

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

MM Docket No. 88-375

Amendment of Part 73 of the Rules to provide for an additional FM station class (Class C3) and to increase the maximum transmitting power for Class A FM stations	RM-6236 RM-6237
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MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1991; Released: May 30, 1991

By the Commission:

INTRODUCTION

1. Before the Commission are petitions for reconsideration and clarification of the *Second Report and Order* ("*Second Report* ") in this proceeding.¹ The petitions generally support the actions taken in the *Second Report*, but raise questions as to the interpretation of, and need for, some of the new rules.

BACKGROUND

2. This proceeding was initiated on July 20, 1988, by a *Notice of Proposed Rule Making* ("*Notice* ").² The *First Report and Order*³ created a new C3 Class of FM station to which many Class A stations in Zone II⁴ could upgrade. In the *Second Report*, the Commission adopted rules which allow licensees of Class A FM stations an opportunity to increase effective radiated power up to a maximum of 6 kilowatts (kW) at an antenna height above average terrain (HAAT) of 100 meters (m) or its equivalent. This increase in power required the adoption of increased separation distances for Class A stations to prevent interference. Existing stations at locations that did not meet the new separation distances (i.e., stations that became short-spaced as a result of the rule change), were "grandfathered."⁵

3. Before addressing the specific issues raised in the petitions, we believe a restatement of what the *Second Report* allows would provide useful guidance. First, a basic premise in that decision is that no interference is

permitted. Discussing the difference between allowing a blanket power increase and a selective power increase in paragraph 49 of the *Second Report*, we stated, "[w]hile a selective increase in power is consistent with the public interest, it should not be accomplished at the expense of reducing coverage or interfering with other existing facilities." In paragraph 52, we indicated that "we wish to extend authority to increase power where possible, so long as it does not interfere with other stations." In paragraph 58, we declared that "we have attempted to... fashion flexible rules that will provide optimum benefit to the public by encouraging improved FM broadcast service, while maintaining the quality and extent of existing FM service." That still describes a basic objective in this proceeding and is a significant element in determining whether a particular proposal is consistent with the public interest.

4. The ability of any particular Class A station to take advantage of this opportunity to increase power depends on its particular circumstances. There are three broad categories of circumstances. A single Class A station may find itself in more than one category with respect to other individual stations. The various different conditions described below would apply to each station pair depending on its category.

5. Category 1 includes those situations where the station to station spacing exceeds the minimum distance separation specified for the new 6 kW Class A stations. Category 2 includes the situations where the station-to-station spacing is less than the minimum distance separation specified for the new 6 kW Class A stations, but more than the minimum specified for the old 3 kW Class A stations. Category 3 includes the situations where the station-to-station spacing is less than the minimum distance separation specified for the old 3 kW Class A stations. To illustrate, the old (3 kW) separation requirement for co-channel Class A to Class B stations is 163 kilometers (km). The new (6 kW) rule requires 178 km between such stations. In this example, Category 1 situations would have a spacing of 178 km or greater; Category 2 situations would have a spacing between 163 and 178 km; and Category 3 situations would have a spacing of less than 163 km. Of course, the separation distances for the categories will depend on the actual classes and channel relationships of the stations involved.

6. Class A stations in Category 1 situations may increase to 6 kW at 100 m HAAT or its equivalent without consent or other special requirements. Class A stations in Category 2 situations have a variety of options. Class A stations in Category 3 situations fall into either of two groupings, each having a set of options.

7. Category 2 stations may change facilities, provided 3 kW at 100 m HAAT equivalency is not exceeded. For stations that have an HAAT greater than 100 meters, the equivalency determination is based on not exceeding a (1

stations would have no more interference potential than 3 kW Class A stations. However, the *Second Report* also included rules that permit licensees of newly short-spaced Class A stations to increase power if they obtain the consent of the licensees of co-channel and adjacent channel stations which might be affected and the increase is consistent with the public interest.

¹ See *Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

² See *Notice of Proposed Rule Making*, MM Docket No. 88-375, 3 FCC Rcd 5941 (1988).

³ See *First Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 2792 (1989).

⁴ Zone II includes all of the United States except areas of the northeast United States and the southern part of California.

⁵ The separation distances were increased so that 6 kW Class A

mV/m or 60 dBu) class contour distance of 24 km.⁶ For stations that have an HAAT less than 100 meters, the equivalency determination is based on the distance to the predicted 0.05 mV/m (34 dBu) F(50, 10) field strength contour not exceeding 98 km. These provisions are found in §73.213(c)(1). Consent of other licensees is not required.⁷

8. A second option for Category 2 stations is to change site within the area that qualifies them as Category 2. As in the first option, 3 kW at 100 m HAAT equivalency must not be exceeded. The same §73.213(c)(1) equivalency provisions apply to this option and consent of other licensees is not required.

