

DOCKET FILE COPY ORIGINAL Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	FCC
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 05-295
FM Broadcast Stations.)	RM-11280
(Cumberland, Kentucky, Weber City,)	
Glade Spring, and Marion, Virginia))	
)	
ASRadio, LLC)	
Glade Spring, Virginia)	File No. BNPH-20060308ALW
)	Facility ID No. 166082
Application for Construction Permit for)	
New FM Station)	

MEMORANDUM OPINION AND ORDER
(Proceedings Terminated)

Adopted: January 2, 2008

Released: January 4, 2008

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 MB Docket No. 05-295 ("Reconsideration 1") filed by JBL Broadcasting, Inc. ("JBL"), licensee of Station WVEK-FM, Cumberland, Kentucky; (2) Comments on Reconsideration 1, filed by ASRadio, LLC ("ASRadio"), permittee of Station WFYE(FM), Glade Spring, Virginia; and (3) various related pleadings.² The Audio Division, on its own motion, is consolidating for consideration in this proceeding the following related matters: (1) a Petition for Reconsideration filed by JBL of a staff action granting the above captioned application and denying an informal objection ("Reconsideration 2");³ and (2) an Opposition to Reconsideration 2 filed by ASRadio.⁴ For the reasons discussed below, we grant Reconsideration 1 and dismiss Reconsideration 2 as moot.

¹ *Cumberland, Kentucky, Weber City, Glade Spring, and Marion, Virginia*, Report and Order, 21 FCC Rcd 6431 (MB 2006) ("R&O").

² These pleadings are (1) a Motion to File Supplement and a Supplement to Petition for Reconsideration filed by JBL on July 13, 2007; (2) a Request for Expedited Action on Petition for Reconsideration filed by JBL on August 17, 2007; (3) a Motion for Leave to File Second Supplement and a Second Supplement to Petition for Reconsideration filed by JBL on September 14, 2007; and (4) a Motion for Leave to File Response to Second Supplement and a Response to Second Supplement filed by ASRadio on October 9, 2007.

³ *Letter to ASRadio, LLC*, Ref. 1800B3-AED (Assistant Chief, Audio Division, Media Bureau, May 26, 2006) ("Staff Letter").

⁴ Also on file is a July 13, 2006, Consent Motion for Extension of Time to Respond to Reconsideration 2 filed by ASRadio.

Reconsideration 1

2. **Background.** At the request of JBL, a *Notice of Proposed Rule Making and Order to Show Cause*⁵ proposed the upgrade of Channel 274A to Channel 274C3 at Cumberland, Kentucky, the reallocation of Channel 274C3 from Cumberland (pop. 2,611) to Weber City, Virginia (pop. 1,333) as a first local service, and the associated modification of the license for Station WVEK-FM pursuant to Sections 1.420(g)(3) and (i) of the Commission's rules (the "Rules").⁶ To accommodate this upgrade and reallocation, the *NPRM/OSC* also proposed: (1) the substitution of Channel 263A for then vacant Channel 274A at Glade Spring, Virginia;⁷ and (2) the substitution of Channel 273A for Channel 263A at Marion, Virginia, and the associated modification of Station WOLD-FM's license.⁸

3. The *R&O* denied JBL's proposal and terminated the proceeding because one of the related channel changes did not comply with the minimum distance separation requirements of Section 73.207(a) of the Rules.⁹ Specifically, the proposed substitution of Channel 273A for Channel 263A at Marion, Virginia, and the modification of the license for Station WOLD-FM were short-spaced to two mutually exclusive applications for a new FM station on Channel 273A at Shawsville, Virginia.¹⁰ These applications were filed in 1997 under the contour protection provisions of Section 73.215 of the Commission's rules and fully protected Station WOLD-FM, then a licensed Channel 273A station, from interference. However, in MM Docket 99-244, Station WOLD-FM's license was modified to specify Channel 263A at a different transmitter site, with the licensee's consent, to accommodate the new allotment of Channel 274A at Glade Spring. As a result of that action and as the *R&O* explained, WOLD-FM became fully protected at the modified site for maximum class facilities on Channel 263A. At the same time, protection for WOLD-FM's formerly licensed Channel 273A facilities ceased. WOLD-FM is permitted, however, to continue to operate on Channel 273A on an interim or "implied Special Temporary Authority" basis.¹¹

⁵ *Cumberland, Kentucky, Weber City, Glade Spring, and Marion, Virginia*, Notice of Proposed Rule Making and Order to Show Cause, 20 FCC Rcd 18039 (MB 2005) ("*NPRM/OSC*").

