

FCC MAIL SECTION

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

MM Docket No. 92-192

In the Matter of

Amendment of Section 73.202(b), RM-7960
Table of Allotments, RM-8036
FM Broadcast Stations.
(Rochester and Walton, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 29, 1993; Released: February 17, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 5486 (1992), issued in response to two separately filed mutually exclusive petitions for rule making. J. B. Ladd ("Ladd") requested the allotment of FM Channel 229A to Walton, Indiana, as that community's first local aural transmission service (RM-7960). Dowagiac Broadcasting Company, Inc. ("DBC"), licensee of Station WDOV-FM, Channel 221A, Dowagiac, Michigan, requested the substitution of Channel 229A for

Channel 221A at Rochester, Indiana, and modification of the license for Station WROI(FM), Channel 221A, accordingly.¹ The Rochester substitution was requested to enable Station WDOV-FM to increase its facility to 6 kilowatts at Dowagiac.² Ladd filed supporting comments in response to the *Notice*. WROI filed joint comments in support of DBC's proposal. DBC filed comments and a counterproposal.³ Ladd, WROI and DBC filed reply comments.⁴ Late filed comments were filed on behalf of Focus Radio, Inc. ("Focus"), proposed assignee of Station WUBU(FM), Channel 292A, South Bend, Indiana.⁵

2. Ladd advocates that the proposal to allot Channel 229A to Walton, Indiana, will further the Commission's allotment priorities by providing that community with its first local aural transmission service, as opposed to an increase in coverage areas by Stations WROI(FM) and WDOV-FM, and therefore urges adoption of his proposal.

3. WROI comments that Station WROI(FM) is the only local aural transmission facility in Rochester (population 5,969),⁶ which it states is the largest community located in Fulton County (population 18,840). Thus, WROI endorses DBC's proposal to allot Channel 229A to Rochester at Station WROI(FM)'s present site⁷ to allow both stations to increase their coverage areas. Additionally, WROI advises that the 6kW power increase would enable it to provide service to a greater portion of Fulton County.⁸

4. Further, WROI maintains that while Walton (population 1,053) is devoid of local aural transmission service, the community receives aural service from nine nearby radio stations. Therefore, WROI urges that adoption of its proposal at Rochester should be preferred since it would enable Station WROI(FM) to provide improved service and expand its coverage area in Fulton County.

¹ At the time this proposal was filed, Manitou Broadcasting Corporation ("Manitou") was the licensee of Station WROI(FM). An assignment of the license to Bair Communications, Inc. ("Bair") (File No. BALH-920716HR) was granted September 9, 1992, and consummated October 21, 1992. All references to pleadings filed on behalf of Station WROI(FM) will be identified as "WROI".

² The proposed substitution would also enable Station WROI(FM) to expand its coverage area at Rochester.

³ DBC counterproposed the allotment of Channel 293A to Rochester. However, DBC's counterproposal is technically defective. Specifically, a staff analysis reveals that, calculated from Station WROI's present site, Channel 293A would be 7.2 kilometers (4.8 miles) short-spaced to Station WQLR(FM), Channel 293B, Kalamazoo, Michigan, at coordinates 42-28-32 and 85-29-22; 6.0 kilometers (3.7 miles) short-spaced to Station WLSN(FM), Channel 293B, Greenville, Ohio, at coordinates 40-08-49 and 84-36-36; and 2.5 kilometers (1.6 miles) short-spaced to Station WUBU(FM), Channel 292A, South Bend, Indiana, at coordinates 41-40-36 and 86-15-08. (We note that the construction permit issued for Station WUBU(FM) was granted pursuant to the provisions of § 73.215 of the Commission's Rules, which allows contour protection for short-spaced assignments.) Therefore, the proposed allotment of Channel 293A to Rochester would require that Station WROI(FM) not only change its channel but also relocate its transmitter to a non-short spaced site. Furthermore, DBC failed to supply the Commission with written consent to Station WROI's transmitter site relocation from either Manitou or Bair. Commission policy requires that written consent of a licensee or permittee be obtained before we will require an existing station to change transmitter site. See *Big Bear Lake, California*, 4 FCC Rcd 7505 (1989), and *Claremore, Oklahoma*, 3 FCC Rcd 4037 (1988).

