

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

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 97-107
Table of Allotments,) RM-9023
FM Broadcast Stations.)
(Potts Camp and Saltillo, Mississippi))

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 23, 2001

Released: August 29, 2001

By the Commission:

1. The Commission has before it an application for review filed by Olvie E. Sisk (“Sisk”), licensee of Station WCNA(FM), Channel 240C3 (95.9 MHz), Potts Camp, Mississippi. Sisk requests review of the *Report and Order* (“R&O”) in MM Docket No. 97-107, 13 FCC Rcd 11,909 (Allocations Br. 1998), in which the Chief, Allocations Branch, denied Sisk’s petition for rulemaking. Broadcasters & Publishers, Inc. (“BPI”), licensee of Station WWKZ(FM), Aberdeen, Mississippi, filed an opposition to the application for review, and Sisk filed a reply to the opposition.¹

Background

2. In its rulemaking petition, Sisk requested the reallocation and change of community of license of its Station WCNA(FM), Channel 240C3, from Potts Camp to Saltillo, Mississippi, pursuant to Section 1.420(i) of the Commission’s Rules.² Saltillo is not located within the current 60 dBu contour of Station WCNA(FM) as licensed to Potts Camp and, thus, Sisk proposed substantial relocation of his transmitter site (38.8 kilometers) to permit coverage of Saltillo should his allotment request be granted. Sisk contended that his proposal would result in

¹ Almost 6 months after his filing of the application for review, Sisk filed a request for official notice of the R&O in MM Docket No. 97-97. BPI then filed a response, and Sisk filed a reply. We discuss that request at para. 11, *infra*.

² This rule permits modification of a license or construction permit for an FM or television station to specify a new community of license without affording other interested parties the opportunity to file a competing expression of interest where the community would use a mutually exclusive channel. *See Modification of FM and TV Authorizations to Specify a New Community of License (“Change of Community R&O”), 4 FCC Rcd 4870 (1989), recon granted in part (“Change of Community MO&O”), 5 FCC Rcd 7094 (1990).*

a preferential arrangement of allotments under the FM Allotment Priorities³ because it would provide Saltillo (1990 U.S. Census population of 1782) with a first local aural transmission service. After reviewing the petition, the staff released a *Notice of Proposed Rule Making* (“*NPRM*”), 12 FCC Rcd 3712 (Allocations Br. 1997), soliciting comment on the proposal but questioning whether the proposal would result in a preferential arrangement of allotments because it would remove the sole local service in Potts Camp (1990 U.S. Census population 483). The *NPRM* pointed out that in the generic rulemaking proceeding adopting Section 1.420(i), the Commission generally prohibited the removal of a community’s sole local service but stated that “a waiver of the prohibition will be considered ‘in the rare circumstances where removal of a local service might serve the public interest.’”⁴ Accordingly, the petitioner was requested to submit additional information to justify waiver of this policy.

3. In response to the *NPRM*, petitioner contended that, pursuant to *Noalmark Broadcasting Corp.*, 50 R.R. 2d 755 (1981), it was permissible to change a station’s community of license and to remove a community’s sole local service in situations such as the instant case, where the first community had suffered a substantial decline in population and prosperity. In support of this position, petitioner claimed that the population of Potts Camp declined 18% since 1970 while the population of Saltillo has increased 259% over the past 25 years. Sisk also alleged that budgetary constraints in Potts Camp had reduced government services, that the level of commercial activity is low with only ten stores, and that since the station went on the air in 1995, it has sold no advertising to anyone in Potts Camp or the immediate area.⁵ Indeed, petitioner believed that Potts Camp has declined to the degree that it is no longer a *bona fide* community for allotment purposes.⁶

³ The FM allotment priorities are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3).] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁴ *NPRM*, 12 FCC Rcd at 3713, citing *Change of Community MO&O*, 5 FCC Rcd at 7096.

