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

Implementation of the AM Expanded Band Allotment Plan	))	MM Docket No. 87-267

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1997 **Released: March 17, 1997**

By the Commission:

1. In *Review of the Technical Assignment Criteria for the AM Broadcast Service,* 6 FCC Rcd 6273 (1991) *("AM Improvement Order"), recon. granted in part and denied in part,* 8 FCC Rcd 3250 (1993) ("*Reconsideration Order*"), the Commission adopted measures to improve and revitalize the AM broadcast band, and to establish standards to permit certain AM licensees and permittees to migrate to frequencies between 1605 and 1705 kHz, the "Expanded Band." On October 14, 1994, the Mass Media Bureau released *Public Notice,* DA 94-1154 (*"Public Notice I"*) which listed the stations eligible to apply for specific Expanded Band assignments (the "First Allotment Plan"). By *Memorandum Opinion and Order*, 10 FCC Rcd 12143 (1995) ("*Order I*"), the Commission partially granted reconsideration, rescinded *Public Notice I* and the initial improvement ranking factors of stations that had petitioned to migrate to the Expanded Band,[1] and solicited comments on proposed technical procedures to calculate revised improvement ranking factors and generate a new allotment plan. In *Comments in Response to Reconsideration of Implementation of the AM Expanded Band and Allotment Plan*, 11 FCC Rcd 12444 (1996) (*"Order II"*), the Commission denied all modifications proposed in comments filed in response to *Order I*, adopted the *Order I* procedures and closed the June 30, 1993-A engineering database to further revision. Concurrently, the Mass Media Bureau released *Public Notice, Mass Media Bureau Announces Revised Expanded AM Broadcast Band Improvement Factors and Allotment Plan*, DA 96-408 (released March 22, 1996) ("*Public Notice II*"), which listed the improvement factor of each station that had petitioned to migrate to the Expanded Band and announced an eighty-seven station allotment plan (the "Second Allotment Plan") for new assignments in the Expanded Band.

[1] Initial improvement factor rankings appeared in a December 3, 1993 *Public Notice.* Stations will be allotted channels on the basis of their calculated improvement factor rankings. *See* 47 C.F.R. § 73.30. Each station's improvement factor is represented by a ratio of the area of interference caused to all other stations divided by the migrator's interference-free service area. The larger the improvement factor, the greater the reduction in existing band interference that would result from the relocation of the migrating station to the Expanded Band.

2. Now before the Commission are eight timely-filed petitions for reconsideration of *Order II and Public Notice II*.[2] For the reasons set forth below, we grant in part the petition of WGNY, rescind the Second Allotment Plan, and modify the frequency preclusion program, one of two primary programs used to generate the allotment plan, to follow the federal travelers information station ("TIS") frequency preclusion standards specified in *Order I*. On our own motion we conform the revised plan to Region 2 treaty requirements and eliminate software coding errors in the frequency preclusion and allotment plan programs. We also clarify the second harmonic interference standard which has been applied in this proceeding. We deny the other petitions for reconsideration. The Mass Media Bureau is concurrently reissuing the Expanded Band allotment plan (the "Third Allotment Plan") based on the changes adopted in this Order.

THE WGNY PETITION

3. **The Second Harmonic Interference Standard.** Stations operating on 810, 820, 830, 840, and 850 kHz have the potential to cause interference to Expanded Band stations operating at twice the carrier frequency of the existing band stations, *i.e.*, to Expanded Band stations operating on 1620, 1640, 1660, 1680, and 1700 kHz. Such second harmonic interference is caused by the generation of the second harmonic of the lower frequency within the radio receiver. Section 73.182 restricts the location of the transmission facilities of 540 - 800 kHz stations in order to prevent second harmonic interference to existing band stations. Sunrise Broadcasting of New York, Inc., licensee of WGNY, Newburgh, New York ("WGNY") maintains that the Commission did not follow the standard announced in *Order I* to calculate harmonic interference between existing and Expanded Band stations. Moreover, WGNY contends that we should reconsider the stated *Order I* standard which provides significantly greater harmonic interference protection than the standard set forth in the Commission's rules. It argues that the rule, itself, is too preclusive and urges the Commission to "revisit" this issue to ensure that the final allotment plan achieves the greatest possible interference reductions among licensed stations.

