

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re

Revision of Procedures Governing Amendments)
To FM Table of Allotments and Changes) MB Docket No. 05-210
of Community of License in the Radio Broadcast)
Services)
)

To: Office of the Secretary
Attn: The Commission

PETITION FOR FURTHER NOTICE OF PROPOSED RULE MAKING

Anderson Associates,¹ by its attorneys, pursuant to Section 1.401 of the Commission's Rules, hereby seeks a further notice of proposed rule making, or other action that may be appropriate, with respect to a clarification of, and modifications to, the Commission's procedures announced in *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14221, ¶ 15 (2006), *recon. pending* (the "*Changes of Community R&O*"), and carried out in *Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Various Locations)*, Order, DA 11-1689, released October 7, 2011 (the "*Various Locations Order*"). The *Various Locations Order* summarily amended without notice and comment, contrary to the settled procedures in Section 1.420 of the Commission's rules, and without any expressions of interest, Section 73.202(b) of the Commission's rules (the FM Table of Allotments) by adding 30 vacant FM allotments. Anderson Associates respectfully requests a clarification of, and modifications to, the procedures carried out in the *Various Locations Order*.

In support thereof, the following is submitted:

¹ Anderson Associates, Broadcast Consultants, headed up by the father-son team of Charles M. and Christopher Anderson, is a national consulting firm specializing in FM allocations and applications.

SUMMARY OF REQUESTED CLARIFICATIONS AND MODIFICATIONS

1. In this Petition for Further Notice of Proposed Rule Making, Anderson Associates is asking the following:

- A clarification, with respect to a non-reserved band FM facility, that in the event of a surrendered, cancelled, expired or revoked FM license or construction permit, the allocation record does not remain, does not require continued protection, and the underlying allotment, if any, is automatically deleted from the FCC's CDBS database.
- A clarification that, going forward, a valid continuing expression of interest to apply for, build and operate a station, is required prior to the reinsertion of a previously made allotment into Section 73.202(b), the FM Table of Allotments.
- A clarification that upon the surrender, cancellation, expiration or revocation of a non-reserved band FM license or construction permit, the vacant spectrum is immediately available on the same day for petitions for new allotments and modifications to existing allotments under Section 1.429 of the Commission's rules, and for applications for modification of licenses or construction permits under Section 73.3573 of the Commission's rules.
- A clarification that, upon a the unsuccessful auction of a new FM allotment which does not result in an FM construction permit being granted, the Audio Division has the delegated authority to, and is required to, remove that allotment by order from Section 73.202(b), the FM Table of Allotments, as failing to have a valid continuing expression of interest to apply for, build and operate a station.

The basis for each of these clarifications and modifications is given below.

THE COMMISSION'S CURRENT PROCEDURES REQUIRING CLARIFICATION

2. In the *Various Locations Order*, the Commission amended Section 73.202(b) of its rules by "updates" to the FM Table of Allotments to reinstate certain specific FM allotments into the text of Section 73.202(b) of the Commission's rules. The Commission noted that the allotments were removed in 2006 as a result of the notice and comment rule making proceeding in *Changes of Community R&O*.

3. The FCC justifies its amendment adding channels to Section 73.202(b) of its rules by this explanation (footnotes omitted and emphasis added):

Formerly, the FM Table listed all vacant FM allotments as well as FM channels and communities occupied by authorized facilities. In 2006, the Commission removed the allotments of authorized and awarded FM facilities from the FM Table in order to accommodate the new application procedures for radio stations to change their communities of license. As contemplated by the *Changes of Community R&O*, when an authorization is cancelled, the vacant allotment must be reinstated in the FM Table to preserve the opportunity to license a future station in the specified community. The allotments listed in the attached Appendix were removed as part of the *Changes of Community R&O*, but they are currently vacant. We are, therefore, reinstating the allotments set forth in the Appendix.

4. This explanation, however, despite its reliance upon *Changes in Community R&O*, is not supported by that decision. Rather, the *Various Locations Order* appears to be a short-circuiting of established procedures set forth in Section 1.420 of the Commission's rules for the adding of FM allotments to Section 73.202(b).

THE RELIANCE IN THE *VARIOUS LOCATIONS ORDER* UPON THE *CHANGES OF COMMUNITY R&O* IS MISPLACED

5. There is no question that Section 73.202(b) of the Commission's rules did not currently contain listings for the thirty added vacant allotments. Further, there is no question but that Section 73.202(b) of the Commission's rules which is part of the Code of Federal Regulations at 47 C.F.R. Section 73.202(b) had not contained the thirty added allotments since 2006.

6. The Commission in the *Various Locations Order* mischaracterizes the changes adopted in *Changes of Community R&O*. The statement in paragraph 2 of the *Various Locations Order* that “[a]s contemplated by the *Changes in Community R&O*, when an authorization is cancelled, the vacant allotment must be reinstated in the FM Table to preserve the opportunity to license a future station in the specified community” appears to be a mischaracterization of what was adopted in *Changes of Community R&O*.

7. To support the statement in paragraph 2 of the *Various Locations Order*, the *Various Locations Order* at footnote 4 quotes *Changes of Community R&O* stating that “[the] FM Table is ‘to reflect only vacant allotments that do not correspond to an authorized station or reserved assignment’”.² For the Commission’s interpretation of this sentence to enable the actions taken in the *Various Locations Order* would mean, however, that one of two unlikely and possibly unlawful procedures flows from *Changes of Community R&O*. The first would be that the Commission gave its Audio Division full authority to forever going forward amend the text of Section 73.202(b) at any time without prior notice and comment. The second would be that the *Changes of Community R&O* docket would remain open and not final for years, possibly decades, for the Commission and the Audio Division on their own motion to continually change and massage the text of Section 73.202(b), based only upon the record compiled prior the release of *Changes of Community R&O* in 2006.

8. Neither of these procedures makes much sense. Simply put, neither the quoted sentence, nor any of the discussions that preceded or succeeded it, appeared to contemplate that an allotment superseded by an authorized facility removed from the FM Table of Allotments would later be, without further notice and comment rule making proceedings, reinstated in Section 73.202(b) of the Commission’s rules. And, as discussed below, there are significant Section 307(b) and public interest reasons why an allotment superseded by an authorized facility should not be summarily re-inserted into the text of Section 73.202(b) of the Commission’s rules.

9. The Audio Division’s action appears to reflect a concept where an allotment, once made, even though removed from Section 73.202(b), the FM Table of Allotments through the grant of an authorization to a station or through subsequent Commission rule making proceedings, never goes away but rather remains suspended in some sort of fourth dimension,

² *Changes in Community R&O* at Paragraph 15.

ready to be ported back to the three-dimensional world upon the unilateral action of the Audio Division. When all non-reserved band FM allotments, whether for vacant or existing facilities, were stated in Section 73.202(b), once an existing facility ceased to exist, it was clear that the underlying FM allotment remained.

10. With the changes in procedure of *Changes of Community R&O*, however, it is not clear that the underlying FM allotment remains once an existing FM facility ceases to exist. Accordingly, the Commission should issue a further notice of proposed rule making in order to clarify its existing policies and procedures with respect to non-reserved band FM allotments. As noted below, there are significant Section 307(b) and public interest reasons why the underlying allotment should not remain, and why the bringing back to life of old allotments without notice and comment, and Section 1.420 procedures, is poor policy.

FM ALLOTMENTS REQUIRE A VALID CONTINUING EXPRESSION OF INTEREST

11. An allotment to the FM Table of Allotments requires a valid continuing expression of interest to apply for, build and operate a station. *See e.g. Olustee, Oklahoma*, 20 FCC Rcd 8209 (Audio Division 2005) (“A showing of continuing interest is required before a channel can be allotted”). By definition, if an FM channel is now vacant and without a radio station operating upon it after having such a radio station at one time so operating upon it, there is a fatal lack of a valid continuing expression of interest in the allotment. It is possible that through a notice and comment rule making proceeding with an appropriate Section 307(b) analysis, the allotment for a particular now defunct broadcast facility could be allotted in the same or another community. But, no notice and comment rule making proceedings took place before the amendment to Section 73.202(b) of the Commission’s rules in the *Various Locations Order*. There are no valid continuing expressions of interest on record at the Commission for these allotments. Accordingly, a valid continuing expression of interest, a basic requirement for

an allotment, was absent from each of the thirty allotments inserted by the *Various Locations Order* into Section 73.202(b) of the Commission's rules.

THE VARIOUS LOCATIONS ORDER WAS NOT A MINISTERIAL ACTION

12. The Commission's observation that the new FM allotments added to Section 73.202(b) previously underwent notice and comment rule making is of no relevance to the action of the Commission in the *Various Locations Order*. It is well settled that the Commission cannot simply decide to reinstate the text of a former rule after having deleted it. For example, the Commission cannot now by a simple order reinstate the text of the Commission's former Regional Concentration of Control ownership prohibition³ on the basis that "it previously underwent notice and comment rule making". It is obvious that re-adding the Regional Concentration of Control ownership rule to the current FCC rules would not be a ministerial action (even though still referenced in Sections 312(e)(1) & (2) of the Communications Act). Yet, the *Various Locations Order* amending Section 73.202(b) of the Commission's rules by adding channels to the FM Table of Allotments is no different as each would take text that was formerly in a rule and add it back without notice and comment rule making proceedings.

13. Footnote 4 to the *Various Locations Order* provides additional evidence that Commission's attempt to amend Section 73.202(b) without the proper procedures was not a simple ministerial act. In footnote 4 of the *Various Locations Order*, it is stated that:

Staff engineering analysis reveals that all of the vacant allotments listed in the Appendix meet the minimum distance separation requirements of 47 C.F.R. § 73.207. However, six of the vacant allotments warrant additional explanation. To prevent short-spacings, we adopted new site restrictions for vacant Channels 257A at Pine Bluff, Arkansas, 263A at Malin, Oregon, and 237A

³ Sections 73.35, 73.240, and 73.636 of the Commission's rules as in effect June 1, 1983 which prohibited any party from directly or indirectly owning, operating, or controlling three broadcast stations in one or several services where any two of such stations are within 100 miles of the third (measured city-to-city), and where there is a primary service contour overlap of any of the stations.

at Drew, Mississippi. Additionally, vacant Channels 264A at Sanborn, Iowa, 237A at Drew, Mississippi, 289C2 at Alva, Oklahoma, and 288C3 at Santa Anna, Texas, are considered fully spaced allotments notwithstanding the subsequent grant of authorizations to several stations that are providing contour protection to these allotments under Section 73.215 of the Commission's Rules.

14. In the *Various Locations Order*, allotments that are short-spaced and that would not have been made pursuant to notice and comment rule making procedures under Section 1.420 of the Commission's rules, were added anyway with no Section 307(b) justifications proffered for the new allotments. The amendment of Section 73.202(b) of the Commission's rules with short-spaced allotments in the *Various Locations Order* is not a "ministerial act".

THE COMMERCIAL FM SERVICE SHOULD NOT NOW BE TREATED DIFFERENTLY THAN THE AM SERVICE FOR SURRENDERED, CANCELLED, EXPIRED OR REVOKED FACILITIES

15. The FCC's procedures with respect to AM stations are currently wholly divergent from the FCC's procedures with respect to non-reserved FM band stations if the processes carried out by the *Various Locations Order* are continued without clarification. Currently, an AM station may voluntarily relinquish its authorization, voluntarily or involuntarily allow a license to expire, or suffer a revocation of license, and the frequency of the former AM station no longer remains in the Commission's databases requiring protection by other facilities. Such a relinquishment may be the result of an interference reduction arrangement. Alternately, an AM station licensee may determine that the economic prospects for continuing to serve its community of license and service area are poor and surrender its license.

16. In each case when the AM station surrenders its license, or the license is expired or revoked, it leaves open spectrum which, provided that current technical rules are satisfied, may be applied for by existing stations or by new applicants. In many cases, this open AM spectrum is put to a more productive use, either at a community that can better support the

broadcast service, or through the expansion of an existing service to better serve its community and surrounding area. The Commission does not perform a Section 307(b) analysis when accepting the voluntary relinquishment of, or when expiring or revoking, an AM station license. Rather, the turning in of the AM authorization is a simple and efficient procedure involving little of the Commission's resources.

17. For the non-reserved FM band, however, when an existing license or construction permit is turned in, expires due to operation of law or to a lack of construction within the required time period, or is revoked, if the procedures followed in the *Various Locations Order* continue, the allotment re-appears even though it was long ago removed from Section 73.202(b) of the Commission's rules. This is neither good public policy nor an efficient use of Commission resources.

NON-RESERVED BAND FM SPECTRUM SHOULD NOT BE WAREHOUSED

18. The non-reserved FM band is a mature service. The Commission should not be warehousing spectrum for which there is no demand. Therefore, if an FM station is removed from the air, either voluntarily by the licensee or permittee, or by Commission action or law, and the license is surrendered, expires, or is revoked, there should not be a continuing allotment. Rather, the available spectrum area resulting from the deleted allotment should be available to the public under existing allotment and application procedures for either a new allotment at a more deserving community, or for expanded service from existing stations. Likewise, if an FM auction channel does not result in a granted FM construction permit, that channel should be immediately deleted from the FM Table of Allotments as, by definition, there is no valid, continuing expression of interest in the channel.

19. Many years ago the Commission determined to do away with the economic showing it had previously required for the awarding of new station construction permits. *See e.g.*

Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638, 639-641 (1988). In doing so, the Commission announced that it would not pre-judge whether a certain community or certain area could successfully support a new broadcast station. Rather, that determination was to be left to the “marketplace” and the requested allotment would be made irrespective of the economic sense such an allotment might make in the overall scheme of the FM Table of Allotments and the operation of radio broadcast stations. As a result of this, there are many FM stations with marginal facilities that will never be successful, either economically or in service to their communities. Some of these marginal FM stations operate with less than minimum operating schedules, sporadically, or not at all due to the inability of the market to financially support a station. Other FM facilities, while perhaps more economically successful, are allotted in such a way that the allotment would make far better sense under Section 307(b) if allotted elsewhere. Or, a deletion could enable other stations whose markets have grown or expanded in new directions to increase service to the public under Section 307(b) priorities. In addition, as a technical matter, there are many opportunities for FM interference reduction (i.e. short spacing elimination) or facility improvement if a short spaced station is eliminated through the deletion of a vacant or unwanted allotment. To leave FM allotments for which there is no valid continuing expression of interest in the FM Table of Allotments is simply bad public policy.

CONCLUSION

20. The underlying rationale for an automatic deletion of the allotment upon surrender, cancellation, expiration or revocation of an existing authorization is sound and appears to be allowed in *Changes of Community R&O* by its deletion of non-vacant allotments from Section 73.202(b) of the Commission’s rules. In addition to the Section 307(b) showing required for a new allotment in the first instance, a valid continuing interest to apply for, build and operate

a station must be shown by an interested party in order for an allotment to be made. By definition, if an FM station license is surrendered, cancelled, expired or revoked, the stated intention by an interested party to operate the station on the allotment has failed. The basis upon which the allotment was made in the first instance is no longer present. Under these circumstances, any reinstatement of an FM allotment back to the FM Table of Allotments upon the surrender, cancellation, expiration or revocation of an FM non-reserved band authorization violates not only the FCC's notice and comment procedures and Section 1.420, but is also inconsistent with the FCC's requirement that there be a continuing expression of interest in the allotment.

WHEREFORE, for the reasons above, it is respectfully requested that the Commission issue a further notice of proposed rule making to clarify its Section 73.202(b) FM Table of Allotments procedures in the event a non-reserved band FM facility's authorization is surrendered, cancelled, expired or revoked, and to clarify its procedures for an allotment in Section 73.202(b) that is subject to auction but for which no facility license is issued subsequent to the auction, as in none of these instances is there the requisite continuing expression of interest in the allotment.

Respectfully submitted,

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