

FCC MAIL SECTION

Federal Communications Commission

DA 99-1947

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

DISPATCHED BY

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 98-207
Table of Allotments,)	RM-9408
FM Broadcast Stations.)	RM-9497
(Wellsville and Canaseraga, New York) ¹)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 15, 1999

Released: September 24, 1999

By the Chief, Allocations Branch:

1. At the request of RP Communications ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 13 FCC Rcd 23338 (1998), proposing the allotment of Channel 246A to Wellsville, New York, as the community's second local FM and third local aural service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Comments and a counterproposal was also filed by RJ Communications.² Reply comments were filed by the petitioner, RJ Communications filed a response to petitioner's reply comments, and petitioner also filed reply comments in response to RJ Communications counterproposal.³

2. RJ counterproposes the allotment of Channel 246A to Canaseraga, NY, as the community's first local aural transmission service. Wellsville and Canaseraga are located approximately 41 kilometers apart whereas the Commission's Rules require a minimum separation of 115 kilometers between co-channel Class A channels. It states that Canaseraga is an incorporated community with a 1990 population of 684 persons according to the U.S. Census.

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

² Public Notice of the filing of the counterproposal was given on March 10, 1999, Rept. No. 2320.

³ The Notice of Proposed Rule Making set forth January 25, 1999, and February 9, 1999, as the dates for filing comments and reply comments, respectively. Petitioner's reply comments were filed on February 10, one day late. Petitioner gave no reason for the late filing and did not request their acceptance as late-filed. The Commission's Rules generally do not contemplate the filing of pleadings beyond the comment and reply comment periods as set forth in the Notice. Therefore, RJ Communications' response to petitioner's reply comments would normally be considered as an unauthorized pleading and not considered. However, where, as here, a counterproposal is filed, the Commission allows an additional fifteen day period for responses to be filed, with the response time starting from the date of the Public Notice announcing the filing of the counterproposal. Further, the Commission has previously interpreted this fifteen day period as a routine extension of the reply comment period and has not limited the scope of the response to the counterproposal itself. See Corinth, Hadley and Queensbury, New York, 2 FCC Rcd 3316 (1987). Since the Public Notice announcing RJ's counterproposal was released on March 10, the pleading cycle did not close until March 25, 1999. Therefore, we will consider all of the pleadings filed herein.

RJ points out that Canaseraga has its own local government, headed by a mayor and board of trustees. In addition, it assesses its own taxes and has its own fire department and medical center. RJ also submits that Canaseraga has a public library, its own school district and kindergarten through 12th grade school, post office and zip code, churches, numerous businesses and various community organizations, including the American Legion. In addition to providing a first local aural service to the residents of Canaseraga, RJ states that a Channel 246A station at Canaseraga would provide service to a larger population than would the allotment at Wellsville (56,727 versus 42,133 persons). It acknowledges that neither proposed allotment would provide a first or second aural reception service and each community receives numerous services, with Wellsville receiving at least 15 AM and FM services and Canaseraga receiving at least 20 such services. However, it submits that the allotment of Channel 246A to Canaseraga would better serve the public interest and further the Commission's allotment priorities since the channel would provide the community with its first local aural transmission service, as opposed to a third such service at Wellsville.⁴

3. Petitioner, in its opposition to the counterproposal, argues that the allotment at Canaseraga is "fatally" defective since it would be short-spaced to Canadian Station CIGL-FM, Channel 246B, Belleville, Ontario, as the two allotments are separated by only 206.1 kilometers. It states that RJ appears to have relied on a required separation of 206 kilometers between domestic Class A and Canadian Class B stations. However, petitioner points out that according to the Canada-United States Agreement (the "Agreement"), as modified on July 9, 1977, a 6 kilowatt Class A domestic station must be separated by 210 kilometers from a Class B Canadian station.⁵ Taking into account the need for this separation between the U.S. and Canadian allotments, as well as the need to protect domestic allotments, the result is a very small, wedge-shaped, area where a Canaseraga transmitter could be sited. However, petitioner contends that this 2.4 square kilometer area, located 15 kilometers south of Canaseraga, would not enable the station to provide unobstructed line-of-sight service to the community. Instead, it states that, even with a 150-meter above ground level antenna height, line-of-sight would be blocked by "significant terrain features." Further, it states that part of this 2.4 square kilometer area is shown as being within a State forest and thus may raise environmental and permit concerns.

4. In response, RJ disputes that the allotment of Channel 246A to Canaseraga is technically unacceptable. First, it points out that short-spacing issues between Canadian and U.S. stations are treated differently than between two domestic allotments. Specifically, the

⁴ The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local aural service; and (4) other public interest matters. Priorities (2) and (3) are given co-equal weight. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

⁵ See Agreement between the Government of the United States of America and the Government of Canada Concerning the Use of the 88 to 108 MHz Frequency Band for Frequency Modulation Broadcasting (FM), dated February 25, 1991, as amended July 9, 1997. See also Public Notice, U.S.-Canada FM Agreement Modified to Permit Added Flexibility for FM Translators, 13 FCC Rcd 4759 (1997) (announced adoption of a 6 kW maximum effective radiated power level for Class A assignments).

Agreement allows for shorter separations than those set forth in the Table of Minimum Separations, Section 73.207(b)(2), where no objectionable interference will be caused within the protected service contour of the existing allotments. Thus, RJ submits that the Commission routinely accepts for consideration allotment proposals which are short-spaced to Canadian stations, citing Albion, New York, et al., 13 FCC Rcd 15376 (1998), Old Forge, New York, et al., 13 FCC Rcd 14001 (1998), and Hilton, New York, et al., 12 FCC Rcd 3584 (1997). In this case, RJ states that a Channel 246A allotment at Canaseraga will not cause objectionable interference to the protected service contour of Station CIGL-FM. In fact, it states that the signal of a Canaseraga station located within the proposed reference coordinates will not even cross the Canadian border. However, should the Commission not wish to enter into special negotiations with Canada, RJ states that we need only impose a site restriction that meets the applicable spacing guidelines, an action which it states the Commission routinely does, even on its own motion, citing Albion, New York, et al., *supra*, Levan, Utah, et al., 12 FCC Rcd 13388 (1997), Wellington, Texas, 13 FCC Rcd 4454 (1998), and Corinth, New York, et al., 5 FCC Rcd 3243 (1990). To this end, RJ states that it has found an alternate site, at coordinates 42-19-38 NL; 77-43-47 WL, which meets the required 210 kilometer spacing to Station CIGL-FM as well as providing 70 dBu coverage to all of Canaseraga. As to the provision of city-grade coverage to Canaseraga, RJ states that petitioner has merely alleged that terrain factors would prevent compliance with the Commission's coverage requirements. Nevertheless, it provides a showing demonstrating that the required 70 dBu, city-grade, coverage can be provided to the community from the proposed reference coordinates. See, Creswell, Oregon, 4 FCC Rcd 7040, para. 8 (1989); Eugene, Oregon, 10 FCC Rcd 9793, para. 4 (1995).

5. In reply to the counterproposal, petitioner again argues that Channel 246A cannot be allotted to Canaseraga in compliance with the requirements of the Agreement since the separation between the proposed allotment and the Belleville station is only 206.1 kilometers instead of the required 210 kilometers. As a result, it says that the proposal is not eligible for simple notification under the Agreement. It also disputes RJ's claim that even though short-spaced it can be submitted to Canada for concurrence. Petitioner also argues that RJ's attempt to correct this problem by submitting an alternate site is unacceptable. It submits that the Commission has a long-standing policy that counterproposals must be technically correct and substantially complete when filed, citing Cloverdale, Montgomery and Warrior, Alabama, 12 FCC Rcd 2090 (1997). Therefore, it avers that any consideration of alternate sites must be denied. However, should the Commission decide to consider the alternate site, petitioner states that the alternate site also would not allow 70 dBu coverage over Canaseraga. Using the expanded boundaries of Canaseraga contained in the 1990 U.S. Census, petitioner argues that only 65% of the community would be encompassed by the 70 dBu signal. Petitioner also again contends that from the site proposed in the counterproposal, as well as the alternate site, terrain obstructions would block the provision of line-of-sight service. Specifically, it states that an antenna of 233 meters above ground level would be required to achieve 100 meters height above average terrain. Stating that this would require a "substantial tower structure," it argues that the required 70 dBu signal could still only cover 90% of Canaseraga. However, the Commission requires 100% city grade coverage at the allotment stage, citing Cloverdale, Montgomery and Warrior, Alabama, *supra*.

6. We believe that the public interest would be served by allotting channels to both Canaseraga, as the community's first local aural service, and to Wellsville, as its third local aural and first competitive FM service. Generally, mutually exclusive proposals are compared in accordance with the Commission's allotment priorities. However, a staff engineering study has found that an alternate channel is available for allotment to Wellsville. Therefore, it is not necessary to comparatively consider the two proposals. Channel 228A can be allotted to Wellsville and Channel 246A can be allotted to Canaseraga in compliance with the Commission's minimum distance separation requirements. A staff engineering study has confirmed that a Channel 246A allotment at Canaseraga, at the reference coordinates set forth herein, can provide the entire community with the required 70 dBu signal. Further, the Canadian government has concurred in the allotment of both channels, albeit as a specially negotiated short-spaced allotment with respect to Channel 246A at Canaseraga. In this regard, the petitioner is not correct that rule making petitions must meet the separation requirements between United States and Canadian allotments as set forth in Section 73.207 of the Commission's Rules. Rather, the Commission may, in cases where the spacing requirements cannot be met simply by the imposition of a site restriction, consider whether the interfering contour of the proposed domestic allotment would overlap the service contour of the Canadian allotment. If the overlap occurs over the United States, the proposed allotment meets the guidelines usually applied in negotiating short-spaced allotments. If such prohibited overlap does occur in Canada the Commission can still seek the concurrence of the Canadian government with the understanding that the ultimate licensee would directionalize the station's signal so as to protect the Canadian station's service contour. See Corinth, Hadley and Queensbury, New York, 5 FCC Rcd 3243 (1990) (Commission denied application for review finding that the allotment of a channel short-spaced to a Canadian allotment were neither extraordinary nor unreasonable), Saranac Lake, New York, 14 FCC Rcd 4098 (1999), and Vergennes, Vermont, Willsboro and Malone, New York, 13 FCC Rcd 9258 (1998).

7. Channel 228A can be allotted to Wellsville in compliance with the Commission's minimum distance separation requirements with a site restriction of 2 kilometers (1.2 miles) west to avoid a short-spacing to Station WWSE, Channel 227B, Jamestown, New York. Channel 246A can be allotted to Canaseraga in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.6 kilometers (6.6 miles) south of Canaseraga to avoid a short-spacing to Station WGRF, Channel 245B, Buffalo, New York.⁶ Canadian concurrence in both allotments have been obtained since each community is located within 320 kilometers (200 miles) of the U.S.-Canadian border. The allotment of Channel 246A at Canaseraga has been concurred in as a specially negotiated short-spaced allotment.

8. 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 November 8, 1999, the FM

⁶ The coordinates for Channel 228A at Wellsville are 42-07-25 North Latitude; 77-55-29 West Longitude. The coordinates for Channel 246A at Canaseraga are 42-21-41 NL; 77-45-09 WL.

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>
Canaseraga, New York	246A
Wellsville, New York	228A, 278A

9. A filing window for Channel 246A at Canaseraga, New York, and Channel 228A at Wellsville, New York, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

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

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
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