16 FCC Rcd 13,876, 13,878 (MMB 2001).

¹⁵ *See* Petition for Reconsideration at 5, ¶ 7, and Statement of William J. Getz at 5.

proposed rule was dismissed.

11. For further information concerning this proceeding, contact Deborah Dupont, Media Bureau, (202) 418-7072.

FEDERAL COMMUNICATIONS COMMISSION

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