

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 13-284
Table of Allotments,)	RM-11704
FM Broadcast Stations.)	
(Evert and Ludington, Michigan))	
)	
Stations WMLQ(FM), Manistee, Michigan,)	
(Facility ID No. 39787), and WMOM(FM),)	
Pentwater, Michigan (Facility ID No. 76507))	
)	

**NOTICE OF PROPOSED RULEMAKING
AND ORDER TO SHOW CAUSE**

Adopted: November 21, 2013

Released: November 22, 2013

Comment Date: January 13, 2014

Reply Comment Date: January 28, 2014

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Petition for Rule Making (“Petition”) filed on June 27, 2013, by Synergy Lakeshore Licenses, LLC (“Synergy”), licensee of Station WMLQ(FM), Manistee, Michigan; and (2) Comments in Support of the Petition (“Comments”) filed on July 9, 2013 by WGHN, Inc. (“WGHN”), the permittee for a new FM station at Ludington, Michigan. The Petition requests the deletion of vacant Channel 274A at Evert, Michigan, and, as a result of the deletion, the return of Stations WMLQ(FM), Manistee, and WMOM(FM), Pentwater, Michigan, to the channels that they previously occupied, and the modification of the construction permit for the new station at Ludington.¹ For the reasons set forth below, we solicit comment on the Petition’s proposals.

2. **Background.** In response to a request by a petitioner who sought a new channel at Evert (the “Evert Petitioner”), we allotted Channel 274A at Evert as a first local service in the *Evert R&O*.² In order to accommodate this new allotment, we made two involuntary channel changes. First, we modified the license of Bay View Broadcasting, Inc. (“Bay View”) for Station WMOM(FM), Pentwater, from Channel 274A to Channel 242A.³ Second, we modified Synergy’s license for Station WMLQ(FM), Manistee, from Channel 249A to Channel 282A.⁴ Consistent with the Commission’s *Circleville* policy,⁵ the *Evert R&O* required the ultimate permittee of Channel 274A at Evert to reimburse Bay View and Synergy for their

¹ See *Evert and Ludington, Michigan*, Report and Order, 24 FCC Rcd 2584 (MB 2009) (“*Evert R&O*”).

² *Id.* at 2585.

³ *Id.* at 2584.

⁴ *Id.* at 2585.

⁵ See *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159 (1967) (requiring that, whenever an existing station is ordered to change frequency to accommodate another station, the benefitting station must reimburse the affected station for its reasonable and prudent expenses) (“*Circleville*”).

reasonable costs of changing their frequencies.⁶ Additionally, to facilitate the new Evert allotment, we substituted Channel 249A for vacant Channel 242A at Ludington.⁷

3. In its Petition, Synergy requests the deletion of Channel 274A at Evert and, as a result of the deletion, the return of the Pentwater and Manistee stations to Channels 274A and 249A, respectively, and a change of the then vacant but applied for Ludington allotment to its original Channel 242A. Synergy contends that this relief is warranted because: (1) there is no interest in the Evert channel as the Evert Petitioner did not bid on the channel in the recent Auction 94 and the channel went unsold;⁸ (2) as a result of the auction, there is no permittee of Channel 274A at Evert and thus no party responsible for reimbursing Synergy for its channel substitution expenses; (3) vacant Channel 249A at Ludington was acquired in Auction 94⁹ and, if there is no relief such as that suggested by the Petition, the Ludington channel cannot be operated without Station WMLQ(FM) changing to Channel 282A; and (4) to require the channel substitution by Station WMLQ(FM) without a party responsible for expense reimbursement is unfair and contrary to *Circleville*.¹⁰ As an alternative to the relief requested in the Petition, Synergy suggests that the party who will become the Ludington construction permit holder could agree to assume the responsibility of reimbursing Station WMLQ(FM) for its channel substitution expenses, or the Commission could condition the permit on the assumption of these expenses, because it is a station benefitting from the involuntary channel change under *Circleville*.¹¹

4. In its Comments, WGHN supports the first option suggested by Synergy, the deletion of Channel 274A at Evert and return of the allotments at Pentwater, Manistee, and Ludington to their original channels, because: (1) it would expedite the activation of service on the Ludington allotment since WGHN would not have to wait for Station WMLQ(FM) to change channels; and (2) Station WMLQ(FM) could remain on its current channel, thereby mooted the reimbursement issue.¹²

5. **Discussion. Channel Deletion.** As a threshold matter, we address the appropriateness of considering Synergy's Petition to delete Channel 274A at Evert. In 2011, the Commission revised an FM allotment processing policy by no longer considering requests for the reallocation, downgrade, or deletion of vacant allotments outside of the competitive bidding process.¹³ The rationale for this policy is that permitting vacant allotment deletions or modifications undermines the orderly auctioning of spectrum and the finality of the actions adopting the initial allotments.¹⁴ We do not believe that *Enfield* is a bar to considering Synergy's Petition because Channel 274A at Evert has already gone through an auction cycle and parties had an opportunity to bid on the channel. Under these circumstances, entertaining the Petition would not undermine the auction process. Further, the language in *Enfield* does not explicitly bar the entertaining of requests to delete channels after an auction has occurred. Indeed, considering such a request

⁶ *Id.* at 2586-87.

⁷ *Id.* at 2585.

⁸ See *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction 94*, Public Notice, 28 FCC Rcd 6973, 6983-88, Attachment A (2013).

⁹ WGHN was the successful bidder for Channel 249A at Ludington in Auction 94. See *id.* at 6983. Subsequent to the filing of the Petition, WGHN was granted a long-form application for a construction permit on this channel on August 22, 2013. See File No. BNPH-20130722ACO.

¹⁰ See Synergy's Petition for Rule Making at 1-3.

¹¹ *Id.* at 3-4.

¹² See WGHN's Comments at 1-2.

¹³ See *Enfield, New Hampshire, Hartford and White River Junction, Vermont, and Keeseville and Morrisonville, New York*, Memorandum Opinion and Order, 26 FCC Rcd 798, 800-01 (2011) ("*Enfield*"), *recon. pending*.

¹⁴ *Id.*

is similar to the issuing of Notices of Proposed Rule Makings, on our own motion, to delete vacant FM allotments that have gone through the auction process and are still vacant.¹⁵ Accordingly, we believe that it is appropriate to consider Synergy's Petition.

6. Having made this threshold determination, we next consider the merits of the Petition. We find that Synergy's proposal to commence a rule making proceeding on the deletion of Channel 274A at Evert is meritorious for several reasons. First, there does not appear to be any interest in retaining the channel as neither the Evert Petitioner nor any other party bid on the channel in Auction 94, and the channel is still vacant. Second, while the deletion of Channel 274A at Evert could result in the loss of a potential first local service at that community, this action could eliminate the issue of reimbursing Station WMLQ(FM), which would no longer have to change channels. Third, the public interest could be served by expediting the activation of the Ludington allotment because the holder of the permit for that allotment would no longer have to wait for Station WMLQ(FM) to change channels. Fourth, the deletion of Channel 274A at Evert may create other opportunities in nearby communities for new FM allotments or upgrades of existing stations. Accordingly, we solicit comment on whether vacant Channel 274A at Evert should be deleted.¹⁶ Interested parties should file comments expressing an interest in this vacant allotment to prevent its removal. Moreover, interested parties must provide an explanation as to why they did not participate in our competitive bidding process.

7. *Related Channel Changes.* In the event that we delete Channel 274A at Evert, we also propose to return Stations WMLQ(FM) and WMOM(FM) to the channels that they were previously licensed on and to modify WGHN's construction permit to specify the channel originally allotted at Ludington. Specifically, we propose to modify the license of Station WMLQ(FM), Manistee, from Channel 282A to Channel 249A.¹⁷ It is not necessary to issue an Order to Show Cause to Synergy because it has voluntarily requested this channel change. Further, no actual change of facilities is required because Station WMLQ(FM) has not changed channels pursuant to the *Evert R&O* and has been operating on Channel 249A pursuant to an implied Special Temporary Authorization ("STA").

8. Additionally, we propose an involuntary channel change for Bay View's Station WMOM(FM), Pentwater, from Channel 242A to 274A. This channel change is necessary because a staff engineering analysis reveals that the Manistee and Ludington allotments cannot be returned to their original channels unless Station WMOM(FM) returns to Channel 274A. While Bay View was served with a copy of the Petition, Bay View has not submitted any comments. We note, however, that Bay View was granted a construction permit on March 12, 2013, to change its frequency to Channel 242A as ordered in the *Evert R&O*¹⁸ and that the transmitter site specified in the construction permit application is the same as its licensed site for Channel 274A.¹⁹ Accordingly, we issue an Order to Show Cause to Bay View as to why its license for Station WMOM(FM) should not be modified to specify Channel 274A in lieu of Channel 242A.

9. We also propose to modify WGHN's construction permit from Channel 249A to Channel 242A at Ludington in order to accommodate the previously discussed channel changes. It is not necessary to issue

¹⁵ See, e.g., *Cove and Daisy, Arkansas, et al.*, Notice of Proposed Rule Making, 26 FCC Rcd 12787 (MB 2011) (proposing the deletion of 20 vacant FM allotments in various communities that have been through the competitive bidding process); *Port Lions, Alaska, et al.*, Notice of Proposed Rule Making, 28 FCC Rcd 8465 (MB 2013) (proposing the deletion of six vacant allotments in various communities that have been through the auction process).

¹⁶ The reference coordinates for Channel 274A at Evert are 44-01-03 NL and 85-17-51 WL.

¹⁷ The proposed reference coordinates for Channel 249A at Manistee are 44-14-07 NL and 86-19-05 WL.

¹⁸ See File No. BPH-20121001AON.

¹⁹ The proposed reference coordinates for Channel 274A at Pentwater are 43-52-10 NL and 86-21-32 WL.

an Order to Show Cause to WGHN because it has voluntarily consented to this channel change.²⁰ A staff engineering analysis reveals, however, that the transmitter site specified in WGHN's construction permit for Channel 249A at Ludington is not fully spaced if we substitute Channel 242A. We have identified an alternate site for Channel 242A that is fully spaced.²¹ Accordingly, if we were to substitute Channel 242A for Channel 249A at Ludington, WGHN may be required to modify its construction permit to specify a rule-compliant site.

10. *Reimbursement.* As a final matter, we seek comment on two reimbursement issues. First, although not raised by the Petition, if we delete Channel 274A at Evert and order the related channel changes discussed above, both WGHN and Bay View may incur application costs in implementing these station modifications.²² We invite comment on whether they would seek reimbursement for these expenses, and if so, whether the expenses are reimbursable under *Circleville* and by whom. Second, if we retain Channel 274A at Evert and Station WMLQ(FM), Manistee, is required to change channels, we solicit comment on Synergy's suggestion of whether WGHN, as the holder of the construction permit, would consent to reimburse partially Synergy for the costs of its channel change because WGHN would be a benefitting party since it would not have to wait for the auctioning and licensing of the Evert allotment in order to commence operations at Ludington.

11. **Conclusion/Administrative Matters.** Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>Community</u>	<u>Channel</u>	
	<u>Present</u>	<u>Proposed</u>
Evert, Michigan	274A	-----
Ludington, Michigan	249A	242A

12. *Order to Show Cause.* We are issuing an *Order to Show Cause* directed to Bay View Broadcasting, Inc., licensee of Station WMOM(FM), Pentwater, to show cause why its license should not be modified to specify operation on Channel 274A.

13. Section 316(a) of the Communications Act of 1934, as amended, permits the Commission to modify an authorization if such action is in the public interest. Further, pursuant to Section 316(a), we are required to notify the affected station of the proposed action, as well as the public interest reasons for the action, and afford at least 30 days to respond. This procedure is set forth in Section 1.87 of the Commission's Rules.²³

14. Pursuant to Section 1.87 of the Commission's Rules, the above affected licensee, Bay View Broadcasting, Inc., licensee of Station WMOM(FM), may, no later than January 13, 2014, file a written statement showing with particularity why its respective license should not be modified as proposed in this

²⁰ See WGHN's Comments at 1-2.

²¹ The proposed reference coordinates for Channel 242A at Ludington are 43-54-30 NL and 86-26-10 WL.

²² Indeed, it appears that WGHN may have already incurred costs in implementing the channel change ordered in the *Evert R&O* as it was granted an application to move to Channel 242A at Pentwater.

²³ See *Modification of FM and Television Licenses Pursuant to Section 316 of the Communications Act*, Order, 2 FCC Rcd 3327 (1987).

Notice of Proposed Rule Making and Order to Show Cause. The Commission may call upon the licensee to furnish additional information. If the licensee raises any substantial and material questions of fact, a hearing may be required to resolve such questions of fact pursuant to Section 1.87 of the Rules. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, the licensee will be deemed to have consented to the modification as proposed in this *Notice of Proposed Rule Making and Order to Show Cause* and a final Order will be issued if the modification is found to be in the public interest.

15. We also seek comment on whether to modify the authorizations for WGHN's new station at Ludington, Michigan, to reflect Channel 242A in lieu of Channel 249A, and for Station WMLQ(FM), Manistee, Michigan, to reflect Channel 249A in lieu of Channel 282A.

16. 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.

17. Interested parties may file comments on or before January 13, 2014, and reply comments on or before January 28, 2014, 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 Petitioner, as follows:

David D. Oxenford, Esq.
Wilkinson Barker Knauer, LLP
2300 N. Street, N.W.
Suite 700
Washington, DC 20037-1128

18. Parties must file an original and four paper 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. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at the Commission's headquarters building located at 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. 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. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

19. 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.²⁴ 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

²⁴ See *Certification that Sections 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).

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).

20. A copy of this *Notice of Proposed Rule Making and Order to Show Cause* will be mailed to David D. Oxenford, Esq., Wilkinson Barker Knauer, LLP, 2300 N Street, N.W., Suite 700, Washington, DC 20037 (Counsel to Synergy); Bay View Broadcasting, Inc., 4359 South Howell Avenue, Suite 106, Milwaukee, WI 53207 (Licensee of Station WMOM(FM)); Dennis J. Kelly, Esq., P.O. Box 41177, Washington, DC 20018 (Counsel to Bay View Broadcasting, Inc.); WGHN, Inc., c/o. Will Tieman, 2169 N. Cedar Street, Holt, MI 48842 (Permittee of Channel 249A, Ludington, MI); David Tillotson, Esq. 4606 Charleston Terrace, N.W., Washington, DC 20007 (Counsel to WGHN); Roy E. Henderson, 1610 Woodstead Court #350, The Woodlands, Texas 77380 (the Evert Petitioner); and Robert J. Buenzle, Esq., 11710 Plaza America Drive, Suite 2000, Reston VA 20190 (Counsel to Roy Henderson).

21. For further information concerning a proceeding listed above, contact Andrew J. Rhodes or Rolanda F. Smith, Media Bureau (202) 418-2700. 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 the 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

Nazifa Sawez, 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 required to file comments expressing the proponent's continuing interest in the proposed allotment and restating 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 12th Street, S.W, Washington, D.C.