⁶ These rules permit the modification of a station's authorization to specify a new community of license and the upgrade of the class of an FM station on a mutually exclusive co-channel or adjacent channel without affording other interested parties an opportunity to file competing expressions of interest.

⁷ The *NPRM/OSC* noted that Channel 274A at Glade Spring was listed among other vacant non-reserved band FM allotments in Broadcast Auction No. 62, which subsequently occurred on January 12, 2006. ASRadio, LLC became the successful auction bidder for Channel 274A at Glade Spring, and its application for construction permit (File No. BNPH-20060308ALW) was granted on May 26, 2006, subject to the outcome of MB Docket 05-295.

⁸ Previously, in MM Docket No. 99-244, the license for Station WOLD-FM was modified from Channel 273A to Channel 263A to accommodate the allotment of Channel 274A at Glade Spring, Virginia, as a first local service. See *Cumberland, Kentucky, Weber City, Glade Spring, Marion, Richlands, and Grundy, Virginia*, Report and Order, 17 FCC Rcd 5024 (MMB 2002). However, Station WOLD-FM has not commenced operations on Channel 263A. We note that two other stations, WRIC-FM, Richlands, Virginia, and WMJD(FM), Grundy, Virginia, were also required in MM Docket 99-244 to change channels to accommodate the allotment of Channel 274A at Glade Spring and have already implemented their respective channel changes.

⁹ 47 C.F.R. § 73.207.

¹⁰ See File Nos. BPH-19971022MC and BPH-19971023ME. These applications were 6.6 and 0.6 kilometers, respectively, short-spaced to Channel 273A at Marion. There are two other mutually exclusive applications pending for Channel 273A at Shawsville, File Nos. BPED-19971021MF and BPH-19971023MC, which are fully spaced to Channel 273A at Marion.

¹¹ See *1988 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Notice of Proposed Rule Making, 13 FCC Rcd 14849, 14855 n.22 (1998) ("*Technical Streamlining*").

4. In Reconsideration 1,¹² JBL seeks the reinstatement and grant of its rulemaking proposal and argues that the foregoing rationale for dismissal of its rulemaking petition is arbitrary and capricious in violation of Section 706(2)(A) of the Administrative Procedure Act.¹³ In support of this position, JBL contends that (1) Station WOLD-FM has a right under Section 316 of the Communications Act of 1934, as amended, not an implied special temporary authorization, to continue to operate on Channel 273A because the R&O in MM Docket No. 99-244 did not actually modify the license of Station WOLD-FM to specify operation on Channel 263A; (2) the language relied upon in the *Technical Streamlining* proceeding for concluding that Station WOLD-FM has an implied special temporary authorization for Channel 273A applies only to "one-step applications," and not to rulemaking proceedings; and (3) the two Shawsville applications should continue to be treated under the contour protection provisions of Section 73.215, and, therefore, the WOLD-FM Channel 273A proposal should be treated as fully spaced to these applications.¹⁴

5. In its Comments, ASRadio states that it recently was granted the construction permit for Channel 274A at Glade Spring, is ready to build Station WFYE(FM), but cannot operate on Channel 274A until Station WOLD-FM is moved from Channel 273A to Channel 263A as required by the R&O in MM Docket 99-244. ASRadio also recognizes that Station WOLD-FM has not yet moved to Channel 263A and that the outcome of MB Docket 05-295 will determine whether WFYE(FM) at Glade Spring will occupy Channel 274A or 263A. ASRadio has determined that it can serve Glade Spring as well or better with Channel 263A and, therefore, supports grant of Reconsideration 1. ASRadio also urges expeditious action in this matter because (1) WOLD-FM would be relieved of the obligation to change channels; (2) ASRadio can construct immediately on Channel 263A without regard to Station WOLD-FM, expediting a first local transmission service to Glade Spring; and (3) there would be a more efficient use of broadcasters' resources because the reimbursement obligations for ASRadio and JBL would be either eliminated or mitigated.¹⁵

6. In a Motion for Leave to File Supplement to Reconsideration 1, JBL argues that the public interest would be served by considering its Supplement to Reconsideration 1 because it reports new facts affecting the outcome of this proceeding that occurred after the 30-day period for filing a petition for reconsideration. Specifically, the Supplement to Reconsideration 1 points out that on July 9, 2007, two applicants for Channel 273A at Shawsville, Virginia, filed separate amendments to their applications, specifying a common proposed transmitter site. JBL further contends that use of this amended transmitter site eliminates the short-spacing between these applications and Station WOLD-FM's current operation on Channel 273A at Marion.¹⁶ Because the impediment to grant of JBL's rulemaking proposal has been eliminated, JBL requests the reinstatement and grant of its proposal.¹⁷

¹² *Public Notice* of the filing of Reconsideration 1 was given in Report No. 2788, August 15, 2006.

