

FCC MAIL SECTION

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Federal Communications Commission

DA 98-153

DISPATCHED

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

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 94-116
Table of Allotments,	)	RM-8507
FM Broadcast Stations.	)	RM-8567
(Jefferson City, Cumberland Gap,	)	
Elizabethton, Tennessee, and	)	
Jonesville, Virginia)	)	

**MEMORANDUM OPINION AND ORDER**  
(Proceeding Terminated)

**Adopted:** January 21, 1998**Released:** January 30, 1998

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by Eaton P. Govan, III and Berton B. Cagle, Jr. ("Govan & Cagle") directed to the Report and Order in this proceeding, 10 FCC Rcd 12207 (1995). Holston Valley Broadcasting Corporation ("Holston Valley") filed an Opposition to Petition for Reconsideration and Govan & Cagle filed a Reply to that Opposition. For the reasons discussed below, we deny the Petition for Reconsideration.

Background

2. At the request of Govan & Cagle, licensee of Station WAEZ, Channel 257C3, Elizabethton, Tennessee, and Station WEZG, Channel 257A, Jefferson City, Tennessee, the Notice of Proposed Rule Making in this proceeding, 9 FCC Rcd 5738 (1994), set forth two proposals. First, the Notice proposed the substitution of Channel 257C2 for Channel 257C3 at Elizabethton, and modification of the Station WAEZ license to specify operation on Channel 257C2. In order to accommodate this upgrade, the Notice also proposed the substitution of Channel 256A for Channel 257A at Jefferson City, the reallocation of Channel 256A from Jefferson City to Cumberland Gap, Tennessee, and modification of the Station WEZG license to specify operation on Channel 256A at Cumberland Gap. In response to the Notice, Holston Valley filed a counterproposal proposing the allotment of Channel 256A to Jonesville, Virginia, as a first local service.

3. The Report and Order allotted Channel 256A to Jonesville, Virginia, as a first local service. In doing so, the Report and Order determined that the proposed Channel 256A allotment at Cumberland Gap is technically defective because a major obstruction between the proposed transmitter site and Cumberland Gap would preclude line-of-sight coverage to all of Cumberland Gap as required by Section 73.315 (b) of the Commission's Rules. The Report and Order also

noted that under the Commission's allotment priorities, a first local service to Jonesville would prevail over a first local service to Cumberland Gap because of the larger population of Jonesville (927 versus 210 persons).

4. In the Petition for Reconsideration, Govan & Cagle set forth two arguments. First, Govan & Cagle contend that the Report and Order erroneously concluded that the Cumberland Gap proposal contravenes Section 73.315(b) of the Rules. Second, Govan & Cagle argue that the Cumberland Gap proposal is preferable "when all public interest factors are considered." We will consider each of these arguments below.

#### Section 73.315(b) of the Rules

5. In the Report and Order, we stated that our engineering analysis and terrain profile indicated that a major obstruction in the sight path between the proposed transmitter site and Cumberland Gap precludes line-of-sight service to Cumberland Gap in contravention of Section 73.315(b) of the Rules.<sup>1</sup> It continues to be our view that the major terrain obstruction on the eastern edge of Cumberland Gap precludes compliance with section 73.315(b) of the Rules. The terrain obstruction is approximately 12.1 kilometers from the proposed transmitter site and Govan & Cagle concede to be at an elevation of 1,700 feet above mean sea level.<sup>2</sup> From the proposed transmitter site, the terrain obstruction in this instance would require a tower of 384 meters (1,261 feet) to provide line-of-sight coverage to all of Cumberland Gap.<sup>3</sup> This is an unrealistic requirement to obviate a major terrain obstruction.

6. In their Petition for Reconsideration, Govan & Cagle first argue that its proposal satisfies the line-of-sight requirement because it is possible to provide the 70 dBu signal to all of Cumberland Gap as required by Section 73.315(b) of the Rules. In support of this argument, Govan & Cagle have submitted a further engineering exhibit pursuant to a procedure developed by the National Bureau of Standards (commonly referred to as "Tech 101").<sup>4</sup> According to this submission, 76.2 % of the locations within Cumberland Gap will receive a signal in excess of 70 dBu assuming a HAAT of 100 meters at the proposed transmitter site. We reject this argument because Govan & Cagle could have submitted this showing in a timely manner earlier

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<sup>1</sup>In order to maximize service to a community of license and minimize interference, Section 73.315(b) of the Rules prescribes that a transmitter site be chosen from which line-of-sight can be obtained from the antenna over the community of license and specifically proscribes a major obstruction in that path.

<sup>2</sup>See Engineering Exhibit at page 3. The 1,700-foot determination is also confirmed by our own engineering study.

