

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-310
Table of Allotments,)	RM-11292
FM Broadcast Stations.)	
(Humboldt and Pawnee City, Nebraska and)	
Valley Falls, Kansas))	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 9, 2005

Released: November 10, 2005

Comment Date: January 3, 2006

Reply Comment Date: January 17, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a petition for rule making filed by Cumulus Licensing LLC, ("Petitioner"), permittee of an unconstructed permit for Channel 244A, Humboldt, Nebraska. Petitioner proposes to substitute Channel 245C2 for Channel 244A at Humboldt, reallocate Channel 245C2 to Valley Falls, Kansas, and modify the construction permit authorization¹ to reflect these changes. Petitioner pledges to file an application to implement the channel upgrade and reallocation at Valley Falls. In addition, Petitioner proposes to allot Channel 256A at Pawnee City, Nebraska and states its intention to file an application to construct the station if the channel is allotted.

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 Valley Falls under Priority Three but would not result in the loss of existing local service at Humboldt because the station is not constructed.⁵ Valley Falls has a population of 1,254 persons compared to Humboldt with 941 persons

¹ See FCC File No. BNPH-20041230ADE, Facility ID No. 164159.

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 *inter alia* to *Linden, Texas et al.*, 16 FCC Rcd 10853 (MMB 2001) (removal of unbuilt facilities does not present the same loss of service concerns as removal of an operating station that the public has become reliant upon).

according to the 2000 U.S. Census. Petitioner states that although the loss of a potential first local service at Humboldt also falls under Priority Three, the Commission has held that under Priority Three, the provision of service to the larger community is preferred.⁶

4. Petitioner provides a study showing gains and losses because it proposes a new transmitter site at Valley Falls.⁷ The relocation will result in a predicted net gain in service to 303,094 persons over an area of 5,945 square kilometers within the proposed 60 dBu contour according to Petitioner. Additionally, Petitioner states that the loss area will remain well served except for a gray area encompassing 18 persons. Although Petitioner asserts that the gray area is *de minimis*, it nevertheless proposes the allotment of Channel 256A at Pawnee, Nebraska. Petitioner acknowledges that the loss of reception service cannot be cured through the provision of vacant allotments but notes that in this instance there is no loss of actual service because the facilities for Channel 244A at Humboldt are unbuilt. Petitioner states that the proposed allotment at Pawnee City would provide a first local service to a community of 1,033 persons according to the 2000 U.S. Census.

5. Petitioner states that Humboldt and Valley Falls are not located in an urbanized area. However, because the proposed 70 dBu contour at Humboldt will cover 100% of the Topeka, Kansas Urbanized Area, Petitioner provides a *Tuck*⁸ showing. The showing addresses the three *Tuck* criteria: (1) the signal population coverage; (2) the size and proximity of the proposed community to the central city of the urbanized area, and (3) the interdependence of the proposed community to the urbanized area. The interdependence factor is the most important criteria considered in making an allotment decision involving the proposed reallocation of a station to an urbanized area.⁹ Petitioner addresses each of the eight *Tuck* factors to demonstrate the independence of Valley Falls from the Topeka, Kansas Urbanized Area. We tentatively conclude that Valley Falls is an independent community entitled to first local preference under *Tuck*.

6. We believe that the proposal to substitute Channel 245C2 for Channel 244A and reallocate the channel from Humboldt to Valley Falls warrants consideration because it would provide Valley Falls, Kansas with a first local service. We recognize that the construction permit for Channel 244A at Humboldt, Nebraska 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.¹⁰ Our engineering analysis shows that Channel 245C2 can be allotted to Valley Falls, Kansas at coordinates located 39-15-00 North Latitude and 95-36-30 West Longitude consistent with the Commission's minimum distance separation requirements.¹¹ There is a site

⁶ Petitioner cites *inter alia* to *Ardmore, Alabama, et al.*, 17 FCC Rcd 16332 (MB 2002).

⁷ The reference coordinates for the construction permit for Channel 244A at Humboldt, Nebraska are 40-09-00 NL and 95-55-43 WL. See e.g. *Linden, Louisiana et al.*, 16 FCC Rcd 10853 (MMB 2001) (theoretical gains and losses considered in proposal for reallocation of unbuilt station involving change in transmitter site).

⁸ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

⁹ The Commission considers the following factors in determining a community's interdependence with a central city: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community's leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own zip code or telephone book provided by the local telephone company; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. *Tuck*, 3 FCC Rcd at 5378.

¹⁰ See e.g. *Pelham and Meigs, Georgia*, 18 FCC Rcd 12187 (MB 2003).

¹¹ 47 C.F.R. § 73.207.

restriction of 16.5 kilometers (10.2 miles) southwest of the community. We also believe that the proposal to allot Channel 256A at Pawnee City, Nebraska as a first local service warrants consideration. We request that Petitioner provide additional information to demonstrate that Pawnee City is a community for allotment purposes, particularly in view of Petitioner's substantial showing of Valley Falls's community status. Our engineering analysis shows that Channel 256A can be allotted to Pawnee City, Nebraska at coordinates located 39-59-28 North Latitude and 96-07-50 West Longitude consistent with the Commission's minimum distance separation requirements. There is a site restriction of 13.7 kilometers (8.2 miles) south of the community.

7. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b),¹² for the communities listed below, to read as follows:

<u>Community</u>	<u>Present</u>	<u>Channel</u>	<u>Proposed</u>
Valley Falls, Kansas	----		245C2
Humboldt, Nebraska	244A		----
Pawnee City, Nebraska	----		256A

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 1.419,¹³ interested parties may file comments or counterproposals on or before January 3, 2006, and reply comments on or before January 17, 2006, 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 Petitioners' counsel, as follows:

Cumulus Licensing LLC
 c/o Mark N. Lipp, Esquire
 Vinson & Elkins L.L.P.
 1455 Pennsylvania Avenue, N.W.
 Washington, D.C. 20004-1008

10. 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.

¹² 47 C.F.R. § 73.202(b).

¹³ 47 C.F.R. §§ 1.415 and 1.419.

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.

11. 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).¹⁴ 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).

12. 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 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

¹⁴ 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).

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.