¹³ 5 U.S.C. § 706(2)(A).

¹⁴ JBL also submits a letter from a principal of one of the short-spaced Shawsville applicants, stating that, if JBL's Petition for Reconsideration were granted, it would amend its application to specify a transmitter site that would be fully-spaced to operation of WOLD-FM on Channel 273A at Marion, Virginia. See *Letter from Grace Communications, L.C.*, Reconsideration 1, Exhibit B.

¹⁵ In this regard, ASRadio contends that if ASRadio were to construct on Channel 274A at Glade Spring while Reconsideration 1 were pending, then, if the Commission should later grant Reconsideration 1, JBL would be forced to fund the relocation of WFYE(FM) to Channel 263A and also move WOLD-FM back to its current operating location, Channel 273A.

¹⁶ See Amendments filed by George S. Flinn, Jr. (File No. BPH-19971022MC) and Grace Communications, L.C. (File No. BPH-19971023ME).

¹⁷ On August 17, 2007, JBL filed a Request for Expedited Action on Petition for Reconsideration, urging the Commission to act on Reconsideration 1 for reasons similar to those advanced by ASRadio in its Comments.

7. Thereafter, in response to a staff request for additional information, JBL filed a Second Supplement to Petition for Reconsideration, stating that it will reimburse the permittee of Station WFYE(FM), Glade Spring, Virginia, and the licensee of Station WOLD-FM, Marion, Virginia, for their reasonable expenses in changing channels in accordance with Commission policy.¹⁸ In its Response to Second Supplement, ASRadio continues to support grant of Reconsideration 1, so long as ASRadio can receive prompt authority to proceed with construction of its new station at Glade Spring.

8. **Discussion.** As a threshold matter, we must address several procedural issues. First, we will grant JBL's Motion to File Supplement to Reconsideration 1. Although Section 1.429(d) of the Commission's rules requires that a petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action, this section permits consideration of a supplement to a petition for reconsideration filed after expiration of the 30-day period "... upon leave granted pursuant to a separate pleading stating the grounds for acceptance of the supplement." We believe that reporting new facts that may affect the outcome of this proceeding constitutes good cause for permitting the late filing.¹⁹ Second, pursuant to Section 1.429(b), a petition for reconsideration relying on facts that have not been previously presented may be considered if, *inter alia*, (1) the facts relied on relate to events that have changed since the last opportunity to present them to the Commission; or (2) it is in the public interest to consider the new facts. We find that both of these grounds are present for consideration of these new facts. The filing of the amendments occurred approximately 11 months after the deadline for filing a petition for reconsideration in this proceeding, and the public interest would be served by their consideration because it could expedite the activation of a first local service at Glade Spring and create a new first local service at Weber City, promoting Priority (3) of the FM Allotment Priorities.²⁰ Third, we will consider JBL's Second Supplement to Reconsideration 1 because it was filed in response to a staff request for additional information.²¹

9. Next, as to the merits, we believe that reconsideration of our denial of JBL's rulemaking proposal is warranted based on the changed circumstances that have occurred since the release of the *R&O*. As previously explained, the rulemaking proposal was denied based on the short-spacings between the current operation of Station WOLD-FM on Channel 273A at Marion and the transmitter sites proposed by two of the applicants for Channel 273A at Shawsville. However, on July 9, 2007, these two applicants filed amendments to their applications that specified a common transmitter site and eliminated the short-spacings.²² These amendments were accepted for filing on August 23, 2007. Because these amendments cure the technical defect with JBL's rulemaking proposal and there will be no prejudice to any competing proponent,²³ we will reinstate and process JBL's rulemaking petition.²⁴

¹⁸ See *Circleville, Ohio, et al.*, Second Report and Order, 8 FCC 2d 159, 163-165 (1967).

