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Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No.92-204
Table of Allotments)	RM-8058
FM Broadcast Stations)	RM-8081
(Lincoln, Pontiac and)	RM-8126
Chenoa, Illinois))	

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY COMMENTS

L&M Broadcasting Company, Inc.

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SUMMARY

L&M Broadcasting Co., Inc. ("L&M"), licensee of Station WESZ(FM), Lincoln, Illinois, filed a petition to upgrade from Channel 230A to Channel 230B1. Livingston County Broadcasters, Inc. ("Livingston"), licensee of Station WJEZ(FM), Pontiac, Illinois, filed a counterproposal to upgrade from Channel 229A to Channel 229B1 and relocate to Chenoa, Illinois, as a first local service. L&M submits that Livingston's proposal to move to Chenoa is not credible because twice before, the last filing on August 25, 1992, two months before filing the Chenoa proposal, Livingston represented that it desired to upgrade at Pontiac. The only apparent reason for the change to Chenoa is Livingston's subsequent discovery of the Lincoln proposal prompting Livingston to claim credit for a first local service, instead. Unlike previous cases where the petitioner's intent cannot be disproved, in this case Livingston's own statements provide extrinsic evidence of intent. The Commission should not tolerate such an obvious abuse of its allocations process.

On the merits, Livingston has not presented sufficient countervailing public interest benefits to overcome the public's legitimate expectation of continued service. Pontiac has 11,428 residents and would be left with only a daytime AM station. Chenoa has 1,732 residents. Livingston failed to show an increase in population gain in the reception service area.

L&M's independent analysis shows a marginal gain of 2,952. Under past case law, the loss of Pontiac's only full-time service is not outweighed by a first local service to Chenoa.

In view of the fact that the Chenoa proposal is not credible and that Livingston failed to present adequate information to justify removing Pontiac's only full-time station, the Commission is left to compare L&M's upgrade at Lincoln with Livingston's upgrade at Pontiac. L&M's population gain analysis reveals that the Lincoln proposal would provide service to 121,734 more persons than would Livingston's Pontiac proposal. L&M's population gain is more than three times larger than that of Livingston.

Nevertheless, in the interest of resolving this proceeding as expeditiously as possible and because L&M has no objection to Livingston's station being upgraded, L&M had its consultant determine whether a technical solution is possible. With specified site restrictions, both the Pontiac and Lincoln stations can be upgraded. L&M has no objection to having its site further restricted to accommodate the Pontiac upgrade. In view of this resolution, L&M urges the Commission to act promptly.

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REPLY COMMENTS

L&M Broadcasting Company, Inc. ("L&M"), licensee of Station WESZ(FM), Lincoln, Illinois, by its counsel, hereby submits its reply to the "Comments and Counterproposal" of Livingston County Broadcasters, Inc. ("Livingston"), licensee of Station WJEZ(FM), Pontiac, Illinois.^{1/} In view of the fact that L&M has found a technical solution which would permit both L&M's and Livingston's stations to upgrade, L&M urges the Commission to act expeditiously to resolve this proceeding. However, in the event the Commission is unable to resolve this proceeding as L&M suggests, L&M will present arguments addressing the credibility

^{1/} This reply pleading is filed within 15 days of the Public Notice, Report No. 1919, released November 24, 1992.

and merits of Livingston's proposal. In support hereof, L&M states as follows:

I. BACKGROUND

1. On July 24, 1992, L&M filed a Petition for Rule Making to substitute Channel 230B1 for Channel 230A at Lincoln, Illinois, and to modify its license for Station WESZ to specify Channel 230B1. On September 4, 1992, the Chief, Allocations Branch, released the Notice of Proposed Rule Making ("Notice"), 7 FCC Rcd 5611 (1992), setting forth L&M's proposal for comments. In response to the Notice, Livingston filed its counterproposal to change Station WJEZ's community of license from Pontiac, Illinois, to Chenoa, Illinois, and to upgrade its class of channel from Channel 229A to Channel 229B1. In support, Livingston stated that Chenoa would receive a first local service and the Chenoa upgrade would provide reception service to 132,237 persons compared to its current Class A service to 23,446 persons.

