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

MM Docket No. 88-526

In the Matter of

Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License — RM-6122

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 26, 1989; Released: June 15, 1989

By the Commission: Commissioner Quello dissenting and issuing a separate statement.

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6890 (1988), proposing a procedure whereby licensees and permittees of FM and television broadcast authorizations could request a new community of license in rule making proceedings to amend the FM and television tables of allotments without subjecting the licensee or permittee to the risk of losing its authorization to competing applicants. The Commission issued the *Notice* in response to a petition for rule making filed by Christian Voice of Central Ohio (petitioner), licensee of Station WCVZ(FM), Channel 224A, Zanesville, Ohio.

BACKGROUND

2. The Commission currently regards any petition to amend the FM or television tables of allotments that would change an allotment's community of license as an event triggering an opportunity for all interested parties to file applications for the new allotment, regardless of whether the allotment is occupied.[1] Upon petitioning the Commission to change the community of license of WCVZ(FM) in order to accommodate an upgrade of the station, petitioner first learned of the existence of this policy. Because it believed that the public interest may be served by a reexamination of this policy, petitioner suggested that the Commission amend its rules to permit FM licensees to upgrade facilities on higher class adjacent or co-channel frequencies, without entertaining competing expressions of interest or competing applications for the amended allotment, even if the upgrade would require modification of the licensee's community of license. Petitioner, citing the Commission's actions in *Modification of FM Broadcast Licenses to Higher Class Co - Channel or Adjacent Channels*,[2] claims that the Commission has rejected the rationale for its present policy.

3. The *Notice* proposed to amend Section 1.420 of the Commission's rules to provide a procedure whereby a licensee or permittee may petition the Commission for an amendment to the FM and television tables, and modification of its license accordingly, without placing its existing authorization at risk, regardless of whether that change involves a change in transmitter site, a change in class of channel, or both. The *Notice* requested comment on the public interest benefits of the proposal, as well as the initial view that the procedure would be available only if the new community would serve the Commission's allotment priorities and policies better than the old community, and if the new allotment is mutually exclusive with the existing allotment. The *Notice* also requested comments on the Commission's initial views that the procedure should be applicable only to adjacent channel upgrades and to intraband noncommercial and commercial channel exchanges. Twenty parties submitted comments in response to the *Notice*, and six parties submitted reply comments.[3]

SUMMARY OF COMMENTS

4. The comments filed in response to the *Notice* were predominantly favorable, with nineteen of the twenty respondents approving some form of the proposal. While only one commenter is in total opposition to the proposal, other commenters oppose several of the tentative conclusions stated in the *Notice*. Generally, these parties question the appropriateness of the proposed procedure in relation to television allotments, or, on the other hand, oppose limiting use of the procedure to instances in which an allotment to a new community would better serve the Commission's allotment priorities and policies. Several parties agree with the Commission's determination that the proposal should be limited to instances in which the proposed allotment is mutually exclusive with the present allotment. The National Association of Broadcasters ("NAB") views mutual exclusivity, in conjunction with application of the allotment criteria, as necessary limitations. Citadel Communications Company ("Citadel") and several others support the tentative conclusion that the procedure not be used for nonadjacent upgrades. Many parties discuss the *Ashbacker* doctrine[4] and related policies. The comments are summarized below.

5. *Ashbacker Doctrine*. Great American Television and Radio Company ("Great American") objects to the proposed procedure, stating that it is contrary to the requirements of *Ashbacker*. Great American argues that the allotment of a channel to a new community is an event triggering the acceptance of competing proposals, as potential competitors for the new allotment may be different from those who applied for the existing allotment. Comparing the instant proceeding to an earlier Commission proposal to permit interband channel exchanges,[5] Great American submits with its comments a joint memorandum of law originally submitted in that proceeding which details the history and requirements of *Ashbacker*. This memorandum states that *Ashbacker* requires the Commission, whenever a channel is made available for use in a community for the first time, to open the channel to applications by all interested parties so that the Commission can determine the most qualified applicant for the channel.

6. Many commenters maintain that *Ashbacker* does not require the Commission to accept competing applications when a proposed new use by the licensee is mutually exclusive with the existing use. CERM Broadcasting Corporation and Crow River Broadcasting ("CERM/Crow River") cite the Commission's actions in *FM Adjacent and*

Co - Channel Upgrades and *Noncommercial Educational Reservations* in support of this proposition. Maines and Premier distinguish the proposal from *Riverside and Santa Ana*, as many public interest benefits would flow from the instant proposal. NAB, referencing *United States v. Storer Broadcasting Company*,[6] states that the Commission need not require comparative hearings when the Commission establishes as a general policy that, in certain categories of cases, allowing competing applications does not serve the public interest.

7. Five reply comments directly address the *Ashbacker* arguments made by Great American. The reply commenters, referencing *FM Adjacent and Co - Channel Upgrades*, maintain that *Ashbacker* does not preclude the proposed procedure. Maines Broadcasting ("Maines") and Premier Broadcasting Group ("Premier") argue that *Ashbacker* does not determine the threshhold circumstances under which the Commission must accept competing applications for an allotment, as *Ashbacker* is directly applicable only to cases in which an unoccupied channel is available for general application, and, under other circumstances, the Commission's determination by rule making of eligibility to apply for a channel is controlling.

8. *Public Interest Benefits*. Many of the supporting comments agree with the description of the public interest benefits in the *Notice*. Commenters note that the present policy deters beneficial upgrades that would require a change in the community of license. Several commenters point out that the new procedure would enhance a licensee's flexibility in choosing and modifying facilities. Many commenters note that the proposal is consistent with earlier Commission actions to modify policies that frustrate the advancement of proposals that would serve the public interest. Citadel argues that the Commission's current policy discourages licensees from changing transmitter sites to newer, larger population centers "because of the need to continue to provide city-grade coverage to a community which may no longer merit local service." Others note that the public interest benefits surrounding this proposal are similar to those discussed in *FM Adjacent and Co - Channel Upgrades*. Maines and Premier state that the proposal could result in the revitalization of stations allotted to communities with an inadequate economic or population base by permitting a station to change its community of license to a city better able to support a station. Tri-Valley Broadcasting Company believes the proposal would allow a licensee to look at growth patterns and decide if a greater population could be better served by a change in the community of license.

9. Cox Enterprises ("Cox"), while not opposed to the proposal, expresses concern that the procedure could facilitate abuses of process by licensees, because a licensee might employ the procedure to abandon an original community of license and move to another community in order to serve a larger market. Cox fears that such a move could harm the original community of license without offering any tangible benefits to the new community.

10. Meredith Corporation ("Meredith") argues that there is no need to apply the proposed procedure to television stations. Meredith notes that, unlike FM service, there is no station classification system in the television service, so there is no need for a television station to change its community of license to obtain a higher classification.

11. Meredith also argues that a television station could use the proposed procedure to circumvent the Commission's programming exclusivity rules. Meredith claims that a station licensed to an urban community could move to a smaller community outside of the area covered by the rules, reorient its antenna or increase its power, and continue to serve the urban community, thereby avoiding the Commission's territorial exclusivity rule.[7] This situation, claims Meredith, would result in less diversity of programming as the station changing its community of license would be free to purchase duplicative programming. NAB states that there are additional issues related to television that the Commission should consider, and suggests that the Commission examine the effect of the proposal with respect to programming exclusivity, cable television signal carriage, and other spectrum related proceedings.

12. The concerns raised by Meredith were addressed by two reply commenters. Citadel maintains that a licensee would not move to a suburban community to broadcast duplicative syndicated material. Pappas argues that it is more likely that suburban broadcasters would want to move to urban areas, thereby bringing within the scope of their programming exclusivity rights a greater number of stations, and thereby increasing the diversity of programming.

13. *The Commission's Allotment Priorities and Policies.* NAB states in both its initial and reply comments that the proposed procedure should be used only if an allotment to the new community would further the policy goals of Section 307(b) and the allotment priorities and policies.[8] NAB expresses concern over the potential of this proceeding to undermine the mandate of localism found in Section 307(b). NAB argues that the allotment criteria now employed reflect Section 307(b)'s objective of ensuring that each local community has a broadcast voice. Failure to consider the allotment priorities, claims NAB, might result in removal of the only voice present in a community. Meredith states that FM licensees should be required to show that the new community of license is preferable under Section 307(b), and is necessary to obtain a higher class allotment, in order to utilize the procedure.

14. On the other hand, a number of commenters in both initial and reply comments oppose the Commission's tentative conclusion that the proposal should only be utilized when the new community serves the Commission's FM allotment priorities and policies. With respect to the FM service, commenters maintain that a strict application of the FM allotment priorities would limit a station's flexibility in changing a community of license, even if there are strong public interest benefits in favor of the change. CERM/Crow River notes that the extension of the procedure to communities not necessarily preferable under the priorities, but offering public interest benefits, would reflect the regional nature of broadcasting and the realities of the marketplace while promoting competition among stations in a market. Press Broadcasting Company ("Press") notes that higher class FM stations and stations in congested areas serve a larger geographic community than the community of license. Press notes that a strict adherence to the allotment criteria ignores the reality that a small suburban station will attempt to serve the entire urban area. Maines and Premier note that a flexible approach to the allotment criteria would allow the Commission to account for all of the marketplace factors that motivate a licensee to change its community of license.

