

FEDERAL COMMUNICATIONS COMMISSION RECEIVED

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OCT 25 2001

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Rhinebeck and Rosendale, New York))

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 97-178
RM-10099

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

MOTION FOR ACCEPTANCE OF LATE FILED OPPOSITION

State University of New York ("SUNY"), by its counsel, moves for acceptance of its late-filed Opposition in the above-captioned matter. The Opposition is appended to this Motion.

Under Section 1.429(f), oppositions to the Petition for Reconsideration filed by Sacred Heart University ("SHU") would ordinarily be due fifteen (15) days after the date of public notice of the petition's filing. Public Notice of the filing of the SHU Petition was published in the Federal Register on September 20, 2001. Thus, under Section 1.4(b)(1), SUNY's Opposition would ordinarily have been due on October 5, 2001.

SUNY acknowledges that its Opposition was not timely filed, but asks that the FCC accept or at least consider its Opposition notwithstanding this error. The Opposition was not timely filed due to the error of undersigned counsel. While the Opposition was prepared and ready to file on Friday, September 14, 2001, counsel overlooked the Federal Register publication on September 20, 2001.

SUNY submits that good cause exists for acceptance or consideration of this late-filed Opposition. The FCC has accepted or considered late-filed pleadings in situations where public

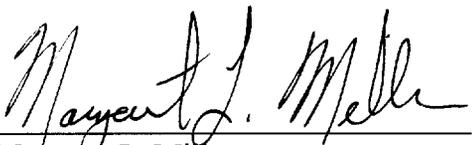
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interest considerations merit the FCC attention. *See Athens Broadcasting, Inc.*, 37 FCC 2d 374 (Rev. Bd 1972); *Dupage County Broadcasting, Inc.*, 21 FCC 2d 395, 397, Rcon. 23 FCC 22d (1970); *Charles W. Jobbins*, 29 FCC 2d 849 (171); *The Edgefield-Saluda Radio Co.*, 5 FCC 2d 148 (1966). In the instant case, the public interest would be best served by allotting Channel 273A to the Town of Rhinebeck, just as the FCC concluded in its Report and Order in this proceeding. Thus, the FCC should consider SUNY's Opposition if only for the purpose of confirming that the public interest would be best served by upholding the FCC's original action.

Moreover, the delay in filing this Opposition has not prejudiced this proceeding or delayed its outcome. Given the extraordinary events of the last six weeks, counsel asks for the FCC's and opposing counsel's indulgence for this error and asks the FCC to consider this Opposition, notwithstanding its tardiness.

Respectfully submitted,

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October 25, 2001

CERTIFICATE OF SERVICE

I, Mandy Brown, certify that a copy of the foregoing "Motion to Accept Late-Filed Opposition" was served this 25th day of October, 2001, by hand delivery or First Class United States mail, postage prepaid, upon the following:

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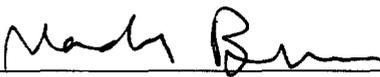
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To: Chief, Allocations Branch
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OPPOSITION TO PETITION FOR RECONSIDERATION

State University of New York (“SUNY”), by its counsel, opposes the Petition for Reconsideration filed August 30, 2001 by Sacred Heart University (“SHU”) against the above-captioned matter. The Allocations Branch properly allocated Channel *273A to Rhinebeck, New York and preferred that allotment over SHU’s proposal for Channel *277A at North Canaan, Connecticut. SHU’s Petition repeats arguments that SHU raised (or should have raised) previously in this proceeding; those arguments had no merit then; they have no merit now. They certainly do not warrant reconsideration.

I. Background

In a Notice of Proposed Rulemaking and Order to Show Cause, released by the Chief, Allocations Branch, on August 15, 1997 (the “NPRM”), the Commission requested comments on two mutually exclusive petitions for rulemaking proposing new allotments at West Hurley, New York (Channel 255A) and North Canaan, Connecticut (Channel *277A). The North Canaan proposal (by SHU) required substitution of Channel 255A for unoccupied but applied-for Channel 273A at Rosendale, New York). On October 6, 1997, SUNY filed comments in

response to the NPRM and counterproposed the allotment of Channel *273A to Rhinebeck, New York as a reserved noncommercial educational channel and as the community's first local aural service. On October 21, 1997, SUNY filed Reply Comments supporting its counterproposal. On April 26, 2001, the FCC released Report No. 2480 establishing a deadline for comments supporting or opposing the counterproposal. Due to the length of time that had elapsed since SUNY last filed comments in the proceeding, SUNY restated and refiled Reply Comments again on May 11, 2001.

In *Report and Order ("R&O")* in MM Docket No. 97-178, DA 01-1735 released July 20, 2001, the Allocations Branch adopted SUNY's counterproposal and allotted Channel *273A to Rhinebeck, New York and substituted Channel 255A for Channel 273A at Rosendale, New York. In doing so, the FCC rejected SHU's Petition to allot Channel *277A at North Canaan, Connecticut, which also would have required the substitution of Channel 255A at Rosendale, New York. As fully explained in the *R&O*, the FCC specifically rejected the view that Channel 255A could not be allotted to Rosendale because it would require the Rosendale applicants to select new transmitter sites. The FCC also noted that the Town of Rhinebeck was preferred over North Canaan because Rhinebeck is a larger community.

II. SUNY's Counterproposal Was Not Defective

The Allocations Branch correctly determined that SUNY's counterproposal was not defective. SHU argues now that SUNY's counterproposal was defective because the substitution of Channel 255A for Channel 273A at Rosendale required protection of the transmitter sites of several Rosendale applications. However, this argument is precluded by Section 1.429(b) of the FCC's Rules. Despite at least two opportunities to raise this issue in this proceeding (at the Reply Comment stage in 1997 and in Response to the FCC's Notice in April,

2001 in Report No. 2480), SHU did not do so (even though SHU did file Reply Comments on October 21, 1997 that addressed SUNY's counterproposal). SHU has not made any showing as to why it did not raise this argument at the reply comment stage or when the FCC specifically sought comments on the SUNY counterproposal in Report No. 2480. SHU's "defective counterproposal" argument is tardy and therefore procedurally defective. SHU should not be heard on the issue.¹

Moreover, SHU's procedural defects notwithstanding, SHU misreads the FCC's rules and policies regarding counterproposals and the protection of previously filed applications. It is critical to note that SHU's own initial proposal to allot Channel *277A to North Canaan also sought to substitute Channel 255A for Channel 273A at Rosendale. *See* SHU Petition for Rulemaking dated December 1, 1995. SUNY's counterproposal did not seek to alter that channel substitution at Rosendale (and, therefore, did not have to "rejustify" it by protecting the Rosendale transmitter sites). Instead, SUNY merely counterproposed that the FCC should prefer to allot Channel *273A at Rhinebeck over and above the allotment of Channel *277A at North Canaan based on the FCC's well-established FM allotment priorities.

Thus, SUNY was not trying to substitute a "new" channel at Rosendale, it was merely suggesting that if the Commission were to substitute channels at Rosendale (as SHU itself had proposed), it should do so for the superior reason of allotting a new reserved channel at Rhinebeck, New York instead of at North Canaan, Connecticut. This is not wrongful "piggybacking" as SHU suggests; it is a legitimate method of counterproposing in an allotment

¹ *See Banks, Redmond, Sunriver and Corvallis Oregon*, 16 FCC Rcd 2272 (Allocations Branch 2001) ("It is well settled that the Commission will not consider new facts on reconsideration unless they fulfill one of the three prongs of Section 1.429(b). In this regard, we also believe that it would not be in the public interest to allow a party to sit back and hope that a decision will be in its favor, and when not, to parry with additional submissions. No Commission process could operate efficiently or expeditiously if such a procedure were allowed.")

proceeding where the original proponent has already put a channel substitution “at issue” by its own petition. For, in the end, if SHU were to prevail on its Petition for Reconsideration, the FCC would still substitute Channel 255A for Channel 273A at Rosendale (as SHU proposed). The public interest, however, is better served by SUNY’s counterproposal than by SHU’s original proposal.

In order to advance its argument, SHU cites Section 73.208 of the FCC’s rules and the decision in *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 6 FCC Rcd 7346 (1991), *recon. granted in part*, 8 FCC Rcd 4743 (1993), (“*Conflicts*”), but gives an incorrect and crabbed reading of these authorities. In *Conflicts*, the FCC was trying to prevent counterproposals that proposed alternative channel substitutions or allotments from “gaming” the system; the FCC was *not* trying to render a counterproposal defective just because it relied on the same channel substitution as the original rulemaking proponent.

Moreover, the applications for Channel 277A at Rosendale are, at best, stale. The Rosendale applications were filed in January 1996 and include both commercial and noncommercial applicants for the unreserved channel. Given the recent court decision in *National Public Radio, Inc. v. FCC*, No. 00-1246, released July 3, 2001 D.C. Cir. 2001), there is great uncertainty about when a final decision will be forthcoming regarding the ultimate recipient of a permit for the channel Rosendale. The original applicants may no longer be interested in prosecuting their applications, they may have lost access to their original transmitter sites, they may have a host of reasons for losing interest in the proceeding, given the lapse of time. There is simply no good reason, in this circumstance, for the FCC to require protection of the preferred transmitter sites for the Rosendale applicants at all, let alone to require protection

only for SUNY's counterproposal, but not for SHU's initial proposal, each of which would result in precisely the same substitution of channels at Rosendale.

III. The Town of Rhinebeck is Preferred over North Canaan

The Allocations Branch correctly decided that the Town of Rhinebeck is preferred over North Canaan. SHU argues that the proper community to consider was the *Village* of Rhinebeck instead of the *Town* of Rhinebeck and that North Canaan should be preferred over the *Village* of Rhinebeck because of its larger size. SHU already raised this argument in this proceeding in its Reply Comments dated October 21, 1997. Moreover, SHU had the opportunity to raise this argument again after the FCC released Report No. 2480 establishing a 15-day deadline for comments supporting or opposing SUNY's counterproposal. This argument has been raised and rejected. There is no basis for reconsideration.

The FCC Correctly Upheld the Designation of the Town of Rhinebeck as the Community of License for SUNY's Counterproposal

Moreover, SHU is wrong on the substantive issue. SHU argues, without citation or support, that SUNY had to show that the Town of Rhinebeck was a more suitable community designation than the Village of Rhinebeck. That is not the case. SUNY demonstrated that the Town of Rhinebeck has all of the indicia of a community. Moreover, SUNY has shown that Rhinebeck is a more deserving community than North Canaan for an FM station allotment. Although SHU may wish that SUNY had chosen a different community, and although SHU may be able to show that North Canaan is more populated than any number of other irrelevant locations, SUNY successfully demonstrated that the Town of Rhinebeck is a community, and that it is more deserving than North Canaan (given the larger population of the Town of Rhinebeck).

The Commission has stated that although “there is no hard and fast rule,” “broadly speaking a community consists of an identifiable population grouping with common local interests.” *Request for a Declaratory Ruling Concerning the Meaning and Effect of Section 73.642(a)(3) of the Commission’s Rules and Regulations Pertaining to Subscription Television*, 55 FCC 2d 187 (August 13, 1975). The Commission has stated numerous times that, in most cases, a community is a “city, town, village or other political subdivision.” *Id.* (emphasis added). In addition, the FCC has noted that a census listing is sufficient to establish a geographically identifiable population group that meets the community criteria. *Greenwood, Seneca, Aiken and Clemson*, 2 FCC Rcd 3583 (June 17, 1987). Further evidence of an “identifiable population grouping” or community can be found in the provision of various services (such as local government) that serve the entire population in question (in this case both the town *and* the village it encompasses).²

