

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

| | | |
|---|---|---------------------|
| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b), |) | MB Docket No. 04-67 |
| Table of Allotments, |) | RM-10856 |
| FM Broadcast Stations. |) | |
| (Pittsfield and Easthampton, Massachusetts, |) | |
| and Malta, New York) |) | |

NOTICE OF PROPOSED RULE MAKING

Adopted: March 10, 2004

Released: March 12, 2004

Comment Date: May 3, 2004

Reply Comment Date: May 18, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rule making filed by Vox New York, LLC, licensee of Station WNYQ(FM) ("WNYQ"), Malta, New York, and Great Northern Radio, LLC, licensee of Station WBEC-FM, Pittsfield, Massachusetts (collectively, "Petitioners"). Petitioners seek to amend the FM Table of Allotments by upgrading Channel 289A, Station WNYQ, Malta, New York, to Channel 289B1. Although this upgrade would be short spaced to Channel 288A, Station WBEC-FM, Pittsfield, Massachusetts, Petitioners propose to reallocate Channel 288A, Station WBEC-FM, from Pittsfield to Easthampton, Massachusetts and to modify Station WBEC-FM's license to reflect the change of community, thus eliminating any potential short spacing between Stations WNYQ and WBEC-FM. Petitioners explain that if the Commission grants their petition for rule making, they will file applications for authority to construct the proposed facilities and, if those applications are granted, they will construct the facilities proposed therein.

2. Pursuant to Section 1.420(g)(3) of the Commission's rules, Petitioners seek to upgrade Channel 289A, Station WNYQ, to Channel 289B1. The proposed upgraded channel is mutually exclusive with Station WNYQ's existing authorization at Malta, New York. Pursuant to Section 1.420(i) of the Commission's rules, Petitioners seek to reallocate Station WBEC-FM's Channel 288A, Pittsfield, Massachusetts, to Easthampton, Massachusetts. Section 1.420(i) of the Commission's rules 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 The proposed use of Channel 288A at Easthampton, Massachusetts, is mutually exclusive with Station WBEC-FM's existing authorization at Pittsfield, Massachusetts.

3. With respect to the proposed reallocation of Channel 288A to Easthampton, Petitioners assert that the adoption of their proposal will result in a preferential arrangement of allotments consistent

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).

with the *Revision of FM Assignment Policies and Procedures*,² by providing Easthampton, Massachusetts³ with its first local aural transmission service. The allotment of Channel 288A to Easthampton would not deprive Pittsfield of its sole local aural transmission outlet, because Pittsfield will retain local service from three AM and three FM stations.⁴

4. Since Easthampton is located within the Springfield, Massachusetts Urbanized Area, the Joint Petitioners must demonstrate that Easthampton is sufficiently independent of the urbanized area to justify consideration as a first local service.⁵ Petitioners have provided a *Tuck* analysis to demonstrate that Easthampton is sufficiently independent of the Springfield Urbanized area to merit a first local service preference. Parties may comment on the submission.

5. The licensees' proposal will result in gain and loss areas. By changing its transmitter site and upgrading Channel 289A to Channel 289B1, the licensee of Station WNYQ will provide new service to a net gain area of 2,287 square kilometers serving 339,405 persons. By changing its community of license from Pittsfield to Easthampton, the licensee of Station WBEC-FM will provide new service to a gain area containing 394,889 persons. The size of the gain and loss areas will be identical and encompass 2,404 square kilometers. Both the gain and loss areas of Station WBEC-FM are well served with 5 or more radio broadcast services. Because the petitioners' proposal is consistent with the provisions of Sections 1.420(g)(3) and (i) of the Commission's rules, we shall propose to modify the authorizations of Stations WNYQ-FM and WBEC-TM without entertaining competing expressions of interest in the use of Channel 289B1 at Malta, New York, and Channel 288A at Easthampton, Massachusetts, or requiring the petitioners to demonstrate the availability of additional equivalent channels for use by other parties

6. Consistent with the technical requirements of the Commission's rules, Channel 289B1 can be allotted to Malta, New York, utilizing coordinates of 42-58-17 NL and 73-40-52 WL, with a site restriction of 9.1 kilometers (5.7 miles) east of Malta. Consistent with the technical requirements of the Commission's rules, Channel 288A can be allotted to Easthampton, Massachusetts, utilizing coordinates of 42-18-52 NL and 72-41-18 WL, with a site restriction of 5.5 kilometers (3.4 miles) north of Easthampton.

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:

² 90 FCC 2d 88 (1982). 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. Equal weight is given to priorities (2) and (3).

³ Easthampton is an incorporated community with a 2000 U.S. Census population of 15,994 persons.

⁴ The three AM stations are: WUHN, 1110 kHz; Station WBRK, 1340 kHz; and WBEC, 1420 kHz. The three FM stations are: WTBR-FM, Channel 209A; WUPE, Channel 240A; and Station WBRK-FM, Channel 269A.

⁵ See *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*").

| <u>City</u> | <u>Channel Nos.</u> | |
|----------------------------|---------------------|-----------------|
| | <u>Present</u> | <u>Proposed</u> |
| Easthampton, Massachusetts | ----- | 288A |
| Pittsfield, Massachusetts | 240A, 269A, 288A | 240A, 269A |
| Malta, New York | 289A | 289B1 |

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. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before May 3, 2004, and reply comments on or before May 18, 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 the petitioners' counsel, as follows:

David G. O'Neil, Esq.
Rini Coran, PC
1501 M Street, N.W., Suite 500
Washington, D.C. 20005

10. 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.

11. 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.⁶

⁶ 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.

12. 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 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.