

RICHARD J. HAYES, JR.

ATTORNEY AT LAW

13809 BLACK MEADOW ROAD
GREENWOOD PLANTATION
SPOTSYLVANIA, VIRGINIA 22553

PRACTICE LIMITED TO MATTERS BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

ORIGINAL ORIGINAL
FILE RECEIVED

NOV 23 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
(703) 972-7941

ADMITTED IN GEORGIA

November 19, 1992

Ms. Donna R. Searcy, Secretary
The Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Petition to Amend the FM Table of Allotments (73.202(b))
De Forest Broadcasting Company, Petitioner
De Forest, Wisconsin

Dear Ms. Searcy:

Transmitted herewith, on behalf of De Forest Broadcasting Company, is an original and four copies of a "Petition to Amend the FM Table of Allotments."

De Forest Broadcasting Company requests FCC consideration of the allotment of Channel 226A to DeForest, Wisconsin as that community's first, local FM service. De Forest Broadcasting Company will apply for the new channel, if allotted, and if awarded the construction permit, will promptly construct the facility.

Should any questions arise regarding this matter, please communicate with the undersigned directly.

Respectfully submitted,

By: 

Richard J. Hayes, Jr., Esq.
Counsel to: De Forest
Broadcasting Company

RJH:tb
Enclosures

No. of Copies rec'd 074
List A B C D E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

NOV 23 1992

ORIGINAL
FILE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Amendment of Section 73.202(b))
Table of Allotments) BC Docket No. _____
FM Broadcast Stations) FM No. _____
De Forest, Wisconsin)

TO: Chief, Allocations Branch

PETITION FOR RULE MAKING

Comes now, De Forest Broadcasting Company, Inc, through counsel, and pursuant to the provisions of Section 1.401 and Section 1.420 of the Commission's Rules (47 C.F.R. 1.401), and pursuant to Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, 60 RR2d 114, (1986), requesting that the Table of Allotments in Section 73.202(b) of the Federal Communications Commission's Rules and Regulations be amended.

De Forest Broadcasting Company hereby requests that the FM Table of Allotments in Section 73.202(b) be amended to include a new, first broadcast service at De Forest, Wisconsin on Channel 226A. De Forest Broadcasting Company seeks that the FM Table of Allotments be amended, as follows:

| Location | Present | Proposed |
|----------------------|---------|----------|
| De Forest, Wisconsin | --- | 226A |
| Wautoma, Wisconsin | 226A | 272A |
| Berlin, Wisconsin | 272A | 284A |

There are compelling, public interest justifications for granting this rule making, and in support thereof, the following is shown:

I. PRELIMINARY STATEMENT

A. First, Local, FM Broadcast Service

The purpose of this request is to provide a much needed, first, local FM broadcast service to the community of De Forest, Wisconsin. At present, De Forest, Wisconsin does not enjoy the service of either an AM or FM facility within its community. The Petitioner proposes that the Commission amend the FM Table of Allotments to allot Channel 226A to De Forest, Wisconsin as that community's first, local, FM broadcast service.

B. Efficient Utilization of FM Spectrum

Such an amendment of the FM Table of Allotments would further the Commission's goal of providing a more efficient use of the FM Spectrum by providing a first, local FM broadcast service at De Forest, Wisconsin. The Amendment of Section 73.202(b) of the Commission's rules to include Channel 226A at De Forest, Wisconsin, would provide coverage to a substantial area and population. The city of De Forest, Wisconsin has a population of 4,482 persons based upon the 1990 U.S. Census data. According to the attached "Engineering Exhibit," a new FM broadcast facility at De Forest, Wisconsin would provide service to 332,758 persons in an area of 2,506 square kilometers. Obviously, a new FM broadcast service at De Forest, Wisconsin would be an efficient utilization of scarce FM broadcast channel resources and would

provide service to a large and growing community. Certainly, the citizens of De Forest and, additionally, those citizens in the predicted 1 mV/m contour of the proposed facility, would benefit from a first, full time, local FM broadcast service. No other person or community has expressed any interest in this channel at De Forest, Wisconsin.

II. ENGINEERING CONSIDERATIONS

A. Substantial Area to Receive Additional Service

Petitioner's engineering exhibit, as attached, provides an analysis of a complete search of the FM band. That study concludes that Channel 226A would provide city-grade coverage to De Forest, Wisconsin. Channel 226A could be allotted, consistent with the mileage separation and city-grade service requirements of the Commission's rules. The consideration of all factors shows that this proposal can be accommodated and that Channel 226A can be added to the FM Table of Allotments at De Forest, Wisconsin without jeopardizing any other community or facility. No community would lose any present or potential service and a substantial area of service would be added if this proposed allocation is granted.

In order to accommodate a new FM broadcast facility on Channel 226A at De Forest, Wisconsin, and in order to provide FM broadcast service to a population of 332,758 persons within an area of 2,506 square kilometers, it is necessary to make some substitutions in the FM Table of Allotments.

At present, Channel 226A has been allotted to Wautoma, Wisconsin. The Petitioner proposes to substitute Channel 272A for Channel 226A. In 1988, Wautoma Radio Company filed an application for Channel 222A at Wautoma, Wisconsin. No construction permit was granted as the result of the filing of that application. Subsequently, the Federal Communications Commission, in MM Docket No. 89-548, ordered that the FM Table of Allotments at Wautoma, Wisconsin be changed and that Channel 226A be substituted for Channel 222A at Wautoma, Wisconsin. Wautoma Radio Company, the applicant for the Wautoma allotment, was ordered to change channels from Channel 222A to Channel 226A. According to the FCC's database, no such application was filed nor was any amendment submitted which changed the channel from 222A to 226A. Therefore, it must be assumed that Wautoma Radio Company has abandoned its intentions to obtain a construction permit for any channel at Wautoma, Wisconsin. It should also be noted that the FCC's database still reflects that Channel 226A is allotted to Wautoma, Wisconsin but that no application for that facility is on file. Therefore, no disruption would occur as a result of the Petitioner's proposal to change the channel allotted at Wautoma, Wisconsin from 226A to 272A.

WISS(FM), Berlin, Wisconsin is licensed to Kingsley H. Murphy, Jr. and operates on Channel 272A. The Petitioner, De Forest Broadcasting Company, proposes that WISS(FM) be relocated from Channel 272A to Channel 284A. As demonstrated in the attached "Engineering Exhibit," the referenced coordinates for Channel 284A at Berlin, Wisconsin would permit

WISS(FM) to operate at its existing transmitter site, requiring only a simple adjustment of the WISS(FM) transmitter and antenna.

Pursuant to the Commission's rules, De Forest Broadcasting Company states that WISS(FM) should be reimbursed for its reasonable and prudent out-of-pocket expenses associated with the channel change at Berlin, Wisconsin. Furthermore, De Forest Broadcasting Company requests that the FCC clearly indicate that the eventual licensee (or permittee) for Channel 226A at De Forest, Wisconsin be obligated to reimburse WISS(FM) for the reasonable and prudent expenses associated with its change of channels. If De Forest Broadcasting Company is awarded a construction permit for Channel 226A, it will reimburse WISS(FM) for its expenses, as discussed above.

Insofar as there are no applications pending for any allotment at Wautoma, Wisconsin, the Commission's rules do not require a proponent in a rule making proceeding to reimburse the reasonable and prudent expenses associated with the channel change since there is no expense recognized by the Commission in association with or pertaining to an amendment of any application on file. As noted above, there is no application on file for Wautoma, Wisconsin.

It should also be noted that the Commission has recognized that the proposal contemplated by the Petitioner amounts to an "incompatible channel swap." In MM Docket No. 85-313 (RM-5037) Amendment of the Commission's Rules Regarding Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels, the Commission stated that:

"The Commission's acceptance of competing expressions of interest in this instance is inappropriate because Ames' proposal to substitute Channel 286C3 for Channel 296A should be treated as an 'incompatible channel swap' pursuant to Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels, 60 RR2d 114 (1986). The Commission stated that it anticipated an incompatible channel swap would be triggered by two communities swapping Class "A" allotments in order for at least one of the communities to receive an existing or adjacent channel upgrade. Without the initial channel swap, the contemplated upgrade would be to a non-adjacent channel. Id at 120 (Para. 24). The Commission's treatment of such a scenario as an "incompatible channel swap" precludes the acceptance of competing expressions of interest in the upgraded allotment, thereby assuring that Petitioner, usually a permittee or licensee, of obtaining the upgrade without placing its permit or license in jeopardy."

Although the Report and Order, referenced above, primarily addresses "incompatible channel swaps" as they relate to upgrades to existing licenses or permits, the Commission stated, at paragraph 19 of that Report and Order that:

"The Commission sees no reason to limit consideration of counterproposals to higher class uses of channels as urged by G&H. Pursuant to existing procedures, the Commission will consider any technically feasible counterproposal (or proposal) filed in response to a proposed allotment. "

In this situation, the instant proposal amounts to an "incompatible channel swap." The proposal results in a new frequency to a new community

which presently has no broadcast service of any kind and, furthermore, there is no other frequency available in the FM spectrum for use at De Forest, Wisconsin. Finally, the allotment of Channel 226A at De Forest, Wisconsin results in first, local, broadcast service. Therefore, competing expressions of interest would be inappropriate at De Forest, Wisconsin because the proposal of De Forest Broadcasting Company should be treated as an "incompatible channel swap."

III. PETITIONER'S INTENTION TO APPLY FOR CHANNEL 226A

If these proposed changes are implemented by the Commission, the Petitioner intends, pursuant to the rules of the Commission, to file an application for a construction permit, and if awarded the permit, to promptly construct the facility. Financially, the Petitioner is more than qualified to construct and operate the facility sought.

IV. SUMMARY

No community will lose any present or proposed service as a result of a grant of this "Petition for Rule Making" and, furthermore, a substantial new area of service will be added. As indicated above, a grant of this "Petition" will provide a much needed, first, local, FM broadcast service to De Forest, Wisconsin. This "Petition" would, if granted, provide for an efficient utilization of broadcast resources.

Therefore, in view of the foregoing facts, Petitioner requests that the FM Table of Allotments (Section 73.202(b)) be amended to allot FM

Channel 226A to De Forest, Wisconsin. In addition, Petitioner requests that the allotment at Wautoma, Wisconsin be changed from Channel 226A to Channel 272A and, furthermore, that Channel 284A be substituted for Channel 272A and that the license of Radio Station WISS(FM), Berlin, Wisconsin, be modified to reflect operation on Channel 284A.

Respectfully submitted,

DE FOREST BROADCASTING COMPANY

By: _____


Richard J. Hayes, Jr., Esquire
Its Attorney

Date: November 19, 1992

Richard J. Hayes, Jr., Esq.
13809 Black Meadow Road
Spotsylvania, Virginia 22553
(703) 972-2690

In the Matter of:

Amendment of Section 73.202(b))
Table of Allotments) MM Docket No. _____
FM Broadcast Stations) RM No. _____
De Forest, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted:

Released:

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for rule making submitted by De Forest Broadcasting Company requesting the allotment of Channel 226A to De Forest, Wisconsin.

2. Channel 226A can be allotted to De Forest, Wisconsin in compliance with the Commission's minimum distance separation requirements as evidenced in the attached engineering statement. Petitioner states that the public interest would benefit from the allotment of this channel as it could provide De Forest with its first, local FM broadcast service.

3. In accordance with Commission policy, we shall propose to modify the license of WISS(FM), Berlin, Wisconsin to specify operation on channel 284A. Furthermore, we will change the allotment at Wautoma, Wisconsin to Channel 272A from Channel 226A. However, pursuant to Section 1.420(g) of the Commission's Rules, competing expressions of interest for Channel 226A at De Forest, Wisconsin will not be accepted.

4. In order to effectuate these proposals, the Commission proposes to amend the Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following communities:

| | Present | Proposed |
|----------------------|---------|----------|
| De Forest, Wisconsin | ---- | 226A |
| Wautoma, Wisconsin | 226A | 272A |
| Berlin, Wisconsin | 272A | 284A |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing by reverence herein.
NOTE: A showing of continuing interest is required by paragraph 2 of the appendix before a channel will be assigned.

6. Interested parties may file comments on or before _____, and reply comments on or before _____, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Richard J. Hayes, Jr., Esquire
13809 Black Meadow Road
Spotsylvania, Virginia 22553
Counsel to De Forest Broadcasting Company

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Assignments, Section 73.202(b), of the Commission's Rules. 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 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact _____, Mass Media Bureau (telephone) (202) _____. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex parte contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An ex parte contact is a message (spoken or written) officially filed at the Commission or oral presentation required by the Commission. 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

Chief, Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

_____, 1992

CERTIFICATE OF SERVICE

I, Richard J. Hayes, Jr., hereby certify that copies of the foregoing were sent via first class mail, postage prepaid, or as otherwise indicated, to each of the following, on this 19th day of November, 1992.

Wautoma Radio Company
981 Howard Street
Greenbay, Wisconsin 54303

Kingsley H. Murphy, Jr.
WISS (FM)
119 North 4th Street
Minneapolis, Minnesota 55401



Richard J. Hayes, Jr.