The Town of Rhinebeck features numerous such services which demonstrate its community status. Because the 55-page exhibit to SHU’s Petition which details information on the Town Rhinebeck serves SUNY’s argument more so than SHU’s, and so as to not burden the Commission with additional paper, SUNY refers to SHU’s exhibit to demonstrate the numerous Town-wide services in Rhinebeck that make clear its community status. For example, there is a Town Government in Rhinebeck, a Rhinebeck Town Court, a Rhinebeck Town Clerk, Rhinebeck Town Dog Control, Rhinebeck Town Maintenance, Rhinebeck Town Recycling and a Rhinebeck Town Supervisor. Furthermore, as SHU itself points out, the Town of Rhinebeck also has its own individual U.S. Census listing, a traditional indication of community status. The

² See, e.g., *Greenwood, Seneca, Aiken and Clemson*, 2 FCC Rcd 3583 (1987); *Sandy Springs, GA*, 6 FCC Rcd 6580 (1991); *Aguila, AZ*, 6 FCC Rcd 4278 (1991); *East Hemet, CA*, 4 FCC Rcd 7895 (1989); *Harold, KY*, 6 FCC Rcd 6019 (1991).

Town of Rhinebeck also has its own highway department, building inspector and a zoning board. These indicia of the Town's community status have already been presented to and accepted by the Commission.

There is, no doubt, a symbiotic relationship between the Town and the Village which it encompasses. Because of the intertwined existence of the Town and Village, SHU's argument that the smaller Village must be the proper community is without merit. As noted in SHU's own exhibits, Town governmental offices may be held, and are elected by, residents of both the Town and the Village, *since the Village is part of the town*" (emphasis added). Moreover, residents of the Village are citizens of both the Town *and* the Village. The Village of Rhinebeck is not only "located within," but also "belongs to the Town of Rhinebeck." Notably, each of these quotations is found on the single Internet web site that covers all of Rhinebeck ("The Rhinebeck Town-Village Web Site") <www.rhinebeckny.org>. It should come as no surprise then that the Town and Village also share numerous services, ranging from property assessment and recycling to recreational licenses and dog control. Additionally, the public schools (one elementary, one middle and one high school) educate Village and Town students, and the local newspapers serve both the Village and Town.

Given the relationship between the Village and the Town, and the plethora of Town-based services and institutions, it is clear not only that the Town is a community, but also that the Town and Village constitute one cohesive unit, or identifiable population grouping.

The FCC previously addressed a situation in which an FM station assignment was made to Barnstable, Massachusetts, which is both a village and a town. The FCC noted that "section 73.202(b) of our rules does not specify, in connection with New England assignments to towns and individual places of the same name, which is meant." *Amendment of Section 73.202, Table Of Assignments, FM Broadcast Stations* (Doniphan, Mo., etc.), 18 FCC 2d 663 (August 1, 1969).

Given the small size of the village of Barnstable, Massachusetts, and the “showing made as to the needs of the town rather than the village,” the FCC “expected that the proposed facilities...will provide the signal required for principal city service...to all of the town of Barnstable.” Id.

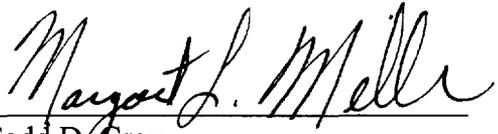
In another instance of a village-town distinction, an assignment was made to Conway, New Hampshire. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Conway, New Hampshire)*, 2 FCC Rcd 3745 (June 24, 1987). The FCC did not question whether the town or village of Conway was the “proper” designation; it accepted the clear request for rulemaking that had specified the village. Similarly, in the instant proceeding, although both the Village and Town of Rhinebeck may be viable communities of license, all that is relevant is that SUNY clearly requested allotment to the Town, demonstrated that the Town qualifies a community, proved that it is deserving of an allotment, and the Allocations Branch agreed on all counts.

CONCLUSION

For the reasons stated above, SUNY opposes SHU's Petition. The FCC properly determined that Channel *273A should be allotted to Rhinebeck, New York. SHU presents no valid argument for reconsideration of the Allocations Branch decision. The Town of Rhinebeck is preferred over the West Hurley and North Canaan proposals under Commission rules, policies and precedent and will best serve the public interest.

Respectfully submitted,

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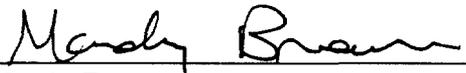
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