

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 04-20
Table of Allotments,)	RM-10842
FM Broadcast Stations.)	
(Cambridge and St. Michaels, Maryland))	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 11, 2004

Released: February 13, 2004

Comment Date: April 5, 2004

Reply Comment Date: April 20, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rule making filed by CWA Broadcasting, Inc. ("Petitioner"), licensee of Station WINX-FM, Channel 232A, St. Michaels, Maryland. Petitioner seeks to amend the FM Table of Allotments by upgrading Station WINX-FM from Channel 232A to 232B1 and reallocating Channel 232B1 from St. Michaels to Cambridge, Maryland, thus providing Cambridge with its third local aural transmission service.

2. Petitioner 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

3. Petitioner's current proposal to have its community of license changed from St. Michaels to Cambridge is the result of a rather long history involving its attempts to find a transmitter site that would allow Petitioner to serve Cambridge, its initial community of license. At the request of Petitioner, which was then the permittee of Station WFBR (now Station WINX-FM), Channel 232A, Cambridge, Maryland, the Commission reallocated Channel 232A from Cambridge to St. Michaels, Maryland, and modified the Station WFBR construction permit to specify St. Michaels as the community of license.² Petitioner explains that it filed its original 1992 Petition for Rule Making to reallocate Channel 232A to St. Michaels because it could not secure local zoning approval for the construction of an antenna tower that would provide the 70 dBu coverage of Cambridge required by the Commission's rules.³ Petitioner notes that during the five years between the filing of the original Petition for Rule Making and the final decision allowing the reallocation of Channel 232A to St. Michaels, circumstances changed materially and Petitioner was able to secure zoning approval for a transmitter site that would provide the requisite signal over Cambridge. On January 9, 1997, prior to the

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 *Cambridge and St. Michaels, Maryland*, 12 FCC Rcd 3504 (1997) ("1997 Decision").

³ See 47 CFR § 73.315.

Commission's *1997 Decision* reallocating Channel 232A from Cambridge to St. Michaels, the Commission granted Petitioner a construction permit for this site. Subsequently, a station was constructed and that facility currently operates from this new site near Trappe, Maryland. Petitioner never filed the requisite construction permit application to implement the reallocation of Channel 232A to St. Michaels.

4. On July 10, 2002, Petitioner filed a Petition to Dismiss,⁴ requesting that its original 1992 Petition for Rule Making be dismissed. Noting that it has never filed a construction permit application to implement the reallocation of Channel 232A to St. Michaels, Petitioner claimed that it no longer needed to change its community of license from Cambridge to St. Michaels because the station was serving Cambridge. The Commission denied Petitioner's 2002 Petition to Dismiss,⁵ observing that Petitioner's failure to file the requisite construction permit application to implement the reallocation of Channel 232A to St. Michaels did not affect the finality of the underlying Commission action that reallocated Channel 232A to St. Michaels and modified Petitioner's station authorization to specify St. Michaels as its community of license. The Commission stated that, at this juncture, the appropriate procedure would be for Petitioner to file a petition for rule making proposing the reallocation of Channel 232A back to Cambridge.

5. Petitioner has followed the Commission's most recent directive and requests that Station WINX-FM's Channel 232A be upgraded to Channel 232B1 and that Channel 232B1 be reallocated from St. Michaels to Cambridge, Maryland. Petitioner asserts that the allocation of Channel 232B1 to Cambridge would not deprive St. Michaels of its sole local transmission outlet, because the originally proposed St. Michaels facility was never built and thus St. Michaels has never had a local aural transmission outlet. Petitioner also observes that the Commission has determined that removal of an allocation for which a station has not been constructed does not present the same concerns as the loss of service represented by the removal of an operating station.⁶ Further, Petitioner asserts that the public interest would be served by the upgrade of Station WINX-FM's facilities.

6. Engineering studies show that Petitioner's proposal will create a loss area containing 125,373 persons and covering 804 square kilometers, whereas the gain area will contain 127,683 persons and cover 2,637 square kilometers. Thus, Petitioner's proposal would produce a net gain of 2,310 persons and 1,833 square kilometers being served. The entire loss area is completely covered by at least five

⁴ On April 16, 1997, Petitioner filed a Petition for Clarification directed to the Commission's *1997 Decision* reallocating Channel 232A to St. Michaels. That petition stated that Petitioner had filed its original 1992 Petition for Rule Making due to its inability to secure local zoning approval for the construction of a tower and that subsequently the Commission granted Petitioner a construction permit to build its tower. No specific relief was requested in the Petition for Clarification. Nevertheless, when it filed its Petition to Dismiss, Petitioner argued that the Petition for Clarification should be construed as a petition for reconsideration of the Commission's *1997 Decision* and that the *1997 Decision* was therefore not final. In this light, Petitioner claimed that its Petition for Rule Making was subject to dismissal. Petitioner's arguments were rejected.

⁵ 17 FCC Rcd 20425 (MB 2002).

⁶ See *Sanibel and San Carlos Park, Florida*, 10 FCC Rcd 7215 (MMB 1995); *Pawley's Island and Atlantic Beach, South Carolina*, 8 FCC Rcd 8657 (MMB 1993) and *Glencoe and LeSueur, Minnesota*, 7 FCC Rcd 7651 (MMB 1992).

other existing full-time services, and thus, is a well served area. Although no white⁷ area will be served by the gain area, several sections of the gain area are presently deemed to be underserved. Thus, an area containing 1,184 persons and covering 10 square kilometers currently receives only one full-time radio service (gray area). Another area containing 2,808 persons and covering 70 square kilometers currently receives only two full-time services. A third area containing 11,382 persons and covering 181 square kilometers currently receives only three full-time services. A fourth area containing 13,056 persons and covering an area of 224 square kilometers currently receives only four full-time services. Since Petitioner's proposal is consistent with the provisions of Section 1.420(i) of the Commission's Rules, we shall propose to modify the authorization of Station WINX-FM without entertaining competing expressions of interest in the use of Channel 232B1 at Cambridge, Maryland, or requiring Petitioner to demonstrate the availability of an additional equivalent channel for use by other parties.

7. Consistent with the technical requirements of the Commission's Rules, Channel 232B1 can be reallocated to Cambridge, Maryland, at Petitioner's specified site, utilizing coordinates of 38-29-39 NL and 76-13-21 with a site restriction of 15.1 kilometers (9.4 miles) southwest of Cambridge.

8. 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>City</u>	<u>Channel Nos.</u>	
	<u>Present</u>	<u>Proposed</u>
Cambridge, Maryland	292A	232B1, 292A
St. Michaels, Maryland	232A	-----

9. 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.

10. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before April 5, 2004, and reply comments on or before April 20, 2004, 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 Petitioner's counsel, as follows:

⁷ A "white" area is an area in which no radio reception service is provided.

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11. Parties must file an original and four paper 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 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

12. 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.⁸

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

⁸ 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.

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 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.