

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

MM Docket No. 92-159

In the Matter of

Amendment of the Commission's
Rules To Permit FM Channel and Class
Modifications by Application.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 4, 1993;

Released: July 13, 1993

By the Commission:

1. By this *Report and Order*, the Commission modifies its rules to permit licensees and permittees to request by application upgrades on adjacent and co-channels,¹ modifications to adjacent channels of the same class, and downgrades to adjacent channels.² Licensees and permittees currently must request these changes through a two-step process in which the party first files a petition for rule making and, if the petition is granted, then an application. We will eliminate the rule making step in circumstances where it largely duplicates the application process, and instead allow a licensee or permittee to seek such modification by application alone.

BACKGROUND

2. *Existing Processes.* As we explained in the *Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 4943 (1992) ("*Notice*"), an FM licensee or permittee seeking an upgrade on an adjacent or co-channel, a modification to an adjacent channel of the same class or a downgrade to an adjacent channel first must file a petition for rule making to amend the FM Table of Allotments.³ The petition is analyzed to determine whether it will meet our technical requirements, including minimum distance separation⁴ and city grade coverage.⁵ If this analysis indicates that the proposed channel could be allotted, the Commission issues a *Notice of Proposed Rule Making* ("*NPRM*") seeking comment on the allotment and designating dates by which

comments and reply comments must be filed. Parties may file counterproposals during the comment period suggesting alternate, mutually exclusive uses of the spectrum in other communities. If the Commission determines that grant of the proposal is in the public interest, it issues a *Report and Order* modifying the license or permit to specify the new channel, amending the Table of Allotments and requiring the petitioner to file, within ninety days of the effective date of the *Report and Order*, a minor change construction permit application specifying the modification. The petitioner is also required to file any required fees with the minor change application.

3. Once the minor change construction permit application is received, a tenderability review is performed in which the application is examined for completeness. The application is then placed on a *Public Notice of Tenderability/Acceptability*. The application undergoes an engineering analysis to verify compliance with the Commission's Rules regarding minimum distance separation, city grade coverage, and station class requirements with respect to tower height and operating power. The proposed transmitter site is also checked for compliance with requirements regarding environmental concerns, and for requirements regarding tower height and proximity to airports. If the application complies with all relevant requirements, a construction permit is issued.

4. A licensee or permittee usually will specify the same site in both the petition for rule making and in the application. In such instances, the engineering analysis for the application is generally duplicative of the analysis performed on the rule making petition. In those instances where the applicant specifies a different site than proposed in the rule making proceeding, it does so generally because in developing the more comprehensive technical proposal required by an application, it found its earlier proposed site unsuitable. As part of its more detailed showing, an applicant also may employ the contour protection provisions of Section 73.215 of the Rules to propose facilities that would otherwise be short-spaced to existing stations.⁶

5. *Proposed Rule Changes.* The *Notice* suggested that the comprehensive engineering analysis performed with respect to applications for adjacent and co-channel upgrades, modifications to adjacent channels of the same class, and downgrades to adjacent channels subsumes the analysis performed at the rule making stage. This unnecessary duplication of effort may impose unnecessary costs and delays on the stations seeking modifications and an unwarranted burden on the Commission's resources. Accordingly, the *Notice* proposed to eliminate this duplication by permitting these modifications by application, rather than by rule making.

¹ Adjacent channels include the three channels above and the three channels below the specified channel. A co-channel is the channel occupied under the licensee's or permittee's existing authorization. Pursuant to Section 1.420(g)(3) of the Commission's Rules, for instance, a licensee operating on Channel 250A may seek a channel upgrade on Channels 247, 248, 249, 251, 252, or 253, or on its existing channel.

² Pursuant to Section 73.3573, a licensee or permittee currently may request a co-channel downgrade by application. See *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989).

³ See 47 C.F.R. Section 1.420.

⁴ 47 C.F.R. Section 73.207; See *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990) *rev. denied sub nom. Chester County Broadcasting Co. v. FCC*, Case No. 90-1496, (D.C. Cir. June 6, 1991).

⁵ 47 C.F.R. Section 73.315(a); see, e.g., *Greenwood, South Carolina*, 3 FCC Rcd 4108 (1988), *corrected*, 3 FCC Rcd 4374 (1988).

⁶ See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas ("Contour Protection Report and Order")*, 4 FCC Rcd 1681 (1989).

