

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations. )  
(Rose Hill, Trenton, Aurora )  
and Ocracoke, North Carolina) )

MM Docket 95-88  
RM-8641  
RM-8688  
RM-8689

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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To: Chief, Allocations Branch

OPPOSITION TO MOTION TO STRIKE REPLY COMMENTS

Duplin County Broadcasters ("DCB"), by its attorneys, hereby opposes the "Motion To Strike Reply Comments" filed on September 1, 1995 by Topsail Broadcasting, Inc. ("TBI") in the above-captioned matter.

1. TBI has fashioned its pleading as a "motion to strike" in a thinly-veiled attempt to improperly respond beyond the authorized pleading cycle to DCB's August 25, 1995 reply comments in this proceeding. As will be shown below, there is no defect or impropriety in DCB's reply comments. Rather, it is TBI's attempt to make further, unauthorized evidentiary proffers by a so-called "Motion To Strike" that is procedurally improper and should be disregarded.

2. DCB's reply comments directly responded to opposition comments filed by TBI, and by W&B Media, Inc. ("W&B"). Specifically, DCB's reply rebutted W&B's argument that under RKO General, Inc. (KFRC), 5 FCC Rcd 3222 (1990), vacated as moot pursuant to settlement, 6 FCC Rcd 1808 (1991) ("KFRC"), and Faye and

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Richard Tuck, 3 FCC Rcd 5374 (1988) ("Tuck"), Trenton should be deemed "interdependent" with the communities of Jacksonville, New Bern, Kinston, and Havelock City (W&B Opposition, p.10); and TBI's argument that Trenton should be deemed within the "Jacksonville-New Bern-Havelock-Kinston-Goldsboro" market (TBI Opposition, p.3). DCB's reply showed that, contrary to the opponents' suggestions, Trenton is a self-governing, economically self-sufficient community with no governmental or economic reliance on Jacksonville, New Bern, Havelock, Kinston or Goldsboro. Applying the factors set forth in KFRC and Tuck, cited by W&B, DCB presented substantial and material evidence that Trenton is unquestionably a community:

- (1) Trenton is the seat of Jones County, with numerous governmental, business, service, and ecclesiastical employers. As many of the working residents of Trenton remain in Trenton to work as commute to other places.
- (2) A bi-weekly newspaper is published in Trenton, and a city cable franchise is slated to commence service. Trenton residents perceive that out-of-town radio stations do not serve Trenton's needs and interests.
- (3) Trenton residents consider themselves to be "from Trenton," and do not consider themselves to be part of the communities of Jacksonville, New Bern, Kinston, Havelock or Goldsboro.
- (4) Trenton is self-governing and its residents elect their Mayor and Town Board.
- (5) The local telephone book has a separate Trenton section. "Extended service" or long-distance calling is required to call Jacksonville, New Bern, Kinston, Havelock or Goldsboro.

- (6) The needs of Trenton are served by numerous local businesses and the Trenton Medical Center.
- (7) Political candidates in the Trenton area have not advertised on radio due to high rates to advertise on Jacksonville, New Bern, Kinston, Havelock or Goldsboro stations.
- (8) Trenton does not receive any municipal services (*i.e.* police, fire protection, schools, libraries) from Jacksonville, New Bern, Kinston, Havelock or Goldsboro.

(Reply Comments, pp. 4-9). DCB further showed that neither W&B nor TBI had presented any evidence whatsoever that Trenton is dependent on Jacksonville, New Bern, Kinston, Havelock or Goldsboro.

3. In its "Motion To Strike," TBI illogically suggests that DCB should have submitted evidence of Trenton's independence from Jacksonville, New Bern, Kinston, Havelock, and Goldsboro in its initial comments. However, TBI and W&B only first raised the issue of Trenton's independence from those communities in their oppositions, which were filed on the same date as DCB's initial comments. The Commission did not ask for additional evidence of Trenton's community status in its Notice of Proposed Rule Making, DA 95-1277 (Chief, Alloc. Br., rel. June 19, 1995), and noted that Trenton is a census designated place ("CDP"); caselaw holds that status as a CDP presumptively establishes community status. See e.g. Miramar Beach, FL, 6 FCC 5778, 5779 (Asst. Chief, Alloc. Br., 1991) ("There is a strong presumption that a CDP is a community for allotment purposes.")

4. As DCB's reply comments properly and directly responded to matters first raised in opposition comments, TBI's "Motion To Strike" is without basis and should be denied. Rocky Mount, Bassett and Stanleytown, VA, MM Docket No. 94-63, DA 95-1838, n.4 (Chief, Alloc. Br., rel. August 25, 1995) (denying motion to strike reply comments which responded to matters addressed in counterproposal); Miramar Beach, FL, supra at n.1 (denying motion to strike reply comments which appropriately responded to opposition comments).

