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Federal Communications Commission

DA 99-2758

DISPATCHED BY

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-347
Table of Allotments,)	RM-9751
FM Broadcast Stations.)	RM-9761
(Exmore and Cheriton, Virginia, and)	
Fruitland, Maryland))	
)	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 1, 1999

Released: December 10, 1999

Comment Date: January 31, 2000
Reply Comment Date: February 15, 2000

By the Chief, Allocations Branch:

1. In this proceeding, we are combining into a single docket two inter-related petitions for rule making involving the community of Exmore, Virginia, because favorable action on both of these requests will result in Exmore not having any local aural transmission service. Be-More Broadcasting ("Be-More), permittee of a new FM station on Channel 291B1 at Exmore, Virginia, requests the reallocation of its channel to Cheriton, Virginia, and the modification of its construction permit (BPH-19951109MC) to specify the new community of license (RM-9751).¹ Great Scott Broadcasting ("Great Scott"), licensee of Station WKHI, Channel 298B, Exmore, requests the substitution of Channel 298B1 for Channel 298B, its reallocation to Fruitland, Maryland, and the modification of Station WKHI's license to specify the new community of license (RM-9761). Both rule making proponents have stated their intention to apply for their respective channels, if allotted.

2. Both petitions were filed pursuant to Section 1.420(j) of the Commission's Rules which allows 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 ("Community of License"), 4 FCC Rcd 4870 (1989), recon. granted in part, ("Change of License MO&O"), 5 FCC Rcd 7094 (1990).

3. Be-More states that the public interest would be served by relating Channel 291B1 to Cheriton as it would provide the community with its first local service. It states that Cheriton is a census designated place with a 1990 population of 515 people and is a listed community in the Rand McNally Road Atlas. Further, Be-More states that its station is not constructed at this time and that

¹ Be-More also has on file a one-step application for Channel 291B at Exmore (BMPH-19980630IC).

the reallocation will not deprive Exmore of its sole local aural service since it will continue to receive service from Station WKHI on Channel 298B.

4. Great Scott states that the reallocation of Channel 298, as a Class B1, to Fruitland would result in a preferential arrangement of allotments since it would provide the more populous community with its first local aural service. Exmore has a population of 1,115 persons. It states that Fruitland is an incorporated community with a 1990 U.S. Census population of 3,511 persons, with its own post office and zip code, police force, city hall, sanitation department, water and sewage plant, bank, primary and intermediate school and a volunteer fire department. In addition, Great Scott submits that Fruitland is currently developing a 91-acre industrial park located close to both the Salisbury-Ocean City Regional Airport and the Port of Salisbury and a Wal-Mart employing 600 people is expected to open in the spring of 2000. Thus, it states that it is clear that Fruitland is an independent community deserving of its own local aural service. Great Scott says that the reallocation of Station WKHI to Fruitland, at the transmitter site specified in its request, will enable the station to expand its coverage area from its present 1,789 square kilometers containing 47,217 people to 3,724 square kilometers with 124,544 people. This represents a gain area of 3,057 square kilometers containing 108,277 people and a loss area of 1,122 square kilometers with 31,400 people. According to Great Scott, the entire gain and loss areas are well served during the day with at least five reception services. As to nighttime service, Great Scott states that the loss area will not contain any unserved or underserved areas as the population will continue to receive a minimum of two and a maximum of eight aural services. However, the reallocation of Channel 298B1 to Fruitland will provide a second nighttime aural service to 647 people within a 104 square kilometer area.

5. Great Scott recognizes that its station represents the sole operating station at Exmore and that the Commission has stated that a construction permit for a new station is not a substitute for the loss of an operating station. However, it argues that the outstanding construction permit should not be entirely disregarded but rather "is a factor to be considered in favor of the proposal. . . ." Modification of License MO&O, supra, at 7097. It contends that under the Commission's current rules, Be-More, or its successor, must build the Channel 291B station no later than April 24, 2001, as the rules provide little opportunity for the construction delays permitted in the past. See, 47 C.F.R. §73.3598.

6. An initial engineering review of the proposals shows that Channel 291B1 can be allotted to Cheriton in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.7 kilometers (11.6 miles) northeast to accommodate Be-More's requested transmitter site.² Since Be-More is requesting a change in its transmitter site, it is requested to provide a study showing the areas and populations which would lose and gain service if its proposal is granted as well as the reception services available in both the gain and loss areas. We also request that Be-More provide information concerning the status of Chariton as a community for allotment purposes. Section 307(b) of the Communications Act requires that the Commission allot channels "among the several States and communities." Generally, if a community is incorporated or listed in the U.S. Census, that is

² The coordinates for Channel 291B1 at Cheriton are 37-26-25 North Latitude and 75-52-51 West Longitude.

sufficient to satisfy status. Although Chariton is listed in the 1990 U.S. Census with a population of 515 people, the Census listing is not absolute for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a library, schools, shopping centers, churches, a newspaper, and social or civic organizations. Further, the Commission has, in the past, rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question. Therefore, we request that Be-More present the Commission with specific information to demonstrate that Chariton has the social, economic and governmental indicia to qualify it as a "community" for allotment purposes. See, Alberton, Montana, 12 FCC Rcd 1407 (1997), denied on other grounds, 12 FCC Rcd 7609 (1997).

7. Channel 298B1 can be allotted to Fruitland in compliance with the Commission's minimum distance separation requirements with a site restriction of 16 kilometers (9.9 miles) southwest to avoid a short-spacing to Station WRXS, Channel 295A, Ocean City, Maryland, and Station WSNJ-FM, Channel 299B, Bridgeton, New Jersey.³ We also request that Great Scott clarify its gain and loss study. It appears that the study is based on the station's current parameters (50 kW ERP at 82 meters HAAT) rather than the station's full Class B facilities. See, Greenup, Kentucky and Athens, Ohio, 2 FCC Rcd 4319 (1987), recon. granted, 4 FCC Rcd 3843 (1989), app. for rev. granted, 6 FCC Rcd 1493 (1991).

8. We believe both proposals warrant further consideration to determine whether a grant of either proposal would result in a preferential arrangement of allotments. In considering these reallocation proposals, we will be guided by the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).⁴ As noted earlier, favorable action on both requests would result in Exmore not having any local service. While the Commission does not have the same concerns about loss of service as between operational and unconstructed permits, the Commission does incorporate the potential service in determining whether granting a proposal would result in advancing the FM allotment priorities. See, Littlefield, Wolfforth and Tahoka, Texas, 12 FCC Rcd 3215 (1997), recon. pending.

9. 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 communities listed below, to read as follows:

³ The coordinates for Channel 298B1 at Fruitland are 38-11-32 North Latitude and 75-41-58 West Longitude.

⁴ The allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local aural service; and (4) other public interest matters. Priorities (2) and (3) are given co-equal weight.

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Fruitland, Maryland	--	298B1
Chariton, Virginia	--	291B1
Exmore, Virginia	291B1, 298B	--

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

11. Interested parties may file comments on or before January 31, 2000, and reply comments on or before February 15, 2000, 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, or its counsel or consultant, as follows:

A. Wray Fitch III
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102-3807
(Counsel to Be-More)

Ross G. Greenberg
Leventhal, Senter & Lerman, P.L.L.C.
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
(Counsel to Great Scott)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

13. 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 Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.