

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

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 04-34
Table of Allotments,) RM-10848
FM Broadcast Stations.)
(Joliet and Lemont, Illinois))

NOTICE OF PROPOSED RULE MAKING

Adopted: March 3, 2004

Released: March 5, 2004

Comment Date: April 26, 2004

Reply Comment Date: May 11, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rule making filed by HBC License Corporation (“Petitioner”), licensee of Station WVIX(FM), Channel 228A, Joliet, Illinois, proposing the reallocation of Channel of 228A from Joliet to Lemont, Illinois, and the modification of Station WVIX(FM)’s presently authorized construction permit accordingly.¹ Petitioner states its intention to apply for the channel, if reallocated.

2. The proposal is filed pursuant to 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.² In support of its proposal, petitioner states that Station WVIX(FM operates on Channel 228A at Joliet, Illinois. There are two AM stations (WJOL and WWHN), four FM stations (Stations WVIX, WCFS, WJCH, and WLLI), and one television station (WGBO-TV) licensed to Joliet (population 106,221).³ By contrast, Lemont is an incorporated village with a population of 13,098. It has an elected mayor, Village Board, refurbished Village Hall, public library, a post office, several public schools, a zip code, other government offices, numerous retail establishments (including a bank), and many places of worship, etc. Petitioner further

¹ Petitioner states that Station WVIX(FM) is operating pursuant to automatic program test authority from the construction permit site (File No. BPH-20020822ABT), and that an application for license (File No. BLH-20031015ADZ) is pending.

² 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).

³ All populations figures are taken from the 2000 U.S. Census.

states that Lemont has no radio or television station. Petitioner submits that, in accordance with principles

articulated in Section 307(b) of the Commissions Act of 1934, as amended, the reallocation of Channel 228A to Lemont would result in a preferential arrangement of allotments and would clearly be in the public interest.

⁴

3. The Commission now allows a station to change its community of license despite the presence of pre-1964 and pre-1989 “grandfathered” short-spacings and those permitted under Section 73.215 of the Commission’s Rules.⁵ Consistent with that policy, we note that Station WVIX(FM) is a pre-1964 “grandfathered” station that is short-spaced to two other pre-1964 “grandfathered” stations—Stations WXRT-FM and WLIT-FM in Chicago, Illinois. Generally, a “grandfathered” station may change its community of license under *Peachtree* when the modification involves no site change, no new short-spacings, and no exacerbation of existing short-spacings.

4. Petitioner states in its proposal that Station WVIX(FM) has changed its transmitter site, and in doing so, has maintained its “grandfathered” status. Petitioner also advises that Station WVIX(FM) has commenced program testing from the presently authorized construction permit site. As such, we will consider this reallocation proposal at this site. Since an engineering analysis has determined that at the construction permit site, no new short-spacings would be created, and no existing short-spacings would be exacerbated, Station WVIX(FM) should be afforded the opportunity to change its community of license under an expansion of the criteria afforded in *Peachtree*.⁶

⁴ The FM 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 given to priorities (2) and (3).] See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1982).

⁵ See *Newnan and Peachtree City, Georgia (“Peachtree”)*, 7 FCC Rcd 6307 (1992); *Oceanside and Encinitas, California*; and *Berlin and North Conway, New Hampshire*, 14 FCC Rcd 15307 (1999) (pre-1964 “grandfathered” short-spacing).

⁶ We note that petitioner’s reliance on *Worcester and Westborough* is misplaced. There, Petitioner requested, for the propose of the rulemaking, that it be allowed to use the licensed site although Station WAAF(FM) had an outstanding construction permit. In granting the change of community, the Petitioner was conditioned to use the licensed site instead of the construction permit site (which created additional shortspacings). See *Worcester and Westborough Massachusetts*, 18 FCC Rcd 23750 (2003),

We also distinguish this case from *Albermarle and Indian Trail* where the transmitter site change was requested in the petition for rule making and not, as here, obtained prior to its filing. There, we held that the requested site change was in the public interest because it lessened the some of the short-spacings between the “grandfathered” stations in question and increased the area and population to be served. See *Albermarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876 (2001), *app. for rev. pending*.

5. Both Joliet and Lemont are partially located within the Chicago, Illinois Urbanized Area, and the 70 dBu signal would continue to encompass 9.5% of that urbanized area. Therefore, no Tuck analysis is necessary.⁷ Additionally, because no change in the transmitter site is requested, no gain and loss area study is required. We also request that petitioner provide the public interest benefits derived from the transmitter site change at the application stage in order to determine if it also warrants consideration at the allotment stage.

6. We believe that this proposal warrants consideration since the reallocation of Channel 228A from Lemont, Illinois, would provide the community with its first local aural transmission service, without depriving Joliet of its sole local service.⁸ An engineering analysis has determined that Channel 228A can be reallocated to Lemont in compliance with the Commission’s minimum distance separation requirements with a site restriction 7.0 kilometers (4.4 miles) south at petitioner’s authorized construction permit site.⁹ As requested, we propose to modify Station WVIX(FM)’s construction permit to specify operation of Channel 228A at Lemont, Illinois, as its new community of license. In accordance with Section 1.420(i) of the Commission’s Rules, we shall not accept competing expressions of interest for the use of Channel 228A at Lemont, Illinois, or require petitioner to provide equivalent class channel for the use of other interest parties.

7. 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:

| <u>City</u> | <u>Channel No.</u> | |
|------------------|--------------------|-----------------|
| | <u>Present</u> | <u>Proposed</u> |
| Joliet, Illinois | 228A, 244A | 244A |
| Lemont, Illinois | -- | 228A |

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.

⁷ See *Long Beach and East Los Angeles, California*, 10 FCC Rcd 28672 (1995); see also *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *RKO General, Inc.*, 5 FCC Rcd 3222 (1990); and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

⁸ Three FM stations (WCSF, WJCH and WLLI-FM) and two AM stations (WJOL and WWHN) would remain licensed to the community.

⁹ The coordinates for Channel 228A at Lemont are 41-36-39 North Latitude and 88-00-33 West Longitude.

9. Interested parties may file comments on or before April 26, 2004, and reply comments on or before May 11, 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 counsel for petitioner, as follows:

Lawrence N. Cohn, Esq.
Cohn and Marks, LLP
1920 N Street, N.W., Suite 300
Washington, D.C. 20036
(Counsel for Petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do to apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.¹⁰

10. 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.

11. 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 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

¹⁰ 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.

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 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. 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 Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, 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 12th Street, S.W., Washington, D.C.