6. We tentatively concluded that it may be desirable to limit this one-step process in order to avoid harming core allotment policy objectives. We noted that there are some types of showings that are considered acceptable in connection with applications, such as contour protection showings pursuant to Section 73.215 of the Rules and showings of "substantial compliance" with our city grade coverage requirements, that we have expressly declined to consider in connection with allotment proceedings.⁷ In order to prevent the allotment of channels that would conflict with our present allotment standards, we proposed to limit the availability of the new one-step procedure only to those proposals that comply with both our application criteria and our allotment standards. We suggested that this could be achieved in two ways. We could require that any application filed pursuant to the new procedure meet minimum distance separation and city grade standards as applied in the allotment context, without making use of less restrictive application standards such as contour protection or substantial compliance, at the site specified in the application. Alternatively, we could allow an applicant to apply for a station modification at a site that would not meet allotment standards, so long as the applicant can demonstrate that an available site exists which would comply with allotment standards.

7. The *Notice* also proposed to limit this procedure to modifications that require no changes to the Table of Allotments other than a change in the allotment of the station seeking the modification.⁸ We also tentatively concluded that the procedure should not be extended to apply to non-adjacent channel upgrades, which are generally subject to competing expressions of interest.⁹

8. We proposed that the cut-off rule recently adopted by the Commission whereby minor change applications are cut off from the filing of mutually exclusive petitions for rule making as of the day the applications are received at the Commission¹⁰ should apply with respect to any application filed pursuant to this new procedure. We tentatively

concluded that the *Ashbacker* doctrine¹¹ does not preclude adoption of the proposed changes. Finally, we proposed that any changes adopted in this proceeding apply only to applications filed after the effective date of the rules.

9. *Overview of Comments.* The nine parties filing comments or reply comments in response to the *Notice* generally agree that adoption of a one-step upgrade process would be in the public interest.¹² NAB, Radio South, Bromo, Fuss and Reynolds maintain that a one-step upgrade process would expedite expanded radio service. Parties addressed most of the issues raised in the *Notice*, including how best to protect core allotment policy objectives, whether the one-step process should be extended to cover non-adjacent channel upgrades and proposals that require other changes to the Table of Allotments, and the effective date of the new rules. NAB and Bromo agreed with our proposal that the cut-off rule governing minor change applications should apply with respect to any application filed pursuant to the new procedure, while Reynolds questioned whether such an approach should be adopted.¹³ No party addressed the *Ashbacker* issue.^{14 15}

DISCUSSION

10. After careful consideration of the comments filed in this proceeding, we conclude that adoption of a one-step upgrade procedure is warranted. We believe that using a one-step process through the filing of a minor change construction permit application for adjacent and co-channel upgrades, same class adjacent channel substitutions, and adjacent channel downgrades will serve the public interest by speeding the implementation of service modifications and eliminating redundant processing.¹⁶ We also believe that each of these actions has inherent public benefit. Upgrades generally provide enhanced service to the public. Adjacent channel downgrades provide flexibility to use allotments that may have become unusable due to recently adopted enhanced spacing requirements.¹⁷ Same class adja-

⁷ In adopting rules allowing short spacing through the use of contour protection, we expressly declined to allow the use of contour protection at the allotment stage. See *Contour Protection Report and Order*, 4 FCC Rcd 1681 (1989). With respect to city grade coverage, compare *Southwest Communications, Inc.*, released July 16, 1986 (letter from Chief, FM Branch) (application standard of 80% coverage considered "substantial compliance" pursuant to city grade coverage requirement of Section 73.315 of the Rules) with *Greenwood, South Carolina*, 3 FCC Rcd 4108 (1988), corrected, 3 FCC Rcd 4374 (1988) (allotment standard requires 100% city grade coverage pursuant to Section 73.315 of the Rules).

⁸ For example, a licensee on Channel 250A at Community X may wish to upgrade to Channel 250C3, which is mutually exclusive with Channel 250A at Community Y. In its petition for rule making, the licensee at Community X could request that an alternate channel be allotted to the licensee at Community Y. If the licensee at Community Y did not agree in advance to the substitution, we would issue an *Order to Show Cause* why it should not be required to change channels.

⁹ See 47 C.F.R. 1.420(g)(1) and (2).

¹⁰ See *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *pet. for recon. granted in part*, FCC 93-339, adopted June 28, 1993 ("*Conflicts*").

¹¹ *Ashbacker v. U.S.*, 326 U.S. 327 (1945).

¹² Appendix C lists parties filing comments and reply comments.

¹³ Reynolds filed comments in this proceeding and in response to a petition for reconsideration filed against *Conflicts*. We stated in the resolution of that proceeding that his concerns are more appropriately considered herein. See *Conflicts (Memorandum Opinion and Order)*, FCC 93-339, adopted June 28, 1993, n.7.

¹⁴ As requested in a petition for rule making (RM-7933) filed on February 10, 1992, NAB also urges the Commission to initiate a comprehensive review of FM allotment policies. These matters are not properly before us in this proceeding and will be addressed separately. Similarly, Reynolds's comments suggesting that we make substantive changes in our FM allotment policies are beyond the scope of this proceeding.

¹⁵ NAB, Radio South, North Jefferson, Reynolds and Morris refer in their respective comments to ongoing allotment proceedings. We do not believe it is proper or necessary to examine the facts of these proceedings in the context of this generic rule making proceeding. Therefore, comments will not be considered to the extent that they specifically reference ongoing proceedings.

¹⁶ Under this procedure, any notification to the Canadian or Mexican governments would be made after the application is filed.

¹⁷ See *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 Stations*, 6 FCC Rcd 3417 (1991), *affirming Second Report and Order*, 4 FCC Rcd 6375 (1989) (establishing 6 kW limit for Class A FM stations),

cent channel substitutions will enable some Class A licensees and permittees presently limited to three kilowatts to increase power to six kilowatts. Allowing parties to request these modifications in a one-step process will eliminate the unnecessary duplication of effort involved in performing a comprehensive engineering analysis at each stage, which imposes unnecessary costs on both the stations seeking modifications and the Commission's resources.¹⁸

11. *Protection of Core Allotment Policy Objectives.* Six parties addressed our suggestion that the one-step upgrade process should be limited in order to avoid harming core allotment policy objectives. NAB and Skidelsky argue that any application filed pursuant to the one-step process should meet both application criteria and our allotment standards. NAB notes that this restriction would prevent applicants from relying on contour protection or substantial compliance with city-grade coverage rules. Skidelsky claims that the Commission would be free to grant waiver requests if an upgrading station initially demonstrated, for instance, full city grade coverage, but then determined that it could no longer obtain a transmitter site to provide such coverage.

12. Four parties argued that applicants under the one-step process should be able to specify sites that are in compliance with the application criteria but not necessarily the allotment standards. Bromo maintains that such an approach would permit upgrades while considering "real world" problems such as Federal Aviation Administration clearance and zoning problems. Reynolds argues that permitting the use of contour protection in the one-step process could provide additional reception service to areas that otherwise would be unable to meet the allotment standards. Southern Starr claims that the use of actual sites, rather than theoretical sites specified in order to comply with allotment standards, may permit the Commission to grant additional proposals that would have been foreclosed due to unavailability of acceptable theoretical sites. Fur-

thermore, Southern Starr argues that the specification of actual sites would lead to more accurate reception area gain and loss analyses, when required by the Commission.

13. We conclude that it is in the public interest to preserve the benefits of the current system by preventing the allotment of channels that would not meet our present allotment standards. The preservation of those allotment standards is necessary to prevent overcrowding and to promote a more even distribution of stations. We also conclude, however, that applicants should be permitted to apply for a station modification under the one-step process at a site which complies with all application criteria, even if that site would not meet allotment standards. Our current rules allow such a result, and to deny the use of the one-step process to applicants who can demonstrate compliance with the allotment standard, but apply for a site acceptable pursuant to the application criteria, would therefore be inconsistent with current practice. However, since it would be contrary to sound allotment policy for parties to receive modifications by using the one-step process that would be denied under the two-step process, all applicants using the one-step process must also demonstrate that a suitable site exists which would comply with allotment standards with respect to minimum distance separation and city-grade coverage.¹⁹ Our actions herein do not expand the use of contour protection in any way, but merely follow our established practice. Furthermore, we emphasize that we do not intend that contour protection be used as an allotment tool. See *Contour Protection Report and Order*, 4 FCC Rcd 1681 (1989).²⁰

14. In this regard, we wish to make our intentions abundantly clear. Where a station seeks a modification using the one-step process, and is unable to demonstrate that a suitable site exists that would meet allotment standards for the station's channel and class, that application would be dismissed, even if the facilities which the applicant intends to build would otherwise comply fully with Commission standards.²¹ For example, if X seeks to upgrade its station from

First Report and Order, 4 FCC Rcd 2792 (1989) (establishing Class C3 FM stations); *Review of Technical Parameters for FM Allocation Rules of Part 73 Subpart B, FM Broadcast Stations*, 4 FCC Rcd 3557 (1989) (establishing IF separations).

¹⁸ As we stated in the *Notice*, grant of the application will be followed by an amendment to the FM Table of Allotments. Such amendments will be treated as minor and non-controversial as they simply reflect authorized station operations. Thus, there is good cause for proceeding without notice and comment and for making the rule change effective upon publication in the Federal Register. See 5 U.S.C. Section 553 (b)(3)(d). No commenter addressed this issue.