<sup>3</sup>The maximum facilities for a Class A FM station are six kilowatts at an antenna height above average terrain (HAAT) of 100 meters. In order to maintain maximum equivalent facilities, an antenna height of 384 meters would require a corresponding reduction in power to 392 watts.

<sup>4</sup>P.L. Rice, A.G. Longley, D.A. Norton and A.P. Barsis, "Transmission Loss Predictions for Tropospheric Communications Circuits," NBS Technical Note 101, first published in 1965 by the National Bureau of Standards.

in this proceeding. See Section 1.106(c) of the Rules; see also Valley Telecasting Co., Inc. v. FCC, 336 F2d 914 (D.C. Cir.1964).

7. The line-of-sight issue was raised in this proceeding and Govan & Cagle was afforded a timely opportunity to respond to this issue. Specifically, Holston Valley raised this issue in its "Counterproposal and Comments" by stating:

"There is a major terrain obstacle between the Channel 256A transmitter site and Cumberland Gap ... Channel 256A at the site proposed by G & C cannot provide line of sight 70 dBu service to Cumberland Gap."

In "Reply Comments" Govan & Cagle responded as follows:

"A radial is drawn ... from the proposed coordinates for Channel 256A at Cumberland Gap ... through the city of Cumberland Gap. While this radial crosses Poor Valley Ridge, the highest elevation on the path is 1,600 feet AMSL, not 1,700 feet as stated in the HVBC Comments. Additionally, this ridge is approximately one-mile farther away from Cumberland Gap than was depicted on the HVBC exhibit, Exhibit E-5, and is therefore no major terrain obstacle. The predicted city-grade (70 dBu F(50,50)) contour was computed according to the Commission's Rules in the relevant directions and is plotted on Exhibit 1 clearly showing that the 70 dBu contour extends beyond the City of Cumberland Gap by more than 4 miles."

In view of this disagreement and after consideration of both arguments, it was incumbent upon us to make our own engineering evaluation of this matter which required a terrain profile study.

8. We routinely review applications and rulemaking proposals to determine compliance with specific technical requirements. We did so in this proceeding. As discussed in paragraph 5, supra, the obstruction in this instance is, in fact, a major obstruction and precludes compliance with Section 73.315(b) of the Rules. Our review of this matter was not an improper administrative procedure. Cf. KIRO, Inc. v. FCC, 438 F2d 141 (D.C. Cir. 1970). Contrary to the argument advanced by Govan & Cagle, there is no "administrative due process right" for either party to review our engineering study prior to the Report and Order. The appropriate remedy by an aggrieved party is to file a petition for reconsideration disputing the accuracy of our engineering finding.

9. Govan & Cagle have cited three cases to support its contention that it should have been afforded an opportunity to review our engineering study. Govan & Cagle also contend that these cases support the argument that their proposal should not have been denied because it did not provide line-of-sight service to Cumberland Gap as required by Section 73.315(b) of the Rules. These cases do not warrant departure from our decision in the Report and Order. We will discuss each of these cases.

10. In KIRO, Inc. v. FCC, *supra*, the Court held that a participating party was entitled to review an engineering exhibit, upon which the Commission had based its decision, submitted by a party who had not previously participated in the proceeding. In this proceeding, the parties participated and addressed the line-of-sight issue. It did not deny administrative due process to either party for us to then resolve a specific engineering issue concerning a specific rule on the basis of our expertise. See MCI Cellular Telephone Company v. FCC, 738 F2d 1322 (D.C. Cir. 1984). In Rush County Broadcasting Co., 26 FCC 2d 480 (1970), the Commission did state that line-of-sight over the entire community is not an absolute requirement. In that case, the Commission specifically determined that the obstruction was not major. Instead, that case was considered in the context of a "minor" deviation which, to the extent it restricted line-of-sight to Rushville, Indiana, should not lead to an absolute denial of a proposal. The Commission also noted that the applicant had taken steps to increase antenna height that would remove or lessen any possible undesired consequences. In this proceeding, we have found the obstruction to be major and that an antenna structure of sufficient height to overcome this obstruction to be unrealistic. Govan & Cagle have not contested this engineering conclusion. In Margaret C. Schaller, 5 FCC Rcd 5329 (1990), the Chief of the Audio Services Division observed that a failure to provide line-of-sight to a community of license does not necessarily imply deficient coverage. That statement was made in the context of a finding that an opposing party had not made a convincing showing that a terrain obstruction precluded line-of-sight to the proposed community of license. Our action in this proceeding is consistent with those earlier conclusions that a minor obstruction does not necessarily imply deficient coverage.

