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February 24, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Amendment of Section 73.202(b),
FM Table of Allotments
Rose Hill, Trenton, Aurora, and Ocracoke, NC
MM Docket No. 95-88

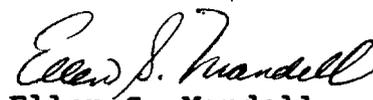
Dear Mr. Caton:

Transmitted herewith on behalf of Conner Media Corporation, the licensee of WBSY(FM), Rose Hill, North Carolina, is the original plus four copies of its "Reply to Opposition to Petition For Reconsideration" in the above-referenced proceeding.

This submission is respectfully directed to the Chief, Allocations Branch, Policy and Rules Division.

Please direct any questions or correspondence in connection with this matter directly to this office.

Very truly yours,


Ellen S. Mandell

Enclosure
cc (w/encl.): see attached certificate of service

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1997

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	MM Docket No. 95-88
)	
Amendment of Section 73.202(b),)	RM-8641
Table of Allotments,)	RM-8688
FM Broadcast Stations)	RM-8689
(Rose Hill, Trenton, Aurora,)	
and Ocracoke, North Carolina))	

To: Chief, Allocations Branch
Policy and Rules Division

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Conner Media Corporation ("CMC"), the licensee of WBSY(FM), Rose Hill, NC, by its attorneys and pursuant to Section 1.429(g) of the Commission's rules, hereby replies to the Opposition To Petition For Reconsideration ("Opposition") filed by Aurora Broadcasting ("AB") in the above-captioned matter, as follows:

1. This proceeding was initiated by CMC's predecessor-in-interest^{1/}, to request reallocation of Channel 284A from Rose Hill to Trenton, NC, an upgrading of the allotment to Class C2, and modification of the WBSY license accordingly. AB counter-proposed allotment of Channel 283A at Aurora, NC. CMC proposed to resolve the conflict between the Trenton and Aurora proposals by allotting Channel 221A to Aurora in lieu of Channel 283A.

^{1/}Duplin County Broadcasters, then-licensee of FM station WBSY, Channel 284A, Rose Hill, NC, assigned the WBSY license to CMC, pursuant to FCC consent under File No. BALH-960412GR, on August 1, 1996.

2. By Report and Order (Rose Hill, Trenton, Aurora, and Ocracoke, North Carolina) ("R&O"), MM Docket No. 95-88, 61 Fed Reg. 66618, published December 18, 1996, the Chief, Allocations Branch, of the Commission's Mass Media Bureau ("Bureau"), concluded that Channel 221A was not available at Aurora due to short-spacing to the outstanding construction permit of WRSV(FM), Channel 221A, Rocky Mount, NC (File No. BPH-951002IB), and the construction permit to upgrade unbuilt station WAHL, Ocracoke, NC, from Channel 225A to Channel 224C1 (File No. BMPH-950728IC). Although the Bureau found that Trenton qualifies as a "community" for allotment purposes and should not be attributed with the radio services licensed to the Jacksonville, New Bern, Kinston or Havelock, NC areas, the Bureau allotted Channel 283A to Aurora, NC, and denied the proposal to allot Channel 284C2 to Trenton, NC, based on a comparison of the populations of Aurora and Trenton.

3. In its Petition For Reconsideration of the R&O, CMC showed (1) that the Bureau could have made the Channel 221A allotment at Aurora, thus enabling allotments to both Aurora and Trenton, by imposing a site restriction to ensure compliance with spacing requirements to WRSV, Rocky Mount, NC; and (2) that the construction permit to upgrade unbuilt station

WAHL, Ocracoke, NC, was scheduled to expire on February 12, 1997^{2/}, and should not be extended^{3/}

4. AB now claims that Channel 221A at Aurora would not an "acceptable alternative" to Channel 283A, due to the proposed site restriction (Opposition, p.3). Under long-standing case precedent, however, the Commission considers proposed allotments to be "equivalent," as long as the channels are of the same class, comply with minimum spacing criteria, and provide for 70 dBu coverage to the proposed allotment community. See e.g. Nikiski, Alaska, MM Docket No. 96-50, DA 97-344 (Chief, Alloc. Br., released February 21, 1997), citing Vera Beach, Florida, 3 FCC Rcd 1049 (Chief, Alloc. Br., 1988), rev. denied 4 FCC Rcd 2184, 2185 (1989)^{4/}. Consistent with the

^{2/}OB filed an application for extension of construction permit on January 13, 1997 (FCC File No. BMPH-970113JA) and an application for assignment of the construction permit to Mr. Bruce S. Cotton on January 17, 1997 (File No. BAPH-970121GS). CMC filed an objection to the extension application on February 7, 1997, which is incorporated herein by reference, and intends to oppose the assignment application within the time period permitted by statute. As of the date of this filing, neither CMC nor its counsel has been served with an opposition to CMC's objection to WAHL's extension application.

^{3/}CMC showed that the WAHL permit is technically deficient and the underlying allotment is substandard, as 70 dBu coverage will not be provided to WAHL's license community of Ocracoke from either the transmitter site or the allotment site. CMC also showed that WAHL does not have and has never had reasonable assurance of the site specified in its permit.

^{4/}Indeed, the Commission has recognized that no two channels are ever entirely identical. Vera Beach, supra, 4 FCC Rcd at 2185.

equivalency test set forth in Vera Beach, CMC demonstrated that Channel 221A is the same class as Channel 283A and can be allotted to Aurora at the reference site consistent with spacing and coverage requirements^{5/}. CMC also showed that a large area is available for location of the Channel 221A facility^{6/}. As Channel 221A and Channel 283A are legally equivalent, AB's contention that Channel 221A is not an acceptable alternative should be rejected.

5. AB also complains that it never expressed any intention to apply for a station at Aurora other than on Channel 283A (Opposition, p.3). However, it is well within the Bureau's discretion to resolve conflicting allotment proposals by making an alternative channel allotment, without requiring any further expression of interest in the alternative allotment. Cottage Grove and Brownsville, Oregon, 7 FCC Rcd 7579 (Chief, Policy & Rules Div., 1992).

6. AB also attempts to depict the WAHL upgrade permit as a continuing constraint to allotment of Channel 221A at Aurora (Opposition, p.4). However, in view of CMC's demonstrations^{7/} that the WAHL permit is technically deficient and that the

^{5/} Petition, Exhibit 1.

^{6/} Petition, Exhibit 1, Figure 5.

^{7/} AB appears to have overlooked that CMC earlier objected to the WAHL permit in an October 5, 1995 filing, prior to grant of the permit.

underlying allotment is substandard^{2/}, the permit for that still-unbuilt facility, which was scheduled to expire on February 12, 1997, should not be extended^{2/}.

7. AB attempts to resurrect its theory that Trenton should be deemed a "quiet village" (Opposition, p.5), citing Sunshine Broadcasting, Inc., 2 FCC Rcd 7559, 7560 (1987). However, in contradistinction to the "quiet village" profile set forth in Sunshine, Trenton has been shown to be the incorporated, self-governing, historically well-established county seat of Jones County, with numerous businesses and distinct local interests (R&O, ¶11, 20). Under the circumstances, there is no merit to AB's attempt to portray Trenton as a "quiet village."

8. Nor has AB shown any basis to dredge up its failed argument that Trenton is dependent on any other city, for purposes of attributing to Trenton another city's radio stations (Opposition, p.6). AB has not overcome CMC's showing

^{2/}See note 3, supra.

^{2/}AB's Technical Comments incorrectly state that CMC failed to mention the alternate prediction method used by the permittee of WAHL, Ocracoke Broadcasters ("OB"), in its one-step application. At note 4, CMC discussed in detail why OB relied inappropriately on Bayshore, New York, 57 RR 2d 1275 (Chief Policy & Rules, 1985), recon. denied 59 RR 2d 1652 (Chief, Policy & Rules, 1986), rev. denied 2 FCC Rcd 1293 (1987), as a basis to demonstrate principal-city coverage using a propagation methodology other than that set forth in the Commission's rules.

that Trenton is an independently-governed, self-sufficient municipality (see R&O, ¶¶20-21).

9. There is no legal basis for AB's suggestion that Aurora is preferred to Trenton as a "first local service" (Opposition, pp.5-6) CMC likewise proposes a "first local service," to Trenton (R&O, ¶22).

10. AB's suggestion that CMC's proposal would leave Rose Hill without "full-time local service" is specious. Consistent with the Commission policy stated in Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870, 4874, recon. denied in part, 5 FCC Rcd 7094, 7097 (1990) ("New Community of License"), CMC's proposal will not remove Rose Hill's sole local service. The record reflects that Rose Hill will continue to receive local service from co-owned WEGG. The record further reflects that Rose Hill is well-served by more than twenty aural services, including more than five full-time services. The proposed reallocation to Trenton thus would be consistent with present policy expressed in Atlantic and Glenwood, Iowa, MM Docket No. 94-122, 10 FCC Rcd 8074 (Chief, Alloc. Branch, 1995) (channel reallocated to new community where loss area would continue to receive service from at least five full-time aural stations). See also Quincy and Susanville, California, 10 FCC Rcd 7709, 7710 (Chief, Alloc. Br., 1995).

11. AB would characterize as "irrelevant" CMC's showing that the Trenton proposal would make more efficient use of the spectrum; rather, AB would resolve the matter solely upon a comparison of the 1990 population counts for the two communities (Opposition, p.6). However, radio signals do not stop at a station's city limits. It has been shown that the proposed Trenton allotment would serve more than eleven times the number of persons as the Aurora allotment, and more than four times the geographic area than the Aurora allotment^{10/}.

12. Spectrum efficiency has long been the basis for evaluating competing upgrade proposals. Greenup, Kentucky, 2 FCC Rcd 4319 (1987), aff'd in relevant part, 4 FCC Rcd 3843 (1989), aff'd in relevant part, 6 FCC Rcd 1493 (1991), appeal dismissed sub. nom. WATH, Inc. v. FCC, D.C. Cir. No. 91-1268 (September 26, 1991); Metropolis, Illinois, 7 FCC Rcd 6218 (Chief, Alloc. Br. 1992). CMC respectfully submits that it would not be rational to ignore, in the instant case, the dramatically superior spectrum efficiency of the Trenton proposal, and to instead prefer the less efficient Aurora proposal -- based on a population difference between the communities of a mere 370 persons.

13. AB also would characterize as "irrelevant" the fact that Jones County, NC, of which Trenton is the county seat,

^{10/}Petition, ¶20.

presently is unserved by any local stations (Opposition, p.6), whereas Aurora is located in Washington County, NC, which already has broadcast stations licensed to communities in the county. CMC respectfully submits that such a discrepancy is unfair and inequitable, and fails to comply with the directives of Section 307(b) of the Communications Act. The instant case offers the Commission an opportunity to ameliorate this exclusion of Jones County's residents from receiving local service, by grant of CMC's request for allotment of first local service to Trenton.

WHEREFORE, the premises considered, the Bureau is respectfully requested to grant CMC's petition for reconsideration.

Respectfully submitted,

CONNER MEDIA CORPORATION

By Ellen S. Mandell
Peter Gutmann
Ellen S. Mandell
Its Attorneys

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February 24, 1997

CERTIFICATE OF SERVICE

I, Veronica A. Pierce, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true copy of the foregoing "Reply to Opposition to Petition For Reconsideration" was sent this 24th day of February, 1997, by U.S. first class mail, postage prepaid, to the following:

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Mass Media Bureau
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*Hand delivered