

FCC MAIL SECTION

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

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In the Matter of)
)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Brazil and Spencer, Indiana))
)
)

MB Docket No. 03-192
RM-10763

NOTICE OF PROPOSED RULEMAKING

Adopted: September 3, 2003

Released: September 5, 2003

Comment Date: October 27, 2003

Reply Comment Date: November 12, 2003

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rulemaking filed jointly by Crossroads Investments, Inc., licensee of Station WSDM-FM, Channel 249A, Brazil, Indiana, and Mid-America Radio of Indiana, Inc., licensee of Station WSKT(FM), Channel 224A, Spencer, Indiana ("Petitioners"). Petitioners propose to substitute Channel 224A for Channel 249A at Brazil and modify the license for Station WSDM-FM accordingly, and to substitute Channel 249A for Channel 224A at Spencer and modify the license of Station WSKT(FM) accordingly. Petitioners state that if granted, they will promptly implement the proposed changes.

2. In support of their proposal, petitioners state that Station WSDM-FM in Brazil Indiana, and Station WSKT(FM) in Spencer, Indiana are Class A stations limited in power to three kilowatts. The stations are prohibited from increasing facilities to six kilowatts on co-adjacent channels due to spacing restrictions. Petitioners further state that this proposal requests an upgrade on a nonadjacent channel which would normally allow for competing expressions of interest. However, in similar situations, the Commission has acknowledged that while not strictly adjacent channel relationships, the mutual exclusivity of the channels involved is similar to the scenario provided for in Section 1.420(g)(3) of the Commission's Rules. Section 1.420(g)(3) allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. However, the Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually exclusive relationship required under Section 1.420(g)(3), and has determined to consider these "incompatible channel swaps" on a case-by-case basis.¹

¹An "incompatible channel swap" is a channel substitution for an upgrade and an accommodating substitution that are mutually exclusive and are uniquely available, i.e., there is no alternate channel of its class that is fully spaced from the station's site. See *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels*, 60 RR 2d 114 (1986).

3. We believe the proposed channel swap warrants consideration since it would eliminate a grandfathered short-spaced allotment between Station WSKT(FM) and Stations WTTS-FM, Bloomington, Indiana, and WJCP, Austin, Indiana. In addition, it will enable Station WSKT(FM), to expand its coverage area and nearly double the population it serves, from 35,410 persons to 70,163 persons, by allowing it to advance to full Class A facilities and operate at 6kW and 100 meters HAAT. The substitution of Channel 224A for Channel 249A at Brazil, Indiana will involve no gain or loss of service because no changes of transmitter site are necessary to effectuate the changes. Thus no offsetting loss area will occur for either station.

4. An engineering analysis has determined that Channel 249A can be allotted to Spencer in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.5 kilometers (5.9 miles) west of the community at Station WSKT(FM)'s requested site.² Additionally, Channel 224A can be allotted to Brazil with a site restriction of 1.8 kilometers (1.1 miles) southwest of the community at Station WSDM-FM's requested site. As requested, we shall also propose to modify the licenses of Stations WSKT (FM) and WSDM-FM to specify operation on Channels 249A and 224A, respectively. In accordance with Section 1.420(g)(3) of the Commission's Rules, any party expressing an interest in the respective channels should demonstrate why these proposals are not "incompatible channel swaps" such that their expressions of interest are foreclosed.

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 communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Brazil, Indiana	249A	224A
Spencer, Indiana	224A	249A

5. IT IS ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making* to the following:

Crossroads Investments, LLC
1301 Ohio Street
Terre Haute, Indiana 47807336
(Licensee of Station WSDM-FM)

Mid-America Radio of Indiana, Inc.
P.O. Box 1970
60 N. Wayne Street
Martinsville, Indiana
(Licensee of Station WSKT(FM))

6. 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.

(...continued from previous page)

²The coordinates for Channel 249A at Spencer are 39-15-18 North Latitude and 86-51-51 West Longitude.

6. Interested parties may file comments on or before October 27, 2003, and reply comments on or before November 12, 2003, 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:

Frank R. Jazzo
Anne Goodwin Crump
Fletcher, Heald and Hildreth, PLC
1300 North 17th Street
Eleventh Floor
Arlington, Virginia 22209

8. 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.³

9. For further information concerning this proceeding, contact Victoria M. McCauley, 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
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

³ 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.

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 Rulemaking* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rulemaking* 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 Rulemaking* 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 Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, 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 Information Reference Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington, D.C. 20554.