

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

In the Matter of )  
 )  
Amendment of Section 73.202(b) )  
Table of Allotments, )  
FM Broadcast Stations. )  
 )  
(Butler and Reynolds, Georgia) )

MM Docket No. 01-5 /  
RM-10028  
RM-10107

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**OPPOSITION TO**  
**PETITION FOR RECONSIDERATION**

Fort Valley State University ("the University"), by its attorneys, and pursuant to Section 1.429 of the Commission's Rules, hereby respectfully files its Opposition to the "Petition for Reconsideration" filed February 27, 2002<sup>1</sup>, filed by H. David Hedrick ("Hedrick") of the Allocations Branch's *Report and Order, Butler and Reynolds, Georgia*, DA 02-204, released January 25, 2002 [67 Fed. Reg. 5956, published February 8, 2002] ("*R&O*"), that allotted FM Channel \*245A to Reynolds, Georgia, reserving the allotment for noncommercial educational ("NCE") use.

**Background**

Hedrick filed a petition that culminated in the Commission's *Notice of Proposed Rule Making ("NPRM")*, 16 FCC Rcd 736 (2001) that proposed to allot Channel 245A to

<sup>1</sup> Section 1.429 affords interested parties 15 days after the date of public notice of the petition's filing within which to file an opposition. Counsel can find no evidence that public notice has yet been given, but in an abundance of caution (and to expedite resolution of this matter) this opposition is being filed within 15 days following the filing date of Hedrick's petition.

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Butler, Georgia, as its first local service. On March 5, 2001, the University timely filed a Counterproposal that requested the Commission to deny Hedrick's proposal, and instead, amend Section 73.202(b) of the Rules to add Channel \*245A to Reynolds, Georgia, as its first local service, and reserve the channel for NCE use by appending an asterisk (\*) to Channel 245A in the Table of Allotments under Reynolds, Georgia. The Allocations Branch adopted the University's Counterproposal. Hedrick then filed his Petition for Reconsideration.

### **Hedrick's Petition for Reconsideration Must Be Denied**

As a basis for reconsideration, Hedrick claims there are "new facts" that require reconsideration and vacation of the *R&O*. Hedrick sets forth four arguments: (1) The population of Butler has increased while the population of Reynolds has decreased; (2) the *R&O* should be set aside in light of the Commission's adoption of a Notice of Proposed Rule Making in MM Docket 95-31 (*Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, FCC 02-44, released February 25, 2002); (3) The Allocations Branch applied the wrong test in deciding between Butler and Reynolds; (4) The University, its attorney and technical consultant allegedly "deliberately omitted facts" in order to "obfuscate" this proceeding; and (5) The Allocations Branch should have allotted Channel 245A to Butler because it does not require a site restriction. None of Hedrick's arguments can be considered because Hedrick was admittedly late in filing his Comments and the University's counterproposal was legally an uncontested proposal. Moreover, even if Hedrick's proposal for Butler were compared with the University's proposal for Reynolds, the University's proposal would result in a preferential arrangement of allotments.

**A. Hedrick's late-filed Comments Were Properly Rejected.**

The deadline for the submission of comments in this docket was March 5, 2001. It is undisputed that Hedrick's Comments were late filed (in fact, Hedrick submitted as Exhibit A a copy of a U. S. Postal Service Return Receipt showing that the Commission received his Comments on March 7, 2001.) As the Allocations Branch stated, "It is the responsibility of the party submitting comments to ensure that documents are delivered to the Commission on time." For this proposition, the Allocations Branch cites *Gosnell and Osceola, Arkansas; Germantown and Ripley, Tennessee*, 4 FCC Rcd 6170 (1989). There, the Allocations Branch rejected as untimely comments filed one day late "due to a problem with the courier used to deliver the comments to the Commission." Here, Hedrick was two days late. His only excuse is that there was "an unforeseen six day postal delay." On March 1, 2001, a Thursday, it appears that Hedrick deposited in the U.S. mail his comments in order to meet the deadline of Monday, March 5, 2001. On that Thursday, Hedrick had several options to ensure delivery of his comments: (1) He could have used UPS or Federal Express; (2) or he could have faxed his comments to an attorney or filing service in Washington that could have filed them by the deadline. He could have not waited until the last moment to send his comments. He instead took the cheap way out, mailed the comments, and must suffer the consequences that flow from the late filing. Those consequences were predictable.

The consequences of Hedrick's parsimony are that the Commission will not consider his comments, and since there was no timely-filed expression of interest for the commercial use of Channel 245A at Butler, Hedrick's proposal cannot be compared against the University's counterproposal for the use of Channel \*245A at Reynolds. The

leading case was cited by the Allocations Branch: *Santa Isabel, Puerto Rico and Christiansted, Virgin Islands*, 3 FCC Rcd 2336 (1998) which was affirmed by the U. S. Court of Appeals in *Amor Family Broadcasting v. FCC*, 918 F. 2d 960 (D. C. Cir. 1990). In the case before the Commission, the Commission explained that receipt of a timely expression of interest in the use of a channel is important since a channel allotted absent a current expression interest could lie vacant after the Commission had expended limited resources conducting a rule making proceeding. The Commission noted that it was “aware of no case, and the parties have failed to cite an allotment case, where an untimely expression of interest was considered in the face of a conflicting proposal.” In the case on appeal, the Court upheld the Commission’s action, finding that “the Commission’s policy on late filings to be reasonable and within the Commission’s discretion.”<sup>2</sup>

**B. Hedrick’s Arguments Are Without Merit.**

When seen through the prism of *Santa Isabel, Puerto Rico and Christiansted, Virgin Islands, supra*, the action of the Allocations Branch in treating the University’s counterproposal as uncontested and granting it was reasonable and within the FCC’s discretion. However, the University will quickly address each of Hedrick’s arguments.

