

FCC MAIL SECTION

Federal Communications Commission

DA 99-825

MAY 4 2 24 PM '99

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

In the Matter of)
)
 Amendment of Section 73.202(b)) MM Docket No. 97-233
 Table of Allotments,) RM-9162
 FM Broadcast Stations.)
 (East Brewton, Alabama and)
 Navarre, Florida))

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 30, 1999

Released: April 30, 1999

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of the Report and Order¹ in this proceeding filed by 550-AM.² No opposing pleadings have been filed. For the reasons discussed below, we grant the Petition for Reconsideration.

Background

2. At the request of 550-AM ("Petitioner"), permittee of unbuilt Station WGCX(FM), Channel 239A, East Brewton, Alabama, the Notice of Proposed Rule Making ("Notice") in this proceeding³ proposed the substitution of Channel 239C3 for Channel 239A, at East Brewton, Alabama, the reallocation of Channel 239C3 to Navarre, Florida, and the modification of Station WGCX's authorization accordingly. This reallocation proposal was filed pursuant to Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.⁴

3. In considering a reallocation proposal, the Commission compares the existing allotment versus the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982). The Notice requested comment on this proposed reallocation and specifically solicited additional information to substantiate Petitioner's allegations that Navarre is a community for allotment purposes and that its population is

¹ 13 FCC Rcd 22188 (Allocations Br. 1998).

² 550-AM also filed a Supplement to the Petition for Reconsideration which we will consider because it involves a matter of which we can take official notice. See infra at para. 8.

³ 12 FCC Rcd 19469 (Allocations Br. 1997).

⁴ See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License"), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

18,000 persons.

4. The Report and Order determined that Navarre, Florida, qualifies as a "community" to which an FM channel could be allotted because it has many local businesses, a post office, two newspapers, several local civic and social organizations, churches, and schools. Nevertheless, the staff was unable to confirm the Petitioner's estimate of Navarre's population. Since the 1990 U.S. Census did not list Navarre as an incorporated town or a "Census Designated Place,"⁵ the staff relied on the 1998 Rand McNally Commercial Atlas and Marketing Guide ("Atlas") to determine Navarre's population. The Atlas states that the population of Navarre is 900. Since Navarre, Florida, qualified as a "community," Petitioner's reallocation proposal required us to compare the existing allotment to East Brewton, Alabama, with the proposed allotment to Navarre, Florida, to determine whether the reallocation would result in a preferential arrangement of allotments. In this regard, the existing allotment to East Brewton, Alabama, would provide the first local transmission service to that town, which has a population of 2,579, whereas allotting a new FM channel to Navarre, Florida, would provide that community, which appeared to have a population of 900, with its first local transmission service. Since it appeared that East Brewton had a greater population than Navarre, the larger community of East Brewton was the preferred allotment.

5. In making this determination, we observed that the entire area that would be served by a Channel 239C3 allotment at Navarre already receives at least seven aural services and was considered to be adequately served. In contrast, it appeared that the existing East Brewton allotment would provide a fifth reception service to 7,011 persons in an area of 746.8 square kilometers (288.5 square miles) east northeast of East Brewton. Since the reception of five aural signals is considered to be adequate service, we noted that the East Brewton allotment would provide a public interest benefit by providing a fifth reception service to a sizeable area and population. Considering the totality of factors in this case, the existing allotment to East Brewton was viewed as superior to the proposed allotment to Navarre, because it appeared that the existing allotment would provide a first local service to more people than the requested allotment to Navarre, Florida, and would also provide a fifth reception service to 7,011 persons. In these circumstances, the Report and Order denied Petitioner's requested reallocation of Station WGCX from East Brewton, Alabama to Navarre, Florida.

