

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

MM Docket No. 87-494

In the Matter of

Amendment of Section 73.202(b), RM-5869
Table of Allotments,
FM Broadcast Stations.
(Big Stone Gap, Virginia and
Barbourville, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 18, 1990 Released: September 28, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6805 (1987), issued at the request of Valley Broadcasting, Inc. (petitioner), licensee of Station WAXM(FM),¹ Channel 228A, Big Stone Gap, Virginia, proposing the substitution of Channel 228C2 for Channel 228A at Big Stone Gap, and modification of its license to specify operation on the higher class co-channel. In addition, Barbourville Community Broadcasting Company ("BCBC"), the licensee of Station WYWY-FM at Barbourville, Kentucky, was ordered to show cause why its license should not be modified to specify operation on Channel 241A in lieu of Channel 228A, in order to accommodate the upgrade at Big Stone Gap.

2. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to upgrade Station WAXM(FM). First Radio, Inc. ("First Radio"), licensee of Station WSEK(FM), Somerset, Kentucky, filed comments.² BCBC filed an opposition to the proposal and requested a hearing. Petitioner filed reply comments.

3. BCBC opposes the modification of Station WYWY-FM at Barbourville in order to accommodate the upgrade at Big Stone Gap. BCBC further opposes being forced to change its "long-time operation on Channel 228A to Channel 241A" without benefit of an upgrade. It contends that the petitioner should demonstrate that the new channel at Barbourville could be upgraded. BCBC asserts that the petitioner's willingness to reimburse WYWY-FM is not sufficient, since the petitioner has not "followed up the proffer with any indication of what it would assert to be reasonable cost." BCBC further asserts that an agreement should be reached between the parties for its reimbursement stipulating provisions for pre-payment before the forced disruption of service at Barbourville. It alleges that the upgrading at Barbourville and the agreement with the petitioner should be prerequisites to the adoption of the proposal.

4. In reply comments, petitioner states that as a party seeking to upgrade its own facilities by requiring an existing station to change frequencies, it is not required to

show that the station changing frequency can be upgraded. Petitioner further states that the proposal to increase the service area of Station WAXM(FM) provides ample public interest benefits. Petitioner contends that there is no requirement that an agreement as to WYWY's "reasonable" expenses be reached prior to final action on the proposal, citing *Circleville, Ohio*, 8 FCC 159 (1967) and *License Modification Pursuant to Section 316 of the Act*, 2 FCC Rcd 3327 (1987).

5. We have considered all the information before us and conclude that the public interest would be served by the substitution of Channel 228C2 for Channel 228A at Big Stone Gap, Virginia, providing that community with its first wide coverage area FM service. The substitution can be made in compliance with the Commission's minimum spacing requirements with a site restriction of 7.8 kilometers (4.9 miles) west of Big Stone Gap.³ The restriction is necessary to avoid short spacings to Station WBBO-FM, Channel 227, Forest City, North Carolina, and Channel 226A at Clinchco, Virginia. Additionally, in order to accomplish the substitution at Big Stone Gap, Channel 241A must be substituted for Channel 228A at Barbourville.⁴

6. We find that BCBC has not raised a substantial and material question of fact requiring a hearing on its license modification. See *Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act*, 2 FCC Rcd 3327 (1987). BCBC's objections to the proposal are insufficient to justify denial of petitioner's proposal. Furthermore, BCBC's demands on the petitioner to identify a channel which could provide upgrading possibilities or a proposal to upgrade at Barbourville are inconsistent with Commission precedent. It is the responsibility of BCBC to either present a counterproposal for upgrading Station WYWY-FM or identify an alternative channel for consideration. See, e.g., *Saint Marys, West Virginia*, 1 FCC Rcd 1222 (1986); and *New London and Merrill, Wisconsin*, 3 FCC Rcd 4829 (1988). It has done neither.

7. Petitioner has stated its willingness to reimburse the licensee of Station WYWY-FM for the reasonable costs of changing frequencies, as required by Commission policy. See *Circleville, Ohio*, 8 FCC 2d 159 (1967).

8. As requested, we are herein modifying the license of Station WAXM(FM) to specify operation on Channel 228C2, in accordance with Section 1.420(g) of the Commission's Rules.

9. Accordingly, pursuant to the authority found 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 **November 13, 1990**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Barbourville, Kentucky	241A
Big Stone Gap, Virginia	228C2

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WAXM(FM), Big Stone

Gap, Virginia, IS MODIFIED, to specify operation on Channel 228C2 in lieu of Channel 228A, 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 facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WYWY-FM, Barbourville, Kentucky, IS MODIFIED, to specify operation on Channel 241A in lieu of Channel 228A, subject to the following conditions:

- (a) Nothing contained herein shall be construed as authorizing any change in license BLH-5967 except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).
- (b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-5967 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order*, to the licensee of Station WYWY-FM, as follows: Barbourville Community Broadcasting Company, P.O. Box 768, Barbourville, Kentucky 40906.

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

14. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FOOTNOTES

- ¹ Formerly Station WLSD-FM.
- ² First Radio advanced a counterproposal to substitute Channel 241C2 for Channel 244A at Somerset. It also suggested an alternative proposal for the substitution of Channel 273A for Channel 228A at Barbourville instead of Channel 241A. First Radio sought to preserve consideration for the upgrade on Channel 241C2 while also seeking the possible upgrade on Channel 246C2 at Somerset. The Commission subsequently substituted Channel 246C2 for Channel 244A at Somerset and modified the license of Station WSEK(FM) accordingly. See *Moscow, Ohio et al*, 4 FCC Rcd 3441 (1989). No party sought reconsideration of that action. Therefore, no further consideration of Channel 241C2 at Somerset is warranted. Thus, the counterproposal is moot.
- ³ The restricted site coordinates are 36-53-22 and 82-51-38. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may implement this upgrade by availing itself of the provisions of Section 73.213(c)(1) of the Commission's rules. See 47 CFR § 73.213(c).
- ⁴ Station WYWY-FM's licensed site coordinates are 36-51-55 and 83-53-55.

FEDERAL COMMUNICATIONS COMMISSION

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