

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 15-167
Table of Allotments,)	RM-11751
FM Broadcast Stations.)	
(Grant, Oklahoma))	
)	
Application of)	File No. BPH-20141028AAK
Lieberman Broadcasting of Dallas Licensee LLC)	Facility ID No. 15854
Station KZMP-FM, Pilot Point, Texas)	

**NOTICE OF PROPOSED RULE MAKING
AND ORDER TO SHOW CAUSE**

Adopted: July 9, 2015

Released: July 10, 2015

Comment Date: August 31, 2015

Reply Comment Date: September 15, 2015

By the Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Petition for Rule Making filed October 29, 2014, by Katherine Pyeatt (“Pyeatt”) for the allotment of FM Channel 286A at Grant, Oklahoma (the “Grant PRM”); (2) Pyeatt’s concurrently filed application for a construction permit for the new allotment and paid the necessary filing fees;¹ (3) a conflicting application filed October 28, 2014, by Liberman Broadcasting of Dallas Licensee LLC (“Lieberman”), licensee of Station KZMP-FM, Pilot Point, Texas (“KZMP”), for a construction permit to implement a previously granted upgrade in KZMP’s channel class from Channel 285C1 to 285C0;² and (4) various related pleadings.³ For the reasons set forth below, we propose to allot Channel 286A to Grant, treat the Pilot Point Application as a counterproposal, and issue an *Order to Show Cause* to Liberman as to why KZMP’s channel class should not be downgraded.

2. **Background.** Liberman was issued its initial construction permit to upgrade KZMP in 2008. A successor permit, specifying the same facilities, was issued in 2011 and was due to expire on November 1, 2014.⁴ On October 28, 2014, Liberman surrendered that construction permit and filed the

¹ See File No. BNPB-20141029ACJ (the “Grant Application”).

² See File No. BPH-20141028AAK (the “Pilot Point Application”).

³ These pleadings include: (1) an Informal Objection to the Pilot Point Application filed by Pyeatt on November 10, 2014 (“Objection”); (2) an Opposition to Informal Objection filed by Liberman on November 20, 2014; (3) an Opposition to Petition for Rule Making filed by Liberman on December 8, 2014; and (4) Reply to Oppositions filed by Pyeatt on December 31, 2014.

⁴ Specifically, on November 26, 2007, Liberman applied for a “one-step” upgrade for KZMP from Channel 285C1 to 285C0 (“One-Step Application”), which was granted on December 3, 2008. See File No. BPH-20071126AJG. The One-Step Application substituted Channel 285C0 for Channel 285C1 at Pilot Point and modified KZMP’s license to specify operation on Channel 285C0 in lieu of Channel 285C1. On September 28, 2011, Liberman surrendered the initial construction permit and filed a replacement application for a construction permit to implement the upgrade, which was granted on November 1, 2011. See File No. BPH-20110928AJC.

Pilot Point Application, its third application for the same upgraded facilities. Pursuant to a policy set forth in *WEMC(FM), Harrisonburg, Virginia*,⁵ this action opened up a “one-day” filing window in which competing proposals could be filed. On October 29, 2014, Pyeatt filed the conflicting Grant PRM, proposing the allotment of Channel 286A at Grant. The Grant PRM conflicts with the Pilot Point Application as Channels 286A at Grant and Channel 285C0 at Pilot Point are short-spaced under Section 73.207 of the Commission’s Rules (the “Rules”).⁶ Because the Grant PRM was timely filed and conflicts with the Pilot Point Application, the two proposals are mutually exclusive and must be considered together.

3. In support of the Grant PRM, Pyeatt contends that the allotment of Channel 286A at Grant (population 289) would provide the community with its first local service. Pyeatt alleges that Channel 286A can be allotted at Grant consistent with Section 73.207 of the Rules. Although Pyeatt acknowledges that Channel 286A is short-spaced to a construction permit for KZMP on Channel 285C0 at Pilot Point,⁷ she argues that the Grant PRM does not have to protect this authorization because it expired on November 1, 2014.⁸ Pyeatt also certifies in both the Grant PRM and the Grant Application that “. . . I will participate in the auction for the channel and if awarded the permit will promptly build the station.” Accordingly, Pyeatt urges the issuance of a Notice of Proposed Rule Making.

4. In its Opposition, Liberman alleges that the Grant PRM and Grant Application should be dismissed for two reasons. First, Liberman contends that, contrary to Pyeatt’s assertion, the expiration of the KZMP permit did not automatically downgrade the Channel 285C0 allotment at Pilot Point. Rather, Liberman states that the Grant PRM and Grant Application are required to protect Channel 285C0 unless an *Order to Show Cause* has been issued to downgrade the allotment to its former class.⁹ Because the Grant PRM and Grant Application are short-spaced to Channel 285C0 at Pilot Point, Liberman asserts that they should be dismissed. Second, Liberman argues that Pyeatt’s certification that she will establish a new FM service is not credible. In support of this position, Liberman states that, since 2001, Pyeatt has submitted 84 Petitions for Rule Making, has obtained five construction permits, and has not completed construction or put a station on the air. Additionally, Liberman claims that the credibility of Pyeatt’s pledge to construct a new station is undermined by collusion with Charles Crawford (“Crawford”), who uses the same business address as Pyeatt, and submitted within days following the filing of the Grant PRM, “blocking” petitions for new allotments on the only alternate frequencies that could have been used to eliminate the conflict between Pyeatt’s and Liberman’s proposals.¹⁰

5. In her Objection, Pyeatt contends the Pilot Point Application should be dismissed because: (1) as an application for an upgrade, it fails to specify a fully spaced allotment reference point for Channel

⁵ See *WEMC(FM), Harrisonburg Virginia*, Letter, 29 FCC Rcd 5925 (MB 2014).

⁶ See 47 C.F.R. § 73.207.

⁷ See File No. BPH-20110928AJC.

⁸ See Pyeatt Petition for Rule Making at 3 and Figure 1.

⁹ See Liberman Opposition to Petition for Rule Making at 3.

¹⁰ Specifically, Liberman notes that Crawford filed Petitions for Rule Making for new FM allotments on Channel 295A at Wright City, Oklahoma, on October 31, 2014, and on Channel 247A at Bogata, Texas, on November 3, 2014. Liberman also states that its engineering analysis of possible alternate frequencies that might be available at Grant and that would not conflict with the Pilot Point Application disclosed only two channels – 247A and 295A. See Liberman Opposition to Petition for Rule Making, Engineering Statement of Joseph M. Davis. We subsequently initiated separate rule making proceedings on Crawford’s proposals. See *Wright City, Oklahoma*, Notice of Proposed Rule Making, 29 FCC Rcd 15502 (MB 2014); *Bogata, Texas*, Notice of Proposed Rule Making, 30 FCC Rcd 44 (MB 2015).

285C0 at Pilot Point in violation of Section 73.203 of the Rules;¹¹ and (2) Liberman does not intend to build the upgraded channel at Pilot Point as it has failed to do so over the past seven years.

6. In its Opposition to the Objection, Liberman argues that Pyeatt mischaracterizes the Pilot Point Application as an upgrade. On the contrary, Liberman argues that it is an application to implement a previously granted upgrade and is, therefore, not required to specify a fully spaced allotment reference point. Additionally, Liberman states that it intends to construct the C0 station but circumstances beyond its control have delayed build out of the upgrade.¹²

7. In her Reply, Pyeatt: (1) requests the issuance an Order to Show Cause to KZMP as to why its channel class should not be downgraded to Class C1 as KZMP has been “warehousing” spectrum contrary to Commission policy; (2) alleges that Liberman does not have reasonable assurance of site availability due to the lack of consent of two other stations to replace their common antenna and the filing of three applications without such consent constitutes lack of candor; (3) disputes Liberman’s figures regarding the number of rule making petitions that she has filed; and (4) denies any responsibility for the filing of Crawford’s rule making petitions.

8. **Discussion. Short-Spacing.** As a threshold matter, we must consider whether the Grant PRM and the Pilot Point Applications violate Section 73.207 of the Rules and are acceptable for filing. With respect to the former, we agree that the surrender of the construction permit for KZMP did not automatically downgrade the allotment at Pilot Point, and Pilot Point Application is not required to specify a fully-spaced reference point for Channel 285C0. Likewise, as initially filed, the Grant PRM was short-spaced to the KZMP Channel 285C0 construction permit.¹³ However, it is well established that we may consider the Grant PRM because, as discussed below, we are contemporaneously issuing an *Order to Show Cause* to KZMP as to why its channel class should not be downgraded to Channel 285C1.¹⁴ Accordingly, both the Grant PRM and Pilot Point Applications are acceptable for consideration in this proceeding.

9. *Grant PRM.* We believe that the public interest would be served by proposing the allotment of Channel 286A at Grant (population 289) because it could result in a first local service to that community. Grant, a Census Designated Place, has its own post office, a large casino resort with restaurants, a volunteer fire department, and several local churches and businesses. A staff engineering analysis reveals that Channel 286A can be allotted to Grant in conformity with the Rules at reference coordinates 33-57-16 NL and 95-36-30 WL.

10. We next address Liberman’s concerns regarding the credibility of Pyeatt’s expressions of interest in the proposed Grant allotment. It is well established that we will not allot an FM channel in the absence of a *bona fide* expression of interest.¹⁵ Additionally, to address the problem of speculative

¹¹ 47 U.S.C. § 73.203, Note.

¹² Liberman explains that two stations must consent to the replacement of their existing common antenna with a new antenna to accommodate their signals along with KZMP and that, due to the other priorities of these stations, the needed consents had not been obtained. However, Liberman states that “recent discussions have been more positive and the parties appear ready to proceed.” See Liberman Opposition to Objection at 5-6.

¹³ See, e.g., *Archer City, Texas*, Notice of Proposed Rule Making, 18 FCC Rcd 9498 (MB 2003) (stating that the requests for new or modified allotments must protect an FM channel that had been upgraded from Class C2 to C1 even though no application had been filed to implement the upgrade).

¹⁴ See, e.g., *Bethel Springs, Martin, Tiptonville, Trenton, and South Fulton, Tennessee*, Memorandum Opinion and Order, 17 FCC Rcd 14472, 14474-76 (MB 2002) (reconsidering and granting a counterproposal to downgrade a vacant allotment from Class C0 to C3 in order to accommodate the upgrade in channel class and change in community of license of an FM station).

¹⁵ See *Needles, California, et al.*, Report and Order, 26 FCC Rcd 16973, 16974 (MB 2011); *Amendment of Sections 1.420 and 73.3584 of the Commission’s Rules Concerning Abuses of the Commission’s Processes*, Report and

(continued....)

petitioners, the Commission has required petitioners for new allotment simultaneously to file a construction permit application for that channel and imposed a filing fee.¹⁶ Additionally, the application must include a certification that, if the FM channel requested is adopted, the petitioner intends to participate in the auction of the channel requested. In this proceeding, we note that Pyeatt concurrently filed the Grant Application and made the requisite certification.

11. *Involuntary Downgrade.* We also believe that the public interest would be served by issuing an *Order to Show Cause* (“OSC”) to Liberman as to why its license should not be modified to specify operation on lower class Channel 285C1 in lieu of Channel 285C0. Nearly seven years have passed since KZMP’s One Step Application was granted, and Liberman has not implemented the upgrade. Because requests for new or modified facilities are required to protect Channel 285C0, we believe that it is appropriate to issue an *OSC*.

12. 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 1.97 of the Commission’s Rules.¹⁷

13. Pursuant to Section 1.87 of the Commission’s Rules, Liberman Broadcasting of Dallas Licensee LLC, licensee of Station KZMP-FM, Pilot Point, Texas, may no later than August 24, 2015, file written statements showing with particularity why its license should not be modified as proposed in this *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.

14. The Commission SHALL SEND a copy of this *Order to Show Cause* by Certified Mail, Return Receipt Requested, to the following: James R. Bayes, Esq., Mark N. Lipp, Esq, and Marnie K. Sarver, Esq., Wiley Rein LLP, 1776 K Street, N.W., Washington, DC 20006 (Counsel to Liberman); and Liberman Broadcasting of Dallas LLC, 1845 Empire Avenue, Burbank, CA 91504.

15. *Pilot Point Application.* We also believe that the public interest would be served by considering the *Pilot Point Application* because it could result in the provision of service to an additional 1,507,667 people¹⁸ and treating it as a counterproposal to the *Grant PRM* in view of their mutual exclusivity. Both Pyeatt and Liberman are invited to submit comments, seeking to demonstrate why their proposals better serve the public interest under the FM Allotment Priorities.¹⁹ A staff engineering

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Order, 5 FCC Rcd 3911, 3914-15 (1990) (limiting consideration that may be paid for withdrawal of an expression of interest in an allotment proceeding to deter non-*bona fide* proposals).

¹⁶ *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14223 ¶ 18 (2006), recon. pending.

¹⁷ *See Modification of FM and Television Licenses Pursuant to Section 316 of the Communications Act*, Order, 2 FCC Rcd 3327 (1987).

¹⁸ *See Liberman Opposition to Informal Objection*, Engineering Statement at 2.

¹⁹ 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 (1982).

analysis reveals that a construction permit for Channel 285C0 can be granted for KZMP at the application reference coordinates of 33-32-14 NL and 96-49-54 WL under Section 73.215 of the Rules. Our staff analysis also confirms that there are no alternate channels that would remove the conflict between the Grant PRM and the Pilot Point Application other than Channels 295A and 247A, which are unavailable because they are proposed in separate rule making proceedings for allotment to Wright City, Oklahoma, and Bogata, Texas, respectively.²⁰

16. **Conclusion/Administrative Matters.** Accordingly, we seek comment on the proposed amendment to the FM Table of Allotments, Section 73.202(b), with respect to the community listed below, as follows:

<u>City</u>	<u>Present</u>	<u>Channel No.</u>	<u>Proposed</u>
Grant, Oklahoma	-----		286A

17. 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. Pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, interested parties may file comments or counterproposals on or before August 31, 2015, and reply comments on or before September 15, 2015, 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 rule making petitioner and counter proponent as follows: Katherine Pyeatt, 2215 Cedar Springs Rd., #1605, Dallas, Texas 75201; James R. Bayes, Esq., Mark N. Lipp, Esq., and Marnie K. Sarver, Esq., Wiley Rein LLP, 1776 K Street, N.W., Washington, DC 20006 (Counsel to Liberman).

18. 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 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. 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.**

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.²¹ This document does not contain proposed information collection

²⁰ The issues of collusion between Pyeatt and Crawford are properly raised by Liberman in those separate proceedings, so we will not address them in this item.

²¹ 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).

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).

20. For further information concerning this proceeding, contact Andrew J. Rhodes, 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 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.

21. The Commission SHALL SEND a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to Katherine Pyeatt, 2215 Cedar Springs Road, Suite 1605, Dallas, Texas.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
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 12th Street, S.W, Washington, D.C.