2. Earlier, on August 25, 1992, one month after L&M filed the Lincoln upgrade proposal, Livingston had filed a "Petition for Rule Making" requesting the same upgrade of Channel 229A to Channel 229B1, but instead of Chenoa as the community of license, Livingston proposed to remain at Pontiac. That proposal was also accepted by the Commission as a

counterproposal in this proceeding by the November 24 Public Notice.

**II. THE COMMISSION SHOULD DENY LIVINGSTON'S
CHENOA PROPOSAL AS NOT CREDIBLE AND AS
AN ABUSE OF THE COMMISSION'S PROCESS**

3. Based on the record in this proceeding, L&M submits that Livingston's second proposal to upgrade at Chenoa is not credible. Rather, Livingston has abused the Commission's processes by representing in a petition filed August 25, 1992, that it would upgrade at Pontiac and, then upon discovering that L&M's Lincoln proposal may be more deserving, changing its proposal to claim a first local service preference at another community.

4. Livingston itself has provided the Commission with the extrinsic evidence that proves abuse of process. Livingston filed a petition for rule making not once but twice in the past year proposing to remain at Pontiac with upgraded facilities. The first petition was filed on December 11, 1991, see Exhibit 1, in which it prematurely proposed to substitute Channel 229B1 for Channel 229A at Pontiac. That petition was dismissed by Letter of May 15, 1992, from the Acting Chief, Allocations Branch, as late filed to a conflicting pending proposal for Channel 228A at Fisher, Illinois, in MM Docket 90-477.^{2/} See

^{2/} In MM Docket 90-477, 7 FCC Rcd 5223 (1992) Channel 273A was allotted to Fisher instead of Channel 228A.

Exhibit 2. Then, as already noted, on August 25, 1992, Livingston filed exactly the same proposal (using the same database of December 4, 1991) for an upgrade of its facilities at Pontiac.^{3/}

5. Thus, as recently as August 25, 1992, just two months before Livingston filed its Chenoa counterproposal on October 26, 1992, Livingston represented that it intended to serve the residents of Pontiac which it had served since 1981. Now Livingston expects the Commission to believe that suddenly it really wants to serve Chenoa, with a 1990 population of 1,732, rather than Pontiac with a population of 11,428.^{4/}

6. The only conceivable reason for Livingston's fascination with Chenoa is the prospect of gaining a preference under the Commission's allocation priorities for a first local service. Obviously Livingston did not believe that its pending proposal to upgrade at Pontiac would prevail over L&M's proposal to upgrade at Lincoln. L&M defies Livingston to show some other reason for suddenly abandoning Pontiac, which Livingston had served for nearly twelve years, in favor of Chenoa.

^{3/} This petition was also prematurely filed and should not have been accepted by the Commission's staff. The effective date of MM Docket 90-477 was October 1, 1992. Any petition filed before that date is conditioned on the absence of an appeal of the Commission's action in MM Docket 90-477.

^{4/} Since Chenoa is located in McLean County, L&M expects that Livingston County Broadcasters, Inc., also plans to change its name to reflect the new county it proposes to serve.

7. Except for trying to gain an allocation priority, what other reason could Livingston possibly have? Did Livingston ascertain the needs of the residents of Chenoa for a local radio station during the period from August 25 to October 26? Did Livingston receive letters during this period from Chenoa residents urging it to address the local issues in Chenoa? Did Livingston's Station WJEZ previously offer local programming designed specifically for the residents of Chenoa? If not, why else would Livingston want to move Pontiac's only full-time station from Pontiac on October 26, 1992, when it could have proposed a first local service to Chenoa when it filed previously on December 11, 1991, and August 25, 1992.

8. Furthermore, if Livingston sincerely wanted to serve Chenoa, it could have filed a petition to allot Channel 299A to Chenoa. Instead, on October 26, 1992, simultaneously with its Chenoa counterproposal, Livingston filed a petition for rule making to allot Channel 299A to nearby Colfax, Illinois. See Exhibit 3. According to the 1990 U.S. Census, Colfax is a Village in Martin Township with 805 residents. But, Livingston has no intention to serve Colfax, just as it has no intention to provide Chenoa with a first local service. The only reason Livingston decided to file a petition to allot Channel 299A to Colfax on the same day it filed to upgrade at Chenoa is obviously to preclude L&M, or some other party, from proposing to allot Channel 299A to Chenoa as its first local service.

