

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

2001 MAR 28 A 10: 06

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Grants and Bosque Farms, New Mexico))

MM Docket No. 01-78
RM-10080

NOTICE OF PROPOSED RULE MAKING

Adopted: March 14, 2001

Released: March 23, 2001

Comment Date: May 14, 2001
Reply Comment Date: May 29, 2001

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Educational Media Foundation ("petitioner"), permittee of noncommercial educational Station KQLV, Channel 288C, Grants, New Mexico, requesting the substitution of Channel 288C2 for Channel 288C at Grants, its reallocation to Bosque Farms, New Mexico, as the community's second local FM service, and the modification of Station KQLV's permit accordingly. In addition, petitioner requests the allotment of Channel 244C3 to Grants. Petitioner states that it will apply for both Channel 288C2 at Bosque Farms and Channel 244C3 at Grants, if allotted.

2. Petitioner filed its request pursuant to Section 1.420(i) of the Commission's 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). Petitioner states that the allotment of Channel 288C2 at Bosque Farms and Channel 244C3 at Grants will further the Commission's allotment priorities and result in a preferential arrangement of allotments since it will provide Bosque Farms with its first competitive local aural service without depriving Grants of its sole local aural service.¹ The reallocation of Channel 288C2 to Bosque Farms could also allow Station KQLV to greatly increase the number of people who would receive a new aural service. Petitioner states that Grants, with a 1990 U.S. Census population of 8,626 people, currently receives local aural service from AM Station KMIN and FM Stations KAIU, KXXQ and KYVA. Bosque Farms, with a 1990 U.S. Census population of 3,791 people, receives local aural

¹ The Commission's 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 given to priorities (2) and (3)). See, Revision of FM Allotment Policies and Procedures, 90 FCC 2d 88 (1982).

service from Station KTEG, Channel 284C1.²

3. Petitioner points out that Station KQLV, although granted a construction permit in May, 1998, remains unbuilt because of "considerable difficulties" encountered in receiving transmitter site approval from the U.S. Forest Service. Petitioner states that its construction permit authorizes operation with 100 kilowatts from a transmitter site located on land administered by the Forest Service. However, in order to operate a transmitter with 100 kilowatts of power, the Forest Service rules require at least 500 feet vertical separation from other users on the site. Moreover, this approval process, which it states takes a minimum of two years, requires that the objections of area Native American tribes, who consider the site sacred, be taken into consideration, and thus a favorable outcome is far from certain. Therefore, in order to begin broadcasting before the expiration of its construction permit, petitioner states that it has now filed an application to decrease the station's power to those of a Class C3 facility (BMPED-20010129ADE).

4. Petitioner states that if Station KQLV could ultimately be licensed at the site specified in its construction permit, the station would provide service to 192,912 people within its 60 dBu contour but if Station KQLV is unable to operate with more than Class C3 facilities at Grants, service will be provided to only 20,943 people. However, if Channel 288C2 is reallocated to Bosque Farms, it states that the station will be able to provide service to an additional 337,621 people, or a gain of 275% in population served. Petitioner recognizes that the reallocation will result in a loss of service to 35,650 people. Of this figure, it states that 28,107 people will continue to receive at least five fulltime aural services, 4,209 people will continue to receive four fulltime aural services and 1,396 people will receive two fulltime aural services. The reallocation to Bosque Farms will also create an underserved population of 1,852 people receiving only one fulltime service (grey area) and 86 people receiving no fulltime aural service (white area). However, petitioner reiterates that Station KQLV is unbuilt and thus does not provide a service which any population has come to rely upon. The entire gain area is already well served with five or more fulltime aural services.

5. We believe petitioner's proposal warrants consideration since the reallocation of Channel 288C2 to Bosque Farms could provide the community with its first competitive local aural service while Grants would retain local aural service from one AM and three FM stations. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in Channel 288C2 at Bosque Farms. We will also propose the allotment of Channel 244C3 to Grants since petitioner has expressed an intention to apply for the channel. A staff engineering study has confirmed that Channel 288C2 can be allotted to Bosque Farms in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.3 kilometers (7.6 miles) southwest, to accommodate petitioner's desired transmitter site.³ Bosque Farms is located 26 kilometers (16 miles) south of Albuquerque, New Mexico. However, we have determined that Station

² The Commission also has before it the application of Guardian Communications, Inc., for a new AM station at Bosque Farms. See, BNP-20000131AAU.

³ The coordinates for Channel 288C2 at Bosque Farms are 34-47-55 NL; 106-48-59 WL.

KQLV would provide 70 dBu coverage to only 20.3% of the Urbanized Area. Therefore, petitioner will not be required to provide a Tuck showing demonstrating that Bosque Farms is independent of the Urbanized Area.⁴ In addition, the staff engineering review of petitioner's proposal substantially agrees with the petitioner's loss and gain showings. However, the staff has determined that while the reallocation of Channel 288C2 to Bosque Farms will create a gray area of 353 square kilometers, no population is affected since the area is unpopulated. Channel 244C3 can be allotted to Grants in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.⁵

6. 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>
Bosque Farms, New Mexico	284C	284C1 ⁶ , 288C2
Grants, New Mexico	224A, 264A, 279C, 288C	224A, 244C3, 264A, 279C

7. 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.

8. Interested parties may file comments on or before May 14, 2001, and reply comments on or before May 29, 2001, 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:

David D. Oxenford
Veronica D. McLaughlin
Shaw Pittman

⁴ See, Headland, Alabama, and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995), 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).

⁵ The coordinates for Channel 244C3 at Grants are 35-09-08 NL; 107-50-33 WL.

⁶ We will also editorially amend the FM Table of Allotments by substituting Channel 284C1 for Channel 284C at Bosque Farms to reflect the license of Station KTEG (BLH-19981015KC).

2300 N Street, NW
Washington, DC 20037-1128
(Counsel to petitioner)

9. 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.

10. 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.