

FCC MAIL SECTION

Federal Communications Commission

DA 99-1286

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DISPATCHED

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

In the Matter of	)	
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	)	
Amendment of Section 73.202(b),	)	MM Docket No. 99-240
Table of Allotments,	)	RM-9503
FM Broadcast Stations.	)	
(Albemarle and Indian Trail, North	)	
Carolina)	)	

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: June 23, 1999**

**Released: July 2, 1999**

Comment Date: August 23, 1999  
Reply Comment Date: September 7, 1999

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Susquehanna Radio Corp. ("petitioner"), licensee of Station WABZ, Channel 265A, Albemarle, North Carolina, requesting the reallocation of Channel 265A to Indian Trail, North Carolina, as the community's first local aural service, and the modification of Station WABZ's license to specify Indian Trail as its community of license. Petitioner states that it will apply for Channel 265A, if reallocated to Indian Trail.

2. Petitioner filed its request pursuant to the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990).

3. In support of its proposal, petitioner alleges that the reallocation will provide Indian Trail with its first local aural service, will eliminate entirely two of three pre-1964 grandfathered short-spacings which affect Station WABZ's operation, and will substantially reduce a third short-spacing while completely eliminating the pre-existing interference to all three stations. Petitioner states that Station WABZ operates as a 3 kW, pre-1964, grandfathered short-spaced station with respect to Stations WHSC, Channel 262C, High Point, NC, WIFM, Channel 265A, Elkin, NC,

and WKXU, Channel 266C, Burlington, NC.<sup>1</sup> If the change of community is granted, it states that the short-spacings to the High Point and Elkin stations will be entirely eliminated and the short-spacing to the Burlington station will be substantially reduced from 72.54 kilometers to 28.1 kilometers. In addition, petitioner states that the existing interference (54 dBu and 60 dBu contour overlap) with Station WKXU at Burlington will cease over a 103 kilometer area with 1,259 people and with Station WHSL at High Point over an 8 kilometer area with 1,224 people. Petitioner contends that the elimination and/or reduction of long-standing short-spacings has traditionally been a matter of "great importance" to the Commission, citing Eatontown, Point Pleasant, and Red Bank, New Jersey, 5 RR 2d 1762 (1965) citing Third Further Notice of Proposed Rule Making in Docket No. 14185, FCC 64-10, at para. 5. It also cites Newnan and Peachtree City, Georgia ("Newnan"), 7 FCC Rcd 6307 (1992), where the Allocations Branch stated "that we will consider waiving strict application of Section 73.207 in limited circumstances, provided that no new short spacings are created, no existing short spacings are exacerbated, and the potential for interference between the currently short spaced stations is not increased." Unlike Newnan, *supra*, petitioner states that this proposal seeks to move away from the short spacings and provide a "large" net gain in the elimination of interference to the three stations. Additionally, petitioner submits that the change in community will enable Station WABZ to increase the population it serves from its present 79,643 people to 427,165 persons, for a net gain of 347,522 people. It states that the population within both the gain and loss areas are well-served with at least five aural services.

4. Petitioner submits that its proposal complies with the prerequisites set forth in Change of Community, *supra*, in that the use of Channel 265A at Indian Trail is mutually exclusive with its use at Albemarle, the allotment at Indian Trail is to be preferred under the Commission's allotment priorities since it would provide the community with its first local aural service (priority 3) as opposed to a third local aural service at Albemarle (priority four)<sup>2</sup> and the removal of Channel 265A from Albemarle will not leave the community without any local aural service as it will continue to receive such service from AM Stations WSPC and WZKY. Because Indian Trail is located within the Charlotte Urbanized Area, petitioner provides information to demonstrate that Indian Trail is independent of the metropolitan area pursuant to the criteria set forth in Faye and Richard Tuck ("Tuck"), 3 FCC Rcd 5374 (1988). The independence factors set forth in Tuck are: (1) the extent to which the community residents work in the larger metropolitan area rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has

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<sup>1</sup> At its presently licensed site, Station WABZ is short-spaced by 21.4 kilometers to Station WHSC at High Point and 6.9 kilometers to Station WIFM at Elkin. From Station WABZ's outstanding construction permit (BPH-9004112IG), the short-spacing to Station WHSC is 14.7 kilometers and to Station WIFM is 10.4 kilometers.

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

its own local government and elected officials; and (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services, such as police, fire protection, schools, and libraries. Petitioner contends that all eight factors do not have to favor the specified community but that a community can be found to be independent if a majority of the factors are in its favor, citing Parker and St. Joe, Florida, 11 FCC Rcd 1095 (1996), and Jupiter and Hobe Sound, Florida, 12 FCC Rcd 3570 (1997). In this case, it contends that a majority of the eight factors "unquestionably" show that Indian Trail is separate and independent of Charlotte.

5. Indian Trail, with a 1990 U.S. Census population of 1,942 people, is located in Union County. According to the petitioner, Station WABZ, if relicensed to Indian Trail, would provide a 70 dBu signal over 18% of the Charlotte Urbanized Area and 2% of the central city. In addition, it states that Indian Trail is not only located in another county, Union as opposed to Mecklenberg, but is also located at the furthest portion of the Urbanized Area and separated by several communities, including one (Stallings) in Union County. As to the Tuck, supra, factors demonstrating the independence or interdependence of Indian Trail, petitioner provides the following information.

(1) The extent to which the community residents work in the larger metropolitan area rather than the specified community. Petitioner states that, according to the 1990 U.S. Census Bureau, 11.3% of the employment age (16 years and older) residents of Indian Trail work in the community itself, 10.9% work in Union County and 46.5% work in Charlotte.

(2) Whether the smaller community has its own newspaper or other media that covers the community's local needs and interests. It states that Indian Trail does not have its own local newspaper but that the town is served by the Monroe Enquirer Journal, which is published Tuesday through Sunday, and has a combined circulation of 2,400 within the towns of Indian Trail, Weddington and Stallings. Petitioner states that, according to an employee at the paper, subscribers are primarily located in Union County and the paper does not focus on Charlotte events, which is the seat of Mecklenberg County, although it does cover some major events. It submits that Indian Trail does have its own Internet web page ([www.indiantrailonline.com](http://www.indiantrailonline.com)) which includes information about the community and also provides a means for local businesses to advertise. Cable television is provided to the residents of Indian Trail through Cablevision of Monroe, which does not provide cable service to Charlotte.

(3) Whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area. Petitioner states that Indian Trail was incorporated in 1907. According to the petitioner, the area was settled before the American Revolution by Scotch-Irish and German settlers, and Indian Trail began as an outpost along an Indian trading trail that extended from Concord to the Waxhaw Indian settlement near present-day Waxhaw. The laying of the Central Carolina Railroad tracks in the area in 1874 also

helped the community become a distribution center for cotton and other goods. While the 1990 U.S. Census population for Indian Trail is 1,942 people, petitioner states that the 1996 population of Indian Trail is approximately 6,000 people because of the town's annexation of land to the east, away from Charlotte and which closed the gap between it and Monroe, the seat of Union County.

(4) Whether the specified community has its own local government and elected officials. Indian Trail has a council-manager form of government, run by an elected mayor, five elected council members and a town manager. There are approximately five fulltime and one part-time town employees, including the Town Clerk, Finance Officer and Planning Director. Petitioner states that planning and zoning services and residential garbage collection are provided to the residents by the town government. Water and sewer services are provided by Union County Public Works.

(5) Whether the smaller community has its own telephone book provided by the local telephone company or zip code. Indian Trail has a post office and zip code (28079). According to the petitioner, the Indian Trail business and residential telephone directory is published by Alltel and included in the same telephone book as the Charlotte business and residential listings. However, the listings for Charlotte are in a separate section. In addition, Indian Trail has its own three digit telephone exchange prefix (821).