Therefore, DBC's counterproposal has not been accepted. In view of our determination, comments filed with respect to the counterproposal will not be considered.

⁴ DBC's reply comments will be considered to the extent they support its original proposal to allot Channel 229A to Rochester and are moot insofar as they alternately endorse the requested allotment of Channel 293A to that community. See note 2, *supra*.

⁵ Focus' comments, which were accompanied by a motion to accept, object to consideration of Channel 293A to Rochester, as set forth in DBC's comments. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods indicated in the *Notice*. In any event, since DBC's counterproposal has not been accepted, Focus' responsive comments are moot.

⁶ Population figures cited herein are from the 1990 U.S. Census.

⁷ WROI advises that it has filed a modification application (File No. BPH-921014IE) to correct a minor error in the coordinates and transmitter height for Station WROI(FM). According to WROI, the correct coordinates at its transmitter site are 41-03-14 and 86-16-12, and the true height of its transmitter is 249 feet (rather than 220 feet listed in its authorization). WROI asserts that while the corrected coordinates create no new short spacings, it will increase 0.24 kilometers to Station WDOV-FM, Dowagiac, Michigan, while decreasing 0.80 kilometers to Station WVSH(FM), Huntington, IN.

⁸ WROI states that maximum operation on Channel 229A with 6 kW at its current height will enable it to achieve a 37% increase in coverage area within its 60 dBu contour (453 sq. mi. to 621 sq. mi.) WROI states that operation on Channel 229A with maximum facilities (6 kW at 100 meters HAAT) would result in an increase of 110% in its service area (from 453 sq. mi. to 953 sq. mi.).

5. WROI adds that the close proximity of Grissom Air Force Base to the reference site at Walton may hamper the selection of an appropriate transmitter site to accommodate Channel 229A at that community due to restrictive radio and aeronautical hazard control zones.

6. DBC's responsive comments argue that public interest considerations favor the proposed substitution of Channel 229A at Rochester since it would eliminate the existing "grandfathered" short-spacings between Station WROI(FM) and Station WDOV-FM, as well as between Station WROI(FM) and Station WVSH(FM), Channel 220A, Huntington, Indiana.⁹ Additionally, DBC states that the Rochester substitution would eliminate a short-spacing between Station WDOV-FM and Station WKGH(FM), Channel 222A, Allegan, Michigan.¹⁰

7. In reply comments, WROI reiterates its support of DBC's initial proposal to allot Channel 229A to Rochester at Station WROI(FM)'s current site,¹¹ since it would result in an improved service to a relatively sparsely populated county with few radio services. WROI asserts that DBC's proposal to improve the facilities of Stations WROI(FM) and Station WDOV-FM represents a more efficient allotment plan than mechanically applying the Commission's allotment priorities favoring a first local aural transmission service at Walton. WROI states that its belief is premised also on the potential technical problems posed by Walton's close proximity to Grissom Air Force Base. WROI argues that its proposal should be favored because it will promptly implement its proposed service improvement to the relatively thinly populated Fulton County. WROI urges the Commission to adopt DBC's proposal rather than the proposal for a new allotment at Walton. WROI asserts that the Walton allotment would result in years of delay because it would require the opening of a filing window inviting the filing of multiple applications and a comparative hearing. Furthermore, WROI argues, Walton is a smaller community which currently receives a multiplicity of reception services and thus does not warrant its own local service.