4. In *Order I*, we proposed to preclude Expanded Band assignments which would result in prohibited second harmonic overlap, as determined in accordance with 47 C.F.R. § 73.182(s). *See Order I*, 10 FCC Rcd at 12148. However, *Order I* misstates this rule as prohibiting a new, *i.e.*, Expanded Band, station assignment where "the service area of an existing station...would

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[2] Petitions for reconsideration were filed by: 1) Western New York Public Broadcasting Association, licensee of Station WNED, Buffalo, New York ("WNED"); 2) Triad Network, Inc., permittee of Station WWBG, Greensboro, North Carolina ("WWBG"); 3) Lloyd B. Roach, Incorporated, licensee of Station WPWA, Chester, Pennsylvania ("WPWA"); 4) WHTG, Inc., licensee of Station WHTG, Eatontown, New Jersey ("WHTG"); 5) Olga I. Fernandez, permittee of Station WJIT, Sabana, P.R. ("WJIT"); 6) Dynastar Communications, Inc., licensee of Station WWNR, Beckley, West Virginia ("WWNR"); 7) Radio Property Ventures, licensee of Station KQXI, Arvada, Colorado ("KQXI"); and 8) Sunrise Broadcasting of New York, Inc., licensee of Station WGNY, Newburgh, New York ("WGNY"). On May 16, 1996, Press Broadcasting Company, Inc. ("Press") filed a "Petition for Reconsideration and Request for Declaratory Ruling." Press's request for reconsideration is untimely and will be dismissed. Press's declaratory ruling request raises the issue whether a station which obtains an Expanded Band authorization may broker time on either the existing or Expanded Band station during the period during which dual frequency operations are authorized. This petition remains pending.

overlap the service area of a potential Expanded Band station...." *Id.* In fact, subsection (s) generally prohibits the licensing of two stations, one with a frequency twice the other, unless the transmission facilities of the lower frequency station is located outside the service area of the higher frequency station.[3] Notwithstanding the erroneous formulation of 47 C.F.R. § 73.182(s) in *Order I*, the second harmonic studies actually used in generating the allotment plan precluded only those potential Expanded Band assignments where the calculated groundwave service contour of the Expanded Band station would encompass the transmitter site of an authorized harmonically-related station. Thus, the harmonic interference standard applied is substantially less preclusive than previously indicated and is similar to the approach which WGNY advocates.

5. However, contrary to the implication in *Order I*, 10 FCC Rcd at 12148, the staff, in fact, did not strictly apply Section 73.182(d) in calculating prohibited harmonic interference for the purpose of generating the First Allotment Plan. Section 73.182(d) defines the service area of a station for the purpose of these calculations.[4] Pursuant to this subsection an AM station's "primary service" area is calculated on the basis of its 2.0 mV/m contour in communities of at least 2,500 persons and its 0.5 mV/m contour elsewhere. The computer program, however, used the more preclusive 0.5 mV/m signal strength for the protected contour in all instances.

6. We choose not to incorporate into the generation of the Third Allotment Plan the two signal strength contour values given in Section 73.182(d) and conclude that it is more appropriate to determine harmonic preclusions based solely on the 0.5 mV/m protection standard, regardless of the population of the community in which the transmission facilities of the lower frequency station is located. This action is consistent with our objective throughout this proceeding to authorize, to the maximum extent possible, new interference-free AM station services in the Expanded Band. The 0.5 mV/m standard comports with the technical framework used to develop each of the allotment plans, and its use is generally more consistent with interference protection standards in the AM service than is the 2.0 mV/m contour. We further note that the Expanded Band proceeding has defined a station's daytime service area as its 0.5 mV/m contour. *AM Improvement Order*, 6 FCC Rcd at 6310; *see also id.* at 6287-88 (affirming use of "protected" value of 0.5 mV/m for determining where station provides adequate signal). Additionally, the daytime component of the improvement factor, *see Note 1, infra,* parallels this definition, using a station's 0.5 mV/m contour to calculate its daytime service area. *See* 47 C.F.R. § 73.35.[5]

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[3] "Two stations, one with a frequency twice of the other, should not be assigned in the same groundwave service area unless special precautions are taken to avoid interference from the second harmonic of the station operating on the lower frequency...." 47 C.F.R. § 73.182(s).

