



WSTE-FM, Toccoa, Georgia, to specify "Sugar Hill, Georgia" as the Station's community of license. In support of reconsideration, the following is shown:

Southern requested the Commission to delete Channel 291C1 from Toccoa and to reallocate it to Sugar Hill, Georgia, with a concurrent modification of the license of WSTE-FM to operate on Channel 291C1 at Sugar Hill, Georgia. This change is permissible under Section 1.420(i) of the Rules, which authorizes the Commission to modify the license or permit of an FM station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's present allotment.

In the Branch Letter, the Chief said he was returning the petition for rule making because (a) it would result in a short-spaced allotment to WYAY, Channel 294C, Gainesville, Georgia, and (b) the Commission did not believe that the proposed reallocation would result in a public interest benefit which would justify the allotment of a channel which does not comply with the Commission's mileage separation requirements. The Branch Letter recognized that "the exception of the requirement that an allotment at a new community of license comply with Section 73.207 of the Rules is limited to the short-spaced FM stations in existence prior to the creation of the FM Table of Allotments," but failed to note that WSTE-FM is such a grandfathered short-spaced station.

#### **Preliminary Matter**

As an initial matter, the Branch Letter makes a reference to Southern's pending application (File No. BMPH-980128IF) to modify the facilities of WSTE-FM. As that application is independent of the matters presented in Southern's Petition for Rule

Making that seeks to change the community of license of WSTE-FM, the application should not be considered in connection with Southern's Petition for Rule Making.

### **WSTE-FM is a Grandfathered Short-Spaced Station**

As previously noted, WSTE-FM is a so-called "grandfathered short-spaced station" as contemplated by Section 73.213 of the Commission's Rules. WSTE-FM was authorized prior to November 16, 1964, did not meet the separation distances required by Section 73.207 of the Rules, and has remained continuously short-spaced since that time. As such, the station may be modified or relocated with respect to other short-spaced stations. Section 73.213(a)(4) of the Rules provides that, "For stations covered by this paragraph (a), there are no distance separation or interference protection requirements with respect to second-adjacent and third-adjacent channel short-spacings that have existed continuously since November 16, 1964." Therefore, because the staff was apparently unaware of the grandfathered status of WSTE-FM, it reached the erroneous conclusion to return Southern's Petition for Rule Making.

The Commission has authorized the relocation of grandfathered short-spaced FM stations in other cases. In *East Los Angeles, Long Beach and Frazier Park, California*, 10 FCC Rcd 2864 (1995), the Commission authorized the subject station to move to a short-spaced transmitter site that would not increase the interference potential of any other station and would result in service to a larger population than would the existing facility. In that case, consideration was given to the impact of the movement of the station in light of the interference protection requirements of former Section 73.213(a). Now, in light of the removal of any consideration of the second and third adjacent

constraints for grandfathered short-spaced FM stations, there is even less reason for the Commission to take the position set out in the Branch Letter. Southern pointed out in its January 18, 1998, letter that in *Newman and Peachtree City, Georgia*, 5 FCC Rcd 1774 (MM Bur. 1990), the Commission approved a community change, with this observation:

We have stated that we will consider waiving strict application of Section 73.207 in limited circumstances, provided that no new short spacings are created, no existing short spacings are exacerbated, and the potential for interference between the currently short-spaced stations is not increased.

As Southern stated, no transmitter site change from the one authorized is proposed in the petition, so no existing short spacings are exacerbated and the potential for interference between the currently short-spaced stations is not increased. Full city-grade service to Sugar Hill can be provided from the authorized transmitter site. Thus, there is no impediment to the relocation of WSTE-FM under the Commission's stated policies. If Southern were not seeking to change WSTE-FM's community of license, a rule making proceeding would be unnecessary. Southern could relocate WSTE-FM to any site without regard to the second or third adjacent short spaces by simply filing form 301. Although the procedure may be different, the practical effect is exactly the same, i.e., WSTE-FM could relocate its transmitter site through an application but would not be permitted to do so through a rule making proceeding. Such a dichotomy is arbitrary and will not withstand judicial review. A waiver of Section 73.207 is warranted.

### **Public Interest Benefit**

Contrary to the Commission's belief expressed in the Branch Letter, the proposed reallocation will result in a public interest benefit which would justify the allotment of a channel which does not comply with the Commission's mileage separation requirements. WSTE-FM will provide a first local service to Sugar Hill, Georgia, a community currently without any local service. In *East Los Angeles, Long Beach and Frazier Park, California, supra*, the Commission found that the provision of first local service, *inter alia*, was one of the reasons justifying the reallocation of the channel. In light of the above showing that WSTE-FM is a grandfathered short-spaced FM station that is eligible to change its community of license in this manner, the Commission's concern for a "justification" to change the Table of Allotments becomes moot.

