

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. 06-88
FM Broadcast Stations. ) RM-11254
(Boonville and Wheatland, Missouri) )
)
)
)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 2006

Released: June 9, 2006

Comment Date: July 31, 2006

Reply Comment Date: August 15, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a petition for rulemaking (the "Boonville Petition") filed by Bittersweet Broadcasting, Inc., formerly Big Country of Missouri, Inc. ("Petitioner"), requesting the upgrade of its Station KWJK-FM, Boonville, Missouri, from Channel 226A to Channel 226C3. To accommodate this allotment, the Petitioner proposes the substitution of Channel 272A for vacant but applied for Channel 226A at Wheatland, Missouri.

2. The Petitioner's rulemaking petition also requested the reclassification of Stations KMXV(FM), Channel 227C, and KCKC(FM) (formerly KSRC(FM), Channel 271C, both Kansas City, Missouri, to specify operation as Class C0 facilities because each operates below the minimum Class C facilities of 100 kW ERP and 451 meters HAAT. An Order to Show Cause was subsequently issued to these stations. Because no responses were filed during the 30-day comment period, the stations were reclassified as C0 stations.

3. The Boonville Petition was filed on August 28, 2001. It was originally dismissed because it was

1 The license for Station KWJK-FM was assigned pursuant to a short-form application (File No. BALH-20051031ACQ), which was granted on November 4, 2005. The call letters for this station were changed from KWRT-FM to KWJK-FM, effective October 12, 2005.

2 At the time that the Petitioner filed its rulemaking petition, Channel 226A was vacant. However, World Radio Link, Inc., ("WRL") became the successful auction bidder for Channel 226A at Wheatland in Auction No. 62 and has an application for a construction permit (File No. BNPH-20060309ABD) pending. We will serve a copy of this Notice of Proposed Rule Making on World Radio Link, Inc., so that it can participate in this rulemaking proceeding.

3 See 1988 Biennial Regulatory Review - Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Second Report and Order, 15 FCC Rcd 21,649 (2000), and 47 C.F.R. §§ 1.420(g), Note 2 and 73.3573, Note 4.

4 Reclassification of License, Order to Show Cause, 20 FCC Rcd 12182 (MB 2005).

5 See Various Locations, Report and Order, 21 FCC Rcd 2231 (MB 2006).

impermissibly contingent on the dismissal of a cut-off proposal to allot Channel 277C1 to Steelville, Missouri.<sup>6</sup> Although the staff dismissed the Steelville proposal prior to the filing of the Boonville Petition, that action was not yet final.<sup>7</sup> Petitioner seeks reconsideration of the dismissal of the Boonville Petition. We will grant reconsideration and issue this *Notice of Proposed Rule Making* for two reasons.<sup>8</sup> First, dismissal of the Steelville proposal is now final.<sup>9</sup> Second, while the Petitioner's reconsideration petition was pending, we modified our policy on the treatment of non-final rulemaking proceedings. Previously, a rulemaking proposal could not be contingent upon a decision in an earlier, cut-off proceeding unless that decision had become final.<sup>10</sup> We subsequently modified that policy so that a rulemaking proposal could be contingent upon an effective but not yet final decision in another rulemaking proceeding.<sup>11</sup>

4. The Petitioner filed its rulemaking petition in accordance with Section 1.420(g)(3) of the Commission's rules. This section permits upgrades of FM stations on mutually exclusive co-channels or adjacent channels without affording other interested parties an opportunity to file competing expressions of interest in the upgraded channel.

5. In support of its proposal, the Petitioner contends that the upgrade would enable it to continue to provide a 70 dBu service to all of Boonville and would increase its area and population served. Specifically, the Petitioner alleges that the proposed Channel 226C3 operation would serve an area encompassing 4882 square kilometers, which contains a population of 138,059 persons. The Petitioner states that the resultant increase in service area of 2488 square kilometers represents an increase of 100 percent, and the increase in population of 28,580 persons represents an increase of 26 percent. The Petitioner further asserts that Channel 272A can be substituted for Channel 226A at Wheatland, Missouri, with a slight change in Wheatland's allocation reference coordinates.

6. We solicit comment on the Petitioner's rulemaking proposal because it could provide a substantial increase in area and population served by Station KWJK-FM. We note that the Petitioner is proposing to change its transmitter site.<sup>12</sup> A staff engineering analysis reveals that there would be a gain of service to a population of 35,465 persons within an area of 2,287 square kilometers.<sup>13</sup> There would be a loss area of 3.43 square kilometers; however, the loss area is unpopulated.

7. Channel 272A can also be substituted for vacant but applied for Channel 226A at Wheatland, Missouri, at the reference site proposed by the Petitioner, which is located 5.4 kilometers northwest of Wheatland.<sup>14</sup> This proposed site is fully spaced and meets the Commission's technical requirements. We note, however, that if WRL's proposed transmitter site for Channel 226A were used as the reference

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<sup>6</sup> See *Letter to Frederick A. Polner*, December 14, 2001.

<sup>7</sup> See *Lincoln, Osage Beach, Steelville, and Warsaw, MO*, Report and Order, 7 FCC Rcd 3015 (MMB 1992).

<sup>8</sup> See 47 C.F.R. § 1.429(b)(1) (reconsideration can be granted due to changed circumstances).

<sup>9</sup> *Lincoln, Osage Beach, Steelville, and Warsaw, MO*, 17 FCC Rcd 6119 (2002), Memorandum Opinion and Order, *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 12679 (2004).

<sup>10</sup> See, e.g., *Oxford and New Albany, MS*, Memorandum Opinion and Order, 3 FCC Rcd 6626 (MMB 1988).

<sup>11</sup> See *Auburn, Northport, Tuscaloosa, et al., AL*, Memorandum Opinion and Order, 18 FCC Rcd 10333 (MB 2003).

<sup>12</sup> The proposed reference coordinates for Channel 226C3 at Boonville, MO, are 38-51-17 NL and 92-38-17 WL.

<sup>13</sup> The Petitioner's engineering studies were conducted with 1990 U.S. Census data whereas the staff engineering analysis uses data from the 2000 U.S. Census.

<sup>14</sup> The proposed reference coordinates for Channel 272A at Wheatland, MO, are 37-58-44 NL and 93-26-49 WL.

coordinates for Channel 272A at Wheatland, Channel 272A would not be fully spaced<sup>15</sup> We tentatively conclude that WRL’s application is not entitled to cut-off protection vis-à-vis the Boonville Petition and that WRL can be required to modify its application to specify Channel 272A because WRL’s application was filed after the rulemaking petition.<sup>16</sup> Indeed, the *Public Notice* for Auction No. 62 alerted potential bidders for FM allotments to exercise due diligence with respect to “. . . all pending rulemaking petitions and open proceedings that might affect the FM allotment(s) on which they plan to bid.”<sup>17</sup> Accordingly, we solicit comment from both the Petitioner and WRL on our tentative conclusion. Additionally, WRL may seek to demonstrate the public interest benefits, if any, of the transmitter site specified in its application and whether they outweigh the public interest benefits of the Petitioner’s proposed upgrade.<sup>18</sup>

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>Community</u>	<u>Present</u>	<u>Proposed</u>
Boonville, Missouri	226A, 257C2	226C3, 257C2
Wheatland, Missouri	226A	272A

9. We also propose to modify the Petitioner’s license for Station KWJK-FM to specify operation on Channel 226C3 at Boonville, Missouri.

10. IT IS ORDERED, That the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL Send a copy of this *Notice of Proposed Rule Making* by Certified Mail, Return Receipt Requested, to the following applicant and its principal/contact representative:

World Radio Link, Inc. P.O. Box 5429 Twin Falls, ID 83303-5429 (Applicant for Channel 226A, Wheatland, MO)	Clark Parrish 39 Canyon View Road Jerome, ID 83338 (Principal and Contact Representative, World Radio Link)
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11. 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.

12. Pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, interested parties may file comments on or before July 31, 2006, and reply comments on or before August 15, 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,

<sup>15</sup> The application coordinates for Channel 226A at Wheatland are 37-59-10 NL and 93-12-49 WL. See File No. BNPH-20060309ABD. Using these application coordinates for Channel 272A at Wheatland, the allotment would be short-spaced to Station KJPW-FM, Channel 272A, Waynesville, Missouri.

<sup>16</sup> See *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report and Order, 7 FCC Rcd 4917 (1992) (“*Conflicts*”).

<sup>17</sup> *Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005*, 20 FCC Rcd 10492, 10500 (2005).

<sup>18</sup> See *Conflicts*, Report and Order, 7 FCC Rcd at 4917. See also *Andalusia, AL*, Report and Order, 49 Fed. Reg. 32201, published August 13, 1984.

D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Bittersweet Broadcasting, Inc.  
1600 Radio Hill Road  
Boonville, Missouri 65233  
(Petitioner)

Frederick A. Polner, Esq.  
Rothman Gordon Foreman & Groudine, P.C.  
Third Floor, Grant Building  
Pittsburgh, PA 15219-2203  
(Counsel to Petitioner)

13. 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.**

14. 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>19</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).

15. 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

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<sup>19</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*, Order, 46 FR 11549 (February 9, 1981).

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

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.