#### Preferred Allotment

11. Govan & Cagle argue that their proposal for a first local service to Cumberland Gap and an upgraded service at Elizabethton should have been preferred over a first local service for Jonesville. The Report and Order did not make a comparison of the two competing proposals because of the engineering deficiency of the Cumberland Gap allotment. In this regard, the Report and Order did note that had we made a comparison between first local services to Cumberland Gap and Jonesville, a Jonesville allotment would be preferred because of the larger population (927 versus 210 persons). We continue to believe that an engineering deficiency of the Cumberland Gap proposal renders a comparative consideration of the two competing proposals unnecessary and a Channel 256A allotment to Jonesville, Virginia, as a first local service is the appropriate resolution of this proceeding. However, we would like to clarify the comparative aspect of the Report and Order.

12. At the outset, we agree with the contention set forth by Govan & Cagle that any comparative analysis in this proceeding would not have been limited to merely comparing the respective populations of Cumberland Gap and Jonesville.<sup>5</sup> Had the Cumberland Gap proposal

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<sup>5</sup>Conflicting sets of FM allotment proposals are comparatively considered under the guidelines set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982). The priorities are as follows:

been technically acceptable, a full comparative analysis, as required by priority (4) in FM Assignment Priorities and Policies, *infra*, would have included the fact that the proposed reallocation to Cumberland Gap makes possible the companion aspect of the Govan & Cagle proposal for a Channel 257C2 upgrade at Elizabethton, Tennessee.<sup>6</sup>

13. However, in order to compare these proposals on an overall basis, we would first have had to make a threshold finding that the reallocation of the Station WEZG channel from Jefferson City to Cumberland Gap would have resulted in a preferential arrangement of allotments. To make such a finding, we would compare the existing allotment at Jefferson City versus the proposed allotment at Cumberland Gap in accordance with FM Assignment Priorities and Policies. See Modification of FM and TV Channels to Specify a New Community of License ("Community of License"), 4 FCC Rcd 4870 (1989), *recon*, 5 FCC Rcd 7094 (1990). In this case, we could not have made a finding that Cumberland Gap would be the preferred allotment, and we would, therefore, not have considered the population gain resulting from the upgrade at Elizabethton. We would have removed the second local service from Jefferson City, a community of 5,494 persons, and reallocated the channel to Cumberland Gap, a community of 210 persons. This would be inconsistent with previous actions in which we have not accorded a decisional significance as a first service to a community of such a size over a competing proposal for a "competitive voice" to a larger community. It is our view that in such a comparative proceeding, we would have deemed Cumberland Gap to be a "quiet village" and therefore not entitled to a dispositive preference as a first local service. See Debra D. Carrigan, 58 RR2d 96 (1985); Santee Cooper Broadcasting Co., 57 RR2d 662 (1992); Ruarch Associates, 101 FCC 2d 1358 (1985).

14. Such a decision would have been reinforced by Community of License. In Community of License, the Commission observed that the public has a legitimate expectation that existing service will continue and this expectation is a factor that must be weighed independently against any service benefit that may result from reallocating a channel. 5 FCC Rcd at 7097. Removal of service from Jefferson City would have been warranted only if there were sufficient public interest factors to offset the expectation of continued service. The fact that the overall Govan & Cagle proposal would have served 7,321 more persons in an area already receiving abundant service is not sufficient to overcome the loss of a competitive service in Jefferson City

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- 1) First full-time aural service
  - 2) Second full-time aural service
  - 3) First local service
  - 4) Other public interest factors

(Co-equal weight is given to priorities (2) and (3))

<sup>6</sup>As noted by Govan & Cagle, a reallocation from Jefferson City to Cumberland Gap would have resulted would have resulted in a net loss of service to 43,039 persons for Station WEZG. On the other hand, the proposed upgrade for Station WAEZ at Elizabethton would have resulted in a gain of service to 93,766 persons. The overall net service gain from both proposals would have been 50,727 persons. In comparison, a new Channel 256A allotment at Jonesville will serve 43,406 persons. Therefore, the two Govan & Cagle proposals would have served 7,321 more persons.

and the expectation that this service will continue.<sup>7</sup>

15. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Eaton P.Govan,III and Berton B. Cagle, Jr. IS HEREBY DENIED.

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

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

FEDERAL COMMUNICATIONS COMMISSION

Charles W. Logan  
Acting Chief, Policy and Rules Division  
Mass Media Bureau

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<sup>7</sup>The Commission has considered 5 or more reception services as "abundant." Family Broadcasting Group, 53 RR2d 662, 669 (Rev. Bd. 1983, rev. denied FCC 83-559 (Comm'n Nov. 29, 1983); See also LaGrange and Rollingwood, Texas, 10 FCC Rcd 333& (1995).