

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

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|----------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b), |) | MM Docket No. 98-162 |
| Table of Allotments, |) | RM-9263 |
| FM Broadcast Stations. |) | |
| (Sugar Hill and Toccoa, Georgia) |) | |

NOTICE OF PROPOSED RULE MAKING

Adopted: September 2, 1998

Released: September 11, 1998

Comment Date: November 2, 1998

Reply Comment Date: November 17, 1998

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Southern Broadcasting of Pensacola, Inc. ("petitioner"), requesting the substitution of Channel 291C1 for Channel 291C at Toccoa, Georgia,¹ and the reallocation of Channel 291C1 from Toccoa, to Sugar Hill, Georgia, as the community's first local aural service, and the modification of its license for Station WSTE-FM to specify Sugar Hill as its community of license.² Petitioner states that it will apply for the channel, if allotted.

2. Petitioner filed its request pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). In support of its proposal, petitioner states that Sugar Hill is an incorporated city with a 1990 population of 4,557 persons. In addition, Sugar Hill has its own local government, consisting of a mayor and five councilmen, and its own post office and zip code and local park. While police, fire, water, sewerage, and library services are provided by the county, petitioner states that

¹ Petitioner Station WSTE-FM is licensed as a Class C and it has an outstanding construction permit as a Class C1.

² Petitioner's petition was initially returned as unacceptable for consideration because the allotment would result in a short-spacing to Station WYAY, Channel 294C, Gainesville, Georgia. On reconsideration, petitioner states that Station WSTE-FM is a pre-1964 grandfathered short-spaced station and therefore should be treated under the guidelines set forth in Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992). Based on this information, petitioner's petition for reconsideration is granted to the extent that the instant Notice of Proposed Rule Making is being issued to solicit comments on its proposal.

the city imposes its own property and ad valorem taxes and is home to a number of businesses, such as Shoney's Restaurant, Big Lots retail store, Quality Food Store, Wade Ford, Tobacco Shack, Georgia Power, Enterprise Rent a Car, and Memories of Lifetime. Petitioner further states that Sugar Hill is not located in an Urbanized Area. Toccoa, with a 1990 population of 8,226 persons, receives local broadcast service from two AM stations, WLET and WNEG, as well from commercial television station, WNEG-TV.

3. Petitioner states that Station WSTE-FM, authorized prior to November 16, 1964, is considered to be a grandfathered short-spaced station since, it did not then and has not since, met the minimum distance separation requirements set forth in Section 73.207 of the Commission's Rules. However, since it is not requesting a change in Station WSTE-FM's presently authorized transmitter site or facilities, petitioner contends that the grandfathered short-spacings are not an impediment to the requested change in the Table of Allotments.

4. In Newnan and Peachtree City, Georgia, supra, we reallocated Channel 244A from Newnan to Peachtree City and modified the license of Station WMKJ to specify Peachtree City as the new community of license. Station WMKJ was a "grandfathered" (pre-1964, before the new spacing requirements) that did not meet the current spacing requirements set forth in Section 73.207 of the Rules. The proposal in Newnan and Peachtree City, supra, did not involve any change in the technical facilities of Station WMKJ. In taking this action, we recognized that we were creating a new short-spaced allotment in contravention of Section 73.207 of the Rules. Our rationale for this action was that "grandfathered" FM stations were in compliance with our Rules when authorized and should be afforded the same opportunity to change their community of license as other stations authorized in conformity with our Rules.

5. We are requesting specific comment on whether this policy should be continued and, if so, whether it should be extended to post-1964 FM stations that are not now in conformity with our current spacing requirements.³ In both instances, the result is removing one allotment from the FM Table of Allotments that does not comply with current spacing requirements and adding an allotment that does not comply with current spacing requirements at a new community.

Technical Summary

6. Channel 291C1 can be allotted to Sugar Hill with a site restriction of 45.7 kilometers (28.4 miles) northeast.⁴ This site, which is the transmitter site specified in

³ This concern would also be applicable to three-kilowatt (pre-1989) Class A FM stations seeking to change a community of license without a change in technical facilities. 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, 4 FCC Rcd 6375 (1989), recon. 6 FCC Rcd 3417 (1991).

⁴ The coordinates for Channel 291C1 at Sugar Hill are 34-22-41 North Latitude; 83-39-30 West Longitude.

Station WSTE-FM's outstanding construction permit (BPH-9703251C), will maintain the present short-spacing to Station WYAY, Channel 294C, Gainesville, Georgia. We note that Station WSTE-FM also has pending before the Commission an application (BMPH-9801281F) which specifies a different transmitter site (coordinates 34-21-48; 83-43-41) which would result in additional short-spacings to Station WGST-FM, Channel 289C2, Canton, Georgia, and Station WSTH-FM, Channel 291C1, Alexander, Alabama. However, because the petitioner specifically proposed the use of its construction permit site, and the Commission has not, as yet, acted on its pending application to change its site, we are proposing the Sugar Hill allotment at the coordinates specified in the station's granted construction permit.

7. We believe petitioner's proposal warrants consideration since the allotment of Channel 291C1 could provide Sugar Hill with its first local aural transmission service without depriving Toccoa of its sole local aural service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

| <u>City</u> | <u>Channel No.</u> | |
|---------------------|--------------------|-----------------|
| | <u>Present</u> | <u>Proposed</u> |
| Sugar Hill, Georgia | -- | 291C1 |
| Toccoa, Georgia | 291C | -- |

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before _____, 1998, and reply comments on or before _____, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick
 Smithwick & Belendiuk, P.C.
 1990 M Street, N.W., Suite 510
 Washington, D.C. 20036
 (Counsel to petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections

603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.