¹⁹ In making this showing, an applicant must include a separate exhibit to the application which shows that the allotment reference site would meet allotment standards with respect to spacing and city grade coverage and that it would be suitable for tower construction. This exhibit must include a site map or, in the alternative, a statement that the transmitter will be located on an existing tower. Generally speaking, examples of unsuitable allotment reference sites include those which are offshore, in a national or state park in which tower construction is prohibited, on an airport, or otherwise in an area which would necessarily present a hazard to air navigation. Consistent with existing allotment standards, the applicant is not required to submit a certification of site availability concerning the allotment reference site.

²⁰ We also wish to provide practitioners with some guidance as to the manner in which the staff intends to implement these changes, especially with respect to the FM Engineering Data

Base. We caution practitioners, however, that the FM Engineering Data Base continues to be an unofficial information source, and this guidance is in no way intended to limit the ability of the staff to alter, as needed, the manner in which it administers the data base. It is currently the staff's practice to make two entries in the FM Engineering Data Base when a party seeks an upgrade. One entry reflects the "allotment" of a higher class channel, and is commonly referred to as the "vacant allotment" entry. The vacant allotment entry sets forth a station's upgraded channel and class, and includes a set of geographic coordinates commonly referred to as the "allotment reference coordinates." The other entry, commonly referred to as the "minor mod" entry, includes the channel, class, and geographic coordinates specified in the application for a construction permit to implement the upgrade. (Once the application is granted, the minor mod entry changes from an "application" entry to a "construction permit" entry, and the "vacant allotment" entry changes to a "used allotment" entry.) It is the staff's present intention to make both an allotment and a minor mod entry in connection with applications filed pursuant to the one-step process. The allotment reference coordinates will either be the same as those specified in the application, or in the event the applicant submits the exhibit detailed in Note 19, the coordinates specified in the exhibit.

²¹ One-step applicants which fail to specify reference coordinates for a suitable site that meets the allotment standards for the proposed channel and class will be afforded the opportunity to submit a curative amendment pursuant to 47 C.F.R. Section 73.3522(a)(6).

Class A to Class C3, but the site which X specified fails to provide "city-grade" service to its community of license and meet the minimum distance separation requirements of Section 73.207 of the Rules, X's application, unless amended to cure this defect, will be dismissed.²² This would be true even if X could submit an application pursuant to Section 73.215 of the Rules which would otherwise comply with our rules. It was never our intention in adopting the contour protection methods of Section 73.215 of the Rules to allow unlimited use of its provisions. Instead, we sought to provide stations with some flexibility to respond to real world problems, an especially important consideration in light of the increasing congestion in the FM band. It was not our intention in that proceeding, nor is it our intention in this proceeding, to provide a means for exacerbating that congestion. Therefore, we believe that the limits we impose on the use of the one-step process are necessary to preserve our core allotment policies, and we would not adopt the new process in the absence of these or similar limits.

15. *Cut-off Rule.* Consistent with the cut-off standard adopted in *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *pet. for recon. granted in part*, FCC 93-339, adopted June 28, 1993 ("*Conflicts*"), minor change applications filed under this new process will be cut off from the filing of other applications²³ or rule making proposals as of the day they are received at the Commission. Bromo and NAB support such an approach. We concluded in *Conflicts* that the delays caused to applicants by unlimited exposure to potentially conflicting rule making petitions are undesirable. Applying cut-off procedures consistent with those established in *Conflicts* will provide certainty to applicants in terms of exposure to conflicting proposals. Moreover, this approach is consistent with our continuing efforts to encourage FM licensees to seek to improve service to the public by removing the risk to their

existing authorizations where doing so does not unfairly prejudice new applicants.²⁴ Reynolds expresses concern that this approach would provide one-step applicants with an unfair advantage over parties that must use the rule making process to obtain upgrades. He fears that providing such cut-off protection could preclude consideration of a petition proposing an upgrade that offers superior public interest benefits to the upgrade proposed in the application. We disagree that "one-step" applicants have any advantage (unfair or otherwise) over petitioners for rule making. Rather, the process is designed to favor the party that is most prompt in submitting its request to the Commission. To the extent that this new procedure may foreclose any potential petitioner's opportunity to request a modification, we believe that it is balanced by the certainty and protection from exposure to conflicting requests that the new procedure would provide. Furthermore, a prospective petitioner will be able to predict whether a particular station has the potential to seek a modification by application, thereby enabling the petitioner to file a conflicting request in advance of that application. Prediction is possible because this new procedure will be limited to only those modification requests which show that a site exists which meets the requirements of a rule making proposal. Moreover, the operation of stations on adjacent and co-channels in neighboring communities, in conjunction with our minimum distance separation and city grade coverage requirements, necessarily limit the maximum power, maximum height and location that a licensee or permittee could request in its application, and provide the ability to predict with certainty any preclusive effect that a potential modification may have on FM spectrum availability in the area.

