

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 04-319
FM Broadcast Stations.)	RM-10984
(Coal Run, Kentucky, and Clinchco, Virginia))	

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

Adopted: June 16, 2011

Released: June 17, 2011

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration (“Reconsideration Petition”), filed by East Kentucky Broadcasting Corporation (“East Kentucky”), licensee of Station WPKE-FM, Coal Run, Kentucky, of the *Report and Order* in this proceeding, denying East Kentucky’s Petition for Rule Making (“Rule Making Petition”).¹ Dickenson County Broadcasting Corporation (“Dickenson County”), licensee of Station WDIC-FM, Clinchco, Virginia, filed an Opposition to Petition for Reconsideration, and East Kentucky filed a Reply to Opposition to Petition for Reconsideration. For the reasons discussed below, we grant the Reconsideration Petition and the Rule Making Petition.

2. **Background.** At the request of East Kentucky, the *Notice of Proposed Rule Making*² proposed the upgrade of Station WPKE-FM, Coal Run, Kentucky, from Channel 276A to Channel 221C3 at a new transmitter site and the modification of its license to specify operation on non-adjacent Channel 221C3, pursuant to Section 1.420(g) of the Commission’s Rules (the “Rules”).³ In order to accommodate this upgrade, we issued an *Order to Show Cause* (“OSC”) to Dickenson County as to why its license for Station WDIC-FM should not be modified from Channel 221A to Channel 276A. In response to the OSC, Dickenson County argued that there was a major terrain obstruction between Coal Run and the proposed reference site that would preclude 70 dBu service to Coal Run in contravention of Section 73.315(b) of the Rules.⁴

3. In the *R&O*, we agreed with Dickenson County that there was a major terrain obstruction 10.4 kilometers (6.5 miles) from the proposed transmitter and that it would be necessary to construct a tower of approximately 173 meters (568 feet) above ground level to achieve a height above average terrain

¹ *Coal Run, Kentucky, and Clinchco, Virginia*, Report and Order, 22 FCC Rcd 5347 (MB 2007) (“*R&O*”).

² *Coal Run, Kentucky, and Clinchco, Virginia*, Notice of Proposed Rule Making and Order to Show Cause, 19 FCC Rcd 15395 (MB 2004) (“*Notice*”).

³ 47 C.F.R. § 1.420(g).

⁴ 47 C.F.R. § 73.315(b).

(“HAAT”) of 224 meters (735 feet) to overcome this terrain obstruction.⁵ The *R&O* noted that increasing the HAAT beyond the maximum set forth in Section 73.211 would require a commensurate reduction in effective radiated power (“ERP”) in order to ensure that the station is not operating in excess of maximum facilities for the station’s proposed class.⁶ In this situation, the *R&O* determined that it would be necessary to reduce the station’s ERP to 5.1 kilowatts, which is below the minimum 6 kilowatt ERP provided in the Rules for a Class C3 station.⁷ Accordingly, the *R&O* denied East Kentucky’s proposed upgrade.

4. In its Reconsideration Petition, East Kentucky claims that the *R&O* misapplied Section 73.211. In support of this position, East Kentucky states that Section 73.211 does not establish an invariable six kilowatt minimum ERP for Class C3 stations. Rather, East Kentucky contends that Section 73.211(b)(2) permits the use of a HAAT in excess of the class reference provided that the ERP is reduced so that the reference distance does not exceed its class contour distance.⁸ Likewise, East Kentucky states that Section 73.211(a)(3) also permits an FM station to operate at less than minimum ERP for its class provided that the predicted distance to the station’s proposed 60 dBu contour exceeds the maximum distance contour for the next lower class. In this instance, with a proposed ERP of 2.05 kilowatts, a tower of 173 meters (568 feet) above ground level, and a HAAT of 341 meters (1,119 feet), East Kentucky alleges that the 60 dBu contour would extend 39 kilometers, corresponding to maximum Class C3 facilities.⁹ East Kentucky also notes that there are 125 Class C3 stations operating with an ERP below 6 kilowatts. Accordingly, East Kentucky concludes that the *R&O* was in error and that its Rule Making Petition should be granted.