⁵ Sisk alleged, in addition, that Potts Camp has no dentist or supermarket and has a single part-time policeman on duty 6 months a year. He also advised that Potts Camp has a part-time mayor and a city hall open 3 hours per weekday. Sisk submitted a signed declaration of the town clerk for Potts Camp (and for neighboring Myrtle, MS) that although it has a medical clinic and pharmacy, a doctor is on site a half-day per week. The clerk also reported that Potts Camp has a small grocery store and a convenience store with gas pumping facilities. Presented also were the results of Sisk’s own survey of 12 businesses in and around the community, 3 of which plan to purchase small amounts of radio advertising during the year, hardly producing enough revenue to support a station’s operation for a year, alleged Sisk. He further argued that no business gave any indication of planning to purchase advertising time on WCNA(FM). *See R&O*, 13 FCC Rcd at 11,910, 11,911.

⁶ Also in response to the *Notice of Proposed Rulemaking* (“*Notice*”), 12 FCC Rcd 3712 (1997), in this docket, BPI had filed what it styled a counterproposal. However, the staff dismissed this filing as unacceptable because its request to allot Channel 275C3 to Saltillo was not a counterproposal as it did not have the required mutual

4. In the *R&O*, the staff rejected these arguments. As a threshold matter, the *R&O* held that Potts Camp still qualified as a community for allotment purposes because it has a population of 483 persons, a local government, police, and some businesses. Next, the staff compared the existing and proposed arrangement of allotments under the FM allotment priorities. The *R&O* recognized that both the existing and proposed arrangement of allotments would trigger Priority 3, first local service, and that if this were a situation comparing two *de novo* requests for allotments, we would normally favor Saltillo because it is the larger community. However, the *R&O* held that this difference in population was not the type of “rare circumstance” that would outweigh removal of Potts Camp’s sole local service, because it was in effect providing a marginal benefit under the same allotment priority. This position was further buttressed by the fact that, although the proposal would provide a net gain of service to 56,202 persons, it would also create a loss of service to 31,629 persons, of which 2190 persons would be reduced from five to four full-time reception services and 833 persons would be reduced from four to three reception services. The *R&O* also found that Sisk’s reliance on *Noalmark, supra*, was misplaced because in that case, a station was allowed to move from a community that had ceased being a community for allotment purposes because it no longer had any population, businesses, or a local government. Finally, the *R&O* held that the failure of the Potts Camp station to generate significant advertising revenue from businesses in Potts Camp does not justify the reallocation because economic issues are not considered relevant in the allotment context.⁷

Application for Review

5. Sisk contends that his application for review is warranted because the *R&O* “involves application of Commission policy in such a way as to create an irrational result which is irreconcilable with other case precedent,” citing Section 1.115(b)(2) of the Commission’s Rules. He points out that the Commission noted in the *Change of Community MO&O* that a community’s legitimate expectation of continued service may be offset by other public interest factors. In addition, he questions the rigidity of the policy that, on the one hand, disfavors the change of community of license of an on-air station, and on the other, permits the relocation of an unbuilt station not yet operational. Citing *Chatom and Grove Hill, Alabama*, 12 FCC Rcd 7664 (MM Bur. 1997), Sisk notes that the Commission has not raised a similar level of concern with permittees that would provide a first local service and seek to relocate to nearby communities. This disparity in treatment, alleges Sisk, “creates perverse incentives.” Where a permittee has

exclusivity with the proposal set forth in the *Notice*.

⁷ See *R&O*, 13 FCC Rcd at 11,912 n.8 and cases cited therein. See also *Change of Community R&O*, 4 FCC Rcd at 4874 (“ . . . adherence to the allotment criteria will ensure that any exchange involving a change in the community of license will be made in the public interest and not solely in the financial interests of the participants.”).

concerns about whether it can operate in a declining community and petitions the Commission for a relocation, the incentive is to avoid construction, and thereby avoid the strictures against relocating to a more economically sustainable community if the permittee becomes a licensee. Where such delay occurs, no one receives service. Sisk argues, the effect of the policy is to force a permittee to remain in a declining community when he has made the investment and taken the risk to construct and provide service to the community. He decries a policy that, on the other hand, rewards the “laggard” permittee, which never completes construction and provides no service, but denies the diligent permittee that completes construction and provides a sole local service, but is faced with policies that inhibit its relocation from a declining community. Sisk further posits that in the event that the existing licensee is forced to terminate operations and a vacant allotment results, and one of the presumed new applicants becomes the subsequent permittee, it then would have an opportunity to seek, if desired, approval to change its community of license. He points out the anomaly wherein the permittee would have a disincentive to construct the station quickly and restore service, because as licensee, policies against relocating the station, once it is already providing service, preclude a change in its community of licensee.