15. Similar concerns are expressed regarding the tentative conclusion that a change in the community of license of a television station be approved only if the new community is preferable under the television allotment priorities and policies. Citadel notes that television allotment priorities have not been revised since 1952, and do not account for the availability of alternative video delivery media such as cable television, satellite dishes, and videotape recorders. Citadel argues that a mutual exclusivity requirement would be a sufficient limitation to the rule, and therefore it is unnecessary to utilize the allotment criteria as well. Harron Communications Corporation ("Harron"), among others, states that the proposal must account for the different standards governing FM and television licensees. Citing to *Buena Vista Telecasters of Texas, Inc.*,[9] Harron states that television stations are generally considered regional in nature because of the scarcity and propagation characteristics of television channels, whereas radio stations can focus narrowly on local needs, thereby making a determination of the preferred community of license for a television station difficult. Pappas Telecasting ("Pappas") shares this view.

16. Several commenters discuss the possible effects of the proposal on their television stations, generally arguing that a change in a community of license should not be blocked by strict adherence to the Commission's television allotment criteria if the change results in significant public interest benefits. Telemundo of Galveston-Houston ("Telemundo"), licensee of a Spanish-language television station in Galveston, Texas, notes that its service to Houston's Hispanic population is limited due to the misalignment of many home receiving antennas, but that it cannot move its antenna to improve service to Houston and still provide a city grade signal over Galveston. Telemundo notes that it might be able to change its transmitter site if it could utilize the proposed procedure and change its community of license to Houston, but might be unable to do so unless it could show a decisive Section 307(b) preference for Houston over Galveston. Citadel notes that the allotment criteria could prevent a reassignment of its television satellite station from the small town of Albion, Nebraska, to Lincoln, Nebraska, where it could operate as a full service station. In that event, Citadel claims it would seek to reassign its station to a town near Lincoln that would be preferable under the criteria.

17. Harron asks the Commission to specify that the proposed procedure would be available to licensees seeking to reassign to their allotted communities channels which were assigned elsewhere pursuant to the Commission's former "15-mile" rule.[10] Harron notes that if the proposed procedure is not available in such cases, a licensee may have to face a comparative hearing in order to return to its originally allotted community.

18. *Intraband Commercial/Noncommercial Television Channel Exchanges.* Telemundo supports the application of this proposal to intraband exchanges. On the other hand, Meredith questions the statement in the *Notice* that the procedure could provide first noncommercial or commercial service "where our present allotment scheme would not allow such service,"[11] noting that no provision of the current scheme prevents the noncommercial operation of a commercial channel. Meredith states that it is unsure whether the Commission is referring to the possibility that a swap, in combination with a change of community of license, could result in the availability of a new allotment previously precluded by spacing requirements, or to the possibility that a noncommercial station economically unable to operate on its current channel could overcome its financial problems by receiving payment in return for a swap with a "less desirable frequency in a less desirable community." Meredith hypothesizes that a noncommercial station licensed to the major city of a market could, in exchange for payment, swap with a commercial station in a fringe community, thereby providing the noncommercial station with cash but leaving the major city without a noncommercial station. Meredith states that the Commission should not permit exchanges when the primary result of the exchange is an influx of capital to the noncommercial station at the cost of reduced noncommercial service to the major city.

19. *Alternative Proposals.* Many of the comments suggest modifications to the proposal. As an alternative to use of existing allotment priorities, several commenters suggest that the Commission require a station seeking to change its community of license to maintain some degree of service to its former community of license. Press suggests that a minimum 60 dBu FM radio signal, or a Grade A television signal, be provided to the former community, while Cox suggests a minimum 67 dBu signal.[12] Cox notes that its proposal would prevent abuse by licensees who would otherwise abandon small markets for larger communities. Pappas proposes that a television station be permitted to change to any community within its city grade contour. CERM/Crow River suggests that licensees be required to show that the former community of license would continue to be served, either by the licensee's station or other stations.

20. NAB suggests that the Commission include language in any amendment to Section 1.420(g) of the Rules stating that the procedure will only be used to further Section 307(b) priorities. NAB believes this is necessary to ensure that the procedure is not used to undermine Section 307(b) and the Commission's mandate of localism.

21. Great American proposes a system similar to that available to AM licensees in which an FM or TV licensee could request a change in its city of license, arguing that this would be consistent with the holding of *Ashbacker.* The Commission would issue a public notice to adopt the change and modify the license if no *bona fide* expressions of interest in the new city of license were received and the change was in the public interest. If expressions of interest were received, the licensee would be free to continue the procedure in a comparative hearing or withdraw its proposal. Several commenters argue that Great American's proposal represents the type of waste and posturing the Commission expressly rejected in *FM Adjacent and Co-Channel Upgrades.*

DISCUSSION

22. After careful review of the comments filed in this proceeding, we are convinced that the Commission's current procedures for modification of FM and television authorizations to specify a new community of license should be amended. The present procedure discourages changes to the tables of allotments that would result in a better overall arrangement of allotments. Many licensees and permittees may be deterred from seeking improvements to technical facilities that would require a modification of its community of license, as they would be at risk of losing their authorizations in a comparative hear-

ing. Accordingly, we will amend the Commission's rules to provide a procedure whereby a licensee or permittee may petition the Commission for an amendment to the FM and television tables of allotments, and modification of its license accordingly, without placing its existing authorization at risk.[13] The procedure is limited to situations in which the new allotment would be mutually exclusive with the existing allotment[14] and will not apply to nonadjacent channel upgrades.[15]

23. This amendment is not precluded by the *Ashbacker* doctrine. The Commission can promulgate rules limiting eligibility to apply for a newly allotted channel when such action promotes the public interest, convenience and necessity.[16] The Court of Appeals has noted that *Ashbacker* applies only to parties whose applications are mutually exclusive, and not to prospective applicants.[17] A party seeking to amend the FM or television tables of allotments is a prospective applicant until its application is submitted and accepted pursuant to the Commission's Rules. "Only by compliance with such procedures may an application enter the ranks of ' *bona fide* applications' protected by *Ashbacker*. " *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1561 (D.C. Cir., 1987).

24. We believe the public interest, convenience and necessity would best be served by allowing permittees and licensees to change their community in the circumstances set forth herein without being subject to competing applications. We recognize that, as a general matter, policy considerations may favor permitting the filing of competing applications.[18] However, our current policy discourages changes of community that could improve service to the public because licensees are generally unwilling to propose such service improvements because the result would be a comparative hearing. Removal of this disincentive through a change in our current policy would serve the public interest. In addition, where the new allotment is mutually exclusive with the existing one, foreclosing competing applications does not, as a practical matter, deprive potential applicants of opportunities for comparative consideration. Under our rules such potential applicants already are precluded from requesting such a new allotment because of the mutual exclusivity with the existing one.[19] Moreover, as suggested above, under our existing policy, they will rarely, if ever, have the opportunity to file a competing application in response to a request by the existing licensee for a change of community because the potential for such a competing application discourages the filing of such requests by existing licensees. Accordingly, our change in this order does not significantly change the actual opportunities afforded to potential applicants, but this change does permit service improvements that are otherwise almost certain not to occur. In addition, the public interest in making available such otherwise unavailable improved service outweighs any concern that an applicant more qualified than the existing licensee to provide such service may exist.[20]

25. In order to amend an allotment using this procedure, we will compare the proposed allotment plan to the existing state of allotments for the communities involved. If adoption of the proposed allotment plan would result in a net service benefit for the communities involved (that is, if the plan would result in a preferential arrangement of allotments), we will adopt the proposal. We conclude that the best way to ensure a preferential arrangement of allotments is to apply the relevant FM or television allotment priorities and policies. The Commission has applied the current FM allotment criteria since 1982, and the television allotment criteria since 1952. We believe that continuing to use the allotment criteria, instead of employing an *ad hoc* approach to determine if a new community of license is preferable to the former community, is consistent with the public interest and lends certainty to the process by retaining a body of precedent upon which a petition for change of the community of license can be analyzed. In addition, we note that requests for a change in community of license involving a transmitter site change or a change in class of channel may conflict with other rule making proposals not involving a change in community of license.[21] We believe it appropriate to evaluate all conflicting proposals, regardless of whether they involve a change in community of license, using the same priorities and policies. We note, in response to comments suggesting that the Commission create a more flexible test for this procedure, that the Commission's policy is to apply the allotment criteria in a flexible manner where circumstances warrant.[22]

26. Several commenters suggest that we require a licensee seeking a change in its community of license to maintain some degree of service to its former community of license as an alternative to the use of the allotment criteria. We decline to take into account the degree of service a licensee will maintain to its original community of license as a factor in making our decision. Were we to accept continued coverage as a factor in favor of a licensee seeking to change its community of license, we would have to ensure that the coverage was provided to the original community in perpetuity, lest the licensee avoid one of the terms of its promise that allowed the move. On the other hand, we should not preclude a change in community of license that would result in a preferential arrangement of allotments solely because the licensee will no longer serve its original community of license. Instead, we will rely solely on a determination as to whether the change would result in a preferential arrangement of allotments.

