

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

In the Matter of)
)
Amendment of section 73.202(b), Table of) MB Docket No. 22-337
Allotments, FM Broadcast Stations (Dennison,) RM-11930
Ohio))

REPORT AND ORDER

Adopted: April 11, 2023

Released: April 11, 2023

By the Assistant Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Audio Division has before it the Notice of Proposed Rule Making,1 issued in response to a Petition for Rule Making filed by Western Radio Group (Petitioner). Comments were separately filed by Petitioner, REC Networks (REC),2 and WJER, LLC (WJER).3 REC filed Reply Comments. No counterproposals or other comments were received in response to the Notice. For the reasons discussed below, we amend the FM Table of Allotments, section 73.202(b) of the Commission’s rules,4 by allotting Channel 272A at Dennison, Ohio.

II. BACKGROUND

2. The Notice proposed the allotment of Channel 272A at Dennison, Ohio, as a first local service. Dennison was incorporated in 1873 and is listed in the 2020 U.S. Census with a population of 2,709 persons. Dennison qualifies as a community for allotment purposes: it has a mayor, city council, fire and police departments, zoning board, finance, public safety, economic development, and human resources committees. It also has a high school, middle school, elementary school, and hospital. There are also several attractions located within Dennison such as a railroad depot museum and water park.

3. Petitioner filed Comments reiterating its expression of interest in Channel 272A at Dennison, Ohio.5 Petitioner states that, if the channel is allotted, it will apply for the channel in any FM auction for the Dennison allotment, and it will prosecute its application and promptly construct the facilities in the event the Commission grants its application.6

1 See Dennison, Ohio, Notice of Proposed Rule Making, DA-22-1096, rel. October 17, 2022 (MB 2022) (“Notice”); see also 87 FR 63999 (published 10/21/2022).

2 REC is a national regulatory advocate for Low-Power FM (LPFM) broadcast services.

3 Additionally, WDNP-LP’s listeners and other local members of Dover, Ohio (the “Parties”) timely filed pleadings in the Commission’s Electronic Comment Filing System (ECFS). As discussed infra, we find the Parties’ filings violate 47 CFR § 1.420(a) and (c) because the pleadings were not served on Petitioner or its counsel nor did they include certificate of service, and therefore, cannot be considered in this proceeding. See Appendix.

4 47 CFR § 73.202(b).

5 Comments of Western Radio Group (Petitioner Comments) at 1.

6 Id.

4. WJER, in its comments, states that the proposed Dennison allotment would displace Station WDNP-LP, Dover, Ohio (WDNP), an LPFM service operating on Channel 272 that provides noncommercial programming to Dover, Ohio.⁷ It endorses WDNP's programming, as well as the qualifications and actions of WDNP's volunteer staff and board of directors, especially its training of volunteers in broadcast operations.⁸ WJER maintains that Dennison is already well served by station WBTC(AM), licensed to the neighboring community of Uhrichsville, Ohio, which it claims is owned by Petitioner.⁹ WJER thus requests that the Commission carefully consider allotting Channel 272A at Dennison, Ohio due to the potential displacement of WDNP.¹⁰

5. In its comments, REC acknowledges that LPFM stations are secondary FM services.¹¹ That said, REC contends that section 5(3) of the Local Community Radio Act of 2010 (LCRA), by its wording, does not require that LPFM stations be considered secondary to new FM allotments, but are secondary only to existing and modified full-service FM stations.¹² It notes the numerous submissions from members of the community and listeners of WDNP, arguing that under section 307(a) of the Communications Act,¹³ these opinions must be taken into account when determining whether amending the FM Table of Allotments is in the public interest.¹⁴ REC argues that LPFM licensees are required to maintain a level of localism through the nature of their organizational governance, and thus that a well-operated LPFM station, such as WDNP, becomes part of the fabric of the community. REC argues that because the LCRA does not require that an LPFM station be secondary in status to a new FM full service station, the public benefit of an LPFM station that has been in operation for over seven years should therefore be weighed against the interest in adding a new FM "drop-in" allotment.¹⁵

6. REC contends that WDNP is currently operating on the best channel available in the area. REC conducted a channel study using WDNP's licensed site that shows available channels 272, 245, and 290. It states that WDNP's current Channel 272 is the only channel that meets both section 73.807(a)'s minimum distance separation requirements to existing FM facilities and the recommended distance separation required for an LPFM station to not receive incoming interference.¹⁶ REC asserts that

⁷ Comments of WJER, LLC (WJER Comments) at 1-2.

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ REC Comments at 1, para. 2.

¹² *See Local Community Radio Act*, Pub. L. No. 111-371, 124 Stat 4072 (2011) (LCRA) at §5. ("The Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that (1) licenses are available to FM translator stations, FM booster stations, and low-power FM stations; (2) such decisions are made based on the needs of the local community; and (3) FM translator stations, FM booster stations, and low-power FM stations shall remain equal in status and secondary to existing and modified full-service FM broadcast stations.").

¹³ 47 U.S.C. § 307(a). Section 307(a) of the Communications Act mandates that the Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of the Communications Act, shall grant to any applicant therefor a station license.

¹⁴ REC Comments at 3, paras. 7-8.

¹⁵ REC calls on the Commission and Congress to examine LPFM stations, especially those that have programming and community involvement characteristics, similar to Class A TV broadcast stations, to find methods to improve the ability for LPFM stations to receive additional relief, limited to what is permitted by statute. REC also asks that the Commission reinterpret the LCRA to provide LPFM stations with technical relief in the protection of FM translator stations. *See* REC Comments at 6, para. 19. We decline to consider these requests, as they are beyond the scope of this allotment proceeding.

¹⁶ 47 CFR § 73.807(a). *See* REC Comments at 3.

Channels 245 and 290 do not meet the Commission's recommended interference-free requirements, as a result of WRRK, Braddock (Pittsburgh), Pennsylvania,¹⁷ and WXDX-FM, Pittsburgh, Pennsylvania, respectively.¹⁸ REC additionally states that Petitioner's Technical Exhibit also includes LPFM station WNPA-LP, Canton, Ohio as being displaced but its displacement will depend on which party wins the FM auction and the location of the Dennison station.¹⁹

7. With regard to the many comments submitted by WDNP listeners, referenced by REC, Petitioner argues that these comments should be disregarded and treated as prohibited *ex parte* presentations because the listener commenters failed to serve Petitioner or its counsel as required by section 1.420(a) and (c) of the Commission's rules.²⁰ To alleviate commenter concerns about displacement of WDNP, however, Petitioner provides an engineering study demonstrating that alternative FM Channels 245 and 290 are available at Dover, Ohio for WDNP.²¹ In its Reply Comments, REC recognizes that the community listener submissions are considered unauthorized *ex parte* filings pursuant to section 1.1208,²² but contends that the Parties have a right to express grievances over the LPFM station's displacement.²³ REC requests that if the unauthorized *ex parte* filings are stricken from the record, no enforcement action be taken against the Parties for participating in this proceeding.²⁴ No other party filed reply comments.

III. DISCUSSION

8. We find that the proposal complies with the Commission's technical requirements and will modify the Table of Allotments as requested in the Petition.²⁵ We further find that, contrary to REC's interpretation, section 5(3) of the LCRA applies to new full-service FM broadcast stations, *i.e.* FM "drop-in" allotments, making LPFM stations secondary to these stations. The Commission addressed in the *LPFM Third Order* the issue of LPFM station displacement by seeking comment on whether it should amend section 73.809 of the rules to establish a licensing presumption that would protect certain operating LPFM stations from subsequently proposed community of license modifications and whether that presumption should be extended to protect LPFM stations against subsequently filed petitions for rulemaking for new FM allotments and/or modification applications not proposing community of license

¹⁷ REC's study depicts that WRRK, a Class B station, would place a 41.1 dB μ interfering contour at the WDNP-LP transmitter site and a 42.3 dB μ interfering contour at the edge of the LPFM service contour along the bearing from WDNP-LP to WRRK.

¹⁸ REC's study depicts that WXDX-FM places a 41.3 dB μ interfering contour at the WDNP-LP transmitter site and a 42.6 dB μ interfering contour at the edge of the LPFM service contour along the bearing from WDNP-LP to WXDX-FM.

¹⁹ 47 CFR §73.809(a) defines interference from an LPFM station to a subsequently filed full-service FM facility is where interference occurs within the 3.16 mV/m (70 dB μ) of such full-service station, the community of license or any area of the community of license predicted to receive at least a 1 mV/m (60 dB μ) signal.

²⁰ Petitioner Comments at 2. See 47 CFR § 1.420(a), (c).

²¹ Petitioner Comments at 2-3 and Attachment 2. REC's channel study also shows that Channels 245 and 290 are available as alternatives for WDNP-LP. REC Comments at 3-4, paras. 11-12.

²² 47 CFR § 1.1208.

²³ REC Reply Comments (REC Reply) at 2. REC believes that this case should prompt the Commission to reexamine its *ex parte* regulations, given that many of those rules have (in REC's view) become obsolete since the advent of electronic filing. *Id.*

²⁴ *Id.* at 3.

²⁵ See 47 CFR § 73.207.

changes.²⁶ The Commission later stated, in *LPFM Fifth Order*, that adoption of the LCRA rendered these proposals unnecessary.²⁷ We note that the Commission adopted numerous measures to complete implementation of the LCRA that provide service and licensing rules to promote the LCRA's goals, and technical rules to ensure the efficient use of the radio broadcast spectrum.²⁸

9. Although studies were submitted regarding the potential of displacement to WDNP's licensed site, it is well established that at the FM allotment stage, we do not consider the displacement or interference of secondary FM services.²⁹ LPFM and FM translator stations are authorized as secondary FM services subject to service-specific rules restricting their operations and interference caused to other stations to ensure the integrity of existing FM full power stations.³⁰ While we recognize the valuable service being provided by LPFM stations, these facilities are secondary FM services and must protect subsequently authorized full-service primary stations.³¹ The Commission is subject to a Congressional directive to ensure that LPFM stations remain secondary to full-service primary FM stations.³² Further, the integrity of the FM Table of Allotments depends on strict adherence to the current standards governing the relationship between primary and secondary FM operations that were adopted to provide certainty and clarity in the process of allotting and modifying primary FM stations.³³ We therefore will not consider the potential displacement of secondary FM services, such as LPFM station WDNP, as a

²⁶ *LPFM Third Order* at 22 FCC Rcd at 21943, ¶ 75 (2007).

²⁷ See *Creation of a Low Power Radio Service*, Fifth Report and Order, Fourth Further Notice of Proposed Rulemaking and Fourth Order on Reconsideration, 27 FCC Rcd 3315, 3344, ¶ 72 (2012)(*LPFM Fifth Order*) (declining to move forward with proposed rule changes related to LPFM station displacement, the obligations of full-service new station and modification applicants to potentially impacted LPFM stations, and LPFM-FM translator protection priorities).

²⁸ See LCRA, § 5; *Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986 (2011); *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364 (2012); Fifth Report and Order, Fourth Further Notice of Proposed Rulemaking and Fourth Order on Reconsideration, 27 FCC Rcd. 3315 (2012)(setting forth proposed changes intended to advance the LCRA's core goals of localism and diversity while preserving the technical integrity of all of the FM services); and Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402 (2012), *granted and denied in part*, Order on Reconsideration, 28 FCC Rcd 14489 (2013). Likewise, the Media Bureau has taken steps to implement Section 8 of the LCRA, which requires the Commission "to conduct an economic study on the impact that low-power FM stations will have on full-service commercial FM stations" and to provide a report to Congress on that study within one year of the LCRA's enactment. See LCRA, § 8; *Media Bureau Seeks Comment on the Economic Impact of Low Power FM Stations on Full-Service Commercial FM Stations*, Public Notice, 26 FCC Rcd 6565 (MB 2011) and *Economic Impact of Low-Power FM Stations on Commercial FM Radio: Report to Congress Pursuant to Section 8 of the Local Community Radio Act of 2010*, Report, 27 FCC Rcd 3 (MB 2012).

²⁹ See *Dubach, Natchitoches, Oil City and Shreveport, Louisiana, and Groesbeck, Longview, Nacogdoches, Tennessee Colony and Waskom, Texas*, Report and Order, 20 FCC Rcd. 19495 (MB 2005)(stating that low power FM stations are secondary services that must protect subsequently authorized full service stations).

³⁰ See, e.g., 47 CFR § 73.809; 47 CFR § 74.1203.

³¹ 47 CFR § 73.809.

³² See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Policies*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2571-72, n.77, recon. granted in part, 27 FCC Rcd 12829 (2012)(*Rural 2d R&O*)(stating that in Section 5 of the Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (to be codified in 47 U.S.C. § 303), Congress directed the Commission to ensure that FM translator and booster stations, and LPFM stations, remain secondary to existing and modified full-service FM stations).

³³ See *Bridgeton and Pennsauken, New Jersey*, Report and Order, 18 FCC Rcd 12192,12193, ¶ 6 (MB 2003).

negative factor when evaluating FM allotment proposals.³⁴ We find that REC's other arguments raise issues that are beyond the scope of this proceeding.³⁵

10. While we do not dispute WJER's assertions regarding WDNP's service to the community and its training of local residents in broadcast operations, as discussed above these considerations are not applicable to the criteria established to evaluate the proposal before us.³⁶ Likewise, the fact that Petitioner's principals are the same as those of WBTC Radio LLC, licensee of WBTC(AM) and FM translator W270CI at neighboring Uhrichsville, Ohio,³⁷ does not mandate rejection of this proposal. Any potential local ownership rule issues will be addressed after the allotment has been subject to competitive bidding and a construction permit application is filed.³⁸ Accordingly, we conclude that the public interest would be served by allotting a first local service at Dennison, Ohio, under Priority (3).³⁹ A staff engineering analysis indicates that Channel 272A can be allotted to Dennison, Ohio, consistent with the minimum distance separation requirements of the Commission's rules (Rules), with a site restriction of 2.7 km (1.7 miles) west of the community.⁴⁰ The reference coordinates are 40-23-54 NL and 81-21-33 WL.

11. Finally, with regard to the *ex parte* submissions of WDNP listeners, the *Notice* stated in paragraph 7 that comments and reply comments shall be served on Petitioner or its counsel, and that certificate of service must accompany such comments pursuant to section 1.420 of the rules.⁴¹ The Parties listed in the Appendix failed to serve Petitioner or its counsel with a copy of their pleading or provide certificate of service as required by section 1.420(a) and (c) of the rules.⁴² We agree with Petitioner. Pursuant to section 1.1208 of the rules, this proceeding is considered restricted, and *ex parte* presentations are prohibited.⁴³ Moreover, section 1.420(a) specifically prescribes that comments in an FM allotment rulemaking proceeding initiated by a petition for rulemaking shall be served on the petitioner. Although the majority of the Parties were individual listeners, the exemption for written *ex parte* presentations submitted by such individuals found in section 1.1204(a)(8) of the rules does not apply, as it is specifically directed to *ex parte* submissions regarding applications rather than rulemaking proceedings.⁴⁴

³⁴ See *Minor Change Applications Informal Objection*, Letter, 35 FCC Rcd. 556 (MB 2020); see also *Fort Walton Beach, Florida*, Report and Order, 32 FCC Rcd 5837 (2017).

³⁵ See *supra* note 15. Additionally, REC requests that we evaluate the "track record" of an LPFM subject to displacement, which is not required by our rules and procedures. See REC Comments at 4-6, paras. 15-16, 19. See also *infra* para. 12 and note 59.

³⁶ See *supra* para. 10; 47 CFR § 73.809.

³⁷ See File No. 0000197075 (WBTC(AM) and W270CI, licensed to WBTC Radio LLC, owned 66% by Trimerge Futures LLC and 33% by CDMW Holdings LLC), and File No. 0000196976 (Western Radio Group owned 66% by Trimerge Futures LLC and 33% by CDMW Holdings LLC).

³⁸ 47 CFR § 73.3555(a).

³⁹ We make this determination using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982). 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).

⁴⁰ 47 CFR § 73.207.

⁴¹ See *Notice*, DA 22-1096, rel. October 17, 2022, para. 7.

⁴² 47 CFR § 1.420(a) and (c).

⁴³ 47 CFR § 1.1208. An *ex parte* presentation is any communication that concerns the merits or outcome of a proceeding and is not served on the parties to the proceeding, or, if oral, is made without their opportunity to be present. 47 CFR § 1.1202(a).

⁴⁴ 47 CFR § 1.1204(a)(8).

We therefore find that the Parties violated section 1.420(a) and (c), and their pleadings represent prohibited *ex parte* presentations that cannot be considered in this proceeding.⁴⁵

12. *Paperwork Reduction and Regulatory Flexibility.* The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980, as amended,⁴⁶ do not apply to a rulemaking proceeding to amend the FM Table of Allotments, section 73.202(b) of the Rules.⁴⁷ This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995.⁴⁸ 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 2002.⁴⁹

IV. ORDERING CLAUSES

13. IT IS FURTHER 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, effective May 26, 2023, the FM Table of Allotments, 47 CFR § 73.202(b), IS AMENDED, with respect to the community listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Dennison, Ohio	272A

14. The window period for filing applications for Channel 272A at Dennison, Ohio will not be opened at this time. Instead, the issue of opening this allotment for filing will be addressed by the Commission in subsequent order.

15. IT IS FURTHER ORDERED, That the Commission will send a copy of this *Report and Order* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

⁴⁵ 47 CFR §§ 1.1202(b)(1) and 1.1208. We further reject REC’s suggestion that the *ex parte* rules infringe upon the Parties’ First Amendment rights. *See Herbert L. Schoenbohm*, Decision, 13 FCC Rcd 15026, 15034-35, para. 23 (1998) (“The *ex parte* rules do not infringe upon an applicant’s constitutional right to discuss the proceeding with others. Rather, they protect the integrity of the administrative process by ensuring that the Commission’s decisions are fair and impartial and that they are based on a public record free of any taint of improper influence from non-record communications between decision makers and outside persons. (citation omitted) We do not believe it violates the First Amendment to require that presentations to the agency be made on the record and to require that solicitations of presentations to the agency be limited to requests for on-the-record presentations.”). As for REC’s expressed concerns, however, we will not take “enforcement action” against the Parties based on these isolated, first-time rule violations, beyond declining to consider the offending presentations.

⁴⁶ *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).

⁴⁷ 47 CFR § 73.202(b).

⁴⁸ *See* 44 U.S.C. §§ 3501-3520.

⁴⁹ *See* 44 U.S.C. § 3506(c)(4).

17. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2054.

FEDERAL COMMUNICATIONS COMMISSION

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APPENDIX

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