Petition for Reconsideration

6. Petitioner claims that the Commission erred in only attributing 900 persons to the community of Navarre. In its Petition for Reconsideration, Petitioner has submitted significant data indicating that the actual population of Navarre is at least several times as great as that of East Brewton, Alabama. In Exhibit 2 to its Petition for Reconsideration, it provides a letter from Bill Campbell, who is a Santa Rosa County Commissioner. Navarre is located in Santa Rosa County, Florida. Mr. Campbell states that the estimated population of Navarre is over 22,000 persons, while the community of Navarre Beach is about 3,000 persons. Mr. Campbell's description of the boundaries of Navarre is similar to that of Mr. Jerry Sears, who is the Chief of the Holley-Navarre Fire Department, in Petitioner's Exhibit 3. Further, Mr. Campbell's description of Navarre's boundaries coincides with the area marked as Navarre in Exhibit 1 of Petitioner's Comments. This area includes four voting precincts: Hidden Creek, West Navarre, East Navarre and Navarre Beach, and Biscayne Point. Navarre Beach is a small community on an island across Santa Rosa Sound from Navarre that faces the Gulf of Mexico. Its voters are included in Precinct #26, East Navarre and Navarre Beach. We take official notice that the Santa Rosa County Office of the

⁵ If Navarre had a recognized population of 1,000 or more, the U.S. Census could have listed it as a "Census Designated Place." See Bureau of the Census, U.S. Dep't. of Commerce, Pub. No. 1990 CPH-2-11 1990 Census of Population and Housing, Florida, pp. A9-10.

Supervisor of Elections listed the following numbers of registered voters in the four precincts that comprise Navarre and Navarre Beach as of March 1999: Hidden Creek Precinct #34--3,784 registered voters; West Navarre Precinct #29--2,313 registered voters; East Navarre and Navarre Beach Precinct #26--2,482 registered voters, and Biscayne Point Precinct #35--2,570 registered voters. The only precinct that has voters not located in Navarre is Precinct #26. The four precincts have a total of 11,149 voters.

7. Petitioner also provides other information demonstrating that the population of Navarre has grown immensely since the 1990 U.S. Census. Petitioner's Exhibit 5 is a letter from James L. Brooks, the Customer Service Manager at the local post office, who states that the number of delivery points in "Navarre, Florida 32566" is 7,347 residences and 221 businesses for a total of 7,568. This exhibit is further supported by a letter from Mike L. Bickers, Postmaster for the area that includes Navarre, who states that the local Navarre Branch has the potential to deliver to 8,029 structures. See Petitioner's Exhibit 6. Mr. Bickers also explains that the community of Navarre Beach is included in the structure count and that some of those units are only vacation homes. More significantly, he points out that usually more than one person lives in each structure. Petitioner's Exhibit 10, provided by the Holley-Navarre Fire District, is a study which shows both the tremendous growth in residential structures since 1992 as well as the fire department's estimate that the population within its service area is about 17,107, assuming 2.7 persons per residence. Petitioner observes that, given the small size of Holley, which the fire department serves, it is evident that most of the growth in structures and population has occurred in the community of Navarre. Petitioner notes that Navarre Beach, another small community, is not served by the Holley-Navarre Fire Department. Petitioner's Exhibit 11 consists of a letter from Donna Jones, an Administrative Assistant for the Santa Rosa County Inspection Department, that shows the explosive growth in construction in Navarre over the past several years. Ms. Jones states that 2,783 family dwellings were constructed between 1991 and 1996 in Navarre-Holley, 450 new family dwellings were constructed in 1997 and the first quarter of 1998 showed 103 family dwellings being constructed in Navarre-Holley. Ms. Jones estimates that only five percent of the construction took place in Holley and the rest occurred in Navarre.

8. In its Petition for Reconsideration, Petitioner states that Station WPHG-FM, a noncommercial facility recently licensed to Brewton, Alabama, would serve all but 674 persons of the 7,011 persons the Report and Order stated would not receive more than four radio services if Station WGCX relocated to Navarre, Florida. In its Supplement to its Petition for Reconsideration, Petitioner asserts that Station WFXX(FM) (formerly WWGA), Georgiana, Alabama, has recently commenced operation and that it will provide primary service to the entire area that the Report and Order stated would receive no more than four radio services if Station WGCX were relocated to Navarre, Florida. Thus, Petitioner argues, after the proposed relocation of Station WGCX from East Brewton, Alabama, to Navarre, Florida, the area that the Report and Order claimed would not receive more than four radio signals will be adequately served with five primary signals.

