

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.
(Dundee and Odessa, New York)
MB Docket No. 06-97
RM-11254

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 25, 2007

Released: July 27, 2007

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Notice of Proposed Rule Making issued in response to a rulemaking petition filed by Finger Lakes Radio Group, Inc., licensee of Station WFLR-FM, Dundee, New York ("Petitioner"); (2) supporting comments filed by the Petitioner; (3) a counterproposal and comments filed by Bible Broadcasting Network, Inc. ("BBN"); (4) comments in support of the Petitioner's rulemaking petition filed by Kevin M. Fitzgerald, General Partner of Station WPHD(FM), South Waverly, Pennsylvania ("Fitzgerald"); (5) reply comments filed by the Petitioner; (6) reply comments filed by Fitzgerald; and (7) an update of record filed by the Petitioner. For the reasons discussed below, we grant the Petitioner's rulemaking petition and dismiss BBN's counterproposal.

2. Background. The Petitioner requested the substitution of Channel 238A for Channel 240A at Dundee, New York (population 1,690), the reallocation of Channel 238A to Odessa, New York (population 617), and the modification of its license accordingly, pursuant to the provisions of Section 1.420(i) of the Commission's rules. Subsequent to the filing of the rulemaking petition, a one-step application was granted to substitute Channel 238A for Channel 240A at Dundee. The NPRM proposed the reallocation of Channel 238A to Odessa as the community's first local service and the modification of the license for Station WFLR-FM, accordingly.

1 Dundee and Odessa, New York, Notice of Proposed Rule Making, 21 FCC Rcd 5070 (MB 2006) ("NPRM").

2 Fitzgerald's comments were late filed and not accompanied by a request for late acceptance. Specifically, the pleading appears to have been mailed on June 28, 2006, but was not received at the Commission until July 7, 2006, which was after the July 3, 2006, comment deadline. However, we will consider Fitzgerald's pleading in order to resolve this proceeding on a complete factual record. Acceptance of this pleading will not prejudice other parties to this proceeding.

3 This rule permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the new allotment.

4 See File No. BPH-20040317AAL, which was granted on April 19, 2005. See also Various Locations, Report and Order, 21 FCC Rcd 7116, 7117 (MB 2006) (changing the FM Table of Allotments to reflect the substitution of Channel 238A for Channel 240A at Dundee, New York).

3. In its supporting comments, the Petitioner states that it will promptly submit an application to implement its Odessa Channel 238A proposal, if granted. Likewise, Fitzgerald supports the reallocation of Channel 238A to Odessa because it will enable Station WPHD(FM), Channel 241A, South Waverly, Pennsylvania, to upgrade its current facility from 3 kW to 6 kW at its current transmitter site.

4. In its comments and counterproposal, BBN proposes the allotment of Channel 238A at Savona, New York (population 822) as a first local service. This counterproposal is mutually exclusive with the NPRM's proposal because Channels 238A at Odessa and 238A at Savona are short-spaced under the Commission's minimum distance separation requirements.<sup>5</sup> In support of this proposal, BBN alleges that Savona is a community for allotment purposes because it is listed in the U.S. Census and has other indicia of community status such as a post office, a volunteer fire department, a village office, a court, a local school, and a library. BBN also argues that its counterproposal should be preferred under the FM Allotment Priorities.<sup>6</sup> Although both the Petitioner's and BBN's proposals trigger Priority (3) as first local services, BBN claims its proposal is preferable because Savona has a larger population than Odessa.

5. BBN recognizes that, at the time of filing, its counterproposal for Channel 238A at Savona did not protect the Petitioner's construction permit for Channel 238A at Dundee as required by the Commission's rules.<sup>7</sup> However, BBN argues that the construction permit should be cancelled for two reasons. First, BBN alleges that the Petitioner's construction permit application was filed for no purpose other than to block applicants from filing valid counterproposals. BBN claims that this intent is evident from the timing of the filing of the construction permit application and the rulemaking petition. BBN notes that the WFLR-FM construction permit application was filed on March 18, 2004, and was granted on April 19, 2005. The proposed rulemaking petition was filed on March 21, 2005. BBN argues that such a timeline ensured the Petitioner that any subsequent rulemaking petition would be precluded because it would be required to protect the construction permit. Second, BBN challenges the availability of the Dundee permit site, noting that it is located next to a historic landmark, the Sugar Hill Fire Tower, which is the property of the New York State Department of Environmental Conservation.<sup>8</sup>

6. In separately filed reply comments, the Petitioner and Fitzgerald state that BBN's counterproposal was required to protect both Station WFLR-FM's license on Channel 240A and construction permit on Channel 238A at Dundee. Because, at the time of filing, the counterproposal was impermissibly short-spaced to WFLR-FM's construction permit, they argue that the counterproposal must be dismissed. In its update of record, the Petitioner refers to a minor change application<sup>9</sup> filed by Station WTTC-FM, Towanda, Pennsylvania, which stated that it was mutually exclusive with the Petitioner's rulemaking petition, and points out that an amendment was subsequently filed, removing the conflict.

7. **Discussion.** As a threshold matter, we agree with the Petitioner and Fitzgerald that BBN's counterproposal must be dismissed as technically defective. FM rulemaking petitions and counterproposals are required to protect existing licenses, construction permits, vacant allotments, and

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<sup>5</sup> See 47 C.F.R. § 73.207.

<sup>6</sup> The FM allotment priorities are: (1) first full-time aural service; (2) second full-time 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 (1982).

<sup>7</sup> See 47 C.F.R. § 73.208(a).

<sup>8</sup> BBN recognizes that the Petitioner's construction permit application for Channel 238A at Dundee was filed before the National Programmatic Act deadline of submitting Section 106 showings regarding proximity to historic structures. However, it notes that the application was granted after the Commission's rules implementing the NPA Act became effective and argues that these issues may still be relevant.

<sup>9</sup> See *File No.* BPH-20060703ABE. This construction permit application was subsequently granted on April 4, 2007.

cut-off applications.<sup>10</sup> It is also well established that counterproposals are required to be technically correct and substantially complete when filed and are subject to dismissal for failure to meet this requirement.<sup>11</sup> Because BBN's counterproposal for Channel 238A at Savona was short-spaced to the construction permit for Channel 238A at Dundee at the time it was filed, the counterproposal is dismissed.

8. To the extent that BBN argues that we should disregard the short-spacing because the construction permit was incorrectly granted, the construction permit grant is long since final. The construction permit was granted on April 19, 2005, and Commission records reveal that no petition for reconsideration was filed. We, therefore, reject BBN's untimely and collateral attempt to challenge this action.<sup>12</sup> Further, with respect to BBN's concern that the construction permit site may not be built due to proximity to a historic structure, we note that the application proposed the use of an existing tower without significant changes to that tower.<sup>13</sup>

9. We also reject as speculative BBN's contention that Station WFLR-FM's construction permit application was filed for the purpose of blocking the filing of counterproposals to its rulemaking petition. It has submitted no extrinsic evidence to support this position. While it alleges that the one year time period between the filing of the construction permit application and the rulemaking petition is indicative of an intent to block counterproposals, we do not agree. On the contrary, a much shorter time period would likely be more probative of an intent to block. Furthermore, BBN has cited no precedent that would prohibit Station WFLR-FM from simultaneously prosecuting a one-step application to change channels at Dundee and a rulemaking petition to change its community of license from Dundee to Odessa. We also note that the Petitioner and Fitzgerald are incorrect in claiming that a counterproposal was required to protect Petitioner's formerly licensed facility on Channel 240A at Dundee. Protection for Channel 240A ended with grant of the Channel 238A construction permit.<sup>14</sup> Thus, the fact that Petitioner waited one year after the filing of the Dundee construction permit application to file the Odessa rulemaking petition is evidence of a lack of intent to block the filing of counterproposals.

10. Next, we will grant the Petitioner's rulemaking petition because it satisfies our rules and policies on change of community of license. First, Channels 240A and 238A at Dundee are mutually exclusive with Channel 238A at Odessa. Second, there will not be a removal of the sole local service at Dundee because Station WFLR(AM) is also licensed to Dundee. Third, the proposal will result in a preferential

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<sup>10</sup> 47 C.F.R. §73.208(a).

<sup>11</sup> See, e.g., *Eldorado and Lawton, Oklahoma*, Report and Order, 5 FCC Rcd 6737 (MMB 1990); *Fort Bragg, California*, Report and Order, 6 FCC Rcd 5817 n.2 (MMB 1991); *Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas*, Report and Order, 3 FCC Rcd 6507, 6511 n.2 (MMB 1998); and *Sanford and Robbins, North Carolina*, Report and Order, 12 FCC Rcd 1, 2-3 (MMB 1997).

<sup>12</sup> See, e.g., *Letter to Steven Wendell*, 21 FCC Rcd 8665 (MB 2006) (declining to consider untimely collateral challenge to grant of a license application); *Letter to Jerrold Miller, Esq.*, 21 FCC Rcd 2200 (MB 2006) (rejecting untimely collateral challenge to grant of assignment application because no fraud on Commission's processes and challenged result not unconscionable); and *Morningstar Educational Network*, Memorandum Opinion and Order, 18 FCC Rcd 19249, 19251 (2003) (challenge to grant of protected service area rejected as untimely because raised nearly two years later).

<sup>13</sup> See File No. BPH-20040317AAL, Exhibit 29.

<sup>14</sup> See *1988 Biennial Regulatory Review, Streamlining of Mass Media Applications, Rules, and Processes*, Notice of Proposed Rule Making, 13 FCC Rcd 14849, 14855 n.22 (1998) (granting one-step FM application amends the table of allotments and modifies that station's license to operate on the new channel; during construction period, licensee may continue to operate the previously authorized facilities on an interim or 'implied Special Temporary Authority' basis); and *Gunnison, Crawford, et al., Wyoming*, Memorandum Opinion and Order, 20 FCC Rcd 5908, 5913 (MB 2005).

arrangement of allotments under the FM Allotment Priorities because adding a first local service at Odessa under Priority (3) is preferable to retaining a second local service at Dundee under Priority (4). Fourth, while there will be a gain service to 82,643 persons and a loss of service to 31,841 persons, for a net gain of service to 50,802 persons, the people in the loss area are well served with five or more reception services.<sup>15</sup>

11. Odessa qualifies as a community for allotment purposes. It is listed in the U.S. Census and has sufficient social and economic indicia of community status such as a mayor and five-member village board of trustees, its own Public Works Department, post office and zip code, school system, various local businesses, churches, and business groups.

12. Further, no *Tuck*<sup>16</sup> analysis was required because Odessa is not located within an Urbanized Area, and from the proposed reference coordinates for Channel 238A at Odessa, Station WFLR-FM will place a 70 dBu contour over approximately 4.1% of the Elmira, New York, Urbanized Area. Although we reserved the right to require a *Tuck* analysis if interested parties showed the feasibility of locating the Station WFLR-FM transmitter at a site that would enable the station to provide a 70 dBu signal to more than 50 percent of the Elmira Urbanized Area, no such showing was made. .

13. **Technical Considerations.** Channel 238A can be reallocated to Odessa at the Petitioner's specified site, which is located 7.9 kilometers (4.9 miles) west of the community in compliance with the Commission's minimum distance mileage separations.<sup>17</sup> The reference coordinates for this allotment are 42-20-38 NL and 76-53-03 WL.<sup>18</sup> This proposed site is short-spaced to Channel 238C1, Belleville, Ontario, Canada. Because the reference site for Channel 238A at Odessa is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence in this proposed allotment by Canada was obtained as a specially negotiated short-spaced allotment.

14. **Ordering clauses.** Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b), and 0.283, IT IS ORDERED, That effective September 10, 2007, the Media Bureau's Consolidated Data Base System will reflect Channel 238A at Odessa, New York, as the reserved assignment for Station WFLR-FM in lieu of Channel 238A at Dundee, New York.

15. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, Finger Lakes Radio Group, Inc.'s license and construct permit for Station WFLR-FM, Dundee, New York, are modified to specify operation on Channel 238A at Odessa, New York, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensee and permittee shall submit to the Commission a minor change application for construction permit (Form 301).
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's rules; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location

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<sup>15</sup> This study was based on comparing Station WFLR-FM's operating, licensed facilities on Channel 240A at Dundee and the proposed reference coordinates for Channel 238A at Odessa.

<sup>16</sup> See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988).

<sup>17</sup> 47 C.F.R. § 73.207.

<sup>18</sup> We note that the reference coordinates for Channel 238A at Odessa are fully spaced to the previously mentioned construction permit for Station WTTC(FM), Channel 237A, Towanda, Pennsylvania.

or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's rules.

16. IT IS FURTHER ORDERED, That the counterproposal filed by Bible Broadcasting, Network, Inc., IS DISMISSED.

17. IT IS FURTHER ORDERED, That the rulemaking petition (RM-11254) filed by Finger Lakes Radio Group, Inc., IS GRANTED.

18. IT IS FURTHER ORDERED, That a copy of this *Report and Order* be sent by Certified Mail, Return Receipt Requested, to James L. Oyster, Esq., 108 Oyster Lane, Castleton, Virginia 22716 and John F. Garziglia, Esq., Womble Carlyle Sandridge & Rice, PLLC, 1401 I Street, N.W., Washington, D.C. 20005 (Counsel for Finger Lakes Radio Group, Inc.); Gary S. Smithwick, Esq., Smithwick & Belendiuk, 5028 Wisconsin Ave., N.W., Suite 301, Washington, D.C. 20016 (Counsel for Bible Broadcasting Network, Inc.); and Kevin M. Fitzgerald, P.O. Box 20155, Scranton, Pennsylvania 18502 (Principal of Station WPHD(FM), South Waverly, Pennsylvania).

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

FEDERAL COMMUNICATIONS COMMISSION

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