

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

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Statesville and Clemmons,
North Carolina)
MB Docket No. 03-219
RM-10797

NOTICE OF PROPOSED RULE MAKING

Adopted: October 8, 2003

Released: October 10, 2003

Comment Date: December 1, 2003
Reply Comment Date: December 16, 2003

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rule making filed on behalf of Mercury Broadcasting Company, Inc., licensee of Station WFMX(FM), Statesville, North Carolina ("Petitioner"), proposing the substitution of Channel 289C1 for Channel 289C at Statesville, the reallocation of Channel 289C1 from Statesville to Clemmons, North Carolina, as the community's first local transmission service, and the modification of the license for Station WFMX (FM) to reflect the changes.

2. Petitioner filed this proposal for reallocation in accordance with the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment. In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM Allotment priorities.

3. In support of the petition, Petitioner states that its proposal will serve the public interest and meets the requirements for reallocation set forth in Change of Community R&O. First, the allotment of Channel 289C1 at Clemmons is mutually exclusive with the current use of Channel 289C at Statesville. Second, the community of Statesville will not be deprived of its only local service. Third, the proposal would provide a first local aural transmission service at Clemmons, population 13,827 persons (2000 U.S. Census), which will result in a preferential arrangement of allotments over the retention of a fourth local transmission service at Statesville, population 23,320 persons (2000 U.S. Census). Petitioner also notes

1 See Amendment of the Commission's Rules Regarding 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, 5 FCC Rcd 7094 (1990).

2 See Revision of FM Assignment Policies and Procedures, 90 FCC2d 88, 91 (1988). The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to given to priorities (2) and (3)].

3 Stations WAME(AM), WSIC(AM), and WKKT(FM) will remain in Statesville.

that the reallocation would result in the elimination of existing short-spacings to two other stations.<sup>4</sup> In addition, Petitioner includes information regarding the gain and loss of service resulting from the downgrade and reallocation. They state that the current operation provides 60 dBu service to 2,733,625 persons, and the proposed operation at maximum facilities will serve 1,433,845 persons. Our engineering analysis shows that there would be a net loss of service to 1,256,031 persons in an area of 5,849 square kilometers. However, Petitioner states that 401,070 persons will receive a new service and the entire loss and gain areas will remain well served, the vast majority of the loss area receiving signals from 8 to 14 FM stations, not counting AM service. We seek comment on the potential loss of service from this downgrade and the public interest benefits of the change of community and downgrade.

4. In further support of the reallocation, Petitioner states that Clemmons is a community for allotment purposes, that it is in the Winston-Salem Urbanized Area. We take notice that Clemmons is a community for allotment purposes.<sup>5</sup> Clemmons was founded in 1802, incorporated as a community in 1986, and is in the U.S. Census. It has its own government and elected officials. Petitioner further states that the proposal would not be a move from a rural to an urbanized area because the 70 dBu at Station WFMX's current site and channel already serves 100% of the Winston-Salem and it would be a move from one urbanized area to another.<sup>6</sup> However, they also include an analysis of the community's independence of the larger one using the factors delineated in *Faye and Richard Tuck*.<sup>7</sup> We seek comment on this issue.

5. We believe that the proposal warrants consideration because it would provide Clemmons with a first local aural transmission service without depriving Statesville of its sole local transmission service and could eliminate two short spacings. Channel 289C1 can be reallocated at Clemmons at a site 32 kilometers (19.9 miles) north of the community.<sup>8</sup>

6. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>Community</u>	<u>Present</u>	<u>Channel</u>	<u>Proposed</u>
Statesville, North Carolina	245C, 289C		245C
Clemmons, North Carolina	---		289C1

7. 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.

8. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments or counterproposals on or before December 1, 2003, and reply comments on or before December 16, 2003, and are advised to read the *Appendix* for the proper procedures. Comments should

<sup>4</sup> The first short spacing involves a pre-1964 grandfathered short-spacing to Station WFJA(FM) Channel 288A, Sanford, North Carolina, and the second involves a short -spacing created pursuant to Section 73.215 by Station WZNY(FM), Channel 289C, Augusta, Georgia.

<sup>5</sup> *Revision of FM Assignment Policies and Procedures*, 90 FCC2d 88, 101 (1988).

<sup>6</sup> *See Headland, Alabama and Chatahoochee, Florida*, 10 FCC Rcd 10352 (1995).

<sup>7</sup> *See Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

<sup>8</sup> Channel 289C1 can be allotted at Clemmons at coordinates 36-17-30 NL and 80-15-30 WL.

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 Petitioners' counsel, as follows:

Harry C. Martin, Esq.  
Fletcher, Heald & Hildreth  
1300 North 17<sup>th</sup> Street  
11<sup>th</sup> Floor  
Arlington, VA 22209-3801

9. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12<sup>th</sup> Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.<sup>9</sup>

11. For further information concerning this proceeding, contact Victoria M. McCauley (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 petitioners constitutes an *ex parte*

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<sup>9</sup> See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Makings to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*. 46 FR 11549 (February 9, 1981).

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  
Assistant Chief, Audio Division  
Media Bureau

Attachment: Appendix

## APPENDIX

1. Pursuant to 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 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(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) 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 protection. 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 proposals 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. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments. (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, at its headquarters, 445 12th Street, S.W., Washington, D.C.