Under the Commission's policies, a proposal for Channel 299A at Chenoa would have been preferred over Livingston's Class B1 proposal at Chenoa. See, e.g., Cottage Grove and Bend, Oregon, 6 FCC Rcd 4208 (1991). Livingston need not have played its trump card. L&M had no intention of proposing to allot Channel 299A to Chenoa because it would not file such a pleading unless it had an honest intention to apply for and construct a Class A facility at Chenoa.

9. In fact, if L&M wanted to take advantage of the Commission's process and use the priorities as a chess game, L&M could have proposed to upgrade at another community such as Mason City, Illinois, thereby proposing a first local transmission service to 2,257 people. However, L&M did not want to move from Lincoln, and L&M would not make a representation that it would serve the needs of another community and abandon Lincoln unless it sincerely desired to do so. L&M was aware that it could have succeeded against Livingston's checkmate in this manner, but L&M believes that the Commission will not tolerate such a blatant attempt by a licensee to subvert the Commission's allocation system. L&M has confidence that the Commission will protect the integrity of its processes, and that when a licensee has twice recently proposed to continue to serve its community of license, the Commission will see a sudden change of mind for exactly what it is.

10. In Abuse of Commission's Processes, 5 FCC Rcd 3911, 3914 (1990), the Commission acknowledged that

"[t]here is significant potential for abuse of the allotment process.... As an additional safeguard against abuse, we are also clarifying our policies concerning expressions of interest in applying for and constructing a station made in allotment proceedings."

In this regard, the Commission stated that,

"[t]hese expressions [of interest] have the status of representations to the Commission.... Thus, a statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1015 of the Rules and would be subject to prosecution pursuant to Section 502 of the Act, forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions."

11. In previous instances where there has been an allegation of a non bona fide or disingenuous expression of interest, the alleging party has failed to provide extrinsic documentation of a misrepresentation. See e.g., Oakdale and Campti, Louisiana, DA 92-1473, released November 23, 1992.^{5/} However in this case, Livingston twice represented that it intended to remain at Pontiac with its proposed upgrade

^{5/} In that case, the Commission deleted an allotment on reconsideration after determining that no application had been filed for the allotment and after being told that the original expression of intent was not bona fide. Instead, the Commission upgraded a nearby station which had been precluded from doing so by the now deleted allotment.

facilities. Then, only after becoming aware of L&M's proposal to upgrade at Lincoln, did Livingston switch its intention to Chenoa to take advantage of the Commission's allotment priorities. The Commission finally has a case presented to it with extrinsic evidence of intent. If the Commission is serious about protecting the integrity of its processes, it has the opportunity to send a message to the public that it will not tolerate such abuse.

12. Accordingly, based on Livingston's own statements and in the absence of any credible explanation to the contrary, the Commission must find that either Livingston misrepresented when it stated in its December 11, 1991, and August 25, 1992, petitions that it intended to serve Pontiac, or it misrepresented when it stated on October 26, 1992, that it intended to serve Chenoa.

13. If these filings were applications, the Commission would make a finding that the applications are inconsistent in violation of Section 73.3518 of the Commission's Rules and would dismiss the later filed application. See e.g., Atlantic Radio Communications, Inc., 7 FCC Rcd 5105 (1992) (where two inconsistent applications were filed on the same day). In a pending proceeding, the Commission has already found that petitions to upgrade on the same channel can be treated as applications. See Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, 7 FCC Rcd

4943 (1992). Under this same rationale the Commission should not entertain inconsistent upgrade proposals in rule making proceedings.^{6/}

**III. ON THE MERITS, CHENOA IS NOT MORE
DESERVING OF THIS FM CHANNEL
THAN PONTIAC**

14. In Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7097 (1990), the Commission stated "[t]he public has a legitimate expectation that existing service will continue, and that this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel from one community to another...." Pontiac, a community of 11,428 persons, is clearly deserving of an FM station and has come to