9. A third option for Category 2 stations is to apply for a modification pursuant to the contour protection provisions of §73.215. Consent of other licensees is not required. A fourth option for Category 2 situations is available if both involved stations are Class A stations. They both may increase to 6 kW at 100 m HAAT or its equivalent if the increases are mutual and are otherwise consistent with the public interest.

10. A fifth option for a Category 2 station is a unilateral increase in facilities, up to a maximum of 6 kW at 100 m HAAT or its equivalent, provided several conditions are met: (a) The consent of the affected station must be obtained; (b) The increase must be consistent with the public interest; and, for Class A stations short-spaced to non-Class A stations, (c) No fully spaced or less short-spaced transmitter site is available. This option is available either at the existing transmitter site or in conjunction with a move to a new Category 2 transmitter site. The final option for a Category 2 situation is to change site to meet the new (6 kW) spacing requirements, in which case the Category 1 option is available (increase to 6 kW at 100 m HAAT or equivalent without consent or special requirements).

11. The first grouping in Category 3 includes those stations at locations authorized prior to November 16, 1964, that did not meet the separation distances required by §73.207 and have remained short-spaced since that time. Stations in this situation may modify their facilities in accordance with §73.213(a), up to a maximum power of 6 kW at an HAAT of 100 meters, or the equivalent power for a greater HAAT. They also may apply for modifications pursuant to the contour protection provisions of §73.215. Finally, they may change site to increase the distance between the stations so that they become Category 2 or Category 1 situations, in which case the options appropriate to those categories would be available.

⁶ This provision was in effect prior to this rulemaking and is included here for completeness.

⁷ In a connected matter, we wish to clarify our policy regarding applications for construction permits filed to implement allotments resulting from petitions for rule making to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment. In addition, such applications must meet the new spacing requirements with respect to all pending applications that are fully spaced to the reference point for the

12. The other Category 3 grouping consists of those Class A stations that are in a Category 3 situation because of distance requirement waivers, changes in the rules or other reasons. These stations were not directly addressed in the *Second Report*. Their options are discussed and clarified in paragraph 37, *infra*.

13. Petitions for reconsideration, partial reconsideration, and/or clarification of the rule amendments adopted in the *Second Report* were submitted by the National Association of Broadcasters ("NAB") and the United Class A Broadcasters Coalition ("Coalition").⁸ The broadcast engineering consulting firm of du Treil, Lundin & Rackley, Inc. ("DLR") submitted a petition for reconsideration approximately two months late that we have treated as late-filed comments.⁹ CBS, Inc. ("CBS") submitted a statement in support of NAB's petition. Generally, the Coalition believes that some of the new rules unnecessarily handicap licensees of Class A stations from obtaining improved coverage. NAB and CBS, however, believe that the new rules are necessary to prevent degradation of the FM service, but question whether they are sufficiently restrictive and detailed to do so.

DISCUSSION

Provisions for obtaining consent for a power increase

Issue

14. Section 73.213(c)(2) of the Commission's rules allows existing Class A stations that became short-spaced as a result of the increased spacing requirements the opportunity to increase power if such stations first obtain the consent of the stations to which they are short-spaced. NAB requests that the Commission specify procedures for obtaining that consent to insure that the process is not used to circumvent spacing requirements and decline to accept applications that do not comply with those procedures. NAB suggests that the licensee of each station fitting the Commission's description of an "affected station"¹⁰ be notified by certified mail of proposed power increases and that before applying for such an increase, the applicant should furnish the Commission with a certificate indicating that it has previously obtained affirmative responses from all affected parties. Such written consent would be submitted to the Commission with the certificate. NAB apparently also believes that the consent

new allotment.

⁸ The Coalition is an umbrella organization of numerous Class A broadcasters.

⁹ DLR argued that a waiver of the filing deadline is warranted because of the complex nature of the proceeding and its inability to fully anticipate how the rules would be applied in concrete situations. We find these grounds for a waiver of the filing deadline insufficient. Treating the DLR petition as late-filed comments, we have considered them to the extent they are relevant to the issues on reconsideration.

¹⁰ Section 73.213(c)(2) describes "affected stations" as those on co-channel or first, second or third adjacent channels that would be short-spaced to the proposed facility.

provisions should apply to stations for which short-spacing is sought through the use of directional antennas permitted by §73.215.¹¹

15. NAB further suggests that the rules be clarified to indicate that properly-spaced stations may not become short-spaced as a result of their licensees having obtained the consent of affected FM station licensees. In cases in which consent is given, NAB also wishes the Commission to consider, in its public interest assessment, whether there is a loss of service inconsistent with §307(b) of the Communications Act so that the consent procedure cannot be used as a means to "negotiate interference."¹² CBS agrees with NAB and states that the Commission should adopt formal notice and filing procedures requiring Class A FM station licensees seeking to increase power to notify licensees of potentially affected stations in writing and to submit to the Commission such licensees' written consent to the proposed power increase.

16. While generally opposing the NAB proposals, the Coalition does suggest that the Commission might consider specifying the details of the consent procedure for those situations where a Class A station licensee does not propose to provide contour protection pursuant to §73.215 of the Commission's Rules.¹³ In such cases, the Coalition suggests that applicants only be required to notify affected stations by certified mail and submit the receipts or certification of consents from such stations as part of the application.

17. NAB, however, disagrees with this position and states that it does not consider any directional antenna use to be automatically consistent with the current interference protection standards. Therefore, NAB contends the licensees of a potentially affected station should have the opportunity to decide whether adequate protection is being afforded, not the applicant for the increase in power.

18. The Coalition counters this argument by first noting that station applicants make no final determinations of whether another station is adequately protected or not. Rather, such determinations are made by the Commission. Second, the Coalition notes the Commission has already made the judgment that directional antennas can be used, pursuant to §73.215, to provide adequate protection to affected stations, and points out that §73.215, in most cases, requires directional antenna use to be more accurately described in terms of signal pattern prediction than non-directional antenna systems. Thus, the Coalition concludes that there is no basis for requiring Class A

station licensees who provide §73.215 protection to other stations to first acquire a consent from the licensees of potentially affected stations.

Analysis

19. Sections 73.213 and 73.215 represent two separate approaches to obtaining a power increase. Applications filed pursuant to §73.215 do not require the consent of other licensees because full protection will be afforded to all stations' service contours.¹⁴ However, §73.213(c)(2) states that "Each application to operate a Class A station with an ERP and HAAT such that the reference distance¹⁵ would exceed 24 kilometers must contain an *exhibit demonstrating the consent* (emphasis ours) of the licensee of each co-channel, first, second or third adjacent channel station (for which the requirements of §73.207¹⁶ are not met) to a grant of that application. "The rule does not address the manner of securing consent because that process is merely incidental. Consent cannot be procured without adequate notification. As a practical matter, our experience indicates that the "exhibit demonstrating consent" is provided by all §73.213(c)(2) applicants and consists either of a letter indicating specific consent, or an agreement between two licensees seeking a mutual power increase. A simple declaration on the part of an applicant that consent has been obtained is not adequate and is not acceptable. We emphasize that "consent" is not and may not be the equivalent of "negotiated acceptance of interference." Rather, it is an acknowledgement of the proposed modification and an indication that it is not objectionable. Consent also serves the practical purpose of greatly reducing the technical showings and arguments that would otherwise be required.¹⁷

20. NAB apparently believes that consent will be presumed if the licensee of a short-spaced station fails to respond to a request for consent to a grant of a §73.213(c)(2) application. The discussion in the preceding paragraph clearly indicates that this is not the case. A non-response on the part of a short-spaced licensee will not be interpreted as consent. We see no value in requiring §73.213(c)(2) applicants to notify short-spaced licensees by certified mail, or in requiring such receipts to be furnished to us as proof of notification because we are only interested in the exhibit of consent, not the manner of obtaining it.

Exemption from the eight-kilometer limit on short-spaced Class A station operation

§73.215. The responsibility for ensuring that proper protection is afforded by applicants filing pursuant to §73.215 rests with the Commission, not any other party.

¹⁵ The 24 kilometers (roughly 15 miles) "reference distance" is the approximate distance to the 1 mV/m service contour of a former (3 kW @ 100 meter HAAT) full-facility Class A station.

¹⁶ Section 73.207 specifies the normal separation distances required between the various full-facility classes of stations. Stations which do not meet those distances are considered short-spaced.

¹⁷ As described in the background section above, the rules currently make it abundantly clear that the consent provisions are specifically for *grandfathered* short-spaced stations. Thus, it is clear that non-short-spaced station licensees may not submit applications for modification under any part of §73.213

¹¹ See NAB's *Opposition to United Class A Broadcasters Coalition's Petition for Reconsideration*, at p. 4

¹² NAB is on record in several Commission proceedings as opposing the concept of negotiation of interference rights. See, e.g., NAB Comments in MM Docket No. 87-267, filed February 1, 1988, at 10-12.

¹³ The Coalition suggests that if a licensee of a short-spaced Class A facility, applying for a power increase pursuant to alternative provisions found in §73.215, can demonstrate that because of a directional antenna, uneven terrain, or an antenna height reduction, coverage would not increase in a short-spaced direction, there should be no need to obtain the consent of other licensees.

