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

MAILED
OCT 17 2006
FCC Mail Room

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	
FM Broadcast Stations.	)	
(Port Norris, New Jersey, Fruitland, and Willards,	)	MB Docket No. 04-409
Maryland, Chester, Lakeside, and Warsaw,	)	RM-11108
Virginia)[1]	)	RM-11234

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 2006 **Released: October 13, 2006**

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a *Notice of Proposed Rule Making*[2] issued at the request of Dana Puopolo ("Petitioner") requesting the allotment of Channel 299A at Port Norris, New Jersey, as the community's first local aural transmission service. Petitioner filed comments in support of the proposal. CXR Holdings, Inc. ("CXR"), licensee of Station WDYL(FM), Chester, Virginia, filed a counterproposal which it later amended. Port Norris Radio, Popular Assembly of New Horizons 3000 and Joseph D'Allesandro all filed comments in favor of the allotment at Port Norris and in opposition to CXR's counterproposal. CXR filed reply comments.[3]

2. In its counterproposal, as amended, CXR requests the substitution of Channel 265B1 for Channel 266A, reallotment of Channel 265B1 from Chester to Lakeside, Virginia as the community's first local aural service, and modification of Station WDYL's license to reflect the changes. To accommodate the allotment of Channel 265B1 at Lakeside, CXR proposes the substitution of Channel 298A for Channel 265A at Warsaw, Virginia, at a new transmitter site and the modification of Station WNNT-FM's license to reflect the channel substitution. CXR also proposes to substitute Channel 299A for Channel 298B1 at a new site at Fruitland, Maryland and modify Station WKHI(FM)'s license accordingly. Great Scott Broadcasting, licensee of WKHI(FM), Fruitland, Maryland, has consented to this modification. Proposals to substitute Channel 299B1 for 298B1 at Fruitland and reallot Channel 299B1 from Fruitland to Willards, Maryland, and reallot Channel 273B from Princess Anne, Maryland to Fruitland, Maryland, which the licensees had agreed to, were deleted in CXR's amended counterproposal. CXR has pledged to reimburse all parties for their expenses in changing channels and transmitter sites.

3. In response to CXR's counterproposal, we issued an *Order to Show Cause*[4] directed to

[1] Fruitland, Princess Anne, and Willards, Maryland, Chester, Lakeside, Warsaw, Virginia have been added to the caption. *See Public Notice*, Report No. 2704, released April 22, 2005.

[2] *Port Norris, New Jersey,* Notice of Proposed Rule Making, 19 FCC Rcd 22010 (MB 2004)

[3] CXR contends in reply comments that its proposal has priority over a later filed application for construction permit (File No. BPH-20050428ABL) filed by MainQuad Communications, Inc. CXR also reiterates its interest in pursuing its Channel 265B1 Lakeside proposal at the originally specified reference coordinates.

[4] *Port Norris, New Jersey, Fruitland, Maryland, Chester, Lakeside, and Warsaw, Virginia*, Order to Show Cause, 10 FCC Rcd 10629 (MB 2005).

Northern Neck and Tidewater Communications, Inc. ("Northern Neck"), licensee of Station WNNT-FM, Warsaw, Virginia to show cause why its license should not be modified from Channel 265A to Channel 298A. Northern Neck responded to the Order to Show Cause, agreeing to the proposed changes to its license.

4. **Discussion**. We have compared the conflicting proposals under our policy set forth in *Revision of FM Assignment Policies and Procedures* because no alternative channels are available to eliminate the conflict.[5] The proposal and counterproposal each involve an allotment to a community that would receive its first local aural transmission service, a Priority 3 factor. Although each community is deserving of an allotment, because each would both serve the same allotment priority, our rules favor the community with the larger population. Port Norris is a Census Designated Place with a 2000 U.S. Census population of 1507 persons, and Lakeside is a Census Designated Place with a 2000 U.S. Census population of 11,157 persons. Accordingly, we will grant the Lakeside counterproposal as amended.