(6) Whether the community has its own commercial establishments, health facilities and transportation systems. Petitioner states that there are numerous businesses located within Indian Trail, with a number of these businesses incorporating Indian Trail in their name, such as Indian Trail Animal Hospital, Indian Trail Barber Shop, Indian Trail Concrete, Indian Trail Glass, etc. In addition, located in the community is the Indian Trail Business Park, encompassing 80 acres of land and the 300,000 square foot Harris Teeter perishables warehouse which moves 20 million cases of goods yearly. Medical and dental services are available to Indian Trail residents at the Indian Trail Medical Clinic, Indian Trail Eye Clinic and the Indian Trail Dental Center. Recreation facilities are provided by the Indian Trail Athletic Association which operates Edna Love Park, which petitioner states is busy with sports leagues and offers playgrounds, picnic areas and ballfields. There is also an 18-hole public golf course in Indian Trail. Petitioner states that cultural activities include the Indian Trail Art Day, a day-long celebration of the arts, and the Indian Pow Wow at the Indian Trail Elementary School where members of the community can learn more about Native American arts and culture. In addition, petitioner states that the annual Fourth of July parade enjoys a lot of community support. Petitioner also advises that Indian Trail is home to over twenty churches, including the Indian Trail Presbyterian Church, Indian Trail United Methodist, Grace Baptist Church, etc., and civic organizations including the Veterans of Foreign Wars, Rotary Club, Civil Air Patrol, Lions and Lioness Clubs, and Boy and Girl Scouts.

(7) The extent to which the community and central city are part of the same advertising market. Petitioner states that local businesses can advertise in the Enquirer Journal, on Indian Trail's internet webpage or on Cablevision of Monroe. Thus, it contends that the residents do

not need to travel to Charlotte or use Charlotte media sources in order to find out what is happening in Indian Trail.

(8) The extent to which the specified community relies on the larger metropolitan area for various municipal services, such as police, fire protection, schools, and libraries. Petitioner states that its library is a branch of the Union County Public Library System, not of the Charlotte and Mecklenberg County system and that the elementary, middle and high schools located in Indian Trail are part of the Union County Public School District. As to public safety, petitioner states that Indian Trail contracts with the Union County Sheriff's Department for police service and it receives fire protection services from three different volunteer fire departments located in communities in Union County, not Charlotte or Mecklenberg County.

6. In Newnan, supra, the Commission reallocated Channel 244A from Newnan to Peachtree City and modified the license of Station WMKJ(FM) accordingly. Station WMKJ(FM), a "grandfathered" facility under Section 73.213 of the Commission's Rules, did not meet the current spacing requirements set forth in Section 73.207(b) of the Rules. The proposal in Newnan, supra, did not involve any change in the technical facilities of Station WMKJ(FM). In taking that action, we recognized that we were creating a new short-spaced allotment in contravention of Section 73.207(b) of the Rules. However, our rationale for that action was that "grandfathered" FM stations were in compliance with our Rules when authorized and should be afforded the same opportunity to change their community of license as other stations authorized in conformity with our Rules. In four earlier proceedings, we have required specific comment on whether this policy should be continued and, if so, whether it should be extended to post-1964 stations that are not now in conformity with our current spacing requirements. Our final decision in this proceeding will be subject to the outcomes of those earlier proceedings.

7. Channel 265A can be allotted to Indian Trail with a site restriction of 10 kilometers (6.2 miles) northeast to accommodate petitioner's desired transmitter site.<sup>3</sup> Use of this site, however, will require a waiver of the Commission's minimum distance separation requirements since it would be short-spaced to Station WKXU, Channel 266C, Burlington, NC, by 28.1 kilometers. While petitioner has stated that the reallocation of Channel 265A from Albemarle to Indian Trail will not create any new short-spacings to other radio stations, we are not provided with any information as to whether the relocation of the station's transmitter site will adversely affect any population which now receives interference-free service. See, Chillicothe, Forest, Lima, New Washington, Peebles, and Reynoldsburg, Ohio, 12 FCC Rcd 13710 (1996), recon. dismissed, released January 15, 1999. We request that such information be provided in comments herein.

8. In consideration of the above, as the proposed allotment could provide a first local service to Indian Trail without depriving Albemarle of its sole local service, we seek comments on petitioner's proposal to reallocate Channel 265A from Albemarle to Indian Trail. Accordingly,

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<sup>3</sup> The coordinates for Channel 265A at Indian Trail are 35-06-53 North Latitude and 80-33-44 West Longitude.

we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Albemarle, North Carolina	265A	--
Indian Trail, North Carolina	--	265A

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before August 23, 1999, and reply comments on or before September 7, 1999, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark N. Lipp  
 Shook, Hardy & Bacon  
 1850 K Street, NW  
 Suite 900  
 Washington, DC 20006-2244  
 (Counsel to petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation

and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

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

Attachment: Appendix

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APPENDIX

1. Pursuant to authority found 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 PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center at its headquarters, 445 12th St, S.W., Washington, D.C.