¹⁴ Thus, the Coalition misinterprets the consent requirement if it believes that the requirement applies to short-spaced Class A stations for which a power increase is sought pursuant to

Issue

21. Section 73.215 of the Commission's Rules currently places a temporary 8 kilometer (5 mile) limit on the amount of short-spacing applicants may propose for FM stations authorized pursuant to its contour protection provisions.¹⁸ Because reconsideration of the Commission's FM short-spacing decision in MM Docket No. 87-121 is still pending, NAB requests the Commission not to exempt Class A stations from the 8 kilometer short-spacing limit. NAB fears that Commission policies which increasingly focus on contour protection (such as §73.215), rather than distance separations, are inevitably destined to degrade the FM broadcast service. CBS supports NAB's contention and suggests that until such time as the propagation algorithms become reliable, the Commission should forego accepting applications involving contour protection being afforded by newly short-spaced Class A stations. The Coalition counters by stating that any action the Commission takes here need not prejudice the pending reconsideration of MM Docket No. 87-121 if the Commission makes clear that any exemption from the five-mile limit will be subject to the final outcome in that proceeding. The Coalition asserts that by NAB's challenging the accuracy of the Commission's current FM propagation prediction methodology at this juncture, it in effect is also challenging the current FM spacing requirements which are derived from the same prediction methods.

Analysis

22. The 8 kilometer limit adopted in MM Docket No. 87-121 was imposed merely as a temporary measure to restrict the number of §73.215 applications our FM processing staff would receive initially. It was not imposed because we had any doubts about the adequacy of the §73.215 contour protection provisions. Because we wanted as many Class A FM stations to be upgraded as possible, given the benefits of increased Class A coverage, the *Second Report* exempted Class A stations from the 8 kilometer short-spacing limit. We do not find NAB's concern about the contour protection provision in §73.215 sufficient to warrant our reconsideration of this decision. As noted by the Coalition, the distance separation requirements in our rules are based on calculations of signal strength contours using the same propagation model which is at the heart of the contour protection provisions in §73.215. We see no reason to single out Class A stations using the contour protection method of §73.215 as the only stations to which concerns about that section would apply. Neither do we see any compelling reason to cease processing applications based on rules derived from the propagation curves we have used for many years. Our propagation model may evolve and improve. But we believe public interest concerns, including the prompt initiation of new service, do not warrant our delaying applications pending such improvement. Moreover, matters regarding the adequacy of the contour protection provisions in §73.215 are more properly addressed in the reconsideration in the MM Docket No. 87-121 proceeding.

Public interest showings**Issue**

23. Section 73.213(c)(2) states that the Commission will grant a short-spaced license under its provisions only if it finds that the grant is consistent with the public interest. The Coalition interprets §73.213(c)(2) to require a public interest showing by applicants seeking power increases for newly short-spaced Class A stations. The Coalition states that such a provision is necessary only when a request is made to increase coverage in a short-spaced direction; but in the case where a licensee of a Class A station increases power unilaterally, the service gain will typically outweigh service loss, thereby obviating the need for a specific public interest showing. NAB supports the need for the Commission to make determinations that its grants are in the public interest, but states that such findings are *pro forma* if the applicant has met all other relevant requirements.

Analysis

24. Section 73.213(c)(2) does not require applicants to submit a special "public interest showing." It states that "Applications submitted pursuant to the provisions of this paragraph may be granted only if such action is consistent with the public interest." The burden is on the Commission to make the finding, taking all of the facts before it into account. To make such a determination, the Commission may request additional information not solicited in the usual application forms. In practice such requests are specific and limited, and do not require the applicant to submit a "public interest showing." Therefore, the Coalition's petition in this respect is misdirected and warrants no change in the current policy.

¹⁸ See *Second Report* at § 57.

The availability of non-short-spaced locations

Issue

25. Section 73.213(c)(2) states that "Applications that specify a transmitter site which is short-spaced to an FM station other than another Class A station which is seeking a mutual increase in facilities may be granted only if no alternative fully-spaced site or less short-spaced site is available. Licensees of Class A stations seeking mutual increases in facilities need not show that a fully-spaced or less short-spaced site is available."¹⁹ The Coalition contends there is no basis for requiring Class A stations short-spaced to stations of other classes and seeking to increase power at existing sites to first show that no fully spaced or less short-spaced site is available. Such showings, suggests the Coalition, should only be required when an applicant seeks a waiver to install a full-facility transmitter at a new short-spaced site. DLR agrees with the Coalition.

26. As a general rule, NAB believes that the Commission should always consider the availability of alternative sites as a means to avoid increases in FM band interference.²⁰ NAB notes that station licensees wishing to upgrade at their current sites can do so by using FM directional antennas, and that for such stations, a showing of alternative sites should not be a necessary prerequisite for a grant of an upgrade application.²¹ However, NAB believes that such a showing should be required for stations that will be relocated.²²

Analysis

27. Our experience subsequent to the adoption of the *Second Report* indicates that nearly every licensee of a Class A station seeking a facility upgrade wishes to do so at its current station location. Relocating such stations is simply not cost-effective in most situations.

Because power increases sought pursuant to §73.213(c)(2) require the consent of all potentially affected licensees, the current requirement for a showing of nonalternative site availability appears unduly restrictive in the case of stations for which relocation is not practicable. We agree with all of the parties that such a showing should be required in the case of a §73.213(c)(2) application involving both an increase in facilities and station relocation.²³ Thus, §73.213(c)(2) is amended to reflect the modified requirement, thereby granting the Coalition's petition in this respect.

Second and third adjacent channel protection

Issue

28. Section 73.213(c)(1) sets forth co-channel and adjacent channel separation criteria applicable to "grandfathered" Class A stations that cannot meet the new separations based on maximum Class A facilities of 6 kW

at an antenna HAAT of 100 meters. These separations were those formerly contained in §73.207. As a result of action taken in the *Second Report and Order* in MM Docket No. 86-144, the table includes separation distances which protect the service of second and third adjacent channel stations.²⁴

29. The Coalition objects to our protecting second and third adjacent channel facilities, noting that for over 20 years (prior to the action taken in Docket 86-144) the Commission routinely permitted grandfathered short-spaced stations to modify facilities without consideration of second and third adjacencies. The Coalition seeks reconsideration, arguing that because the Commission permitted facility modifications for two decades for second and third adjacent FM stations already short-spaced, including Class C stations with 100 kW of power, there is no good reason why short-spaced Class A stations should not be able to increase coverage in second and third adjacent channel directions. Lastly, the Coalition suggests that adequate public notice had not been given concerning this matter, pursuant to 5 U.S.C. §553 (b) and (c). Thus, it concludes that the Commission may not lawfully rely on revised §73.213 to prohibit power increases in directions of second and third adjacent channel stations.

30. NAB contends that the Coalition's arguments are without merit. NAB notes that in MM Docket No. 86-144, the Commission determined that allowing grandfathered short-spaced stations to continue to routinely modify their facilities without considering second and third adjacencies would increase the probability of interference and be inconsistent with the efficient use of the FM spectrum. NAB asserts that, of all the forms of interference, second and third adjacent channel interference is potentially the most damaging because it occurs in the signal coverage area where the adversely affected station would normally have its strongest signal. Thus, NAB asserts that to ignore such interference for an entire class of stations that seek to increase power would seriously damage the technical integrity of the FM service.

31. However, DLR asserts that many Class A stations are short-spaced to second and third adjacent channel facilities and thus have practically no opportunity to increase power under the new rules. DLR suggests that allowing relocation of these facilities provided there is no increase in population receiving interference within the coverage contour of the larger facility would enable the larger facility to retain the size of its potential audience, while allowing additional population to be served by the modified Class A facility.

Analysis

32. As the Coalition notes, action taken in MM Docket No. 86-144 eliminated the exclusion which formerly permitted shortspaced station licensees authorized prior to November 16, 1964, to avoid protecting second and third adjacent channel stations. However, the Coalition filed no

¹⁹ This requirement only applies to applications submitted pursuant to §73.213, not to those submitted pursuant to §73.215.

²⁰ See NAB *Opposition Comments* at p. 5.

²¹ *Ibid.* The reference to "FM directional antennas" suggests that this opinion is applicable only to §73.215 applications, not to §73.213 applications.

²² *Ibid.* Upgrades pursuant to §73.213 do not necessarily involve station relocation.

²³ Such a showing would not be required in connection with a §73.215 application because such facilities are expected to fully protect the service of other FM stations.

²⁴ See *Second Report and Order*, MM Docket No. 86-144, 2 FCC Rcd 5693.

petition for reconsideration at that time. Revisiting that action now would be inappropriate. Moreover, adequate notice of second and third adjacent channel separation distances was presented for public consideration in the *Notice of Proposed Rule Making* of this proceeding.²⁵ Therefore, the Coalition's allegations of procedural deficiencies are without merit. The suggestion made by DLR which is summarized in the preceding paragraph is clearly outside the scope of this proceeding.

Other matters

33. The Commission's FM application processing staff has identified several problems with respect to the Class A power increase rules.

34. First, the question has arisen as to how §73.213(c)(2) should be applied in the case where two Class A licensees are short-spaced with respect to each other, where they agree to mutual power increases, but where one licensee is not prepared to effectuate the increase in consonance with the other licensee. The rule is silent with respect to a staggered or deferred power increase. We now recognize that financial limitations or other factors may preclude a simultaneous increase in the power of two short-spaced Class A stations, at least during a particular period of time. This can result in a significant problem. While a unilateral power increase with the consent of a short-spaced, non-upgrading Class A licensee is possible, such consent is likely to be rare, because the consenting licensee, when applying for a facility upgrade at some later date, must protect both the new and the old service of the Class A station upgraded first.²⁶

35. We believe there is an equitable solution to the problem defined in the previous paragraph. Accordingly, we have adopted the following policy in such cases. Because most short-spacing cases do not involve minimal short-spacing (i.e., minimal spacing based on the former mutual maximum facilities of 3 kW @ 100 meters HAAT), some unilateral increase in power will generally be possible which will not lead to future conflicts or loss of service.

