FM Station, Class A
FM Station, Class B
FM Station, Class C
FM Station, Frequencies
Frequency Allocation, FM
Policy, Delineation of

FM channel rule making policies and procedures revised and updated to reflect changes in circumstances since the FM Table of Assignments was adopted.

—*FM Channel Policies/Procedures*
BC Docket No. 80–130

FCC 82–240

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Revision of FM Assignment Policies and Procedures	BC Docket No 80–130

SECOND REPORT AND ORDER

Adopted: May 20, 1982; Released: June 2, 1982

BY THE COMMISSION:

1. On March 27, 1980, the Commission adopted the *Notice of Inquiry and Notice of Proposed Rule Making*, in this proceeding, 45 Fed. Reg. 26390, published April 18, 1980, designed to explore the various aspects of our treatment of proposals to amend the FM Table of Assignments.[1] The *Notice* proposed to update both the procedures employed as well as the standards used to evaluate proposed changes in the Table. However, it did not propose changes in the technical standards used to govern these

[1] This table appears as Section 73.202(b) of the Commission's Rules and specifies the FM channels assigned to the various communities listed. A party wishing to apply for a channel but finding none vacant at the desired location files a petition to amend the Table by adding the desired channel

assignments.[2] In order to put this subject in better perspective, it is necessary to provide some background on how the current policies were created and have since been applied.

2. The current FM Table of Assignments was the outgrowth of the rule making proceeding in Docket No. 14185 begun on June 21, 1961.[3] The FM Table and the policies and procedures now utilized by the Commission were developed in the early 1960's and have been little changed since then. Not only has the subject not been studied on an overall basis since then, there have been profound changes in the nature of FM broadcasting. In sharp contrast to the situation in the early 1960's when little interest was shown in FM use (and that mostly in major cities) FM channels now are in demand everywhere. Since the old procedures were developed to deal with a far different situation, it made eminently good sense to revisit the subject to see what changes might be required.

3. The FM Table is intended to allow the Commission to meet its obligation under Section 307(b) of the Communications Act to provide a "fair, efficient and equitable distribution of radio service" to the various states and the communities within them. As set forth in Docket No. 14185 and repeated in the present Notice, the objectives to be served by the FM Table are:

- Provision of some service of satisfactory signal strength to all areas of the country,
- Provision of as many program choices to as many listeners as possible, and
- Service of local origin to as many communities as possible.[4]

Needless to say, there were and are various ways to go about achieving these objectives. In addition to establishing the methodology, there was a need for continuing surveillance to assess the extent to which these FM

[2] That subject was treated in the *Notice of Proposed Rule Making* in BC Docket No. 80–90, in which the Commission decided to explore such matters as making Class A assignments on Class B/C channels, establishing two new classes of stations and modifying the co-channel and adjacent channel spacing requirements to reflect these changes. The end result of such technical changes would be to make many more FM channels available for assignments than is now possible. This could be expected to lead to an increased number of filings seeking new FM assignments. This, necessarily, would make the matter of updating our procedures an even more important one. While the *Notice of Proposed Rule Making* in BC Docket No. 80–90 referred to this docket as an "associate" item, the action taken today will in no way prejudge action the Commission might deem warranted in BC Docket No. 80–90. Given the substantial savings which will accrue to this Commission as a result of today's action, we see no reason to delay these benefits pending consideration in BC Docket No. 80–90.

[3] *Notice of Inquiry, Notice of Proposed Rule Making and Memorandum Opinion and Order*, FCC 61–833, 26 FR 6130. A *Second Further Notice of Proposed Rule Making* was issued in 1962, 40 F.C.C. 728, and the Table itself was adopted in 1963 in the *Third Report, Memorandum Opinion and Order*, 40 F.C.C. 747.

[4] These were the same objectives which the Commission had used over the years to govern AM 307(b) choices. They were again cited by the Court of Appeals in its recent affirmance of the clear channel decision, *Loyola University v. FCC*, Case No. 80-1824, Slip Opinion at 3.

practices were achieving the desired objectives. As we pointed out in the present *Notice*, this has not been possible, as most of our energies have been devoted to day-to-day administration. The present proceeding is designed to remedy this omission and examine each of the component policies which govern FM assignments.[5]

4. To aid commenting parties in focusing on the subject, the *Notice* set forth the individual policies which were being applied to FM assignments along with their historical background and what appeared to be the consequences of their current use. We believe that it is appropriate to continue use of this format. This separate discussion is not intended to ignore the fact that these policies are interrelated and in fact do overlap. Where appropriate, the discussion notes the common themes and the factual premises that connect the topics.

