

FCC MAIL SECTION

AUG 29 1995 Before the Federal Communications Commission Washington, D.C. 20554

DISPATCHED BY MM Docket No. 94-63

In the Matter of

Amendment of Section 73.202(b), RM-8450
Table of Allotments, RM-8526
FM Broadcast Stations.
(Rocky Mount, Bassett and Stanleytown, Virginia)¹

REPORT AND ORDER (Proceeding Terminated)

Adopted: August 18, 1995; Released: August 25, 1995

By the Chief, Allocations Branch:

1. At the request of WNLB Radio, Inc. ("petitioner"), licensee of Station WZBB(FM), Channel 260A, Rocky Mount, Virginia, the Commission has before it the Notice of Proposed Rule Making, 9 FCC Rcd 3044 (1994). The Notice proposed the substitution of Channel 260C3 for Channel 260A, the reallocation of Channel 260C3 from Rocky Mount to Bassett, Virginia, and the modification of petitioner's license to specify Bassett as Station WZBB(FM)'s community of license. Comments were filed by Edward A. Baker d/b/a Radio 900, licensee of Station WCBX(AM), Bassett, Virginia, ("Baker") and petitioner.² Baker filed reply comments. Petitioner filed a counterproposal.³ Petitioner and Baker filed reply comments. Baker filed a motion to strike part of petitioner's reply comments and petitioner filed an opposition to the motion to strike.⁴

2. Petitioner reiterates its intention to apply for Channel 260C3, if allotted to Bassett. In support of its proposal, petitioner notes that the estimated area which will lose existing service would comprise about 10% of Station WZBB(FM)'s present coverage, while the estimated gain area would more than double the existing service provided by the station. According to petitioner, adoption of its

proposal would provide a first local full-time service to Patrick County, which presently is served only by daytime AM station WHEO and would also provide a second nighttime service to much of Henry County. In response to those concerns stated in the Notice questioning whether petitioner's proposal to add a service to the community of Bassett would result in a preferential arrangement of allotments,⁵ petitioner counterproposed the reallocation of Channel 260C3 to Stanleytown, Virginia, in lieu of its consideration at Bassett. Petitioner states that Stanleytown is a Census Designated Place ("CDP") located adjacent to Bassett. It is a community quite comparable to Bassett, both in terms of population and community attributes. Petitioner states that should the Commission determine that the public interest would be better served by adoption of its counterproposal, it will apply for Channel 260C3, if allotted to Stanleytown.

3. Baker filed comments objecting to the requested reallocation, noting that petitioner would not be providing a first local service to Bassett, since Station WODY(AM) is licensed to serve Bassett and has been operating for approximately 34 years. Baker argues that adoption of petitioner's proposal would deprive Rocky Mount of its only local FM service. In addition, Baker contends that the gain area proposed by petitioner is approximately 40 percent less than that projected by petitioner. Removal of WZBB(FM) from Rocky Mount would result in 2049 potential local listeners per each of the remaining Rocky Mount stations while adoption of the reallocation would result in 790 persons per station at Bassett, a service discrepancy, that Baker contends would enrich petitioner as owner of one of the remaining Rocky Mount stations, while resulting in serious financial distress to WCBX(AM) in Bassett. With regard to petitioner's counterproposal, Baker states petitioner has failed to provide demographic data that would enable the Commission to determine whether or not the public interest would be served by moving an established station from a large community to the "hamlet of Stanleytown". Finally, Baker argues that the possibility of petitioner securing a fully spaced site is nil. Baker submits that where a fully spaced site must be located lies wholly within the Philpott Lake-Fairy Stone Park area and is administered by the U.S. Army Corp of Engineers, the Virginia Commission on Game and Inland Fisheries, and the Franklin County Director of Planning and Zoning. Baker argues that the likelihood of petitioner securing authority from all of these agencies to erect a commercial radio station in the Philpott Lake, Fairy Stone Park area is virtually zero. Baker submits that absent a showing that a

¹ The community of Stanleytown has been added to the caption.