Discussion

9. As a threshold matter, although Section 1.429(b) of the Commission's Rules generally prohibits reconsideration petitions from relying upon previously undisclosed facts, an exception exists if the Commission determines that consideration of the facts relied on is required in the public interest. See 47 C.F.R. § 1.429(b)(3). We believe that the new facts that have been submitted by Petitioner regarding the population of Navarre fall within this exception because they seek to cure a decisionally significant and manifest error, which, if left uncorrected, would adversely affect the public interest. See, e.g., Garden City, Indiana, 6 FCC Rcd 3747, 3748 (Policy and Rules Div. 1991), citing WWIZ, Inc., 37 FCC 685, 695 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

10. After having reviewed the evidence and the arguments contained in the Petition for Reconsideration and the preceding record, we have determined that the current population of Navarre, Florida, is at least several times as large as that of East Brewton, Alabama (population of 2,579), and that the proposed upgrade of Channel 239A to Channel 239C3 and the relocation of that channel to Navarre, Florida is a preferential arrangement of allotments compared to leaving Channel 239A allotted to East Brewton, based upon the FM allotment priorities set forth in FM Priorities, supra. As stated previously, we take official notice that the Santa Rosa County Office of the Supervisor of Elections has listed 11,149 registered voters in the four precincts comprising Navarre. The only precinct including voters not living in Navarre is Precinct #26. Even if we subtract all of the 2,482 voters included in Precinct #26, there are 8,667 registered voters in the three precincts that consist entirely of Navarre residents. Thus, assuming that not all residents of Navarre are registered voters, *i.e.*, that some of the residents are under age 18, it would appear that Navarre might have a population of considerably more than 10,000 persons. Although the information set forth in paragraphs 6 and 7, supra, indicates that Navarre probably has a population ranging from 14,000 to 22,000, it is very clear that Navarre has a population that is at least several times the size of East Brewton, Alabama, and thus must be the preferred allotment in this case.

11. Further, virtually all the areas that we predicted would receive only four radio services if Station WGCX were relocated from East Brewton, Alabama, to Navarre, Florida, are already receiving at least five radio signals, which is considered to be adequate service. It appears that a small area would receive only four radio signals if the allotment were to be relocated to Navarre, Florida. This area consists of 24.6 square kilometers (9.5 square miles) and 150 persons. We believe that the benefit of providing a fifth reception service to these 150 persons is outweighed by the overall public interest benefits of providing a first local transmission service to the substantial population of Navarre and permitting the station to upgrade its class, thereby serving a total population of 316,060, as opposed to the 26,858 persons that would be served by the station remaining in East Brewton. Accordingly, we shall grant Petitioner's Petition For Reconsideration, substitute Channel 239C3 for Channel 239A, at East Brewton, Alabama, and reallocate Channel 239C3 to Navarre, Florida.

12. An engineering analysis has determined that Channel 239C3 can be allotted to Navarre, Florida, consistent with the minimum distance separations requirements of Section 73.207(b) of the Commission's Rules, at the petitioner's specified site, located 5.1 kilometers (3.2 miles) north of Navarre, utilizing coordinates 30-26-52 and 86-51-55.⁶ In accordance with Section 1.420(i) of the Commission's rules, we also modify Station WGCX(FM)'s construction permit to specify operation on Channel 239C3 at Navarre, Florida, as its new community of license.

⁶ We note that Channel 239C3 at Navarre is short-spaced to three pending applications for Channel 237A, Gulf Breeze, Florida. However, Channel 291A was substituted for Channel 237A at Gulf Breeze in the context of MM Docket No. 83-493, and that allocation has become final. See footnote 7 of the Notice in this proceeding.

13. Accordingly, pursuant to the authority found 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 June 14, 1999, 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:

<u>City</u>	<u>Channel No.</u>
East Brewton, Alabama	-----
Navarre, Florida	239C3

14. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of 550-AM for Station WGCX(FM) East Brewton, Alabama, IS MODIFIED to specify operation on Channel 239C3 in lieu of Channel 239A and to specify Navarre, Florida, in lieu of East Brewton, Alabama, as the community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the permittee 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.

15. Pursuant to Commission Rule Sections 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, 550-AM, permittee of Station WGCX(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade and change in community of license.

16. IT IS FURTHER ORDERED That 550-AM's Petition for Reconsideration IS GRANTED.

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

FEDERAL COMMUNICATIONS COMMISSION

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