

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

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Dundee and Odessa, New York)
MB Docket No. 06-97
RM-11254

NOTICE OF PROPOSED RULE MAKING

Adopted: May 10, 2006

Released: May 12, 2006

Comment Date: July 3, 2006

Reply Comment Date: July 18, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a petition for rulemaking filed by Finger Lakes Radio Group, Inc. ("Petitioner"), requesting the reallocation and change of community of license for its Station WFLR-FM from Channel 240A at Dundee, New York, to Channel 238A at Odessa, New York.

2. The Petitioner 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. 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 priorities.

3. In support of this proposal, the Petitioner contends that the reallocation would satisfy Priority 3 by authorizing a first local aural transmission service at Odessa (pop. 617). By way of comparison, the retention of the station at Dundee (pop. 1,690) as a second local service would trigger less significant Priority 4. The Petitioner alleges that Odessa qualifies as a community for allotment purposes because it

1 Subsequent to the filing of the rulemaking petition, a one-step application (File No. BPH-20040317AAL) was granted on April 19, 2005, to substitute Channel 238A for Channel 240A at Dundee. The Petitioner now has a construction permit for Channel 238A at Dundee but is still operating pursuant to a license on Channel 240A at Dundee.

2 See Modification of FM and TV Authorizations to Specify a New Community of License, Report and Order, 4 FCC Rcd 4870 (1989), recon. granted in part, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

3 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, Second Report and Order, 90 FCC 2d 88, 91 (1988).

4 Station WFLR-AM, 1570 kHz, is also licensed to Dundee.

is listed in the U.S. Census. The Petitioner also sets forth various indicia of community status. Odessa is a village with a mayor and a five-member village board of trustees. Odessa has its own Public Works Department, post office and zip code, and its own school system with an elementary school and a junior/senior high school. In addition, the Petitioner identifies various local businesses, churches, and business groups.<sup>5</sup>

4. This proposal complies with the Commission's technical rules and warrants consideration because it could provide Odessa with a first local service. In addition, the proposal appears to satisfy the requirements of Section 1.420(i) because Channels 240A and 238A at Dundee are mutually exclusive with Channel 238A at Odessa and because adding a first local service at Odessa under Priority (3) would be preferable to retaining a second local service at Dundee under Priority 4.

5. Although Odessa is not located within an Urbanized Area, a staff engineering analysis reveals that from the proposed reference coordinates for Channel 238A at Odessa, Station WFLR-FM will place a 70 dBu contour over approximately 4.1% of the Elmira, New York, Urbanized Area. Because that coverage will be less than 50 percent, we tentatively conclude that no *Tuck*<sup>6</sup> analysis is necessary to demonstrate that Odessa is sufficiently independent of the Elmira Urbanized Area to warrant a first local service.<sup>7</sup> Interested parties may, nevertheless, demonstrate the feasibility of locating the Station WFLR-FM transmitter at a site that would enable the station to provide a 70 dBu signal to more than 50 percent of the Elmira Urbanized Area.<sup>8</sup> Should such information be presented in this proceeding, we reserve the right to require the Petitioner to provide a *Tuck* analysis.<sup>9</sup>

6. A staff engineering study also shows that there will be a gain of service to 82,643 persons over 1,317 square kilometers and a loss of service to 31,841 persons over 1,320 square kilometers, for a net gain of service to 50,802 persons. However, the people in the loss area are well served with five or more reception services.<sup>10</sup>

7. Channel 238A can be reallocated to Odessa at a site 7.9 kilometers (4.9 miles) west of the community. The proposed reference coordinates for Channel 238A at Odessa are 42-20-38 NL and 76-53-03 WL. This proposed site is short-spaced to Station CJBC1F, Channel 238C1, Belleville, Ontario, Canada. Because the proposed reference site for Channel 238A at Odessa is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence in this proposed allotment by Canada, as a specially negotiated short-spaced allotment, must be obtained

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:

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<sup>5</sup> See Rulemaking Petition, Exhibit 2.

<sup>6</sup> See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988).

<sup>7</sup> See *Headland, AL, and Chattahoochee, FL*, Report and Order, 10 FCC Rcd 10352 (MMB 1995) (*Tuck* showing is required when a proposed reallocation to a community located outside an Urbanized Area would provide a 70 dBu signal to more than 50 percent of the Urbanized Area).

<sup>8</sup> See, e.g., *Franklin, Addis, and Eunice, LA*, Notice of Proposed Rule Making, 20 FCC Rcd 16340 (MB 2005).

<sup>9</sup> See, e.g., *Chillicothe and Ashville, OH*, Report and Order, 18 FCC Rcd 22410 (MB 2003), *app. for rev. pending*.

<sup>10</sup> This study was based on comparing Station WFLR-FM's licensed facilities on Channel 240A at Dundee and the proposed reference coordinates for Channel 238A at Odessa.

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Dundee, New York	240A	---
Odessa, New York	---	238A

9. We also propose to modify the Petitioner's construction permit to specify operation on Channel 238A at Odessa, New York.

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 July 3, 2006, and reply comments on or before July 18, 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 the petitioner, as follows:

James L. Oyster, Esq.  
 108 Oyster Lane  
 Castleton, Virginia 22716-2839  
 (Counsel for Finger Lakes Radio Group, Inc.)

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>11</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

<sup>11</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 Fed. Reg. 11549 (February 9, 1981).

(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

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.