5. In its Opposition, Dickenson County contends that, even assuming *arguendo*, East Kentucky is correct about the application of Section 73.211(a), the proposal is not technically feasible because the terrain obstruction is worse than originally reported by East Kentucky and will require a significantly taller tower than indicated in the *R&O*. Dickenson County predicates this argument upon a terrain profile between the allocation site and “a point on what is thought to be the city limit of Coal Run.”¹⁰ Dickenson County claims that, based upon this terrain profile, it would be necessary to construct a tower 401 meters (1,316 feet) tall to provide line of sight to Coal Run over this terrain obstruction, and even with such a tall tower, “there are portions in Coal Run that will not receive the requisite 70 dBu line of sight signal from the East Kentucky allocation reference location.”¹¹ In addition, Commission policy presumes that a proposed allotment site is technically feasible and available, but Dickenson County states

⁵ See *R&O*, 22 FCC Red at 5348, ¶ 4.

⁶ *Id.* The maximum facilities for a Class C3 FM station are an ERP of 25 kW and a HAAT of 100 meters. See 47 C.F.R. § 73.211(b).

⁷ 47 C.F.R. § 73.211(a)(iv). The *R&O* inadvertently referred to Section 73.211(b)(2)(iv) of the Rules instead of Section 73.211(a)(iv).

⁸ East Kentucky’s Reconsideration Petition, at 2.

⁹ *Id.* at 3.

¹⁰ Dickenson County’s Opposition, Technical Comments at 2. The reference coordinates for the Coal Run city limits used are 37-30-88 NL and 82-83-00 WL.

¹¹ Dickenson County’s Opposition, at 4.

that the presumption is rebuttable. Dickenson County believes that it has rebutted the presumption because East Kentucky has not shown that it can construct a tower of 401 meters (1,317 feet) in mountainous terrain or obtain FAA clearance for the tower.¹² Finally, noting that the Commission is required to treat similarly situated applicants in the same manner, Dickenson County claims that East Kentucky's proposal must be denied because the staff had previously dismissed Dickenson County's upgrade application for similar reasons.¹³ Specifically, Dickenson County contends that the basis for that staff action was that a tower of 305 meters (1,000 feet) would be necessary and no information had been submitted suggesting that use of the site would be feasible.¹⁴

6. In its Reply, East Kentucky argues that Dickenson County's terrain profile showing that a single radial fails to achieve line of sight coverage to Coal Run does not demonstrate that East Kentucky's proposal is technically infeasible because, under Commission precedent, line of sight is not required if a proponent can demonstrate that the signal strength from the site will exceed 70 dBu and will encompass the community.¹⁵ East Kentucky notes that Dickenson County did not submit any evidence or calculations to establish that the terrain obstruction would prevent the delivery of a 70 dBu signal over Coal Run. On the contrary, East Kentucky submits showings under the Commission's standard prediction method and the Longley-Rice method that a signal level greater than 70 dBu will be delivered to Coal Run at the allocation site used in the R&O with a tower of 207 meters (679 feet) and an ERP of 1.75 kW.¹⁶ Under these circumstances, East Kentucky contends that its proposed upgrade should be granted.

7. **Discussion.** Section 1.429 of the Rules sets forth the limited provisions under which the Commission will reconsider a final action in a rule making proceeding. Reconsideration is warranted only if the petitioner cites error of fact or law has presented facts or circumstances that otherwise warrant Commission review of its prior action.¹⁷

8. *Procedure.* As a preliminary matter, we consider Dickenson County's allegation that the Reconsideration Petition is procedurally defective because it cites the general reconsideration provisions of Section 1.106 of the Rules in lieu of Section 1.429 that applies to reconsideration in notice and comment rule making proceedings.¹⁸ Dickenson County claims that it has been prejudiced because under Section 1.106, it had less time to file an opposition than it would have under Section 1.429,¹⁹ and,

¹² *Id.* at 5.

¹³ File No. BPH-20010502AAN.

¹⁴ *Letter to Gary S. Smithwick, Esq., and John F. Garziglia, Esq.*, Reference 2-B450 (MB Dec. 18, 2003) ("*Smithwick Letter*").

¹⁵ East Kentucky's Reply, at 2.

¹⁶ *Id.*, Technical Report, at 1-2.

¹⁷ *See* 47 C.F.R. § 1.429; and *Eagle Broadcasting Co. v FCC*, 514 F.2d 852 (D.C. Cir. 1975).

¹⁸ *See* Dickenson County's Opposition, at 2-3.

¹⁹ The deadline for filing oppositions to petitions for reconsideration under Section 1.106 is ten days (plus an additional three days if service of the petition is by mail) whereas the deadline for filing oppositions under Section 1.429 is 15 days from Public Notice of the reconsideration petition in the Federal Register.

therefore, the Reconsideration Petition should be dismissed. East Kentucky responds by asserting that Dickenson County has not been prejudiced as it chose to file its pleading early. We agree with East Kentucky. Although East Kentucky did not cite the appropriate reconsideration rule, the staff issued, pursuant to Section 1.429, a *Public Notice*, affording Dickenson County an additional 15 days to file oppositions.²⁰ No prejudice has occurred to Dickenson County because, after having filed its Opposition early, it could have supplemented its pleading by the opposition deadline but did not do so.²¹ Accordingly, we will consider the Reconsideration Petition.

9. *Section 73.211.* We agree with East Kentucky that the *R&O* misapplied Section 73.211 in this proceeding. Under this rule, an FM station can operate in the manner described in the Reconsideration Petition. Specifically, a station may have a HAAT greater than the class reference provided that it reduces its ERP such that the distance to its 60 dBu contour exceeds the reference distance for the next lower class and does not exceed the reference distance for its class. In this instance, our engineering analysis confirms that with a tower of 173 meters (568 feet) above ground level, a HAAT of 341 meters (1,119 feet), and an ERP of 2.05 kW, the 60 dBu contour of Station WPKE-FM would extend 39 kilometers, which is equal to the maximum distance for Class C3 stations. Therefore, the *R&O* incorrectly denied the Rule Making Petition for violation of Section 73.211, and we must reinstate the Rule Making Petition and reexamine East Kentucky's proposed upgrade.

10. *Site Feasibility.* In FM allotment proceedings, the Commission requires "the reasonable expectation that a useable site is available complying with the minimum spacing requirements."²² "Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable."²³ In this case, we believe that Dickenson County has not rebutted the presumption of site feasibility or availability. While Dickenson County has submitted a terrain profile showing that a single radial does not provide line of sight to a reference point at the outer boundary of Coal Run, line of sight is not absolutely required under Section 73.315(b) of the Rules provided that an engineering showing is made that the received signal strength as transmitted from the site will exceed 70 dBu and will encompass the principal community.²⁴ Significantly, Dickenson County has not submitted any evidence or calculations other than its single terrain profile to establish that the alleged terrain blockage would prevent the delivery of a 70 dBu signal over Coal Run.²⁵ In contrast, East Kentucky has submitted an engineering showing under the Commission's standard method of propagation, demonstrating that a 70 dBu signal will encompass Coal Run. from the proposed transmitter

²⁰ See *Public Notice*, 72 FR 31329 (June 6, 2007).

²¹ Specifically, Dickenson County filed its Opposition on May 17, 2007, while the deadline for filing Oppositions established in the *Public Notice* was June 21, 2007.

²² See *San Clemente, California*, Memorandum Opinion and Order, 3 FCC Rcd 6728, 6729 (1988), *appeal dismissed sub nom. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir 1989).

²³ *Id.*

²⁴ See 47 C.F.R. § 73.315(b). See also *Margaret C. Shaller*, Hearing Designation Order, 5 FCC Rcd 5329 (MMB 1990), *citing Rush County Broadcasting Co., Inc.*, Memorandum Opinion and Order, 26 FCC 2d 480 (1970) ("[f]ailure to provide line of sight does not necessarily imply deficient coverage").

²⁵ See, e.g., *The Dalles, Oregon, et al.*, (finding that an objector's allegation of shadowing due to a terrain obstruction did not contain any computations for the 70 dBu signal level based on the terrain profiles provided).

site with facilities of a tower of 207 meters (679 feet) above ground level, a HAAT of 375 meters (1,230 feet), and an ERP of 1.75 kW.²⁶ Under these circumstances, we find that East Kentucky has demonstrated compliance with Section 73.315 of the Rules. Further, we believe that a tower of 207 meters (679 feet) does not trigger the concerns raised by Dickenson County with respect to a tower in excess of 400 meters (1,312 feet).²⁷ Nor has Dickenson County provided any evidence to suggest that a tower of this height cannot be constructed at this location. Accordingly, we conclude that East Kentucky's proposal is technically feasible.

11. *Disparate Treatment.* Next, we reject Dickenson County's argument that it received disparate treatment because the staff previously denied its application due to the infeasibility of using a 305 meters (1,000 feet) tower above ground level to overcome a terrain obstruction. The facts in that case are distinguishable from the present proceeding because the terrain obstruction in that earlier case was far more severe. Specifically, the staff's decision concluded that, even with a tower height of 305 meters (1,000 feet) above ground level, the terrain obstruction was still in excess of 200 meters (656 feet) above the line of sight path between the transmitter site and community of license.²⁸ By way of contrast, our staff engineering analysis reveals that the terrain obstruction in the present proceeding is approximately 50 meters above the line of sight path.²⁹ Further, no information was provided in the earlier case to show that any of the community of license would receive a 70 dBu signal when the terrain obstruction is considered, but in the instant proceeding, East Kentucky has demonstrated that Coal Run would receive a 70 dBu signal. Accordingly, we find that Dickenson County was not disparately treated.

12. **Conclusion.** In view of the above, we believe that the public interest would be served by granting East Kentucky's proposed upgrade for Station WPKE-FM because it will result in a substantial increase of population served.³⁰ Specifically, there will be a gain of service to 69,402 persons, and a loss of service to 7,964 persons, for a net gain of 61,438 persons. Further, the population in the loss area is well served with five or more services.³¹

²⁶ East Kentucky's Reply, Technical Report. East Kentucky has also submitted a showing using the Longley-Rice method that a signal strength greater than 70 dBu will be delivered to the entire community of Coal Run. *Id.*, Technical Report, Exhibits E1 and E2.

²⁷ See *Lake City, Chattanooga, Harrogate, and Halls Crossroads, Tennessee*, Report and Order, 20 FCC Rcd 18961 (MMB 2005) (approving, in a rule making proceeding, a proposed tower of 205 meters above ground level to clear a terrain blockage and provide 70 dBu coverage over the community of license); and *Vacaville and Middletown, California*, First Report and Order, 4 FCC Rcd 8315, 8316 (MB 1989) (finding that a tower of 230 meters above ground level was suitable to overcome a terrain obstruction and provide a 70 dBu signal to the proposed community).

²⁸ See *Smithwick Letter*, at 1.

²⁹ This terrain obstruction is at 10.7 kilometers from the proposed transmitter site. The *R&O* mischaracterized it as a major terrain obstruction whereas it should be considered a minor terrain obstruction.

