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

FCC MAIL SECTION
AUG 12 4 57 AM '04

In the Matter of)
)
Amendment of Section 73.202(b)) MB Docket No. 04-319
Table of Allotments,) RM-10984
FM Broadcast Stations.)
(Coal Run, Kentucky and Clinchco, Virginia))

**NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE**

Adopted: August 10, 2004

Released: August 12, 2004

Comment Date: October 4, 2004

Reply Comment Date: October 19, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Rule Making filed by East Kentucky Broadcasting Corp. ("Petitioner"), licensee of Station WPKE-FM, Channel 276A, Coal Run, Kentucky, proposing the substitution of Channel 221C3 for Channel 276A at Coal Run, and the modification of Station WPKE-FM's license accordingly. To accommodate the upgrade, Petitioner also proposes the substitution of Channel 276A for Channel 221A at Clinchco, Virginia, and the modification of Station WDIC-FM's license accordingly. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, Petitioner states that the proposal is an "incompatible channel swap" since the channel swap between Stations WPKE-FM and WDIC-FM is the only way to effectuate the upgrade at Coal Run, Kentucky.¹ As an "incompatible channel swap," Petitioner asserts that the proposed channel substitutions should be protected from competing expressions of interest consistent with the adjacent channel upgrade provisions of Section 1.420(g)(3) the Commission's Rules.² Specifically, Section 1.420(g)(3) allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. However, the Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually exclusive relationship required under Section 1.420(g)(3), and has determined to consider these "incompatible channel swaps" on a case-by-case basis.³

3. Although the Petitioner provided a preclusion study demonstrating that only Channel 276A can be substituted at Clinchco, the Commission has expressed its concern regarding the effect that potential upgrades on Channel 221 may have on the availability of noncommercial educational channels

¹ This proposal fulfills the requirements for an "incompatible channel swap" because the channel substitution for the upgrade and the accommodating substitution are each mutually exclusive and are uniquely available, i.e., there is no alternate channel of its class that is fully spaced from the station's site.

² 47 C.F.R. § 1.420(g)(3).

³ See *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels*, 60 RR 2d 114 (1986).

operating on Channels 218, 219 and 220, in markets where a TV Channel 6 operation exists. Therefore, Petitioner is required to provide a preclusion study demonstrating the impact of allotting Channel 221C3 to Coal Run on the availability of Class A, C3, C2, C1, C0 and C noncommercial educational allotments on Channels 218, 219 and 220, along with maps showing the areas precluded for each of the classes or relevant channels.

4. Whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred.⁴ Petitioner has stated its willingness to reimburse the licensee of Station WDIC-FM for reasonable costs associated with changing to Channel 276A.

5. We believe the proposal to substitute Channel 221C3 at Coal Run, Kentucky, warrants consideration because it would allow Station WPKE-FM to expand its service area. An engineering analysis has determined that Channel 221C3 can be substituted at Coal Run in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.2 kilometers (11.9 miles) southeast to avoid a short-spacing to the licensed site for Station WZAQ(FM), Channel 222A, Louisa, Kentucky. The reference coordinates for Channel 221C3 at Coal Run are 37-23-57 North Latitude and 82-23-42 West Longitude. To accommodate the upgrade, Channel 276A can be substituted at Clinchco, Virginia, at Station WDIC-FM's presently licensed site. The reference coordinates for Channel 276A at Clinchco are 37-08-42 North Latitude and 82-23-22 West Longitude. In accordance with the provisions of Section 1.420(g)(3) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 221C3 at Coal Run, or require Petitioner to demonstrate the existence of an equivalent class channel for use by other interested parties.

6. Accordingly, we seek comment on the proposed amendments of the FM Table of Allotments, 47 C.F.R. Section 73.202(b), for the communities listed below, to read as follows:

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Coal Run, Kentucky	276A	221C3
Clinchco, Virginia	221A	276A

7. Accordingly, IT IS ORDERED, That pursuant to 47 U.S.C. Section 316(a), Dickenson County Broadcasting Corp., licensee of Station WDIC-FM, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 276A in lieu of Channel 221A at Clinchco, Virginia.

8. Pursuant to 47 C.F.R. Section 1.87, Dickenson County Broadcasting Corp., may, no later than October 4, 2004, file a written statement showing with particularity why its respective license should not be modified as proposed in this *Order to Show Cause*. The Commission may call on Dickenson County Broadcasting Corp., to furnish additional information. If raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modifications, deny the modifications, or set the matter of modifications for hearing. If no written statement is filed by the date referred to above, Dickenson County Broadcasting Corp., will be deemed to have consented to the modification as proposed in this *Order to Show Cause* and a final *Order* will be issued by the Commission, if the channel modification is found to be in the public interest.

⁴ See *Circleville, Ohio*, 8 FCC 2d 159 (1967).

9. IT IS FURTHER ORDERED, That a copy of this *Notice of Proposed Rule Making and Order to Show Cause*, be sent by Certified Mail, Return Receipt Requested, to the following:

Dickenson County Broadcasting Corp.
Route 1, Box 412
Clintwood, Virginia 24228

Gary S. Smithwick, Esq.
Smithwick & Belendiuk
5028 Wisconsin Ave., Suite 301
Washington, D.C. 20016

10. 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 in paragraph 2 of the *Appendix* before a channel will be allotted.

11. Pursuant to 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before October 4, 2004, and reply comments on or before October 19, 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, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Howard J. Barr, Esq.
Womble, Carlyle, Sandridge & Rice, PLLC
1401 Eye Street, N.W., Suite 700
Washington, D.C. 20005
(Counsel for Petitioner)

12. Parties are required to file an original and four 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.

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁵ This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

14. For further information concerning a proceeding listed above, contact Sharon P. McDonald, Media Bureau (202) 418-2180. For purposes of this restricted notice and comment rule making

⁵ See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend 47 C.F.R. Sections 73.202(b), 73.504 and 73.606(b)*. 46 FR 11549 (February 9, 1981).

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 in the applicable docket 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 any summary of any new information shall be served by the person making the presentation upon the other parties to the proceeding in particular docket unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), 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* 47 C.F.R. Section 1.420(d).)

(b) Petitions for rule making which conflict with the proposals in this *Notice* 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 47 C.F.R. Sections 1.415 and 1.420, 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. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments (*see* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.