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

MM Docket No. 88-148

In the Matter of

Amendment of Section 73.202(b),	RM-6033
Table of Allotments,	RM-6101
FM Broadcast Stations.	
(Ariton, Alabama and Bonifay, Florida)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 22, 1988; Released: January 30, 1989

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 2226 (1988), proposing either the allotment of Channel 249A to Ariton, Alabama, as its first local service (RM-6033), or the substitution of Channel 249C1 for Channel 249A at Bonifay, Florida (RM-6101). The Ariton proposal was filed by Patsy Nance Marsh and Rickey Earl Nance (Marsh and Nance) and the Bonifay proposal by Mary Lake Communications, Inc. (Mary Lake), licensee of station WTBB-FM, Channel 249A, who also seeks modification of its license accordingly. The mutually exclusive proposals were consolidated into this proceeding. In response to the *Notice*, Marsh and Nance filed a request for dismissal of the Ariton petition, Mary Lake submitted comments in support of a Bonifay allotment, and Marsh and Nance filed reply comments.

BACKGROUND

2. As set forth in the *Notice*, we were unable to determine if Ariton is a community for allotment purposes, as Ariton is not listed in the 1980 Census. Therefore, Marsh and Nance were requested to furnish additional data to assist the Commission in this task. The *Notice* also noted that the proposals would be considered on a comparative basis with the allotment priorities in the *Revision of FM Assignment Policies and Procedures*,[1] 90 FCC 2d 88, 92 (1982) (*Revision* criteria) serving as a guide. The Commission's preliminary approach suggested favoring the Ariton proposal over the Bonifay proposal, as an allotment to Ariton would result in a first local service to the community, whereas an allotment to Bonifay would result in expanded service.

3. On June 10, 1988, the Commission received a "Request for Dismissal of Petition for Rule Making" from Marsh and Nance. The "Dismissal Request" asked that the Ariton proposal be dismissed and stated that the public interest would be better served by granting the Bonifay petition. The "Dismissal Request" also stated that Marsh and Nance would seek an allotment to Ariton "at a later date".

4. The Commission received on the same day timely comments from Mary Lake supporting the Bonifay allotment. Mary Lake states that it would promptly build a new facility if Bonifay received the allotment. Mary Lake claims the gains in WTBB's service area resulting from an upgrade are preferable to the new service that would begin in Ariton. Mary Lake states that a major objective of the Commission is the upgrading of class A stations. An Ariton allotment, Mary Lake claims, "would have significant impact on the ability of WTBB and others to expand service." Mary Lake suggests that the priorities adopted in the *Revision* criteria should not be mechanically applied, noting instances[2] in which the Commission rejected an automatic preference for first local service over proposals for second and third assignments to larger cities. Mary Lake notes that Bonifay, with a population of 2,534, is three times as large as Ariton, which has a population of 844.

5. Furthermore, Mary Lake claims, Ariton is not a "community" for allotment purposes. Mary Lake notes that Ariton is neither incorporated nor listed in the U.S. Census, and thus the Commission cannot assume Ariton is a community. Mary Lake maintains there is a growing trend of petitioners manipulating the allotment and licensing process by choosing small communities "not for the purpose of local service but to serve as convenient vessels to gain an unwarranted advantage through mechanical application of the priorities." Mary Lake claims that recognizing Ariton as a community would result in conferring community designation "to what is nothing more than a 'flag of convenience' in order to obtain preferential allocation [*sic*] treatment." Mary Lake argues that the Commission has a policy of defining a "community of significant size" as one with a population of 1,000 or more, and when faced with choosing between a large community and a town of less than 1,000, the Commission has referred to the latter as a "quiet village", refusing to afford quiet villages preferential treatment under the *Revision* criteria. [3] Mary Lake claims that Ariton is a quiet village, as its population is less than 1,000, and the choice of community should therefore turn upon the fourth *Revision* criteria of other public interest factors.

6. Mary Lake claims that neither proposal will result in the provision of first or second aural service, so community preference must be based on other public interest factors. An allotment to Bonifay will allow WTBB to serve "several times the area a Class A station could serve", thereby benefiting "significant numbers" of people. Mary Lake maintains that Ariton receives radio services from the same county in which it is located, or an adjoining county. Mary Lake claims that, based on a comparison of which proposal will serve the larger population, a Bonifay allotment is "more efficient and is to be preferred" over an Ariton allotment. Mary Lake claims the ability of an Ariton station to survive economically should be considered at this stage, along with the likelihood that an Ariton station would not be built.

7. Marsh and Nance filed "Reply Comments of Petitioner" during the reply period in which they request that their petition for an Ariton allotment be reinstated. Marsh and Nance claim they withdrew their petition after their consultant reached a "verbal agreement" with Mary Lake on the last day of the comment period. Because the

settlement was reached at such a late time, Marsh and Nance claim to have prepared comments verifying that Ariton is an incorporated city and not a quiet village, as well as the withdrawal petition that was filed. Marsh and Nance claim their consultant filed the withdrawal petition after being informed that a settlement had been reached. Marsh and Nance claim that Mary Lake has not consummated the agreement and appears to be unwilling to do so. Therefore, Marsh and Nance request withdrawal of their dismissal petition and submit as an appendix the comments originally prepared in the event a settlement was not reached.

8. The Appendix of Marsh and Nance's "Reply Comments" state that Ariton is a community for allotment purposes. An exhibit is included that notes the existence of a bank in Ariton, an Ariton public school system with 516 students and 33 teachers, various small industries, and five full-time city employees. Also included is an excerpt from a book by a local historian discussing the history of Ariton.

9. Marsh and Nance's Appendix includes an engineering statement showing that a C1 station operating at Bonifay would provide no first or second aural service. Although an upgraded station at Bonifay would serve many people, Marsh and Nance state that as a matter of allotment priorities, an Ariton allotment must prevail, as an Ariton station will provide first local service to the community. Marsh and Nance cite a recent decision[4] in which the Commission staff describes the "quiet village" found in mutually exclusive proposals as a community with a population of less than 1,000, in which an allotment to either community would provide service to both communities, and where the larger community is seeking the allotment in order to provide a first competitive outlet. Marsh and Nance maintain that Ariton is entitled to a comparative preference because Ariton is not a quiet village. Marsh and Nance state that Ariton has no local service and would not receive service from a Bonifay upgrade, and that an allotment to Bonifay would be not a new service but an upgrade. Finally, Marsh and Nance state their intent to apply for an Ariton channel and, if successful, to construct a station.

10. The "Reply Comments" contain a rebuttal to Mary Lake's comments. Marsh and Nance note Mary Lake's failure to discuss *Scranton and Surfside Beach, supra*, in its analysis of whether Ariton is a quiet village. Marsh and Nance point out that, contrary to Mary Lake's statements, Ariton is an incorporated town with a mayor and city counsel. Marsh and Nance take issue with Mary Lake's allegation that Ariton is being used as a "flag of convenience" in order to manipulate Commission rules, stating that Ariton is a community and the allotment is a means of furthering development. Marsh and Nance note that their petition for rule making was filed several months before Mary Lake's, so the Ariton petition could not have been filed to gain an advantage over Bonifay. Also noted is Marsh and Nance's concern not that a station would not be built at Ariton, but that many applications would be received for the station. Marsh and Nance maintain Mary Lake errs in claiming that Ariton is a quiet village and should receive no significant preference. Marsh and Nance also note that Mary Lake's certificate of service incorrectly notes Marsh and Nance's consultant as the petitioner for the allotment. Finally, Marsh and Nance reiterate that they will build and operate a station at Ariton if their application is successful.

DISCUSSION

11. After close examination of the pleadings filed in this case, we have determined that Marsh and Nance should not be permitted to withdraw their request for withdrawal of the petition for an allotment to Ariton. As a result, the proposal for an allotment to Ariton is removed from this proceeding and an allotment of Channel 249C1 is made to Bonifay, Florida.

12. The petitioner for a proposed allotment must file comments restating the petitioner's present intention to apply for the channel if allotted and to construct a station if so authorized. Failure to do so may lead to denial of the allotment. *See* paragraph 2 of the Appendix to the *Notice*. Not until Marsh and Nance filed reply comments did a party express an interest in the allotment. The Commission has previously accepted late-filed comments supporting an allotment proposal in situations where there is no opposition to the proposal, and acceptance of the proposal would not adversely impact another pending and acceptable proposal. However, the Ariton and Bonifay proposals are mutually exclusive. Acceptance of Marsh and Nance's expression of interest at this time would be unfair to Mary Lake, who timely filed an expression of interest in a Bonifay allotment, and would jeopardize the integrity of the Commission's processes. Therefore, it is not proper for the Commission to accept Marsh and Nance's untimely expression of interest in the Ariton proposal, in light of the contested nature of this proceeding.[5] As a result, we will dismiss the petition for an allotment at Ariton.

13. Marsh and Nance's claim that Mary Lake originally agreed to a settlement offer and then refused to consummate the agreement does not affect our decision. The Commission cannot and should not decide if a valid agreement existed between Mary Lake and Marsh and Nance, and, if so, if Mary Lake violated the agreement. A local civil court is the appropriate forum for such a matter. *See Columbia, Jamestown, and Smiths Grove, Kentucky*, 50 RR 2d 236, 237 (1981).

14. Mary Lake filed a statement of continuing interest in the substitution of Channel 249C1 for Channel 249A at Bonifay. No acceptable conflicting proposals or comments were filed. We believe the public interest would be served by substituting Channel 249C1 at Bonifay, since it could enable Station WTBB to expand its service area. A staff engineering analysis reveals that Channel 249C1 can be allotted to Bonifay in conformity with the minimum distance separtion requirements of Section 73.207(b) of the Commission's Rules.[6] As proposed, we will also modify the license of Station WTBB to specify operation on Channel 249C1.

15. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 16, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel Number
Bonifay, Florida	249C1

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Mary Lake Communications, Inc., Station WTBB, Bonifay, Florida, IS MODIFIED, effective **March 16, 1989,** to specify operation on Channel 249C1 in lieu of Channel 249A, 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 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 impact statement pursuant to Section 1.1301 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That the petition of Marsh and Nance requesting the allotment of FM Channel 249A to Ariton, Alabama, IS HEREBY DISMISSED.

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

19. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policies and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

[2] Mary Lake cites to *North Charleston, South Carolina*, 51 RR 2d 25 (1982), *Ruarch Associates*, 101 FCC 2d 1358 (1985), and *Beacon Broadcasting*, 63 RR 2d 794 (1987).

[3] Mary Lake cites to *Debra C. Carrigan*, 100 FCC 2d 721 (1985), *Ruarch, supra, Cherokee Broadcasting Co.*, 15 RR 2d 1205 (1969), and *Conway, Arkansas*, 2 FCC Rcd 5118 (1987). We note that *Conway* was later modified on other grounds. 3 FCC Rcd 2845.

[4] *Scranton and Surfside Beach, South Carolina*, 3 FCC Rcd 2798 (1988).

[5] *See Santa Isabel, Puerto Rico*, 2 FCC Rcd 3454, 3455 (1987), *aff'd* 3 FCC Rcd 2336 (1988).

[6] The engineering analysis utilized Mary Lake's site coordinates of 30-41-57 and 85-37-15.