

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

In re Application of

ROBERTS  
COMMUNICATIONS, INC.

File No. BPH-920318ID

For a Construction Permit to  
Modify the Facilities of  
Station WXOD(FM),  
Winchester, New Hampshire

**MEMORANDUM OPINION AND ORDER**

Adopted: January 18, 1996; Released: February 2, 1996

By the Commission:

1. The Commission has under consideration an application for review filed on August 30, 1993, by L.B. New Hampshire, Inc. ("LB"), licensee of stations WKNE(AM/FM), Keene, New Hampshire. LB challenges a Mass Media Bureau ("Bureau") action which denied LB's informal objection to Roberts Communications, Inc.'s ("Roberts") above-captioned application to modify the facilities of WXOD(FM), Winchester, New Hampshire<sup>1</sup> and granted the subject application. See *Letter from Chief, Audio Services Division, Mass Media Bureau to Roberts Communications, Inc.*, dated July 14, 1993. We also have on file Roberts' opposition, LB's reply and various supplemental pleadings and replies. As set forth below, we deny the application for review.

**BACKGROUND**

2. On March 18, 1992, Roberts filed the above-captioned application to relocate WXOD(FM)'s transmitter from its present site, 6.8 km from Winchester and 14.5 km from Keene, to a site 16.6 km from Winchester and 4.5 km from Keene.<sup>2</sup> In an exhibit to the application, Roberts stated that multipath problems caused by the terrain and the desire to provide an acceptable signal into neighboring Keene, New Hampshire, necessitated a transmitter site change. Believing that the proposed transmitter site would not allow for city-grade coverage of Winchester, Roberts also requested a waiver of 47 C.F.R. § 73.315(a).<sup>3</sup> LB filed an informal

objection alleging that Roberts' waiver request understated the extent to which a waiver was necessary to serve Winchester. In its opposition, Roberts stated that, upon further study, it had discovered that the application fully complied with 47 C.F.R. § 73.315(a) and that a waiver was therefore unnecessary. LB replied that Roberts intended to abandon Winchester and actually serve the larger community of Keene. LB further contended that, by creating a loss area to 31,026 existing listeners, the application is not in the public interest. In response, Roberts reaffirmed its commitment to serve Winchester and alleged that LB's assertions to the contrary were intended solely to "prevent, or at least forestall, legitimate competition." The Bureau denied LB's objection and granted the subject application, finding that a waiver of § 73.315(a) was unnecessary, that Roberts' application complied with all applicable technical rules and that, pursuant to *Suburban Community Policy*, the *Berwick Doctrine*, and the *De Facto Reallocation Policy* ("*Suburban Community*"), 93 FCC 2d 436 (1983), *recon. denied*, 56 R.R. 2d 835 (1984); *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), questions of service gains and losses were generally not relevant in evaluating applications which conform to an allotment.

3. Although LB concedes that Roberts' application conforms to all of the *Suburban Community* technical requirements,<sup>4</sup> it asserts that "the staff erred by failing to apply established policy to LB's evidence that Roberts intends to serve Keene and abandon Winchester." Specifically, LB contends that the staff ignored: (1) Keene's more desirable status; (2) the proposed site's proximate location to Keene; (3) the proposal to increase signal strength into Keene while maintaining the "minimally-required" service to Winchester; (4) the "substantial loss" of existing service; (5) Roberts' co-location of the WXOD(FM) main studio in Keene with WKBK(AM);<sup>5</sup> and (6) Roberts' statements regarding service to Keene. LB argues that the staff "made no findings" with respect to the "objective" evidence cited by LB and suggests that a test incorporating the factors outlined in *Communications Investment Corp. v. FCC* ("*CIC*"), 641 F.2d 954 (D.C. Cir. 1981) should be applied here to determine whether the cited evidence indicates that Roberts intends to abandon Winchester.<sup>6</sup> LB also contends that the staff "ignored LB's assertion that the Commission's abandonment of the *de facto* reallocation policy cannot be reconciled with the Commission's renewed interest in the concept that there is an expectation of continued service to a community that can be overcome only by sufficient

<sup>1</sup> WXOD(FM) is a Class A station authorized to operate on Channel 254 with 1.75 kW effective radiated power ("ERP") at 187 meters height above average terrain ("HAAT").

<sup>2</sup> The subject application also proposed an increase in ERP and HAAT.

<sup>3</sup> Section 73.315(a) requires a minimum field strength of 70 dBu over a station's principal community of license.

<sup>4</sup> LB does not renew its challenge to the principal community contour coverage issues raised in Roberts' waiver request.

<sup>5</sup> Roberts is also the licensee of WKBK(AM), Keene, New Hampshire.

<sup>6</sup> The factors outlined in *CIC* are: (1) the ratio of the popula-

tion of the city of license to that of the larger city; (2) the ratio of the distance between the proposed site and the city of license to the distance between the site and the larger community; (3) the ratio of the signal strength in the city of license to the signal strength in the larger city; (4) a loss area in the city of license or surrounding areas; (5) whether the proposed site is already in use by larger city stations; (6) whether the station is commonly owned with an AM station in the larger city and plans to share programming, staff or facilities with it; (7) whether the station has evinced a prior intent to locate in the larger city; (8) whether the station proposes to move its studio to the larger city; and (9) whether there is a unique advantage to the site

public interest gains."<sup>7</sup> Finally, LB states that the Commission must reconcile its "one-step" upgrade" policy<sup>8</sup> with its "core allotment policies."

#### DISCUSSION

4. The Commission initially adopted the Table of Assignments to serve as an aid in fulfilling its mandate to distribute broadcast services fairly, efficiently and equitably in accordance with the objectives of Section 307(b) of the Communications Act of 1934, as amended. Revision of FM Broadcast Rules, *Third Report, Memorandum Opinion and Order*, 40 FCC 747, 757 (1963). The Table of Assignments facilitates the distribution of channels in each service to specific communities throughout the country. Recognizing, however, that an applicant might have an incentive to seek a frequency in a smaller, under-served community of license that is geographically proximate to another community with a larger population and economic base with the goal of serving the larger community, the Commission adopted several policies to determine which community an applicant actually intended to serve. See *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190 (1965) (adopted objective test of AM applicant's intent to serve a larger geographically proximate community); *Berwick Broadcasting Corp.*, 20 FCC 2d 393 (1969) (applied the public interest consideration underlying the AM suburban community policy to FM radio); *Hall Broadcasting Co., Inc.*, 71 FCC 2d 235, 237 (1979) (defined *de facto* reallocation as involving an attempt to utilize a channel assigned to one community in order to establish a broadcast service in another community). In 1983, however, the Commission abandoned these tests of an applicant's intent on the grounds that they inhibited entry into unserved communities and frustrated competition in metropolitan communities. See *Suburban Community*, 93 FCC 2d at 445. The Commission adopted, instead, a presumption that an applicant intends to serve its designated community of license so long as each of the following three criteria is met: (1) the applicant provides a city-grade service to the designated community of license; (2) the applicant proposes programming that will serve the designated community of license; and (3) the applicant's main studio is within its community of license. See *Suburban Community*, 93 FCC 2d at 456.

5. We find that, in this case, the Bureau fully considered all facts present in the record and properly applied the *Suburban Community* standard in granting the subject application. As noted above, WXOD(FM) provides a city-grade service to Winchester, its designated community of license. Additionally, Roberts has reaffirmed its commitment to continue to serve Winchester. Finally, although WXOD(FM)'s main studio location is not within its com-

munity of license, as originally required by *Suburban Community*, it is within its principal community contour and thus in conformity with the present requirements of our main studio rule. 47 C.F.R. § 73.1125. In *Main Studio and Program Origination Rules, Report and Order*, 2 FCC Rcd 3215 (1987) ("R&O"), we relaxed the main studio rule to permit a station to locate its main studio anywhere within its principal community contour. We took this action based on our determination that the community of license location standard was "unduly restrictive and [could] be modified without affecting [a] station's ability to serve its community of license." 2 FCC Rcd at 3218. In the R&O, we specifically acknowledged that this relaxation of the main studio rule was "not inconsistent" with our findings in *Suburban Community, Id.* We will thus view an applicant that locates its studio within its principal community contour as having satisfied *Suburban Community's* third criterion. See *Decatur Telecasting Inc.*, 7 FCC Rcd 8622, 8623 (MMB, 1992) (applicant's intention to locate its main studio within its predicted community contour was found to satisfy the *Suburban Community* main studio location requirement). Therefore, because we find that WXOD(FM) is in conformity with each of the three *Suburban Community* criteria, we presume it will serve Winchester.

6. The six factors that, according to LB, mandate a contrary conclusion, see para. 3 *supra*, are exactly the type of factors that *Suburban Community* rejected as unreliable indicators of an applicant's intent to abandon its community. Specifically, they are among the *CIC* factors which we essentially discarded in *Suburban Community*. See note 6, *supra*. Although LB suggests that we should revert to using the *CIC* factors in this case, we see no justification for doing so. In *Suburban Community*, we concluded that "the risk of a renewal challenge for failure *actually* to serve the designated community constitutes a more effective regulatory tool than utilization in advance of guidelines and factors that are inexact in divining intent." *Suburban Community*, 93 FCC 2d at 456 (emphasis in original). Thus, we decided that if an application satisfies the three objective factors adopted in *Suburban Community*, it is preferable to provide the applicant an "opportunity to demonstrate its good faith" rather than try to determine how the station will be operated in the future. *Suburban Community*, 93 FCC 2d at 457 (quoting *Robert Adams*, 38 FCC 2d 1, 4 (1972)). That principle is the one the Bureau applied in this case, and we concur in its doing so.

7. With respect to LB's assertion that we must reconcile the abandonment of the *de facto* reallocation! policy with our "renewed interest" in preserving local service, as expressed in *Modification of FM Licenses* and *Eatonton*, see note 7, *supra*, we do not agree that any inconsistency exists. As set forth in *Suburban Community*, an applicant seeking to change facilities must provide city-grade coverage and

proposed. *CIC*, 641 F.2d at 969-70.

<sup>7</sup> LB contends that we have expressed this "renewed interest" in *Modification of FM and TV Authorizations to Specify a New Community of License ("Modification of FM Licenses")*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094, 7097 (1990) (the public has a legitimate expectation of continued local service which will be weighed against the benefits that may result from reallocation of a channel from one community to another) and in *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama ("Eatonton")*, 6 FCC Rcd 6580, 6586 (1991), *app. for rev. pend.* (objective factors, including an

examination of disruption to local service, used to determine whether a petition for reallocation would serve the public interest).

<sup>8</sup> See Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, *Report & Order ("Modifications")*, 8 FCC Rcd 4735 (1993) (the "one-step upgrade" application process permits applicants to forego the filing of a rulemaking petition and to instead file only an application when requesting upgrades on adjacent and co-channels, modifications to adjacent channels of the same class, and downgrades to adjacent channels).

must affirm that it will continue to provide programming to its community of license. Thus, preservation of local service remains a paramount issue in applications to modify facilities. Both authorities cited by LB discuss the importance of preserving local service in the context of the reallocation of channels to one community at the expense of another. Nothing in *Suburban Community*, or in our action here, is inconsistent with that priority. As noted above, we have simply determined that based upon a licensee's demonstration of compliance with the *Suburban Community* three-factor standard -- which has been satisfied in this instance -- we will presume a licensee intends to continue to serve its community of license.

8. Finally, in its application for review, LB also raises for the first time its concern that core allotment policies will not be addressed by the Commission at the application stage in the context of a "one-step upgrade" application. See note 8, *supra*. To the extent that LB is challenging what it perceives as a shortcoming in the outcome of the "one-step upgrade" proceeding, its allegations are untimely. We terminated that proceeding in July 1993. Moreover, we note that even had the subject application been filed subsequent to the Commission's adoption of the "one-step upgrade procedures," it would not have required use of the "one-step upgrade" application process because the proposed modification of facilities sought only to change transmitter site, HAAT and ERP. Therefore, LB's "one-step upgrade" contentions have no relevance to the grant of Roberts' application. In any event, however, we do not agree that the "one-step upgrade" policy fails to account for the Commission's core allotment policies. In *Modifications*, we expressly imposed limitations on the "one-step upgrade" process in order to "preserve our core allotment polic[y]" objectives of maintaining minimum distance separation and full "city-grade" coverage. *Modifications*, 8 FCC Rcd at 4738. LB's contentions are thus without merit.

9. ACCORDINGLY, IT IS ORDERED, that the application for review filed on August 30, 1993, by L.B. New Hampshire, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary