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

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 05-16
Table of Allotments,) RM-11143
FM Broadcast Stations.) RM-11295
(La Grange, Richlands, Shallotte, Swansboro,)
Topsail Beach, and Wrightsville Beach,)
North Carolina¹)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 4, 2006

Released: January 6, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it the Notice of Proposed Rule Making ("Notice")² issued in response to a Petition for Rule Making filed on behalf of Sea-Comm, Inc. ("Petitioner") licensee of Stations WBNU, Shallotte, North Carolina; WWTB, Topsail Beach, North Carolina; and WBNE, Wrightsville Beach, North Carolina. Petitioner filed comments and reply comments. Conner Media Corporation ("Conner") filed "Comments and Counterproposal" ("Counterproposal") and reply comments. Several other responsive pleadings were filed. Subsequently, both Petitioner and Conner ("Joint Parties") submitted a settlement agreement entitled "Resolution of Rulemaking Proceeding" ("Joint Resolution") which proposed granting Conner's Counterproposal.³ For the reasons stated below, we grant Conner's Counterproposal and dismiss Petitioner's Petition for Rule Making.

2. In its Petition for Rule Making, Petitioner proposed to upgrade Channel 279C3, Station WBNU, to Channel 279C2, reallocate Channel 279C2 from Shallotte to Wrightsville Beach, North Carolina, and modify the Station WBNU license accordingly. To accommodate the Station WBNU changes, Petitioner proposed to downgrade Station WWTB from Channel 280C3 to Channel 281A, reallocate Channel 281A from Topsail Beach to Richlands, North Carolina, and modify the license of Station WWTB accordingly. In order to assure that Topsail Beach retains a local aural transmission service, Petitioner proposed to upgrade Station WBNE from Channel 229A to Channel 229C3, reallocate Channel 229C3 from Wrightsville Beach to Topsail Beach and to modify Station WBNE's license

¹ La Grange and Swansboro have been added to the caption.

² Richlands, Shallotte, Topsail Beach and Wrightsville Beach, North Carolina, 20 FCC Rcd 1282 (MB 2005).

³ The Joint Parties agree that upon the grant of Conner's Counterproposal, all pending pleadings except the Joint Resolution, may be dismissed without further consideration. Therefore, the reply comments of Conner and Petitioner and all pleadings filed subsequent to those reply comments but prior to the Resolution of Rulemaking Proceeding are dismissed, upon the grant of Conner's Counterproposal. The pleadings filed after the reply comments include Conner's motion to file a procedural response to Petitioner's reply comments and the procedural response itself; Petitioner's opposition to Conner's foregoing motion and response; Petitioner's motion to strike Conner's reply comments; Conner's opposition to the foregoing motion to strike; and Petitioner's reply to that opposition.

accordingly. Petitioner's proposal would provide a first local aural transmission service to Richlands, North Carolina. Conner filed a counterproposal (RM-11295) which proposed the same three steps of Petitioner's initial Petition for Rule Making, except Conner recommended that Station WWTB move to Swansboro, North Carolina (2000 U.S. Census population of 1,426 persons), rather than Richlands (2000 U.S. Census population of 928 persons), thus providing the larger community of Swansboro with its first local aural transmission service. In addition, the counterproposal requested the upgrade of Conner's Station WZUP, La Grange, North Carolina, from Channel 284C3 to Channel 284C2. After the record was closed, Petitioner and Conner filed their Joint Resolution that proposed granting Conner's counterproposal.

3. The Joint Resolution asks that Petitioner's Petition for Rule Making be dismissed and that Conner's Counterproposal be granted. The Joint Parties explain that Petitioner's decision to support Conner's Counterproposal was unilateral and did not result from any negotiations or discussions between the parties or their representatives. Each of the Joint Parties has submitted a declaration under penalty of perjury explaining that no consideration has been paid or promised to Petitioner to induce its concurrence with Conner's Counterproposal.⁴ The downgrade of Channel 280C3, Station WWTB to Channel 281A and the reallocation of Channel 281A to Swansboro, North Carolina, would provide Swansboro with its first local aural transmission service. In their Joint Resolution, Petitioner and Conner made the three foregoing reallocation requests for Stations WBNU, WWTB, and WBNE pursuant to Section 1.420(i) of the Commission's rules,⁵ 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.⁶ In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities.⁷

4. We find that reallocation Channel 281A, Station WWTB, from Topsail Beach to Swansboro, North Carolina, would result in a preferential arrangement of allotments under the FM allotment priorities because it would provide the first local aural transmission service to Swansboro (priority (3) of the FM allotment priorities).⁸ This would not deprive Topsail Beach of its only local aural transmission service, because Station WBNE will move to Topsail Beach to replace Station WWTB. Further, a total net gain in radio service to 145,190 persons would result from the three changes in community of license we grant in this proceeding. Swansboro, North Carolina is an incorporated town to which an FM allotment may be made. Since the proposed Channel 281A facility at Swansboro would provide a 70 dBU contour over 64.6 percent of the Jacksonville, North Carolina

⁴ These declarations comply with 47 C.F.R. § 1.420(j).

⁵ 47 C.F.R. § 1.420(i).

⁶ See *Modification of FM and TV Authorizations to Specify a New Community of License*, ("Community of License"), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

⁷ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). 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. Equal weight is given to priorities (2) and (3).

⁸ *Community of License* does not provide for a party to seek a change in community of license of a station licensed to another party. In this situation, the Petitioner has agreed to the modification of its Station WWTB as recommended by Conner in its Counterproposal.

Urbanized Area, the Joint Parties were required to provide a *Tuck* showing that Swansboro is sufficiently independent of the Jacksonville, North Carolina Urbanized Area, that the proposal to relocate Station WWTB to Swansboro deserves credit for providing the first local service to Swansboro.⁹ Conner submitted a *Tuck* analysis in its Counterproposal that demonstrates that Swansboro is independent of the Jacksonville Urbanized Area. This analysis meets a clear majority of the eight *Tuck* factors, as required by Commission precedents.¹⁰ Conner states that Swansboro is self-governed and also has its own town manager, levies its own property tax, provides its own police and fire departments, rescue squad and sewer and water services. In addition, Swansboro has a weekly newspaper published in Swansboro, its own zip code, numerous commercial establishments, and several health facilities. Therefore, in accordance with the provisions of Section 1.420 (i) of the Commission's rules,¹¹ we modify the licenses of Stations WBNU, WWTB, WBNE as requested and grant the Joint Parties' Joint Resolution. Pursuant to Section 1.420(g)(3) of the Commission's rules,¹² we also grant the Joint Parties' request to upgrade Channel 284C3, Station WZUP, to Channel 284C2 at La Grange, North Carolina. In addition, we shall condition the commencement of service on Channel 281A by Station WWTB at Swansboro, on the commencement of service on Channel 229C3 by Station WBNE at Topsail Beach, to avoid any disruption of service of local service to Topsail Beach.

5. Consistent with the technical requirements of the Commission's rules, Channel 279C2 can be allotted to Wrightsville Beach, North Carolina, utilizing coordinates of 33-59-56 NL and 77-54-35 WL, with a site restriction of 25.4 kilometers (15.8 miles) southwest of Wrightsville Beach; Channel 229C3 can be allotted to Topsail Beach, North Carolina, utilizing coordinates of 34-25-37 NL and 77-38-33 WL, with a site restriction of 7.0 kilometers (4.3 miles) north of Topsail Beach; and Channel 281A can be allotted to Swansboro, North Carolina, utilizing coordinates of 34-42-41 NL and 77-16-07 WL, with a site restriction of 13.9 kilometers (8.7 miles) west of Swansboro. Lastly, Channel 284C3 can be upgraded to Channel 284C2 at La Grange, North Carolina, utilizing coordinates of 35-07-39 NL and 77-42-59 WL, with a site restriction of 20.9 kilometers (13.0 miles) south of La Grange.

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

7. 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 February 21, 2006, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED for the

⁹ *See Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988); *see also Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995) (a reallocation proposal that seeks a preference for providing a first local aural transmission service to a community must submit a showing pursuant to *Faye and Richard Tuck* when the proposed 70 dBu contour will encompass more than 50 percent of an Urbanized Area.)

¹⁰ *See, e.g., Parker and Port St. Joe, Florida*, 11 FCC Rcd 1095, 1096 (MMB 1996).

¹¹ 47 C.F.R. § 1.420(i).

¹² 47 C.F.R. § 1.420(g)(3).

communities listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
La Grange, North Carolina	284C2
Shallotte, North Carolina	292A
Swansboro, North Carolina	281A
Topsail Beach, North Carolina	229C3
Wrightsville Beach, North Carolina	279C2

8. IT IS FURTHER ORDERED that the foregoing Resolution of Rulemaking Proceeding IS GRANTED.

9. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Sea-Comm, Inc. IS DISMISSED as requested.

10. IT IS FURTHER ORDERED, That the Counterproposal submitted by Conner Media Corporation IS GRANTED.

11. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of Sea-Comm, Inc. for Station WBNU(FM), Shallotte, North Carolina, IS MODIFIED to specify operation on Channel 279C2 at Wrightsville Beach, North Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the 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 be conducted in accordance with 47 C.F.R. Section 73.1620; and

(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 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

12. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of Sea-Comm, Inc. for Station WWTB(FM), Topsail Beach, North Carolina, IS MODIFIED to specify operation on Channel 281A at Swansboro, North Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the 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 in accordance with 47 C.F.R. Section 73.1620 until Station WBNE(FM) is operating on Channel 229C3 at Topsail Beach; and

(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 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

13. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of Sea-Comm, Inc. for Station WBNE(FM), Wrightsville Beach, North Carolina, IS MODIFIED to specify operation on Channel 229C3 at Topsail Beach, North Carolina, 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 47 C.F.R. Section 73.1620; and

(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 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

14. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of Conner Media Corporation for Station WZUP(FM), La Grange, North Carolina, IS MODIFIED to specify operation on Channel 284C2 at La Grange, North Carolina, 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 47 C.F.R. Section 73.1620; and

(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 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

15. Pursuant to 47 C.F.R. Section 1.1104(3)(l), Sea-Comm, Inc., licensee of FM Stations WBNU, WWTB, and WBNE, and Conner Media Corporation, licensee of FM Station WZUP, are required to submit a rule making fee in addition to the fee required for the applications to effectuate the changes in community of license for FM Stations WBNU, WWTB and WBNE and the upgrade in channel for Station WZUP, respectively, at the time their Form 301 applications are submitted.

16. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

17. For further information concerning the above, contact R. Barthen Gorman, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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