

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

In the Matter of

Amendment of Section 73.202(b),)	MM Docket No. 92-195
Table of Allotments,)	RM-7091
FM Broadcast Stations.)	RM-7146
(Beverly Hills, Chiefland, Holiday,)	RM-8123
Micanopy, and Sarasota, Florida))	RM-8124
)	
In re Application of)	
)	
For Modification of the Facilities)	File No. BPH-940307IZ
of FM Station WXOF,)	
Beverly Hills, Florida)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 7, 2000

Released: February 14, 2000

By the Commission:

1. The Commission has before it a Petition for Reconsideration filed by Dickerson Broadcasting, Inc. ("Dickerson Broadcasting"), directed to both an earlier staff *Memorandum Opinion and Order* in this proceeding, 11 FCC Rcd 4641 (MMB 1996), and the subsequent staff action granting the above-captioned application. Gator Broadcasting Corporation, Heart of Citrus, Times Publishing Company, and New Wave Communications, L.P. jointly filed an Opposition to Petition for Reconsideration. Dickerson Broadcasting filed a Reply to the Opposition. For the reasons discussed below, we deny the Petition for Reconsideration and affirm the action granting the application to modify the facilities of Station WXOF, Beverly Hills, Florida.

Background

2. In response to a Petition for Rule Making filed September 29, 1989, by Heart of Citrus, Inc. ("Heart of Citrus"), permittee of Station WXOF, Channel 246A, Beverly Hills, Florida, the *Notice of Proposed Rule Making* in this proceeding proposed the substitution of Channel 246C3 for Channel 246A at Beverly Hills, and modification of the Station WXOF construction permit to

specify operation on Channel 246C3. In addition to comments and/or reply comments from Heart of Citrus, Highlands Media Company, Inc., Roper Broadcasting, Inc., WGUL-FM, Inc., White Construction Company, and Pasco Pinellas Broadcasting Company, we received two counterproposals. These counterproposals proposed upgrades at four other communities. The first counterproposal was jointly filed by Sarasota-FM, Inc., former licensee of Station WSRZ, Channel 292A, Sarasota, Florida, and Gator Broadcasting Corporation, licensee of Station WRRX, Channel 249A, Micanopy, Florida. That counterproposal proposed an alternate Channel 292C3 upgrade at Beverly Hills in order to accommodate a Channel 246C2 upgrade for Station WLWU, Channel 292A, Holiday, Florida, and a Channel 300A substitution for Station WLQH, Channel 247A, Chiefland, Florida. In turn, these channel substitutions permitted the proposed Channel 293C2 upgrade for Station WSRZ, Channel 292A, Sarasota, Florida, and a Channel 247C2 upgrade for Station WRRX, Channel 249A, Micanopy. The second counterproposal was filed by Heart of Citrus proposing a Channel 246C2 upgrade for Station WXOF. The *Report and Order* upgraded Station WRRX, Micanopy, to Channel 247C2; Station WSRZ, Sarasota, to Channel 293C2; and Station WXOF, Beverly Hills, to Channel 292C3.¹

3. The Channel 292C3 allotment at Beverly Hills does not meet the 142-kilometer separation requirement now set forth in Section 73.207(b) of the Rules with respect to Station WEAG-FM, Channel 292A, Starke, Florida. The *Report and Order* stated that because the petition for rule making filed by Heart of Citrus was filed prior to the October 2, 1989, effective date of the new FM separation requirements, Heart of Citrus may avail itself of the former 138-kilometer separation requirement now set forth in Section 73.213(c)(1) of the Rules in regard to Station WEAG-FM.

4. Dickerson Broadcasting, licensee of Station WEAG-FM, filed a Petition for Reconsideration directed against that *Report and Order*. In that Petition for Reconsideration, Dickerson Broadcasting argued that the Channel 292C3 allotment at Beverly Hills was made without notice and that the allotment poses an impediment to its efforts to increase the operating power of Station WEAG-FM from three to six kilowatts.² Dickerson Broadcasting also contended

¹In order to accommodate the Channel 247C2 upgrade for Station WRRX at Micanopy, the *Report and Order* also substituted Channel 300A for Channel 247A at Chiefland, Florida, and modified the construction permit of Station WLQH to specify operation on Channel 300A. In addition, the *Report and Order* granted the Channel 292C3 upgrade for Station WXOF at Beverly Hills in conjunction with the Channel 246C2 upgrade for Station WLWU at Holiday. These proposals were an "incompatible channel swap" as envisioned in *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channel*, 60 RR 2d 114,120 (1986). See *Holiday, Florida*, 7 FCC Rcd 2557 (1992); see also *Clincho, Virginia*, 6 FCC Rcd 3732 (1991). As such, these nonadjacent upgrades were granted without opening either proposed upgrade to other expressions of interest.

²In *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations ("Mileage Separation Order")*, 4 FCC Rcd 6375 (1989), the Commission set forth new separation requirements for Class A FM stations which permit six-kilowatt operation. Existing Class A FM stations complying with the new separation requirements were permitted to increase their operating power from three to six kilowatts. In this situation, existing FM allotments at Kingsland, Georgia, Five Points, Florida, Cross City, Florida, and Pointe Vedra, Florida, preclude Station WEAG-FM from increasing its

that there was no basis to apply the separation requirements of Section 73.213(c)(1) of the Rules with respect to the Channel 292C3 allotment because only the Channel 246C3 proposal was filed prior to October 2, 1989. After consideration of each of these arguments, the staff adopted a *Memorandum Opinion and Order* denying the Petition for Reconsideration. 8 FCC Rcd 8515 (MMB 1993).

5. Thereafter, Dickerson Broadcasting filed an Application for Review directed to that staff *Memorandum Opinion and Order*. In addition to reiterating its earlier arguments, Dickerson Broadcasting stated in footnote 3 of its Application for Review as follows:

"Indeed, for the record, Dickerson hereby advises the Commission and all parties hereto that, if Dickerson is assured the full measure of protection of the current mileage separations (as opposed to the mileage separations in effect prior to October 2, 1989), Dickerson will withdraw the instant application for review."

On March 21, 1996, the staff granted the above-captioned application of Heart of Citrus (File No. BPH-940307IZ) to implement the Channel 292C3 upgrade for Station WXOF at Beverly Hills. That application was filed and granted pursuant to Section 73.215 of the Rules and expressly affords Station WEAG-FM protection as if it were a six-kilowatt Class A FM station.³ In view of the fact that the authorized facilities of Station WXOF now protect Station WEAG-FM as a six-kilowatt facility in accordance with the current separation requirements set forth in Section 73.207(b) of the Rules, the staff determined that Dickerson Broadcasting was no longer aggrieved by its action in MM Docket No. 92-195 allotting Channel 292C3 to Beverly Hills. In light of this fact and the representation specifically set forth in footnote 3, the staff dismissed the Application for Review.

6. Dickerson Broadcasting then filed the instant Petition for Reconsideration directed to both the staff *Memorandum Opinion and Order* dismissing its Application for Review and the staff action granting the Station WXOF application implementing the Channel 292C3 upgrade at Beverly Hills.⁴ In support of this Petition for Reconsideration, Dickerson Broadcasting references its earlier argument that the Channel 292C3 allotment at Beverly Hills was made without notice and that there was no basis to apply the 138-kilometer separation requirement of Section 73.213(c)(1) of the Rules to a Channel 292C3 allotment. In this vein, Dickerson Broadcasting states that since the underlying

operating power to six kilowatts. As stated above, the new separation requirements for six-kilowatt operation are set forth in Section 73.207(b) while the former separation requirements for a three-kilowatt Class A FM operation are now set forth in Section 73.213(c)(1) of the Rules.

³Section 73.215 of the Rules provides for the acceptance of an FM application that proposes a short-spaced transmitter site if the application complies with specified contour protection criteria. See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Assignments by Using Directional Antennas ("Directional Antennas")*, 4 FCC Rcd 1681 (1989), *recon. granted in part and denied in part*, 6 FCC Rcd 5356 (1991).

⁴Dickerson Broadcasting has also filed a "Protective Statement for the Record" addressing the fact that the earlier staff action dismissing its Application for Review did not consider its substantive arguments. This *Memorandum Opinion and Order* constitutes our resolution of all substantive arguments advanced by Dickerson.