6. Sisk argues that it has demonstrated that Potts Camp is economically non-sustainable by restating in his application for review what he outlined in its pleadings filed before the staff’s issuance of the *R&O*. See note 5, *supra*. Sisk discounts the staff’s view that economic issues were of little relevance, asserting that it showed the financial peril of the station and the community’s lack of any legitimate expectation of continued service in Potts Camp. He cites instances in other contexts where the Commission has considered the economic realities of operating a broadcast station in today’s ever-more competitive markets. In deciding to increase national and local ownership limits in *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2758 (1992), *recon. granted in part*, 7 FCC Rcd 6387 (1992), *recon. granted in part*, 7 FCC Rcd 6387, (1992), *further recon. granted in part*, 9 FCC Rcd 7183 (1994), notes Sisk, the Commission recognized, for example, the degree of market fragmentation that has changed the financial conditions for the radio industry, including the growth of radio revenue and radio’s market share of local advertising markets. Sisk maintains that the Commission should take financial conditions into account for allotment decisions as it does in granting waivers of its multiple ownership rules, under which it is provided that the Commission looks favorably on requests for waiver of the one-to-a market rule that deals with “failed stations.” Sisk comments that it appears that the Commission would prefer for a station to go dark before it would consider financial hardship and allow for a change of community of license. Reallotment of Potts Camp to Saltillo, Sisk argues, would result in a more efficient and equitable distribution of frequencies and is in the public interest.⁸

⁸ In its opposition to Sisk’s application for review, BPI reported that it had only recently filed a petition for rulemaking (RM-9347), requesting that Channel 275C3 be allotted to Saltillo as its first local service. BPI noted that such service could be provided to Saltillo while retaining Potts Camp’s sole local service. Sisk filed a reply arguing that it should be considered as a request for a second local service. In response to BPI’s request, a

Discussion

7. In challenging the Commission's general prohibition on a licensee's removal of a community's sole local transmission service, Sisk contests the underlying basis for our change of community of license policies. Among those policies was preservation of the public's expectation of continued service, which was fully considered and adopted in the Commission's *Change of Community MO&O*. In contesting these policies, Sisk's application for review fails to convince us that these policies are either harmful or irreconcilable with precedent. We will deny his application for review.

8. In the *Change of Community MO&O*, the Commission reiterated that we would generally approve a change in a station's community of license where an allotment to the community gaining the service would better satisfy the allotment priorities and policies than retaining the allotment in its original community, unless the change would deprive a community of its sole local transmission outlet. *See* 5 FCC Rcd at 7094. While noting that waivers of this prohibition might be warranted in limited circumstances, the Commission stated that the public's expectation of continued service was a compelling concern that must be independently weighed against the overall public interest benefits of such removal. In short, the Commission rejected the view that a sole remaining transmission service could be removed from a community simply because another community might be preferred under our standards for awarding new allotments. Thus, where existing service is involved, special circumstances must be demonstrated to warrant its removal. The Commission cited as an example a case where removal of the first local service from a community would result in the provision of a reception service to a "white area," *i.e.* an area with a significantly sized population that had received no aural service prior to the station's relocation. Provision of new service to a white area, of course, would be preferred because it satisfies the highest FM allotment priority.⁹ *Ibid* at 7096, 7097.

