

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

MM Docket No. 91-348

In the Matter of

Conflicts Between Applications
and Petitions for Rulemaking to
Amend the FM Table of Allotments

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 16, 1992;

Released: August 4, 1992

By the Commission:

1. By this *Report and Order*, the Commission adopts new procedures for resolving conflicts between rulemaking petitions to amend the FM Table of Allotments and applications for new FM stations or for changes in facilities. Under our current procedures, pending FM applications are not protected from subsequently filed rulemaking petitions, resulting in delays in the processing of FM applications when conflicts arise. However, there are "cut-off" rules which protect rulemaking petitions from subsequently filed petitions and FM applications from subsequently filed applications. Since these cut-off rules in the petition and application contexts have proven effective in providing certainty to parties and avoiding unnecessary delays in processing, we are today adopting a new cut-off rule for resolving conflicts between rulemaking petitions and FM applications. In essence, FM applications will become protected from rulemaking petitions at the same time that they gain protection from other mutually exclusive applications -- that is, FM applications for new stations or major changes filed during a filing window will be protected from rulemaking petitions at the close of the filing window.¹ All other FM applications will be protected as of the date they are received at the Commission. Conflicting rulemaking petitions filed before these cut-off dates will be considered mutually exclusive with FM applications, and the conflicts will be resolved under our existing policy for making substantive choices between conflicting proposals.

¹ Applications for new FM stations or major changes in the band reserved for noncommercial educational broadcasting, which are not subject to window filing procedures, will be protected at the end of the 30-day period for filing mutually exclusive applications as established in periodically released Commission Public Notices. See 47 C.F.R. § 73.3564(d) and § 73.3573(e).

² 6 FCC Rcd 7346 (1991).

³ See, e.g., *Andalusia, Alabama* (Policy and Rules Div.), 49 FR 32201, published August 13, 1984. This policy has been in effect

BACKGROUND

2. *Existing Policy.* As we explained in the *Notice of Proposed Rule Making* in this proceeding,² our existing procedure is that at any time during the pendency of an FM application, a rulemaking petition for a new FM allotment or an upgrade in the class of an existing FM allotment may be filed that conflicts with the transmitter site proposed in the FM application. Under these circumstances, we make substantive choices between the conflicting proposals based on several factors. First, we try to restrict the site of the proposed allotment or to use an alternative channel to eliminate the conflict. If this is not possible, we have generally given preference to the rulemaking petition over the application because we have presumed that granting a new FM allotment or an upgrade in the class of an existing allotment serves the public interest, while protecting an applicant's preference for a specific transmitter site specified in an application serves only an applicant's private interest.³ Applicants have been permitted to rebut this presumption and demonstrate an overriding public interest justification for preferring the application site over the rulemaking petition⁴ but have rarely prevailed.⁵ As a result, to resolve the conflict, the FM applicant is typically required to amend its application to specify a nonconflicting site. In cases involving a number of mutually exclusive rulemaking proposals, this procedure may require an applicant to suspend prosecuting its application until the rulemaking proceeding is resolved, since the applicant cannot know until then whether the conflicting rulemaking proposal will be adopted.

3. *NPRM Proposal.* While this policy has resulted in more new FM allotments than would have otherwise been possible, the *Notice* recognized that it has imposed significant risks and uncertainty on applicants because, at any time during the pendency of an application, a conflicting rulemaking petition could be filed which would significantly delay further processing of the application. The *Notice* also stated that these risks persist late in the application process, after large amounts of funds may have been expended to prosecute the application. Since this uncertainty could substantially deter potential applicants from seeking to establish or improve service, the *Notice* proposed that FM applicants be cut-off from subsequently filed rulemaking petitions at some point in the application process. Specifically, the *Notice* proposed to use the deadline for filing Petitions to Deny against new and major change FM applications as the cut-off point for rulemaking petitions that conflict with those applications. This cut-off point was proffered because it occurs 30 days after new and major change applications have been placed on a publicly-released Notice of Acceptance. Likewise, the *Notice* proposed that minor change applications would be cut-off 30 days after acceptance of the application.⁶ The

since the original FM Table of Allotments was in preparation. See *First Report and Order* in Docket No. 14185, 40 FCC 662, 703 (1962).

⁴ This would entail showing what new areas would be covered by the applicant's proposed transmitter site and the extent to which these areas are currently unserved or underserved. See *Andalusia* at para. 8.

⁵ One example of an applicant prevailing over a rulemaking petition occurred in *Las Vegas, Nevada* (Policy and Rules Div.), 51 FR 9433, published March 19, 1986.

⁶ The *Notice* observed that minor change applications are generally granted within 120 days of filing.

Notice solicited comment on these proposed cut-off dates and questioned whether these time periods should be lengthened or shortened. Finally, the *NPRM* requested comment on whether the FM allotment priorities⁷ should be used to determine if a rulemaking petition or an application receives cut-off protection -- that is, an application or a rulemaking petition would be preferred depending on whether it would further a higher allotment priority such as a first local service.

SUMMARY OF COMMENTS

4. *Overview.* All nine parties that filed comments or reply comments in this proceeding agree that FM applications should be given cut-off protection from subsequently filed rulemaking petitions at some time during the application process for essentially the same reasons set forth in the *Notice*.⁸ They contend that the present procedures expose an applicant to considerable risks and delays after the filing of what was an acceptable application at the time it was submitted. They question whether this approach is in the public interest because applicants have often invested considerable amounts of money in seeking to improve service to the public. They also believe that since FM rulemaking petitions are similar in effect to the applications that follow, it is reasonable to resolve conflicts with the type of cut-off rules that have already proven effective in the application context.

5. *Earlier Cut-Off Date.* Of the nine commenting parties supporting a cut-off rule, five believe that a cut-off date earlier than the one proposed in the *Notice* should be adopted.⁹ While there are some variations in their proposals, they essentially agree that applications should be cut-off from subsequently filed petitions for rule making on the date that the applications are filed.¹⁰ Under this approach, if a rulemaking petition were filed after an FM application, it would have to protect the transmitter site specified in the application or be dismissed. Likewise, if a rulemaking petition were filed before a conflicting application, the application would have to protect the rulemaking

petition or be dismissed. In support of this approach, commenters give three reasons. First, while they recognize that the *Notice's* proposal will eliminate many conflicts between applications and rulemaking petitions, they allege that it does not go far enough because it still invites the type of application/rulemaking conflicts that the Commission is now trying to avoid. This in turn still leads to uncertainty and delay for some FM applicants. Second, it is urged that an earlier cut-off date is needed to reduce the potential for abuse that exists because, prior to the cut-off dates proposed in the *Notice*, petitions for rulemaking can be filed by third parties to block attempts by applicants to upgrade their stations or to bring a new competitive service into a community. This potential for abuse could be substantially reduced if applications were cut-off on the date they were filed.¹¹ Third, they believe that this approach appropriately rewards a party who expeditiously files an application before a rulemaking proposal.¹²

6. *NPRM's Proposed Cut-Off Dates.* One commenter, TeleSouth Communications, Inc. ("TeleSouth") explicitly supports the cut-off rules proposed in the *Notice*. However, TeleSouth, as well as Mullaney Engineering, also urge the Commission to protect previously "cut-off" applications when resolving mutually exclusive rulemaking proceedings. For example, if two rulemaking proponents seek the allotment of the same channel to different, nearby communities, the Commission's staff may discover an alternative channel for one of the communities so that both rulemaking proposals can be granted. If such an alternative channel conflicts with an FM application that has already been "cut-off" from rulemaking petitions, TeleSouth and Mullaney believe that the Commission should be precluded from using that channel to resolve the rulemaking conflict, unless it can protect the application by site restricting the channel allotment.¹³

7. *Distinctions Based Upon FM Priorities.* Only two commenters, Pepper & Corazzini and KRTS/Texas Classical Radio, addressed the issue of whether the FM priorities should be used in determining if rulemaking petitions or applications are given cut-off protection. Both

⁷ These priorities are (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Equal weight is given to priorities (2) and (3). See *Second Report and Order* in BC Docket No. 80-130, 90 FCC 2d 88 (1982) (*Revision of FM Assignment Policies and Procedures*).

⁸ A list of the parties filing comments and reply comments may be found in Appendix C.

⁹ See comments filed by Pepper & Corazzini; KRTS, Inc. and Texas Classical Radio, Inc.; du Treil, Lundin & Rackley, Inc.; Haley, Bader & Potts; and Mullaney Engineering, Inc.

¹⁰ Two variations of this approach were suggested regarding applications for new FM stations or major changes filed during a filing window. First, Pepper & Corazzini proposes that these applications be cut-off as of the opening of the filing window. Second, KRTS, Inc. and Mullaney Engineering propose that they be cut-off as of the end of the filing window because this is the same date that new and major change applications are cut-off vis-a-vis other applications.

¹¹ To further limit the possibility that "strike" rulemaking petitions may be filed to block FM applications, the joint comments of KRTS, Inc. and Texas Classical Radio request that the Commission also require disclosure by rulemaking petitioners of the identities and other media interests of their principals. They believe that such information would provide the Commission and interested parties with insight into the motives of a peti-

tioner who files a conflicting proposal. We will not, however, consider this proposal as it is beyond the scope of the *Notice* in this proceeding.

¹² One commenter, du Treil, Lundin & Rackley, suggests that the Commission should protect FM rulemaking petitions on the date that they are filed from subsequently filed rulemaking petitions because this would further reduce delay and expense to rulemaking proponents. We will not, however, consider this proposal as it is beyond the scope of the *Notice* in this proceeding.

¹³ TeleSouth also believes that the Commission should reinstitute its practice of issuing periodic public notices announcing the acceptance for filing of rulemaking petitions to amend the FM Table of Allotments because this would assist prospective applicants for new or modified FM facilities in the selection of transmitter sites. We do not believe that it is necessary to reinstitute this practice because this information is already available to the public. Specifically, after a rulemaking petition to amend the FM Table of Allotments has been accepted, we issue either a Notice of Proposed Rule Making or a Public Notice accepting the petition as a counterproposal in an existing allotment proceeding. In addition, prior to the release of these documents, the reference coordinates for acceptable rulemaking petitions are added to the Commission's FM Engineering Data Base which is also available to the public.

of these commenters agree with the Commission's tentative conclusion in the *Notice* that no distinctions between applications and rulemaking petitions should be made based upon the FM priorities because this would be too difficult to administer. They contend that this approach would require the Commission to conduct analyses under Section 307(b) of the Communications Act each time a party claims a higher allotment priority, which would create delays for applicants and an increased workload for the Commission.¹⁴

DISCUSSION

8. After careful consideration of the record in this proceeding and in light of our experience gained in administering the FM application process in recent years, we agree with the commenters that applicants for new or modified FM facilities should be protected from subsequently filed rulemaking petitions at some point during the application process because the current approach imposes significant and unwarranted risks and uncertainties on applicants. A rulemaking petition can be filed at any time during the pendency of an application, even after substantially large amounts of funds have been expended in order to prosecute an application. We believe that this unlimited exposure to potentially conflicting petitions and the concomitant delay it causes to applicants is both inequitable and inconsistent with our treatment of mutually exclusive proposals in both the allotment and application contexts. In FM allotment rulemaking proceedings, the Commission's Rules set forth deadlines for filing mutually exclusive counterproposals, and proposals that are not timely filed are not considered.¹⁵ Likewise, mutually exclusive applications for new FM stations or major changes in the commercial FM band must be filed before a filing window closes and, for new or major change applications in the noncommercial FM band, before a cut-off date established in a public notice accepting the application. These cut-off procedures have worked effectively by providing some certainty to applicants in terms of their exposure to conflicting proposals, while at the same time

allowing the Commission to consider competing proposals where they exist. We believe that a similar cut-off procedure could effectively lessen the uncertainty and delays experienced by FM applicants vis-a-vis conflicting rulemaking petitions.

9. Furthermore, the significant increase in the number of FM stations and the accompanying congestion in the FM band that has occurred since the formation of the FM Table of Allotments in 1964, coupled with land use and Federal Aviation Administration restrictions, has made it increasingly difficult for FM applicants to find new or improved transmitter sites. Given the time and effort required by FM applicants to secure new transmitter sites, we believe that FM applicants should be afforded some form of cut-off protection from subsequently filed rulemaking proposals.

10. After reexamining the cut-off rule proposed in our *Notice* and considering the commenters' proposals, we are of the view that FM applications should receive protection from conflicting rulemaking proposals at the same time that they receive such protection from other mutually exclusive applications. Under this approach, applications for new stations or for major changes in the nonreserved FM band¹⁶ filed during a filing window will be protected from rulemaking petitions at the close of the filing window. Likewise, applications for new FM stations or major changes in the reserved, noncommercial band will be protected at the end of the 30-day period for filing mutually exclusive applications as established in periodically released Commission Public Notices. All other FM applications -- including all minor change applications in either the reserved or nonreserved band and "first come, first served" applications for new FM stations or major changes in the nonreserved band filed after the close of a filing window¹⁷ -- will be protected from conflicting rulemaking proposals on the date they are received at the Commission.¹⁸

11. We believe that this approach strikes a reasonable balance between the public interest benefits arising from proposals to amend the FM Table of Allotments, thereby

¹⁴ In the only reply comment filed in this proceeding, the National Association of Broadcasters ("NAB") expressed support for the *Notice's* goal of providing greater certainty to applicants. However, noting that it would soon be filing a request for a comprehensive reassessment of the Commission's FM allotment and application processing policies, NAB urges that any final action in this proceeding be deferred until the agency has had the opportunity to complete such a review. We disagree. Although we recently solicited public comment on NAB's petition (RM-7933), we note that the issues raised in the petition are broad in scope and will require additional time to study. See *Public Notice*, Report No. 1882, March 20, 1992. Since the record in this proceeding indicates that FM applicants can benefit from some form of cut-off protection from subsequently filed rulemaking petitions, we do not believe that we should withhold the grant of such protection pending the outcome of a comprehensive review of FM allotment and application policies. Nothing we adopt today, by its nature, precludes a fair consideration of the alternatives which NAB has advanced.

¹⁵ 47 C.F.R. 1.420(d).

¹⁶ The nonreserved FM band refers to FM Channels 221-300, which are available for commercial use and are listed in the FM Table of Allotments. See 47 C.F.R. § 73.202(b). FM Channels 201-220 have been reserved for noncommercial FM broadcasting and are commonly referred to as the reserved band. See 47 C.F.R. § 73.501.

¹⁷ We note that in a companion proceeding adopted today, we relaxed our "hard look" system for processing commercial FM applications to provide applicants with additional opportunities to amend their applications to correct deficiencies. See *Report and Order* in MM Docket No. 91-347, FCC 92-328, adopted July 16, 1992. The rule we adopt addresses the treatment of such amendments, as well as other amendments, with respect to earlier filed rulemaking proposals. Specifically, where an application is filed first, and subsequently a petition for rule making is filed that does not conflict with the application, it is conceivable that the application could be subsequently amended, either to correct a defect or for some other reason. If this amendment conflicts with the rulemaking petition, we do not intend to provide the amended application cut-off protection *nunc pro tunc* as of the date the unamended application would receive cut-off protection. Instead, the amended application will be treated as if filed on the date of the amendment for purposes of applying the cut-off rule.

¹⁸ For purposes of this category, if a rulemaking 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 rulemaking petitions.

providing new or expanded FM service, and the benefits arising from providing applicants for new or modified FM facilities some degree of certainty that their applications are no longer subject to mutually exclusive proposals. Under this approach, prospective petitioners will have the same notice and opportunity to file conflicting proposals as is now afforded to prospective applicants whose applications might conflict with the pending application. We see no reason why this procedural window should not prove sufficient to protect the emergent plans of rulemaking petitioners as well. We note, moreover, that consistency between the potential exposure of an applicant to conflicting applications and conflicting rulemaking proposals will enhance the certainty and predictability of the application process.

12. The rule we are adopting differs somewhat from our original proposal to cut-off new and major change applications on the deadline for filing petitions to deny and to cut-off minor change applications 30 days after release of a notice of their acceptance, unless the minor change applications were granted earlier. After reviewing the comments, the majority of which favor the approach we now adopt, and our experience in processing applications and petitions, we conclude that our new rule strikes a more reasonable balance between the procedural rights and expectations of applicants and petitioners than our initial proposal because an FM applicant is "cut-off" from conflicting rulemaking proposals and other applications on the same date. In contrast, our original proposal would have established a cut-off date for filing rulemaking proposals at least 30 days after the date for filing competing applications, thereby unnecessarily exposing applicants to an additional period of uncertainty. Furthermore, the original proposal could have led to inequities to applicants. Applications filed on the same date could be accepted for filing on different dates depending upon the staff work involved in reviewing the "tenderability" and "acceptability" of the applications, thereby resulting in varying periods of vulnerability for similarly situated applications. To prevent any unfairness that this may cause, the rule we now adopt bases cut-off protection on the dates applications are filed, rather than processing dates.¹⁹

13. *Use of Alternative Channels.* Beyond protecting FM applicants from subsequently filed rulemaking petitions, both TeleSouth and Mullaney Engineering request that the Commission protect previously cut-off applications when it undertakes to resolve mutually exclusive rulemaking proceedings by using alternative channels. We agree with TeleSouth and Mullaney Engineering that it would be inequitable for the Commission to use generally alternative channels in a way that would prejudice the FM applicant who already has cut-off protection.²⁰ Such an approach would undermine the new rule's purpose of providing a degree of certainty to FM applicants.

14. However, we believe that there is one circumstance in which we do not wish to restrict our discretion to specify alternative channels. If one or more parties to the rulemaking proceeding suggest an alternative channel and reference coordinates in a pleading filed before the FM application is entitled to cut-off protection, we believe that the alternative channel may be considered. This would not create unfairness to the FM applicant because the proposal to use the alternative channel was on file before the application was entitled to cut-off protection. Also, we believe that this would give parties in a contested rulemaking proceeding an opportunity to submit settlement suggestions which would serve the public interest.

15. *Distinctions Based Upon FM Priorities.* We also conclude that, in determining whether an application or a rulemaking petition should receive cut-off protection, no distinctions should be made as to whether one serves a higher allotment priority than the other.²¹ Such an approach would be difficult to administer because we would have to undertake detailed comparisons of the proposals before determining whether cut-off protection would be granted. Not only could this heavily burden our administrative resources but also it might obviate the purpose for having a cut-off rule because an applicant could not rely upon cut-off protection if a conflicting rulemaking petition were subsequently filed and triggered a higher allotment priority. Moreover, this approach would be inconsistent with our current allotment policy under which an untimely counterproposal in an allotment proceeding may not be considered even if it would trigger a higher allotment priority -- such as a first or second full-time reception service -- than the proposals that were timely filed.

16. *Effective Date.* The new cut-off rule we are adopting will become effective 30 days after publication in the Federal Register. All rulemaking petitions that are on file by that date will be handled under our existing procedures; rulemaking petitions filed after that date must comply with the new cut-off rule. As we stated in the *Notice*, we believe that this 30-day period before the rule becomes effective will provide adequate notice to potential petitioners for new allotments or upgrades while expediting the benefits to the public of the new cut-off procedure.

CONCLUSION

17. We believe that the current procedures governing conflicts between rulemaking petitions to amend the FM Table of Allotments and FM applications impose significant risks on applicants because pending applications are vulnerable to conflicting proposals at any time. The new cut-off rule we are adopting today will provide some certainty to applicants by limiting their exposure to conflicting rulemaking proposals while at the same time

¹⁹ As a related matter, we will retain cut-off protection for applications that have been dismissed or denied until the dismissal or denial is no longer subject to Commission review. While this issue was raised in the *Notice*, we note that none of the commenters addressed it.

²⁰ For example, suppose two mutually exclusive rulemaking proposals were filed, one on January 1, 1992, and one on February 1, 1992. Thereafter, an FM application is filed on June 1,

1992, which does not conflict with either rulemaking proposal. However, in September, 1992, the Commission's staff discovers that the mutually exclusive allotment proposals could both be accommodated by using an alternative channel which conflicts with the FM application. We believe that it would be inequitable in these circumstances to select the alternative channel since the FM application has already received cut-off protection.

²¹ See note 7, *supra*.

affording prospective rulemaking petitioners the opportunity to seek new allotments or upgrades through the rulemaking process.²²

18. 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. § 73.208(a) IS AMENDED as set forth in Appendix A, below.

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

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

21. IT IS FURTHER ORDERED, that MM Docket No. 91-348 IS TERMINATED.

22. For further information, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Rule Changes

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

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

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

2. Section 73.208 is amended by revising paragraph (a)(1), adding new paragraphs (a)(3) and (b)(2), and redesignating existing paragraphs (b)(2)(b)(4) as paragraphs (b)(3)-(b)(5) to read as follows:

Section 73.208 Reference points and distance computations.

(a)(1) The following reference points must be used to determine distance separation requirements when petitions to amend the Table of Allotments (§ 73.202(b)) are considered:

(i) First, transmitter sites if authorized, or if proposed in applications with cut-off protection pursuant to paragraph (a)(3) of this section;

(ii) Second, reference coordinates designated by the FCC;

(iii) Third, coordinates listed in the United States Department of Interior publication entitled *Index to the National Atlas of the United States of America*; or

(iv) Last, coordinates of the main post office.

(The community's reference points for which the petition is submitted will normally be the coordinates listed in the above publication.

* * * * *

(3) Petitions to amend the Table of Allotments that do not meet minimum distance separation requirements to transmitter sites specified in pending applications will not be considered unless they are filed no later than:

(i) the last day of a filing window if the application is for a new FM facility or a major change in the non-reserved band and is filed during a filing window established under Section 73.3564(d)(3); or

(ii) the cut-off date established in a Commission Public Notice under Section 73.3564(d) and 73.3573(e) if the application is for a new FM facility or a major change in the reserved band; or

(iii) the date of receipt of all other types of FM applications.

If an application is amended so as to create a conflict with a petition for rule making filed prior to the date the amendment is filed, the amended application will be treated as if filed on the date of the amendment for purposes of this subsection (a)(3).

(b) * * *

(2) Reference coordinates designated by the FCC; or, if none are designated,

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

I. Need for and Purpose of this Action:

This action is taken to establish cut-off procedures governing conflicts between rulemaking petitions to amend the FM Table of Allotments and applications for new or changed FM facilities. The Commission believes that these new procedures will reduce the exposure that FM applicants currently have vis-a-vis conflicting rulemaking petitions and the concomitant delays in the processing of their applications.

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

None.

²² We are also taking this opportunity to make an amendment to Section 73.208(b) so that it contains the same types of geographic reference coordinates set forth in Section 73.208(a) consistent with the discussion in *Annette B. Godwin*, 7 FCC Rcd 3140 (Aud. Ser. Div. 1992). We find this rule change to be

minor and non-controversial and a matter in which the public is unlikely to be interested. Accordingly, we find for good cause that notice and comment on this rule change is unnecessary. See 5 U.S.C. § 553(b)(B).