FCC MAIL SECTION
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MM Docket No. 01-107
FM Broadcast Stations.	)	RM-10057
(Mount Pleasant and Hemlock,	)	
Michigan)	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 2005 **Released: November 4, 2005**

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Petition for Reconsideration of a *Report and Order*[1] in this proceeding filed by the MacDonald Broadcasting Company ("MacDonald"); (2) an Opposition filed by Wilks License Co., LLC ("Wilks); and (3) a Notice of Substitution of Parties filed by NM Licensing, LLC ("NML"). For the reasons discussed below, we deny the Petition for Reconsideration.

BACKGROUND

2. At the request of Wilks, the *Notice of Proposed Rule Making*[2] in this proceeding proposed the reallotment and change of community of license for Station WCEN-FM, Channel 233C1, from Mount Pleasant to Hemlock, Michigan, pursuant to the provisions of Section 1.420(i) of the Commission's Rules.[3] The *NPRM* also acknowledged the existence of "grandfathered" short-spacings between WCEN-FM and several other stations but set forth Wilks' argument that the grandfathered short-spacings should survive the requested change of community because no transmitter site or other technical changes are proposed.

3. Comments in response to the *NPRM* were filed by MacDonald, licensee of Stations WSAM-AM and WKCQ-FM, Saginaw, Michigan, and WEEG-FM, Essexville, Michigan, contending that the proposed reallotment and license modification constitute a "move-in" from the smaller community of Mount Pleasant (pop. 25,946) to the larger city of Saginaw, Michigan (pop. 130,000). In support of this position, MacDonald stated that Mount Pleasant is located about 50 miles from Saginaw while Hemlock is merely 10 miles from Saginaw. In addition, MacDonald claimed that Wilks already located its studio for WCEN-FM in Saginaw in violation of Section 73.1125(a) of the Commission's rules and that the change of community proposal was an attempt to legitimize the studio change. Under these circumstances, MacDonald asserted that a *Tuck*[4] showing is required to determine whether Hemlock (pop.

[1] *Mount Pleasant and Hemlock, MI,* 16 FCC Rcd 18782 (MMB 2001) ("*R&O*").

[2] 16 FCC Rcd 9456 (MMB 2001) ("*NPRM*").

[3] This rule 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.

[4] *Faye and Richard Tuck,* 3 FCC Rcd 5374 (1988).

1,601) is sufficiently independent of Saginaw to warrant a first local service preference.

4. The *R&O* granted the reallotment and change of community of license for Station WCEN-FM from Mount Pleasant to Hemlock, finding that this action would create a preferential arrangement of allotments under the FM allotment priorities.[5] Specifically, the reallotment and license modification would provide Hemlock a first local service under priority (3) while retention of the station in Mount Pleasant would be a third local service, triggering priority (4). However, the *R&O* required that Wilks specify its current licensed site for Station WCEN-FM, Mount Pleasant, Michigan, for the applications for a construction permit and a license for Station WCEN-FM, Hemlock, Michigan, because of the "grandfathered" short-spacings.

5. In its Petition for Reconsideration, MacDonald contends that the arguments set forth in its Comments were not adequately considered. In support of this position, MacDonald alleges that the *R&O* did not address its contention that the reallotment would result in a "move-in" of Station WCEN-FM to the Saginaw Urbanized Area. Although the *R&O* determined that Hemlock is a community for allotment purposes, MacDonald argues that, pursuant to precedent, the Commission requires an additional analysis under the eight *Tuck* factors[6] to determine whether the suburban community of Hemlock is sufficiently independent from the Saginaw Urbanized Area as to justify a first local transmission service preference. Because no *Tuck* analysis was included, MacDonald contends that the *R&O* was incomplete and insufficient in its justification of the reallotment. Further, MacDonald requests that the Commission investigate the current location of the main studio of WCEN-FM and determine whether the licensee is in violation of Section 73.1125(a), and if so, what the proper sanction should be.

6. In its Opposition to the Petition for Reconsideration, Wilks argues that the Petition for Reconsideration should be denied because MacDonald erroneously insists that the staff was required to apply a *Tuck* analysis. On the contrary, Wilks claims that no *Tuck* showing was required because Hemlock is not located within the Saginaw Urbanized Area and because the city-grade (70 dBu) signal of Station WCEN-FM will not cover 50 percent or more of the Saginaw Urbanized Area. Wilks further contends that MacDonald has failed to demonstrate why the Commission's precedent should be ignored in this case.

7. NML filed a Notice of Substitution of Parties, stating that it acquired Station WCEN-FM on January 6, 2003, from Wilks and requesting that NML be substituted as the licensee of record in this proceeding. Additionally, NML states that it adopts and approves the Opposition to Petition for Reconsideration filed by Wilks.

[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 is given to priorities (2) and (3).] *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982).

[6] The eight *Tuck* 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 its own zip code or telephone book provided by the local telephone company; (6) whether the community has its own commercial 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; and (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. *Faye and Richard Tuck,* 3 FCC Rcd at 5378.

DISCUSSION

8. Section 1.429 of the Commission's rules sets forth the limited provisions under which the Commission will reconsider a rulemaking action. Reconsideration is warranted only if the petitioner cites error of fact or law or has presented facts or circumstances that otherwise warrant Commission review of its prior action.[7] After careful review of the pleadings, we deny MacDonald's Petition for Reconsideration because it has demonstrated no errors of fact or law in the *R&O*.

9. Although the *R&O* did not explicitly address MacDonald's arguments about the alleged "move-in" of Station WCEN-FM to Saginaw or the need for a *Tuck* showing, Wilks/NML are correct that no *Tuck* showing is required under the facts of this case. As Wilks/NML correctly point out, a *Tuck* showing is required if a station is moving from a community located outside of an urbanized area to another community located within an Urbanized Area, as defined by the U.S. Census.[8] Similarly, we have also applied *Tuck* to cases where a station proposes to move from a community located outside of an urbanized area to another community located outside but proximate to an Urbanized Area if either the petitioner specifies reference coordinates or a commenter/counterproponent identifies reference coordinates from which the station would place a city-grade (70 dBu) signal over 50 percent or more of the Urbanized Area and over the entire proposed community of license.[9] Our staff engineering analysis confirms that Hemlock is located outside of the Saginaw Urbanized Area. Further, the city-grade (70 dBu) signal of Station WCEN-FM does not cover 50 percent or more of any Urbanized Area. Indeed, the 70 dBu signal covers about 5.6 percent of the area of the Saginaw Urbanized Area and less than 1 percent of the Bay City, Michigan, Urbanized Area.

10. We see no reason to deviate from the above policies and require a *Tuck* showing in this case. First, Wilks did not propose to relocate the WCEN-FM transmitter site. In accordance with the *R&O*, Wilks filed and the staff granted an implementing application to license the Hemlock station at the previously licensed WCEN-FM transmitter site.[10] Consequently, there has been no further encroachment into the Saginaw market.[11] Second, as a Class C1 station, WCEN-FM is constrained from moving its transmitter site closer to the Saginaw Urbanized Area because such a move would exacerbate its existing, grandfathered short-spacing to Station WCSX(FM), Channel 234B, Birmingham, Michigan. Third, the staff acted in conformance with well-settled precedent. *Tuck* is only applied in cases where the proposed facilities would or could cover 50 percent or more of an Urbanized Area. This "bright line" test ". . . strikes an appropriate balance between ensuring that rural stations do not migrate to urban areas in a manner inconsistent with the goals of Section 307(b) of the Communications Act and at the same time providing stations with the opportunity to change their communities of license, if this would serve the public interest."[12]

11. Finally, no error of law occurred by granting this change of community proposal under our allotment criteria and not ruling on an alleged violation of the main studio rule in the context of this

[7] See *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975).

[8] *See, e.g., Elizabeth City, NC*, 7 FCC Rcd 6815 (MMB 1992).

[9] *See, e.g., Chillicothe and Ashville, OH*, 18 FCC Rcd 22410 (MB 2003), *app. for rev. pending*; *Lincoln and Sherman, IL*, 19 FCC Rcd 23581 (MB 2004), *app. for rev. pending*; and *Talladega and Munford, AL*, DA 05-2217, released July 29, 2005. *See also Headland, AL, and Chattahoochee, FL*, 10 FCC Rcd 10352 (MMB 1995).

[10] *See* File No. BMLH-20011121AAX (granted Feb. 26, 2002).

[11] The reference coordinates for Station WCEN-FM are 43-43-36 and 84-36-16.

[12] *Headland, AL, and Chattahoochee, FL*, 10 FCC Rcd at 10354.

proceeding because that matter was not within the scope of the allocations proceeding.[13]

12. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by the MacDonald Broadcasting Company IS DENIED.

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

14. For further information concerning the proceeding, contact Andrew J. Rhodes, Audio Division, Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

[13] A Request for Forbearance from application of the main studio rule was filed by Wilks on January 12, 2001. The license for Station WCEN-FM was modified to specify Hemlock pursuant to the *R&O* on December 3, 2001, mooting the Request for Forbearance. The unopposed application to assign the WCEN-FM license was granted on December 30, 2002 without the Commission taking any action against Wilks. *See* File No. BALH-20021106ABP.