

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

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 05-279
Table of Allotments,) RM-11276
FM Broadcast Stations.)
(Old Forge and Black River, New York))
)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 2, 2005

Released: November 4, 2005

Comment Date: December 27, 2005

Reply Comment Date: January 10, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a petition for rule making filed by Radioactive, LLC, ("Petitioner"), permittee of an unconstructed permit for Channel 223A, Old Forge, New York. Petitioner proposes to reallocate Channel 223A from Old Forge to Black River, New York, and to modify the construction permit authorization¹ to specify the new community. Petitioner pledges to file an application to implement this reallocation.

2. Petitioner filed this proposal for reallocation in accordance with the provisions of Section 1.420(i),² 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.³ In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM Allotment priorities.⁴

3. Petitioner states that the proposal would provide a first local service at Black River under Priority Three but would not result in the loss of existing local transmission service or aural reception service at Old Forge because the station is not constructed.⁵ Petitioner states that Black River is an incorporated village with a 2000 U.S. Census population of 1,285 persons, and is therefore a community for allotment purposes. It is governed by a Village Board, has its own sewer and water services, volunteer fire department, churches, and numerous local businesses. The predicted 70 dBU contour of the

¹ See FCC File No. BNP-20050103AFU, Facility ID No. 164250.

² 47 C.F.R. §1.420(i).

³ See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

⁴ See Revision of FM Assignment Policies and Procedures, 90 FCC2d 88, 91 (1988). The FM Allotment priorities are: (1) first full-time aural service, (2) second full-time aural service, (3) first local service, (4) other public interest matters. [Co-equal weight is given to given to priorities (2) and (3)].

⁵ Petitioner cites to Chatom and Grove Hill, Alabama, 12 FCC Rcd 7664 (MMB 1997); Bagdad and Chino Valley, Arizona, 11 FCC Rcd 523 (MMB 1995).

proposed Channel 223A allotment at Black River does not trigger a *Tuck*⁶ analysis because it is not located in an Urbanized Area nor does it encompass any such area.

4. We believe that the proposal warrants consideration because it would provide Black River with a first local service. We recognize that the construction permit for Channel 233A at Old Forge is not constructed and that the loss of a potential service does not raise the same level of concern as that of an existing service.⁷ The proposed engineering analysis also shows that Channel 223A can be allotted to Black River at coordinates located 44-04-01 North Latitude and 75-38-53 West Longitude consistent with the Commission's minimum distance separation requirements.⁸ There is a site restriction of 13.3 kilometers (8.3 miles) northeast of the community. Because the proposed reference coordinates are located within 320 kilometers (199 miles) of the Canadian border, concurrence of the Canadian government has been requested for the allotment.

5. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b),⁹ for the communities listed below, to read as follows:

<u>Community</u>	<u>Present</u>	<u>Channel</u>	<u>Proposed</u>
Old Forge, New York	223A, 231A		231A
Black River, New York	---		223A

6. 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. Pursuant to Sections 1.415 and 1.419,¹⁰ interested parties may file comments or counterproposals on or before December 27, 2005, and reply comments on or before January 10, 2006, and are advised to read the *Appendix* for the proper procedures. Comments should be filed with the

⁶ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

⁷ *See e.g. Pelham and Meigs, Georgia*, 18 FCC Rcd 12187 (MB 2003).

⁸ 47 C.F.R. § 73.207.

⁹ 47 C.F.R. § 73.202(b).

¹⁰ 47 C.F.R. §§ 1.415 and 1.419.

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 Petitioners' counsel, as follows:

Radioactive, LLC
c/o Marissa G. Repp, Esquire
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

8. 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 12th 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. Section 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

9. 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).¹¹ 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. Section 3506(c)(4).

10. For further information concerning this proceeding, contact Helen McLean (202) 418-2738. 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 petitioners constitutes an *ex parte* presentation and shall not

¹¹ See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Makings to Amend 47 C.F.R. Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*. 46 FR 11549 (Feb. 9, 1981).

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.