

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

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MB Docket No. 05-166
FM Broadcast Stations.	)	RM-11228
(Wilburton, Okemah, and McAlester,	)	
Oklahoma)	)	
	)	
	)	

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: April 6, 2005**

**Released: April 8, 2005**

**Comment Date: May 31, 2005**

**Reply Comment Date: June 14, 2005**

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a petition for rulemaking and a supplement to petition for rule making jointly filed by Little Dixie Radio, Inc., KESC Enterprises, Inc., and Southeastern Oklahoma Radio, LLC (“Petitioners”).<sup>1</sup> The Petitioners request the reallocation and change of community of license for Station KESC(FM) from Channel 279C1 at Wilburton, Oklahoma, to Channel 279C1 at Okemah, Oklahoma. To prevent the removal of the sole local aural service at Wilburton, the Petitioners propose to reallocate and change the community of license for Station KMCO(FM) from Channel 267C1 at McAlester, Oklahoma, to Channel 267C1 at Wilburton, Oklahoma. The Petitioners state their intentions to apply for the allotments and to construct the facilities if the applications are granted.

2. The Petitioners 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.<sup>2</sup> In reviewing a proposal under Section 1.420(i), the Commission compares the existing and proposed arrangement of allotments to determine whether the reallocation would result in a preferential arrangement of allotments based upon the FM allotment

<sup>1</sup> When the rulemaking petition was filed, Little Dixie Radio, Inc., was the licensee of Stations KESC(FM), Wilburton, Oklahoma, and KMCO(FM), McAlester, Oklahoma; KESC Enterprises, Inc., was the proposed assignee of KESC(FM), and Southeastern Oklahoma Radio, LLC was the proposed assignee of Station KMCO(FM). On January 18, 2005, the Media Bureau staff granted the applications (BALH-20040610ABH and BALH-20040610ABL) to assign the licenses for Stations KESC(FM) and KMCO(FM) to KESC Enterprises and Southeastern Oklahoma Radio, respectively; and the parties consummated the transactions on January 28, 2005. The grants of the assignment applications are not final and are currently under Commission review. *See Little Dixie Radio*, FCC 05-54, released March 4, 2005.

<sup>2</sup> *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).

priorities.<sup>3</sup> In addition, the rule requires that the station's amended allotment be mutually exclusive with the station's present channel.

3. In support of their proposal, the Petitioners contend that it will result in a preferential arrangement of allotments because Okemah (population 3,038) will have a first local service, triggering Priority 3. Because Channel 267C1 will be reallocated to Wilburton and KMCO(FM)'s license modified to specify that community, Wilburton (population 2,972) will retain local aural transmission service. By way of comparison, the Petitioners assert that retention of the allotments as currently authorized will trigger less significant Priority 4 because McAlester (population 17,783) would retain a fifth local service.<sup>4</sup> The Petitioners also contend that reallocated Channel 279C1 at Okemah will provide a gain in service to 171,300 persons and a loss of service to 54,629 persons, for a net gain of service to 116,671 persons. The Petitioners state that 54,462 people in the loss area will continue to be well served with five or more aural services and that 167 persons in the loss area will be reduced from five to four aural services. Further, the Petitioners point out that there will be no gain or loss of service by the reallocation of Channel 267C1 from McAlester to Wilburton because there will be no change of transmitter site for Station KMCO(FM), which already provides a city-grade (70 dBu) signal over Wilburton.

4. The Petitioners alleges that Okemah is a community for allotment purposes because it is incorporated and listed in the U.S. Census. The Petitioner also sets forth various indicia of community status. Okemah is governed by a manager and five council members, has its own police and fire departments, provides water and sewer service, and operates three schools through the Okemah Public School District. The Petitioners add that Okemah has its own hospital, public library, weekly newspaper, parks, recreation facilities, numerous churches, several civic organizations, and numerous businesses.

5. Beyond establishing the community status of Okemah, the Petitioners contend that no *Tuck*<sup>5</sup> showing is required because neither Okemah nor Wilburton is located within any Urbanized Area as defined by the U.S. Census. Further, Station KESC(FM) on Channel 279C1 at Okemah and Station KMCO(FM) on Channel 267C1 at Wilburton will not place a city-grade, 70 dBu, signal over any part of an Urbanized Area.

6. This proposal complies with the Commission's technical rules and warrants consideration because it could provide Okemah with its first local service while maintaining a first local service at Wilburton. In addition, the proposal appears to satisfy the requirements of Section 1.420(i) because Stations KESC(FM) and KMCO(FM)'s existing and proposed channels are mutually exclusive with each other and because adding a first local service Okemah and maintaining a first local service at Wilburton, triggering Priority (3) twice, would be preferable to retaining a fifth local service at McAlester under Priority 4 and maintaining a first local service at Wilburton under Priority (3).

7. Channel 279C1 can be reallocated to Okemah at the Petitioners' proposed site, which is located 21.3 kilometers (13.3 miles) south of Okemah, in compliance with the Commission's minimum distance mileage separations.<sup>6</sup> The reference coordinates for this proposed allotment are 35-14-22 and 96-18-48. Channel 267C1 can be reallocated to Wilburton at Station KMCO(FM)'s current site at reference coordinates 34-59-13 and 95-42-10.

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<sup>3</sup> 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 is given to priorities (2) and (3)]. See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1988).

<sup>4</sup> Stations KNED(AM), KTMC-AM-FM, and KBCW(FM) are currently licensed to McAlester, Oklahoma.

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

<sup>6</sup> 47 C.F.R. § 73.207.

8. 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>Communities</u>	<u>Present</u>	<u>Proposed</u>
McAlester, Oklahoma	267C1, 286A	286A
Okemah, Oklahoma	---	279C1
Wilburton, Oklahoma	279C1	267C1

9. We also propose to modify Station KESC(FM)'s license to specify operation on Channel 279C1 at Okemah, Oklahoma, in lieu of Channel 279C1 at Wilburton, Oklahoma, without entertaining competing expressions of interest. Likewise, we propose to modify Station KMCO(FM)'s license to specify operation on Channel 267C1 at Wilburton, Oklahoma, in lieu of channel 267C1 at McAlester, Oklahoma, without entertaining competing expressions of interest.

10. 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.

11. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before May 31, 2005 and reply comments on or before June 14, 2005, 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 petitioner, as follows:

Richard R. Zaragoza, Esq.  
 Veronica D. McLaughlin Tippet, Esq.  
 Shaw Pittman LLP  
 2300 N Street, NW  
 Washington, DC 20037-1128

12. 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 Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. See 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

13. 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>7</sup> This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small 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).

14. For further information concerning this proceeding, contact Andrew J. Rhodes, 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 in the applicable docket 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 any summary of any new 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

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<sup>7</sup> *See Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules.* 46 FR 11549 (February 9, 1981).

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) 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 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. 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* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., TW-A325, 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 (Room CY-A257) at its headquarters, 445 12<sup>th</sup> Street, S.W, Washington, D.C.