5. The *Notice* also distinguished between unopposed petitions and situations where a choice between conflicting proposals is necessary In the former instance, there is a notably lesser need for extensive filings from the petitioner; and we indicated our desire to avoid burdening the petitioner with filing requirements that serve no useful purpose. Not only are such burdens unfair, they can only serve to delay action on the proposal. In the latter case, more information may be necessary when the Commission must make a 307(b) choice between conflicting proposals.[6] Recognizing that different standards may be required in each situation, the Commission proposal minimal requirements for the "singleton" case which then could be supplemented if a conflict arose. The discussion which follows observes this distinction.

FM Priorities

6. *The FM priorities* set forth the relative importance of the service to be provided from the perspective of Section 307(b) of the Communications Act. The original priorities were stated as follows:[7]

(1) Provision for all existing FM stations

(2) Provision of a first FM service to as much of the population of the United States as possible, particularly that portion of the population which receives no primary AM service nighttime

[5] We have already acted to end the procedural step of calling for responses and replies to a petition even before a Notice of Proposed Rule Making issues Although reconsideration of this action, taken in the *First Report and Order*, 88 F C C 2d 631 (1981), has been sought, those issues are not pertinent to the remaining issues to which we now turn

[6] As already noted, this requirement about distributing radio service underlies the FM Table concept, but it also applies to the choice which often must be made between conflicting assignment proposals

[7] The priorities were first set out in the 1962 *Further Notice of Proposed Rule Making* in Docket No 14185, and were later incorporated by reference in paragraph 25 of the *Third Report, Memorandum Opinion and Order*, the document which adopted the Table (40 F C C 747 (1963))

(3) Insofar as possible, to provide each community with at least one FM broadcast station, especially where the community has only a daytime-only or local (Class IV) AM station, and especially where the community is outside of an urbanized area

(4) To provide a choice of at least two FM services to as much of the population of the United States as possible, especially where there is no primary AM service available

(5) To Provide, in all communities which appear to be of enough size (or to be located in areas with enough population) to support two local stations, two local FM stations, especially where the community is outside of an urbanized area

(6) To provide a substitute for AM operation which, because they are daytime-only or suffer service interference at night, are marginal from a technical standpoint

(7) Channels unassigned under the foregoing priorities will be assigned to the various communities on the basis of their size, location with respect to other communities, and the number of outside services available

7. In the *Notice* we proposed a simplification of the priorities as follows:

(1) First full-time aural service
(2) Second full-time aural service
(3) First local service
(4) Other public interest matters

[Co-equal weight would be given to priorities (2) and (3)]

8. Some of the parties filing comments supported the proposed change in priorities. The National Radio Broadcasters Association thought the new priorities would be "sound tools for selecting between conflicting allocation proposals" so long as they are applied sensibly and not rigidly or mechanically. Likewise, the National Telecommunications and Information Administrative ("NTIA") supported the proposal generally as did National Public Radio ("NPR"). NTIA, however, did suggest that only the first two priorities were needed NPR thought attention could be given in the priorities to the need for public radio service, and it suggested that the proposal should be examined in terms of whether the proposed community has or lacks full-time public radio service.

9. Various other parties opposed changing the priorities, arguing that it would lead to giving inadequate attention to local service or the needs of smaller, rural communities. These concerns were reflected in the filings of the National Association of Broadcasters ("NAB"), the General Electric Broadcasting Company, Inc. ("GEBCO"), and the American Broadcasting Companies ("ABC"). NAB argued that the Commission apparently had concluded that smaller communities now have enough FM service so that the focus could shift instead to assigning channels to large urban areas. The NAB argued against any such change of emphasis. They also called for greater cooperation between industry and government and stressed the role of the Government-Industry Advisory Group that meets to consider various issues affecting AM and FM broadcast service autho-

rization. ABC and others expressed a similar concern that the change could lead to a lessened emphasis on local service.

10. We have concluded that changes in the FM priorities are required The first priority is no longer applicable, as provision has long since been made for all existing stations. Next recognition needs to be given to the fact that AM and FM have become joint components of a single aural medium. Ever since the *Anamosa and Iowa City* case, 46 F.C.C. 2d 520 (1974), the Commission has taken the single aural service concept into account in applying the FM priorities. It is time to formally codify this change.