36. For example, let us presume that the short-spacing between two Class A stations is such that a mutual power increase to 4.0 kW and an HAAT of 100 meters would be

possible with no contour overlap or disruption of existing service.²⁷ We will permit such a unilateral increase in power with the consent of the non-upgrading, short-spaced Class A licensee. This will permit a prompt enhancement of service of the station initially upgraded. Sometime later, circumstances may permit the upgrade of the other station, which can then be upgraded to a power of 4.0 kW and an HAAT of 100 meters. At such a point in time, the two short-spaced licensees could effect a new agreement to mutually upgrade to 6 kW, if both are able to do so.²⁸ In this way, the upgrade potential of both stations would be preserved and no interference would be caused to established service. We want to emphasize that while we will not deny a unilateral power increase to 6 kW on the part of a Class A station short-spaced to another Class A station, where the consent of the non-upgrading licensee is given, we want the consenting licensee to be fully aware of the consequences of such consent (i.e., possible preclusion for a subsequent facility increase to 6 kW at 100 meters HAAT.) This being the case, we believe most unilateral power increases on the part of one Class A station short-spaced to another will follow the procedure we have just described.

37. As mentioned in paragraph 12, *supra*, there are stations that were first authorized after November 16, 1964 to use a transmitter site that does not meet the spacing distances formerly required for 3 kW Class A stations. Up until now, these stations have been permitted to increase power up to 3 kW at an HAAT of 100 meters, or equivalent power for a greater HAAT, at their present site. In addition to, or in conjunction with, this first option, they may change to a new site which maintains or increases the distance between the stations. They also may apply for a modification pursuant to the contour protection provisions of §73.215. Finally, they may change site to increase the distance between the stations so that they meet the former 3 kW spacing requirements, or the existing 6 kW spacing requirements, in which case the options described in paragraphs 5 - 10 for those situations would be available.

38. We wish to clarify the status of Class A stations short-spaced after November 16, 1964. Section 73.213(c) implies that only those authorized Class A stations which

²⁵ See *Notice of Proposed Rule Making*, MM Docket No. 88-375, Appendix A, proposed §73.207(b)(1), 3 FCC Rcd 5941 (1988).

²⁶ Because §73.213 does not envision interference being caused to existing service, the subsequent consent of a Class A licensee upgrading initially cannot be presumed. This constitutes a disincentive for a Class A licensee unable to upgrade for whatever reason to consent to an upgrade sought by the licensee of another short-spaced facility.

²⁷ The following method of calculation shall be used:

First, assume both stations to be operating with an 8-radial HAAT of 100 meters. Then, by means of contour studies conducted using the methods specified in §73.215, determine the theoretical power at which each station could operate while not causing interference to the other, assuming the other station is at the same power.

Next, determine the actual power at which each station could operate based on their actual currently licensed 8-radial HAAT's. For stations with licensed HAAT's at or below 100 meters, this is done by determining the ERP that would yield the same distance to the *interference* contour as determined in the first step *supra*. This ERP cannot exceed 6.0 kW. For

stations with licensed HAAT's in excess of 100 meters, this is done by determining the ERP that would yield the same distance to the *protected* contour as determined in the first step *supra*.

To illustrate, assume Station "A" currently operates with an ERP of 3.0 kW and a licensed 8-radial HAAT of 88 meters while Station "B" operates on the same channel with an ERP of 2.0 kW and HAAT of 123 meters. Since both are Class A stations on the same channel, the protected and interfering contours would be the F(50, 50) 60 dBu and the F(50, 10) 40 dBu, respectively. Also assume that, based on the contour study, both stations could operate with a theoretical ERP of 4.0 kW (at 100 meters HAAT) without either station interfering with the other. Then, Station "A" could operate with an actual ERP of 4.6 kW (at 88 meters HAAT) and Station "B" could operate with an actual ERP of 2.65 kW (at 123 meters HAAT).

²⁸ This example is not intended to preclude the possibility of an initial upgrade agreement outlining the scenario described. In other words, both licensees could initially agree on an ultimate upgrade to 6 kW, with a unilateral upgrade to 4.0 kW in the short term.

became short-spaced as a result of the increased separation distances adopted in this rule making may be modified or relocated in accordance with that rule section. However, because all such facility increases are contingent upon the consent of affected cochannel and adjacent channel licensees, and because we have allowed the grandfathered short-spaced stations authorized prior to November 16, 1964 the opportunity to increase power to 6 kW, we believe it is eminently fair and equitable to allow up to 6 kW ERP for the remaining Class A stations that were short-spaced prior to the adoption of the *Second Report*. Therefore, we are amending §73.213(c) accordingly.

39. The question has also been posed as to whether Class A station licensees wishing to increase power in accordance with §73.213 or §73.215 should be able to maintain their existing coverage in short-spaced directions.²⁹ DLR believes that a licensee seeking a power increase for a station that has existing overlap with another FM station, will have to reduce existing coverage in those directions where the prohibited overlap occurs. DLR suggests that such licensees would be penalized if they were required to reduce facilities to less than the equivalent of 3 kilowatts and 100 meters in any direction as part of an overall power increase.

40. The provisions in §73.213 are intended to maximally protect the service of other short-spaced stations. Nevertheless, we see no reason why licensees seeking to enhance their service should forfeit service already established in directions where some overlap exists. Therefore, we will permit facility enhancements sought pursuant to §73.213 that retain current coverage in directions where overlap exists, provided no new predicted interference is created to the current service of any other short-spaced co-channel and adjacent channel licensees.

41. Another clarification involves §73.207(b)(3), which states that under the Mexico-United States FM Broadcasting Agreement, Class A stations operating with more than 3 kW ERP and 100 meters HAAT are treated as Class B stations. The correct antenna height in accordance with that Agreement should be 91 meters HAAT. We are editorially amending this rule section to reflect the correct figure.

42. Lastly, §73.207(b)(2), regarding the spacings to be used for U. S. stations relative to Canadian allotments and assignments, states in part that, "... U.S. Class A assignments operating with more than 3 kW ERP and 100 meters antenna HAAT, ... are considered to be Class B1. "Similar language is found in §73.207(b)(3) regarding spacings to Mexican allotments and assignments. We note that some applicants requesting facilities in excess of 3 kW ERP at 100 meters HAAT for new Class A stations located within 320 kilometers of the Canadian or Mexican borders have had their applications returned as unacceptable for filing. We take this opportunity to explain certain rules and the differences between applications for new facilities and those seeking to improve existing authorized facilities.

43. As explained in §73.1650, FM authorizations are subject to compliance with Bi-lateral Agreements that the U.S. has with Canada and Mexico. Those agreements de-

fine, among other things, classes of stations by power and height limitations and specify minimum distance separation requirements. For convenient reference, those separation requirements have been incorporated in §73.207 as Tables B and C. Because some domestic classes are not defined in these agreements or may have different limitations, §§73.207(b)(2) and (3) explain what substitutions must be made *in order to apply the tables correctly*.

44. The two Bi-lateral Agreements each contain a table of allotments which associates classes of stations, as defined in the agreement, with specific channels and communities. As a consequence, allotments within 320 kilometers of the Canadian and Mexican borders are listed twice - once in our domestic table (§73.202) and once in the appropriate agreement.

45. A difficulty arises when a particular allotment is shown as Class A both in our domestic table and in either agreement. Domestically, the Class A limits are 6 kW at 100 m, but in the Canadian and Mexican agreements they are 3 kW at 100 m and 3 kW at 91 m respectively. Before we authorize Class A facilities in a border zone which specify values that exceed the 3 kW at 100 m or 3 kW at 91 m limitation, we must first obtain the concurrence of Canada or Mexico to modify the appropriate bilateral table (but not our domestic table), so as to change the allotment to Class B1 (Canada) or Class B (Mexico). Of course the allotment must meet the B1 or B distance separations with respect to foreign allotments and assignments.

46. In the case of a vacant Class A allotment in a border zone, an interested party may request the FCC to obtain Canadian or Mexican concurrence to upgrade the allotment to B1 or B in the appropriate bi-lateral table. It will remain a Class A allotment in the domestic table and no applications exceeding 3 kW at 100 m (or 3 kW at 91 m) will be accepted for that allotment until international coordination is completed. In the case of an existing Class A authorization in a border zone, the licensee may simultaneously file an application which specifies facilities in excess of 3 kW at 100 m (or 3 kW at 91 m), and a request for the Commission to obtain international consent to a modification of the bi-lateral table. The application will not be processed until the international coordination is resolved.

47. Applications for a vacant Class A allotment which specify facilities in excess of 3 kW at 100 m within the Canadian border zone or 3 kW at 91 m within the Mexican border zone are not acceptable for filing unless the table of allotments in the applicable agreement has already been changed to a higher class. Further, applications for vacant allotments which do not conform to a bi-lateral table but which are accompanied by requests for negotiations to amend the bi-lateral table also are not acceptable for filing.

48. In the interest of fairness to competing applicants and other affected parties, and in order to expedite service to the public, the Commission's "hard look" processing standards adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), specify that applications must be acceptable for filing at the close of the amendment as of right period. A request that the Com-

²⁹ The question of protection to be afforded pursuant to §73.215 will not be addressed here because it is being reconsidered in the pending MM Docket No. 87-121 proceeding.

mission seek international clearance for an application not filed in accordance with the applicable agreement is, in essence, a request for waiver of our "hard look" processing requirements. In the case of multiple applicants for an allotment, such waiver would be unfair to the other applicants who fully complied with the acceptability criteria. Additionally, even for single applicants for new stations, there is no guarantee that negotiations would be successful and, even if successful, the undue delay involved in obtaining clearance and, thus, implementing new service to the community could be substantial. Requests for negotiations on behalf of existing stations, however, do not trigger similar detrimental public interest consequences and we will therefore hold them on file pending the outcome of such negotiations. We note that once an applicant for a new station receives a construction permit, an application for a power increase accompanied by a request for negotiations may be filed.

REGULATORY FLEXIBILITY ANALYSIS

49. In accordance with the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), a regulatory flexibility analysis follows:

I. Need and purpose of this action:

This action is intended to provide additional opportunities for improving the facilities of existing Class A FM broadcast stations. The rules adopted herein somewhat reduce the showing required by applicants of short-spaced Class A FM stations.

II. Summary of Issues Raised by Public Comment in Response to the Final Regulatory Flexibility Analysis:

No commenters addressed either the Initial Regulatory Flexibility Analysis or the Final Regulatory Flexibility Analysis, or raised Regulatory Flexibility issues as such on reconsideration.

III. Significant Alternatives Considered and Rejected:

There were no significant alternatives to the action taken herein that were not discussed.

50. The Secretary shall send a copy of this Report, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §601 *et seq.*, (1981)).

PAPERWORK REDUCTION ACT STATEMENT

51. The decisions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden that the Commission imposes on the public. This reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

52. Accordingly, IT IS ORDERED THAT the Petitions for Reconsideration and/or Clarification ARE GRANTED as specified above and ARE DENIED in all other respects. IT IS FURTHER ORDERED THAT, pursuant to

authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303, and effective July 15, 1991, Part 73 of the Commission's Rules IS AMENDED as set forth below in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.207 is amended by revising the introductory text of paragraph (b)(3) to read as follows:

Section 73.207 Minimum distance separation between stations.

(b)***

(3) Under the Mexico - United States FM Broadcasting Agreement, domestic U.S. allotments and assignments within 320 kilometers (199 miles) of the common border must be separated from Mexican allotments and assignments by not less than the distances given in Table C, which follows. When applying Table C, U.S. Class C2, C3 and B1 allotments and assignments are considered to be Class B; U.S. Class C1 allotments and assignments are considered to be Class C; also, U.S. Class A assignments operating with more than 3 kW ERP and 91 meters antenna height above average terrain (or equivalent lower ERP and higher antenna HAAT based on Annex IV of the Agreement) are considered to be Class B.

3. 47 CFR 73.213 is amended by revising paragraphs (c) and (c)(2) to read as follows:

Section 73.213 Grandfathered short-spaced stations.

(c) *Short spacings involving at least one Class A allotment or authorization.* Stations that became short spaced on or after November 16, 1964 (including stations that do not meet the minimum distance separation requirements of paragraph (c)(1) of this Section and that propose to maintain or increase their existing distance separations) may be modified or relocated in accordance with paragraph (c)(1) or (c)(2) of this Section, *except that* this provision does not apply to stations that became short spaced by grant of applications filed after October 1, 1989, or filed pursuant to § 73.215. If the reference coordinates of an allotment are short spaced to an authorized facility or another allot-

ment (as a result of the revision of Section 73.207 in the Second Report and Order in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this Section only with respect to such short spacing. No other stations will be authorized pursuant to these paragraphs.

* * * * *

(2) *Applications for authorization of Class A facilities greater than 3000 watts ERP and 100 meters HAAT.* Each application to operate a Class A station with an ERP and HAAT such that the reference distance would exceed 24 kilometers must contain an exhibit demonstrating the consent of the licensee of each co-channel, first, second or third adjacent channel station (for which the requirements of Section 73.207 are not met) to a grant of that application. Each such application must specify a transmitter site that meets the applicable IF-related channel distance separation requirements of Section 73.207. Applications that specify a new transmitter site which is short-spaced to an FM station other than another Class A station which is seeking a mutual increase in facilities may be granted only if no alternative fully-spaced site or less short-spaced site is available. Licensees of Class A stations seeking mutual increases in facilities need not show that a fully spaced site or less short-spaced site is available. Applications submitted pursuant to the provisions of this paragraph may be granted only if such action is consistent with the public interest.