

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.
(Irvington, Kentucky, and French Lick,
Indiana)
MB Docket No. 07-296
RM-11412

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 27, 2010

Released: January 29, 2010

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Notice of Proposed Rule Making and Order to Show Cause issued at the request of L. Dean Spencer ("Petitioner"); (2) Comments filed by the Petitioner; (3) an Opposition to Proposed Rule Making and Order to Show Cause filed by Willtronics Broadcasting ("Willtronics"), the licensee of Station WFLQ(FM), French Lick, Indiana; (4) Reply Comments filed by the Petitioner; and (5) Supplemental Comments filed by the Petitioner. For the reasons discussed below, we will grant the rulemaking petition.

2. Background. In response to the Petitioner's rulemaking petition, the NPRM proposed the allotment of FM Channel 261A at Irvington, Kentucky, as a first local service. In order to accommodate Channel 261A at Irvington, the NPRM included an Order to Show Cause directed to Willtronics to show cause why its license for Station WFLQ(FM), French Lick, Indiana, should not be modified to specify operation on Channel 229A in lieu of Channel 261A. The NPRM noted that the Petitioner had expressed its willingness to reimburse Willtronics for the reasonable and prudent costs associated with the proposed channel change, as required by Commission policy. The NPRM also pointed out that the Petitioner had concurrently filed a construction permit application for Channel 261A at Irvington and had paid the requisite filing fee pursuant to the Commission's new procedures.

3. In his comments, the Petitioner supports the allotment of Channel 261A at Irvington and the related channel substitution at French Lick and incorporates by reference the information submitted in the rulemaking petition. The Petitioner also states that he will continue the prosecution of the Irvington

1 Irvington, Kentucky, and French Lick, Indiana, Notice of Proposed Rule Making and Order to Show Cause, 23 FCC Rcd 11182 (MB 2008) ("NPRM"). This document was republished to establish new comment and reply comment deadlines because a clerical error had prevented the original NPRM from being published in the Federal Register. See Irvington, Kentucky, and French Lick, Indiana, 23 FCC Rcd 237 (MB 2008).

2 See Circleville, Ohio, Memorandum Opinion and Order, 8 FCC 2d 159 (1967) ("Circleville").

3 See File No. BNPB-20071010ACC.

4 See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of Licenses in the Radio Broadcast Services, Report and Order, 21 FCC Rcd 14212 (2006).

application and, if awarded a construction permit, build the station promptly.

4. In its response to the *Order to Show Cause*, Willtronics contends that the license for Station WFLQ(FM) should not be modified involuntarily to specify operation on Channel 229A because (1) as a single station owner, it does not have the wherewithal to “front” the engineering and promotional costs for changing channels; (2) the Petitioner has not stated its willingness to participate in any auction for a new channel at Irvington; and (3) the health of the Petitioner raises questions about his ability to reimburse Willtronics.⁵ In his reply comments, the Petitioner contends that Willtronics has not cited any cases in support of its objections. On the contrary, the Petitioner states that Commission case law uniformly supports a change in channels for an existing station to enable the allotment of a first local transmission service. Further, the Petitioner argues that it has pledged to reimburse Willtronics for the reasonable costs of changing channels and that nothing more is required. Finally, although the Petitioner believes that his health is not a relevant issue in this proceeding, he states that he is doing well and regaining full health.

5. **Discussion.** We believe that the public interest would be served by the allotment of Channel 261A at Irvington because this will provide a first local service to the community. Irvington is a community for allotment purposes. As described in the *NPRM*, it is listed in the U.S. Census as a Census Designated Place, with a population of 1,257 persons. Irvington has a mayor, six-member city council, clerk/treasurer, city attorney, fire chief, police chief, and director of public works. Channel 261A can be allotted at the Petitioner’s specified site, which is located 13.8 kilometers (8.5 miles) northwest of the community.⁶

6. Next, we find that Willtronics has not raised a substantial and material question fact that would warrant a hearing on the modification of the Station WFLQ(FM) license to specify operation on Channel 229A in lieu of Channel 261A at French Lick. As we have previously stated, “[i]t is well settled that the substitution of an existing station’s channel serves the public interest where the substitution permits the provision of new or expanded service at another community.”⁷ We have also found that the public interest benefit of this new service outweighs any temporary disruption to the listeners of the station changing channels.⁸ In this instance, the proposed channel substitution and license modification for Station WFLQ(FM) is in the public interest and, therefore, permissible under Section 316(a) of the Communications Act of 1934, as amended,⁹ because it will promote a first local service at Irvington.¹⁰

7. Consistent with *Circleville*, the ultimate permittee of the Irvington allotment will be required to reimburse Willtronics for its reasonable and prudent costs associated with the involuntary channel change at French Lick.¹¹ Although Willtronics claims that it does not have the wherewithal to “front” the

⁵ Specifically, Willtronics alleges that the Petitioner was hospitalized after the filing of his Supplemental Comments.