11 In adopting new priorities, we continue to believe that greatest emphasis needs to be given to assuring the availability of at least one full-time radio service to as many people as possible. New priority one is designed for this purpose. Next in terms of importance are second aural service and first local service. As the Commission pointed out in *Anamosa and Iowa City*, the old system of giving greater priority to first local service could lead to anomalous results, and in fact:

> "[A]pplying them literally the result would be that any community, even one of only 100 persons seeking a first channel would automatically succeed in preference to a second channel to a city of 1,000,000 that would bring a second service to 4,000,000 people" 46 F.C C. 2d 520 (at 525)

In effect, the Commission has dealt with this problem by giving co-equal status to these two priorities. We believe that this approach also should be codified. This is what the new priorities two and three will do. In cases involving a choice between such second aural and first local services, the populations provided each of those services would be compared. Preference would be given depending on whether more persons would receive a second aural service or a first local service. Under this approach we will continue to give emphasis to local service while avoiding the possibility of anomalous results under the old priorities.

12. Finally, we believe it is preferable to employ a single priority for the remaining areas of comparison. It will allow the Commission to compare the benefits offered by the respective proposals without being bound by the rigid sequence of the old priorities.[8]

13. We believe that substantial gains can be obtained through use of the new priorities, including speeding our processes and easing resolution of disputes. Also, reducing the number of priorities has the advantage of avoiding the previous process which required an extra effort to document how a strong preference on one criterion outweighs another party's lesser

[8] This comparison can take into account the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities and their growth rate

preference on a higher rated priority. Overall, the new priorities better reflect the current FM situation and the need to concentrate on higher priority services. One final point needs to be emphasized. Since these priorities are used solely to make a choice between proposals, there is no need for a proponent to undertake an engineering study to demonstrate first or second aural service if no choice between proposals is presented. If conflicting proposals already are on file, the Notice of Proposed Rule Making can call for the submission of this information If the conflict arises in response to the Notice, the material should accompany the new parties' comments. The original party could then supplement its original showing when filing its reply comments. In this way we can avoid delay in processing petitions and can save the Commission and the parties from unnecessary expense.

Reservation Policies

14. In this category are a series of policies which were designed to reserve channels for a future (and theoretically preferable) use. These policies called for rejection of proposed assignments, because of the effect on future assignment possibilities. The decision to employ these policies was based on the awareness that in the then-new FM medium, demand would develop slowly and unevenly. If no restrictions were employed, there would not be an equitable distribution of facilities. In particular, major urban areas would get a disproportionate share of assignments because that is where interest in FM developed first. A system was needed to make sure channels would be available elsewhere as interest in FM grew and spread. Now, of course, FM has become a mature medium and it is time to reexamine these restrictive policies to see if they are still needed. These policies are those involving *preclusion*, use of *population guidelines* and, to a lesser extent, the policy on the *appropriate class of channel* to assign based on the size of the community involved. We will examine these policies individually beginning with preclusion.

15. *Preclusion.* Simply stated, if a channel is assigned to one location, then that assignment precludes use of that channel and adjacent channels elsewhere in the same general area. The policy was adopted as a means of holding channels in reserve for future use when FM interest had grown. Under the policy, the Commission considered the impact of proposed Class B or C assignments on the ability of other communities to obtain an assignment of their own. To do this, it was necessary for both the proponent and the Commission's staff to do extensive engineering work and to prepare full showings. Sometimes other existing assignments already precluded new assignments in this area, so the proposal raised no concern. In other cases, since alternative assignments were available to precluded communities, preclusion was of no concern. At issue here is whether preclusion showings should be required and what should be done

if alternative assignments are not possible to communities lacking their own assignment.[9] Since there are 80 commercial FM channels available for use, preclusion in any one case leaves the great majority of channels unaffected. Cumulatively, though, the supply may have been depleted so that a given assignment may preclude the last opportunity for an assignment to a particular locality. If a proposal is received from that locality, the matter is a simple one of a choice between the proposals. The preclusion issue is an effort to deal with cases where interest in the precluded community is not expressed.

16. The approach suggested by the *Notice* involved use of the Commission's computer to study the impact of preclusion and to select the least preclusive channel for assignment. Where preclusion appeared to be significant, we contemplated the possibility of a notification procedure. Under this approach, time would be afforded to interested parties in affected communities to step forward and express interest in having the channel assigned to the otherwise precluded community. In so doing, this party also would need to provide the requisite commitment that it would apply for the channel, if assigned, and would construct it if authorized. It was clear that there would be additional administrative costs involved in use of such an approach. Parties were asked to indicate if they thought the benefits of this approach warranted its increased expense and delay. If they did support it, they were asked to indicate what size community should be used in determining the impact of preclusion.

17. Responses on these points varied. NTIA agreed that if there were a choice of channels it was appropriate to choose the least preclusive channel for assignment. Nonetheless, it saw no need to deny a proposal because of preclusion. Others supported the approach of assigning the least preclusive channel, but they asked the Commission to be more specific about what was meant by "least preclusive" channel. NPR, for example, said it was incumbent on the Commission to define and describe the term for the benefit of affected parties. On the more general point, NPR, GEBCO and others thought concern about preclusion was warranted. They supported the notification concept along the lines set forth in the *Notice*. In their view, there still is reason to withhold an otherwise acceptable assignment solely because of preclusion. Even though the need for or the interest in a station was not yet manifested, they believed that the opportunity should be protected lest there be no way of responding to the interest if and when it did arise.

18. The Commission's experience clearly demonstrates that the importance of preclusion has greatly diminished. The preclusion policy was

[9] In deciding how large a community needs to be before preclusion becomes a matter of concern, the Commission's standard of community size has varied from 1,000 population to 2,000 or on occasion, 2,500

adopted at a time when there was a great concern about the need to hold channels in reserve for future need when the medium had developed. Now that the FM medium has matured, the need to continue a reservation approach has diminished greatly. In most cases, it is conjectural at best to think that another year or two or more would result in any substantial changes. In fact, interest may never arise, and service would have been denied for no real reason.

19. The proposed notification approach can deal with this imperfectly at best. It can only offer a brief window in which interest in the precluded community could be expressed. This seems far too short to be of any practical value, and it could raise the possibility of obstructionist tactics. Places not yet in existence would not benefit from the proposed policy since they could not be identified in preclusion studies. As to existing communities, there is no way to know whether interest would ever be expressed. Yet, under the policy, every proposal would be delayed while the subject was studied. Most would be granted anyway, based on our experience in this area. Thus, the policy would likely have few beneficiaries. This is not enough to sustain such a burden.

20. We must also be concerned about the administrative impact of continued use of preclusion and the impact of insistence on the preparation of preclusion studies. The burden involved could only be compounded by a notification process. Notices would have to be sent to all communities and their receipt verified. The end result of this approach could only be a notable increase in the paperwork involved in seeking an assignment as well as the time of the Commission's staff in processing these proposals. Out of this comes delay in processing and thus a postponement of service. All considered, the cost is too high for the rare benefits derived. This is especially true if the Commission has to deal with the additional assignment proposals arising as a result of the outcome of BC Docket No. 80–90. While notification, at least in the abstract, seemed a fair substitute for the old preclusion policy, it must be regarded as infeasible because of its impact on our processes. Based on the maturation of the FM medium we have decided to end our preclusion policy. It is no longer necessary to hold channels in reserve awaiting development of the medium. This does not mean a lessened concern about these affected localities. Where interest there is shown through the filing of a counterproposal, it will be given careful attention and accorded the full weight it deserves.

21. *Population criteria.* These criteria represented another example of holding channels in reserve. The guidelines were designed to reflect an appropriate apportionment of channels based on the size of the community involved, thus preventing larger cities (where interest in FM had developed) from obtaining a disproportionate share of channels. These criteria were taken into account in creation of the FM Table, and they

have been applied ever since to petitions to add assignments to the FM Table. The population criteria are as follows:

* communities under 50,000 population—1 or 2 channels;
* communities between 50,000 and 100,000 population—2 to 4 channels,
* communities between 100,000 and 250,000 population—4 to 6 channels,
* communities between 250,000 and 1,000,000 population—6 to 10 channels, and
* communities over 1 million population—10 to 15 channels [10]

In the *Notice* we questioned whether it was necessary or appropriate to continue use of these guidelines, especially since they seemed to have accomplished their purpose.

22. Reaction to this proposal varied. Again, the NAB focused on its concern that localism was being given short shrift and that the Commission was now emphasizing assignments for large urban areas at the expense of smaller localities. This position was supported in filings by ABC and GEBCO. All of the opponents (to some degree at least) thought that the population guidelines served to protect opportunities for service in smaller localities and read the Commission's proposal as expressing a lessened concern on this score. On the other hand, several opponents pointed to the fact that the Commission has not applied these guidelines so rigidly as to preclude all assignments in excess of them They urged a continuation of this approach treating the proposal much like a waiver request, rather than dropping the guidelines entirely. Along this line, ABC thought that the *Notice* exaggerated the burden involved in overcoming the presumption of the guidelines. In ABC's view, waivers already were being given where appropriate. NPR, on the other hand, supported the Commission's proposal. NRBA wanted the criteria dropped rather than given only lip service through waiver. As NRBA saw it, ". . . [I]t is clearly preferable to abandon these criteria rather than force parties seeking allocations to go through purely formalistic waiver exercises."