16. Although adoption of the cut-off rule established in *Conflicts* will in some instances remove the ability of parties to file counterproposals seeking conflicting uses of the spectrum,²⁵ we conclude that the *Ashbacker* doctrine²⁶ does not preclude adoption of the changes contemplated herein.

²² We note that applicants submitting the showing detailed in Note 19 will be considered mutually exclusive with any earlier filed rule making petition or application if the allotment reference or minor mod coordinates do not meet spacing requirements to the rule making petition or application. Thus, if X submits the exhibit outlined in Note 19, *supra*, and the site specified in that exhibit does not meet the spacing requirements of Section 73.207 with respect to an earlier filed rule making petition filed by Y, X and Y's proposals will be considered mutually exclusive, even if the minor mod application otherwise would not present a conflict with the rule making proposal because the application meets the requirements of Section 73.215 of the Rules. Under these circumstances, X and Y's proposals would generally be considered on their merits in the context of the rule making proceeding, as described more fully in paragraphs 17 and 18, *infra*, to determine which would best serve the public interest. Furthermore, if X's allotment reference site or its application site conflicts with a minor mod application filed earlier by Z, X's application will be held in abeyance until such time as final action is taken on Z's application. In the event Z's application is granted, X is given one opportunity to amend to remove the conflict with Z's application; in the event Z's application is dismissed or denied, X's application is then considered.

²³ One-step applications that are in conflict with previously filed one-step applications cut-off under this procedure will be held in a queue until disposal of the lead application. See *Amendment of Part 73 of the Commission's Rules to Modify the Commission's Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1992).

²⁴ See *Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses*, 56 RR 2d 1253 (1984); *Modification of FM and TV Broadcast Licenses to Higher Class Co-channel or Adjacent Channels*, 60 RR 2d 114 (1986); see also *Change of Community Report and Order*, 4 FCC Rcd 4870 (1989) *recon. denied*, 5 FCC Rcd 7094 (1990).

²⁵ For example, X files a petition for rule making and the Commission issues a *Notice of Proposed Rule Making* inviting comment on the proposal. Before the end of that comment period, Y files an application that conflicts with X's proposal. These conflicting proposals would be mutually exclusive, and treated in accordance with the procedure set forth in paragraphs 17 and 18, *infra*. After Y files but before the comment deadline, Z files a counterproposal which conflicts with both X's proposal and Y's application. Z's counterproposal is precluded by Y's application. In the *Conflicts* reconsideration *Memorandum Opinion and Order*, we explicitly recognize that this is a possible outcome of the cut-off rule. See *Conflicts*, FCC 93-339, adopted June 28, 1993. As we state in *Conflicts*, potential petitioners can file their proposals at any time, and need not wait until a proceeding is initiated, or once initiated, until the end of a comment period to file their proposals. Establishing these procedures is necessary to the Commission's orderly processes. However, as stated in *Conflicts*, a counterproposal that is timely filed in response to an *NPRM* but cut off by the filing of an intervening application will be considered in the rule making proceeding if the affected counterproponent files a timely amendment that protects the applicant's site.

²⁶ *Ashbacker v. U.S.*, 326 U.S. 327 (1945).

In *Ashbacker*, the United States Supreme Court held that where two *bona fide* applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give it. However, the Court has noted that the Commission can promulgate rules limiting eligibility to apply for a channel when such action promotes the public interest, convenience and necessity.²⁷ We believe the changes proposed herein would serve the public interest because enhanced service to the public would be expedited. Furthermore, in *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986), the Court of Appeals noted that *Ashbacker* applies only to parties who are applicants, and not to prospective applicants. A party seeking to amend the FM Table of Allotments is a "prospective applicant" until its application is submitted and accepted pursuant to the Commission's Rules.²⁸

17. *Conflicts Between Applications Filed Pursuant to the One Step Procedure and Earlier or Simultaneously Filed Allotment Petitions.* In adopting a cut-off rule for minor modification applications *vis a vis* allotment rule making petitions, we indicated that:

if a rule making petition is filed prior to or on the same date as a conflicting FM application, they will both be considered timely filed and treated under our existing substantive policy for resolving conflicts between applications and rule making petitions.

Conflicts, n.18. Briefly stated, the substantive policy is that an application is considered, in the absence of a showing to the contrary, to represent no more than the applicant's preference for a particular transmitter site. Accommodation of an applicant's preference provides minimal public interest benefits, and thus virtually any conflicting proposal involving a net public interest benefit will be preferred. We see no reason to depart from this general approach with respect to conflicts between minor modification applications filed pursuant to the one-step process and earlier or simultaneously filed allotment petitions. However, our discussion of this issue in *Conflicts* did not address in any detail the treatment of conflicts between minor modification applications and rule making petitions. In particular, we did not address in *Conflicts* the actions an applicant must take to argue the comparative merits of its proposal with respect to a timely rule making petition. We are particularly concerned that applicants not view our cut-off rule or our one-step process as obviating the need to prosecute their proposal in the rule making context, should that be necessary because of a simultaneously or earlier filed allotment rule making petition. Nor do we

wish the one-step process to become a means of circumventing the rule making process, if the proposal in the application conflicts with such a rule making petition. Therefore, we believe petitioners and applicants can benefit from some elaboration of these matters.

18. Generally, applications that conflict with earlier or simultaneously filed rule making petitions will be held in abeyance, and will not be granted unless the conflict is resolved. Unless the applicant amends its application so as to remove the conflict, the conflict will be resolved in the context of the rule making proceeding.²⁹ Furthermore, applicants using the one-step process to file an application in conflict with an earlier filed petition should file the application prior to the deadline established for filing counterproposals to the petition.³⁰ Applications filed prior to this deadline will be treated as if they were counterproposals, and will be listed on the Public Notice routinely issued by the staff to provide an additional opportunity to comment concerning such counterproposals. Applications filed after this deadline will, consistent with existing practice, be presumed to represent no more than an applicant's preference for a particular site.³¹

19. *Limit to Co-Channel and Adjacent Channel Upgrades, and to Modifications Requiring No Other Changes to the Table.* NAB was the sole commenter to support the proposal in the *Notice* to limit modifications under the one-step process to co-channel and adjacent channel upgrades and to those that require no other changes in the Table of Allotments, arguing that modifications that could affect other parties should be examined and governed by the full allotment rule making process. Radio South, Bromo, Fuss and Reynolds argue that the procedure should also apply to nonadjacent channel upgrades. Bromo, Fuss and Reynolds claim that a licensee or permittee seeking a nonadjacent upgrade could demonstrate the availability of an additional, equivalent class channel in conjunction with its application, and expressions of interest in the channel could be solicited in the Public Notice announcing the filing of the application. If an expression of interest is received, the Commission could then issue a *Notice of Proposed Rule Making* seeking comment on the allotment. Bromo and Reynolds propose that the one-step process should also apply to changes in community of license, claiming that the equities of a change in community proposal can be weighed in the application process.³² Finally, Bromo proposes expanding the one-step process to include intermediate frequency ("IF") channels as well.³³ With respect to other changes to the Table of Allotments, Fuss and Reynolds believe that proposals requiring other modifications should be allowed if any station required to move to a different channel to accommodate the upgrade submits

²⁷ *U.S. v. Storer*, 351 U.S. 192 (1956).

²⁸ See also *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1561 (D.C. Cir. 1987) ("only by compliance with such procedures may an application enter the ranks of *bona fide* applications' protected by *Ashbacker*"). The Commission employed a similar analysis in adopting Section 1.420(i) of its Rules, which permits FM and television licensees and permittees to seek a change in community of license without facing competing applications. See 4 FCC Rcd 4870, 4873 (1989).

²⁹ In the event the application does not prevail in the rule making proceeding, in order to protect its interests, the applicant must file a timely petition for reconsideration or application for review of the rule making determination.

³⁰ This deadline is established by a *Notice of Proposed Rule*

Making. In addition, we encourage applicants who are aware of possible conflicts to file timely comments in the rule making proceeding.

³¹ Because any showing to the contrary would constitute late-filed comments in the rule making proceeding, it would not, absent extraordinary and compelling circumstances, be considered sufficient to alter this presumption.

³² See 47 C.F.R. Section 1.420(i).

³³ An IF channel is one that is 53 or 54 channels removed from another channel. For instance, the IF channels with respect to Channel 230 are Channels 283 and 284.

an agreement to do so in conjunction with the application, thereby avoiding issuance of a *Show Cause Order*. Reynolds argues that permitting such upgrades by application will avoid the delay that can result in processing the upgrade request due to the filing of potentially abusive counter-proposals.

20. We will generally limit this new process to adjacent and co-channel upgrades, adjacent and co-channel equivalent channel changes, and adjacent channel downgrades as proposed in the *Notice*, with one variation. As suggested by Bromo, we will apply the one-step process to mutually exclusive IF channels consistent with the Commission's *Report and Order* amending Section 1.420(g) which treated IF channels as adjacent channels for upgrade purposes. See *Modification of FM Broadcast Licenses to Higher Class Co-channel or Adjacent Channels*, 60 RR 2d 114, 115, n.1 (1986). Contrary to the commenters' arguments, we do not believe that we should extend the new process to nonadjacent channel upgrades or equivalent channel substitutions, modifications requiring other changes in the Table of Allotments or requests for change of community of license. Although Bromo, Fuss and Reynolds have suggested methods by which the Commission could continue to solicit expressions of interest or allow channel substitutions with affected licensees' advance consent, we believe that it would be premature to implement the changes suggested at this time. We note that the types of actions these parties propose that we allow by a one-step procedure involve potentially much more significant changes in the preclusive effects of the allotments involved, since more than one station may be involved, and the scope of the proposal is not limited by the need to continue to provide principal community coverage to the station or stations' community of license. The greater the preclusive effects, the greater the potential impact on third parties. We also note that expanding the scope of the changes allowable under a one-step process could undermine, in some circumstances, the purpose underlying our rule against contingent applications.³⁴ Under these circumstances, and until such time as we have greater experience with a one-step process, we believe a more cautious approach is warranted.

21. *Other Matters*. Bromo argues that use of the one-step process should be mandatory in order to prevent "warehousing" of the spectrum by those who receive an upgrade but fail to file an application to specify operation on the higher class channel. We agree, and we will require use of the new procedure for eligible parties. Since any party seeking these modifications will be afforded the same opportunities under the one-step procedure that they currently receive under the two-step procedure, we see no reason that the use of this one-step procedure be optional.

22. *Effective Date*. Two commenters addressed our proposal that any changes adopted in this proceeding should apply only to proposals filed after the effective date of the rules. Fuss agrees, claiming that applying the rules to petitions for upgrades already on file will cause disruption and

confusion in processing applications. Radio South disagrees, maintaining that the rules should apply to both pending and future proposals. Otherwise, argues Radio South, the benefits of the new process will be denied to licensees who have already filed petitions in order to obtain service upgrades as expeditiously as possible.

23. These changes will be effective 30 days after publication in the Federal Register. No petitioner will be required to dismiss its rule making petition and refile its request in the form of an application. However, a rule making petitioner who has submitted a proposal that, upon the effective date of the new rules, could be advanced in the form of an application, will be permitted to withdraw its rule making petition and resubmit its proposal in the form of an application. Parties choosing to withdraw their rule making proposals are cautioned, however, that in doing so they may adversely affect their position with respect to earlier filed petitions for rule making or earlier or simultaneously filed applications.³⁵ Generally, we believe that dismissing a pending rule making petition and refile in the form of an application will only be a desirable course of action if there is no earlier or simultaneously filed rule making proposal pending.

ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, that pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 303, Part 73 of the Commission's Rules, 47 C.F.R. IS AMENDED as set forth in Appendix A, below.

25. IT IS FURTHER ORDERED, that the rules adopted herein will become effective 30 days after publication in the Federal Register.

26. Pursuant to the Regulatory Flexibility Act of 1980, the Final Regulatory Flexibility Analysis for this proceeding is attached as Appendix B.

27. IT IS FURTHER ORDERED, that MM Docket 92-159 IS TERMINATED.

28. For further information, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

³⁴ 47 C.F.R. Section 73.3517.

³⁵ For example, on day 1, X filed a rule making petition for a new station. On day 2, Y filed a conflicting petition for a station upgrade. The Commission issued an *NPRM*, and the comment date (the last date for filing counterproposals) passed on day 90. On day 120, the new one-step procedure becomes effective. On the same day, Y withdraws its rule making proposal, and refiles its proposal in the form of an application. Because Y's application was filed after the *NPRM*'s comment date, Y's application

will be held in abeyance, and in the rulemaking proceeding will be considered a mere site preference, and X is thus virtually certain to prevail in the rule making proceeding. Similarly, if X filed a rule making petition for a station upgrade, and Z timely filed a counterproposal in the rule making proceeding, if X subsequently withdrew its rule making proposal, and refiles it in the form of an application, X's application will be held in abeyance, and in the rule making proceeding would not prevail over Z's counterproposal. See paragraph 18, *supra*.

APPENDIX A

Parts 1 and 73 of Title 47 of the Code of Federal Regulations are amended to read as follows:

Part 1 - Practice and Procedure

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

AUTHORITY: 47 U.S.C. Sections 154 and 303.

