

FCC MAIL SECTION

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Federal Communications Commission

DA 97-2485

DISPATCHED

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 96-240
Table of Allotments,)	RM-8946
FM Broadcast Stations.)	RM-9019
(Lockport and Amherst, New York) ¹)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 19, 1997

Released: December 5, 1997

By the Chief, Allocations Branch:

1. At the request of Culver Communications Corp. ("Culver"), the Commission has before it the Notice of Proposed Rule Making, 11 FCC Rcd 20514 (1996), proposing the allotment of Channel 221A to Lockport, New York, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.² A counterproposal was filed by Kevin O'Kane ("O'Kane") requesting the allotment of Channel 221A to Amherst, New York, as the community's first local FM service.³ Culver filed reply comments and a reply to O'Kane's counterproposal.⁴

¹ The community of Amherst has been added to the caption.

² As requested in the Notice, petitioner also complied with Section 1.52 of the Commission's Rules by supplying an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge.

³ Public Notice of the filing of the counterproposal was given on March 6, 1997, Report No. 2177.

⁴ After the record closed, O'Kane filed a petition for leave to file response and response to Culver's reply comments, Culver filed a motion to strike O'Kane's response, and O'Kane filed an opposition to Culver's motion to strike. O'Kane recognizes that the Commission's Rules do not provide for the filing of a response to reply comments but states that Culver raised issues for the first time in reply comments, specifically that Amherst should be denied a first local service preference because of its location within the Buffalo Urbanized Area. We find that O'Kane has not provided any information which could not have been provided in a timely fashion or of decisional significance. In a timely filed reply comment, Culver acknowledged O'Kane's counterproposal and submitted arguments as to why the Amherst proposal should not be preferred over its Lockport proposal. While the Public Notice announcing the Amherst counterproposal was released after the reply comments were filed by Culver, and allowed a further response period, O'Kane did not file any response during this period. Rather, he waited until after Culver filed a response to the Public Notice announcing the filing of the counterproposal. Because there are no pleadings which are authorized by the Commission's Rules beyond responses to counterproposals, counterproponents are expected to include in their counterproposals all relevant information. In this case, Culver not only opposed the counterproposal in response to the Public Notice but also in timely filed reply comments. O'Kane chose not to answer any of the opposition arguments until after the authorized response period, even though a response could have been submitted to the arguments raised by Culver's reply comments during the Public Notice response period. Therefore, O'Kane's

2. O'Kane states that Amherst, with a 1990 U.S. Census population of 106,157 persons, is located in Erie County and has licensed to it only one daytime-only AM station. Lockport, on the other hand, with a 1990 U.S. Census population of 24,426 persons, receives local service from a fulltime AM station. Thus, he contends that Amherst is in greater need of its first fulltime station than Lockport for its second such service. O'Kane submits that Channel 221A can be allotted to Amherst in compliance with the Commission's minimum distance separation requirements with respect to all U.S. stations. He notes that there would be short-spacings to three Canadian stations or allotments but that the Lockport allotment would involve short-spacings to five Canadian stations or allotments. Therefore, he requests that the allotment be proposed to the Canadian Government as a specially negotiated short-spaced allotment.

3. In response to the counterproposal, Culver states that O'Kane's sole basis for contending that Amherst is more deserving of the allotment is that Channel 221A would provide the larger community with its first fulltime aural service. However, it argues that since Amherst has licensed to it Station WUFO(AM), O'Kane's proposal cannot be considered as providing the community with its first local service. Therefore, it argues that the mutually exclusive proposals must be considered under the Commission's fourth allotment priority, other public interest matters.⁵ In examining proposals under priority (4), Culver states that the Commission has considerable flexibility and looks at such factors as the size of the communities, size of audiences and areas served, and the number of aural transmission services each community receives, citing Faribault, Blooming Prairie, Northfield and New Prague, MN, 7 FCC Rcd 3937, 3939 (1992), and Cowden and Tower Hill, Illinois, 10 FCC Rcd 10511 (1995). Culver states that O'Kane failed to reveal that Amherst, while larger in population than Lockport, is "merely" a suburb of Buffalo, which is located approximately seven miles away. It contends that Amherst's larger population is due solely to its location within the Buffalo Urbanized Area. Culver submits that Amherst has no separate zip codes, instead being listed in the Buffalo section of the zip code directory, no separate phone number directory but rather their telephone numbers are included in the Buffalo directory, and, finally, more Amherst residents work in Buffalo than Amherst. Culver points out that Amherst receives fulltime aural service from nine commercial FM stations, most of which are licensed to Buffalo, at least four AM stations and two noncommercial educational FM stations. As proof that Amherst is really only a part of Buffalo, Culver states that Amherst's Station WUFO(AM) maintains its main studio and transmitter in Buffalo and its contour covers more than 97% of the Buffalo Urbanized Area.

4. Lockport, on the other hand, is the county seat of Niagara County and located twenty-five miles northeast of Buffalo. In addition, Culver states that a local Class A station would not provide service to Buffalo or the Buffalo metro market. More importantly, it asserts that the allotment at Lockport would serve an underserved area by providing a fifth aural service to 2,679

unauthorized response to Culver's reply comments will not be considered.

⁵ See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982). The allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters, which co-equal weight given to priorities (2) and (3).

persons. Therefore, it argues that the population differential, which is based solely on Amherst's location within the Buffalo Urbanized Area, should not be the dispositive factor in allotting Channel 221A.

5. Based on the record before us, we believe that both communities are deserving of a first local FM service. We disagree with Culver that Amherst should be considered only a suburb of Buffalo and thus credited with the services which are licensed to Buffalo and other surrounding communities. As the Commission has stated on numerous occasions, the fact that a community receives service from stations licensed to nearby communities does not negate a community's need for a local transmission service whose programming is directed to the needs and interests of its community of license. Amherst is listed in the 1990 U.S. Census, has its own local schools, police department, library, Chamber of Commerce, businesses, places of worship, post office and zip code, and, indeed, has already been allotted to it a radio broadcast station.

6. Channel 221A is the only channel which can be allotted to either community. Therefore, the two communities must be comparatively considered using the allotment priorities set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982). These priorities are: (1) first fulltime aural reception service; (2) second fulltime aural reception service; (3) first local transmission service; and (4) other public interest matters, with co-equal weight given to priorities (2) and (3). Our decision herein rests solely on the fourth priority, other public interest matters. The first three priorities are not applicable in this case since neither allotment would provide either a first or second fulltime aural reception service and both communities have local aural transmission service. Lockport receives local service from fulltime AM Station WLVL and Amherst receives local service from daytime-only AM Station WUFO.

7. Pursuant to our evaluation of the relative public interest benefits accruing from an allotment to each community, we find that the public interest would be better served by allotting Channel 221A to Amherst, as it would provide the larger community with its first nighttime and first competitive aural service. Our comparison of the communities considered such factors as population, location and reception services. In this case, we find that both communities are considered to be well-served with at least five fulltime reception services. We note that Amherst does receive more reception services than Lockport. However, we find this not to be dispositive in favor of Lockport. Amherst is more than four times larger than Lockport and is presently without any local transmission service at night. Further, the fact that a Lockport station may provide a fifth reception service to 2,679 persons does not overcome the vastly larger number of persons who would receive a new service from the Amherst station. As stated in Seabrook, Huntsville, Bryan, Victoria, Kenedy, and George West, Texas, 10 FCC Rcd 9360 (1995), we will continue to base our decisions on raw population totals unless the opposing party presents a showing discounting the raw totals in proportion to the number of services available in the proposed service area pursuant to the methodology set forth in Greenup, Kentucky and Athens, Ohio, ("Greenup"), 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). This, Culver did not do. Therefore, consistent with Commission policy and precedent, we will

allot Channel 221A to the larger of the two communities.

8. Channel 221A can be allotted to Amherst in compliance with the Commission's mileage separation requirements with respect to all domestic allotments without the imposition of a site restriction.⁶ The allotment is short-spaced to Channel 219C1, St. Catharines, Ontario, Channels 221C1/221B, Brantford, Ontario, and Channel 222B, Oshawa, Ontario, Canada. However, concurrence by the Canadian government has been received in the Amherst allotment as a specially negotiated short-spaced allotment.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 20, 1998, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Amherst, New York	221A

10. A filing window for Channel 221A at Amherst, New York, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

11. IT IS FURTHER ORDERED, That the petition for rule making filed by Culver Communications Corp. (RM-8946) to allot Channel 221A to Lockport, NY, IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

⁶ The coordinates for Channel 221A at Amherst are 42-58-42 North Latitude and 78-48-00 West Longitude.