² Petitioner also filed a letter stating that it had attempted to serve the Pyramid Communications, licensee of Station WRFX(FM), Kannapolis, North Carolina, with a copy of its comments and counterproposal, however, its correspondence was returned with no forwarding address provided.

³ Public Notice of the filing of the counterproposal was given September 26, 1994, Report No. 2031. We note the Commission inadvertently placed the counterproposal on public notice again October 31, 1994, however, by notice dated November 3, 1994, the Commission deleted the later notification.

⁴ In response to the Public Notice announcing acceptance of petitioner's counterproposal, petitioner filed reply comments. Baker filed a motion to strike directed to these reply comments.

Baker argues in its Motion that petitioner's reply comments go beyond the counterproposal and address issues raised in the Notice of Proposed Rule Making and earlier comments. We will deny to the motion to strike because we find that the reply comments are generally addressing the Stanleytown counterproposal and engineering issues which apply to the Stanleytown counterproposal also apply to the Bassett proposal since the same transmitter site is proposed for both.

⁵ The Notice questioned whether adoption of petitioner's proposal to bring a second aural transmission service to Bassett would advance the Commission's preferential arrangement of allotments pursuant to the Commission's change of community procedure. See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

site is available for the proposed move, the Commission will be wasting its time and funds in adopting petitioner's proposal.

4. In rebuttal, petitioner supports both the initial proposal to allot Channel 260C3 to Bassett, and the counterproposal to allot Channel 260C3 to Stanleytown. As a preliminary matter, petitioner provided evidence that a suitable privately-owned parcel of property has been located and is available.⁶ Petitioner further submits that at its new proposed site⁷ there would be a gain of 2,176 sq. km. and 80,903 people, a loss of 323 sq. km. and 6,119 people, yielding a net gain of 1,853 sq. km. and 74,784 people. In this regard, petitioner states that the net gain represents 75.4% of the area and 88.5% of the population presently served by Station WZBB(FM). With respect to Baker's characterization of Stanleytown as a "hamlet", petitioner comments that the community is a CDP which obviates the need for the types of arguments concerning licensable status which Baker has attempted to raise, citing, *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). Nevertheless, petitioner submits that Stanleytown contains five churches, an elementary school, a private academy for grades 1-12, a health care center, a Ruritan club (which also provides refuse collection services to the town), a country club, post office, a major car dealership, three physicians, a nursing home, and approximately 25 other businesses. Stanleytown's major business is Stanley Furniture which employs about 2000 persons. Petitioner notes that communities the size of Stanleytown intentionally do not incorporate so as to benefit from county services, all of which are furnished to similar communities such as Bassett.

5. To begin with, we will address Baker's assertion that Stanleytown is not a community.⁸ Stanleytown is a CDP as defined by the U.S. Census. The designation of an area as a CDP raises the presumption that an area is a community for allotment purposes, although that presumption is rebuttable and Baker has in this case.⁹ Even so, petitioner states that Baker's information is false. Baker asserts that Stanleytown has no civic clubs, whereas petitioner argues that there is a Ruritan club and a country club. Baker claims there are no physicians, high or middle schools, hospital or garbage service. On the other hand, petitioner states that the Ruritan club provides garbage service and there are three physicians practicing in Stanleytown. Peti-

tioner further states there is an elementary school, a private academy, a health care center and a nursing home. While it appears Stanleytown is a small community (population 1,563),¹⁰ the community has a major employer (Stanley Furniture), churches, health facilities, civic and social clubs and a U.S. Post Office. We find that, contrary to Baker's beliefs, that Stanleytown is a community for allotment purposes.

