

FCC MAIL SECTION

Federal Communications Commission

DA 00-142

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 00-12
Table of Allotments,)	RM-9706
FM Broadcast Stations.)	
(West Rutland, Vermont))	

NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE

Adopted: January 19, 2000

Released: February 1, 2000

Comment Date: March 23, 2000

Reply Comment Date: April 7, 2000

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Great Casco Bay Wireless Talking Machine Limited Liability Company ("petitioner"), licensee of Station WTHT, Channel 298C1, Lewiston, Maine, requesting the substitution of Channel 298A for Channel 298C3 at West Rutland, Vermont, and the modification of Station WRUT's construction permit to specify the Class A channel. Petitioner states that the substitution of Channel 298A for Channel 298C3 at West Rutland would enable Station WTHT to operate as a full 100 kW station.

2. Petitioner states that on September 21, 1990, pursuant to the request of Brian Dodge ("Dodge"), Channel 298C3 was substituted for Channel 298A at West Rutland. See Report and Order, MM Docket 89-519 (5 FCC Rcd 5886 (1990)). The Report and Order also modified Station WRUT's construction permit (BPH-851209MK) to the higher class channel.¹ Station WRUT's Class A construction permit was granted on June 13, 1988 and expired on December 13, 1989. On December 29, 1989, Dodge filed both an application to reinstate the expired construction permit and an application to modify the station's permit by changing the transmitter site, antenna height above average terrain, and effective radiated power, but not the station's class (BMPH-891229ID). On April 26, 1991, the staff notified Dodge that Station WRUT's channel had become a Class C3 and requested that an amendment to his modification application be submitted specifying Class C3 facilities. On July 19, 1991, Dodge's application BMPH-891229ID was dismissed since no response to the April 26, 1991, letter had been received. On August 5, 1991, Dodge filed an amendment to application BMPH-

¹ Brian Dodge was the permittee of Station WRUT when Channel 298C3 was substituted for Channel 298A at West Rutland, pursuant to the Report and Order in MM Docket No. 89-519, *supra*. On October 5, 1990, Dodge filed a voluntary assignment of construction permit (BAPH-901005GT) to WRUT, Inc., an entity entirely controlled by Dodge, which was granted on October 24, 1990, and consummated on May 11, 1993.

891229ID specifying Class C3 facilities, stating that he never received the April 26, 1991, letter because it was sent to an incorrect address. On August 13, 1991, Dodge was informed that because the April 26, 1991, letter had been sent to an incorrect address, the Class A modification application (BMPH-891229ID) was reinstated nunc pro tunc and the August 5, 1991, Class C3 amendment was accepted for good cause. However, because of problems with the Class C3 amendment, Dodge was provided with a thirty (30) day period in which to amend the application. Dodge was informed that failure to respond within thirty (30) days would result in the dismissal of the application pursuant to Section 73.3568(b) of the Commission's Rules. On December 11, 1991, the Class A modification application (BMPH-891229ID) and the August 5, 1991, Class C3 amendment thereto, were dismissed for failure to respond.² On April 13, 1993, the application to replace the station's expired permit (BPH-891229JP) was denied, the underlying construction permit (BPH-851209MK) was declared forfeited and cancelled and the call letters were deleted. See Letter to Brian Dodge, reference 1800B3-MFW. On May 12, 1993, Dodge filed a petition for reconsideration requesting that the Commission reinstate the cancelled construction permit and grant the modified Class A application with the requested extension of the construction permit period but did not seek reconsideration of the dismissal of its Class C3 modification application. On May 5, 1995, Dodge filed an application for license to cover the Class A construction permit BPH-851209MK as modified by its 1989 application. On October 10, 1995, because of technical discrepancies between the construction permit facilities and the license application facilities, the staff informed Dodge that the station did not qualify for automatic program test authority and ordered it to cease operations immediately. On March 6, 1996, the staff denied Dodge's February 27, 1996, request for Special Temporary Authority ("STA") to allow Station WRUT to return to the air and operate with the Class A facilities specified in the license application until Dodge could effectuate the facilities set forth in its construction permit. On December 17, 1998, the Commission denied as untimely filed that portion of the petition for reconsideration which requested reinstatement of the application to modify the construction permit (BMPH-891229ID) to specify new Class A facilities. This action was taken without prejudice to the timely appeal of the cancellation of Class A construction permit BPH-851209MK or the denial of the application to replace the expired permit, BPH-891229JP. That appeal remains pending

3. Petitioner states that downgrading Channel 298 from Class C3 to Class A is in accord with Commission precedent, citing Hazelhurst, Utica and Vicksburg, MS, 9 FCC Rcd 6439 (Allocations Br. 1994) (licensee deemed to have abandoned interest in its higher class channel when no Class C3 application was filed in response to the rule making), and Leavenworth, Othello and East Wenatchee, WA, 10 FCC Rcd 983 (Allocation Br. 1995) (licensee was downgraded from Class C1 to Class C3 at Othello when it failed to file a construction permit application in response to the rule making).

4. We believe petitioner's proposal warrants consideration since the allotment of Channel 298A in lieu of Channel 298C3 at West Rutland could enable Station WTHT to increase its facilities. Based on the fact that the no petition for reconsideration of the dismissal of his application specifying Class C3 facilities was filed and the May 1, 1995, license application (BALH-950501KF), as amended

² No petition for reconsideration of the dismissal of the Class C3 amendment was requested.

on April 2, 1996, specifying 3 kW Class A facilities, we believe that the public interest would be served by proposing to substitute Channel 298A for Channel 298C3 at West Rutland.³ This action is without prejudice to Dodge's timely appeal of the cancellation of construction permit BPH-851209MK or of the denial of application BPH-891229JP. Channel 298A can be allotted to West Rutland in compliance with the Commission's minimum distance separation requirements and at the transmitter site specified in Station WRUT's construction permit, which is 4.1 kilometers (2.6 miles) southeast of West Rutland.⁴ West Rutland is located within 320 kilometers (200 miles) of the U.S.-Canadian border. However, because this is a proposal to downgrade the allotment, notification but not prior approval of the Canadian government is required.

5. 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>Present</u>	<u>Channel No.</u>	<u>Proposed</u>
West Rutland, Vermont	298C3		298A

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, WRUT, Inc., permittee of Station WRUT, West Rutland, Vermont, , SHALL SHOW CAUSE why its construction permit SHOULD NOT BE MODIFIED to specify operation on Channel 298A as proposed herein instead of Channel 289C3.

7. Pursuant to Section 1.87 of the Commission's Rules, WRUT, Inc., may, not later than March 23, 2000, file a written statement showing with particularity why its construction permit should not be modified as proposed in the Order to Show Cause. The Commission may call on WRUT, Inc. to furnish additional information. If WRUT, Inc. 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 modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, WRUT, Inc. will be deemed to have consented to the modification as proposed

³ By letter of October 10, 1995, the Commission informed Dodge that a staff review of his license application (BLH-950501KF) revealed several discrepancies between the antenna height and overall tower heights listed in the license application and those authorized in construction permit BPH-851209MK, as modified by BMPH-891229ID. Further, since the facilities specified in the license application did not match those authorized in construction permit BMPH-891229ID, he was told that the station did not qualify for automatic program test authority and thus could not commence program test operations, and if such program test operations had started, must cease immediately. Further, Dodge was informed that the station could not recommence operations without prior Commission approval. On April 2, 1996, Dodge filed an amendment to his pending license application.

⁴ The coordinates for Channel 298A at West Rutland are 43-34-04 NL; 73-00-30 WL.

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.

8. 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.

9. Interested parties may file comments on or before March 23, 2000, and reply comments on or before April 7, 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:

Dan J. Alpert
2120 N. 21st Road
Arlington, VA 22201
(Counsel to petitioner)

10. 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 permittee of Station WRUT, as follows: Brian Dodge, WRUT, Inc., P.O. Box 69, Dover, NH 03821.

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

12. 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.