

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

MM Docket No. 88-185

In the Matter of

Amendment of Section 73.202(b), RM-6288  
Table of Allotments, RM-6499  
FM Broadcast Stations.  
(Montgomery, Dunbar and  
Mount Gay-Shamrock, West Virginia)

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 2, 1988; Released: January 18, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2555 (1988), issued at the request of Upper Kanawha Valley Broadcasters, Inc. (Upper Kanawha), proposing the allotment of Channel 227A to Montgomery, West Virginia, as a first local FM service. The Commission also has before it the petition for rule making filed by Donald Mills, d/b/a West Virginia Rural Radio Company (WV Rural Radio), permittee of Station WBES-FM, Channel 233A at Dunbar, West Virginia, seeking the substitution of Channel 233B1 for Channel 233A at Dunbar, and modification of the station's construction permit accordingly. In order to accomplish the substitution at Dunbar, WV Rural Radio suggests the substitution of Channel 227A for vacant and unapplied for Channel 234A at Mount Gay-Shamrock, West Virginia.<sup>1</sup> Channel 227A at Mount Gay-Shamrock conflicts with the proposed allotment of the same channel to Montgomery, thus it is necessary to consider the petition herein. WV Rural Radio also suggests as an alternate action that the Commission consider the deletion of Channel 234A without a replacement channel. WV Rural Radio submitted information in support of its proposal to provide Dunbar with a first wide coverage area FM service. In response to the *Notice* Upper Kanawha filed supporting comments reaffirming its intention to apply for the channel at Montgomery.

2. Our engineering analysis has confirmed that Channel 233B1 can be allotted to Dunbar in compliance with the Commission's minimum distance separation requirements with a site restriction if Channel 227A is substituted for Channel 234A at Mount Gay-Shamrock.<sup>2</sup> A site restriction of 13.1 kilometers (8.2 miles) northeast of Dunbar is required in order to avoid short spacings to Station WVMA(FM), Channel 231B at Oak Hill, West Virginia, and Station WKLC-FM, Channel 286B at St. Albans, West Virginia.<sup>3</sup> As specified in the *Notice* Channel 227A can be allotted to Montgomery consistent with the Commission's minimum distance separation requirements with a site restriction of 6.5 kilometers (4 miles) west of the community.<sup>4</sup> The restriction is necessary in order to avoid short spacings to Station WCWV(FM), Channel 225B,

Summersville, West Virginia, and vacant and unapplied for Channel 227A at White Sulphur Springs, West Virginia. The proposals are mutually exclusive since they are separated by less than the required 105 kilometers (65 miles) for co-channel allotments.

3. Since the proposals are mutually exclusive we attempted to resolve the conflict by determining if there were other channels available at either community. Our initial engineering analysis has found Channel 227A to be the only available channel at either community. In view of this determination we are faced with conflicting proposals for either a first local service at Montgomery or modification of the station facilities at Dunbar. Therefore the proposals must be comparatively considered. The issuance of this *Further Notice* is for the purpose of soliciting comments on the optional proposals presented by WV Rural Radio. Moreover, we shall provide WV Rural Radio an opportunity to demonstrate in comments herein why its proposed upgrade should prevail over the provision of a first local service at Montgomery. In this regard, WV Rural Radio should be guided by the allocation criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), specifying the provision of first or second aural service, since the Commission generally favors a first local service.<sup>5</sup>

4. We find that if Channel 234A were deleted from Mount Gay-Shamrock, as suggested as an alternative proposal by WV Rural Radio, both proposals could be granted. Generally, the Commission will not routinely entertain a proposed channel deletion absent a compelling showing of need or Commission error.<sup>6</sup> Here, based on the information presented we believe it is in the public interest to seek comments on the proposed deletion of Channel 234A from Mount Gay-Shamrock as well as the substitution of Channel 233B1 for Channel 233A at Dunbar.

5. As requested, we shall propose to modify the permit of Station WBES-FM to specify operation on the higher class co-channel, Channel 233B1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that WV Rural Radio demonstrate the availability of an additional equivalent channel at Dunbar.

6. In view of the aforementioned, the Commission seek comments on alternative proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

City	Channel No.	
	Present	Proposed
<b>OPTION I</b>		
Montgomery, West Virginia	---	227A
Dunbar, West Virginia	233A	233A
Mount Gay-Shamrock, West Virginia	234A	234A

## OPTION II

Montgomery,	---	---
West Virginia		
Dunbar,	233A	233B1
West Virginia		
Mount Gay-Shamrock,	234A	227A
West Virginia		

## OPTION III

Montgomery,	---	227A
West Virginia		
Dunbar,	233A	233B1
West Virginia		
Mount Gay-Shamrock,	234A	---
West Virginia		

7. 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.

8. Interested parties may file comments on or before **March 10, 1989**, and reply comments on or before **March 27, 1989**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jeffrey R. Batten  
 Manager, Upper Kanawha Valley  
 Broadcasters, Inc.  
 1028 First Avenue  
 Montgomery, West Virginia 25136  
 (Petitioner for Montgomery, West Virginia)

Leonard S. Joyce, Esquire  
 Blair, Joyce & Silva  
 1825 K Street, N.W.  
 Washington, D. C. 20006  
 (Counsel for proponent at Dunbar, West Virginia)

9. 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.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. 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

Steve Kaminer  
 Deputy Chief  
 Policy and Rules Division  
 Mass Media Bureau

## 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 Procedures.* 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 proposal(s) 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.)

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 Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

#### FOOTNOTES

<sup>1</sup> Channel 234A was allotted to Mount Gay-Shamrock, West Virginia, in MM Docket No. 84-231. No applications were filed during the window period which closed on March 10, 1988.

<sup>2</sup> The reference coordinates for the vacant allotment are 37-51-00 and 82-00-06.

<sup>3</sup> The restricted site coordinates are 38-27-34 and 81-39-17.

<sup>4</sup> The restricted site coordinates are 38-09-47 and 81-23-40.

<sup>5</sup> The allocation criteria are as follows: (1) first aural service; (2) second aural service; public interest matters. Co-equal weight is given to priorities (2) and (3).

<sup>6</sup> See *Memorandum Opinion and Order*, 50 FR 47391 (1985).