⁶ The reference coordinates for Channel 261A at Irvington are 37-56-52 NL and 86-24-54 WL.

⁷ *Americus and Emporia, Kansas*, Report and Order, 21 FCC Rcd 7258, 7259 (MB 2006) (ordering an involuntary channel substitution for an existing station to accommodate a first local service at another community). *See also* *Ava, Branson, and Mountain Grove, Missouri*, Report and Order, 10 FCC Rcd 13035, 13036 (MMB 1995) (requiring involuntary channel substitutions for two stations to accommodate an upgrade in channel class and expanded service for a station at another community).

⁸ *See Circleville*, 8 FCC 2d at 162, ¶ 7; and *Connersville, Madison, and Richmond, Indiana*, Report and Order, 20 FCC Rcd 18871, 18876 (MB 2005).

⁹ 47 U.S.C. § 316(a) (permitting the modification of a station’s license or construction permit to promote the public interest).

¹⁰ The reference coordinates for Channel 229A at French Lick are 38-35-41 NL and 86-36-48 WL.

¹¹ *See Circleville, Ohio*, 8 FCC 2d at 163, ¶ 11.

engineering and promotional costs in changing channels, it has not provided a sufficient basis for departing from the procedures set forth in *Circleville*. Specifically, Willtronics has not cited any case in support of its position and has not provided documentation regarding its financial circumstances.¹² Further, the timing of the reimbursement to Willtronics is a matter that can be negotiated by the parties.¹³ We also find that the Petitioner's willingness to participate in the auction for the new allotment at Irvington is subsumed in its continuing expression of interest to prosecute its application and, if awarded a construction permit, to build the station promptly. Indeed, the Petitioner's continuing expression of interest in the Irvington allotment contains essentially the same language suggested in the *NPRM*.¹⁴ Finally, the health of the Petitioner is not relevant at this time because it is not known who will become the ultimate permittee of the Irvington allotment and because reimbursement will not occur for some time until the Irvington allotment has been auctioned and a permittee has built a new station and is ready to commence operations.

8. Accordingly, pursuant to the authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 47 C.F.R. Sections 0.61, 0.204(b), and 0.283, IT IS ORDERED, That effective March 15, 2010, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), is AMENDED, with respect to the community listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Irvington, Kentucky	261A

9. IT IS FURTHER ORDERED, That effective March 15, 2010, the Media Bureau's Consolidated Data Base System will reflect Channel 229A at French Lick, Indiana, as the reserved assignment for Station WFLQ(FM) in lieu of Channel 261A.

10. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the license for Station WFLQ(FM), French Lick, Indiana, is modified to specify operation on Channel 229A, 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 a construction permit (Form 301), specifying the new facilities;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize changes in transmitter location or to avoid the necessity of filing environmental assessments pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

¹² *Cf. Cheyenne, Wyoming, and Gering, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7531 (MMB 2000) (declining to require the benefiting party to pay expenses in advance for the frequency change because no factual showing had been made regarding its inability to reimburse) ("*Cheyenne*"); and *Dickson, Tennessee*, Report and Order, 4 FCC Rcd 8707 (1989) (denying a request for an escrow arrangement because lack of a factual basis questioning a party's ability to reimburse).

¹³ *Castle Rock and Colorado Springs, Colorado, et al.*, Report and Order, 7 FCC Rcd 7688, 7670 (MMB 1992) (time and manner of reimbursement are matters left to the good faith negotiations of the parties).

¹⁴ See *NPRM*, Appendix, 23 FCC Rcd at 11186, No. 2 ("The proponent of a proposed allotment is also expected to file comments . . . It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly.")

11. A filing window for Channel 261A at Irvington, Kentucky, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent order.

12. IT IS FURTHER ORDERED, That the ultimate permittee of Channel 261A at Irvington, Kentucky, IS REQUIRED to reimburse the licensee of Station WFLQ(FM) for its reasonable and prudent costs is changing from Channel 261A to Channel 229A, pursuant to Commission policy.

13. IT IS FURTHER ORDERED, That the rulemaking petition (RM-11412) filed by L. Dean Spencer IS GRANTED.

14. A copy of this *Report and Order* will be sent to John F. Garziglia, Esq, Womble, Carlyle Sandridge & Rice, PLLC, 1401 I Street, N.W., Seventh Floor, Washington, D.C. 20005 (Counsel for L. Dean Spencer); Willtronics Broadcasting, P.O. Box 100, French Lick, Indiana 47432 (Licensee of Station WFLQ); and Richard R. Zaragoza, Esq. and Christine A. Reilly, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, D.C. 20037 (Counsel for Willtronics Broadcasting).

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

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

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau