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COMMUNICATIONS DIVISION

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

In the matter of)
)
Amendment of Section 73.202(b)) MB Docket No. 02-335
FM Table of Allotments,) RM-10545
FM Broadcast Stations.)
(Hart, Pentwater and Coopersville,)
Michigan))

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 4, 2004

Released: February 6, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a *Notice of Proposed Rulemaking*¹ issued at the request of Waters Broadcasting Corporation, licensee of Station WCXT and Synergy Media, Inc., licensee of Station WWKR ("Petitioners"), requesting changes to the FM Table of Allotments in Michigan. Petitioners filed comments and reply comments. Comments and reply comments were filed by Fort Bend Broadcasting Company, licensee of Station WBNZ, ("Fort Bend"), Northern Radio of Michigan, Inc., licensee of Station WKLT ("Northern Radio") and WATZ Radio, Inc., licensee of Station WATZ ("WATZ Radio"). Fort Bend filed a counterproposal. For the reasons discussed below, we are granting Petitioners' proposal and dismissing Fort Bend's counterproposal.

2. At the request of Waters Broadcasting Corporation, licensee of Station WCXT, Hart, Michigan, and Synergy Media, Inc., licensee of Station WWKR, Pentwater, Michigan, the *Notice* proposed the substitution of Channel 287B for Channel 287C2, reallocation of Channel 287B from Hart, Michigan, to Coopersville, Michigan, and modification of the license for Station WCXT accordingly. Petitioners also requested the reallocation of Channel 231C3 from Pentwater, Michigan, to Hart, Michigan, to maintain local aural transmission service at Hart with the license for Station WWKR modified accordingly. The proposed reallocations of Stations WCXT and WWKR were filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits 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.² In support of the proposal, Petitioners state that Channel 287B may be allotted to Coopersville consistent with the Commission's spacing requirements providing a first local service for the community.³ Operating at its specified site, Petitioners state that Station WCXT will provide a primary service to a population of 1,116,129 people in an area of 12,491.3 square kilometers. The gain area has a population of 930,977 people and the area that will lose service from Station WCXT has a population of 30,544 people and is served by five or more other aural services. Petitioners acknowledged that

¹ See *Hart, Pentwater and Coopersville, Michigan*, 17 FCC Rcd 22086 (MB 2002).

² See *Modification of FM and TV Authorizations to Specify a new Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

³ The 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 is given to priorities (2) and (3).] See *Second Report and Order in BC Docket 80-130*, ("Revision of FM Assignment Policies and Procedures"), 90 FCC 2d 88, 91 (1982).

reallotment of Station WCXT from Hart to Coopersville would remove the sole local service from that community and have requested the reallotment of Station WWKR from Pentwater to Hart to ensure continuation of local service for Hart. Petitioners provided information establishing community status for Coopersville and stated that Coopersville is located outside of any Census Bureau-designated Urbanized Areas and that the 70 dBu contour of the proposed station will cover only 42.8 percent of the Muskegan Urbanized Area.⁴

3. Fort Bend, licensee of Station WBNZ, Frankfort, Michigan, filed a counterproposal in this proceeding.⁵ Fort Bend proposes the upgrade of Station WBNZ, Channel 257C2 to Channel 257C1, and the change of its community of license from Frankfort to Garfield Township, Michigan. The reallotment of Station WBNZ from Frankfort to Garfield Township would remove the sole local service from Frankfort. To accommodate the substitution and change of community, Fort Bend requests the following changes at Alpena, Beaverton, Cheboygan, Frankfort, Glen Arbor and Standish, Michigan.

Community	Present	Proposed
Alpena, Michigan	257C2	249C2
Beaverton, Michigan	249A	246A
Cheboygan, Michigan	249C3	271C3
Frankfort, Michigan	257C2	227A
Garfield Township, Michigan	-----	257C1
Glen Arbor, Michigan	227A	287A ⁶
Standish, Michigan	245A	295A

The proposal requires three existing stations, WATZ, Alpena, licensed to WATZ Radio, Inc., WMRX, Beaverton, licensed to Steel Broadcasting, Inc., and WWCM, Standish, licensed to Central Michigan University, to change channels with Station WWCM also relocating its transmitter. Fort Bend states that agreements have been reached with the Beaverton and Standish stations providing consent for the changes. Fort Bend requests that an *Order to Show Cause* be issued to the Alpena station. Fort Bend contends that its proposal is acceptable as a counterproposal as the allotment of Channel 287A at Glen Arbor conflicts with the proposed allotment of Channel 287B at Coopersville, Michigan. Fort Bend offered an alternate transmitter site for Channel 287B at Coopersville to avoid the conflict, which could allow both Coopersville and Garfield Township to receive first local service. Fort Bend argues that Petitioners' requested reference site for Channel 287B at Coopersville would have covered less than 100 percent of the community, but from the alternate site the 70 dBu contour will completely cover Coopersville. Further, Fort Bend believes that the alternate site for Coopersville is superior to the requested site used in the *Notice* as Station WOOD,

⁴ Although not required, Petitioners provided a showing with respect to the criteria listed in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988), demonstrating that Coopersville is an independent community. A Commission engineering analysis shows that Channel 287B at Coopersville at the proposed site will cover 34% of the Muskegan Urbanized Area.

⁵ Fort Bend is also the proponent of a similar proposal in MM Docket No. 01-115, Au Gres, Michigan, et al. In order to permit consideration of its counterproposal, Fort Bend withdrew its pending proposal in the Au Gres proceeding on December 30, 2002, in compliance with Section 1.420(j) of the Commission's Rules.

⁶ In response to a petition filed by WKJF Radio, Inc., MB Docket No. 03-142 proposes to delete vacant Channel 227A at Glen Arbor, Michigan, to accommodate a new transmitter site for Station WKJF-FM, Cadillac, Michigan. See 18 FCC Rcd 12682 (M.B. 2003).

licensed to Clear Channel Radio Licenses, Inc., Grand Rapids, Michigan, operates under Section 73.215 of the Commission's Rules and the alternate reference site for Coopersville reduces the short spacing between the two stations. With respect to the removal of sole local service from Frankfort, Fort Bend proposes the allotment of Channel 227A at Frankfort as a back-fill channel. Fort Bend has committed to filing an application for Channel 227A at Frankfort and acknowledges that the relocation of Station WBNZ from Frankfort to Garfield Township may have to await construction and initiation of operation of the new facility at Frankfort, and will accept a construction permit for Station WBNZ so conditioned. Fort Bend contends that its counterproposal will provide a first local service to Garfield Township with an overall net gain in area of 9,072 square kilometers and a population of 155,851 people.

4. Reply comments were filed by Northern Radio, WATZ Radio, Fort Bend and Petitioners.⁷ Northern Radio, licensee of Stations WKLT, Kalkaska, Michigan and WKVK, Honor, Michigan, argues that Fort Bend's counterproposal should be rejected as technically defective. According to Northern Radio, on the December 30, 2002, comment deadline, the counterproposal was contingent upon action in other pending rulemaking proceedings making it unacceptable for consideration. WATZ Radio, licensee of Station WATZ, Alpena, Michigan, supports Petitioners' proposal and urges dismissal of Fort Bend's counterproposal. WATZ Radio argues that the counterproposal is dependent on the reallocation of Channel 287C2 from Hart to Coopersville to accommodate the allotment of Channel 287A at Glen Arbor, Michigan. Simply put, Channel 287A is not available for allotment at Glen Arbor were Station WCXT to remain licensed to Hart on Channel 287C2 at its current site. Petitioners acknowledge that Fort Bend's counterproposal is mutually exclusive with Channel 287 at Coopersville using its proposed site and have no objection to the use of an alternate site to remove the conflict. However, the site proposed by Fort Bend may be located in the Muskegon State Game Area which could cause concern as to actual construction at that site. Petitioners have located an alternate site that has the advantage of increasing the separation between Coopersville and the site specified in the application to modify the facilities of Station WOOD, Grand Rapids, Michigan. Petitioners state that operating from the alternate site, Station WCXT at Coopersville will provide primary service to a population of 1,118,671 people in an area of 10,368 square kilometers. The gain area covers 5,972 square kilometers with a population of 934,330 people. Petitioners state that they are providing a showing, from the alternate site, using the criteria listed in *Faye and Richard Tuck* demonstrating that Coopersville is independent of the Muskegon Urbanized Area as the 70 dBu contour of Station WCXT will cover all of the Muskegon Urbanized Area.⁸ Fort Bend provided reply comments continuing to support its counterproposal. Fort Bend contends that the use of an alternate site for Channel 287B at Coopersville will allow new allotments at Coopersville and Garfield Township.

5. Discussion. Based upon the information presented in this proceeding, we believe the public would be served by the substitution of Channel 287B for Channel 287C2 and reallocation of Channel 287B from Hart to Coopersville, Michigan, since it will provide Coopersville with a first local service. To provide continuing service at Hart, we shall reallocate Channel 231C3 from Pentwater to Hart, modifying the license for Station WWKR accordingly, as requested by Petitioners. A staff engineering analysis confirms that the requested reallocations can be made in compliance with the Commission's spacing requirements.⁹ Our analysis also confirms that the reallocation of Channel 287B from Hart to Coopersville at Petitioners' alternate site will result in a loss of service to 31,355 people with a gain in service of 934,330 people with both the gain and loss areas having five or more services. We further show that Coopersville is not located

⁷ Late-filed comments were filed by Fort Bend and WATZ Radio. Counsel for Fort Bend Broadcasting Company filed a notice of change of address on June 6, 2003.

⁸ See 3 FCC Rcd 5374 (1988).

⁹ The coordinates for Channel 287B at Coopersville, Michigan, are 43-17-20 and 86-02-51. The coordinates for Channel 231C3 at Hart, Michigan, are 43-51-33 and 86-18-27. Since Coopersville and Hart are located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian Government has been requested for the changes to the FM Table of Allotments adopted in this proceeding.

in an urbanized area but from the alternate site, Station WCXT will provide service to the entire Muskegon Urbanized Area. Petitioners provided a *Tuck* showing establishing independence of Coopersville from the Muskegon Urbanized Area. The Commission has specifically stated that the public has a legitimate expectation that existing service will continue, and that this expectation is a factor to be weighed independently against the service benefits that may result from reallocating a channel. Therefore, although we are granting Petitioners' proposal to provide first local service to Coopersville, to ensure that local service will continue to be provided to Hart, we shall condition the grant of an authorization to operate Station WCXT on Channel 287B at Coopersville upon activation of service for Station WWKR on Channel 231C3 at Hart.¹⁰

6. We are dismissing the counterproposal filed by Fort Bend for several reasons. We find that although the counterproposal requesting the allotment of Channel 287A at Glen Arbor does conflict with the proceeding, the conflict occurs between the current arrangement of allotments, Channel 287C2 at Hart, as well as the proposed arrangement of allotments, Channel 287B at Coopersville, and, therefore, is not a true counterproposal in this proceeding but a proposal that is dependent upon the outcome of this proceeding. Thus, it is not entitled to consideration as a counterproposal in this proceeding.¹¹ Although Fort Bend's counterproposal provides an alternate site for Channel 287B at Coopersville which could remove the conflict with Channel 287A at Glen Arbor once Channel 287C2 is deleted at Hart, Petitioners argue that the site may be located in a State Game Area, causing concern as to actual construction at the site. Petitioners have, therefore, requested an alternate site which removes the conflict with Glen Arbor. We have allotted Channel 287B at Coopersville at Petitioners' alternate site affording Fort Bend flexibility should a new proposal be submitted. Fort Bend's proposed reallocation of Station WBNZ from Frankfort, Michigan, to Garfield Township, Michigan, removes the sole local service from Frankfort. To provide for continuation of service at Frankfort, Fort Bend has proposed the allotment of Channel 227A at Frankfort as a backfill, making a commitment to file an application for the channel at the appropriate time. In *Pacific Broadcasting of Missouri*, the Commission reiterated the importance of a community continuing to have local service.¹² In the same proceeding the Commission instructed the staff to cease the "backfill" practice on a going-forward basis. Under this policy, the staff will not grant any currently pending rulemaking petition that requires a vacant allotment "backfill" to preserve local service. Fort Bend's proposed allotment of Channel 227A at Frankfort as a "backfill" channel fails to meet the policy requirements set forth in *Pacific Broadcasting of Missouri*. A community of license modification proponent may not rely on a new "backfill" FM allotment to "preserve" a community's sole local transmission service. A rule making petitioner seeking a change in community of license may do so only if there is another operating station licensed to the community being vacated, or if the proposed backfill involves a currently licensed and operating station that can be reallocated to the community being vacated, and the backfill reallocation itself complies with local service requirements.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g), and ®, and 307(b) of the Communications Act of 1934, as amended, and 0.61, 0.204(b) and 0.283 of the Commission's rules, IT IS ORDERED That effective March 22, 2004, the FM Table of Allotments, Section 73.202(b) of the Commission's rules, IS AMENDED, with respect to the communities listed below, as follows:

¹⁰ See *Llano and Marble Falls, TX*, 12 FCC Rcd 809 (M.M. 1997).

¹¹ See *Ironton, Malden and Salem, Missouri*, 13 FCC Rcd 6584 (M.M. 1998) and *Indian Springs, Nevada, Mountain Pass, California, Kingman, Arizona, and St. George, Utah*, 14 FCC Rcd 10568 (M.M. 1999).

¹² *Pacific Broadcasting of Missouri LLC*, 18 FCC Rcd 2291 (2003), recon. pending.

Community	Channel No.	
	Present	Proposed
Coopersville, Michigan	-----	287B
Hart, Michigan	287C2	231C3
Pentwater, Michigan	231C3, 274A, 280A	274A, 280A

8 IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Waters Broadcasting Corporation for Station WCXT, Hart, Michigan, IS MODIFIED to specify operation on Channel 287B at Coopersville in lieu of Channel 287C2 at Hart, and the license for Station WWKR, Pentwater, Michigan, IS MODIFIED to specify operation on Channel 231C3 at Hart in lieu of Channel 231C3 at Pentwater, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, each licensee 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 not be conducted by Station WCXT at Coopersville until Station WWKR has commenced operation at Hart in accordance with Section 73.1620 of the Rules.

(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 unless the proposed facilities are categorically excluded from environmental processing.

(d) Operating authority for Station WCXT, Channel 287B at Coopersville may not be granted until operations have commenced by Station WWKR, Channel 231C3, at Hart, Michigan.

9. IT IS FURTHER ORDERED, That the counterproposal filed by Fort Bend Broadcasting Company IS DISMISSED.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in 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 of community. As a result of this proceeding, Waters Broadcasting Corporation, licensee of Station WCXT, Hart, Michigan, and Synergy Media, Inc., licensee of Station WWKR, Pentwater, Michigan, are required to submit rule making fees in addition to the fees required for the applications to effect the changes of community for Stations WCXT and WWKR, respectively.

11. For further information regarding the proceeding listed above, contact Kathleen Scheuerle, (202)418-2180.

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

FEDERAL COMMUNICATIONS COMMISSION

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