

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

| | | |
|--|---|---------------------|
| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b), |) | MB Docket No. 06-77 |
| Table of Allotments, |) | RM-11324 |
| FM Broadcast Stations. |) | RM-11334 |
| (Burkesville, Greensburg, Hodgenville, Horse Cave, |) | |
| Lebanon, Lebanon Junction, Lewisport, Louisville, |) | |
| Lyndon, New Haven, Springfield and St. Matthews, |) | |
| Kentucky, Edinburgh, Hope, Tell City and |) | |
| Versailles, Indiana, Belle Meade, Goodlettsville, |) | |
| Hendersonville, Manchester and Millersville, |) | |
| Tennessee) |) | |

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

Adopted: April 13, 2007

Released: April 16, 2007

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Indiana University Student Broadcasting (“Indiana University”) and a Petition for Reconsideration filed by Indiana Community Radio Corporation (“Indiana Community”) both directed to the *Report and Order* in this proceeding.¹ Elizabethtown CBC, Inc., Newberry Broadcasting, Inc. and Cumulus Licensing LLC (“Joint Parties”) filed an Opposition directed to each Petition for Reconsideration. Cox Radio, Inc. filed a Consolidated Opposition to Petitions for Reconsideration. For the reasons discussed below, we dismiss the Indiana University Petition for Reconsideration and deny the Indiana Community Petition for Reconsideration.²

¹ *Burkesville, Greensburg, Hodgenville, Horse Cave, Lebanon, Lebanon Junction, Lewisport, Louisville, Lyndon, New Haven, Springfield and St. Matthews, Kentucky, Edinburgh, Hope, Tell City and Versailles, Indiana, and Belle Meade, Goodlettsville, Hendersonville, Manchester and Millersville, Tennessee*, Report and Order, 21 FCC Rcd 11465 (MB 2006).

² Indiana Community has also filed a “Petition for Reconsideration Supplement,” a “Motion to Correct Errors,” a “Motion to Strike Opposition to Petition for Reconsideration 1,” a “Motion to Strike Opposition to Petition for Reconsideration 2” and an “Opposition to Motion to Sever.” None of these pleadings address our determination that Indiana Community’s proposal for Channel 262A at Morristown does not conflict with any proposal in this proceeding and, therefore, is not eligible for consideration in the context of this proceeding. Furthermore, Indiana Community does not address the merits of any action in this allotment proceeding or suggest that any action was contrary to any Commission allotment criterion or policy. Rather, Indiana Community argues that a former employee of the Commission should not have been allowed to participate in this proceeding or any other allotment proceeding. The former employee was not employed at the Commission during the pendency of this proceeding. This proceeding commenced with the filing of an Amended Proposal on March 21, 2005, more than 17 years after this employee resigned from the Commission. Indiana Community has also not referred to any specific instance of improper activity by this former employee in this proceeding. Accordingly, these pleadings will not be considered in the context of this proceeding.

2. **Background.** At the request of the Joint Parties, the *Notice of Proposed Rule Making* in this proceeding proposed nine cities of license modifications.³ Included among those proposals was a request to reallocate Channel 274A from Springfield, Kentucky, to New Haven, Kentucky, and modify the Station WLSK to specify New Haven as the community of license. These requests were filed pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file a competing expression of interest.⁴ In response to the *Notice*, CXR Holdings, licensee of Station WRKA, Channel 276A, St. Matthews, Kentucky, filed a Counterproposal. In that Counterproposal, CXR Holdings proposed the substitution of Channel 276C2 for Channel 276A at St. Matthews, reallocation of Channel 276C2 to Lyndon, Kentucky, and modification of its Station WRKA license to specify operation on Channel 276C2 at Lyndon. In order to accommodate this reallocation and upgrade, CXR Holdings proposes a series of channel substitutions and reallocations involving eight communities in Indiana and Kentucky. Included among these proposals is the proposed substitution of Channel 274A for Channel 275C3 at Tell City, Indiana, reallocation of Channel 274A to Lewisport, Kentucky, and modification of the Station WLME license to specify operation on Channel 274A at Lewisport. The proposed Channel 274A reallocation to Lewisport conflicted with the proposed reallocation of Channel 274A to New Haven, Kentucky, as set forth in the *Notice*. In Reply Comments, the Joint Parties withdrew their interest in pursuing the reallocation of Channel 274A to New Haven. As such, there was no longer any conflict between the Joint Parties' proposal and the CXR Counterproposal.

