

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

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In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 04-20
Table of Allotments,)	RM-10842
FM Broadcast Stations.)	RM-11128
(Cambridge, Newark, St. Michaels, and Stockton,)	RM-11129
Maryland and Chincoteague, Virginia))	RM-11130

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 20, 2006

Released: September 22, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it (a) the *Report and Order*¹ in this docket; (b) a Petition for Reconsideration of that *Report and Order* filed by CWA Broadcasting, Inc. ("Petitioner"), licensee of Station WINX-FM, Channel 232A, St. Michaels, Maryland;² (c) an Opposition to the Petition for Reconsideration filed by MTS Broadcasting, L.C. ("MTS"); and (d) a Reply to the Opposition filed by Petitioner. In addition, we have a Motion to Compel³ filed by MTS, an Opposition to Motion to Compel filed by Petitioner, and a Reply to the foregoing opposition pleading filed by MTS. For the reasons stated below, we deny reconsideration.

2. **Background.** At the request of the Petitioner, the *Notice of Proposed Rule Making*⁴ in this proceeding proposed to upgrade Station WINX-FM from Channel 232A to 232B1, reallocate Channel 232B1 from St. Michaels to Cambridge, Maryland, and to modify its station license accordingly.⁵ MTS, licensee of Station WCEM-FM, Cambridge, Maryland, filed "Comments and Counterproposal" ("Counterproposal")

¹ *Cambridge, Newark, St. Michaels, and Stockton, Maryland, and Chincoteague, Virginia*, Report and Order, 20 FCC Rcd 19099 (MB 2005).

² We also have before us Petitioner's "Petition for Leave to File Supplement to Petition for Reconsideration" and "Supplement." The Supplement concerns a one-step application proposing to upgrade Station WINX-FM from Channel 232A to Channel 232B1 (File No. BPH-20020718ABE). This application is separate from Petitioner's proposal in this proceeding and need not be considered in resolving this docket.

³ MTS filed a motion requesting that the Commission compel Petitioner to file an application implementing the Commission's grant of the Petitioner's request in an earlier docket to operate on Channel 232A at St. Michaels. *See Cambridge and St. Michaels, Maryland*, Memorandum Opinion and Order, 12 FCC Rcd 3504 (MMB 1997); *petition to dismiss denied*, Memorandum Opinion and Order, 17 FCC Rcd 20425 (MB 2002). This matter also is outside the scope of this proceeding and will not be considered.

⁴ *Cambridge and St. Michaels, Maryland*, Notice of Proposed Rule Making, 19 FCC Rcd 2592 (MB 2004) ("Notice").

⁵ RM-10842.

which proposed to allot Channel 233A to Newark, Maryland,⁶ while Route 12 Community Broadcasters filed "Comments and Counterproposal" ("Counterproposal") which proposed to allot Channel 232A to Stockton, Maryland.⁷ In addition, Dana J. Puopolo filed a Counterproposal to allot Channel 233A to Chincoteague, Virginia, as its second local aural transmission service.⁸ The staff placed the three foregoing counterproposals on a *Public Notice*,⁹ and both Petitioner and MTS filed Reply Comments to that *Public Notice*. The *Report and Order* allotted Channel 235A to Newark, Maryland and Channel 233A to Chincoteague, Virginia.

3. **Discussion.** In its Petition for Reconsideration, Petitioner repeats its arguments summarized in the *Notice*¹⁰ concerning the history of its efforts to have its community of license changed from Cambridge to St. Michaels, then back to Cambridge. Petitioner claims, essentially, that the "unique" facts in this case "compel" the Commission to allow Petitioner to change its community of license to Cambridge. We have considered all of Petitioner's arguments in this matter, both at the *Report and Order* stage and at this stage. We conclude that these arguments are without merit. We do not perceive any unique facts or circumstances that compel us to disregard the FM allotment priorities¹¹ in this case and grant Petitioner's request. Retaining Channel 232A at St. Michaels would provide the community with its first local aural transmission service under priority (3) of the FM allotment priorities. Upgrading Channel 232A to Channel 232B1 and moving Channel 232B1 to Cambridge would trigger priority (4) of the FM priorities, namely "other public interest matters," by providing Cambridge with its third local aural transmission service and a net gain in service to 2,310 persons and priority (2) by providing a second service to a "gray" area¹² with a population of 1,184 persons. Because FM allotment priorities (2) and (3) are co-equal, this gray area to be served (priority (2)) must be weighed against a first local service to the community of St. Michaels, which has a larger population of 1,193 persons.¹³ Thus, coupled with our award of a first local service to Newark and a first competitive service to Chincoteague, we affirm our earlier determination that Petitioner's request to change its community of license to Cambridge must be denied.

⁶ RM-11129.

⁷ RM-11130.

⁸ RM-11128.

⁹ The *Public Notice (Report No. 2685)* is dated December 9, 2004.

¹⁰ See paragraphs 3-5 of the *Notice*.

¹¹ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982), *recon. denied*, Memorandum Opinion and Order, 56 RR 2d 448 (1983) ("*FM Allotment Priorities*"). 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).

¹² A "gray" area is an area with one reception service.

¹³ Cf. *Washington and Watkinsville, Georgia*, Report and Order, 18 FCC Red 18327 (MMB 2003), where the creation of a loss area in which 618 persons would be left with one full-time aural service (i.e., the creation of a gray area) was outweighed by the benefits that would result from the proposed first local service to a community of 2,097 persons.

4. Petitioner claims also that Newark, Maryland does not qualify as a community to which an FM allotment can be made. We disagree. Newark, Maryland, is a Census Designated Place (CDP) with a 2000 U.S. Census population of 339 persons, a post office, zip code, a volunteer fire department, several businesses, including a child-care center and assisted care facility, two churches, and a museum. Although Newark is not a large community, the Commission presumes that if a community is incorporated or listed in the U.S. Census, the community qualifies for FCC allotment purposes.¹⁴ Petitioner claims that the *Report and Order* is inconsistent with staff decisions in *Grants and Peralta, New Mexico*,¹⁵ and *Gaviota, California*.¹⁶ In *Grants*, a noncommercial educational licensee requested to change its community of license from Grants to Peralta. The staff determined that Peralta was not sufficiently independent of the Albuquerque, New Mexico Urbanized Area to qualify for consideration as a first local service under *Faye and Richard Tuck*.¹⁷ After making that determination, the staff erroneously found that Peralta also did not have sufficient indicia to qualify as a community for allotment purposes. The reasoning in *Grants* is inconsistent with established Commission precedent.¹⁸ Peralta is a CDP with a population of 3,182 persons according to the 1990 Census. Peralta has its own zip code, volunteer fire department, an elementary school, local businesses and a church. In fact, the record in *Grants* establishes that Peralta has many of the indicia of community status which the Commission routinely finds probative.¹⁹ Petitioner's reliance on *Gaviota* is misplaced because unlike Newark, Maryland, *Gaviota, California*, had virtually no indicia of a community.²⁰

5. Petitioner also argues that, as an alternative proposal to Petitioner's change of community request in this docket to move from St. Michaels to Cambridge, Maryland, the Commission should consider allotting Channel 232B1 to Oxford, Maryland and changing Petitioner's community of license from St. Michaels to Oxford, Maryland, because Oxford would meet applicable Commission technical requirements and would provide Oxford with its first local aural transmission service. This is an untimely

¹⁴ See *FM Allotment Priorities*, *supra*, 90 FCC 2d 88, 101.

¹⁵ *Grants and Peralta, New Mexico*, Report and Order, 14 FCC Rcd 21446 (MMB 1999) ("*Grants*").

¹⁶ *Gaviota, California*, Report and Order, 16 FCC Rcd 1518 (MMB 2000) ("*Gaviota*").

¹⁷ *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374, (1988) ("*Tuck*"). A *Tuck* issue was required in *Grants* because the proposed Peralta station would place a 70 dBu contour over more than 50 percent of the Albuquerque Urbanized Area. See *Headland, Alabama, and Chattahoochee, Florida*, Report and Order, 10 FCC Rcd 10352 (1995).

¹⁸ See *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcasting Assignments (Semora, North Carolina)*, Memorandum Opinion and Order, 5 FCC Rcd 934 (1990) and the cases cited therein; and *Kenansville, Florida*, Memorandum Opinion and Order, 10 FCC Rcd 9831 (1995).

¹⁹ A community for allotment purposes must be an identifiable population grouping. In making such a determination, we consider such indicia as local businesses, local government, churches and civic organizations, a post office or zip code, schools, and municipal services.

²⁰ 16 FCC Rcd at 1520. The staff decision in *Gaviota* found that *Gaviota, California*, had no public library, post office, local government, municipal services, school system or community organizations.

counterproposal in contravention of Section 1.420(d) of the Commission's Rules.²¹ A counterproposal must be filed by the comment date.²² Therefore, this proposal will not be considered in this proceeding.

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, IT IS ORDERED, That the Petition for Reconsideration submitted by CWA Broadcasting, Inc. IS DENIED.

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

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

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

²¹ 47 C.F.R. § 1.420(d).

²² *See, e.g., Bainbridge, Georgia*, Memorandum Opinion and Order, 13 FCC Rcd 6424 (MMB 1998).