

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of) MM Docket No. 93-17
)
Amendment of Section 73.202(b),) RM-8170
Table of Allotments,)
FM Broadcast Stations,)
(Rosendale, New York))

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

**OPPOSITION TO EMERGENCY REQUEST FOR STAY
OF FM APPLICATION WINDOW**

Aritaur Communications, Inc. ("Aritaur"), by and through counsel, hereby submits its Opposition to the "Emergency Request for Stay of FM Application Window" filed by State University of New York ("SUNY") in the above-captioned proceeding.¹ In support whereof, the following is shown:

¹ SUNY's Emergency Request was filed on November 21, 1995, along with a Petition for Reconsideration of the Commission's Report and Order, DA 95-2129, in this proceeding. Public notice of SUNY's Petition for Reconsideration was given on December 13, 1995, when the Commission issued a Public Notice, Report No. 2115, wherein it noted that SUNY's Petition had been filed. Prior to that time, Aritaur was unaware that SUNY had filed a Petition for Reconsideration. Upon inspection of the Commission's files, Aritaur learned that SUNY had filed its Emergency Request. After learning of the existence of SUNY's Emergency Request, Aritaur prepared this Opposition; however, the Opposition could not be filed with the Commission earlier due the Federal government shutdown and snow emergency. Given the circumstances, Aritaur respectfully requests that the Commission consider this Opposition as timely-filed.

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Standing

1. SUNY has filed a Petition for Reconsideration seeking review of the Commission's Report and Order, 10 FCC Rcd 11471 (1995), ("R&O"), allotting a new FM station on Channel 273A at Rosendale, New York.² SUNY argues that the Commission erred when it opened a new FM window for Channel 273A at Rosendale and that Channel 273A should have been reserved for use with SUNY's noncommercial FM station, WFNP, Rosendale. SUNY seeks reconsideration of the Commission's decision and requests that the Commission stay the opening of the window for the filing of applications for the new FM station. The FM window opened on December 4, 1995, and closed on January 4, 1996. On January 4, 1996, Aritaur filed an application for the new FM Channel 273A at Rosendale. If the Commission grants SUNY's Emergency Request, it may return Aritaur's pending application. If such action is taken, Aritaur will suffer irreparable, measurable harm. Aritaur is without question a "party in interest" within the meaning of §309(d) of the Communications Act of 1934, as amended, and has standing to oppose SUNY's Emergency Request. See, FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

Background

2. In its Petition for Rulemaking filed in this proceeding, SUNY requested the Commission to allot new FM Channel 273A to Rosendale. WFNP, Channel

² Together with this Opposition, Aritaur is simultaneously filing an Opposition to SUNY's Petition for Reconsideration.

204A, Rosendale shares Channel 204A with another noncommercial broadcaster, WRHV, Poughkeepsie, New York, through a timesharing arrangement. SUNY requested that the Commission allot Channel 273A at Rosendale and that, pursuant to §1.420(g) of the Commission's Rules, the license of WFNP be modified to permit operation on Channel 273A. In effect, SUNY requested that the Commission not permit other parties to file for the new FM Channel at Rosendale and that SUNY's proposed modification for WFNP be protected from outside expressions of interest.

3. In its Notice of Proposed Rulemaking, 8 FCC Rcd 947 (1993), in this proceeding, the Commission sought a clarification from SUNY as to whether SUNY intended to operate WFNP on Channel 273A as a noncommercial or commercial station. This clarification was necessary because Channel 273A is a "nonreserved band" channel and SUNY had not specifically requested that the channel be reserved for noncommercial use. In response to the Commission's inquiry, SUNY stated in its comments that it did not want Channel 273A reserved for noncommercial use. See, R&O at fn 5.

4. Since SUNY did not specifically request that Channel 273A be reserved for noncommercial use, the Commission allotted Channel 273A at Rosendale but it did not modify the license of WFNP to operate on Channel 273A pursuant to §1.420(g) of the Rules. Instead, the Commission allotted the new Channel and opened an FM filing window. SUNY now seeks reconsideration of the

Commission's decision and a stay of the FM window pending a decision on its Petition for Reconsideration.

The Rosendale Filing Window Has Expired and SUNY's Request is Now Moot

5. In its R&O, the Commission opened a window from December 4, 1995, to January 4, 1996, for the filing of applications for the new FM station at Rosendale. The Commission was closed during a portion of the filing window, from December 18, 1995, to January 10, 1996, due to the Federal government shutdown and snow emergency. During this time, the Commission continued to accept applications for new FM stations at its fee office in Pittsburgh, Pennsylvania. On January 11, 1996, the first day the Commission re-opened, the Commission issued a Public Notice, DA 96-2, wherein it stated that it would accept as timely filed applications for new FM stations that were due during the Commission shutdown as long as those applications were filed no later than 5:30 p.m. on January 16, 1996.³ No action was taken by the Commission to stay the Rosendale filing window.

6. Because the Commission did not stay the Rosendale filing window prior to the window's closing, SUNY's Emergency Request is now moot and should be dismissed. See, FM Table of Allotments (Athens, OH), DA 95-2118, released October 12, 1995, at fn 4. Even if the Commission were to consider SUNY's

³ Aritaur disagrees with the Commission's ad hoc attempted extension of the Rosendale filing window, and believes January 4, 1996, was the deadline for such applications.

Emergency Request, it must be denied because it does not meet the Commission's strict requirements for stay.

Good Cause Does Not Exist to Support SUNY's Request for Stay

7. Under §1.429(k) of the rules, "...upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration." 47 C.F.R. §1.429(k). When considering whether a party has shown "good cause," to support a request for stay, the Commission makes the following four-part analysis:

- (1) The likelihood of irreparable injury to the petitioner in the absence of relief.
- (2) The injury to other parties in the proceeding that might follow if relief is granted.
- (3) The injury to the public interest that might result if the petition is granted.
- (4) The likelihood that a petitioner might prevail on the merits on reconsideration, review or appeal.

See, Storer Communications, Inc., 101 FCC 2d 434 (1985); **WAMTC v. Holiday Tours, Inc.**, 559 F. 2d 841 (D.C. Cir. 1977), and **Virginia Petroleum Jobbers Ass'n v. FPC**, 259 F. 2d 921 (D.C. Cir. 1958).

SUNY's Emergency Request fails all four tests.

Likelihood of Harm to SUNY

8. SUNY has not shown that it will experience irreparable harm if the Commission denies its Emergency Request. SUNY claims it will be harmed if the Rosendale window is not stayed but SUNY does not show how it will be harmed if the Commission accepts applications for Channel 273A at Rosendale. The

Commission's FM processing line is already frozen while the Commission develops new comparative criteria. Therefore, any competing applications for Channel 273A will remain on hold in the processing line just as if the Commission had imposed a stay. If the Commission later reverses its R&O, it will only have to dismiss the pending applications with no resulting harm to SUNY. SUNY claims that the existence of other applications will undermine the Commission's ability to reverse itself and thus will weaken SUNY's chances for reconsideration.

However, such harm is not actual and is merely theoretical and cannot justify the imposition of a stay. See, Wisconsin Gas Co. v. FERC, 758 F. 2d 669 (D.C. Cir. 1985); and Arnold L. Chase, 4 FCC Rcd 5085, 5086 (MMB 1989). SUNY has not met the burden of showing how its interests will be harmed if the Commission permits the Rosendale filing window to go forward.

Likelihood of Harm to other Parties

9. SUNY ignores the likelihood of harm to Aritaur, as well as the other potential applicants in this proceeding that would result if a stay is imposed.

Aritaur has expended funds to investigate, prepare and file an application for filing in the Rosendale window. If the Commission grants SUNY's Emergency Request and stays the Rosendale window, it is likely to return Aritaur's application.

Aritaur will be forced to spend additional funds to re-file its application at such later time that the Commission determines that a window should be opened. There is no harm whatsoever to accepting applications for the new Rosendale station and holding those applications in the Commission's frozen FM processing line.

Likelihood of Injury to the Public Interest

10. SUNY also ignores the fact that the public interest may be harmed if the Commission grants its Emergency Request. By staying the Rosendale window and forcing applicants for Channel 273A to await a final decision in this proceeding before filing their applications, the Commission may delay the ultimate initiation of service to the public. Allowing the applications to be filed and to go forward once the FM processing freeze is lifted will result in speedier initiation of service. Permitting a stay will only serve to needlessly delay the ultimate processing of the Rosendale applications for no legitimate purpose. Since SUNY has failed to meet this requirement, as well as the other tests for stay, its Emergency Request must be denied.

No Likelihood of Success on Reconsideration

11. SUNY has not shown that it is likely to prevail on the merits of its Petition for Reconsideration. SUNY has failed to demonstrate that the Commission erred when it allotted Channel 273A at Rosendale, New York, and opened a filing window for the new allotment. The Commission's action was supported by precedent and will serve the public interest. The Commission correctly found that it could not invoke the provisions of §1.420(g) of the Rules to permit modification of WFNP's license and to protect SUNY from the filing of outside expressions of interest. The Commission found that, in the Report and Order, 56 RR 2d 1253 (1984), adopting §1.420(g) of the Rules, it had stated that the special modification provision would not apply to stations seeking to switch from a noncommercial band

channel to a commercial band channel, finding that such an issue was outside the scope of the proceeding. Since the Commission did not specifically state in the Report and Order that such modifications were permitted, there was no justification to permit SUNY to invoke §1.420(g) in this case. While the Commission permitted a licensee to modify its station license from a reserved band channel to a nonreserved band channel in FM Table of Allotments (Sioux Falls, SD), 51 FR 4169, released February 3, 1986, the Commission noted that its decision in that case was based upon unique circumstances that do not exist here.

12. Even if SUNY had requested that Channel 273A be reserved for use as a noncommercial channel, the Commission correctly found that its proposal would have been denied. The Commission permits noncommercial FM stations to modify their licenses to operate on commercial channels reserved for noncommercial use only in those cases where it is demonstrated that no reserved band channel is available because of either (a) foreign spacing constraints or (b) potential interference to TV Channel 6 operations. In this case, there was no channel within the reserved FM band for use by WFNP because of domestic spacing constraints and not because of either foreign spacing constraints or TV Channel 6 interference problems. Therefore, even if SUNY had requested that Channel 273A be reserved for use as a noncommercial channel, its proposal would have been denied as contrary to Commission precedent. See, R&O at ¶2, citing, FM Table of Allotments (Siloam Springs, Arkansas), 2 FCC Rcd 7485 (1987), aff'd, 4 FCC Rcd 4920 (1989), and FM Table of Allotments (Bulls Gaps, Tennessee), DA 95-

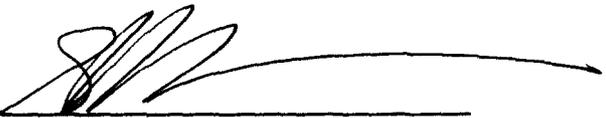
1981, released September 22, 1995. It is unlikely that SUNY will prevail on the merits on its Petition for Reconsideration and there is no justification for stay in this case.

WHEREFORE, the above-premises considered, Aritaur Communications, Inc. respectfully requests that the "Emergency Request for Stay of FM Application Window" filed by State University of New York be **DENIED**.

Respectfully submitted,

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By:



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CERTIFICATE OF SERVICE

I, Denise L. Felice, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 16th day of January, 1996, copies of the foregoing were sent by first class mail, postage prepaid, to the following:

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