**It is irrelevant that the population of Butler has increased while the population of Reynolds has decreased.** In light of the Commission’s refusal to consider Hedrick’s proposal for Butler, the relative population changes in the two communities is irrelevant.

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<sup>2</sup> It should be noted that the filing date of March 5, 2001, fell six months before the horrific events of September 11, 2001. Since that date, the Commission has afforded parties some leeway in meeting filing deadlines to accommodate additional security procedures in mail screening. It should also be noted that Hedrick’s Petition for Reconsideration was early filed, the deadline for that filing being March 11, 2002 (30 days following public notice which was given on February 8, 2002).

**There is no basis to set aside the *R&O* due to the pendency of the Commission’s proceeding concerning commercial and noncommercial educational applicants that have applied for “non-reserved” spectrum.** Without explaining the basis for his position, Hedrick argues that the *R&O* should be “set aside” until such time as the Commission issues a Report and Order in MM Docket 95-31 (Second Further Notice of Proposed Rulemaking, *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, FCC 02-44, released February 25, 2002 (“NPRM”)). The NPRM focuses on the procedures the Commission should use to license “non-reserved” channels in which both commercial and noncommercial educational entities have an interest. In the case of Reynolds, Georgia, the fact pattern of concern to the Commission dealt with in the NPRM cannot happen. Channel \*245 has been allotted to Reynolds, Georgia, and reserved for noncommercial use. Since Channel \*245 is “reserved,” neither Hedrick, nor any other commercial broadcaster is eligible to apply for its use. Therefore, there is no basis to delay action on this proceeding on account of the pendency of MM Docket No. 95-31.

**The Allocations Branch did not apply the wrong test in deciding between Butler and Reynolds.** In fact, the Allocations Branch did not apply any test, finding that the University’s proposal for Reynolds was uncontested. However, even if Butler and Reynolds were compared, Reynolds would be the preferred community. Hedrick argues that Butler is preferred to Reynolds since Butler has a larger population than Reynolds and experienced a growth between the 1990 and 2000 censuses while Reynolds lost population. What Hedrick fails to mention is that Butler gained only 234 persons and Reynolds lost only 30 persons – truly insignificant numbers. Additionally, Hedrick

ignores other information in the 2000 census that places the communities in perspective – i.e., the population density of Reynolds is 784.9 persons per square mile while the population density of Butler is only 602.2 persons per square mile. So, if Reynolds were as large in land area as Butler, it would be a larger community. The point is, at these levels of population, the fact that Butler is slightly larger than Reynolds, is, as the University, has previously argued, *diminimis*. The University has previously demonstrated that the allotment of Channel \*245A to Reynolds would better serve the public interest and would be consistent with Section 73.202(a)(1)(ii) of the Commission’s Rules; i.e., that the University is technically precluded from using the reserved band by existing stations or previously filed applications and the proposed station would provide a second noncommercial radio service to 2,000 or more people who constitute 10% of the population within the proposed allocation’s 60 dBu (1 mV/m) service contour. The University showed that the allotment would allow a second noncommercial radio service to 5,336 persons within the 60 dBu (1 mV/m) service contour of 38,802 persons. Since this is 13.75% of the total number served, it exceeds the 2,000 persons/10% benchmark by a wide margin. Hedrick failed to address these facts which show that the allotment of Channel \*245 to Reynolds is preferred to Butler.

**Neither the University, its attorney nor its technical consultant “deliberately omitted facts” in order to “obfuscate” this proceeding as alleged by Hedrick.**

Hedrick made this outrageous allegation based on an article that appeared in the February 7, 2002, edition of the Macon, Georgia, *Telegraph* newspaper, reporting on the establishment of a new campus-based low power unlicensed cable FM system at the University. Hedrick apparently is alleging that the University’s statement in its technical

exhibit supporting the Counterproposal was incorrect; i.e., that “there is no over-the-air broadcasting available to students other than the carrier current AM system that can be heard in selected buildings on campus.” At the time this statement was filed with the Commission, March 5, 2001, it was true since the low power cable FM system was not in operation. The University after March 5, 2001, installed an FM Radiating Coaxial Cable System. It uses a special radiating “leaky” coaxial cable which is designed to radiate a signal that does not exceed 250 microvolts per meter at a distance of 3 meters from the radiating cable. The power level is so low that the Commission does not require a license for it (See Sections 15.5(b) and 15.239(b) of the Commission’s Rules). The FM system is similar to an AM carrier current system. Its existence does not change the fact that there is no licensed “over-the-air” broadcasting service of any type available to the students of the University.

**This case is not governed by the rule in *Stuart and Boone, IA*.**<sup>3</sup> Citing this case, Hedrick argues that the Allocations Branch should have allotted Channel 245A to Butler because it does not require a site restriction while the allotment to Reynolds does. However, Hedrick ignores that his proposal for Butler will not be considered by the Commission because of its late filing. Therefore, this argument, and all the others he advances, is moot.

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<sup>3</sup> 5 FCC Red 4537 (1990).

WHEREFORE, the University respectfully urges the Commission to deny Hedrick's Petition for Reconsideration as promptly as possible.

Respectfully submitted,

**FORT VALLEY STATE UNIVERSITY**

By: 

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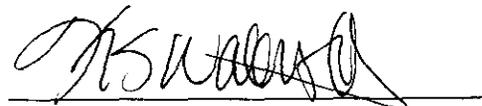
**CERTIFICATE OF SERVICE**

I, Kelly Waltersdorf, a legal assistant in the law offices of Smithwick & Belendiuk, P.C., certify that on this 14th day of March, 2002, copies of the foregoing were mailed to the following:

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\*by hand