23. We agree with NRBA that since waiver has become the general practice, there is little reason to retain the guidelines. The guidelines have served their purpose and have preserved opportunities until interest in FM developed. Now, of course, we are dealing with a matured medium in which many seek to operate in smaller communities. This means that the Commission can now withdraw this barrier and deal with the individual proposals that are filed. We no longer believe it is proper to say that no new service at all is better than allowing an assignment in excess of the limit specified in the criteria. As before, when conflicting proposals are

[10] These are guidelines not guarantees, so that various places, large and small, have not received the specified number of assignments

filed, they can still be compared in terms of their 307(b) consequences, and preference given to the smaller community if appropriate.

24. *Appropriate class of channel.* There are two components to this subject. The first relates to the policy of taking into account the size of a community in deciding the class of channel to assign. Under this policy we have assigned Class A channels to smaller communities and Class B/C channels to larger communities. In part, this policy was part of the overall approach of holding channels in reserve, in this case the B or C channels being reserved for larger communities. In the *Notice*, we questioned whether there was a need to continue a hard and fast policy or whether flexibility was preferable. The second aspect relates to intermixture, our policy against assigning two different classes of channels to the same community.

25. The theoretical advantage of assigning a Class A channel to a small town and a B/C channel to serve larger ones breaks down in many cases. Some small towns are the population center for a sizeable area. Since a Class A channel would not be able to cover this entire area, a Class B or C channel is needed.[11] Also, when no B or C channels are available for a larger city, proposals to assign Class A channels there are received. In these cases, the result of the policy is to require additional work for the petitioner and to introduce unnecessary delay in reviewing the showings on behalf of an exception to the policy. With this in mind we thought that this policy could be eliminated. This aspect of the *Notice* elicited virtually no response. Nor has the Commission's own experience since suggested a need to continue a policy that either refuses an assignment which fully meets the rules or makes it only after an extensive showing has been filed. Accordingly, we no longer intend to mandate the choice of a channel based on community size.

26. Our policy against intermixing classes of channels in the same community is not based on any concepts of reserving spectrum for future use. Rather, its foundation is the idea that a higher power facility would have a competitive advantage over a lower power one in the same community.[12] Our proposal to end this policy elicited considerable comment. These comments focused separately on the two quite different aspects of the policy. Assigning a Class A channel to a community with B or C assignments was seen as quite different from the reverse situation. Several parties agreed that it was not necessary to have a policy against assigning a Class A channel to a community that already had one or more

[11] The 1 mV/m coverage of a Class A station extends about 15 miles, a Class B station over 30 and a Class C station almost 60 miles All of this is based on maximum facilities

[12] As the *Rome, New York,* proceeding made clear, this policy prohibited intermixing assignments in a particular community It did not preclude intermixing channels in the market See *Notice of Proposed Rule Making and Memorandum Opinion and Order,* 42 Fed Reg 58189, adopted October 17, 1977

Class B or C channels. They agreed with the Commission's view, expressed in the *Notice*, that the party proposing such an assignment could be presumed to have understood and accepted the competitive risk. Although technically a violation of the policy against intermixture, this has been the informal approach taken by the Commission. Supporters of the Commission's proposal, like NRBA, agreed that these parties could protect themselves, but the NAB disagreed. It argued that the Commission should not rely on the willingness of a party to enter into such competition. Instead it urged an in-depth study of a Class A station's ability to compete. The Pennsylvania Association of Broadcasters ("PAB") also was unpersuaded. It referred to a case where it said economic data submitted by the Class B licensee was rejected.[13] PAB charged that the Commission was abandoning all but engineering or technical concerns. In other words, the Commission was advocating a marketplace approach to the making of assignments in which all assignments that met applicable engineering standards would be granted. In PAB's view, this violates the Commission's obligation under Section 307(b) of the Act to allocate frequencies in the public interest and would be in conflict with the Supreme Court's decision in *FCC* v. *RCA Communications*, 346 U.S. 86 (1953), and the Court of Appeals decision in *Hawaiian Telephone Co* v. *FCC*, 498 F. 2d 771 (D.C. Cir. 1974). In both cases, according to PAB, the Courts held that it is not enough to presume a national policy favoring competition. Rather, it asserts, the Commission must demonstrate the tangible benefits it expects to flow from such competition before taking the action.

