

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 02-316
Table of Allotments,)	RM-10542
FM Broadcast Stations.)	
(Cedar Bluff, Virginia and Gary, West Virginia))	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 2002

Released: October 4, 2002

Comment Date: November 25, 2002

Reply Comment Date: December 10, 2002

By the Assistant Chief, Audio Division:

1. The Audio Division has before it the petition for rule making filed by Monterey Licenses, LLC (“petitioner”), licensee of Station WHQX(FM), Channel 299C3, Cedar Bluff, Virginia, proposing the reallocation of Channel 299C3 from Cedar Bluff to Gary, West Virginia, and the modification of Station WHQX(FM)’s license accordingly. Petitioner states its intention to apply for the channel, if reallocated to Gary.

2. The proposal is filed 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.¹ In support of its proposal, petitioner states that Gary is an incorporated city located in McDowell County, West Virginia, and has a 2000 U.S. Census population of 917 persons. It has its own mayor, police department, fire department, elementary and high schools, and several churches. Its businesses include, among others, Gary Fabrication, Inc., Gladys’ Kitchen, TJ Restaurant, TruLine, Inc., First National Bank of Keystone, Bantam Market, Residents of Gary are cared for by doctors and dentists at the local Tug River Health and Dental Clinics, Tug River Continuous Care Center and the Nursing Home Group. Since petitioner does not seek to relocate its transmitter site, a gain and loss area study is not required. Moreover, since the proposed site will not provide a 70 dBu signal over 50% or more of any urbanized area, a Tuck analysis is not necessary²

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

² See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *RKO General, Inc.*, 5 FCC Rcd 3222 (1990); and *Faye and Richard Tuck*, 3

3. We believe the proposed upgrade warrants consideration since it would provide a first local transmission service to Gary, West Virginia, without depriving Cedar Bluff of its sole local service, whereas Station WYRV(AM) would remain licensed to the community. An engineering analysis has determined that Channel 299C3 can be reallocated to Gary in compliance with the Commission's minimum distance separation requirements at petitioner's presently licensed site.³ As requested, we shall also propose to modify the license of Station WHQX(FM) to specify Gary, West Virginia, as its new community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 299C3 at Gary, West Virginia.

4. 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>
Cedar Bluff, Virginia	299C3	---
Gary, West Virginia	---	299C3

5. 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.

6. Interested parties may file comments on or before **November 25, 2002**, and reply comments on or before **December 10, 2002**, 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:

Paul A. Cicelski, Esq.
 Shaw Pittman LLP
 2300 N Street, N.W.
 Washington, D.C. 20037
 (Counsel for Petitioner)

FCC Rcd 5374 (1988).

³ The coordinates for Channel 299C3 at Gary are 37-08-00 North Latitude and 81-35-43 West Longitude.

7. Parties who choose to file by paper must 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, Vistrionix, 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 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

8. 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.⁴

9. For further information concerning this proceeding, contact Sharon P. McDonald, 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
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

⁴ 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 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 Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, 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 Information Reference Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington, D.C. 20554.