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

MAILED

JUN -1 2009

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,) MM Docket No. 99-322
FM Broadcast Stations,) RM-9762
(Chillicothe and Ashville, Ohio))

FCC 08-215

MEMORANDUM OPINION AND ORDER

Adopted: September 24, 2008

Released: May 26, 2009

By the Commission: Commissioner Cops dissenting and issuing a statement; Commissioner Adelstein concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by Franklin Communications, Inc., North American Broadcasting Co. and WLCT Radio Incorporated ("Joint Petitioners") directed to the *Memorandum Opinion and Order* in this proceeding.¹ Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") filed an Opposition to Application for Review and the Joint Petitioners filed a Reply. For the reasons discussed below, we deny the Application for Review.

II. BACKGROUND

2. At the request of Secret Communications II, LLC, former licensee of Station WLZT (formerly WFCB), Channel 227B, Chillicothe, Ohio, the *Report and Order*² reallocated Channel 227B from Chillicothe to Ashville, Ohio, and modified the Station WLZT license to specify operation on Channel 227B at Ashville.³ The reallocation was adopted pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.⁴ *Community of License* requires that any reallocation proposal result in a preferential arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.⁵ In this

¹ *Chillicothe and Ashville, Ohio*, 18 FCC Rcd 22410 (MB 2003).

² *Chillicothe and Ashville, Ohio*, 17 FCC Rcd 20418 (MB 2002).

³ Clear Channel Broadcasting Licenses, Inc. is now the licensee of Station WLZT.

⁴ 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).

⁵ 90 FCC 2d 88 (1988). 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).

proceeding, the reallocation provided Ashville (population 3,174) with its first local service while Ghillicothe (population 21,796) will continue to receive local service from six stations. Because Secret Communications did not propose a change in transmitter site, there was no loss of service to any listeners. The *Report and Order* did not require Secret Communications to submit a showing pursuant to *Faye and Richard Tuck* to demonstrate that Ashville is independent of the Columbus Urbanized Area and entitled to consideration as a first local service.¹ This is because Ashville is not located within the Columbus Urbanized Area and Station WLZT provides only 2.7% of the Urbanized Area with a 70 dBu signal.² Similarly, it did not impose a permanent condition prohibiting Station WLZT from relocating its transmitter site.³

3. The staff *Memorandum Opinion and Order* denied a Petition for Reconsideration filed by the Joint Petitioners. In doing so, the staff first determined that on the basis of a subsequent showing by Clear Channel pursuant to *Faye and Richard Tuck*, the reallocation of Channel 227B to Ashville was entitled to consideration as a first local service regardless of the location of the Station WLZT transmitter site or coverage of the Columbus Urbanized Area. The staff also addressed the modification of the Station WLZT license to specify Ashville as the community of license in conjunction with the recently adopted multiple ownership rules.⁴ Prior to this proceeding, Clear Channel owned or controlled seven radio stations in the Columbus radio market. However, in the *Ownership Report and Order*, we revised the definition and means of determining a radio market. Based on the revised local ownership methodology, Pickaway County, where Ashville is located, is now included in the Columbus radio market. Based upon the BIA Media Access Pro database, the Columbus radio market includes 43 radio stations. Revised Section 73.3555(a)(1)(ii) of the Commission's rules permits a single entity to own or control up to seven radio stations in a radio market of 30-44 stations.⁵ Station WLZT would be the eighth radio station for Clear Channel in the Columbus radio market. The staff, however, declined to set aside the modification of the Station WLZT license as requested by the Joint Petitioners for three reasons. First, any issue with respect to compliance with Section 73.3555 of the rules will, consistent with existing policy, be considered in conjunction with the construction permit application filed to implement the reallocation. Second, the *Ownership Report and Order* did not instruct the staff to revise this policy with respect to allotment proceedings. Third, on the date the *Memorandum Opinion and Order* was released, the United States Court of Appeals for the Third Circuit had stayed the effectiveness of the new media ownership rules set forth in the *Ownership Report and Order*.⁶

¹ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

² *Cf. Headland, Alabama, and Chattochee, Florida*, 10 FCC Rcd 10352 (1995) (required a *Tuck* showing when a 70 dBu signal was provided to more than 50 percent of the Urbanized Area).

³ On May 19, 2004, the staff granted an application to relocate the Station WLZT transmitter site to a location that would enable Station WLZT to provide a 70 dBu signal to nearly all of the Columbus Urbanized Area (File No. BPH-20031112AIA). The grant of that application was conditioned on the outcome of this proceeding.

⁴ *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* (“*Ownership Report and Order*”), 18 FCC Rcd 13620 (2003).

⁵ 47 C.F.R. § 73.3555(a)(1)(ii).

⁶ *Prometheus Radio Project, et. al. v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2003)(per curiam); *Prometheus Radio Project, et. al. v. FCC*, 373 F. 3d 372 (3d Cir. 2004), *affirming in part and remanding in part, 2002 Biennial*
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4. In the Application for Review, the Joint Petitioners contend that the staff decision based upon a first local service to Ashville is a "regulatory mirage, a non-functional vestige of a different regulatory regimen abandoned by the Commission over the last two decades." The Joint Petitioners also argue that the staff action was inconsistent with the new multiple ownership rules. We will discuss each of these arguments.

III. DISCUSSION

5. After review of the record in this proceeding, we concur with the staff determinations that Ashville is independent of the Columbus Urbanized Area and that the first local service allotted to Ashville in this proceeding represents a significant public interest benefit. We reject Joint Petitioners' argument that the Commission has "abandoned" the requirement that a licensee provide local service to its community of license.¹ While we no longer require a licensee to adhere to detailed ascertainment procedures, meet nonentertainment programming guidelines or maintain detailed programming logs, various Commission rules are designed to ensure that broadcast stations serve their licensed communities. Each licensee is expected to be responsive to the issues facing its community of license.² To this end, each licensee is required to list in its public inspection file the programs that have addressed the most significant community issues during the previous three months.³ These lists are retained in the public inspection file until final action on the station's renewal application. This represents a significant and meaningful licensee requirement to serve its community of license. This also provides a tangible means for the local residents and the Commission staff in considering applications for renewal of station licenses, to determine whether the station is serving the local community.⁴ Moreover, we require broadcast stations to maintain main studios in or near their communities of license and to assure adequate public access to each station. Finally, the Commission's technical rules require that each full service broadcast station place a city-grade signal over most or all of the community of license.

6. We also agree with the decision below to continue the established policy of not considering multiple ownership issues in conjunction with an allotment rulemaking proceeding.⁵ The staff will continue to require applicants to demonstrate compliance with local ownership rules in construction permit applications to implement related allotment actions.⁶

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Regulatory Review, Report and Order and Notice of Proposed Rule Making, stay modified on rehearing, No. 03-3388 (3d Cir. Sept. 3, 2004).

¹ See, e.g., *In the Matter of Broadcast Localism*, 19 FCC Rcd 12425 (2004).

² See *Deregulation of Radio*, 84 FCC 2d 968 (1981), recon. granted in part, 87 FCC 2d 796 (1981), aff'd in relevant part, *Office of Communication of United Church of Christ v FCC*, 707 F. 2d 1413, 1435 (D.C. Cir. 1983).

³ 47 C.F.R. § 73.3526(e)(12).

⁴ 47 U.S.C. § 309(k).

⁵ See *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, 17 FCC Rcd 25055 (MMB 2002); see also *Letter from Peter H. Doyle, Acting Chief, Audio Services Division, to Paul A. Cuelski, Esq. et al., File No. BAPH-20011101ABD (May 24, 2001)*.

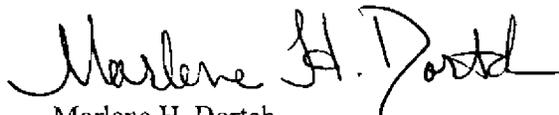
⁶ The Clear Channel application to implement this reallocation (File No. BPH-20031112A1A) was granted on May 19, 2004, and fully complied with the multiple ownership rules then in effect. Moreover, although the
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IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by the Franklin Communications, Inc., North American Broadcasting Co., and WLCT Radio Incorporated IS DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

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Commission adopted in mid-2003 a geographical-based methodology for stations in Arbitron-rated markets, it did not do so until after the staff had approved the reallocation and license modification in this case. We do not generally apply changes in ownership rules retroactively so as to require divestiture of existing combinations or to set aside the modification of a station's license as requested by the Joint Petitioners in this case. *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-815 (upholding Commission decision to require divestiture of newspaper/broadcast combinations only in "egregious" cases). Thus, examining the reallocation and license modification in this case under the contour-based methodology set forth in the local radio ownership rule in effect at the time of the staff decision, we confirm the staff's finding that the Clear Channel application to implement the reallocation of Channel 227B from Chillicothe to Ashville, Ohio, fully complied with the multiple ownership rules then in effect.

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Chillicothe and Asheville, Ohio), MM Docket No. 99-322.*

I dissent for the reasons set forth at length in my earlier statements. *See, e.g., Table of Allotments for FM Stations in Evergreen, Alabama and Shalimar, Florida, released October 31, 2008.* The majority's application of the *Tuck* factors is so lax that it scarcely amounts to a test at all.

Here, for instance, the majority again affirms an astonishing staff finding that the fact that Asheville has *less than 1%* of the population of Columbus is not a sufficient disparity to justify an unfavorable finding under the "relative population" factor. Similarly, the majority affirms a staff finding that the work patterns of Asheville residents justifies a finding that it is an independent community, notwithstanding the fact that: (1) only 39 percent of Asheville residents work in the *county* in which Asheville is located; and (2) the average commute time of Asheville residents is 26 minutes and the village of Asheville is only about two miles long.

There are other infirmities in the analysis, but those alone would have sufficed to change the result and grant the Application for Review. I respectfully dissent. Given the deficiencies of the *Tuck* standard and its application in particular cases, I am very pleased that my colleagues have agreed to examine our radio allotment and assignment criteria, including the *Tuck* standard, as part of the recently released Rural Radio Service Notice of Proposed Rulemaking.¹

¹ *Policies to Promote Rural Radio Service and Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, FCC 09-30, (rel. Apr. 20, 2009).

**CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Chillicothe and Ashville, Ohio), MM Docket No. 99-322.*

I concur in this item, and I continue to believe that the Commission needs to re-examine our licensing and allotment process, especially our application of the *Tuck* factors. I share the concern that our *Tuck* analysis does not provide any means of ensuring that the proposed station will be a meaningful local outlet and not just an additional service to the urbanized area. There is merit to the Joint Petitioners' argument that the Commission has "abandoned" the requirement that a licensee provide local service to its community of license.¹

As I have said before, the Commission is supposed to keep the allotment/re-allotment "parlor game" honest, particularly because we know interested parties have significant incentives to relocate radio stations from relatively underserved rural areas to suburban communities that are closer to well-served urban markets.

Nevertheless, I am pleased the Commission is re-examining our licensing and allotment process to ensure that we are meeting our statutory obligation to distribute radio service throughout the United States in a fair, efficient and equitable manner.

¹ See *FCC Report on Broadcast Localism and Notice of Proposed Rule Making* (rel. January 24, 2008) (finding that "modification of certain of our rules, policies and practices may be necessary to address the deficiencies of many broadcasters in meeting their obligation to serve their local communities").