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Ramapo's responsibility to inform the Commission of its desired change in status or excuse its failure to file a § 1.65 amendment.

9. Ramapo was required pursuant to 47 C.F.R. § 73.3514(a) to provide all the information called for in its application form and, when that information was "no longer substantially accurate or complete in all significant respects," to amend its application pursuant to 47 C.F.R. § 1.65. This procedure is consistent with both the wide discretion afforded the Commission by Section 154(j) of the Communications Act of 1934, as amended, to fashion procedures "as will best conduce to the proper dispatch of business and to the ends of justice" (*See also*, 47 U.S.C. § 303(r)) and with the specific intent of Section 1.65 to place upon applicants the responsibility for reporting any substantial change "in circumstances pertaining to basic qualifications . . . and factors urged as basis for grant or a comparative preference." *Report and Order* in Docket 18467, 3 RR 2d 1622, 1624 (1964). As a seasoned licensee of 25 years duration, Ramapo's lack of diligence in reporting a substantial change in its status against the WBGO and WFDU license renewal applications is inexplicable. With seven renewals of its original license (BLED-388) to date, Ramapo should be fully cognizant of the rules governing the license renewal process. "We expect a diligent applicant to apprise [itself] of the applicable Commission regulations and to take steps necessary to comply with those requirements." *Bronco Broadcasting Co., Inc.*, 58 FCC 2d 909, 912 (1976). We can only conclude, therefore, that Ramapo's acknowledged failure in making a timely claim of mutual exclusivity is the result of its own lack of diligence rather than of any miscarriage of Commission processing routines.

10. Finally, Ramapo claims that its waiver request indicates, by virtue of the prohibited overlap, that its application is mutually exclusive with the WBGO and WFDU renewals and it is therefore clear that all three applications cannot be granted. Citing *Mansfield Broadcasting Company*, 8 RR 2d 155, Ramapo claims that a hearing is warranted in this case because grant of the renewals precludes grant of its own application.[7] This argument is without merit. In requesting a waiver of 47 C.F.R. § 73.509, Ramapo implicitly suggested that its proposal was *not* to be considered mutually exclusive with the WBGO and WFDU renewals since all three applications could be granted if a waiver of the allegedly *de minimis* overlap was granted, and that this was Ramapo's desired result. This implicit suggestion was confirmed by Ramapo's negative response to Section I, Item 5. Once advised that the showing in support of its waiver request lacked critical information, Ramapo cannot simply change course and assert the rights of a mutually exclusive applicant nearly eight months after the cut-off date for filing applications mutually exclusive with the WBGO and WFDU renewal applications and seven months after grant of these renewal applications. Moreover, since the possibility of a waiver, given the appropriate showing, has never been rejected out of hand, it can not be said that grant of the renewals precluded grant of Ramapo's proposal.

11. At various stages in this proceeding, Ramapo had several options available to it. Upon receiving notice that its request for waiver lacked critical information, Ramapo could have supplemented the waiver request to provide the necessary information on the population affected by the proposed changes; it chose not to do so. Ramapo could have also amended its application to advise the

Commission that its proposal was to be considered mutually exclusive with the WBGO and WFDU renewals. Again, no such amendment was filed. Finally, once the WBGO and WFDU renewals were granted, Ramapo could have requested, through a timely filed petition for reconsideration, that these grants be set aside and that its application be consolidated with those renewal proceedings. Because Ramapo failed to exercise any of these options, we agree with WBGO and WFDU that Ramapo cannot be permitted to fashion a "post-hoc rationalization" for giving its application further consideration.

12. Accordingly, IT IS ORDERED, That the application for review filed by Ramapo Indian Hills Regional High School District IS DENIED.

13. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send, by Certified Mail-Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] In the *Second Report and Order* in Docket 20735, 43 Fed. Reg. 39704, 39708 (1978), the Commission ruled that "low power operations [10-watt] cannot be permitted to function in a manner which defeats the opportunity for other more efficient operations which could serve larger areas." Accordingly, the Commission directed such licensees to move their Class D operations, in preferential order, to one of the nonreserved (commercial) channels, to Channel 200 or to the least-preclusive reserved band (noncommercial) channel. Those stations seeking to exempt themselves from this requirement and, ultimately, reclassification to class D secondary status, could file an application to increase their facilities to at least the minimum Class A level of 100 watts effective radiated power.

[2] *Public Notice* B-34 (Mimeo No. 3023, released March 21, 1983).

[3] Specifically, the Bureau noted that Ramapo failed to address alternative solutions to the potential interference problem such as the utilization of a directional antenna and/or a reduction in the antenna height above average terrain.

[4] The deadline for filing applications mutually exclusive with the WBGO and WFDU renewal applications was May 1, 1984. Because no applications claiming mutual exclusivity with these renewals had been filed, the Bureau granted the WBGO and WFDU renewals on May 17, 1984. In an unrelated action, WBGO's renewal was rescinded July 3, 1984, based on that application's established mutual exclusivity with Drew University's proposal (File No. BPH-831212AE) to upgrade its Madison, New Jersey facilities to Class A status.

[5] Section I, Item 5 (presently Section I, Item 3) of FCC Form 340 specifically requests whether the application being filed is mutually exclusive with a license renewal application and, if so, requires the applicant to identify the call sign and community of license of the station seeking renewal. Ramapo responded negatively to this question thereby expressly representing that its application was not mutually exclusive with any license renewal.

[6] Furthermore, it is well established that the Commission need not hold a hearing on applications it rejects for failing to meet its technical acceptance rules. *Columbia Communications Corporation v. FCC*, 832 F.2d. 189, 193 (D.C. Cir. 1987), citing *Storer Broadcasting*, 351 U.S. at 202, 205, 76 S.Ct. at 770, 771-72 (1950).

[7] In *Mansfield*, the Commission refused to sever a *pending* AM application from a larger group of mutally exclusive applications and consolidate it for hearing with another application not in the group. The Commission held that no prohibited overlap existed between the two applications and the grant of one application would not therefore preclude grant of the other. Ramapo mistakenly titles this citation Ocean County Radio Broadcasting. Since Ramapo's references are contained within Mansfield, we will use the correct title in the body of this Order.

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Making, CC Docket No. 86-309, FCC 86-319, Mimeo 36783 (released July 18, 1986); *Report and Order*, 2 FCC Rcd 6600 (1987).

[6] Although off-island services will be provided by LTLD, PRTC must comply with these conditions before LTLD can be authorized to enter the off-island service market.

[7] MCI, General Comserve Corporation, A-Plus Information Processing Corporation and Call U.S. Inc. also filed petitions for reconsideration of the Commission's *Report and Order* in CC Docket No. 86-309.

[8] On August 19, 1988, PRTA filed a petition for declaratory ruling requesting a determination that the provision of off-island telecommunication services by a wholly-owned, separate subsidiary of PRTA would qualify the separate subsidiary for treatment as a non-dominant carrier. By separate order released today, we granted PRTA's request that its separate subsidiary, LTLD, would be non-dominant inthe provision of off-island services. In light of LTLD's status as a non-dominant carrier, no further action is required on LTLD's pending Section 214 applications to provide services in the domestic off-island market. However, LTLD's continued operation in the domestic off-island market is contingent on PRTC's compliance with the conditions adopted in the *Report and Order* in CC Docket No. 86-309.

[9] See MTS and WATS Market Structure, 81 FCC 2d 177, 202 (1980); International Relay, Inc., 77 FCC 2d 819, 824 (1980), on reconsideration, 82 FCC 2d 41 (1981); MCI Order, at para. 8; Satellite Business Systems, 91 FCC 2d 941, 946-7 (1982); Western Union Telegraph Co., 91 FCC 2d 1051, 1061-3 (1982).

[10] The *Report and Order* in CC Docket No. 86-309 also found that competition was reasonably feasible in the domestic off-island market. In light of LTLD's non-dominant status,there is no need for further action on LTLD's pending Section 214 applications to provide service in the domestic off-island market.

[11] We note that interntional frequency coordination in accordance with Article 11 of the International Telecommunications Union (ITU) Radio Regulations has not been completed. Thus, authorizationof LTLD's Humacao earth station is conditioned on final coordination of the earth station with other administrations in accordance with Article 11 of the ITU Radio Regulations.

[12] NECA Tariff F.C.C. No. 1, Transmittal Nos. 274 and 285, effective February 16, 1988. NECA Tariff F.C.C. No.1 has since been replaced by NECA Tariff F.C.C. No. 5.

[13] This condition is subject to reconsideration in the CC Docket 86-309 proceeding.

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

MM Docket No. 88-375

In the Matter of

Amendment of Part 73 of the	RM-6236
Rules to provide for an	RM-6237
additional FM station class	
(Class C3) and to increase	
the maximum transmitting	
power for Class A FM stations	

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1988; Released: September 12, 1988

By the Commission:

INTRODUCTION

1. The Commission hereby gives notice of proposed rule amendments that would permit improvements in the facilities of the majority of Class A FM broadcast stations in the United States.[1] Specifically, this *Notice of Proposed Rule Making* proposes the creation of a new "C3" class of FM broadcast station and a general increase in the maximum transmitting power permitted for Class A FM broadcast stations. By providing additional opportunities for expanded coverage areas, both proposals would potentially enable Class A FM broadcast stations to provide better service to their audiences. We believe that adoption of the proposed regulations would further promote a competitive marketplace for the development and use of broadcast facilities and services, further develop a regulatory framework that permits markets for broadcast services to function effectively, and improve efficiency in the allocation, licensing, and use of the electromagnetic spectrum.

BACKGROUND

2. Commercial FM stations are allotted to communities throughout the United States.[2] These allotments are listed in a Table of Allotments contained in the Commission's Rules.[3] For FM station classification purposes, the country is divided into three zones: I, I-A and II.[4] Zones I and I-A represent areas of greater population density. FM facilities are classified on the basis of the zone in which the transmitter is located, the transmitter power and the effective antenna height.[5] There are currently six classes of commercial FM broadcast stations: A, B1, B, C2, C1 and C. Each class has a minimum power requirement and a maximum power limit.[6] Stations and vacant allotments in each class are afforded protection from interference from other FM stations on the same channel and adjacent channels by means of required distance separations. Class B and B1 stations are assigned only in Zones I and I-A. Class C, C1 and C2 stations are assigned only in Zone II. Class A FM stations are assigned in all three zones, throughout the country. There are approximately 2043 Class A stations,[7] more than any other class. However, Class A stations have the smallest service areas. A Class A station operating with maximum facilities has a primary service area with an average radius of about 24 kilometers (km) or 15 miles (mi).[8]

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THE PETITIONS

3. The Commission has before it two petitions, each seeking rule amendments that could potentially improve existing Class A FM station facilities. The first petition, filed by Petaz Communications, Inc. (Petaz)[9] on June 16, 1987, requests amendment of the Commission's rules to provide for a new class of commercial FM station in Zone II. Stations in this new class (tentatively designated as Class C3) would have the same maximum effective radiated power and reference height above average terrain as do Class B1 stations in Zone I. The purpose of this additional intermediate size class in Zone II would be to provide opportunities for new service and increased existing service. In particular, 200 to 300 Class A FM stations may be able to upgrade to the proposed Class C3.

4. The second petition, filed by the New Jersey Class A FM Broadcasters Association (New Jersey)[10] on September 1, 1987, requests that the Commission amend its rules to allow Class A FM broadcast stations to operate using a maximum effective radiated power (ERP) of 6000 watts, rather than the 3000 watts currently permitted. The purposes of this power increase are to enlarge the service areas of Class A stations and to provide a stronger, more reliable signal within the existing service areas of these stations. Numerous comments and replies were filed in response to this petition.[11]

5. *The Petaz Petition.* The Petaz petition derives much of its rationale from the Commission's BC Docket No. 80-90 proceeding, which created three new intermediate classes of FM broadcast stations.[12] Thus, Petaz notes that there is a substantial difference between the coverage area of a Class A assignment and that of a Class C2 assignment (the next higher class).[13] It notes that in many cases where Class A allotments are currently assigned in Zone II, a more powerful allotment could be made, but not one as powerful as a Class C2 assignment. Therefore, Petaz proposed an intermediate station classification, designated as Class C3, which would permit many of the current Class A stations to upgrade their service and would increase the efficiency and flexibility of the Commission's station classification and allotment scheme. Petaz further suggested, for the proposed C3 Class, co-channel and adjacent channel distance separation requirements based on providing a primary service area bounded by the projected 0.7 mV/m (57 dBu) desired signal strength contour.

6. Comments in support of this petition were received from the National Association of Broadcasters, independent consultants Paul H. Reynolds and Virgle Leon Strickland, and JAB Broadcasting (JAB), licensee of WDLT (FM) in Chickasaw, Alabama. There were no comments submitted in opposition to the proposal. While all of the comments strongly supported the proposal for a new Class C3 in Zone II, they all took exception to the particular contour selected by Petaz as a basis for deriving the distance separation requirements. The commenters were unanimous in urging that separation distances be calcu-

service area for the Class C3 dbu) contour, rather than the uggested by Petaz.

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iat the Commission recently reserved twenty channels for owever, it estimates that only ns can actually take advantage ade on those twenty channels ces to other existing FM sta- cause a substantial investment be necessary. New Jersey be- tions could take advantage of sts, at far less expense, merely ment or by installing higher

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that all Class A stations meet- on requirements be allowed to 00 watts ERP at 100 meters n (HAAT), or equivalent.[18] It itions would protect Class B 0.794 mV/m) contour.[19] New iat grandfathered short-spaced Class A stations be divided into two groups: (1) those short-spaced by less than 10 km and (2) those short-spaced by 10 km or more. Stations in the former group would be allowed to increase power provided that the 60 dBu (1.0 mV/m) contours of other short-spaced stations would be protected. Stations in the latter group would be allowed to increase power provided that the 64 dBu (1.585 mV/m) contours of other short-spaced stations are protected, or if equivalent protection between the two stations is provided.

13. The majority of the comments in response to the New Jersey petition (118 of the 127) were filed by licensees of Class A FM stations from all over the United States. These commenters unanimously support New Jersey's proposal, and most indicate that they would take advantage of any permitted power increase at the earliest opportunity.

14. Many of the remaining comments were filed by licensees of Class B or B1 FM stations. They strongly oppose the New Jersey proposal, asserting that if nearby Class A stations were permitted to increase power in the manner New Jersey requests, interference within the primary service area of Class B and B1 stations would result.[20] National Public Radio (NPR) also opposed New Jersey's petition, but on the grounds that a power increase for Class A stations might limit development of the upper portion of the non-commercial FM band.

15. The comments of the National Association of Broadcasters (NAB) suggest a compromise between the two positions. NAB is sympathetic to the New Jersey request for additional power, but is also concerned that there be no loss of service within any portion, no matter how small, of the primary service areas of Class B stations. NAB suggests that Class A stations be allowed to increase power, but upon individual application, and provided they are able to meet the requirements of a new table of separations. The table of separations NAB provides differs from the current table in Section 73.207 only in that the minimum required distances between Class A stations and co-channel and first adjacent channel Classes A, B1 and B stations are increased slightly. The increased distances, in kilometers, are as follows (the existing required distance is given in parenthesis).

NAB Recommended Separation Distance Increases for 6000 Watt Class A FM Stations

	Class A	Class B1	Class B
co-channel	111 (105)	143 (138)	168 (163)
1st adjacent channel	68 (64)	96 (88)	113 (105)

16. The Association for Broadcast Engineering Standards, Inc. (ABES), in its comments, also favors increased separation distances if Class A power is raised. However, the table of increased distances suggested by ABES differs from NAB's table. The increased distances recommended by ABES, in kilometers, are as follows (current distances in parenthesis):

ABES Recommended Separation Distance Increases for 6000 Watt Class A FM Stations

	Class A	Class B1	Class B	Class C1	Class C
co channel	116 (105)	144 (138)	178 (163)	no change	no change
1st adj	71 (64)	97 (88)	114 (105)	no change	no change
2nd/3rd adj.	28 (27)	no change	no change	75 (74)	107 (105)

PROPOSALS

17. Having considered the petitioners' showings and the comments filed in response thereto, we are persuaded that significant public benefits may indeed result from the creation of a new FM Class C3 in Zone II and a modest increase in transmitting power for Class A stations. We tentatively conclude that each of these actions would result in a net increase in service to the listening public. To the extent that the potential audience for Class A FM stations is expanded, beneficial competition and program diversity are likely to be enhanced.

18. Originally, Class A stations were intended to provide local service to smaller communities. However, in order to meet the demand for FM service, they are now also assigned to larger communities in order to provide additional service where no additional higher class stations can be assigned.[21] Also, to encourage the improvement of FM service, the Commission has in recent years amended its rules to reduce the expense, inconvenience and risk incurred by FM stations, including Class A stations located in smaller communities, seeking upward reclassification of their allotment and station facilities.[22] Consequently, many Class A FM stations today find themselves competing directly with the much larger Class B1, B, C2, C1, and C FM stations in the same communities.[23] The actions we propose have the potential to offset some of the competitive disadvantages currently faced by Class A stations.

19. Class A stations, although they have comparatively small service areas, play a very large and vital role in the broadcasting marketplace, particularly by providing service with a local focus and by serving smaller or specialized programming listener groups. Allowing these licensees to improve their facilities, either through increased transmitting power or upgrading to a higher class, will enable them to better serve the listening public.[24]

20. *Class C3 proposal.* The Commission has initiated preliminary studies which indicate that FM spectrum utilization in Zone II may be increased if an additional intermediate classification is created along the lines of those suggested in the petition filed by Petaz. As demonstrated in BC Docket No. 80-90, which involved a similar action, the creation of such an intermediate classification could further increase the availability of channel assignments while affording full protection to the service of the existing allotments and stations. This would create new opportunities for parties interested in broadcasting, and would permit a number of current Class A stations to upgrade to the higher level facilities. Both results would bring more and better service to the radio audience. Therefore, we propose to add a new class of station, Class C3 (an intermediate class between Class A and C2) with maximum facilities of 25 kW ERP and antenna height of 100 meters (328 feet) above average terrain.

21. For expediency, Petaz chose these particular maximum parameters (25 kW ERP, 100 m HAAT) consistent with those of the Class B1, so as to be able to utilize the existing Class B1 separation distances. We find that the coverage that would result from these parameters (see footnote 13, *supra*.) does fall midway between that of Class A and Class C2, and thus they seem to be reasonable choices. However, because we are not proposing to adopt the same separation distances for Class C3 as are currently required for Class B1 (see paragraph 24, *infra*), we request comment on whether some other combination of maximum ERP and reference HAAT might be more appropriate.

22. In addition, we propose to revise the table (see the proposed revision to Table A of Section 73.207 in Appendix A) which establishes the minimum separation distances for all classes of FM commercial broadcast stations. Using a primary service area bounded by the 1 mV/m (60 dbu) contour to determine the required separation distances, we estimate that at least 15 percent of the current Class A allotments and assignments would be able to upgrade to Class C3 facilities at their present locations. This percentage could be significantly higher if licensees are willing to relocate their transmitting antenna sites, where possible. Also, a number of allotments that currently can not be made in particular communities because of the Class C2 separation distance requirements, may be possible under the Class C3 separation requirements.

23. Spectrum utilization in Zone II could also be improved through adoption of the proposed Class C3. Currently, Class A stations are limited to a maximum ERP of 3 kW with 100 meters HAAT. The next higher station class, Class C2, is limited to a maximum ERP of 50 kW with 150 meters HAAT. Although a Class C2 station may elect to operate with less than the maximum power (provided it operates with an ERP exceeding 3 kW), the availability of nearby adjacent and co-channel allotments is still subject to separation distance requirements based on the Class C2 maximum ERP and reference HAAT. Consequently, it is possible for a Class C2 station to operate with a combination of low effective power and antenna height that will produce a smaller coverage area than that of a Class A station operating with a greater antenna height. Yet, in accordance with our current rules, such a Class C2 station can preclude other allotments on the basis of protecting vast areas that it does not actually serve.[25] It is our tentative belief that the public would be best served by reclassifying such stations as Class C3 if they they do not elect to increase their facilities within some specified period, because this could make room for additional Class C3 allotments in Zone II. As was determined in BC Docket 80-90, a three year period appears to be a reasonable time frame for stations to upgrade their facilities.

24. As noted above, the proposed Class C3 has the same range of operating facilities (i.e., powers and antenna heights) as Class B1. The difference, as also noted, is that Class B1 stations have required separations intended to protect them from adjacent and co-channel interference over an area having an approximate radius of 45 km (27.9 miles), whereas Class C3 stations would have required separations intended to protect them from similar interference over an area having an approximate radius of 39 km (24.2 miles). In BC Docket No. 80-90, we conducted some analysis of the potential utility of a category of station similar to the now proposed C3 Class.[26] While we found some projected allotment gains, we concluded that such an intermediate station classification would not be the most beneficial at that time for use in Zone II. We sought then

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series of monthly meetings which began in June 1987. The Subcommittee's recommendations form the basis for NAB's comments.

30. Using METHOD 2, we would allow only those Class A stations able to meet appropriate separation distances (to existing licensed stations, applications, or construction permits, but not vacant allotments) to increase power. Service gains would not be as great as under METHOD 1, but any adverse effects on existing stations would be minimized. The effect of this approach would be to create two categories of Class A station - one would consist of 6000 watt Class A stations; the other would comprise those Class A stations that could not reach 6000 watts ERP because of their inability to meet the increased separation requirements. All grandfathered short-spaced stations would apparently fall into the latter category. However, some grandfathered short-spaced stations might be allowed to increase power (pursuant to existing policy) if mutual agreements could be reached with all of the stations involved, and if it were shown that such an increase would serve the public interest.[32]

31. METHOD 2, with its two categories of stations (3000 watts and 6000 watts), implies different separation distance requirements for each power level. Alternatively, we could employ a single set of distances based on the higher power. However, that would unnecessarily restrict the ability of lower power stations to change sites. Both choices appear to add a measure of complexity to what is intended to be a straight-forward proposal. We seek comment on this.

32. Regardless of which method were to be selected, we would prefer to minimize administrative burdens. We note that NAB has recommended that we consider an increase in Class A maximum power only upon individual application. Although the Commission generally proceeds upon individual applications in upgrading FM facilities, we are concerned that employment of such a procedure here would result in undue delays, even for applications that present no problems. Nevertheless, we solicit comments on the procedural aspects and implications of a case-by-case approach.

33. We believe, however, that the application processing burden can be lessened and unnecessary delays in authorizing the proposed power increase can be avoided if we employ procedures combining elements of both the "blanket" increase requested by New Jersey and the strictly case-by-case method suggested by NAB. Therefore, we are proposing the following procedures for handling administration of the Class A power increase. We propose to allow those Class A stations that can effect the power increase by simply adjusting transmitter output power, replacing an omnidirectional antenna with a higher gain omnidirectional antenna, replacing the transmission line or components within the transmission line, or by a combination of these methods, to do so without individual prior approval.[33] In such cases, the station licensee would be required only to file Form 302, together with a supplemental exhibit addressing environmental and coordination matters[34], within ten days after the power increase is made.[35] In all other cases, such as a change in location or an increase in antenna height, individual prior approval would be required and the station licensee would need to file Form 301 before making the change. Also, in cases where the power increase could result in exposure of workers or the general public to levels of radio frequency radiation in excess of American National Standards Institute guidelines (ANSI C95.1-1982), approval by the Commission in advance of implementation would be required.[36] Use of these procedures would enable many Class A stations to take advantage of the increase quickly, and would avoid undue burden on our application processing staff. (*See* the proposed amendments to Section 73.1690 in Appendix A.)

34. The rule amendments proposed differ only slightly between METHOD 1 and METHOD 2. Specifically, in the proposed revisions to Section 73.211, proposed new paragraph (b)(1)(iv) would be included if METHOD 2 were employed, and excluded if METHOD 1 were employed. (*See* proposed amendments to Section 73.211 in Appendix A.) Also, additional revisions to Section 73.207 would be necessary if METHOD 2 were chosen *and* applications from all classes of stations, rather than just applications from Class A stations, were required to comply with the additional separation distance requirements. We invite suggestions for any additional rule changes that might be needed to administer the proposed power increase.

35. With regard to NPR's concern that Class A upgrades may adversely affect public broadcast services, (particularly in areas where TV Channel 6 operation reduces the spectrum available for non-commercial operations), we note that we already developed a policy to address this issue in the *First Report and Order* in MM Docket 86-144[37]. We would apply the same policy to the Channel 221 Class A to Class C3 upgrades that would result from our proposal herein. Nevertheless, we invite comments as to whether and how this policy should be modified to prevent public radio service from being constricted if bilateral increased separation requirements are employed in connection with the proposed Class A power increase.

OTHER MATTERS

36. *IF separation distances*. Earlier this year we adopted a *Further Notice of Proposed Rule Making* (*Further Notice*) in MM Docket 86-144 in which we proposed to adjust the FM domestic intermediate frequency (IF) distance separation requirements to provide a uniform level of protection from IF interference.[38] The distances we set forth in that proposal were calculated to prevent overlap of the predicted 36 mV/m (91 dBu) contours of IF-related stations, regardless of the station classes. Consistent with that proposal, we have calculated IF separation distances for the proposed new Class C3 based on the same technical criterion, and have incorporated them into our proposed rules here.[39] (*See* the proposed Section 73.207 in the Appendix.)

37. In view of the proposed power increase for Class A stations, however, we find it necessary to propose an increase in the required Class A- to-Class A IF distance separation and slightly less reduction (than proposed in the *Further Notice*) in the required IF distance separations between Class A and all other classes of stations. If Class A power were to be increased as we propose, and the Class A-to-Class A distance remained at 8 km, as the rules currently require, overlap of the 50 mV/m contours, rather than the 36 mV/m contours, would be prevented. We considered the 50 mV/m level in our IF proposal, but found that the record in that proceeding did not support, on technical grounds, relaxation to that level.[40] We are not seeking comment here on the appropriate level of protection from IF interference as this issue will be decided in the other proceeding (MM Docket 86-144). We do however invite comments on the matter of how to handle any existing IF-related Class A stations that do not meet the proposed 10 km Class A to Class A spacing.

38. *Stations located in Puerto Rico and the Virgin Islands*. Class A, B1 and B FM stations are authorized in Puerto Rico and the U.S. Virgin Islands, which are part of Zone I-A. However, in order to overcome the effects of the islands' mountainous terrain, these stations are already allowed much larger coverage areas than their counterparts in the mainland.[41] The additional coverage results from the application of a less restrictive overheight power reduction method for facilities there.[42] We see no reason to prevent these stations from using the same range of transmitter ERP as their mainland counterparts. However, we believe that no additional coverage is justified. Therefore, we are proposing to increase the maximum ERP for Puerto Rico/Virgin Islands Class A FM stations to 6000 watts, and to reduce the reference HAAT to 240 meters. By doing so, we are maintaining exactly the same coverage area that these stations now have. In other words, these stations would be allowed to increase power to 6000 watts provided that their antenna HAAT does not exceed 240 meters. Also, we are proposing to revise paragraph 73.211(b)(3) governing stations in Puerto Rico and the Virgin Islands to conform it to the system for station maximum limits that we adopted in MM Docket 86-144. To this end we are proposing reference HAAT values for all three classes that are equivalent to the current height-power combinations in the rules.[43]

39. *Canadian and Mexican border areas*. Before the proposed Class C3 allotment or the proposed Class A power increase could be implemented within the areas adjoining the Canadian and Mexican borders, coordination with the respective governments of those two countries would be necessary. There are 429 Class A stations within 320 kilometers (199 miles) of the Canadian border and 133 Class A stations within 320 kilometers of the Mexican border. We anticipate that any of these stations that wish to increase power would have to be evaluated on a case-by-case basis.

40. At present, the maximum power permitted for Class A stations in our bilateral FM broadcasting agreements with Canada and Mexico is 3000 watts (with antenna HAAT of 100 meters and 90 meters, respectively). Consequently, it would be necessary for Class A stations that propose to increase power above 3000 watts within 320 kilometers of the borders to be renotified as Class B1 or Class B allotments, as appropriate. We anticipate that this would require many specially negotiated short-spaced allotments. Provision is made in the Canadian Agreement for such negotiations. However, the Mexican Agreement makes no such provision and it would be necessary to defer short-spaced notifications pending the establishment of a new agreement with Mexico containing needed provisions (discussions have already been initiated).

41. *Reclassification of existing stations*. There are some Class C2 stations currently operating with an ERP of 25 kW or less and an antenna HAAT such that the reference distance[44] for these stations is not greater than 39 km (the class contour distance for the proposed C3 Class). Also, there are a few Class C stations operating with (grandfathered) ERP greater than 100 kW, but with an antenna HAAT such that the reference distance for these stations is not greater than 72 km. In both cases, we

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NSIDERATIONS

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present. Section 1.1202(h). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206

INITIAL REGULATORY FLEXIBILITY ANALYSIS

46. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IFRA) of the expected impact on small entities of the proposals suggested in this document. Comments on the IFRA are invited. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IFRA to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*,(1981)).

I. Reason for action

The Commission is proposing to add an additional Zone II FM broadcast station classification (Class C3), and to increase the permitted maximum power for Class A FM broadcasting stations. The principal reason for these proposals is to provide additional options for improvement of facilities of Class A FM stations. In particular, the proposed action would provide means for Class A FM broadcast stations to expand their signal coverage areas and to provide a stronger signal within their existing coverage areas, while providing reasonable levels of protection to other classes of existing stations and allotments. These proposed actions are intended to increase FM broadcast service to the public and to encourage beneficial competition between broadcast facilities.

II. The objective

The objectives of the proposed rules are to promote a competitive marketplace for the development and use of broadcast facilities and services, to provide a regulatory framework that permits markets for broadcast services to function effectively, and to encourage efficiency in the allocation, licensing, and use of the electromagnetic spectrum.

III. Legal basis

The legal basis for the action proposed herein is contained in Sections 4 and 303 of the Communications Act of 1934, as amended. Specifically, paragraphs 303(a), 303(b), 303(c), 303(d), 303(f), 303(h) and 303(r) of the Communications Act apply.

IV. Description, potential impact, and number of small entities affected

There are approximately 5382 FM broadcast stations, most of which are small entities. Changes in operating parameters as proposed herein have the potential to affect the balance between the number of stations that can be authorized in a given market and the extent of primary service each can provide.

V. Reporting, Recordkeeping, and Other Compliance Requirements

There would be no additional reporting, recordkeeping or other compliance requirements. However, under the proposed rules, those Class A licensees able to increase transmitting power without prior approval would be required to file, together with existing Form 302, a supplementary exhibit comprising responses to a few of the questions that are contained in existing Form 302.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rules

No federal rules overlap, duplicate or conflict with the proposed rules.

VII. Any Significant Alternatives Minimizing Impact On Small Entities and Consistent with stated Objective

Two of the parties filing initial comments suggested that additional or increased distance separations be required for Class A FM stations wishing to increase power. These suggestions could affect the impact of this proposal on small entities. The Commission will consider all relevant and timely comments filed that address these alternatives.

PAPERWORK REDUCTION

47. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to impose a modified information collection requirement on the public. Implementation of any modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSE

48. IT IS PROPOSED, pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303, That Part 73 of the Commission's Rules be AMENDED as set forth in the attached Appendix A.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III.
Acting Secretary

APPENDIX A

It is proposed to amend 47 CFR Part 73 as follows:

1. The authority citation for Part 73 would continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.207 would be amended by revising paragraph (a), the introductory text to paragraph (b) and the text of paragraph (b)(1), by revising six entries in and adding seven rows to TABLE A in paragraph (b)(1), by revising the text of paragraphs (b)(2) and (b)(3), and by adding a new paragraph (c), as follows:

§ 73.207 Minimum distance separation between stations.

(a) Except as provided in §73.213, FM allotments and assignments must be separated from other allotments and assignments on the same channel (co- channel) and on five pairs of adjacent channels by not less than the minimum distances specified in paragraphs (b) and (c) of this section. The Commission will not accept petitions to amend the Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments unless transmitter sites meet the minimum distance separation requirements of this section. Class D (secondary) assignments, however, are subject only to the separation distance requirements contained in paragraph (b)(3) of this section. (*See* §73.512 for rules governing the channel and location of Class D (secondary) assignments.)

(b) The distances listed in Tables A, B, and C apply to allotments and assignments on the same channel and each of five pairs of adjacent channels. The five pairs of adjacent channels are the first (200 kHz above and 200 kHz below the channel under consideration), the second (400 kHz above and below), the third (600 kHz above and below), the fifty-third (10.6 MHz above and below), and the fifty-fourth (10.8 MHz above and below). The distances in the Tables apply regardless of whether the proposed station class appears first or second in the "Relation" column of the table.

(1) Domestic allotments and assignments must be separated from each other by not less than the distances in Table A which follows:

TABLE A - MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)

Relation	Co-channel	200 kHz	400/600 kHz	10.6/10.8 MHz
A to A	(no changes to other distances)			10 (6)
A to B1				12 (8)
A to B				15 (9)
A to C3	138 (86)	84 (52)	42 (26)	12 (8)
A to C2				15 (9)
A to C1				22 (14)
A to C	(no changes to other distances)			29 (18)
B1 to B1				
B1 to B				

0 (31) 14 (9)

ces)

1 (44) 17 (11)

ces)

3 (27) 14 (9)
6 (35) 17 (11)
6 (47) 24 (15)
6 (60) 31 (19)

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MINIMUM DISTANCE SEPARATION FROM TV CHANNEL 6 (82-88 MHz)

FM Class	TV Zone I	TV Zones II & III
A	16	21
B1	19	23
B	22	26
C3	19	23
C2	22	26
C1	29	33
C	36	41

3. 47 CFR 73.210 would be amended by revising paragraphs (a), (b)(1), (b)(2), and (b)(3) to read as follows:

§ 73. 210 Station classes.

(a) The rules applicable to a particular station, including minimum and maximum facilities requirements, are determined by its class. Possible class designations depend upon the zone in which the station's transmitter is located, or proposed to be located. The zones are defined in §73.205. Allotted station classes are indicated in the Table of Allotments, §73.202. Class A, B1 and B stations may be authorized in Zones I and I-A. Class A, C3, C2, C1, and C stations may be authorized in Zone II.

(b) The power and antenna height requirements for each class are set forth in §73.211. If a station has an ERP and an antenna HAAT such that it cannot be classified using the maximum limits and minimum requirements in §73.211, its class shall be determined using the following procedure:

(1) Determine the reference distance of the station using the procedure in paragraph (b)(1)(i) of §73.211. If this distance is less than or equal to 28 km, the station is Class A; otherwise,

(2) For a station in Zone I or Zone I-A, except for Puerto Rico and the Virgin Islands.

(i) If this distance is greater than 28 km and less than or equal to 39 km, the station is Class B1

(ii) If this distance is greater than 39 km and less than or equal to 52 km, the station is Class B.

(3) For a station in Zone II:

(i) If this distance is greater than 28 km and less than or equal to 39 km, the station is Class C3

(ii) If this distance is greater than 39 km and less than or equal to 52 km, the station is Class C2.

(iii) If this distance is greater than 52 km and less than or equal to 72 km, the station is Class C1.

(iv) If this distance is greater than 72 km and less than or equal to 92 km, the station is Class C.

* * * * *

4. 47 CFR 73.211 would be amended by revising paragraphs (a)(1), (a)(2), the table in the introductory text of paragraph (b)(1), paragraphs (b)(1)(ii) and (b)(3) to read as follows:

§ 73. 211 Power and antenna height requirements.

(a) *Minimum requirements.* (1) Except as provided in paragraphs (a)(3) and (b)(2) of this section, FM stations must operate with a minimum effective radiated power (ERP) as follows:

(i) The minimum ERP for Class A stations is 0.1 kW.
(ii) The ERP for Class B1 stations must exceed 6 kW.
(iii) The ERP for Class B stations must exceed 25 kW.
(iv) The ERP for Class C3 stations must exceed 6 kW.
(v) The ERP for Class C2 stations must exceed 25 kW.
(vi) The ERP for Class C1 stations must exceed 50 kW.
(vii) The minimum ERP for Class C stations is 100 kW.

(2) Class C stations must have an antenna height above average terrain (HAAT) of at least 300 meters (984 feet). No minimum HAAT is specified for Classes A, B1, B, C3, C2, or C1 stations.

* * * * *

(b) *Maximum limits.* (1) Except for stations located in Puerto Rico or the Virgin Islands, the maximum ERP in any direction, reference HAAT, and distance to the class contour for each FM station class are listed below:

Station Class	Maximum ERP	Reference HAAT in meters (ft)	Class contour distance in kilometers
A	6kW (7.8 dBk)	100 (328)	28
B1	25kW (14.0 dBk)	100 (328)	39
B	50kW (17.0 dBk)	150 (492)	52
C3	25kW (14.0 dBk)	100 (328)	39
C2	50kW (17.0 dBk)	150 (492)	52
C1	100kW (20.0 dBk)	299 (981)	72
C	100kW (20.0 dBk)	600 (1968)	92

* * * * *

(ii) If a station's ERP is equal to the maximum for its class, its antenna HAAT must not exceed the reference HAAT, regardless of the reference distance. For example, a Class A station operating with 6 kW ERP may have an antenna HAAT of 100 meters, but not 101 meters, even though the reference distance is 28 km in both cases.

* * * * *

(iv) Class A stations, other than stations located in Puerto Rico or the Virgin Islands, are further limited to a maximum ERP in any direction of 3kW (4.8 dBk), with height power reduction based on a class contour distance of 24 kilometers, unless the following minimum separation distances to other FM assignments are met:

MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)

Relation	Co-channel	200 kHz	400/600 kHz
A to A			
A to B1			
A to B			

(SEE TEXT OF NOTICE FOR POSSIBLE DISTANCES)

(3) For stations located in Puerto Rico or the Virgin Islands, the maximum ERP in any direction, reference HAAT, and distance to the class contour for each FM station class are listed below:

Station Class	Maximum ERP	Reference HAAT in meters (ft)	Class contour distance in kilometers
A	6kW (7.8 dBk)	240 (787)	42
B1	25kW (14.0 dBk)	150 (492)	46
B	50kW (17.0 dBk)	472 (1549)	78

* * * * *

5. 47 CFR 73.506 would be amended by revising paragraph (a)(3) to read as follows:

§ 73. 506 Classes of noncommercial educational FM stations and channels.

(a) * * *

(3) Noncommercial educational FM (NCE-FM) stations with more than 10 watts transmitter power output are classified as Class A, B1, B, C3, C2, C1, or C depending on the station's effective radiated power and antenna height above average terrain, and on the zone in which the station's transmitter is located, on the same basis as set forth in §§73.210 and 73.211 for commercial stations.

* * * * *

6. 47 CFR 73.610 would be amended by adding a new paragraph (f) to read as follows:

§ 73. 610 Minimum distance separations between stations.

* * * * *

(f) The distances listed below apply only to allotments and assignments on Channel 6 (82-88 MHz), after , 1988 The Commission will not accept petitions to amend the Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments where the following minimum distances (between transmitter sites, in kilometers) from any FM Channel 253 allotment or assignment are not met:

CE SEPARATION
EL 253 (98.5 MHz)

1V Zones II & III
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current distances in §73.207 of the FCC rules protect service generally within the 60 dBu contour for Class A, C2, C1, and C stations, within the 57 dBu contour for Class B1 stations, and within the 54 dBu contour for Class B stations. The distances from the station location to these "desired signal" contours are derived from F(50,50) propagation data, whereas the distances to the "undesired signal" contours are derived from F(50,10) propagation data. F(50,50) means that the signal strength exceeds the specified level at 50% of the locations 50% of the time. F(50,10) means that the signal strength exceeds the specified level at 50% of the locations 10% of the time. These three basic signal strengths (54 dBu, 57 dBu and 60 dBu) are used for computations in this analysis instead of the numerous signal strengths that could be derived from the separation distances. For example, instead of using 59.3 dBu (0.927 mV/m) for Class A and 59.5 dBu (0.944 mV/m) for Class C, 60 dBu (1 mV/m) is used for both. It is understood that in the absence of interfering signals, usable service is provided well beyond the boundaries of these contours, and that this secondary service could be adversely affected by the Class A power increase requested. However, the effects on secondary service are not considered here. This analysis also ignores the effects of terrain and directional antenna characteristics, which could serve either to lessen or to exacerbate the effects shown. These simplifications are acceptable because the purpose of this analysis is to show only in a relative sense the theoretical magnitudes of the effects of a power increase, from 3000 to 6000 watts ERP, for Class A stations.

Attached table and charts. Attached is a table showing the minimum separation distances necessary, currently and if the Class A power increase were implemented, to maintain protection ratios (undesired to desired signal ratios) as follows: -20 dB for co-channel, -6 dB for first adjacent channel, and +40 dB for 2nd and 3rd adjacent channel. Also, there are eight charts showing the effects of increasing Class A power from 3,000 to 6,000 watts on other existing stations. On each chart, the shaded areas represent the predicted 60 dBu coverage area gained by the Class A station. Solid areas represent lost area (i.e. protection ratios exceeded) within the appropriate signal contour (54, 57 or 60 dBu).

Class A service area gains. The predicted 60 dBu contour of a Class A station operating with the current maximum facilities (3000 watts ERP and 100 meters antenna HAAT) is located approximately 24.2 kilometers (15.0 miles) from the transmitter. Increasing Class A transmitting power from 3,000 to 6,000 watts would provide a modest increase in this distance, from 24.2 to 28.3 kilometers (15.0 to 17.6 miles). Consequently, the approximate predicted area within the 60 dBu contour would increase from 1839.8 to 2516.1 square kilometers (710.7 to 971.9 square miles). This is an increase of 36.8% in area.

Impact on existing Class A stations. Where two co-channel Class A stations are at the minimum spacing permitted by §73.207, and both increase power from 3,000 to 6,000 watts (CHART A), no coverage within the 60 dBu contour is lost. However, each station gains less area than it would in a non-interference- limited situation. If one Class A station increases power, and the other doesn't (CHART B), the station with increased power receives the benefit of the full increase in predicted coverage area (as in the non-interference- limited situation), while the other station would lose an essentially negligible amount of coverage within its 60 dBu contour (approximately 14 square kilometers). Exactly the same analysis applies for the first adjacent channels (CHARTS C & D), except that the area lost is even less. It should be noted here that each Class A station increasing power could theoretically affect a maximum of six other co-channel Class A stations, plus 12 first adjacent channel Class A stations. Currently required spacings for second and third adjacent channel stations are sufficient to protect existing Class A stations from increased power Class A stations. However, there *may* be some minor impact in the gained coverage area for minimum spaced Class A stations that increase power, as a result of second and third adjacent channel signals.

Impact on stations in Zone II. Zone II contains Class A, C2, C1 and C stations. Strictly from a contour analysis perspective, the requested Class A power increase would not cause any loss of coverage within the 60 dBu contour of any Class C, C1, or C2 FM broadcast station.

Impact on stations in Zone I. Zone I (an area of greater population density in the northeastern portion of the continental U.S.) contains Class A, B1 and B stations. For the hypothetical situation where a Class A station is at the minimum spacing to a co-channel Class B or B1 station (CHARTS E & G) or a first adjacent channel Class B or B1 station (CHARTS F & H respectively), the power increase would result in a small loss of area within the 54 dBu (or 57 dBu, as applicable) contour. These theoretical area losses are as follows:

Class A to B, co-channel	232 square km or 1.7% of the area within the 54 dBu contour.
Class A to B, 1st adjacent channel	200 square km or 1.5% of the area within the 54 dBu contour.
Class A to B1, co-channel	28 square km or 0.4% of the area within the 57 dBu contour.
Class A to B1, 1st adjacent channel	115 square km or 1.8% of the area within the 57 dBu contour.

It appears that there are currently no situations where a Class A station is located closer than 170 kilometers to a Class B station on the same channel. In fact there are only 5 instances where a Class A and B station on the same channel are located within 250 km of each other. Consequently, there is actually very little likelihood of Class B service area (within the 54 dBu contour) being lost as a result of a co-channel Class A station increasing power from 3000 to 6000 watts.

With regard to Class B1 protection, at this time there are only 29 Class B1 stations. These B1 stations are either new, upgraded former Class A stations, or downgraded former Class B stations. Of these, only the downgraded former Class B stations could be short-spaced. Although spacing data for these Class B1 stations vs Class A stations has not been analyzed here, there is not, in the aggregate, much potential for lost service (within the 57 dBu contour) from only 29 stations, each potentially losing only a small percentage.

Therefore, the only significant consideration regarding loss of service area within assumed protected contours, resulting from an increase in Class A power from 3000 to 6000 watts under existing minimum separations, is the Class A to B first adjacent channel situation. There appear to be 300 to 400 instances in which existing Class A stations are located within 125 km of existing Class B stations on the first adjacent channel. From CHART F, it can be seen that the current required minimum separation between a Class A station and a Class B station on the first adjacent channel (105 km) does not protect all of the area within the 54 dBu contour of the Class B station.

Each increased power Class A station could theoretically affect a maximum of 3 co-channel Class B stations or 4 co-channel Class B1 stations, plus 2 first adjacent channel Class B or B1 stations.

Impact on stations in Zone I - A. Stations in Puerto Rico and the Virgin Islands are allowed full power operation at a much higher antenna height above average terrain than their mainland counterparts. Increasing the Class A limit to 6,000 watts while retaining the current full power antenna HAAT of 335 meters in Puerto Rico and the Virgin Islands would result in Class A stations having a greater coverage area than Class B1. Therfore, it does not appear to be advantageous to increase the power limit in Puerto Rico or the Virgin Islands unless the reference HAAT (highest HAAT for full-power operation) is decreased by a corresponding amount. (Stations in southern California are also in Zone I-A, but must comply with the same height-power limits as stations in Zone I.)

FOOTNOTES

[1] Class A FM broadcast stations are the smallest FM broadcast stations in terms of allowed primary service area. *See* footnote 6 *infra*.

[2] Section 307(b) of the Communications Act of 1934, as amended, requires the Commission to make a fair, efficient, and equitable distribution of radio service among the several States and communities. Allotments are made through the rule making process, and when competing proposals are received, they are evaluated in light of stated priorities, specifically (1) provision of a first full-time aural service, (2) provision of a second full-time aural service or a first local service, and (3) other public interest factors (e.g., number of services received in the proposed area, the need for or lack of public radio service, etc.). *See*, the *Second Report and Order* in BC Docket 80-130, 90 FCC 2nd 88 (1982), at page 90, paragraphs 6-13.

[3] *See* 47 C.F.R. §73.202.

[4] The zones are defined in §73.205 of the Commission's rules. Zone I is a large area in the northeastern portion of the United States, containing the District of Columbia, the states of Indiana, Illinois, Pennsylvania, Ohio, West Virginia, Maryland, Delaware, Massachusetts, Connecticut, and portions of Michigan, Wisconsin, New York, Maine, New Hampshire, Vermont and Virginia. Zone I-A contains Puerto Rico, the U.S. Virgin Islands, and all but the northernmost portion of California. Zone II contains Alaska, Hawaii, and the rest of the continental United States not in Zones I and I-A.

[5] *See* 47 C.F.R. §73.210.

[6] The effective radiated power requirements and limits for each class of FM broadcast station are set forth in §73.211 of the Commission's rules. In terms of these requirements and limits, the various classes compare, from smallest to largest, as in the following table. Also shown are the current reference antenna height

:e area radius estab-

:nce
na Approx pri-
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328) m	24 (15) km (mi)
328)	45 (28)
492)	64 (40)
492)	52 (32)
981)	72 (45)
(1968)	105 (65)

cial FM broadcast sta-

the area within which
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FM broadcast service,
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Commission's rules.

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is located in Zone I.
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ice Report No. 1709, on

w Jersey and the National
ission extended the dead-
988, and replies to March
iary 25, 1988.

Docket No. 80-90, 94 FCC
June 27, 1983, in which

lculated areas of primary
n these three classes are as

Area (mi²)

707
1,810
3,217

mmission, through various
vored the larger Class B and
A facilities, necessitating the
egation, New Jersey cites as
Report and Order in Docket
which the Commission *inter*

alia increased the *maximum* power for Class B stations from 20000 to 50000 watts, (2) the *Second Report and Order* in BC Docket 80-130, 90 FCC 2nd 88 (1982), where the Commission allowed Class B and C allotments in smaller communities; (3) the smaller facilities afforded to Class A stations relative to the larger classes; and (4) the protection, in effect, of areas served by weaker signal strengths of Class B and B1 stations, as compared to Class A protection.

[15] New Jersey offers as specific examples of such areas the counties of Monmouth, Ocean, Morris, and Middlesex, NJ. Much of the population of these areas can not receive the signals of local (Class A) stations, New Jersey claims.

[16] This rule prevented the Class A stations operating on these reserved channels from upgrading to one of the larger classes without changing to another channel. *See First Report and Order* in MM Docket 86-144, 2 FCC Rcd 660 (1987).

[17] On December 21, 1987, New Jersey filed a supplement to its petition, revising its proposal with regard to Class A to B adjacent channel required spacing and to the methodology under which grandfathered short- spaced Class A FM stations would be allowed to increase power. In its original filing, New Jersey had recommended an increase in the required separation between Class A and adjacent channel Class B stations, from 105 to 109 km. New Jersey's proposed treatment of grandfathered short-spaced Class A stations had originally relied on a table of permissible modifications contained in §73.213 of the Commission's rules at that time. The supplement differs from the original filing principally in that New Jersey no longer recommends an increase in the Class A to B first adjacent channel minimum separation. New Jersey now states that existing separations will provide adequate protection for Class B stations. New Jersey also revised its recommended procedure for handling grandfathered short-spaced stations as is explained further in the main text.

[18] The phrase "or equivalent", used in the context of maximum facilities limits, means any combination of higher antenna HAAT and lower ERP that produces a reference distance, computed in accordance with §73.211 of the rules, equal to the reference distance produced by the stated antenna HAAT and ERP.

[19] By protecting a contour, New Jersey means that the ratio of the undesired signal strength to the desired signal strength at the protected contour does not exceed the specified protection ratios. The protection ratios generally used for commercial FM stations are as follows: (1) co-channel, -20 dB, (2) first adjacent channel, -6 dB, (3) second and third adjacent channel, +40 dB.

[20] This assertion is based upon the premise that the primary service area for a Class B station is that area within which the provided signal has a predicted median strength of 0.5 mV/m or greater (the 54 dBu contour), and for a Class B1 station, the area within which the provided signal has a predicted median strength of 0.7 mV/m or greater (the 57 dBu contour). *See*, for example, the comments of Greater Media, Inc. and Cox Enterprises, Inc. However, §73.209 of the Commission's rules provides that the extent of protection accorded commercial FM broadcast stations is limited solely to that which results from the application of the rules specifying minimum distance separation between stations, and maximum power and antenna height of stations. Such protection does not correspond exactly to protection of the area within any particular signal strength contour (unlike the situation for non-commercial FM broadcast stations, whose 1 mV/m signal contour is protected by the Commission's rules).

[21] In the *Second Report and Order* in BC Docket 80-130, the Commission rescinded its policy that prevented intermixture of the classes in the same community. *See* 90 FCC 2nd 88 (1982), at page 97, paragraphs 24-30.

[22] *See* the *Report and Order* in MM Docket No. 83-1148, 98 FCC 2nd 916 (1984). Citing its policy encouraging broadcast licensees to upgrade their facilities (in order to better serve their audiences), the Commission amended its rules to provide for the modification of existing licenses in the course of a rule making proceeding to amend the Table of Allotments, for licensees seeking to upgrade to a newly allotted superior class, provided at least one additional equivalent channel is available to accomodate other parties expressing interest in the new channel. *See also* the *Report and Order* in MM Docket No. 85-313, 60 RR 2nd 114 (1986). The Commission further expanded the applicability of this procedure to include certain types of situations in which no additional equivalent channel is available. *See also* the *First Report and Order* in MM Docket No. 86-144, 2 FCC Rcd 660 (1987). The Commission removed a rule that had reserved 20 channels for Class A stations only. This rule had prevented Class A stations operating on these channels from upgrading to one of the larger classes of station without changing to another channel.

[23] There are currently approximately 310 communities where both Class A and higher class FM stations are allotted. But there are many additional small communities that are suburbs of larger ones, thus setting up competition between large stations allotted to the larger communities (but whose signals cover the smaller communities also) and Class A stations in those smaller communities.

[24] Increased power (that would be made available to Class A stations by either of the two proposals) offers two distinct benefits. First the existing audience would receive a stronger and therefore more reliable signal. This is of particular value to those who are currently in a fringe area. Second, a usable signal would be extended into new areas and thereby offer an additional choice to the radio audience in those areas.

[25] A Class C2 station with maximum facilities is expected to serve an area having a radius of approximately 52 km (32 mi). A Class C2 station with minimum facilities (3100 watts ERP and 30 meters HAAT), on the other hand, may serve an area having a radius of only 13 km (8 mi). However, other FM allotments for that region are precluded on the basis of the projected full service radius (32 miles).

[26] *See* the *Report and Order* in BC Docket 80-90, paras 53-58, and Appendix B, Option 5.

[27] New Jersey terms the objective of its request "coverage relief", although the coverage of an FM station is determined by many factors such as terrain, antenna height, transmitting power, and proximity to other FM stations. The Commission is considering herein only a possible increase in the maximum permitted effective radiated power. A major benefit of such an increase would be a stronger (and therefore more reliable) signal within the current coverage area. However, most stations would also realize a significant increase in coverage. Class A stations that raise power by the full amount proposed would potentially increase their predicted 1 mV/m coverage area by 37 percent.

[28] *See Further Notice of Proposed Rule Making* in MM Docket 86-144, (FCC 88- 87, released March 22, 1988) 3 FCC Rcd 1601 (1988).

[29] Grandfathered short spaced stations are stations at locations authorized prior to November 16, 1964 that did not meet the minimum distance requirements (*see* §73.207) on that date and that have remained short- spaced since that date. *See* §73.213.

[30] Consistent with our determination in MM Docket 86-144 that licensees should not be allowed to modify the facilities of grandfathered short- spaced stations in ways that increase the likelihood of interference, we would not allow the power increase to extend a grandfathered short spaced Class A station's 1 mV/m contour toward the 1 mV/m contours of other short-spaced stations. *See Second Report and Order* in MM Docket 86-144, 2 FCC Rcd 5693 (1987), *recon. granted* (FCC 88-152, released April 29, 1988)

[31] Graphical data showing the frequency of various separation distances for actual FM assignments is given as an appendix to the article "An Analysis of the FCC's FM Station Separation Methods in view of Docket 87-121" by John C. Kean, page 177, 1988 Proceedings, 42nd Annual NAB Broadcast Engineering Conference. The article shows, among other things, that most FM stations are located farther apart than the minimum spacings required by FCC rules.

[32] If the Commission finds that the public interest would be served by a mutual increase in the facilities of two or more grandfathered short- spaced stations pursuant to the terms of such an agreement, Section 73.213 may be waived to permit the increase. However, this policy does not apply to site relocations. *See Public Notice*, FCC 75-1367, dated December 15, 1975, 57 FCC 2d 1263 (1975); 40 Fed. Reg. 58893, December 19, 1975, codified in §73.4235 of the Commission's rules. *See also Public Notice*, released September 25, 1987, 2 FCC Rcd 5701 (1987), which extended the policy to encompass agreements with grandfathered short- spaced stations on the second and third adjacent channels.

[33] However certain exceptions would apply - *see* Canadian and Mexican border areas, *infra*.

[34] The supplemental exhibit would be provided as a reproducible appendix to the *Report and Order* in this proceeding. It would contain questions and informational showing requirements related to potential environmental and coordination concerns, such as hazardous radiation of radio frequency energy, proximity to the Canadian and Mexican borders, FOB monitoring stations, and "quiet zones."

[35] If the Form 302 or supplement, however, were to reveal any discrepancy from licensed parameters of record (*e. g.*, geographical coordinates, antenna heights), or that the station is ineligible for the power increase (under Method 2), the staff would be directed to order that the subject Class A station be returned to its licensed parameters and to require the station licensee to file other forms or informational showings as necessary.

[36] Where a Commission action authorizing such a proposal could have a significant impact upon the quality of the human environment, within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4321- 4335, the preparation of an environmental assessment is required. For further information about environmental processing requirements and procedures, see Part 1 Subpart I of the Commission's Rules, 47 CFR §1.1301 *et seq.*, particularly, §1.1307(b) in reference to radio frequency radiation.

[37] *See* 2 FCC Rcd 660 (1987) at paragraph 12. The Commission stated the policy that, where the Grade B contour of a Channel 6 TV station and the 1 mV/m signal contour of a proposed upgraded facility on FM Channel 221 would overlap, the petitioner of such facility would have a particularly heavy burden to demonstrate that a grant of its request to upgrade is in the public interest. In such situations, the Commission will examine the record to determine the availability of existing and potential non-commercialeducational FM service.

[38] *See Further Notice of Proposed Rule Making* in MM Docket 86-144, (FCC 88- 87, released March 22, 1988) 3 FCC Rcd 1601 (1988).

[39] Our use of the 36 mV/m level as a basis for calculating IF separation distances in this proceeding does not prejudge the issues raised in the *Further Notice*. We will conform our final action in this proceeding to the outcome of that one.

[40] Id. at paragraph 6 and footnote 14.

to and the Virgin Islands than their mainland counterparts, ultimately adopts the power maximum area within the Puerto Rican Class A station 0 mi²), while the maximum mainland Class A station effect would be only 2516 increase, it is only 1840 km²

tions in the mainland U.S. r (3000 watts ERP) if their Puerto Rico/Virgin Islands ll power (3000 watts ERP) meters. For antenna HAAT st be used, such that the tour is not greater than it 335 meters HAAT. See 47

lanation of the maximum assification system for com- r and Order in MM Docket on, granted (FCC 88-152. F.R. §§73.210 and 73.211. thod for determining refer- ic distance to the predicted n kilometer.

MINIMUM DISTANCE SEPARATION BETWEEN CLASS A FM STATIONS AND OTHER FM STATIONS
(kilometers)

Class of station "X"	situation now: to protect Class A from station "X"	situation now: to protect station "X" from Class A	situation now: FCC rule §73.207	under power increase proposal: to protect station "X" from Class A+	under power increase proposal: to protect Class A+ from station "X"	channel relationship
A	100.1	100.1	105	110.9	104.2	+co-channel
	60.8	60.8	64	67.9	64.9	+1st adjacent
	26.5	26.5	27	27.0	30.6	+2nd & 3rd adjacent
A+				115.0	115.0	+co-channel
				72.0	72.0	+1st adjacent
				31.1	31.1	+2nd & 3rd adjacent
B1	137.8	131.3	138	142.9	141.9	+co-channel
	84.4	88.4	88	96.3	88.5	+1st adjacent
	28.3	47.4	48	48.0	32.4	+2nd & 3rd adjacent
B	161.9	163.3	163	177.6	166.0	+co-channel
	102.3	116.6	105	124.7	106.4	+1st adjacent
	30.2	68 4	69	69.1	34.3	+2nd & 3rd adjacent
C3 (proposed)				125.8	141.9	+co-channel
				82.8	88.5	+1st adjacent
				41.9	32.4	+2nd & 3rd adjacent
C2	163.3	128.1	163	138.9	166.0	+co-channel
	102.3	88.8	105	95.9	106.4	+1st adjacent
	30.2	54.5	55	55.0	34.3	+2nd & 3rd adjacent
C1	196.1	148.2	196	159.0	200.2	+co-channel
	129.2	108.9	129	116.0	133.3	+1st adjacent
	34.3	74.6	74	75.1	38.4	+2nd & 3rd adjacent
C	222.0	167.7	222	178.5	226.1	+co-channel
	160.8	128.4	169	135.5	164.9	+1st adjacent
	37.9	94.1	105	94.6	42.0	+2nd & 3rd adjacent

NOTES:

[illegible] satisfy the specified protection criteria at the boundary of the [illegible] the primary service areas of the protected stations are bounded by [illegible] 54 dBu for Class B, 57 dBu for Class B1, 60 dBu for all other classes.

[illegible] are that the following undesired to desired signal ratios must not be exceeded: -20 dB for co-channel, -6 dB for first adjacent channel, and +40 dB for 2nd and 3rd adjacent channel.

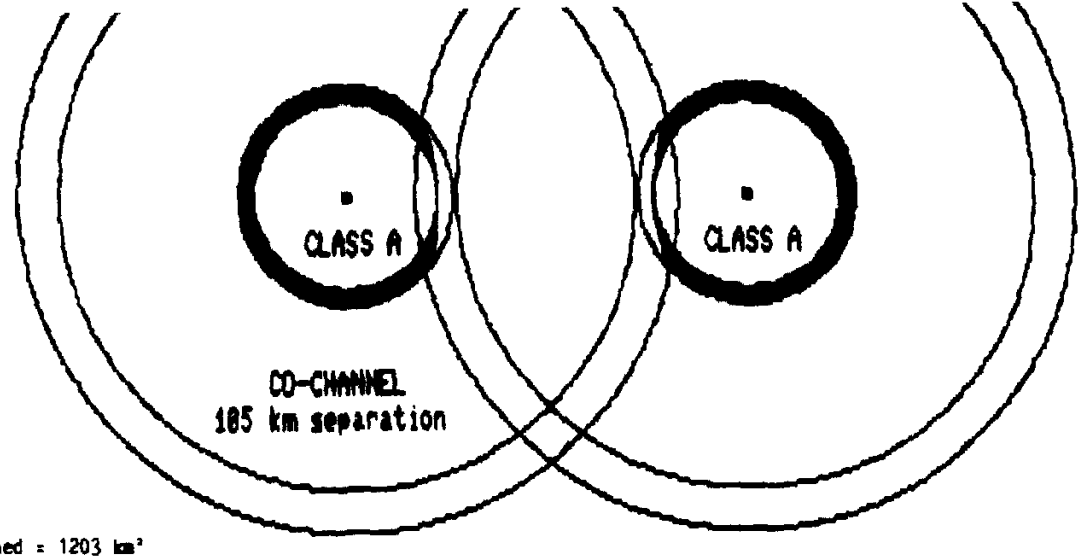
4. Class A+ denotes a station operating with 6000 watts ERP with an antenna HAAT of 100 meters.

5. **Boldface** indicates that the specified undesired to desired signal ratio is not or would not be achieved by stations at the minimum spacing currently permitted by §73.207 of FCC rules.

CHART A

This chart represents the 1 mV/m (60 dBu) coverage of two co-channel Class A stations at minimum spacing (105 km), where both increase power from 3000 watts to 6000 watts.

There are about 300 instances where two co-channel Class A stations are located within 111 km of each other.



Total new area gained = 1203 km²

Total existing area lost = 0 km²

Net area gained = 1203 km²

CHART B

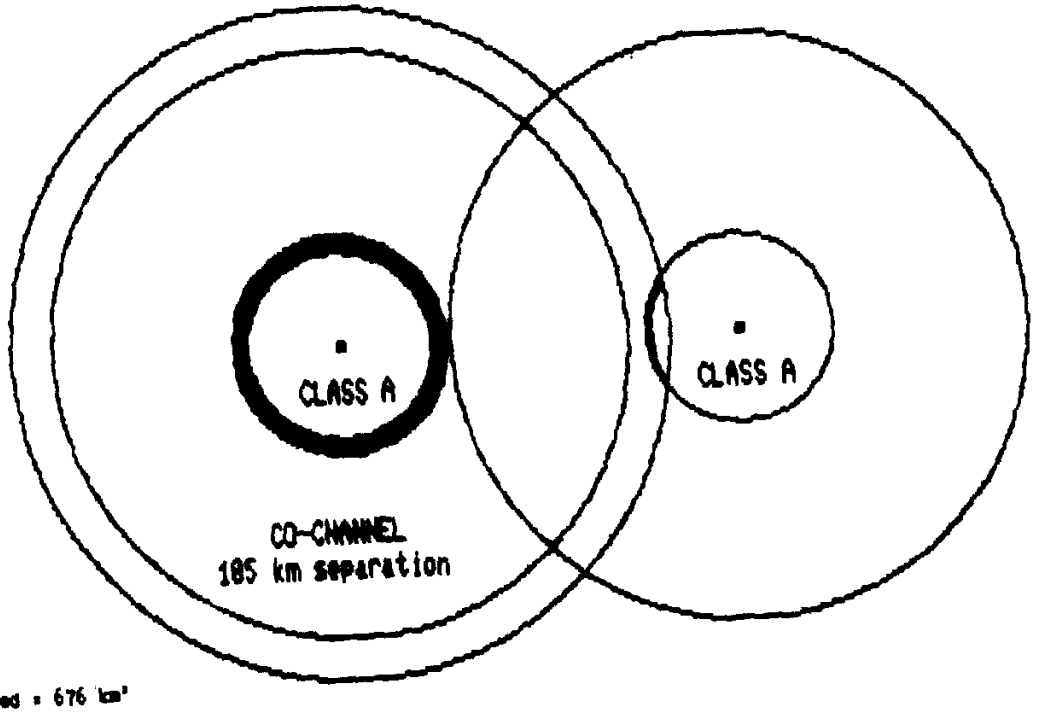


CHART B

This chart represents the 1 mV/m (60 dBu) coverage of two co-channel Class A stations at minimum spacing (105 km), where one increases power from 3000 watts to 6000 watts, but the other stays at 3000 watts.

There are about 300 instances where two co-channel Class A stations are located within 111 km of each other.

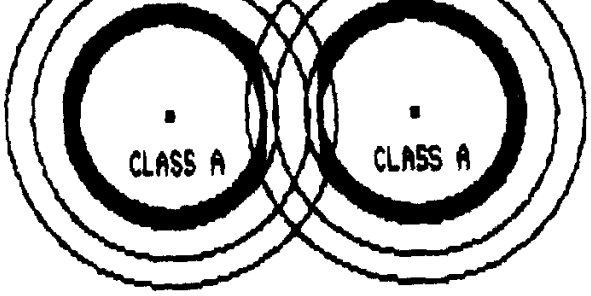
Total new area gained = 676 km²

Total existing area lost = 14 km²

Net area gained = 662 km²

This chart represents the 1 mV/m (60 dBμ) coverage of two first adjacent channel Class A stations at minimum spacing (64 km), where both increase power from 3000 watts to 6000 watts.

There are about 12 instances where two first adjacent channel Class A stations are located within 75 km of each other.



FIRST ADJACENT CHANNEL
64 km separation

Total new area gained = 1260 km²

Total existing area lost = 0 km²

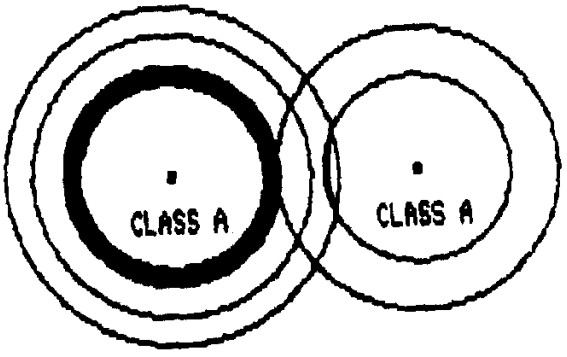
Net area gained = 1260 km²

CHART D

CHART D

This chart represents the 1 mV/m (60 dBμ) coverage of two first adjacent channel Class A stations at minimum spacing (64 km), where one increases power from 3000 watts to 6000 watts, but the other stays at 3000 watts.

There are about 12 instances where two first adjacent channel Class A stations are located within 75 km of each other.



FIRST ADJACENT CHANNEL
64 km separation

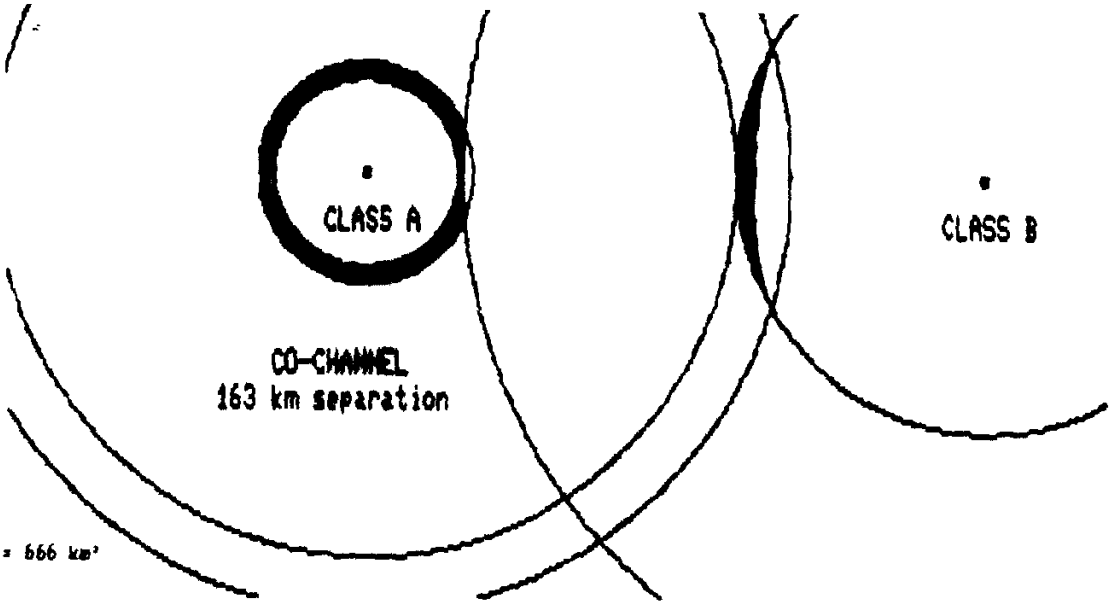
Total new area gained = 676 km²

Total existing area lost = 12 km²

Net area gained = 664 km²

This chart represents the 1 mV/m (60 dBμ) coverage of a Class A station and the 0.5 mV/m (54 dBμ) coverage of a co-channel Class B station at minimum spacing (163 km), where the Class A station increases power from 3000 watts to 6000 watts.

There are only 5 instances where a Class A station and a Class B station on the same channel are located within 250 km of each other.



Total new area gained = 666 km²

Total existing area lost = 232 km²

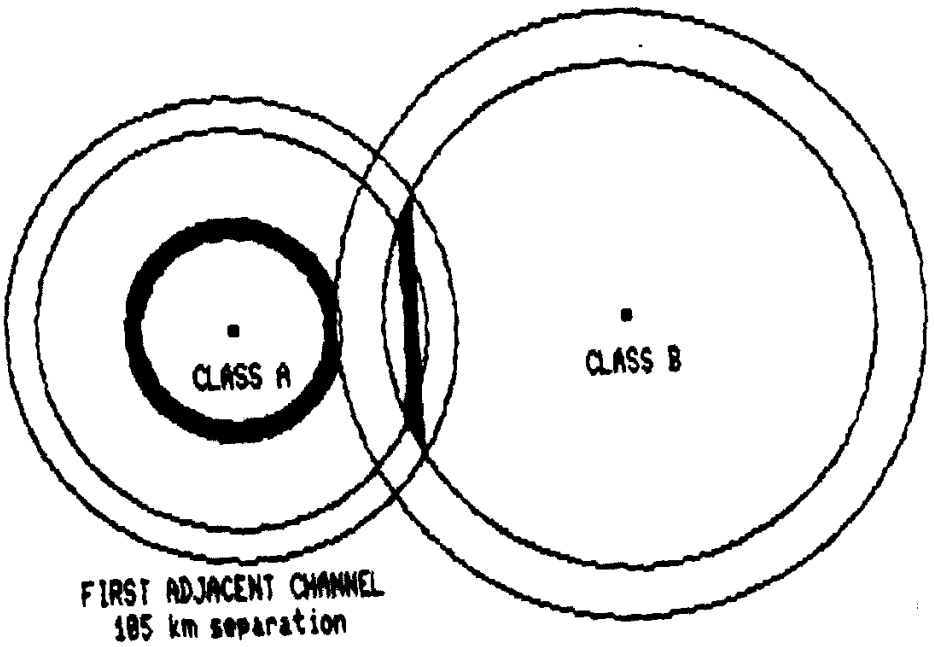
Net area gained = 434 km²

CHART F

CHART F

This chart represents the 1 mV/m (60 dBμ) coverage of a Class A station and the 0.5 mV/m (54 dBμ) coverage of a first adjacent channel Class B station at minimum spacing (105 km), where the Class A station increases power from 3000 watts to 6000 watts.

There are about 300 to 400 instances where a Class A station and a Class B station on the first adjacent channel are located within 125 km of each other.



Total new area gained = 660 km²

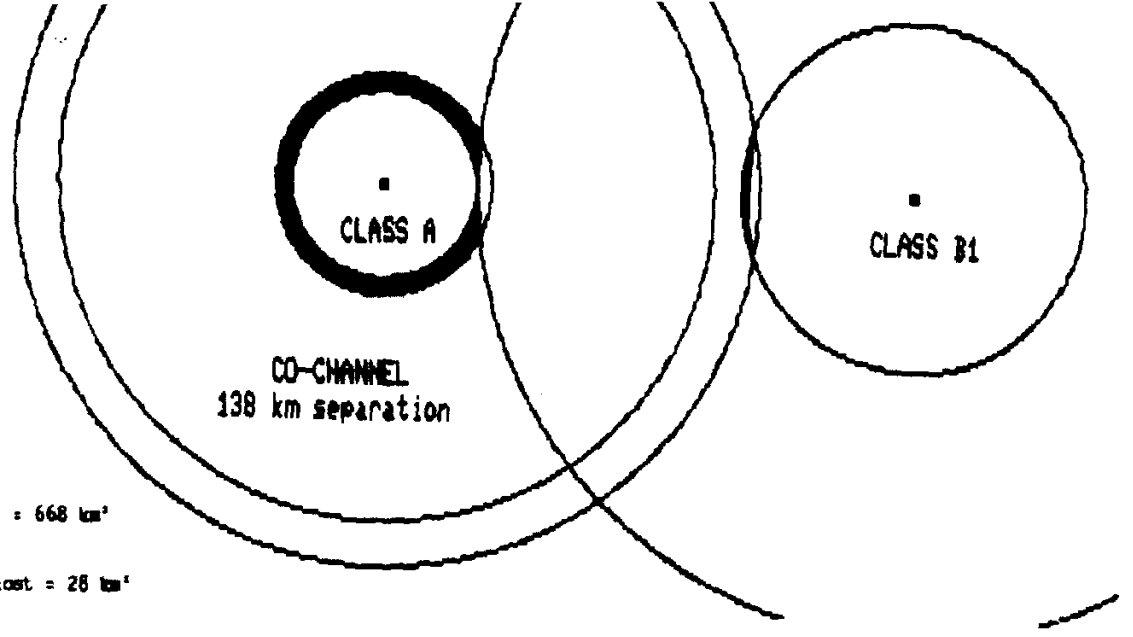
Total existing area lost = 200 km²

Net area gained = 460 km²

CHART G

This chart represents the 1 mV/m (60 dBμ) coverage of a Class A station and the 0.7 mV/m (57 dBμ) coverage of a co-channel Class B1 station at minimum spacing (138 km), where the Class A station increases power from 3000 watts to 6000 watts.

There are only 29 Class B1 stations at this time.



Total new area gained = 668 km²

Total existing area lost = 28 km²

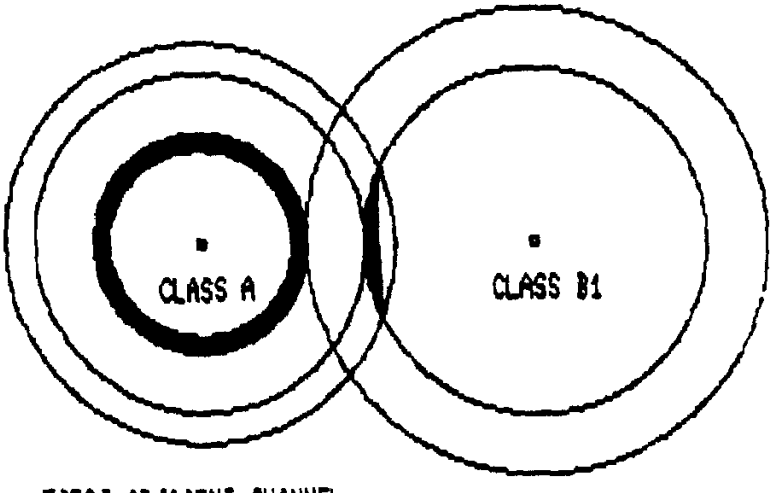
Net area gained = 640 km²

CHART H

CHART H

This chart represents the 1 mV/m (60 dBμ) coverage of a Class A station and the 0.7 mV/m (57 dBμ) coverage of a first adjacent channel Class B1 station at minimum spacing (88 km), where the Class A station increases power from 3000 watts to 6000 watts.

There are only 29 Class B1 stations at this time.



FIRST ADJACENT CHANNEL
88 km separation

Total new area gained = 675 km²

Total existing area lost = 115 km²

Net area gained = 560 km²

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C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

. 90-486

(b). RM-7379

FOOTNOTE

[1] The coordianies for Channel 278A are 37-16-24 and 94-36-

) **ORDER**
rminated)

Released: January 24, 1991

ons Branch:

re it for consideration the
g, 5 FCC Rcd 6447 (1990),
on filed by William Bruce
uce proposed the allotment
Missouri, as that commu-
vice. Petitioner filed com-
and stated his intention to
r comments were received.
rest would be served by the
Asbury, Missouri, since it
with its first FM broadcast
allotted to Asbury in com-
listance separation require-
's Rules without a site

the authority contained in
and (r) and 307(b) of the
, as amended, and Sections
e Commission's Rules, IT IS
arch 11, 1991, the FM Table
02(b) of the Commission's
community listed below, to

Channel No.
278A

filing applications will open
on April 11, 1991.
ERED, That this proceeding

concerning this proceeding,
Mass Media Bureau, (202)

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

MM Docket No. 87-110

In re Applications of

EMPIRE STATE BROADCASTING CORPORATION (WWKB)
Buffalo, New York

File No. BR-840201WQ

For Renewal of License

BURSAM COMMUNICATIONS CORPORATION (WTHE)
Mineola, New York

File No. BP-840430AC

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1991; Released: January 25, 1991

By the Commission:

1. Before the Commission for consideration is a Review Board Decision, *Empire State Broadcasting Corporation*, 5 FCC Rcd 2999 (Rev. Bd. 1990), affirming a summary decision granting Empire State Broadcasting Corporation's application for renewal of the license of WWKB(AM), and denying the mutually exclusive application of Bursam Communications Corporation to increase the operating power of WTHE(AM). *See Empire State Broadcasting Corporation*, 4 FCC Rcd 7008 (S.D. 1989). After careful consideration of the Review Board decision and the parties' pleadings,[1] we affirm the Board's decision in this matter. We wish, however, to comment on certain matters.

I. BACKGROUND

2. Bursam's proposal to increase the operating power of WTHE(AM) would cause objectionable interference to WWKB(AM) in violation of 47 C.F.R. § 73.187, which limits the signal that WTHE(AM), a Class II AM station, may radiate during critical hours toward a co-channel Class I station.[2] The staff of the Mass Media Bureau denied Bursam's request for a waiver of 47 C.F.R. § 73.187. Bursam's application was tendered during the renewal period filing window for WWKB(AM). Therefore, it was designated for hearing with Empire State's application for renewal of WWKB(AM)'s license since, in the absence of a waiver, the proposals were made mutually exclusive by the interference Bursam's proposal would cause. *See Empire State Broadcasting Corporation*, 2 FCC Rcd 2439 (M.M. Bur. 1987), *vacated and reissued*, 2 FCC Rcd 2793 (M.M. Bur. 1987). The hearing designation order specified a Section 307(b) issue to determine which proposal would better provide fair, efficient, and equitable distribution of radio service.[3] In an interlocutory order, the Review Board directed the ALJ to determine, in addition, whether Bursam was entitled to waiver of 47 C.F.R. § 73.187. *See Empire State Broadcasting Corporation*, 2 FCC Rcd 7554, 7556 ¶ 10 (Rev. Bd. 1987), *citation*, 3 FCC Rcd 313 (Rev. Bd. 1988). The ALJ found that Bursam failed to justify a waiver of the rule, and that Empire State was entitled to a dispositive preference under the Section 307(b) issue. The Board affirmed the ALJ's Section 307(b) finding, but declined to consider the merits of Bursam's exceptions concerning denial of the waiver. In doing so, the Board questioned whether Bursam's application should have been designated for hearing and whether the waiver issue should have been considered. *See Empire State Broadcasting Corporation*, 5 FCC Rcd at 3002-3 ¶ 11, 3005 ¶ 16.

II. DISCUSSION

3. In light of the questions raised by the Board, we wish to state our views as to the legal principles applicable to this case. Bursam's application to increase the operating power of WTHE(AM) conflicts with the interference protection for Class I stations mandated by 47 C.F.R. § 73.187. However, Bursam's application, timely filed during the renewal period filing window for WWKB(AM), is mutually exclusive with Empire State's renewal application, and therefore was accepted for filing. Pursuant to 47 C.F.R. § 73.3516(e),[4] the mutual exclusivity between Bursam's application to increase operating power and Empire State's renewal application gave Bursam a right to a comparative hearing. *See also*, 47 U.S.C. § 309(e); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945). Thus, the staff correctly designated Bursam's application for hearing.[5] *See Ramapo Indian Hills Regional High School District*, 3 FCC Rcd 4859, 4860 ¶ 6 (1988); *Westinghouse Broadcasting Co., Inc.*, 64 FCC 2d 643, 645 ¶¶ 5-6 (1977); *Bronco Broadcasting Co., Inc.*, 50 FCC 2d 529, 531 ¶ 5, 536 ¶ 15 (1974), *recon. denied* 52 FCC 2d 836 (1975).

4. We note however, that Bursam's burden of proof under the Section 307(b) issue to be determined in the comparative hearing is virtually insurmountable. Had the Board not directed the ALJ to consider whether Bursam was entitled to a waiver of 47 C.F.R. § 73.187, the ALJ could have issued a summary decision without a hearing, granting Empire State's renewal, since Bursam concedes that Empire State prevails on the Section 307(b) issue. Oral Argument Tr. 2030-31, 5 FCC Rcd at 3005 ¶ 17. As the Board now acknowledges, no waiver issue should have been tried in the context of the Section 307(b) inquiry. 5 FCC Rcd at 3005 ¶ 16. *See Fort Collins Telecasters, A Partnership*, 60 RR 2d 1401, 1405-6 ¶ 8 (Rev. Bd. 1986), *rev. denied*, FCC 87-172 (May 13, 1987); *Frank H. Yemm*, 39 RR 2d 1657, 1659 ¶¶ 6-7 (1977). Bursam had no right to a hearing on its waiver request, since Bursam failed to make allegations of fact sufficient to justify a waiver of 47 C.F.R. § 73.187; therefore, the staff properly designated no waiver issue for hearing.[6] *See Lovers Park Broadcasting Co.*, 8 RR 2d 998, 999-1000 ¶ 5 (1966), *citing Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

5. Similarly, an inevitable summary decision in favor of the incumbent would apparently be the outcome of future renewal challenges in which a Class II station files an

lities that is mutually exclu-
enewal application. We be-
of hearing procedures does
nd indeed, undermines the
icient use of its limited staff
. *Star Signal Corporation*, 1
86). Accordingly, we direct
consider appropriate rule
y rejection of renewal chal-
e allocations rules mandate
favor of the incumbent.

present right to a compara-
.F insofar as it mandates a
07(b) between the gains in
that would result from in-
E(AM) and the loss of *all*
reject Bursam's suggestion
l to permit a comparison of
from its proposal with *only*
VKB(AM) that would result

tled frequently because few
by challenging the renewal
remains good law and has
when this kind of renewal
earing. *See Interstate Broad-*
Rcd 4051 ¶ 7 (M.M. Bur.
M interference do not allow
osses to resolve AM interfer-
e Commission follows a
gorically prohibits the types
the rules. *See The Audio*
1 ¶ 3 (1987); *Amendment of*
Rules, Regarding AM Station
Relationship Between AM &
FCC 1515, 1522 ¶¶ 13-15
2d 1567 (1965). *KPLT*'s pro-
e potential gains in service
the loss of listeners by the
reflects the "go/no-go" ap-
cation scheme.

proposed power increase and
l amount to a *de facto* grant
73.187 to Bursam, when no
r hearing and when Bursam
; on its waiver request.[8] The
of both applications, conflicts
scheme for the allocation of
that the Commission cannot
ails to comply with the fun-
s set forth in the rules to the
d to rely on that protection.
Rcd at 3172 ¶ 11. There is
rules of general applicability,
s, merely because the context
e U. S. v. Storer Broadcasting
(1956); *Simmons v. FCC*, 145
11); *Rio Grande Family Radio*
5, 328 ¶¶ 8-9 (1971). Con-
inquiry mandated by *KPLT*
s case.

III. ORDERS

9. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed June 22, 1990 by Bursam Communications Corporation IS DENIED; and that the Chief of the Mass Media Bureau IS DIRECTED to take action in accordance with paragraph 5, above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are before the Commission: (1) an Application for Review filed June 22, 1990 by Bursam; (2) an Opposition to the Application for Review filed July 6, 1990 by the Mass Media Bureau, and (3) an Opposition to the Application for Review filed July 9, 1990 by Empire State Bursam was granted an extension of time, to June 22, 1990, in which to file its application for review. *Empire State Broadcasting Corp.* 4 FCC 901-601 (Jun. 12, 1990).

[2] The period of critical hours is defined as the two hours after local sunrise and the two hours preceding local sunset. *See* 47 C.F.R. §§ 73.14, 73.187.

[3] Pursuant to *Pillar of Fire*, 2 FCC Rcd 519 (1987), the Section 307(b) issue could be dispositive only if Empire State were not entitled to a renewal expectancy. A contingent comparative issue was also designated.

[4] 47 C.F.R. § 73.3516(e) provides:

> An application for a construction permit for a new broadcast station or for modification of construction permit or license of a previously authorized broadcast station will not be accepted for filing if it is mutually exclusive with an application for renewal of license of an existing broadcast station unless it is tendered for filing by the end of the first day of the last full calendar month of the expiring license term.

[5] We disagree with the Board's suggestion in *dicta* that the Bureau's failure to return Bursam's application as unacceptable for filing implied that the Bureau believed that the Commission's interference rules do not apply to applications filed against a license renewal. *See* 5 FCC Rcd 3002 ¶¶ 10-11. The cases cited by the Board do not support its observation that all applications which violate interference rules are subject to summary rejection, since those cases do not involve mutually exclusive applications filed during the renewal filing window for an existing licensee. Compare *KPLT, Inc.*, 1 FCC 2d 901 (1965) (in KPLT, a daytime-only AM station filed an application to increase its power during the renewal window for a co-channel Class I station. The daytime-only applicant requested a waiver of the interference rules because its proposal would cause objectionable interference to the Class I station. *See* 1 FCC 2d 901 ¶ 2. The Commission denied the waiver request but ordered a hearing because the proposals were mutually exclusive.

[6] Even if a waiver issue had been warranted, we see no error in the ALJ's rejection of Bursam's evidence concerning its waiver request and the ALJ's subsequent denial of a waiver. Bursam contends that 47 C.F.R. § 73.187 is no longer necessary because the importance of interference protection for Class I

stations has declined. However, by attacking the rule itself, Bursam does not advance an appropriate basis for a waiver since a waiver inquiry assumes the rule's validity. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The ALJ properly excluded evidence of Bursam's past programming and community service. Non-technical service related arguments do not justify a waiver of technical "go/no-go" AM allocations standards. *See ICBC Corp. v. FCC*, 716 F.2d 926, 930 (D.C. Cir. 1983). The ALJ was also justified in rejecting evidence Bursam presented to demonstrate that WWKB(AM)'s skywave signal causes interference to its own groundwave signal, since the Commission was aware of the effects of such a distortion zone when it adopted the protection standards for clear channel stations, one of which is 47 C.F.R. § 73.187. *See* 4 FCC Rcd at 7018 ¶ 65. Additionally, the ALJ properly excluded this evidence as untimely, since it was not offered as part of Bursam's direct case. *See General Electric Cablevision Corp.*, 11 FCC 2d 667, 668-69 ¶¶ 3,5 (Rev. Bd. 1968).

[7] In this connection, we note that the area Bursam proposes to serve by increasing its power during critical hours contains no area or population served by fewer than five other aural services and partially served by at least four additional aural services during critical hours. 4 FCC Rcd at 7019. Thus, the public interest benefits of Bursam's proposal are marginal at best.

[8] Bursam also argues that a waiver is appropriate pending the outcome of a Commission Rule Making which concerns the validity of the protection standards of 47 C.F.R. § 73.187. *See Notice of Proposed Rule Making, Review of the Technical Assignment Criteria for the AM Broadcast Service*, 5 FCC Rcd 4381 (1990). We disagree. Bursam cites *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) as support for its argument. In that case, the Court noted that the Commission had extended *temporary* waivers of the cross-ownership rules while those rules were the subject of a Rule Making. 844 F.2d at 815. The waivers deferred requirements to divest broadcast properties pending a proposal to relax certain provisions of the cross-ownership rules. Here, however, Bursam did not merely seek the temporary deferral of a divestiture, but proposed that a new service be authorized contrary to a still valid rule. In any event, the pending Rule Making on AM allocation standards does not contemplate altering the interference protection which Bursam must afford to WWKB(AM). *See Notice of Proposed Rule Making*, 5 FCC Rcd at 4464 ¶ 31 (1990).

MARGINAL GAINS.