Channel 292C3 allotment was defective, there was no basis to implement this allotment pursuant to Section 73.215 of the Rules. Finally, Dickerson Broadcasting argues that the staff did not have delegated authority to dismiss its Application for Review. In order to resolve this proceeding on the basis of a Commission resolution of all issues, we will consider each of these arguments below.

Adequacy of Notice

7. The argument advanced by Dickerson Broadcasting alleging a lack of notice with respect to a Channel 292C3 allotment at Beverly Hills is unavailing. As noted earlier, the *Notice* in this proceeding did, in fact, propose a Channel 246C3 upgrade for Station WXOF. In paragraph 3(c) of the Appendix to the *Notice*, we expressly alerted all potentially interested parties that "filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved." A summary of the *Notice* was published in the Federal Register on September 15, 1992, 57 FR 42537, thereby affording all interested parties notice of the proposed Class C3 upgrade at Beverly Hills. In this instance, both the Federal Register summary and our established procedure of allotting alternate channels in allotment rulemaking proceedings involving multiple proposals provided notice to Dickerson Broadcasting of the possibility of allotting an alternate channel at Beverly Hills. See e.g. *Shreveport, Louisiana, et.al.*, 7 FCC Rcd 470 (1995); *Southampton, Bridgehampton, Westhampton and Calverton-Roanoke, New York*, 10 FCC Rcd 11516 (1995).

8. As noted by Dickerson Broadcasting, we recognize that the Appendix to the *Notice of Proposed Rule Making* in this proceeding was not published in the Federal Register. In a 1987 action implementing Federal Register summaries, we addressed the concern of some parties that a Federal Register summary of a *Notice of Proposed Rule Making* may not provide adequate notice to the public. *Amendment to Clarify Sections 0.411(b), 0.416, 0.445(b), 0.445(c), 0.445(d), 0.412(a)(1), and 0.430 of the Commission's Rules*, 2 FCC Rcd 1094,1096 ((1987). We concluded that a Federal Register summary which included all information required by Section 553(b) of the Administrative Procedure Act was sufficient to alert interested parties to request a full text of the *Notice of Proposed Rule Making*.⁵ The full text would include the Appendix. A Federal Register summary proposing a Class C3 upgrade at Beverly Hills provided notice to Dickerson Broadcasting that any future opportunity to increase the operating power of station WEAG-FM to six kilowatts could be affected by an alternate Channel 292C3 allotment at Beverly Hills.

9. In this regard, we are not required by either our Rules or the Administrative Procedure Act to issue a new *Notice of Proposed Rule Making* for every channel that comes under

⁵Section 553(b) of the Administrative Procedure Act, 5 U.S.C. § 553, requires that a Notice of Proposed Rule Making published in the Federal Register include the following:

- "(1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

consideration. See *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990); *Medford and Grants Pass, Oregon*, 45 RR2d 359 (1979); *Pensocola, Florida*, 62 RR2d 535 (1982). As discussed above, the *Notice* elicited counterproposals and thereby alerted parties of the possibility of allotting an alternate channel to any community in MM Docket No. 92-195. The fact that the *Report and Order* allotted an alternate channel to Beverly Hills which, in turn, precluded any subsequent consideration of a six-kilowatt operation by Station WEAG-FM, was merely doing that which we alerted parties that we could do. As such, this procedure meets the "logical outgrowth" test applied to determine whether a rule making action is based on adequate notice and opportunity for public participation. See *Weyerhaeuser Company v. Costle*, 590 F.2d 1011,1031 (D.C.Cir. 1978); *Owensboro on the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1958). In regard to any six-kilowatt operation by Station WEAG-FM, we again note that existing FM allotments at Kingsland, Georgia, Five Points, Florida, Cross City, Florida, and Pointe Vedra, Florida, preclude Dickerson Broadcasting from increasing the operating power of Station WEAG-FM to six kilowatts. For this reason, a counterproposal by Dickerson Broadcasting in this proceeding proposing a six-kilowatt operation for Station WEAG-FM would not comply with the six-kilowatt separation requirements set forth in Section 73.207(b) of the Rules and would not have been acceptable.

10. Dickerson Broadcasting contends that the type of notice in this proceeding has been found to be inadequate by the Court of Appeals in *National Black Media Coalition v. FCC ("NBMC")*, 791 F. 2d 1016 (2d Cir.1986). *NBMC* is distinguishable from this proceeding. In *NBMC*, we issued a Notice of Proposed Rule Making proposing to extend the existing minority preference policy to the acceptance of applications for AM foreign clear channels which had recently become available for use in the United States. Instead, we did the opposite. The subsequent Report and Order in that proceeding did not adopt any minority preference criteria even though we had clearly stated that we intended to adopt a minority preference policy. The Court of Appeals determined that this was not "substantially as proposed" in the Notice and the notice given in that proceeding was therefore inadequate to enable interested parties to provide meaningful comment.

11. Dickerson Broadcasting correctly notes that in adopting the Notice in *NBMC*, we stated that we were proposing to adopt this rule "substantially as proposed in this Notice of Proposed Rule Making or in accordance with such variants, modifications, or alternatives within the scope of the issues of this proceeding, as we may find preferable after considering the entire record." According to Dickerson Broadcasting, this language is "functionally identical" to the language contained in Appendix 3(c) to the *Notice* in this proceeding which states "the filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved." We disagree. The *Notice* in this proceeding proposed a Channel 246C3 upgrade at Beverly Hills. The alternate Channel 292C3 upgrade ultimately adopted is a "different channel" exactly as stated in the Appendix. Unlike *NBMC*, such an action upgrading Station WXOF to a Class C3 channel is "substantially as proposed" in the *Notice*.

Applicable Separation Requirement

12. Dickerson Broadcasting argues that there was no basis to apply the 138-kilometer

separation requirement of Section 73.213(c)(1) of the Rules to a Channel 292C3 allotment at Beverly Hills. We disagree. As stated earlier, Heart of Citrus filed its Petition for Rule Making on September 29, 1989, proposing a Channel 246C3 at Beverly Hills. In accordance with *Mileage Separation Order*, the Heart of Citrus Petition for Rule Making filed prior to October 2, 1989, was processed pursuant to the rules then in effect. The former spacing requirements specified a 138-kilometer separation between a Class A and a Class C3 co-channel FM allotment. Furthermore, the procedure discussed in the preceding paragraphs for consideration of alternate channels was in effect at the time Heart of Citrus filed its Petition for Rule Making and remains in effect. The Heart of Citrus Petition for Rule Making was merely examined and considered in accordance with the rules in effect on the date it was filed. We would follow this procedure as long as that proceeding remained pending. There is nothing in *Mileage Separation Order* that would suggest that we would not follow our procedures with respect to considering alternate channels in a pending rulemaking proceeding or consider different separation requirements for any alternate channel that may be considered in the proceeding.

Mount Pleasant, Iowa

13. In its Petition for Reconsideration, Dickerson Broadcasting contends that the action in this case applying the separation requirements in Section 73.213(c)(1) to the alternate Channel 292C3 allotment at Beverly Hills is inconsistent with a separate action in *Mount Pleasant, Iowa*, 10 FCC Rcd 12069 (1995). In *Mount Pleasant*, the staff rejected a counterproposal filed after October 2, 1989, because it did not comply with the applicable new separation requirements now set forth in Section 73.207(b) of the Rules. As discussed below, the staff action in *Mount Pleasant* is consistent with the action in this proceeding and does not preclude a Channel 292C3 allotment at Beverly Hills.

14. In *Mount Pleasant*, the staff considered a proposal in MM Docket No. 90-103 for the substitution of Channel 288C3 for Channel 288A at Mount Pleasant, Iowa, and modification of the Station KILJ license to specify operation on Channel 288C3 at Mount Pleasant. The underlying petition for rule making was filed prior to October 2, 1989. In response to the *Notice of Proposed Rule Making* in that proceeding, subsequent to October 2, 1989, Susan I. Coloff filed a counterproposal proposing an alternate Channel 281C3 upgrade at Mount Pleasant. This alternate channel at Mount Pleasant would have facilitated a resolution of a separate proceeding in MM Docket No. 89-521 in which she had filed a counterproposal seeking to upgrade Station KMCH, Channel 234A, Manchester, Iowa, to Channel 234C3.

15. The *Notice of Proposed Rule Making and Order to Show Cause* in MM Docket No. 89-521 was filed prior to October 2, 1989, and involved the communities of Lancaster, Wisconsin, Clinton, Iowa, and Morrison, Illinois. Like *Mount Pleasant* and this proceeding, any counterproposal filed in MM Docket No. 89-521 was subsequent to October 2, 1989. Coloff could have proposed an alternate channel for Mount Pleasant or any other community set forth in the pending *Notice* in MM Docket No. 89-521 in accordance with the former separation requirements now set forth in Section 73.213(c)(1) of the Rules. However, any proposal filed after October 2, 1989, for a community *not* already set forth in a *Notice* must have complied with the new separation requirements now set forth in Section 73.207(b) of the Rules. The counterproposal filed by Coloff

in MM Docket No. 89-521 introduced a new community into that proceeding. Specifically, Coloff proposed a Channel 288A substitution at Geneseo, Illinois. A Channel 288A allotment at Geneseo did not comply with the new separation requirements. This was fatal to her counterproposal in MM Docket No. 89-521, which, in turn, obviated any need for the proposed channel substitution at Mount Pleasant in MM Docket No.90-103. Notwithstanding any perceived suggestion in *Mount Pleasant* that we would not follow the alternative channel procedure discussed in paragraph 12, *supra*, it continues to be our view that following the alternative channel procedure is the procedure most conducive to the efficient transaction of Commission business and is consistent with *Mileage Separation Order*. In contrast, the new communities set forth in the joint counterproposal filed by Sarasota-FM and Gator Broadcasting in this proceeding proposed allotments that complied with the current separation requirements in Section 73.207(b) of the Rules.

Section 73.215 of the Rules

16. As noted earlier, on March 21, 1996, the staff granted the Heart of Citrus application to implement the Channel 292C3 upgrade for Station WXOF at Beverly Hills. The application was filed and granted pursuant to Section 73.215 of the Rules and expressly affords Station WEAG-FM protection as if it were a six-kilowatt FM station. Although Dickerson Broadcasting argues that Section 73.215 of the Rules cannot be used to validate a short-spaced allotment, the Channel 292C3 allotment at Beverly Hills complies with the applicable separation requirements in effect at the time the original Petition for Rule Making was filed. As such, Heart of Citrus properly availed itself of the provisions of Section 73.215 of the Rules.

Sections 0.283(b)(3) and 1.115 of the Rules

17. In the *Memorandum Opinion and Order* released April 16, 1996, the staff dismissed the Dickerson Broadcasting Application for Review. As noted earlier, that action was premised on the grant of the Station WXOF application implementing its Channel 292C3 upgrade and the specific statement by Dickerson Broadcasting in its Application for Review. Dickerson Broadcasting now contends that the staff did not have delegated authority to dismiss this Application for Review. We need not decide whether the staff should have dismissed the earlier Application for Review because we now independently review that action and concur with the staff's rationale.⁶ As discussed earlier, the action allotting Channel 293C3 to Beverly Hills is no longer an impediment to any future six-kilowatt operation by Station WEAG-FM. Accordingly, we agree with the staff that Dickerson Broadcasting is no longer aggrieved within the ambit of Section 1.115 of the Rules.⁷

18. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration

⁶*Cf. Beehive Telephone, Inc. v. Bell Operating Cos., Memorandum Opinion and Order*, 12 FCC Rcd 17930, 17938-39 (1997) (Commission decision affirming staff decision effectively moots delegated authority argument).

⁷Section 1.115(a) of the Rules permits "any person aggrieved by any action taken pursuant to delegated authority to seek Commission review of that action."

filed by Dickerson Broadcasting, Inc. directed to the *Memorandum Opinion and Order* dismissing its Application for Review and the subsequent action granting the application implementing the Channel 292C3 allotment at Beverly Hills, Florida (File No. BPH-940307IZ) IS DENIED.

19. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary