

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 16-371
Table of Allotments,)	RM-11777
FM Broadcast Stations)	
(Red Lake, Minnesota))	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 3, 2016

Released: November 4, 2016

Comment Date: December 26, 2016
Reply Comments Date: January 10, 2017

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Rule Making¹ (Petition) filed by Red Lake Nation (Petitioner),² and an associated FCC Form 301 application.³ Petitioner proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission’s rules,⁴ by allotting FM Channel 287C1 at Red Lake, Minnesota, as a first local transmission and Tribal-owned commercial radio service. Petitioner seeks a Tribal Priority for the proposed allotment. In this Notice of Proposed Rule Making, we seek comment on that proposal.

2. **Background.** In *Rural Radio*,⁵ the Commission concluded that it would serve the public interest to establish a Section 307(b) priority in favor of Tribes and Tribal-owned entities proposing the allotment of FM radio channels to serve Tribal Lands.⁶ The rationale for this determination was that “the establishment of an allocation priority for the provision of radio service to Tribal Lands by Tribal Nation-owned stations will advance our Section 307(b) goals and serve the public interest by enabling Tribal

¹ The Petition was originally filed in ECFS on November 17, 2015, and was re-filed with the Office of the Secretary on January 15, 2016. A Supplement to Petition for Rule Making was filed on June 27, 2016 (Petition Supplement).

² Red Lake Nation is a registered trademark in the State of Minnesota of the Red Lake Band of Chippewa Indians.

³ FCC File No. BNPH-20151117AXW.

⁴ 47 CFR § 73.202.

⁵ *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239 (2009) (NPRM); First Report and Order, 25 FCC Rcd 1583 (2010) (First R&O); Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556 (2011) (Second R&O); and Third Report and Order, 26 FCC Rcd 17642 (2011) (Third R&O) (collectively, *Rural Radio*).

⁶ First R&O, 25 FCC Rcd at 1596-97, paras. 26-27. See also NPRM, 24 FCC Rcd at 5248, n.29 (defining “Indian Tribe[s]” and “Federally Recognized Indian Tribes”), and n.30 (defining “Tribal Lands”).

Nations to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing.”⁷

3. The Commission instituted several eligibility criteria to qualify for a Tribal Allotment.⁸ Those criteria pertain to the identity of the applicant, the land and population covered by the principal community contour, the location of the proposed community, and the availability of radio services, especially Tribally owned or Tribal entity-owned radio services, at the proposed community.⁹

4. Petitioner seeks waiver of the Tribal Lands coverage criteria of the Tribal Allotment Criteria.¹⁰ Specifically, Petitioner requests waiver of the criterion that the total population on Tribal Lands residing within the proposed service contour (60 dBu) constitutes at least 50 percent of the covered population, subpart (B)(2)(c) of the Tribal Allotment Criteria.¹¹ Petitioner explains that the proposed Class C1 allotment creates a large principal community contour (70 dBu) and a large service contour (60 dBu), and while Red Lake Nation’s Tribal legal boundaries are very large, covering approximately 636,954 square acres, the area is not large enough to represent 50 percent of the area within the proposed principal community contour pursuant to subpart (B)(1).¹² Alternatively, Petitioner claims that its proposal complies with the principal community requirements of subparts (B)(2)(a) and (B)(2)(b) of the Tribal Allotment Criteria. Petitioner states that the proposed principal community contour encompasses greater than 77 percent of Red Lake Nation’s Tribally designated legal boundaries and serves well in excess of the minimum 2,000 people living on Tribal Lands, covering a population of 11,696 people. However, the total population on Tribal Lands residing within the proposed service contour constitutes

⁷ First R&O, 25 FCC Rcd at 1588, para. 8; Third R&O, 26 FCC Rcd at 16467, n.32.

⁸ In order to satisfy the prerequisites for a Tribal Allotment, the following eligibility criteria must be met: “(A) The applicant is either a federally recognized Tribe or Tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes . . . ; (B)(1) At least 50 percent of the area within the proposed principal community contour is over that Tribe’s Tribal Lands, or (2) the proposed principal community contour (a) encompasses 50 percent or more of that Tribe’s Tribal Lands, (b) serves at least 2,000 people living on Tribal Lands, and (c) the total population on Tribal Lands residing within the proposed station’s service contour constitutes at least 50 percent of the total covered population . . . ; (C) The proposed community of license must be located on Tribal Lands; and (D) The proposed service must constitute first or second aural (reception) service, or first local Tribal-owned commercial transmission service at the proposed community of license.” (Tribal Allotment Criteria). Third R&O, 26 FCC Rcd at 17646-47, para. 8. *See also* First R&O, 25 FCC Rcd at 1596-97, paras. 26-27; Second R&O, 26 FCC Rcd at 2561-63, 2586-87, paras. 9-11, 59; 47 CFR § 73.3573, Note 5.

⁹ Upon award of a Tribal Allotment, within a reasonable period of time the Commission will release a public notice announcing a Threshold Qualifications Window, during which any qualifying applicant will be afforded the opportunity to file FCC Form 301 for the channel allotted as a Tribal Allotment. *See* Third R&O, 26 FCC Rcd at 17645-50, paras. 7-15. *See also* Second R&O, 26 FCC Rcd at 2588-90, paras 62-64. Should no applicant meeting threshold qualifications file a FCC Form 301 during the Threshold Qualifications Window (and should the proponent request that its already-filed Form 301 application not be immediately processed), the Tribal Allotment will be included in the inventory for a broadcast auction at a later date. In that event, only threshold qualified applicants, including the original proponent, may specify the Tribal Allotment in their applications to participate in the auction (FCC Form 175). Third R&O, 26 FCC Rcd at 17649-50, paras 12-13.

¹⁰ 47 CFR § 73.3573, Note 5.

¹¹ Second R&O, 26 FCC Rcd at 2586-87, para. 59.

¹² Petitioner states that Red Lake Nation’s legal boundaries cover approximately 26 percent of the area within the proposed principal community contour, not 50 percent as is required by part (B)(1) of the Tribal Allotment Criteria. Petition Supplement at 2.

less than 50 percent of the total covered population.¹³ Petitioner, therefore, requests a waiver of subpart (B)(2)(c) of the Tribal Allotment Criteria.

5. In support of its waiver request, Petitioner explains that the proposed Class C1 allotment was selected in order to provide “meaningful service” to as many Red Lake Nation Tribal members as possible, while taking into account transmitter site constraints.¹⁴ Petitioner states that there is limited selection for the proposed transmitter site due to the infrastructure of Red Lake Nation Tribal Land, the bulk of Tribal Land is consumed by Upper and Lower Red Lakes, and the international and domestic interference protection requirements.¹⁵ Given the constraints on the transmitter placement, Petitioner states that the proposed Class C1 allotment service area is needed in order to provide the requisite coverage to Red Lake Nation Tribal Lands and the community of Red Lake,¹⁶ to serve the significant number of Tribal members who live on “ceded” lands north of Red Lake Nation’s legal boundaries;¹⁷ and to provide some coverage to Bemidji and Thief River Falls, Minnesota, which are employment, training, and retail sources for Tribal members.¹⁸ Thief River Falls, for example, is the headquarters location of the Tribally owned Seven Clans Casino, which employs 300 Red Lake Nation citizens, and is the location where Red Lake and Warroad Casino (both also Tribally owned) employees receive training.¹⁹ Finally, Petitioner explains that the proposed facility will serve as a vital communications source for Tribal members traveling through the region.²⁰

6. In further support of its Petition, Petitioner states that the Red Lake Band of Chippewa Indians is a federally recognized Native American Tribe.²¹ Furthermore, Petitioner states that (1) the proposed 70 dBu contour encompasses greater than 77 percent of Tribal Lands and serves 11,696 people living on Tribal Lands;²² (2) Red Lake, Minnesota, the proposed community of license, is located on Red Lake Nation Tribal Lands; (3) the proposed facility will be the first local transmission and Tribal-owned commercial radio service at Red Lake;²³ and (4) the proposed principal community contour would not cover more than 50 percent of the Tribal Lands of a non-applicant Tribal Nation.²⁴ Petitioner further states that Red Lake, Minnesota, is a community for allotment purposes. Red Lake is a census-designated place (CDP) in Beltrami County, with its own ZIP code,²⁵ and a 2010 census population of 1,731 persons,

¹³ Petitioner claims that the proposed allotment would provide a 60 dBu service to a population of 61,726, while the total population on Tribal Lands within the 60 dBu contour is 11,696. Supplement at 3.

¹⁴ Supplement at 4.

¹⁵ *Id.* at 3.

¹⁶ Petition at 4.

¹⁷ Supplement at 3.

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Petition at 1.

²² *Id.* at 2-3.

²³ Supplement at n.2.

²⁴ *Id.* at 3. The Second R&O requires that an applicant may not claim the Tribal Priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. Second R&O, 26 FCC Red at 2587, para. 59.

²⁵ The ZIP code is 56671.

of whom over 97 percent are Native American,²⁶ and Red Lake is home to the tribal government, high school, hospital, nursing home, and Red Lake Nation College.²⁷

7. **Discussion.** In this instance, we believe the public interest will be served by, and that there is good cause for, waiver of subpart (B)(2)(c) of the Tribal Allotment Criteria. Waiver is available on a showing of good cause, when the facts of a particular case make strict compliance with a rule inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.²⁸ In granting a waiver, the Commission must both explain why deviation better serves the public interest than strict application of the rule and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.²⁹ In the Second R&O, the Commission specifically stated that it will entertain waiver requests from applicants proposing Tribal service to areas where the population on Tribal Lands is less than 50 percent of the covered population.³⁰ The Commission explained that it would be receptive to waiver showings for proposed facilities designed to minimize non-Tribal coverage, while still providing needed service to Tribal Lands, or to remedy the absence of Tribal radio service in the area.³¹

8. Here, Petitioner has demonstrated that due to transmitter site limitations, the proposed Class C1 maximum allotment is the only means to provide needed service to the legal boundaries of Red Lake Nation Tribal Lands (excluding Northwest Angle lands on the Canadian Border)³² and to as many Red Lake Nation Tribal members as possible. Furthermore, this allotment will serve as the first local transmission and Tribal-owned commercial radio service for the Red Lake Nation. Finally, Petitioner has demonstrated that the proposed allotment also will serve Tribal members who live on “ceded” land north of the Red Lake Reservation; those who are employed by or are training at Tribally owned businesses including casinos; and Tribal members traveling to and from major retail areas in the region.

9. The facts presented by Petitioner are sufficient to support consideration of the allotment of FM Channel 287C1 at Red Lake, Minnesota, as a Tribal Allotment. The proposed Tribal Allotment of FM Channel 287C1 could serve the public interest by providing vital radio service to Red Lake and to the surrounding Red Lake Nation Tribal Lands. It also could enable the Petitioner to set its own communications priorities and goals with respect to such service. Moreover, the allotment could further the public interest by providing a first local transmission and Tribal-owned radio service at Red Lake. Finally, the proposed change in the FM Table of Allotments complies with the technical requirements of the Commission’s rules.

10. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, 47 CFR Section 73.202(b), by the allocation of FM Channel 287C1 at Red Lake, Minnesota, as a Tribal

²⁶ United States Census Bureau, American Fact Finder, searchable at http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml# (last visited Sept. 15, 2016).

²⁷ Petition at 2.

²⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972).

²⁹ *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

³⁰ Second R&O, 26 FCC Rcd at 2587, para. 59.

³¹ *Id.* at 2587, para. 59, n.156.

³² Supplement at 4.

Allotment, as set forth below:³³

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Red Lake, Minnesota	----	287C1

Proposed Coordinates for Channel 287C1 at Red Lake, Minnesota: 47-59-00 NL and 95-33-33 WL with a site restriction of 42.4 km (25.34 miles) northwest of the community.³⁴

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 in 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,³⁵ interested parties may file comments on or before December 26, 2016, and reply comments on or before January 10, 2017, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission. Additionally, a copy of any filing should be served on counsel for Petitioner, as follows:

Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street
11th Floor
Arlington, VA 22209

13. Parties must file an original and one copy of each filing.³⁶ 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 will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at the FCC Headquarters Building located at 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. The filing hours at this location are Monday through Friday, 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, Maryland 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to FCC Headquarters at 445 12th Street, S.W., Washington, D.C. 20554. Alternatively, parties may submit the filing electronically at <http://apps.fcc.gov/ecfs/>. Online filing is optional. Participants that file comments and replies in electronic form need only submit one copy of those comments, so long as the submission conforms to any procedural or filing requirements established for formal electronic comments.³⁷ **All filings must be addressed to Marlene H. Dortch, Secretary, Federal**

³³ Concurrence by the Government of Canada is required because Channel 287C1 at Red Lake, Minnesota, is located within 320 kilometers (199 miles) of the U.S.-Canadian border. Canadian concurrence has been received for this vacant allotment.

³⁴ This site restriction is necessary in order to achieve 100 percent service coverage (60 dBu) to the legal boundaries of the Red Lake Nation Tribal Lands.

³⁵ See 47 CFR §§1.415 and 1.419.

³⁶ See *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Reorganization*, GC Docket No. 10-44, Report and Order, 26 FCC Rcd 1594, 1602, para. 21 (2011).

³⁷ 47 CFR § 1.419(d).

Communications Commission, and Office of the Secretary. Any paper 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.³⁸ 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.³⁹ 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 107-198.⁴⁰

15. For further information concerning these proceedings, contact Adrienne Y. Denysyk, Media Bureau, at (202) 418-2700. For purposes of these restricted notice and comment rule making proceedings, 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 this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Nazifa Sawez
Assistant Chief
Audio Division
Media Bureau

³⁸ *Id.* at § 1.7.

³⁹ See *Certification that Section 603 and 604 of the Regulatory Flexibility 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 (Feb. 9, 1981).

⁴⁰ See 44 U.S.C. § 3506(c)(4).

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 CFR Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 CFR 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. 47 CFR § 1.420(d).

(b) Petitions for rule making which conflict with the proposals in this *Notice* 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 CFR 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. The person filing the comments shall serve comments on the Petitioner. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments (*see* 47 CFR Section 1.420(a), (b) and (c).) Comments should be filed with the Secretary, Federal Communications Commission, Washington, DC 20554. Alternatively, parties may submit the filing electronically at <http://apps.fcc.gov/ecfs/>. Online filing is optional.

5. Number of Copies. In accordance with the provisions of 47 CFR Section 1.419(b), an original and one copy of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission. Participants that file comments and replies in electronic form need only submit one copy of those comments, so long as the submission conforms to any procedural or filing requirements established for formal electronic comments. 47 CFR § 1.419(d).

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, at its headquarters, 445 12th Street, S.W., Washington, DC. All filings are also available at <http://apps.fcc.gov/ecfs/>.