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Federal Communications Commission

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

In the Matter of)	
)	
)	
Amendment of Section 73.622(b),)	MB Docket No. 04-185
Table of Allotments,)	RM-10860
Digital Television Broadcast Stations.)	
(Appleton, Wisconsin))	
)	
)	

NOTICE OF PROPOSED RULE MAKING

Adopted: May 11, 2004

Released: May 21, 2004

Comment Date: July 12, 2004
Reply Comment Date: July 27, 2004

By the Chief, Video Division:

1. The Commission has before it a proposal filed by Ace TV, Inc. ("Ace"), licensee of station WACY(TV), requesting the substitution of DTV channel 27 for DTV channel 59 at Appleton. Ace states that it will apply for DTV channel 27, if allotted.

2. In support of its proposal, Ace states that the adoption of its proposal will permit WACY(TV) to replace its out-of-core channel with an in-core channel. Ace also notes that its proposal is part of an agreement to resolve a conflict with CBS Broadcasting, Inc.'s proposal to substitute DTV channel 39 for station WFRV-TV's assigned DTV channel 56 at Green Bay, Wisconsin.¹ Ace contends that adoption of its alternate channel proposal at Appleton will enable both parties to operate on new in-core channel allotments.

3. We believe Ace's proposal warrants consideration. DTV Channel 27 can be substituted for DTV Channel 59 at Appleton, Wisconsin, as proposed, in compliance with the principle community coverage requirements of Section 73.625(a) with a "c" designation at coordinates 44-21-30 N. and 87-58-48 W. In addition, we find that this channel change is acceptable under the 2 percent criterion for de minimis interference that is applied in evaluating requests for modification

¹ In response to the *Notice of Proposed Rule Making (Green Bay, Wisconsin)* in MM Docket No. 01-334, 16 FCC Rcd 21923 (2001), Ace filed a counterproposal requesting the substitution of DTV channel 39 for WACY-DT's assigned DTV channel 59 at Appleton. Subsequently, Ace and CBS entered into an agreement to resolve the conflicting proposals. As part of that resolution, Ace located alternate DTV channel 27 to use for its digital operations at Appleton. Since there is no mutually exclusivity between the allotment of DTV channel 39 to Green Bay and the use of DTV channel 27 at Appleton, we are considering Ace's request as a new petition for rule making and are issuing this separate *Notice*

of initial DTV allotments under Section 73.623(c)(2).² Since the community of Appleton, Wisconsin, is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government has been obtained for this allotment. We propose to substitute DTV Channel 27c for DTV Channel 59 for station WACY-DT at Appleton with the following specifications:

State & City	DTV Channel	DTV power (kW)	Antenna HAAT (m)
WI Appleton	27c	50	336

4. Accordingly, we seek comments on the proposed amendment of the DTV Table of Allotments, Section 73.622(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>
Appleton, Wisconsin	59	27c

5. 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.

6. Interested parties may file comments on or before July 12, 2004, and reply comments on or before July 27, 2004, 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
 Shaw Pittman LLP
 2300 N Street, NW
 Washington, DC 20037-1128
 (Counsel for Ace TV, Inc.)

² Our engineering studies indicate that the use of DTV channel 27 at Appleton, Wisconsin, conflicts with the pending Class A application filed by station W30BU, channel 30, Green Bay, Wisconsin. However, in the *Establishment of Class A Television Service*, the Commission stated that DTV stations would be allowed to make channels changes and adjust the station facilities in order to correct unforeseen technical problems and will be allowed to impinge upon the service area of a Class A facilities to resolve technical issues. In this case, Ace is seeking an in-core channel to eliminate the need for WFRV-TV to construct two different DTV facilities as the transition is made into the core spectrum. We find that Ace's request is consistent with the provisions of the Community Broadcasters Protection Act of 1999, which gives full-service stations the flexibility to make necessary adjustments to DTV allotment parameter, including channel changes, even after certification of an LPTV station's eligibility for Class A status 15 FCC Rcd 6355 (2000), *clarified on recon.* 16 FCC Rcd 8244, 8268-69 (2001).

7. 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 TV Table of Allotments, Section 73.606(b) and 73.622(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. The Regulatory Flexibility Act of 1980 would also not apply to rule making proceedings to amend the DTV Table of Allotments, Section 73.622(b) of the Commission's Rules.

8. For further information concerning this proceeding, contact Pam Blumenthal, Media Bureau, (202) 418-1600. 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

Barbara A. Kreisman
Chief, Video Division
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 DTV Table of Allotments, Section 73.622(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.). The Commission permits the electronic filing of all pleadings and comments in proceeding involving petitions for rule making (*except in broadcast allotment proceedings*). See Electronic Filing of Documents in Rule Making Proceedings, GC Docket No. 97-113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S.

Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U S Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of 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 Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington, D.C.