[4] *Order I*, 10 FCC Rcd at 12148 ("The service area of a station is that area protected from interference and is defined as the 0.5 mV/m for rural areas in Section 73.182(d) of the rules."); *Order II*, 11 FCC Rcd at 12448 ("Section 73.182(d) of the Commission's rules defines [the Section 73.182(s)] service area as the 0.5 mV/m contour.").

[5] In contrast, the 2.0 mV/m primary service contour specified in Section 73.182(d) is no longer factored into interference analyses in AM application processing. *AM Improvement Order*, 6 FCC Rcd at 6290-92. It has been used in hearings to compare the areas and populations served by facilities proposed in competing applications.

Moreover, the use of two contour values, depending on the location of the existing band station's transmission facilities, would likely engender disputes about the location and population of particular communities, boundaries of unincorporated areas and similar factually-intensive controversies that could consume limited staff resources without necessarily improving the overall allotment plan. Finally, our preliminary analysis indicates that the use of two contour values would not, to any significant extent, permit additional Expanded Band Allotments. For all of these reasons we believe the better course is to continue to protect migrators to this contour and preclude second harmonic Expanded Band frequency assignments where the proposed station's 0.5 mV/m contour would encompass the transmitter site of an authorized 810-850 kHz station.

7. Finally, WGNY proposes that, rather than incorporating the harmonic protection requirements of Section 73.182, we should preclude Expanded Band allotments only where the operating station's 10 mV/m contour overlaps any portion of the Expanded Band station's 2.0 mV/m contour. WGNY submits that its less restrictive standard would promote the efficient use of the Expanded Band. We disagree. The importance of making interference-free Expanded Band assignments tips the balance against WGNY's preclusion standard which would needlessly expose some Expanded Band stations to second harmonic interference. We do not wish to achieve the goal of reducing interference to the existing band at the expense of increasing the potential for harmonic interference to new Expanded Band stations. Accordingly, we reject WGNY's proposal.[6]

8. **TIS Station Protection.** WGNY calculates that federal TIS Station KPC712 should have -- but did not -- preclude a WGNY allotment on 1620 kHz. Thus, it claims, a flawed computer program incorrectly computed the contour separations for federal TIS stations. WGNY concludes that the Commission must generate a new allotment list.

9. Under the protection standards developed in this proceeding, a federal TIS station operating on 1610 kHz would preclude a first adjacent Expanded Band assignment on 1620 kHz where the TIS station is less than 15 kilometers from the proposed station's 0.5 mV/m contour. *Order I*, 10 FCC Rcd at 12148.[7] Based on a review of the Second Allotment Plan computer program, we have determined that the staff applied a different preclusion standard, calculating

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[6] WGNY also contends that application of § 73.182(s) itself is "not logical" in view of the rule's explicit limitation that "the Commission, in general, will not take this kind of interference into consideration when authorizing stations." WGNY misreads this section. The quoted language refers to receiver image interference, not harmonic interference. In fact, no Expanded Band frequencies were precluded on the basis of potential receiver image interference.

[7] We stated:

> Federal travellers information station protection will be defined by the distance between the Expanded Band and federal travellers information station transmitter. For co-channel and first adjacent channel projections, we will use the distances set out in Section 90.242(a)(2)(i) of our Rules: distance to the Expanded Band station's 0.5 mV/m contour plus 130 km for co-channel; distance to the 0.5 mV/m contour plus 15 km for first adjacent channel.

distance separations on the basis of the Expanded Band station's .25 mV/m contour. As a result, several stations, including WGNY, were erroneously considered for a 1620 kHz assignment on this basis. The TIS station computer program preclusion component has been corrected to conform to *Order I.* We note that WGNY is precluded on both 1610 kHz and 1620 kHz by Station KPC712.