³⁰ The reference coordinates for Channel 221C3 at Coal Run are 37-23-57 NL and 82-23-42 WL. Although the *Notice* requested East Kentucky to submit a preclusion study on the impact that an upgrade on Channel 221 may have on the availability of noncommercial educational channels operating on Channels 218, 219, and 220 due to the proximity of Station WVVA-TV, Channel 6, Bluefield, West Virginia, this showing is moot as Station WVVA-TV is now operating on Channel 46.

³¹ No competing expressions of interest in Channel 221C3 at Coal Run were solicited or received because, as explained in the *Notice*, the channel substitutions at Coal Run and Clinchco constitute an "incompatible channel (continued....)

13. To accommodate the Coal Run upgrade, we are involuntarily substituting Channel 276A for Channel 221A at Clinchco, Virginia, and modifying the license of Station WDIC-FM to reflect the change.³² In compliance with Commission policy,³³ East Kentucky states that it will reimburse the licensee of Station WDIC-FM for its reasonable expenses associated with changing its frequency to Channel 276A. We find that the involuntary channel change will serve the public interest by facilitating the upgrade in station class and the increase in population served by Station WPKE-FM at Coal Run. We expect the parties to cooperate in modifying Station WDIC-FM to the new channel and in determining reasonable expenses.

14. **Ordering Clauses.** Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) 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 August 1, 2011, the Media Bureau's Consolidated Data Base System will reflect Channel 221C3 as the reserved assignment for Station WPKE-FM in lieu of Channel 276A at Coal Run, Kentucky, and Channel 276A as the reserved assignment for Station WDIC-FM in lieu of Channel 221A at Clinchco, Virginia.

15. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of East Kentucky Broadcasting Corporation for Station WPKE-FM, Coal Run, Kentucky, and Dickenson County Broadcasting Corporation for Station WDIC-FM, Clinchco, Virginia, ARE MODIFIED to specify operation on Channels 221C3 and 276A, respectively, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensees shall file with the Commission minor change applications for construction permits (FCC Form 301) specifying the new facilities;
- (b) Upon grant of the construction permits and commencement of operations, program tests may be conducted in accordance with Section 73.1620 of the Commission's rules;
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's rules, unless the proposed facilities are categorically excluded from environmental processing.

16. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by East Kentucky Broadcasting Corporation IS GRANTED.

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swap." See *Notice*, 19 FCC Rcd at 15395-96. An "incompatible channel swap" is a channel substitution for an upgrade and a coordinated substitution that are mutually exclusive and is uniquely available to effect the proposed class upgrade, *i.e.*, there is no alternate channel of its class that is fully spaced from the station's site. See *Jackson and Salyersville, Kentucky*, Report and Order, 17 FCC Rcd 4662, 4663 n.2 (MMB 2002).

³² Channel 276A can be allotted at Clinchco, Virginia, at Station WDIC-FM's current licensed site at reference coordinates 37-08-42 NL and 82-23-22 WL.

³³ See *Circleville, Ohio*, Memorandum Opinion and Order, 8 FCC 2d 159 (1967).

17. IT IS FURTHER ORDERED, that the Petition for Rule Making, RM-10984, filed by East Kentucky Broadcasting Corporation IS REINSTATED AND GRANTED.

18. The Commission will send a copy of this *Memorandum Opinion and Order* to Congress and the Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)A).

19. A copy of this *Memorandum Opinion and Order* will be sent to John Garziglia, Esq., Peter Gutmann, Esq., Womble Carlyle Sandridge & Rice, PLLC, 1401 I Street, NW, Suite 700, Washington, DC 20005 (Counsel for East Kentucky Broadcasting Corporation); Gary S. Smithwick, Esq., Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, NW, Suite 301, Washington, DC 20016 (Counsel for Dickenson County Broadcasting Corp.); and Dickenson County Broadcasting Corp., 2298 Rose Ridge, Clintwood, VA 24228 (Licensee of Station WDIC-FM).

20. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

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

FEDERAL COMMUNICATIONS COMMISSION

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