

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

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JUN 16 2004

In the Matter of)
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)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Clayton, Georgia and Sylva, North Carolina))

MB Docket No. 04-21
RM-10863

FCC-MAILROOM

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 2004

Released: June 10, 2004

Comment Date: August 2, 2004

Reply Comment Date: August 17, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rule making filed by Sutton Radiocasting Corporation, ("Petitioner"), licensee of Station WRBN(FM) ("WRBN"), Channel 281A, Clayton, Georgia. Petitioner seeks to amend the FM Table of Allotments by reallocating Channel 281A from Clayton, Georgia, to Sylva, North Carolina, and modifying Station WRBN's license accordingly. This reallocation of Channel 281A will provide Sylva with its second local aural transmission service. Petitioner states that if the Commission grants its petition for rule making, Petitioner will file an application to effectuate its proposal.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.¹ The proposed use of Channel 281A at Sylva, North Carolina, is mutually exclusive with Station WRBN's existing authorization at Clayton, Georgia.

3. Petitioner asserts that the adoption of its proposal will result in a preferential arrangement of FM allotments consistent with the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*,² by providing the larger community of Sylva, North Carolina, (2000 U.S. Census population of 2,435), with its second local aural transmission service. Petitioner also observes that the allotment of Channel 281A to Sylva would not deprive the smaller community of Clayton, Georgia (2000 U.S. Census population of 2,019), of its sole local transmission outlet, because Clayton will retain local service from AM Station WGHC.

4. Since Petitioner's reallocation proposal involves a transmitter site change, there will be gain and loss areas for Station WRBN. Both the loss and gain areas cover 2,323 square kilometers. The

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

² 90 FCC 2d 88 (1982). The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters. Equal weight is given to priorities (2) and (3).

Petitioner's proposal will create a net gain of 33,578 people served. Both the gain and loss areas are already well-served with 5 or more radio broadcast services. Because Petitioner's proposal is consistent with the provisions of Section 1.420(i) of the Commission's rules, we shall propose to modify the authorization of Station WRBN without entertaining competing expressions of interest in the use of Channel 281A at Sylva, North Carolina, or requiring Petitioner to demonstrate the availability of an additional equivalent channel for use by other parties.

5. Consistent with the technical requirements of the Commission's Rules, Channel 281A can be allotted to Sylva, North Carolina, utilizing coordinates of 35-19-40 NL and 83-20-11 WL, with a site restriction of 11.2 kilometers (7.0 miles) southwest of Sylva. We note that the populations of Clayton, Georgia and Sylva, North Carolina do not differ greatly and that each community is currently served by an AM Station.³ Since providing a second local aural transmission service to Clayton or Sylva would fall under priority (4) "other public interest matters" of the FM allotment priorities, we request Petitioner to demonstrate what public interest benefits would be provided by moving Clayton's only fulltime broadcast station, namely Station WRBN, to Sylva. Such a reallocation would result in Clayton losing its only local nighttime transmission service, while providing Sylva with two fulltime stations. It would appear that this reallocation would not result in a preferential arrangement of allotments.⁴ However, Petitioner is invited to submit comments on this issue. In this regard, since both the gain and loss areas that result from reallocating Channel 281A from Clayton to Sylva are already well-served with five or more fulltime services, the fact that Petitioner's proposal will create a net gain of 33,578 persons served does not appear to be a significant public interest factor.

6. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel Nos.</u>	
	<u>Present</u>	<u>Proposed</u>
Clayton, Georgia	281A	-----
Sylva, North Carolina	-----	281A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before August 2, 2004, and reply comments on or before August 17, 2004, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington,

³ Sylva is served by fulltime AM Station WRGC, whereas Clayton is served by daytime AM station WGHC.

⁴ See *Royston and Commerce, Georgia*, 15 FCC Rcd 5676 (MMB 2000).

D.C. 20554. Additionally, a copy of such comments should be served on Petitioner's counsel, as follows:

John F. Garziglia, Esq.
Womble Carlyle Sandridge & Rice, PLLC
1401 I Street, N.W., 7th Floor
Washington, D.C. 20005

9. Parties must file an original and four paper copies of each filing. Filings 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, Natek, 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 or 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.

10. 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.⁵

11. For further information concerning this proceeding, contact R. Barthen Gorman, 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.

⁵ See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

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 that 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

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent 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 Procedures. 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 proposal 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 who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW, Washington, D.C.