

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

ORIGINAL

In the Matter of)
)
Amendment of the Commission's Rules)
Governing Modification of FM and AM)
Authorizations)

MB Docket No.
RM -

RECEIVED

MAR - 5 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RULEMAKING

Ronald A. Unkefer
Gary M. Lawrence, Esq.
Hal A. Rose, Esq.
FIRST BROADCASTING INVESTMENT
PARTNERS, LLC
750 North Saint Paul St.
10th Floor
Dallas, Texas 75201
(214) 855-0002

Tom W. Davidson, Esq.
Phil Marchesiello, Esq.
Heidi R. Anderson, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
1676 International Drive
Penthouse
McLean, Virginia 22102
(703) 891-7500

No. of Copies rec'd 04
List ABCDE
MB 04
04-41

TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
I. INTRODUCTION	2
A. First Broadcasting	2
B. Approach to Enhancing Spectrum Efficiency	3
C. Procedural Barriers to Provision of Public Interest Benefits	4
D. The FCC’s Processing Rules are Ripe for Change	6
II. PROPOSALS	7
A. The Commission Should Permit an FM Station Community of License Change Through a Minor Modification Application	8
B. The Commission Should Presume That, Under Certain Defined Circumstances, Relocation of an FM Station Providing a Community’s Sole Local Service to a New Community of License Without a First Local Service is in the Public Interest	14
C. The Commission Should Establish a Simplified Procedure to Remove Non-Viable FM Allotments from the FM Table of Allotments	19
D. The Commission Should Open a One-Time Settlement Window to Resolve the Backlog of Pending FM Rulemakings	23
E. The Commission Should Permit Change of an AM Station’s Community of License Through a Minor Modification Application	27
F. The Commission Should Streamline the Process for Downgrading a Class C Station to Class C0 Status	30
III. CONCLUSION	33

EXECUTIVE SUMMARY

In the instant petition for rulemaking, First Broadcasting Investment Partners, LLC (“First Broadcasting”) urges the Federal Communications Commission (“Commission”) to adopt several changes to its procedures governing modifications of FM and AM authorizations. These procedural changes, if implemented, will benefit licensees, the Commission and the public as a whole. As set forth herein, many of the Commission’s current procedures often impose a heavy burden on both licensees and the Commission’s staff, resulting in costs such as delays in delivering improved service to the public and deterrence of investment in improved facilities. Over twenty years have passed since the Commission’s last comprehensive review of its allotment procedures, and several changes have been made to the Table of Allotments during this same period. For these reasons, First Broadcasting submits that the Commission’s current procedures are ripe for review and in need of revision.

First Broadcasting has identified several simple rule changes that eliminate many of the costs imposed by the Commission’s current procedures and instead ensure that the Commission’s procedures better serve the public interest. Namely, First Broadcasting proposes that the Commission:

- permit a change of an FM station’s community of license through a *minor modification* application;
- presume that, under certain defined circumstances, relocation of an FM station providing a community’s sole local service to a new community of license without a first local service is in the public interest;
- establish a simplified procedure to remove non-viable FM allotments from the FM Table of Allotments;
- open a one-time settlement window to resolve the backlog of pending FM rulemakings;
- permit a change of an AM station’s community of license through a *minor modification* application; and
- streamline the process for downgrading a Class C station to Class C0 status.

Adoption of these needed rule changes will trigger significant public interest benefits including shorter FM and AM modification processing delays, more efficient use of limited Commission resources, protection against warehousing of valuable spectrum and expeditious delivery of better radio service to the public. Ultimately, implementation of these rule changes will enable First Broadcasting, other licensees and the Commission to work together towards the continued pursuit of public interest benefits through efficient spectrum use.

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

In the Matter of)	
)	
Amendment of the Commission's Rules)	MB Docket No.
Regarding Modification of FM and AM)	RM -
Authorizations)	

PETITION FOR RULEMAKING

First Broadcasting Investment Partners, LLC ("First Broadcasting") hereby petitions the Federal Communications Commission ("FCC" or "Commission"), pursuant to Section 1.401, *et seq.*, of the Commission's Rules, for amendment of certain of its procedures governing modifications of FM and AM authorizations.¹ Specifically, First Broadcasting urges the Commission to initiate a rulemaking proceeding and solicit public comment on the following changes:

- (i) permit a change of an FM station's community of license through a minor modification application;²
- (ii) presume that, under certain defined circumstances, relocation of an FM station providing a community's sole local service to a new community of license without a first local service is in the public interest;³
- (iii) establish a simplified procedure to remove non-viable FM allotments from the FM Table of Allotments;⁴
- (iv) open a one-time settlement window to resolve the backlog of pending FM rulemakings;⁵

¹ See 47 C.F.R. § 1.401, *et seq.*

² See *infra* Section II.A.

³ See *infra* Section II.B.

⁴ See *infra* Section II.C.

- (v) permit a change of an AM station's community of license through a minor modification application;⁶ and
- (vi) streamline the process for downgrading a Class C station to Class C0 status.⁷

As further set forth herein, adoption of these procedural changes will serve the public interest by, among other things: (i) decreasing lengthy FM and AM modification processing delays; (ii) improving the efficient use of limited Commission resources; (iii) preventing warehousing of valuable spectrum; and (iv) ensuring the expeditious delivery of better radio service to the public.

I. INTRODUCTION

A. First Broadcasting

First Broadcasting is a limited liability company whose primary members include Alta Communications, one of the country's most respected and successful broadcast industry private equity funds, and First Broadcasting Investments, L.P., a seasoned broadcast investor and operator with substantial experience in improving stations and maximizing spectrum resources.⁸ First Broadcasting was founded by Ronald Unkefer in 1992.⁹ In that same year, First Broadcasting entered the broadcasting industry through the purchase of two legacy San

⁵ See *infra* Section II.D.

⁶ See *infra* Section II.E.

⁷ See *infra* Section II.F.

⁸ See Alta Communications, "Who We Are," <http://www.altacomm.com/whoweare/index.htm> (describing business plan); First Broadcasting, "Company Profile," <http://www.firstbroadcasting.com/companyprofile.htm> (chronicling First Broadcasting's historical development and successes).

⁹ See First Broadcasting – Who We Are – Ronald Unkefer, <http://www.firstbroadcasting.com/unkefer.htm>.

Francisco radio stations.¹⁰ First Broadcasting later sold these stations after significantly improving each station's performance.¹¹ Since this initial successful venture, First Broadcasting has commenced a structured and expansive program of broadcast station acquisitions and development, beginning in Dallas, Texas and continuing far beyond. First Broadcasting currently holds controlling interests in twelve radio stations and has filed assignment applications seeking FCC consent to acquire five more stations.¹² Upon completion of the pending transactions, First Broadcasting will hold controlling interests in stations in California, Maryland, Michigan, Oklahoma, Texas, Ohio and Washington.¹³

B. Approach to Enhancing Spectrum Efficiency

A critical element of First Broadcasting's success has been its ability to serve the public interest by improving station performance through creative spectrum management. Specifically, First Broadcasting has purchased underperforming stations, often with declining operations and

¹⁰ *Id.* The first two stations First Broadcasting purchased were KBAY(FM), formerly KYA(FM), and KSFO(AM). See Broadcast Actions, *Public Notice*, Report No. 21268 (rel. Dec. 5, 1991) (consenting to assignment of KSFO(AM) and KAY(FM) to First Broadcasting Company, FCC File Nos. BAL-911018EE and BAL-911018EF).

¹¹ First Broadcasting ultimately sold KBAY(FM) to Alliance Broadcasting and KSFO(AM) to Capital Cities/ ABC. See Broadcast Actions, *Public Notice*, Report No. 21877 (rel. May 5, 1994) (consenting to assignment of KYA(FM), FCC File No. BALH-940202GM); Broadcast Actions, *Public Notice*, Report No. 15851 (rel. July 14, 1994) (consenting to assignment of KSFO(AM), FCC File No. BAL-940628EH).

¹² First Broadcasting exercises direct or indirect control over the following stations: KRVF(FM), KRVA-FM, KBIS(AM), KCLE(AM), KEOR(AM), KZSA(FM), KAZZ(FM), KLLM(FM), KVAC(AM) and KXCL(FM). In addition, First Broadcasting is the proposed assignee of WAOL(FM), WAXZ(FM) and WOXY(FM). Ronald Unkefer, who has ultimate control over First Broadcasting, also controls Big D Broadcasting, LLC, the licensee of KVDL(AM) and WAAM(AM), and the proposed assignee of WAMD(AM) and KJSA(AM).

¹³ First Broadcasting is actively pursuing transactions involving other broadcast stations which still are in their initial stages.

listenership. Through an investment of capital and technical know-how, First Broadcasting has dramatically boosted the stations' population coverage and improved their overall service quality, thereby resulting in a more efficient use of the stations' spectrum.¹⁴ The public interest benefits of First Broadcasting's efforts include providing many communities with their first local service, increasing stations' population coverage, implementing service quality improvements, installing experienced management teams and ensuring greater station responsiveness to community needs.¹⁵

C. Procedural Barriers to Provision of Public Interest Benefits

First Broadcasting is committed to the continued pursuit of public interest benefits through efficient spectrum use; however, the FCC's current allocation procedures and related rules significantly restrain First Broadcasting's ability to do so. Pursuant to the FCC's current procedures, licensees like First Broadcasting must devote substantial resources and time to participate in rulemaking proceedings to make certain AM and FM station modifications, such as

¹⁴ For example, First Broadcasting purchased KOSL(FM) (formerly KNGT(FM)), in January 2003. Pursuant to a one-step application, First Broadcasting relocated the station's transmitter, increased its effective radiated power from 0.51 kW to 4.3 kW, changed its tower height and upgraded the station's class from A to B1. First Broadcasting later sold the station to the Hispanic Broadcasting Corporation (now Univision Radio). See FCC File No. BPH-20021001AAF (construction permit authorizing improvements); FCC File No. BALH-20030307AEA (application seeking approval for assignment to the Hispanic Broadcasting Corporation). KOSL(FM) now serves its community of license, Jackson, California, and surrounding areas with Spanish-language programming.

¹⁵ One recent example is First Broadcasting's acquisition and turn-around of KZSA(FM), Placerville, California. Upon acquiring KZSA(FM), First Broadcasting implemented technological upgrades, expanded the station's coverage area, installed an experienced local management and programming team, and changed the station format to country to serve a currently underserved segment of the local market. Upon launch of the revamped station, KZSA(FM) began airing 10,000 commercial free songs in a row. See "Today's Country and California's Gold Signs on as Sacramento's Country Music Leader," http://www.firstbroadcasting.com/article_13.htm.

community of license changes, rather than utilize relatively simple and successful procedures applicable to other similar modifications and facilities improvements.¹⁶ These complex proceedings inherently involve extensive reliance on and use of the Commission's resources, such as personnel time and administrative overhead, and, as a result, can take years to complete. Indeed, even a cursory review of the current backlog at the Commission yields startling results. For example, of the one hundred thirty-one allocations-related petitions for rulemaking filed in 2002, thirty-one petitions that were docketed remain pending two years later while thirty-six petitions have not even been docketed yet.¹⁷ The backlog has grown so large that the Audio Division presently is issuing orders to resolve rulemaking proceedings initially docketed two years ago.¹⁸

It is clear that the sheer number of backlogged proceedings, let alone their complexity, is growing too large for the Audio Division to handle in a reasonable period of time. Despite unquestioned dedication and effort of its staff, the Audio Division simply does not have the personnel and other resources necessary to expeditiously resolve all of the rulemakings before it, and it seems unlikely that in the near-term Congress will allocate sufficient additional funding to enable the Commission in general and the Audio Division in particular to address this situation. As a result, parties currently must wait as long as several years for complex rulemakings to be resolved, and no relief for either the proponents or the Commission appears imminent.

¹⁶ See, e.g., 47 C.F.R. § 1.420 (listing procedures for amendment of the FM Table of Allotments); 47 C.F.R. § 73.3573 (describing minor modification application procedure). Section II addresses these issues in more detail.

¹⁷ These statistics are from a proprietary database maintained by First Broadcasting, the contents of which are based on information from the Commission's public databases.

¹⁸ See, e.g., Amendment of Section 73.202(b) FM Table of Allotments, FM Broadcast Stations (Hart, Pentwater and Coopersville, Michigan), MB Docket No. 02-235, RM-10545 (rel. Feb. 6, 2004) (resolving petition filed on Feb. 15, 2002).

Delays of this magnitude are problematic because they result in significant costs to all parties, to the Commission and to the listening public. These costs, further detailed below, include: (i) inefficient spectrum use; (ii) delays in delivering improved service to the public; (iii) deterrence of investment in improved facilities; (iv) transactional costs; and (v) waste of scarce and valuable Commission resources.

D. The FCC's Processing Rules are Ripe for Change

The FCC has an obligation to reevaluate its rules and procedures over time and to modify policies in response to changes in technology and the broadcast industry.¹⁹ First Broadcasting submits that the FCC's allocation-related procedures are ripe for review. The FCC has not conducted a comprehensive review of its FM Table of Allotment procedures since 1982.²⁰ Many of these burdensome procedures have not been updated, modified or streamlined for over 20 years despite the fact that the Table of Allotments has changed substantially during this same period. The list of dramatic changes includes: (i) the addition of thousands of new allotments when the Commission created four new classes of FM channels;²¹ (ii) the increase of the maximum transmitting power for Class A FM stations from 3kW to 6 kW;²² and (iii) innumerable rulemakings to change a station's community of license. The complexity of the

¹⁹ See *Office of Communication of the United Church of Christ*, 707 F. 2d. 1413, 1425 (D.C. Cir. 1983); see also 47 U.S.C. § 161 (requiring Commission to review rules on a biennial basis).

²⁰ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

²¹ See *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 FCC 2d 152 (1983) (creating classes C2, C1 and B1); *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989).

²² *Id.*

FCC's task has grown exponentially as a result of these changes yet the FCC's procedures remain the same. Accordingly, as these proceedings grow more complex and take longer to complete, the above-described costs imposed on the proponent, the Commission and the public interest intensify.²³

II. PROPOSALS

Although the FCC's rulemaking procedures may be appropriate for handling the most complex allotment scenarios, most allotment cases are routine and thus can be handled through far less formal procedures, thereby reducing significantly the Commission's administrative burden while, at the same time, promoting the public interest. As set forth further below, handling certain routine modifications in a more simplified manner is consistent with the Communications Act and with the Commission's rules. These changes also will promote the Commission's policies and objectives, thereby resulting in numerous and substantial public interest benefits. Based on its evaluation and review of the FCC's existing procedures for implementing radio station modifications and the governing legal principles, First Broadcasting has identified a number of FCC processing procedures and implementing rules which, in the public interest, warrant change. First Broadcasting is cognizant that prior to making any changes in current procedures, the FCC should ensure that such changes serve three primary public interest considerations and goals: (i) efficient use of Commission resources; (ii) expeditious delivery of service improvements; and (iii) highest and best use of valuable spectrum. With

²³ For instance, the number of allocation-related petitions for rulemaking filed more than doubled in the last year. Based on an analysis of the Commission's databases, including the Electronic Comment Filing System, approximately one hundred thirty such petitions were filed in 2002 while over three hundred were filed in 2003.

these three goals in mind, First Broadcasting urges the FCC to initiate a rulemaking proceeding to seek comment on the following rule changes discussed separately below.

A. The Commission Should Permit an FM Station Community of License Change Through a Minor Modification Application

1. Current Commission Procedure

Under current Commission procedures, a licensee or permittee who seeks to change the community of license of its station must prepare, file and prosecute a petition for rulemaking to amend the FM Table of Allotments.²⁴ Such petitions then are subject to the filing of counterproposals, which are considered during the same proceeding as the original proposal.²⁵ The entire rulemaking process often consumes extraordinary amounts of Commission resources, entails substantial financial expenditures by the proponents, and takes years to complete. In contrast, this same applicant could move its operations to a first, second or third adjacent channel and change its class simply by filing a minor modification application, in the course of which very few Commission resources are consumed, financial expenditures made, or time lost.²⁶ Such applications often are processed within three to four months.²⁷ The difference in processing time, burden and expense for these two categories of modifications is striking.

Delay of this magnitude tends to compound complexity and expense by introducing a great deal of regulatory uncertainty into the FM broadcast industry. The open ended nature of a rulemaking proceeding also leads to uncertainty as to outcome. This uncertainty then operates as

²⁴ 47 C.F.R. § 1.420.

²⁵ 47 C.F.R. § 1.420.

²⁶ 47 C.F.R. § 73.3573.

²⁷ For example, approximately 90% of the FM minor modification applications granted in 2003 were granted within four and a half months of the date they were filed.

a disincentive to investment in broadcast signals, facilities and infrastructure. Specifically, applicants who identify potentially beneficial modifications are much less likely to pursue such changes when they face an uphill regulatory battle with no certain result or completion date. The FCC recognized this problem as recently as 1999 when it modified its processing rules for changes in the AM, NCE FM and FM translator services, stating that: “The current policy of not providing cut-off protection to minor change applications in the AM, NCE FM and FM translator services exposes applicants to significant uncertainty, expense and delay, and may substantially deter applicants from seeking to improve service.”²⁸ Further exacerbating the situation is the fact that pending rulemakings also prevent geographically adjacent stations from obtaining consent to modifications that may conflict with proposals subject to a pending rulemaking because the Commission holds such applications in abeyance while a rulemaking is pending. In either scenario, the uncertainty and delay lock up valuable and scarce FM spectrum resources for extended periods of time, thereby indefinitely postponing or preventing altogether many changes that would benefit the public.²⁹

2. Proposed Change

An ideal remedy for the delay involved in community of license rulemaking proceedings is to follow a course already demonstrated to be efficient, effective and legally sound; the FCC should process a request to change an FM station’s community of license to a mutually exclusive

²⁸ See Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules, 14 FCC Rcd 5272, 5277 (1999). Further, the Commission acknowledged in its *One-Step Order* in 1993 that permitting certain changes by application rather than by rulemaking “eliminate[s] unnecessary duplication of effort..., which imposes unnecessary costs on both the stations seeking modifications and the Commission’s resources.” See Amendment of the Commission’s Rules to Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 4737 (1993) (“*One-Step Order*”).

²⁹ See, e.g., *One-Step Order* at 4739 (“We believe the changes proposed herein would serve the public interest because enhanced service to the public would be expedited.”).

community of license as a minor modification application subject to the same first-come, first-served procedure used to process other minor modification applications which are mutually exclusive to existing authorizations, such as one-step changes in station class or channel.³⁰ Such an amendment to the FCC's rules would enable applicants to accomplish important facilities improvements without facing the delay and uncertainty associated with competing applications, thereby permitting expedited delivery of better service to the public.³¹ Further, processing community of license changes in this manner is fully consistent with the *Ashbacker* doctrine.³² As was the case with those changes addressed in the Commission's *One-Step Order*, community of license changes of the type described above "would serve the public interest because enhanced

³⁰ Class and channel changes, like a community of license change, involve amending the Table of Allotments, yet they are made by application rather than by rulemaking. As the Commission stated in its *One-Step Order*, this application-based procedure is fully consistent with the Commission's allotment policy objectives, *see One-Step Order* at 4737-38, and with the *Ashbacker* doctrine, *see One-Step Order* at 4738-39.

³¹ For example, a one-step application seeking a change to the applicant's community of license also could seek to modify the applicant's class up or down one grade or channel to the first, second, or third adjacent channel to expand the applicant's move-in options. Further, under existing FCC rules, up to four contingently related applications may be filed by an FM licensee. *See* 47 C.F.R. § 73.3517(e). Thus, an applicant seeking to change its community of license could negotiate agreements with up to four nearby stations pursuant to which the stations would concurrently file contingently related one-step applications to modify their class, channel, and/or community of license, as described above, to accommodate the desired move-in of the applicant.

³² In *Ashbacker v. U.S.*, the United States Supreme Court set forth a rationale pursuant to which granting one of two bona fide mutually exclusive applications without a hearing could deprive the loser of the opportunity Congress gave it. *See Ashbacker v. U.S.*, 326 U.S. 327 (1945). In its *One-Step Order*, the Commission justified its application cut-off procedures by noting how the *Ashbacker* doctrine applies only to "applicants" and not to "prospective applicants." *One-Step Order* at 4739. Because "a party seeking to amend the FM Table of Allotments is a 'prospective applicant' until its application is submitted," permitting an applicant to seek an AM community of license change by application, like permitting an applicant to seek an upgrade by application, is fully consistent with *Ashbacker*. *Id.* (citations omitted).

service to the public would be expedited.”³³ Assuming the proposal complies with other FCC rules and policies, such as Section 307(b), the Commission then should grant a construction permit.³⁴

By processing community of license changes in the above-described manner, the FCC could reduce, if not erase, the typical complexity associated with allotment rulemakings involving community of license changes of operational FM radio stations. Processing time for such changes would drop from years to a few months. In addition, processing applications with exhibits containing Section 307(b) showings will take what has evolved into a highly subjective and unpredictable process and turn it into a simple process that is both objective and predictable.³⁵ Rather than having to compare a series of proposals and counterproposals, as is the case in a rulemaking, the FCC will be able to review a single exhibit to determine whether a proposal is consistent with its allocation priorities and in the public interest.³⁶ As the FCC itself

³³ See *One-Step Order* at 4739 (noting that the “Commission can promulgate rules limiting eligibility to apply for a channel when such action promotes the public interest, convenience and necessity”).

³⁴ The FCC could require applicants to submit an exhibit to their application demonstrating how their proposed change provides a “fair, efficient, and equitable distribution of radio services.” See 47 U.S.C. § 307(b). Applications could be further restricted by requiring any proposed changes to a station's community of license to fully comply with all spacing rules and be able to be accomplished without modification of any geographically adjacent station. Or, if the modification of other stations is required, then the Commission should require that the related modification applications be filed contemporaneously as contingent, interdependent applications.

³⁵ Using its first come/first served cut-off procedure, the FCC has been able to process one-step applications individually on their own merits without having to consider and choose between multiple competing applications. By contrast, the FCC has been required to adopt somewhat arbitrary and easily manipulated criteria to choose among competing, highly similar petitions for rulemaking, and, as a result, has developed an extensive, several year backlog of rulemakings.

³⁶ If the exhibit demonstrates that the proposal is consistent with a priority ranked higher than the priority currently being served, then the Commission could presume that the change is in

has stated, the one-step procedure “serve[s] the public interest by speeding the implementation of service modifications.”³⁷ These benefits will increase if the one-step procedure is expanded to include an FM applicant’s community of license change which is mutually exclusive with its current community of license and otherwise in compliance with the FCC’s rules.

By way of historical note, two reasons were cited in opposition to such procedural change the last time the FCC revised its processing rules. The first was a potential conflict with the contingent application rule. The second was a lack of experience processing “one step” applications. Neither of these reasons is any longer valid.³⁸ When the FCC adopted its one-step application procedure in 1999, the Commission postponed applying the procedure to FM community of license changes.³⁹ According to the FCC at that time, “[I]t would be premature to implement the changes suggested at this time. . . . Under these circumstances, and until such time as we have greater experience with a one-step process, we believe a more cautious approach is warranted.”⁴⁰ The Commission also noted a potential conflict with the contingent application

the public interest. This procedure would be very similar to the procedure used to evaluate certain mutually exclusive applications filed during an AM filing window. In that context, the FCC staff conducts a Section 307(b) analysis prior to holding an auction for mutually exclusive AM applications which propose to serve different communities. *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 13 FCC Rcd 15920, 15964 (1998). Applicants submit an attachment, commonly known as a Section 307(b) showing, which sets forth details about the applicant’s proposal, such as the area and population proposed to be served and the number of stations licensed to the proposed community of license. *See, e.g.,* AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction, *Public Notice*, DA 00-2416, at 3 (rel. Oct. 27, 2000).

³⁷ *One-Step Order* at 4736.

³⁸ *Id.* at 4741.

³⁹ *Id.* at 4741.

⁴⁰ *Id.* at 4740.

rule then in effect, which generally prohibited the filing of most contingent applications.⁴¹ Since that time, the contingent application rule has been modified to allow up to four contingent FM construction permit applications to be processed together.⁴² In addition, the Commission now has had over ten years of practice using the one-step procedure, which in First Broadcasting's experience, has worked with admirable speed, efficiency and cost effectiveness for all parties concerned, including the Commission and the public. Accordingly, the FCC has sufficient reason to reconsider its earlier position and instead permit FM community of license changes to be made by application.⁴³ Streamlining the FCC's procedures in this manner will make the FCC's public interest review objective rather than subjective, will cut delays from years to months, will go a long way towards addressing the backlog of rulemakings and will ensure that better service is delivered to the public as quickly as possible.

⁴¹ *Id.* at 4740.

⁴² 47 C.F.R. § 73.3517; *see* 1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 14 FCC Rcd 5272, 5272 (1999). Thus, if an FM community of license change is deemed a minor change, applicants could file one or multiple applications to change a station's community of license, along with applications for other minor changes, as contingent applications.

⁴³ Further, the FCC processed multiple applications seeking a community of license change during the last AM filing window without any legal impediments. *See supra* note 36. Thus, the FCC has experience processing community of license changes outside of the rulemaking context. In 1999, when it declined to permit AM and FM noncommercial licensees to change their community of license by a minor modification application, the Commission questioned whether Section 307(b) concerns would be sufficiently addressed. *See* Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 14 FCC Rcd 5272, 5278 (1999). Experience with the one-step upgrade and contingent application process now has demonstrated that these concerns were unfounded; Section 307(b) considerations can be thoroughly evaluated in an application context.

B. The Commission Should Presume That, Under Certain Defined Circumstances, Relocation of an FM Station Providing a Community's Sole Local Service to a New Community of License Without a First Local Service is in the Public Interest

1. Current Procedure

The Commission currently does not permit a station providing its community's sole FM local service to move to a new community of license unless another operating station simultaneously is moved into the previous community.⁴⁴ This restriction is based on an interpretation of the Commission's FM allocation priorities, which were adopted to implement Section 307(b) of the Communications Act.⁴⁵ Section 307(b) requires the FCC to provide a "fair, efficient, and equitable distribution of radio services" when considering modification applications.⁴⁶ In order to ensure this distribution, the FCC has adopted four basic FM allotment priorities, pursuant to which it considers whether a proposed modification would result in: (i) a community's first full-time aural service; (ii) a community's second full-time aural service; (iii) a community's first local service; or (iv) other public interest benefits.⁴⁷ Proposals that would further the first or second priority generally are preferred over proposals that would promote only the third priority, and so on.⁴⁸ Due to the FCC's current application of these priorities, an applicant may not move a station that is a community's first local service to a new community

⁴⁴ See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870, 4874 (1989) ("However, in all three cases, we will not allow any broadcaster to take advantage of this new procedure if the effect would be to deprive a community of an existing service representing its only local transmission service.").

⁴⁵ See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 7094, 7096-97 (1990).

⁴⁶ 47 U.S.C. § 307(b).

⁴⁷ See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 91-92 (1982).

⁴⁸ Priorities (ii) and (iii) are considered co-equal.

unless the station will be: (i) the first or second aural service for the new community; or (ii) the first local service in a new community *and* other “public interest considerations” weigh in favor of the move.⁴⁹

When evaluating the “public interest considerations” in this latter category, the Commission often emphasizes increased signal population coverage as a significant public interest factor.⁵⁰ Thus, one could surmise that a station which is a community’s first local service should be able to move to another community where it would be a first local service if the station would serve more people in the new community than it could in its current community. Unfortunately, this beneficial result never materializes because the Commission has determined that the current community’s interest in “continuity of service” *always* trumps increased signal population coverage and other public interest benefits.⁵¹ The Commission appears to apply this rigid interpretation no matter how many other public interest factors are present.⁵²

The Commission’s current policy of promoting continuity of service over all other public interests is contrary to the intent of Section 307(b) and does not maximize service to the public.

⁴⁹ *Id.*

⁵⁰ Indeed, in the Commission’s original allocation priorities, “Provision of a first FM service to as much of the population of the United States as possible...” was the very first priority after “provision for all existing FM stations.” *See* Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 90 (1982) (citing Third Report, Memorandum Opinion and Order, 40 FCC 747 (1963)).

⁵¹ *See* Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7096 (1990) (describing “Absolute Restriction on Removal of Sole Existing Local Transmission Service”).

⁵² *See* Application of Pacific Broadcasting of Missouri, LLC For Special Temporary Authorization to Operate Station KTKY(FM), Refugio, Texas, FCC 03-18, at ¶ 7 (rel. Feb. 11, 2003) (“Thus, except in rare cases, we prohibit an FM licensee from changing its community of license if to do so would deprive its current community of license of its sole local service.”).

The interests of one community in retaining its sole existing local transmission service should not outweigh the interests of the greater number of listeners in a second community in obtaining their first local transmission service, especially when the first community already is served by multiple aural services and when other public interest factors are present. Rather, the primary concern of the FCC should be to provide the most people with a first local service.

The counterproductive effect of the Commission's exclusive emphasis on continuity of service may be demonstrated by a simple example.⁵³ Consider a situation in which Community A receives eight aural services, most of which are located in communities geographically near Community A and thus address many of Community A's needs. Community A also has a single local service. Community B, on the other hand, receives only two aural services, one of which currently is off the air. Community B does not have its own local service. Under the Commission's current allocation priorities, an applicant could not move the FM station from Community A to Community B even if: (i) it would serve more people from Community B than from Community A; (ii) it would be only the third station to serve the people of Community B, while Community A still would be served by eight stations; and (iii) it would offer other tangible and important public interest benefits. This example demonstrates that in systematically emphasizing "continuity of service," the Commission is ignoring the exact public interest that provides a basis for the allocation priorities themselves—ensuring a "fair, efficient, and equitable

⁵³ The Commission previously has recognized that an emphasis solely on "first local service" could lead to absurd results. *See* Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 (1982) ("As the Commission pointed out in *Anamosa* and *Iowa City*, the old system of giving greater priority to first local service could lead to anomalous results and in fact: 'Applying them literally the result would be that any community, even one of only 100 persons seeking a first channel would automatically succeed in preference to a second channel to a city of 1,000 that would bring a second service to 40,000 people.'").

distribution of radio services.”⁵⁴ Any rationalization designed to demonstrate that, in the above example, keeping a station in Community A while denying it to Community B is “fair,” “efficient” or “equitable,” let alone all three, would be strained at best. Rather, the FCC potentially is favoring one community over another simply because it was chosen decades ago as a place worthy of an allotment, in disregard of shifting populations, market forces and, most importantly, the public interest.⁵⁵

2. Proposed Change

In order to ensure that the true intent of Section 307(b) is realized, the FCC should cease emphasizing “continuity of service” over all other public interest factors when considering whether a first local service may relocate from one community to another.⁵⁶ Instead, the FCC should use a more tailored approach which balances the public’s interest in continuity of service with other important factors. Specifically, the FCC should establish a presumption that it is in the public interest to permit an FM station providing a community’s sole local service to move to a new community provided that: (i) at least two other stations provide a 70 dBu signal to the current community (i.e., the current community has at least two aural services); (ii) the station

⁵⁴ See 47 U.S.C. § 307(b).

⁵⁵ At the time of their adoption, the allocation priorities were intended to permit consideration of various public interest benefits rather than restrict the Commission’s review to rigid, specific priorities. See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982) (“Finally, we believe it is preferable to employ a single priority for the remaining areas of comparison. It will allow the Commission to compare the benefits offered by the respective proposals without being bound by the rigid sequence of the old priorities... This comparison can take into account the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities and their growth rate.”).

⁵⁶ The Commission’s current emphasis on continuity of service is not mandated by statute or judicial interpretations but rather is a Commission interpretation. Thus, the FCC has sufficient discretion to alter this approach if, as demonstrated herein, public interest considerations warrant such a change in policy.

will be the first local service in the proposed community; (iii) the station's 70 dBu contour will serve a larger population in the proposed community of license than it does in its current community of license; and (iv) the move does not cause any short spacing and/or resolves any existing short spacing.

This approach results in at least two significant benefits. First, the presumption gives the FCC the discretion to weigh multiple public interest benefits in its Section 307(b) analysis, not just one—the preservation of local service—which currently trumps all other public interests. Under the approach proposed herein, loss of local service will remain an important consideration, however, that “cost” will be balanced against other potential benefits. Second, establishing a presumption based on certain specified factors ensures that the FCC performs its Section 307(b) analysis in an objective manner. Restricting relocation of a community's sole local service to situations in which the current community already has at least two aural services guarantees that the members of the current community continue to receive a satisfactory level of service, even if that service does not originate in their specific community. To further require that the station extend its population coverage before permitting a move helps maximize spectrum resources. Mandating that the new community be one without a local service ensures that there is no net loss in the number of communities receiving a first local service. Finally, the prohibition on new short spacing promotes the FCC's objective of minimizing potential interference. In sum, use of the presumption detailed above would provide the FCC with enough flexibility to permit modifications that serve the public interest and still prioritize first local service.

C. The Commission Should Establish a Simplified Procedure to Remove Non-Viable FM Allotments from the FM Table of Allotments

1. Current Procedure

The FM Table of Allotments contains thousands of allotments ranging from communities as large as New York City, with a population in excess of eight million, to communities like Rozel, Kansas, home to only 182 persons.⁵⁷ Many of these allotments have remained vacant since their inception decades ago. In the meantime, an applicant with a station in a nearby community seeking to modify its facilities must protect such a vacant allotment no matter how long it has been vacant or how remote the possibility that a station will be built there. This effect is due to the FCC's antiquated Table of Allotment amendment procedures. Pursuant to these procedures, FM allocations listed in the Table of Allotments remain in the Table of Allotments indefinitely unless deleted via a separate rulemaking, which, as set forth below, involves significant uncertainty and delay, and consumes extraordinary amounts of Commission resources.⁵⁸

The continued existence of so many non-viable vacant allotments warehouses valuable and scarce FM spectrum resources, thereby in effect penalizing the listening public. For example, these allotments—which provide no current benefits to the public whatsoever—prevent other licensees from expanding their signal coverage. In addition, the presence of these long-

⁵⁷ See United States Census Bureau, 2000 United States Census, Table SUB-EST2002-10-20-Kansas Incorporated Place Population Estimates, Sorted Within County: April 1, 2000 to July 1, 2002 (rel. July 10, 2003).

⁵⁸ Deleting a vacant allotment proves even more difficult given that the Commission will delete an allotment only if an expression of interest is not filed during the comment period following the notice of proposed rulemaking. See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, Cheyenne and Saratoga, Wyoming, 10 FCC Rcd 6722 (1995) (noting “[i]t is Commission policy not to delete a channel where there has been an expression of interest”).

vacant allotments thwarts the addition of new allocations in nearby more populated areas which could obtain an allotment and support a station if the vacant allotment was not present. For instance, a station near a vacant allotment may wish to extend its contour over additional communities but cannot do so because it must protect an allotment that may have been vacant for years, if not decades. Thus, a policy intended to help members of a community may in fact work to their detriment because it prevents the extension of signals into their community.

The FM Table of Allotments includes dozens of vacant allotments assigned to communities so sparsely populated that it is virtually guaranteed that no station ever will be built using many of these allotments. Absent a certain population density in or around a community, even the largest and most established broadcast owners will not build a station because advertisers will not pay them to reach so few people.⁵⁹ The economic principle behind this result is that the capital costs of constructing and maintaining a radio station are relatively fixed, regardless of the size of the community in which the station resides, while the potential for revenue increases substantially with the population of the community. In this respect, radio stations are not unlike other businesses that depend principally upon advertising for financial support. For instance, many small communities do not have their own community newspaper for the very same reason—there simply are not enough people in their community to attract the advertising dollars necessary to support the printing and distribution of the newspaper. Thus, many small communities get their news from a more regional newspaper which serves their small community along with many others. Their “right to receive a first local newspaper” does

⁵⁹ Due to population shifts, many communities are even less likely to support a station now than when they were added to the Table of Allotments. In many other instances, stations that manage to be built and begin operating in small communities later begin operating with a reduced schedule or eventually go dark. In the meantime, this spectrum lies unused and stands in the way of modifications that would serve the public interest.

not prevent newspapers in other communities from being distributed in their area; nor does it prevent other nearby communities from being the locus of their own newspaper. Clearly, such an outcome would be absurd yet the FCC's current policy of maintaining long vacant allotments in effect promotes just such a result.

2. Proposed Change

Warehousing spectrum that could be used more effectively is contrary to the public interest and to the critically important "fair, efficient, and equitable distribution" goal of Section 307(b). Maintaining vacant FM allotments at such a high cost to the public, and indeed to Commission efficiency, is even more injurious given that a simple rule change could remedy the problem with no resulting detriment to the Commission's Section 307(b) objectives or other public interest concerns.⁶⁰ In order to clear the FM Table of Allotments of these perpetually vacant allotments, the FCC should: (i) include all vacant FM allotments in a single upcoming auction; (ii) delete those allotments that are not purchased at auction; and (iii) delete any allotment that is purchased but then not built out during the three-year construction permit

⁶⁰ The Commission previously has recognized the harm that vacant allotments cause. *See, e.g.*, In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Santa Isabel, Puerto Rico and Christiansted, Virgin Islands), 3 FCC Rcd 2336, 2337 (1988) ("Absent an expression of interest, a newly allotted channel could lie vacant after the Commission had expended limited resources conducting a rulemaking proceeding and after parties had submitted comments regarding a proposed channel. An expression of interest is all the more important where the requested allotment action would conflict with another application. A further allotment under these circumstances would not only waste Commission and participants' resources, it could preclude additional or improved service elsewhere with no countervailing service benefit to the public. Thus, the requirement of an expression of interest is reasonable and necessary to the efficient conduct of the agency's business, and the Commission has good reason to preserve the integrity of its processes by requiring adherence."). Unfortunately, the very mechanism the Commission adopted to remedy these harms of delay, warehousing of spectrum and inefficient use of Commission resources—the "expression of interest"—now is causing the exact harms the requirement was intended to prevent.

period.⁶¹ Or, if a current or future allotment lies vacant for a specified period of time—perhaps three years or more—the FCC should permit a party to initiate a simplified allotment deletion proceeding pursuant to which the FCC solicits comment and, absent a compelling justification for retaining the allotment, deletes the allotment. Finally, if a station licensee wishes to surrender its license, the Commission should grant such a request and delete the station’s allotment.⁶²

The potential public interest benefits of deleting vacant FM allotments are significant no matter what process the FCC ultimately uses. Deleting perpetually vacant allotments or deleting an allotment upon the surrender of a license would permit existing stations to expand their service into the community that is home to the vacant or abandoned allotment. In addition, the increased spacing area could enable a new station to be built in a nearby community, from where it still may reach the community which loses its allotment. Either of these two scenarios results in a net gain in service and efficiency, for the residents of the community with the vacant allotment, for other nearby communities and for the Commission.

Implementation of a simple and more efficient procedure for deleting FM allotments is further supported by the fact that a similar procedure has been in place for, and worked well for,

⁶¹ This would prevent applicants from claiming stations merely to disrupt other applicants’ plans to improve spectrum efficiency, thereby frustrating the goal of maximizing spectrum resources. The FCC previously has adopted rule changes intended to preclude these tactics. *See* Amendment of Section 1.420(f) of the Commission’s Rules Concerning Automatic Stays of Certain Allotment Orders, 11 FCC Rcd 9501, at ¶ 9 (1996) (amending automatic stay rule so that the filing of meritless petitions for reconsideration of rulemaking decisions would not unduly delay the “commencement of construction and the provision of expanded serviced to the public.”). In the alternative, if the FCC does not have the resources to include all empty allotments in upcoming auctions, the FCC should permit applicants to request that particular empty allotments be auctioned.

⁶² As set forth further below, this procedure would be consistent with how the Commission handles AM authorizations that are relinquished or revoked.

the AM band. Under the Commission's current policies, once an AM authorization expires or is revoked or relinquished, the station's parameters are deleted from the FCC's databases. As a result, AM applicants need not continue to protect the fictional facilities of the now defunct station. Shortly thereafter, existing licensees or new applicants often step in to maximize use of the vacated spectrum, either by inserting a new station or expanding facilities of an existing station or stations. When an AM license is removed from the databases, the FCC does not conduct a Section 307(b) analysis. Instead, the Commission simply lets the market decide when a station no longer is viable and lets the market step in to utilize the vacated spectrum. In contrast, FM applicants must protect FM allotments even after an FM station which previously used that allotment no longer is present. Use of a different procedure for the FM band is perplexing given that, as demonstrated above, the current FM procedure causes more harm than benefit. The FCC should acknowledge the efficiency, appropriateness and positive public interest benefits associated with the AM procedure, and apply them to the FM arena so that residents of communities with vacant FM allotments can realize a net gain in service and enjoy the benefits that such new services can provide.

D. The Commission Should Open a One-Time Settlement Window to Resolve the Backlog of Pending FM Rulemakings

1. Current Procedure

Although all of the rule and policy changes discussed above would lead to significant public interest benefits in the future, the impact of the changes likely will be muted by the sheer

magnitude of the current backlog of pending FM rulemakings.⁶³ The changes discussed above will not reduce the existing backlog of FM rulemakings on their own because they are prospective. All of the public interest benefits discussed above could be more fully realized, and realized more quickly, if the Commission's staff could begin with a "clean slate" or at least a smaller backlog of rulemakings. One simple and proven method of clearing away some of these rulemakings would be to permit the parties themselves, in a one-time window, to negotiate settlements, and to give such parties as much flexibility as possible in their negotiations. Under the Commission's current rules, parties may discuss a compromise between their various proposals and counterproposals, but one party may not pay another party an amount of money greater than the receiving party's reasonable expenses in exchange for withdrawal of its proposal or counterproposal.⁶⁴ Specifically, Section 1.420(j) provides that a party withdrawing an expression of interest in a construction permit during a rulemaking proceeding must submit a certification that it will not receive consideration in excess of its "legitimate and prudent" expenses in exchange for the withdrawal.⁶⁵

2. Proposed Change

To ensure that all of the public interest benefits associated with the rule changes suggested herein are delivered expeditiously, the FCC should open a one-time 60-day to 120-day

⁶³ As set forth above, many of these proceedings remain pending for years. During the pendency of such rulemakings, valuable and scarce FM spectrum resources often are not employed to their highest and best use consistent with the public interest. Further, the affected licensees are unlikely to invest significant capital in the improvement of their stations due to regulatory uncertainty. In addition, geographically adjacent licensees are unlikely to seek to upgrade or modify their stations, even when doing so clearly is in the public interest, also because of such regulatory uncertainty.

⁶⁴ 47 C.F.R. § 1.420(j).

⁶⁵ 47 C.F.R. § 1.420(j).

window during which Section 1.420(j) is waived with respect to all pending rulemakings to amend the FM Table of Allotments. During such a settlement window, parties could enter into settlements pursuant to which withdrawing parties may be paid settlement payments in excess of their expenses.⁶⁶

Waiving Section 1.420(j) during a one-time, temporary settlement window would not frustrate the purpose of the rule itself. The stated justification for Section 1.420(j) is to discourage the speculative filing of oppositions or counterproposals, the sole intent of which is to extract settlement payments.⁶⁷ However, because Section 1.420(j) was in place at the time currently pending oppositions and counterproposals were filed, such filings clearly were not made with any intent to obtain settlement payments in excess of expenses. Thus, the Commission could waive Section 1.420(j) with respect to already pending rulemakings without jeopardizing the public interest goal behind the rule.

Commission waiver of Section 1.420(j) during a one-time short term settlement window also is consistent with FCC precedent. As recently as 2001, the Media Bureau opened a four month window during which parties to pending proceedings involving mutually exclusive AM, FM, and TV modification applications were permitted to reach “universal” settlements.⁶⁸ During

⁶⁶ Consistent with FCC precedent, parties that will continue to prosecute their proposals following a settlement should be required to supplement their proposals with a Section 307(b) showing which demonstrates that the proposal represents a “fair, efficient, and equitable distribution of radio services” consistent with the mandates of Section 307(b).

⁶⁷ See Amendment of Sections 1.420 and 73.3584 of the Commission’s Rules Concerning Abuses of the Commission’s Processes, 6 FCC Rcd 3380, ¶ 2 (1991) (noting that “prior policy of approving unrestricted settlements in allotment cases created an incentive to file competing expressions of interest for the purpose of extracting a profit from settlement rather than for the legitimate purpose of prosecuting an application”).

⁶⁸ See Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications, *Public Notice*, 16 FCC Rcd 17091 (2001) (“Universal Settlement Filing Window Public Notice”) (establishing a 60-day universal settlement filing window); see also

the filing window, the FCC waived Section 73.3525(a) of its rules, which generally precludes mutually exclusive applicants from withdrawing from proceedings in exchange for consideration in excess of their expenses.⁶⁹ Thus, applicants were permitted to negotiate settlements involving financial payments that normally would have been prohibited. Parties to currently pending Table of Allotment rulemakings should be given a similar opportunity to negotiate settlements, without the financial restrictions of Section 1.420(j). With respect to the 2001 universal settlement window, the FCC explained that “opening a window for universal settlements will provide an opportunity to resolve promptly [delineated pending applications] and permit the expeditious authorization of new broadcast service.”⁷⁰ Opening a one-time, temporary settlement window in the instant case would result in a similarly beneficial backlog-clearing effect. In addition to erasing the overwhelming backlog of pending rulemakings, such a temporary settlement window would enable competitive markets to determine the highest and best use of the FM spectrum in controversy, an oft-cited goal of the Commission.⁷¹

Extended Settlement Period for Closed Groups of Mutually Exclusive Broadcast Applications Announced; Period to Close February 15, 2002, *Public Notice*, 16 FCC Rcd 22047 (2001) (extending the universal settlement filing window for over two months).

⁶⁹ See 47 C.F.R. § 73.3525(a).

⁷⁰ See Universal Settlement Filing Window Public Notice, at 1. Under the FCC’s rules, the proceedings subject to the universal settlement filing window normally would have been resolved via auctions, but a judicial decision unrelated to the subject of this memorandum prevented the FCC from using auctions to resolve the proceedings. As a result, dozens of disputed modification proceedings became backlogged.

⁷¹ As the Media Bureau has noted, the FCC has used such settlement windows in other instances in the past:

Section 73.3525(a) waivers were previously granted to expedite resolution of mutually exclusive applications that were frozen in response to *Bechtel v. FCC*, 10 F. 3d 875 (D.C. Cir. 1993). The same approach is codified in Section 309(1)(3) of the Communications Act, which was adopted as part of the Balanced Budget Act of 1997 to promote settlements of long-pending applications [prior to the implementation of broadcast auctions].

E. The Commission Should Permit Change of an AM Station's Community of License Through a Minor Modification Application

1. Current Procedure

The FCC currently characterizes the change of an AM station's community of license as a major modification of its license and only accepts applications for such major modifications during periodic open filing windows, the last of which reportedly generated over a thousand filings.⁷² To the extent that such major modifications are mutually exclusive, the FCC resolves the mutual exclusivity through an auction. In contrast, minor modifications such as a power increase may be accomplished by the filing of an application at any time; these applications then are processed on a first-come, first-served basis.⁷³

The current process for changing an AM station's community of license often results in unwarranted delays and excessive burden on the Commission itself. Applicants must wait for an AM filing window to open, and then are subject to even further delay while their applications are processed and, in many cases, auctioned. For instance, four years passed between the last two AM filing windows.⁷⁴ Moreover, mutually exclusive applications filed during the last AM filing window in January 2000 were not auctioned until three years later.⁷⁵ Thus, assuming that past experience is an approximate indication of likely future delays, an applicant who determined that it should change the community of license of its AM station in March of 2000 will have to wait

Universal Settlement Filing Window Public Notice, at 1 (citations omitted).

⁷² 47 C.F.R. § 73.3571.

⁷³ 47 C.F.R. § 73.3571.

⁷⁴ See AM Auction Filing Window and Application Freeze Extended to February 1, 2000, *Public Notice*, DA 00-131 (rel. Jan. 27, 2000) (noting that window opened on January 24, 2000); AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze, *Public Notice*, DA 03-3532 (rel. Nov. 6, 2003).

⁷⁵ New AM Broadcast Stations Auction Closes, *Public Notice*, DA 02-3450 (rel. Dec. 18, 2002).

until January 2007 before it is authorized to make that change. Such an applicant will have waited almost four years for a filing window and will have to wait another three years to receive its authorization at auction. Seven years is not an acceptable period of time to wait to implement an AM community of license change, and can in no way be deemed to serve the public interest.⁷⁶ As with FM rulemaking proceedings, delays of this magnitude trigger significant costs for all parties involved, including the public and the Commission. For example, long delays prevent the efficient use of AM spectrum and further postpone, perhaps indefinitely, the delivery of better service quality.

Even if the efficiency of the filing window procedure could be increased so that processing periods were reduced from several years to several months, many of the costs associated with the current procedure would remain. For instance, permitting AM community of license changes to be sought only during a filing window—with applications for new stations and for far more complicated facilities modifications—dramatically increases the already heavy burden faced by the FCC staff personnel responsible for analyzing such proposals. Specifically, filing windows naturally encourage concentrated batches of hundreds and often thousands of applications to be filed simultaneously, thus stretching the resources of the Commission beyond their capacity.⁷⁷

⁷⁶ Admittedly, the extraordinary delays of the recent past were due in large part to legal uncertainties concerning auctions; however, even in a best case scenario, the delays associated with filing windows are unacceptably long, especially when compared to the processing time for minor modification applications.

⁷⁷ For example, thousands of applications were filed during the last FM translator filing window. We understand that the Commission intends to open filing windows more frequently, however, this plan alone will not solve the problems detailed above. Pent-up demand likely will result in the filing of an extremely large number of applications during these initial filing windows, which then could prevent the Commission from opening windows more frequently.

2. Proposed Change

In light of these unacceptable delays and associated costs, the FCC should implement revisions to its procedures governing AM community of license changes. Specifically, the FCC should permit applicants to seek a change in the community of license of an AM station through a rolling minor modification application process rather than through a filing window. This proposed application process would operate on a rolling basis, much like the FM one-step minor modification process currently operates. In order to restrict the potential number of applications and ensure continuity of service to as many listeners as possible, changes to an AM station's community of license should be permitted by application only if they are mutually exclusive to the licensee's existing AM license and comply with all other applicable FCC rules. Such applications also should contain Section 307(b) showings. Applications deemed acceptable for filing would be processed on a first-come, first-served basis to avoid mutual exclusivity and auctions.

As more fully set forth above, processing AM community of license changes only during filing windows results in delays and unnecessary and inappropriate strains and stresses on Commission resources. In contrast, were FCC staff members able to process AM community of license changes on a rolling, first-come, first-served basis, they could direct more focused, individualized attention to every application. Evening out the staff's workload over a long period of time rather than forcing the staff to process these applications in bursts would result in a more thorough review of every application and more assurance that the FCC staff was carefully implementing the Commission's priorities. Continuing to process AM community of license changes only in filing windows will perpetuate inherent flaws; processing such changes on a rolling basis as minor modifications will enable the Commission to better fulfill its public

interest objectives. Ultimately, shifting to an application based system for these AM changes will bring beneficial service changes to the public in a matter of months rather than a matter of years.⁷⁸

F. The Commission Should Streamline the Process for Downgrading a Class C Station to Class C0 Status

1. Current Procedure

The FCC currently permits a station seeking to move or upgrade its facilities to request that the FCC downgrade the status of nearby Class C stations transmitting from a lower height than assumed under the Commission's rules for purposes of calculating their protected contours. In 2000, a substantial percentage of Class C stations—60% as of 2000—were transmitting from tower heights under 450 meters height above average terrain (“HAAT”) even though their protected contours are calculated as if the stations transmit from towers of 600 meters HAAT.⁷⁹ As a result, the actual 60 dBu contours of these stations did not approach their imputed protected contours. Rather than downgrade all such Class C stations nationwide, the FCC decided to permit adjacent stations to request that the FCC downgrade individual Class C stations to Class C0 status to permit other stations to move or upgrade their facilities if the proposed facilities

⁷⁸ Permitting AM community of license changes by minor change application also is consistent with the structure of current FCC rules because unlike FM stations, AM stations are not memorialized in a codified Table of Allotments. Therefore, to the extent that the FCC believes there is a statutory requirement which mandates that certain modifications to FM stations be accomplished through rulemakings, this same concern would not apply to AM changes.

⁷⁹ Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 15 FCC Rcd 21649, 21655 (2000) (noting that 519 of 863 Class C stations operated with tower heights of between 300 and 450 meters).

would be short-spaced to the Class C station but fully spaced to a Class C0 assignment.⁸⁰ The FCC allows a Class C station subject to a downgrade request to file a notice with the FCC within 30 days of the downgrade request stating that the Class C station intends to increase its tower height to 451 meters or more.⁸¹ The Class C station then must file an appropriate modification application within 180 days of filing this notice and also must build out its modified facilities within three years of approval.⁸² The Class C station's obligations effectively cease upon the filing of the application. In the meantime, the station that requested the downgrade is precluded from improving its facilities unless and until the Class C station obtains approval for its modification and constructs such a modification.

This flexible process is intended to provide Class C stations with a one-time opportunity to increase their tower height and avoid a downgrade to class C0 status. Unfortunately, many Class C stations subject to downgrade requests widely abuse the FCC's procedures to indefinitely postpone other stations' upgrades. Specifically, the FCC's current procedure enables Class C stations to file modification applications to increase the heights of their towers or relocate their transmitter location with full knowledge that substantial obstacles, such as site location issues, zoning problems, FAA height restrictions and other barriers, likely will substantially delay the FCC's processing of the applications.⁸³ These obstacles prevent the Class

⁸⁰ Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 15 FCC Rcd 21649, 21662-21663 (2000). A Class C0 station has a tower height between 300 and 450 meters and an operating power of up to 100 kW. A Class C station may have a tower height of 451 to 600 meters.

⁸¹ *Id.* at 21663-21664.

⁸² *Id.*

⁸³ For example, a Class C station may file a construction permit application without a new antenna structure registration number; it simply may check a box stating that a notification was filed with the FAA. The FAA may take months to process the notification and ultimately

C stations from obtaining FAA approval of their new towers or otherwise delay FCC action on the applications for prolonged periods of time, often two years or more.⁸⁴ The Class C stations then have an additional three years to build out their proposed facilities before their construction permits expire as a matter of law. As a result, the FCC's current rules, which were intended "to promote more efficient use of FM spectrum by making available this underutilized spectrum on a demand basis for competing broadcast uses," actually have the opposite effect. Few adjacent stations requesting downgrades of Class C stations can afford to wait as long as five years—the period of time necessary for it to become clear that the Class C station, despite filings to the contrary, has no intention of deploying new tower facilities—to upgrade or move their facilities. As a result, adjacent stations often refrain from initiating the process necessary to downgrade a Class C station. As set forth above, even if an adjacent station does request a downgrade, the FCC's current procedures make it easy for a Class C station to express an intent to increase its tower height, only to delay for years in the hope that the requesting adjacent station ultimately will abandon its upgrade plans. In the meantime, valuable and scarce spectrum resources remain unused, a result which is contrary to the public interest and to the FCC's objectives in creating the Class C downgrade procedure.⁸⁵

may determine that the proposed tower would be an impermissible hazard to aviation. The Class C station then may need to find a new site. Throughout this period of "trial and error," the Class C station's construction permit application remains pending and thus delays another station's plans to upgrade.

⁸⁴ For instance, the Class C station's application could remain pending at the FCC while the station licensee pursues zoning approvals.

⁸⁵ *Id.* at 21662 (reasoning that "reclassification would serve the public interest by recovering valuable FM spectrum").

2. Proposed Change

The FCC should consider rule changes to ensure that its original objectives in adopting the Class C downgrade procedure are realized. Specifically, the FCC should adopt the following rule changes to accomplish this result:

- (i) Dismiss any modification application submitted by a Class C station to avoid a downgrade to Class C0 status if the applicant does not provide the FCC with all the information it needs to process the application within 90 or 120 days of initially filing an incomplete modification application;⁸⁶
- (ii) Bring applications to downgrade a station from Class C to Class C0 status to the front of the processing queue to ensure that modification applications are processed expeditiously;
- (iii) Reduce the amount of time available for a Class C station to file a modification application from 180 to 90 days following a request by an adjacent station for the Class C station to be downgraded to Class C0 status; and/or
- (iv) Exercise increased oversight of a Class C station's progress in building out its construction permit and proactively revoke construction permits when the Class C station permittee has not achieved certain milestones established by the FCC, such as FAA "no hazard" approval or any necessary zoning approvals, by specific deadlines established by the FCC.

By implementing any or all of these or similar processing changes, the FCC will help to ensure that its original objectives behind adoption of the Class C to Class C0 downgrade procedure are fully realized, and limit the ability of unscrupulous station owners to "game the system."

III. CONCLUSION

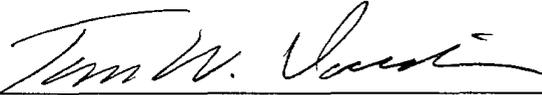
Many of the FCC procedures faced by First Broadcasting and all other radio licensees when attempting to make certain beneficial modifications to their facilities are obsolete at worst,

⁸⁶ This solution would prevent a Class C station from indefinitely delaying another station's upgrade plans for several unjustifiable reasons, such as its failure to obtain an FAA determination of "no hazard."

and inefficient at best. As further set forth herein, the specific procedural changes detailed above would remedy the inadequacies of these procedures and would result in significant public interest benefits. Accordingly, First Broadcasting urges the Commission to issue a notice of proposed rulemaking seeking comment on these proposals. Although First Broadcasting believes that the changes in certain procedures for AM and FM facility modifications proposed herein are appropriate ways to address the costs of the current procedures and to increase benefits to the public, First Broadcasting is keenly aware that other solutions could be just as beneficial. Thus, First Broadcasting is hopeful that upon the issuance of a notice of proposed rulemaking, other commenters will share their insight and suggestions in order to ensure that the approach the Commission ultimately adopts is in the public interest.

Respectfully submitted,

First Broadcasting Investment Partners, LLC

By: 

Ronald A. Unkefer
Gary M. Lawrence, Esq.
Hal A. Rose, Esq.
FIRST BROADCASTING
INVESTMENT PARTNERS, LLC
750 North Saint Paul St.
10th Floor
Dallas, Texas 75201
(214) 855-0002

Tom W. Davidson, Esq.
Heidi R. Anderson, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
1676 International Drive
Penthouse
McLean, Virginia 22102
(703) 891-7500

Its Attorneys

March 5, 2004