6. Having found Stanleytown to be a community for allotment purposes, we must evaluate the comparative merits of retaining Channel 260A at Rocky Mount versus substituting 260C3 and reallocating the channel to either Bassett or Stanleytown. We believe the public interest would be served by the substitution of Channel 260A for Channel 260C3, and its reallocation to Stanleytown, since it would provide the community with its first local aural transmission service and enable Station WZBB(FM) to upgrade its facilities.¹¹ Specifically, the reallocation would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures.¹² Under those procedures, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities as set forth in *Revision of FM Assignment Policies and Procedures, supra*.¹³

7. In making our determination, we find that under priority three, Stanleytown would receive a first local transmission service. Bassett already has an AM local transmission service and, thus falls under priority four. Furthermore, the reallocation will not remove the sole local transmission service from Rocky Mount, since AM stations WNLB and WYTI will remain licensed to the community. In addition, our engineering analysis indicates that the upgrade and reallocation to Stanleytown will enable Station WZBB(FM) to provide service to a gain area of 2,228 square kilometers with a population of 77,405 persons. We recognize that the removal of Station WZBB(FM) from Rocky Mount will create a reception service loss area of 124 square kilometers with a population of 2,208 persons. However, our concerns about this loss area are mitigated by the fact that all of the population located in this loss area will continue to receive at least five full-time aural reception services.

8. An engineering analysis has determined that Channel 260C3 can be allotted to Stanleytown in compliance with the Commission's minimum distance separation require-

⁶ Petitioner has included as part of its evidence, a letter from Melvin L. Clark, Jr., a member of the Franklin County Planning Commission. The letter states that there are no zoning restrictions as they relate to the construction of a broadcast tower at petitioner's proposed site.

⁷ Petitioner also states that the areas and populations which would receive or lose service would be identical under either the initial proposal for reallocation to Bassett or the counterproposal for reallocation to Stanleytown since the same hypothetical site will provide city grade coverage to both communities.

⁸ We also note that Baker has challenged the availability of a theoretical site for the proposed channel allotment. While Baker contends that petitioner may not be able to obtain approval to erect a commercial radio station tower within the fully spaced area, we believe that this argument is speculative. There is no documentation from zoning officials to support this assertion. On the other hand, petitioner has presented evidence indicating the availability of a privately-owned parcel of property that would be suitable for its proposed transmitter site. Moreover, the question of whether a specific site is legally available and

suitable is a matter to be more appropriately considered in connection with an application for a construction permit for use of a channel. See *Pinckneyville, Illinois*, 30 R.R. 2d 1344, 1347 (1974) and *Key West, Florida*, 3 FCC Rcd 6423 (1988). In this case, we know that a fully spaced area exists to locate a transmitter site, and Baker has not shown that zoning problems would prevent locating an FM tower anywhere within the area specified by petitioner.

⁹ See e.g., *East Hemet, California, et. al.*, 4 FCC Rcd 7895 (1989); *Hannahs Mill, and Milledgeville, Georgia*, 7 FCC Rcd 3944 (1992).

¹⁰ Population figures are taken from the 1990 U.S. Census.

¹¹ Station WZBB(FM) is prohibited from upgrading its facilities at Rocky Mount due to short-spacing conflicts with Station WFXQ(FM), Channel 260C3, Chase City, Virginia, and Station WVAF(FM), Channel 260B, Charles town, West Virginia.

¹² See *Modification of License MO&O, supra*.

¹³ The allotment priorities are as follows: (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. The provision of second aural service and first local service are treated co-equally.

ments with a site restriction of 12.8 kilometers (18.0 miles) northwest to accommodate petitioner's desired site.¹⁴ In accordance with Section 1.420(i) of the Commission's Rules, we will modify Station WZBB(FM)'s license to specify operation on 260C3 at Stanleytown in lieu of Channel 260A at Rocky Mount, Virginia.

9. 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 **October 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Rocky Mount, Virginia	-
Stanleytown, Virginia	260C3

10. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license for Station WZBB(FM), IS MODIFIED to specify Stanleytown, Virginia, as its community of license on Channel 260C3, in lieu of Channel 260A at Rocky Mount, Virginia, 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.
- (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.

11. 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, WNLB Radio, Inc., licensee of Station WZBB(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license.

12. Accordingly, IT IS FURTHER ORDERED, That the petition for rule making submitted by WNLB Radio, Inc., to substitute Channel 260C3 for Channel 260A and reallocate Channel 260C3 to Bassett, Virginia (RM-8450), IS DENIED.

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

14. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

¹⁴ The coordinates for Channel 260C3 at Stanleytown are

North Latitude 36-48-47 and West Longitude 80-04-41.