3. As requested by the Joint Parties, the *Report and Order* substituted Channel 294C3 for Channel 294A at Belle Meade, Tennessee, reallocated Channel 294C3 to Millersville, Tennessee, and modified the Station WNFN license to specify operation on Channel 294C3 at Millersville. In order to accommodate this upgrade and first local service for Millersville, the *Report and Order* modified the licenses of six stations in Tennessee and Kentucky. As proposed in the CXR Holdings Counterproposal, the *Report and Order* substituted Channel 276C2 for Channel 276A at St. Matthews, Kentucky, reallocated Channel 276C2 to Lyndon, Kentucky, and modified the Station WRKA license to specify operation on Channel 276C2 at Lyndon. To accommodate this upgrade and first local service for Lyndon, the *Report and Order* modified the licenses of six stations in Indiana and Kentucky. Included among these modifications was the substitution of Channel 262A for Channel 275A at Edinburgh, Indiana, and the modification of the Station WYGB to specify operation on Channel 262A.

4. Indiana University is the licensee of low power Station WIUX-LP operating on Channel 262. In its Petition for Reconsideration, Indiana University requests that we rescind our action allotting Channel 262A to Edinburgh because it would require the cessation of Station WIUX-LP. According to Indiana

³ *Hodgenville, Horse Cave, Lebanon, Lebanon Junction, New Haven and Springfield, Kentucky, and Belle Meade, Goodlettsville, Hendersonville, Manchester and Millersville, Tennessee*, Notice of Proposed Rule Making, 21 FCC Rcd 3560 (MB 2006).

⁴ See *Modification of FM and TV Authorizations to Specify a New Community of License* ("Community of License"), Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

University, such a cessation would deprive the students of Indiana University and the surrounding community of the “educational, cultural, and technical benefits” provided by Station WIUX-LP. Indiana University also alleges that it “did not have a fair chance to file public comments” because the Edinburgh proposal did not appear on the Commission’s internet site or public notice until after the June 13, 2006, reply comment date in this proceeding.

5. On March 9, 2007, the Joint Parties and Indiana University filed a “Joint Request for Approval of Settlement Agreement and Request for Approval of Withdrawal.” Pursuant to that agreement, Indiana University would file a minor change application to modify the Station WIUX-LP license to specify operation on Channel 256 pursuant to Section 73.870(a) of the rules.⁵ Once this application is granted, Indiana University would then dismiss its Petition for Reconsideration in exchange for reimbursement for its legitimate and prudent expenses incurred in changing the Station WIUX-LP frequency. This application (File No. BPL-20070314ABQ) was granted on March 19, 2007. As requested, we are dismissing the Indiana University Petition for Reconsideration.

6. In the *Report and Order*, we also dismissed an untimely proposal filed by Indiana Community, licensee of noncommercial educational FM Station WJCF, Channel 201A, Morristown, Indiana. In that proposal, Indiana Community requested the modification of its Station WJCF license to specify operation on Channel 262A at Morristown, and have the Channel 262A allotment at Morristown reserved for noncommercial educational use. In dismissing this proposal, we noted that a Channel 262A allotment at Morristown does not conflict with any proposal in this proceeding and there was no reason or basis to consider that proposal in connection with our resolution of this proceeding. We also stated that a Channel 262A allotment at Morristown would be short-spaced to the licensed site of Station WWKI, Channel 263B, Kokomo, Indiana, in contravention of Section 73.207(b) of the rules.⁶

7. In its Petition for Reconsideration, Indiana Community does not address our determination that its proposed Channel 262A allotment at Morristown does not conflict with any proposal in this proceeding and would, therefore, not be acceptable for consideration as a counterproposal. Indiana Community does not dispute the fact that, as filed, its proposal for Channel 262A at Morristown is short-spaced to Station WWKI. Instead, Indiana Community states that, as a result of this proceeding, Cumulus Licensing LLC, one of the Joint Parties, is in violation of the Commission’s multiple ownership limits. In addition, Indiana Community appears to suggest that there was no basis to upgrade and change the community of license of Station WRKA in this proceeding because the Station WRKA renewal application “was granted in error.” The *Report and Order* also modified the license of Station WXCH, Channel 276A, Versailles, Indiana, to specify operation on Channel 275A at Hope, Indiana. In this regard, Indiana Community asserts that the Channel 275A allotment at Hope is short-spaced to Station WRZX, Channel 277B, Indianapolis, Indiana, and that Versailles no longer has local service. Finally, Indiana Community states that the “financials on

⁵ 47 C.F.R. § 73.807(a).

