

**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. 10-108
FM Broadcast Stations.	)	
(Pacific Junction, Iowa)	)	

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: May 12, 2010**

**Released: May 14, 2010**

**Comment Date: July 6, 2010**

**Reply Comment Date: July 21, 2010**

By the Chief, Audio Division, Media Bureau:

1. The Audio Division, on its own motion, proposes the deletion of Channel 299C2 at Pacific Junction, Iowa. This allotment was added to the FM Table of Allotments in 2000.<sup>1</sup> Channel 299A was included in Auction 37 and acquired by Connoisseur Media, LLC (“Connoisseur”) as the winning bidder.<sup>2</sup> Connoisseur’s original construction permit was granted on March 18, 2005,<sup>3</sup> and a minor modification of the original authorization was granted on July 5, 2007.<sup>4</sup>

2. In December 2007, Connoisseur requested that its March 18, 2008, construction deadline be tolled,<sup>5</sup> based on receipt of a “Notice of Presumed Hazard” issued by the Federal Aviation Administration (“FAA”) dated November 30, 2007. The FAA took the formal step of issuing the Notice because it objected to Connoisseur’s proposed operation of the new FM station on the 107.7 MHz frequency (Channel 299) due to potential interference to FAA localizer frequencies used as navigational aids for aircraft.<sup>6</sup> On March 27, 2009, Connoisseur filed a request for refund of payments it had made in connection with its winning bid for

<sup>1</sup> *Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Pacific Junction, Iowa)*, Report and Order, 15 FCC Rcd 10756 (MB 2000). See also 47 C.F.R. § 73.202(b) (2001). Channel 299A at Pacific Junction is the community’s first local aural transmission service.

<sup>2</sup> *FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced*, Public Notice, 20 FCC Rcd 1021 (MB/WTB 2004). Connoisseur won the Pacific Junction construction permit with a net winning bid of \$4,397,250.

<sup>3</sup> File No. BNPH-20041228AAI.

<sup>4</sup> File No. BMPH-20061019AAM. Both the original construction permit and the permit modification proposed operation on the same existing tower, at the same antenna height. Neither proposed any increase in height for the existing tower. The tower site specified in the original Class A construction permit application was the same as that presently authorized in the outstanding permit for the upgraded Class C2 facility.

<sup>5</sup> *Letter from David D. Oxenford, Esq. to Marlene H. Dortch, Secretary*, Request for Tolling of Construction Period, New, Pacific Junction, Iowa, FCC File No. BMPH-20061019AAM (Dec. 20, 2007). Additional time was granted on January 28, 2008. Connoisseur submitted a status report on July 28, 2008.

<sup>6</sup> Federal Aviation Administration, “Notice of Presumed Hazard,” Aeronautical Study No. 2007-ACE-3320-OE, issued November 30, 2007.

the Pacific Junction FM permit, arguing that it was awarded a channel that cannot be constructed due to FAA interference issues that were unknown at the time of auction and cannot be resolved through technical changes and/or negotiations with the FAA and the United States Air Force.<sup>7</sup> Connoisseur supplemented its request on June 26, 2009.<sup>8</sup>

3. On November 25, 2009, Connoisseur submitted a second supplement, in which it reports that the FAA has again issued a “Notice of Presumed Hazard” for the use of the Pacific Junction channel due to predicted interference to the Instrument Landing System frequency configurations for Eppley Airfield at Omaha, Nebraska, and Offutt Air Force Base. The FAA also found that replacement frequencies cannot be found.<sup>9</sup> Based on these FAA actions, Connoisseur concludes that FM Channel 299 (on either Class C2 or Class A) at Pacific Junction “cannot be used within its FCC area-to-locate without creating interference to several FAA frequencies and potentially creating a hazard to air navigation, and there are no substitute FAA channels that can be used to remedy this problem.”<sup>10</sup> Media Bureau staff also has reviewed the availability of frequencies and has determined that there are no alternative channels available to serve Pacific Junction.

4. We recognize that the proposed deletion would deprive Pacific Junction residents of a new FM broadcast service. However, the FAA problems associated with Channel 299C2 appear to be too substantial to permit the construction and operation of a new Pacific Junction station. This conclusion is based on the fact that neither a Class C2 nor a Class A facility can be implemented on Channel 299 at Pacific Junction based on electromagnetic interference (“EMI”) objections raised by the FAA on behalf of itself and the U.S. Air Force. Therefore, we believe that the retention of the FM allotment at Pacific Junction would no longer serve the public interest and we initiate this proceeding proposing its deletion from the FM Table of Allotments.<sup>11</sup> The proposed Pacific Junction deletion is consistent with Commission policy that we will not allot or retain a channel where there is no site that would meet FAA criteria and the Commission’s spacing requirements.<sup>12</sup>

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<sup>7</sup> Petition for Refund of Winning Bid Payment, March 27, 2009.

<sup>8</sup> In the Petition and the June 26, 2009, Supplement, Connoisseur submits several consultant reports and asserts that it performed all the due diligence that could reasonably be expected of a reasonable applicant for an FM station. It notes that it obtained an FAA No Hazard determination with regard to the tower specified in its initial authorization. FAA issues surfaced only after it filed a modification application specifying the same antenna height on the same tower. Connoisseur concedes, however, that unbeknownst to it, the FAA had previously imposed a condition requiring the former tower owner to coordinate any new frequencies on the tower with the FAA. Connoisseur states that it had no way of knowing about the condition because the full FAA determination was not readily available to the public.

<sup>9</sup> See Exhibit A to Second Supplement to Petition for Refund of Winning Bid Payment (“Second Supplement”), Email from Bruce Beard, Federal Aviation Administration, Air Traffic, Obstruction Evaluation Service Supervisor, “Notice of Presumed Hazard,” Aeronautical Study No. 2007-ACE-3320-OE, November 16, 2009.

<sup>10</sup> Second Supplement at 3. Moreover, Connoisseur has submitted findings of two independent aviation consultants which it asserts further demonstrate “the futility of pursuing any appeal of the FAA decision.” *Id.* at 1.

<sup>11</sup> See, e.g., *San Clemente, California*, Report and Order, 10 FCC Rcd 8291 (MMB 1995); *Jacksonville, Pine Knoll Shores, and Harkers Island, North Carolina*, Memorandum Opinion and Order, 10 FCC Rcd 13159 (MMB 1995); *Pinckneyville, Illinois*, Report and Order, 41 RR 2d 69 (MMB 1977) (“*Pinckneyville*”) (petition to delete allotment granted when Commission concluded that the assignment was “erroneously made”).

<sup>12</sup> Although the Commission generally presumes in rulemaking proceedings that a technically feasible site is available, that presumption is rebuttable. See *San Clemente, California*, Memorandum Opinion and Order, 3 FCC Rcd 6728 (1988), *appeal dismissed sub. nom., Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989).

5. In accordance with the above, we invite comments on the proposal to delete<sup>13</sup> the Channel 299 at Pacific Junction.<sup>14</sup> Any party filing a comment expressing an interest in retaining service in Pacific Junction, Iowa, will be required to provide evidence, demonstrating that a properly spaced site is technically feasible and meets FAA criteria. Additionally, any expressions of interest specifying sites conforming with the minimum distance separation requirements of Section 73.207(b) in response to this *Notice* will be required to submit specific showings demonstrating the ability to provide a 3.16 mV/m contour over the entire principal community of Pacific Junction, as required by Section 73.315 of the Commission's Rules.<sup>15</sup> Although site certification is generally not required in the context of a rulemaking proceeding, we believe the facts in this case warrant a departure from that policy. Any interested party will be required to provide information demonstrating that it has reasonable assurance of transmitter site availability.

6. Accordingly, we seek comment on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

<u>Channel</u>		
<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Pacific Junction, Iowa	299C2	-----

7. 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 in paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before July 6, 2010 and reply comments on or before July 21, 2010, 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 Connoisseur, as follows:

David D. Oxenford, Esq.  
 Counsel for Connoisseur Media, LLC  
 Davis Wright Tremaine LLP  
 1919 Pennsylvania Avenue, N.W.  
 Suite 200  
 Washington, D.C. 20006

9. Parties 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

<sup>13</sup> See, e.g., *Boswell, Oklahoma and Detroit, Texas*, Report and Order, 22 FCC Rcd 17632 (MB 2007) and *Coosada, Alabama*, Memorandum Opinion and Order, 17 FCC Rcd 21117 (MB 2002) (it is Commission policy to refrain from maintaining an allotment in instances where there are no *bona fide* expressions of interest).

<sup>14</sup> The reference coordinates for Channel 299C2 at Pacific Junction are 18-20-36 NL and 64-55-48 WL.

<sup>15</sup> See 47 C.F.R. §§ 73.207(b), 73.315. See also *Pinckneyville*, 41 RR 2d at 72 (reasonable availability of a transmitter site that meets spacing and coverage requirements is the premise on which an assignment is made and "without it we must conclude that [this] assignment was erroneously made").

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 the Commission's Secretary, Office of the Secretary, Federal Communications Commission. **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.**

10. 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>16</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).

11. For further information concerning a proceeding listed above, contact Rolanda F. Smith, or Lisa Scanlan, 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 in particular docket 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

Peter Doyle, Chief  
Audio Division  
Media Bureau

Attachment: Appendix

<sup>16</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.