

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

In the Matter of)
)
Amendment of Section 73.622(i), Post-Transition) MB Docket No. 21-73
Table of DTV Allotments, Television Broadcast) RM-11889
Stations (Toledo, Ohio))

NOTICE OF PROPOSED RULEMAKING

Adopted: March 4, 2021

Released: March 4, 2021

Comment Date: [30 days after date of publication in the Federal Register]

Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Video Division, Media Bureau has before it a petition for rulemaking filed November 27, 2020 by Dominion Broadcasting, Inc. (Licensee), the licensee of WLMB (IND), channel 5, Toledo, Ohio (WLMB or Station).¹ Licensee requests the substitution of channel 35 for channel 5 at Toledo, Ohio, in the DTV Table of Allotments.²

II. BACKGROUND

2. In support of its channel substitution request, Licensee states that, since the Station transitioned to channel 5 in 2008 in conjunction with the Commission’s digital television transition, it has regularly received complaints from viewers unable to receive the Station’s over-the-air signal.³ Licensee states that these issues have “continued unabated” for twelve years.⁴ Licensee further states that it “has been forced to constantly scramble to retain viewers with a variety of methods, some costly.”⁵ Licensee maintains that these propagation problems have put WLMB at a distinct competitive disadvantage to the other stations broadcasting in the Toledo market. Licensee states that the Commission has long since

¹ See Petition for Rulemaking of Dominion Broadcasting, Inc. (filed Nov. 27, 2020), LMS File No. 00000127485 (Petition).

² On April 13, 2017, the Commission completed the incentive auction and broadcast television spectrum repacking authorized by the Spectrum Act. See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402 (codified at 47 U.S.C. § 309(j)(8)(G)), 6403 (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (Spectrum Act); Incentive Auction Closing and Channel Reassignment Public Notice: The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced, GN Docket No. 12-268, Public Notice, 32 FCC Rcd 2786 (2017). The post-incentive auction transition period ended on July 13, 2020. The Media Bureau will amend the rules to reflect all new full power channel assignments in a revised Table of Allotments. Because the Table has not yet been amended, the Division will continue to refer to the Post-Transition Table of DTV Allotments, 47 CFR § 73.622(i) (2018), for the purpose of this proceeding.

³ Petition at 2-3 and Exhibit A.

⁴ Id. at 3.

⁵ Id.

recognized that “VHF channels have certain characteristics that have posed challenges for their use in providing digital television service” and that the Station’s experience is no different.⁶

3. To remedy its propagation problems, Licensee proposes substituting UHF channel 35 for VHF channel 5. Licensee provides an Engineering Statement that it claims confirms that, with WLMB’s proposed parameters, including a 375 kW ERP, channel 35 can be substituted for channel 5 at Toledo, Ohio, in compliance with the Commission’s rules.⁷ Licensee states that the proposed facility would continue to provide a principal community contour completely covering WLMB’s community of license and would not cause impermissible interference to any station.⁸

4. Licensee contends that the Engineering Statement also confirms that WLMB’s channel 35 contour would be fully contained within the Station’s existing channel 5 contour and would continue to reach what Licensee characterizes as a “substantial majority” of the population within the Station’s current service area, including fully covering the City of Toledo.⁹ Licensee concedes that an analysis using the Commission’s TVStudy indicates that WLMB’s move from channel 5 to channel 35 would create a predicted interference-free population loss of 735,018 persons.¹⁰ However, Licensee maintains, the majority of that population is located in the densely populated Detroit metropolitan area, which is outside of the Toledo, Ohio Nielsen Designated Market Area (DMA).¹¹ Furthermore, Licensee continues, when terrain limitations and other over-the-air television services are taken into account, nearly all viewers predicted to lose access to WLMB’s signal would continue to be “well served” as they would continue to have access to at least five full power or Class A television signals.¹² Licensee calculates that only 388 people are predicted to live in portions of a “very small new loss area” that would not otherwise be well-served.¹³ Licensee asserts, however, that even those viewers would not lose access to their only over-the-air television service, as they continue to receive three full power or Class A television signals.¹⁴

5. Licensee claims that the Commission will approve a proposed channel substitution that includes a loss of service if the proposal is “supported by a strong showing of countervailing public interest,” such as offsetting service gains.¹⁵ Given the persistent feedback WLMB has received about reception issues within the Station’s core coverage area, Licensee maintains that any “nominal population loss” in outlying areas of the station’s contour would be more than outweighed by the substantial improvement in the Station’s actual over-the-air reception within its community of license and in other core portions of its service area.¹⁶ Licensee concludes that the proposed substitution of channel 35

⁶ *Id.* at 1-2 citing *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16511, para. 42 (2010).

⁷ Petition at 5 and Exhibit B – Engineering Statement.

⁸ *Id.*

⁹ *Id.* at 5 and Engineering Statement.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 5-6 and Engineering Statement.

¹³ *Id.* at 6 and Engineering Statement.

¹⁴ *Id.*

¹⁵ *Id.*, citing *see Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, Notice of Proposed Rulemaking, 22 FCC Rcd 9478, 9493 ¶ 38 (2007); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Columbus and Monona, Wisconsin)*, MB Docket No. 05-122, Memorandum Opinion and Order, 21 FCC Rcd 10012 (MB 2006) (*Columbus and Monona Allotment Decision*) (noting that most of the loss area is well served with five or more aural services).

¹⁶ Petition at 6.

therefore would serve the public interest by giving Toledo-area residents greater, more reliable access to WLMB's free over-the air signal, with few if any viewers losing access to robust over-the-air service.¹⁷

III. DISCUSSION

6. We believe that Licensee's channel substitution proposal warrants consideration. Channel 35 can be substituted for channel 5 at Toledo, Ohio, as proposed, in compliance with the principal community coverage requirements of section 73.625(a) of the Commission's rules (rules),¹⁸ at coordinates 41-44-41 N and 084-01-06 W. In addition, we find that this channel change meets the technical requirements set forth in sections 73.616 and 73.623 of the rules.¹⁹ Given its location, we note that Licensee's proposal is subject to coordination with Canada. Although substituting channel 35 for channel 5 would result in a loss of service to approximately 735,018 persons, we agree with Licensee that the loss area is "well-served" by at least five other television stations.²⁰ Further, although Licensee's proposal would result in a loss of service to approximately 388 people that would not otherwise be "well-served," we find such a loss area to be *de minimis*.²¹

7. We propose to substitute channel 35 for channel 5 for station WLMB with the following specifications:

<u>City and State</u>	<u>DTV Channel</u>	<u>DTV Power (kW)</u>	<u>Antenna HAAT (m)</u>
Toledo, Ohio	35	375	169.7

8. Accordingly, we seek comment on the proposed amendment of the Post-Transition Table of DTV Allotments, section 73.622(i) of the rules,²² for the community listed below, to read as follows:

<u>City and State</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Toledo, Ohio	5, 11, 13, *29, 46, 49	11, 13, *29, 35, 46, 49

IV. PROCEDURAL MATTERS

9. *Showings Required.* Comments are invited on the proposal discussed in this Notice of Proposed Rulemaking (*NPRM*). Petitioner or any proponent that expresses interest in the allotment will be expected to answer whatever questions are presented in initial comments. The petitioner of a proposed allotment is required to file comments even if it only resubmits or incorporates by reference its former pleadings. The petitioner must restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly.²³ Failure to file may lead to denial of the request. Any requests by a proponent for withdrawal or dismissal of an allotment request must be filed with the Commission in accordance with section 1.420(j) of the rules.²⁴

¹⁷ *Id.*

¹⁸ 47 CFR § 73.625(a).

¹⁹ 47 CFR §§ 73.616, 73.623.

²⁰ See *Columbus and Monona Allotment Decision*, supra n. 15.

²¹ See *WSET, Inc.*, 80 FCC 2d 233, 246 (1980) (finding that population loss of less than 500 persons is *de minimis*).

²² 47 CFR § 73.622(i).

²³ See, e.g., *Buffalo, Iola, Normangee, and Madisonville, Texas*, MB Docket No. 07-279, Report and Order, 24 FCC Rcd 8192, 8194, para. 9 (MB 2009).

²⁴ 47 CFR § 1.420(j).

10. *Cut-off Protection.* The following procedures will govern the consideration of the 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.²⁵
- (b) The filing of a counterproposal may lead the Commission to allot a different channel than was requested in the Petition.²⁶

11. *Comments and Reply Comments.* Pursuant to sections 1.415, 1.419, and 1.420 of the rules,²⁷ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).²⁸

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>. Parties that choose to file electronically only need to submit one copy of each filing so long as the submission conforms to all procedural and filing requirements. Online filing is optional.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy 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. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. 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. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
 - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington DC 20554.
 - Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.²⁹
 - During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

12. *Service.* Pursuant to section 1.420 of the rules,³⁰ 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 petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is

²⁵ 47 CFR § 1.420(d).

²⁶ 47 CFR § 1.420(g)(2).

²⁷ 47 CFR §§ 1.415, 1.419, and 1.420.

²⁸ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

²⁹ See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Red 2788 (2020).

³⁰ 47 CFR § 1.420.

directed. A certificate of service shall accompany such comments and reply comments.³¹ Additionally, a copy of such comments should be served on counsel for petitioner, as follows:

Joseph C. Chautin, III, Esq.
Hardy, Carey, Chautin & Balkin, LLP
1080 West Causeway Approach
Mandeville, LA 70471

13. *Ex Parte Notices– Restricted.* The proceeding this *NPRM* initiates shall be treated as a “restricted” proceeding in accordance with the Commission’s *ex parte* rules.³² For purposes of this restricted notice and comment rulemaking proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a notice of proposed rulemaking 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.³³ 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.³⁴ 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 a particular docket unless the Commission specifically waives this service requirement.³⁵ Any comment that 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.

14. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection via ECFS (<http://apps.fcc.gov/ecfs/>). Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

15. *Paperwork Reduction and Regulatory Flexibility.* The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980, as amended,³⁶ do not apply to a rulemaking proceeding to amend the DTV Table of Allotments, section 73.622(i) of the rules.³⁷ This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995.³⁸ 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 2002.³⁹

³¹ See 47 CFR § 1.420(a), (b) and (c).

³² 47 CFR §§ 1.1200 *et seq.*

³³ 47 CFR § 1.1208.

³⁴ 47 CFR § 1.1204(a)(10).

³⁵ 47 CFR § 1.1204(a)(10)(ii). In addition, an oral presentation in a restricted proceeding not designated for hearing requesting action by a particular date or giving reasons that a proceeding should be expedited other than the need to avoid administrative delay is permitted. A detailed summary of the presentation must be filed in the record and served by the person making the presentation on the other parties to the proceeding, who may respond in support or opposition to the request for expedition, including by oral *ex parte* presentation, subject to the same service requirement. 47 CFR § 1.1204(a)(11).

³⁶ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

³⁷ 47 CFR § 73.622(i).

³⁸ See 44 U.S.C. §§ 3501-3520.

³⁹ See 44 U.S.C. § 3506(c)(4).

16. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

17. *Additional Information.* For further information concerning the proceeding listed above, contact Shaun A. Maher, Video Division, Media Bureau, (202) 418-2324, Shaun.Maher@fcc.gov.

V. ORDERING CLAUSES

18. **IT IS ORDERED** that, pursuant to authority found in 47 U.S.C. sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1), 303(g), (r), and 307(b), and sections 0.61, 0.204(b), and 0.283 of the rules, 47 CFR §§ 0.61, 0.204(b), and 0.283, **IT IS PROPOSED TO AMEND** the Post-Transition Table of DTV Allotments, section 73.622(i) of the rules, 47 CFR § 73.622(i), as set forth in this *NPRM*, and this *NPRM IS ADOPTED*.

19. **IT IS FURTHER ORDERED** that, pursuant to applicable procedures set forth in sections 1.415, 1.419, 1.420 of the rules, 47 CFR §§ 1.415, 1.419, and 1.420, interested parties may file comments, including counterproposals, on the *NPRM* in MB Docket No. 21-73 and RM-11889 on or before thirty (30) days after publication in the Federal Register and reply comments on or before forty five (45) days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau