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Federal Communications Commission

DA 98- 692

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

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 98-53
Table of Allotments,	)	RM-9253
FM Broadcast Stations.	)	
(Malvern and Bryant, Arkansas)	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 8, 1998

Released: April 24, 1998

Comment Date: June 15, 1998

Reply Comment Date: June 30, 1998

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Malvern Entertainment Corporation ("petitioner"), licensee of Station KBOK-FM, Channel 227A, Malvern, Arkansas, requesting the reallocation of Channel 227A from Malvern to Bryant, Arkansas, and modification of its license accordingly. Petitioner states that it will apply for the Channel 227A if it is allotted to Bryant.

2. Petitioner seeks to invoke the provisions of § 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See *Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), recon. granted in part (*"Change of Community MO&O"*), 5 FCC Rcd 7094 (1990). In this regard petitioner advises that the requested reallocation of Channel 227A to Bryant (pop. 5,269),<sup>1</sup> is mutually exclusive with its present use at Malvern (pop. 9,256). The distance between Malvern and the petitioner's proposed site at Bryant is 30.2 kilometers (19 miles), whereas a distance of 115 kilometers (71 miles) is required in this instance.<sup>2</sup> Petitioner states that operation on Channel 227A with maximum facilities at its proposed site would result in the provision of a 70 dBu signal over the entire community of Bryant.

3. In further support of the proposal petitioner states that Bryant is an incorporated community which has an elected mayor, as well as its own police, fire, city and water

<sup>1</sup>Population figures were taken from the 1980 U.S. Census.

<sup>2</sup>Coordinates specified by the petitioner for a transmitter site at Bryant are 34-30-30 NL and 92-32-42 WL.

departments. According to petitioner, Bryant also possesses its own post office and zip code (72022), schools, civic, community, and religious organizations, as well as commercial establishments. Petitioner indicates that adoption of its proposal would result in a preferential arrangement of allotments consistent with the *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1992), as the reallocation will enable Station KBOK-FM to provide a first local aural transmission service to the residents of Bryant, whereas Malvern would retain local aural transmission service from daytime Station KBOK(AM) and KISI(FM), Channel 268A.

4. While we believe that the petitioner's proposal warrants consideration as it could provide Bryant with its first local aural transmission service without depriving Malvern of local service, based upon our analysis of the information presented, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments.<sup>3</sup> In this regard, we note that according to the 1990 U.S. Census data, Bryant is located partially within the Little Rock-North Little Rock Urbanized Area.<sup>4</sup> In such instances where a proposed community is either 100% within an urbanized area or only partially within such area, we have applied the *Huntington* doctrine to the proposal.<sup>5</sup> See also *Coolidge and Gilbert, Arizona*, 11 FCC Rcd 3610 (1996); *Falmouth and Mashpee, Massachusetts*, 10 FCC Rcd 10445 (1995); *Hallie and Ladysmith, Wisconsin*, 10 FCC Rcd 9257 (1995). In this regard, our engineering analysis reveals that 926 residents (17.6%) of Bryant's populace of 5,269 are included within the Little Rock-North Little Rock Urbanized Area. Our engineering analysis has determined also that operation at the petitioner's intended site on Channel 227A with maximum Class A facilities at Bryant would result in the provision of a 70 dBu signal to less than 1% of the Little Rock-North Little Rock urbanized area. In this instance, our primary concern is not with the degree of projected coverage of the Little Rock-North Little Rock urbanized area, but rather in light of Bryant's partial location therein, whether it should deserve a first local service preference, or whether it should be credited with all of the aural transmission services licensed to the Little Rock-North Little Rock urbanized area. Therefore, petitioner is requested to submit information sufficient to demonstrate that Bryant is deserving of such a preference, using the factors enumerated in *RKO General ("KFRC")*, 5 FCC Rcd 3222 (1990) and *Faye and Richard Tuck*

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<sup>3</sup>The allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).]

<sup>4</sup>While the boundaries of most of the community lie outside of the urbanized area, Bryant's partial inclusion therein distinguishes this proposal from the policy announced in *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995) (proponents seeking to relocate to a community adjacent to an urbanized area that would place a 70 dBu signal over 50% or more of the urbanized area must submit a *Tuck* analysis (emphasis supplied).

<sup>5</sup>See *Huntington Broadcasting Co. v. F.C.C.*, 192 F.2d 33 (1951).

("Tuck"), 3 FCC Rcd 5374 (1988).<sup>6</sup> See also *Elizabeth City, North Carolina and Chesapeake, Virginia*, 9 FCC Rcd 3586 (1994).

5. Moreover, as petitioner proposes to relocate its transmitter site to accommodate its request, the proposal will result in areas that will lose existing reception service as well as areas that will gain new reception service. Therefore, petitioner is requested to provide information to reflect the areas and populations that will gain as well as those that will lose existing service.<sup>7</sup> The requested data should also include the total reception services that are now available within the gain and loss areas.<sup>8</sup>

6. Based upon the information presented, we shall propose to reallocate channel 227A from Malvern to Bryant, Arkansas, and modify the authorization for Station KBOK-FM accordingly. As the petitioner's modification request is consistent with the provisions of Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest or require the petitioner to demonstrate the availability of an additional channel at Bryant.

7. A staff engineering analysis confirms that Channel 227A can be allotted to Bryant, Arkansas, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's proposed site located 11 kilometers (6.8 miles) southwest of the community at coordinates 34-30-30 NL and 92-32-42 WL.

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<sup>6</sup>The three criteria considered in making a first local service preference determination are (1) signal population coverage, *i.e.* the degree to which a station would provide coverage not only to the suburban community but to the adjacent metropolis as well; (2) the size and proximity of the suburban community relative to the adjacent city; and (3) the interdependence of the suburban community with the central city.

<sup>7</sup>In evaluating proposals pursuant to Section 1.420(i), the Commission has stated: "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both." See *Modification, supra*, at 5 FCC Rcd 7097.

<sup>8</sup>Reception services are those aural services that can be received within a given geographical area, including full-time AM, as well as FM commercial stations. In determining reception service provided by an FM station, the area of service circumscribed by the station's 1.0 mV/m signal contour, assuming maximum facilities for the class of station, except for Class C, should be considered. For the latter class, the minimum or existing Class C facilities, whichever is greater, should be used in the study. The area of reception service for full-time AM stations is defined according to whether it is a clear channel Class AM station or another class of full-time AM station. For a clear channel Class A station, the reception area is defined by a station's 0.5 mV/m groundwave contour, based on its licensed facilities. For all other classes of full-time AM stations, reception service is defined as that service received within a station's nighttime interference-free contour. For purposes of determining the availability of aural services in the areas affected by the change of community proposal, the petitioner should include in its study the reception services provided by all relevant AM and FM stations. Reception areas that receive at least five radio services are considered to be well-served.

8. In view of the above, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Bryant, Arkansas	--	227A
Malvern, Arkansas	227A, 268A	268A

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before June 15, 1998 , and reply comments on or before June 30, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jerrold Miller, Esq.  
Miller & Miller  
P.O. Box 33003  
Washington, DC 20033

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service

requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

**FEDERAL COMMUNICATIONS COMMISSION**

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

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies: In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings: All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239), at its headquarters, 1919 M Street, N.W., Washington, D.C.