

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

MM Docket No. 88-118

In the Matter of

Revision of Section 73.3573(a)(1)  
of the Commission's Rules Concerning  
the Lower Classification of an  
FM Allotment

**REPORT AND ORDER**  
**(Proceeding Terminated)**

Adopted: January 23, 1989; Released: March 17, 1989

By the Commission:

1. The Commission has before it the *Notice of Proposed Rule Making*, in this proceeding, 3 FCC Rcd 2192 (1988). The *Notice* proposed to allow applicants, permittees, or licensees to downgrade the class of an FM allotment by merely filing an application, rather than requiring a rule making proceeding before the downgrade application is considered.<sup>1</sup> In response to the *Notice*, we received comments from Martin L. Hensley, Capitol Broadcasting Corporation and the National Association of Broadcasters. By this decision we are implementing the proposal set forth in the *Notice*.

**BACKGROUND**

2. Currently, in order to reclassify an existing FM allotment to a higher or lower class, Section 73.3573(a)(1) of the Rules requires that the FM Table of Allotments first be amended. A party initiates such an amendment by filing a petition for rule making. A notice of proposed rule making then proposes the higher or lower class allotment and solicits comments and reply comments. After a determination that grant of the proposal would serve the public interest, a report and order is issued amending the Table of Allotments accordingly. Approximately one year normally elapses between the time the petition is filed and the issuance of a report and order. Thereafter, a party wishing to operate facilities on the new channel class must file an application.<sup>2</sup> The *Notice* proposed the elimination of the rule making requirement as a condition precedent to downgrading the class of an allotment.

3. Downgrading can be desirable in the context of either a vacant allotment or an existing FM station. For example, both existing stations seeking to relocate their transmitter sites and applicants filing for a new FM station must meet the separation criteria set forth in our Rules. For various reasons, such as the inability to meet FAA requirements, zoning restrictions, or the desire to use an existing structure at a site not complying with the separation criteria, an applicant may not be able to secure an acceptable site. If the applicant could specify a lower

class of station (B1, C1, C2 or A) with reduced separation requirements, it may have a greater selection of potential sites from which to choose. With regard to existing structures, occasionally an applicant is unable to attain the prescribed minimum antenna height for the particular class. Once again, specifying a lower class of station with a lower prescribed minimum antenna height may be a solution. Further, an applicant might also determine that the higher class is either unnecessary or not economically viable because of the increased costs of constructing a higher antenna tower or operating with higher power.

4. The comments we received were favorable. In addition to supporting the Commission's proposal, Martin L. Hensley requests that parties with rule making petitions on file be "grandfathered" and that a "freeze" be "imposed on all allotments, except Docket 80-90 frequencies, until this matter before the Commission is decided." Capitol Broadcasting Corporation (Capitol) supports the Commission's proposal. Also, Capitol refers to a potential situation in which a licensee of an existing station files an application specifying facilities less than the prescribed minimum in either antenna height or power while specifying the desired higher class of channel in another part of the application form. Capitol requests that these stations not be presumed to have requested a downgrade. The National Association of Broadcasters (NAB) also filed comments. In its comments, the NAB urges that the procedural safeguard of public participation currently available to interested parties in the rule making process also be available under the proposed procedure, either by allowing petitions to deny or informal objections against downgrade applications. In addition, the NAB urges that in situations involving a prevailing allotment in a comparative rule making proceeding, a party be prevented from proposing a downgraded allotment in a subsequently filed application. After careful consideration of these comments, we are going forward with the proposed revision of Section 73.3573(a)(1) of the Rules.<sup>3</sup> We discuss the revised procedure in conjunction with these comments below.

**VACANT ALLOTMENTS**

5. Under existing procedures, FM channels are allotted to communities in rule making proceedings in which both the channel number and class are established. The report and order in the rule making proceeding normally establishes an application filing window for the new allotment. If no applications are filed, or if applications are filed but all are subsequently dismissed or denied, the allotment becomes available on a first come/first served basis. Parties filing for a vacant FM allotment during the application filing window or after the application filing window closes may propose only that class of channel specified in the Table of Allotments. A party may file an application proposing a downgraded channel only after a subsequent rule making proceeding downgrading the allotment.

6. Under our new procedure, an applicant filing for a new FM allotment during an application filing window must specify the class of channel prescribed in the Table of Allotments. In the event the channel becomes subject to processing on a first-come/first served basis, an applicant may specify the lower class channel.

7. Interested parties, including the public and parties in the earlier rule making proceeding which allotted the channel, will be able to participate in the application

process and raise the same arguments and concerns which they are now able to advance in a rule making proceeding. Instead of filing comments and reply comments in the rule making proceeding, the interested party may file a petition to deny or an informal objection directed against the application for a new station specifying a downgraded class. All substantial and material issues will be considered in the context of that application.

#### EXISTING AUTHORIZATIONS

8. Under existing procedures, licensees or permittees must first file a petition for rule making to downgrade the channel class of the allotment on which they are authorized. After the rule making proceeding, the licensee or permittee files a minor change application to modify facilities. The modification of facilities can involve a reduction in power, a reduction in antenna height, and/or a change in transmitter site.

9. Under the new procedures, the licensee or permittee will merely file a minor change application to modify facilities. Interested parties may file an informal objection directed against the minor change application to downgrade the allotment of an existing station. A reduction in power or antenna height by itself does not have any preclusive effect with respect to other applications or rule making petitions. On the other hand, a change in transmitter site could conceivably involve a conflict with a pending application or rule making petition. These conflicts and any other matter which may arise in these modification applications will be processed in accordance with existing policies and procedures.<sup>4</sup> We do not perceive any public interest benefit in first having a rule making proceeding to downgrade the allotment because of either a reduction in facilities or a change in transmitter site. All matters, including potential loss of service to underserved areas, can be considered in either the rule making or the application context. The public and the station will benefit from the expedited review and implementation of new service provided by our revised procedure. Our revised procedure trims approximately one year from the time needed to implement a proposed downgrade. In turn, this will also expedite consideration of other proposals made possible by the downgrading of an existing allotment and the reduced separation requirements.

#### OTHER MATTERS

10. The NAB expresses concern about the filing of an application proposing to downgrade a vacant allotment. Specifically, this concern involves a situation where mutually exclusive petitions for rule making are filed proposing FM channel allotments to different communities. A petitioner may propose a higher class channel in the comparative rule making proceeding and then, once the channel has been allotted, file an application proposing a downgraded channel. This would occur in the context of an application for a construction permit for a new station filed on a first-come/first served basis after the filing window closes, or, if an application is filed during the application filing window and granted, in an application for modification of construction permit filed after the grant. We addressed this concern in paragraph 10 of the *Notice*.

11. We continue to believe that such a practice could be unfair to other parties and communities in the rule making proceeding. This is especially true if, by proposing the higher class channel in the rule making proceeding, a party obtains a comparative advantage. However, we do not perceive the need to adopt an absolute proscription on the filing of such applications as suggested by the NAB. Instead, we will reserve the right to take appropriate action in such situations on a case-by-case basis. There are two reasons for this decision. First, based on our own experience and review of the comments, we do not believe that this will be a pervasive problem requiring a specific rule. In fact, it is our experience that applicants are normally interested in upgrading their allotment and not operating with reduced facilities. See e.g. *Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984). Second, there may be unforeseen or other public interest reasons for a subsequent application proposing a downgraded allotment. We believe that it is more conducive to the efficient transaction of Commission business to consider these reasons in the context of making our public interest finding while processing the application. However, a proponent of a downgrade who makes the request before or during the first year of station operation and who was the prevailing petitioner in a contested allotment proceeding as a direct result of the class of channel proposed will be expected to make a compelling showing that the downgrade would serve the public interest.

12. We also have an analogous concern in situations where the successful applicant from among two or more mutually exclusive applicants for an allotment has obtained a construction permit as a result of a decisive Section 307(b) preference awarded in a comparative licensing proceeding. Accordingly, a proponent of a downgrade who makes the request before or during the first year of station operation and who received a dispositive comparative preference in a licensing proceeding will be expected, if the reason for the preference is obviated by the downgrade, to make a compelling showing that the downgrade would serve the public interest.

13. We do not perceive any public interest reason to "grandfather" existing petitioners as suggested by Martin L. Hensley. We see no reason to require existing stations with pending petitions to wait longer to file an application for a downgrade than stations without petitions on file. However, Mr. Hensley's proposal raises the question of transition procedures to the new system. In the event that a petition for rule making proposing a downgrade in the channel class of an existing station is pending on the effective date of the revised rules, the petition for rule making will be dismissed and the petitioner may immediately file the appropriate application. We will not accept downgrade applications prior to the effective date of the new procedure. As for the situation envisioned by Capitol Broadcasting Corporation with respect to an "automatic" downgrading by an applicant inadvertently proposing facilities below the prescribed minimum antenna height or power,<sup>5</sup> we note that the application form clearly requires the applicant to specify the class of channel being proposed. In the event this type of inconsistency should occur under the present rules, the application will be subject to dismissal.

14. In regard to a vacant allotment, we will amend the Table of FM Allotments upon grant of the construction permit specifying the downgraded class. Similarly, we will also amend the Table upon grant of a construction permit

downgrading the class of an outstanding construction permit for a new FM station. In both cases, once this construction permit is granted, we shall no longer protect the original allotment class at the reference point. Rather, we shall process other applications and rule making petitions based upon the downgraded channel. See Section 73.208(b)(1) and (2) of the Commission's Rules. Should the construction permit be revoked at a later date, the downgraded channel will be retained in the Table. On the other hand, after grant of a construction permit to modify the facilities of an *existing* FM authorization to a lower class, we will continue to protect the authorized facilities until the modified facilities are licensed. The construction permit for the modified facilities will also be protected as currently done in cases where a site change is granted.<sup>6</sup> Upon licensing, we will amend the Table accordingly.

15. Pursuant to the Regulatory Flexibility Act of 1980, our final analysis is as follows:

#### I. Need for and Purpose of the Rule

1. We have concluded that the present rule making and application procedure are an unnecessary burden on the applicant and delay the processing of the proposal. This also delays new service to the public. All relevant public interest matters can be considered in an application procedure.

#### II. Summary of issues raised by public comments to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

1. Comments contended that processing expediency and easing the burden on applicants should not override the rights of interested parties wishing to bring certain matters to the attention of the Commission. As set forth above, we find that public participation will not be curtailed by the changes and that the benefits of the changes in terms of expedited processing are substantial. The only change is that public participation will take place in an application context rather than a rule making proceeding.

#### III. Significant Alternatives Considered and Rejected

1. The alternative rejected was to retain the rule making and application procedure. Any such procedure would continue to burden the applicant and delay processing. Moreover, the revised procedures will not preclude interest parties from having relevant concerns considered by the Commission.

16. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

17. Authority for adoption of the rules contained herein is contained in Sections 4(i) and 303 of the Communications Act of 1934 as amended.

18. Accordingly, IT IS ORDERED, That Sections 73.3573(a)(i) and 73.203 of the Commission's Rules ARE AMENDED as set forth in Appendix A below, effective May 1, 1989.

## FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

### APPENDIX

47 C.F.R. Part 73 of the Federal Communications Rules and Regulations is amended as follows:

1. Section 73.203 is revised to read as follows:

#### Section 73.203 Availability of channels

(a) Except as provided for in paragraph (b) of this section, applications may be filed to construct FM broadcast stations only at the communities and-on the channels and classes contained in the FM Table of Allotments (Section 73.202(b)). Applications that fail to comply with this requirement, whether or not accompanied by a petition to amend the Table, will not be accepted for tender.

(b) In the event a channel becomes available for application on a first-come/first-served basis, an applicant may propose a lower class channel. Applications for the modification of an existing FM broadcast station may also propose a lower class of channel. In both cases, the applicant need not file a petition for rule making to amend the Table of FM Allotments (Section 73.202(b)) to specify the lower channel class.

2. In Section 73.3573, paragraph (a)(1) is revised to read as follows:

#### Section 73.3573 Processing of FM broadcast and FM translator station applications.

(a) \* \* \*

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for FM stations authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (Section 73.202(b)). Other requests for change in frequency or community of license for FM stations must first be submitted in the form of a petition for rule making to amend the Table of Allotments. In the case of FM translator stations authorized under Part 74, it is any change in frequency (output channel), or authorized principal community or area. For noncommercial educational FM stations, a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area). However, the FCC may within 15 days after the acceptance of any other application for modifica-

tion of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of Section 73.3580 and 1.1111 pertaining to major changes. Proposals to upgrade the class of an FM broadcast station must first be submitted as petitions for rule making to amend the Table of Allotments. After the initial filing window closes for a vacant FM allotment, an applicant may propose a downgraded class in an application for a new FM broadcast station. A licensee or permittees may seek the downgrading in class of its existing FM broadcast station by filing a minor change application.

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#### FOOTNOTES

<sup>1</sup> Prior to 1984, Section 73.206 of the Rules provided for only two classes of channels in each of the three zones of the country (Zone I or IA - Class A or B; Zone II - Class A or C). In BC Docket No. 80-90, we created three additional classes of channels (Class B1, Class C1 and Class C2) which operate with lesser power and/or antenna height and require reduced minimum separation standards. *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Assignments*, 94 FCC 2d 152 (1983), *recon. granted in part and denied in part*, 97 FCC 2d 279 (1984).

<sup>2</sup> Where the downgrade is made to an allotment for which there is a licensee or permittee, the only eligible applicant for the downgraded allotment is the licensee or permittee.

<sup>3</sup> In revising Section 73.3573(a)(1), we will also be revising the parallel provision in Section 73.203 of the Rules.

<sup>4</sup> See e.g., *Amendment of Section 73.3572 and 73.3573 Relating to Processing FM and TV Broadcast Applications*, 50 Fed. Reg. 19936, published May 13, 1985.

<sup>5</sup> An example would be an applicant specifying Class C on the application form while inadvertently proposing an antenna height below the prescribed 300-meter minimum. Capitol Broadcasting Corporation appears to be concerned with the potential for this application to be granted and the allotment downgraded to Class C1.

<sup>6</sup> Any subsequent application or petition for rule making must meet the prescribed minimum spacing requirements with respect to the geographic coordinates and channel class of that construction permit.