¹⁹ See, e.g., *Columbus and Monona, Wisconsin*, Memorandum Opinion and Order, 21 FCC Rcd 10012 (MB 2006) (granting a motion to supplement a petition for reconsideration to provide information on facts that have changed since the release of the *Report and Order* in an FM allotment proceeding).

²⁰ The FM Allotment Priorities are (1) first fulltime aural service; (2) second fulltime 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*, Second Report and Order, 90 FCC 2d 88, 91 (1982).

²¹ Under these circumstances, it is not necessary to rule upon JBL's Motion for Leave to File Second Supplement.

²² See *supra* note 18.

²³ See, e.g., *Lebanon Broadcasting Co., Inc.*, Memorandum Opinion and Order, 68 FCC 2d 822 (1978) (granting on a reconsideration an application for a new FM station that had been previously denied for violating newspaper cross-ownership rule because of the subsequent divestiture of the newspaper interest and the lack of prejudice to any competing applicants).

²⁴ In view of this disposition, we will not address the arguments raised by JBL in its original Reconsideration 1.

10. We will substitute Channel 274C3 for Channel 274A at Cumberland, reallocate Channel 274C3 from Cumberland, Kentucky, to Weber City, Virginia, and modify the license for Station WVEK-FM, accordingly, because the requirements of Section 1.420(i) have been met.²⁵ First, the proposed use of Channel 274C3 at Weber City is mutually exclusive with the current use of Channel 274A at Cumberland. Second, Cumberland will not be deprived of its only local service because Station WCPM(AM) will continue to be licensed to Cumberland. Third, the provision of a first local service at Weber City under Priority (3) of the FM Allotment Priorities will result in a preferential arrangement of allotments over the retention of a second local service at Cumberland under Priority (4). To accommodate the new Weber City allotment, we will substitute Channel 263A for Channel 274A at Glade Spring and modify the construction permit for Station WFYE(FM) accordingly.²⁶ Likewise, we will substitute Channel 273A for Channel 263A at Marion, Virginia, and modify the license for Station WOLD-FM, accordingly.²⁷ JBL has stated its willingness to reimburse the permittee of Station WFYE(FM) and the licensee of Station WOLD-FM for their reasonable expenses, if any, in changing channels in accordance with Commission policy.²⁸

11. Weber City is a community for allotment purposes because it is incorporated and listed in the U.S. Census. It also has other indicia of community status such as a town government, an elementary school, a fire department, a post office, zip code, cable television system, and various commercial establishments, including two automobile dealerships, two banks, a funeral home, a furniture store, a medical clinic, and a pharmacy. Further, because Station WVEK-FM's proposed 70 dBu contour covers 100 percent of the Kingsport, Tennessee-Virginia Urbanized Area, JBL was required to submit a *Tuck* showing.²⁹ We find that a majority of the eight *Tuck* factors are present and that Weber City is sufficiently independent of the Kingsport, Tennessee-Virginia Urbanized Area to warrant a first local service.³⁰

12. A staff engineering analysis reveals that the upgrade and reallocation of Station WVEK-FM will result in a gain of 357,378 persons and a loss of service to 56,525 persons, for a net gain of 300,853. However, the loss area is well served with five or more aural services.

13. **Conclusion.** Accordingly, we will grant both JBL's reconsideration and rule making petitions in MB Docket 05-295.

Reconsideration 2

14. **Background.** On May 9, 2006, JBL filed an informal objection to ASRadio's application for a new commercial FM station on Channel 274A at Glade Spring.³¹ JBL argued that the processing of ASRadio's application should be held in abeyance pending the outcome of MB Docket No. 05-295 because Channel 274A at Glade Spring would conflict with JBL's rulemaking petition to allot Channel 274C3 at Weber City. Thereafter, the staff denied JBL's informal objection and conditionally granted ASRadio's application on the final outcome of MB Docket No. 05-295 because "... our policy is not to

²⁵ The reference coordinates for Channel 274C3 at Weber City, Virginia, are 36-31-36 NL and 82-35-13 WL.

²⁶ The reference coordinates for Channel 263A at Glade Spring, Virginia, are 36-47-50 NL and 81-36-52 WL.

²⁷ The reference coordinates for Channel 273A at Marion, Virginia, are 36-54-10 NL and 81-32-27 WL.

²⁸ See *supra* note 17.

²⁹ See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374, 5378 (1988) ("*Tuck*").

³⁰ Specifically, factors 3 (local perception); 4 (local government and elected officials); 5 (zip code and telephone book); 6 (commercial establishments, health facilities); and 8 (local services such as police and fire departments) are present.

³¹ File No. BNPB-20060308ALW.

withhold grants of applications due to conflicts with pending rulemakings that propose to reallocate the channel of the application eliminating the conflict."³²

15. In Reconsideration 2, JBL seeks rescission of the grant of ASRadio's construction permit or a tolling of the period for construction until the Commission acts on JBL's rulemaking proposal in MB Docket 05-295. JBL contends that such an approach would serve the public interest because it would eliminate the need for Station WOLD-FM, Marion, Virginia, to change channels twice and for ASRadio and JBL to reimburse the station for its reasonable costs in making these changes. ASRadio filed an opposition, contending that whatever may be the merits of JBL's Reconsideration 1, JBL has shown no valid basis for the Commission to rescind ASRadio's construction permit or restrict its authority to construct.

16. **Discussion.** JBL's request to rescind WFYE(FM)'s construction permit or to toll the period for construction pending action in MB Docket 05-295 has become moot because of our simultaneous action granting JBL's rulemaking petition. That action eliminates the conflict between Channel 274C3 at Weber City and Channel 274A at Glade Spring and enables Station WFYE(FM) to construct without regard to Station WOLD-FM at Marion. Accordingly, we will dismiss JBL's Reconsideration 2.

Ordering Clauses

17. 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 Sections 47 C.F.R. Sections 0.61, 0.204(b), and 0.283, IT IS ORDERED, That, effective February 18, 2008, the Media Bureau's Consolidated Data Base System will reflect Channel 274C3 at Weber City, Virginia, as the reserved assignment for Station WVEK-FM in lieu of Channel 274A at Cumberland, Kentucky; Channel 263A as the reserved assignment for Station WFYE(FM), Glade Spring, Virginia, in lieu of Channel 274A; and Channel 273A as the reserved assignment for Station WOLD-FM, Marion, Virginia, in lieu of Channel 263A. A summary of this decision will be printed in the *Federal Register*.

18. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the license for Station WVEK-FM, Cumberland, Kentucky, IS MODIFIED to specify operation on Channel 274C3 at Weber City, Virginia, 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.

19. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the construction permit for Station WFYE(FM), Glade Spring, Virginia, IS MODIFIED to specify Channel 263A, and the license for Station WOLD-FM, Marion, Virginia, IS MODIFIED to specify Channel 273A, subject to the following conditions:

³² *Staff Letter, supra* note 3. Public notice of this staff action was given in *Broadcast Actions*, Report No. 46247, June 1, 2006.

- (a) Within 90 days of the effective date of this Order, AS Radio, LLC and Emerald Sound Inc. shall submit to the Commission minor change applications for construction permits (Form 301), specifying the new facilities;
- (b) Upon grant of the construction permits, 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.

20. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and 3(l), JBL Broadcasting, Inc., is required to submit a rulemaking fee in addition to the fee required for the application to effectuate the change of community of license and upgrade for Station WVEK-FM at the time its Form 301 application is submitted.

21. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by JBL Broadcasting, Inc. in MB Docket 05-295 IS GRANTED.

22. IT IS FURTHER ORDERED, That the Petition for Rule Making (RM-11280) filed by JBL Broadcasting, Inc. IS GRANTED.

23. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by JBL Broadcasting, Inc. in File No. BNPB-20060308ALW IS DISMISSED AS MOOT.

24. IT IS FURTHER ORDERED, That a copy of this *Memorandum Opinion and Order* be sent by Certified Mail, Return Receipt Requested, to Dennis J. Kelly, Esq., Post Office Box 41177, Washington, D.C. 20018 (Counsel for JBL Broadcasting, Inc.); John S. Logan, Esq., Dow Lohnes PLLC, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, DC 20036 (Counsel for ASRadio, LLC); Stephen C. Simpson, Esq., 1250 Connecticut Avenue, N.W., Suite 200, Washington, D.C. 20036 (Counsel for George S. Flinn, Jr.); Mr. Rick Lambert, Grace Communications, L.C., 2509 Horsehoe Ridge, Cape Girardeau, Missouri 63701; and Mr. Bob Dix, Emerald Sound, Inc., Post Office Box 1047, Marion, Virginia 24354 (Licensee of Station WOLD-FM, Marion, Virginia).

25. IT IS FURTHER ORDERED, That these proceedings ARE TERMINATED.

26. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau