

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

MM Docket No. 95-137

In the Matter of

Amendment of Section 73.202(b) RM-8683
Table of Allotments,
FM Broadcast Stations.
(Milton, West Virginia and Flemingsburg,
Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 17, 1996;

Released: June 4, 1996

By the Acting Chief, Allocations Branch:

1. At the request of Simmons Broadcasting Company ("petitioner"), licensee of Station WFXN(FM), Channel 292A, Milton, West Virginia, the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 10 FCC Rcd 9292 (1995), proposing the substitution of Channel 292B1 for Channel 292A at Milton, West Virginia, and the modification of the Station WFXN(FM) license to specify operation on Channel 292B1. To accommodate the upgrade, the *Notice* also proposed the substitution of Channel 236A for Channel 292A at Flemingsburg, Kentucky, and the modification of the existing license of Station WFLE-FM to specify operation on Channel 236A. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted, and its willingness to reimburse the licensee of Station WFLE-FM for its reasonable expenses associated with the channel change. James P. Wagner also filed comments in support of the proposal. For the reasons discussed below, we are upgrading Station WFXN(FM) to specify operation on Channel 292B1, and modifying the license of Station WFLE-FM to specify operation on Channel 236A.

2. An *Order to Show Cause* was issued to Fleming County Broadcasting, Inc. ("FCBI"), licensee of Station WFLE-FM, directing it to demonstrate why its license should not be modified to specify operation on Channel 236A in lieu of Channel 292A. FCBI did not respond to the *Order to Show Cause*, and therefore, pursuant to Section 1.87 of the Commission's Rules, is deemed to have consented to the proposed modification.

3. In response to the *Notice*, we also received "Comments and Counterproposals" and "Reply Comments" filed jointly by Kentucky River Broadcasting Company ("Kentucky River"), licensee of Station WCYO(FM), Channel

291A, Irvine, Kentucky; WMOR, Inc., licensee of Station WMOR(FM), Channel 221A, Morehead, Kentucky; and James P. Gray, licensee of Station WCAK(FM), Channel 264A, Carlisle, Kentucky. These counterproposals propose upgrades for each of these stations. In regard to this proceeding, the proposed substitution of Channel 236A for Channel 292A at Flemingsburg also makes possible for WMOR, Inc. to propose the substitution of Channel 291C3 for Channel 221A at Morehead, and modification of its Station WMOR(FM) license to specify operation on Channel 291C3. As a result of the channel substitution at Morehead, James P. Gray is able to propose the substitution of Channel 221C3 for Channel 264A at Carlisle, and modification of his Station WCAK(FM) license to specify operation on Channel 221C3. Assuming the channel substitution at Carlisle, Kentucky River is able to propose the substitution of Channel 264C3 for Channel 291A at Irvine, and modification of its Station WCYO(FM) license to specify operation on Channel 264C3.

4. We will not process these proposed joint upgrades in the context of this proceeding. There are two reasons for not doing so. First of all, a counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. See *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990). In regard to this proceeding, the proposed joint upgrades are merely contingent on the proposed Channel 236A substitution at Flemingsburg.¹ Second, we note that Section 1.420(g)(1) of the Commission's Rules permits such nonadjacent channel upgrades if there are no timely filed expressions of interest in the proposed upgraded allotments. The only exception to this provision would be a situation in which we are able to determine that the proposed channel upgrades are "incompatible channel swaps." *Modification of FM Broadcast Licenses to Higher Class Co-channels or Adjacent Channels*, 60 RR2d 114,120 (1986). In this situation, we do not believe that it would be conducive to the efficient transaction of Commission business to delay resolution of this proceeding in order to determine whether the proposed channel upgrades are in fact, "incompatible channel swaps" and, if necessary, afford interested parties the opportunity to express an interest in applying for the upgraded allotments.

5. We believe the public interest would be served by substituting Channel 292B1 for Channel 292A at Milton, West Virginia, since the upgrade will enable Station WFXN(FM) to expand its FM coverage area. An engineering analysis has determined that Channel 292B1 can be allotted to Milton in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.7 kilometers (0.5 miles) southeast to avoid a short-spacing to the licensed site of Station WWJM(FM), Channel 292A, New Lexington, Ohio.² To accommodate the upgrade, we shall also substitute Channel 236A for Channel 292A at Flemingsburg, Kentucky. Additionally, Channel 236A can be allotted to Flemingsburg, Kentucky, in compliance with the Commission's minimum distance separation requirements at Station WFLE-FM's presently

¹ In the event this joint proposal had been pending as a petition for rule making prior to the *Notice*, we would have consolidated both petitioner's upgrade proposal and this joint proposal into a single docket since both require the same channel substitution at Flemingsburg. In such a proceeding, all benefitting parties

would have had to agree to reimburse the licensee of Station WFLE-FM for the costs of changing its channel. See *Circleville and Columbus, Ohio*, *infra*.

² The coordinates for Channel 292B1 at Milton are North Latitude 38-29-02 and West Longitude 82-12-59.

licensed site.³ In accordance with Section 1.420(g)(3) of the Commission's Rules, we shall modify Station WFXN(FM)'s license to specify operation on Channel 292B1 in lieu of Channel 292A at Milton, West Virginia. We shall also modify the license of Station WFLE-FM to specify operation on Channel 236A in lieu of Channel 292A at Flemingsburg, Kentucky.

6. Whenever an existing licensee or permittee is ordered to change frequency to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred. See *Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). Petitioner has stated its willingness to reimburse the licensee of Station WFLE-FM for reasonable costs associated with moving to Channel 236A.

7. Accordingly, pursuant to the authority found in Section 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 July 19, 1996, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Milton, West Virginia	292B1
Flemingsburg, Kentucky	236A

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Simmons Broadcasting Company, for Station WFXN(FM), Milton, West Virginia, IS MODIFIED to specify operation on Channel 292B1 in lieu of Channel 292A, 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).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted**, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Simmons Broadcasting Company, licensee of Station WFXN(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Fleming County Broadcasting, Inc., for Station WFLE-FM, Flemingsburg, Kentucky, IS MODIFIED to specify operation on Channel 236A in lieu of Channel 292A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WFLE-FM's license, BLH-930805KB, 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), specifying the new facility.

(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-930805KB, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows:

Fleming County Broadcasting, Inc.
P.O. Box 452
Flemingsburg, Kentucky 41041
(Licensee of Station WFLE-FM)

12. IT IS FURTHER ORDERED, That the counter-proposals filed jointly by Kentucky River Broadcasting Company, WMOR, Inc., and James P. Gray, ARE DISMISSED.

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

14. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

³ The coordinates for Channel 236A at Flemingsburg are North Latitude 38-24-42 and West Longitude 83-34-41.