

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

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 00-31
Table of Allotments,)	RM-9815
FM Broadcast Stations.)	
(Nogales and Vail, Arizona))	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 16, 2000

Released: February 25, 2000

Comment Date: April 17, 2000

Reply Comment Date: May 2, 2000

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Desert West Air Ranchers Corporation (“petitioner”), licensee of Station KZNO(FM), Channel 252A, Nogales, Arizona, seeking the substitution of Channel 253A for Channel 252A, the reallocation of Channel 253A to Vail, Arizona, as that community’s first local aural transmission service, and modification of its authorization accordingly. Petitioner stated its intention to apply for Channel 253A if it is reallocated to Vail, as requested.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission’s Rules that permits the modification of a station’s authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License (“Change of Community R&O”)*, 4 FCC Rcd 4870 (1989), *recon. granted in part “Change of Community MO&O”*, 5 FCC Rcd 7094 (1990). In support of the proposal, petitioner states that the proposed use of Channel 253A at Vail (pop. 550)¹ is mutually exclusive with the current use of Channel 252A at Nogales. The two communities are located 66.1 kilometers apart whereas a minimum distance of 72 kilometers is required between first adjacent Class A channels. Further, petitioner claims that its proposal would result in a preferential arrangement of allotments consistent with the Revision of FM Assignment Policies and Procedures² by providing a first local service to Vail (priority 3), whereas Nogales would retain local aural transmission service from Station KNOG(FM), Channel 216A, and Station KOFH(FM), Channel 256A.

¹ Population figures reported herein were taken from the 1990 U.S. Census Reports.

² The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters (co-equal weight is given to priorities (2) and (3)).

3. In further support of the proposal petitioner advises that the proposed 60 dBu contour at Vail will provide service to 355,449 persons in an area of 2,863 square kilometers. Further, petitioner avers that as Station KZNO currently provides service to 21,219 persons in an area of 309 square kilometers, the reallocation will result in a net gain in population of 334,230 persons as well as an additional 2,554 square kilometers. Petitioner advises that the loss area would occur mostly in Nogales, which is located on the U.S.-Mexican border. Further, petitioner reports that over 92% of Nogales' residents are Mexican Americans who receive local service from Stations KOFH(FM) and KNOG(FM). Additionally, petitioner asserts that Nogales also receives reception service from seven FM and five AM stations licensed to Nogales, Mexico. Petitioner comments that the population within the loss area is well served by the numerous stations located nearby, and that no white or gray areas would be created.³

4. Petitioner advises that while its proposal meets the requirements of Section 73.207(b) of the Commission's Rules to all existing and proposed domestic allocations and facilities, it is short spaced to Channel 253, Agua Prieta, Sonora, Mexico. However, contour protection is proposed to that facility in accordance with the 1992 FM Broadcasting Treaty between the United States and Mexico ("US/Mexican Treaty").

5. Although Vail is unincorporated, petitioner reports that it is listed as a proposed census designated place ("CDP") for the 2000 Census. Further, petitioner advises that Vail is listed in the Rand McNally Commercial Atlas and Marketing Guide which it attributes it with a population of 550 persons. However, it reports that the US Post Office credits Vail with 622 boxes and 1,966 rural route deliveries within its zip code 85641. Petitioner advises that in a recent news article in the Arizona Daily Star, Vail is described as the most rapidly growing district in Pima County. Further, the article advises that Vail's school population of 1,000 students is expected to increase approximately 56% in the next four years. Based on those figures, petitioner comments that the U.S. Census population within Vail's zip code of 3,124 persons appears accurate. As to other community indicia present in Vail, petitioner reports that locality has its own unified school district with two elementary schools and a middle school. Additionally, petitioner reports that Vail residents are served by the Vail Water Company, two Volunteer Fire Departments, two electric company services, an American Legion office and businesses identified by the name of the community such as Vail Homes and Building Co., Vail Feed Stores, Vail Steakhouse and Vail Ranch. Petitioner avers that given Vail's community status and its constant growth, it has a need for its own radio station to serve its residents. Petitioner concludes that its proposal is in the public interest as Vail would receive a first local service (priority three), and the gain in area and population are substantial.

³ Petitioner comments that in considering reception services, in this instance the Commission should consider those provided by the Mexican stations to the overwhelming Mexican-American population residing in the loss area as those stations represent the residents daily source of broadcast service.

Conversely, Nogales will not be left without local service (priority four).

6. A staff engineering analysis of this proposal reveals that while the petitioner claims that the gain area for proposed Channel 253A at Vail encompasses 355,449 people in an area of 2,863 square kilometers, its engineering calculations are premised on assuming the effect of terrain factors on the propagation of the primary service contour. Under those circumstances, the 60 dBu contour for Channel 253A extends approximately 43 kilometers in the direction of Tucson and thus covers a large portion of the Tucson urbanized area. Employing an omnidirectional signal from the proposed Vail allotment extends the 60 dBu contour 28.3 kilometers, in which case the Tucson urbanized area is barely covered. Petitioner has also used the effects of terrain data in calculating the loss area at Nogales. Further, our analysis reveals that in calculating the loss area encompassed in its present service at Nogales, petitioner is using the actual facilities of Station KZNO (0.215 kW, 70 meters), in determining the primary service area, whereas we examine Station KZNO as having the potential to operate as a maximum Class A facility, which it can accomplish at its present community of license.

7. While petitioner claims that the residents within the loss area have numerous broadcast services available, only local Station KNOG, Channel 216A, would remain as an operating broadcast facility at Nogales at this time.⁴ As to the other broadcast services, petitioner advises that Nogales has an FM translator station licensed to it, and also receives service from seven FM stations, as well as five AM stations authorized at Nogales, Sonora, Mexico. Additionally, petitioner reports that five Tucson FM stations provide a 50 dBu contour over Nogales, and that two Tucson AM stations, as well as one Marana, Arizona AM station provides a 1 mV/m groundwave contour over Nogales, Arizona. In the first instance, translator stations are not considered in a determination of reception services as they are secondary services. Furthermore, we do not consider foreign stations when determining reception services in loss areas. Therefore, we must discount service received from the Nogales, Sonora, Mexico broadcast stations. Nor can we consider service provided within the 50 dBu contour of the Tucson FM stations as reception service is premised on the provision of an FM station's 1.0 mV/m signal contour. As to the three domestic AM stations petitioner includes in its reception availability analysis, they provide daytime coverage only, and cannot be included as service to Nogales.⁵

⁴ We note that proposed Station KOFH, Channel 256A, Nogales, is currently off the air. According to Commission records the construction permit issued to Felix Corporation for Station KOFH expired on January 31, 2000, and we have no indication at this time that an application for an extension of the authorization has been filed.

⁵ Reception services are those aural broadcast services that can be received within a given geographical area, including full-time AM and FM commercial stations. In determining reception service provided by an FM station, the area of service circumscribed by the station's 1.0 mV/m signal contour should be considered, assuming maximum facilities for the class of station except Class C. For Class C stations, the licensed facilities or the minimum Class C facilities, whichever is greater, should be considered. The area of reception service for full-time AM stations is defined according to whether it is a Class A AM station or another class of full-time AM station. For

8. Our engineering analysis further reveals that based upon the proposed site for Channel 253A at Vail at coordinates 31-55-30 NL and 110-37-30, the gain area contains 7,626 people and covers 2,135 square kilometers. As there will be no overlap between the 60 dBu contours, the loss area of Channel 252A at Nogales contains 27,480 people and covers 1,562 square kilometers. Therefore, this proposal would produce a net loss of 19,854 people being served and a net gain in land area served of 573 square kilometers. Further, our analysis indicates that the entire gain area for proposed Channel 253A at Vail is entirely covered by at least five other fulltime services and is considered to be well served. Conversely, a few sections of the loss area of Channel 252A at Nogales would be left with less than five fulltime services if the reallocation proposal is granted. In this regard, we find that the reallocation would create an area of 32 square kilometers containing 5 people who will receive no fulltime services (white area); an area of 255 square kilometers containing 50 people who will receive one fulltime service (gray area); and an area of 405 square kilometers containing 21,222 people left with two fulltime services. The remainder of the loss area receives at least five fulltime services. The 70 dBu contour of the existing facility at Nogales nor the proposed facility at Vail cover any urbanized areas.

9. In evaluating proposals to change community of license, the Commission has stated, "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel from one community to another. *Community of License MO&O*, 5 FCC Rcd at 7097 (1990). We realize that this proposal would provide Vail with its first local aural transmission service, and that Nogales would retain service by Station KNOG, Channel 216A. We will also consider Station KOFH's authorization at Nogales if it seeks an extension for its expired construction permit during the pendency of this proceeding. Our engineering analysis indicates that by changing its community of license, Station KZNO(FM) would serve 7,626 people in an area of 2,135 square kilometers. However, the removal of Station KZNO(FM) from Nogales would result in a loss of service to 27,480 people in an area of 1,562 square kilometers. Moreover, the entire gain area at Vail receives at least five fulltime aural reception services. On the other hand, the area that would lose Station KZNO's signal receives fewer domestic signals overall. This proposal would result in a net loss of service to 19,584 persons being served, including a first and second fulltime service to 5 and 50 persons respectively. As indicated earlier, petitioner is not required to relocate to Vail or any other community to achieve full Class A facilities, as it can be accomplished at Nogales. In light of the foregoing, we question the public interest benefits of the petitioner's requested change of community of license, and solicit comments on our areas of concern.

a Class A clear channel station, the reception area is defined by a station's 0.5 mv/m groundwave contour, based on its licensed facilities. With respect to all other classes of full-time AM stations, for allocation purposes, reception service is defined as that service received within a station's nighttime interference-free contour.

10. We will propose to substitute Channel 253A for Channel 252A at Nogales and reallocate Channel 253A to Vail, as requested. As the petitioner's modification request complies with the requirements of Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 253A at Vail.

11. Channel 253A can be allotted to Vail consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, at the petitioner's specified site located 15.8 kilometers (9.8 miles) southeast of Vail at coordinates 31-55-30 NL and 110-37-30 WL. However, Mexican concurrence must be obtained for Channel 253A at Vail as a specially negotiated, restricted allotment towards Station KHSAP-FM, Channel 253B, Agua Prieta, Sonora, Mexico, at coordinates 31-18-24 NL and 109-33-37 WL.

12. In light of the above, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Nogales, Arizona	252A, 256A	256A
Vail, Arizona	--	253A

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before April 17, 2000, and reply comments on or before May 2, 2000, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, S.W.; TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel or consultant, as follows:

Mark N. Lipp, Esq.
Shook, Hardy & Bacon
600 14th Street, NW
Suite 800
Washington, DC 20005

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of

Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b),and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained 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 PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW., Washington, D.C.