5. In reaching this result, we recognize that we have not applied *Huntington Broadcasting Co. v. FCC*[6] and *Faye and Richard Tuck*.[7] Lakeside lies within the Richmond Urbanized Area as does Chester. Therefore, in reallotting an FM channel from one community to another within this same urbanized area, no issue exists as to whether the petitioner is attempting to move into an urbanized area. As we stated in *East Los Angeles, California*,[8] we have applied *Huntington* and *Tuck* in cases involving moves from communities outside of urbanized areas to communities inside of urbanized area, because we were concerned that a first local service preference could be used as a mechanism for a station to enter a large market. However, those concerns do not exist in cases such as the instant one where a station is already licensed to a community in an urbanized area and seeks to change its community of license to another community in the same urbanized area.

6. Popular Assembly of New Horizons 3000 and Joseph D'Allesandro argue that we should deny the CXR proposal because it fails to protect LPFM Stations WLOU-LP, Williamsburg, Virginia, and WRBG-LP, Millsboro, Delaware. This argument is without merit. Proposed allotments for full power FM stations are not required to protect low power stations.

7. We modify the Station WDYL(FM) license to specify Lakeside as the community of license pursuant to Section 1.420(i) of the Commission's rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest in the proposed allotment.[9] In this instance, the reallotment of Channel 265B1 at Lakeside, Virginia, is mutually exclusive with the licensed site of Station WDYL(FM), Channel 265A, Chester, Virginia. Chester will continue to receive local operational service from AM Station WGGM.

8. Channel 265B1 can be allotted at Lakeside, Virginia, at a site 9.6 kilometers (5.9 miles) east of the community.[10] Channel 299A can be allotted at Fruitland, Maryland at a site 13.2 kilometers

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[5] *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 91 (1988). The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)].

[6] *Huntington Broadcasting Co. v. FCC.*, 92 F.2d 33 (D.C. Cir. 1951) ("*Huntington*").

[7] *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) *("Tuck")*.

[8] *See East Los Angeles, Long Beach and Frazier Park, California,* Report and Order, 10 FCC Rcd 2864 (MMB 1995); *recon. dismissed,* 13 FCC Rcd 4692 (MMB 1998).

[9] *See Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870, 4873 (1989), recon. granted in part, Memorandum Opinion and Order, 5 FCC Rcd 7394 (1990).

[10] The site coordinates for Channel 265B1 at Lakeside are 34-36-08 NL and 77-22-09 WL.

(8.2 miles) northeast of the community.[11] Channel 298A can be allotted at Warsaw, Virginia, at Station WNNT-FM's transmitter site located 1.7 kilometers (1.1 miles) south of the community.[12]

9. 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).

10. Accordingly, pursuant to the authority found 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 November 27, 2006, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, to read as follows:

Community	Channel No.
Fruitland, Maryland	299A
Lakeside, Virginia	265B1
Warsaw, Virginia	298A

11. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the authorization of CXR Holdings, Inc., licensee of Station WDYL(FM), Chester, Virginia, Channel 265A, Chester, Virginia, IS MODIFIED to specify operation on Channel 265B1at Lakeside, Virginia, subject to the following conditions:

(a) Within 90 days of the effective date of the *Order*, CXR Holdings, Inc., 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) that the authorization of Great Scott Broadcasting, licensee of WKHI(FM), Channel 298B1, Fruitland, Maryland IS MODIFIED to specify operation on Channel 298A, subject to the following conditions:

(a) Within 90 days of the effective date of the *Order*, Great Scott Broadcasting 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

[11] The site coordinates for Channel 299A at Fruitland are 38-22-55 NL and 75-29-25 WL

[12] The site coordinates for Channel 298A at Warsaw are 37-56-39 NL and 76-45-05 WL.

(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) that the authorization of Northern Neck and Tidewater Communications, Inc., licensee of Station WNNT-FM, Channel 265A, Warsaw, Maryland, IS MODIFIED to specify operation on Channel 298A, subject to the following conditions:

(a) Within 90 days of the effective date of the *Order*, Northern Neck and Tidewater Communications, Inc 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. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and (3)(l) of the Commission's rules, CXR Holdings, Inc., licensee of Station WDYL(FM), Chester, Virginia, is required to submit a rulemaking fee in addition to the fee required for the application to effectuate the community of license for Station WDYL(FM) to specify operation on Channel 265B1 at Lakeside, Virginia, at the time its Form 301 application is submitted.

15. IT IS FURTHER ORDERED That the petition for rulemaking filed by Dana Puopolo IS DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION

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