

FEB 8 3 43 PM '00 Federal Communications Commission

DISPATCH

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

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 00-17
Table of Allotments,)	RM-9814
FM Broadcast Stations.)	
(Andalusia, Alabama and Holt, Florida))	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 19, 2000

Released: February 4, 2000

Comment Date: March 27, 2000
Reply Comment Date: April 11, 2000

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Capstar TX Limited Partnership (“petitioner”), licensee of Station WTKE(FM), Channel 251C1, Andalusia, Alabama, seeking to amend the FM Table of Allotments by reallocating Channel 251C1 to Holt, Florida, and modification of its authorization accordingly. Petitioner failed to state its intention to apply for Channel 251C1 if it is reallocated to Holt, and should do so in responsive comments.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission’s Rules which permits the modification of a station’s authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *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 support of the proposal, petitioner describes Holt as a town with defined boundaries, containing a population of 400 persons according to the 1999 Rand McNally *Commercial Atlas and Marketing Guide*. Further, petitioner states that Holt has its own post office and zip code (32564), a volunteer fire department, a water department, several churches, a Ruritan club, as well as several businesses. Further, petitioner advises that as Holt is not located within an urbanized area, nor would the proposed Holt facilities provide a 70 dBu signal to 50% or more of any urbanized area, a *Tuck* analysis is not required.¹

3. Further, petitioner advises that operation of Station WTKE from the proposed Holt reference coordinates would result in loss of service to 38,585 persons in an area of 252 square

¹ See *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951), *RKO General, Inc.*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

kilometers. Moreover, petitioner advises that the proposed reallocation will not result in the creation of any white or gray areas, and that five or more full-time stations serve nearly all of the loss area.² Conversely, petitioner reports that assuming operation at the proposed Holt reference site, Station WTKE would provide a new service to 3,344 persons in an area of 450 square kilometers, and overall would provide service to 339,652 persons in an area of 16,422 square kilometers.

4. Further, petitioner avers that adoption of its reallocation proposal would result in a preferential arrangement of allotments consistent with the *Revision of FM Assignment Policies and Procedures*,³ 90 FCC 2d 88 (1982), as the reallocation would provide a first local aural transmission service to Holt (priority three), whereas Andalusia would retain local aural transmission service from Station WAAO-FM, Channel 279A as well as noncommercial Station WSTF(FM), Channel 218A (priority four).

5. Although Holt, Florida is not incorporated, the 1990 U.S. Census lists Holt by its post office name with a population of 1,821. The 1999 Rand-McNally Community Atlas and Marketing Guide attributes the town with a population of 400 persons. In view of the wide discrepancy in the reported population, petitioner is requested to clarify in comments the population of Holt, Florida, and identify the official information source. Additionally, Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census as a Census Designated Place ("CDP"), that is sufficient to satisfy its status. In this instance, Holt is not incorporated nor listed as a CDP in the U.S. Census. Although the petitioner provided information to reflect that Holt has a post office, a few churches, a volunteer fire department, a water department, a civic organization and several businesses, it has not specifically identified the listed entities by street addresses, or identified any other businesses or political, social and commercial organizations that identify themselves with Holt. *See Stock Island, Florida*, 8 FCC Rcd 343 (1993). Therefore, we request petitioner to provide additional information to demonstrate Holt's community status. This may be proven by the testimony of local residents or by objective or subjective evidence indicating the existence of a community. *See Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *aff'd.*, 2 FCC Rcd 7562 (1987). Some examples of objective indications of community status include the existence of political, social, economic, commercial, cultural or religious organizations and services in the community. *See Kenansville*,

² Petitioner advises that a small rural area within the loss area is served by four full-time stations. However, while that small area has no actual population, it would be credited with 153 persons if an even distribution of population within the loss area were assumed.

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

Florida, 5 FCC Rcd 2663 (1990), *aff'd*. 10 FCC Rcd 9831 (1995). Petitioner is requested to provide additional information regarding the attributes of Holt, Florida, consistent with the above guidelines.

6. In accordance with Commission policy, if a proponent intends to move its authorized facility to a community that is adjacent to an urbanized area, and if the intended operation would provide a 70 dBu signal over 50% or more of the urbanized area, the petitioner is required to demonstrate that the intended city of license is sufficiently independent of the central city to justify a first local service preference. *See Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995). In this instance, Holt is not located within an urbanized area. And, although Station WTKE currently provides 60 dBu service to both the Pensacola and Fort Walton Beach urbanized areas, a staff engineering analysis reveals that the 70 dBu contour of Station WTKE does not cover any urbanized area.⁴ Therefore, the petitioner's request to change its community of license is not subject to the provision of additional information responsive to a *Tuck* analysis to determine Holt's independence from the urbanized areas to warrant a first local service preference. Further, according to our engineering analysis, Station WTKE's currently authorized site at Andalusia serves 377,546 persons. The proposed reallocation from Andalusia, Alabama, to Holt, Florida, at a site 3.1 kilometers from Station WTKE's current site, and 32.2 kilometers (20 miles) north of Holt at coordinates 30-59-57 NL and 86-41-20 WL, will result in a loss of population coverage to 45,116 persons within Station WTKE's 60 dBu contour.⁵ However, the proposed site for Station WTKE will provide service to 336,697 persons in an area of 16,422 square kilometers, and will result in 4,267 persons gaining a new service.⁶ Both the gain and loss areas receive five or more services.

7. In consideration of the above, and on a comparative basis, the petitioner's proposal would result in a preferential arrangement of allotments, if Holt is found to be a community for allotment purposes, as it could provide a first local aural transmission facility to Holt (priority three) whereas Andalusia would retain local service (priority four). Therefore, we will propose to reallocate Channel 251C1 from Andalusia, Alabama, to Holt, Florida, and modify the petitioner's license for Station WKTE accordingly. As the petitioner's modification request is consistent with the requirements of

⁴ The 60 dBu contour of Station WTKE currently provides coverage to less than 50% of the Pensacola, Florida Urbanized Area but covers practically all of the Fort Walton Beach, Florida, Urbanized Area. Although the reallocation proposal will not increase the current coverage to the noted urbanized areas, there will be a slight area and population loss to the Pensacola Urbanized Area as a result of the reallocation from Andalusia, Alabama, to Holt, Florida.

⁵ See footnote 4, *supra*.

⁶ We are unable to confirm petitioner's assertion regarding a small rural area receiving four full-time services that would be credited with 153 persons if evenly distributed population were assumed, due to the incremental size of the area and the lack of purported population distribution.

Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 251C1 at Holt.

8. Channel 251C1 can be allotted to Holt, Florida, in conformity with the technical requirements of the Commission's Rules at the petitioner's specified site located 32.2 kilometers north of Holt at coordinates 30-59-57 NL and 86-41-20 WL.

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

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Andalusia, Alabama	251C1, 279A	279A
Holt, Florida	--	251C1

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 March 27, 2000, and reply comments on or before April 11, 2000, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW; TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Gregory L. Masters, Esq.
 E. Joseph Knoll, III, Esq.
 Wiley, Rein & Fielding
 1776 K Street, N.W.
 Washington, D.C. 20006

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

13. For further information concerning this proceeding, contact Nancy Joyner, Mass Media

Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment that 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 discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent 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 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 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 (Room CY-A257), at its headquarters, 445 Twelfth Street, SW., Washington, D.C.