⁶ This proposal is identical to a Counterproposal filed by Indiana Community in MB Docket No. 05-17. In that proceeding, we dismissed the Counterproposal because it was contingent on the reallocation of Channel 262A from Connersville, Indiana, to Norwood, Ohio, and, in addition, would be short-spaced to Station WWKI. *Connersville, Madison and Richmond, Indiana, Erlanger Lebanon, Lebanon Junction, New Haven and Springfield, Kentucky, and Norwood, Ohio*, Report and Order, 20 FCC Rcd 18871 (MB 2005). Indiana Community did not seek reconsideration of that action.

this matter” have not been disclosed by the Joint Parties and that this failure to disclose is not in the public interest.

8. The Indiana Community Petition for Reconsideration is without merit. At the outset, we reiterate that the Indiana Community proposal for a Channel 262A allotment at Morristown is not in conflict with any proposal in this proceeding and could not have been considered as a counterproposal in this proceeding.⁷ A counterproposal must be a proposal for an alternative and mutually exclusive allotment or set of allotments timely submitted in the proceeding in which the proposal is made.⁸ In regard to Indiana Community’s unsupported allegation that, as a result of the *Report and Order*, Cumulus Licensing is now in violation of the Commission’s multiple ownership rules, we note that it is established policy not to consider ownership issues in conjunction with an allotment rulemaking proceeding.⁹ Instead, we will continue to require applicants to demonstrate compliance with local ownership rules in construction permit applications to implement related allotment actions.¹⁰ The Station WRKA renewal application was granted on September 7, 2004. That action is now final and Indiana Community has provided no basis to revisit that action in the context of this rulemaking proceeding. Contrary to the Indiana Community assertion, the Channel 275A allotment at Hope is not short-spaced to Station WRZX, Channel 277B, Indianapolis, Indiana.¹¹ Indiana Community is also incorrect in its assertion that as a result of this proceeding, Versailles, Indiana, will no longer have local service. Station WKRY will continue to provide local service to Versailles. After affording all interested parties an opportunity to participate, our actions in this proceeding resulted in a preferential arrangement of allotments as required by *Community of License*. The fact that the rulemaking proponents did not disclose “financials” concerning any contractual arrangement between them does not negate this determination. Furthermore, there is no requirement that the parties filing an allotment rulemaking petition disclose any financial arrangements between them. The only financial disclosure requirement is set forth in Section 1.420(j) of the rules which pertains only to parties in a rulemaking proceeding withdrawing their expression of interest.¹²

⁷ We also note that the Indiana Community proposal is fatal in two other respects. The proposal is not mutually exclusive with the current WJCF authorization. Moreover, the rules do not permit reserved band licensees to propose channel substitutions to the non-reserved band.

⁸ See *Milton, West Virginia, and Flemingsburg, Kentucky*, Report and Order, 11 FCC Rcd 6374 (MMB 1996).

⁹ See *Chillicothe and Ashville, Ohio*, Report and Order, 17 FCC Rcd 20418 (MB 2002), *recon. denied*, 18 FCC Rcd 22410 (MB 2003), *app. for rev. pending*. See also, *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, Report and Order, 17 FCC Rcd 25055 (MMB 2002); and Letter from Peter H. Doyle, Acting Chief, Audio Services Division, to Paul A. Cicelski, Esq. et al., File No. BAPH-20011101ABD (May 24, 2001).

¹⁰ See *Chillicothe, Dublin, Hillsboro and Marion, Ohio*, Report and Order, 20 FCC Rcd 6305 (MB 2005).

¹¹ The reference coordinates for the Channel 275A allotment at Hope, Indiana, are 39-19-29 and 85-53-41. This site complies with the 69-kilometer minimum separation requirement set forth in Section 73.207(b) of the rules with respect to the licensed site of Station WRZX at 39-53-43 and 86-12-04.

¹² 47 C.F.R. § 1.420(j).

9. 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 GAO, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because both Petitions for Reconsideration were denied.

10. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Indiana University Student Broadcasting IS DISMISSED.

11. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed by Indiana Community Radio Corporation IS DENIED.

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

13. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau