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

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 95-88
Table of Allotments,	)	RM-8641
FM Broadcast Stations.	)	RM-8688
(Rose Hill, Trenton, Aurora, and	)	RM-8689
Ocracoke, North Carolina)	)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 9, 2000 **Released: June 16, 2000**

Chief, Allocations Branch:

1. The Allocations Branch has before it a Petition for Reconsideration of the Report and Order, 11 FCC Rcd 21223 (1996), in this proceeding,[1] filed by Conner Media Corporation ("CMC"), licensee of Station WBSY(FM), Channel 284A, Rose Hill, North Carolina. Aurora Broadcasting ("AB") filed an opposition. Reply comments were filed by CMC. CMC also filed a Supplement to Petition for Reconsideration.[2]

2. Background. The Notice of Proposed Rule Making, 10 FCC Rcd 6611 (1995), was issued in response to a petition filed by Duplin County Broadcasters ("DCB"), then-licensee of Station WBSY(FM), Channel 284A, Rose Hill, North Carolina. DCB proposed the substitution of FM Channel 284C2 for Channel 284A at Rose Hill, the reallotment of upgraded Channel 284C2 to Trenton, North Carolina, and the modification of the Station WBSY(FM) license accordingly. AB counterproposed the allotment of Channel 283A to Aurora, North Carolina, as its first local service, instead of the allotment of Channel 284C2 at Trenton. In the Report and Order, the Commission allotted Channel 283A to Aurora rather than Channel 284C2 to Trenton.[3] Comparing the two

[1]Public Notice of the petition for reconsideration was given on January 29, 1997, Report No.2174.

[2] Bruce Cotton, the proposed assignee of the construction permit for Station WAHL(FM), Channel 224C1, Ocracoke, North Carolina, filed a Request to File a Response and Response to Supplement to Petition for Reconsideration. Woolstone Corporation, an applicant for Channel 283A, Aurora, NC filed a Response to the Supplement to Petition for Reconsideration. CMC filed an Answer to Response to Supplement to Petition for Reconsideration. We will consider the supplement to petition for reconsideration and these responsive pleadings in order to review this proceeding on a more complete record. We will also allow both Woolstone and Cotton to participate in this proceeding. Woolstone is now the permittee of Channel 283A at Aurora that is at issue in this decision. Further, Cotton had pending a petition for reconsideration of a staff decision deleting the construction permit for Station WAHL(FM), Ocracoke, that could have been affected by the outcome of this proceeding.

[3]In its reply comments CMC argued that the conflict between the Trenton and Aurora proposals could be resolved and allotments could be made to both communities by allotting Channel 221A to Aurora in lieu of Channel 283A. The Allocations Branch rejected this alternate channel proposal for Aurora, finding that Channel

communities under priority (3) of the Commission's allotment policies.[4] The Report and Order found that Channel 283A should be allotted to Aurora since it was the larger of the two communities.[5]

3. Petition for Reconsideration. CMC generally contends that the Commission erred in rejecting the alternative channel allotment for Aurora. CMC argues that the permit to modify Station WRSV(FM), Channel 221A, Rocky Mountain, NC, does not preclude allotment of Channel 221A to Aurora and that Channel 221A can be allotted to Aurora consistent with Station WRSV(FM)'s permit by use of a further site restriction for Channel 221A at Aurora.[6] Specifically, CMC argues that at coordinates 35-16-27 North Latitude and 76-39-39 West Longitude, Channel 221A can be allotted to Aurora in accordance with all spacing and coverage requirements. Secondly, CMC argues that the permit to upgrade unbuilt Station WAHL, Channel 224C1, Ocracoke, NC, may not be an impediment to the use of Channel 221A at Aurora because there is a pending proceeding on whether to grant an extension of time to construct the station. In this regard, CMC contends that there were patent technical defects in WAHL's application, i.e., failure to comply with the minimum principal-city coverage requirements of Section 73.315 and possible misrepresentations of fact regarding site availability. Lastly, CMC argues that a population difference of 370 is not a meaningful basis to distinguish between allotment proposals. CMC contends that the Trenton proposal would make the most efficient use of the spectrum by maximizing service to the largest population and the largest geographic area.

4. Opposition. In opposition, AB argues that the Bureau did not err in rejecting the alternative channel allotment for Aurora. AB contends that CMC's proposed site restriction for Channel 221A does not make it an acceptable alternative channel because AB has not expressed an interest in applying for that channel. Regarding alleged deficiencies in Station WAHL(FM)'s application, AB states that neither DCB nor CMC filed any objection to the grant of Station WAHL(FM) application;

221A at Aurora was blocked by the outstanding construction permit of WRSV(FM), Channel 221A, Rocky Mount, North Carolina and the one-step upgrade of Station WAHL, Channel 225A, Ocracoke, North Carolina, to Channel 224C1.

[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 matter. Priorities (2) and (3) are given equal weight. See Revision of FM Assignment Policies and Procedures, 90 FCC Rcd 2d 88 (1982).

[5] The Commission rejected the argument that Trenton's population was artificially small because of the approximately 1000 people living outside of Trenton but who considered themselves to be residents of Trenton. The R&O explained that the Commission does not take into consideration people who reside outside of a community in arriving at population figures but rather uses figures published by the U.S. Census where available or from other official sources.

[6] CMC also argues that the WRSV(FM)'s construction permit was granted in error. CMC notes that it requested the alternative Channel 221A for Aurora on September 5, 1995. The WRSV application was filed on October 2, 1995. CMC argues that WRSV failed to accord the earlier filed CMC proposal the required protection. See Conflicts. In light of the above, CMC contends that the WRSV application should have been dismissed as defective. For a resolution of this issue, see infra n.12.

therefore, their arguments are untimely and should not be considered. Finally, in response to CMC's argument that a population difference of 370 is not a meaningful basis to distinguish between allotment proposals, AB argues Aurora is more than twice as populous as Trenton. Moreover, AB notes that its proposal will provide a first local service to a qualified community and will satisfy the Commission's allotment priorities.

5. Reply. In reply comments, CMC disagrees that Channel 221A at Aurora would not be an acceptable alternative to Channel 283A due to the proposed site restriction. CMC notes that for allotment purposes Channel 221A and Channel 283A are considered "equivalent" channels and either would comply with the Commission's spacing requirements. Concerning whether there has been any expression of interest in another channel at Aurora, CMC states that it is well within the Bureau's discretion to resolve conflicting allotment proposals by making an alternative channel allotment, without requiring any further expression of interest in the alternative allotment, citing Cottage Grove and Brownsville, Oregon, 7 FCC Rcd 7579 (1992). CMC also disagrees that its proposal will remove Rose Hill's sole local service since that community will continue to receive local service from co-owned WEGG.

6. Supplementary Pleadings. In its Supplement to Petition for Reconsideration, CMC notes that the Bureau has denied the application for extension of Station WAHL(FM)'s construction permit at Ocracoke,[7] canceled Station WAHL(FM)'s construction permit, and deleted Station WAHL(FM)'s call sign. CMC contends that this development clears the way for allotment of Channel 221A to Aurora in lieu of Channel 283A, so that Channel 284C2 at Trenton can also be allotted. Such a result according to CMC would be in accord with the Commission's policy to accommodate conflicting allotment proposals with alternate channels where possible, citing Willcox, Arizona and Lordsburg, New Mexico, MM Docket No. 95-50, DA 96-2134 (1996) and Rapid City and Lead, South Dakota, 10 FCC Rcd 7715 (1995).

7. In its Response to the Supplement to Petition for Reconsideration, Cotton, the proposed assignee of the construction permit for Station WAHL(FM), Channel 224C1, Ocracoke, disagrees that the deletion of the construction permit now makes possible the use of Channel 221A at Aurora. In support of this position, he argues that the decision to delete the construction permit is not yet final. He also contends that Channel 221A is not useable at Aurora because it is short-spaced to the reference coordinates for Channel 224C1 at Ocracoke. In another Response to Supplement to Petition for Reconsideration, Woolstone, who was at that time one of two mutually exclusive applicants for Channel 283A, Aurora, agrees with and supports Cotton's position that Channel 221A should not be allotted to Aurora.. In its Answer to Cotton's Response to Supplement to Petition for Reconsideration, CMC argues that Cotton, as the proposed assignee of a cancelled construction permit, does not have a sufficient present interest to participate in this proceeding. CMC also questions Cotton's assertion that the deletion of the Ocracoke construction permit is not yet final and argues that, under the Commission's Rules, the deletion is in effect. As to the merits, CMC again argues that the short-spacing to the reference coordinates for Channel 224C1 at Ocracoke should not be an

[7]File No. BMPH-970113JA

impediment because the allotment is defective for technical reasons. Finally, in a Reply to the Answer to Response to Supplement to Petition for Reconsideration, Cotton alleges that, notwithstanding the fact that the deletion of the construction permit is in effect, the decision is still not yet final because Cotton and Ocracoke Broadcasters filed a petition for reconsideration of the letter ruling deleting the construction permit. Cotton also disagrees with CMC's contention that the short-spacing of Channel 221A at Aurora to the reference coordinates for Channel 224C1 at Ocracoke present no obstacle to the use of the alternate channel at Aurora because the Ocracoke allotment fully complies with the Commission's rules and policies.

8. Discussion. After carefully reviewing the record in this proceeding, we will deny both CMC's petition for reconsideration and supplement to petition for reconsideration. With respect to the first issue raised by the petitions, we continue to believe that the Report and Order properly rejected the suggested use of alternate Channel 221A at Aurora to resolve the conflict between the mutually exclusive allotment proposals for Trenton and Aurora, NC. As the Report and Order correctly noted, at the time that the Trenton rulemaking petitioner suggested the use of Channel 221A at Aurora on September 5, 1995, Channel 221A was short-spaced to a prior filed, one-step upgrade application (BMPH-950728IC) submitted by the permittee of Station WAHL(FM), Ocracoke, NC, to upgrade its station from Channel 225A to Channel 224C1.[8] That application was filed on July 28, 1995. Since the Ocracoke application for Channel 224C1 was filed before the Trenton rulemaking petitioner suggested the use of alternate Channel 221A, the alternate channel was required to protect the previously filed application under Section 73.208(a)(1)(i) and (a)(3) of the Commission's Rules. See Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, 7 FCC Rcd 4917 (Comm. 1992), recon. granted in part and denied in part, 8 FCC Rcd 4743 (Comm. 1993). See also Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735 (Comm. 1993). Because Channel 221A at Aurora was not fully spaced to the previously filed Ocracoke application for Channel 224C1, the Report and Order correctly concluded that the alternate channel at Aurora could not be used.

9. CMC now contends that changed circumstances have occurred with respect to the Ocracoke station -- that is, the deletion of the construction permit for Station WAHL(FM), Channel 224C1, Ocracoke -- and that this development clears the way for the use of Channel 221A at Aurora. We do not agree. As correctly noted by Cotton and Woolstone, even though the construction permit for Station WAHL(FM), Ocracoke, has been deleted,[9] Channel 221A at Aurora is still short-spaced to the outstanding reference coordinates for Channel 224C1 at Ocracoke, thereby violating Section 73.208(a) of the Commission's Rules. That section requires rulemaking petitioners to protect vacant allotments, as well as outstanding Commission

[8] As originally suggested, Channel 221A at Aurora was 15.8 kilometers short-spaced to the Section 73.215 construction permit application site for Channel 224C1 at Ocracoke and 15.1 kilometers short-spaced to the fully-spaced, theoretical reference site for Channel 224C1 at Ocracoke specified in the application.

[9] A petition for reconsideration of the letter decision deleting the construction permit for Station WAHL(FM), Ocracoke, was subsequently denied, and that decision has become final.

authorizations and previously cut-off applications. Channel 224C1 at Ocracoke is such a valid, vacant allotment and must be protected under Section 73.208 by a party who subsequently requests the use of an alternate channel that conflicts with this vacant allotment. This is due to the fact that the Commission adopted these reference coordinates when it granted the Ocracoke application. Since no petition for reconsideration was filed of that grant, that action became final under the Commission's Rules.

10. While CMC now contends that Channel 224C1 at Ocracoke is technically defective due to the alleged inability to provide a city-grade signal over all of Ocracoke and that we should delete this allegedly defective allotment, we cannot do so in the context of this proceeding. This is due to the well established principle that alternate channels suggested after the counterproposal deadline in an FM allotment proceeding to resolve a conflict between mutually exclusive proposals may not be considered if such a proposal introduces a new community into the proceeding. See, e.g., Bainbridge, GA, 12 FCC Rcd 13399, n.1 (Allocations Br. 1997), recon. denied, 13 FCC Rcd 6424, 6425-26 (Policy and Rules Div. 1998) (the use of alternate Channel 251A at Bainbridge rejected because it required a related channel substitution at the new community of Dawson, GA and was suggested after the initial comment/counterproposal deadline). See also Corpus Christi and Three Rivers, TX, 8 FCC Rcd 1375-76 (Allocations Br. 1993), recon. denied, 11 FCC Rcd 517, 517-18 (Policy and Rules Div. 1996) (alternate channel proposed in reply comments to resolve conflict between mutually exclusive proposals not accepted because it introduced new community of Carrizo Springs after counterproposal deadline); and Ashland, California, Rolla, and Monroe City, MO, 8 FCC Rcd 1799 n.3 (Allocations Br. 1993) (settlement agreement that would have resolved a conflict between mutually exclusive proposals not accepted because it introduced a new community after deadline for filing counterproposals). The reason for this policy is that considering new communities after the counterproposal deadline would require the issuance of a Further Notice of Proposed Rule Making regarding the new communities. As explained in the Bainbridge reconsideration decision " . . . such a procedure would not be conducive to the efficient transaction of Commission business." Id. 13 FCC Rcd at 6425. It would further delay the resolution of allotment proceedings and make it difficult to achieve finality in cases.

11. In the instant case, consideration of the allotment of Channel 221A at Aurora would introduce two new communities and require a Further Notice of Proposed Rule Making. First, we would have to add the community of Ocracoke to the proceeding and propose the deletion of Channel 224C1, the substitution of an equivalent class C1 channel, or the downgrade of the channel. Second, we would have to introduce the community of New Bern, NC, because at the time that Channel 221A at Aurora was suggested, it was also short-spaced to an earlier filed application (BPED-950626MA) for a new, noncommercial, educational FM station on Channel 220A at New Bern.[10] Although CMC contends that Channel 211A is available for substitution at

[10] The New Bern noncommercial application was subsequently granted. Channel 221A at Aurora is short-spaced to this station by 44.2 kilometers.

New Bern and that the permittee has consented to this frequency change, that issue would also have to be raised by the issuance of a Further Notice of Proposed Rule Making.[11] Therefore, since the use of Channel 221A at Aurora was suggested on September 5, 1995, and the deadline for filing comments/counterproposals involving new communities was August 10, 1995, we cannot entertain this alternate channel suggestion.[12] Furthermore, we have conducted an additional channel search and determined that there are no other alternate, equivalent class channels that could be allotted to Aurora.

12. Petitioner also contends that a population of 370 is not a meaningful basis to distinguish between allotment proposals. While we agree with the petitioner that a population difference of approximately 370 people between Aurora and Trenton is small, we disagree that it is not a meaningful basis on which to base our decision. As noted above, the allotment of Channel 284C2 to Trenton or Channel 283A to Aurora would provide each community with its first local aural service (priority 3). As previously noted, in a choice between counterproposals both involving priority 3, the Commission has consistently made the decision based on population difference and a comparison of reception services.[13] Here, where both communities receive numerous aural services from nearby communities the Commission has based its decision on a comparison of the population. It is well established that when comparing two competing counterproposals that would provide a first local service and finding neither community distinguishable based on reception services, the decisional factor is the population difference.[14] Therefore, we continue to believe the public interest will be better served by the allotment

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[11] In its reply comments of September 5, 1995, the original rulemaking petitioner for the Trenton reallotment cited the case of Bisbee and Green Valley, AZ, 6 FCC Rcd 1330 (Allocations Br. 1991), for the proposition that we could substitute noncommercial, reserved Channel 211 for reserved Channel 220 at New Bern to prevent a short-spacing between Channel 221A at Aurora and the application for Channel 220 at New Bern. However, Bisbee and Green Valley is distinguishable from the present proceeding because the proposed channel substitution in that case did not add a new community after the deadline for filing counterproposals. Rather, in the Bisbee and Green Valley case, the original rulemaking petition requested the substitution of Channel 217C2 for Channel 219A at Tucson and the modification of the license for noncommercial educational Station KXCI(FM) on Channel 217C2, which had been consented to by the licensee of Station KXCI(FM), and the Notice of Proposed Rule Making proposed the upgrade at Green Valley contingent upon Station KXCI(FM) filing an application and receiving authority to operate Station KXCI(FM) on Channel 217. By way of contrast, in the present proceeding, the proposed substitution in the reserved band for New Bern was proposed after the deadline for filing counterproposals.

[12] As a separate matter, we recognize that Channel 221A at Aurora was also short-spaced to a later filed application (BPH-951001IB) for a construction permit for a new FM station on Channel 221A at Rocky Mount, NC. Although the Commission's Rules require applicants to protect previously suggested alternate channels in allotment proceedings, the Rocky Mount application was granted notwithstanding this short spacing. However, this grant is harmless error as to CMC because the other short-spacings described above preclude the use of Channel 221A at Aurora. Additionally, if the Rocky Mount short spacing were the only impediment to the use of Channel 221A, CMC could have used a further site restriction on Aurora to eliminate this short spacing.

[13] See Athens and Atlanta, Ill , 11FCC Rcd 3445 (1996)

[14] See Blanchard, Louisiana and Stephens, Arkansas, 8 FCC Rcd 7083 (Allocations Br. 1993), rev denied, 10 FCC Rcd 9828 (Comm. 1995) (in a comparison between mutually exclusive proposals for first local transmission

of Channel 283A to Aurora.

13. In view of the above, IT IS ORDERED, That the Petition for Reconsideration and Supplement to the Petition for Reconsideration filed by Conner Media Corporation ARE DENIED.

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

15. For further information concerning this proceeding, contact Arthur D. Scrutchins, (202) 418-2180, or Andrew J. Rhodes, (202) 418-2120, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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services at two different communities, the larger community was awarded the allotment even though the population difference between the communities was 38 people).