

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 01-322
Table of Allotments,)	RM-10332
FM Broadcast Stations.)	
(Fremont and Sunnyvale, CA..))	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 14, 2001

Released: November 23, 2001

Comment Date: January 14, 2002
Reply Comment Date: January 29, 2002

By the Chief, Allocations Branch:

1. The Allocations Branch has before it a petition for rule making filed on behalf of Chase Radio Properties, L.L.C. (“Chase”), licensee of Station KCNL(FM), Channel 285A, Fremont, California, seeking to amend the FM Table of Allotments by reallocating Channel 285A from Fremont to Sunnyvale, California, and modifying its authorization accordingly.

2. Chase seeks to invoke the provisions of Section 1.420(i) of the Commission’s rules which 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.¹ In support of its proposal, Chase explains that the requested change in operations is mutually exclusive with its existing authorization. Further, Chase observes that its reallocation proposal would provide the community of Sunnyvale, which has a 1990 U.S. Census population of 117,229 persons, with its first local aural transmission service.

3. Chase asserts that the adoption of its proposal will result in a preferential arrangement of allotments consistent with the Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982),² by providing Sunnyvale with its first local aural transmission service. Our engineering staff finds that the loss area resulting from allotting Channel 285A to Sunnyvale contains 1,799 square

¹ See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

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)].

kilometers with a population of 1,139,667 persons, while the gain area contains 1,797 square kilometers with a population of 861,750 persons. No white or gray service areas would be created within the loss area and there are no white or gray service areas within the proposed gain area. All of the loss area will continue to receive well over five aural services while the gain area already receives well over five aural services. Further, relocating Station KCNL to Sunnyvale would eliminate KCNL's current short-spacings to Stations KFOG(FM), San Francisco; KRPQ(FM), Rohnert Park; and KITS(FM), San Francisco. We note that the reallocation of Channel 285A to Sunnyvale would not deprive Fremont of its sole local transmission outlet, because Fremont is currently served by local station KOHL(FM), Channel 207A, in addition to Station KCNL(FM), Channel 285A.

4. In accordance with Commission policy, if a rulemaking proponent intends to move its authorized facility to a community that is within an Urbanized Area or if the proposed facility would place a city grade (70 dBu) signal over 50 percent or more of the Urbanized Area, the proponent is required to demonstrate that the intended city of license is sufficiently independent of the central city to justify a first local service preference.³ Sunnyvale is within the San Jose Urbanized Area and the 70 dBu contour of the proposed facility in Sunnyvale would encompass more than 50 percent of the San Jose Urbanized Area. Chase provided a Tuck analysis to demonstrate that Sunnyvale is sufficiently independent of San Jose to merit a first local service preference.⁴ We believe that Chase's proposal warrants consideration since the allotment of Channel 285A to Sunnyvale could provide a first local aural transmission service to Sunnyvale.

5. Since Chase's reallocation request is consistent with the provisions of Section 1.420(i) of the Commission's Rules, we shall propose to modify the authorization of Station KCLN(FM) without entertaining competing expressions of interest in the use of Channel 285A at Sunnyvale, California, or requiring Chase to demonstrate the availability of an additional equivalent channel for use by other parties.

6. Channel 285A can be allotted to Sunnyvale, California, consistent with all spacing and city signal coverage requirements, utilizing Chase's requested site at the coordinates of 37-18-41 North Latitude and 121-48-58 West Longitude. In determining predicted coverage in allotment proceedings, we generally use the standard methodology employing the F(50,50) curves, which assumes a circular city-grade contour over uniform average terrain in all directions from a hypothetical reference site.⁵ If such methodology determines that a 70 dBu signal could not encompass the entire proposed community of license, the Commission may permit the use of actual terrain data along a specific radial toward the principal city to determine the range of the signal along a specific azimuth. See Woodstock and Broadway, Virginia, 3 FCC Rcd 6398 (1988) ("Woodstock"). Woodstock is a limited exception to our standard methodology and requires a rulemaking proponent, in addition to depicting actual terrain, to demonstrate a reasonable assurance of the continued availability of its proposed transmitter site and that FAA approval of the site has been obtained. Chase's proposed transmitter site

³ See e.g., Parker and St. Joe, Florida, 11 FCC Rcd 1095 (1995).

⁴ See Huntington Broadcasting Co. v. F.C.C., 192 F. 2d 33 (D.C. Cir. 1951), RKO General, Inc. ("KFRC"), 5 FCC Rcd 3222 (1990), and Faye and Richard Tuck ("Tuck"), 3 FCC Rcd 5374 (1988).

⁵ See Section 73.313 of the Commission's Rules.

is 20.4 kilometers from Sunnyvale. Although use of our standard methodology indicates that Chase would not cover Sunnyvale with a 70 dBu contour because that contour would extend only 16.2 kilometers from its transmitter site, Chase has demonstrated by use of actual terrain data along a specific radial from its proposed transmitter site toward Sunnyvale that it will encompass Sunnyvale with a 70 dBu contour. Chase has also met the other Woodstock requirements. Further, in Woodstock, which did not involve a new allotment, but an upgrade to a higher channel class for an existing authorization, the Commission stressed that if the upgrade proposal were adopted, it would not make the amended allotment available for application by anyone but the rulemaking proponent. Likewise, in this case, if the request to reallocate Channel 285A to Sunnyvale is granted, only Chase could apply for the reallocated channel. In this light, it appears that Chase has complied with the rationale of Woodstock and that its proposal to reallocate Channel 285A from Fremont to Sunnyvale may be considered.

7. Accordingly, 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>Channel Nos.</u>	
<u>City</u>	<u>Present</u>	<u>Proposed</u>
Fremont, California	285A	-----
Sunnyvale, California	-----	285A

8. 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.

9. Interested parties may file comments on or before January 14, 2002, and reply comments on or before January 29, 2002, 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, SW; TW-A325, Washington, D.C. 20554.

Additionally, a copy of such comments should be served on Chase's counsel, as follows:

Harry C. Martin
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209

10. 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.

11. For further information concerning this proceeding, contact R. Barthen Gorman, 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 that 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 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.