Southern requests the Commission to reconsider the action taken in the Branch Letter, to waive Section 73.207 to the extent necessary to accept Southern's Petition for Rule Making for filing, and to promptly issue a Notice of Proposed Rule Making to seek comment on Southern's proposal to reallocate channel 291C1 to Sugar Hill, Georgia.

In view of the foregoing, Southern requests the Commission to (a) reconsider the Branch Letter, (b) allocate Channel 291C1 to Sugar Hill, Georgia, and (c) modify the license of WSTE-FM to operate on FM Channel 291C1 at Sugar Hill, Georgia. As stated *supra*, if the FCC modifies the license of WSTE-FM to operate on Channel 291C1 at Sugar Hill, Southern will timely file an application for minor change construction permit to operate

WSTE-FM at Sugar Hill, and upon grant thereof, Southern will construct the new facilities and operate them.

Respectfully submitted,

**SOUTHERN BROADCASTING  
OF PENSACOLA, INC.**

By:

A handwritten signature in black ink, appearing to read "Gary S. Smithwick", written over a horizontal line.

Gary S. Smithwick  
Its Attorney

**SMITHWICK & BELENDIUK, P.C.**

1990 M Street, N.W.

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(202) 785-2800

April 16, 1998



Federal Communications Commission  
Washington, D.C. 20554

MAR 20 1998

Mr. Gary S. Smithwick  
Smithwick & Belendiuk, P.C.  
1990 M Street, N.W.  
Suite 510  
Washington, D.C. 20036

Dear Mr. Smithwick:

This is in response to the petition for rule making which you filed on November 24, 1997, on behalf of Southern Broadcasting of Pensacola, Inc. ("Southern"). Southern, licensee of Station WSTE-FM, Toccoa, Georgia, requests the deletion of Channel 291C1 from Toccoa, Georgia, its reallocation to Sugar Hill, Georgia, as the community's first local aural service, and the modification of its license to specify Sugar Hill as the station's community of license.

An initial engineering review shows that at the coordinates requested in your petition, which is the site specified in your outstanding construction permit, BPH-970325IC, the allotment of Channel 291C1 at Sugar Hill would be short-spaced to Station WYAY, Channel 294C, Gainesville, Georgia. In addition, use of the site specified in your pending application (BMPH-980128IF), would be short-spaced to Station WGST-FM, Channel 289C2, Canton, Georgia, Station WSTH-FM, Channel 291C1, Alexander, Alabama, as well as Station WYAY at Gainesville.

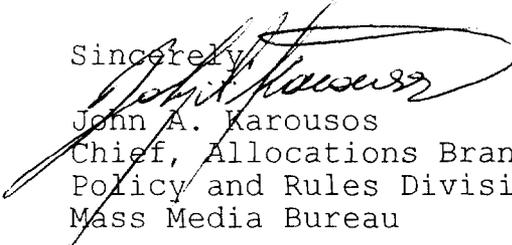
By letter of January 22, 1998, you acknowledge that the transmitter site specified in your petition would not meet the mileage separation requirements set forth in Section 73.207. However, because you are not requesting a change in your existing transmitter site or technical facilities, Southern urges that the petition be considered under the guidelines set forth in Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992).

We are returning your petition for rule making for two reasons. First, it will result in a short-spaced allotment to Gainesville, Georgia, in contravention of Section 73.207 of the Rules. We agree that, like Newnan and Peachtree City, the proposal does not involve relocating the existing transmitter site. However, the exception to the requirement that an allotment at a new community of license comply with Section 73.207 of the Rules is limited to the short-spaced FM stations in existence prior to the creation of the FM Table of Allotments. We see no overriding public interest benefit in expanding Newnan and Peachtree City in order to create a new short-spaced allotment in this proceeding.

We also believe that the proposed reallocation will not result in a public interest benefit which would justify the allotment of a channel which does not comply with the Commission's mileage separation requirements. Specifically, it does not improve the existing short-spacing, will not provide new service, and will provide no new opportunity for additional service not already available. The only apparent benefit will be identifying Station WSTE-FM as licensed to Sugar Hill. As the Commission has found in the past, the provision of a first local transmission service is not a sufficient justification for the degradation of the Table of FM Allotments.

Accordingly, your petition for rule making is not acceptable for consideration.

Sincerely,

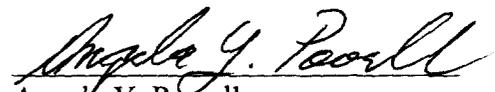


John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**CERTIFICATE OF SERVICE**

I, Angela Y. Powell, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on this 16th day of April, 1998, a copy of the foregoing was hand delivered to:

Mr. John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
2000 M Street, N.W.  
Room 554  
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Angela Y. Powell