5. Furthermore, TBI's "Motion To Strike" abuses the Commission's pleading cycle, by improperly introducing belated allegations claimed to go to Trenton's independence. At the outset, it should be noted that TBI's new proffer consists solely of its own self-serving, unverified representations, unsubstantiated by either affidavit or independent evidence, and therefore should be rejected out-of-hand for evidentiary deficiency. In any event, when viewed in the context of DCB's previously-presented evidence of Trenton's independence and self-sufficiency as a community, there is no decisional significance to TBI's belated proffer<sup>1/</sup>.

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<sup>1/</sup>For example, TBI's "Motion To Strike" makes passing references to such obscure and non-decisional matters as the ethnic ancestry of Trenton's historic settlers, listings by a few non-Trenton businesses in the Trenton section of the telephone directory, a drug treatment center in New Bern, a community college campus in Jones County, and a TV transmitter near Trenton. Even if TBI's proffer had been made on a timely basis  
(continued...)

6. TBI further challenges as "inapposite" ("Motion To Strike," p.3) DCB's citation to the recent ruling in Atlantic and Glenwood, Iowa, MM Docket No. 94-122, DA 95-1583 (Chief, Alloc. Branch, rel. July 25, 1995), that:

While we are concerned about the loss of the community's nighttime aural service<sup>2/</sup>, this concern is eased by the fact that Atlantic will continue to receive nighttime service from at least five stations.

Atlantic and Glenwood Iowa, supra at para. 6. Atlantic and Glenwood, Iowa is directly relevant in the instant case, where DCB's present license community, Rose Hill, will continue to receive local service from WEGG(AM) and more than five full-time aural services following reallocation to Trenton.

7. The ruling in Atlantic and Glenwood, Iowa, that loss of service concerns are ameliorated where the original community will continue to receive at least five full-time services, correctly reflects the current trend in recent reallocation cases. See e.g., Rocky Mount, Bassett and Stanleytown, Virginia, MM Docket No. 94-63, DA 95-1838 (Chief, Alloc. Branch, rel. August 25, 1995) ("We recognize that the removal of Station WZBB(FM)

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<sup>1/</sup>(...continued)  
and with proper substantiation, these matters are irrelevant. It is well-established that a community need not receive every conceivable service from within its own borders to qualify as a community for allotment purposes. Miramar Beach, supra at 5779, citing Semora, NC, 5 FCC Rcd 934, 935 (1990).

<sup>2/</sup>The remaining AM station in Atlantic and Glenwood, Iowa provided no protected nighttime service.

from Rocky Mount will create a reception service loss area . . . . However, our concerns about this loss area are mitigated by the fact that all of the population located in this loss area will continue to receive at least five full-time aural reception services"); and Quincy and Susanville, California, MM Docket No. 92-221, DA 95-1518 (Chief, Alloc. Branch, rel. July 17, 1995) ("While we carefully evaluate any proposal that would result in the loss of existing reception service, the population within the loss area will continue to receive service from five or more fulltime aural services").

8. There is no relevance under the allotment priorities established in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 (1982), to TBI's question as to whether another FM transmission service would be allocable to Rose Hill ("Motion To Strike", p.3). What is relevant, however, is that Rose Hill will not lose its only local service, and will continue to be well-served.

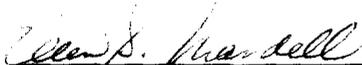
9. Contrary to TBI's assertion ("Motion To Strike", p.4), DCB showed in its reply (p.9) that in prior comparative allotment proceedings the Commission has indeed allotted frequencies to communities with small populations, citing Bloomington and Nashville, Indiana, 4 FCC Rcd 5765 (Chief, Alloc. Br., 1989) (allotment granted to community of a few hundred people), and Bartow, Chauncey, Dublin, Eastman, Jeffersonville, Lyons, Soperton and Unadilla, Georgia, 4 FCC Rcd 6876 (Chief, Alloc.

Br., 1989), recon. dismissed, 5 FCC Rcd 442 (Chief, Alloc. Br., 1990) (channel allotted to a community of 350 persons). Moreover, DCB's reply comments noted (p.9) that Trenton's population count for census purposes is artificially small, as the City has not formally annexed areas populated by approximately 1,000 additional persons, just outside Trenton proper, whose residents consider themselves to be part of Trenton.

WHEREFORE, the premises considered, TBI's "Motion To Strike" should be denied, and the proposal to substitute Channel 284C2 at Trenton, North Carolina, for Channel 284A at Rose Hill, North Carolina, and to modify the license of WBSY accordingly, should be granted.

Respectfully submitted,

**DUPLIN COUNTY BROADCASTERS**

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September 13, 1995

**CERTIFICATE OF SERVICE**

I, Veronica Pierce, do hereby certify that a true and correct copy of the foregoing "Opposition to Motion to Strike Reply Comments" has been served upon the following individuals by U.S. Mail on this 13th day of September, 1995.

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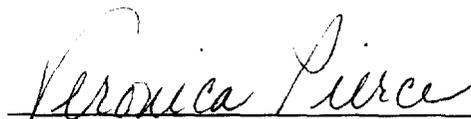
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