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

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

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 20, 2002 **Released:** March 22, 2002

By the Chief, Allocations Branch:

1. The Allocations Branch has before it a Petition for Reconsideration filed by Sacred Heart University, Inc. ("Sacred Heart") directed to the Report and Order in this proceeding. 16 FCC Rcd 14072 (2001).[1] For the reasons discussed below, we deny the Petition for Reconsideration.

Background

2. The Notice of Proposed Rule Making and Order to Show Cause set forth two mutually exclusive Petitions for Rule Making. 12 FCC Rcd 11978 (1997). Raymond Natole proposed the allotment of Channel 255A to West Hurley, New York, as a first local service. Sacred Heart proposed the allotment of Channel 277A* to North Canaan, Connecticut, as a reserved noncommercial educational channel, as a first local service. In order to accommodate Channel 277A* at North Canaan, Sacred Heart proposed the substitution of Channel 273A for Channel 277A at Sharon, Connecticut, and modification of the Station WQQQ license to specify operation on Channel 273A. To accommodate the Channel 273A allotment at Sharon, Sacred Heart also proposed the substitution of Channel 255A for vacant Channel 273A at Rosendale, New York. The Channel 255A substitution at Rosendale is in conflict with the proposed Channel 255A allotment at West Hurley.

3. In response to the Notice, SUNY filed a Counterproposal proposing the allotment of Channel 273A* to Rhinebeck, New York, reserved for noncommercial educational use, as a first local service. To accommodate Channel 273A* at Rhinebeck, it was likewise necessary to substitute Channel 255A for Channel 273A at Rosendale. The Report and Order allotted Channel 273A* to Rhinebeck, New York. In that action, we noted that this allotment will provide a first local service to a community of 7,558

[1] State University of New York ("SUNY") filed an Opposition to Petition for Reconsideration and Sacred Heart filed a Reply to Opposition. In this regard, the Public Notice announcing the filing of the Sacred Heart Petition for Reconsideration was published in the Federal Register on September 20, 2001, 66 FR 48467. Section 1.429(f) of the Rules requires that an opposition to petition for reconsideration be filed within 15 days of the publication of the Public Notice in the Federal Register. In this instance, SUNY did not file its Opposition to Petition for Reconsideration until October 25, 2001. In the absence of any showing of good cause or justification for this untimeliness, we will not consider this untimely Opposition. Similarly, we will also not consider the Sacred Heart Reply directed to this Opposition.

persons, and that Rhinebeck is incorporated, listed in the U.S. Census and is governed by a town council. As the larger community, the Rhinebeck proposal was favored over the smaller communities of West Hurley with a population of 2,252 persons, and the North Canaan proposal with a population of 3,284 persons. See West Liberty and Richwood, Ohio, 6 FCC Rcd 6068 (1991); Three Oaks and Bridgman, Michigan, 5 FCC Rcd 1004 (1990); Clarksville and Lanesville, Indiana, 4 FCC Rcd 4968 (1989). The Channel 273A* allotment was also reserved for noncommercial educational use due to the operation of television Station WRBG, Channel 6, Schenectady, New York, and the resulting fact that there were no available FM channels in the reserved noncommercial educational band (Channel 201A to Channel 220A). Sacred Heart filed a Petition for Reconsideration directed to that Report and Order.

4. In its Petition for Reconsideration, Sacred Heart first contends that the SUNY Counterproposal did not protect the transmitter sites specified in the pending applications for the Channel 273A allotment at Rosendale, New York, and therefore was unacceptable. Second, Sacred Heart contends that the appropriate community for consideration was the "Village" of Rhinebeck and not the "Town" of Rhinebeck. Since the Village of Rhinebeck has a population of only 3,077 persons, its proposal for North Canaan with a population of 3,350 persons should have been preferred. We will consider each of these arguments below.

5. The SUNY Counterproposal was entitled to consideration in the context of this proceeding. In reaching this determination, we realize that this Counterproposal was filed 19 months after the applications for the Channel 273A allotment at Rosendale. To accommodate its proposal at Rhinebeck, SUNY proposed the same channel substitution at Rosendale as had been proposed by Sacred Heart. As noted by Sacred Heart, each of the Rosendale applicants would normally be entitled to have their individual transmitter site preference protected in that the proposed channel must meet the separation requirements at each of these sites. See Conflicts Between Applications and Petitions for Rule making to Amend the FM Table of Allotments ("Conflicts"), 6 FCC Rcd 7346 (1991); recons. granted in part 8 FCC Rcd 4743 (1993). This could also render an otherwise valid counterproposal unacceptable if the counterproponent introduces a channel substitution into the proceeding regarding pending applications. In Conflicts, the Commission identified one exception in which an applicant would not have its transmitter site protected in a rulemaking proceeding. This is the situation in which "one or more parties to the rulemaking proceeding suggest an alternative channel" before the FM application is filed. In that situation, the transmitter site set forth in a subsequent application need not be protected. 7 FCC Rcd at 4920.

6. In regard to this situation, the Sacred Heart proposal is within this exception because it filed its Petition for Rule Making on December 1, 1995. Included in that Petition for Rule Making, Sacred Heart proposed the substitution of Channel 255A for Channel 273A at Rosendale. At that time there were no applications on file for this vacant allotment. Thereafter, on January 11, 1996, nine applications were filed for this allotment. In accordance with Conflicts, these applications were subject to the earlier-filed Sacred Heart Petition for Rule Making which could eventually result in one or more of the applicants being required to amend their application to specify Channel 255A at a new transmitter site. In its Petition for Reconsideration, Sacred Heart contends, for the first time, that even though SUNY is proposing the same channel substitution at Rosendale, the SUNY Counterproposal is not acceptable because it was filed after the applications at Rosendale. We disagree. In Conflicts, the Commission intended to minimize risks and uncertainties for applicants and avoid unlimited exposure to potentially conflicting rulemaking petitions. Consistent with Conflicts, the Rosendale applicants were already on notice that their channels and preferred transmitter sites would not be protected in the context of this proceeding. The Rosendale applicants will be required to amend their respective applications regardless of the outcome of this proceeding. In regard to this proceeding, there is no public interest justification or specific requirement under Conflicts to preclude a comparative evaluation of the Sacred Heart and SUNY proposals.

7. We also continue to believe that Channel 273A* was appropriately allotted to the "Town" of Rhinebeck. As discussed in an exhibit to its Petition for Reconsideration, Rhinebeck consists of two governmental jurisdictions, the Town of Rhinebeck and the Village of Rhinebeck. The Village of Rhinebeck is surrounded by the Town of Rhinebeck. Residents who live outside the Village are considered are citizens of only the Town while residents of the Village are considered citizens of both the Town and Village. In addition to its own U.S. Census listing with a population of 7,558 persons, the Town of Rhinebeck is governed by a Town Board elected by the residents of both the Town and Village of Rhinebeck. The Town government provides municipal services to the residents of the Town and some residents of the Village. Notwithstanding the fact that the New York State uses the term "Town" to define a larger subdivision within a county, the Town of Rhinebeck is a geographically identifiable population group that meets our community criteria. Cf. Greenwood, Seneca, Aiken and Clemson, South Carolina, 2 FCC Rcd 3583 (1987). The Town of Rhinebeck is a community for allotment purposes.

8. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Sacred Heart University, Inc., IS DENIED.

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

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

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