

Nov 25 2 39 PM '97 Federal Communications Commission

DA 97-2406

DISPATCHED

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

|                                |   |                      |
|--------------------------------|---|----------------------|
| In the Matter of               | ) |                      |
|                                | ) |                      |
| Amendment of Section 73.202(b) | ) | MM Docket No. 97-233 |
| Table of Allotments,           | ) | RM-9162              |
| FM Broadcast Stations.         | ) |                      |
| (East Brewton, Alabama and     | ) |                      |
| Navarre, Florida)              | ) |                      |

## NOTICE OF PROPOSED RULE MAKING

Adopted: November 12, 1997

Released: November 21, 1997

Comment Date: January 12, 1998

Reply Comment Date: January 27, 1998

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of 550-AM ("petitioner"), permittee of Station WZEW(FM), Channel 239A, East Brewton, Alabama, seeking to amend the FM Table of Allotments by substituting Channel 239C3 for Channel 239A, at East Brewton, the reallocation of Channel 239C3 to Navarre, Florida, and modification of its authorization accordingly. Petitioner stated its intention to apply for Channel 239C3 if it is reallocated to Navarre.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.<sup>1</sup> In support of the proposal petitioner states that the requested reallocation from East Brewton (population 2,579) to Navarre, Florida (population 900),<sup>2</sup> is mutually exclusive with its existing authorization. The distance between East Brewton and the petitioner's specified site at Navarre

<sup>1</sup>See *Modification of FM Licenses ("Change of Community R&O")*, 4 FCC Rcd 4870, recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990).

<sup>2</sup>Navarre is not listed in the U.S. Census. Therefore, our population figure was taken from the 1995 *Rand McNally Commercial Atlas and Marketing Guide* ("Atlas"). Petitioner advises that according to the Navarre Beach Visitors Center, the population of the community is 18,000 persons, with 26,000 persons using services provided by the Navarre area. As the *Atlas* population count differs vastly from that presented by the petitioner, and we cannot determine from petitioner's statement whether its population count includes areas surrounding Navarre, the petitioner is requested to provide documentation with its comments to substantiate the population level it ascribes to Navarre.

is 89 kilometers (55 miles) whereas a distance of 142 kilometers (88 miles) is required.<sup>3</sup> Further, petitioner advises that Navarre, located in Santa Rosa County, is currently devoid of a greatly needed first local service. Additionally, petitioner advises that Navarre contains the community indicia commonly associated with determining such status, including numerous commercial outlets, financial institutions, churches, educational facilities, a fire department, as well as local community and civic organizations. Petitioner advises also that Navarre's population increases vastly during the summer with the influx of tourists vacationing at adjacent beaches on the Gulf of Mexico.

3. In further support, petitioner asserts that the adoption of its proposal will result in a preferential arrangement of allotments consistent with the *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1992),<sup>4</sup> by providing Navarre with its first local aural transmission service. Additionally, petitioner advises that the reallocation will enable Station WZEW(FM) to increase the degree of service from its present theoretical level of 27,257 persons and an area of 2,500 square kilometers, to a population of 311,213 and an area of 4,769 square kilometers. Further, petitioner asserts that as Station WZEW(FM) has not been licensed to operate on Channel 239A, its reallocation proposal will not result in the loss of existing service at East Brewton. Moreover, petitioner advises that although Navarre is not located within an urbanized area, operation as a Class C3 facility from its proposed transmitter site will result in the predicted 70 dBu contour of Station WZEW(FM) reaching less than 50% of the Pensacola and Fort Walton Beach urbanized areas. Therefore, petitioner asserts that its request to change its community of license is not subject to the provision of additional information responsive to a *Tuck* analysis to determine whether Navarre is sufficiently independent of Pensacola and Fort Walton Beach to merit a first local service preference.<sup>5</sup>

4. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the proponent of a channel allotment must demonstrate the place to be a geographically identifiable population grouping. *Revision of FM*

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<sup>3</sup>Coordinates at the site specified by the petitioner for a transmitter site at Navarre, Florida, are 30-26-52 and 86-51-55. Coordinates at the authorized site for Station WGCX(FM), at East Brewton, Alabama, are 31-13-59 and 87-03-28.

<sup>4</sup>The 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)).

<sup>5</sup>See *Huntington Broadcasting Co. v. F.C.C.*, 192 F.2d 33 (D.C. Cir. 1951), *RKO General, Inc. ("KFRC")*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck ("Tuck")*, 3 FCC Rcd 5374 (1988). In *KFRC* and *Tuck*, the Commission clarified the type of evidence to consider in determining whether a suburban community deserves a first local service preference by relying on three factors: (1) signal population coverage; (2) size and proximity of the suburban community relative to the adjacent community; and (3) the interdependence of the suburban community with the central city.

*Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982). Although the proponent of an allotment does not need to show that the borders of the locality are precisely delineated, it must show that the residents of the locality are commonly regarded as a distinct group. This can be accomplished by the testimony of local residents or by objective or subjective evidence indicating the existence of a community. *Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *aff'd*, 2 FCC Rcd 7562 (1987). Some examples of objective indications of community status include receipts from local businesses, photographs of local churches, schools, and business entities, and the existence of political, social, economic, commercial, cultural or religious organizations and services in the community. See *Kenansville, Florida*, 5 FCC Rcd 2663 (Policy & Rules Div. 1990), *aff'd*, 10 FCC Rcd 9831 (1995). As indicated *supra*, Navarre is not listed in the U.S. Census.<sup>6</sup> Although petitioner states that according to the Navarre Beach Visitors Center, the population of the community is 18,000 persons, with 26,000 persons using services provided by the Navarre area, we cannot determine from its statement whether the population count includes Navarre Beach and other surrounding areas. Therefore, petitioner is requested to submit documentation with its comments to substantiate the population level ascribed to Navarre. Additionally, petitioner is requested to supply maps delineating the relevant boundaries of Navarre. Moreover, while petitioner has stated that Navarre has commercial activity, banks, churches, schools, a fire department, and local community and civic organizations, it has not specifically identified those entities with addresses or shown that they are intended to serve Navarre, as opposed to other areas. In the past, the Commission has rejected claims of community status where a nexus has not been demonstrated between the political, social, and commercial organizations and the community in question. See *Moncks Corner, Kiawah Island, and Sampit, South Carolina*, 11 FCC Rcd 8630 (1996); see also, *Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991), and cases cited therein. In view of the above, and based upon petitioner's initial presentation, we cannot determine Navarre's status as a community under the *Beacon Broadcasting* or *Kenansville* principle. Therefore, petitioner is requested to provide additional information, consistent with the above guidelines, regarding the attributes of Navarre, Florida.

5. In accordance with Commission policy, if a proponent intends to move its authorized facility to a community that is adjacent to an urbanized area and if its intended operation would place a city grade (70 dBu) signal over 50% or more of the urbanized area, the petitioner is required to demonstrate that the intended city of license is sufficiently independent of the central city to justify a first local service preference. See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995). We recognize that Navarre is not located within an urbanized area. A staff analysis has confirmed petitioner's assertion that if Channel 293C3 is allotted to Navarre, Station WZEW(FM) will provide a 70 dBu signal to less than 50% of either the Pensacola or Fort Walton Beach urbanized areas. Therefore, the petitioner's request to change its community of license is not subject to the provision of additional information responsive to a *Tuck* analysis to determine whether Navarre is sufficiently independent of the Pensacola and

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<sup>6</sup>Although Navarre is listed in the *Atlas*, geographical location alone is not sufficient to establish "community" status. See, *Vinville, Mississippi*, 48 FR 5974 (1983) and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991). Additionally, we note that the *Atlas* reflects that the main post office to serve Navarre is located in Gulf Breeze.

Fort Walton Beach urbanized areas to warrant a first local service preference or whether it should be credited with all of the authorized services within the two urbanized areas.

6. In light of the above, as petitioner's proposal would result in a preferential arrangement of allotments if Navarre is found to be a community for allotment purposes, we believe the proposal warrants consideration since the allotment of Channel 239C3 could provide a first local aural transmission service at that locality. Moreover, while we carefully evaluate a proposal that would result in a loss of existing reception service, in this instance Station WZEW(FM) is not constructed. Therefore, we do not consider its removal from East Brewton, Alabama, to present the parallel concerns with loss of service represented by the removal of an operating station, as it does not constitute a service that the public has become reliant upon. See *Sanibel and San Carlos Park, Florida*, 10 FCC Rcd 7215 (1995); *Pawley's Island and Atlantic Beach, South Carolina*, 8 FCC Rcd 8657 (1993); and *Glencoe and LeSueur, Minnesota*, 7 FCC Rcd 7651 (1992).

7. As the petitioner's modification request is consistent with the provisions of Section 1.420(i) of the Commission's Rules, we shall propose to modify the authorization for Station WZEW(FM) without entertaining competing expressions of interest in the use of Channel 239C3 at Navarre, Florida, or requiring the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties.

8. Channel 239C3 can be allotted to Navarre, Florida, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, at the petitioner's specified site, located 5.1 kilometers (3.2 miles) north, utilizing coordinates 30-26-52 and 86-51-55.<sup>7</sup>

9. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

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<sup>7</sup>We note that proposed Channel 239C3 at Navarre is short spaced to three pending applications for Channel 237A, Gulf Breeze, Florida. However, Channel 291A was substituted for Channel 237A at Gulf Breeze in the context of MM Docket No. 83-493. See 2 FCC Rcd 4233 (1987). The Table of Allotments has been amended accordingly. See 47 CFR 73.202(b). Further, we note that the allotment of Channel 291A at Gulf Breeze was conditioned upon an interrelated conditional allotment of Channel 254A for Channel 291A at Pensacola, Florida in MM Docket No. 84-231. See 2 FCC Rcd 1290 (1987). According to our review of the Commission's records the conditions surrounding the allotment of Channel 254A at Pensacola have been satisfied, i.e., (1) grant of a license to cover a construction permit (BPH-860707KC) to relocate the transmitter site for Station WPMO(FM), (now Station WKNN-FM), Channel 256, Pascagoula, Mississippi, and to downgrade the station to Class C1 status (see File No. BLH-860707KC); (2) grant of a license to cover a construction permit (File No. BPH-831123AN) for Station WGNE-FM (now Station WFSY(FM), Panama City, Florida, to relocate its transmitter site (see File No. BLH-880328KA); and (3) grant of a license to relocate the transmitter site of noncommercial educational Station WUWF(FM), Channel 201C, Pensacola, Florida (see File No. BLED-880322KC).

| City                  | Channel No. |          |
|-----------------------|-------------|----------|
|                       | Present     | Proposed |
| East Brewton, Alabama | 239A        | --       |
| Navarre, Florida      | --          | 239C3    |

10. 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.

11. Interested parties may file comments on or before January 12, 1998, and reply comments on or before January 27, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William J. Pennington, III, Esq.  
Post Office Box 403  
Westfield, MA 01086

12. 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 Allotments, 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) and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. 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 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 a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding 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.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

Attachment: Appendix

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APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, 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 Procedures. 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 Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) 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 Sections 1.415 and 1.420 of the Commission's Rules and Regulations, 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 Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, 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 Center (Room 239), at its headquarters, 1919 M Street, N.W., Washington, D.C.