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

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MB Docket No. 06-83
FM Broadcast Stations.	)	RM-11325
(Vernon Center and Eagle Lake, Minnesota)	)	
	)	
	)	
	)	

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NOTICE OF PROPOSED RULE MAKING

Adopted: April 12, 2006 **Released: April 14, 2006**

Comment Date: June 6, 2006
Reply Comment Date: June 20, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a petition for rulemaking filed by Radioactive, LLC ("Petitioner"), the holder, pursuant to the winning bid in Auction No. 37, of a construction permit for an unbuilt FM station on Channel 231A, Vernon Center, Minnesota. The Petitioner requests the reallotment and modification of its construction permit from Channel 231A at Vernon Center (pop. 359) to Channel 231A at Eagle Lake, Minnesota (pop. 1,787).

2. The Petitioner filed this proposal for reallotment in accordance with the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.[1] In reviewing a proposal under Section 1.420(i), the Commission compares the existing and proposed arrangement of allotments to determine whether the reallotment would result in a preferential arrangement of allotments based upon the FM allotment priorities.[2]

3. In support of this proposal, the Petitioner contends that the reallotment would satisfy Priority 3 by authorizing a first local aural transmission service at Eagle Lake. The Petitioner alleges that Eagle Lake qualifies as a community for allotment purposes because it is incorporated and listed in the U.S. Census. The Petitioner also sets forth various indicia of community status. Eagle Lake has its own mayor and city council, employs a city administrator and deputy clerk, provides its residents with public services such as water and sewer, and has its own police department and volunteer fire department. In

[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] 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. [Co-equal weight is given to priorities (2) and (3)]. *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 91 (1988).

addition, the Petitioner identifies various local businesses, churches, and business groups.[3]

4. Although the Petitioner acknowledges that the principal community (70 dBu) contour of the realloted station would encompass a majority of the Mankato, Minnesota, Urbanized Area, it contends that a *Tuck*[4] showing is not necessary given that its station is not constructed.[5] Further, because an FM station at Vernon Center on Channel 231A could also place a 70 dBu contour over a majority of the Mankato Urbanized Area, the Petitioner argues that its proposal does not constitute a migration to an urbanized area, obviating the need for a *Tuck* showing.[6] The Petitioner also asserts that its proposal will not constitute a removal of a sole local service from Vernon Center because the station is not on the air.[7] Finally, the Petitioner affirms that it will apply for the reallotted channel at Eagle Lake.

5. The Petitioner has shown that Eagle Lake is a community for allotment purposes. However, we also request that the Petitioner submit a *Tuck* showing to demonstrate that Eagle Lake is sufficiently independent of the Mankato, Minnesota, Urbanized Area to warrant a first local service. While the Petitioner contends that a *Tuck* showing is not necessary because its station is unbuilt, we disagree. It is the potential migration of a station into an Urbanized Area that triggers our *Tuck* concerns, and not whether the station is built or unbuilt.[8] Indeed, we have considered *Tuck* showings in cases involving the reallotment of unbuilt stations into Urbanized Areas.[9]

6. Likewise, the facts of the instant case do not fall into the exception set forth in *Greeley, CO,* for not submitting a *Tuck* showing. In *Greeley*, as well as several other cases,[10] we did not require *Tuck* showings where the proponent of a reallotment had an authorization with which it placed a 70 dBu contour over 50 percent or more over the Urbanized Area in question. However, in this case, the facilities set forth in the Petitioner's construction permit for Vernon Center will place a 70 dBu contour over approximately two percent of the Mankato Urbanized Area. The Petitioner is speculating that it could

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[3] *See* Rulemaking Petition, at 3.

[4] *See Faye and Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988) ("*Tuck*"). The purpose of a *Tuck* showing is to determine whether the proposed community of license is sufficiently independent of the nearby Urbanized Area to warrant a first local service under Priority 3 of the FM Allotment Priorities. *See, e.g., Mount Pleasant and Hemlock, MI,* 20 FCC Rcd 17165 (MB 2005).

[5] *See Nantucket, East Harwich, and South Chatham, MA,* 20 FCC Rcd 3577, 3578 (MB 2005) (*Tuck* applies only to a proposed relocation of an existing station).

[6] *See, e.g., Greeley and Broomfield, CO,* 15 FCC Rcd 9419, 9420 (MMB 2000) (no *Tuck* analysis required when 70 dBu contour already placed over majority of urbanized area).

[7] *See, e.g., Chatom and Grove Hill, AL,* 12 FCC Rcd 7644 (MMB 1997); and *Bagdad and Chino Valley, AZ,* 11 FCC Rcd 523 (MMB 1995).

[8] We acknowledge that in *Nantucket, East Harwich, and South Chatham, MA,* we stated that "*Tuck* applies only to a proposed relocation of an existing station . . . " *See* 20 FCC Rcd at 3578. In that paragraph, we were drawing a distinction between our policy of not applying *Tuck* to cases involving drop-in FM allotments with our policy of applying *Tuck* to proposed reallotments and changes of community of license of FM allotments under Section 1.420(i) of the Commission's rules. Although the Petitioner believes that the term "existing stations" refers only to constructed or operating stations, we clarify that *Tuck* applies in cases where the holder of an existing authorization , *i.e.,* a construction permit for a built or unbuilt station or a license, seeks to reallot and change its community of license, or not, and our other requirements for invoking *Tuck* are present. *See, e.g., Mount Pleasant and Hemlock, MI,* 20 FCC Rcd 17165 (MB 2005).

[9] *Humboldt and Pawnee City, NB, and Valley Falls, KS,* 20 FCC Rcd 17940 (MB 2005); *Oraibi and Leupp, AZ,* 14 FCC Rcd 13547 (MMB 1999).

[10] *See, e.g., Boulder and Lafayette, CO,* 12 FCC Rcd 583, 584 (MMB 1997); and *East Los Angeles, et al., CA,* 10 FCC Rcd 2864, 2868-69 (1995).

have been authorized to provide a 70 dBu signal over 50 percent or more of the Mankato Urbanized Area. Under these circumstances, we do not believe that the Petitioner should be treated as if it were already authorized to serve the Mankato Urbanized Area. Our view is further buttressed by the fact no *Tuck* showing was required when this allotment was made at Vernon Center[11]or will be required at the application stage. Consequently, this reallotment proceeding is our only opportunity to consider whether Eagle Lake is sufficiently independent of the Mankato Urbanized Area to warrant a first local service.

7. Our tentative view is that the Petitioner's proposal could result in a preferential arrangement allotments. Although the retention of Channel 231A at Vernon Center would be a first local service and the proposed reallotment to Eagle Lake could also be a first local service under Priority 3, the reallotment would be favored because the population of Eagle Lake is greater than that of Vernon Center.[12] Further, because the Vernon Center station is unbuilt, its reallotment would not constitute the removal of the community's sole local service and the loss of service does not present the same concerns as if it were an operating station.[13]

8. Channel 231A can be realloted to Eagle Lake at a site 5.6 kilometers (3.5 miles) northwest of the community. The proposed reference coordinates for Channel 231A at Eagle Lake are 44-12-29 NL and 93-55-00 WL.

9. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

Community	Present	Proposed
Vernon Center	231A	---
Eagle Lake	---	231A

10. We also propose to modify the Petitioner's construction permit to specify operation on Channel 231A at Eagle Lake, Minnesota, in lieu of Channel 231A at Vernon Center, Minnesota.

11. 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.

12. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before June 6, 2006, and reply comments on or before June 20, 2006, 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:

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Tarah S. Grant, Esq.
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[11] *Lake Crystal, Madelia, Mankato, and Vernon Center, MN,* 13 Fcc Rcd 5269 (MMB 1998).

[12] *See, e.g., Ardmore, AL,* 17 FCC Rcd 16331, 16334-35 (MB 2002); *Three Oaks and Bridgman, MI,* 5 FCC Rcd 1004 (MMB 1990); and *Blanchard, LA, and Stephens, AR,* 10 FCC Rcd 9828 (1995). A staff engineering analysis reveals that neither the existing nor the proposed arrangement of allotments would trigger Priorities 1 or 2.

[13] *See, e.g., Sanibel and San Carlos Park, FL,* 10 FCC Rcd 7215 (MMB 1995); and *Oraibi and Leupp, AZ, supra* note 11.

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13. Parties who choose to file by paper must 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 Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary.** ***See*** **47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

14. 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.[14] This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed 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).

15. For further information concerning this proceeding, contact Andrew J. Rhodes, 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 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

[14] *See Certification that Section 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).

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

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Attachment: Appendix

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) 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 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. 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* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., TW-A325, 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 (Room CY-A257) at its headquarters, 445 12th Street, S.W, Washington, D.C.