

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

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 04-318
Table of Allotments,) RM-11040
FM Broadcast Stations.)
(Culebra, Puerto Rico)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 10, 2004

Released: August 12, 2004

Comment Date: October 4, 2004

Reply Comment Date: October 19, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it the petition for rule making filed by La Gigante Radio Corporation (“Petitioner”), permittee and operator by Special Temporary Authority (“STA”) of Station WXZX-FM, proposing the substitution of Channel 291A for Channel 254A at Culebra, Puerto Rico. To accommodate the allotment, Petitioner also proposes the deletion of vacant Channel 291B at Vieques, Puerto Rico. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, Petitioner states that Station WXZX-FM presently operates on Channel 293A pursuant to an STA. Petitioner further states the substitution of Channel 291A for Channel 254A at Culebra would enable Station WXZX-FM to obtain a permanent authorization for a first local transmission service. Petitioner asserts that the deletion of Channel 291B at Vieques to accommodate the allotment raises no public interest concerns because a station has never been constructed, so the residents of Vieques have not come to rely on that service, and Vieques is already served by the full-time operation of AM Station WIVV.¹ Petitioner further asserts that the public interest favors deleting vacant Channel 291B at Vieques and allotting Channel 291A at Culebra because the Culebra facility has been built and operational for nearly six years, and the residents of Culebra have come to rely upon the service.

3. The history of the Culebra allotment reveals what when applications were filed in 1991, Channel

¹ At the request of V.I. Stereo Communications (“V. I. Stereo”), the licensee of WVIS-FM, Channel 291B was reallocated from Christiansted, Virgin Islands to Vieques, Puerto Rico, pursuant to the *Report and Order* in MM Docket No. 91-259, 10 FCC Rcd 6673 (1995). Applications were filed by V.I. Stereo, however, the Commission cancelled the WVIS-FM license because construction of the Vieques facility was not effectuated in a timely manner, and it was determined that Station WVIS-FM did not operate for a continuous 12-month period, terminating the authorization for the station as a matter of law. Thus, the Channel 291B allotment in Vieques was never constructed, and is now a vacant allotment.

293A was allotted to Culebra as the community's first local transmission service. Unfortunately, Culebra was one of the communities involved in a "daisy chain" of allotments in MM Docket No. 91-259. The *Report and Order* in that docket was affirmed on appeal, resulting in the deletion of Channel 293A and the allotment of Channel 254A at Culebra. Petitioner located a suitable site that would allow operation of Station WXZX-FM on Channel 254A. However, Petitioner could not, and still cannot, seek an authorization to operate on Channel 254A at Culebra because the stations involved in the "daisy chain" have not moved their facilities to accommodate the operation on Channel 254A at Culebra as they were directed to do so by the Commission. In order to initiate a first local service at Culebra, Petitioner was forced to seek an STA to operate Station WXZX-FM on Channel 293A, since it could not obtain permanent authorization on either Channel 254A or Channel 293A. The STA was originally granted in 1998, and Petitioner has regularly renewed the STA to continue to provide a first local service to Culebra, but would prefer a permanent authorization.

4. We believe the proposal warrants consideration since the allotment of Channel 291A at Culebra, Puerto Rico, would enable Station WXZX-FM to have a permanent authorization in order to maintain the community's first local transmission service. To accommodate the allotment, it is necessary to delete vacant Channel 291B at Vieques, Puerto Rico. Therefore, we shall seek comments as to whether we should delete vacant Channel 291B at Vieques to accommodate the Culebra allotment. If an expression of interest is filed during the comment period in this proceeding, we will retain Channel 291B at Vieques for future auction. It is Commission policy not to delete a channel in which interest has been expressed. However, if no interest is expressed for retention of Channel 291B at Vieques, we shall delete the channel to accommodate the allotment of Channel 291A at Culebra.

Technical Summary

5. An engineering analysis has determined that Channel 291A can be allotted at Culebra in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.2 kilometers (1.4 miles) northwest at petitioner's presently authorized STA site. The coordinates for Channel 291A at Culebra are 18-19-19 North Latitude and 65-17-59 West Longitude. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 291A at Culebra, Puerto Rico. The Commission's Rules do not contemplate the filing of expressions of interest in proceedings which seek to make equivalent channel substitutions.²

6. Accordingly, we seek comments 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:

² The Commission considers channels of the same class to be equivalent unless showings have been made that stations cannot be constructed for reasons such as environmental consequences or air hazards. See *Vero Beach, Florida*, 3 FCC Rcd 1049 (1988); *rev. denied*, 4 FCC 2184 (1989); and *Tawas City, Michigan*, 9 FCC Rcd 4794 (1994), *recon. denied*, 10 FCC Rcd 6108 (1995).

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Culebra, Puerto Rico	254A	291A
Vieques, Puerto Rico	291B	---

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. Interested parties may file comments on or before October 4, 2004, and reply comments on or before October 19, 2004, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Scott C. Cinnamon, Esq.
Law Offices of Scott C. Cinnamon, PLLC
1090 Vermont Ave., NW, Suite 800, #144
Washington, DC 20005
(Counsel for Petitioner)

9. Parties are required to 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 12th 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.³ This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small

³ See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Makings to Amend 47 C.F.R. §§ 73.202(b), 73.504 and 73.606(b)*. 46 FR 11549 (February 9, 1981).

business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

12. For further information concerning this proceeding, contact Sharon P. McDonald, 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 solicited 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
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), 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* 47 C.F.R. Section 1.420(d).)

(b) Petitions for rule making which conflict with the proposals in this *Notice* 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 47 C.F.R. Sections 1.415 and 1.420, 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* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, 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.