^{6/} Livingston's proposal to serve Chenoa is a variation of an abuse which the Commission eliminated in 1983 in Suburban Community Policy, The Berwick Doctrine, and the DeFacto Reallocation Policy, 93 FCC 2d 436 (1983). In that decision, the Commission eliminated the 10 and 15-mile rule in Section 73.203(b) whereby after a channel is allotted to a particular community, the application could be filed at another community within 10 miles for Class A and within 15 miles for Class B/C channels. The elimination of this rule resulted in part from the increasing frequency in which applicants were not applying for the community to which the channel was allotted but, instead sought to obtain a dispositive first local service preference over competing applicants for the same channel. The Commission stated that commenters had complained that during that time applications were rife with misrepresentations that the applicant had no real intent to serve the specified community. The Commission acknowledged that such misrepresentations may occur and reminded applicants of statutory and regulatory provisions concerning candor and honesty. Id. at 444-445.

rely on its only full-time local service since 1981. As a result of Livingston's proposed move to Chenoa, Pontiac will be left only with a daytime AM station. In Eatonton and Sandy Springs, Georgia, et al., 6 FCC Rcd 6580 (1991), application for review pending, the Commission emphasized at Paragraph 16, "...the continuation of existing service is a significant factor that must be weighed in the public interest balance." At Paragraph 34, the Commission further stated that "the weight to be accorded the public's expectation is substantial. As the Commission indicated in Pillar of Fire, 62 RR 2d 276 (1987), we should not allow a mechanistic application of Section 307(b) of the Communications Act to automatically override our concerns with disruption to existing service." Here, Livingston has not made its case for depriving the 11,428 residents of Pontiac of its only local full-time and only FM station as against providing Chenoa's 1,732 residents a first local service.

15. In comparing the need for service at a new community to the need to continue service at the existing community, the Commission requires a showing that there are countervailing public interest benefits. See Eatonton, Georgia, supra, and Van Wert, Ohio and Monroeville, Indiana, 7 FCC Rcd 6519 (Alloc. Br. 1992). In Van Wert, the Commission was unable to find sufficient public interest benefits in providing Monroeville (population 1,372) with its first local service over the retention of Van Wert's (population 11,035) only FM station.

The facts in the present case are strikingly similar. Chenoa's population of 1,732 persons is comparable to Monroeville's 1,372 persons. While Pontiac's 11,428 persons is similarly close to Van Wert's 11,035 population. Chenoa, like Monroeville, would receive a first local service. Chenoa is located approximately 23 miles from Bloomington, Illinois, while Monroeville is located 17.3 miles from Ft. Wayne. A major factor influencing the Commission's decision to deny the Van Wert move was the removal of Van Wert's only local nighttime service. Pontiac would suffer the same loss.

16. Livingston has made no showing to demonstrate how many more people, if any, would be served from the Chenoa site than from the Pontiac site, nor has Livingston shown whether these people lack reception services. This failure to provide countervailing public benefits from the loss of a transmission service is fatal to the proposal. See Van Wert, Ohio and Monroeville, Indiana, supra and Eatonton, Georgia, et al., supra. Furthermore, such failure to provide the required information can not be cured by a late filed pleading after the record is closed. See e.g., Stamps and Camden, Arkansas, 3 FCC Rcd 3644 (1988). Accordingly, the Commission has not been provided with a demonstration that the gain, if any, in reception service from an upgrade at Chenoa versus an upgrade at Pontiac is adequate to overcome the loss of Pontiac's only local

nighttime service and the legitimate expectation of continued FM service at Pontiac.

17. In another recent case involving Moncks Corner and Kiawah Island, South Carolina, 7 FCC Rcd 6522 (1992), the Commission, in denying a change in community of license, was influenced by the fact that the Moncks Corner station could achieve an upgrade (albeit to a Class C3 instead of a Class C2) without having to change its community of license to Kiawah Island. Here, as Livingston itself has demonstrated, the requested upgrade can be achieved at Pontiac without having to move to Chenoa.

18. Therefore, the Commission cannot, consistent with past cases, find that Livingston has presented countervailing public benefits to overcome the legitimate expectations of continued service. The Chenoa upgrade proposal should also be denied on the merits.

IV. THE PROPOSED LINCOLN UPGRADE SHOULD BE FAVORED OVER THE PONTIAC UPGRADE

19. Based on the above-discussion, the Commission can justifiably dismiss the Chenoa proposal as not bona fide or can deny the Chenoa proposal on the merits. Thus, Livingston's only remaining proposal is the one filed on August 25, 1992, to upgrade its facility at Pontiac. As indicated earlier in Footnote 3, that proposal was filed prematurely. Nevertheless,

the Pontiac proposal would lose to the Lincoln proposal on the merits.

20. In comparing conflicting requests for upgrades, the Commission is guided by population gain analyses under the guidelines set forth in Greenup, Kentucky, and Athens, Ohio, 2 FCC Rcd 4319 (M.M. Bur. 1987); recons. granted, 4 FCC Rcd 3843 (M.M. Bur. 1989); review granted, 6 FCC Rcd 1493 (1991). A population gain study is to be provided at the comment deadline in order to provide L&M, as the original petitioner, an opportunity to reply. See Stamps and Camden, Arkansas, supra. However, Livingston failed to provide such a study for the Pontiac proposal. The only population gain study provided by Livingston was done for the Chenoa proposal at different coordinates. Nevertheless, L&M's engineering consultant Paul Dean Ford has evaluated the gain area of the proposed Pontiac Class B1 upgrade for Livingston's reference coordinates. The total population that will be served by the proposed Pontiac Class B1 facility is 79,687 persons. See attached Engineering Statement. When that population figure is reduced by the current Pontiac Class A population figure of 23,446 as stated by Livingston in Paragraph 3 of its counterproposal, the total population gain equals 56,241 persons.^{2/}

^{2/} L&M's engineering consultant was unable to confirm the population coverage of 132,257 persons proposed by Livingston at the Chenoa coordinates. Using the Dataworld program, the population coverage inside the Chenoa 60 dBu (continued...)

21. On the other hand, the population within the gain area using the Lincoln proposed Class B1 referenced coordinates is 223,362. When the population (45,387) from Station WESZ's proposed Class A facility^{8/} is subtracted, the total population gain is 177,975. See attached Engineering Statement. This figure is substantially higher than the Pontiac gain of 56,241 persons.^{9/} Under prior case law, this substantial difference of 121,734 more persons clearly justifies granting the Lincoln Class B1 upgrade over the Pontiac Class B1 upgrade. See e.g., Oxford and New Albany, Mississippi, 3 FCC Rcd 615 (MM Bur. 1988); Spring Grove and Preston, Minnesota, et al., 4 FCC Rcd 5738 (MM Bur. 1989). This substantial difference in population gain also explains why Livingston decided to abandon its Pontiac upgrade proposal and switch to another community in order to claim a first local service preference.

^{7/}(...continued)

contour is 82,639. See attached Engineering Statement. That figure is only 2,952 additional persons than Livingston's proposed population coverage from its Pontiac site.

^{8/} L&M has located a site for a 6 kW facility on Channel 230A and will be submitting the application shortly. For purposes of the population gain analysis, L&M will use this application site for 6 kW rather than the lower population coverage of its existing 3 kW Class A facility.

^{9/} Even using Livingston's unsupported figure of population coverage of 132,237 from the Chenoa coordinates and subtracting the current 23,446 persons served, the population gain would total 108,791, substantially smaller than the Lincoln 177,975 gain.

**V. BOTH THE LINCOLN AND PONTIAC/CHENOA
CLASS B1 UPGRADES CAN BE ACCOMMODATED**

22. In the interest of resolving this proceeding as expeditiously as possible and avoiding further pleadings by both parties that would only drain Commission resources, L&M commissioned its engineering consultant to determine whether with alternate site restrictions both upgrade proposals could be spaced adequately. As indicated in the attached Engineering Statement, a solution has been found. If the Commission allots Channel 230B1 to Lincoln at 40° 00' 00" and 89° 29' 00" and allots Channel 229B1 to Pontiac or Chenoa at 40° 45' 53" and 88° 35' 28", the two allotments would be adequately spaced (with rounding off) at 113.8 km. A separation of 114 km is required for first adjacent Class B1-Class B1 channels.

23. The Pontiac/Chenoa reference point suggested above is located 10.8 km east of Chenoa and 13.3 km south of Pontiac, well within the required 70 dBu coverage area for both communities. The site proposed for Lincoln is located approximately 19.1 km SW of Lincoln, well within the proposed 70 dBu contour of the Class B1 facility. In view of the fact Livingston has proposed to move its site in order to upgrade, and in the interest of accommodating both proposals, the Commission can impose a further site restriction. See e.g., Greenville, Texas, 6 FCC Rcd 6048 (1991). On its part, L&M would accept the further site restriction to eliminate the

conflict. L&M has no objection to the Pontiac station being able to upgrade this scenario.^{10/}

CONCLUSION

24. On the basis of the facts presented, the Commission must find that Livingston's proposal to move to Chenoa is not credible given Livingston's previous representations that it intended to serve Pontiac. The Commission needs more than a statement that Livingston now intends to serve Chenoa. In the absence of an explanation, the Commission must conclude that Livingston is abusing the Commission's allocation priorities. On the merits, Livingston has failed to justify the removal of Pontiac's only local full-time station in favor of a first local service to Chenoa. In comparing the need for an upgrade at Pontiac to an upgrade at Lincoln, Livingston failed to provide the population gain study to make the comparison. Using L&M's figures, L&M's proposal would serve 121,734 more persons than Livingston's proposal. The allotment of a Class B1 at Lincoln is clearly favored by the allocation priority (4). Nevertheless, L&M has presented a technical solution permitting both stations to upgrade with site restrictions. In the

^{10/} If the Commission finds that Livingston's intention to serve Chenoa is credible, then under this solution, the Commission could modify Livingston's station to specify Chenoa at the further restricted coordinates.

interest of expediting service to the public, L&M urges the Commission to adopt that solution.

Respectfully submitted,

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Its Counsel

December 9, 1992

EXHIBIT 1

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(Pontiac, Illinois))	

To: Mass Media Bureau
 Policy & Rules Division
 Allocations Branch

PETITION FOR RULE MAKING

Livingston County Broadcasters, Inc., licensee of FM station WJEZ, Pontiac, Illinois ("WJEZ"), respectfully petitions the Commission to amend Section 73.202(b) of the Rules to substitute Channel 229B1 for Channel 229A at Pontiac, Illinois, and to modify the license of WJEZ to specify operations on the upgraded channel.

WJEZ presently operates on Channel 276A, but has been ordered to Channel 229A, at its present transmitter location, by the Report and Order in MM Docket No. 90-137, RM-7106. As shown by the attached engineering study done by Dybedock and Associates, Inc., WJEZ will be permitted to upgrade its facility from a Class A to a Class B1 while meeting the spacing requirements of 73.207 of the Commission's Rules. A location south of Pontiac was determined to be suitable and meets the spacing requirements of 73.207. There is available for

construction of the B1 facility a substantial area in that vicinity which will meet the requirements of 73.315 by placing a 70 dBu signal over Pontiac.

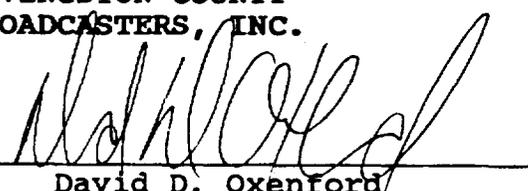
By upgrading to Channel 229B1, WJEZ would be able to increase its power to full Class B1 facilities. Its coverage area would grow as well, resulting in a new broadcast service becoming available to a significant number of people. No other change in the Table of Allotments would be required to accommodate WJEZ's request. Thus, this proposal is in the public interest.

WJEZ will promptly file an application for construction permit upon the finality of this channel change, and will promptly construct on the new frequency upon grant of the permit.

Accordingly, Section 73.202(b) of the rules should be amended as requested.

Respectfully submitted,

LIVINGSTON COUNTY
BROADCASTERS, INC.

By 

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December 11, 1991

ENGINEERING STATEMENT

SUPPORTING

PETITION TO AMEND 73.202, THE FCC FM TABLE OF ALLOTMENTS

ON BEHALF OF

**LIVINGSTON COUNTY BROADCASTERS, INC.
PONTIAC, ILLINOIS**