9. Holders of unbuilt construction permits were considered eligible to file for a change of community of license without regard to the general prohibition on removal of a community's only operational on-air service (first local) because unbuilt stations do not provide such service. Indeed, the Commission specifically defined existing service for change of community of license cases as that

Notice of Proposed Rulemaking was issued in MM Docket 99-2, 14 FCC Rcd 850 (1999), proposing that allotment. Later, Channel 275C3 was allotted to Saltillo in a *Report & Order*, 14 FCC Rcd 10,718 (1999). A couple of months after that allotment become effective, BPI, while withdrawing its opposition to Sisk's application for review, also attempted to withdraw its expression of interest in Channel 275C3 at Saltillo, requesting additionally that the allotment be deleted. However, its withdrawal was untimely, the allotment having become effective on August 23, 1999. *See* 64 FR 38592, published July 19, 1999. We also note BPI's compliance with 47 C.F.R. §1.420(j) in filing a declaration that it had not received nor will it receive any consideration for withdrawing its opposition to Sisk's application for review.

⁹ Indeed, it is rare to find any region in the country that does not receive at least one aural broadcast service.

provided by stations that were on-the-air and on which their listeners had come to rely. *Ibid* at 7097. We note that Sisk cited *Chatom, supra*, for the proposition that the Commission has had a far lower concern with relocation of unbuilt stations providing a first local service. The reason cited in *Chatom* for this disparity, however, is the same one we rely upon herein – adherence to the longstanding Commission policy against removal of the sole remaining operational station in a community absent a compelling showing that waiver of this prohibition is warranted. Here, no such showing has been made and we therefore affirm the staff’s refusal to permit the requested community of license change.

10. First, under the facts present in this case, the proposed and existing arrangement of allotments trigger the same allotment priority. As the *R&O* properly determined, both retaining or reallocating the station would provide first local transmission services. And, while Saltillo is a larger community and would, on this ground, prevail over Potts Camp in a new allotment proceeding, this distinction is not the sort of compelling public interest benefit that would overcome our strong preference for retaining first local operating service. Our view is buttressed by the fact that the reallocation would create a loss of service to 31,629 persons, of which 3023 would be considered underserved because they would receive fewer than five full-time reception services.¹⁰ Moreover, the 56,202 persons that would gain service in and around Saltillo as a result of the proposed reallocation are already well-served with reception services, *i.e.* all 56,202 receive the signals of at least five broadcast radio stations.

11. Second, we do not believe that the kind of financial concerns raised by Sisk as justification for his proposal warrant waiver of the bar on removing the only local service from a community. As an initial matter, we note that the Commission does not generally consider party-specific economic issues in making allotment decisions.¹¹ In any event, Sisk has not demonstrated that his particular station is failing, or faces unavoidable failure. Indeed, Sisk provides no information as to his station’s current advertisers or its overall financial condition. The argument that Sisk appears to make is simply that Potts Camp is a small community and that he could operate more profitably in the larger community of Saltillo. This is clearly not a basis for removing a first local, operating broadcast service from a community. In this connection, we note that Sisk requests that we take official notice of the *Report and Order* in MM Docket 97-97 and

¹⁰ See *supra*, para 4 (2,190 persons would be reduced from five to four reception services, and 833 persons would be reduced from four to three reception services.).

¹¹ See, *e.g.* *Albion, Nebraska*, 10 FCC Rcd 3183 (Allocations Br. 1995), *rev. denied*, 10 FCC Rcd 11,927 (Comm. 1995) (allotment of second television channel to Albion made over objection of adverse economic impact); *Southampton, New York*, 7 FCC Rcd 4412 (Allocations Br. 1995), *rev. denied*, 10 FCC Rcd 11,516 (Comm. 1995) (Commission affirmed four FM allotments in the same county, reasoning that “it remains our policy not to address the potential economic impact of new allotments on existing stations”); and *Monterey, Tennessee*, 2 FCC Rcd 6627 (Allocations Br. 1992), *rev. denied*, 7 FCC Rcd 1606 (Comm. 1992) (cited with approval Mass Media Bureau’s view that argument of economic harm against upgraded allotment at Monterey was invalid).

alleges that economic considerations were implicitly the primary reason in that proceeding for permitting the removal of the sole local service from Mt. Juliet to Belle Meade, Tennessee. We disagree. In that case, the Commission affirmed a staff decision that electromagnetic interference (“EMI”) and the absence of a suitable transmitter site were the exclusive grounds for allowing the reallocation and change of community of license, not economic concerns. Indeed, the Commission made no reference, implicit or otherwise, to any costs that the Mt. Juliet permittee would incur in order to avoid the EMI as part of its discussion section, as alleged by Sisk. *See Report and Order*, 12 FCC Rcd 10,481 (Allocations Br. 1997), *recon. denied*, 12 FCC Rcd 17,616 (MMB 1997), *rev. denied*, 15 FCC Rcd 8226 (Comm. 2000). This case is also distinguishable because, even though the station had commenced operations, it had to cease broadcasting because of the aforementioned engineering concerns and thus could no longer be relied upon by listeners.