27. At most, the cases cited by PAB required the Commission to substantiate the benefits expected to flow from additional competition, not simply presume that such benefits would flow. Here the benefits are clear. Additional needed service can be provided, thus making it possible for the listener to have additional program choices. Moreover, this view is consistent with the Commission's long held position favoring competition through the authorization of additional broadcast services. In fact, the burden in broadcast cases has been on the party opposing competition. Thus in *Carroll* cases,[14] for example, the party opposing the new competitor on economic grounds must establish how the public would be damaged by competition. For these reasons we cannot accept the applicability of PAB's observations about competition.[15] Consequently, we believe that

[13] This case, *Falmouth Massachusetts*, BC Docket No 80-159 *Report and Order*, 48 RR 2d 1673 (1981), *Memorandum Opinion and Order*, 50 RR 2d 377 (1981), is still before the Commission and no comment on its particular facts is appropriate here Our concern here is with the general standards to apply, not whether special circumstances exist in that or any other particular case

[14] *Carroll Broadcasting* v *FCC*, 258 F 2d 440 (D C Cir 1958)

[15] The PAB comments also relied on the Court of Appeals' decisions in the "Format cases," *FCC* v *WNCN Listeners Guild*, 450 U S 582, 67 L Ed 521 (1981), but the Supreme Court has reversed the

allowing voluntary Class A competition may be the only way to bring new service, and it appears both unnecessary and wasteful to let the channel lie fallow rather than allow such intermixture. In any event, in the ordinary case, making this assignment has no disruptive effect on existing operations.

28. The assignment of a Class B or C channel to a community having only one or more Class A assignments presents a different situation. Although NTIA and NPR supported allowing this form of intermixture as well, the other commenters either opposed it entirely or asked that the existing Class A station be given a controlling preference in a comparative proceeding over use of the Class B/C channel. These comments were based on a concern over the economic impact of such intermixture. They argued that the Class A operation, with its circumscribed coverage area, could not compete with the newcomer with its greater coverage area. According to some, we should not drop our policy against intermixture without first conducting an extensive review of its implications, particularly in view of the other actions being taken by the Commission to bring new AM and FM service. Others suggested an economic exploration of the situation in the particular market before making the assignment. NRBA called for considering this matter as the equivalent of a *Carroll* case objection to a broadcast authorization, namely that the public would suffer a net loss of service if the additional station were to operate. Noting the fact that *Carroll* showings must meet a high standard before the matter can be placed in issue, NRBA asked us to use a "reasonable" standard to govern showings in assignment cases.

29. What NRBA urges is a complete departure from our regular practice in FM assignment cases. We have repeatedly rejected consideration of *Carroll* objections in rule making and have consistently held that such objections should be raised in connection with the application to use the channel. The rule making proceeding is designed to further the 307(b) objectives to provide a fair, efficient and equitable distribution of radio service. This process is not a suitable one for consideration of the economic questions that underlie the *Carroll* issue. In addition, the mere presence of a channel tells little about how or even just where it would be put to use by a particular licensee. Thus, until an application is filed, the Commission is not in any position to resolve any such issue which might arise. Although we understand the concern expressed by existing Class A licensees, we do not feel that the FM rule making context is the proper place to resolve it. If a question properly arises in any individual instance, it can best be handled in the application context where appropriate

Court of Appeals and held that the Commission does not need to consider changes in the entertainment format of radio stations Thus, there is no rejection of the Commission's view that it is appropriate to rely on competitive forces to shape station formats

consideration can be given to the argument in deciding on use of the channel. Our action here to change the policy against intermixture is not intended to foreclose parties from raising objections to the application when the facts warrant. The standards for considering these objections have been long established and parties can expect that any objections will be given appropriate treatment. As to the policy change itself, we believe it is important to bring new and often much needed service even if it involves intermixture. The willingness of newcomers to use Class A facilities in competition with existing Class B/C stations suggests that the competitive position is not as bleak as it has been painted.[16] Also, the effect of allowing intermixture is not much different from letting an AM broadcaster use a lower frequency, thereby serving a much larger area with the same power. In fact, the difference in coverage area of AM stations in the same market can be as great as the difference between a Class A and a Class B FM station's coverage area. We have not prevented AM stations from having such an advantage in coverage area even if the other existing AM stations had circumscribed service areas because of higher frequency or lower power. We believe that competitive market skills may turn out to be far more important than theoretical service area. After all, it is not service area alone that counts but the size of the audience, and that does not necessarily coincide with the station's class or coverage area.

30. We also need to consider what treatment to afford the application of the Class A licensee to use any newly assigned Class B/C channel.[17] This is a question now before the agency as a result of the Court of Appeals remand in *Julie P. Miner* v. *FCC*, 663 F. 2d 152 (D.C. Cir. 1980). We will address this matter at the time we resolve the *Miner* case.

Demographic showings

31. In connection with the request to assign an FM channel to a locality, petitioners have been called upon to show not only that the proposed location of the channel assignment in fact is a community, but that it needs the assignment. To establish this the petitioner informs the Commission, often at great length, about such things as industries, major businesses, and tourist attractions. In the *Notice*, we questioned whether there is any valid reason for the Commission to require the submission of this demographic data. If the petitioner believes that the service is needed and that advertising support for it could be generated, what reason is there for the

[16] Recent examples include *Jacksonville, Illinois*, BC Docket 80-337, 46 Fed Reg 34590 (1981), *Killeen, Texas*, BC Docket 80-236, 46 Fed Reg 20674 (1981), and *Spokane, Washington*, BC Docket 80-502, 46 Fed Reg 36854 (1981) In the *Spokane* case, the Class A operation was to be in competition with seven existing Class C operations'

[17] Where possible, we have assigned additional Class B/C channels for the use of existing Class A licensees, but here we are dealing with cases where that cannot be done

Commission to question this judgment? In fact, in cases where the place's status as a community is clear, we thought there should be no need to submit demographic data at all.

32. Commenting parties who discussed this issue supported the Commission's proposal in cases where the status of the community is not in issue. They agreed that in such cases demographic showings serve no useful purpose. If the place is a community, why should the Commission care if it is a tourist mecca rather than an industrial center or farming town? Even less is there a need to know all the other demographic facets that have no necessary place in Commission evaluation of the proposal. All the present requirement does is make the petitioner prepare and file unnecessary paperwork which the Commission's staff is required to study and summarize in the rule making documents. No public loss will attend ending this requirement. Terminating this outdated requirement can only bring important gains for all.

33. Only one minor exception needs to be noted. Section 307(b) of the Communications Act speaks in terms of distribution of facilities among the "several states and *communities*" (emphasis supplied). In this regard, we normally have considered any incorporated place or any other place listed in the census reports as a community. However, from time to time a petitioner will specify a place that is neither incorporated nor listed in the census reports, and we required a demographic showing to indicate that the place was in fact a cognizable community under Section 307(b). To obviate this showing, the *Notice* herein proposed accepting any population grouping as a community. Virtually no attention was given to this proposal in the comments.

34. In considering this matter further, we have come to believe that our proposal would not significantly facilitate the rule making process. Rather, Section 307(b) requires that we continue to require assignments to "communities" as geographically identifiable population groupings. For this purpose it is sufficient that the community is incorporated or is listed in the census. However, if a petitioner desires the assignment of a channel to a place that is neither incorporated nor listed in the census reports, it will be required to supply the Commission with information adequate to establish that such a place is a geographically identifiable population grouping and may therefore be considered a community for these purposes. Failure to file such information with the petition for rule making will delay the Commission's processes.

35. Thus, with this infrequently applicable exception, petitioners need not file demographic data with their requests for rule making to amend the FM Table of Assignments. In situations where a conflict between proposals develops, the information necessary to resolve that conflict can be filed either in response to the Notice of Proposed Rule Making or a counterproposal.

Berwick Issue

36. In rule making a *Berwick* issue is said to arise when someone proposes the assignment of a channel to a particular community and it appears that the petitioner's real purpose may be to use this suburban location to serve another larger community nearby.[18] In line with their views in other regards, NPR and NTIA supported deletion of *Berwick* issues at the rule making stage. NRBA also supported deletion, but its support was premised on the opportunity to raise the issue at the application stage. So long as that opportunity was provided, NRBA saw no purpose in raising it in the rule making. GEBCO argued to the contrary, that the Commission needed to know at the rule making stage if the petitioner intended to serve the specified community. It wanted the Commission to consider this matter when properly raised. ABC took a slightly different tack. It felt that the issue should be considered where it was validly raised but that the standard used to judge the objection should be a high one. NAB also wanted the *Berwick* issue used in rule making and cites *Communications Investment Corp.* v. *FCC*[19] for the proposition that the FCC cannot allow *de-facto* reallocation of FM stations from smaller towns to larger ones without hearing. It also refers to language in that opinion about forestalling excessive concentration of facilities in larger cities and the need to insure adequate service to smaller communities and sparsely settled areas.

