

FCC 67-578

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
 AMENDMENT OF SECTION 73.202, TABLE OF
 ASSIGNMENTS, FM BROADCAST STATIONS
 (LEITCHFIELD, KY., ROLLA AND COLUMBIA,
 MO., BAKERSFIELD, CALIF., SANDUSKY, MICH.,
 ENTERPRISE AND TROY, ALA., LADYSMITH,
 WIS., AND IRONWOOD, MICH., STURGEON BAY,
 WIS., MORRIS, MINN., JERSEYVILLE, ILL.,
 AUGUSTA, GA., BREWTON AND ANDALUSIA,
 ALA., WICKENBURG, ARIZ., POTSDAM, N.Y.,
 NEW ALBANY, OHIO, AND CIRCLEVILLE,
 OHIO)

Docket No. 16662
 RM-957, RM-948,
 RM-940, RM-949,
 RM-941, RM-956,
 RM-878, RM-958,
 RM-944, RM-959

SECOND REPORT AND ORDER

(Adopted May 10, 1967)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND COX DISSENTING;
 COMMISSIONERS WADSWORTH AND JOHNSON ABSENT.

1. The Commission has under consideration the further notice of proposed rulemaking issued herein on November 4, 1966 (FCC 66-963), proposing to amend the FM Table of Assignments (sec. 73.242 of the rules) by assigning channel 285A at Columbus, Ohio, and substituting channel 296A for 285A at Circleville, Ohio. The proposal was supported by the Christian Voice of Central Ohio (Christian Voice), a potential applicant for the Columbus assignment, and opposed by Honor L. Greenawalt and Nelson R. Embrey II, doing business as Circleville Broadcasting Co., licensee of station WNRE (FM), on channel 285A at Circleville (WNRE). This station would change channels under the proposal. These were the only commenting parties.

BACKGROUND

2. A brief account of the background of this matter will be helpful. The Table of FM Assignments (sec. 73.202 of the rules), adopted in mid-1963,¹ contained seven channels at Columbus, six class B channels on which stations were in operation, and channel 285A, designed to provide an additional channel in line with the general population criteria used in preparing the table.² Channel 292A was assigned to

¹ Third report, memorandum opinion and order in docket 14185, 23 R.R. 1859, FCC 63-735, released Aug. 1, 1963.

² Further notice of proposed rulemaking in docket 14185, FCC 62-867, released Aug. 14, 1962. Cities of from 250,000 to 1 million population were to be assigned, if possible, six to 10 commercial channels. Since Columbus had a 1960 population of about 475,000 and thus was not near the bottom of the bracket, the assignment of more than six channels appeared appropriate.

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Circleville (1960 census population, 11,059), some 25 miles south of Columbus. No immediate demand developed for the additional Columbus assignment, and in mid-1964 it was deleted and assigned to Circleville as a substitute for 292A, which was being deleted there for use as a first assignment at another community (docket 15424, 2 R.R. 2d 1695, 1698, FCC 64-616). No replacement at Columbus could be found. In October 1964, an application was granted for channel 285A at Circleville, becoming station WNRE.

3. In December 1964, Christian Voice filed a petition for rulemaking looking toward returning 285A to Columbus by shifting the Circleville assignment and WNRE to channel 296A, which could be used at that city. When WNRE (then a new CP holder) opposed the change, Christian Voice amended its petition to specify instead channel 280A for New Albany, Ohio, a small community some 12 miles from Columbus. It was represented that this assignment could be used consistent with all mileage separation requirements with respect to other assignments, and on this basis we proposed in docket 16006 to assign channel 280A to New Albany, and later adopted the proposal (report and order in docket 16006, 1 F.C.C. 2d 1060, adopted Oct. 20, 1965). Christian Voice tendered an application for a station on this channel in April 1966. It was then discovered that any use of the New Albany assignment would involve a short separation with station WPAY-FM on adjacent channel 281 at Portsmouth, Ohio, since that station's transmitter is in zone II (Kentucky) and it is, thus, a class C station requiring a 105-mile separation with respect to class A stations on first adjacent channels (about 11 miles more than the distance to the proposed New Albany site). Accordingly, in the initial notice herein (issued May 27, 1966) we proposed on our own motion to delete the New Albany assignment. Christian Voice opposed this in comments. In August 1966, Christian Voice filed supplemental comments (with a petition to accept them), requesting 280A for New Albany for use on a short-spaced "equivalent protection" basis, but also advancing, as an alternative, its earlier proposal to return channel 285A to Columbus by making the Circleville shift. An opposition by WNRE and reply by Christian Voice were filed, and on the basis of these pleadings we issued the further notice herein, stating that the short-spaced New Albany assignment is not warranted and setting forth the Columbus-Circleville proposal.

