

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

MM Docket No. 84-293

In the Matter of

Amendment of Section 73.202(b)

Table of Allotments

FM Broadcast Stations.

RM-4611

(Oak Beach and Bay Shore, New York)

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1987 Released: February 27, 1987

By the Commission:

1. The Commission has before it for consideration the *Memorandum Opinion and Order*, released April 3, 1986 (Mimeo No. 3533), which denied petitions for reconsideration filed by Doubleday Broadcasting of New York, Inc., former licensee of Station WAPP, Lake Success, New York, (Doubleday),¹ and Long Island Radio Company, licensee of Station WBAB-FM, Babylon, New York (WBAB), directed against the *Report and Order* allotting FM Channel 276A to Bay Shore, New York. Doubleday and WBAB have filed Applications for Review of the *Memorandum Opinion and Order*.²

BACKGROUND

2. The present proceeding is an outgrowth of two earlier proceedings involving the allotment of FM Channel 276A to Bay Shore. In 1970, the Commission, *inter alia*, allotted this channel to Bay Shore.³ However, upon reconsideration and at the request of the United States Department of the Interior, we deleted this allotment. That action was premised on the fact that the only site area complying with Commission spacing requirements was located on Fire Island on land owned by the National Park Service which would not be available for a 300-foot tower due to environmental considerations.⁴ Thereafter, in 1982, we denied a proposal by Living Communications, Inc. to allot Channel 276A to Bay Shore due to the unavailability of a site which would comply with the spacing requirements.⁵

3. On September 21, 1983, Long Island Music Broadcasting Corporation ("LIMBC") filed a new petition to allot Channel 276A to Bay Shore, New York. In the petition, LIMBC specifically referred to the earlier proceedings involving the allotment of Channel 276A to Bay Shore and stated that "it had now obtained a lease agreement with the National Park Service to rent the Fire Island Lighthouse. The revenue from the lease would be used to restore the Lighthouse. However, the National Park Service would only approve a 25 foot addition atop the Lighthouse which would result in a height above average terrain (HAAT) of 205 feet. As consequence, operation from this site is predicted to provide the re-

quired signal level of at least 70 dBu principal city coverage to only 45% of Bay Shore. Thereafter, LIMBC filed a supplemental request to add Channel 276A at Oak Beach, New York, as an alternative. LIMBC expressly stated that this pleading "supplements" the earlier pleading and "requests as an alternative action the institution of a rule making proceeding to add Channel 276A at Oak Beach, New York."

4. The *Notice of Proposed Rule Making*, 49 FR 14541, published April 12, 1984, specifically proposed Channel 276A for Oak Beach. In addition to outlining the history of this proceeding, the *Notice* solicited comments on whether Oak Beach has sufficient social, economic or cultural indicia to qualify as a "community" for allotment purposes. In the *Report and Order*, 50 FR 10768, published March 18, 1985, the Mass Media Bureau, under delegated authority determined that Oak Beach does not have characteristic indicia normally needed to justify the status of a "community" for allotment purposes. Nevertheless, we also noted that the underlying proposal for the use of Channel 276A for Bay Shore was both unique and meritorious. It would provide Bay Shore with a first local service while contributing to the efforts to restore and preserve the Fire Island Lighthouse. In the *Report and Order*, we recognized that the predicted 70 dBu signal would encompass only 45% of Bay Shore. In this connection, we referred to the fact that the area between the Lighthouse and Bay Shore consists of water and the 70 dBu can be expected, in actuality, to extend further and possibly encompass Bay Shore. In any event, we noted that in view of the height limitations imposed by the National Park Service, a request for waiver, if necessary, would be appropriate for consideration at the application stage. Thereafter, by *Memorandum Opinion and Order* the staff denied the aforementioned petitions for reconsideration filed by Doubleday and WBAB.

APPLICATIONS FOR REVIEW

5. In support of the Applications for Review, Doubleday and WBAB contend that the Channel 276A allotment to Bay Shore (1) does not comply with the minimum spacing requirements now set forth in Section 73.207 of the Rules, (2) contravenes the Administrative Procedure Act in that it was allotted without prior notice, (3) derogates the principal city coverage requirement contained in Section 73.315 of the Rules, (4) relies on the fact that the Lighthouse would be restored, and (5) claims that postponing a decision on the effect this facility will have on the Lighthouse contravenes the National Historic Preservation Act. After careful consideration of this matter, we are of the view that the arguments advanced by Doubleday and WBAB do not warrant deleting the Channel 276A allotment to Bay Shore. We will consider these arguments *seriatim*.

MINIMUM SPACING REQUIREMENTS

6. The Channel 276A allotment to Bay Shore results in a 67.8 kilometer separation with second adjacent (Channel 278) Class B FM Station WOHT, Lake Success, New York, and a 66.2 kilometer separation with second adjacent (Channel 274) Class B FM Station WNEW-FM, New York, New York, licensed to Metromedia. Prior to our action in Docket 80-90 revising the FM technical standards, *Modification of FM Broadcast Station Rules to*

Increase the Availability of Commercial FM Assignments, 94 F.C.C. 2d 152 (1983), the required minimum spacing was 64 kilometers. In Docket 80-90, the minimum spacing requirement was increased to 69 kilometers. WBAB and Doubleday argue that since both the *Notice* and the *Report and Order* for the Channel 276A allotment in Bay Shore were released after the March 1, 1984, effective date for the new rules, the new spacing requirements should apply. Doubleday cites language in two subsequent *Public Notices* in support. We disagree. Section 73.207 of the Rules requires that any petition for rule making for an FM channel comply with the minimum spacing requirements. LIMBC filed its petition for rule making on September 21, 1983, prior to the effective date for the new minimum spacing requirements. Inasmuch as it complied with the minimum spacing requirements then in effect, it was accepted on that basis. By *Public Notices*, we adopted interim policies and procedures to implement the new rules. This need was especially acute in this situation because the *Report and Order* in Docket 80-90 was released on June 14, 1983, and the new rules did not go into effect until March 1, 1984. Among our concerns was fairness to parties with pending petitions for rule making and applications as well as parties who would be filing either petitions or applications during the interim period.

7. In the December 9, 1983, *Public Notice*, we stated that all petitions for rule making and applications for FM channels filed on or before December 16, 1983, would be protected while the omnibus rule making proceeding (MM Docket No. 84-231) was in progress. In regard to the LIMBC petition, the proposed allotment complied with the 64 kilometer minimum spacing requirement then in effect and on that basis was accepted. In the March 27, 1984 *Public Notice*, cited by Doubleday, we announced that in regard to applications filed before March 1, 1984, complying with the old minimum spacing requirements, the new spacing requirements for second and third adjacent channels will be automatically waived. The same equitable considerations would also be applicable to petitions for rule making because these petitions are part of the overall process leading to the authorization of an FM broadcast service. Therefore, petitions for rule making prior to March 1, 1984, were processed under the old rules." In this vein, we would not process a rule making petition for which we would not accept applications. In doing so, we recognized that it would be necessary, in certain situations, for some applicants to avail themselves of the pre-Docket 80-90 spacing requirements under which the underlying petitions for rule making were processed. In an effort to contradict this policy, Doubleday has referred to a *Public Notice* of April 9, 1985 (Mimeo No. 3775) in which we stated:

"... all commercial applications for FM allotments adopted on or after March 1, 1984, must meet the minimum distance separations specified in Section 73.207 of the Commission's Rules PLUS an additional 16 kilometers to existing Class C stations with the buffer zone."

The purpose of this *Public Notice* was to alert applicants as to the additional 16-kilometer buffer zone requirement and not to undermine the rights of any potential applicant awaiting the outcome of a rule making being processed under the former spacing requirements. The separation requirements referenced in the *Public Notice*

are the separation requirements applicable to the particular allotment for which applications are being tendered. In the present case, the applicable separation requirements are the former requirements.

LACK OF NOTICE

8. Section 553 of the Administrative Procedure Act requires that a notice of proposed rule making contain adequate notice and a fair opportunity for interested parties to participate and present relevant information. The content of such notice is also contained in Section 1.413 of the Rules. In this situation, Doubleday and WBAB argue that the *Notice* in the present proceeding failed to give adequate notice in that it specifically proposed "Oak Beach" and did not indicate that we would be considering a proposal for Bay Shore that would not comply with the principal city coverage requirement in Section 73.315 of the Rules.

9. After a careful review of the *Notice of Proposed Rule Making* in MM Docket No. 84-293, we are of the view that this *Notice* did, in fact, alert interested parties that a proposed Bay Shore allotment was still before the Commission. This *Notice* specifically referred to the "Supplement" which embodied the Oak Beach proposal and the original petition which proposed Bay Shore. In this regard, the *Notice* mentioned that the earlier unavailability of the Fire Island Lighthouse was no longer a barrier to the Channel 276A allotment to Bay Shore. In an engineering exhibit to its petition, LIMBC recognized that the 205 foot HAAT restriction imposed by the National Park Service would result in principal city coverage to only 45% of Bay Shore. It is for this reason that LIMBC filed the Supplement which used the word "alternative" in regard to an Oak Beach proposal. Contrary to the argument by Doubleday, LIMBC did not abandon its Bay Shore proposal. Likewise, the *Notice* did not indicate an abandonment or preclude the possibility of a Bay Shore allotment. The observation in the *Notice* that issues addressed in opposition comments by Doubleday pertaining only to Bay Shore would be moot and need not be considered if we allotted this channel to Oak Beach does not indicate that further consideration of Bay Shore was foreclosed. Moreover, in the event that Oak Beach did not qualify as a "community" for allotment purposes, the only available use for this channel was at Bay Shore as a first local service. In allotting this channel to Bay Shore, the comments by Doubleday were no longer moot and thus considered in the *Report and Order*.

10. Doubleday also challenges the staff's reliance on the case of *Weyerhaeuser Company v. Costle*, 590 F. 2d 1011, 1031 (D.C. Cir. 1978). There the court stated that an incremental change in a rule making conclusion can be made consistent with the notice provision of the Administrative Procedure Act if it is a logical outgrowth of the proposal. To comply with the "logical outgrowth" test, the particular conclusion must be within the scope of the notice. The scope of the notice is determined by the description of the subject matter and issues involved in the rule making proceeding. We continue to believe that in view of the fact that the Bay Shore proposal had not been withdrawn, the action in the *Report and Order* allotting Channel 276A to Bay Shore was within the scope of the *Notice*. The *Notice* described the proposal for Bay Shore and discussed the issue of principal city cov-

erage. Once we had determined that Oak Beach lacked "community" status we were not required to initiate a new proceeding. Instead, reverting back to the Bay Shore proposal was an incremental change in our conclusion with regard to the appropriate community to allot this channel. This incremental change to the originally proposed Bay Shore allotment met the "logical outgrowth" test devised by the Weyerhaeuser court, *supra*. See also *Owensboro on the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1978).

PRINCIPAL CITY COVERAGE

11. In the present situation, we recognized that by allotting an FM channel to Bay Shore, the current HAAT restriction imposed by the National Park Service would not permit a prediction that all of Bay Shore would receive the requisite city grade coverage. Doubleday has objected to a statement contained in both the *Report and Order* and *Memorandum Opinion and Order* that the 70dBu contour could very well extend further than the predicted distance because the area between the Lighthouse and Bay Shore consists of water with no terrain obstruction. This engineering judgment was not determinative on whether to allot this FM channel. Instead, it was only a recognition of the fact that the prediction method of determining FM signal coverage utilizing the F(50,50) curves incorporates a terrain roughness factor. See Section 73.313 of the Rules. There would be no terrain obstruction over the immediate water path from the Lighthouse to Bay Shore and the 70 dBu contour should extend a greater distance. In regard to any future requests for waiver of Section 73.315 of the Rules at the application stage, the *Report and Order* merely alluded to the fact that waivers of the principal city service requirement have been granted where, as here, the applicant established the unavailability of alternate transmitter sites. Cf. *Eutlinger*, 79 FCC 2d 145 (Review Board 1980), *aff'd* 725 F. 2d 125 (D.C. Cir. 1983). See also *Central Coast Television*, 14 F.C.C. 2d 985 (Review Board 1968). In any event, statements contained in the *Report and Order* were not meant to derogate the overall accuracy of the method for predicting FM service contours in Section 73.313 of the Rules or represent a departure from the method for conducting FM field strength measurements as set forth in Section 73.314 of the Rules.

RESTORATION OF FIRE ISLAND LIGHTHOUSE

12. We disagree with the contention advanced by WBAB and Doubleday that our action allotting Channel 276A to Bay Shore was premised on the fact that revenue from the lease would be used to restore the Lighthouse. While we continue to commend the cooperation between LIMBC and the National Park Service which could lead to a first local broadcast service to Bay Shore and the restoration of the Lighthouse, we did not abrogate allotment rules and policies on the basis of restoring the Lighthouse. Instead, our public interest finding was based on other factors. Basically, the allotment could provide a first local service to a community of over 36,000 population and represents the only known possible use of this channel.

13. Inasmuch as the Lighthouse is listed in the National Register of Historic Places, Doubleday claims that allotting this FM channel to Bay Shore while postponing

consideration of the impact on the Lighthouse until the application stage contravened the National Historic Preservation Act, 16 U.S.C. 470 and rules promulgated pursuant to that Act, 36 C.F.R. 800.1 *et. seq.* We disagree with this argument for three reasons. First, Section 470(d) of the National Historic Preservation Act provides that Federal agencies give maximum encouragement to groups or individuals undertaking preservation by private means. The *Report and Order* specifically referred to the union of governmental and business purposes leading to the restoration of the Lighthouse. Secondly, the bidding process leading to the Lighthouse lease arrangement was done pursuant to Section 470(h)(3) of the National Historic Preservation Act and in coordination with the New York State Historic Preservation Officer. As a consequence, it appears unlikely that the proposed use of the Lighthouse would contravene this Act. Thirdly, Section 1.1306(a)(6)(iii) of the Commission's Rules defines as a major environmental action the construction of any facilities which will affect a structure listed in the National Register of Historic Places. As such, Section 1.1311(a) of the Rules requires the submission of an environmental narrative with the application. We believe that this existing procedure complies with the National Historic Preservation Act and is consistent with efficient and orderly dispatch of Commission business.

14. Accordingly, IT IS ORDERED, That the aforementioned Applications for Review filed by Doubleday Broadcasting of New York, Inc. and Long Island Radio Company ARE DENIED and the action in MM Docket No. 84-293 allotting FM Channel 276A to Bay Shore, New York is HEREBY AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

¹ Doubleday has since assigned its license to Emmis Broadcasting Corporation of New York as Station WOHT(FM).

² In order to avoid the preparation of a duplicative Application for Review, WBAB has incorporated by reference and adopted all of the arguments advanced in the Application for Review filed by Doubleday.

³ *Bay Shore, New York*, 20 F.C.C. 2d 988 (1970)

⁴ *Bay Shore, New York*, 25 F.C.C. 2d 877 (1970).

⁵ *Bay Shore, New York*, FR 29856, published July 9, 1982.

⁶ See e.g., *Table of Allotments, FM Broadcast Stations (Truro, Massachusetts)*, *Report and Order in MM Docket 83-1126*, 49 FR 34016, published August 28, 1984. See also *Worthington, Minnesota*, *Report and Order in Docket No. 84-519*, 50 FR 12258, published March 28, 1985; *Eureka, Kansas*, *Report and Order in Docket 83-1294*, 49 FR 38546, published October 1, 1984; *Folly Beach, South Carolina*, *Report and Order in Docket 83-1130*, 49 FR 33131, published August 21, 1984.