27. Cox states in its comments the possibility that this procedure may facilitate abuses of process by rural licensees desiring to serve large urban areas. There may be situations in which, consistent with the allotment priorities and policies, a licensee may try to increase its total population served by moving, for instance, from a rural community to a suburban community. We do not believe that such a move necessarily constitutes abuse of process so long as the new community of license is preferable to the original community under our allotment criteria, although the result may be removal of some service from communities on the fringe of an urban area. The application of the allotment priorities and policies, in conjunction with the Commission's minimum distance separation requirements[23] and the present intensive use of spectrum in urban areas, will act as a barrier to the clustering of stations in major metropolitan areas. We will, however, carefully monitor these situations, and will address the issue if necessary.

28. A licensee might want to use the new rule in one of three circumstances. First, a licensee might propose a change in its community of license, but no change in its transmitter site or, for an FM station, its channel class. Second, a licensee might propose to change its transmitter site and community of license. Third, applicable only to the FM service, a licensee might propose to change its community of license and channel class, and possibly its

transmitter site as well.[24] However, in all three cases, we will not allow any broadcaster to take advantage of this new procedure if the effect would be to deprive a community of an existing service representing its only local transmission service. In the first case the question of whether the amended allotment would result in a preferred distribution of facilities under our allotment priorities and policies will serve as a threshhold test of the acceptability of the proposal.[25] In the second and third cases, the preclusive effect of the allotment changes, and, therefore, it is possible that other changes mutually exclusive with the existing station could be advanced in the proceeding. We believe it is best to take into account the totality of the service improvements resulting from a proposed change in community of license when determining whether an allotment proposal should be approved. Therefore, in the second and third situations, we will decide the proposal on a case by case basis, based on whether or not the proposed changes, taken as a whole, would advance our allotment priorities.[26] Under the allotment priorities, we will be particularly hesitant to deprive an area of an existing first or second reception service. These precautions will ensure that the change in community of license will result in a preferential arrangement of allotments.

29. We believe that it is unnecessary to accept NAB's suggestion to include language in the new rule stating that the procedure will only be used to further Section 307(b) priorities. The rule merely reflects procedures for amending the tables of allotments in certain circumstances. The substantive standards for allotments have been separately established by the Commission in policy statements and various *Report and Orders*, and we shall apply those substantive standards and policies in any rule makings encompassed by the rule adopted herein.

30. We will not specify, as suggested by Harron, that this procedure be available to licensees seeking to reassign to their allotted communities channels assigned elsewhere pursuant to the Commission's former "15-mile" rule. The procedure we now adopt is limited to situations in which a licensee files a rule making petition and an associated request for modification of license simultaneously. Unlike the FM table of allotments, the television table of allotments has not been modified to conform its provisions to the actual usage of channels under the "10-mile" and "15-mile" rules by licensees. Therefore, licensees seeking to modify their assignments to specify the allotted community listed in the tables may request to do so by filing an application for a modification of license, and we will grant the request where appropriate.

31. This procedure will be applicable to exchanges of intraband noncommercial and commercial channels. It does not apply to interband (that is, UHF-VHF) channel exchanges. The Commission's Rules currently permit intraband exchanges,[27] and the procedure should apply to exchanges consistent with our rules. The possibility of abuse of the new rule is minimal, because adherence to the allotment criteria will ensure that any exchange involving a change in the community of license will be made in the public interest and not solely in the financial interests of the participants. Furthermore, use of this procedure may allow either or both stations to offer upgraded service previously prohibited due to a mutually exclusive allotment.

32. We disagree with Meredith's claim that the procedure is unnecessary for television channels. While, unlike the FM service, there is no classification system in the television service and therefore no possibility of an "upgrade" to be derived from a change in community of license, the public may nonetheless benefit from application of this procedure to the television service. For instance, a licensee may, through a change in its community of license, be able to move its transmitter in order to improve service to the surrounding area in a manner consistent with our allotment priorities. Our rules should assist licensees seeking such results.

33. Meredith contends that this procedure could allow a television station to circumvent the Commission's programming exclusivity rules. The incentives for moving a station in order to avoid these rules are not clear. For instance, a licensee in urban community A may seek to relocate to rural community B, located sufficiently far from community A to be beyond the zone of protection described in Section 73.658(m) of the Rules, but close enough that its signal can still reach community A. While the licensee may then choose to broadcast duplicative syndicated programming to community A, the licensee has no protection from the possibility that a competing station in community A may broadcast programming duplicative of what the community B licensee is broadcasting. This loss of protection significantly diminishes the value of broadcasting the programming to both stations, and therefore may in fact be a disincentive to relocation.[28] Even if a licensee does move to a suburban community solely to avoid the scope of the programming exclusivity rules, the amended allotment would not have been approved had it not resulted in a preferential arrangement of allotments under the allotment criteria.[29]

34. We decline to adopt Great American's alternative procedure. The Great American proposal would essentially permit a licensee to amend the table of allotments to change its community of license if, after public notice of the proposal, no expressions of interest were filed for the proposed community. Adoption of this proposal would not be in the public interest, as it is similar to the procedure we determined in *FM Adjacent and Co - Channel Upgrades* to be wasteful of Commission, petitioner, and commenter resources.

CONCLUSION

35. Based on the Commission's consideration of the record in this proceeding and for the reasons set forth above, the Commission concludes that it is appropriate to amend section 1.420(i) of its rules and regulations as set forth in the attached Appendix B.

36. FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and Purpose of Rule

The Commission's rules and policies discourage FM and television licensees and permittees from changing the community of license of an allotment in order to implement service improvements, as any amendment to the FM or television tables of allotments changing an allotment's community of license is regarded as an event triggering an opportunity for interested parties to file applications for the allotment. Virtually no licensee or permittee has been willing to risk the loss of its allotment in a comparative

hearing and, as a result, the public is deprived of potentially beneficial service improvements. The amended rule provides a procedure whereby a licensee or permittee may request a new community of license during the course of rule making proceedings to amend the FM and television tables of allotments without risking loss of its authorization to a competing applicant. In addition, the procedure will help small businesses by reducing the costs involved in changing a community of license.

II. Flexibility Issues Raised in the Comments

No significant regulatory flexibility issues were raised in the comments.

III. Significant Alternatives Considered but Not Adopted

The comments received in response to the *Notice* proposed the following significant alternatives: (1) instead of using the existing allotment priorities and policies to determine whether the table of allotments should be amended, to employ a totality of the public interest test or require the licensee to maintain a certain degree of service over the former community of license; and (2) an alternative procedure that would permit a licensee to file a petition for an amendment of the table of allotments and modification of its license and, if after the Commission issued public notice of the petition and no *bona fide* expressions of interest were filed, the Commission could make the changes. We reject the first alternative because there are numerous benefits accompanying the use of the present allotment priorities and polices compared to developing a new system for this procedure. Furthermore, these criteria constitute the Commission's current method of implementing the policies of Section 307(b) of the Communications Act, and will ensure that no community is deprived of necessary FM and television service. We reject the second alternative because it would be wasteful of Commission, petitioner, and commenter resources. We rejected similar procedures in *Modification of FM Broadcast Licenses to Higher Class Co - Channel or Adjacent Channels*, 60 RR 2d 114 (1986) for similar reasons. In any event, licensees will not face additional burdens pursuant to the procedure we adopt herein, nor would they have under the alternatives considered but rejected, as use of the procedure will be purely voluntary.

37. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 603(a) (1982)).

PAPERWORK REDUCTION ACT STATEMENT

38. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, That Part 1 of the Commission's Rules and Regulations are amended, effective **July 31, 1989,** as set forth in Appendix B below.

40. IT IS ALSO ORDERED, That the motion of Citadel Communications Co., Ltd., for leave to file late comments is granted.

41. IT IS ALSO ORDERED, That this proceeding IS TERMINATED.

42. Authority for the action taken herein is contained in Sections 1, 2, 4(i) and (j), 303(r), 316, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), (j), 303(r), 316, 403.

43. For further information concerning this proceeding, contact Michael Ruger, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna M. Searcy
Secretary

APPENDIX A

The following parties submitted comments:

Amerimedia, Inc.

Michael R. Birdsill

CERM Broadcasting Corporation and Crow River Broadcasting, Inc. (joint comments)

Christian Voice of Central Ohio

Citadel Communications Co., Ltd.

Cox Enterprises, Inc.

Great American Television and Radio Company, Inc.

Don R. Davis

Harron Communications Corporation

KCFX Radio, Inc.

Kudzu Broadcasting Partnership

Maines Broadcasting, Inc.

Meredith Corporation

National Association of Broadcasters

Pappas Telecasting Incorporated

Premier Broadcast Group, Inc.

Press Broadcasting Company

Keith Reising

Telemundo of Galveston-Houston, Inc.

Tri-Valley Broadcasting Corporation

The following parties submitted reply comments:

Christian Voice of Central Ohio

Citadel Communications Company, Ltd.

Maines Broadcasting, Inc.
National Association of Broadcasters
Pappas Telecasting Incorporated
Premier Broadcast Group, Inc.

APPENDIX B

Part 1 of Title 47 of the CFR is amended as follows:

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.

2. Section 1.420 is amended by adding new paragraph (i) to read as follows:

§ 1.420 Additional Procedures in Proceedings for Amendment of the FM, Television, or Air Ground Table of Allotments.

* * * * *

(i) In the course of the rule making proceeding to amend § 73.202(b) or § 73.606(b), the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.

FOOTNOTES

[1] This policy was expressed in *Riverside and Santa Ana, California*, 65 FCC 2d 920 (1977), *recon. denied*, 68 FCC 2d 557 (1978).

[2] 60 RR 2d 114 (1986). In that proceeding (hereinafter cited as "*FM Adjacent and Co - Channel Upgrades* "), the Commission amended Rule 1.420 to permit FM licensees to upgrade their facilities on a higher class adjacent or co-channel in the same community in the context of a rule making proceeding. However, this amendment did not overrule *Riverside and Santa Ana. See Green Cove Springs, FL*, 3 FCC Rcd 2195 (1988).

[3] A list of commenting parties is set forth in Appendix A. The comments of Citadel Communications ("Citadel") were filed on January 10, 1989, one day after the deadline for filing comments. Citadel states that a computer malfunction prevented filing of the comments on January 9, although a separate technical statement to be included with the comments was timely filed. Late-filed comments are not routinely accepted for consideration. In this case, as good cause has been shown and acceptance will not prejudice other parties to this proceeding, we will consider Citadel's statement as a petition to acccept late-filed comments and grant it pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3 (1987).

[4] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[5] *Amendments to the TV Table of Assignments to Change Noncommercial Educational Reservations, Notice of Proposed Rule Making* in MM Docket No. 85-41, 50 FR 10817, March 18, 1985. An intraband, but *not* an interband, channel exchange procedure was adopted in the proceeding. *See Report and Order* in MM Docket No. 85-41, 51 FR 15628, April 25, 1986, *recon. denied*, 3 FCC Rcd 2517 (1988) (hereafter cited as *Noncommercial Educational Reservations)*.

[6] 351 U.S. 192 (1956).

[7] *See* 47 C.F.R. § 73.658(m). In its comments, Meredith refers to "syndicated exclusivity", yet discusses territorial exclusivity. Our discussion will focus on territorial exclusivity.

[8] The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). The television allotment priorities are (1) to provide at least one television service to all parts of the United States, (2) to provide each community with at least one television broadcast station, (3) to provide a choice of at least two television services to all parts of the United States, (4) to provide each community with at least two television broadcast stations, and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *Sixth Report and Order*, 41 FCC 148, 167 (1952). We have generally been willing to apply the television priorities in a more liberal fashion than the FM priorities due to the recognition that television is a more regional service. *See, e.g., Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984).

[9] 94 FCC 2d 625, 628 (Rev. Bd. 1983).

[10] The "15-mile" rule, formerly Commission Rule 73.607(b), 47 C.F.R. § 73.607(b) (1982), permitted a television station to be located within fifteen miles of the community of license listed in the Television Table of Allotments without requiring the licensee to petition for an amendment to the Tables. A similar procedure, Rule 73.203(b), 47 C.F.R. § 73.203(b) (1982), applied to FM radio stations. Both rules were deleted in *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984).

[11] *Notice* at 6891.

[12] Cox does not specify in its comments whether its proposal would apply to FM or television signals, or both.

[13] There are several entries in the FM and television tables of allotments involving hyphenated allotments. The Commission has hyphenated allotments in three instances: in order to postpone until the application stage any unresolved or close questions as to which community should use the assignment; upon a showing that a station licensed to a small community is likely to fail unless it is able to apply for authority to operate from a larger community; or upon a showing that the communities should be treated as one community by reason of their proximity and common social, cultural, trade and economic interests. *Hampton-Norfolk-Portsmouth-Newport News, Virginia*, 53 RR 2d 53, 55 (1983). The instrument of authorization for stations operating on hyphenated allotments generally specifies one of the hyphenated communities as the community of license, and we have historically considered on a case-by-case basis applications to modify such authorizations to specify a new community of license. We will continue to do so, but our action today also provides licensees on such allotments with the option of seeking "dehyphenation" of the allotment and simultaneous modification of license in a rule making proceeding.

[14] This rule will apply to adjacent and co-channel changes for FM stations, and to co-channel, adjacent channel, and UHF taboo channels in the television service. *See* 47 CFR §§ 73.207, 73.610, 73.698.

[15] No comments were received in response to the tentative conclusion in the *Notice* to permit competing expressions of interest in cases in which a licensee or permittee proposes a modification of its present assignment to a community to which the same channel could be allotted with a site restriction in relation to the proponent's present assignment. In this case, we will accept competing expressions of interest for the site restricted allotment, as the allotment is not mutually exclusive and could provide a new service.

[16] *See U.S. v. Storer,* 351 U.S. 192 (1956).

[17] *Reuters Ltd. v. FCC,* 781 F.2d 946, 951 (D.C. Cir. 1986).

[18] In *Cheyenne, Wyoming,* 62 FCC 2d 63 (1976), the Commission refused, in a rule making proceeding, to modify the license of an existing licensee to specify operation on a newly assigned channel of a superior class in the same community. The Commission stated that the public interest would be best served by affording other interested parties an opportunity to file an application and to be given consideration for the higher class frequency. *Id.* at 67. In this order, as in our *FM and Adjacent Co-Channel Upgrades* order, we believe the public interest weighs in favor of a different approach, for the reasons explained herein.

[19] *See FM Adjacnt and Co-Channel Upgrades* at 119. Of course, such potential applicants were not always barred from requesting an alternative allotment. They could have made a competing request when the existing allotment was made.

[20] *Compare Cheyenne, Wyoming,* 62 FCC 2d at 67-68.

[21] For example, assume there are three communities, A, B, and C. Community B is located between communities A and C. FM licensee X, operating on Channel 240A in community A, petitions to change its community of license to community B in order to operate at Channel 240C2. This move, however, would be mutually exclusive with a petition filed by Y for an allotment of Channel 240A to community C. The Commission will evaluate the two proposals pursuant to the FM allotment priorities and policies to determine which proposal would result in a preferential arrangement of allotments.

[22] *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 92 (1982), *Sixth Report and Order,* 41 FCC 148, 172 (1952).

[23] Commission Rules 73.207, 73.610, 47 C.F.R. §§ 73.207, 73.610.

[24] The second and third instances may or may not result in continuation of a city grade signal in the original community of license.

[25] For example, suppose FM licensee X sought to change its community of license from community A, in which it is one of two local stations, to community B, with five local stations. Communities A and B have roughly the same population. Under such circumstances, second local service is clearly of a higher priority than sixth local service. As a result, we would dismiss X's petition as unacceptable.

[26] For example, assume there are three communities, A, B, and C. Community A, with a population of 10,000, has two local radio services. The licensee in Community A proposes to relocate to community B, a community of 30,000, as that community's third local transmission service. However, the move would also permit the allotment of a first local service to community C, which has a population of 1,500. The Commission will evaluate the proposal in order to determine whether the combined service gains in community B and the allotment of first local transmission service in community C outweigh the loss of second local service in community A.

[27] Commission Rule 1.420(h), 47 C.F.R. § 1.420(h).

[28] In addition to there being no clear incentive to relocate simply to circumvent our program exclusivity rules, we note that a move may also affect the copyright status of a station carried on cable television systems. *Cf. Cable Compulsory License (Policy Decision)* in Docket No. RM 85-2, 52 FR 28362, July 29, 1987, by the Copyright Office. These effects are by no means uniformly favorable. A licensee may risk its cable carriage in the original community because of the higher copyright royalties charged to carry distant signals.

[29] In the event that such a move results in egregious harm to a licensee, that party may petition to amend Commission Rule 76.51, 47 C.F.R. § 76.51, in order to hyphenate the television markets involved.

DISSENT STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: In the Matter of Modification of FM and Television Authorizations to Specify a New Community of License (MM Docket No. 88-526)

The table of allotments for FM and television broadcasting constitutes the cornerstone of communications policy. Section 307(b) of the Act obligates the Commission to license broadcast facilities to communities in a fair, efficient, and equitable manner. Our allotment decisions are designed to ensure that as many communities as possible are able to obtain service.[1] The orderly distribution of these facilities is essential if *all* Americans are to have access to free over-the-air broadcasting service.

By removing existing procedural constraints, the majority's decision will give licensees the ability, indeed the incentive, to change their communities of license, modify their facilities or both. The item acknowledges that licensees in rural areas will attempt to move towards suburban or more urban areas merely to increase the size of their audiences. From an economic standpoint, such a result may be more efficient, but it runs counter to the time honored policy of fairly distributing licenses to communities throughout the United States.

Once these procedural restraints are removed, mere reliance on our existing allotment policies may not, by themselves, prevent such migration. For example, many FM allotment decisions are not premised on the classic first rural service, second rural service and first local service criteria. Instead, many allotment decisions are made pursuant to the fourth criterion, "other public interest factors." This element takes into consideration a host of factors which, in my opinion, may not adequately consider the importance of geographic distribution on a community-by-community basis.

Experience tells me that we will begin to see a gradual movement from communities with limited populations and low incomes to larger more economically advantageous communities. Admittedly, the decision does prevent a station from abandoning its community when it is the only facility in the market. While this makes the decision more palatable, it simply does not go far enough. This decision will set in motion the entire table of allotments for the FM and television services.

On balance, the public's interest in maintaining the integrity of our tables outweighs the private benefit that may accrue to individual broadcasters from moving to more economically advantageous communities. Therefore, I must dissent.

FOOTNOTE FOR STATEMENT

[1] *See* Revision of FM Assignment Policies and Procedures, 90 F.C.C. 2d 88, 92 (1982); *Sixth Report and Order,* 41 F.C.C. 148, 167 (1952).