

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)
Amendment of Section 73.202(b))
Table of Allotments) MM Docket No. 97-178/
FM Broadcast Stations) RM-8329 FEB 25 2002
(West Hurley, Rosendale, and) RM-8739
Rhinebeck, New York, and) RM-10099
North Canaan and Sharon, Connecticut))

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

REPLY TO OPPOSITION

Sacred Heart University, Inc. ("SHU"), by its counsel, replies to the "Opposition to Petition for Reconsideration" filed on October 25, 2001 by the State University of New York ("SUNY") in the above-captioned proceeding. SUNY's proposal was procedurally defective when filed and should not have been granted for both procedural and substantive reasons.

1. As a procedural matter, SUNY alleges that SHU's petition for reconsideration is barred by Section 1.429(b) of the Commission's rules.¹ But that is clearly erroneous. Section 1.429(b)(3) permits the grant of a petition for reconsideration if "[t]he Commission determines that consideration of the facts relied on is required in the public interest."² The "facts relied on" by SHU in its petition for reconsideration demonstrate that the grant of SUNY's counterproposal was in error for two reasons: first, because SUNY's counterproposal failed to protect the transmitter sites of several prior-filed applications at Rosendale, New York as it was required to under Section 73.208 of the Rules; and second, because the Town of Rhinebeck is not a proper

¹ Opposition at 2-3.

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community for allotment purposes. Consideration of these facts is in the public interest because it will cure Commission error. *See Boonville and Columbia, Missouri*, 8 FCC Rcd 3878 (1993) (consideration of claim of error serves the public interest); *East Brewton, Alabama and Navarre, Florida*, 14 FCC Rcd 6974 (1999) (new facts seek to cure a decisionally significant error which would affect the public interest). Moreover, consideration of these facts will enable the Commission to rule on a complete record. *See Monck's Corner, South Carolina, et al.*, 15 FCC Rcd 8973 (2000). Finally, it will enable the allotment of a first local service to the community that best deserves it under the Commission's allotment priorities. *See Mesquite, Nevada*, 3 FCC Rcd 1873 (1988).

2. Turning to the substance of SUNY's objection, SUNY advances no credible theory why it should not be held to the requirements of Section 73.208 of the Commission's Rules. Specifically, that section requires every rule making proposal to protect the transmitter sites of prior-filed and cut-off applications. *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). The nine applications for Channel 273A at Rosendale, New York were filed 19 months before SUNY's counterproposal and were entitled to cut-off protection against later filed rule making proposals. SUNY's counterproposal did *not* protect the transmitter sites of these applications, and SUNY does not offer any legitimate cure, or reason why that defect is not fatal to its counterproposal. SHU's proposal, on the other hand, was filed *before* the Rosendale applications. That critical timing difference justifies disparate treatment. *See Lancaster, Wisconsin, et al.*, 6 FCC Rcd 6113 (1991), previously cited by SHU.³ SUNY

² 47 C.F.R. § 1.429(b)(3).

³ Petition for Reconsideration at 3, footnote 4.

could have filed its counterproposal earlier, but it did not choose to do so. Having chosen, it must live with the consequences of its choice.

3. Nor is SUNY's argument regarding the Town of Rhinebeck availing. The Village of Rhinebeck is a self-governing entity that qualifies as a community for allotment purposes, as SHU has previously demonstrated. The Commission has previously found that when a town encompasses other self-governing units, the relevant community is the "urban portions of the town." *Alpha & Omega Educ. Broadcast Found., Inc., et al.*, 5 FCC Rcd 2693 at ¶ 3 (1990).⁴ Rhinebeck Town encompasses the self-governing unit of Rhinebeck Village. That clearly makes the Village of Rhinebeck, not the Town of Rhinebeck, the correct allotment community.

4. Further support that the allotment should be made to the Village of Rhinebeck is found in the Commission's case law regarding townships. In many states, the primary civil and political subdivisions of a county are "townships." See *Black's Law Dictionary*. The Commission does not make allotments to townships. *Brownstown, Indiana, et al.*, 7 FCC Rcd 3173, 3174 (1992). See *Hawthorne, WI*, 12 FCC Rcd 20142 (1997) ("the Commission generally allots channels to communities not to Townships"), *Brewster, Massachusetts*, 13 FCC Rcd 8537 (1998) ("we have not allotted channels to Townships."). However, in New York, as in the New England states, the primary county subdivisions are called "towns," not townships. See Exhibit 1 (Town of Rhinebeck is a "county subdivision"); *Brewster, Massachusetts, supra*, 13 FCC Rcd at 8538 n.1 (New England "town" is equivalent to township). Just as if it were a township, Rhinebeck Town also encompasses the unincorporated community of Rhinecliff in addition to

⁴ See also *Broadcast Facilities Corp. et al.*, 3 FCC Rcd 7342 at ¶ 11 (1988) (village of Frankfort, as opposed to Town of Frankfort, is the appropriate community); *Conway, New Hampshire*, 2 FCC Rcd 3745 (1987) (cited by SUNY) (allotment to village of Conway, not Town of Conway). SUNY's other case, *Doniphan, Missouri, et al.*, 18 F.C.C.2d 663 (1969) clearly is not relevant here because in choosing the Town of Barnstable over the Village of Barnstable the Commission based its decision on the

Rhinebeck Village. *See* Exhibit 2. Because the Town of Rhinebeck is the geographic and political equivalent of a township, the Commission should not make an allotment to the Town of Rhinebeck.

5. SUNY should not be permitted to choose a larger governmental unit, Rhinebeck Town, when it is clear as SHU demonstrated in its Petition for Reconsideration and earlier in Reply Comments filed on October 21, 1997, that Rhinebeck Village is the urban center and the community with which the residents identify. SUNY filed its proposal nearly 2 years after SHU filed its Petition. SUNY selected the Town of Rhinebeck simply because its population is larger than North Canaan. Under these circumstance, SUNY should not be permitted to specify the Town instead of the Village of Rhinebeck when to do so would cause the denial of a first local service to North Canaan.

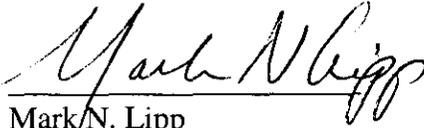
6. Thus, even if SUNY's counterproposal is considered under a waiver of Section 73.208 (for which there is absolutely no justification), it would still not be preferred over SHU's petition under the Commission's allotment priorities. The Village of Rhinebeck (2000 pop. 3,077) is smaller than North Canaan, Connecticut (2000 pop. 3,350). Since a channel in either community would be a first local service, population is the deciding factor. *See, e.g., West Liberty and Richwood, Ohio*, 6 FCC Rcd 6068 (1991).

WHEREFORE, for the foregoing reasons, the Commission should grant SHU's petition for reconsideration, reverse its previous decision in this proceeding, and grant a new allotment at North Canaan, Connecticut, with channel substitutions at Sharon, Connecticut and Rosendale, New York.

"unique circumstances" surrounding Barnstable and its relationship to Cape Cod. *Id.* at ¶ 24. SUNY has shown no such "unique circumstances" here.

Respectfully submitted,

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Its Counsel

February 25, 2002

EXHIBIT 1

U.S. Census Bureau**U.S. Gazetteer**

Select one of the following matches to your query to look at that place in the Tiger Map Browser or retrieve 1990 Census tables.

You can search this index. Type the keyword(s) you want to search for:

- **Rhinebeck, NY** (village)
Population (1990): 2725
Location: 41.92868 N, 73.90753 W
Zip Code(s): 12572
Browse Tiger [Map](#) of area.
Lookup 1990 Census [STF1A](#), [STF3A](#) tables.
- **Rhinebeck, NY** (county subdivision)
Population (1990): 7558
Location: 41.92725 N, 73.89901 W
Zip Code(s): 12572
Browse Tiger [Map](#) of area.
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*Note: This dataset is derived from the Census GICS and does not contain unincorporated place names.

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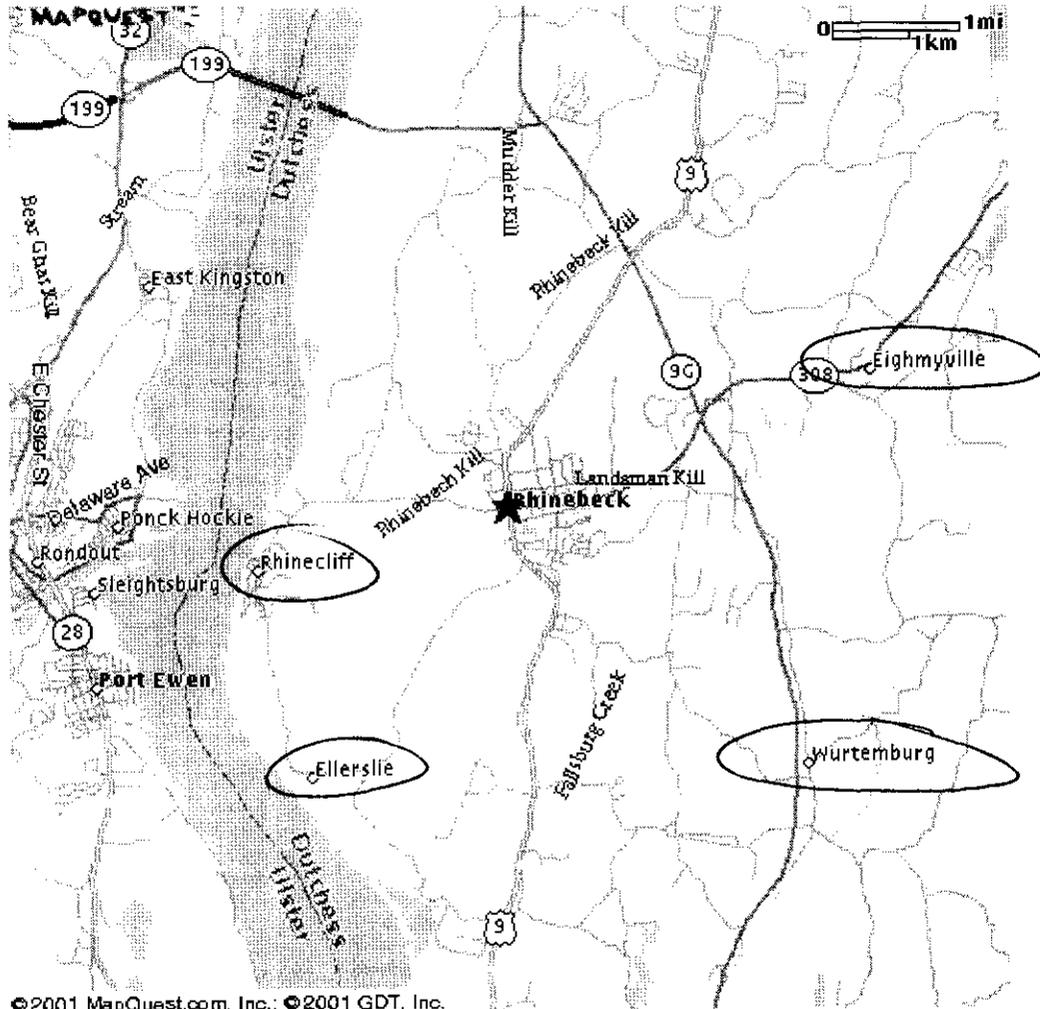
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EXHIBIT 2

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Rhinecliff

Rhinecliff was originally Rhinebeck Landing and was the terminus of the Rondout Ferry. Rhinebeck village is about a mile and a half east or inland of Rhinecliff. According to Rhinebeck's town historian Nancy Kelly, the dock spelled by Wade as Shults was located in the northern part of Rhinebeck, near the present Kingston-Rhinecliff Bridge. It served the settlement of Palantine German families which located on land of Henry Beekman about 1715. It should not be confused with the Schatzel Dock which was a name used later and which was located in the area now known as Rhinecliff.

The area noted by Wade as "a part of the original settlers came from the Rhine" is actually the area purchased by Dutch families in 1686. The dock and settlement at the north end was known as Kipsbergen. Kipsbergen became a part of Rhinebeck in 1737.

Return to Rhinebeck on the Panorama

Rhinebeck Landing

Text from William Wade

Ninety miles from New York, on the east bank of the river, is Rhinebeck Landing, around which are a number of beautiful country residences overlooking the Hudson. Two miles east from this is the village of Rhinebeck, a part of whose original settlers came from the Rhine, and whose inhabitants still retain many marks of their origin.

Rhinebeck Landing was the terminus of the Rondout Ferry. It later came to be known as Rhinecliff. Rhinebeck village is about a mile and a half east or inland of Rhinecliff. According to Rhinebeck's town historian Nancy Kelly, the dock spelled by Wade as Shults was located in the northern part of Rhinebeck, near the present Kingston-Rhinecliff Bridge. It served the settlement of Palantine German families which located on land of Henry Beekman about 1715. It should not be confused with the Schatzel Dock which was a name used later and which was located in the area now known as Rhinecliff.

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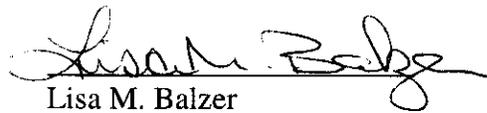
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