2. Section 1.420 is amended by adding Note 1 following paragraph (g) and redesignating the Note following paragraph (h) as Note 2 to read as follows:

§1.420 Additional procedures in proceedings for amendment of the FM, TV or Air-Ground Table of Allotments.

* * * * *

Note 1: In certain situations, a licensee or permittee may seek an adjacent, intermediate frequency or co-channel upgrade by application. See Section 73.203(b) of this chapter.

* * * * *

Part 73 - Radio Broadcast Services

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

AUTHORITY: 47 U.S.C. Sections 154 and 303.

4. Section 73.203 is amended by revising paragraph (b) and adding a Note to read as follows:

§73.203 Availability of channels.

* * * * *

(b) Applications filed on a first come, first served basis may propose a lower or higher class adjacent, intermediate frequency or co-channel. Applications for the modification of an existing FM broadcast station may propose a lower or higher class adjacent, intermediate frequency or co-channel, or an same class adjacent channel. In these cases, the applicant need not file a petition for rule making to amend the Table of Allotments (Section 73.202(b)) to specify the modified channel class.

Note: Changes in channel and/or class by application are limited to modifications on first, second and third adjacent channels, intermediate frequency (IF) channels, and co-channels which require no other changes to the FM Table of Allotments. Applications requesting such modifications must meet either the minimum spacing requirements of Section 73.207 at the site specified in the application, without resort to the provisions of the Commission's Rules permitting short spaced stations as set forth in Sections 73.213-215 or demonstrate by a separate exhibit attached to the application the existence of a suitable allotment site that fully complies with Sections 73.207 and 73.315, without resort to Sections 73.213-215.

5. Section 73.3573 is amended by revising paragraph (a)(1), redesignating Notes 1 and 2 as Notes 2 and 3 and adding new Note 1 to read as follows:

§73.3573 Processing FM broadcast station applications.

(a) Applications for FM broadcast stations are divided into two groups:

(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 station 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 (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. Applications filed on a first come, first served basis may propose a higher or lower class adjacent, intermediate frequency or co-channel in an application for a new FM broadcast station. A licensee or permittee may seek the higher or lower class adjacent, intermediate frequency or co-channel or the same class adjacent channel of its existing FM broadcast station authorization by filing a minor change application. 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 the application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of Sections 73.3580 and 1.1111 pertaining to major changes.

Note 1: Applications to modify the channel and/or class of an FM broadcast station to an adjacent channel, intermediate frequency (IF) channel, or co-channel shall not require any other amendments to the Table of Allotments. Such applications may resort to the provisions of the Commission's Rules permitting short spaced stations as set forth in Sections 73.215 as long as the applicant shows by separate exhibit attached to the application the existence of an allotment reference site which meets the allotment standards, the minimum spacing requirements of Section 73.207 and the city grade coverage requirements of Section 73.315. This exhibit must include a site map or, in the alternative, a statement that the transmitter will be located on an existing tower. Examples of unsuitable allotment reference sites include those which are offshore, in a national or state park in which tower construction is prohibited, on an airport, or otherwise in an area which would necessarily present a hazard to air navigation.

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

I. Need for and Purpose of this Action:

This action is taken to establish a procedure by which an FM licensee or permittee may request a modified channel or class without first submitting a petition for rule making. The Commission believes that this new procedure will

remove an unnecessary duplication of effort that imposes unnecessary costs on both stations seeking modifications and the Commission's resources.

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

None.

III. Significant Alternatives Considered and Rejected:

The Commission proposed in the *Notice of Proposed Rule Making* to limit the availability of the procedure only to those proposals that comply with both our application criteria and our allotment standards. One option suggested to reach this objective was to require that any application filed pursuant to the new procedure meet minimum distance separation and city grade standards as applied in the allotment context, without making use of less restrictive application standards. Another option was to allow an applicant to apply for a station modification at a site that would not meet allotment standards, so long as the applicant can demonstrate that an available site exists which would comply with allotment standards. We rejected the first option on the ground that it would create an inequitable result in which the one-step procedure would be subject to a more restrictive standard than the current two-step procedure.

APPENDIX C

List of Commenters

1. Bromo Communications, Inc. ("Bromo")
2. Larry G. Fuss, d/b/a Contemporary Communications and Delta Radio, Inc. ("Fuss")
3. Audrey R. Morris ("Morris")
4. National Association of Broadcasters ("NAB")
5. North Jefferson Broadcasting Company, Inc. ("North Jefferson") [reply comments]
6. Radio South, Inc. ("Radio South")
7. Paul Reynolds ("Reynolds") [reply comments]
8. Barry Skidelsky ("Skidelsky")
9. Southern Starr Broadcasting Group, Inc. ("Southern Starr") [reply comments]