4. Christian Voice, a nonprofit corporation formed to operate a religious station, reasserts the need of Columbus for a seventh commercial channel, calling attention to the 1960 census population of that city (471,316) and its standard metropolitan statistical area (Franklin County, 682,962). In particular, it is urged that there is need for a station of the sort Christian Voice would operate, largely devoted to religious broadcasting (discussions by members of the clergy, programs for shut-ins and persons in institutions, Bible study, religious drama, classical religious music, church services, and sermonettes from time to time during the day). It claims that other area stations do not meet the need for religious programming other than on Sundays. It lists 45 Roman Catholic and Protestant churches supporting its proposal, and attaches letters from the radio and TV director of the Roman Catholic Archdiocese, the head of the Ohio Council of

Churches, and 14 other ministers supporting its cause, as well as letters from the mayor of Columbus and other individuals to the same effect (a total of 300 are said to have been received).

5. In opposition, WNRE asserts that there is no substantial need for an additional Columbus assignment, since there are now eight FM stations there (including two educational stations) and since other stations present a substantial amount of religious programming.³ It is also claimed that Christian Voice's operation would be by no means entirely of this character, since in its application for channel 280A at New Albany it proposed about 35 percent of other types of programming, and 64 percent of its programming would be commercial. In opposition to having to change channel, WNRE asserts that it had to amend its pending application in 1964 because of the substitution of channels at Circleville (at a cost of some \$1,300), and that this proposed second shift would be disruptive of the stability to which a licensee is entitled. It is claimed that the station is just getting established (it commenced operation in September 1965), and that the change "could mean the difference between survival and demise" of Circleville's only station, especially since its former frequency would be used only a short distance away in Columbus. It is said that listener confusion and loss of revenue would result. WNRE refers to two cases in which we have made new assignments by requiring stations in other cities to change channels, and asserts that neither applies here because in both of those cases the new channel would be the first in the community.

6. A good deal of the arguments of the parties relates to reimbursement to WNRE for the cost of changing channels, which here, as in other similar cases, will be expected in a reasonable amount. Christian Voice, as it had earlier, states that if it becomes the permittee, it is ready to reimburse WNRE for the legitimate and prudent out-of-pocket expenses incurred in the move, engineering costs or otherwise, and to have the Commission decide the matter if the parties cannot agree. WNRE questions Christian Voice's ability to pay and urges that it should pay regardless of whether it ultimately gets the channel or not, since it is the party causing the shift if one is required. This party asks that, if the proposal is adopted despite its opposition, Christian Voice be required to commit itself to pay the reasonable and prudent costs of the change in frequency. WNRE sets forth a list of cost items it believes to be appropriate for reimbursement, set forth below and totaling over \$15,000, and asks for a Commission determination as to which of these Christian Voice should be required to pay. In reply, Christian Voice restates its willingness to pay reasonable costs but only if it gets the channels, questions both the amounts set forth by WNRE and whether certain items are properly includible at all, and reasserts its ability to pay (showing cash in bank of more than \$5,000). An engineering affidavit is attached in support of Christian Voice's lower cost figures.

³ We note that one Columbus FM station, WCOL-FM, which was required to program separately from the companion AM station 50 percent of the time starting Jan. 1, 1967, has turned to a format largely devoted to religious music of various kinds. However, religious music is only one of the several types of religious programming proposed by Christian Voice. There is particular reference in the opposition to a station at Springfield, Ohio, licensed to a religious group and devoted primarily to religious programming, which WNRE claims is clearly received in Columbus. However, we note that, 43 miles away, this station does not put into Columbus a signal of anything like the 1 mv/m intensity specified in sec. 73.315(b) of the rules as necessary to provide service in metropolitan areas.

CONCLUSIONS

7. After careful consideration of the facts and arguments urged by the parties, we conclude that the proposal should be adopted, and channel 285A assigned to Columbus and channel 296A substituted for 285A at Circleville. As mentioned (footnotes 1 and 2), Columbus was assigned seven commercial channels when the FM table was adopted, and its size and importance clearly warrant that number, in light of the general population criteria used.⁴ The number was temporarily reduced by our 1964 action removing one assignment, for which no demand had developed, in order to make a needed first assignment in another community; but now that a demand has been demonstrated and addition of a channel is possible without loss of assignments elsewhere, we believe the proposed addition is clearly desirable. The public interest in the new Columbus assignment, in our view, clearly outweighs whatever disruption of service may occur temporarily in connection with the Circleville operation. Economic injury is, of course, a relevant consideration only insofar as it affects the public interest rather than the private interest of the licensee;⁵ and we are not persuaded that the effect of the channel shift is likely to be great enough to force the demise of Circleville's only local station or a significant deterioration in its service. We believe that 2 years of operation, which the station will have accumulated by October 1967, when this action becomes effective, should have given the station sufficient identity with its listeners so that they will continue to listen to it on its new channel. The October 1967 date should give adequate time for WNRE to acquaint its audience with the forthcoming change and engage in suitable promotion.

8. WNRE points to two cases in which we ordered stations to change channels in order to provide first assignments in other communities (Kenton-Bellefontaine, Ohio, and Miami-Hialeah, Fla., and asserts that the same high degree of need is not present here. However, these are by no means the only two cases in which we have taken such action, nor has it been confined to situations where a first assignment was involved. For example, in docket 15937, we ordered a station at Prosser, Wash., to change in order to make a third assignment (first class C) at Wenatchee; and in docket 15911 we ordered a station at Cocoa, Fla., to change in order to provide a second assignment at West Palm Beach (see 2 FCC 2d 828, 7 R.R. 1541, 6 R.R. 1514). As in those cases (as well as those mentioned by WNRE), the public interest in the new Columbus assignment outweighs the amount of public detriment which may be involved. We also note the argument that this is the second channel shift at Circleville. This might be a consideration if an authorized station had been involved both times; but that is not the case here. As far as the public is concerned, this will be the first change.

9. We have reached the above decision on the basis of general allocation principles. As a general principle, channel assignment questions

⁴ Of the 27 cities with 1960 census populations larger than Columbus, only two (Atlanta and Memphis) are assigned six commercial channels; the rest have seven or more. Several cities smaller than Columbus have seven or more, including Birmingham, Oklahoma City, Omaha, and Portland (Oreg.).

⁵ *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

cannot be decided on the basis of programing to any substantial extent, for one reason because it cannot be determined who the grantee will ultimately turn out to be, and for another because programing is subject to change. However, if it does develop that Christian Voice becomes the licensee on the new Columbus channel, it appears that a significant contribution to the programing available in that area would be made.

10. Accordingly, we conclude that the public interest would be served by adoption of the proposal. As mentioned in the background discussion earlier, at one time there appeared to be another means of providing another channel in the Columbus area, and channel 280A was assigned at nearby New Albany. It later developed that this assignment could not be used in compliance with the mileage separation and principal city coverage rule. In the further notice we indicated that we regarded assignment of that channel on what would necessarily be a short-spaced basis as inappropriate, especially when an additional Columbus assignment can be provided consistently with the rules. We adhere to that decision here, and channel 280A is being deleted from New Albany. There is no reason to make assignments in derogation of the rules when an assignment can be provided which meets standard separation requirements. See *Danville and Gretna, Virginia*, docket 15987, 5 FCC 2d 333, 8 R.R. 2d 1595 (1966).

11. *Reimbursement: Who should pay.*—WNRE claims that it should be reimbursed by Christian Voice whether or not that party becomes the permittee on the new Columbus channel: Christian Voice asserts that it should be responsible only if it gets the channel and that whoever becomes the permittee should be the source of reimbursement. We agree with Christian Voice. In the *Kenton-Bellefontaine* case cited by WNRE, and in other such cases, we have repeatedly stated that the reimbursement should come from the party benefiting from the change: i.e., whoever becomes the permittee on the new channel (see 3 FCC 2d 605).

12. *Cost items claimed.*—As mentioned above, WNRE sets forth a total of \$15,409 which it believes to be "legitimate and necessary out-of-pocket expenses" and asks the Commission to rule on which items we believe are reasonable and prudent, and require Christian Voice to commit itself to pay them. Christian Voice in reply comments (supported by an engineering affidavit) questions several of the cost figures and asserts that one item—losses in revenue—should not be included at all. We do not here pass upon the amounts set forth, since it cannot now be determined what they will actually prove to be; it appears at this point that Christian Voice's lower figures will likely be closer to the mark. The largest sum we have approved in these cases is \$2,800. We believe it appropriate, for the guidance of the parties here and in similar cases, to make certain observations as to what items may be the subject of reimbursement:

(a) *Engineering, legal and equipment.*—WNRE claims a total of about \$6,700 in engineering and technical costs (\$5,000 for a new antenna and installation, \$175 for monitors, \$15 for a frequency-measuring service, \$1,000 in consulting engineering fees, and \$500 in legal fees). Christian Voice questions the amount for the antenna and the consulting engineering fees. We believe that the items mentioned are all appropriate for reimbursement,

though, as stated, not necessarily the amounts claimed.⁶ We make one observation: A licensee required to change frequency is entitled to reimbursement for equipment only to the extent new equipment is actually required (i.e., some antennas can be retuned for a relatively small shift), and only for equipment corresponding to that previously in use. In other words, the benefiting party should not be required to pay for improving and modernizing the existing station's facilities.

(b) *Printing (logs and stationery)*, \$89.—Assuming new logs have to be printed, this appears appropriate.

(c) *Out-of-pocket nonreducible expenses while station is off the air.*—WNRE claims it will be off the air 1 to 2 weeks, with expenses continuing at the rate of \$983 a week, which is claimed (salaries \$850, telephone, rent, etc.). Christian Voice asserts the changeover can be made in a 12-hour period, certainly no more than 1 to 2 days of off-air time, or \$382 at the rate mentioned. These expenses appear appropriate for reimbursement for whatever silent period is actually needed to make the required adjustment. It is expected that the licensee will attempt to resume operation as soon as possible.

(d) *Advertising promotion for new frequency.*—WNRE claims \$4,511 for newspaper advertising, including advertising for a 6-month period in a Columbus daily, a Circleville paper and four other area papers. Christian Voice criticizes this figure, asserting that 6 months' advertising is not necessary, since most of the informational job could be done by announcements over the station. We agree with WNRE that a certain amount of newspaper advertising should be reimbursable, but as mentioned above in connection with equipment, we do not believe the benefiting party should be required to pay for improving the situation of the existing station. While we do not now decide the question, it appears unlikely that more than \$1,000 would be appropriate on this score.

(e) *Loss of revenue.*—WNRE estimates its loss of revenue—both during off-air time and subsequently through failure of advertisers to renew until listeners become familiar with the new dial position—at \$3,000. Christian Voice asserts that the Commission should adhere to its position in the *Kenton-Bellefontaine* case that such losses are not properly the subject of reimbursement, because they are speculative and conjectural at best, the holding of a license is not a guarantee of profits or revenues, and the holder is not entitled to reimbursement for loss thereof if the public interest requires a change in facilities. (See 3 FCC 52d 605, 7 R.R. 2d 1608-1609.) We adhere to this position. See *Nelson Bros. Bond and Mortgage Co. v. FCC*, 289 U.S. 266 (1932).

(f) *Miscellaneous (telephone calls, etc.)* \$100.—Reimbursement for such items appears appropriate.

13. We expect the parties to be guided in their negotiations by these observations. It is expected that they will attempt in good faith to reach agreement.

14. *Procedural matters.*—We are making the new Columbus and Circleville assignments adopted herein effective October 1, 1967, a period of nearly 5 months which should be adequate to prepare for the changeover. Since this is the expiration date of WNRE's license, that station can be directed to change frequency without following the requirements of section 316 of the Communications Act concerning modification of license. See *Transcontinent Television Corp. v. FCC*, 308 F. 2d 339 (1962). The renewal application for WNRE shall specify channel 296A instead of channel 285A.

15. WNRE may continue to operate on channel 285A until at least October 1, 1967, unless it wishes to change over at an earlier date, in which case it may apply and will be given temporary authority to do so. As to operation after October 1, 1967, if action on an application for the Columbus assignment is not imminent (e.g., if a

⁶ It is noted that the WNRE antenna could be used at Columbus and that a large portion of the cost of a new antenna could be recovered.

comparative hearing situation develops), it would be appropriate to permit WNRE to continue to operate on channel 285A if it desires to do so. We are providing that it may continue on channel 285A until 45 days after grant of an application for that channel at Columbus.

16. In view of the foregoing, *It is ordered*, That:

(a) Section 73.202 of the Commission's rules, the Table of FM Assignments, *Is amended*, effective June 19, 1967, to delete the reference to New Albany, Ohio;

(b) Section 73.202 *Is amended*, effective October 1, 1967, to read as follows with respect to the cities listed:

City:	Channel No.
Circleville, Ohio.....	296A
Columbus, Ohio.....	222, 234, 242, 246, 250, 259, 285A

(c) An application for renewal of license of station WNRE, Circleville, Ohio, *Shall specify* channel 296A instead of channel 285A;

(d) Station WNRE, Circleville, Ohio, *May continue to operate* on channel 285A until October 1, 1967, or 45 days after grant of an application for a station on channel 285A at Columbus, Ohio, whichever is later; or the licensee thereof may apply for temporary authority to operate on channel 296A prior to October 1, 1967;

(e) At least 30 days before it wishes to commence operation on channel 296A, or within 30 days after it receives notification from the Commission that its operating authority on channel 296A under paragraph 15(d) above, is about to terminate, the licensee of station WNRE shall submit to the Commission the technical information normally required of an applicant for construction permit on channel 296A, including any changes in antenna and transmission line; and within 30 days after receiving Commission authority to operate on channel 296A it shall submit the measurement data normally required of an applicant for FM station license.

17. Authority for the adoption of the amendments is contained in sections 4(i), 303, 307(b), and 316 of the Communications Act of 1934, as amended. *It is further ordered*, That this proceeding *Is terminated*.

FEDERAL COMMUNICATIONS COMMISSION,
 BEN F. WAPLE, *Secretary*.
 8 F.C.C. 2d