37. As NAB acknowledges, *Communications Investment Corp* was not a case dealing with the FM Table. In fact, the Court acknowledged that the Table is not immutable but can be modified through rule making. Nothing in the Court's opinion suggests that the Commission cannot allocate or reallocate channels through rule making. Nor does the Court indicate the need for hearing in such rule making. As to any question about the *bona fides* of the party involved, we believe that it cannot be effectively resolved in rule making where none of the relevant particulars about the actual use of the channel are available.[20] Also, based on our decision to drop the population guidelines and to alter the priorities, the previous incentive to specify a smaller community will diminish. In any event, we do not believe it is appropriate to question the intent of the party seeking an assignment to a particular community in the rule making process.

[18] *Berwick Broadcasting Co.*, 20 F C C 2d 393 (1969)

[19] 206 U S App D C 1, 641 F 2d 954 (1981)

[20] Thus, in the *Berwick* case itself, it was not the community to which the channel was assigned but where it was to be used under the then "25-mile" rule that raised the problem The continued applicability of this precedent in hearing cases is beyond the scope of this inquiry

Assigning a Channel to Avoid a Hearing

38. The next point to consider is the Commission's policy of refusing to assign a channel on a showing that it would avoid a hearing over who is to obtain use of a single vacant channel. While this issue does not arise often, when it does, real delay and expense to all concerned can result. If two applicants seek use of a particular channel, a comparative hearing ordinarily is necessary. However, this could be avoided if a second channel could be assigned. The Commission has a policy of refusing to do so merely to avoid a hearing. This means that action is withheld on the rule making proposal and parties are forced to go through years of prosecuting applications for no real purpose. It would seem preferable that a prompt decision be made on adding a channel, thereby saving time and expense for all concerned. Under current policy, the entire hearing process has to be resolved first or the party must relinquish its right to a hearing without even knowing if a channel actually will be added. Under these circumstances, it is no wonder a party would insist on pursuing its hearing rights first. Under our proposal, the parties could now pursue the rule making alternative without sacrificing their hearing rights.

39. The comments generally support a change in current policy. ABC and others do offer a caveat: in its concern to avoid hearings, the Commission should not put itself in the position of assigning more channels than are warranted and should consider the economic impact of two (rather than one) new assignments before making them. GEBCO concurs and also says the Commission should be ready to consider whether the channel is needed more somewhere else. It was not our intention to suggest that special *favorable* treatment must be given if a hearing would be avoided. Rather, our goal was to remove impediments that call automatically for *unfavorable* treatment. We believe that the best situation is one in which each proposal is examined on its own merits. If a second assignment can properly be made, there is every reason to decide this promptly and thereby avoid the high cost and great delay in an evidentiary hearing. If it is not to be assigned because another conflicting proposal is more meritorious, this too should be established early, lest unfairness to one or another litigant result. In non-conflicting cases we do not contemplate refusing an assignment on economic or competitive grounds.

40. The policy changes being made can bring needed simplification to an unnecessarily cumbersome process and make far better use of the Commission's limited resources. Substantively, too, they represent important new departures more in keeping with our deregulatory goals. The old policies have served their purpose but now must be replaced by new standards which are appropriate to the current environment.

41. Therefore, IT IS ORDERED, That the new policies ARE ADOPTED effective upon publication in the Federal Register, and as of that date shall be applied to all applicable proceedings in which a Report and Order has not yet been issued.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Application, Mutually Exclusive
Comparative Hearing
Hearing, Designation for
Renewal, Designated for Hearing

License renewal application for FM station and application for CP are mutually exclusive and are designated for a comparative hearing to determine which proposal would better serve the public interest. —*Kaye-Smith Enterprises*
BC Docket No. 82–265

FCC 82–221

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

DENA PICTURES, INCORPORATED AND ALEXANDER BROADCASTING COMPANY a joint venture d/b/a KAYE-SMITH ENTERPRISES	BC Docket No. 82–265 File No. *BRH–801001UZ*

Has: 99.9 MHz, Channel 260
100 kW (H&V), 1150 feet

For Renewal of License of Station
KISW(FM), Seattle, Washington

Vincent L. Hoffart, d/b/a HOFFART BROADCASTING Seattle, Washington	BC Docket No. 82–266 File No. BPH–801229AE

Req: 99.9 MHz, Channel 260
100 kW (H&V), 1148 feet

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1982; Released: June 1, 1982