12. Further, Sisk has not demonstrated that broadcast service as a general matter is economically insupportable at Potts Camp. Evidence that the community of license itself is small and possibly unable to fully support a broadcast facility by itself does not establish that the service area of a station licensed to Potts Camp cannot draw on an adequate base to operate its facility. In this regard, a staff engineering analysis reveals the service area of Channel 240C3 at its currently licensed site – the area encompassed by the station’s signal of 60 dBu or greater -- includes all of Union County, about two-thirds each of Benton and Tippah Counties, approximately one-third each of Marshall, Pontotoc, and Lafayette Counties, and ten percent or less of Lee, Alcorn, and Prentiss Counties. About 69,211 people reside within the 60 dBu contour of Potts Camp Station WCNA (FM).¹² Presumably there are numerous potential advertisers within this area that provide services to this substantial population. Absent presentation of more detailed facts surrounding economic conditions at Potts Camp, we conclude that Sisk has not made out a case for a shift in policy in the instant case, or consideration of a shift in our policy in general.

13. We further disagree with Sisk that our policies governing changes of community of license lead to an irrational distinction between licensees and permittees. Sisk argues that a permittee desirous of relocating has a disincentive to construct its station rapidly and become a licensee because doing so would limit its ability to move. It is speculative for Sisk to predict that the permittee would delay that construction in order to be better positioned to request a change of its community of license. This is particularly the case now that the Commission has adopted new policies in its *Streamlining Order*¹³ that establish a three-year deadline for construction of broadcast radio facilities and strictly limit the

¹² The distance between the existing and proposed transmitter sites is 38.8 km (24.1 mi), such that the 60 dBu contour of WCNA(FM) as relocated to Saltillo would provide no coverage of Potts Camp. The distance between the center city coordinates of Saltillo and Potts Camp is 64.6 km (40.1 mi).

¹³ *In the Matter of 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23,056 (1998), *recon.*, 14 FCC Rcd 17,525 (1998).

acceptable reasons for extensions of time. As the Commission contemplated in the *Streamlining Order*, the new rules adopted therein would serve as an incentive for applicants to plan construction of their stations even before they applied, so that preliminary steps will have been taken to commence actual construction shortly after a permit is granted. See ¶ 37, *supra*. In this vein, we would also expect that before an applicant files, it will have conducted at least preliminary market research into whether the community could indeed support the station. The very filing of an application to build and operate in a community presupposes that its selection was made because the community showed promise of providing that support. For any disincentive to arise while completing construction, conditions in that community would have had to decline precipitously in a relatively short period. We question the likelihood of this occurring.

14. As a final matter, as related in note 8, *supra*, Saltillo was allotted Channel 275C3, which, shortly, will be made available for application via an auction. Therefore, despite denial of the instant application for review and our refusal to reallocate the existing channel at Potts Camp, whichever party prevails at auction will have the opportunity to provide Saltillo with its own radio station.¹⁴

15. Accordingly, IT IS ORDERED That, pursuant to 47 C.F.R. §1.115(g), the Application for Review filed by Ovie E. Sisk IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁴ Included among the FM construction permits available for auction on December 5, 2001 is the one for vacant Channel 275C3 allotment at Saltillo. See "Auction for FM Broadcast Construction Permits Postponed Until December 5, 2001: Broadcast Auction 37 FM Rescheduled from May 9, 2001," *Public Notice*, DA 01-619 (released March 7, 2001) and "Removal of FM Broadcast Construction Permit from Auction No. 37," *Public Notice*, DA 01-233 (released January 30, 2001).