FCC MAIL SECTION
Nov 22

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

In the matter of	)	
	)	
Amendment of Section 73.202(b)	)	
FM Table of Allotments,	)	MB Docket No. 02-376
FM Broadcast Stations.	)	RM-10617
(Sells, Arizona)	)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 17, 2004 **Released: November 22, 2004**

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making*[1] issued at the request of Rural Pima Broadcasting ("Petitioner"), proposing the allotment of Channel 285A at Sells, Arizona, as the community's first local aural transmission service. Lakeshore Media, LLC ("Lakeshore"), licensee of Station KWCX-FM, Willcox, Arizona, filed a counterproposal to substitute Channel 285C3 for Channel 285C2 at Willcox, and reallot Channel 285C3 from Willcox to Davis-Monthan Air Force Base, Arizona ("Davis-Monthan AFB"), as a first local aural transmission service. Lakeshore's counterproposal also includes the allotment of Channels 283C2 and 245C2 at Willcox to provide service to unserved and underserved areas created by the reallotment of Channel 285C3 from Willcox to Davis-Monthan AFB. Lakeshore also proposes to modify the transmitter site for Station KZZP(FM), Channel 284C, Mesa, Arizona to accommodate its preferred transmitter site for Station KWCX-FM.[2] Finally, it proposes an alternate channel, Channel 249A, to be allotted at Sells in lieu of Channel 285A as requested by Petitioner. Journal Broadcasting Corporation ("Journal") and REC Networks ("REC") filed comments in opposition to the counterproposal. Lakeshore filed reply comments and a supplement in response. Petitioner filed comments stating that it will file an application for Channel 285A at Sells, if allotted and if granted, will construct the facility as authorized. It filed a supplement stating that it would file an application for Channel 249A as well. On October 26, 2004, Lakeshore filed an amendment to its counterproposal, which is addressed below.

2. In support of the counterproposal, Lakeshore states that Davis-Monthan AFB is a community for allotment purposes, and that it is independent of the Tucson, Arizona, Urbanized Area based on the factors enumerated in *Faye and Richard Tuck*.[3] Lakeshore also notes that the proposed

[1] *See Sells, Arizona*, 17 FCC Rcd 24575 (2002).

[2] On October 26, 2004, Lakeshore filed a Leave to Amend and an Amendment to its counterproposal to modify this aspect of its counterproposal in light of the Bureau's recent decision in *Gunnison, et al., Colorado, and Laramie, Wyoming*, DA 04-2908 (MB, rel. Sept. 20, 2004) holding that requests to modify transmitter site location to accommodate rulemaking petitions are not allowed under Section 73.208 of the Commission's rules. Lakeshore proposes modify Station KZZP(FM)'s license to operate on Channel 282C0 in lieu of Channel 284C, and remain at its current site. In light of our decision below, this request is denied as moot.

[3] These factors are: 1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; 2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; 3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; 4) whether the specified community has its own local government and elected officials; 5) whether the smaller community has a telephone book provided by the local telephone company or zip code; 6) whether the community has its own commercial

(continued....)

60dBu contour would provide service to 813,043 persons, which is a net gain in population of 799,998 persons. It states that portions of the loss area are served by as many as ten existing or proposed services. However, it states that there are also unserved areas and underserved areas created, but those areas will be provided service by the proposed allotments of Channels 282C2 and 245C2 at Willcox. Lakeshore also notes that its proposal requires that Station KZZP, Channel 284C, Mesa, Arizona, change its transmitter site reference coordinates. Lakeshore includes a statement by Citicasters Licenses, L.P. ("Citicasters") indicating it is willing to change its transmitter site reference coordinates to a site that complies with Section 73.207 of the rules, and Lakeshore agrees to reimburse Citicasters for the reasonable costs of changing its transmitter site to the extent necessary under the Commission's spacing rules. Finally, Lakeshore states that its proposed reference point would be short spaced to Station XHNI-FM, Nogales, Sonora, Mexico, but that under the 1992 Treaty between the U.S. and Mexico, it will provide contour protection to Station XHNI.

3. In opposition to the counterproposal, Journal and REC both argue that Davis-Monthan AFB does not qualify as an independent community for allotment purposes because it is entirely within the city limits of Tucson, Arizona and does not have sufficient indicia as an independent community under *Tuck*. Both note that the U.S. Census deleted the base as a Census Designated Place in 1990 when it was annexed into Tucson. REC argues that the base should not be found independent under *Tuck* because it is a "campus" environment more like a university or prison, and should not presumptively be considered an independent community for allotment purposes.

4. Journal also argues that Lakeshore's counterproposal should be denied because its proposal to allot Channels 282C2 and 245C2 at Willcox to avoid unserved and underserved areas as "backfill" allotments is precluded by the Commission's decision in *Pacific Broadcasting of Missouri, LLC ("Refugio")*,[4] and without the backfill allotments, the counterproposal would leave behind vast unserved and underserved areas, *i.e.*, white and gray area. In addition, Journal argues that the counterproposal should be denied because its short spacing to Station XHNI-FM will result in a substandard allotment incapable of operating at maximum C3 facilities. Finally, Journal argues that the proximity of the sites for Channel 285C3 at Davis-Monthan AFB and Channel 284C at Mesa are too close to airport runways to assume that they will receive FAA approval.

5. Lakeshore responds to these arguments by repeating that Davis-Monthan AFB is a community for allotment purposes and that it is independent of Tucson based on the *Tuck* factors. It also argues that *Refugio* only applies to backfill allotments to preserve transmission service and does not apply to backfill allotments to preserve reception service. Lakeshore also argues that unlike the loss of a transmission service, which can only be replaced by an operating station, the Commission considers the allotment of a new channel to be an adequate replacement for the loss of a reception service. Thus, Lakeshore contends, the mere allotment of a new channel is sufficient to prevent the creation of white or gray area.

6. Lakeshore also argues that Journal's allegation that Channel 285C3 at Davis-Monthan AFB will be "a substandard allotment" because of the need to protect Station XHNI-FM at Nogales, Sonora, Mexico is speculative. Lakeshore contends its proposal satisfies the Commission's technical rules, including the principal community coverage rule and relevant spacing rules. It further argues that operation from the reference point with maximum facilities is not required. Finally, Lakeshore states that

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establishments, health facilities, and transportation systems; 7) the extent to which the specified community and the central city are part of the same advertising market; 8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries. 3 FCC Rcd 5375 (1988).

[4] *Pacific Broadcasting of Missouri, LLC*, 18 FCC Rcd 2291 (2003); *recon. den.* 19 FCC Rcd 10,950 (2004).

Journal's argument that the tower sites for Channel 285C3 at Davis-Monthan AFB and Channel 284C at Mesa, Arizona, might be too close to airport runways to receive FAA clearance is also speculative and unsupported. It argues that at the allotment stage it is presumed that a technically feasible site exists and that Journal's speculative argument does not overcome this presumption.

7. **Discussion.** We agree with Journal that the Commission's reasoning in *Refugio* applies equally to the facts of this case. Vacant allotments cannot be used to avoid loss of first or second reception service. *Refugio* specifically refers to the presumptive need to continue existing transmission services. However, under the allotment priorities, first fulltime aural reception service is the first priority and second fulltime aural reception service and first local aural transmission service are of equal value as the second and third priorities. Vacant allotments are equally inadequate to cure the priority one and two service losses at issue here.

8. In this case the areas losing service are significant in size. Our engineering analysis shows that the loss area resulting from the substitution of Channel 285C3 for Channel 285C3 at Willcox and the reallotment of Channel 285C3 from Willcox to Davis-Monthan AFB will contain 8,560.3 square kilometers with a population of 13,842. Our analysis also shows that an area of 2,142 square kilometers with a population of 2,846 would be left with no aural reception service, and an area of 1,068 square kilometers with a population of 1,022 would be left with one aural reception service.[5] In a case such as this, in which the downgrade and reallotment of a channel would create large and heavily populated white and gray areas, we will not allow a party to propose to fill that area with vacant channels. As the Commission held in *Refugio*, the ultimate licensing of a backfill through our auction procedures is both an uncertain and time consuming process. Further, as we held in *Change of Community*,[6] "the public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel regardless of whether the service removed constitutes a transmission service, a reception service or both."[7] The Commission also stated that removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service. Even allotting a first local transmission service to a community does not outweigh the loss of all reception service to almost 3,000 listeners and removing all but one service to 1,000.

9. We disagree with Lakeshore's argument that the Commission considers the allotment of a channel to be an adequate replacement for the loss of a reception service. Further, Lakeshore is incorrect that white or gray area created by a proposal can be filled by the mere allotment of a new channel. None of the cases cited by Lakeshore stands for either proposition.[8] Unlike this case, those cases refer to the status of previously allotted vacant channels. In *Greenup, Kentucky and Athens, Ohio,*[9] we stated that we will take into account vacant allotments in determining whether a proposed allotment should receive Priority 1 or 2 credit. This policy is based on our conclusion that the Commission "should normally" assume that service will be provided on previously allotted vacant channels.[10] In contrast, the proposed reallotment raises a fundamentally different issue, *viz.*, whether a vacant allotment is sufficient to offset

[5] Significant areas would be left with two aural services (1,447 sq. km/pop. 5,254), three aural services (980 sq. km./pop. 3,181), and four aural services (2,656 sq.km./pop.1,539).

[6] *Change of Community MO&O,* 5 FCC Rcd 7094 (1990) *affirming* 4 FCC Rcd 4870 (1989).

[7] *Id.* at 7097.

[8] In *Nogales, Vail and Patagonia, Arizona,* 16 FC Rcd 20515 (2001), the staff found that no areas would receive fewer than two fulltime aural reception services; in *Meeker and Craig, Colorado,* 15 FCC Rcd 23858, (2000) the staff denied the proposed reallotment. Neither case granted a vacant allotment to fill white or gray area.

[9] *Greenup, Kentucky and Athens, Ohio,* 6 FCC Rcd 1493 (1991).

[10] *Id.* at 1494.

the loss of an existing service which provides a first or second reception service to a significant number of listeners. Petitioner's reliance on *Greenup*, is, therefore, misplaced. As we said in *Change of Community*, "replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered..., does not adequately cure the disruption to 'existing service' occasioned by removal of an operating station. From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a TV or radio set."[11] We conclude, for the same reasons we articulated in *Refugio*, that a vacant allotment is insufficient to offset the loss of service that would result from the relocation of Station KWCX-FM.[12]

10. We believe that the allotment of Channel 285A at Sells[13] will serve the public interest because it will provide the community with its first local service. Channel 285A can be allotted at Sells at a site 9.3 kilometers (5.8 miles) south of the community.[14] We note that this site has received concurrence from the government of Mexico as a specially negotiated restricted allotment limited to 1.1 kW ERP and 100 m HAAT or the equivalent along the 123.2 degree azimuth toward Station XHNI(FM) Channel 286B, Nogales, Sonora Mexico.

11. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, 5 U.S.C. Section 801(a)(1)(A).

12. Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective January 6, 2005, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, is amended for the communities listed below, to read as follows:

Community	Channel
Sells, Arizona	285A

13. The window period for filing applications for this allotment will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent Order.

14. IT IS FURTHER ORDERED That the counterproposal filed by Lakeshore Media, LLC, IS DENIED.

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

[11] *Id.*

[12] Accordingly, we need not consider the other issues raised against the Lakeshore counterproposal.

[13] Sells is a community for allotment purposes. It is a Census Designated Place with a 2000 U. S. Census population of 2,799 persons. It has schools, a police department, businesses, healthcare, and churches. Petitioner has established the community status of Sells, Arizona.

[14] The coordinates for Channel 285A at Sells are 31-49-44 NL and 111-53-28 WL.

16. For further information concerning this proceeding, contact Victoria M. McCauley (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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