

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

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Nevada City and Mineral, California)
MB Docket No. 09-9
RM-11511

NOTICE OF PROPOSED RULE MAKING

Adopted: February 2, 2009

Released: February 4, 2009

Comment Date: March 30, 2009

Reply Comment Date: April 14, 2009

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Rule Making filed by Shamrock Communications, Inc. ("Petitioner"), the permittee of a new FM station on Channel 297C, Alturus, California. The Petitioner proposes the deletion of vacant FM Channel 297A at Nevada City, California, and the allotment of Channel 297A at Mineral, California. The Petitioner states that these proposed channel changes are being filed as part of a hybrid application and rulemaking proposal involving the Petitioner's concurrently filed minor change application. In this application, the Petitioner proposes the reallocation of Channel 297C from Alturus, California, to Fernley, Nevada, and the associated modification of its construction permit for a new FM station at Alturus, pursuant to the provisions of Section 1.420(i) of the Commission's Rules. The modification of the Alturus construction permit is contingent upon the deletion of the Nevada City allotment.

2. In support of its rulemaking request, the Petitioner contends that the deletion of vacant Channel 297A at Nevada City and the proposed new allotment at Mineral would result in a preferential arrangement of FM channels because Mineral would receive a first local service, triggering FM Allotment Priority (3). By way of contrast, the Petitioner contends that Nevada City would not lose its sole local broadcast service because Channel 297A is a vacant, unapplied for allotment, and noncommercial educational Station KVMR(FM), Channel 208B1, is licensed to the community. Further, the Petitioner contends that Mineral is a community for allotment purposes because it is a Census Designated Place (population 143). The Petitioner claims that Mineral has its own post office, postal zip code, fire

1 See File No. BMPH-20071108ACY.

2 47 C.F.R. § 1.420(i). This rule permits the modification of a station's authorization to specify a new community of license on a mutually exclusive co-channel or adjacent channel without affording other interested parties an opportunity to file competing expressions of interest.

3 The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). See Revision of FM Assignment Policies and Procedures, Second Report and Order, 90 FCC 2d 88 (1982).

department, schools, and several businesses that serve the community of Mineral, as well as its visitors. Finally, the Petitioner states that Mineral is home to Lassen Volcanic National Park, a tourist destination.

3. As a threshold matter, although the Petitioner frames its proposal as a reallocation of a vacant FM channel, the Commission's reallocation procedures do not apply to vacant allotments. Rather, only an authorized facility can be reallocated to a new community.<sup>4</sup> Accordingly, we view the Petitioner's requests as a two-step process. First, the Petitioner is requesting the deletion of Channel 297A at Nevada City, California. The Commission's long-standing policy in this area is generally not to delete a vacant allotment in which interest has been expressed, absent a compelling reason to do so.<sup>5</sup> Accordingly, we solicit comment on whether to retain Channel 297A at Nevada City. Parties interested in retaining the allotment may file statements to that effect in comments and need not file Form 301 construction permit applications. As a courtesy, we will attempt to serve a copy of this *Notice of Proposed Rule Making* on the parties that participated in the proceeding which resulted in the allotment of Channel 297A at Nevada City.<sup>6</sup>

4. Second, the Petitioner is proposing that Channel 297A be allotted to Mineral. We will solicit comment on this proposal because the public interest could be served by providing a first local service at Mineral. Our tentative view is that Mineral is a community for allotment purposes because it is listed in the U.S. Census and the Petitioner has demonstrated various indicia of community status such as schools, local businesses, a fire department, and a zip code.

5. Next, the Petitioner certifies that if Channel 297A is reallocated from Nevada City to Mineral, California, it intends to participate in the auction for Channel 297A and to construct promptly a station if it is the winning bidder. However, the Petitioner did not concurrently file an application for construction permit on FCC Form 301 for Channel 297A or pay the requisite filing fee.<sup>7</sup> Under our revised procedures, the filing of a rulemaking petition or a counterproposal to add a new allotment must be accompanied by a construction permit application specifying the proposed facilities and the payment of the filing fee.<sup>8</sup> However, given the lack of explicit guidance in *Allocations Streamlining* concerning the filing of applications for purported "reallocations" of vacant FM channels, we will require in this case that the Petitioner file the construction permit application form and pay the requisite filing fee by the comment date in this proceeding. Nevertheless, going forward, we clarify that the Audio Division will dismiss any proposed "reallocation" of a vacant FM channel not accompanied with an FCC Form 301 application at the time of filing.

6. Channel 297A can be allotted at Mineral at the Petitioner's specified site.<sup>9</sup> We note, however, that there is a terrain obstruction of 130 meters in height between the Petitioner's specified site and the principal community of Mineral. A staff engineering analysis reveals that a tall tower of at least 210

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<sup>4</sup> See 47 C.F.R. § 1.420(i) (licensee or permittee of an FM station may seek modification of its authorization on a mutually exclusive channel in a different community). Cf. *Santa Margarita and Guadalupe, California*, Report and Order, 2 FCC Rcd 6930 (MMB 1987) (denying a request by an applicant to upgrade a vacant channel because upgrade procedures apply only to the permittee or licensee of the channel).

<sup>5</sup> See, e.g., *Montrose and Scranton, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 6305, 6306 (1990) (denying request to delete an allotment because interest had been expressed in retaining the allotment).

<sup>6</sup> See *Nevada City, California*, Report and Order, 19 FCC Rcd 23212 (MB 2004).

<sup>7</sup> See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14224, ¶ 20 (2006) ("*Allocations Streamlining*").

<sup>8</sup> *Id.*

<sup>9</sup> The reference coordinates for Channel 297A at Mineral, California, are 40-16-11 NL and 121-31-46 WL.

meters (689 feet) above ground level would be required to overcome this terrain obstruction and provide 70 dBu coverage to all of Mineral.<sup>10</sup> The Petitioner is requested to provide, along with its expression of interest in the proposed allotment, documentation regarding the suitability and availability of the proposed site for a tall tower and a statement regarding its willingness to construct such a tower.<sup>11</sup> Alternatively, the Petitioner may propose a different site that would overcome or obviate the obstruction.

7. Accordingly, we seek comment 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>Community</u>	<u>Present</u>	<u>Proposed</u>
Nevada City, California	297A	---
Mineral, California	---	297A

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. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before March 30, 2009, and reply comments on or before April 14, 2009, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Patricia M. Chuh, Esq.  
 Kenneth E. Satten, Esq.  
 Wilkinson Barker Knauer, LLP  
 2300 N Street, N.W.  
 Suite 700  
 Washington, DC 20037  
 (Counsel for Shamrock Communications, Inc.)

10. Parties are requested to file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12<sup>th</sup> Street, SW, Washington, D.C. 20554. **All filings must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. See 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

<sup>10</sup> See 47 C.F.R. § 73.315(a) and (b).

<sup>11</sup> See e.g., *The Dalles, Oregon*, Notice of Proposed Rule Making, 11 FCC Rcd 1788 (MMB 1996) (soliciting documentation concerning the construction of a tall tower to overcome a terrain obstruction).

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.<sup>12</sup> This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

12. A copy of this *Notice of Proposed Rule Making* will be sent by Certified Mail, Return Receipt Requested, to Dana J. Puopolo, 2134 Oak Street #C, Santa Monica, CA 90405 (Original Petitioner for Channel 297A, Nevada City, California).

13. For further information concerning this proceeding, contact Andrew J. Rhodes, 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 in the applicable docket 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 any summary of any new 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  
Assistant Chief  
Audio Division  
Media Bureau

Attachment: Appendix

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<sup>12</sup> *See Certification that Section 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).

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), 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* 47 C.F.R. Section 1.420(d).)

(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 47 C. F.R. Sections 1.415 and 1.420, 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* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., TW-A325, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, 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 Information Center (Room CY-A257) at its headquarters, 445 12<sup>th</sup> Street, S.W, Washington, D.C.