

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.
(Columbus and Monona, Wisconsin)
MB Docket No. 05-122
RM-11198

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 31, 2006

Released: September 5, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Petition for Reconsideration of a Report and Order in this proceeding filed by Good Karma Broadcasting, LLC, licensee of Station WTLX(FM), Columbus, Wisconsin ("Petitioner") ; and (2) a Motion to Supplement Petition for Reconsideration filed by the Petitioner. For the reasons discussed below, we will grant reconsideration.

BACKGROUND

2. At the request of the Petitioner, the Notice of Proposed Rule Making in this proceeding proposed the reallocation and change of community of license for Station WTLX(FM) from Channel 263A at Columbus, Wisconsin, to Channel 263A at Monona, Wisconsin, pursuant to the provisions of Section 1.420(i) of the Commission's rules. The NPRM stated that the reallocation would provide a first local aural service at Monona (pop. 8,018) without depriving Columbus (pop. 4,479) of its sole local service. In order to prevent the removal of the sole local transmission service in Columbus, the Petitioner relied upon a simultaneously filed "back-fill" application to change the community of license of its Station WTTN(AM), 1580 kHz, from Watertown, Wisconsin, to Columbus, which was filed in connection with AM Auction No. 84 and was not mutually exclusive with any other applications submitted in the filing window.

1 Columbus and Monona, WI, Report and Order, 20 FCC Rcd 16253 (MB 2005) ("R&O").

2 The Petitioner's Motion to Supplement, which was filed on April 11, 2006, seeks to update the record in this proceeding by providing information on facts that have changed since the Commission released its R&O. We will grant the Motion to Supplement because it will facilitate resolution of this case. See Butler and Reynolds, GA, Memorandum Opinion and Order, 21 FCC Rcd 1516 n.2 (MB 2006).

3 Columbus and Monona, WI, Notice of Proposed Rule Making, 20 FCC Rcd 6049 (MB 2005) ("NPRM").

4 This rule permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.

5 See File No BMJP-20050118AJT.

3. The *R&O* dismissed the Petitioner's rulemaking proposal because it was contingent upon an ungranted construction permit application as a "backfill" to replace the prospective loss of a sole local service. The *R&O* explained that relying upon an ungranted AM "backfill" application is not conducive to the efficient processing of petitions for rule making.⁶ The *R&O* stated that the petition for rule making may be refiled after the AM license application is granted, specifying Columbus as the new community of license.

4. In its Petition for Reconsideration, the Petitioner contends that its rulemaking proposal should be reinstated and granted for two reasons. First, the Petitioner argues that the *R&O* failed to apply precedent in dismissing the rulemaking petition. In support of this position, the Petitioner states that in *Marion and Johnston City, IL*,⁷ the staff simultaneously approved the change of community of license of an expanded band AM station from Johnston City, Illinois, to Berwyn, Illinois, and a "backfill" reallocation of an FM station from Marion, Illinois, to Johnston, City. To prevent the removal of a sole local service, the staff imposed a condition that the AM station could not commence operations at Berwyn until the FM station commenced operations at Johnston City. The Petitioner asserts that the same approach should be applied in the instant proceeding and that the proposed reallocation to Monona should be granted subject to the initiation of replacement radio service at Columbus.

5. Second, the Petitioner argues that the newly adopted policy prohibiting the reliance upon ungranted AM "backfill" applications to prevent the prospective loss of service should not be applied in this instance because it was intended, by its terms, to apply only to rulemaking petitions "in the future." As such, the Petitioner submits that this policy should apply only to rulemaking petitions filed after September 26, 2005, the date that the policy was announced. Because the Petitioner's rulemaking petition was filed eight months before the new policy was adopted, it argues that the policy should not be applied in this case.⁸

6. In its Motion to Supplement Petition for Reconsideration, the Petitioner points out that the WTTN(AM) application was granted on April 7, 2006. Because its proposal no longer relies on an ungranted AM application as a "backfill" to replace the prospective loss of the sole local service at Columbus, the Petitioner contends that the basis for the dismissal of its rulemaking petition no longer exists and that its proposed reallocation should be granted.

DISCUSSION

7. At the outset, we clarify that the policy set forth in *Aguila and Apache Junction, AZ*, of prohibiting the reliance upon ungranted AM "backfill" applications to prevent the prospective loss of service is predicated upon our concern that these AM applications are subject to the auction process. The complexity and length of time of the auction process, as well as the potential for an AM major change application to become mutually exclusive with other applications filed during an auction window, is not conducive to the efficient processing of FM rulemaking petitions. By way of contrast, the AM application relied upon in *Marion and Johnston City, IL*, which involved an expanded band AM station, was not subject to the auction process and can more easily be coordinated with an FM rulemaking petition than an AM auction application. As a result, we believe that the *Marion and Johnston City, IL*, case is distinguishable from the present proceeding.

⁶ See *Aguila, Apache Junction, et al., AZ*, Notice of Proposed Rule Making, 18 FCC Rcd 15202, 15203 n.2 (MB 2005). Therein, the staff stated that "[i]n the future, any petition for rule making which specifies an ungranted construction permit application as a 'backfill' to replace the prospective loss of a sole local service will be returned." *Id.*

⁷ Report and Order, 18 FCC Rcd 15346 (MB 2003).

⁸ In the alternative, the Petitioner requests a waiver of this policy based upon the same reasoning set forth above.

8. It is well established that the Commission may change its processing rules at any time and parties do not have a vested right that a particular rule or policy will continue to be applied.⁹ However, we will, for equitable reasons, reinstate and process the Petitioner's rulemaking petition. Our decision is based upon the fact that the Petitioner's proposal was filed before the release of the decision in the *Aguila and Apache Junction, AZ*, proceeding, announcing the new processing policy.¹⁰ Further, reinstating the Petitioner's proposal will not prejudice any other parties because no mutually exclusive proposals were filed.

9. We will conditionally reallocate and change the community of license of Station WTLX(FM) from Channel 263A at Columbus, Wisconsin, to Channel 263A at Monona, Wisconsin, because the requirements of Section 1.420(i) have been met.¹¹ First, the proposed use of Channel 263A at Monona is mutually exclusive with the current use of Channel 263A at Columbus. Second, Columbus will not be deprived of its only local service because we will prohibit Station WTLX(FM) from commencing operations at Monona until Station WTTN(AM) commences operations at Columbus in accordance with its now-granted construction permit. Third, the provision of a first local service at Monona under Priority (3) of the FM Allotment Priorities¹² will result in a preferential arrangement of allotments over the retention of a second local service at Columbus under Priority (4).¹³

10. Monona is a community for allotment purposes because it is incorporated and listed in the U.S. Census. As described in the *NPRM*, Monona has a Common Council comprised of a mayor and six alderpersons. The city also has its own police, volunteer fire/emergency, medical service, and public works departments, and a commercial base with over 500 businesses. Further, because Monona is located within the Madison, Wisconsin, Urbanized Area and the 70 dBu signal of Station WTLX(FM) will encompass 83 percent of that Urbanized Area, the Petitioner submitted a *Tuck* showing.¹⁴ We find that a majority of the eight *Tuck* factors are present and that Monona is sufficiently independent of the Madison Urbanized Area to warrant a first local service.¹⁵

11. A staff engineering analysis reveals that the reallocation of Station WTLX(FM) will result in a gain of 321,238 persons and a loss of service to 35,479 persons, for a net gain of 285,759. However, most of the loss area is well served with five or more aural services.¹⁶

⁹ See, e.g., *Chadmoore Comm., Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997) (filing of upgrade applications did not vest petitioners with a legally cognizable expectation that criteria for considering their applications would remain unchanged). See also *Letter to Pamela C. Cooper, Esq., et al.*, 16 FCC Rcd 12668, 12672 (MMB 2001) (changes in processing rules may be applied in cases arising before their promulgation).

¹⁰ As previously noted, the AM "backfill" application relied upon by the Petitioner was granted on April 7, 2006.

¹¹ The reference coordinates for Channel 263A at Monona are 43-08-19 NL and 89-22-27 WL.

¹² The FM allotment priorities are (1) first fulltime aural service; (2) second fulltime 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).

¹³ We note that there is pending a previously filed application for a new AM station at Monona (File No. BNP-20040129ATZ) that is mutually exclusive with two other applications in AM Auction No. 84. However, a request for approval of a settlement has been filed under which the Monona application would be dismissed. See Joint Request for Approval of Agreement, MX Group. No. 84-18 at 2.

¹⁴ See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374, 5378 (1988) ("*Tuck*").

¹⁵ Specifically, factors 1 (significant percentage of workforce employed in the community); 2 (a local media outlet); 4 (local government and elected officials); 5 (zip code); 6 (commercial establishments, health facilities); and 8 (local services such as police, public works, fire, and bus system) are present.

¹⁶ Although 824 persons in an area of 24 square kilometers will be reduced from five to four aural reception services and 1,878 persons in an area of 133 square kilometers will be reduced from four to three services, the services

(continued...)

12. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's rules, IT IS ORDERED, That effective October 20, 2006, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, for the communities listed below, as follows:

<u>Communities</u>	<u>Channel Number</u>
Columbus, Wisconsin	---
Monona, Wisconsin	263A

13. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the license of Good Karma Broadcasting, LLC, for Station WTLX(FM), Channel 263A, Columbus, Wisconsin, IS MODIFIED to specify operation on Channel 263A at Monona, Wisconsin, 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 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;
- (c) Operating authority for Station WTLX(FM) at Monona, Wisconsin, may not be granted until operations have been commenced by Station WTTN(AM), 1580 kHz, Columbus, Wisconsin; and
- (d) 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 Section 1.1307 of the Commission's rules.

14. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and (2)k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rulemaking fee when filing its application to implement the change of community of license and/or upgrade. As a result of this proceeding, the licensee of Station WTLX(FM) is required to submit a rulemaking fee in addition to the fee required for the application to effect the change in community of license.

15. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Good Karma Broadcasting, LLC, IS GRANTED.

16. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Good Karma Broadcasting, LLC, (RM-11198) IS GRANTED.

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

(...continued from previous page)

remaining in these loss areas are comparable to those of other relocations granted by the Commission. *See, e.g., Scappose and Tillamook, OR*, 15 FCC Rcd 10899 (MMB 2002) (4,312 persons left with four aural services, 2,461 persons with three aural services, and 19 persons with two aural services).

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

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau