

FCC MAIL SECTION

DOCKET FILE COPY ORIGINAL

AUG 31 9 36 AM '98

Federal Communications Commission

DA 98-1682

DISPATCH

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

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 98-155
Table of Allotments,	)	RM-9082
FM Broadcast Stations.	)	RM-9133
(Alva, Mooreland, Tishomingo, Tuttle,	)	
and Woodward, Oklahoma)	)	

**NOTICE OF PROPOSED RULE MAKING**  
**AND**  
**ORDERS TO SHOW CAUSE**

**Adopted: August 19, 1998**

**Released: August 28, 1998**

Comment Date: October 19, 1998  
Reply Comment Date: November 3, 1998

By the Chief, Allocations Branch:

1. The Commission has before it two interrelated petitions for rule making. FM 92 Broadcasters, Inc. ("FM 92") requests the substitution of Channel 228A for Channel 261C1 at Woodward, Oklahoma, the modification of Station KWFX(FM)'s license to specify operation on the Class A channel, and the allotment of Channel 261C1 to Mooreland, Oklahoma, as its first local aural service. Ralph Tyler ("Tyler"), licensee of Station KTSH, Tishomingo, Oklahoma, requests the reallocation of Channel 259C3 from Tishomingo to Tuttle, Oklahoma, as the community's first local aural service, and the modification of Station KTSH's license accordingly. To accommodate the allotment at Tuttle, Tyler also requests that Channel 292C1 be substituted for Channel 261C1 at Woodward, Oklahoma, that Station KWFX(FM)'s license be modified to specify the alternate Class C1 channel, that Channel 260C1 be substituted for Channel 259C1 at Alva, Oklahoma, and that Station KXLS(FM)'s license be modified to specify the alternate Class C1 channel.

3. FM 92 states that Channel 261C1 at Woodward, although reserved for use by Station KWFX pursuant to Commission action in MM Docket 90-286, has remained fallow for the past six years.<sup>1</sup> According to FM 92, the substitution of Channel 228A for Channel 261C1 at Woodward should not present a hardship to Classic Communications, Inc. ("Classic"), the licensee of Station KWFX, since it has never constructed the higher power facility nor moved

<sup>1</sup> See 5 FCC Rcd 6628 (1990).

the station from the Class A channel.<sup>2</sup> In fact, FM 92 states that the Class C1 construction permit which had been granted on by the Commission on April 22, 1992 (BPH-911220IE) was cancelled by the Commission on September 2, 1994, at the request of the then-licensee of Station KWFX, Fuchs Communications, Incorporated. Further, FM 92 believes, based upon Commission records, that Station KWFX went dark on December 1, 1995, and thus is now not on the air, even as a Class A. It argues that KWFX should not be allowed to monopolize two channels at Woodward.

3. According to FM 92, Mooreland is an incorporated community with a 1990 U.S. Census population of 1,157, within Woodward County, with a population of 18,796 persons. Further, FM 92 submits that Mooreland has its own local government, consisting of a mayor, vice-mayor, three trustees, clerk, treasurer, town administrator, auditor, attorney, building inspector and utility foreman. Mooreland provides such municipal services and police and fire protection, court system, water treatment, electric and schools, as well as its own tax collection system. In addition, Mooreland has numerous retail, wholesale and service-related businesses, including tax offices, a bank, a telephone company, grocery store, hardware and auto supply store, beauty shops, restaurants, convenience stores, a farmer's co-op, a realty company, a motel, a nursing home, a funeral home, an attorney, a dentist and doctors, as well as electricians, plumbers, mechanics and building contractors. Mooreland also has a noncommercial airport and its own weekly newspaper as well as a half-dozen churches. FM 92 states its intention to apply for Channel 261C1, if allotted to Woodward.

4. Tyler, who seeks the reallocation of Channel 259C3 from Tishomingo to Tuttle, as its first local aural service, submits that its request complies with the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870

---

<sup>2</sup> On November 28, 1995, Fuchs Communications filed an application for the voluntary assignment of license of Station KWFX to Classic, which was granted on March 7, 1996. Thus, the licensee of Station KWFX will be referred to herein as Classic. On March 25, 1996, FM 92 filed a petition for reconsideration of the assignment of license to determine whether the expired construction permit (BPH-911220IE) for Channel 261C1 was assigned with the Station KWFX license. By letter of June 18, 1996, the staff, under delegated authority, granted FM 92's request for the dismissal of its petition for reconsideration. However, the staff found that the construction permit had been cancelled on September 2, 1994 and, because the cancellation had become final at the time that the assignment application was filed, the grant of the assignment application concerned only the license for Station KWFX. See Letter to F. Joseph Brinig and Kathryn R. Schmeltzer from Chief, Audio Services Division, June 18, 1996 (1800B3-REO). By letter of June 11, 1997, the Audio Services Division, informed Classic that Channel 228A had been removed from Woodward pursuant to Commission action in MM Docket 90-286, supra, and that it had thirty (30) days in which to either file an application for Channel 261C1 or present another proposal for modifying Station KWFX's license. The letter also noted that the Commission had before it two mutually exclusive petitions for rule making which involved the use of Channel 261C1 at Woodward. See Letter to F. Joseph Brinig from Chief, Audio Services Division, June 11, 1997 (1800B3-mg). On November 8, 1997, Classic filed an application for a construction permit for Station KWFX specifying operation on Channel 261C1 (BPH-970811IC).

(1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). Tyler states that the reallocation meets the threshold requirements of Section 1.420(i) in that the allotment of Channel 259C3 at Tuttle is mutually exclusive with its allotment at Tishomingo and that the reallocation will not deprive Tishomingo, a community of 3,116 persons, of its sole local aural service since there is a pending application for a new noncommercial FM station (BPED-970127MD).<sup>3</sup>

5. Tyler states that Tuttle, with a 1990 population of 2,807 persons, is an incorporated city with a mayor, city manager and city counsel. Tuttle has its own police and volunteer fire departments, a parks board, planning commission, board of adjustment, city attorney, four primary and secondary schools and two city parks. In addition, the Tuttle Public Works Authority provides gas, water, sewer and garbage services. Tyler states that Tuttle also has its own post office and zip code, numerous churches, two banks, a nursing home, two dentists and a chiropractor and an osteopath, a local chamber of commerce and a weekly newspaper, the Tuttle Times. In addition, the community is home to businesses such as Braum's Dairy and Delta Faucet. Therefore, it states that Tuttle is a community for allotment purposes. Tyler submits that Station KTSH presently provides service to 36,134 persons while, as a Tuttle station, it will be able to serve a total of 767,353 persons, for a net gain of 731,219 persons. Further, while the relocation of the transmitter site will result in a loss area, he states that the entire area will continue to receive at least five fulltime services. Tyler states that he will apply for the channel, if allotted to Tuttle.

6. Tyler states that Tuttle is not located within an urbanized area, and from the transmitter site proposed for Channel 259C3, only 23% of the Oklahoma City Urbanized Area will receive a 70 dBu signal from Station KTSH. Therefore, in accordance with Commission policy as set forth in Headland, Alabama, and Chattahoochee, Florida, he says that there is no need for the Commission to determine whether Tuttle is independent of the Urbanized Area before determining that Tishomingo is entitled to a first local service preference.

7. In order to effectuate the allotment at Tishomingo, Tyler requests the substitution of Channel 292C1 for Channel 261C1 at Woodward, the modification of Station KWFX's license accordingly, and the substitution of Channel 260C1 for Channel 259C1 at Alva, Oklahoma, along with the modification of Station KXLS(FM)'s license to specify operation on the alternate Class C1 channel. He states that each station can operate on the alternate channel from their present transmitter sites. Tyler states that he is unsure as to the status of Channel 261C1 at Woodward, noting that the Commission cancelled the station's Class C1 construction permit in 1994 and the station's statement that "it 'does not intend to utilize the Channel 261C1 construction permit' and relinquishes and surrenders any right which it or KWFX-FM may have to that construction permit." However, should the Commission determine that Station KWFX is entitled to reimbursement for the cost of changing channel, Tyler states that he will reimburse

---

<sup>3</sup> On October 14, 1997, the Commission granted the construction permit application of South Central Oklahoma Christian Broadcasting, Inc. for Station KAZC on Channel 202A.

both licensees for the reasonable and prudent costs associated with such a change in their operating channels.

8. In a supplement to his petition, Tyler states that the conflict between the use of Channel 261C1 at Woodward and the same channel at Mooreland can be removed with the use of alternate channels. Therefore, he proposes that Channel 292C1 be substituted for Channel 261C1 at Woodward, which can be used at Station KWFX's presently licensed transmitter site, and that Channel 283C1 be allotted to Mooreland, which can be used at the transmitter site proposed by FM 92. The allotment of Channel 259C3 at Tuttle would still require the substitution of channels at Alva.

9. Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail"), licensee of Station KXLS, Alva, Oklahoma, filed a motion to dismiss Tyler's petition. It argues that Tyler's petition is, at best, prematurely filed since it would remove Tishomingo's sole local broadcast service. In this regard, Chisholm Trail states that the Commission, in Change of Community R&O, *supra*, held that we would not allow a station to change its community of license if the effect were to deprive the original community of its sole local broadcast service. Further, it points out that the Commission, on reconsideration, stated that the replacement of an existing station with either a vacant allotment or an unconstructed permit would not, by itself, adequately cure the disruption to existing service which would occur from the removal of an operating station. See also Llano and Marble Falls, Texas, 10 FCC Rcd 4913 (1995), Kaukana and Cleveland, Wisconsin, 6 FCC Rcd 7142, 7143, n.3 (1991) and Klamath Falls, Altamont and Butte Falls, Oregon, and Dorris, California, 10 FCC Rcd 7583 (1995). Chisholm Trail also submits that Tyler's claim that Tishomingo will continue to receive local service from a new noncommercial station is in error since the community cannot continue to receive service from a station which does not exist. Chisholm Trail points out that the Review Board has previously found that "'the filing of an application. . . does not necessarily assure the expeditious advent of a station.'" Santee Cooper Broadcasting Co., 99 FCC 2d 781 (Rev. Bd. 1984). Finally, Chisholm Trail states that the Commission has "repeatedly" stated that the public interest is not served by removing a community's sole local transmission service solely to provide a first local transmission service to another community, citing Potts Camp and Saltillo, Mississippi, 12 FCC Rcd 372, 3713 (1997), Sibley, Iowa and Brandon, South Dakota, 11 FCC Rcd 3635 (1996), and Llano and Marble Falls, Texas, *supra*. Given that Tyler bases its request on the existence of another local service at Tishomingo, it argues that Tyler is asking the Commission to accept and act on its petition even though it is contingent upon the licensing of Station KAZC at Tishomingo. This, it contends, is in conflict with the policy set forth in Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996), which states that the Commission no longer will accept petitions for rule making which are contingent upon the action of third parties in order to effect compliance with the Commission's rules.

10. We believe that the proposals of FM 92 and Tyler warrant consideration since the allotments could provide first local aural services at both Mooreland and Tuttle, Oklahoma. Chisholm Trail is correct that, pursuant to the policy set forth in Change of Community MO&O, *supra*, the removal of Station KTSH from Tishomingo would constitute the removal of the

community's sole local service because Station KAZC has not been licensed.<sup>4</sup> However, while the Commission has stated that the removal of a community's sole local existing service would not be undertaken lightly, it did not place an absolute ban on such actions. Therefore, Tyler is requested to provide further information demonstrating why the public interest would be served by removing Tishomingo's sole local broadcast service in order to provide a first such service to Tuttle. See Change of Community MO&O, supra, at 4096. See also Liano and Marble Falls, Texas, supra.

11. As discussed by both FM 92 and Tyler, Station KWFX's license was modified from Channel 228A to Channel 261C1 pursuant to the Report and Order in MM Docket 90-286, the station was granted a construction permit for that channel on April 22, 1992, and, at the request of the then-licensee, Fuchs Communications, the construction permit was forfeited and cancelled on September 2, 1994. However, while Classic has continued to operate on Channel 228A, the licensee has now filed an application specifying operation on Channel 261C1. However, Classic's application requests that it be allowed to continue operating with Class A power of 6 kW at its current location pending the filing of another application specifying a new antenna and transmitter site which will allow an increase in power to 25 kW. Classic states that it is planning to submit such an application "as soon as a new location becomes available and as soon as finances allow." Based on this request wherein Classic does not propose to operate with minimum Class C1 facilities, even after it obtains a new transmitter and transmitter site, we believe it appropriate to alternatively propose the substitution of Channel 228A for Channel 261C1 at Woodward and request that Classic state which channel and class it intends to pursue. In accordance with Commission policy, Tyler has stated his intention to reimburse both Classic and Chisholm Trail for the reasonable and prudent expenses related to the change of channel should his proposal be adopted. No such statement has been provided by FM 92. Therefore, it is requested to do so in comments herein. See, e.g., Cordele, Dawson & Montezuma, Georgia, 8 FCC Rcd 7672 (1993).

12. A staff engineering study has confirmed that the alternate allotment proposal submitted by Tyler can be effectuated in compliance with the Commission minimum distance separation requirements. Channel 260C1 can be allotted to Alva at Station KXLS's licensed transmitter site. Channel 292C1 can be allotted to Woodward at Station KWFX's licensed transmitter site as well as at the transmitter site set forth in its pending application (BPH-970811IC). Channel 228A can be allotted to Woodward at Station KWFX's presently licensed transmitter site. Channel 283C1 can be allotted to Mooreland with a site restriction of 9.3 kilometers south (5.8 miles) to avoid a short-spacing to Station KTCM, Channel 262C2, Kingman, Kansas. Channel 259C3 can be allotted to Tuttle with a site restriction of 9.3

---

<sup>4</sup> "We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to 'existing service' occasioned by removal of an operating station." See Change of Community MO&O, supra, at 7097.

kilometers (5.8 miles) east to accommodate Tyler's desired transmitter site.<sup>5</sup>

13. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
	<u>Option I</u>	
Alva, Oklahoma	259C1, 278C1, 289C2	260C1, 278C1, 289C2
Mooreland, Oklahoma	--	283C1
Tishomingo, Oklahoma	259C3	--
Tuttle, Oklahoma	--	259C3
Woodward, Oklahoma	240A, 261C1, 266C, 272A	240A, 266C, 272A, 292C1
	<u>Option II</u>	
Alva, Oklahoma	259C1, 278C1, 289C2	260C1, 278C1, 289C2
Mooreland, Oklahoma	--	283C1
Tishomingo, Oklahoma	259C3	--
Tuttle, Oklahoma	--	259C3
Woodward, Oklahoma	240A, 261C1, 266C, 272A	228A, 240A, 266C, 272A

14. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Chisholm Trail Broadcasting Co., Inc., licensee of Station KXLS(FM), Alva, Oklahoma, and Classic Communications, Inc., licensee of Station KWFX, Woodward, Oklahoma, SHALL SHOW CAUSE why their licenses SHOULD NOT BE MODIFIED to specify operation on Channel 260C1 and Channel 292C1 or 228A, respectively, as proposed herein instead of their present Channel 259C1 and Channel 261C1, respectively.

15. Pursuant to Section 1.87 of the Commission's Rules, Chisholm Trail and/or Classic may, not later than October 19, 1998, file a written statement showing with particularity why their licenses should not be modified as proposed in the Order to Show Cause. The Commission may call on Chisholm Trail and/or Classic to furnish additional information. If Chisholm Trail and/or Classic raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the

<sup>5</sup> The coordinates for Channel 260C1 at Alva are 36-35-41 North Latitude; 98-15-38 West Longitude. The coordinates for Channel 283C1 at Mooreland are 36-21-24; 99-13-37. The coordinates for Channel 259C3 at Tuttle are 35-17-33; 97-42-58. The coordinates for Channel 292C1 at Woodward are 36-25-42; 99-24-10.

modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Chisholm Trail and/or Classic will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

16. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the licensees of Station KXLS(FM) and KWFX, as follows: Station KXLS, Chisholm Trail Broadcasting Co., 316 East Willow, Enid, OK 73701; Station KWFX, Classic Communications Inc., P.O. Box 1600, Woodward, OK 73802.

17. 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.

18. Interested parties may file comments on or before October 19, 1998, and reply comments on or before November 3, 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 petitioners, or their counsel or consultant, as follows:

Kathryn R. Schmeltzer  
Kevin M. Walsh  
Fisher Wayland Cooper Leader & Zaragoza, L.L.P.  
2001 Pennsylvania Avenue, NW  
Suite 400  
Washington, D.C. 20006  
(Counsel to FM 92)

Gary S. Smithwick  
Smithwick & Belendiuk, P.C.  
1990 M Street NW  
Suite 510  
Washington, D.C. 20036  
(Counsel to Tyler)

19. 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), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

20. For further information concerning this proceeding, contact Leslie K. Shapiro, 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 found 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 protection. 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 proposals 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.