

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

2001 JUL -5 P 3: 19

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Thermopolis and Story, Wyoming))
)

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MM Docket No. 00-159
RM-9889

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 20, 2001;

Released: June 29, 2001

By the Chief, Allocations Branch:

1. At the request of Idaho Broadcasting Consortium, Inc. ("petitioner"), permittee of Station KHWC(FM),¹ Channel 252C2, Thermopolis, Wyoming, the Allocations Branch has before it the Notice of Proposed Rule Making, 15 FCC Rcd 19046 (2000), proposing the substitution of Channel 252C1 for Channel 252C2 at Thermopolis, reallocation of Channel 252C1 from Thermopolis to Story, Wyoming, and the modification of Station WHWC(FM)'s construction permit accordingly.² Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if reallocated to Story. Lovcom, Inc. ("Lovcom") filed opposing comments. Reply comments were filed by petitioner and Lovcom. After the record closed, petitioner filed a "Motion for Leave to File and Clarification."³

2. The proposed reallocation was filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Amendment of the Commission's Rules Regarding Modification of FM

¹ Call sign KHWC was assigned on April 17, 2001.

² The construction permit for Channel 252C2 at Thermopolis was assigned from Idaho Broadcasting Consortium, Inc. to Legend Communications of Wyoming, L.L.C. on May 31, 2000, and consummated on August 1, 2000.

³The Commission generally does not accept pleadings after the closing of the pleading cycle. However, since this clarification is of decisional significance and will enable us to have a complete record, it will be accepted and considered.

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

3. In its comments, petitioner states that the proposed reallocation of Channel 252C1 to Story, Wyoming, as the community's first local aural transmission service will result in a preferential arrangement of allotments. Additionally, the reallocation will result in a net gain of service to an area 7,725.6 square kilometers (2,982.9 square miles) containing a population of 21,462 persons, as well as the elimination of a gray area of 659.9 square kilometers (254.8 square miles) containing 15 persons. It will provide a fourth service to an area of 5,063.6 square kilometers (1,955.1 square miles) containing 923 persons, and a fifth service to an area of 4,561.0 square kilometers (1,761 square miles) containing 2,653 persons. Thus, not only is the overall net service gain more than 21,000, but new service will be provided to 3,591 persons in underserved areas. All the theoretical loss area will remain well-served with the exception of a small area of 1,269.4 square kilometers (490.1 square miles) containing 61 persons. Petitioner claims that these factors far outweigh the minimal loss in service that will theoretically occur as a result of the change in community of license. Moreover, Thermopolis will retain service from full-time, commercial service from Station KTHE(AM), KDNO(FM), and from noncommercial Station KUWT(FM).

4. In its opposing comments, Lovcom, Inc., licensee of Stations KROE(AM), KZWY(FM), and KYTI(FM), Sheridan, Wyoming, argues that Story is not a "community" for allotment purposes. In support of its argument, Lovcom states that Story is neither incorporated nor listed in the U.S. Census, nor does petitioner establish that Story is a "geographically identifiable population grouping." Lovcom further states that petitioner has failed to establish a nexus between the social, economic and governmental organizations and Story, citing Avon, North Carolina, 14 FCC Rcd 3939 (1999); and Belview, Minnesota, 11 FCC Rcd 12793 (1996). Furthermore, Lovcom asserts that petitioner provided inaccurate and misleading information about the existence of "community" indicia in Story, and failed to show any nexus between organizations and businesses and the needs of Story residents. Lovcom claims that the critical deficiency is petitioner's failure to demonstrate that the organizations and businesses in Story are intended to serve the residents of Story rather than residents in other nearby areas such as Sheridan, citing Lupton, Michigan, 11 FCC Rcd 14428 (1996); Pleasant Dale, Nebraska, 14 FCC Rcd 18893 (1999); Kanarraville, Utah, 14 FCC Rcd 15962 (1999); and Littlefield, Arizona, 15 FCC Rcd 10263 (2000). Lovcom submits an affidavit supporting its claim that Story does not possess the "community" indicia to establish it as a "community" for allotment purposes. For these reasons, Lovcom requests that the petitioner's proposal be denied.

5. In its reply comments, petitioner states that the Commission defines "community" for allotment purposes as a "geographically identifiable population grouping." Petitioner further states that Story is listed in the 2000 U. S. Census as a Census Designated Place (population 887), and that there is the presumption that it is a "community" for allotment purposes. Story is also listed in the 2000 Rand McNally Commercial Road Atlas as having a population of 700 persons, and

appears on the Wyoming road map. Furthermore, petitioner asserts that there are numerous other characteristics which demonstrate that Story is a "community" for allotment purposes. Petitioner submits an affidavit and responses to questionnaires/surveys of residents and employees of businesses located in Story. The affidavit declares that some of the businesses located in Story are: The Balkenbush Real Estate Company, the T.L.C. Greenhouse, The Alpine Excavation Company, the Wagon Box Inn Restaurant, Campground and Cabins, the Tunnel Inn Restaurant, the Story Pines Inn, Electronic Classroom Furniture, The Lodore Supper Club Restaurant, the Waldorf "A" Story Restaurant and Deli, the Piney Creek General Store, Inc., the Wyoming Game and Fish Department Fish Hatchery. Story also has a U.S. Post Office, its own zip code (82842), its own telephone exchange (683), Story Community Branch Library, Story Volunteer Fire Department, and the Story Elementary School. There are three or four churches, and signs were observed by the affiant for the Story Lions Club, The Story Women's Club, a local park and playground equipment, the Thorn Rider Youth Camp, and a Presbyterian Church. Petitioner asserts that the residents of Story consider themselves not a part of any other community, but rather a separate, self-contained community deserving of a first local aural transmission service.

6. In its reply comments, Lovcom contends that the gray area petitioner claims will be eliminated is erroneous, in that petitioner used nighttime service areas rather than daytime service areas for AM stations. Therefore, when the daytime contours of AM stations area used there are no gray area to be eliminated by the proposed reallocation. Lovcom further argues that even if actual service contours of existing FM stations were used rather than uniform circle, petitioner's proposal would result in providing a sixth or higher aural service to all the proposed service area. Thus, Lovcom concludes that even if Story were deemed to be a "community" for allotment purposes, which it is not, there would be "scant" public interest benefits. In response to Lovcom's claims, petitioner submits an engineering statement demonstrating that the reallocation of Channel 252C1 to Story will eliminate a gray area and provide service to underserved populations. Petitioner asserts that the Commission has specified the methodology to be used to conduct reception service analyses in numerous rule making cases, citing Woodville and Wells, Texas, 15 FCC Rcd 18010 (2000). Petitioner further asserts that these procedures were followed exactly in preparing its analysis of reception services in the gain and loss areas, and that Lovcom's analysis deviates from well-established Commission policies.

Discussion

7. As an initial matter, we find that petitioner has sufficiently demonstrated that Story is a "community" for allotment purposes. To establish that a locality is a "community" for allotment purposes, it must be demonstrated that a locality has "social economic, cultural or governmental indicia" which identify it as a community. See Avon, North Carolina, 14 FCC Rcd 3939, 3940 (1999). It is sufficient to demonstrate that the locality is "commonly regarded as a distinct group. This can be proven by the 'testimony of local residents or by objective indications of the existence of a common perception that a locality's populace constitutes a distinct geographical population.'" Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast

Assignments, 5 FCC Rcd 934 (1990). The Commission has held that “[e]xamples of objective indications of community status include the existence of political, commercial, social and religious organizations and services in the community. Another indication of community status is ‘whether the residents function as and conceive of themselves as residents of a community, around which their interests coalesce.’” Based on the information before us, we believe the public interest would be served by the substitution of Channel 252C1 for Channel 252C2 at Thermopolis, the reallocation of Channel 252C1 from Thermopolis to Story, Wyoming, as the community’s first local aural transmission service.⁴

8. In considering a change of community of license proposal, we must determine whether the proposal would result in a preferential arrangement of allotments pursuant to the Commission’s change of community procedures. See Change Community, supra. Under those procedures, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities.⁵ See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 (1982).

9. In making that comparison, we find that the proposed arrangement of allotments triggers priority (3)--first local service. Under this priority, Story would receive a first local aural transmission service. The station is unbuilt and the reallocation will not result in the removal of the sole local service in Thermopolis (population 3,172), whereas, one AM and two FM stations would remain licensed to the community. Moreover, our engineering analysis has determined that the methodology used in petitioner’s gain and loss area study is consistent with the Commission’s guidelines, and that theoretically, the reallocation of Channel 252C1 to Story will provide new service to gain area of 16,422 square kilometers (6,340.6 square miles) containing a population of 29,562 persons. The reallocation would also eliminate a gray area of approximately 810 square kilometers (312.7 square miles) containing a population of 25 persons. On the other hand, we note that the reallocation will create a loss area of 8,560.3 square kilometers (3,305.2 square miles) containing a population of 8,248. The loss area would continue to receive three or more reception services, and 50% of the gain area would continue to receive three reception services. Since the 70 dBu signal for the reallocation would not encompass 50% or more of any urbanized area, a Tuck analysis is not necessary.⁶

⁴ Official Notice has been taken.

⁵ The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3).]

⁶ See Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995); Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951); RKO General, Inc., 5 FCC Rcd 3222 (1990); and Faye and Richard Tuck, 3 FCC Rcd 5374 (1988).

Technical Summary

10. An engineering analysis has determined that Channel 252C1 can be reallocated to Story in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site.⁷ In accordance with Section 1.420(i) of the Commission's Rules, we modify Station KHWC(FM)'s construction permit to specify operation on Channel 252C1 at Story, Wyoming, as its new community of license.

11. 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, August 13, 2001, 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>
Thermopolis, Wyoming	269C1
Story, Wyoming	252C1

12. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Legend Communications of Wyoming, L.L.C. for Station KHWC(FM), Thermopolis, Wyoming, IS MODIFIED to specify operation on Channel 251C1 at Story, Wyoming, 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.

13. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a

⁷ The coordinates for Channel 252C1 at Story are 44-34-28 North Latitude and 106-52-14 West Longitude.

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, Legend Communications of Wyoming, L.L.C. permittee of Station KHWC(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.

14. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to petitioner, as follows:

Legend Communications of Wyoming, L.L.C.
5074 Dorsey Hall Drive, Suite 205
Elliott City, Maryland 21042
(Permittee of Station KHWC(FM))

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

16. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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