OTHER PETITIONS FOR RECONSIDERATION

10. The remaining petitions for reconsideration attempt to relitigate arguments raised and fully considered at earlier stages of this proceeding. It is well settled that reconsideration will not be granted merely to rehash matters already treated and resolved. *See, e.g., WWIZ, Inc.*, 37 FCC 2d 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). We briefly address *seriatim* those arguments which we reject as repetitious or otherwise without merit.

11. Western New York Public Broadcasting Association, licensee of WNED(AM), Buffalo, New York ("WNED") and Triad Network, Inc., permittee of WWGB(AM), Greensboro, North Carolina ("WWBG") each contend that it is entitled to a specific explanation of the reasons their respective stations were not included in the Second Allotment Plan. The staff has made available its analyses to WNED and WWBG and their requests will be denied. [8] WWBG also seeks reconsideration of the "decision" to select only a small number of migrating stations. It argues that the allotment plan specifies only two stations in North Carolina, two in Virginia, one in Tennessee, one in South Carolina and none in West Virginia, even though, in WWBG's view, the Commission could make additional interference-free Expanded Band assignments in this region. WWBG urges the Commission to reconsider whether the Expanded Band separation requirements are too strict. Lloyd B. Roach, Incorporated, licensee of WPWA(AM), Chester, Pennsylvania ("WPWA") asserts that unless the Commission makes some assignments in Delaware and Pennsylvania, over 11,000,000 people will never benefit from the Expanded Band program. These contentions have been previously considered.[9] No grounds have been presented

[8] Summary sheets of each petitioner's computer preclusion study, which identified the universe of frequency assignments for each potential migrator, have been associated with MM Docket 87-267 and made available for public inspection. Also associated therewith are the data on which each station's improvement factor was calculated. Thus, all applicants had the opportunity to evaluate fully the basis for Commission action in each specific case. MM Docket 87-267 is available for public inspection in the Public Reference Room (Room 239, 1919 M St., N.W. Washington D.C.) and copies of this material may be obtained from the Commission's duplicating contractor, International Transcription Services, Inc., (202) 857-3800. The database is also available in computer readable form by special order from the U.S. Department of Commerce, National Technical Information Service ("NTIS"), 5288 Port Royal Road, Springfield, Virginia 22161.

[9] In *Order I*, 10 FCC Rcd at 6281-6282, we stated:

> The Commission fully considered the public interest in the *AM Improvement Order* and the *Reconsideration Order*. It was determined that the public interest was best served by attempting to reduce overall interference in the existing band as a whole. The time to reconsider the rulemaking has long since passed. . . .

warranting reconsideration. Accordingly, the Third Allotment Plan adheres to the spacing requirements previously adopted in this proceeding.[10]

12. WPWA and WGNY object to the co-primary status accorded federal TIS stations in this proceeding, a policy designed to protect these low-powered stations while promoting opportunities for Expanded Band allotments. WPWA notes that the Second Allotment Plan contains only one 1610 kHz assignment. It argues that the Commission erred in not requiring the involuntary relocation of federal TIS stations to other frequencies, including 1710 kHz, and that as a result a significant opportunity to improve the AM broadcast band may be lost. This issue already has been considered[11] and WPWA's request for reconsideration will be denied. WGNY reargues its contention that under the Commission's rules, federal TIS stations are secondary, not co-primary, to regular AM stations and therefore, that they should only be protected on a limited basis. WGNY complains that the Commission appears to have awarded "permanent primary status" to federal TIS stations and proposes that we make 1610 kHz assignments in this proceeding conditioned on the federal TIS station vacating the frequency within two years of the grant. We deny WGNY's requests as repetitive.[12]

13. WGNY also renews its suggestion that the Commission use measured soil conductivity data to calculate station contours where such data was on file prior to June 30, 1993. The Commission fully explored and rejected this approach as marginally beneficial and

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> Lastly, stations in North Carolina, Virginia, West Virginia, Tennessee, South Carolina, Long Island, New England, the New York City metropolitan area or Pennsylvania would have received allotments where there was demand for an allotment and where "its location was not precluded from receiving an allotment."

[10] Minimum co-, first and second adjacent channel separations in the Expanded Band are 800, 200 and 53 kilometers, respectively. *See AM Improvement Order*, 6 FCC Rcd at 6356. Stations operating on 1590 and 1600 kHz also are protected on the basis of these minimum distance separations. *See Order I*, 10 FCC Rcd at 12149; 47 C.F.R. § 73.37(f).

[11] We stated:

> Federal travelers information stations will continue on 1610 kHz on a co-primary basis "until they can be reaccommodated in an orderly fashion on an alternate frequency." *See Reconsideration Order*, 8 FCC Rcd at 3257. Once a determination is made as to the appropriateness and timing of this reaccommodation, AM stations that were precluded from receiving an allotment because of conflicts with federal travelers information stations will be afforded an opportunity to migrate to the Expanded Band. *Order II*, 11 FCC Rcd at 12447.

[12] *See Order I*, 10 FCC Rcd at 12146 (explaining co-primary policy and case-by-case treatment of potential Expanded Band allotments on 1610 and 1620 kHz).

administratively unwieldy.[13] WGNY fails to persuade us that relying uniformly on theoretical conductivity values for the assignment of Expanded Band allotments is either ill-advised or unlawful.[14] Accordingly, WGNY's request to use measured conductivity data will be denied.

14. WHTG, Inc., licensee of WHTG(AM), Eatontown, New Jersey ("WHTG") argues that the Second Allotment Plan should be amended with respect to Station WJRZ, Toms River, New Jersey. WJRZ has an improvement factor of 37.5019 and is listed as a potential 1620 kHz migrator in the Second Allotment Plan. However, on September 14, 1995, the Chief of the Audio Services Division, Mass Media Bureau, denied an application for extension of time to construct WJRZ, cancelled the construction permit, and deleted the WJRZ call sign. The Commission has denied review of this action. *Knox Broadcasting, Inc.*, FCC 97-63 (adopted February 20, 1997). WHTG contends that WJRZ should be removed from the Third Allotment Plan, in which it remains listed as a potential 1620 kHz migrator, because the cancellation of the WJRZ permit has already achieved the Commission's goal of reducing congestion in the existing AM band. We reject WHTG's request as premature. If and when the cancellation of the WJRZ construction permit becomes final, *i.e.*, beyond administrative and judicial review, we will then make 1620 kHz available.[15]

15. Olga I. Fernandez, permittee of WJIT(AM), Sabana, Puerto Rico ("WJIT") argues that the database used to generate the Second Allotment Plan erroneously treated WJIT-AM as a daytime-only station. It requests that the Commission recalculate its improvement factor ranking to take into account its authority to broadcast 1000 watts nighttime. In *Order I*, licensees were afforded a 30-day period to file requests to correct the database.[16] Basic fairness and our

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[13] See *Order II* 11 FCC Rcd 12447-48 (use of theoretical M-3 ground conductivity data would facilitate Expanded Band implementation and best foster overall goals of this proceeding).

[14] This issue has been fully considered. We stated:

> In calculating the daytime contours, theoretical conductivity values will be used for the purpose of determining the daytime improvement factor. Although it would be possible to use measured conductivity data in connection with the contour calculations for the improvement factor, we conclude that the benefits of this approach would be very minimal. In order to use such data fairly, a complete search of all available data for all stations would be necessary. Even with all measured conductivity values considered, we believe that, with few exceptions, the effect of the measurement data would even out and there would be little overall impact on the ultimate ranking of the prospective migrators. *See AM Improvement Order*, 6 FCC Rcd at 6310.

[15] *See AM Improvement Order*, 6 FCC Rcd at 6318 (establishing second filing window timetable for petitions by existing stations to migrate to expanded band for those allotments that have not been authorized). *See also Order II*, 11 FCC Rcd at 12447.

[16] We provided the following instructions for potential migrators:

> After the thirty-day correction period, no further requests for change will be accepted, and the database will be "frozen" and used as corrected. This final

interest in administrative finality foreclose any further consideration of proposed changes to the June 30, 1996-B database. We deny WJIT's request as untimely.

16. Dynastar Communications, Inc., licensee of WWNR(AM), Beckley, West Virginia ("WWNR") requests that its improvement factor be recalculated because it now proposes to broadcast in stereo. The April 15, 1993 *Public Notice*, which announced the filing window for Expanded Band petitioners, required applicants to file their intentions to broadcast with AM stereo facilities by June 30, 1993. WWNR's request is untimely. WWNR "will not be allowed to improve its position by any change made subsequent to June 30, 1993." *Id.*

17. Radio Property Ventures, licensee of KQXI(AM), Arvada, Colorado ("KQXI") was originally selected as potentially eligible to migrate to the Expanded Band. However, it was not listed in the Second Allotment Plan. KQXI contends that its improvement factor may have been improperly determined because it is not clear that the Commission calculated the station's improvement factor on the basis of its 10 kW nighttime facility. KQXI raised this issue in 1993, long before the thirty-day period for proposing 1996-B database changes, when it sought reconsideration of the staff's initial calculation of the KQXI improvement factor. The staff granted reconsideration and amended the database at that time so that KQXI would be credited with 10 kW nighttime power operations. *See Letter to Jerold L. Jacobs, Esq.*, released October 4, 1994 (Ref. 1800B2-BSB). Notwithstanding the apparent discrepancy between this determination and certain printout materials made available to the public, the staff manually confirmed the KQXI improvement factor calculation, including the station's nighttime authority, prior to the Second Allotment Plan computer run.[17] KQXI next argues that it was erroneously denied consideration for an allotment on 1700 kHz. Our review shows that KQXI was properly precluded from 1700 kHz by its harmonic relationship to Station KOA, Denver, Colorado which operates on 850 kHz. Lastly, KQXI contends that there must be a *per se* error in the process used to generate the Second Allotment Plan because only one of the nine stations originally found potentially eligible to apply for an allotment on 1680 kHz also appears in the revised plan. Although KQXI is correct in noting the substantial differences between 1700 kHz assignments in the First and Second Allotment Plans, it has not shown any error in the selection of stations included in the latter list. We reject KQXI's unsupported and speculative theory.

OTHER MATTERS

18. In reviewing the several challenges to our frequency preclusion and allotment

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corrected database will be the June 30, 1993-B database and will be used to generate the revised improvement factor rankings and revised allotment plan.

Order I, 10 FCC Rcd at 12144-2145.

[17] The computer software used by the staff is available from NTIS. See footnote 4. Accordingly, KQXI can verify the staff calculations.

methodologies, we have identified several software errors. The preclusion program permitted assignments on 1620 and 1640 in certain parts of the Virgin Islands and on 1620 and 1690 kHz in other parts. However, under the Region 2 Treaty, United States Virgin Islands Expanded Band assignments are permitted without geographic limitation on 1620 and 1690 kHz only. Moreover, the staff also concluded that minor geographic coding discrepancies left open the possibility of Florida Expanded Band assignments which could conflict with international agreements. The preclusion program has been modified to conform to treaty restrictions. Finally, the staff has eliminated several other coding errors following an exhaustive review of the software programs which generate the frequency preclusion tables and allotment plan. *See Central Florida Enterprises v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978) (while reconsideration petitions are pending, the Commission may reconsider other issues on its own motion), *cert. dismissed*, 441 U.S. 957 (1979).

REVISED ALLOTMENT PLAN

19. The modifications to the Expanded Band computer programs adopted on reconsideration impact on the frequencies available for assignment, the selection of stations eligible to migrate, and the frequencies assigned to potential migrators. In these circumstances, we concur with WGNY that the portion of *Public Notice II* which sets forth the Second Allotment Plan must be rescinded and a new allotment plan generated. The Mass Media Bureau is releasing a public notice ("*Public Notice III*") concurrently with the release of this Order. *Public Notice III* lists the eighty-eight stations eligible to apply for Expanded Band authorizations under the Third Allotment Plan and their specific allotments. Previously, we announced that applications for construction permits for Expanded Band stations would not be requested until the revised allotment plan becomes a final Commission action. We now conclude that the public interest would be better served by calling for the filing of construction permit applications within ninety days of the release of *Public Notice III*. Under the Third Allotment Plan, fifty-nine licensees have not changed allotments. Nineteen stations have been reassigned to a different frequency. Nine licensees listed in the Second Allotment plan can no longer be accommodated in the Expanded Band, and ten other licensees are now eligible for migration.

20. Accordingly, IT IS ORDERED that Attachment II to *Public Notice, Mass Media Bureau Announces Revised Expanded AM Broadcast Band Improvement Factors and Allotment Plan*, DA 96-96-408 (released March 22, 1996) IS RESCINDED.

21. IT IS FURTHER ORDERED that the petition for reconsideration filed by Sunrise Broadcasting of New York, Inc., licensee of Station WGNY, Newburgh, New York IS GRANTED to the extent indicated above, and the petitions for reconsideration filed by Western New York Public Broadcasting Association, licensee of Station WNED, Buffalo, New York, Triad Network, Inc., permittee of Station WWBG, Greensboro, North Carolina, Lloyd B. Roach, Incorporated, licensee of Station WPWA, Chester, Pennsylvania, WHTG, Inc., licensee of Station WHTG, Eatontown, New Jersey, Olga I. Fernandez, permittee of Station WJIT, Sabana, P.R., Dynastar Communications, Inc., licensee of Station WWNR, Beckley, West Virginia, and Radio Property Ventures, licensee of Station KQXI, Arvada, Colorado, ARE DENIED.

22. IT IS FURTHER ORDERED that the petition for reconsideration filed by Press Broadcasting Company, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in *Review of the Technical Assignment Criteria for the AM Broadcast Service,* 5 FCC Rcd 4381 (1990) (*Technical Assignment Criteria Rulemaking*). The Commission sought written public comments on the proposals in *Technical Assignment Criteria Rulemaking*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in *Report and Order, Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991) (*Report and Order*) was issued prior to enactment of the amendments to the RFA Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which was enacted as Title II of the Contract With America Advancement Act of 1966 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).[18] This FRFA is limited to matters raised in response to the Commission's action on reconsideration of *Report and Order* in *Comments in Response to Reconsideration of Implementation of the AM Expanded Band and Allotment Plan,* 11 FCC Rcd 12444 (1996) and addressed in this *Memorandum Opinion and Order.*

I. Need for and Objectives of this *Memorandum Opinion and Order*:

This proceeding was initiated to improve the quality of AM broadcasting by permitting the migration of existing band stations experiencing significant levels of interference to the expanded AM band, *i.e.*, 1605 - 1705 kHz. The actions taken in the *Memorandum Opinion and Order* are consistent with this goal. Specifically, the *Memorandum Opinion and Order* modifies the frequency preclusion computer program to follow the federal travelers information station interference standards previously specified in this proceeding. It also clarifies the second harmonic interference standard incorporated in the frequency preclusion program. Lastly, the order conforms the revised allotment plan to Region 2 treaty requirements and eliminates software coding errors in the frequency preclusion and allotment plan programs.

II. Summary of Significant Issues Raised by the Public Comments In Response to the IRFA:

As previously disclosed, no comments have been submitted in this proceeding in response to the IRFA. Out of an abundance of caution we have reconsidered the conclusions previously reached in the FRFA even though this proceeding will directly impact less than one percent of licensed commercial radio stations and less than thirteen percent of the stations eligible to migrate to the expanded band. Nineteen stations have changed frequencies from

[18] Title II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601 *et seq.*

the second to third allotment plans and nine stations listed in the second allotment plan can no longer be accomodated.

III. Description and Estimate of the Number of Small Entities To Which the *Memorandum Opinion and Order* Will Apply:

The Small Business Administration defines a radio broadcasting station that has $5 million or less in annual receipts as a small business.[19] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[20] Included in this industry are commercial, religious, educational, and other radio stations.[21] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[22] The 1992 Census indicates that 96 percent (5,861 of 6,127) radio station establishments produced less than $5 million in revenue in 1992.[23] Currently, there are more than 12,000 operating, licensed radio stations.[24]

The Commission previously determined that 710 AM licensees and permittees were eligible to migrate to the expanded band, based on timely expressions of interest in these frequencies. This list excludes daytime-only stations whose calculated interference reduction improvement factor is zero. The third allotment plan, which is being released simultaneously with the *Memorandum Opinion and Order*, lists eighty-eight of these stations that are eligible to apply for expanded band authorizations. Nine stations listed on the second allotment plan cannot be accommodated under the new plan. Ten new stations have been added. Many, if not most of the eighty-eight potential migrators are small business entities. Because the decision to file a construction permit application and, following grant, to construct an AM broadcast station which operates on an expanded band frequency is wholly voluntary, it is impossible to predict how many stations will be directly impacted by this proceeding. To the extent that eligible stations elect to migrate to the expanded band, an unknown number of the approximately 4,900 operating, licensed AM broadcast stations could experience some reduced level of interference and congestion in the existing band. Most of these existing band stations also would qualify as "small entities."

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[19] 13 C.F.R. § 121.201, SIC 4832.

[20] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce.

[21] *Id.*

[22] *Id.*

[23] The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

[24] *FCC News Release*, No. 72140 (released February 5, 1997) (announcing that 4,854 AM, 5,429 FM and 1,868 noncommercial educational FM broadcast stations were licensed as of January 31, 1997).

Alternative Classification of Small Stations. An alternative way to classify small radio stations would be based on the number of employees. The Commission currently applies a standard based on the number of employees in administering its Equal Employment Opportunity Rule (EEO) for broadcasting.[25] Thus, radio (and television) stations with fewer than five full-time employees are exempted from certain EEO reporting and record keeping requirements.[26] We estimate that the total number of broadcast stations with 4 or fewer employees is approximately 4,239[27] and that most of these are radio stations.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

Stations listed in the third allotment plan will be afforded 90 days to file feeable applications for construction permits on the allotted channels. These applications will be placed on cut-off lists following their acceptance for filing to permit the filing of petitions to deny. Each station, following grant of its construction permit application, will have eighteen months to complete station construction and file a feeable application for covering license. To satisfy these requirements it is likely that each of these stations will require the use of professional legal and engineering services.

V. Significant Alternatives and Steps Taken By Agency to Minimize Significant Economic Impact on a Substantial Number of Small Entities Consistent with Stated Objectives:

As noted above, the revised expanded band allotment plan would permit less than thirteen percent of eligible AM station licensees and permittees to migrate to the expanded

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[25] The Commission's definition of a small broadcast station for purposes of applying its EEO rules was adopted prior to the requirement of approval by the SBA pursuant to Section 3(a) of the Small Business Act, 15 U.S.C. § 632 (a), as amended by Section 222 of the Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 222(b)(1), 106 Stat. 999 (1992), as further amended by the Small Business Administration Reauthorization and Amendments Act of 1994, Pub. L. No. 103-403, § 301, 108 Stat. 4187 (1994). However, this definition was adopted after the public notice and the opportunity for comment. *See Report and Order* in Docket No. 18244, 23 FCC 2d 430 (1970).

[26] *See, e.g.*, 47 C.F.R. § 73.3612 (Requirement to file annual employment reports on Form 395 applies to licensees with five or more full-time employees); *First Report and Order* in Docket No.21474 (*Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*), 70 FCC 2d 1466 (1979). The Commission is currently considering how to decrease the administrative burdens imposed by the EEO rule on small stations while maintaining the effectiveness of our broadcast EEO enforcement. Order and Notice of Proposed Rule Making in MM Docket No. 96-16 (*Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines*), 11 FCC Rcd 5154 (1996). One option under consideration is whether to define a small station for purposes of affording such relief as one with ten or fewer full-time employees.

[27] Compilation of 1994 Broadcast Station Annual Employment Reports (FCC Form 395B), Equal Opportunity Employment Branch, Mass Media Bureau, FCC.

band. Stations electing to apply for and construct expanded band facilities are subject to essentially the same license processing requirements as an any applicant seeking a new broadcast station. The changes adopted in the *Memorandum Opinion and Order* were necessary given technical considerations and international treaty requirements.

VI. Report to Congress:

The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Report and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.