8. Ladd responds that pursuant to the *Second Report and Order, supra*, the Commission created the 6 kilowatt Class A station on a selective basis in recognition that not all Class A stations could increase their power level due to grandfathered short spacings. Other Class A station requests to increase power require showings to demonstrate how an increase in a station's service area would benefit the public. Conversely, Ladd remarks that the Commission's allotment priorities, 90 FCC 2d 88 (1982), favor a first local service

over a proposal to upgrade an existing facility, citing *Belvidere, New Jersey and Scranton, Pennsylvania*, 6 FCC Rcd 1333 (1991); *Lafayette, Tennessee*, 6 FCC Rcd 3289 (1991); and *Homerville, Lakeland and Statenville, Georgia*, 6 FCC Rcd 5801 (1991). While both Stations WROI(FM) and WDOV-FM could benefit from DBC's proposal, Ladd comments that it does not change the comparative analysis, citing *Northweye, et al., Missouri*, 7 FCC Rcd 1449 (1992).

9. Ladd also argues that, contrary to DBC's contention, the number of reception services in Walton would not be a relevant factor. First, DBC has not established the number of stations that actually cover Walton. Second, even if this showing were made, longstanding Commission policy says that reception services are no replacement for first local transmission service. See *Clinton, Louisiana*, 45 RR 2d 1587 (1979); *Westover and Grafton, West Virginia*, 46 Fed. Reg. 10737 (1981); and *Conklin, New York*, 5 FCC Rcd 1104 (1990).

10. In response to WROI's concern that the close proximity of a military base to Walton may impede the selection of a usable transmitter site for Channel 229A, Ladd submitted an engineering study indicating that there are other areas in which an antenna could be constructed consistent with the Commission's technical requirements.¹²

11. In an effort to resolve the conflicting requests, the staff performed a frequency analysis for Rochester and Walton. Our analysis reveals that there is no alternate Class A channel available as a first local service to Walton, and no alternate channel available to Rochester to accommodate DBC's modification proposal. Therefore, the proposals must be comparatively considered.

12. As indicated in the *Notice*, pursuant to the Commission's allotment priorities, a first local service is generally preferred over a proposal to upgrade an existing facility.¹³ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982); see also *Benton, Arkansas*, 2 FCC Rcd 1963, 1965 (1987); and *Lafayette, Tennessee*, 6 FCC Rcd 3289 (1991). Neither the allotment of Channel 229A to Walton nor the requested increase in power by Station WROI(FM) to 6 kilowatts operation would provide any first or second fulltime aural service. The proposed allotment of Channel 229A to Walton triggers allotment priority 3 -- first local service, while the upgrade at Rochester constitutes an improved service under priority 4 -- other public interest factors. Moreover, although a 6 kilowatt operation by Station WROI(FM) at Rochester could enable

⁹ As stated in the *Notice*, both WROI(FM) and WDOV-FM presently operate as grandfathered Class A stations. The distance between the authorized site for Station WROI(FM), Rochester, Indiana, at coordinates 41-03-02 and 86-15-39 and Station WDOV-FM, Dowagiac, Michigan, at coordinates 41-59-52 and 86-03-14 is 106.6 kilometers (66.2 miles) whereas 115 kilometers (185.1 miles) is required to accommodate DBC's desire to increase its facility to 6 kilowatts. The distance between WROI(FM) and Station WVSH(FM), Huntington, Indiana, at coordinates 40-53-32 and 85-30-38 is 65.6 kilometers (41 miles) whereas a minimum separation of 72 kilometers (45 miles) is required.

¹⁰ The distance between Station WDOV-FM and Station WKGH(FM), at coordinates 42-34-52 and 85-45-17, is 69.3 kilometers (43.1 miles) whereas a minimum separation of 72 kilometers (115.9 miles) is required. Station WDOV-FM is also 2.1 kilometers (1.3 miles) short-spaced to an application for Channel 220A at Howe, Indiana, at coordinates 41-38-59 and 85-21-12 (see File No. BPED-910320MA). DBC would remedy those

short-spacings by relocating its transmitter 4.8 kilometers (3 miles) southwest of Dowagiac at coordinates 41-56-29 and 86-07-40.

¹¹ WROI advises that by increasing its power to 4.3 kilowatts at its present site pursuant to the Commission's revised rules in the *Second Report and Order*, in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), recon. 6 FCC Rcd 3417 (1991), it could increase its service to approximately 8,850 additional people within its service area.

¹² Ladd states that according to his consulting engineer, Channel 229A can be allotted to Walton at sites ranging from a large area extending from the proposed Walton site coordinates, 4.8 kilometers (3 miles) west, to a location 15 kilometers (10 miles) northwest from the closest airport runway, from which a 70 dBu signal could be provided over the entire community.

¹³ The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

it to expand its service in Fulton County, neither DBC nor WROI made a showing that the present population not receiving a 70 dBu signal from Station WROI(FM) is underserved. See *Belvidere, New Jersey, supra*. As a result of the above analysis, Walton is afforded the higher priority, and must be preferred over the Rochester proposal. See *Epworth and Dyersville, Iowa, 7 FCC Rcd 106 (1992)*.

13. Despite the site availability concerns raised by WROI, we see no reason to question Ladd's representations of site availability. WROI provides no documentation from military officials or aeronautical consultants to substantiate WROI's concerns that the proximity of a military base may limit the availability of suitable sites to serve Walton. Additionally, Ladd submitted engineering information to support its suggestion that there are other sites available to accommodate Channel 229A at Walton in conformity with the Commission's Rules. Therefore, we find no justification to alter the original coordinates specified for the Walton proposal in the *Notice*.¹⁴

14. Moreover, although WROI asserts that Walton presently receives reception service from stations licensed to nearby communities, as Ladd correctly observes, the Commission has traditionally held that such service is not a substitute for local transmission service. See *Conklin, New York, 5 FCC Rcd 1104 (1990)*, and cases cited therein.

15. With respect to WROI's power increase request, as Ladd observes, consistent with Commission policy expressed in the *Second Report and Order, supra*, although FM stations are encouraged to improve their service by selectively increasing power wherever possible, facility increase requests by grandfathered stations must demonstrate that such requests are in the public interest. See 47 CFR § 73.213(c). Elimination of the grandfathered short-spacings triggered by DBC's proposal¹⁵ is indeed a public interest factor to be considered. However, the request to increase the power of Station WROI(FM) to 6 kW to enable it to expand its coverage area does not outweigh the greater public interest benefit that would result from providing Walton with its first local aural transmission service. See *Belvidere, New Jersey, supra*.

16. As indicated in the *Notice*, Channel 229A can be allotted to Walton in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (2) of the Commission's Rules with a site restriction 3.1 kilometers (2.0 miles) northeast¹⁶ of the community to avoid a short-spacing to Station WKHY(FM), Channel 228A, Lafayette, Indiana.¹⁷ Moreover, since Walton is located within 320 kilometers (199 miles) of the U.S.-Canadian border, concurrence of the Canadian government to the proposed allotment of Channel 229A at that community was received.

17. Accordingly, pursuant to the 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 April 5, 1993, the FM Table of

Allotments, Section 73.202(b) of the Commission's Rules. IS AMENDED to include the community listed below, as follows:

City	Channel No.
Walton, Indiana	229A

18. IT IS FURTHER ORDERED, That the petition for rule making of Dowagiac Broadcasting Company requesting the substitution of Channel 229A for Channel 221A at Rochester, Indiana (RM-8036) IS DENIED.

19. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Dowagiac Broadcasting Company IS DISMISSED as moot.¹⁸

20. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by Certified Mail to the following:

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¹⁴ However, other sites conforming with the Commission's Rules may be specified for Channel 229A at the application level. See *Melbourne, Florida, 5 FCC Rcd 1031 (1990)*.

¹⁵ See notes 9 and 10, *supra*.

¹⁶ Coordinates used for Channel 229A at Walton are 40-40-45 and 86-12-39.

¹⁷ Coordinates at the licensed site of Station WKHY(FM) are

40-23-13 and 86-58-10.

¹⁸ As stated in the *Notice*, the Rochester proposal was previously denied by staff letter on May 1, 1991. Dowagiac Broadcasting Company filed a petition for reconsideration of that action, which we treated as a petition for rule making in the context of this proceeding.

21. IT IS FURTHER ORDERED, That the window period for filing applications on Channel 229A at Walton will open on **April 6, 1993**, and will close on **May 6, 1993**.

22. For further information concerning the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

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

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau